

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

DAY 58 VOL 58
October 31, 2019



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1 Court File No. 94-CQ-50872CM
2 ONTARIO
3 SUPERIOR COURT OF JUSTICE

4 B E T W E E N:

5 THE CHIPPEWAS OF SAUGEEN FIRST NATION, and THE
6 CHIPPEWAS OF NAWASH FIRST NATION
7 Plaintiffs

8 - and -

9 THE ATTORNEY GENERAL OF CANADA,
10 HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO,
11 THE CORPORATION OF THE COUNTY OF GREY, THE
12 CORPORATION OF THE COUNTY OF BRUCE, THE CORPORATION
13 OF THE MUNICIPALITY OF NORTHERN BRUCE PENINSULA,
14 THE CORPORATION OF THE TOWN OF SOUTH BRUCE PENINSULA,
15 THE CORPORATION OF THE TOWN OF SAUGEEN SHORES, and
16 THE CORPORATION OF THE TOWNSHIP OF GEORGIAN BLUFFS
17 Defendants

18 Court File No. 03-CV-261134CM1

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

20 CHIPPEWAS OF NAWASH UNCEDED FIRST NATION and
21 SAUGEEN FIRST NATION
22 Plaintiffs

23 - and -

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

26 --- This is VOLUME 58/DAY 58 of the transcript of
27 the trial proceedings in the above-noted
28 matter, being held at the Superior Court of
29 Justice, Courtroom 5-1, 330 University Avenue,
30 Toronto, Ontario, on the 31st day of October, 2019.

31 -----
32 B E F O R E: The Honourable Justice Wendy M.
33 Matheson
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A P P E A R A N C E S:

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

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

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

REPORTED BY: Deana Santedicola, RPR, CSR, CRR

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I N D E X

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10	4371: 1842 publication by the Canada	7519:16
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13	Emigration to Upper Canada".	
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25	from September 1854.	

09:52:38 1 -- Upon commencing at 10:01 a.m.

08:46:46 2
10:00:06 3 THE COURT: My computer is thinking
10:03:50 4 about joining us this morning.

10:03:58 5 There we go. Please go ahead.

10:04:27 6 PROFESSOR DOUGLAS McCALLA; Under Prior
10:04:28 7 Oath.

10:04:28 8 CROSS-EXAMINATION BY MS. GUIRGUIS

10:04:28 9 (CONT'D):

10:04:28 10 Q. Thank you, Your Honour.

10:04:29 11 Good morning, Professor McCalla.

10:04:30 12 A. Good morning.

10:04:31 13 Q. So I want to start today by
10:04:33 14 discussing squatting. So, first, I just wanted to
10:04:38 15 get the term clear with what you are referring to
10:04:41 16 or what we refer to when we talk about squatting.
10:04:45 17 "Squatting" refers to people settling on lands
10:04:47 18 illegally; correct?

10:04:48 19 A. It means -- settling might be a
10:04:52 20 tricky word but certainly occupying for some
10:04:55 21 purposes and without some formal title or leasehold
10:05:01 22 or for some other proper legal authorization to be
10:05:04 23 on the property.

10:05:06 24 But settling can imply a more permanent
10:05:10 25 occupation than some squatters had in mind.

1 Q. And so when you say that, that
2 leads me to the next clarifying question that I
3 had. So the more permanent, there is less
4 permanent. So it would also refer to people being
5 there on the lands illegally taking timber or other
6 resources?

7 A. That is tricky, but I think I
8 would allow that to be part of squatting. If you
9 are there long enough to remove trees, you have
10 squatted while you are doing it.

11 Q. Because that would take still
12 quite a long time.

13 A. Certainly some time, yes.

14 THE COURT: Can you just pause for a
15 moment, counsel. Can you just tip your microphone
16 more straight. I think that is better.

17 MS. GUIRGUIS: That is better? Okay.

18 THE COURT: Much better. Thank you
19 very much.

20 MS. GUIRGUIS: No problem.

21 THE COURT: Just give me a moment,
22 Counsel.

23 All set. Please go ahead.

24 BY MS. GUIRGUIS:

25 Q. Thank you, Your Honour.

1 So squatting could be settling more
2 long-term. It could be just being on the land
3 without licence or authorization to be there, and
4 it could be there for a medium amount of time to
5 take resources or take timber?

6 A. Yes.

7 Q. Okay. Great. Thank you. So I
8 want to ask you whether you agree with a simple
9 proposition that I think that we see in the
10 secondary sources in the literature, that there was
11 an institutionalized system of squatting in Upper
12 Canada between 1836 and 1854.

13 A. If you don't mind, I would like to
14 make a slightly extended answer to that question,
15 because I think some of the literature, notably
16 Lillian Gates and those who follow from her,
17 exaggerate the extent of squatting. I think it was
18 very prevalent in certain circumstances and in
19 certain places but that it was not the normal way
20 of acquiring land.

21 The problem with Lillian Gates is she
22 never ever addressed the private land market, which
23 is how most people acquired land in that period, so
24 I think in specific places and at specific times,
25 it was a standard practice, but it was not the

1 universal practice in Upper Canada. The normal way
2 of getting land was to buy it or rent it legally,
3 mainly in the private land market.

4 Q. Okay. So thank you. That is
5 fair. So when it comes to -- but what I mean by
6 when I say "squatting as an institutionalized
7 system", it was still a central feature of land
8 settlement in Upper Canada?

9 A. As I say, at some times and in
10 some places and not universally, which some of the
11 literature seems to imply that nearly everybody got
12 their land by squatting, and I think that is not
13 the case. Most of the numbers in my report showing
14 increases in land occupied, most of that land was
15 acquired by some legal mode of purchase, grant or
16 lease.

17 So -- but in particular places and
18 times -- and there are a few examples in my
19 report -- I think squatting was quite common, and
20 it was recognized.

21 Q. Quite common and recognized.
22 Okay. And it was supported by the government in
23 those cases?

24 A. My understanding is the government
25 never supported it, but generally tolerated it.

10:08:52 1 Q. Right. Was lenient with it?

10:08:55 2 A. Yes.

10:08:55 3 Q. Okay. Thank you. So I want to
10:08:59 4 talk a bit about some of the ways that the
10:09:01 5 government was lenient with squatters or with
10:09:03 6 squatting, and I would like to turn up Exhibit
10:09:08 7 1284, which is the report of Charles Buller, and
10:09:15 8 this report relates to the disposition of lands in
10:09:17 9 British North America.

10:09:19 10 So Charles Buller was the Chief
10:09:21 11 Secretary to Lord Durham; correct?

10:09:23 12 A. Yes.

10:09:23 13 Q. So that is why we have Lord
10:09:25 14 Durham's "Report on the Affairs of British North
10:09:28 15 America" on the screen in front of us, and I
10:09:31 16 believe Buller's report is an appendix there.

10:09:33 17 So Lord Durham was sent to the colony
10:09:37 18 to make a report on the problems that arose in the
10:09:39 19 Upper Canada and Lower Canada rebellions; is that
10:09:42 20 correct?

10:09:42 21 A. Yes.

10:09:43 22 Q. And Buller was commissioned by
10:09:45 23 Durham to write a report on British North American
10:09:49 24 land disposal issues?

10:09:50 25 A. Yes, that is my understanding, but

1 I don't believe he wrote it.

2 Q. He didn't write it?

3 A. No. Edward Gibbon Wakefield wrote
4 it.

5 Q. Yes, I saw that, I think, in some
6 of the sources that a lot of people believe that
7 somebody else wrote it, and he signed it?

8 A. Yes.

9 Q. Okay. But his name is the
10 signature that is on it?

11 A. Yes.

12 Q. So we call it the Buller Report?

13 A. Yes.

14 Q. Okay. The report was released in
15 1839; is that correct? I think we can scroll to
16 it. I think it is around page 109 of the PDF. 106
17 of the document is the place that I want to go to,
18 so maybe as we scroll to it, we'll see the day.

19 THE COURT: Can I just see the
20 beginning of the report, Counsel?

21 MS. GUIRGUIS: Yes.

22 THE COURT: What page is that on?

23 MS. GUIRGUIS: So that is the beginning
24 of the document.

25 THE COURT: No, the beginning of the

1 report, the one that you are referring to as
2 opposed to the cover of the book.

3 MS. GUIRGUIS: It is Appendix B.

4 THE COURT: Yes.

5 MS. GUIRGUIS: We will find it.

6 THE COURT: Take your time. It is
7 Appendix A. There we go. Could you just enlarge
8 that for me for a minute, that page. Yes.

9 MS. GUIRGUIS: Can you zoom in?

10 THE COURT: Make it a little bigger.
11 Even more.

12 MS. GUIRGUIS: Uhm-hmm.

13 THE COURT: That is good. Okay. Just
14 pause for a moment.

15 Thank you.

16 BY MS. GUIRGUIS:

17 Q. Thank you. So it was printed on
18 March 5th, 1839, we see from there. And I take it
19 you are familiar with the report?

20 A. Only in very general terms, for
21 reasons I could explain, but we don't need to do
22 that right now.

23 Q. No. Thank you, sir.

24 So I would like to go to the bottom of
25 page of 106 of the document, which is highlighted

10:12:01 1 in green here. This section sets out Mr. Buller's
10:12:05 2 conclusions on squatters in British North America,
10:12:07 3 and he talks about the cases of the squatting
10:12:09 4 problem. So he says here:

10:12:12 5 "The profusion of the
10:12:13 6 Government in granting land has, in
10:12:15 7 fact, placed serious, and, in many
10:12:17 8 cases, insurmountable obstacles to
10:12:19 9 its acquisition, by those who had
10:12:23 10 but little property, and no
10:12:24 11 influence. While the utmost
10:12:25 12 facilities were afforded to those
10:12:27 13 whose only object in obtaining a
10:12:29 14 grant, was to profit by a future
10:12:30 15 sale of the land, there has been in
10:12:32 16 effect, if not in intention, an
10:12:34 17 equal niggardliness with respect to
10:12:37 18 those who would have improved their
10:12:40 19 grant. In many cases, also, it was
10:12:42 20 impossible, without the expense of a
10:12:43 21 journey to the capital of the
10:12:45 22 province, to ascertain whether or
10:12:46 23 not the land upon which a person was
10:12:48 24 desirous of locating himself,
10:12:50 25 belonged to the Government; and even

10:12:52 1 when this point was ascertained,
10:12:54 2 there was no certainty of being able
10:12:55 3 to acquire it."

10:12:58 4 He refers to the Alien Law which was
10:13:01 5 passed so that American citizens couldn't hold
10:13:04 6 lands, and then at the bottom of the page, until
10:13:07 7 107, he says:

10:13:08 8 "The result of these
10:13:09 9 circumstances has been, that no
10:13:10 10 small portion of the actual settlers
10:13:14 11 are persons who Squatters, have no
10:13:16 12 title to the soil which they
10:13:18 13 cultivate."

10:13:19 14 So what Buller is saying here
10:13:22 15 essentially is that squatting has caused -- or was
10:13:25 16 caused by land policies that favour speculators and
10:13:28 17 large landholders; is that correct?

10:13:29 18 A. That is what he's saying.

10:13:31 19 Q. And it was also caused by
10:13:34 20 difficulty that ordinary people faced in obtaining
10:13:38 21 land from the Crown?

10:13:39 22 A. From the Crown.

10:13:39 23 Q. And this is not dealing with the
10:13:43 24 private land sales that you mentioned?

10:13:44 25 A. No. But because it is asserting

10:13:47 1 that this is a universal problem, it misses the
10:13:50 2 private land market entirely.

10:13:51 3 Q. Right. So we are only dealing
10:13:53 4 with Crown lands at this point? This is only
10:13:56 5 referring to Crown lands?

10:13:58 6 A. This is referring to a larger
10:14:01 7 pattern of how people are on the land, and it is
10:14:04 8 assuming that, to be on the land, they need to
10:14:07 9 acquire land from the Crown.

10:14:08 10 Q. Right.

10:14:09 11 A. Which was not, in fact, the case
10:14:13 12 since there were large quantities of land available
10:14:15 13 in the private land market by 1839.

10:14:19 14 Q. So you are suggesting that there
10:14:22 15 was no squatting on private lands?

10:14:24 16 A. I am not suggesting that, but I am
10:14:26 17 suggesting that there was little reason for
10:14:29 18 somebody to squat in the sense of settling and
10:14:32 19 putting an investment of time into a property if
10:14:35 20 they didn't have some security for getting a return
10:14:39 21 on their effort, and if there was a chance to do
10:14:42 22 that via renting of property or buying it in the
10:14:47 23 private land market, you would prefer that to
10:14:50 24 squatting because it gave you a more secure
10:14:52 25 position.

10:14:52 1 If I could offer an example, I am just
10:14:57 2 now reading a farmer's diary from 1839 -- it is
10:15:00 3 just by coincidence -- and he arrives in Wellington
10:15:03 4 County in 1836, rents a farm immediately, two years
10:15:09 5 later buys a farm in the private land market, buys
10:15:12 6 it on credit. He doesn't have to pay the whole
10:15:14 7 price at once. And that is, in fact, how most
10:15:17 8 arrivals from England would have acquired their
10:15:20 9 land. He documents very clearly his strategy why
10:15:24 10 he rents to start with, and he gets to know the
10:15:27 11 area. Then he finds somebody who, for one reason
10:15:30 12 or another, wants to sell a partly-developed farm,
10:15:33 13 and he buys it on time. So he pays for it on the
10:15:36 14 series of credit payments.

10:15:37 15 So Buller is not getting at all of that
10:15:43 16 side of the market.

10:15:43 17 Q. Okay. So if you could help me
10:15:49 18 understand one thing. The area that we are talking
10:15:52 19 about, when the Crown takes the surrender of these
10:15:57 20 lands, let's say, in the Treaty 45 1/2 area which we
10:16:00 21 have talked about on Exhibit P, which is the light
10:16:03 22 green area, those become Crown lands?

10:16:04 23 A. Uhm-hmm.

10:16:06 24 Q. And then they are sold, and some
10:16:07 25 of them end up in private hands?

10:16:09 1 A. Well, if they are sold, presumably
10:16:11 2 whoever buys them, it is private hands, so --

10:16:13 3 Q. Private hands. So if there is a
10:16:15 4 large landowner, what you are saying is that if
10:16:17 5 somebody purchases a big swath of it, then can sell
10:16:20 6 it off, then you're -- that is what you are talking
10:16:22 7 about when it comes to private land sales?

10:16:24 8 A. Yes.

10:16:24 9 Q. But it initially started as Crown
10:16:26 10 lands?

10:16:27 11 A. At some point it all started as
10:16:28 12 Crown land.

10:16:29 13 Q. Okay. So I think that that's --
10:16:33 14 so staying on that topic of when it starts as Crown
10:16:36 15 lands, the difficulties that ordinary people were
10:16:40 16 facing in obtaining those Crown lands, that is what
10:16:44 17 Buller is talking about?

10:16:50 18 A. Yes.

10:16:50 19 Q. Okay. Thank you. And he notes
10:16:50 20 that there was a slow land granting process of
10:16:50 21 those Crown lands?

10:16:51 22 A. That is his claim, yes.

10:16:53 23 Q. Right. And he also notes the fact
10:16:58 24 that there was large tracts of land that were held
10:17:01 25 by powerful people?

10:17:05 1 A. Yes, he notes that. I don't know
10:17:06 2 if he empirically establishes how large those
10:17:11 3 tracts are and where they are, which would be two
10:17:14 4 quite relevant variables.

10:17:15 5 Q. Right. Okay. Thank you.

10:17:15 6 So I want to turn now to Lillian Gates,
10:17:18 7 and with your caveat in mind, which I take that she
10:17:21 8 focussed on the land policies of Upper Canada when
10:17:25 9 it came to Crown lands and didn't look at the
10:17:28 10 private land sales, but staying with the Crown
10:17:30 11 lands imagining that we are in the time after they
10:17:31 12 were ceded from the Indigenous peoples.

10:17:31 13 A. Yes.

10:17:33 14 Q. So if we go to Exhibit 4280, which
10:17:36 15 is Lillian Gates "Land Policies of Upper Canada".
10:17:46 16 So I would like to go to page 303 of the document,
10:17:48 17 which is PDF image 106.

10:17:54 18 THE COURT: You said this is Exhibit
10:17:57 19 4280, Counsel?

10:17:58 20 MS. GUIRGUIS: Yes, 4280.

10:18:01 21 THE COURT: Is this an excerpt from the
10:18:02 22 book?

10:18:03 23 MS. GUIRGUIS: I believe it is the
10:18:04 24 whole book.

10:18:05 25 THE COURT: Okay.

MS. GUIRGUIS: Oh, it is an excerpt?

Okay. We have the whole book elsewhere, but we are using an excerpt.

THE COURT: That is okay.

BY MS. GUIRGUIS:

Q. Okay. So this is in her conclusion. She says -- again highlighted in green in this box:

"The land of Upper Canada was initially regarded in Great Britain and in Canada as Crown land to be managed under the direction of the Colonial Office by the Lieutenant-Governor and Executive Council of the province, assisted later by an official who bore an English title, Commissioner of Crown Lands."

So this is what we were just talking about, about the distinction with Crown lands:

"The Imperial government was at first [...]"

THE COURT: I'm sorry, Counsel.

MS. GUIRGUIS: Again, I am leaning too much.

10:18:47 1 THE COURT: Well, just push the
10:18:49 2 microphone away from you --

10:18:49 3 MS. GUIRGUIS: Sorry.

10:18:49 4 THE COURT: -- over there, because it
10:18:50 5 pops. That is no problem.

10:18:52 6 MS. GUIRGUIS: That is good?

10:18:52 7 THE COURT: Yes.

10:18:52 8 MS. GUIRGUIS: I have no problem of
10:18:53 9 having a loud voice.

10:18:54 10 THE COURT: It is not a problem as far
10:18:55 11 as I'm concerned, but the technology needs to be
10:18:57 12 adjusted.

10:18:57 13 MS. GUIRGUIS: Thank you, Your Honour.

10:18:59 14 BY MS. GUIRGUIS:

10:19:01 15 Q. "The Imperial government was at
10:19:02 16 first disposed to give the land away
10:19:04 17 to reward loyalty and services;
10:19:05 18 later it wanted to make the land pay
10:19:07 19 the expenses of its administration;
10:19:09 20 finally it became eager to develop a
10:19:10 21 revenue from the Crown lands to
10:19:12 22 further emigration from the mother
10:19:13 23 country. Gradually, the land came
10:19:16 24 to be thought of as public domain
10:19:17 25 subject to the legislature of the

1 province, and this foreign concept
2 came to be accepted by the Colonial
3 Office."

4 So this is the summary that Gates gives
5 of the land policies in Upper Canada that she says
6 rise to a pervasive system of squatting, and the
7 initial grant that Gates refers here, these were
8 grants to Loyalists and political and military
9 elites; is that right?

10 A. Yes.

11 Q. Then Gates mentions the
12 government wanting to make the land pay for the
13 administration -- for the expense of its
14 administration?

15 A. Yes. If I may say, the --

16 Q. Uhm-hmm.

17 A. In the 1820s, as political
18 developments were going on, the Imperial Government
19 became quite concerned at the security of the
20 payment for colonial officials, and it, therefore,
21 sold a large tract of Crown reserves, the Crown
22 lands, to the Canada Company in return for secure
23 revenue.

24 Q. Okay.

25 A. So that it used most of the public

10:20:22 1 lands that were available for development at the
10:20:25 2 time as a way of ensuring that the legislature
10:20:28 3 couldn't cut off the executive's funds.

10:20:31 4 So it was an alternative to taxation.

10:20:33 5 Q. Right. So it had this -- and this
10:20:36 6 is what I was going to ask you, this is referring
10:20:38 7 to Crown reserves?

10:20:39 8 A. Yes.

10:20:39 9 Q. And you mentioned the Canada
10:20:41 10 Company, which I am going to come back to because I
10:20:43 11 want to ask you about that as well.

10:20:44 12 But they had these Crown reserves,
10:20:47 13 lands that they had obtained from the Indigenous
10:20:50 14 peoples here in various ways, and then this was
10:20:53 15 sold, and it would pay for -- sold in some cases,
10:20:57 16 sometimes granted, paid for the expenses of its
10:21:01 17 administration of the colony?

10:21:02 18 A. Well, yes, depending -- as I say,
10:21:06 19 the Canada Company was a particular example --

10:21:08 20 Q. Right.

10:21:08 21 A. -- of a process, but the objective
10:21:12 22 was to be sure that the officers of government had
10:21:17 23 a source of income that was not subject to the
10:21:20 24 legislature. That was the 1820s version of the
10:21:23 25 story.

10:21:24 1 And what was involved then was the
10:21:26 2 Huron tract, which is western Upper Canada in the
10:21:29 3 lands, plus Crown reserves which had been set aside
10:21:36 4 throughout the whole area of the province.

10:21:38 5 Q. Okay. And there was school lands
10:21:41 6 that Gates discusses as well. Those were large
10:21:45 7 blocks of land set aside to help fund education in
10:21:48 8 the colony?

10:21:48 9 A. Yes. They tried that for awhile.

10:21:50 10 Q. And then she finally -- she
10:21:52 11 references the Crown ultimately seeking "to develop
10:19:10 12 a revenue from the Crown lands to further
10:19:12 13 emigration from the mother country." So that would
10:21:59 14 be England?

10:22:00 15 A. Yes. I am not quite sure what she
10:22:03 16 means by that given that the government didn't
10:22:05 17 spend much money on immigration, but I forget
10:22:11 18 exactly how she arrives at that conclusion. But it
10:22:15 19 doesn't matter for the point, but --

10:22:17 20 Q. Okay. Well, that is something --
10:22:21 21 I mean, I'll come back and ask you about that. So
10:22:24 22 you are saying that the British government didn't
10:22:25 23 spend much money on -- the Imperial Government
10:22:27 24 didn't spend much money on immigration?

10:22:29 25 A. I am saying that most immigration,

10:22:31 1 particularly by the 1830s and '40s, was private and
10:22:35 2 voluntary.

10:22:35 3 Q. 1830s and '40s. Okay.

10:22:47 4 Because the reference that she has here
10:22:51 5 is that the colony is seeking to draw British
10:22:54 6 emigrants?

10:22:54 7 A. Yes, it definitely is.

10:22:56 8 Q. Okay. So you would agree that one
10:23:00 9 of Gates' main points is that, by tying up land in
10:23:03 10 these kinds of grants, it made it much more
10:23:06 11 difficult for small-scale farmers to access land?

10:23:08 12 A. No, I don't agree with that.

10:23:10 13 Q. You don't agree that that's one of
10:23:12 14 the points that she is making?

10:23:12 15 A. She is making that point.

10:23:12 16 Q. Yes.

10:23:14 17 A. I am not agreeing with the point.

10:23:15 18 Q. You don't agree that this was
10:23:18 19 contributing to squatting, that -- these policies
10:23:21 20 about land?

10:23:22 21 A. I am saying in some places in some
10:23:24 22 times, but mainly, if I'm a speculator, and I buy a
10:23:29 23 large grant of land, I need somehow or other to get
10:23:33 24 something from it. The assumption that it is all
10:23:35 25 going to sit there forever untouched, probably I am

10:23:39 1 going to want to sell some of it, and that is where
10:23:41 2 the private land market comes in.

10:23:43 3 Or I may want to rent it out, and there
10:23:46 4 is a book that is cited in my report by Catherine
10:23:48 5 Wilson which brings tenancy out of total blackness.
10:23:52 6 Lillian Gates doesn't even recognize tenancy as a
10:23:57 7 serious issue, and Wilson shows that, in the sample
10:24:01 8 area she looked at, 40 percent of all the lands
10:24:03 9 were held on leases or short-term rentals.

10:24:07 10 So the speculator, in a context such as
10:24:12 11 this, needs to earn money to keep the game going,
10:24:16 12 if you like, and particularly once an effective
10:24:23 13 local tax system comes in. Once you might actually
10:24:27 14 have to pay tax on your land-holdings, you need a
10:24:30 15 revenue in order just to pay the taxes on it.

10:24:32 16 So the fact that there is speculation
10:24:34 17 or large land holdings is not -- does not rule out
10:24:38 18 the possibility that lots of that land is then
10:24:42 19 passing on to private buyers or private renters.

10:24:44 20 Q. Those private buyers and those
10:24:49 21 private renters, so those small-scale farmers,
10:24:52 22 would then have to buy it from the person, the
10:24:53 23 speculator in Toronto?

10:24:55 24 A. Not necessarily Toronto.

10:24:56 25 Q. Or wherever it may be. I am just

10:24:58 1 using that as an example.

10:24:59 2 A. But except that there is
10:25:01 3 literature that suggests it is all done from
10:25:03 4 Toronto, whereas people who study it closely find
10:25:05 5 that all sorts of people bought land as investments
10:25:12 6 more than they could use for their own immediate
10:25:14 7 farming purposes. There were many different
10:25:16 8 reasons why people might buy extra land and not all
10:25:20 9 of them were the Toronto elite, shall we say. So
10:25:23 10 that is why I paused for a moment when you
10:25:26 11 mentioned Toronto.

10:25:27 12 Q. Okay. Fair enough. But you have
10:25:31 13 agreed that there was prevalent squatting happening
10:25:35 14 in Upper Canada, right? It was common?

10:25:38 15 A. It was, as I say, in some places
10:25:40 16 and at some times.

10:25:41 17 Q. Right.

10:25:41 18 A. And to unknown dimensions because
10:25:45 19 of the nature of the process, but what I have
10:25:51 20 argued is that fundamentally the land occupancy
10:25:53 21 statistics in my report represent land that has
10:26:00 22 passed into the private market and been taken up
10:26:02 23 by -- mainly by ordinary farmers.

10:26:03 24 Q. In your report, when you are
10:26:04 25 looking at the area that is of concern here, when

1 we are talking about the Treaty 45 1/2 area and the
2 peninsula, you are saying that that was passed to
3 private lands and then farmers were able to access
4 it?

5 A. Well, I am saying that my
6 understanding of the process there after 1836 was
7 precisely that, that land, however it was first
8 acquired from the Crown, would then in due course
9 find its way to private buyers. And if it passed
10 to large landholders, they would one way or another
11 make land available by sale or by rent, so that you
12 can see in the population figures the spread of
13 population into those townships.

14 Q. Right.

15 A. And most of those people will not
16 have been squatters for very long, if they were
17 ever squatters.

18 Q. So I think that we are talking
19 about -- I might be missing what we are saying, or
20 we are talking about two different things, because
21 you are saying on the one hand that the land passed
22 to private landowners and then that could be sold
23 off to small farmers, but that doesn't mean that
24 there wasn't squatting happening on those lands,
25 does it?

10:27:19 1 A. Well, we can't know how much
10:27:21 2 squatting there might have been.

10:27:23 3 Q. Right.

10:27:23 4 A. But the question is why would you
10:27:25 5 squat if there was a legal way to acquire a
10:27:27 6 property?

10:27:28 7 Q. Well, this is something that you
10:27:29 8 mentioned, is that why would you put effort into it
10:27:32 9 if you weren't going to be able to get the title to
10:27:37 10 the property, and that is the next proposition that
10:27:38 11 I want to speak to you about is that -- the
10:27:42 12 leniency with which the government dealt with
10:27:44 13 squatters. We have talked about that. You have
10:27:46 14 said that they were lenient with squatters?

10:27:48 15 A. Yes.

10:27:48 16 Q. So I would like to turn to Gates
10:27:56 17 again. I understand your reservations about her
10:27:58 18 analysis. This is a different exhibit, a different
10:28:00 19 excerpt of Gates, Exhibit 4309.

10:28:10 20 So this is page 289 of the document at
10:28:15 21 the bottom of the paragraph, which is 300 of the
10:28:19 22 PDF.

10:28:20 23 THE COURT: Oh, I see. This is 277
10:28:25 24 what I am looking at.

10:28:26 25 MS. GUIRGUIS: Yes. We are getting

10:28:27 1 there.

10:28:28 2 THE COURT: But you are going for 289.

10:28:30 3 MS. GUIRGUIS: 289.

10:28:30 4 THE COURT: All right.

10:28:30 5 BY MS. GUIRGUIS:

10:28:33 6 Q. This is 289. So if we scroll down
10:28:34 7 to the bottom paragraph, if we can zoom in on that.
10:28:43 8 So she talks about -- here, she says:

10:28:45 9 "The usefulness of squatters in
10:28:47 10 opening up new country was generally
10:28:49 11 admitted, and, from an early date,
10:28:51 12 the squatter was popularly regarded
10:28:53 13 as equitably entitled to
10:28:55 14 compensation for his improvements if
10:28:56 15 he were dispossessed."

10:29:00 16 And then she goes on to talk about the
10:29:02 17 Charles Buller report, which we have already gone
10:29:04 18 to.

10:29:06 19 So would you agree that there was
10:29:08 20 generally an acceptance that there was a usefulness
10:29:10 21 of squatters?

10:29:11 22 A. That appears to have been the
10:29:13 23 case. As I say, doctrinally, there was not. In
10:29:17 24 practice, there was.

10:29:19 25 Q. So if we turn to Exhibit 4288,

10:29:26 1 which is Vosburgh, "Agents of Progress". So this
10:29:37 2 is Michelle Vosburgh. You have referred to her --

10:29:37 3 A. Yes.

10:29:39 4 Q. -- and her work?

10:29:39 5 A. Yes.

10:29:39 6 Q. So you are familiar with her work?

10:29:39 7 A. Yes.

10:29:50 8 Q. Okay. So if we could turn to page
10:29:50 9 149 of the document, which is page 157 of the PDF,
10:29:52 10 the bottom paragraph. We don't have this one
10:30:00 11 highlighted. Apologies. It starts with:

10:30:01 12 "The efforts of a squatter or a
10:30:03 13 legitimate settler to clear the land
10:30:04 14 would benefit not only himself but
10:30:06 15 the whole community, and the
10:30:07 16 landowners in the locality. As
10:30:09 17 well, the more land that was
10:30:11 18 settled, the higher the price the
10:30:13 19 government might receive for other
10:30:14 20 public lands in the area."

10:30:16 21 So again, we are talking about Crown
10:30:18 22 lands:

10:30:19 23 "So while the Crown land agent
10:30:20 24 could be forfeiting some commission,
10:30:22 25 and the government some revenue by

10:30:23 1 allowing a squatter or settler to
10:30:25 2 purchase land by private sale
10:30:27 3 instead of by auction, in the long
10:30:29 4 run, both the Crown land agent and
10:30:31 5 government (and speculators) would
10:30:33 6 realize greater revenue because
10:30:34 7 lands in more settled areas
10:30:37 8 commanded higher prices."

10:30:38 9 So is it fair to say that the squatters
10:30:46 10 were seen as useful by many in Upper Canada and
10:30:48 11 later in Canada West?

10:30:49 12 A. Yes, in the context that she is
10:30:55 13 discussing here.

10:30:56 14 Q. Right. And in Vosburgh's thesis
10:31:00 15 here, she is looking at an area in Treaty 45 1/2,
10:31:04 16 that light green area on Exhibit P? That is her
10:31:08 17 study?

10:31:08 18 A. Yes. As I recall, that has been
10:31:11 19 her main focus.

10:31:15 20 Q. So looking at that area in that
10:31:19 21 time period, it is fair to say that squatting was
10:31:22 22 useful from the perspective of the Crown officials
10:31:23 23 as well?

10:31:24 24 A. Yes.

10:31:24 25 Q. Okay. First, because they helped

10:31:26 1 settle the territory; second, she said they drove
10:31:29 2 up the land prices, and so that way allowing
10:31:31 3 squatting was profitable to the government?

10:31:35 4 A. Well, and provided the squatter
10:31:36 5 eventually bought the property.

10:31:38 6 Q. Right. She also mentions here
10:31:40 7 that -- I think it was here or in Gates -- that
10:31:48 8 they would allow the squatter settler to purchase
10:31:50 9 the land sale, and so they would recognize their
10:31:52 10 rights in those lands, right? So that is why it
10:31:54 11 was worth the effort of squatting?

10:31:56 12 A. Yes. In places where you could
10:32:01 13 anticipate that the land was coming on the market,
10:32:03 14 it could be a good idea to be there ahead of time.

10:32:05 15 Q. Okay. Thank you. So I would like
10:32:13 16 to turn now to another source that you cite in your
10:32:18 17 report, John C. Weaver, "The Great Land Rush".

10:32:22 18 THE COURT: Just a moment, counsel.

10:32:24 19 All right. Is there an exhibit number?

10:32:50 20 MS. GUIRGUIS: There is -- what I have
10:32:51 21 in front of me is an SC number. I know that there
10:32:53 22 was a portion that was added as an exhibit, but I
10:32:55 23 am going to go through different excerpts.

10:32:57 24 So SC-1289, and it is at page -- I want
10:33:10 25 to go to page 156 of Weaver, which I believe to be

1 at page 16 of this PDF. I have two different SC
2 numbers.

3 THE COURT: Just before we do that, are
4 you asking that this excerpt be marked as an
5 exhibit?

6 MS. GUIRGUIS: Yes, I will, once I make
7 sure that this is the right excerpt.

8 THE COURT: Please go ahead.

9 MS. GUIRGUIS: Yes, because I am not
10 seeing 156 here.

11 THE COURT: Take your time here.

12 MS. GUIRGUIS: I think it might be
13 1288. There we are. Okay.

14 So this is the page number that I am
15 looking for, page 156 of Weaver. So Your Honour, I
16 would like to add this as the next exhibit, John C.
17 Weaver, "The Great Land Rush". I believe this is
18 the whole chapter. Dan, could you just scroll up
19 and see which chapter it is?

20 So this is Chapter 4, "Acquisition:
21 Uprooting Native Title", from John C. Weaver, "The
22 Great Land Rush", if I could add that as the next
23 exhibit.

24 THE COURT: Mr. Registrar?

25 THE REGISTRAR: Exhibit 4369.

1 EXHIBIT NO. 4369: Chapter 4 entitled
2 "Acquisition: Uprooting Native Title"
3 from John C. Weaver's "The Great Land
4 Rush".

5 BY MS. GUIRGUIS:

6 Q. Thank you. So going back to page
7 156, and I would like to start with an excerpt
8 beginning midway through the second paragraph, just
9 there. So we start here with -- "The defiant
10 landowners [...]" is the first sentence there, and
11 it goes on to page 157. I don't -- I won't propose
12 to read the whole thing aloud, but I don't know if
13 you are familiar with these. You probably are.

14 A. This passage, I am familiar.

15 Q. You are familiar with.

16 A. Yes.

17 Q. Okay. So I don't want to read the
18 whole thing aloud, but I'll just give you a moment
19 to take a look at it if you want to take a look at
20 it again.

21 A. Could we go back to the top of
22 that paragraph for a second?

23 Q. Yes.

24 A. Part of the feature of this
25 passage is -- begins with the Royal Proclamation

1 and then suddenly we are years before it. And this
2 is one of the interesting challenges in reading
3 John Weaver, is his approach to chronology is
4 sometimes challenging, shall we say.

5 So he then goes on to talk about
6 precede the Royal Proclamation, but at any rate,
7 that may be relevant to your question. I am not
8 sure.

9 Q. Well, my question is about -- so
10 just to summarize, is it fair to say, what Weaver
11 is describing is an example of squatting on
12 Iroquois land in Pennsylvania? That's right?

13 A. Yes.

14 Q. And the Juniata Valley?

15 A. Yes.

16 Q. And what he describes here is that
17 Pennsylvania directed its magistrates to appease
18 the Iroquois by burning a few log cabins; is that
19 correct?

20 A. Yes.

21 Q. But ultimately decided to concede
22 the squatters a pre-emption right?

23 A. Yes.

24 Q. And as you know, he starts off by
25 talking about the Royal Proclamation of 1763, but

1 he jumps to this example of the 1740s.

2 A. Yeah.

3 Q. So at page 26 of your report --
4 and you are relying in part on this passage -- you
5 say, Weaver comments that measures like these
6 "never curbed squatters for long"; is that right?

7 A. Could I just check if that is a
8 direct quotation for a moment?

9 Q. Yes, absolutely, and we can bring
10 up the report for everybody's benefit.

11 A. Yes, that is a direct quote from
12 him.

13 Q. So your first report is Exhibit
14 4367, if Mr. Shaule can bring that up, and go to
15 page 26. And in any case, you know what, we can
16 stay with this document because I'm going to come
17 back to it.

18 So he comments that measures like this
19 never curbed squatters for long, and by "measures
20 like these", you mean burning the log cabins?

21 A. Yes. That is a good example. You
22 move in, and to set an example, you punish a few
23 squatters.

24 Q. And you are also referring to
25 military intervention?

10:38:24 1 A. Yes. I am trying to remember
10:38:25 2 whether that was what happened in Pennsylvania, but
10:38:29 3 if that is what he says, then yes, because I rely
10:38:33 4 on him for that story.

10:38:35 5 Q. Right. So I would like to turn
10:38:35 6 your attention to the end of Weaver's passage on
10:38:38 7 page 157, his page 157. So if we slide over and go
10:38:49 8 to the top, he says there, in the second sentence
10:39:00 9 at the top of page 157:

10:39:02 10 "The only feasible weapon
10:39:04 11 against squatting and speculating in
10:39:06 12 Indian territory was a flat,
10:39:07 13 unequivocal refusal to issue any
10:39:10 14 enforceable interest."

10:39:11 15 So in other words, according to Weaver,
10:39:15 16 perhaps the best way to deal with squatting on
10:39:17 17 Indian lands, like the peninsula, was to refuse to
10:39:20 18 issue any interests to those lands to the
10:39:23 19 squatters?

10:39:23 20 A. That is what he says, and of
10:39:29 21 course, his book is about why that didn't work.

10:39:40 22 Q. But what he is suggesting here is
10:39:40 23 that the really -- the only thing versus military
10:39:42 24 intervention or burning log cabins down is to make
10:39:45 25 that principle clear to squatters. Do you stand by

10:39:48 1 it, to tell the squatters if they don't vacate
10:39:51 2 permanently, they can never own land?

10:39:53 3 A. Well, that is what that sentence
10:39:54 4 is saying, and as I say, the gist of his book is
10:39:59 5 why -- despite that, why that didn't happen
10:40:03 6 effectively in any of the countries that he is
10:40:05 7 discussing.

10:40:09 8 Q. But isn't he saying that it didn't
10:40:10 9 work because they didn't follow this?

10:40:12 10 A. That is not the gist of the larger
10:40:17 11 story of the book. In other words, he is saying
10:40:19 12 why they didn't follow it, what the pressures were,
10:40:22 13 what the orientations of the officials were as
10:40:25 14 well, and that is relevant to this.

10:40:27 15 Q. Right.

10:40:28 16 A. And relevant to his whole
10:40:31 17 interpretation is how officialdom saw these
10:40:38 18 processes and who ultimately they would side with
10:40:41 19 when there were disputes, but he is also very
10:40:45 20 attentive to all the ways in which private actors
10:40:48 21 could subvert government intentions.

10:40:48 22 Q. Right.

10:40:52 23 A. And one of which was squatting,
10:40:54 24 but there were many others as well that he
10:40:58 25 discusses in the various territories over the very

1 long period that he discovers.

2 So he could say this, and I think he is
3 sympathetic to that idea in principle in the larger
4 shape of his book, but then what his book documents
5 again and again over hundreds of pages is how and
6 why that flat, unequivocal refusal didn't happen
7 permanently, even if it happened briefly.

8 Q. Even if it happened briefly?

9 A. Yes.

10 Q. And it is, as you say, because the
11 officials, how they saw these processes and who
12 ultimately they would side with in the dispute?
13 Like the example that we are looking at right now
14 is that ultimately what happened is that they went,
15 and they burned the log cabins. They had this
16 intervention to appease the Iroquois, but
17 ultimately they did recognize an enforceable
18 interest for these folks.

19 A. Yeah, the "they" in this case is
20 the Penn family who rule Pennsylvania, so it is
21 some removed from London and Imperial officials and
22 so on, but it is part of the British Empire.

23 Q. Uhm-hmm.

24 A. But he is not saying that it is
25 just because of the officials, but because of all

1 of the kinds of pressures that land hunters could
2 bring to bear, some of which involved their
3 intervention in Indigenous communities in various
4 ways, and the New Zealand example I mentioned
5 yesterday where particular Maori leaders made
6 private deals with land hunters, and that was one
7 of the things that subverted the policy there.

8 So it is a complicated story as to why
9 the flat, unequivocal refusal didn't happen.

10 Q. Right.

11 A. And in his argument ultimately I
12 think couldn't happen, but it is not just because
13 of officials.

14 Q. Okay. So to your knowledge, this
15 flat, unequivocal refusal, making it clear that
16 squatters would never own land unless they vacated,
17 that was never tried on the peninsula; correct?

18 A. Not that I know of. There are
19 details of the peninsula that I wouldn't claim
20 expertise on it, but not that I know of.

21 Q. Or anywhere in Upper Canada?

22 A. I don't think I have ever seen it
23 written up, and I am relying on secondary sources
24 for all of this, but I don't remember seeing
25 anybody say here is a place where squatters were

10:43:27 1 burned out and people were driven across the
10:43:31 2 frontier and forbidden ever to be in Upper Canada
10:43:34 3 again or any of the kinds of punishments that --
10:43:37 4 banishment was actually a punishment available to
10:43:39 5 the authorities, but I don't remember hearing of
10:43:41 6 any squatters being banished.

10:43:43 7 Q. Right. Okay. Thank you.

10:43:44 8 So I am going to back to what I ended
10:43:49 9 on yesterday by trying to go to one of the sources
10:43:52 10 that you rely on. Belich, is it?

10:43:56 11 A. I have not ever met him, but we
10:43:58 12 can call him by whatever we want today, so I'll
10:44:00 13 defer to you.

10:44:01 14 Q. Right. We won't tell him.

10:44:03 15 A. I say Belich, but I don't have any
10:44:12 16 reason for knowing that over other possibilities.

10:44:12 17 Q. Okay. Thank you, sir.

10:44:12 18 So I was trying to go to one of the
10:44:12 19 sources you rely on, but I didn't have the correct
10:44:15 20 pages that I wanted to. I do now. So if we could
10:44:18 21 bring up SC1291. This is from Belich "Replenishing
10:44:26 22 the Earth", and, Your Honour, I would like to add
10:44:29 23 this is Chapter 8, this excerpt. It's 25 pages,
10:44:31 24 Chapter 8 of James Belich's "Replenishing the
10:44:35 25 Earth", page 260 to 305. I would like to add that

1 as the next exhibit.

2 THE COURT: Mr. Registrar.

3 THE REGISTRAR: Exhibit No. 4370.

4 EXHIBIT NO. 4370: Chapter 8, 25 pages,
5 of James Belich's "Replenishing the
6 Earth", pages 260 to 305.

7 BY MS. GUIRGUIS:

8 Q. So let's go to page 281, which is
9 page 13 of the PDF. Thank you.

10 We have the two passages that are
11 marked here:

12 "[...] the Ontarian elite seem
13 typical colonizing crusaders, always
14 keen to spark a boom and willing to
15 invest their own money as well as
16 that of the public."

17 If we jump down to the next one, it

18 says:

19 "As in Australia, large free
20 grants of land were influential in
21 drawing in these moneyed settlers,
22 well before the boom."

23 And then it talks about Talbot arriving
24 in 1803. "Talbot" is Thomas Talbot. I think you
25 referred to him yesterday, and you do also in your

10:45:47 1 report; correct?

10:45:47 2 A. Yes. I may have referred to him
10:45:48 3 yesterday, but your memory will be stronger than
10:45:52 4 mine from yesterday, but I do refer to him in my
10:45:54 5 report, for sure.

10:45:55 6 Q. And who is Talbot?

10:45:56 7 A. Talbot was an Anglo-Irish -- I
10:46:04 8 guess he is a lesser aristocrat -- who decides to
10:46:08 9 settle in Upper Canada, and he takes advantage of
10:46:10 10 the early provisions where the government, which
10:46:14 11 has little money and much land, is making large
10:46:16 12 land grants to people that are assumed to be able
10:46:23 13 to induce settlers to come to the province.

10:46:26 14 Q. Okay.

10:46:26 15 A. And they make an arrangement with
10:46:29 16 these people who are thought to be able to
10:46:34 17 encourage settlement.

10:46:35 18 Q. Right.

10:46:37 19 A. Some of them did, many of them did
10:46:40 20 not. And I can't now remember the precise
10:46:43 21 modalities by which Talbot's lands came to be
10:46:47 22 settled, but his arrangement was that for every
10:46:51 23 settler he brought, he acquired a grant, and his
10:46:54 24 story is that his interpretation of his
10:46:57 25 arrangements was considerably more generous to him

10:47:00 1 than the government's was, and he won.

10:47:03 2 But his lands did gradually get
10:47:05 3 settled, and he acquired a great block of land in
10:47:09 4 direct consequence of the number of people who
10:47:10 5 settled on the territory that was within his
10:47:13 6 original grant.

10:47:14 7 But I cannot remember the precise
10:47:17 8 ownership arrangements; that is, it doesn't make
10:47:21 9 sense if he owned it all, what this granting thing
10:47:24 10 was. So I think his contract specified that for
10:47:28 11 each settler that he could show was established on
10:47:31 12 the land, he was then given a grant of several lots
10:47:34 13 for himself, and that is how he accumulated the
10:47:39 14 large holdings that he did.

10:47:40 15 Q. Okay. So that is why he is
10:47:41 16 mentioned here, and that is what I want to ask you
10:47:43 17 about, is the efforts of folks like Talbot and
10:47:45 18 other authorities, let's say, let's call them, the
10:47:53 19 Ontarian elite, for example, these colonizing
10:47:56 20 crusaders, how that affected what you talk about
10:47:58 21 the population boom.

10:47:59 22 So we are talking about a bit of an
10:48:01 23 earlier -- this is in the 1820s and '30s; correct?

10:48:05 24 A. Well, here we are talking about
10:48:07 25 Talbot arriving in 1803.

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10:48:10 2
10:48:11 3
10:48:15 4
10:48:15 5
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10:48:34 10
10:48:36 11
10:48:38 12
10:48:39 13
10:48:42 14
10:48:44 15
10:48:46 16
10:48:47 17
10:48:50 18
10:48:53 19
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10:48:56 21
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10:48:59 23
10:49:01 24
10:49:03 25

Q. Right.

A. And he is there for a long time, and so much of his land accumulation happened later.

Q. Happened later. Okay. And if we go to the next quote that I want to bring you to, which is page 282. There we go. So highlighted in green here, it says:

"Land grants generated sparks by bringing in well-connected boosters, but it took speculative land markets to help the sparks burst into flame. From the mid-1820s, individual promoters like Talbot were joined by settlement companies, imperial emigration schemes, and philanthropic organizations. London capitalists interested in Canada met at the North and South American Coffee House and the Canada Club; they had strong influence on at least three British newspapers. The Canada Company, formed in 1826 with a capital of 1 million pounds to

1 develop and sell off Upper Canada's
2 reserve land, established five
3 immigration agencies in the British
4 Isles."

5 So the settlement companies that it is
6 referring to here -- and now we are talking about
7 the mid 1820s -- that is companies like the Canada
8 Company?

9 A. Yes. I think it is the main one
10 by far.

11 Q. Okay.

12 A. There was a British America Land
13 Company in Lower Canada as well.

14 Q. And it promoted immigration to the
15 colony?

16 A. Yes.

17 Q. And this is the company you had
18 previously mentioned, we were talking that the
19 Crown had sold off some reserves to?

20 A. Yes.

21 Q. Okay. So one last quote that I
22 want to take you to at page 283 of this document,
23 so if we shift over. Thank you:

24 "Another key to Ontario's
25 booming against odds was 'Federal

10:50:10 1 subsidy' - from London. Government,
10:50:14 2 Wakefieldians, and philanthropists
10:50:16 3 alike wanted to divert the flow of
10:50:18 4 British migrants and money from the
10:50:20 5 United States to British
10:50:24 6 possessions."

10:50:25 7 If we skip down to the second one:

10:50:27 8 "The British government pumped
10:50:29 9 about 4 million pounds into the
10:50:30 10 Ontario economy in the 1820s and
10:50:33 11 1830s. London financed the Rideau
10:50:36 12 Canal, built 1826-32, at a cost of
10:50:40 13 about 1 million pounds, to link what
10:50:43 14 is now Ottawa to Lake Ontario,
10:50:45 15 largely for military reasons. 'The
10:50:48 16 British government's expenditure on
10:50:50 17 Upper Canada actually exceeded that
10:50:52 18 by the Upper Canadian government
10:50:54 19 throughout the colony's history.'
10:50:56 20 But Ontario's government was no
10:50:57 21 laggard. It spent around 2.5
10:50:59 22 million pounds on public works in
10:51:01 23 the period, and its money too came
10:51:03 24 from London."

10:51:03 25 I think you also mentioned this

10:51:07 1 yesterday, is that the British government paid --
10:51:11 2 poured quite a lot of resources into Upper Canada?

10:51:13 3 A. Yes. I think if you look at the
10:51:16 4 footnote for that source, you'll find it is a quote
10:51:18 5 from "Planting the Province", which I wrote.

10:51:20 6 Q. Oh.

10:51:21 7 A. So we are into a degree of
10:51:22 8 circularity on this.

10:51:24 9 Q. So you would agree, based on this
10:51:26 10 passage and likely your own work then, that there
10:51:29 11 was an active push behind this explosive
10:51:31 12 colonization?

10:51:32 13 A. Yes.

10:51:33 14 Q. And there was significant
10:51:36 15 financial expenditures by the Imperial and local
10:51:38 16 government to promote settlement?

10:51:40 17 A. Much of this expenditure that we
10:51:43 18 are talking about here is not directly promoting
10:51:46 19 settlement. As I say, the British government
10:51:50 20 decided to finance the Rideau Canal to bypass the
10:51:55 21 vulnerable St. Lawrence, and that was under
10:51:57 22 pressure from the British military who wanted a
10:51:59 23 more secure way to communicate between Kingston and
10:52:05 24 Montreal. And they sent Colonel By out to arrange
10:52:13 25 for a barge canal that they could tow materials.

1 Q. Okay.

2 A. Colonel By was caught up by the
3 technological enthusiasm of the era and said, Let's
4 make it fit for steamboats, and he overran his
5 budget by 400 to 500 percent, and by the time they
6 had caught up to him, he had built a steamboat
7 canal. But that was not explicitly to promote
8 immigration. It was, again, as a project to defend
9 the colony.

10 So a lot of this expenditure is not
11 explicitly for promoting population movement, even
12 if it had that effect.

13 Q. In part though it is, would you
14 agree with that?

15 A. The British government, I think
16 not very much at all. It is supporting civil
17 administration. It is supporting improvements, and
18 the improvements partly were to do with that, but
19 it was partly simply to make the economy function
20 better in the building of public works.

21 Q. What about free grants of land to
22 settlers?

23 A. Well, of course they are moving
24 away from free grants of land precisely in this
25 period. From 1826 on, they are selling land, not

10:53:19 1 granting land in the main.

10:53:23 2 Q. But there was still some free
10:53:24 3 grants of land?

10:53:25 4 A. I would have to go back and check
10:53:26 5 exactly for what purpose. There were certainly
10:53:29 6 people entitled to free grants, as descendants of
10:53:33 7 Loyalists, from war service and so on, but the
10:53:38 8 fundamental policy from 1826 was we are going to
10:53:42 9 sell lands, and earlier one of your questions went
10:53:44 10 to that as well.

10:53:45 11 Q. Right. So all of these elements,
10:53:48 12 though, you would agree that it created a
10:53:51 13 persistent flow of settlers to the colony?

10:53:54 14 A. I think the settlers created the
10:53:56 15 flow, and as my report shows, the graph of
10:54:01 16 immigration shows that when the colonial economy
10:54:06 17 collapsed, as it did in the late 1830s, immigration
10:54:11 18 collapses.

10:54:11 19 Q. Right.

10:54:12 20 A. The expenditures continue, but
10:54:13 21 immigration collapses, so there is not a direct
10:54:15 22 correlation between expenditure and migration. The
10:54:18 23 migrant has to foresee that things are going to be
10:54:20 24 better in the new world, and when things turn badly
10:54:23 25 in the colony, then migrants stop coming, and it

1 doesn't matter whether there is expenditure or not
2 because the migrant hears news from relatives who
3 have gone before who say, Boy, things are tough
4 here.

5 So that I see the migrants ultimately
6 as autonomous actors in this and not simply as
7 dependent variables of government.

8 Q. Not entirely dependent variables,
9 but there was --

10 A. Not mainly dependent variables.

11 Q. Not mainly.

12 A. I mean, that is the whole point of
13 "Planting the Province", that these are actors with
14 their own motivations and wills and strategies.

15 Q. Right. But the policy choices,
16 the financial choices, the resource choices, made
17 by the Imperial Government and the colonial
18 government certainly would contribute to --

19 A. Contribute, definitely.

20 Q. Right.

21 A. I quite agree with that.

22 Q. Right. The choices that they made
23 to put resources towards that, whether it be for
24 military purposes, my understanding, I believe from
25 reading even this source, is that even for military

10:55:25 1 reasons is to promote more settlers in the colony
10:55:28 2 was deemed something good for security, right,
10:55:34 3 so --

10:55:34 4 A. Yes. Particularly they wanted to
10:55:35 5 promote settlement along the Rideau Canal as part
10:55:39 6 of the process of securing it.

10:55:41 7 Q. So certainly these choices made by
10:55:45 8 the Imperial colonial government you say are in
10:55:48 9 part contributing to this explosive colonization;
10:55:51 10 is that correct?

10:55:52 11 A. They are contributing, but they
10:55:55 12 also reflect the force of the colonization that is
10:55:57 13 going on. In other words, they are reflecting the
10:56:00 14 demand for land in the new colony.

10:56:03 15 Q. So you mentioned yesterday, and
10:56:07 16 you mentioned in your report as well, that there
10:56:11 17 was options for the government. So if this was a
10:56:14 18 result of choices that were made or in part a
10:56:18 19 result of choices that were made by the
10:56:20 20 governments, then one other option for the
10:56:21 21 government could have been to stop pumping these
10:56:24 22 resources into creating this flow; isn't that
10:56:28 23 right?

10:56:28 24 A. But that is not the primary
10:56:31 25 purpose of the British expenditures particularly.

1 The Upper Canadian ones are driven by public works
2 expenditures, primarily canals, canals which are
3 meant to foster commerce and in the process also
4 foster settlement. So one can't separate out
5 settlement and say that is the only motivation.

6 Q. Right.

7 A. And it can be shown that the
8 choice of what to spend -- to borrow for and to
9 spend money on was very much influenced by
10 political factors. In other words, by the
11 established interests already in the colony.

12 Q. Uhm-hmm.

13 A. So that they are saying we need
14 roads built in our district. We need a harbour in
15 our district. We are already here, and now we need
16 a harbour.

17 Q. Right. So that is answering the
18 question of why they would spend the expenditures,
19 but when we are saying when they make the choices
20 to foster settlement, which includes spending money
21 or promoting it or whatever it may be, that is a
22 choice that they made, to foster the settlement and
23 another -- what I would like to put to you, because
24 you talk about in your report that this inevitably
25 would lead to seeking another cession from

10:58:00 1 Indigenous people in Upper Canada to meet that
10:58:02 2 demand.

10:58:02 3 A. That is their fundamental
10:58:05 4 objective, and in the report, it goes to later than
10:58:10 5 what is referred to in this excerpt here. It goes
10:58:12 6 to the 1850s, and particularly in the 1850s the
10:58:18 7 consciousness that the process by which this
10:58:19 8 expansion has gone on is reaching its limit.

10:58:23 9 So it is articulated quite fully by
10:58:25 10 Francis Hincks, and perhaps more than some of these
10:58:31 11 earlier documents.

10:58:32 12 Q. I want to go to another section of
10:58:39 13 John Weaver, and I think this has been added as an
10:58:41 14 exhibit, but Mr. Shaule might have this as document
10:58:48 15 S1843, and it is Exhibit 4364. So these are
10:59:04 16 pinpoints and cites that you used in your report to
10:59:05 17 John Weaver.

10:59:05 18 THE COURT: Just give me a moment,
10:59:06 19 Counsel.

10:59:07 20 MS. GUIRGUIS: Sure.

10:59:18 21 THE COURT: You said this might be an
10:59:18 22 exhibit?

10:59:18 23 MS. GUIRGUIS: It is an exhibit. I
10:59:18 24 just found the number. My apologies. 4364.

10:59:20 25 THE COURT: 4364?

10:59:22 1 MS. GUIRGUIS: Yes.

10:59:23 2 THE COURT: Just give me a moment here.

10:59:28 3 Is this an excerpt as well?

10:59:29 4 MS. GUIRGUIS: I think it is simply --
10:59:31 5 yeah, it is a few pages that were -- oh, no, it is
10:59:35 6 a full -- I think it is a full chapter. So it is
10:59:37 7 the excerpts that are cited particularly by
10:59:40 8 Professor McCalla in his report.

10:59:46 9 BY MS. GUIRGUIS:

10:59:46 10 Q. So if we turn to page 143, which
10:59:49 11 is page 9 of the PDF -- 134. My apologies. So it
10:59:59 12 is page 134 of the document. Near the middle of
11:00:03 13 the page, it says:

11:00:08 14 "Then governments exerted power
11:00:09 15 through sovereign acts to acquire or
11:00:12 16 expunge whatever native title had
11:00:14 17 been conceded to the Indigenous
11:00:15 18 people."

11:00:15 19 And if we turn to page 177 of the
11:00:19 20 document, which is page 21 of the PDF, John Weaver
11:00:31 21 says:

11:00:36 22 "In jurisdiction after
11:00:37 23 jurisdiction, from the late
11:00:39 24 nineteenth century to the
11:00:40 25 mid-twentieth, when colonial regimes

11:00:42 1 and Neo-European governments
11:00:43 2 announced hearings to settle once
11:00:45 3 and for all the land question [...]"
11:00:47 4 He is talking about, I think,
11:00:48 5 hearings -- the example that he is talking about in
11:00:50 6 the page before is hearings "to review humanitarian
11:00:53 7 legislation that were meant to protect Indigenous
11:00:54 8 peoples from further land grabs". He says:
11:00:59 9 "[...] it was a sign that they
11:01:01 10 were embarking on another round of
11:01:02 11 promise breaking."
11:01:04 12 So in this excerpt, he is referring to
11:01:06 13 the promises government made to Indigenous peoples
11:01:10 14 to protect from further land grabs; is that right?
11:01:13 15 A. Yes, as I -- and I am not sure
11:01:16 16 whether that is the only protection, but that is a
11:01:18 17 particular protection here.
11:01:19 18 Q. Okay. And when he says "from
11:01:24 19 further land grabs", he is also talking about
11:01:28 20 protection from settler encroachment?
11:01:29 21 A. Yes.
11:01:29 22 Q. So when you say in your report
11:01:36 23 that the government could have chosen to enforce
11:01:37 24 the Treaty -- you have testified to this
11:01:41 25 yesterday -- you clarified in your earlier

11:01:43 1 testimony that you were talking about enforcing
11:01:45 2 Treaty 45 1/2; correct?

11:01:48 3 A. No, I think we were talking about
11:01:51 4 Treaty 72 at that point, but I could be wrong. I
11:01:55 5 think it was Treaty 72 that I was talking about.

11:01:57 6 Q. To enforce the Treaty --

11:01:59 7 A. In my report, yes, because it was
11:02:01 8 addressed to the 1854 context.

11:02:04 9 Q. It was addressed to the 1854 --
11:02:08 10 well, let's pull it up so that I don't misstate it.
11:02:12 11 So let's pull up Exhibit 4367. So if we turn to
11:02:57 12 page 25 of your report, right there. So the
11:03:08 13 paragraph beginning "The second [...]"

11:03:11 14 So this is when you are going through
11:03:12 15 the different options available:

11:03:14 16 "The second was actively to
11:03:15 17 enforce the existing treaty."

11:03:19 18 So that is referring to Treaty 45 1/2?

11:03:22 19 A. Okay. Yes. Now that I have
11:03:23 20 caught the context, I --

11:03:24 21 Q. It makes more sense?

11:03:25 22 A. Yes.

11:03:26 23 Q. Okay. So when you say to enforce
11:03:35 24 the existing treaty, Treaty 45 1/2, you are
11:03:39 25 referring to the promise in that Treaty to protect

1 from the encroachment of whites?

2 A. Yes.

3 Q. So to protect from further land
4 grabs, namely, the grab for the peninsula?

5 A. Yes.

6 Q. So that was an option you
7 considered open to the government?

8 A. Hypothetically, and -- well, the
9 argument is there. I won't repeat it here.

10 Q. Right. And that would be versus
11 embarking on, to borrow Weaver's words, another
12 round of promise-breaking?

13 A. Yes.

14 Q. That the government made another
15 choice, but in this case, I guess in 1854, the
16 government made another choice to embark -- again
17 to borrow his words -- on another round of
18 promise-breaking to those Indigenous peoples?

19 A. You could read it that way, but
20 there is -- the argument was it is the only way to
21 protect what we have promised, but selling some
22 land and protecting others, we realize our
23 objective. You couldn't -- I am not going to enter
24 into the treaty negotiation itself or any of that.

25 Q. Right.

11:04:43 1 A. But that was part of the reasoning
11:04:46 2 that Oliphant offered in his report. In order to
11:04:48 3 protect some lands, we may have to do something
11:04:56 4 with others.

11:04:56 5 Q. Okay. Thank you.

11:04:59 6 I want to jump back and talk about free
11:05:03 7 land grants, and you had mentioned that it happened
11:05:05 8 in a particular time. Are you familiar with free
11:05:14 9 grants of land that would happen along colonization
11:05:19 10 roads?

11:05:19 11 A. In general, yes.

11:05:20 12 Q. Okay. And those would be free
11:05:23 13 grants of 50 acres on either side of a road?

11:05:26 14 A. Well, one side or the other.

11:05:28 15 Q. One side or the other?

11:05:29 16 A. You couldn't get both sides
11:05:31 17 easily, but your brother could get the other side.

11:05:33 18 Q. So I want to turn to an example
11:05:38 19 that we have in the historical record, and that is
11:05:40 20 the colonization road from Garafraxa to Owen Sound.

11:05:45 21 A. Uhm-hmm.

11:05:46 22 Q. Are you familiar with this
11:05:47 23 example?

11:05:48 24 A. In general.

11:05:48 25 Q. In general.

11:05:50 1 A. We'll find out how closely.

11:05:53 2 Q. We won't go into too much detail.

11:05:57 3 A. Well, as I say, I certainly have
11:05:59 4 read about it.

11:06:00 5 Q. Okay. Great. Thank you. So the
11:06:01 6 colonization road from Garafraxa to Owen Sound, I
11:06:09 7 think we are familiar with where Owen Sound is, but
11:06:09 8 are you able to point out on one of the maps where
11:06:12 9 Garafraxa is?

11:06:12 10 A. Well, I don't know how precisely
11:06:15 11 we need to find it, but it is down around here.

11:06:18 12 Q. Okay.

11:06:19 13 A. If that is close enough, in
11:06:20 14 Wellington County.

11:06:21 15 Q. It is in Wellington County, so
11:06:23 16 that is south of Owen Sound.

11:06:26 17 A. Southeast of Owen Sound.

11:06:28 18 Q. Southeast of Owen Sound on your
11:06:30 19 way to the Greater Toronto Area, let's say.

11:06:32 20 A. Yeah. Well, let's say on the way
11:06:34 21 to Guelph.

11:06:35 22 Q. On the way to Guelph.

11:06:36 23 A. Which is a more central place.

11:06:37 24 Q. Fair enough. So we are talking
11:06:43 25 about the road that runs from -- that would or

11:06:46 1 being proposed the road from Garafraxa up north to
11:06:50 2 Owen Sound. So I would like to take you to Exhibit
11:06:53 3 1337. This is an old handwritten document. It is
11:07:02 4 dated April 15th, 1840. I unfortunately don't have
11:07:11 5 a transcript of this, so I think if we can zoom in.
11:07:14 6 So this is an opinion of S.B. Harrison. Have you
11:07:23 7 seen this document before?

11:07:24 8 A. I don't believe I have seen this
11:07:26 9 document.

11:07:26 10 Q. Okay.

11:07:27 11 A. But I am happy to read it, if I
11:07:29 12 have time.

11:07:30 13 Q. Yes, absolutely, if you want to
11:07:31 14 take a look at it and then --

11:07:34 15 A. Well, I am not sure that I can
11:07:35 16 scroll it, that is the only thing.

11:07:37 17 Q. We can scroll for you.

11:07:38 18 THE COURT: Is the memorandum eight
11:07:39 19 pages in length, Counsel?

11:07:41 20 MS. GUIRGUIS: It is. I am only -- the
11:07:45 21 relevant parts are from page 1 to the top of page
11:07:51 22 4.

11:07:51 23 THE COURT: Yes, I am just thinking
11:07:53 24 if -- I mean, the gentleman obviously should have
11:07:55 25 time to read it.

11:07:56 1 MS. GUIRGUIS: Right.

11:07:56 2 THE COURT: We could take a 15-minute

11:08:00 3 break during which that could occur.

11:08:02 4 MS. GUIRGUIS: Okay.

11:08:03 5 THE COURT: It is not yet at the time

11:08:06 6 of the ordinary break, but it is going to be

11:08:09 7 tedious for him to have to continually say "please

11:08:15 8 move the document", "please move the document".

11:08:19 9 So unless this presents some difficulty

11:08:21 10 to you, I would propose that we let him do that.

11:08:24 11 MS. GUIRGUIS: Not at all. That's

11:08:25 12 fine. Thank you.

11:08:25 13 THE COURT: Okay. Sir, you'll get help

11:08:28 14 reading it from Counsel, plus tech experts, and

11:08:30 15 we'll take a 15-minute break.

11:08:32 16 -- RECESSED AT 11:08 A.M.

11:29:44 17 -- RESUMED AT 11:29 A.M.

11:29:44 18 THE COURT: Please go ahead.

11:29:50 19 BY MS. GUIRGUIS:

11:29:50 20 Q. Thank you, Your Honour.

11:29:51 21 So we left off at Exhibit 1337, which

11:29:57 22 we provided to you, Professor McCalla, to take a

11:29:59 23 look at, April 15th, 1840, opinion of S.B.

11:30:05 24 Harrison.

11:30:05 25 So without -- I won't take us through

11:30:07 1 it too much, but you would agree with me that he is
11:30:10 2 talking about an influx of immigration that is
11:30:13 3 expected and that public works are suspended, and
11:30:17 4 that immigrants should be given assistance to
11:30:20 5 settle; is that correct?

11:30:20 6 A. He is trying to think about how to
11:30:22 7 solve a problem in the ports where immigrants might
11:30:26 8 gather, and here is an interesting case of what we
11:30:28 9 were talking about before.

11:30:30 10 Q. Uhm-hmm.

11:30:31 11 A. Namely, the extreme financial
11:30:33 12 difficulties in the colony right after the
11:30:35 13 rebellion, which he is still worried about, and yet
11:30:39 14 the immigrants are coming now again for various
11:30:42 15 reasons.

11:30:46 16 So in my report, I actually mention the
11:30:48 17 degree to which officials relied on immigration
11:30:51 18 numbers as their best clue about population.

11:30:51 19 Q. Right.

11:30:53 20 A. So this is a nice instance of
11:30:54 21 that, that the immigration expectations are driving
11:30:58 22 what he is saying here, yes.

11:30:59 23 Q. Okay. And he is trying to get
11:31:02 24 ahead of it and stop them from staying at ports?

11:31:04 25 A. Yes.

11:31:05 1 Q. And that is -- and then he says
11:31:08 2 that one option is to appropriate a tract of land
11:31:11 3 from that surrendered by Saugeen at Owen Sound. So
11:31:14 4 this is at, for those that want to follow along
11:31:16 5 with the handwriting, is at the bottom of page 2
11:31:21 6 to -- he starts talking about that to about the
11:31:24 7 middle of page 3. So that is right. So that is
11:31:33 8 the option that he is discussing, and he lists the
11:31:37 9 advantages of settling immigrants at Owen Sound; is
11:31:43 10 that correct?

11:31:43 11 A. Yes.

11:31:43 12 Q. And he says that the -- at the top
11:31:47 13 of page 4, he says:

11:31:52 14 "Another advantage would be
11:31:54 15 opening the communication with the
11:31:57 16 tract by the means of Hurontario
11:32:00 17 Street".

11:32:00 18 [As read.]

11:32:00 19 A. Yes.

11:32:00 20 Q. So is that referring to the same
11:32:03 21 street we were talking about, the road from
11:32:05 22 Garafraxa to Owen Sound?

11:32:06 23 A. I would have to look at a current
11:32:08 24 map to be sure of where Hurontario goes, but it is
11:32:13 25 either that, or it's quite closely parallel to it,

11:32:16 1 but I'll take it as that you know, so I'll agree
11:32:19 2 with that.

11:32:19 3 Q. And when he says "opening up
11:32:21 4 communication" between the two, he means improving
11:32:26 5 the flow of people --

11:32:27 6 A. It appears he -- no. It appears
11:32:28 7 he means opening a road.

11:32:30 8 Q. And opening a road would
11:32:34 9 necessarily involve the flow of people, correct, or
11:32:38 10 improve the flow of people?

11:32:39 11 A. Well, it would allow it, so I
11:32:45 12 think allow is better than improve in that context.
11:32:49 13 In other words, it would permit people to have
11:32:52 14 access to the whole length of what is along that
11:32:54 15 road.

11:32:55 16 Q. Okay. And allow them to
11:32:57 17 ultimately settle at the tract of land from that
11:33:01 18 surrendered by Saugeen at Owen Sound?

11:33:03 19 A. Yes.

11:33:03 20 Q. Okay. Thank you. So I want to
11:33:07 21 switch to another exhibit, 1373. If you could zoom
11:33:23 22 in a little for my benefit so I can read it. This
11:33:30 23 is a notice dated November 1, 1840. It is posted
11:33:34 24 "to potential settlers", and it says:

11:33:38 25 "Notice is hereby given, that a

1 road through the Crown Land from the
2 North West angle of the Township of
3 Garafraxa to Owen's Sound, upon Lake
4 Huron, is opening at the expense of
5 Government."

6 And then it says:

7 "Lots of 50 acres of land each,
8 will be laid out on each side of the
9 road."

10 And then it sets out the terms for
11 obtaining or applying to get those grants of 50
12 acres on each side.

13 A. Yes.

14 Q. So this road that now we are
15 getting notice of from Garafraxa to Owen Sound, and
16 the land grants that went on either side, the free
17 land grants of 50 acres on either side, would have
18 encouraged settlement to move north to Owen Sound,
19 is that correct, in 1840?

20 A. Well, that is obviously an
21 objective of the project but not only to Owen Sound
22 but all the way along the road.

23 Q. Okay. Thank you. So I would like
24 to pull up a document. It is SC1290. Oh, it is
25 not excerpted.

1 Okay. So this is a document. It is an
2 1842 publication, and it is by the Canada Company.
3 It is called "A Statement of the Satisfactory
4 Results Which Have Attended Emigration to Upper
5 Canada". I don't -- this wasn't the version I
6 was -- I wanted to have the title page and this
7 map.

8 Are you familiar with this document,
9 this publication?

10 A. I must have read it at some time
11 in the past but not for quite a long time.

12 Q. Okay. I am going to ask my
13 colleague to scroll to the title page to take a
14 look, which I think might be below this map or
15 after it. There.

16 And it is published by the Canada
17 Company, which we have talked about.

18 A. Yes.

19 MS. GUIRGUIS: Okay. Your Honour, I
20 would like to add this as the next exhibit, but my
21 intention was not to add the entire thing. It was
22 to have just the title page and the map. I can add
23 the entire document or just --

24 THE COURT: Well, if you are content to
25 do that, we have that image, so we might as well go

11:36:05 1 ahead.

11:36:05 2 MS. GUIRGUIS: Okay. And then we'll
11:36:07 3 replace that out in the database with the excerpt.

11:36:11 4 THE COURT: Well -- sorry.

11:36:13 5 MS. GUIRGUIS: Yes. Sorry.

11:36:14 6 THE COURT: If you are content to mark
11:36:16 7 the entire document --

11:36:17 8 MS. GUIRGUIS: Oh, the entire thing?
11:36:18 9 Okay.

11:36:19 10 THE COURT: -- then we can do that.

11:36:21 11 MS. GUIRGUIS: Okay.

11:36:21 12 THE COURT: Mr. Registrar.

11:36:22 13 THE REGISTRAR: Exhibit No. 4371.

11:36:22 14 THE COURT: Thank you.

11:36:25 15 MS. GUIRGUIS: Thank you.

11:36:25 16 EXHIBIT NO. 4371: 1842 publication by
11:34:55 17 the Canada Company entitled "A
11:34:57 18 Statement of the Satisfactory Results
11:35:00 19 Which Have Attended Emigration to Upper
11:35:02 20 Canada".

11:36:30 21 BY MS. GUIRGUIS:

11:36:38 22 Q. Okay. So I want to zoom in on the
11:36:40 23 part of the map that shows the area that we are
11:36:41 24 talking about, which is the Bruce Peninsula, if we
11:36:50 25 can. Here we go.

1 Okay. So this is an 1842 map of the
2 peninsula, and the lands south of the peninsula,
3 which is the Treaty 45 1/2 area. You would agree
4 with me, sir, that this map, by 1842, what we see
5 are there is survey lands that reach northeast to
6 Goderich on the shore of Lake Huron?

7 A. Yes.

8 Q. So that is right under where it is
9 labelled "Land Belonging to the Crown" and right
10 above that "Indian Territory"?

11 A. Yes.

12 Q. And you would agree with me, sir,
13 that this map shows that by 1842, on the other side
14 survey lands have reached on the northwest side up
15 to Owen Sound on the Georgian Bay side?

16 A. The townships are certainly named.
17 I don't know how fully they would have been
18 surveyed, but they have certainly been named and
19 probably laid out at least in general.

20 Q. So by 1842, what we see in this
21 map is the line of settlement is nearing the
22 boundary of the Saugeen Indian Reserve; that is,
23 the peninsula?

24 A. There is quite a lot of territory
25 in what is called "Indian Territory" there, but it

11:38:14 1 is not that far.

11:38:15 2 Q. And is it reasonable to conclude
11:38:22 3 that the line of settlement is not that far from
11:38:25 4 the peninsula due to the choices we were just
11:38:29 5 talking about such as the free grants of land along
11:38:32 6 the road stretching from Garafraxa to Owen Sound?

11:38:34 7 A. That would cover only that one
11:38:37 8 strip of townships.

11:38:38 9 Q. Uhm-hmm.

11:38:39 10 A. And otherwise, it wouldn't cover
11:38:44 11 the rest of that territory.

11:38:49 12 Q. But it would cover that area, the
11:38:51 13 road, and we have said that that's coming from
11:38:54 14 Garafraxa, which is between Owen Sound and Guelph
11:38:59 15 and up to Owen Sound?

11:39:00 16 A. There is a line of townships there
11:39:03 17 that that road particularly opened, and it is the
11:39:07 18 one line of townships closest to "Indian
11:39:11 19 Territory".

11:39:11 20 Q. And promoted that the line of
11:39:12 21 settlement was moving north?

11:39:14 22 A. The concept of a line of
11:39:16 23 settlement is a bit general. There is a kind of
11:39:21 24 zone of settlement is, I think, a better term than
11:39:23 25 a line. This is not like a military offensive

11:39:28 1 marching along. And there are early settlers going
11:39:31 2 into some of the townships; others are still
11:39:33 3 filling up. The chances are very good -- well, I
11:39:35 4 know from the Canada Company that they had land for
11:39:38 5 sale through all of those townships below Indian
11:39:41 6 territory. It wasn't that they had sold all those
11:39:44 7 lands by any means, and of course, this pamphlet
11:39:47 8 was meant to try to sell those lands.

11:39:49 9 So the notion that this represents a
11:39:51 10 clearly demarcated line behind which everything is
11:39:55 11 full and in front of which just the people with
11:39:59 12 pent-up demand pressing to cross it isn't quite the
11:40:02 13 issue.

11:40:03 14 Q. Uhm-hmm. Right. So if we use
11:40:05 15 your terminology, zone of settlement, what I then
11:40:07 16 mean to say is that the zone of settlement is
11:40:10 17 people moved somewhat as a group, right, is that
11:40:17 18 you are not going to find one person going out way
11:40:20 19 far north when they don't have any support system
11:40:23 20 or roads or anything of that sort?

11:40:24 21 A. Yes, that is extremely accurate
11:40:27 22 and not always recognized in the literature.

11:40:28 23 Q. Thank you.

11:40:29 24 A. There is a whole literature about
11:40:32 25 the hearty pioneer living alone in the bush.

11:40:35 1 Q. So I would like to turn to a local
11:40:37 2 history now by Robertson, which you mentioned
11:40:40 3 yesterday in your testimony as a good resource,
11:40:43 4 that deals particularly with the lands of the
11:40:45 5 County of Bruce. So that is the area that is
11:40:47 6 marked as "Indian Territory" or "Land Belonging to
11:40:52 7 the Crown", I guess, on the map that we have just
11:40:54 8 looked at.

11:40:55 9 So this is Exhibit 4286. If we go to
11:41:02 10 page 31, which is page 43 of the PDF, so Robertson
11:41:12 11 says about the County of Bruce and lands that are
11:41:15 12 just south of the peninsula then:

11:41:18 13 "The rapidity with which the
11:41:20 14 county of Bruce was settled may be
11:41:21 15 largely attributed to the offer made
11:41:23 16 by the government of a free grant,
11:41:25 17 to actual settlers, of a fifty acre
11:41:28 18 farm lot on either [side] of the
11:41:30 19 first two concessions north or south
11:41:31 20 of the Durham Road."

11:41:35 21 So this is an example of something
11:41:37 22 similar that there is free grants of land on either
11:41:40 23 side of the road?

11:41:41 24 A. Yes, but I don't think it is the
11:41:42 25 same road.

11:41:43 1 Q. It is not the same road.

11:41:44 2 A. Yes.

11:41:44 3 Q. It is the Durham Road. We can
11:41:49 4 actually see it on Exhibit Q.

11:41:56 5 A. It is probably in my report as
11:41:58 6 well. We just have to find it.

11:42:12 7 Q. Oh, and it is in front of us on
11:42:13 8 the screen. So the -- Exhibit Q is a map of the
11:42:18 9 Grey Bruce Peninsula, the Grey Bruce County, and it
11:42:23 10 has coordinates along the side. So the coordinates
11:42:26 11 of where I believe the Durham Road is, is G2 and
11:42:33 12 G3. Does that look correct? Does that look around
11:43:01 13 about correct?

11:43:02 14 A. Yes.

11:43:02 15 Q. So when we say "on either [side]
11:43:05 16 of the first two concessions north or south of the
11:43:09 17 Durham Road", so we were talking about south of the
11:43:12 18 peninsula in Bruce County. And in the next
11:43:15 19 paragraph Robertson goes on -- sorry, if we flip
11:43:18 20 back to Exhibit 4286, he goes on to say:
11:43:23 21 "The notice that the 'free
11:43:24 22 grants' were open for location was
11:43:26 23 made in August, 1848, and renewed in
11:43:29 24 June, 1849."
11:43:31 25 And he goes on further on that page and

11:43:33 1 to the next about making an application -- about
11:43:37 2 how you would make an application to the Crown
11:43:39 3 lands agent at Durham to obtain these free grants.

11:43:42 4 So this further tells us when he talks
11:43:45 5 about how this contributed to the rapid settlement
11:43:49 6 of the County of Bruce, is that free grants of land
11:43:52 7 equals rapid settlement?

11:43:53 8 A. That is his interpretation of how
11:43:58 9 the process worked.

11:43:59 10 Q. Uhm-hmm.

11:44:00 11 A. One could imagine that a different
11:44:03 12 approach would still have led to rapid population
11:44:08 13 increase at the time given the number of immigrant
11:44:10 14 arrivals in the late 1840s, and the general
11:44:13 15 demographic pressures that my report mentions which
11:44:16 16 were pushing people to look for new lands to farm.

11:44:20 17 So I wouldn't make the Durham Road the
11:44:24 18 single dominating cause, but it reflects that
11:44:26 19 larger process.

11:44:27 20 Q. Right. Now, I am not suggesting
11:44:29 21 that it is the only cause.

11:44:31 22 A. No.

11:44:31 23 Q. But that the choice to provide
11:44:35 24 free grants of land --

11:44:36 25 A. Yes.

11:44:37 1 Q. -- fostered settlement in this
11:44:40 2 area of Upper Canada.

11:44:41 3 A. Well, what it would also do was
11:44:44 4 produce a road that would foster settlement.

11:44:46 5 Q. Right.

11:44:47 6 A. And that might be the more
11:44:48 7 important variable than the free grants themselves,
11:44:54 8 is to have a road that crosses the entire territory
11:44:58 9 and makes it possible to settle lands that are not
11:45:00 10 along the road as well.

11:45:01 11 Q. Right. So again, going back to
11:45:05 12 what you said yesterday in your report about the
11:45:06 13 government having different options, so if the
11:45:12 14 government didn't make the choice to put resources
11:45:15 15 into fostering settlement to Upper Canada, didn't
11:45:20 16 give out free grants of land, would you agree that
11:45:23 17 it would have avoided the need for more land
11:45:25 18 further north or helped to avoid that?

11:45:27 19 A. I think it would be a very small
11:45:30 20 help, that is to say, I doubt that the Durham Road
11:45:35 21 is the sole and independent variable in what is
11:45:40 22 driving settlement in that whole region. What is
11:45:43 23 driving settlement is the expansion of population
11:45:45 24 and people looking for arable land, and that is the
11:45:49 25 whole history of Upper Canada, people looking for

11:45:52 1 arable land.

11:45:53 2 Q. Sure.

11:45:53 3 A. So I don't think that -- if the
11:45:55 4 government had said no free grants, if it had said
11:45:59 5 no surveys, no roads, now, that would have been a
11:46:03 6 deterrent.

11:46:05 7 Q. Right.

11:46:05 8 A. But that is a different level
11:46:08 9 of -- and that would have meant a completely
11:46:09 10 different outlook by the government from 1791 right
11:46:16 11 until we are talking about here.

11:46:17 12 So I wouldn't put undue weight on the
11:46:20 13 Durham Road alone, but it is reflective of a larger
11:46:23 14 process.

11:46:23 15 Q. And, so, sorry, let me be clear.
11:46:26 16 I am using the Durham Road as an example that there
11:46:31 17 was free grants happening along that area.

11:46:32 18 So I am not suggesting to you that the
11:46:34 19 Durham Road was the sole factor or the Garafraxa
11:46:37 20 Road was the sole factor and the free grants of
11:46:39 21 land along that was the sole factor in pushing
11:46:41 22 settlements north towards the peninsula.

11:46:43 23 A. No, I understand.

11:46:44 24 Q. Those are contributing factors,
11:46:46 25 and the other contributing factors which we have

1 reviewed this morning, being that there was
2 significant expenditures towards promoting
3 immigration to the colony. There was the Canada
4 Company's involvement, for example.

5 So there was a lot of resources put
6 into promoting settlement of the colony for various
7 purposes. There was free grants of land happening.
8 There was the building of works, public works, and
9 roads and so on. Those are all choices that the
10 government was making at the time.

11 A. Yes.

12 Q. Okay. And you would agree with me
13 that all of those choices taken together meant that
14 they needed more land, and it kept pushing the zone
15 of settlement north?

16 A. If that makes the government the
17 independent variable, I am a little hesitant to
18 agree to that because the settlers are coming not
19 simply because of propaganda, not simply because
20 of -- I mean, the Canada Company is a case in
21 point. It advertises continuously and yet its
22 lands fill up gradually, and they fill up at the
23 same time as other lands in the Southwestern
24 Ontario as part of a larger flow of settlement,
25 which is not simply a function of government policy

1 and maybe not a function of government policy at
2 all. There were so many reasons to leave Britain
3 at the time that I wouldn't say that -- I wouldn't
4 want to make the government into the independent
5 variable. Obviously the government likes this and
6 is ready to pursue it, but I don't want to say it
7 happens because of their choices alone or even
8 mainly.

9 Q. But it is one important variable?

10 A. It is certainly a variable, yes.

11 Q. It is not their choices alone, but
12 their choices matter?

13 A. The government's choices?

14 Q. Yes.

15 A. They clearly have a role to play,
16 and as I say, if they had said we will simply never
17 survey another township, we don't know what the
18 outcome would have been. Presumably those people
19 would have gone to the United States.

20 Q. Right.

21 A. But that is --

22 Q. And if they had done that, then
23 they would have avoided the need to obtain the land
24 cession from the Saugeen Anishinaabe in respect of
25 the peninsula?

11:49:10 1 A. Indeed.

11:49:11 2 Q. Would you agree that another
11:49:13 3 choice open to the government -- we have talked
11:49:15 4 about lands being in the hands of speculators and
11:49:18 5 large landowners. Would you agree that another
11:49:20 6 choice open to them was to reallocate the land out
11:49:24 7 of their hands?

11:49:25 8 A. I am not sure I follow the
11:49:26 9 question.

11:49:26 10 Q. Okay.

11:49:28 11 A. Because I am not sure if the
11:49:32 12 notion is reallocate from large landholders. I am
11:49:39 13 saying that all of the experience of Upper Canada
11:49:40 14 in the 1840s and '50s is the large landholders were
11:49:46 15 doing the reallocation by themselves. They were
11:49:48 16 doing it in order to earn income from the land.

11:49:51 17 One of the reasons people built up
11:49:53 18 large land holdings in the early years of the
11:49:55 19 settlement was it was almost the only safe place to
11:49:59 20 put money, and men who had made some money, wanting
11:50:03 21 to provide for their widows, often bought land.

11:50:06 22 Q. Right.

11:50:06 23 A. But the land was of no use to the
11:50:09 24 widow if it wasn't put to use, because if she
11:50:11 25 didn't get an income from it, either by selling it

1 or by renting it, then -- so I think the large
2 landholders, if they still existed and the Canada
3 Company is the largest example in the 1840s, they
4 were in the business of reallocating the land.

5 Q. Right. Okay. And I want to come
6 back to that question again but in a slightly
7 different way and a different topic, so just make
8 note of that, but thank you for that.

9 So I just want to turn to a few more
10 questions that I have about immigration to Upper
11 Canada in the 1840s and 1850s.

12 So in your report, you talk about two
13 main sources of population pressure in Upper Canada
14 between 1830 and 1867. You talk about the high
15 birthrate, and you talk about immigration.

16 A. Yes.

17 Q. So I want to clarify a few things
18 about immigration in this period. First, is it
19 fair to say that immigration had been a significant
20 force in the colony since the late 18th century?

21 A. Yes.

22 Q. I want to pull up your book, an
23 excerpt from your book "Planting the Province",
24 which is SC1294.

25 THE COURT: Is that not an exhibit

11:51:43 1 already, Counsel?

11:51:44 2 MS. GUIRGUIS: Not the part that I
11:51:45 3 would like to go to.

11:51:56 4 So we have a few pages from your book
11:52:01 5 "Planting the Province". I believe it is pages --
11:52:03 6 the title page and pages 179 to 180. Your Honour,
11:52:08 7 I would like to add this as the next exhibit.

11:52:10 8 THE COURT: All right. Mr. Registrar.

11:52:12 9 THE REGISTRAR: Exhibit No. 4372.

11:52:15 10 EXHIBIT NO. 4372: Pages 179 to 180
11:52:01 11 from the book entitled "Planting the
11:52:02 12 Province" authored by Douglas McCalla.

11:52:17 13 BY MS. GUIRGUIS:

11:52:21 14 Q. So if we go to the top of page
11:52:28 15 180, you say there were four main peaks in
11:52:32 16 immigration, 1819, 1831 to 1832, then 1841 to 1842,
11:52:42 17 and 1847; is that correct?

11:52:47 18 A. Yes.

11:52:47 19 Q. And you broke the four peaks into
11:52:51 20 three waves. You say that there was a wave after
11:52:53 21 the War of 1812, and a second wave between 1829 to
11:52:58 22 1837, and a final wave that peaked around 1847 but
11:53:03 23 ran from about 1840 to 1854; is that a fair
11:53:08 24 summary?

11:53:08 25 A. Yes.

1 Q. Okay. So is it fair to say prior
2 to 1836 the Crown had some experience with the idea
3 that there could be rapid immigration into Upper
4 Canada?

5 A. Yes.

6 Q. Because there had been at least
7 two major waves of mass immigration by then?

8 A. Yes. That is just the British
9 immigration because, of course, before the War of
10 1812, there had been American immigration.

11 Q. Right. And prior to 1836, the
12 Crown had experience with population booms, and the
13 challenges they posed in terms of controlling the
14 behaviour of new settlers; is that right?

15 A. Sorry, the second part of the
16 question again?

17 Q. So they have experience with
18 population booms, and the challenges that were
19 posed with population booms in terms of controlling
20 the behaviour of new settlers?

21 A. I'm not sure about controlling the
22 behaviour is a -- I would need to think about what
23 that implies.

24 Q. All right.

25 A. But they certainly had experience

1 of immigration. They had experience of what it
2 meant for development, and there was also
3 experience of what happened if immigrants arrived
4 with no money.

5 Q. Right.

6 A. And the story is often dominated
7 by those who arrived with no money, even though
8 many immigrants arrived with money, which is how
9 they could be in the private land market.

10 Q. And it was within the
11 contemplation of Crown officials that a boom could
12 occur again?

13 A. Yes.

14 Q. And it was reasonably likely?

15 A. Well, to put it differently,
16 despite Mr. Harrison's worry in 1840, mostly it was
17 something they hoped for.

18 Q. Okay. So immigration in the 1840s
19 and early 1850s, you say at page 11 of your report
20 for this case that the colonial government had no
21 ability to control the numbers of emigrants
22 arriving?

23 A. Yes.

24 Q. Though immigration was generally
25 welcome?

11:55:05 1 A. Yes.

11:55:06 2 Q. And yesterday you emphasized that
11:55:10 3 the colonial government was excited about it
11:55:12 4 because they thought this is what Canada should be?

11:55:14 5 A. Yes.

11:55:15 6 Q. Okay. So you would agree with me
11:55:21 7 that senior colonial officials sought to promote
11:55:24 8 immigration from Great Britain into Canada?

11:55:26 9 A. Yes.

11:55:27 10 Q. Okay. So I would like to bring up
11:55:32 11 an article. It is at SC1287. So this is by Rainer
11:55:59 12 Baehre. It is called "Pauper Emigration to Upper
11:56:05 13 Canada in the 1830s". Are you familiar with this
11:56:07 14 article?

11:56:07 15 A. Yes. It has been some time since
11:56:09 16 I have read it, but I certainly have read it in the
11:56:12 17 past.

11:56:12 18 MS. GUIRGUIS: Your Honour, I would
11:56:13 19 like to add this as the next exhibit.

11:56:16 20 THE COURT: Mr. Registrar.

11:56:17 21 THE REGISTRAR: Exhibit No. 4373.

11:56:21 22 EXHIBIT NO. 4373: Article authored by
11:55:59 23 Rainer Baehre entitled "Pauper
11:56:04 24 Emigration to Upper Canada in the
11:56:06 25 1830s".

1 BY MS. GUIRGUIS:

2 Q. So I would like to take you to
3 page 342 of the article, which is at PDF image 4,
4 and here the author is talking about Lieutenant
5 Governor John Colborne, who served from 1828 to
6 1836, and starting about the fourth line down, it
7 starts saying:

8 "During the 1830s, for example,
9 Lieutenant-Governor John Colborne
10 and his successor, Francis Bond Head
11 (1836-38) openly supported
12 emigration. In 1832, Colborne
13 commented that 'no subject is more
14 clearly connected with the immediate
15 prosperity of the colony...than the
16 anticipated progressive increase in
17 the number of Emigrants.'"

18 And it goes on to say that:

19 "[...] Colborne wanted a
20 national state-sponsored programme
21 for bringing settlers, though the
22 Colonial Office was to rebuff him
23 gently because of domestic political
24 considerations of their own. When
25 in 1840 Colborne reiterated his

11:57:34 1 position to the Duke of Argyll, who
11:57:36 2 was anxious to ask the former
11:57:36 3 Lieutenant-Governor about possible
11:57:38 4 emigration from the Scottish
11:57:40 5 highlands, Colborne told the Duke
11:57:44 6 that he regarded emigration as
11:57:46 7 absolutely essential in protecting
11:57:48 8 the welfare of Upper Canada."

11:57:51 9 And then it ends off at the end of that
11:57:54 10 sentence saying:

11:57:55 11 "Bond Head held a similar
11:57:57 12 view."

11:58:04 13 So to the extent that immigration was
11:58:06 14 out of control, and they couldn't stop it, it was
11:58:08 15 at least in part, as you have said, that they were
11:58:10 16 excited about it, something that Crown officials in
11:58:12 17 the colony promoted and fostered?

11:58:14 18 A. Yes.

11:58:15 19 Q. Okay. I would like to take you to
11:58:26 20 a document that you cited in your report. It is
11:58:29 21 cited at footnote 71 of your report. The document
11:58:32 22 is S0344. It is an excerpt from "The Union of the
11:58:38 23 Canadas" by J.M.S. Careless, and I think you
11:58:44 24 mentioned that Careless was one of the two or three
11:58:46 25 top historians of his generation yesterday; is that

1 right?

2 A. Yes.

3 Q. So you are familiar with his work?

4 A. Uhm-hmm.

5 Q. Okay. Your Honour, I would like
6 to add this as the next exhibit.

7 A. Except I don't think that I'm
8 citing that book in that footnote.

9 Q. Oh, that's right. You have cited
10 him in -- another work?

11 A. I have cited an essay in a
12 collection that he edited. But I am certainly
13 familiar with this book.

14 MS. GUIRGUIS: Okay. In that case, may
15 I add this as the next exhibit.

16 THE COURT: Mr. Registrar.

17 THE REGISTRAR: Exhibit No. 4374.

18 EXHIBIT NO. 4374: Excerpt from "The
19 Union of the Canadas" by J.M.S.

20 Careless.

21 THE COURT: So this gentleman's name is
22 Careless?

23 MS. GUIRGUIS: Yes, Careless.

24 THE COURT: 4374, Mr. Registrar?

25 THE REGISTRAR: Correct, Your Honour.

11:59:40 1 BY MS. GUIRGUIS:

11:59:44 2 Q. So I just want to take you to one
11:59:46 3 passage in this book at page 114, PDF image 36. It
11:59:54 4 is highlighted in green, if we can zoom in. And it
11:59:59 5 says here:

12:00:00 6 "Moreover, in 1848 the
12:00:02 7 immigration service was transferred
12:00:05 8 from Imperial to Canadian
12:00:07 9 responsibility, enabling the colony
12:00:08 10 to control its own intake of
12:00:11 11 settlers thereafter."

12:00:17 12 So Careless's account suggests that
12:00:20 13 Canada was able to control its own intake of
12:00:22 14 settlers and immigrants after 1848; do you agree
12:00:25 15 with this?

12:00:26 16 A. If the issue is the delegation of
12:00:32 17 responsibility for immigration, yes. My report
12:00:36 18 argues that in practice they couldn't. They had no
12:00:40 19 way of stopping somebody getting on a ship in
12:00:44 20 England or Ireland and taking passage to North
12:00:47 21 America. There was nothing the colonial government
12:00:51 22 could do about that, and I am not aware of anything
12:00:55 23 other than quarantine at Quebec when people
12:01:01 24 arrived.

12:01:02 25 So the general principle that is

12:01:05 1 enunciated there was part of the larger story I was
12:01:07 2 saying yesterday of British disengagement from the
12:01:10 3 detailed administration of the Canadas, but what
12:01:14 4 control actually meant in terms of control of its
12:01:18 5 own intake, I don't think anything the government
12:01:23 6 did had to do with the immigration dropping back to
12:01:26 7 under 40,000 per year. That was not something the
12:01:29 8 government had anything to do with.

12:01:31 9 Q. Okay. As of 1848, would you agree
12:01:35 10 that that was when the Province of Canada gained
12:01:38 11 much more autonomy over establishing its own
12:01:43 12 immigration policy?

12:01:43 13 A. It received much more autonomy in
12:01:48 14 general, because that is also the timing of
12:01:52 15 responsible government, and again, it is part of
12:01:54 16 the larger British devolution of responsibilities
12:01:58 17 that had once -- Britain had once felt it wanted to
12:02:03 18 have and didn't want anymore.

12:02:04 19 So yes, from that point on, had the
12:02:06 20 colony wished to, it might have had quite different
12:02:08 21 policies, but I still don't how they would have
12:02:11 22 stopped people getting on those ships on the other
12:02:13 23 side of the ocean.

12:02:14 24 Q. Okay. Thank you.

12:02:15 25 If I could just have one moment.

1 Okay. So let me turn to asking about
2 squatting on the peninsula prior to 1854. At page
3 20 of your report, your expert report, you say that
4 squatting was happening everywhere on the
5 settlement frontier of western Upper Canada in the
6 mid-1850s.

7 So you would agree with me that that
8 means that squatting would also have been happening
9 on the peninsula prior to its surrender in 1854?

10 A. I can't know that definitively. I
11 know that it is happening near there, but I
12 wouldn't profess to be able to go out on the ground
13 and predict exactly where squatting was happening.
14 We certainly have observers saying it was
15 happening, but I can't independently say from my
16 own research that here is exactly where it was
17 happening.

18 But in the context of the mid-1850s, in
19 the expectation that land was going to be put on
20 the market, squatters were having -- there was a
21 strong incentive for people to squat on land that
22 was soon going to be available for sale.

23 Q. Okay. And this leads to the next
24 question I wanted to ask you, is that due to the
25 nature of squatting being an illegal activity, we

12:03:52 1 don't have in the historical record a detailed
12:03:54 2 record of squatters' identities, where they were
12:03:56 3 and so on; correct?

12:03:57 4 A. Correct. For all I know, some
12:04:00 5 were deep in the land records. There is some hint
12:04:03 6 of people who were claiming by prior occupation,
12:04:06 7 but I have never heard anybody write on that, and I
12:04:11 8 have certainly never investigated it, so I think it
12:04:13 9 is a safe bet that we don't know.

12:04:14 10 Q. Okay. And I think you said we
12:04:22 11 certainly have observers saying that it is
12:04:25 12 happening?

12:04:26 13 A. Yes.

12:04:26 14 Q. So I want to turn to Weaver, which
12:04:34 15 I think the page of Weaver that I just want to turn
12:04:38 16 to briefly, this excerpt, is at Exhibit 4364, which
12:04:44 17 is S1843.

12:04:47 18 THE COURT: Is this a different
12:04:48 19 excerpt?

12:04:49 20 MS. GUIRGUIS: No, I believe it is the
12:04:50 21 same one.

12:04:51 22 THE COURT: From the one we just
12:04:52 23 marked?

12:04:53 24 MS. GUIRGUIS: The one -- no. The one
12:04:55 25 that was marked at the beginning of Professor

12:04:56 1 McCalla's testimony.

12:04:58 2 THE COURT: And the Exhibit number
12:05:00 3 again?

12:05:01 4 BY MS. GUIRGUIS:

12:05:14 5 Q. 4364. And if we go to page 22 of
12:05:16 6 the PDF, which is page 268 of the document -- so,
12:05:31 7 sorry, at the bottom of the first paragraph where
12:05:33 8 it says "there are gaps in knowledge [...]", so if
12:05:36 9 you could just enlarge that a bit for me, and I
12:05:38 10 think you have agreed with this, he says:

12:05:42 11 "There are gaps in knowledge
12:05:43 12 about small squatters on frontiers
12:05:46 13 everywhere, although accounts of
12:05:47 14 colonization in all Neo-Europes" -
12:05:51 15 the colonies, I suppose - "point to
12:05:52 16 interactions among small squatters,
12:05:54 17 first peoples, and large
12:05:56 18 landholders, whether speculators,
12:05:57 19 ranchers, or plantation operators."

12:06:00 20 So you would agree with that?

12:06:02 21 A. Yes, though it leaves out -- it is
12:06:07 22 a question of exactly where we are on the frontier
12:06:12 23 of Neo-Europes, because all of the evidence
12:06:20 24 suggests that there is a fourth factor in there,
12:06:22 25 small property owners as well, but only when the

12:06:24 1 property has passed into some kind of legal
12:06:29 2 availability.

12:06:29 3 So --

12:06:31 4 Q. Right.

12:06:32 5 A. And Weaver stops before that has
12:06:34 6 happened, so there is another set of actors in the
12:06:38 7 whole process.

12:06:38 8 Q. Okay.

12:06:39 9 A. As well, it is worth saying that a
12:06:41 10 lot of his work is focussed on Australia, where
12:06:44 11 large landholders were a particular issue.

12:06:46 12 Q. But would you agree on the general
12:06:49 13 point that evidence of squatting that we will have
12:06:51 14 will be in historical accounts, that we'll see in
12:06:57 15 the record interactions with small squatters or
12:06:59 16 squatters on the frontier?

12:07:00 17 A. Yes.

12:07:01 18 Q. So I want to take you to Exhibit
12:07:09 19 1427. So this has a transcript, and this is dated
12:07:20 20 June 10th, 1843, and we see highlighted -- so it is
12:07:27 21 June 10th, 1843, and what it is, is it is a
12:07:32 22 correspondence from Chief Wahbahdick. Chief
12:07:36 23 Wahbahdick is a Chief of Owen Sound Band, the
12:07:38 24 hereditary Chief from the 1830s to 1850s at Big
12:07:42 25 Bay, so of the Owen Sound Band, and he is writing

12:07:45 1 to the Chief Secretary at Government House at
12:07:48 2 Kingston, and you will see in the highlighted area
12:07:53 3 that he says:

12:07:55 4 "We would also be thankful to
12:07:57 5 our father if he would send us a
12:07:59 6 written paper that we might shew to
12:08:02 7 any white man who attempts to settle
12:08:03 8 upon Indian land. There is a great
12:08:05 9 many white men who come here and
12:08:06 10 want us to give them land and we do
12:08:08 11 not wish to hear them as we do not
12:08:10 12 want any white men on our land."

12:08:12 13 So he is writing from Big Bay, which is
12:08:15 14 the Owen Sound area, as the Chief of Owen Sound
12:08:19 15 Band, so that is on the peninsula, and when he says
12:08:23 16 "we don't want them to settle on our lands" in
12:08:27 17 1843, that would have been the reserve on the
12:08:30 18 peninsula; correct?

12:08:31 19 A. Yes.

12:08:31 20 Q. Okay. So this would be an example
12:08:36 21 of the type of accounts, the interactions, that
12:08:40 22 Weaver is describing?

12:08:41 23 A. Yes, very much so.

12:08:43 24 Q. So this would be evidence of
12:08:44 25 squatting happening on the peninsula at the time?

12:08:46 1 A. Or at least explorations towards
12:08:48 2 that.

12:08:48 3 Q. Right.

12:08:50 4 A. In other words, he is not actually
12:08:53 5 saying that we see people settling down, and Weaver
12:08:58 6 documents similar processes on every frontier where
12:09:02 7 people in advance of the cession of title tried to
12:09:05 8 talk First Nations into one form or another of
12:09:09 9 letting them be there.

12:09:10 10 Q. Right.

12:09:11 11 A. So not just in this place, but
12:09:13 12 yes, it is exactly what Weaver is writing about.

12:09:16 13 Q. Thank you. I want to bring you to
12:09:18 14 one more example, Exhibit 1791. So here we have a
12:09:34 15 letter from -- it is dated September 14th, 1850,
12:09:39 16 from Chief Madwayosh and Chief Metigwob, to John
12:09:44 17 Clarke, which is the Crown land agent for Bruce
12:09:48 18 County, and they are making a complaint. They say:

12:09:51 19 "We wish to call your attention
12:09:53 20 to the ways in which parties here
12:09:54 21 are plundering our Lands of Timber,
12:09:58 22 as well as the Government wild
12:10:00 23 Lands, they travel through the woods
12:10:01 24 in every direction in search of pine
12:10:03 25 cutting and, slashing all they can

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find [...]"

So these are the Saugeen Chiefs complaining about timber being taken from their lands, and in 1850, "our lands" would refer to the peninsula?

A. Yes.

Q. Which is the reserve. So again, is this an example of -- we had talked about before that squatting does include timber, taking timber?

A. Yes.

Q. So this is an example that would indicate the squatting was happening on the reserve in 1850?

A. And we don't even have to call it squatting to say that it is clearly an interference in the use of the land by the First Nation. In other words, whether we call it squatting or not, these are unwelcome people taking resources.

Q. Uhm-hmm. All right. Thank you. I would like to talk to you a bit about mill sites, which I anticipate you know quite a bit about.

A. Not so much in detail, but I have had to write about mills, so whether I know about sites is another matter, but you'll soon find out.

12:11:07 1 Q. Well, mill sites were commonly the
12:11:09 2 center of a new town site; correct?

12:11:13 3 A. Often, but it is funny that
12:11:15 4 sometimes mills are just mills standing there at a
12:11:17 5 good site, and the town for one reason or another
12:11:20 6 grows up somewhere else. So it is not guaranteed
12:11:22 7 that you will get a town, but typically you'll get
12:11:27 8 some little center of commerce at least wherever
12:11:30 9 there is a mill. There are thousands of mill sites
12:11:32 10 in Upper Canada and not all of them became
12:11:36 11 significant villages even, but you probably didn't
12:11:40 12 have many villages that didn't have a mill site.

12:11:43 13 Q. In rural areas, they were usually
12:11:46 14 I think -- this is in "Planting the Province",
12:11:53 15 which we can bring up, but perhaps you just
12:11:57 16 remember, is that you have said that they were
12:11:59 17 principally rural. They were distributed quite
12:12:02 18 closely in accordance with population.

12:12:04 19 A. Yes. And it drew a distinction
12:12:06 20 between the mills that served a local population
12:12:08 21 and big commercial mills oriented to the export
12:12:13 22 market.

12:12:13 23 Q. Well, on the frontier, it was
12:12:16 24 lucrative to set up a mill site?

12:12:18 25 A. "Lucrative" is an interesting

1 word. People would not have done it if they didn't
2 think they could make a profit.

3 Q. Right.

4 A. So that is -- what the profit
5 might be, and how exactly it would be earned are
6 separate issues, and there is an issue of scale.
7 To put it another way, what would be an attractive
8 return to somebody with a small amount of capital
9 would have been of no interest to a major
10 businessman; in other words, the rate of return
11 would reflect where the entrepreneur started from.

12 So many of these mills were relatively
13 small. They didn't operate year-round. But they
14 were part of someone's economic activities, and
15 they expected to make a profit out of it.

16 Q. Okay. And my understanding was
17 that setting up a mill site was a form of
18 speculation and that the individual would hold the
19 land that is part of the site in hope of attracting
20 settlers and creating a town and then that land
21 could be sold off at a profit; is that correct?

22 A. No, not necessarily. In other
23 words, that sometimes happened.

24 Q. Okay.

25 A. But more often what you want is to

1 build a mill and earn money by grinding wheat into
2 flour, by sawing logs into boards, and by carting
3 and filling wool, parts of the wool economy, and
4 that is typically what the mill was about. There
5 were some people who - and I couldn't attest to the
6 proportion - who wanted to do the whole thing of
7 selling off town lots around the area and so on.

8 Q. Right.

9 A. Another possibility was that
10 somebody whose main interest was developing a town
11 site would then encourage somebody to come and
12 build a mill on his property as part of that
13 process.

14 Q. Okay.

15 A. But I would distinguish between
16 town speculation and developing mills.

17 Q. Okay. Thank you for clarifying
18 that for me.

19 So at page 12 of your report -- if we
20 can bring up Exhibit 4367, which is your report.
21 So we are at page 12. Thank you. You talk about
22 in your second paragraph that land agents were
23 explicitly forbidden to buy government lands.

24 But at page 19 of your report, if we go
25 there, you acknowledge that:

12:15:53 1 "In a few locations on the most

12:15:55 2 active settlement frontier in

12:15:56 3 western Upper Canada, Crown agents

12:15:58 4 themselves participated - or

12:15:59 5 cooperated - in the speculation."

12:16:05 6 A. Yes.

12:16:06 7 Q. And in your report, you note that

12:16:08 8 even John A. MacDonald was involved in speculation

12:16:11 9 activities?

12:16:11 10 A. Yes. He was -- he bought land in

12:16:13 11 hopes of a fairly imminent sale that would give him

12:16:18 12 a profit, yes.

12:16:19 13 Q. Would you agree that on the

12:16:24 14 peninsula in the 1850s, and the peninsula and south

12:16:28 15 of the peninsula, the Treaty 45 1/2 area, Crown

12:16:34 16 agents and officials were involved directly in

12:16:36 17 speculation activities?

12:16:38 18 A. I do not have sufficient knowledge

12:16:40 19 to say which ones were and which ones were not.

12:16:45 20 The examples that Michelle Vosburgh gives are not

12:16:49 21 exactly in that area, as far as I know. I know

12:16:51 22 that there were investigations of Crown agents'

12:16:55 23 involvement in the properties, some of which found

12:17:00 24 fault and some of which exonerated the agents.

12:17:04 25 But I am not qualified to take you lot

12:17:06 1 by lot or agent by agent through the process, but
12:17:09 2 certainly -- and there was suspicion that others
12:17:12 3 were involved, even if they weren't.

12:17:14 4 Q. Well, let's look at the examples
12:17:18 5 that Vosburgh does in the Squatters Commission and
12:17:21 6 the investigation, and you refer to the Squatters
12:17:25 7 Commission at page 19 of your report as well.

12:17:27 8 And just for the record, the Squatters
12:17:30 9 Commissions, the final reports have been added
12:17:31 10 previously as Exhibits 4293 and 4294, though we
12:17:38 11 don't need to go to them.

12:17:39 12 So the first -- so you are familiar
12:17:48 13 with the Squatters Commissions, Gowan and Hamilton,
12:17:53 14 appointed to investigate complaints?

12:17:54 15 A. Only in very general terms from
12:17:56 16 the secondary sources, and I don't believe I
12:17:58 17 actually cite it on that page.

12:18:00 18 Q. But you refer to it, correct, on
12:18:03 19 this page, or perhaps I have the page wrong. My
12:18:06 20 apologies.

12:18:07 21 A. I am not sure that I refer to it
12:18:08 22 at all. I do cite Vosburgh, and it may be that I
12:18:12 23 have cited the page at which Vosburgh discusses it.

12:18:14 24 Q. Right. Okay. So the Squatters
12:18:17 25 Commission was launched, and they looked into

12:18:21 1 complaints about John Clarke, who was the land
12:18:25 2 agent for the County of Huron, and also complaints
12:18:28 3 into Alexander McNabb, who was the land agent for
12:18:31 4 the County of Bruce?

12:18:32 5 A. Yes.

12:18:41 6 Q. So Lillian Gates also speaks to
12:18:43 7 the Commission, the Squatters Commission.

12:18:45 8 A. Yes.

12:18:46 9 Q. So I would like to turn back to
12:18:48 10 her, and as I said, I note your caveat with her,
12:18:51 11 but you would agree that Lillian Gates is a very
12:18:54 12 authoritative source?

12:18:55 13 A. For what she chose to write about.

12:18:57 14 Q. And many other scholars have cited
12:18:59 15 her --

12:18:59 16 A. Oh, yes.

12:18:59 17 Q. -- and relied on her?

12:19:01 18 A. Yes.

12:19:03 19 Q. So if we go to Exhibit 4309, which
12:19:08 20 is Lillian Gates, and we go to page 292, which is
12:19:16 21 page 303 of the PDF, if we scroll down to the
12:19:31 22 bottom paragraph first, she talks -- she says:

12:19:35 23 "In their first report [...]"

12:19:36 24 She is referring to the Squatters
12:19:38 25 Commission.

12:19:38 1 "In their first report, the
12:19:40 2 commissioners had recommended that
12:19:41 3 many of the sales be cancelled. The
12:19:46 4 report of the Commissioner of Crown
12:19:49 5 Lands for 1857 also recommended that
12:19:51 6 these sales to 'men of wealth
12:19:53 7 and...influence' who evidently
12:19:55 8 expected '...that they would
12:20:01 9 ultimately be able to induce the
12:20:02 10 government to yield to their
12:20:04 11 solicitations and confirm the
12:20:05 12 sales...' be cancelled and that
12:20:08 13 innocent third parties who had
12:20:09 14 purchased from them at an advance of
12:20:16 15 100 per cent to 1,000 per cent be
12:20:19 16 given the right to recover at law
12:20:20 17 what they had paid the speculators
12:20:22 18 and also be granted pre-emption
12:20:24 19 rights to land."

12:20:25 20 So these were the recommendations that
12:20:27 21 they made.

12:20:29 22 And then she further in that paragraph
12:20:31 23 says:

12:20:31 24 "The MacDonald-Cartier
12:20:35 25 government, when it finally acted,

12:20:36 1 simply directed the Crown land
12:20:37 2 agents to adjudicate the disputes
12:20:40 3 according to the law and the
12:20:41 4 regulations, assisted by one of the
12:20:43 5 commissioners."

12:20:44 6 So she is indicating there -- well, let
12:20:47 7 me ask you. So the first report released was after
12:20:50 8 the investigation of John Clarke, the Crown land
12:20:52 9 agent for Huron county; correct?

12:20:55 10 A. Yes. That is what she is saying.

12:20:57 11 Q. Okay. And it was in response to
12:21:01 12 complaints of Clarke's son selling Toronto
12:21:08 13 speculators land on which bona fide settlers had
12:21:12 14 made extensive improvements?

12:21:14 15 A. That is my understanding.

12:21:15 16 Q. Okay. So the --

12:21:17 17 A. "Bona fide" settlers in this
12:21:20 18 context would still be squatters, wouldn't they?

12:21:23 19 Q. Yes. So that is what I was going
12:21:25 20 to ask you. The complainants then would be
12:21:27 21 squatters, bona fide settlers, that were claiming
12:21:30 22 pre-emption privileges?

12:21:31 23 A. Yes.

12:21:32 24 Q. So they issued strong
12:21:34 25 recommendations in this first report saying that

12:21:36 1 these sales to speculators should be cancelled, but
12:21:39 2 they weren't adopted by the government of the day?

12:21:41 3 A. Yes.

12:21:41 4 Q. Which was the MacDonald-Cartier
12:21:45 5 government led by someone, John A. MacDonald, that
12:21:49 6 you have mentioned was involved in speculation?

12:21:50 7 A. Yes. I am not sure that he was
12:21:52 8 involved in speculation there, however.

12:21:53 9 Q. So going back to Gates, if we
12:21:57 10 scroll back up, she talks about the second report
12:22:00 11 from the Commission as being much milder, so:

12:22:06 12 "The second report, on the
12:22:08 13 County of Bruce", so this is about
12:22:09 14 Alexander McNabb, "was completed in
12:22:13 15 January, 1858, and was a much milder
12:22:16 16 document. The agent was found to
12:22:17 17 have shown favouritism and to have
12:22:19 18 disregarded the 200-acre limitation;
12:22:22 19 but, on the whole, he was let off
12:22:24 20 much more easily - if not actually
12:22:27 21 whitewashed - than the agent for
12:22:29 22 Huron, and the evidence against him
12:22:31 23 was not printed."

12:22:34 24 So when Gates says "whitewashed", she
12:22:37 25 means she thinks the Commissioners were glossing

1 over or covering up McNabb's wrongdoing; yes?

2 A. Yes, but I don't know what
3 independent source she would have for that.

4 Q. Right.

5 A. There was a lot of political
6 partisanship surrounding all of these issues.

7 Q. Yes. And indeed, if we go to
8 Exhibit 4288, this is Michelle Vosburgh's "Agents
9 of Progress", whom you cite, and we go to page 129
10 to 130, which is at pages 137 to 138 of the PDF,
11 she talks about here accusations levelled at Gowan
12 and Hamilton, that they wrote their reports with
13 political ambitions in mind. So this is at page --
14 sorry, let me see if -- if we can scroll down
15 below -- sorry, back up. She says in particular:

16 "Hamilton's conduct also came
17 under scrutiny in Toronto's Daily
18 Globe, where it was alleged that he,
19 and others, had speculated in lands
20 in the Greenock town plot in Bruce
21 County by virtue of his position as
22 a Commissioner to investigate the
23 Crown land agents for Huron and
24 Bruce Counties."

25 So there was accusations against him

12:24:07 1 that he had speculated in Bruce County, and it was
12:24:12 2 McNabb that was the land agent for Bruce County;
12:24:15 3 correct?

12:24:15 4 A. Yes, but this is Hamilton that is
12:24:17 5 being talked about here.

12:24:18 6 Q. Yes.

12:24:19 7 A. This is not McNabb in this
12:24:21 8 passage.

12:24:22 9 Q. No, it is not McNabb, but Hamilton
12:24:25 10 is being accused of speculating --

12:24:26 11 A. Yes.

12:24:27 12 Q. -- lands in Bruce County --

12:24:29 13 A. Yes.

12:24:30 14 Q. -- and McNabb was the land agent
12:24:31 15 for Bruce County?

12:24:32 16 A. That's right. Yes. Yes.

12:24:33 17 Q. Right. So what I am inferring is
12:24:40 18 that perhaps Lillian Gates' discussion that it was
12:24:42 19 whitewashed, let's say to borrow her words that,
12:24:46 20 they glossed over his wrong doing, and you have
12:24:48 21 mentioned that things were very politically
12:24:51 22 charged, is that if Hamilton was speculating in
12:24:54 23 Bruce County, perhaps he had a reason to go easier
12:24:58 24 on Alexander McNabb.

12:25:00 25 A. That is possible, but I

12:25:04 1 couldn't -- I wouldn't draw that inference, but I
12:25:06 2 can't refute it without reading a whole lot of
12:25:09 3 documents, which I haven't read, and because the
12:25:12 4 fact is that there were many ways, without the
12:25:15 5 active cooperation of the land agent, where you
12:25:18 6 could still speculate. So the fact that someone
12:25:20 7 had speculated wouldn't be proof that the agent had
12:25:23 8 cooperated.

12:25:23 9 Q. Okay. So I want to continue on
12:25:42 10 our discussion of squatters, but I actually want to
12:25:44 11 go to your second report, "The Indian Chief", there
12:25:49 12 is a paragraph in there, which is Exhibit 4368. If
12:26:08 13 we go to pages 11 and 12 of your report, so --
12:26:20 14 sorry, if we go to the paragraph right there and
12:26:22 15 just stop right there. Thank you. You say here:

12:26:30 16 "In any case, most people in a
12:26:31 17 rural economy relied primarily on
12:26:34 18 local roads for access to mills,
12:26:35 19 villages, larger towns - and
12:26:38 20 neighbours. Maintained by statute
12:26:41 21 labour, these were rough and
12:26:43 22 inconsistent, often impassable
12:26:45 23 during spring thaws and after heavy
12:26:47 24 rains. Still, they allowed movement
12:26:49 25 by the carts, sleighs and wagons,

12:26:54 1 drawn by one or two horses, that
12:26:55 2 were the principal conveyances for
12:26:57 3 farm families and their produce.
12:26:59 4 There was also much movement on
12:27:00 5 horseback and on foot (by people
12:27:03 6 making short or long journeys and by
12:27:06 7 livestock being driven to market)."
12:27:08 8 And when you talk about "most people in
12:27:10 9 a rural economy", this would include farmers?
12:27:13 10 A. Yes.
12:27:13 11 Q. And then people taking and selling
12:27:15 12 timber?
12:27:16 13 A. Yes. People taking and selling
12:27:21 14 timber would generally want to get wood to water as
12:27:24 15 quickly as possible.
12:27:24 16 Q. Right. So this would include
12:27:29 17 squatters?
12:27:30 18 A. Yes.
12:27:32 19 Q. And we have talked about this
12:27:34 20 before as the zone of settlement, as your term, is
12:27:41 21 that when people moved on to a new territory to
12:27:44 22 settle, they would rely on existing networks of
12:27:47 23 trails and roads?
12:27:48 24 A. One of the great mysteries -- and
12:27:50 25 I am not aware of any proper research on the

12:27:53 1 subject -- is how roads materialized in these new
12:27:58 2 areas, but basically the settlers produced them
12:28:00 3 because there is no other way that the local roads
12:28:03 4 could happen.

12:28:04 5 So presumably they began as trails, and
12:28:08 6 I don't know what the surveyors left behind, but I
12:28:12 7 don't think they left their tracks.

12:28:13 8 So road-making and farm settlement went
12:28:18 9 closely together.

12:28:19 10 Q. And so when squatters moved on to
12:28:22 11 a new territory to settle or to take timber, they
12:28:24 12 would also rely on that network of trails and
12:28:26 13 roads?

12:28:26 14 A. Yes. I am not sure why there
12:28:29 15 would be -- would even be local roads when you are
12:28:33 16 squatting. That is one of the things that has
12:28:36 17 literally not been written about. It is very hard
12:28:38 18 to research. There is very little direct knowledge
12:28:41 19 of what happens in those first few years.

12:28:44 20 Q. Right. So when squatters who were
12:28:50 21 setting up to clear a farm, though, when they are
12:28:52 22 setting up to clear land, it is fair to say that
12:28:55 23 there would be a limit to how far they could go
12:28:58 24 from an existing road or path where they would
12:29:00 25 choose to stay ?

12:29:05 1 A. Yes.

12:29:05 2 Q. And they might skip a little ways
12:29:08 3 if there was a particularly desirable site, like a
12:29:11 4 potential mill or something like that, but
12:29:12 5 generally speaking, the preference would be to have
12:29:15 6 access to some kind of existing path?

12:29:17 7 A. Yes.

12:29:18 8 Q. Because squatters, like any other
12:29:20 9 settlers or farmers, needed access to markets and
12:29:23 10 mills and neighbours; is that right?

12:29:26 11 A. Yes.

12:29:26 12 Q. And now for squatters who were
12:29:34 13 taking timber without authorization, they needed to
12:29:36 14 be able to move the timber, like you said, to
12:29:39 15 water, to a market, so they too would be more
12:29:44 16 likely than not to take timber relatively close to
12:29:46 17 an existing network of roads or trails?

12:29:49 18 A. Well, the ideal was relatively
12:29:55 19 close to some kind of stream that ran to water.

12:29:57 20 Q. Right.

12:29:57 21 A. And where there were legal timber
12:30:01 22 operations, a normal feature was to cut trails into
12:30:04 23 the area of timber cutting down to the nearest
12:30:09 24 water that would at least have enough flow in the
12:30:13 25 spring to float logs down to lakes or larger

12:30:17 1 rivers.

12:30:18 2 Q. So for that reason, you wouldn't
12:30:19 3 expect them to hike miles and miles off of existing
12:30:23 4 paths into the deep woods?

12:30:25 5 A. Not -- well, if I am after timber,
12:30:27 6 I'll take the timber that is closest to water that
12:30:30 7 I can find.

12:30:30 8 Q. Right. Okay.

12:30:35 9 A. What I don't know in that setting
12:30:38 10 who is going to buy. There has to be a buyer
12:30:41 11 which -- unless they are shipping timber a long way
12:30:45 12 away from there, there has to be some kind of a
12:30:48 13 local market, and it might be the nearby towns --

12:30:48 14 Q. Right.

12:30:52 15 A. -- would be the most likely place.
12:30:53 16 So in that case, one would almost be speaking less
12:30:56 17 of timber than of lumber.

12:30:58 18 Q. Right. Okay. So once, like, a
12:31:02 19 settler arrived -- or a squatter, sorry, arrives in
12:31:05 20 a place, and they wish to farm, they need to
12:31:10 21 establish them long enough to -- they need to
12:31:12 22 settle themselves long enough to establish
12:31:14 23 meaningful economic benefits, right? They need to
12:31:17 24 be there for at least the growing season?

12:31:19 25 A. Possibly, initially you would be

12:31:23 1 there in the winter to clear land, which you
12:31:29 2 expected to return to in the subsequent year.

12:31:31 3 There is a good deal of movement to and from lands,
12:31:34 4 but it is different to document as well.

12:31:37 5 But probably you would want to have
12:31:41 6 some kind of land on which to plant a crop as
12:31:44 7 quickly as possible.

12:31:45 8 Q. Okay. And quickly as possible you
12:31:48 9 say for the winter to clear it October, November, a
12:31:51 10 couple of months?

12:31:53 11 A. At least.

12:31:54 12 Q. At least. Okay.

12:31:55 13 A. Yes.

12:31:55 14 Q. So even for folks entering a plot
12:31:58 15 of land to just take timber, they have to be there
12:32:01 16 long enough to clear timber and sell it? That
12:32:04 17 should be -- that takes awhile too?

12:32:06 18 A. Clear it and get it out, yes, and
12:32:09 19 that would be sort of October/November to April or
12:32:14 20 May. If the wood is coming out by water, it has to
12:32:20 21 wait until the spring thaw. If, on the other hand,
12:32:24 22 you are dragging it out over the snow either
12:32:26 23 directly on the ice or on a sled, then you have to
12:32:30 24 finish before the thaw. So there are two different
12:32:33 25 seasons according to your mode of getting the wood

12:32:35 1 out of the forest.

12:32:36 2 Q. So squatters are not moving around
12:32:38 3 the territory rapidly?

12:32:39 4 A. Well, intending squatters might
12:32:47 5 be. In other words, let's survey a large chunk of
12:32:50 6 territory to see where we want to squat.

12:32:52 7 Q. Uhm-hmm.

12:32:53 8 A. So --

12:32:55 9 Q. But squatters that are settling --

12:32:56 10 A. Those that are actually trying to
12:33:00 11 establish a presence on a piece of land.

12:33:02 12 Q. Yes. They are not moving around
12:33:03 13 the territory rapidly, and they are not hiding --
12:33:05 14 like, this is clear where they are. They are not
12:33:08 15 hiding in the deep forest?

12:33:09 16 A. No. I don't think that they are
12:33:11 17 hidden -- hidden clearances deep in the bush with
12:33:16 18 no sign of a human going in or out, no.

12:33:18 19 Q. So if the government was
12:33:23 20 interested in finding a squatter or timber thief on
12:33:26 21 the land, the Crown officials, Commissioners,
12:33:29 22 magistrates, constables, operating near the area
12:33:33 23 where they are, let's say the peninsula, would be
12:33:35 24 using the same roads and trails as everyone else to
12:33:38 25 get around; correct?

12:33:39 1 A. Yes.

12:33:40 2 Q. And the same roads and trails
12:33:42 3 relied on by squatters and by folks taking timber?

12:33:44 4 A. Presumably by anybody who is there
12:33:48 5 legally or illegally is probably using the same
12:33:52 6 tracks and roads.

12:33:55 7 Q. So they wouldn't be very difficult
12:33:56 8 to find, and so you would agree with me that they
12:33:59 9 could be found by a Crown official, Commissioner,
12:34:03 10 magistrate or constable for the purpose of, say,
12:34:05 11 receiving a notice to vacate or perhaps to be
12:34:08 12 arrested?

12:34:09 13 A. Yes -- well, yes, is a good
12:34:18 14 answer.

12:34:20 15 Q. Thank you.

12:34:24 16 THE COURT: I notice you looking at the
12:34:27 17 clock, Counsel. Did you have something in mind?

12:34:29 18 MS. GUIRGUIS: No, Your Honour, just
12:34:30 19 checking if it was 1 o'clock, but we had taken the
12:34:32 20 early morning break, so --

12:34:34 21 THE COURT: Well, we are also rising
12:34:35 22 early today, so subject to anyone objecting, if it
12:34:40 23 makes sense, we can also take an early lunch.

12:34:43 24 MS. GUIRGUIS: Okay.

12:34:44 25 THE COURT: We'll let you suggest that

12:34:47 1 if it makes sense in your cross-examination,
12:34:51 2 Counsel. It is up to you.

12:34:52 3 MS. GUIRGUIS: I think that is fine,
12:34:53 4 Your Honour. Thank you.

12:34:54 5 THE COURT: What, taking an early
12:34:55 6 lunch?

12:34:56 7 MS. GUIRGUIS: Taking an early lunch
12:34:57 8 would be fine with me. Thank you.

12:34:58 9 THE COURT: All right. So if we rise
12:35:03 10 now and resume at 1:45, would that be doable for
12:35:10 11 everybody?

12:35:11 12 All right. Sir, you remember the
12:35:16 13 serious constraints on what you will be doing.

12:35:18 14 THE WITNESS: I understand, Your
12:35:19 15 Honour.

12:35:19 16 THE COURT: All right. Thank you.

12:35:20 17 -- RECESSED AT 12:35 P.M.

13:47:27 18 -- RESUMED AT 1:47 P.M.

13:47:27 19 THE COURT: Please go ahead.

13:48:02 20 BY MS. GUIRGUIS:

13:48:02 21 Q. Thank you, Your Honour.

13:48:03 22 Good afternoon.

13:48:06 23 A. Good afternoon.

13:48:10 24 Q. So I want to now turn and look at
13:48:14 25 two statutes that were about trespass on Crown

13:48:20 1 lands and Indian lands, and so I'm going to bring
13:48:23 2 you to these Acts, and I am not asking you to give
13:48:25 3 any legal opinion, of course, about these Acts, but
13:48:27 4 I want to draw your attention to some points in the
13:48:30 5 legislation and ask you some questions about them,
13:48:32 6 based on your understanding.

13:48:33 7 So the first one is Exhibit 1301. So
13:48:47 8 this is an Act dated 1839 for the Protection of the
13:48:52 9 Lands of the Crown in this Province from Trespass
13:48:56 10 and Injury, and if we look first at the preamble,
13:49:01 11 which is on the first page, if we scroll down --
13:49:12 12 there it is. Sorry. On the second page of the PDF
13:49:14 13 is the Act that we are looking at, so dated May 11,
13:49:18 14 1839, an Act for the Protection of the Lands of the
13:49:20 15 Crown in this Province From Trespass and Injury, if
13:49:23 16 we look at the preamble at the first part, and it
13:49:26 17 says:

13:49:26 18 "Whereas the Lands appropriated
13:49:28 19 for the residence of certain Indian
13:49:31 20 Tribes in this Province, as well as
13:49:32 21 the unsurveyed Lands, and Lands of
13:49:35 22 the Crown ungranted and not under
13:49:37 23 location, or sold or held by virtue
13:49:39 24 of any lease or license of
13:49:41 25 occupation [...]", et cetera, et

13:49:41 1
13:49:46 2
13:49:48 3
13:49:49 4
13:50:12 5
13:50:16 6
13:50:18 7
13:50:20 8
13:50:23 9
13:50:25 10
13:50:28 11
13:50:29 12
13:50:29 13
13:50:32 14
13:50:38 15
13:50:41 16
13:50:43 17
13:50:44 18
13:50:47 19
13:50:49 20
13:50:52 21
13:50:54 22
13:50:55 23
13:50:57 24
13:51:01 25

cetera.

I can give you a second to take a look
at it.

A. [Witness reviews document.]

Q. So you would agree with me that
the first part, when we are talking about the lands
appropriated for the residence of certain Indian
tribes and so on, that this suggests that intrusion
on Indian lands by squatters was one of the
concerns at play here, judging by this preamble?

A. Certainly one of the concerns,
yes.

Q. Further down in the same
paragraph, it says, about halfway through, right
where the writing is there to the right:

"That it shall and may be
lawful for the Lieutenant-Governor
of the Province from time to time,
as he shall deem necessary, to
appoint two or more Commissioners
under the Great Seal of this
Province, to receive information,
and to inquire into any complaint
that may be made to them or any of
them, against any person for

13:51:03 1 illegally possessing himself of any
13:51:05 2 of the aforesaid Lands [...]", which
13:51:08 3 we talked about as the Indian lands
13:51:10 4 or could include the Indian lands.

13:51:13 5 And also further down in that
13:51:14 6 paragraph, it says:

13:51:18 7 "[...] and also to inquire into
13:51:19 8 any complaint that may be made to
13:51:20 9 them or any one of them against any
13:51:22 10 person for having unlawfully cut
13:51:24 11 down or removed any timber, trees,
13:51:26 12 stone or soil, on such Lands, or for
13:51:29 13 having done any other wilful and
13:51:33 14 unlawful injury thereon."

13:51:36 15 So from this reading, you would agree
13:51:38 16 that this suggests that the Lieutenant-Governor can
13:51:39 17 appoint Commissioners to look into complaints about
13:51:41 18 illegal possession or stealing of timber on Indian
13:51:44 19 lands?

13:51:45 20 A. Yes.

13:51:46 21 Q. So let's turn to the next page.

13:51:55 22 So here, this section II, it talks about the
13:52:01 23 Commissioners, and what they can do upon
13:52:04 24 investigation of any complaints made of people that
13:52:11 25 are unlawfully in possession of such lands and that

13:52:13 1 it could be lawful and that:

13:52:15 2 "[...] it shall be lawful for
13:52:16 3 the said Commissioners, or any one
13:52:18 4 of them, to give notice to and
13:52:20 5 require such person to remove from
13:52:21 6 the occupation of such Lands, within
13:52:23 7 not less than thirty days from the
13:52:25 8 day of the service of such notice,
13:52:27 9 and if the person so required to
13:52:29 10 remove from the occupation of such
13:52:31 11 Lands shall neglect to remove from
13:52:34 12 the same within the time specified
13:52:35 13 in the said notice, it shall be
13:52:38 14 lawful for the said Commissioners
13:52:41 15 [...] to issue a Warrant under their
13:52:43 16 hands and seals, or the hand and
13:52:46 17 seal of any one of them, directed to
13:52:48 18 the Sheriff of the District, wherein
13:52:51 19 such Lands are situate [...]", and
13:52:53 20 so on.

13:52:54 21 So here we see a reference to issuing a
13:53:00 22 warrant to a sheriff to direct him to eject or
13:53:02 23 remove a person from Indian lands.

13:53:02 24 And my question is, in your research
13:53:05 25 for this litigation or for your other research,

13:53:09 1 have you come across any evidence of such a warrant
13:53:12 2 being issued in relation to lands on the Saugeen
13:53:14 3 Peninsula prior to October 13, 1854?

13:53:18 4 A. Well, it has not been part of my
13:53:20 5 research at any time, and so I have not seen any
13:53:22 6 evidence of that. I presume that by the time of
13:53:26 7 1854, the sheriff of the district would be the
13:53:29 8 sheriff of the county.

13:53:30 9 Q. Uhm-hmm.

13:53:31 10 A. Which is a considerably more
13:53:36 11 compact jurisdiction, although still a large
13:53:37 12 territory.

13:53:38 13 Q. Right. So if we turn to the next
13:53:41 14 section, which is section III, this section deals
13:53:45 15 with penalty for resuming illegal trespass or
13:53:48 16 unlawful occupation of these lands, and it says
13:53:51 17 here, if we go to the fourth line, the end, it
13:53:57 18 starts off with:

13:53:59 19 "[...] it shall be lawful for
13:54:00 20 the said Commissioners, or any one
13:54:01 21 of them, upon complaint made and
13:54:03 22 satisfactory proof being adduced,
13:54:04 23 that such person has returned and
13:54:08 24 unlawfully resumed the occupation of
13:54:09 25 the Lands and Tenements from which

13:54:11 1 he had been removed as aforesaid, to
13:54:13 2 order and direct that he be
13:54:14 3 committed to the Common Gaol of the
13:54:18 4 District in which such Lands are
13:54:19 5 situate [...]"

13:54:21 6 And then also that he could be directed
13:54:23 7 to pay a fine of 20 pounds.

13:54:27 8 So here this section is telling us that
13:54:32 9 the person, if they come back, they can be put in
13:54:34 10 jail for 30 days, and they would have a fine?

13:54:37 11 A. Yes, it says that. I am looking
13:54:39 12 behind the administration of this, and we have two
13:54:41 13 Commissioners covering a large territory.

13:54:44 14 Q. Uhm-hmm.

13:54:44 15 A. Checking back every 30 days,
13:54:46 16 because you get 30 days of notice before you leave,
13:54:49 17 and then -- a minimum of 30 days before leaving.
13:54:53 18 So there are a lot of places for slippage in this,
13:54:57 19 shall we say.

13:54:57 20 Q. Uhm-hmm.

13:54:58 21 A. But definitely if someone was
13:55:02 22 minded to pursue it systematically and to come back
13:55:05 23 every now and then to see whether this person had
13:55:07 24 returned, then this power is clearly there.

13:55:09 25 Q. So the legislation says two

13:55:14 1 Commissioners or more?

13:55:16 2 A. Yes.

13:55:16 3 Q. So it was open to them to appoint
13:55:18 4 more, I guess, to cover it?

13:55:19 5 A. Yes.

13:55:20 6 Q. So in your research for this case
13:55:21 7 or your other research, have you come across any
13:55:24 8 evidence of such a person being put in jail
13:55:27 9 pursuant to this legislation as a result of
13:55:30 10 squatting on the Saugeen Peninsula prior to 1854?

13:55:35 11 A. No.

13:55:36 12 Q. And have you come across any such
13:55:37 13 evidence of a person being fined before 1854 with
13:55:42 14 respect to the Saugeen Peninsula?

13:55:44 15 A. It is not something I have
13:55:46 16 researched, but the answer is no.

13:55:47 17 Q. If we turn to section IV, this
13:55:55 18 deals with penalties for finding people illegally
13:56:00 19 or unlawfully cutting down or removing "any timber
13:56:03 20 or trees, or for having quarried upon, or removed
13:56:05 21 any stone or other materials from the Lands
13:56:07 22 aforesaid", and they can be charged with an offence
13:56:11 23 guilty -- and if they are found guilty, it is
13:56:14 24 "lawful for such Commissioners, or any one of them,
13:56:17 25 to order and direct that he pay a fine to Her

1 Majesty, not exceeding Twenty Pounds, and in
2 default of the paying the same [...]", again, they
3 would be put in jail for a period not exceeding
4 three months.

5 So again, my question is, in your
6 research for this case, for this litigation, or
7 your other research, have you come across any
8 evidence of such a person being fined pursuant to
9 this legislation as a result of taking timber from
10 the Saugeen Peninsula prior to October 1854?

11 A. No.

12 Q. So I want to go to a similar piece
13 of legislation that was passed in 1850. It is
14 Exhibit 1784. So this one, 1850 Act, and it is
15 called an Act for the protection of the Indians in
16 Upper Canada from imposition, and the property
17 occupied or enjoyed by them from trespass and
18 injury.

19 So again, from the preamble at the
20 beginning, starting with that, it says:

21 "Whereas it is expedient to
22 make provision for the protection of
23 the Indians in Upper Canada, who, in
24 their intercourse with the other
25 inhabitants thereof, are exposed to

13:57:44 1 to be imposed upon by the designing
13:57:46 2 and unprincipled, as well as to
13:57:48 3 provide more summary and effectual
13:57:50 4 means for the protection of such
13:57:52 5 Indians in the unmolested possession
13:57:54 6 and enjoyment of the lands and other
13:57:56 7 property in their use or
13:57:58 8 occupation:"

13:57:58 9 So again, from this we know that the
13:58:00 10 concerns at issue here that this legislation is
13:58:03 11 dealing with is interference with Indian possession
13:58:05 12 of their lands?

13:58:06 13 A. Yes.

13:58:06 14 Q. And if we start at section II,
13:58:12 15 which deals with leases on Indian lands, it says:

13:58:18 16 "And be it enacted, That if any
13:58:20 17 person, without such authority and
13:58:22 18 consent, shall in any manner or
13:58:24 19 form, or upon any terms whatsoever,
13:58:25 20 purchase or lease any lands within
13:58:27 21 Upper Canada of or from the said
13:58:29 22 Indians, or any of them, or make any
13:58:32 23 contract with such Indians, or any
13:58:34 24 of them, for or concerning the sale
13:58:36 25 of any lands therein, or shall in

13:58:39 1 any manner, give, sell, demise,
13:58:42 2 convey or otherwise dispose of any
13:58:44 3 such lands, or any interest therein,
13:58:46 4 or offer so to do, or shall enter
13:58:49 5 on, or take possession of, or settle
13:58:51 6 on any such lands, by pretext or
13:58:53 7 colour of any right or interest in
13:58:54 8 the same, in consequence of any such
13:58:56 9 purchase or contract made or to be
13:58:58 10 made, with such Indians, or any of
13:59:00 11 them, unless with such authority and
13:59:02 12 consent as aforesaid, every such
13:59:05 13 person shall, in every such case, be
13:59:07 14 deemed guilty of a misdemeanour, and
13:59:10 15 shall, on conviction thereof before
13:59:13 16 any Court of competent jurisdiction,
13:59:15 17 forfeit and pay to Her Majesty, Her
13:59:17 18 Heirs or Successors, the sum of Two
13:59:20 19 Hundred Pounds, and be further
13:59:23 20 punished by fine and imprisonment,
13:59:25 21 at the discretion of the Court."
13:59:27 22 Are you aware of any instances when
13:59:29 23 someone was prosecuted for making a lease on the
13:59:31 24 Saugeen Indian Reserve without consent, so the
13:59:36 25 Saugeen Indian Reserve on the peninsula prior to

1 October 13th, 1854?

2 A. No.

3 Q. Now, I want to turn to section X
4 which is on the next page. So this is a bit
5 longer. I am just going to give you a moment, if
6 you want to take a look at it.

7 A. [Witness reviews document.]

8 Q. Okay. Thank you.
9 So this provision deals with
10 non-Indians residing on Indian lands.

11 A. Yes.

12 Q. That's correct? And it makes it
13 possible for Commissioners under this Act or ones
14 that were appointed under the 1839 Act, to issue
15 warrants to the sheriff on complaint of this kind
16 of squatting that direct the sheriff to remove the
17 squatter?

18 A. Yes.

19 Q. And also it notes that if there
20 isn't a sheriff, if the lands aren't in any county,
21 then it says the warrant can be directed to any
22 literate person?

23 A. Yes.

24 Q. Well, in your research, have you
25 come across any instances where such warrants were

14:01:52 1 issued in relation to squatters on the Saugeen
14:01:54 2 Peninsula prior to October 13, 1854?

14:01:58 3 A. No.

14:01:59 4 Q. The next section is section XI,
14:02:06 5 and it deals with people that have been removed
14:02:08 6 under these provisions, similar to the 1839 Act
14:02:13 7 that we looked at.

14:02:14 8 And it also similarly provides that if
14:02:22 9 somebody has been removed under these provisions,
14:02:25 10 and they return to the lands, you can see that they
14:02:29 11 can be committed to jail for up to 30 days as well.

14:02:35 12 So in your research for this litigation
14:02:40 13 or your other research, have you come across any
14:02:42 14 evidence of such a person being put in jail
14:02:44 15 pursuant to this legislation, the 1850 Act, as a
14:02:48 16 result of squatting on the peninsula prior to
14:02:50 17 October 13, 1854?

14:02:52 18 A. And then being removed and then
14:02:55 19 returning and then going to jail? No.

14:02:58 20 Q. Okay. Thank you.

14:02:59 21 So one question I have with respect to
14:03:18 22 both of the Acts that we have discussed, there is
14:03:23 23 no mention in what we reviewed of the need for
14:03:26 24 military to enforce this legislation; correct?

14:03:29 25 A. No.

14:03:29 1 Q. And there is no mention of the
14:03:34 2 need to deploy militia or troops to enforce the
14:03:38 3 legislation against trespassers?

14:03:39 4 A. No.

14:03:39 5 Q. So based on what we have reviewed,
14:03:47 6 you would agree that what this contemplates is a
14:03:49 7 Commissioner or two or more Commissioners, such as
14:03:53 8 T.G. Anderson, for example, who was a Commissioner,
14:03:55 9 could enforce this legislation by sending a notice
14:04:02 10 to a person to vacate in 30 days, right?

14:04:05 11 A. Yes.

14:04:05 12 Q. Or by issuing a warrant to a
14:04:07 13 sheriff for the trespasser's arrest?

14:04:09 14 A. Yes.

14:04:09 15 Q. And by seizing offender's timber
14:04:13 16 or other stolen goods?

14:04:14 17 A. Could you just remind me, was
14:04:15 18 there not supposed to be a complaint before this
14:04:17 19 happened?

14:04:18 20 Q. That's right.

14:04:18 21 A. So in other words, someone has to
14:04:20 22 complain first, and then it all follows.

14:04:21 23 Q. Right.

14:04:22 24 A. Yes.

14:04:22 25 Q. So for example, the complaints

14:04:23 1 that we -- the examples that we looked at earlier
14:04:30 2 of the Saugeen Chiefs, for example, in 1850
14:04:32 3 complaining to the local land agent, would that be
14:04:36 4 such a complaint of stealing timber?

14:04:37 5 A. If it named names. In other
14:04:39 6 words, if it was directed against specific
14:04:41 7 individuals who could then be pursued under this
14:04:43 8 law.

14:04:44 9 If it was a general complaint, it seems
14:04:46 10 like it doesn't fit this legislation.

14:04:47 11 Q. Right.

14:04:48 12 A. But if names were named -- and I
14:04:49 13 have no knowledge of that --

14:04:49 14 Q. Right.

14:04:51 15 A. -- then this law would follow.

14:04:53 16 Q. Right. Okay. Thank you.

14:05:07 17 So I want to talk a bit more about
14:05:12 18 notices respecting Indian lands. The legislation
14:05:15 19 that we have just talked about refers to notices
14:05:18 20 being issued to squatters with respect to vacating
14:05:20 21 Indian lands.

14:05:24 22 I would like to bring up a few examples
14:05:28 23 and ask you your observations about them.

14:05:29 24 So the first one is Exhibit 1108. So
14:05:37 25 this is dated February 25th, 1836, and it is a

14:05:42 1 notice from James Givins regarding Indian lands on
14:05:47 2 the Huron Reserve, and I think you have mentioned
14:05:49 3 the Huron Reserve in your testimony prior to this;
14:05:53 4 correct? Did you mention the Huron Tract?

14:05:55 5 A. The Huron Tract, which was not the
14:05:57 6 same as the reserve. The Huron Tract had already
14:06:00 7 been ceded in the 1820s when the Canada Company
14:06:04 8 bought it.

14:06:04 9 So this presumably applies to the lands
14:06:07 10 covered under Treaty 45 1/2 and thereafter, because
14:06:11 11 this is 1836. So it wouldn't apply to the lands
14:06:15 12 that the Canada Company owned, which is what I
14:06:18 13 think I was -- what I referred to.

14:06:21 14 Q. The Canada Company ones where you
14:06:23 15 were talking about the Huron Tract?

14:06:24 16 A. The Huron Tract was not, I think,
14:06:26 17 the same, because I don't think there were any
14:06:28 18 Indian lands in the Canada Company's Huron Tract.

14:06:30 19 Q. Okay. So this is a notice on
14:06:34 20 February 25th, 1836, regarding encroachment of
14:06:38 21 squatters on the Huron Reserve in the western
14:06:41 22 district, and so it is a specific notice with
14:06:43 23 respect to the Huron Reserve, and it is a warning
14:06:46 24 for squatters to vacate those specific lands?

14:06:48 25 A. Yes.

14:06:49 1 Q. So I would like to just compare
14:06:51 2 this to Exhibit 1559, if we could zoom in. So this
14:07:05 3 is a notice. It is dated October 1st, 1845. It is
14:07:13 4 a notice from T.G. Anderson regarding "Indian
14:07:17 5 Lands" it says at the top, and what it says is:

14:07:24 6 "Notice is hereby given to all
14:07:29 7 persons that have taken possession
14:07:30 8 of Indian lands without proper
14:07:33 9 authority, or as it is usually
14:07:40 10 termed squatted, who do not enter
14:07:43 11 into satisfactory arrangements for
14:07:44 12 the legal possession of it with the
14:07:47 13 visiting Superintendent of Indian
14:07:49 14 Affairs at this office before the
14:07:51 15 1st January, 1846, will be
14:07:54 16 prosecuted for cutting and
14:07:56 17 destroying the timber -- and all
14:08:02 18 persons are hereby notified that if
14:08:04 19 they take wood or timber off, or
14:08:07 20 otherwise destroy the trees on any
14:08:10 21 Indian lands without legal
14:08:11 22 permission, they will be prosecuted
14:08:13 23 for the offence."

14:08:15 24 [As read.]

14:08:16 25 So this -- there is nothing here to

14:08:27 1 indicate here where it was posted?

14:08:28 2 A. No.

14:08:28 3 Q. And there is nothing here to
14:08:30 4 indicate who, if anyone, it was sent to directly?

14:08:31 5 A. No.

14:08:32 6 Q. And you are aware that T.G.
14:08:36 7 Anderson was Superintendent for several First
14:08:41 8 Nations, a number of Bands?

14:08:42 9 A. Yes.

14:08:42 10 Q. And there is no specific mention
14:08:44 11 of the peninsula or of the Saugeen Reserve?

14:08:47 12 A. Not specific, no.

14:08:49 13 Q. Okay. As opposed to the specific
14:08:51 14 mention in the one from 1836 to the Huron Reserve?

14:08:56 15 A. Yes.

14:08:57 16 Q. I just want to go to another
14:08:59 17 example, which is Exhibit 1586. So this is a
14:09:15 18 notice that is published in Toronto, or from
14:09:15 19 Toronto, on February 2nd, 1846, again from T.G.
14:09:17 20 Anderson regarding Indian lands.

14:09:20 21 And it says:

14:09:22 22 "Notice is Hereby Given to all
14:09:25 23 Persons that have taken possession
14:09:26 24 of Indian Land without proper
14:09:30 25 authority, or as it usually termed

1 Squatted, who do not enter into
2 satisfactory arrangements for the
3 legal possession of it [...]" by
4 April 1st, 1846.

5 And it warns that they will be
6 prosecuted or ejected.

7 So again, almost identical to the first
8 one?

9 A. Well, it seems like this is the
10 printed version of the handwritten text is how I
11 read it. I don't know how much difference there
12 is, but it sounds effectively to be the same,
13 approximately the same notice or warning.

14 Q. Well, the one we looked at was
15 dated October 1st, 1845.

16 A. Yes.

17 Q. So I don't know if -- that is some
18 months before this, so I don't know if it is the
19 same notice.

20 A. Well, I --

21 Q. It repeats the same content.

22 A. Yes.

23 Q. Yes.

24 A. And in a more public form than a
25 handwritten document.

14:10:11 1

Q. Right.

14:10:12 2

A. Depending on where this appeared.

14:10:13 3

If it appeared in all the provincial newspapers,

14:10:16 4

that would be one thing.

14:10:17 5

Q. Right.

14:10:17 6

A. But I don't know where this --

14:10:19 7

Q. Well, there is nothing to indicate

14:10:21 8

with certainty where it was posted?

14:10:22 9

A. No.

14:10:23 10

Q. And there is nothing to indicate

14:10:24 11

who, if anyone, it was sent to directly?

14:10:26 12

A. No.

14:10:27 13

Q. And there is no specific mention

14:10:28 14

of the peninsula or the Saugeen Reserve?

14:10:32 15

A. Well, it would appear that they

14:10:35 16

didn't feel necessary to specify, since they were

14:10:37 17

saying Indian land in general, so...

14:10:41 18

Q. Right. But based on your research

14:10:43 19

for this litigation or any of your research, have

14:10:46 20

you seen any notice that mentioned specifically the

14:10:48 21

Saugeen Reserve or the peninsula?

14:10:50 22

A. Well, my recollection is that

14:10:53 23

Oliphant, after signing the Treaty, did issue such

14:10:56 24

a warning.

14:10:57 25

Q. Right. That is where I was going

14:11:00 1 to go to next. Except for this one, which is
14:11:03 2 Exhibit 2150, so if we scroll down, right there at
14:11:20 3 the top of page 15 of the document, page 3 of the
14:11:23 4 PDF, you will zoom in there, so this is the notice
14:11:27 5 that you are talking about, that the day after the
14:11:31 6 surrender -- sorry, and it is under the heading
14:11:36 7 "Sub-enclosure 6, to Enclosure in No. 1", so it is
14:11:40 8 actually the second paragraph on page 15 -- oh,
14:11:50 9 right. Okay. Sorry, I'm corrected again. It is
14:11:52 10 the top one, which is the notice posted by
14:11:57 11 Oliphant, so both are notices, the first one being
14:12:01 12 a notice that:

14:12:03 13 "Notice is hereby given, that
14:12:04 14 no squatters will be allowed upon
14:12:05 15 the land recently surrendered to the
14:12:07 16 Crown by the Indians. All persons
14:12:10 17 found trespassing or cutting timber
14:12:13 18 will be prosecuted and punished."

14:12:15 19 And so on.

14:12:16 20 So this is specific to the Indian
14:12:18 21 Reserve on the peninsula?

14:12:19 22 A. Yes.

14:12:19 23 Q. Right. Okay.

14:12:21 24 So let me shift to talk to you about
14:12:36 25 the military.

14:12:38 1 You spoke to my friend yesterday about
14:12:40 2 the Gavazzi riots in Montreal, which you refer to
14:12:44 3 at page 25 of your report.

14:12:46 4 A. Yes.

14:12:47 5 Q. So the Gavazzi riots of Montreal,
14:12:56 6 those riots were in 1853?

14:12:56 7 A. Yes.

14:12:56 8 Q. And am I correct in saying that 80
14:12:57 9 police officers were stationed in Montreal to deal
14:12:59 10 with the riots?

14:13:00 11 A. That is my recollection.

14:13:00 12 Q. And a party of soldiers were sent
14:13:05 13 in to support them?

14:13:06 14 A. Yes.

14:13:06 15 Q. Do you know how many soldiers were
14:13:09 16 sent?

14:13:09 17 A. I don't recall the number.

14:13:10 18 Q. And in that case, what happened is
14:13:16 19 that someone, I think it was the mayor, ordered the
14:13:20 20 military to fire on civilians; is that correct?

14:13:22 21 A. I forget the direct authority that
14:13:24 22 resulted in that action.

14:13:25 23 Q. Okay. And I think you noted in
14:13:29 24 your discussion of it is that the thinking is that
14:13:32 25 they had been -- the soldiers had thought that they

14:13:35 1 had been commanded by their officers so they did
14:13:38 2 fire into the civilians?

14:13:39 3 A. I can't remember the precise
14:13:41 4 details of what they thought and who caused them to
14:13:46 5 think it, but I only know what they did.

14:13:49 6 Q. Right. And when you testified
14:13:54 7 yesterday -- so I am just pulling this from the
14:13:56 8 rough transcript -- you said:

9 "Well, it's clear that aid to
10 the civil power of this kind was not
11 something that Imperial officers
12 welcomed. And they were called out
13 a lot to deal with issues on canal
14 construction as well.

15 And they felt, throughout, that
16 colonial authorities should do more
14:14:16 17 to police their own society."

14:14:16 18 A. Yes.

14:14:16 19 Q. So you would agree with me,
14:14:18 20 though, that regardless of any private misgivings,
14:14:21 21 if the Imperial officers had been ordered by
14:14:23 22 civilian officials to do something, they would have
14:14:27 23 followed that order?

14:14:28 24 A. It would be a question of whatever
14:14:32 25 the correct chain of command is to authorize the

14:14:37 1 calling out of the military forces.

14:14:42 2 In other words, I don't think that just
14:14:46 3 anyone could say, by the way, colonel so and so, we
14:14:50 4 need you. I think that there was a formal chain of
14:14:53 5 command, possibly through the magistrates.

14:14:55 6 Q. Okay. So if they had been ordered
14:14:57 7 by the magistrate to address an issue related to
14:14:59 8 squatting on the Saugeen Peninsula, they would have
14:15:00 9 followed through on that order?

14:15:02 10 A. I can't say what the precise
14:15:06 11 process would be. Given that there are no troops
14:15:09 12 on the spot, given that there is a long distance
14:15:13 13 between the troops and the magistrates, I cannot
14:15:20 14 predict exactly what the process would be, what the
14:15:23 15 resistance might be, and I'm not sure that any
14:15:25 16 magistrate could readily and without a good deal of
14:15:31 17 backing expect that the troops would show up.

14:15:33 18 Q. Okay. So assuming that we don't
14:15:36 19 have to concern ourselves with where the troops are
14:15:39 20 at that given moment or the long distance that they
14:15:41 21 have to travel, if they do have a long distance to
14:15:44 22 travel, and they are getting the order from the
14:15:46 23 proper chain of command --

14:15:49 24 A. Yes.

14:15:49 25 Q. -- would you agree with the

14:15:50 1 proposition that they would follow that order?

14:15:52 2 A. My understanding is that they were
14:15:53 3 very likely to follow that order, yes. I would say
14:15:55 4 yes.

14:15:55 5 Q. Okay. So you talk about at page
14:16:01 6 27 of your report about reductions in the troop
14:16:05 7 levels stationed in garrisons in Canada West in the
14:16:08 8 early 1850s and that in the 1840s and the 1850s
14:16:17 9 decision-making about the size of various garrisons
14:16:19 10 in Canada West was an Imperial decision. Who made
14:16:25 11 the decision for the Imperial Crown?

14:16:31 12 A. Well, it would be the British war
14:16:32 13 office, following through its chain of command, and
14:16:36 14 I am not sure to what extent the Governor General
14:16:39 15 was part of that chain of command, but I don't
14:16:41 16 think there were any colonial officials in that
14:16:43 17 chain of command at all.

14:16:44 18 Q. Okay. Now, these decisions and
14:16:56 19 the size of the garrisons, they would have been
14:17:00 20 adjusted, though, depending on circumstances on the
14:17:02 21 ground in the colony?

14:17:04 22 A. Partly on the ground in the
14:17:05 23 colonies, but there was a larger Imperial logic to
14:17:10 24 reducing the size of the force in Canada, which I
14:17:12 25 spoke to yesterday and briefly addressed in my

14:17:15 1 report.

14:17:15 2 Q. Right.

14:17:16 3 A. So the people on the ground could
14:17:19 4 always imagine a reason for more troops than the
14:17:22 5 Imperial authorities wanted to have stationed in
14:17:24 6 Canada.

14:17:25 7 Q. But troops being -- troops could
14:17:30 8 have been redeployed as a matter of policy?

14:17:32 9 A. As a matter of policy, they could
14:17:33 10 have been.

14:17:33 11 Q. Okay.

14:17:35 12 A. And indeed, they could have been
14:17:36 13 sent back from Britain, of course.

14:17:37 14 Q. And in making that policy
14:17:40 15 decision, I assume that that decision-maker would
14:17:44 16 have relied on, in part, on intelligence from
14:17:47 17 officials on the ground?

14:17:48 18 A. Very much in part, because this
14:17:53 19 was a larger strategic decision by the British
14:17:56 20 government and part of a larger range of strategic
14:18:02 21 decisions they were making as they withdrew from
14:18:04 22 many active responsibilities in the colonies.

14:18:08 23 So it would have required a good deal
14:18:10 24 of persuasion of the British government to
14:18:13 25 authorize increased expenditure. If there was a

14:18:16 1 reason to do it, obviously it would happen. During
14:18:19 2 the American Civil War, troops came back, for
14:18:22 3 example.

14:18:22 4 Q. Okay. So as an example, in
14:18:29 5 response to the Upper Canada rebellion of
14:18:34 6 1837-1838, one of the people who weighed in on
14:18:35 7 whether troops were required in Upper Canada was
14:18:38 8 Lieutenant Governor Bond Head; is that correct?

14:18:39 9 A. Yes.

14:18:39 10 Q. So -- and of course, in later
14:18:48 11 1840s and early 1850s, there is no Lieutenant
14:18:50 12 Governor General of Upper Canada because it doesn't
14:18:53 13 exist anymore?

14:18:53 14 A. That's right.

14:18:54 15 Q. Canada has been united. But you
14:18:56 16 would agree with me that the equivalent official in
14:18:58 17 this period was the Governor General of the
14:19:03 18 Province of Canada?

14:19:04 19 A. Yes.

14:19:04 20 Q. So between 1847 and 1854, that was
14:19:07 21 Colonel Bruce?

14:19:08 22 A. No, the Governor was Lord Elgin.

14:19:13 23 Q. The Governor General was Lord
14:19:21 24 Elgin. Maybe I just have -- okay.

14:19:28 25 So the Governor General -- I am going

14:19:42 1 to leave that now and come back to it, because I
14:19:44 2 think I have my dates wrong or something went wrong
14:19:47 3 there -- to the extent that he thought squatting on
14:19:49 4 the Saugeen Peninsula or other Indigenous lands
14:19:51 5 required more troops that were present in the
14:19:55 6 colony, that person, he could have suggested an
14:19:58 7 increase in troops in Upper Canada to address this?

14:20:00 8 A. He could certainly have requested
14:20:01 9 it. Whether the -- whether authorities in London
14:20:05 10 would have responded at the war office is a
14:20:08 11 separate question. He would have had to make the
14:20:10 12 case for it. He couldn't simply have filled out a
14:20:13 13 form, sent in a requisition and had more troops
14:20:18 14 arrive. But there were troops within the colony,
14:20:21 15 of course.

14:20:22 16 Q. Right.

14:20:23 17 A. Now even after the forces were
14:20:26 18 drawn down, there was still a regiment.

14:20:29 19 Q. Okay. Let me move on to page 25
14:20:43 20 of your report where you discuss one of the Crown's
14:20:47 21 options, which we have talked about already, about
14:20:50 22 keeping its promise, the Crown enforcing the
14:20:52 23 Treaty.

14:20:55 24 So I think you would agree with me that
14:21:01 25 when we think about how to enforce the Treaty from

1 a law enforcement perspective, from what we
2 reviewed, the military isn't the only institution
3 in Upper Canada that could have done that?

4 A. No, the legislation envisaged an
5 entirely other chain of enforcement.

6 Q. Right.

7 A. And I address that in that
8 paragraph, of course.

9 Q. And you also talk about
10 magistrates and constables?

11 A. Yes.

12 Q. And you discount them first
13 because you say that they would be more likely to
14 sympathize with squatters than with the Saugeen?

15 A. I'm afraid that is the answer,
16 yes.

17 Q. But there is also sheriffs in
18 Upper Canada at this point?

19 A. Yes.

20 Q. Would you -- are you saying that
21 they would have been similarly affected by this
22 allegiance to squatters?

23 A. Probably in their -- in principle,
24 yes, but I believe they would have followed a
25 lawful request to go and arrest that man, go and

14:22:09 1 put that man in jail. I believe the sheriff would
14:22:12 2 do that. They had more autonomy. But their
14:22:15 3 values, I suspect, were similar to the other
14:22:18 4 locals.

14:22:22 5 Q. Okay. So we were just looking at
14:22:29 6 2150, and I had taken you to the notice that
14:22:34 7 Oliphant sent to Sheriff Schneider, if you could
14:22:38 8 pull that up again. 2150. Thank you. So right
14:22:54 9 there. Now the second paragraph, this is Oliphant
14:22:57 10 writing a notice to the sheriff, to Sheriff
14:23:00 11 Schneider, and that is the day after Treaty 72 was
14:23:04 12 concluded, and Schneider is the sheriff for the
14:23:09 13 County of Grey; correct?

14:23:10 14 A. Yes.

14:23:10 15 Q. So that is right next to the
14:23:12 16 peninsula, so is it fair to say that Oliphant did
14:23:16 17 assume that he was going to be willing to act to
14:23:21 18 remove trespassers, even if he did have sympathies,
14:23:24 19 as you describe, like the locals?

14:23:26 20 A. That is the plain text, and I have
14:23:29 21 no reason to doubt it.

14:23:30 22 Q. Okay. The last thing I want to
14:23:52 23 ask you about is this section that you talk about
14:23:54 24 in your report talking about the
14:23:56 25 severely-challenged constables. So it is Exhibit

1 4367, and we are on page 25.

2 THE COURT: Did you say 225?

3 BY MS. GUIRGUIS:

4 Q. No, page 25. In the second
5 sentence of the first full paragraph, you say:

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

12 So when you say speculative activity,
13 you mean squatting and timber theft?

14 A. I mean the variety of actions that
15 were happening in Southampton, the big land sale
16 and all of the conflicting claims to titles after
17 that.

18 Q. Okay.

19 A. And a whole range of other land
20 issues in a feverish land market is what I have in
21 mind, and it wasn't here and there a transaction,
22 but there were indications that there were possibly
23 hundreds of lots to be considered in this, and the
24 constables in this context would be neighbours of
25 the people who were squatting.

14:25:20 1

Q. Right.

14:25:23 2

A. And a constable was not a high

14:25:24 3

office and was often one that was not sought. So I

14:25:29 4

don't picture constables as rushing to deal with

14:25:32 5

hundreds of their neighbours. Easier to deal with

14:25:35 6

one or two. It is an issue of scale.

14:25:38 7

Q. Right. So in this sentence, I

14:25:43 8

didn't see any citations for this proposition in

14:25:45 9

your report. What do you rely on? What is the

14:25:48 10

authority you rely on for this proposition?

14:25:50 11

A. The authority I rely on for this

14:25:53 12

proposition is general accounts of the conduct of

14:26:00 13

local law enforcement. David Murray has written

14:26:04 14

extensively on the Niagara Peninsula, for example,

14:26:09 15

and there are other sources that deal with what

14:26:11 16

magistrates and following from the magistrates the

14:26:16 17

constables could do.

14:26:17 18

So if we look at the note for the

14:26:21 19

sentence before, it is David Murray and also Greg

14:26:27 20

Marquis, who is the standard history of Canadian

14:26:31 21

policing, and Marquis's study is larger than his

14:26:34 22

title might suggest. He has a considerable account

14:26:36 23

of how policing worked before confederation as part

14:26:39 24

of his history.

14:26:42 25

So it is the same reference covers the

14:26:44 1 next sentence. In other words, that is a deduction
14:26:47 2 I draw from the sources for the previous sentence.

14:26:51 3 Q. Okay. Thank you.

14:26:53 4 So that cite is in there, in that
14:27:00 5 report? It is the previous one?

14:27:01 6 A. Yeah, note 76 would be the
14:27:03 7 authority that I would go back to.

14:27:04 8 Q. Okay. Could I just have a moment.

14:27:30 9 So I just have a couple more topics to
14:27:43 10 go through with you.

14:27:45 11 So what I would like to speak to you
14:27:49 12 about now is -- again, I think we are at the right
14:28:01 13 place in your report, the next page, page 26 of
14:28:04 14 your report again talking about the options the
14:28:09 15 Crown had to respond to squatting and the third
14:28:12 16 option you present.

14:28:17 17 The third option you describe at page
14:28:21 18 26. There it is in the middle paragraph:

14:28:30 19 "A third was to investigate on
14:28:31 20 the ground, identifying arable soil
14:28:33 21 and negotiating its cession or
14:28:35 22 perhaps working out leasing
14:28:36 23 arrangements for the land. [...]
14:28:39 24 Defining the precise limits of
14:28:41 25 arable land would also have been

14:28:44 1 controversial; and other resources,
14:28:44 2 such as timber, water power sites
14:28:46 3 and potential town sites, were
14:28:46 4 coveted as well."

14:28:51 5 So based on this option, I want to
14:28:56 6 discuss with you Oliphant's plan to get the
14:29:02 7 peninsula and his intention to get the peninsula.

14:29:04 8 So if we could bring up Exhibit 2175,
14:29:12 9 at page 13, which is PDF page 12, so if we just go
14:29:26 10 up to the middle. Thank you. So under the heading
14:29:31 11 of "Sub-enclosure 3, to Enclosure No. 1", this is a
14:29:37 12 letter from Rankin, who is a surveyor in the area;
14:29:40 13 correct?

14:29:40 14 A. Yes.

14:29:40 15 Q. And it is to Anderson. It's dated
14:29:43 16 August 2nd, 1854. So in this document Rankin is
14:29:51 17 discussing the limits of the reserve proposed by
14:29:53 18 the Saugeen Ojibway Nation during an August 2nd,
14:29:59 19 1854, meeting with Anderson. Are you aware of the
14:30:04 20 meeting and what happened between them on August
14:30:06 21 2nd?

14:30:06 22 A. Yes. In general.

14:30:07 23 Q. In general. Yes, generally
14:30:10 24 Anderson makes a proposal for surrender, the
14:30:12 25 Saugeen Anishinaabe come back and say no with a

14:30:15 1 counterproposal and so that is what Rankin is
14:30:19 2 discussing.

14:30:19 3 A. Yes.

14:30:19 4 Q. So starting at the second
14:30:23 5 paragraph of this letter, if we can zoom in a
14:30:25 6 little bit, Rankin talks about here:

14:30:33 7 "Of this 450,000 acres, about
14:30:36 8 190,000 lies to the south of a line
14:30:38 9 from the middle of the group of
14:30:39 10 Fishing Islands to Colpoy's Bay, and
14:30:44 11 about 260,000 to the north of that
14:30:45 12 line, terminating at Cabot's Head
14:30:47 13 and Cape Hind; this latter part
14:30:50 14 probably contains but little that
14:30:52 15 can be cultivated, being believed to
14:30:55 16 be very rocky."

14:30:57 17 So -- and then he goes on to talk about
14:31:01 18 the other 190,000 acres and that is what the
14:31:05 19 Saugeen Anishinaabe came back with, was that they
14:31:09 20 wanted to keep 130,000, but they were willing to
14:31:12 21 surrender 60,000 acres that would be in a
14:31:16 22 wedge-like shape.

14:31:21 23 So Rankin essentially divides the
14:31:24 24 peninsula into two chunks, 190,000 acres to the
14:31:27 25 south of the Fishing Islands and Colpoy's Bay and

14:31:32 1 260,000 to the north of that line, terminating at
14:31:34 2 Cabot's Head and Cape Hind, and he says in this
14:31:41 3 letter to Anderson that this probably contains but
14:31:44 4 little that can be cultivated, believed to be very
14:31:47 5 rocky.

14:31:47 6 So this you would agree is an
14:31:49 7 assessment that they did know what lands were
14:31:54 8 arable on the peninsula?

14:31:56 9 A. Rankin clearly is well-informed.
14:32:00 10 From what Oliphant wrote after the cession, I am
14:32:03 11 not so clear that he was as well-informed, so he
14:32:06 12 ought to have listened to Rankin, but I am not sure
14:32:08 13 he did.

14:32:08 14 Q. So Rankin has advised Anderson and
14:32:11 15 both Rankin and Anderson are Oliphant's employees.

14:32:14 16 A. Yes.

14:32:15 17 Q. Correct? Yes.

14:32:15 18 A. Well, Rankin -- is Rankin directly
14:32:17 19 an employee of Oliphant? It doesn't matter I don't
14:32:21 20 think for this thing.

14:32:21 21 Q. It doesn't -- yeah. Well, I
14:32:23 22 suppose he is reporting to Anderson, and Anderson
14:32:25 23 is a direct employee to Oliphant, would be the
14:32:27 24 better or more accurate way to --

14:32:30 25 A. Okay.

14:32:31 1 Q. And this letter from Rankin to
14:32:32 2 Anderson was over two months before Treaty 72 was
14:32:36 3 concluded?

14:32:36 4 A. Yes.

14:32:37 5 Q. So this suggests that Crown
14:32:41 6 officials working under Oliphant already had a
14:32:44 7 rough and ready idea of which lands on the
14:32:46 8 peninsula could not be cultivated?

14:32:49 9 A. Yes.

14:32:49 10 Q. Okay. So I want to bring up a
14:32:55 11 document that is not yet an exhibit. It is SC1273.
14:33:02 12 This is just a short document. It is The Canada
14:33:05 13 Gazette dated June 24, 1854.

14:33:11 14 Your Honour, I would like to add this
14:33:12 15 as the next exhibit.

14:33:13 16 THE COURT: Mr. Registrar.

14:33:14 17 THE REGISTRAR: Exhibit No. 4375.

14:33:18 18 EXHIBIT NO. 4375: The Canada Gazette
14:33:23 19 dated June 24, 1854.

14:33:23 20 BY MS. GUIRGUIS:

14:33:29 21 Q. So if we look at the second
14:33:34 22 column, we see -- sorry, just scroll down there.
14:33:39 23 The second column over, it starts "secretaries
14:33:43 24 office", and this just tells us that on June 19th,
14:33:47 25 1854:

14:33:49 1 "His Excellency, the Governor

14:33:51 2 General, has been pleased to appoint

14:33:54 3 Lawrence Oliphant, Esquire, Civil

14:33:56 4 Secretary and Superintendent General

14:33:56 5 of Indian Affairs for the Province

14:34:00 6 of Canada."

14:34:01 7 A. Yes.

14:34:01 8 Q. So that is the date that he was

14:34:02 9 appointed, and then if we pull up Exhibit 2094,

14:34:11 10 this is a letter from Oliphant to Anderson dated

14:34:14 11 June 28th, 1854, if we could zoom in. It is not

14:34:22 12 the best writing, but he is replying to Anderson's

14:34:30 13 letter. Sorry. Can you zoom in a little bit?

14:34:35 14 He says near the bottom that:

14:34:57 15 "[...] and that His Excellency

14:34:59 16 thinks it is highly desirable that

14:35:01 17 the reserve at Saugeen should be

14:35:02 18 surrendered by the Indians for

14:35:04 19 sale."

14:35:07 20 [As read.]

14:35:07 21 So he is responding to Anderson saying

14:35:10 22 at this point on June 28, 1854, that he thinks the

14:35:13 23 surrender of the peninsula is a good idea?

14:35:15 24 A. Yes.

14:35:15 25 Q. So approximately one week after he

14:35:18 1 has been appointed --

14:35:18 2 A. Yes.

14:35:19 3 Q. -- he has decided to go with is
14:35:20 4 that?

14:35:20 5 A. Well, it says that "His Excellency
14:35:24 6 thinks it is highly desirable", so I don't know
14:35:27 7 whether His Excellency had already conceived that
14:35:29 8 idea before appointing Oliphant, so I simply don't
14:35:32 9 know how that sequence worked.

14:35:34 10 Q. Uhm-hmm. Well, we do know then
14:35:40 11 within a few months he is on his way to go get the
14:35:43 12 surrender of the peninsula?

14:35:44 13 A. Yes.

14:35:44 14 Q. So if we can pull up SC1272, in
14:35:54 15 the middle here -- this is an article dated
14:35:57 16 September 1854 from The Sarnia Observer, take a
14:36:06 17 look at it in the middle after "Land purchased from
14:36:10 18 Indians [...]", it talks about Oliphant leaving for
14:36:15 19 his journey to the peninsula.

14:36:17 20 Your Honour, could I make this the next
14:36:19 21 exhibit.

14:36:20 22 THE COURT: Mr. Registrar.

14:36:22 23 THE REGISTRAR: Exhibit No. 4376.

14:36:26 24 EXHIBIT NO. 4376: Article from The
14:36:30 25 Sarnia Observer from September 1854.

14:36:30 1 BY MS. GUIRGUIS:

14:36:30 2 Q. So it says in this article:

14:36:32 3 "Mr. Oliphant, the Governor
14:36:34 4 General's Private Secretary, left
14:36:36 5 this city for the west last night to
14:36:38 6 negotiate with the Indians for the
14:36:40 7 surrender of the peninsula lying
14:36:41 8 between the Georgian Bay and Lake
14:36:43 9 Huron on behalf of the government.
14:36:45 10 This is his second mission on this
14:36:47 11 business; the first having failed
14:36:48 12 not for any disinclination of the
14:36:52 13 Indians to sell, but from the
14:36:56 14 persuasions of interested parties
14:36:57 15 who had induced the Indians to
14:37:05 16 believe that it was for their
14:37:06 17 interest to sell, not to government,
14:37:08 18 but to private speculators - as if
14:37:11 19 such purchases and sales were legal,
14:37:13 20 or could be made. Part of the
14:37:14 21 peninsula is understood to be good
14:37:16 22 land; but the remainder is rocky and
14:37:19 23 of little or no value for
14:37:21 24 agricultural purposes."

14:37:24 25 So we knew from the Rankin letter

14:37:27 1 discussed above that Oliphant's employee Anderson
14:37:30 2 knew about the peninsula being rocky.

14:37:31 3 A. Yes.

14:37:32 4 Q. And from here it seems that it is
14:37:34 5 public knowledge such that it is published in a
14:37:36 6 newspaper in September right before he goes?

14:37:37 7 A. Yes. I don't know how the
14:37:39 8 newspaper would know it, but issues of land were of
14:37:44 9 great interest to newspapers in the western part of
14:37:48 10 Upper Canada, so they probably did know.

14:37:49 11 Q. Maybe they had better information
14:37:52 12 than --

14:37:52 13 A. Well, if they were in Sarnia,
14:37:54 14 there is a connection by water, the peninsula as
14:37:56 15 well, but I don't know who would have written this.
14:37:59 16 Not important for your question.

14:38:01 17 Q. We can agree that it was public
14:38:04 18 knowledge at the time, or generally public
14:38:07 19 knowledge from this article, in any case?

14:38:11 20 A. It was a widely-shared opinion.

14:38:14 21 Q. Right.

14:38:15 22 A. But what I keep coming back to as
14:38:18 23 I think about this is the Ottawa Huron Tract where
14:38:24 24 some government officials persisted in believing
14:38:26 25 that this was not rocky and swampy, and it could be

14:38:29 1 settled. So that is the one difficulty, that this
14:38:33 2 clearly represents an informed opinion, but there
14:38:36 3 probably were other opinions.

14:38:37 4 Q. Right. And Oliphant ultimately
14:38:40 5 goes, and he gets a surrender for the entire
14:38:42 6 peninsula?

14:38:42 7 A. Yes.

14:38:42 8 Q. On October 13th, 1854. So I would
14:38:45 9 like to pull up Exhibit 2175 again. So this
14:38:54 10 document includes the November 3rd, 1854, Oliphant
14:38:57 11 report to Lord Elgin, which you refer to at the end
14:39:02 12 of your first report.

14:39:03 13 A. Yes.

14:39:03 14 Q. So in his report at page 7, which
14:39:15 15 is at page 6 of the PDF, we have in this section he
14:39:28 16 sets out -- or in the report itself he sets out how
14:39:32 17 he has a plan for funding the Indian Agency?

14:39:35 18 A. Yes.

14:39:36 19 Q. Which I am sure you reviewed, and
14:39:38 20 at this page he sets out how the Imperial
14:39:41 21 Government would be relieved of any support for
14:39:44 22 Lower Canada, and he goes through, which I don't
14:39:46 23 propose to here, in detail the expenses and income
14:39:49 24 for Upper Canada being dealt with separately, and
14:39:53 25 he starts to talk on the following pages in some

14:39:55 1 detail about how to separate those expenses.

14:40:00 2 A. Yes.

14:40:01 3 Q. Right? What we can see or you
14:40:06 4 would agree with me is that from a review of this
14:40:09 5 is that he is going through the expenditures for
14:40:11 6 annuities, admissions, schools, salaries, he is
14:40:14 7 making a proposal to run a leaner Indian
14:40:18 8 Department?

14:40:18 9 A. Yes, not only leaner, but
14:40:19 10 differently funded.

14:40:20 11 Q. Differently funded.

14:40:21 12 A. Yes.

14:40:21 13 Q. Right. So at the top of page 9 of
14:40:28 14 the report, if you can scroll down to that, I would
14:40:39 15 just like to highlight the portion that deals with
14:40:41 16 the Saugeen and Owen Sound Indians, and again, what
14:40:49 17 you say is that he is going to differently fund it.
14:40:51 18 So he runs through some of the annuities, income
14:40:54 19 and expenditures, saying that -- running a leaner
14:41:02 20 department and using different funds, sources from
14:41:05 21 the Indian funds themselves, he can fund the Indian
14:41:08 22 Agency; correct?

14:41:09 23 A. Yes.

14:41:09 24 Q. So the Saugeen and Owen Sound
14:41:13 25 Indians he is talking about here, he notes that

14:41:16 1 they would come up short for his plan, but for --
14:41:23 2 so sorry, about halfway through, he is going
14:41:26 3 through the different net annual income and so on,
14:41:30 4 and he said:

14:41:32 5 "[...] but to this again is to
14:41:34 6 be added to the sum which will
14:41:36 7 accrue to the Saugeen and Owen Sound
14:41:37 8 Indians, from the sale of the
14:41:39 9 recently surrendered territory,
14:41:40 10 which may be roughly estimated at
14:41:42 11 100,000 [pounds]. This is rating
14:41:45 12 land at a dollar an acre; there
14:41:48 13 could be little doubt, however, that
14:41:49 14 it will fetch considerably more than
14:41:50 15 this; this will give an annual
14:41:53 16 interest of 6,000 [pounds]. It is
14:41:56 17 out of this large income, which may
14:41:58 18 be stated in round numbers, and at
14:42:00 19 the lowest estimate, to exceed
14:42:02 20 17,000 [pounds], that I respectfully
14:42:04 21 submit that the tribes of Upper
14:42:06 22 Canada should be called upon to
14:42:08 23 defray, proportionably to their
14:42:11 24 incomes, those expenses which are at
14:42:13 25 present charged against the Imperial

1 Government, and which are incidental
2 to the support of the department
3 that watches over their interests."

4 So he is relying on dollars from the
5 sale of the peninsula to fund the Indian Agency; is
6 that correct?

7 A. This is what he is proposing.

8 Q. Uhm-hmm.

9 A. I am not sure that that part of
10 this report was implemented.

11 Q. Right. So if we turn to -- but
12 just staying with what he has proposed, and I want
13 to get some clarity around it, but if we turn to
14 page 15 of the report -- there we go. So this is
15 an enclosure, we see -- sorry. Can you scroll
16 down? Thank you. So we see Oliphant setting out
17 the plan above and his various proposed reductions
18 determines that his new lean Indian Department will
19 cost about 3,470 pounds annually, right? That is
20 what it is showing us at the bottom right corner?

21 A. Yes.

22 Q. If I'm reading that correctly.
23 Okay.

24 And if we go to the line for the
25 Saugeen Ojibway Indians, which is right there,

14:43:50 1 where the cursor is, we see that he is expecting
14:43:53 2 that they will contribute 1,173 pounds, reflecting
14:43:58 3 the proportion of their income from interest and
14:44:01 4 annuities relative to other Bands, right?

14:44:04 5 So I want to just turn to his estimate
14:44:07 6 for the Saugeen Anishinaabe's income. He said, we
14:44:15 7 see in the previous quote that, the peninsula would
14:44:17 8 be sold for one dollar per acre, so for 450,000
14:44:21 9 acres, the whole peninsula, that is 450,000
14:44:26 10 dollars, or 100,000 pounds, is what he said.

14:44:28 11 So is the conversion rate -- the
14:44:31 12 implied conversion rate is \$4.5 to one pound
14:44:35 13 sterling; is that correct?

14:44:35 14 A. He is talking -- I assume he is
14:44:39 15 talking about Halifax currency.

14:44:40 16 Q. Yeah.

14:44:41 17 A. In which case I think it is an
14:44:44 18 approximation. If he thought he was going to get a
14:44:46 19 dollar for every one of those 450,000 acres, he
14:44:51 20 would have said we are going to get 110,000 and
14:44:54 21 something pounds.

14:44:54 22 Q. Okay.

14:44:55 23 A. So it is a very approximate
14:44:57 24 figure. He is quite enthused with himself with
14:45:03 25 this point, and he actually says, this is really a

14:45:06 1 low estimate. We are going to do better than that.

14:45:08 2 Q. Okay.

14:45:09 3 A. So I think it is -- he is saying a
14:45:14 4 dollar an acre for 400,000 acres.

14:45:16 5 Q. Right. Okay. So he is using the
14:45:18 6 rough -- he is using the rough conversion of \$4.5
14:45:21 7 to one pound sterling?

14:45:23 8 A. Well, if it is pounds sterling, it
14:45:25 9 would be 4.8.

14:45:26 10 Q. 4.8.

14:45:27 11 A. But pounds currency, which is what
14:45:29 12 they used in the province --

14:45:29 13 Q. Right.

14:45:31 14 A. -- it's \$4.00 to the pound.

14:45:33 15 Q. Okay. So about -- so by your
14:45:36 16 estimation, it is about 110,000 pounds is
14:45:40 17 what --

14:45:40 18 A. Well, if he actually sold every
14:45:42 19 acre for the dollar, yes.

14:45:43 20 Q. Right. And --

14:45:44 21 A. But he is clearly saying it is an
14:45:46 22 approximation.

14:45:47 23 Q. Right. And on that basis, he
14:45:48 24 estimates that he would yield 6,000 pounds per year
14:45:52 25 based on the 6 percent interest?

14:45:53 1 A. Yes.

14:45:54 2 Q. And his plan is that 1,173 pounds
14:45:58 3 per year from this would go to the Indian
14:46:03 4 Department to assist in funding operations and
14:46:06 5 amount to a fee of about 19.55 percent of the
14:46:12 6 Saugeen Anishinaabe's annual interest income.

14:46:14 7 A. That is what he is proposing, yes.

14:46:17 8 Q. Okay. So assuming for a moment
14:46:21 9 that his calculations of land sales, expenditures,
14:46:24 10 et cetera, are correct, would you agree with me,
14:46:29 11 sir, that his plan could only work if he obtained a
14:46:32 12 surrender for the entire peninsula?

14:46:33 13 A. Well, no, because he might have
14:46:45 14 taken Rankin's advice and said that we are going to
14:46:49 15 sell 190,000 at \$3.00 an acre.

14:46:53 16 Q. Right.

14:46:53 17 A. So there were several different
14:46:55 18 ways to arrive at that figure; in other words,
14:46:59 19 there is no necessity to go for the whole peninsula
14:47:03 20 in order to raise the sum that he has in mind.

14:47:06 21 So had he asked Rankin, Rankin might
14:47:11 22 have said most of your money is going to come from
14:47:14 23 the south, so it is not a guarantee that he needs
14:47:19 24 the whole peninsula.

14:47:20 25 Q. Okay. So Rankin's letter, when we

14:47:24 1 went to that, it was discussed in the context of
14:47:30 2 the Saugeen Anishinaabe offering a smaller amount
14:47:33 3 of land of the peninsula, which was 60,000 acres.
14:47:36 4 So if Anderson had taken a surrender of the 60,000
14:47:39 5 acres and still Oliphant using his calculation of
14:47:44 6 \$1.00 per acre, that would be \$60,000, and using
14:47:48 7 his rough calculation, that would be about 13,000
14:47:52 8 pounds sterling or 14,000 pounds sterling?

14:47:55 9 A. Sorry? Let's back up again?

14:47:57 10 Q. Yeah, let's --

14:47:58 11 A. If he sold 60,000 acres --

14:48:01 12 Q. So if he had taken the 60,000
14:48:03 13 acres and if we use his estimate that he is going
14:48:06 14 to get a dollar per acre, that is \$60,000?

14:48:09 15 A. Yes.

14:48:10 16 Q. He has used a conversion rate of
14:48:12 17 \$4.5 for each pound, which I take your expertise in
14:48:19 18 saying that that is probably a little low, it is
14:48:24 19 probably 4.8, so that conversion, that would amount
14:48:28 20 to about 13,400 pounds sterling, by my calculation.

14:48:32 21 A. Let me just calculate for a
14:48:33 22 second.

14:48:34 23 Q. Yes.

14:48:35 24 A. So he has got \$60,000, which is
14:48:40 25 15,000 pounds Halifax currency.

14:48:40 1 Q. Okay.

14:48:46 2 A. So it is 15,000.

14:48:47 3 Q. So 15,000?

14:48:48 4 A. Yeah.

14:48:49 5 Q. So I did this -- so I did my math

14:48:51 6 based on using -- I trusted Oliphant's conversion,

14:48:55 7 from 450,000, for the \$4.5, and it got me to close

14:49:05 8 to that, and assuming the same interest of 6

14:49:07 9 percent per year on which Oliphant relies, would

14:49:10 10 earn -- that it would earn interest, then the

14:49:14 11 Saugeen Ojibway Nation would see about 800 pounds

14:49:17 12 in interest per year; does that sound right?

14:49:28 13 A. Well, so what we said was 15,000

14:49:38 14 pounds.

14:49:39 15 Q. Yes. Uhm-hmm.

14:49:40 16 A. So at 10 percent, that would be

14:49:44 17 1500. 6 percent would be around 800 or so.

14:49:46 18 Q. 800.

14:49:47 19 A. Yes.

14:49:48 20 Q. So that falls short than the 1,173

14:49:51 21 pounds that Oliphant intended to collect from the

14:49:55 22 Saugeen Anishinaabe under his scheme that he was

14:49:58 23 proposing, right?

14:50:01 24 A. Well, except that his scheme

14:50:04 25 required collecting proportional to the income.

14:50:07 1 Q. Yes.

14:50:08 2 A. And so if all he had was 800
14:50:10 3 pounds, he wasn't going to get the right
14:50:13 4 percentage, no.

14:50:13 5 Q. But he would have fallen short of
14:50:15 6 funding the Indian Agency?

14:50:16 7 A. Far short.

14:50:17 8 Q. The totals. Far short.

14:50:19 9 A. Because it always depended upon
14:50:20 10 some of the money going to the First Nations
14:50:22 11 themselves.

14:50:22 12 Q. Right.

14:50:23 13 A. So he couldn't just have taken 800
14:50:24 14 pounds and put it towards the Indian Department.

14:50:27 15 Q. So you would agree with me that a
14:50:29 16 surrender for that lesser amount of lands would not
14:50:31 17 have cut it for his scheme?

14:50:33 18 A. From a financial point of view,
14:50:34 19 no. But obviously there were other reasons as
14:50:39 20 well.

14:50:39 21 Q. Okay. Thank you. So you
14:50:41 22 mentioned this already, that it wasn't implemented,
14:50:44 23 the plan wasn't implemented, and I just want to go
14:50:47 24 quickly, and it is probably something that you are
14:50:49 25 familiar with, is Exhibit 2320.

14:50:51 1 THE COURT: Just before you go quickly
14:50:52 2 somewhere, Counsel, because I need to keep up with
14:50:55 3 what you are doing.

14:50:56 4 MS. GUIRGUIS: Yes.

14:50:57 5 THE COURT: Can you go quickly in five
14:50:58 6 minutes, or are you going to finish today? I am
14:51:01 7 not asking you to finish today, but you know we
14:51:04 8 only have ten minutes, so I need to be able to
14:51:07 9 follow whatever you are doing which, you know,
14:51:10 10 despite my degree in mathematics, has been a
14:51:13 11 challenge in the last 15 minutes.

14:51:15 12 MS. GUIRGUIS: Yes. So I think, Your
14:51:20 13 Honour --

14:51:20 14 THE COURT: If you have something you
14:51:21 15 want to wrap up --

14:51:22 16 MS. GUIRGUIS: We can leave this here.

14:51:24 17 THE COURT: -- by all means, Counsel,
14:51:26 18 but if you aren't going to finish, I don't want you
14:51:28 19 to rush to try and accomplish that because I really
14:51:30 20 need to follow.

14:51:31 21 MS. GUIRGUIS: Right.

14:51:32 22 THE COURT: Yes.

14:51:33 23 MS. GUIRGUIS: Yes, and I don't want to
14:51:34 24 rush through it either, and I think that what I do
14:51:36 25 have is probably about 25 to 30 minutes left,

14:51:38 1 and --

14:51:39 2 THE COURT: As you know, today we can't
14:51:41 3 do that. I'm sorry to tell you that, sir, but it
14:51:43 4 is so.

14:51:44 5 THE WITNESS: I was warned.

14:51:46 6 THE COURT: So if it is 30 minutes, we
14:51:47 7 are not going to finish, so I really don't want you
14:51:50 8 to rush.

14:51:51 9 If you have something you want to wrap
14:51:53 10 up in the next five minutes or so, or if you want
14:51:55 11 to start fresh tomorrow morning.

14:51:57 12 MS. GUIRGUIS: Let's start fresh
14:51:59 13 tomorrow morning.

14:51:59 14 THE COURT: All right. And I take it
14:52:00 15 there is no issue about starting early at this
14:52:02 16 point. We are going to be okay at 10 o'clock?

14:52:04 17 MS. GUIRGUIS: 10 o'clock will be fine.

14:52:05 18 THE COURT: All right. And, sir -- and
14:52:09 19 our witness is very familiar with his obligations
14:52:09 20 in cross-examination, so you'll be in
14:52:12 21 cross-examination overnight, sir.

14:52:14 22 THE WITNESS: Yes, I understand, Your
14:52:16 23 Honour.

14:52:16 24 THE COURT: Thank you, Counsel.

14:52:17 25 Now, before you all leave, Mr. Beggs,

14:52:21 1 who is next if we finish this gentleman tomorrow
14:52:25 2 morning? Do you want to give that some thought
14:52:29 3 overnight and tell me tomorrow morning? Because we
14:52:31 4 also have Monday, remember.

14:52:33 5 MR. BEGGS: Yes, Your Honour, I'll give
14:52:34 6 that some thought.

14:52:36 7 THE COURT: You'll give that some
14:52:38 8 thought?

14:52:38 9 Thank you.

14:52:38 10
14:52:39 11 -- Adjourned at 2:52 p.m.
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REPORTER'S CERTIFICATE


I, DEANA SANTEDICOLA, RPR, CRR,
CSR, Certified Shorthand Reporter, certify:

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

That the testimony of the witness
and all objections made at the time of the
examination were recorded stenographically by me
and were thereafter transcribed;

That the foregoing is a true and
correct transcript of my shorthand notes so taken.

Dated this 12th day of November, 2019.



NEESONS, A VERITEXT COMPANY

PER: DEANA SANTEDICOLA, RPR, CRR, CSR

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