

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

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VOL 50 DAY 50  
October 04, 2019

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Court File No. 94-CQ-50872CM

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

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

- and -

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

Court File No. 03-CV-261134CM1

A N D B E T W E E N:

CHIPPEWAS OF NAWASH UNCEDED FIRST NATION and  
SAUGEEN FIRST NATION  
Plaintiffs

- and -

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

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--- This is VOLUME 50 / DAY 50 of the trial  
proceedings in the above-noted matter, being  
held at the Superior Court of Justice, 330  
University Avenue, Courtroom 5-1 Toronto,  
Ontario, on the 4th day of October 2019.  
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B E F O R E:

The Honourable Justice Wendy M. Matheson

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

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

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

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

I N D E X

PAGE

WITNESS: SIDNEY HARRING

Cross-examination by Mr. Beggs (continued)..

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INDEX OF EXHIBITS

NO. / DESCRIPTION

PAGE

NONE MARKED.

1 --- Upon commencing at 10:02 a.m.

10:02:43 2 THE COURT: Please go ahead.

10:02:45 3 MR. BEGGS: Thank you, Your Honour.

10:02:46 4 I'm going to ask Professor Harring to return to  
10:02:49 5 the stand, please.

10:02:54 6 SIDNEY HARRING: PREVIOUSLY AFFIRMED.

10:03:01 7 CROSS-EXAMINATION BY MR. BEGGS:

10:03:05 8 Q. Good morning, Professor Harring.

10:03:07 9 A. Good morning, sir.

10:03:08 10 Q. I would like to take you back to  
10:03:09 11 your report to start with, and I will be going  
10:03:12 12 to page 51 of your report. At the very bottom  
10:03:25 13 of the page, you state:

10:03:31 14 "Several historians have referred  
10:03:32 15 to the obvious difficulty of  
10:03:34 16 controlling squatters at this time.  
10:03:36 17 These follow the analysis of Jarvis  
10:03:38 18 already cited [...]"

10:03:41 19 And that would be the evidence of  
10:03:43 20 Mr. Jarvis in 1840, is that correct, that you're  
10:03:47 21 referring to there?

10:03:48 22 A. Yes, I believe so.

10:03:53 23 Q. "[...] by Lord Elgin in a letter  
10:03:56 24 to Lord Grey dated 21st November 1849  
10:03:59 25 where he referred to squatters 'as an

1 uncontrollable force of natural law.' "

2 So was that Lord Elgin saying they  
3 were an uncontrollable force?

4 A. I would need to look at the  
5 footnote.

6 Q. Okay. Perhaps we can go to the  
7 footnote on 43 -- yes, on page 83.

8 A. That's the footnote then. That's  
9 -- I have no memory of this, but I'm relying on  
10 the footnote.

11 Q. But would it be fair to say that  
12 that was a fairly common expression among  
13 officials at the time, that squatting was almost  
14 a force of nature and uncontrollable?

15 A. I think in the time the way that  
16 people saw nature, natural law, the will of God,  
17 that, you know, many things were seen as being  
18 an inevitable force of nature. So this would be  
19 consistent with that kind of a worldview.

20 Q. Okay. I'd like to turn to  
21 your -- the aspect of your report talking about  
22 the 1843 complaint by Wahbahdik and the response  
23 by the Executive Council, do you recall that?

24 A. I mean, I have a general  
25 recollection of it. I need the text.

10:05:35 1 Q. If we can turn to page 15 of your  
10:05:36 2 report? If we scroll down at the very bottom it  
10:05:48 3 refers to:

10:05:49 4 "A petition to the Executive  
10:05:51 5 Council by chief Wahbahdik, identified  
10:05:54 6 as 'one of the Chiefs of the Sauguin  
10:05:56 7 Indians' that was responded to on July  
10:05:58 8 21st, 1843, complains of both 'the  
10:06:03 9 intrusion of white settlers on their  
10:06:06 10 reserved lands' and of the sale of  
10:06:08 11 ardent spirits to the Indians."

10:06:11 12 And I believe you spoke about this  
10:06:12 13 with my friend earlier this week as well. You  
10:06:15 14 spoke about the Executive Council's response, is  
10:06:17 15 that correct?

10:06:18 16 A. Yes.

10:06:18 17 Q. And the gist of it was that the  
10:06:20 18 Council took no action and basically claimed it  
10:06:25 19 was powerless to enforce the law, despite the  
10:06:28 20 1839 statute being in place?

10:06:30 21 A. Yes.

10:06:41 22 Q. And if I could go to page 54 of  
10:06:43 23 your report? Where it begins -- well, the  
10:06:57 24 previous sentence -- previous paragraph ended  
10:06:59 25 with:



10:07:01 1 "White settlement was a political  
10:07:03 2 goal and Indian interests were  
10:07:04 3 political expendable."

10:07:07 4 But the paragraph I want to draw your  
10:07:09 5 attention to:

10:07:10 6 "This is confirmed by the  
10:07:11 7 previously discussed Committee of the  
10:07:11 8 Executive Council's response to the  
10:07:11 9 complaint of Chief Wahbahdik in 1843,  
10:07:13 10 recognizing the problem of white  
10:07:16 11 intrusion was one of 'very great  
10:07:18 12 difficulty' but deferring enforcement  
10:07:21 13 until some time in the future when  
10:07:22 14 magistrates might be appointed to  
10:07:24 15 enforce the law."

10:07:25 16 Do you recall that aspect of your  
10:07:27 17 evidence?

10:07:27 18 A. Yes.

10:07:28 19 Q. I'd like to take you to the  
10:07:29 20 documents that we're discussing now. If we can  
10:07:33 21 go to Exhibit 1427? This is the complaint  
10:07:40 22 letter, I believe, or the petition. And it has  
10:07:47 23 a transcript at the beginning of it,  
10:07:49 24 fortunately.

10:07:50 25 And so if we could scroll down to the

10:07:54 1 bottom of the transcript so we can see who it's  
10:07:57 2 from? So it says it's from "Your obedient  
10:08:09 3 servant Wahbahdik Chief".

10:08:13 4 And then if we go back up it refers --  
10:08:17 5 it's dated June 10th, 1843, and it says Big Bay  
10:08:24 6 as being the location it was sent from.

10:08:32 7 Do you know -- well, am I correct that  
10:08:33 8 Big Bay is essentially the same area as Owen  
10:08:36 9 Sound and the Nawash Reserve?

10:08:39 10 A. That was my assumption, but I'm  
10:08:41 11 actually not certain what Big Bay is.

10:08:54 12 Q. So I want to deal with the  
10:08:55 13 specific complaints in here. So he starts off  
10:08:59 14 talking about the governor being sick. And the  
10:09:03 15 second half of the first sentence is:

10:09:05 16 "[...] we beg of you to tell him  
10:09:06 17 that the line which the surveyor run  
10:09:10 18 between our land and that of the  
10:09:11 19 government is not right. It has been  
10:09:12 20 run on our land, and we wish no  
10:09:15 21 further survey be made there or any  
10:09:17 22 white men to come settle on it until  
10:09:20 23 it is settled to the satisfaction of  
10:09:21 24 our people and the government."  
10:09:26 25 If we scroll down for a moment --

1 well, actually, we read that.

2 So, basically, would you agree that  
3 he's talking about the survey that marked the  
4 boundary between the 45 1/2 land and  
5 essentially --

6 A. That's what I believe.

7 Q. And he's saying that his people  
8 disagree with what the surveyors have marked the  
9 boundary as?

10 A. That's what he's saying.

11 Q. And he's saying he doesn't want  
12 white men to settle on the boundary until  
13 they're satisfied that it's correct?

14 A. Yes.

15 Q. So essentially that paragraph is  
16 not talking about white men squatting; it's  
17 talking about white men perhaps settling on the  
18 wrong side of the boundary because the boundary  
19 is in dispute?

20 A. Yes, in the context of -- in his  
21 dispute about the survey, which, you know,  
22 raised the question about exactly what -- where  
23 the boundary is.

24 Q. Right. Okay. So then he asks:

25 "If they would send us a copy of

10:10:49 1 the written agreement made between our  
10:10:51 2 people and our late father, Sir  
10:10:53 3 Francis Bond Head, and also a copy of  
10:10:55 4 the plan of the tract of land sold by  
10:10:58 5 us to the government at the same time.  
10:11:01 6 We would also be thankful to our  
10:11:02 7 father if he would send us a written  
10:11:04 8 paper that we might show to any white  
10:11:07 9 man who attempts to settle upon the  
10:11:09 10 Indian land. There is a great many  
10:11:11 11 white men who come here and want us to  
10:11:14 12 give them land, and we do not wish to  
10:11:16 13 hear them as we do not want any white  
10:11:19 14 men on our land."

10:11:21 15 Now, that portion of the letter, I  
10:11:22 16 think you were indicating that that was  
10:11:24 17 referring to squatting earlier in your evidence,  
10:11:27 18 is that correct?

10:11:28 19 A. Well, the reason he wants a paper  
10:11:31 20 that he can show any white man who attempts to  
10:11:35 21 settle upon the Indian land would be that he  
10:11:38 22 wants to show it to squatters on Indian land,  
10:11:40 23 because he can't show the paper to white men  
10:11:43 24 settling off the Indian land because it would  
10:11:46 25 have no effect.

10:11:49 1 So the implication here is that white  
10:11:51 2 men are settling on his land and he wants a  
10:11:54 3 piece of paper to show them or that he  
10:11:57 4 anticipates white men will settle on his land.  
10:12:00 5 But he is anticipating that in the context where  
10:12:05 6 they're clearly present in the area and there's  
10:12:08 7 white mobility toward his land. He wouldn't  
10:12:12 8 have asked for this outside of that context.

10:12:17 9 Q. Right. Now, is it possible that  
10:12:18 10 these -- that the two paragraphs are connected?  
10:12:21 11 That he wants to -- wants something he can show  
10:12:25 12 to white people who come that this is the  
10:12:28 13 boundary and don't cross it? Or as opposed to  
10:12:31 14 just don't come up anywhere --

10:12:33 15 A. Certainly it's possible.

10:12:36 16 Q. And so if we scroll down a bit he  
10:12:38 17 says, "There's another thing", and it goes to  
10:12:40 18 the next page. And this is about the alcohol:

10:12:46 19 "[...] that gives us a great deal  
10:12:48 20 of concern which we would beg our  
10:12:48 21 father to put a stop to, that is the  
10:12:48 22 practice of selling liquor to the  
10:12:49 23 Indians at this place. At the time  
10:12:54 24 this village was first made we had  
10:12:56 25 hoped it would be a good and proper

10:12:58 1 place, but the English people at the  
10:13:00 2 other village at Big Bay are all the  
10:13:02 3 time selling it to the Indians, and we  
10:13:04 4 are very sorry to see our young men  
10:13:07 5 always drunk about our village."

10:13:09 6 So he's talking about Big Bay there.  
10:13:12 7 His village and the other village, which is  
10:13:15 8 presumably -- would that be Sydenham or --

10:13:20 9 A. Well, I assumed -- my  
10:13:23 10 understanding is the dispute over the line is  
10:13:25 11 that on the Sydenham end there's a curve in the  
10:13:35 12 river, and somehow the line came out on the  
10:13:38 13 wrong side of the Indian village causing them  
10:13:41 14 distress. So I thought he was talking about  
10:13:43 15 that end of the line.

10:13:45 16 But in any case it is that line  
10:13:46 17 between the two villages, and the village would  
10:13:50 18 be Sydenham or the Saugeen, opposite the river  
10:13:52 19 from the Saugeen village.

10:13:56 20 Q. Now, sorry, I'm getting a bit  
10:13:58 21 confused. Sydenham would be on the east side of  
10:14:01 22 the peninsula, correct?

10:14:02 23 A. Sorry, I'm on the west. So we're  
10:14:05 24 talking about that line from east to west and I  
10:14:08 25 wasn't -- I thought that the dispute about the

1 line was on the western end, and there's a  
2 village there too. It's also 20 miles between  
3 the villages, so they could be easily selling  
4 liquor in both villages.

5 But -- so I think -- I'm not certain.  
6 You know, I think the process we're describing  
7 is the process that's apparent here.

8 Q. And I think that will become  
9 apparent from our next document. But actually  
10 before I get to that document, I want to take a  
11 look for a moment at Chief Wahbahdik.

12 Now, if I could call up Exhibit 2147?  
13 So this document is a manuscript copy of Treaty  
14 72. If we can go to the signature page?

15 So it's a bit hard to read, but what  
16 I'm going to suggest to you is there are  
17 actually two people named "Wahbahdik" who sign  
18 Treaty 72. So on the right side in the fourth  
19 line down it says essentially "John Thomas  
20 Wahbahdik", do you see that?

21 A. Uhm-hmm.

22 Q. And it has a totem of -- it looks  
23 to me like an elk or some kind --

24 A. Yes.

25 Q. And if we could go down farther?

1 Down the page. There we have Thomas Wahbahdik.  
2 Which I think might just be an "X", is that  
3 correct?

4 A. Yes.

5 Q. Okay. So you agree that -- well,  
6 do you know from your research whether either of  
7 these two Wahbahdiks are the Wahbahdik we're  
8 talking about in 1843?

9 A. I did not research the treaty, so  
10 I can't tell you.

11 Q. Okay. If we could go to Exhibit  
12 1489? I hope it's not just black. And scroll  
13 down. That's okay. We'll just go back to the  
14 letters.

15 If we could go to Exhibit 1431, and  
16 this is the letter from Mr. Jarvis to the clerk  
17 of the Executive Council, dated 13th of July,  
18 1843, so following Chief Wahbahdik's complaint.

19 And it's actually a bit of a long  
20 letter, so I'm not going to -- if we could  
21 scroll down a bit so you could have a chance to  
22 read it? If you could take a few moments to  
23 read it to yourself? Unless you're already  
24 familiar with it.

25 A. I've seen it, but I'm not



10:18:35 1 familiar with it.

10:18:47 2 (Witness reading the document.)

10:21:13 3 Q. So if I could summarize the  
10:21:15 4 letter, essentially, it -- and ask you if you  
10:21:17 5 agree with my summary. The letter -- the first  
10:21:21 6 part of the letter explains the problem with the  
10:21:22 7 boundary, correct?

10:21:24 8 A. Yes.

10:21:25 9 Q. And Jarvis essentially agrees  
10:21:29 10 with what he understands to be Wahbahdik's  
10:21:31 11 complaint, correct?

10:21:33 12 A. Yes.

10:21:33 13 Q. And he recommends that the  
10:21:35 14 boundary be surveyed to reflect the  
10:21:41 15 understanding of Chief Wahbahdik?

10:21:44 16 A. Yes.

10:21:45 17 Q. And I think in the midst of that  
10:21:51 18 he does refer to Chief Wahbahdik and his people  
10:21:54 19 being in a village essentially at Owen Sound, is  
10:21:56 20 that correct? Did you see that?

10:21:58 21 A. I'm not recalling that, but I'll  
10:22:01 22 assume you're right.

10:22:04 23 Q. It's easy enough to go up for a  
10:22:05 24 moment. Okay. Stop for a moment.

10:22:28 25 A. It is confusing because they're

10:22:30 1 talking about the mouth of the Saugeen and  
10:22:32 2 Indians living south of the mouth of Saugeen.  
10:22:36 3 So often figuring out geography from these  
10:22:38 4 letters is a little difficult.

10:22:40 5 Q. Well, I think this is the passage  
10:22:41 6 that identifies it.

10:22:42 7 A. Okay.

10:22:43 8 Q. At the bottom it --

10:22:44 9 A. "The foot of Owen Sound".

10:22:46 10 Q. It says -- yes.

10:22:50 11 "It was to be the Indian path  
10:22:51 12 which led from the Chief Wahbahdik's  
10:22:53 13 village at the foot of Owen Sound  
10:22:53 14 [...]"

10:23:05 15 A. Yes.

10:23:05 16 Q. "[...] to the upper part of  
10:23:05 17 Medigwaub's [ph]."

10:23:05 18 Which would be at the Saugeen, the  
10:23:05 19 west side.

10:23:05 20 A. Okay.

10:23:05 21 Q. So -- sorry, if we can go back  
10:23:07 22 down again to the passage dealing with the  
10:23:09 23 problem of encroachers? There we go:

10:23:15 24 "The Chief Wahbahdik next  
10:23:16 25 complains of the intrusion of white

10:23:18 1 people upon the Indian lands in a part  
10:23:20 2 of the country so distant it is next  
10:23:22 3 to impossible to grant this practice,  
10:23:24 4 it can only be done by the appointment  
10:23:27 5 of a person armed with magisterial  
10:23:27 6 authority and employed for that  
10:23:28 7 special purpose, in which case he  
10:23:31 8 would have to reside among the Indians  
10:23:32 9 or upon the tract and would, of  
10:23:34 10 course, expect to be paid liberally  
10:23:37 11 for his services."

10:23:39 12 So Big Bay and Owen Sound at this time  
10:23:48 13 is pretty remote from most -- I'm not sure,  
10:23:52 14 1843 -- okay, Upper Canada at this point?

10:23:55 15 A. Yes.

10:23:57 16 Q. There's no real roads going that  
10:24:00 17 far, is that correct?

10:24:01 18 A. 1843, I believe you have paths.

10:24:04 19 Q. Right. So likely one would  
10:24:06 20 travel by boat to get to Owen Sound, is that  
10:24:09 21 correct?

10:24:09 22 A. Yes, or overland as many of the  
10:24:13 23 settlers who are -- you know, still not there  
10:24:16 24 yet.

10:24:16 25 Q. Right.

10:24:17 1 A. But they came overland. But by  
10:24:19 2 boat or -- easier by boat, harder over land.

10:24:24 3 Q. Okay. So would you agree that  
10:24:25 4 it's not -- that Mr. Jarvis isn't wrong here  
10:24:31 5 that it is difficult to prevent intrusion on  
10:24:36 6 territory which is so distant, is that correct?  
10:24:39 7 Would you agree?

10:24:40 8 A. It's -- in 1843 this territory's  
10:24:46 9 district -- and it's difficult because you have  
10:24:47 10 the intrusion.

10:24:52 11 Just remember, they're asking for the  
10:24:54 12 appointment of a person armed with magisterial  
10:24:57 13 authority, which would be the Indian  
10:24:59 14 Commissioners referred to in the 1839 statute.

10:25:03 15 So these people could be appointed and  
10:25:04 16 could reside in the area and be employed for  
10:25:09 17 that "special purpose", in quotation marks,  
10:25:13 18 residing among the Indians and having the  
10:25:16 19 authority to deal with this problem which Chief  
10:25:18 20 Wahbahdik sees. I don't believe he would have  
10:25:21 21 made it up. He's seeing it.

10:25:27 22 Q. Right. If we could go to Exhibit  
10:25:36 23 1434? Now, do you recall, your friend took you  
10:26:12 24 to a document, and I believe it was this one,  
10:26:14 25 which is the committee's recommendation in

10:26:16 1 response to Chief Wahbahdik. Do you recall  
10:26:18 2 that?

10:26:23 3 A. I've seen the document before. I  
10:26:25 4 don't recall the details of it without reading  
10:26:27 5 it again.

10:26:28 6 Q. Sure. But the gist of the  
10:26:29 7 response is, first of all, to agree to change  
10:26:31 8 the boundary to reflect Chief Wahbahdik's  
10:26:40 9 request, is that correct?

10:26:40 10 A. Yes.

10:26:41 11 Q. And if we could scroll down to  
10:26:42 12 the part that begins, "As soon as"? So there,  
10:26:56 13 this is when it begins to discuss the white  
10:26:59 14 settlers again.

10:27:00 15 And I believe my friend went over this  
10:27:01 16 passage with you. I could be wrong, but I think  
10:27:05 17 she did and so I won't go over it again.

10:27:08 18 But essentially they say -- they agree  
10:27:11 19 that -- or they say basically when Owen Sound  
10:27:20 20 becomes more developed, then magistrates can  
10:27:23 21 take care of the problem, is that correct?

10:27:29 22 A. Yes.

10:27:29 23 Q. And that's what you've identified  
10:27:31 24 in your report as essentially the Executive  
10:27:37 25 Council abdicating their responsibilities, is

10:27:39 1 that correct?

10:27:45 2 A. Well, there's a context here and  
10:27:47 3 I think the question is what's happening. And  
10:27:49 4 the 1839 Act appointing Indian Commissioners  
10:27:54 5 with the power of magistrates, I think they're  
10:27:56 6 confusing the legal title here. They're talking  
10:27:58 7 about literal magistrates, which is another  
10:28:00 8 function.

10:28:00 9 But the Indian Commission would have  
10:28:02 10 the power of magistrate who can reside in the  
10:28:06 11 Village of Sydenham or anywhere else where he  
10:28:10 12 would -- he or she of course, but he would have  
10:28:12 13 the power to enforce the 1839 statute against  
10:28:16 14 trespassers.

10:28:19 15 My point is that at this point it  
10:28:23 16 doesn't happen. And I believe the statute of  
10:28:29 17 1839 anticipates protecting Indian lands from  
10:28:33 18 squatters as needed, not necessarily after  
10:28:36 19 settlement, because after settlement is often  
10:28:40 20 too late. So it's a question of continuing -- a  
10:28:45 21 pattern of enforcement that's determined and  
10:28:48 22 continuous. And that's not happening in this  
10:28:52 23 letter.

10:28:52 24 Q. Would you agree that the  
10:28:54 25 remoteness of the Treaty 72 lands at this point

10:28:59 1 in 1843 offers some protection against squatters  
10:29:03 2 itself?

10:29:04 3 A. It does, except the history of  
10:29:08 4 Upper Canada is that they are moving west. This  
10:29:11 5 is ahead of -- you know, at this time it's ahead  
10:29:15 6 of the line of settlement.

10:29:16 7 But, again, Chief Wahbahdik is  
10:29:19 8 concerned about squatters, wants a piece of  
10:29:21 9 paper to show it to them -- or with settlers,  
10:29:24 10 wants a piece of paper to show it to them.

10:29:26 11 So they're aware of it. The problem  
10:29:28 12 is here, whether or not -- we can't count the  
10:29:31 13 number of settlers who are legal, it hasn't been  
10:29:36 14 surveyed yet, so there are squatters on either  
10:29:40 15 side of the line. But it hasn't been surveyed,  
10:29:42 16 I don't believe.

10:29:43 17 So the problem is here. And the  
10:29:44 18 Indians are requesting magistrates and -- what  
10:29:50 19 is a magistrate appointed -- the Commissioners  
10:29:51 20 are appointed much later in the 1840s or even  
10:29:55 21 early 1850s. I don't have the date exactly in  
10:29:58 22 my head.

10:29:59 23 So it isn't responded to in a  
10:30:02 24 substantive way that would make a difference in  
10:30:05 25 controlling squatters or settlers here and now.

1 Q. Now, Chief Wahbahdik didn't  
2 actually ask for magistrates; he asked for a  
3 piece of paper to show people, didn't he?

4 A. Well, they're talking about the  
5 appointment of magistrates in the paragraph I  
6 have in front of me.

7 Q. Yes, this is --

8 A. I'm trying to contextualize it.  
9 This is the letter from Toronto, right?

10 So there's a discussion about the  
11 appointment of magistrates. I'm trying to  
12 contextualize it.

13 Q. Right. But Chief Wahbahdik in  
14 his letter only asked for something to show  
15 white people to tell them that they didn't  
16 belong there?

17 A. Yeah, it's interesting because he  
18 has no enforcement mechanism. And he either  
19 hadn't thought of it or he maybe didn't feel he  
20 needed it. I can't -- again, I can't  
21 contextualize what his mindset was.

22 I think it's -- it clearly shows, you  
23 know, that he has some kind of a commitment to  
24 this process and doing the right thing as a  
25 chief, getting this letter, you know, in that



1 way.

2 I think he's either unaware of or  
3 just -- I can't say what his awareness is  
4 regarding the 1839 statute, although he  
5 apparently asked for this letter under the 1839  
6 statute.

7 So there's a context here that leaves  
8 me some questions that I can't answer.

9 Q. Okay. If I can take you to  
10 Exhibit 1441? And while I'm calling that up  
11 perhaps I can ask you, to your understanding,  
12 the boundary was changed as was recommended by  
13 the Executive Council, is that correct?

14 A. That's my understanding.

15 Q. So this is a letter dated  
16 September 30th, 1843, so shortly after the  
17 exchange with the -- about Chief Wahbahdik's  
18 letter and the Executive Council. You agree  
19 that this follows that?

20 A. Yes.

21 Q. So this is simply the cover page  
22 to the letter, and it says:

23 "W. Rawson CS", which I believe  
24 is colonial secretary], "September  
25 30th, 1843, the GG", probably Governor

10:32:50 1 General, "authorizes the removal of  
10:32:52 2 the squatter referred to in  
10:32:53 3 Mr. Ironside's letter."

10:32:56 4 And so if we could scroll down a bit?  
10:33:09 5 So I know the other day you mentioned the  
10:33:13 6 problem of looking at letters out of their  
10:33:16 7 context, but if we can -- we'll try and make do  
10:33:18 8 with what we have.

10:33:19 9 So this is a letter from the chief  
10:33:22 10 secretary's office, 30th of September, 1843. It  
10:33:26 11 says:

10:33:27 12 "Sir, Having submitted to the  
10:33:27 13 Governor General your letter of the  
10:33:28 14 23rd September [...] with its enclosed  
10:33:34 15 from Mr. Superintendent Ironside  
10:33:37 16 complaining of the intrusion of two  
10:33:39 17 white settlers on the Wyandot Reserve  
10:33:42 18 in the Township of Anderson."

10:33:46 19 Now, that's around Walpole area, is  
10:33:48 20 that correct?

10:33:48 21 A. I need a map sometimes, but  
10:33:51 22 it's -- I'll accept your word for where it is.

10:33:54 23 Q. Well, if you don't know that's  
10:33:56 24 fine.

10:33:56 25 A. Yeah.

10:33:58 1 Q. "I'm commanded to convey to you  
10:34:01 2 His Excellency's authority for taking  
10:34:04 3 the necessary steps to remove them.  
10:34:06 4 His Excellency, however, desires to be  
10:34:08 5 informed as to the reasons for  
10:34:10 6 allowing Joseph White to hold the  
10:34:13 7 front lot, which he already possesses,  
10:34:16 8 contrary to the rule under which he is  
10:34:16 9 to be ejected from the farm lately  
10:34:19 10 vacated. His Excellency also wishes  
10:34:22 11 you to report out of what fund [...]"  
10:34:30 12 If we can scroll to the next page? So  
10:34:30 13 this is a letter to Mr. Jarvis:  
10:34:32 14 "[...] what fund the costs of  
10:34:34 15 proceedings of this nature have  
10:34:36 16 hitherto been usually defrayed, and  
10:34:39 17 upon what fund you propose to charge  
10:34:41 18 them in the present instance."  
10:34:43 19 And then it's signed by W. Rawson.  
10:34:48 20 So would you agree that this letter  
10:34:50 21 indicates that the government is essentially  
10:34:56 22 instructing the Chief Superintendent Jarvis to  
10:35:01 23 eject somebody from the -- from any reserve  
10:35:05 24 land, is that correct?  
10:35:07 25 A. This is 1843, am I right?

1 Q. Yes.

2 A. Yes, it does, and there's a  
3 context. I mean, remember, from the 1839  
4 statute Jarvis has the authority to do this.  
5 This is the highest level of colonial  
6 administration in Kingston telling him he can do  
7 it so -- four years after the statute.

8 So it's not happening. I also don't  
9 know if this person was really ejected. And  
10 when I speak about, you know, that the 1839  
11 statute wasn't enforced, and that's essentially  
12 what scholars find, doesn't mean no attempt was  
13 ever made anywhere at any time. It's just that  
14 you have a systematic failure of the enforcement  
15 of the statute considering that you have 2,000  
16 squatters on the Grand River Reserve alone. I  
17 mean, we have thousands.

18 So I'd be interested in knowing who  
19 Ironside is and what his problem was with the  
20 Indian authorities at Wyandot. But there is  
21 some specific reason for this.

22 Also a specific reason to involve the  
23 colonial secretary in what can only be called a  
24 "minor local matter" that Jarvis had full  
25 authority in.

10:36:24 1 Q. Correct me if I'm wrong, I think  
10:36:26 2 the letter was referring to Mr. Ironside being a  
10:36:34 3 superintendent.

10:36:35 4 A. Okay. Sorry, I've forgotten the  
10:36:38 5 name -- the names. Sorry, I just would like to  
10:36:39 6 know more about this; where this is from and why  
10:36:41 7 the colonial secretary is involved in the  
10:36:45 8 ejection of a routine squatter and why Jarvis  
10:36:48 9 hasn't done it.

10:36:50 10 You wonder what's going on with the  
10:36:52 11 1839 Act if it takes a letter from the colonial  
10:36:56 12 secretary to activate it.

10:36:58 13 Q. If I could go to the following  
10:36:59 14 letter, which is Exhibit 1442, which is Jarvis'  
10:37:02 15 reply to Rawson?

10:37:22 16 So we'll skip the heading and just go  
10:37:24 17 to the body of the letter. Thank you. If I can  
10:37:27 18 enlarge it, please? Scroll over a bit. So it's  
10:37:43 19 October 3rd, 1843. It says:

10:37:47 20 "Sir, with reference to your  
10:37:48 21 letter of the 30th [I think it might  
10:37:49 22 be] ultimo, requesting me to state for  
10:37:58 23 His Excellency's information the  
10:37:58 24 reason for allowing Joseph White  
10:37:59 25 [...]"

10:38:00 1 In fact, he just repeats the questions  
10:38:03 2 for a bit, so we'll scroll down. Okay. So then  
10:38:14 3 he says, after having repeated the questions, he  
10:38:16 4 was asked by Rawson:

10:38:19 5 "I have to observe that I know  
10:38:20 6 nothing of Joseph White nor of the  
10:38:20 7 manner he acquired possession of one  
10:38:23 8 of the lots."

10:38:39 9 I think that might be "neither". If  
10:38:39 10 you can scroll down? I think the word probably  
10:38:40 11 had something to do with "upon", but anyway:

10:38:42 12 "[...] the Indian reservation  
10:38:45 13 more than is communicated in  
10:38:48 14 Mr. Ironside's letter of the 16th  
10:38:50 15 ultimo, which I transmit to you.

10:38:53 16 With respect to the second  
10:38:54 17 question, the proceedings against  
10:38:55 18 squatters have, since the passing of  
10:39:01 19 the Act, 2nd Victoria, chap 15 [...]"  
10:39:05 20 And that's our 1839 Act, correct?

10:39:07 21 A. Yes.

10:39:08 22 Q. "[...] been under that Act, which  
10:39:11 23 authorizes the Commissioner to impose  
10:39:17 24 fines on offenders and defray the  
10:39:21 25 expenses of the proceedings out of

10:39:23 1 such fines. In the present case of it  
10:39:28 2 if it is found practicable the  
10:39:37 3 proceedings will be under the 2nd  
10:39:45 4 Victoria, chap 15."

10:39:48 5 And that's the extent of the letter.

10:39:50 6 So he's explaining that he's going to be  
10:39:53 7 prosecuting Mr. White pursuant to the 1839 Act,  
10:39:56 8 would you agree?

10:40:04 9 A. It seems so, although he says  
10:40:06 10 he's unsure -- there's some unclarity about --  
10:40:10 11 he's unsure of the person's status, I remember  
10:40:14 12 from the first paragraph. I've just seen the  
10:40:14 13 document.

10:40:14 14 Q. I think it said that he didn't  
10:40:16 15 know anything more than what was in the original  
10:40:19 16 complaint letter.

10:40:20 17 A. Right. Which means he is -- he's  
10:40:22 18 sort of -- he's indicating he doesn't have full  
10:40:23 19 information about whether or not he's really in  
10:40:25 20 violation of the statute, but he does indicate  
10:40:27 21 that he's going to proceed --

10:40:28 22 Q. Okay.

10:40:29 23 A. -- if there's a violation.

10:40:30 24 Q. Okay. If I could go to a  
10:40:32 25 different letter, 1443; it's not about the

10:40:37 1 ejection of Mr. White, but it's a letter from  
10:40:41 2 Mr. Jarvis. And I believe it's a short letter.

10:40:59 3 So it's the second letter on this  
10:41:00 4 document, which is down -- or no, that's  
10:41:03 5 Mr. Baldwin. Oh, wait. No that's the right  
10:41:07 6 one.

10:41:08 7 So it's being written to Mr. Baldwin,  
10:41:11 8 who I believe is the Attorney General, and it's  
10:41:15 9 October 1843. Yes, Attorney General:

10:41:21 10 "I take the liberty of bringing  
10:41:24 11 under your notice the Act of 2nd  
10:41:26 12 Victoria, chapter 15 entitled [...]"  
10:41:29 13 And then it gives the title, which is  
10:41:31 14 quite long, but that's the 1839 Act, correct?

10:41:35 15 A. Yes.

10:41:37 16 Q. So the title actually goes down  
10:41:42 17 to the bottom. But it says -- it basically  
10:41:46 18 says:

10:41:47 19 "The Act is rendered inapplicable  
10:41:50 20 to most cases of intrusion upon the  
10:41:54 21 Indian reservation [...]"  
10:41:55 22 Not sure what the word is, but then it  
10:41:55 23 says:

10:41:55 24 "[...] Western Canada and totally  
10:42:10 25 in respect to Crown lands. The Act



10:42:13 1 was passed upon the suggestion of the  
10:42:15 2 Indian Department to enable it to  
10:42:18 3 protect the Indian reservations from  
10:42:21 4 the intrusion of white settlers, but  
10:42:25 5 as nearly all the Indian settlements  
10:42:27 6 are within tracts which have at some  
10:42:34 7 [...]"

10:42:34 8 I don't know the word:

10:42:34 9 "[...] or other been ceded to the  
10:42:52 10 Crown no proceedings can be taken  
10:42:55 11 against intruders under the present  
10:42:58 12 Act."

10:42:58 13 And then he essentially recommends  
10:43:01 14 amending the Act.

10:43:04 15 Do you agree that this letter is  
10:43:05 16 basically suggesting amendments to the Act?

10:43:08 17 A. That's what he says. I'm sitting  
10:43:09 18 here shaking my head, trying to figure out what  
10:43:15 19 his legal thinking is, and of course I can't do  
10:43:18 20 that.

10:43:20 21 Q. That's fair enough, and we don't  
10:43:21 22 want to do a debate about the legal meaning of  
10:43:25 23 the Act.

10:43:27 24 But Mr. Jarvis feels that at this  
10:43:33 25 point that amendment is necessary to make the

1 Act effective, is that correct?

2 A. He's told that.

3 Q. Yes.

4 A. Again, I'm -- you know, the Act  
5 looks plain enough to me, that's all.

6 Q. The question I'd like to put to  
7 you though is, in your report you suggest that  
8 Mr. Jarvis indicates that the Act was  
9 essentially meant to be symbolic legislation or  
10 provide notice to people. But in these last few  
11 letters we've seen Mr. Jarvis apparently  
12 attempting to bring proceedings or make  
13 proceedings possible, is that correct?

14 A. Again, I would -- I've written a  
15 fair amount about Jarvis in my book, which is 20  
16 years ago, way before this case.

17 It's not clear to me what Jarvis is  
18 doing. In law you -- the phrase "symbolic  
19 legislation" is often when a legislature facing  
20 a significant problem will pass a law that in  
21 response to a -- some public demand or some  
22 need, like an Indian demand, simply not  
23 intending that it be enforced or knowing that it  
24 can't be enforced.

25 And I wondered -- when I started

10:44:53 1 studying the Indian Act of 1839 I read, you  
10:44:57 2 know, literally hundreds of these documents. I  
10:45:00 3 wondered about not finding enforcement. You  
10:45:03 4 know, I would have either -- you know, I would  
10:45:05 5 have expected that it might be enforced or that  
10:45:07 6 a local Indian agent might try.

10:45:10 7 And, again, we're now three years,  
10:45:13 8 four years after the Act, Jarvis is writing his  
10:45:16 9 letters, I'm not sure why he hasn't taken more  
10:45:20 10 action on his own authority, you know, clear  
10:45:24 11 reading of the statute after 1839, whether he's  
10:45:28 12 delaying it intentionally, whether he's --  
10:45:34 13 whether he's honestly confused. I'll  
10:45:37 14 acknowledge that he might have been honestly  
10:45:40 15 confused.

10:45:41 16 Jarvis is a smart person and he's  
10:45:43 17 quite a sophisticated colonial functionary -- I  
10:45:48 18 don't mean to -- bureaucrat, functionary,  
10:45:51 19 official. I don't mean to -- and so he's  
10:45:54 20 engaging that process. It looks puzzling to me.  
10:46:00 21 But, you know, the letter says what it says, and  
10:46:02 22 I agree with you.

10:46:04 23 Q. Now, on a slightly different  
10:46:05 24 topic, when you were speaking with my friend  
10:46:08 25 about the way that Oliphant in 1854 asked the

10:46:17 1 sheriff of Grey County to post notices, you  
10:46:22 2 recall talking about that the other day?

10:46:24 3 A. Yes.

10:46:24 4 Q. And you speak of it in your  
10:46:26 5 report as well I believe, is that right? The  
10:46:29 6 sheriff's --

10:46:31 7 A. Yes.

10:46:31 8 Q. You indicated then and in your  
10:46:32 9 report that there was no reason why Oliphant  
10:46:37 10 couldn't have issued such notices earlier or why  
10:46:39 11 Anderson couldn't have done so at an earlier  
10:46:43 12 date?

10:46:43 13 A. Or anybody -- or any official.

10:46:44 14 Q. Right.

10:46:45 15 A. Could have done so.

10:46:47 16 Q. So I'd like to take you to a  
10:46:48 17 document, Exhibit 1578. And this is a document  
10:47:42 18 dated January 1st, 1846?

10:47:47 19 A. Yes.

10:47:47 20 Q. And it's for the Indian Office:

10:47:49 21 "Notice is hereby given to all  
10:47:51 22 persons who have taken possession of  
10:47:53 23 Indian lands without proper authority,  
10:47:55 24 or as it is usually termed 'squatted'  
10:47:57 25 who did not enter into satisfactory

10:48:00 1 arrangements for the legal possession  
10:48:01 2 of it with the visiting Superintendent  
10:48:03 3 of Indian Affairs of this office  
10:48:06 4 before the 1st day of April next will  
10:48:09 5 be prosecuted for cutting and  
10:48:13 6 destroying timber."

10:48:20 7 And I can't make out the part that was  
10:48:25 8 inserted, but it ends with "ejection".

10:48:28 9 "And all persons are hereby  
10:48:29 10 notified that if they take wood or  
10:48:29 11 timber off, or otherwise destroy the  
10:48:31 12 trees or any Indian lands without  
10:48:33 13 legal permission, they will be  
10:48:35 14 prosecuted for the offence."

10:48:38 15 And it's from Mr. Anderson.

10:48:42 16 So would you agree that Mr. Anderson  
10:48:45 17 did actually take steps to provide notices?

10:48:47 18 A. Well, there's a letter here. My  
10:48:49 19 question is, where would it go? Who saw it?  
10:48:56 20 You know, what prompted the letter? He's  
10:48:59 21 actually talking about timber theft  
10:49:01 22 specifically, although they're called  
10:49:03 23 'squatters'.

10:49:05 24 You know, where is it sent? Which  
10:49:08 25 reserve is this focusing on? Is it sent to

1 every squatter in Upper Canada of which there  
2 are 2,000 apparently on the Grand River Reserve  
3 alone? I doubt it.

4 So this letter written by itself  
5 without any information about who it was sent  
6 to, I agree he wrote it and had some purpose in  
7 mind when he wrote it.

8 You don't know if he's trying to, you  
9 know, create some kind of record again,  
10 administrative record that he did something. I  
11 can't read the marginalia on the far left  
12 without taking -- the word "squatter" appears  
13 over there too.

14 So I don't -- I agree it's a letter,  
15 but sitting in a file it doesn't -- this doesn't  
16 amount to enforcement of the Indian Act seven  
17 years after it's passed against thousands of  
18 squatters and thousands of timber thieves.

19 So in relationship to the problem this  
20 would -- I would read it more as evidence of  
21 nonenforcement.

22 Going on to the complaint of  
23 Oliphant -- or that Oliphant, you know, wanted  
24 to post the letter after the cession, the 1839  
25 statute requires -- I mean, the beginning of the

1 enforcement action is that the Commissioner is  
2 supposed to give people 30 days' notice to  
3 vacate. And then the -- it becomes an offence  
4 punishable by jail or fine, I believe a 20-pound  
5 fine and 30 days in jail, something like that.

6 So the first Act is to notify people.  
7 And if squatters happily leave or nonviolently  
8 leave there's no offence under the Act.

9 So the cheapness -- the cheapness, the  
10 inexpensiveness of writing these notices and  
11 serving them on people is pretty apparent under  
12 the Act. And why -- this isn't that kind of a  
13 notice, unless I see who got it and what they  
14 did in 30 days or if they just ignored it,  
15 which, you know, I'm -- I mean, I'm -- I mean,  
16 if I were a squatter and this is the first thing  
17 I heard from the government I might ignore it,  
18 you know, so --

19 Q. Now, without acting -- asking for  
20 any interpretation beyond what is stated plainly  
21 in the Act, isn't the first step -- first of  
22 all, there is no provision at all for a general  
23 notice, is there?

24 A. No, that was Oliphant's own  
25 initiative. There's no reason you can't have a

1 general notice, but the general notice wouldn't  
2 satisfy the Act, as I read it.

3 Q. Right. So the Act actually  
4 requires the first step to be a complaint, is  
5 that correct?

6 A. Yes, you're right.

7 Q. That once the complaint is made  
8 then notice is given?

9 A. Right.

10 Q. If I could go to Exhibit 1108,  
11 please? Take a moment to read that.

12 A. I'll take a moment. I've seen it  
13 before. Do you know the date of this?

14 Q. At the bottom it says 25th of  
15 February, 1836.

16 A. Before the Act.

17 (Witness reading the document.)

18 Okay.

19 Q. So scrolling up again, so this,  
20 as you noted, was dated February 25th, 1836?

21 A. Yes.

22 Q. Which is prior to the Act?

23 A. Prior to the Act.

24 Q. And it's also prior to the Treaty  
25 45 1/2 surrender?



10:53:49 1 A. Yes, it is. Right.

10:53:50 2 Q. So when it's speaking of the  
10:53:51 3 Huron Reserve it's talking really about all the  
10:53:54 4 45 1/2, 72 lands together, is that correct?

10:54:01 5 A. I'm unfamiliar -- you know, I'm  
10:54:01 6 not sure what they call the "Huron Reserve". I  
10:54:05 7 agree it's in the western district and  
10:54:08 8 apparently would include these lands.

10:54:15 9 Q. But in any event, it's public  
10:54:17 10 notice --

10:54:18 11 A. 1836.

10:54:18 12 Q. -- against squatters,  
10:54:19 13 essentially?

10:54:19 14 A. Yes. And, remember, I'd said  
10:54:25 15 when I talked about the statute of 1839 in my  
10:54:28 16 reading, and I get into trouble, you know, I  
10:54:29 17 don't want to talk about law, but the general  
10:54:33 18 law of trespass would have covered it. And this  
10:54:36 19 obviously is relying on other law in the common  
10:54:39 20 law; and is maybe the equivalent of a "no  
10:54:45 21 trespassing" sign.

10:54:47 22 But I don't know -- again, I don't  
10:54:48 23 know where it was posted, how many of them were  
10:54:52 24 posted, whether or not -- and whether or not  
10:54:54 25 people paid any attention to them. It's a

10:54:56 1 document.

10:55:09 2 Q. If I could go to Exhibit 1448?  
10:55:12 3 That doesn't appear to be what I'm looking for.

10:55:30 4 If I could go to Exhibit 1586? So  
10:55:52 5 this is -- the letter we had talked about, which  
10:56:02 6 we were just referring to a few moments ago from  
10:56:05 7 Anderson, which you pointed out was not a notice  
10:56:09 8 but a letter, was in January of 1846.

10:56:13 9 And this is dated 2nd of February,  
10:56:14 10 1846. If we could scroll down to read it? And  
10:56:22 11 this says:

10:56:22 12 "Indian lands. Indian Office.  
10:56:24 13 Notice is hereby given to all persons  
10:56:26 14 that have taken possession of Indian  
10:56:28 15 land without proper authority, or as  
10:56:30 16 usually termed 'squatted', who do not  
10:56:32 17 enter into satisfactory arrangements  
10:56:32 18 for the legal possession of it with  
10:56:34 19 the visiting superintendent."

10:56:38 20 Essentially it's the same text as what  
10:56:41 21 we had seen in the letter?

10:56:43 22 A. Yes.

10:56:49 23 Q. We can scroll and see if there's  
10:56:49 24 anything at the bottom.

10:56:49 25 A. This is --

1 Q. So this is a public notice  
2 following the letter that we saw a few moments  
3 ago?

4 A. Yes. Again, it looked to me like  
5 this might have been published in a newspaper,  
6 or is it a poster? I can't tell. My question  
7 would be, where did this go? Who put it up?  
8 Did anybody follow it? You know, people  
9 commonly ignore, for example, "no trespassing"  
10 signs. And then was anybody prosecuted under  
11 it? So this would be --

12 (Very loud sound of glass shattering  
13 in the courtroom.)

14 THE COURT: Well, that was  
15 fascinating. Okay. So just interrupting, what  
16 seems to have happened is the glass has broken,  
17 and happily to no effect.

18 But it doesn't look -- I think what we  
19 need to do is have them come and remove it.  
20 Both the witness and Mr. Beggs were trying to  
21 get their jobs done.

22 Apologies to everyone.

23 What we're going to do is take a  
24 break. We'll take at least the 20-minute  
25 morning break. But we'll report back through

10:58:07 1 staff about the need to correct this before  
10:58:08 2 anyone actually might be injured by the breaking  
10:58:12 3 of glass.

10:58:14 4 And we'll have to get them to inspect  
10:58:16 5 them all. In the meantime can we please turn  
10:58:24 6 those ones off?

10:58:32 7 So, again, one of those bad things  
10:58:34 8 that happened that luckily had no immediate  
10:58:36 9 consequences, and we'll try and make adjustments  
10:58:38 10 to ensure that that continues to be the case,  
10:58:41 11 and we'll go from there. Very interesting  
10:58:43 12 indeed.

10:58:43 13 All right. Adjourned at least for 20  
10:58:43 14 minutes.

15 --- Whereupon the proceedings were  
16 adjourned at 10:58 a.m.

17  
18  
19  
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21  
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24  
25

REPORTER'S CERTIFICATE

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

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

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

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



PER: HELEN MARTINEAU  
CERTIFIED SHORTHAND REPORTER

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