

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

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VOL 51 DAY 51  
October 07, 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

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26 --- This is VOLUME 51/DAY 51 of the trial  
27 proceedings in the above-noted matter, being held  
28 at the Superior Court of Justice, Courtroom 5-1,  
29 330 University Avenue, Toronto, Ontario, on the 7th  
30 day of October, 2019.  
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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.  
& Alexandra Collizza, Esq.,

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

REPORTED BY: Deana Santedicola, RPR, CSR, CRR

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4310: "First Enclosure No. 60, From  
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4311: Document entitled "Copy of a  
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4312: Document entitled "An Extract  
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6405:5

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09:52:38 1 -- Upon commencing at 10:00 a.m.

09:19:53 2  
10:00:57 3 THE COURT: Good morning, Mr. Beggs.

10:01:00 4 Just before we reconvene, I said I  
10:01:03 5 would put on the record, on Friday the glass  
10:01:05 6 portion of one of our light fixtures decided to  
10:01:07 7 crack and fall, to great noise. Happily, no one  
10:01:13 8 was affected by it directly, but I had all the  
10:01:16 9 other similar glass components removed, and as a  
10:01:21 10 result of that, we adjourned to this morning.

10:01:24 11 And we continue this morning with Mr.  
10:01:27 12 Beggs' cross-examination, unless there is some  
10:01:29 13 preliminary matter, sir, that you wish to raise.

10:01:33 14 MR. BEGGS: No, Your Honour.

10:01:33 15 THE COURT: Please go ahead.

10:01:36 16 MR. BEGGS: If I could ask Professor  
10:01:38 17 Harring to return to the stand, please.

10:01:38 18 PROFESSOR SIDNEY HARRING; Under Prior  
10:01:41 19 Affirmation.

10:01:41 20 CROSS-EXAMINATION BY MR. BEGGS

10:01:41 21 (CONT'D):

10:01:47 22 Q. Good morning, Professor.

10:01:49 23 A. Good morning.

10:01:49 24 Q. Before the interruption on Friday,  
10:01:56 25 you were in the middle of an answer, so I want to

1 give you an opportunity to finish your answer or  
2 add anything that you wish before we finished. So  
3 I am going to take you there and repeat what you  
4 said.

5 A. Okay.

6 Q. So if I could go to Exhibit 1586,  
7 this was the document we were looking at. Now,  
8 prior to looking at this document, we looked at the  
9 letter which had similar language; is that correct?

10 A. Right.

11 Q. So the questions just prior to the  
12 interruption were, my question was:

13 "Question: Essentially it's  
14 the same text as what we had seen in  
15 the letter?"

16 And you replied "Yes." And then my  
17 question was:

18 "Question: So this is a public  
19 notice following the letter that we  
20 saw a few moments ago?"

21 And the rough transcript has your  
22 answer as:

23 "Answer: Yes, again, it looked  
24 to me like this might have been  
25 published in a newspaper or is it a



1 poster? I can't tell. My question

2 would be, where did this go? Who

3 put it up? Did anybody follow it?

4 You know, people commonly ignore 'no

5 trespassing' signs. And then was

6 anybody prosecuted under it? So

7 this would be --"

8 And that was the interruption.

9 So I wanted to give you the chance if

10 you wanted to finish that answer or add to it. Do

11 you have anything to add?

12 A. Thank you. I have of course

13 forgotten where I was when this happened.

14 You know, as a legal historian, I am

15 always concerned with the effect of law and legal

16 notices, so I am saying from this document I simply

17 can't tell what use was put of it at all, or

18 whether it had any effect at all.

19 Q. Okay, thank you. I am going to go

20 to the subject of various illustrations of

21 individual squatters you gave in your report, so I

22 would like to go to your report at Exhibit 4276.

23 If we could go to page 24 of your report and scroll

24 down, at the bottom of the page it refers to:

25 "The Township of Arran,

1 immediately to the south of Amabel,  
2 presents a similar history:"

3 And there is a quote:

4 "Arran's pioneer settler was  
5 Henry Boyle; his coming into Arran  
6 antedating by a year that of the  
7 surveyors."

8 If we could scroll down. And so I'm  
9 just going to skip the rest of the text, which I  
10 believe was from Robertson; would that probably be  
11 correct?

12 A. I would have to look at the  
13 footnote, but I believe that is correct.

14 Q. Okay:

15 "This narrative as well is  
16 revealing. Henry Boyle is not  
17 specifically referred to as a  
18 'squatter', but it is clear that in  
19 settling his farm a year ahead of  
20 the surveyors that he was a squatter  
21 and could not have had any legal  
22 right to his lands."

23 Now, the Township of Arran was south of  
24 the Half Mile Strip; is that right?

25 A. Right.

1 Q. So this wouldn't have been a  
2 squatter on what was then considered Indian lands;  
3 is that right?

4 A. Not on the Treaty 72 lands, no.

5 Q. Okay. And if we could scroll  
6 down. So there's more squatters also in the  
7 Township of Arran, so those also are not in the  
8 Treaty 72 lands?

9 A. No.

10 Q. If we could go to page 27, I am  
11 just going to summarize here. So you mention two  
12 individuals in the Village of Tara, Richard Berford  
13 and John Hamilton. And the Village of Tara is  
14 south of the Treaty 72 lands; it is not on the  
15 Treaty 72 lands, correct?

16 A. Right.

17 Q. And I think a little farther down,  
18 Edward Boulton and Greenock, Greenock is also south  
19 of the Treaty 72 lands?

20 A. Right.

21 Q. And a little farther, at the  
22 bottom, we have the McNally brothers who are in  
23 Brant Township, and that, again, is south of the  
24 Treaty 72 lands?

25 A. Yes.

1 Q. Now, I want to go up to page 17 of  
2 your report and near the bottom of the page. This  
3 is a discussion of the Half Mile Strip, and you  
4 refer to some squatters on the Half Mile Strip and  
5 you give the examples of Thomas Joynt and Richard  
6 Berford, both of whom wrote letters in 1856.

7 Now, the last sentence says:

8 "While we cannot be certain  
9 when each squatter took up his land,  
10 before or after the surrender, the  
11 Indians had complained of settler  
12 encroachment as early as 1843, so it  
13 is likely that at least some of  
14 these squatters had been on Indian  
15 lands at the time of the surrender."

16 So is what you are saying that because  
17 of Wahbahdick's complaint of 1843, we can conclude  
18 that squatters were on the Half Mile Strip in 1850?

19 A. I don't think that is what I said.  
20 Trying to precisely locate squatters from the  
21 descriptions at the time is difficult.

22 So if you could scroll back up, from  
23 the Squatter Commission Reports I can identify  
24 these people were squatting on lots 56 and 57 in  
25 the Half Mile Strip before it was ceded. I

10:08:54 1 don't -- it is extremely unlikely they were there  
10:08:58 2 in 1843 when Chief Wahbahdick's report -- when  
10:09:03 3 Chief Wahbahdick complained of squatters. More  
10:09:05 4 likely they came a year or two before the Half Mile  
10:09:09 5 Strip was ceded and surveyed.

10:09:12 6 Q. Well, we don't know that they were  
10:09:14 7 there in advance of the cession at all, do we? It  
10:09:18 8 says that they are there in 1856 and the surrender  
10:09:22 9 had happened in 1851?

10:09:25 10 A. That is right.

10:09:32 11 Q. Okay. If I could go to page 25  
10:09:37 12 where you discuss an individual named Mr. Johnson.  
10:09:54 13 Actually, I have the wrong page.

10:09:56 14 Sorry, I know it is footnote 85, if we  
10:10:22 15 could go to that. Okay, there we are.

10:10:32 16 "There are more accounts from  
10:10:33 17 deeper into Saugeen lands. Someone  
10:10:35 18 known only as 'Mr. Johnson' had his  
10:10:37 19 property damaged by Colpoy Bay  
10:10:39 20 Indians sometime before 1855.  
10:10:41 21 Johnson was likely a squatter  
10:10:44 22 considering there was no way he  
10:10:46 23 could have had a legal interest in  
10:10:47 24 land near Colpoy Bay at that time.  
10:10:50 25 Local whites were also selling

10:10:52 1 liquor to the Indians at Colpoy

10:10:54 2 Bay."

10:10:55 3 So I would like to look at the context  
10:11:03 4 of Mr. Johnson's presence. If I could go to  
10:11:09 5 Exhibit 2544, so this is a letter, I believe it is  
10:11:37 6 from Mr. Gibbard, who we heard about with the  
10:11:41 7 Manitoulin incident; is that correct? Well,  
10:11:43 8 Mr. Gibbard was the individual who disappeared in  
10:11:47 9 the Manitoulin incident; is that correct?

10:11:50 10 A. I believe so, yes.

10:11:56 11 Q. So we'll scroll down and just make  
10:11:58 12 sure that is him. So yes, signed William Gibbard,  
10:12:02 13 and it seems to be to Mr. Bartlett. So if we could  
10:12:07 14 go up, it is October 3rd, 1859:

10:12:13 15 "I take this the first  
10:12:15 16 opportunity since I left Cape Croker  
10:12:18 17 of writing to inform you that  
10:12:19 18 William Johnston the Lessee of  
10:12:22 19 Barrier or Rabbits [sic] Island, at  
10:12:23 20 the entrance of Melville Sound,  
10:12:25 21 pointed out to me on the spot, his  
10:12:26 22 reels and posts wantonly cut into  
10:12:29 23 small pieces undoubtedly done by the  
10:12:31 24 Cape Croker Indians, they had  
10:12:32 25 previously threatened and took

1 advantage of a few days absence."

2 I don't think we need to go further,  
3 but from that statement it appears Mr. Johnston has  
4 leased a particular island; is that correct?

5 A. I have not seen this document, but  
6 from this document it appears that that's the case.

7 Q. Okay. And if we could go to  
8 Exhibit 2547. So this is a letter from  
9 Mr. Bartlett enclosing the letter from Mr. Gibbard.  
10 If we could scroll down, could you scroll down to  
11 see who it is to? Okay, it is to Mr. Pennefather.

12 So if we could go up again, it says --  
13 can we get the date there, October -- well, it is a  
14 bit of a mess, it might be October 8th, it might be  
15 October 7th:

16 "Sir, I have just received a  
17 letter from Mr. Gibbard the Overseer  
18 of Fisheries, copy of which I  
19 enclose, stating that the lessee of  
20 the Rabbit Island Fishery has been  
21 interfered with by, as he supposes,  
22 the Cape Croker Indians."

23 I don't think we need to go any  
24 further. So again, this confirms that -- would you  
25 agree that it confirms that the Indian Department

10:14:36 1 seems to regard Mr. Johnston as a lawful lessee of  
10:14:40 2 this island?

10:14:41 3 A. Yes, I have not seen this  
10:14:42 4 document, but it appears to confirm that.

10:14:45 5 Q. Okay. If we could go back to your  
10:14:47 6 report for a moment, I just want to check, so that  
10:14:55 7 was footnote 85. If we could scroll to the bottom  
10:14:58 8 where footnote 85 is, I just want to see which  
10:15:02 9 source you are relying on. So footnote -- oh, wait  
10:15:08 10 a minute, this is one of the ones that has the  
10:15:11 11 errata.

10:15:12 12 So if we could scroll down to the  
10:15:32 13 errata. This is Exhibit 4277, the errata, and for  
10:15:36 14 footnote 85, it says:

10:15:47 15 "For damage to Mr. Johnson  
10:15:49 16 property see, Joseph Jones,  
10:15:52 17 Interpreter, Cape Croker to W.R.  
10:15:54 18 Bartlett, visiting Superintendent of  
10:15:55 19 Indian Affairs, October 24, 1859."

10:15:58 20 And then I am not sure, but it seems to  
10:16:06 21 be the same citations, right behind it. So we'll  
10:16:13 22 go to this letter, the October 24, 1859 letter, it  
10:16:16 23 is Exhibit 2548, and if we could enlarge it a bit,  
10:16:37 24 this is to Mr. Bartlett, "Reply of Cape Croker  
10:16:41 25 Indians to Mr. Bartlett" it says at the top:



1 "Dear Sir,

2 We have just received your  
3 letter of the 8th Inst. informing us  
4 about our young men being in the  
5 habit of breaking the laws of the  
6 Country. We are very sorry for that  
7 as we don't like that ourselves, and  
8 if we know them whoever they may be,  
9 we should in a very short time  
10 report them to the magistrates  
11 [...]"

12 If we could just scroll down a bit and  
13 I will let you read a bit of this. If you could  
14 read it to yourself for a few moments.

15 A. I'm sorry, it is a little hard to  
16 read.

17 [Witness reviews document.]

18 I think I have the gist of it.

19 Q. Okay, so essentially the author is  
20 expressing his regret for the damage to  
21 Mr. Johnson's property and he doesn't condone what  
22 was done; is that correct?

23 A. Right.

24 Q. Although he has a suspicion it  
25 might have been the Manitoulin Island Indians?

10:19:08 1 A. Right, they have no idea there.

10:19:10 2 Q. Right. So between these three  
10:19:14 3 letters, there is no sign that either the Crown or  
10:19:15 4 the First Nations regarded Mr. Johnson as not  
10:19:19 5 having a right to be there; would you agree?

10:19:22 6 A. Yes.

10:19:22 7 Q. So when you say in your report  
10:19:28 8 that he was likely a squatter, in fact there is  
10:19:33 9 some evidence that he wasn't; would you agree?

10:19:35 10 A. There is evidence that he wasn't.

10:19:38 11 Q. Okay, and just a thing, I think it  
10:19:42 12 might be a typo, you said that he has property  
10:19:45 13 damaged sometime before 1855. Presumably that is a  
10:19:48 14 typo because these letters are all 1859 that you  
10:19:52 15 cited?

10:19:52 16 A. I'm unsure of the timeline.

10:19:56 17 Q. If you could go to your footnote  
10:19:58 18 85 again in your report. So the letters you cited  
10:20:01 19 were from October 24, 1859?

10:20:05 20 A. Okay.

10:20:05 21 Q. So presumably it was sometime  
10:20:07 22 before 1859; correct?

10:20:08 23 A. Right.

10:20:09 24 Q. Okay. If I could go back to your  
10:20:38 25 report and it is to deal with the individual you

1 identified as Mr. Gerdony, I think that is page 32  
2 of your report, at the very bottom.

3 Now, the --

4 THE COURT: Did you say 32?

5 MR. BEGGS: Yes, page 32.

6 THE COURT: I am not seeing that  
7 reference.

8 THE WITNESS: I am not either.

9 MR. BEGGS: Sorry, the name Gerdony  
10 appears on the second page, but the paragraph  
11 begins as the last paragraph on page 32.

12 THE COURT: I see it now, yes.

13 BY MR. BEGGS:

14 Q. It begins:

15 "Indian Superintendent Anderson  
16 the same year [...]"

17 And I am actually not clear what "the  
18 same year" is from this context, but we'll keep  
19 going:

20 "[...] wrote a report on a plan  
21 to construct a wharf, itself of  
22 dubious legality [...]"

23 Can you tell us why you wrote that a  
24 plan to construct a wharf might be of dubious  
25 legality?

10:21:48 1 A. Well, I was questioning why they  
10:21:50 2 would construct a wharf on -- this is Indian land.

10:21:53 3 Q. Right, okay.

10:21:53 4 "[...] but the report ended  
10:21:54 5 with two related matters that seem  
10:21:57 6 extraneous, but probably reflecting  
10:21:59 7 the disorganized state of land  
10:22:01 8 occupation by squatters in the area,  
10:22:03 9 apparently referring to lands in  
10:22:04 10 Nawash because he was writing about  
10:22:07 11 the Owen Sound area (and not the  
10:22:10 12 Huron side of the peninsula).

10:22:13 13 Anderson referred to a 'head  
10:22:14 14 man' -- and I am actually going to  
10:22:17 15 suggest the words say "hired man"  
10:22:17 16 when we get to it -- "working for  
10:22:19 17 Sawyer, a Saugeen, evidently as some  
10:22:19 18 kind of scheme to build a wharf on  
10:22:19 19 Indian land:"  
10:22:21 20 And this is a quote from Mr. Anderson's

10:22:25 21 report:

10:22:25 22 "I do not know who  
10:22:28 23 [Mr. Gerdony] is, but I suppose him  
10:22:29 24 to be some straggler in hopes to  
10:22:32 25 reap a benefit from the Indians

1 Reserve - but to allow the Indians  
2 to sell cord wood indiscriminately  
3 to the whites would in my opinion  
4 open a door for every class of  
5 trespassing upon their lands and put  
6 the Department to endless trouble  
7 and expenses."

8 You then go on to say straggler might  
9 well mean squatter?

10 A. It is a term I hadn't seen before,  
11 and a number of terms I used refer to people who  
12 are just present on Indian land without a legal  
13 purpose, so I don't know what he meant by  
14 straggler, but we have a white person here, a  
15 non-Indian, operating on Indian land.

16 Q. Okay.

17 A. Over some period of time, not just  
18 -- you don't build a wharf in a day.

19 Q. Okay. Now, the name Gerdony, the  
20 name that appears in the letter is actually quite  
21 difficult to read. I would like to take you to the  
22 Robertson book, page 275, "The History of the  
23 County of Bruce," that is Exhibit 4286. If we  
24 could go to page 275. That doesn't look right.  
25 Oh, there it is. So near the bottom of what we can

1 see on the screen, near the middle:

2 "The largest manufacturing  
3 industry in Tara, the foundry and  
4 agricultural implement works of W.A.  
5 Gerolamy, was founded in 1857."

6 So I am actually going to suggest to  
7 you when we see the letter that the name would be  
8 Gerolamy as referred to in Mr. Robertson's book.  
9 We'll take a look at the letter now. If we could  
10 go -- to put this in the context, I'm going to  
11 start with a couple of letters before your  
12 citation, so I'm going to go to SC1212.

13 So this is a letter from Reverend  
14 Conrad Van Dusen to Mr. Pennefather dated December  
15 17, 1856, and I would like to ask that this be made  
16 the next exhibit.

17 THE COURT: Mr. Registrar?

18 THE REGISTRAR: Exhibit No. 4303.

19 EXHIBIT NO. 4303: Letter from Reverend  
20 Conrad Van Dusen to Mr. Pennefather  
21 dated December 17, 1856.

22 BY MR. BEGGS:

23 Q. Now, he has the usual  
24 introduction, but the second sentence says:

25 "I beg now to state that a

10:26:08 1 severe frost on 31st of August last  
10:26:13 2 cutting off nearly the whole of the  
10:26:15 3 Indians crop of potatoes, and now  
10:26:19 4 many of their families are in a  
10:26:20 5 state of complete destitution. I  
10:26:25 6 advised them to cut cord wood  
10:26:28 7 instead of strolling and begging  
10:26:30 8 about the country like indolent  
10:26:33 9 paupers. Several commenced chopping  
10:26:35 10 wood and by this means began to  
10:26:37 11 cultivate habits of industry and  
10:26:38 12 realized an ample amount for the  
10:26:40 13 support of their families. Also  
10:26:41 14 some time ago, David Sawyer, one of  
10:26:46 15 the Indians, bought of the rest of  
10:26:48 16 the band a piece of their land in  
10:26:50 17 front of the mission house where he  
10:26:55 18 agreed to build a wharf on which to  
10:26:57 19 use this cord wood, and accordingly,  
10:27:00 20 Sawyer hired Mr. [...]"  
10:27:08 21 And that is where it is very difficult  
10:27:10 22 to read, but I believe it might be:  
10:27:13 23 "[...] Mr. Gerolamy, a white  
10:27:14 24 man, to erect for him the wharf, a  
10:27:17 25 work which the Indians had in two

10:27:18 1 instances commenced but never  
10:27:20 2 completed. In view of the wharf  
10:27:26 3 being made, the Indians began  
10:27:28 4 chopping cord wood as above stated,  
10:27:31 5 but mischievous persons have stated  
10:27:34 6 that if the Indians sell cord wood  
10:27:36 7 to white men, they will forfeit  
10:27:37 8 their annuities and that such white  
10:27:40 9 men will be prosecuted. The  
10:27:40 10 consequence is that every Indian has  
10:27:42 11 laid down his axe, fearing to incur  
10:27:45 12 the displeasure of the Indian  
10:27:47 13 Department. They have now been idle  
10:27:48 14 about a week, and many of them have  
10:27:49 15 nothing to eat except what they beg  
10:27:51 16 of their neighbours. If His  
10:27:55 17 Excellency the Governor General will  
10:27:57 18 be pleased to direct that a few  
10:27:58 19 lines be sent encouraging them to  
10:28:00 20 continue their industry cutting cord  
10:28:02 21 wood for sale to anyone who will pay  
10:28:04 22 them the highest price, the wharf  
10:28:05 23 may be [...]" -- and I am not sure  
10:28:08 24 what the word is -- "be completed  
10:28:14 25 for the Indians, on which the wood



10:28:14 1 may be sold, it will greatly serve  
10:28:16 2 the cause of humanity and influence  
10:28:17 3 the Indians to earn by their own  
10:28:19 4 labour a competency for themselves  
10:28:21 5 and their families, without which,  
10:28:24 6 unless supported by the benevolence  
10:28:26 7 of their neighbours, many of them  
10:28:29 8 must perish with hunger during the  
10:28:31 9 winter."

10:28:31 10 [As read.]

10:28:31 11 And then he just asks for an urgent  
10:28:34 12 reply.

10:28:35 13 A. Who signs this? Okay, got it.

10:28:37 14 Q. So it is Conrad Van Dusen, the  
10:28:41 15 missionary.

10:28:43 16 And so the next letter in the chain is  
10:28:47 17 SC1215.

10:29:29 18 A. I can't read this.

10:29:30 19 Q. I have handwritten my own version.

10:29:34 20 A. I can't read it.

10:29:35 21 Q. But it is dated 24th of December  
10:29:38 22 1856. It says Reverend C. Van Dusen in the top  
10:29:44 23 left, and Pennefather as the author.

10:29:47 24 And it says:

10:29:51 25 "I am directed to acknowledge

10:29:52 1 your letter of the 17th Alt, His  
10:29:57 2 Excellency regrets the privations to  
10:29:58 3 which the Nawash Indians are exposed  
10:29:58 4 and would rejoice if by their own  
10:30:01 5 labour and exertion such distress  
10:30:02 6 were alleviated. At the same time,  
10:30:06 7 having regard to the protection of  
10:30:10 8 their property and observance of the  
10:30:12 9 law, His Excellency will not permit  
10:30:15 10 any [...]" - and I don't know that  
10:30:17 11 word - "to go on the reserve for the  
10:30:20 12 purpose of cutting or pulling out  
10:30:22 13 any timber of any sort. The Indians  
10:30:25 14 have full permission to sell any  
10:30:28 15 cord wood which they cut themselves  
10:30:29 16 and draw out with their own [...]"  
10:30:29 17 [As read.]

10:30:32 18 And I don't know what that last word  
10:30:34 19 is.

10:30:36 20 So would you agree that Mr. Pennefather  
10:30:38 21 has said that whatever the Indigenous people cut  
10:30:45 22 themselves is fine; just not allowing white people  
10:30:48 23 to come on and cut?

10:30:50 24 A. Cut and haul.

10:30:51 25 Q. Right.

10:30:52 1 A. Which means that the -- you have  
10:30:58 2 all kinds -- this is a complicated situation, you  
10:31:01 3 know, made worse by the fact that people are  
10:31:02 4 starving.

10:31:04 5 It was common near reserves for  
10:31:10 6 different kinds of white businessmen to try to  
10:31:12 7 engage in, you know, let's just say quasi legal or  
10:31:19 8 illegal extractive activities with the Indians, so  
10:31:22 9 if the Indians cut the timber and the whites then  
10:31:25 10 buy it from them and haul it off, then the whites  
10:31:27 11 haven't taken the timber, the Indians did.

10:31:29 12 The problem is that the wharf and that  
10:31:34 13 part of the operation, I think the -- am I right  
10:31:40 14 the commissioner said it was illegal, he didn't  
10:31:42 15 give permission for that. If the Indians haul it  
10:31:45 16 off the reserve themselves, he seems to think it is  
10:31:49 17 okay, and, you know, I'll accept his interpretation  
10:31:53 18 of it.

10:31:53 19 But you do have to be careful of  
10:31:56 20 various schemes where you have a non-Indian trying  
10:32:02 21 to set up, you know, some kind of a ruse around a  
10:32:08 22 business relationship with an Indian, even, for  
10:32:11 23 example, you know, whether Sawyer or Gerolamy or  
10:32:15 24 whatever his name is was really building the wharf,  
10:32:19 25 right.

10:32:19 1 So all I can see is that something very  
10:32:23 2 complicated is going on and the Indian Department  
10:32:25 3 does not give its approval to the wharf and that  
10:32:30 4 part of the operation.

10:32:32 5 At the same time, there are other  
10:32:37 6 issues, you know, the issue of Indians cutting cord  
10:32:40 7 wood, which is taking Indian property which is the  
10:32:44 8 timber on reserves and hauling it -- cutting it and  
10:32:48 9 hauling it off and selling it to whites, leaving  
10:32:50 10 the reserves, of course, without timber.

10:32:52 11 So it is complicated. I think we get  
10:32:56 12 the gist of what is going on here, but reading  
10:32:58 13 between the lines, it doesn't look to me like the  
10:33:07 14 wharf and Mr. -- I don't know what his name is --  
10:33:09 15 Mr. Gerolamy, he is a local white businessman,  
10:33:14 16 that's all I can say. I'm not certain the wharf is  
10:33:16 17 legal.

10:33:17 18 Q. Now, I don't believe, in what I  
10:33:19 19 just read, that Mr. Pennefather commented one way  
10:33:21 20 or another about the wharf, did he?

10:33:23 21 A. I thought he said the Indians had  
10:33:26 22 to haul it?

10:33:29 23 Q. Well:

10:33:32 24 "[...] will not permit any"  
10:33:33 25 something, and we don't know what

10:33:34 1 the word is, "to go on the reserve  
10:30:19 2 for the purpose of cutting or  
10:30:21 3 pulling out any timber of any sort.  
10:30:24 4 The Indians have full permission to  
10:30:27 5 sell any cord wood which they cut  
10:30:29 6 themselves and draw out with their  
10:30:30 7 own [...]"

10:33:45 8 And again, a word that we can't make  
10:33:47 9 out. So --

10:33:48 10 A. I was reading "draw out" to mean  
10:33:51 11 off the reserve.

10:33:51 12 Q. Right.

10:33:51 13 A. That may not be the right reading.

10:33:54 14 Q. Well, let's go to the letter that  
10:33:56 15 you do quote in your report, and that is SC1216 --  
10:34:05 16 oh, sorry, I would actually like to make this  
10:34:10 17 letter dated December 24th, 1856, from Pennefather  
10:34:14 18 to Van Dusen, the next exhibit, Your Honour.

10:34:17 19 THE COURT: Mr. Registrar?

10:34:19 20 THE REGISTRAR: Exhibit No. 4304.

10:34:10 21 EXHIBIT NO. 4304: Letter dated  
10:34:11 22 December 24th, 1856, from Mr.

10:34:14 23 Pennefather to Reverend C. Van Dusen.

10:34:26 24 MR. BEGGS: So if I could go to the  
10:34:27 25 letter SC1216.

1 THE COURT: Is that request made of  
2 this letter as well? As I said, it is desirable to  
3 not have long --

4 MR. BEGGS: Yes, we'll ask that this be  
5 made an exhibit as well. It is dated December 27,  
6 1856, from Anderson to Pennefather.

7 THE COURT: It is not an exhibit  
8 already, even though this gentleman's sources have  
9 been marked?

10 MR. BEGGS: I am not sure why, but it  
11 doesn't appear to be, Your Honour.

12 THE COURT: All right. Mr. Registrar?

13 THE REGISTRAR: Exhibit No. 4305.

14 EXHIBIT NO. 4305: Letter dated  
15 December 27, 1856, from Mr. Anderson to  
16 Mr. Pennefather.

17 BY MR. BEGGS:

18 Q. If we could scroll down to the  
19 letter. I believe in the whole context,  
20 Mr. Anderson explains the situation:

21 "I have the honour to return  
22 herewith document 9802 which was  
23 referred to me and beg leave to  
24 report thereon as follows. That  
25 about four or five years ago,

10:35:42 1 Mr. David Sawyer proposed to build a  
10:35:44 2 wharf opposite his dwelling which  
10:35:46 3 would have been inconvenient, first  
10:35:48 4 because the banks are too high to  
10:35:52 5 cut the wood down except at a great  
10:35:54 6 expense in making a road. Secondly,  
10:35:58 7 because the distance to the deep  
10:36:00 8 water would be about half a mile,  
10:36:02 9 causing a very heavy expense of  
10:36:05 10 labour. Thirdly, because the wharf  
10:36:07 11 would have been nearly at the  
10:36:08 12 southern extremity of the village,  
10:36:10 13 besides which the Indians were not  
10:36:11 14 disposed to work on such an  
10:36:12 15 undertaking, Mr. Sawyer's enterprise  
10:36:15 16 therefore failed.

10:36:16 17 That I think the next year  
10:36:19 18 another attempt was made to build  
10:36:20 19 one near the former site by the  
10:36:22 20 Indians themselves. This also  
10:36:23 21 failed.

10:36:28 22 That the summer following Mr. Van  
10:36:31 23 Dusen himself undertook to put up a  
10:36:33 24 wharf and with the assistance of the  
10:36:34 25 Indians built two or three cribs not

10:36:37 1 reaching the deep water which were  
10:36:39 2 shortly after washed away, that a  
10:36:41 3 bad feeling brought about within the  
10:36:43 4 Indian community I believe by  
10:36:46 5 Mr. Van Dusen and Sawyer caused a  
10:36:48 6 separation and one part of the band  
10:36:50 7 under Chief Peter J. Kegedonce left  
10:36:58 8 the Owen Sound village and settled  
10:37:01 9 about two miles north of it on the  
10:37:02 10 bayshore where they, by their  
10:37:03 11 industry, built a wharf and supplied  
10:37:05 12 most of the wood required by the  
10:37:08 13 steamboats last summer for which  
10:37:09 14 they received pay on delivery either  
10:37:11 15 in cash or in provisions at their  
10:37:12 16 own option, and these people in my  
10:37:15 17 opinion will be comparatively  
10:37:17 18 comfortable during the winter. That  
10:37:20 19 I pointed out a plan where a wharf  
10:37:22 20 could be built at the northern  
10:37:24 21 extremity of the village with little  
10:37:26 22 labour and which would have had the  
10:37:29 23 advantage of deep water within a  
10:37:33 24 short distance from the shore and  
10:37:36 25 with low banks and wood in abundance



10:37:38 1 in the immediate vicinity, and I  
10:37:38 2 used the strongest arguments I could  
10:37:40 3 to induce the Indians to build a  
10:37:42 4 wharf there to supply wood to the  
10:37:44 5 steam boats. This I wished the  
10:37:46 6 Indians to do, not by expending  
10:37:49 7 their money for the purpose, but by  
10:37:50 8 their own labour, in order that they  
10:37:53 9 might reap without the intervention  
10:37:55 10 of white speculators the entire  
10:37:57 11 benefit themselves.

10:37:58 12 But if the Indians at Nawash  
10:37:59 13 village are badly off for food, it  
10:38:03 14 proceeds from their own improvidence  
10:38:06 15 for they can lay up a store of fish  
10:38:09 16 if they would exert themselves to do  
10:38:11 17 so, but if they are in the destitute  
10:38:14 18 conditions stated by Mr. Van Dusen,  
10:38:16 19 I am of the opinion that 50 pounds  
10:38:18 20 of their annuity judiciously laid  
10:38:23 21 out in the purchase of provisions  
10:38:24 22 and property divided amongst them  
10:38:27 23 would afford them a sufficient  
10:38:28 24 relief besides which they might earn  
10:38:31 25 a considerable sum by working for

10:38:32 1 the white people and thus maintain  
10:38:34 2 themselves through the winter."

10:38:36 3 [As read.]

10:38:36 4 And this is the passage that you

10:38:38 5 quoted:

10:22:25 6 "I do not know who Mr. Sawyer's  
10:22:26 7 hired man Mr. Gerolamy is, but I  
10:22:29 8 suppose him to be some straggler in  
10:22:31 9 hopes to reap a benefit from the  
10:22:34 10 Indian Reserve - but to allow the  
10:22:35 11 Indians to sell cord wood  
10:22:39 12 indiscriminately to the whites would  
10:22:40 13 in my opinion open a door for every  
10:22:42 14 class of trespassing upon their  
10:22:44 15 lands and put the Department to  
10:22:45 16 endless trouble and expenses."

10:39:02 17 [As read.]

10:39:02 18 Now, here it appears that -- well,  
10:39:10 19 actually, I am going to step back. From the three  
10:39:14 20 letters that we have seen, except for the instance  
10:39:17 21 where Mr. Van Dusen gets involved, the wharf seems  
10:39:21 22 to be being built by the Indigenous people  
10:39:23 23 themselves; correct?

10:39:24 24 A. We are talking about two wharves  
10:39:26 25 now, I believe.

10:39:27 1

Q. Right.

10:39:28 2

10:39:32 3

A. This is a long, complicated chain, ending now, I believe, with it seems to be

10:39:35 4

confirming my opinion of Mr. Gerolamy, who is a

10:39:40 5

white person trying to take advantage of the

10:39:41 6

situation. It does seem that some Indians and this

10:39:46 7

missionary --

10:39:48 8

Q. Yes.

10:39:49 9

10:39:51 10

A. -- are involved in this scheme to build this wharf. It is interesting, I am still

10:39:56 11

not clear, there is still some confusion about this

10:40:01 12

scheme to extract cord wood from this village, I

10:40:08 13

gather, and all through the wharf.

10:40:13 14

10:40:15 15

So given my original point, Gerolamy, not meaning to mispronounce his name, didn't belong

10:40:18 16

there and was trying to take advantage of the

10:40:20 17

situation, it does appear to answer your questions

10:40:23 18

that Indian people were involved in two schemes to

10:40:28 19

set up a wharf but I am again confused by the

10:40:35 20

involvement of the missionary here.

10:40:36 21

10:40:40 22

I think we now know who Mr. Gerolamy

is, but there is still the question of depleting

10:40:44 23

the reserve of wood which I guess Mr. Anderson is

10:40:52 24

saying is okay with him as long as the Indians were

10:40:58 25

doing it.

1 And I am not an expert on the Indian  
2 community at Nawash, so I am confused, but I am  
3 trying to follow you along and answer the question  
4 as best I can.

5 Q. If we could go to page 33 of your  
6 report, and if we could go down to the middle of  
7 the page, I took it from this paragraph before you  
8 that you were concerned that the Crown was  
9 forbidding Indigenous people from selling any wood  
10 at all; is that not what you are saying here?

11 A. I am reading it.

12 [Witness reviews document.]

13 What I say is forbidding Indians to  
14 sell wood under any circumstances eliminated the  
15 ambiguity about who was cutting wood on Indian  
16 lands. That was another version of the discussion  
17 we were -- I was just -- the question I was just  
18 answering, there was a problem with white people  
19 under different pretexts taking Indian land, taking  
20 Indian wood, including some kind of a ruse about  
21 getting Indians to cut the wood, which, you know,  
22 wouldn't have mattered as long as the wood winds up  
23 being removed from the reservation, depleting the  
24 reservation and winding up in white hands. It is  
25 not clear to me what is going on here, and it still

10:42:49 1 isn't from the three or four documents that we went  
10:42:51 2 through.

10:42:51 3 But it is a concern. You can see it is  
10:42:54 4 a concern to Anderson. Anderson seems to be saying  
10:42:57 5 it is okay because of the starvation and poverty.  
10:43:02 6 I am not sure how you draw a line around that and  
10:43:07 7 protect the reserve from having its wood depleted.

10:43:11 8 Q. Can you tell me why you  
10:43:16 9 characterize it as a ruse when everybody seems to  
10:43:18 10 want to sell the wood?

10:43:21 11 A. Okay, the ruse, in a larger  
10:43:29 12 context, is that white people off the reserves are  
10:43:36 13 trying to get the resources of the reserves,  
10:43:40 14 timber, in any way they can, in Southern Ontario,  
10:43:44 15 in the 1840s and '50s. And I think the fact that  
10:43:49 16 we have all these letters going back and forth  
10:43:51 17 indicates that it is not a simple question of the  
10:43:54 18 Indians are starving, they want to sell their wood,  
10:43:56 19 we have to make it possible.

10:43:59 20 Even Anderson is worried about what  
10:44:04 21 Gerolamy -- sorry, Gerolamy is doing there. So  
10:44:08 22 there is some concern here I think about that there  
10:44:11 23 is a scheme behind this, and I am not sure the  
10:44:16 24 letters all show that. I mean, everybody wants to  
10:44:20 25 sell this wood. There is some concern about it.

10:44:22 1 There is some concern about it. I agree the  
10:44:25 2 Indians want to sell the wood because they are  
10:44:28 3 hungry.

10:44:28 4 Q. Now, so far as Mr. Gerolamy goes,  
10:44:31 5 it appears from these letters that there is no sign  
10:44:35 6 that he is living there, is there?

10:44:36 7 A. No.

10:44:38 8 Q. So it appears he is there because  
10:44:44 9 Mr. Sawyer hired him to do some work; is that  
10:44:47 10 correct?

10:44:47 11 A. There is -- he is being hired by  
10:44:56 12 an Indian to build a wharf. And squatting is, you  
10:45:02 13 know, a permanent or semi-permanent occupation of  
10:45:06 14 land. If he is there long enough to build a wharf,  
10:45:08 15 he is in business at that location at least  
10:45:11 16 temporarily.

10:45:15 17 Whites often claim to have been hired  
10:45:17 18 by Indians as a way to get around the restrictions  
10:45:19 19 of the Indian Act, that they are not acting. I  
10:45:23 20 simply don't know that, but I agree the document  
10:45:25 21 says he is hired.

10:45:27 22 Q. If I could go to page 55 of your  
10:45:43 23 report, at the bottom, so you have a quote and you  
10:45:59 24 describe it in your text as an anonymous settler,  
10:46:04 25 but if we go to footnote 156, you identify the

1 anonymous settler as A. Hood. Is there a reason  
2 that you identified him as anonymous?

3 A. I see this.

4 Q. I'm sorry?

5 A. I see it.

6 Q. So is it just a mistake that he  
7 is --

8 A. I can't explain it.

9 Q. All right, if we could go back  
10 then to that page 55 where Mr. Hood is writing, so  
11 Mr. Hood is writing simply -- well, this is the  
12 reply actually back from Mr. Bartlett to Mr. Hood  
13 and you have said that he asked if he could occupy  
14 Indian lands as a squatter, and he is told  
15 essentially no; is that correct?

16 A. Yes.

17 Q. And this happens a fair bit,  
18 doesn't it, that people write in and ask if they  
19 can go ahead and get on the land, and they are told  
20 not to by the Crown?

21 A. I honestly can't say how often  
22 this happened. It strikes me as kind of unusual.

23 Q. Okay.

24 A. I think what -- well, the fact  
25 that he is asking if he can occupy surrendered

10:47:33 1 lands of squatters, you know, is kind of an example  
10:47:36 2 of local usage or local practice, but I think you  
10:47:43 3 could only expect to get the kind of answer that he  
10:47:48 4 got, saying he can't occupy it as a squatter, he  
10:47:52 5 has got to wait for the sale.

10:47:54 6 Q. If we could go to page 58 --  
10:48:34 7 sorry, I think page 60. Okay, actually, could we  
10:49:24 8 just go to the footnote, page 87 for footnote 188.

10:49:37 9 So in footnote 188 you say:

10:49:43 10 "The land was so valueless that  
10:49:45 11 it was often in the financial  
10:49:46 12 interest of the purchase[r]s,"  
10:49:49 13 presumably, "to allow the Crown to  
10:49:50 14 cancel their purchases, including  
10:49:52 15 forfeiting whatever money they had  
10:49:53 16 paid, so they could repurchase it at  
10:49:56 17 auction and not have to pay the  
10:49:58 18 County of Bruce the amount of land  
10:50:00 19 taxes in arrears."

10:50:04 20 Now, while that approach might end with  
10:50:09 21 the county or municipal authorities not getting  
10:50:13 22 their money, by doing so wouldn't that increase the  
10:50:17 23 money available to the First Nations, that they get  
10:50:21 24 the initial payment as well as a new initial  
10:50:23 25 payment?



10:50:24 1 A. I need -- I am not sure that I  
10:50:28 2 understand the question. I need -- can I read the  
10:50:32 3 footnote?

10:50:33 4 Q. Sure.

10:50:34 5 A. [Witness reviews document.]

10:50:51 6 Okay, it is complicated, but the land  
10:50:56 7 rush was so intense and the value of the land for  
10:51:03 8 agriculture so unclear to the people who were  
10:51:05 9 rushing that people often paid their 10 percent  
10:51:11 10 down, I guess it would be, on land that couldn't in  
10:51:16 11 fact be farmed or was -- well, land is never  
10:51:20 12 valueless, but not worth the price paid.

10:51:24 13 So a strategy was to then stop paying  
10:51:30 14 any more money, let it be seized or let it be  
10:51:37 15 reclaimed by the Crown, and then buy it again when  
10:51:39 16 it comes up for auction, presumably at a lower  
10:51:42 17 price, because it is at auction, and by then people  
10:51:45 18 have figured out that the value is lower.

10:51:49 19 It is not going to help -- I understand  
10:51:54 20 the County of Bruce is losing the taxes and  
10:51:59 21 arrears, but it is also not going to help the  
10:52:01 22 Indians because the value is dropping. So they are  
10:52:04 23 still going to get -- if they would have gotten,  
10:52:07 24 say, ten years of payments at the original price,  
10:52:09 25 it would have been a higher price.

1                   Once the price drops, they are getting  
2                   ten years of payments or it is being sold at  
3                   auction at a lower price, so the Indian nation, the  
4                   tribe is still not getting the money that it would  
5                   have gotten under the original auction price, as I  
6                   understand it.

7                   Q.     Now, first of all, you have said  
8                   10 percent, but wouldn't it be closer to a third or  
9                   a quarter for the first payment?

10                  A.     I am not certain.

11                  Q.     Okay.  And you say that they would  
12                  get a lower price at auction, but surely later on  
13                  there would be no auctions of these properties;  
14                  they would just be selling them from their land  
15                  office, wouldn't they?

16                  A.     Again, without the documents in  
17                  front of me, I can't really answer that.

18                  Q.     Now, in your report you refer to a  
19                  number of people who were living in the Saugeen  
20                  Indian village when Surveyor Rankin came through;  
21                  is that correct?

22                  A.     Yes.

23                  Q.     And that is at page 34 of your  
24                  report and this quote you have here is from  
25                  Rankin's observations; correct?

10:53:39 1 A. Yes.

10:53:40 2 Q. And that was in August of 1855; is  
10:53:45 3 that correct?

10:53:45 4 A. Yes, it is after the cession, but  
10:53:52 5 right.

10:53:52 6 Q. Now, we are unable to tell from  
10:53:55 7 this document whether these people moved on the  
10:53:58 8 property -- well, they all appear to have purchased  
10:54:02 9 or rented from an Indigenous person; is that  
10:54:05 10 correct?

10:54:05 11 A. Right, it is --

10:54:07 12 Q. So we don't know if they moved  
10:54:10 13 onto the property before or after the Treaty 72  
10:54:18 14 surrender?

10:54:19 15 A. What is the month of this in 18 --  
10:54:23 16 sorry, 1855? Within a short period of time, they  
10:54:27 17 occupy these nine houses. It is impossible to say  
10:54:35 18 when they were occupied. I was simply saying that  
10:54:38 19 this occurs so fast, so quickly after the surrender  
10:54:41 20 that there is some likelihood they were there  
10:54:44 21 before.

10:54:44 22 Q. Okay, I am going to jump topics a  
10:55:03 23 bit. I would like to go to page 57 of your report  
10:55:07 24 and this has to do with the interference with the  
10:55:13 25 survey being conducted. If we could scroll to the

10:55:17 1 bottom of this page. Okay, that is good. And you  
10:55:23 2 spoke about this with my friend on Tuesday, I  
10:55:27 3 believe, about some people pulling out surveyor  
10:55:31 4 stakes; is that correct?

10:55:32 5 A. Yes.

10:55:33 6 Q. And the point of dispute appears  
10:55:46 7 to be -- well, do you know what the point of  
10:56:08 8 dispute was, why they were pulling out the surveyor  
10:56:10 9 stakes?

10:56:11 10 A. No, I don't.

10:56:12 11 Q. Okay. So in the paragraph  
10:56:21 12 beginning "The next year [...]" it says:

10:56:26 13 "Local newspapers, responsive  
10:56:27 14 to the property rights of the land  
10:56:29 15 speculators and settlers eager to  
10:56:31 16 buy these newly surveyed Saugeen  
10:56:33 17 lands, demanded 'the adoption of  
10:56:35 18 punitive measures'."

10:56:38 19 And then the next paragraph says:

10:56:40 20 "A local newspaper demanded not  
10:56:42 21 only the arrest of the Indians  
10:56:43 22 blocking the survey, but also the  
10:56:45 23 arrest of whites who had incited the  
10:56:48 24 Indians 'to attempt resistance to  
10:56:49 25 the officers of the Government.'"

1 Now, the Owen Sound Comment would be a  
2 local newspaper; is that correct?

3 A. Yes.

4 Q. But a Toronto newspaper wouldn't  
5 really be a local newspaper, would it?

6 A. No.

7 Q. And the quotes you are referring  
8 to are quotes from the Toronto Daily Leader?

9 A. Yes.

10 Q. If we could take a look at those  
11 newspaper articles. Exhibit 2246 is the article  
12 from June 6, 1855. If I could ask you to quickly  
13 read the paragraph or the column on the left  
14 entitled "Troubles in the Indian Peninsula."

15 A. [Witness reviews document.]

16 My screen is cut off, I can't read it.

17 Q. Really? Oh, you mean you want it  
18 scrolled up, is that what you are saying?

19 A. No, sideways.

20 Q. Can you take a look at that.

21 A. I am missing an inch or so on the  
22 left margin.

23 Q. Can my friend approach the witness  
24 to see what is on his screen.

25 THE COURT: Well, it has just been

10:59:02 1 changed, so is it still a problem, sir?

10:59:07 2 Sir? Sir --

10:59:12 3 THE WITNESS: Sorry?

10:59:13 4 THE COURT: It has just been adjusted.

10:59:16 5 Did that assist you? Or is it still truncated?

10:59:20 6 THE WITNESS: Mine, the word "t-r-o-u"  
10:59:23 7 are out, and then I have "b-l-e-s."

10:59:27 8 THE COURT: So the answer is it is  
10:59:28 9 still truncated?

10:59:29 10 THE WITNESS: I am missing four  
10:59:30 11 letters. Okay, now I can read it.

10:59:33 12 Thank you.

10:59:37 13 [Witness reviews document.]

10:59:51 14 THE COURT: Is that improved at all?

10:59:52 15 THE WITNESS: Yes, I can read it.

10:59:54 16 THE COURT: You can, okay, please go  
10:59:57 17 ahead.

11:00:38 18 THE WITNESS: Could you scroll it up,  
11:00:40 19 please?

11:00:42 20 Yeah, sorry, I mean down, sorry. Thank  
11:00:46 21 you.

11:00:47 22 [Witness reviews document.]

11:01:30 23 Could you scroll it down again, please.

11:01:36 24 [Witness reviews document.]

11:03:02 25 Could you scroll down again, please.

11:03:04 1 And one more time? Or is it at the  
11:03:20 2 bottom? Was it all the way to the bottom? Okay.

11:03:33 3 BY MR. BEGGS:

11:03:40 4 Q. I think that is fine. So now, you  
11:03:43 5 used this article to say that the local newspapers  
11:04:16 6 had demanded punitive measures against the -- well,  
11:04:25 7 it doesn't say who they are -- you don't say who  
11:04:29 8 they wanted punitive measures against, but the  
11:04:31 9 punitive measures they wanted were against the  
11:04:33 10 whites who might be inciting them; is that correct?

11:04:40 11 A. Could you scroll to the middle? I  
11:04:43 12 thought punitive measures to the people doing this,  
11:04:45 13 but --

11:04:45 14 Q. I think just above where we are:

11:04:52 15 "The origin of the  
11:04:53 16 difficulties, it is well known,  
11:04:54 17 rests not with the Indians, but with  
11:04:56 18 their counsellors, and should the  
11:04:56 19 reported insubordination to the  
11:04:58 20 authority of the Government  
11:04:58 21 unfortunately become so serious as  
11:05:00 22 to demand the adoption of punitive  
11:05:03 23 measures, we must look for the  
11:05:04 24 primarily guilty parties, in those  
11:05:07 25 assemblies of white settlers in

11:05:10 1 which the agitation had its origin.

11:05:12 2 The formality by which the

11:05:14 3 proceedings of these assemblies were

11:05:14 4 characterized, will not relieve them

11:05:16 5 of a seditious character, if it is

11:05:19 6 found that their effect has been to

11:05:20 7 provoke the excitable and

11:05:22 8 weak-minded Indian to acts of

11:05:24 9 violence and disturbance."

11:05:26 10 Now, essentially, apart from the

11:05:29 11 obvious racism of the time, it seems to be saying

11:05:36 12 if punitive measures are necessary, they should be

11:05:40 13 against the white settlers and that the white

11:05:42 14 settlers might be involved in a sedition,

11:05:47 15 essentially; is that right?

11:05:48 16 A. Yes.

11:05:49 17 Q. So it is not a call to punish the

11:05:53 18 Indigenous people, is it?

11:05:54 19 A. I read it more broadly and more

11:05:57 20 generically than that. I read it as punishing the

11:06:00 21 people who are responsible. If you eliminate the

11:06:04 22 racism, you know, the idea that Indians might have

11:06:09 23 been somehow -- had some responsibility for taking

11:06:12 24 up stakes that Indians took up might be part of the

11:06:15 25 equation here.



1 But -- and again, I wasn't -- I am  
2 taking this, sorry, I guess racism -- I am just  
3 taking this in both directions with a grain of  
4 salt. On one hand, we have, and I won't  
5 recharacterize how they characterize Indians, but  
6 then we have, you know, avaricious white people  
7 engaging in sedition, and, you know, I am not sure  
8 that is going on either.

9 This is exaggerated, I believe, and  
10 exaggerated in both directions, probably on its  
11 face. I mean, the whites aren't engaging in  
12 sedition, I don't believe, so it is -- and you see  
13 a lot of this kind of rhetoric on the frontier, so  
14 that is how I read it.

15 Q. Now, you say that the newspaper  
16 articles demonstrate that the Crown had the  
17 capacity to enforce the law. Your report says:

18 "Again, it is clear that  
19 military force was available under  
20 these frontier conditions in order  
21 to enforce the law."

22 And then later on:

23 "This further indicates that  
24 the government had the legal  
25 capacity to do so and was not, in

11:07:32 1

fact, powerless."

11:07:33 2

Now, surely what a newspaper says is

11:07:35 3

not any evidence of what the Crown can or can't do?

11:07:38 4

A. Well, it is not any evidence. It

11:07:40 5

is some evidence.

11:07:40 6

Q. Okay.

11:07:41 7

A. I mean, whoever -- you know, these

11:07:44 8

are educated white people who understand what is

11:07:50 9

going on in Canadian politics at the time, but I

11:07:54 10

agree, it is a newspaper.

11:07:55 11

Q. Okay. Now, in your CV you

11:08:33 12

indicated that you did a book review in 1995 of a

11:08:36 13

book called "Police Powers in Canada, the Evolution

11:08:39 14

and Practice of Authority"; do you recall that?

11:08:43 15

A. I actually don't recall it.

11:08:44 16

Q. You don't, okay. You mentioned

11:09:16 17

the other day some questions about the capacity of

11:09:20 18

a special constable, so I would like to take you to

11:09:26 19

document SC1178.

11:10:14 20

Now, this is a short book entitled "The

11:10:18 21

Canadian Constable's Assistant," and it was one of

11:10:20 22

the references in the "Police Powers in Canada"

11:10:24 23

book, but I take it you don't recall that book?

11:10:26 24

A. No.

11:10:26 25

Q. So if I could go to page 2 now,

1 in --

2 THE COURT: Sir, you remember that we  
3 were going to try and deal with trial exhibits in a  
4 timely way.

5 MR. BEGGS: Yes, Your Honour, I would  
6 like to ask that this be made an exhibit.

7 THE COURT: Mr. Registrar?

8 THE REGISTRAR: Exhibit No. 4306.

9 EXHIBIT NO. 4306: Book entitled "The  
10 Canadian Constable's Assistant."

11 BY MR. BEGGS:

12 Q. Now, this is the introduction, I  
13 take it, and it says:

14 "The number of constables  
15 appointed throughout the country,  
16 and the changing nature of the  
17 office, give a great and general  
18 importance to the considerations  
19 noticed, and indicate the necessity  
20 for information on the subject of a  
21 constable's powers, duties, and  
22 responsibilities. Now the fact is,  
23 that constables are not always  
24 selected for their fitness, and they  
25 are in general grossly ignorant of

11:11:30 1 their duties. Regardless of the  
11:11:32 2 serious consequences that may result  
11:11:33 3 from ignorance, they take no pains  
11:11:35 4 to inform themselves, and certainly  
11:11:37 5 will not incur any expense to do so.  
11:11:40 6 'Tis true a constable acts at his  
11:11:44 7 peril, and may be punished for his  
11:11:46 8 misconduct or neglect; but the  
11:11:48 9 punishment of the officer will not  
11:11:50 10 repair the mischief produced by his  
11:11:53 11 improper conduct."

11:11:54 12 Would you agree with that

11:12:03 13 characterization of constables in the 1850s?

11:12:06 14 A. Sorry, could I ask when was this  
11:12:08 15 written, and who wrote it?

11:12:09 16 Q. Well, the citation in the "Police  
11:12:11 17 Powers" book gives the author as Justice Gowan in  
11:12:15 18 1852.

11:12:21 19 A. I mean, there is a lot of general  
11:12:31 20 commentary about the fitness of law enforcement  
11:12:33 21 officers in the 1850s. A lot of it was kind of by  
11:12:37 22 progressive boosters who were trying to denigrate  
11:12:43 23 the informal constabulary at the time, and instead  
11:12:48 24 urge the adoption of a regular police force,  
11:12:53 25 professional police force, trained police force.

11:12:55 1 So that context might be relevant here, but I don't  
11:13:02 2 know how much credibility to give to that person in  
11:13:06 3 this work.

11:13:08 4 Q. Okay. If I could go to page 4, I  
11:13:14 5 believe they start to describe what a special  
11:13:16 6 constable is. Perhaps it is page 5. So it says:

11:13:29 7 "The High and Petty constables  
11:13:30 8 are of the ordinary class, being  
11:13:33 9 appointed at a certain time, and for  
11:13:35 10 a year."

11:13:38 11 Was that your understanding of  
11:13:40 12 constables, that they have a year's authority?

11:13:47 13 A. I am not certain they were  
11:13:50 14 appointed at a certain time and for a year, but  
11:13:52 15 again, it depends on the authoritativeness of this  
11:13:55 16 work, but, you know, I believe he was describing  
11:13:59 17 something as he understands it.

11:14:00 18 Q. So you wouldn't agree that they  
11:14:03 19 are appointed at every quarter sessions?

11:14:06 20 A. I mean, that might have been -- I  
11:14:09 21 mean, he is describing something that he appears to  
11:14:12 22 know, so I would believe that he is describing  
11:14:16 23 something at a certain time and place.

11:14:19 24 Q. The next sentence says:

11:14:21 25 "Special constables are

11:14:22 1 appointed on particular emergencies,  
11:14:24 2 and with no fixed tenure, or are  
11:14:26 3 appointed to do a particular act."

11:14:27 4 Is that your understanding of special  
11:14:29 5 constables?

11:14:29 6 A. That is.

11:14:30 7 Q. Okay. And that would be the case  
11:14:40 8 of the special constables we heard about for  
11:14:42 9 Manitoulin Island?

11:14:45 10 A. If --

11:14:46 11 Q. The special constables we heard  
11:14:48 12 about for Manitoulin Island, they would have been  
11:14:51 13 appointed for a special emergency, if you will?

11:14:53 14 A. I would assume so.

11:14:57 15 Q. If I could call up Exhibit SC1184.

11:16:27 16 THE COURT: What is it we are hoping to  
11:16:28 17 see?

11:16:29 18 BY MR. BEGGS:

11:16:29 19 Q. It is a report upon -- it is a  
11:16:35 20 government report, a Select Committee Report on  
11:16:37 21 public lands.

11:16:39 22 While I'm waiting, you stated in your  
11:16:42 23 report that the Crown Land Agents and surveyors  
11:16:45 24 played no role in protection, although they were  
11:16:48 25 well placed to do so; is that correct?

11:16:49 1 A. Pardon? I didn't hear you.

11:16:51 2 Q. You stated in your report that  
11:16:54 3 Crown Land Agents and surveyors played no role in  
11:16:56 4 protection, even though they were well placed to  
11:16:58 5 act; does that sound correct?

11:17:05 6 A. That sounds correct.

11:17:06 7 Q. And you said that John Clarke was  
11:17:24 8 the land agent for the Huron District?

11:17:27 9 A. John Clarke?

11:17:28 10 Q. Yes.

11:17:29 11 A. Yes.

11:17:29 12 Q. And that Maclean was the land  
11:17:36 13 agent for the Half Mile Strip? Do you have your  
11:17:43 14 report in front of you?

11:17:44 15 A. I have it, yes.

11:17:45 16 Q. It is at page 35.

11:17:46 17 A. Sure.

11:17:46 18 Q. Or, sorry, 56 for Maclean.

11:18:09 19 A. Okay. Sorry, I'm not finding it.

11:18:27 20 Q. It must be the wrong reference.

11:18:31 21 Okay, in any event, we have the document before us  
11:18:34 22 now. If we could go to page 52 and 53 of the  
11:18:39 23 report.

11:18:40 24 THE COURT: Is this an exhibit?

11:18:41 25 MR. BEGGS: Not yet, Your Honour. If

1 we could make it an exhibit.

2 THE COURT: You have to work on this,  
3 Mr. Beggs.

4 MR. BEGGS: Yes, Your Honour, my  
5 apologies. It is a Report of the Select Committee  
6 Appointed to Enquire and Report Upon the Present  
7 System of Management of the Public Lands.

8 THE COURT: Mr. Registrar?

9 THE REGISTRAR: Exhibit No. 4307.

10 EXHIBIT NO. 4307: Document entitled  
11 "Report of the Select Committee  
12 Appointed to Enquire and Report Upon  
13 the Present System of Management of the  
14 Public Lands."

15 THE COURT: Perhaps one of your  
16 colleagues could remind you, if you forget.

17 Please go ahead.

18 BY MR. BEGGS:

19 Q. If we could scroll down to the  
20 middle there, we see that George Jackson --

21 A. Agent for the County of Grey.

22 Q. Yes, do you recall him?

23 A. I don't recall him now, but I  
24 accept this to be accurate.

25 Q. Okay. And on page 58 and 59 we



1 have John Clarke?

2 A. Yes.

3 Q. Agent for the County of Huron?

4 A. Yes.

5 Q. And on page 68 and 69 we have

6 Mr. McNabb, agent for the County of Bruce?

7 A. Yes.

8 Q. And if we could scroll to the left

9 there for a moment, so I can see the columns. So

10 the fourth -- no, sorry, the bottom with

11 Mr. McNabb. So the fourth from the bottom is

12 September, and so if we can scroll over to the

13 other side, it appears to be October, but he had a

14 considerable amount of money. That would have been

15 from the land sale in September of 1854; is that

16 correct?

17 A. Yes.

18 Q. If I could go to Exhibit 4286,

19 which is "The History of the County of Bruce" by

20 Norman Robertson, and I am going to page 26 and 27,

21 so in the middle there -- sorry, stop, please:

22 "Foreseeing the demand there

23 would be for lumber as soon as

24 settlers commenced to take up land,

25 Mr. Withers commenced the

1 construction of a mill-dam, which he  
2 placed across the river about where  
3 it touches the east side of Huron  
4 Terrace Street, in the town plot of  
5 Kincardine. Here he erected a frame  
6 sawmill, at the raising of which  
7 assistance was rendered by Indians  
8 and the few settlers who had taken  
9 up land in the vicinity."

10 And there is a statement by Mr. Brough

11 that:

12 "When Mr. Withers erected his  
13 mill and dam, he neglected to secure  
14 permission from the Crown to do so;  
15 this oversight resulted  
16 unfortunately for himself, he being  
17 forced, at a considerable loss, to  
18 remove his newly erected mill from  
19 the site where first erected to one  
20 on his farm just outside the town  
21 plot, the exact date of his doing so  
22 the author being unable to find out.  
23 Mr. Withers had further difficulty  
24 in regard to cutting timber on Crown  
25 lands. The lands in Pentegore and

11:22:46 1 vicinity were not offered for sale  
11:22:47 2 by the Crown until August 1851, so  
11:22:50 3 that any timber cut by him prior to  
11:22:52 4 that date was cut on Crown lands,  
11:22:54 5 and subject to Crown dues, which the  
11:22:56 6 Crown Lands Agent at Goderich was  
11:22:59 7 told to take steps to collect or  
11:23:00 8 have the timber seized."

11:23:02 9 [As read.]

11:23:02 10 So would you agree that Crown Land  
11:23:04 11 Agents such as Mr. Clarke were taking steps to  
11:23:09 12 interfere with squatters?

11:23:14 13 A. That isn't entirely clear from  
11:23:18 14 this paragraph. It seems what -- his name is  
11:23:25 15 Withers? He has sort of appropriated a mill site,  
11:23:28 16 and, you know, someone else might want the mill  
11:23:31 17 site. So the Crown Land Agent is told to take  
11:23:34 18 steps to collect timbers and have it seized, but it  
11:23:38 19 is not at all clear that he actually did it.

11:23:41 20 I think there is a chaotic land  
11:23:48 21 arrangement out there and different people are  
11:23:50 22 doing different things. I don't doubt that some  
11:23:54 23 Crown Land Agents under some conditions, you know,  
11:23:57 24 told people things. The question is, you know, why  
11:24:01 25 are they doing that and what interest they have in

11:24:04 1 it and what things they are not telling people to  
11:24:06 2 do.

11:24:06 3 So this doesn't really answer those  
11:24:09 4 questions.

11:24:10 5 Q. Okay, if I could go to Exhibit  
11:24:14 6 1753, please -- actually, sorry, 1733.

11:25:25 7 THE COURT: What is Exhibit 1733?

11:25:27 8 BY MR. BEGGS:

11:25:27 9 Q. It is the letter that is referred  
11:25:28 10 to in the Robertson document, December 11, 1848,  
11:25:33 11 from Mr. Price to Mr. Clarke.

11:25:46 12 If we could scroll over. So it says:

11:25:50 13 "I enclose a letter addressed  
11:25:52 14 to Mr. Withers to whom your letter  
11:25:54 15 of the 4th Alt has reference, which  
11:25:58 16 having read you will forward to him  
11:26:01 17 without loss of time.

11:26:03 18 With reference to depredations  
11:26:08 19 committed on public lands, I  
11:26:11 20 herewith send for your information  
11:26:12 21 and guidance a copy of a letter" -  
11:26:15 22 something - "from the Attorney  
11:26:18 23 General of the 9th April 1845. It  
11:26:21 24 might be desirable that you should  
11:26:24 25 entrust to a surveyor or other

11:26:27 1 person willing to undertake the duty  
11:26:29 2 the seizing of timber cut and  
11:26:32 3 prosecuting under the Petty Trespass  
11:26:34 4 Act if necessary with the distinct  
11:26:36 5 understanding that the Department  
11:26:37 6 would not be answerable for any  
11:26:38 7 irregularities committed in making  
11:26:41 8 the seizure, and as an encouragement  
11:26:44 9 to the parties willing to undertake  
11:26:46 10 the service, the department would  
11:26:47 11 abandon to them the entire proceeds  
11:26:51 12 upon their paying the regular Crown  
11:26:56 13 duties on the timber.

11:27:07 14 Previous, however, to taking any  
11:27:07 15 proceedings against Mr. Withers, we  
11:27:10 16 will endeavour to arrange the matter  
11:27:12 17 by calling upon him to pay the  
11:27:13 18 regular Crown dues, warning him at  
11:27:15 19 the same time that you are  
11:27:17 20 authorized to seize the timber and  
11:27:20 21 fine him under the Summary  
11:27:22 22 Punishment Act."

11:27:23 23 [As read.]

11:27:23 24 And it is signed with the initials  
11:27:28 25 J.H.P., for Mr. Price.

1 So would you agree that Mr. Clarke is  
2 being instructed to essentially take action, if  
3 necessary, against Mr. Withers to --

4 A. He has been instructed to take  
5 action.

6 Q. Okay.

7 A. Again, I think I am looking at or  
8 we are looking at a situation where there's lots of  
9 timber theft going on. This man set up a mill, I  
10 mean, which I assume to be a saw mill given that we  
11 are talking about timber theft, and I have no idea  
12 how long he sawed, but he seems to have sawn -- I  
13 mean, I have no idea how long he sawed.

14 But now we have at some later point  
15 some correspondence here. They have made him move  
16 his mill, which means someone else may want the  
17 mill, the mill site, and they are going to take  
18 some action so try to fine him or seize whatever  
19 timber is left, but I am assuming, if he is  
20 milling, most of the timber is gone. I mean, you  
21 sell it.

22 So this is -- you know, this is at best  
23 an incomplete, a partial -- an incomplete  
24 enforcement action, not even partial, you know, and  
25 I have no idea of how serious it was or -- and you

11:28:51 1 know, this sort of thing goes on. There is no  
11:28:54 2 question about it. The question is, is there a  
11:28:57 3 systematic enforcement in any systematic way.

11:29:06 4 Q. Now, in your testimony you have  
11:29:09 5 often referred to the fact that we don't know for  
11:29:12 6 certain how these various scenarios have played  
11:29:17 7 out. Isn't that a reality of reviewing documents  
11:29:23 8 that are over 150 years old?

11:29:26 9 A. Oh, absolutely, you know, it is a  
11:29:30 10 problem for me in all this work. You judge it in  
11:29:36 11 the context of its time, making, you know, the best  
11:29:41 12 inference that you can.

11:29:42 13 MR. BEGGS: Your Honour, I think now  
11:29:44 14 might be a good time for a break.

11:29:45 15 THE COURT: Okay. Just for purposes of  
11:29:53 16 general ideas for Ontario, do you have a sense of  
11:29:57 17 -- you had said on Friday you might go to the  
11:29:59 18 middle of the day?

11:30:00 19 MR. BEGGS: Yes, I now think I'll be  
11:30:02 20 about half an hour, Your Honour.

11:30:04 21 THE COURT: All right, thank you.

11:30:05 22 -- RECESSED AT 11:30 A.M.

11:55:33 23 -- RESUMED AT 11:53 A.M.

11:55:33 24 THE COURT: Just before you begin, Mr.  
11:55:35 25 Beggs, I forgot to mention it this morning, but I

11:55:38 1 have to take the lunch at 10 to 1:00.

11:55:40 2 Now, if that turns out to create a  
11:55:42 3 timing issue today for you or Mr. Lemmond, we can  
11:55:45 4 make that up this afternoon, all right?

11:55:47 5 MR. BEGGS: Thank you, Your Honour.

11:55:48 6 THE COURT: Please go ahead.

11:55:49 7 BY MR. BEGGS:

11:55:52 8 Q. Thank you.

11:55:52 9 Professor Harring, I want to turn now  
11:56:06 10 to the Half Mile Strip surrender, which was Treaty  
11:56:09 11 67; correct?

11:56:10 12 A. Yes.

11:56:10 13 Q. And in your report you called this  
11:56:13 14 surrender duplicitous, not honestly needed,  
11:56:17 15 possibly a ruse and that the Saugeen believed  
11:56:20 16 themselves to be deceived. Do you still hold to  
11:56:23 17 those opinions?

11:56:24 18 A. Yes, I do.

11:56:25 19 Q. And you believe that because you  
11:56:32 20 do not believe a road was ever intended to be  
11:56:35 21 built; is that your -- is that why you believe it  
11:56:39 22 to be duplicitous?

11:56:40 23 A. It is a combination of factors but  
11:56:43 24 that is one of the factors.

11:56:44 25 Q. Okay. Now, if I could go to page



11:56:53 1 19 of your report. You say at the top of the page:

11:57:08 2 "The road could have been built  
11:57:10 3 along a parallel twenty mile route  
11:57:13 4 between Owen Sound and Southampton  
11:57:15 5 but a half mile further south. Any  
11:57:16 6 reading of a map of the strip shows  
11:57:17 7 that this route was equally  
11:57:19 8 practical, if only slightly longer."

11:57:22 9 Now, did you make any great study of  
11:57:29 10 the maps to reach that conclusion?

11:57:31 11 A. I had the maps in front of me. I  
11:57:33 12 was puzzling with the maps, yes.

11:57:34 13 Q. If I could take you to SC1208.  
11:57:49 14 This is a "Plan of a Strip of Land Lately  
11:57:53 15 Surrendered by the Saugeen Indians as Divided Into  
11:57:57 16 Farm Lots by Charles Rankin," and I would like to  
11:58:00 17 make this the next exhibit.

11:58:03 18 THE COURT: Mr. Registrar?

11:58:03 19 THE REGISTRAR: Exhibit No. 4308.

11:58:05 20 THE COURT: 4308?

11:58:08 21 THE REGISTRAR: Correct, Your Honour.

11:57:50 22 EXHIBIT NO. 4308: "Plan of a Strip of  
11:57:52 23 Land Lately Surrendered by the Saugeen  
11:57:55 24 Indians as Divided Into Farm Lots by  
11:57:58 25 Charles Rankin."

1 BY MR. BEGGS:

2 Q. Now, perhaps we could reduce it a  
3 little. Would you agree that this is a map of the  
4 Half Mile Strip surrender?

5 A. Yes, and this is the county line,  
6 I believe, in the middle, right.

7 Q. Okay. Now, on the left side below  
8 the strip is a body of water labelled "Arran Lake"?

9 A. Yes.

10 Q. Wouldn't you agree that if the  
11 Half Mile Strip were lowered, that it would collide  
12 with Arran Lake?

13 A. Actually, the road that was  
14 ultimately built that everyone used actually went  
15 below the lake, so when I said they could build it  
16 half a mile further, they would have had to have  
17 curved around the lake. In fact, when the road was  
18 not built, the road that ultimately served this  
19 purpose was built more like a couple of miles south  
20 of the strip, going around the lake.

21 Q. And going around the lake added --

22 A. On the south.

23 Q. -- considerable distance to the  
24 road, right?

25 A. That is what they did.

11:59:23 1 Q. But it added considerable  
11:59:24 2 distance, correct?

11:59:25 3 A. I am not geometrically inclined,  
11:59:29 4 but over a 20-mile strip, over a 20-mile stretch  
11:59:35 5 going down and coming back up again, it would add  
11:59:38 6 some distance. I don't know if you would call it  
11:59:40 7 considerable, over 20 miles.

11:59:49 8 Q. I think in your report you state  
11:59:51 9 that the road was not built until -- I better check  
11:59:53 10 this. You say the road was not completed until  
12:00:04 11 1866; is that correct? We can go to page 19 of  
12:00:08 12 your report.

12:00:08 13 A. Well, if I said that, I said that.  
12:00:11 14 It took some years to build, the ultimate road that  
12:00:15 15 followed and the road, again, was south of that  
12:00:20 16 Half Mile Strip.

12:00:22 17 Q. We can scroll to the bottom, sir,  
12:00:24 18 there it is, the second-last sentence "[...] the  
12:00:29 19 road was not completed until 1866."

12:00:31 20 Now, was that based on -- what was that  
12:00:34 21 based on?

12:00:35 22 A. You know, as I read this, it is  
12:00:39 23 not footnoted, so I am not sure. There are -- I  
12:00:42 24 have seen maps showing the road that was ultimately  
12:00:44 25 built. It goes partway across, curves south and

1 goes partway across again, the rest of the way  
2 across, built some years after the 1854 surrender.

3 I had some reason for thinking it was  
4 1866, and of course, saying when a road is  
5 completed in this day and age is kind of a  
6 difficult process because there obviously were --  
7 people are travelling all the time on "roads" in  
8 quotation marks, "trails" in quotation marks. They  
9 were getting across the peninsula this whole time.

10 I don't know, when you talk about the  
11 completion of a colonial era road, it is kind of a  
12 relative term, but it was some years after the  
13 surrender of -- the Treaty 72 surrender, the half  
14 mile treaty surrender of 67 before one was  
15 completed.

16 Q. But would you agree that work on  
17 the road started as early as 1852?

18 A. Well, again, work on the road --  
19 the road wasn't built, so there was a trail. You  
20 would have to work on these trails all the time,  
21 given -- for example, corduroying swampy areas. I  
22 assume any -- I assume the original to call it an  
23 Indian trail that went across would have also  
24 required some work and repair.

25 So there would have been almost

1 continuous work on roads at this time, but it  
2 wasn't built.

3 Q. By "built" you mean finished?

4 A. Well, sorry, I didn't really hear  
5 you.

6 Q. I said by "built" do you mean  
7 finished?

8 A. I mean finished, yes.

9 Q. If I could go to Exhibit 2076.  
10 This will be a letter from Charles Rankin to  
11 Colonel Bruce dated April 5, 1854. So this  
12 document has a transcript. Do you recall --  
13 perhaps you can't see it from -- would you have  
14 seen the original or the transcript?

15 A. I mean, I am seeing some remarks.

16 Q. Okay, let's scroll down a bit.  
17 I am just going to read portions to  
18 you:

19 "I regret to see by your letter  
20 to Mr. McLean [...]"

21 And that would have been the Land Sale  
22 Agent; correct?

23 A. The --

24 Q. Yeah, the Land Sale Agent for the  
25 Half Mile Strip?

12:04:15 1 A. Right.

12:04:16 2 Q. "[...] an extract from which he  
12:04:19 3 has sent me, that you appear to  
12:04:20 4 forget, or are in error, as to the  
12:04:22 5 whole nature of the cession by the  
12:04:24 6 Indians of the strip of land between  
12:04:26 7 this and Saugin -- You speak of it  
12:04:28 8 as if it were like common cases of  
12:04:31 9 their ceding lands and that is  
12:04:33 10 merely as a means by which to raise  
12:04:34 11 money for them.

12:04:35 12 Now you will I think be able  
12:04:37 13 to call to recollection that this  
12:04:39 14 strip was asked from them for the  
12:04:41 15 express purpose of allowing a  
12:04:42 16 settlement to be formed along the  
12:04:44 17 Road proposed to be opened through  
12:04:45 18 it -- Otherwise there had been no  
12:04:47 19 need for all the trouble to have  
12:04:49 20 been taken, which was taken, to  
12:04:50 21 persuade them to cede. Since had  
12:04:53 22 merely the allowance for the road  
12:04:55 23 itself been required they were  
12:04:56 24 always willing to give that, and I  
12:04:59 25 believe moreover to aid in opening

12:05:01 1 it, as a convenience for themselves  
12:05:03 2 in passing between their own  
12:05:05 3 villages. But when the Crown Land  
12:05:09 4 Dep't first proposed to open a road  
12:05:10 5 here they authorized Mr. McNab - who  
12:05:13 6 is now their agent at Saugin - to  
12:05:16 7 treat with the Indians as to  
12:05:18 8 endeavour to persuade them to cede  
12:05:19 9 this strip, for the purpose of  
12:05:21 10 having lots laid off (as you  
12:05:23 11 afterwards had done) to form a  
12:05:25 12 settlement along the line, instead  
12:05:26 13 of having a roads [sic] through 20  
12:05:28 14 miles of wilderness, and I  
12:05:30 15 understood at the time from  
12:05:31 16 Mr. McNab that you were very much  
12:05:33 17 annoyed at the Indians for  
12:05:35 18 stubbornness in refusing to  
12:05:37 19 surrender the strip for such  
12:05:39 20 purpose."

12:05:39 21 And then essentially it talks about how  
12:05:42 22 the fact that they didn't impose actual settlement  
12:05:46 23 defeated that purpose.

12:05:47 24 Do you recall reading this letter?

12:05:49 25 A. I have read this, yes.

12:05:50 1 Q. Would you agree that Mr. Rankin  
12:05:53 2 apparently believed that it was explicitly not the  
12:05:57 3 purpose to simply build a road but to actually  
12:06:00 4 build settlement along the road?

12:06:02 5 A. Again, I read this, I was puzzled  
12:06:09 6 by the whole idea of the mile strip and the Indians  
12:06:12 7 demanding a road, and this idea that -- I  
12:06:14 8 understand why you want settlement along the road  
12:06:17 9 from the standpoint of settlement, because the  
12:06:20 10 settlers would maintain a road.

12:06:22 11 The problem with this analysis is that  
12:06:25 12 building it south of the Saugeen Reserve would be  
12:06:32 13 building it on settled lands, and they could of  
12:06:36 14 course have surveyed -- in surveying the road, they  
12:06:39 15 could survey a quarter mile lot on each side of the  
12:06:43 16 road, again, a half mile strip, I am thinking, but  
12:06:47 17 south, and they could have settled those for the  
12:06:49 18 purpose of maintaining a road, because customarily  
12:06:53 19 local farmers would maintain their stretch of the  
12:06:56 20 road for the common good.

12:06:58 21 So the reason given here didn't ring  
12:07:05 22 true to me, didn't make sense.

12:07:07 23 Q. Okay. Now, you have acknowledged  
12:07:18 24 that Captain Anderson was a Commissioner under the  
12:07:24 25 Protection Act that we -- the 1839, 1850 Acts; is



12:07:30 1 that correct?

12:07:30 2 A. Okay.

12:07:31 3 Q. You agree he was?

12:07:33 4 A. Pardon?

12:07:33 5 Q. Do you agree that Captain Anderson  
12:07:35 6 was a Commissioner?

12:07:36 7 A. Yes.

12:07:37 8 Q. Okay. Do you agree that John  
12:07:40 9 Maclean was also a Commissioner of Crown Lands --  
12:07:43 10 of Indian Lands?

12:07:44 11 A. Yes.

12:07:45 12 Q. If I could go to your report at  
12:08:04 13 page 59, in the middle of the page you refer to  
12:08:33 14 James Belich, referring to hyper-colonization in  
12:08:39 15 the 1830s?

12:08:41 16 A. Yes.

12:08:42 17 Q. And you cite how there was a large  
12:08:47 18 amount of immigrants arriving in Canada in the  
12:08:51 19 1830s?

12:08:51 20 A. Yes.

12:08:52 21 Q. And is that one of the factors in  
12:08:56 22 creating a boon for demand in land?

12:09:00 23 A. Yes.

12:09:01 24 Q. And that was an actual event that  
12:09:07 25 these people were emigrating? There is no doubt

12:09:11 1 that they were coming or did come actually?

12:09:15 2 A. Well, I think the colonial  
12:09:16 3 authorities believed they were coming.

12:09:17 4 Q. Right.

12:09:18 5 A. I'm not sure what the Indians  
12:09:20 6 thought.

12:09:20 7 Q. Now, my last question to you is  
12:09:57 8 now that we have examined some documents that  
12:09:59 9 appear to be notices to the public about squatting  
12:10:03 10 and that land agents have been involved in the  
12:10:07 11 protection of these territories and that  
12:10:11 12 Commissioners were appointed, are you willing to  
12:10:14 13 reconsider that the Crown took steps to protect  
12:10:18 14 these lands from encroachers?

12:10:21 15 A. It is -- I think it is a more  
12:10:29 16 complicated question than that. There is all kinds  
12:10:34 17 of -- there are all kinds of things happening and  
12:10:39 18 different Crown officials operating within their  
12:10:41 19 sphere are taking different actions.

12:10:43 20 The question would be whether, given  
12:10:45 21 what the Crown knew was happening and given their  
12:10:49 22 Indian policy and promises made to the Indians,  
12:10:51 23 that they were acting at a level of legal or  
12:11:00 24 administrative activity that would have in fact  
12:11:03 25 protected the Indians in that context.

1 MR. BEGGS: Okay, thank you very much,  
2 Professor Harring.

3 Those are my questions, Your Honour.

4 THE COURT: Okay, Mr. Lemmond.

5 CROSS-EXAMINATION BY MR. LEMMOND:

6 Q. Good afternoon, Professor Harring.

7 A. Good afternoon.

8 Q. The first thing I want to do is  
9 make sure that I'm audible. Can you hear me  
10 clearly?

11 A. I can hear you.

12 Q. Thank you. Now, I would like to  
13 discuss land policy in Canada West and Upper Canada  
14 with you for awhile, Professor Harring.

15 Now, you would agree that in your  
16 report you rely heavily upon Dr. Gates' publication  
17 in discussing land policy?

18 A. Yes.

19 Q. And you would agree that her  
20 publication, her book on land policy is an  
21 accurate, comprehensive and detailed discussion of  
22 land policy in Upper Canada and Canada West?

23 A. Well, actually, it is the  
24 recognized book in the field. Whether it is, you  
25 know, again, accurate in every detail, I can't say,

12:13:22 1 but it is respected as being that.

12:13:23 2 Q. Well, before we get into the  
12:13:27 3 substance of that, Professor Harring, I would like  
12:13:30 4 to just straighten out the record a little bit.

12:13:32 5 We have so far in the record as an  
12:13:34 6 exhibit parts of her book, so I am going to ask,  
12:13:39 7 without pulling up the document, for her full book  
12:13:43 8 to be made an exhibit, and the full book can be  
12:13:46 9 found at SC0654.

12:13:59 10 THE COURT: If you are not going to  
12:14:00 11 pull it up, you are going to have to read the title  
12:14:05 12 for the record, sir.

12:14:06 13 MR. LEMMOND: Yes, the title is "Land  
12:14:08 14 Policies of Upper Canada."

12:14:18 15 THE COURT: Mr. Registrar?

12:14:20 16 THE REGISTRAR: Exhibit No. 4309.

12:14:20 17 EXHIBIT NO. 4309: Book entitled "Land  
12:14:25 18 Policies of Upper Canada."

12:14:25 19 MR. LEMMOND: And there is one small  
12:14:27 20 problem with that full copy, Your Honour, which is  
12:14:29 21 that one chapter of it has been miscopied. Some  
12:14:32 22 pages are missing and out of order.

12:14:33 23 So I am also going to ask for the  
12:14:35 24 chapter that is problematic to be made an exhibit.

12:14:38 25 THE COURT: Is there any reason why a

1 corrected image couldn't be provided to  
2 Mr. Registrar on another date?

3 MR. LEMMOND: It can be done, Your  
4 Honour.

5 THE COURT: Is the problem that you  
6 want to ask questions about that very chapter?

7 MR. LEMMOND: No, Your Honour.

8 THE COURT: All right. Well, I would  
9 suggest then that we don't clutter up the record,  
10 that you provide Mr. Registrar with a substitute  
11 image and just put on the record for everyone's  
12 benefit which chapter you are referring to.

13 MR. LEMMOND: It is chapter 19.

14 THE COURT: Chapter 19, all right. If  
15 you could just, when the time comes, indicate in  
16 Court that that's been done.

17 MR. LEMMOND: Yes, Your Honour.

18 THE COURT: Please go ahead.

19 BY MR. LEMMOND:

20 Q. Now, Professor Harring, I don't  
21 propose to go through every detail of land policy  
22 during this period, because that would take us  
23 through 300-plus pages.

24 A. I notice your annotations.

25 Q. But what I would like to do is

12:15:35 1 discuss some examples and see if we can come to  
12:15:38 2 some agreement on some broader observations. And I  
12:15:41 3 would like to begin by discussing the Crown  
12:15:44 4 reserves.

12:15:46 5 So, Dr. Harring, would you agree that  
12:15:52 6 soon after the formation of the colony of Upper  
12:15:55 7 Canada in the early 1790s, the Imperial Government  
12:15:58 8 directed the colony to set aside surveyed land as  
12:16:00 9 Crown reserves?

12:16:02 10 A. Right.

12:16:03 11 Q. And essentially the idea, Dr.  
12:16:08 12 Harring, was that those lands could be leased by  
12:16:11 13 the Crown to generate revenue to support the civil  
12:16:14 14 government of the colony?

12:16:15 15 A. Right.

12:16:16 16 Q. And those lands were directed to  
12:16:20 17 constitute at least one-seventh of the surveyed  
12:16:24 18 lands; is that correct?

12:16:25 19 A. I believe one-seventh is the  
12:16:28 20 number, but I am not sure.

12:16:32 21 Q. And, Dr. Harring, would you agree  
12:16:36 22 that that policy of setting aside Crown reserves  
12:16:38 23 was very much a specific response to problems that  
12:16:42 24 had emerged during the -- in the lead-up to the  
12:16:47 25 American Revolution?

12:16:48 1 A. In the lead-up to the American  
12:16:52 2 Revolution in the United States.

12:16:53 3 Q. Yes.

12:16:53 4 A. Yes.

12:16:54 5 Q. And the particular problem that  
12:16:56 6 the policy responded to was the fact that in many  
12:16:59 7 of the American colonies, there was no set  
12:17:01 8 provision for funding the civil government of the  
12:17:05 9 colonies; is that correct?

12:17:06 10 A. Right.

12:17:06 11 Q. And by "civil government" I mean  
12:17:12 12 things such as funding for the Governor, various  
12:17:14 13 royal officials, including royally appointed  
12:17:16 14 judges; is that correct?

12:17:17 15 A. Right, and -- right.

12:17:22 16 Q. So what it meant in practice in  
12:17:24 17 the American colonies was that to support the  
12:17:26 18 administration of the colony, you had one of two  
12:17:30 19 things. Either taxes would be voted for by the  
12:17:33 20 legislature; is that correct?

12:17:34 21 A. Right.

12:17:34 22 Q. Or the money had to be made up by  
12:17:38 23 the British taxpayer through an Imperial grant?

12:17:40 24 A. Right.

12:17:41 25 Q. So the basic point of this regime

1 of Crown reserves was to avoid that problem, that  
2 is, to provide some money to the civil government  
3 so you would not either rely upon British taxpayers  
4 or legislative appropriations?

5 A. Yes.

6 Q. Would you agree, Dr. Harring, that  
7 what that suggests is that this policy, this land  
8 policy of Crown reserves was directed to attain a  
9 very significant policy objective by the Imperial  
10 Government?

11 A. Sorry, I didn't hear your  
12 question.

13 Q. Sorry, it was intended to attain a  
14 significant policy objective, Imperial policy  
15 objective?

16 A. Yes, that is one policy objective.  
17 Another one would be of course the orderly  
18 settlement of the colony through a top-down  
19 directed lands policy, again, unlike the United  
20 States where it was chaotic and -- right.

21 Q. You would agree, Professor  
22 Harring, that it was not intended for this policy  
23 to foster squatting? That was not one of the  
24 purposes underlying the policy?

25 A. It was not intended to foster



12:19:03 1 squatting.

12:19:03 2 Q. But problems emerged with this  
12:19:06 3 policy. One problem that emerged, a very practical  
12:19:09 4 problem, was that settlers in Upper Canada did not  
12:19:12 5 want to lease lands?

12:19:14 6 A. Right.

12:19:14 7 Q. As a result, they would not lease  
12:19:18 8 Crown reserve lands, so the income didn't  
12:19:21 9 materialize from these reserves; is that fair?

12:19:23 10 A. Right, that is fair.

12:19:25 11 Q. I would suggest another problem  
12:19:27 12 with the regime was that there continued to be a  
12:19:32 13 source of political controversy; is that fair?

12:19:35 14 A. Political controversy in the  
12:19:37 15 context of some people wanting to sell the lands to  
12:19:42 16 ordinary people at a reasonable price and also to  
12:19:47 17 avoid the squatting which probably was starting at  
12:19:51 18 the earliest time.

12:19:52 19 Q. Well, I was going to suggest in  
12:19:53 20 another sense, Professor Haring, in this sense.  
12:19:58 21 That at the time, that the basic point of reference  
12:20:01 22 on political and constitutional matters was the  
12:20:04 23 English constitution?

12:20:06 24 A. Okay, yes.

12:20:07 25 Q. And at this time, in England, most

1 Crown territorial revenues, that is revenues  
2 obtained from land, were under the control of the  
3 legislature?

4 A. Yes.

5 Q. So for some people within the  
6 province, it was politically and constitutionally  
7 offensive for the executive branch of government to  
8 have a source of income that wasn't subject to  
9 legislative oversight; is that fair?

10 A. Okay, it is fair.

11 Q. So it is a source of political  
12 controversy in that sense, you would agree?

13 A. Yes.

14 Q. It was also a practical problem in  
15 that the lots, the Crown reserve lots were laid out  
16 intermittently across the checkerboard of the  
17 surveyed townships; is that correct?

18 A. Yes.

19 Q. What that meant in practice was  
20 that you had unoccupied lots interspersed with lots  
21 that people were trying to settle upon; is that  
22 correct?

23 A. Yes.

24 Q. That in turn led to two issues.  
25 One, people who were settling depended upon

12:21:14 1 neighbours for help, so if you didn't have settlers  
12:21:17 2 on a Crown reserve, you didn't have neighbours on  
12:21:19 3 that Crown reserve to assist you in your  
12:21:22 4 settlement; is that fair?

12:21:23 5 A. Right.

12:21:23 6 Q. Is it also fair to say that one of  
12:21:26 7 the problems with the system was that if you did  
12:21:28 8 not have settlers, including leasehold settlers on  
12:21:33 9 the Crown reserve, there weren't people there to  
12:21:36 10 perform road duties?

12:21:37 11 A. Right.

12:21:38 12 Q. And that means that there weren't  
12:21:40 13 people to either build the road in the first place,  
12:21:43 14 and there was a statutory obligation to do so,  
12:21:45 15 wasn't there?

12:21:46 16 A. Right.

12:21:46 17 Q. And there weren't people to  
12:21:48 18 maintain the roads, again, the subject of a  
12:21:50 19 statutory duty; is that correct?

12:21:52 20 A. Yes.

12:21:52 21 Q. So in your testimony earlier,  
12:21:58 22 Professor Haring, I think on a number of occasions  
12:22:00 23 you said something to the effect that policies were  
12:22:03 24 tried and they had their effects and the government  
12:22:09 25 responded and tried other things over time; is that

12:22:11 1 fair?

12:22:12 2 A. Yes.

12:22:13 3 Q. So there is a certain level of  
12:22:15 4 ongoing experimentation with land policy in the  
12:22:19 5 colony; is that fair?

12:22:20 6 A. Yes, because as we have seen, it  
12:22:22 7 wasn't -- many people agree that it wasn't working  
12:22:25 8 the way it was supposed to work.

12:22:26 9 Q. So I would suggest to you, Dr.  
12:22:31 10 Haring, that the government noticed that there  
12:22:33 11 were problems with this regime and after the War of  
12:22:40 12 1812 one response was that the government, the  
12:22:42 13 provincial government, began to allocate Crown  
12:22:45 14 reserve lands to settlers, particularly military  
12:22:50 15 grant settlers; is that fair?

12:22:52 16 A. Yes.

12:22:52 17 Q. Another response was that the  
12:22:55 18 government began to sell Crown reserves during the  
12:22:57 19 1820s; is that correct?

12:22:59 20 A. Yes, they did.

12:23:00 21 Q. And that was very much  
12:23:01 22 specifically at the direction of the Imperial  
12:23:04 23 Government?

12:23:04 24 A. Yes.

12:23:05 25 Q. So I think, Professor Haring,

12:23:15 1 that brings us to another experiment, the Canada  
12:23:19 2 Company lands. Are you familiar with the Canada  
12:23:22 3 Company lands?

12:23:22 4 A. Yes.

12:23:22 5 Q. So we'll go through that in some  
12:23:25 6 detail, but hopefully not too much. Essentially,  
12:23:30 7 you would agree that the scheme was that the  
12:23:32 8 Imperial Government entered into an arrangement  
12:23:35 9 with a British joint stock company called the  
12:23:39 10 Canada Company; is that correct?

12:23:42 11 A. Yes.

12:23:42 12 Q. And the arrangement was that Crown  
12:23:44 13 reserve lands, approximately 1.4 million acres of  
12:23:49 14 Crown reserve lands, were to be sold to the Canada  
12:23:53 15 Company and it would be responsible for settling  
12:23:56 16 those lands; is that correct?

12:23:57 17 A. Yes.

12:23:57 18 Q. And the policy was adopted  
12:23:59 19 sometime around 1824 or 1825; is that about right?

12:24:03 20 A. I believe so.

12:24:04 21 Q. I would suggest to you one aspect  
12:24:17 22 of that policy is what we have seen with Crown  
12:24:20 23 reserves beforehand, that is, the intention of the  
12:24:23 24 Imperial Government was to create a source of  
12:24:26 25 revenue for the support and the civil

12:24:30 1 administration of the province; is that correct?

12:24:32 2 A. Right, and the advantage of the  
12:24:35 3 Canada Company is they got a bunch of money  
12:24:39 4 upfront.

12:24:39 5 Q. And the actual arrangement was  
12:24:40 6 that the Canada Company was to make 15 annual  
12:24:43 7 payments to the executive branch of government; is  
12:24:50 8 that fair?

12:24:50 9 A. Yes.

12:24:50 10 Q. Another aspect of the policy was  
12:24:54 11 to respond to the perceived inadequacy of  
12:24:58 12 colonization efforts as a matter of a lack of  
12:25:00 13 capital; is that fair?

12:25:02 14 A. Yes.

12:25:02 15 Q. So what that meant in practice is  
12:25:05 16 the Canada Company was supposed to bring -- no,  
12:25:09 17 provide the capital upfront to do things such as  
12:25:12 18 provide roads, bridges, mills, surveying, open up  
12:25:18 19 the country that way and then recoup its costs over  
12:25:23 20 time from the settlers; is that fair?

12:25:24 21 A. Right, and importantly, the Canada  
12:25:27 22 Company, because it was financially invested in  
12:25:29 23 this, would recruit the most skillful and able  
12:25:33 24 settlers who could actually make this work as  
12:25:37 25 opposed to hypothetically settlers who arrived with

12:25:41 1 few skills and less capital and would have more  
12:25:45 2 trouble farming.

12:25:46 3 Q. Is it fair to say, Professor  
12:25:47 4 Harring, that the policy of the sale to the Canada  
12:25:52 5 Company was not intended to foster squatting?

12:25:55 6 A. Yes.

12:25:55 7 Q. I would suggest, Dr. Harring, that  
12:25:59 8 with this arrangement we also see some problems,  
12:26:02 9 and one of them is similar to the problem that we  
12:26:04 10 have discussed in relation to Crown reserves which  
12:26:07 11 is that it was an object of political criticism by  
12:26:11 12 reformers during the 1820s and '30s; is that fair?

12:26:15 13 A. Yes.

12:26:16 14 Q. And a similar critique was being  
12:26:19 15 made of the arrangement, that is, the flow of money  
12:26:22 16 to the executive without legislative oversight was  
12:26:27 17 regarded as being politically and constitutionally  
12:26:30 18 offensive?

12:26:30 19 A. Yes.

12:26:31 20 Q. Another consequence I would  
12:26:37 21 suggest, Professor Harring, is that the Canada  
12:26:42 22 Company scheme limited the Crown's ability to  
12:26:45 23 implement a policy of widespread free grants; is  
12:26:51 24 that fair?

12:26:52 25 A. Yes, it would be inconsistent with

12:26:55 1 it in effect because they have already made a deal  
12:26:58 2 with the Canada Company that gives the Canada  
12:27:00 3 Company the authority to settle the land.

12:27:01 4 Q. So you would agree that, you know,  
12:27:03 5 the basic problem underneath that is if the  
12:27:05 6 government started to give a lot of free land away,  
12:27:09 7 it would undercut the ability of the Canada Company  
12:27:12 8 to sell lands and, well, make money from the sale  
12:27:15 9 of lands; is that fair?

12:27:16 10 A. Yes. And also, you know,  
12:27:18 11 considering the example of the United States, which  
12:27:20 12 is always there, free lands made land available to,  
12:27:27 13 I don't know how to put this, a lower class of  
12:27:29 14 settler, a less desirable settler, a settler with  
12:27:32 15 fewer skills and less money who might be, you know,  
12:27:36 16 political trouble in the future.

12:27:38 17 Q. So I take it you are suggesting  
12:27:40 18 that this scheme is also connected to a high  
12:27:43 19 political objective of creating a certain kind of  
12:27:46 20 society?

12:27:47 21 A. It is.

12:27:48 22 Q. A society of those of the better  
12:27:50 23 sort, to use language of the day?

12:27:52 24 A. Well, Gates says that very  
12:27:53 25 clearly.



12:27:54 1 Q. But you would agree, Professor  
12:27:56 2 Haring, that there was squatting on Canada Company  
12:27:58 3 lands also?

12:27:59 4 A. Squatting?

12:28:02 5 Q. Yes.

12:28:03 6 A. Well, I mean, they have -- the  
12:28:06 7 theory of giving it to the Canada Company is you  
12:28:09 8 turn over to them responsibility for it, but they  
12:28:12 9 of course, you know, had whatever agents they had,  
12:28:15 10 allocating it however best they could, but right,  
12:28:18 11 there would have been squatting there too.

12:28:19 12 Q. And essentially the scheme meant  
12:28:21 13 that dealing with squatters was primarily the  
12:28:23 14 Canada Company's problem?

12:28:26 15 A. You would contract it out, if you  
12:28:29 16 will.

12:28:29 17 Q. I am going to go back in time a  
12:28:38 18 little bit, Professor Haring, to discuss militia  
12:28:47 19 grants and military grants.

12:28:48 20 A. Okay.

12:28:49 21 Q. So we are going to turn our minds  
12:28:51 22 back to 1812 and 1813. At the time, the War of  
12:28:56 23 1812 was going on; correct?

12:28:57 24 A. Yes.

12:28:57 25 Q. And you would agree at the time

1 Upper Canada is in part reliant upon its militia  
2 for its defence?

3 A. Yes.

4 Q. And at least the legal obligation  
5 is that all able-bodied men between the ages of 18  
6 and 60 were called upon to serve in the militia?

7 A. I believe that is the age range,  
8 but essentially it is everyone.

9 Q. But it is fair to say that having  
10 the legal obligation and actually getting people to  
11 show up and bear arms and stand on the --

12 A. I would assume that would  
13 definitely be true.

14 Q. So would you agree that one of the  
15 persistent challenges faced by the colonial  
16 government and the Imperial Government during the  
17 War of 1812 was motivating the militia to take up  
18 arms and defend the province?

19 A. The problem of paying soldiers.  
20 They weren't -- you would have to pay them. You  
21 could pay them with, right, money or land.

22 Q. And one response to this problem  
23 was that the colonial government promised militia  
24 soldiers free grants of land after the war?

25 A. Yes.

12:29:58 1 Q. And that promise wasn't restricted  
12:30:04 2 only to Upper Canada. It was extended to Lower  
12:30:08 3 Canada and eventually in practice men who had  
12:30:13 4 served in the Lower Canada militia were also able  
12:30:17 5 to take up militia grants in Upper Canada; is that  
12:30:19 6 fair? So --

12:30:21 7 A. I believe that to be true.

12:30:22 8 Q. And what that reflects, I would  
12:30:27 9 suggest, Professor Harring, is that the problem of  
12:30:32 10 defence wasn't restricted just to one province; it  
12:30:35 11 was a collective problem for the colonial and  
12:30:37 12 Imperial Governments?

12:30:38 13 A. Yes.

12:30:39 14 Q. So you would agree, Professor  
12:30:41 15 Harring, that the policy of giving militia grants  
12:30:45 16 was very much driven again by a high policy  
12:30:47 17 objective of the Imperial and colonial government,  
12:30:50 18 that is, the defence of the colony?

12:30:52 19 A. The defence of the colony at the  
12:30:58 20 cheapest price it could be obtained.

12:31:01 21 Q. You would agree, Professor  
12:31:05 22 Harring, that the policy of granting militia grants  
12:31:07 23 was not intended to foster squatting?

12:31:09 24 A. Yes.

12:31:09 25 Q. Now, in a closely related vein,

12:31:25 1 Dr. Harring, would you agree that the Imperial  
12:31:28 2 Government also promised regular soldiers, that is  
12:31:30 3 British army soldiers who served in the Canadas,  
12:31:33 4 that they would also receive free grants of land as  
12:31:36 5 military grants?

12:31:37 6 A. Yes.

12:31:37 7 Q. And in fact, after the war, the  
12:31:42 8 government extended that policy to officers who had  
12:31:46 9 not served in Canada but had served elsewhere in  
12:31:51 10 the British military?

12:31:52 11 A. I believe it was extended a number  
12:31:53 12 of ways, including sailors, for example.

12:31:56 13 Q. Right.

12:31:57 14 A. And maybe even other Crown  
12:31:59 15 officials at different levels who had been involved  
12:32:02 16 in Canada or serving the government.

12:32:08 17 Q. So is it fair to say, Professor  
12:32:10 18 Harring, that one of the objectives of that policy,  
12:32:12 19 again, was defence? It was a way of rewarding  
12:32:16 20 soldiers for good military service?

12:32:18 21 A. Yes, and populating Canada.

12:32:19 22 Q. I would suggest a more precise  
12:32:23 23 purpose of the policy was the defence of the area  
12:32:27 24 around Kingston going up through the lands that  
12:32:30 25 were intended to be the site of the Rideau Canal;

12:32:36 1 is that fair?

12:32:37 2 A. Yes.

12:32:37 3 Q. And just to explain that a little  
12:32:41 4 more closely, you would agree that one of the chief  
12:32:44 5 areas of concern for the defence of the province  
12:32:46 6 was the vulnerability of that strip of the St.  
12:32:49 7 Lawrence between Kingston and Montreal; is that  
12:32:51 8 fair?

12:32:51 9 A. Yes, Canada could be cut in half  
12:32:54 10 easily, yes.

12:32:54 11 Q. Right, and part of the government  
12:32:56 12 response to that problem after the war was spending  
12:32:58 13 an enormous amount of money on building the Rideau  
12:33:01 14 Canal so that you can go up the Ottawa River, and  
12:33:04 15 come down to Kingston, and avoid that perilous  
12:33:09 16 section of the St. Lawrence; is that fair?

12:33:10 17 A. Yes, and moving the capital to  
12:33:12 18 Ottawa, so it can't be easily captured.

12:33:14 19 Q. And part of what went on with the  
12:33:15 20 military grants is that the military grants were  
12:33:18 21 concentrated in the area of Kingston and the Rideau  
12:33:24 22 Canal specifically so they would have discharged  
12:33:25 23 soldiers on hand to help defend the area; is that  
12:33:27 24 fair?

12:33:28 25 A. Yes.

12:33:28 1 Q. So you would agree that the  
12:33:30 2 military grant program was very specifically  
12:33:34 3 connected to defence policy?

12:33:36 4 A. Yes.

12:33:36 5 Q. I am going to move on to another  
12:33:45 6 related topic, Professor Harring, which is land  
12:33:49 7 policy in the colony, Upper Canada, Canada West, in  
12:33:53 8 relation to aliens and naturalization.

12:33:57 9 A. Okay.

12:33:58 10 Q. And it comes, I think, from the  
12:34:00 11 same area. You would agree that after the War of  
12:34:05 12 1812, one of the prominent concerns, particularly  
12:34:08 13 of the Imperial Government, is the security of the  
12:34:11 14 province in the face of having a population that is  
12:34:15 15 largely American in origin; is that fair?

12:34:18 16 A. Yes.

12:34:19 17 Q. And after 1815, the Imperial  
12:34:25 18 Government very deliberately decides to try to shut  
12:34:28 19 down the province, that is, Upper Canada, to  
12:34:32 20 American immigration and to substitute for it  
12:34:35 21 British immigration?

12:34:38 22 A. British, Scottish and Irish.

12:34:40 23 Q. Right, all three?

12:34:42 24 A. Yes.

12:34:43 25 Q. And Welsh too?

12:34:44 1 A. Yes.

12:34:44 2 Q. So you would agree that that

12:34:52 3 policy in part is a matter of security, you know,  
12:34:57 4 ensuring the loyalty of the province is a matter of  
12:34:59 5 the security of the province as a component of the  
12:35:02 6 British Empire; is that fair?

12:35:03 7 A. That is fair.

12:35:04 8 Q. And another policy thread at the  
12:35:09 9 Imperial level was that the government was starting  
12:35:13 10 to deal with unrest in Britain itself, particularly  
12:35:16 11 industrial unrest in places like southern Scotland  
12:35:18 12 with the closure of textile mills after the  
12:35:21 13 reduction of business from the Napoleonic Wars; is  
12:35:25 14 that fair?

12:35:26 15 A. That is fair.

12:35:27 16 Q. There were also troubles in  
12:35:28 17 Ireland?

12:35:29 18 A. Yes.

12:35:30 19 Q. In terms of, you know, what this  
12:35:39 20 meant on the ground, is it fair to say that there  
12:35:42 21 was a bunch of ups and downs, if you will, in terms  
12:35:44 22 of how the government handles American settlers  
12:35:48 23 after 1815, but the basic point, at least until  
12:35:52 24 1828, is that their legal ability to hold land is  
12:35:56 25 in question?

12:35:57 1 A. Yes.

12:35:57 2 Q. And as of 1828, the policy that is  
12:36:02 3 adopted is Americans and other aliens cannot own  
12:36:06 4 land in Upper Canada until they had been resident  
12:36:10 5 for seven years and naturalized at the end of the  
12:36:12 6 seven-year period; is that fair?

12:36:14 7 A. There is some -- I accept that.  
12:36:16 8 There is some naturalization period.

12:36:17 9 Q. Well, as with other policies we  
12:36:25 10 have discussed, Professor Haring, I would suggest  
12:36:26 11 that there were problems that attended this policy?

12:36:30 12 A. Problems.

12:36:32 13 Q. One of them was that, to put it  
12:36:35 14 simply, that the best people available for opening  
12:36:38 15 up heavily forested land, you know, Carolinian  
12:36:42 16 forest in Southern Ontario, were people who had  
12:36:45 17 experience opening up similar forests in the  
12:36:48 18 States?

12:36:48 19 A. Yes.

12:36:48 20 Q. So the American settler was  
12:36:53 21 particularly useful, as you know, sort of the  
12:36:55 22 vanguard of settlement on the frontier; is that  
12:36:57 23 fair?

12:36:58 24 A. I guess hardworking people, yes.

12:37:03 25 Q. And I would suggest that was



12:37:05 1 particularly the case because the British settlers  
12:37:09 2 who were coming in at the time either had no  
12:37:11 3 agricultural experience, that is coming from the  
12:37:14 4 early industrial cities, or had experience of  
12:37:16 5 very -- a much more established agricultural  
12:37:19 6 landscape. They weren't, you know, people who had  
12:37:22 7 been out there cutting the bush down to establish  
12:37:27 8 farms; is that fair?

12:37:28 9 A. Right, and they lacked capital,  
12:37:30 10 which the Americans who had sold their farms in the  
12:37:32 11 east and were moving west had some money.

12:37:34 12 Q. Now, would you agree with me that  
12:37:39 13 this policy of restricting, in fact actively  
12:37:43 14 deterring American immigration through most of the  
12:37:47 15 period in question was not intended to foster  
12:37:51 16 squatting?

12:37:52 17 A. Yes.

12:37:54 18 Q. Although it did have that effect  
12:37:57 19 because necessarily American settlers would be  
12:37:59 20 squatting?

12:38:00 21 A. They had to, yes, because they had  
12:38:03 22 an inability to get land legally.

12:38:05 23 Q. Right, and that situation really  
12:38:07 24 isn't resolved until 1849 when legislation was put  
12:38:11 25 in place that allows for the holding of land in the

1 province by aliens; is that fair?

2 A. Yes.

3 Q. I am going to bring us closer in  
4 time to the period of the Treaties, Professor  
5 Harring, and I am going to discuss with you the  
6 common school lands.

7 A. I didn't hear the last --

8 Q. Sorry, the common school lands.

9 A. Okay.

10 Q. So, Professor Harring, in 1849  
11 legislation was passed, provincial legislation,  
12 that set aside one million acres of land in the  
13 Huron tract for the purpose of creating a common  
14 school fund; is that correct?

15 A. Yes.

16 Q. And the basic idea was that lands  
17 would be sold, the sales would go into funds that  
18 would be used over time to generate interest that  
19 would be used to support the establishment of a  
20 public education system, both in Upper Canada,  
21 Canada West and Canada East; is that correct?

22 A. Yes.

23 Q. So would you agree that this  
24 policy was, you know, very directly and intimately  
25 connected with the much larger policy initiative of

12:39:37 1 developing public education of the colony?

12:39:40 2 A. Yes.

12:39:40 3 Q. It was not intended to foster  
12:39:47 4 squatting?

12:39:51 5 A. [Witness shakes his head.]

12:39:53 6 Q. But you would agree that it had  
12:39:54 7 some effect also upon making land more widely  
12:39:58 8 available in that in order to sell lands, you had  
12:40:01 9 to avoid undercutting yourself by making land too  
12:40:04 10 readily available for free; is that fair?

12:40:06 11 A. Right.

12:40:07 12 Q. So it had an impact in an indirect  
12:40:10 13 way upon the availability of land for less  
12:40:13 14 well-resourced settlers but it wasn't intended to  
12:40:16 15 preclude people from getting land; is that fair?

12:40:21 16 A. Yes, that is fair.

12:40:35 17 Q. I am just going to locate a  
12:40:45 18 document here. There we go.

12:40:51 19 I am now going to ask for our exhibit  
12:40:57 20 of the Gates book, and I don't have the new exhibit  
12:40:59 21 number for it, to be brought up. And I am going to  
12:41:09 22 ask, Ms. Benson, for you to please bring us to PDF  
12:41:15 23 page 299.

12:41:37 24 And, Professor Harring, I am just going  
12:41:40 25 to bring you to the bottom of that page, literally,

12:41:44 1 you know, the very end of it, so I am going to  
12:41:47 2 bring us into the time frame that we are talking  
12:41:50 3 about, but before I get into it, I just want to set  
12:41:52 4 the stage a little bit.

12:41:54 5 Would you agree that at this time, so  
12:42:00 6 the time referenced here in the passage is October  
12:42:02 7 1854, at that time the primary land policy of the  
12:42:07 8 colony for some years had been to sell land at a  
12:42:11 9 moderate price on a credit scheme?

12:42:15 10 A. Yes.

12:42:15 11 Q. And basically the idea behind that  
12:42:18 12 policy was to not undercut the sale of school  
12:42:23 13 lands, not undercut the sale of clergy lands,  
12:42:27 14 generate some revenue for the government, but at  
12:42:29 15 the same time make it affordable for less  
12:42:34 16 well-capitalized settlers to get land, to become  
12:42:38 17 landowners; is that fair?

12:42:42 18 A. Okay.

12:42:42 19 Q. That is a yes?

12:42:43 20 A. Yes. Sorry.

12:42:46 21 Q. So I am just going to read the  
12:42:49 22 passage:

12:42:51 23 "In October, 1854, after the  
12:42:54 24 Hincks-Morin government [...]"

12:42:58 25 And I am just going to stop there. So

12:42:59 1 Morin was the co-premier along with Hincks at the  
12:43:08 2 time; is that correct?

12:43:08 3 A. Yes.

12:43:08 4 Q. "[...] had given place to the  
12:43:11 5 MacNab-Morin government [...]"

12:43:13 6 So again, we have a continuation of  
12:43:15 7 government -- we have a different administration,  
12:43:17 8 but Mr. Morin continues on as co-premier; is that  
12:43:21 9 fair?

12:43:21 10 A. Okay, yes.

12:43:23 11 Q. "[...] a committee of the  
12:43:25 12 legislature, with A.T. Galt, a  
12:43:27 13 chairman and four one-time  
12:43:28 14 Commissioners of Crown Lands among  
12:43:30 15 the members made an extensive  
12:43:33 16 enquiry into the system of managing  
12:43:35 17 the Crown lands. To satisfy the  
12:43:37 18 demand for land in the western  
12:43:39 19 peninsula, the previous government  
12:43:40 20 had decided to bring the remaining  
12:43:41 21 Crown and school land in Wellington,  
12:43:44 22 Perth, Huron, Bruce, and Grey  
12:43:47 23 counties on the market and to open  
12:43:49 24 about 770 miles of new roads (not  
12:43:55 25 free grant roads) in these

12:43:57 1 counties."

12:43:57 2 So just to pause, you would agree from  
12:43:59 3 this passage, Professor Harring, that the  
12:44:01 4 government is thinking about its land policy, how  
12:44:04 5 it is going to actually administer lands, as part  
12:44:08 6 of opening up further lands for sale, basically in  
12:44:12 7 the Treaty 45 1/2 lands?

12:44:14 8 A. Yes.

12:44:14 9 Q. Continuing with the passage:

12:44:19 10 "The committee had to consider  
12:44:21 11 whether the land made available  
12:44:23 12 should be thrown open to cash sale  
12:44:25 13 as in the state of Michigan, or  
12:44:27 14 continue to be sold on credit in  
12:44:29 15 restricted quantities and subject to  
12:44:31 16 settlement duties. The committee's  
12:44:34 17 hearings took place while sales were  
12:44:36 18 in progress in the western counties  
12:44:38 19 and while the land disputes already  
12:44:40 20 referred to were developing there."

12:44:43 21 So again, they are thinking about  
12:44:44 22 exactly how they are going to go about selling  
12:44:46 23 these lands, whether it is going to be a cash sale,  
12:44:49 24 a credit sale, and as is typical of the period,  
12:44:53 25 they have behind this, you know, an American

12:44:56 1 example, American policies that informed how they  
12:44:59 2 go about selling lands, what prices could be set,  
12:45:01 3 that sort of thing; is that fair?

12:45:04 4 A. Yes.

12:45:04 5 Q. Continuing:

12:45:08 6 "A.N. Morin," so that is the  
12:45:11 7 co-premier, is that right, "[...]  
12:45:14 8 the current Commissioner of Crown  
12:45:16 9 Lands, continued to defend the  
12:45:18 10 credit system [...]"

12:45:19 11 So just to stop there, he defends the  
12:45:22 12 existing system of selling lands on credit; is that  
12:45:25 13 fair? Is that correct?

12:45:27 14 A. Well, I mean, it says that  
12:45:30 15 clearly.

12:45:30 16 Q. Okay:

12:45:32 17 "[...] on the grounds of broad  
12:45:33 18 social policy. He pointed out that  
12:45:36 19 cash sale would benefit speculators  
12:45:39 20 and was therefore incompatible with  
12:45:42 21 a policy of appropriating public  
12:45:44 22 monies for opening roads into new  
12:45:45 23 districts. Morin regarded squatting  
12:45:48 24 as one of the inevitable evils of a  
12:45:51 25 new and rapidly developing country.

12:45:53 1 He favoured giving squatters a right  
12:45:56 2 of preemption and a right to  
12:46:01 3 compensation for their  
12:46:01 4 improvements."

12:46:02 5 So from that passage I would suggest,  
12:46:07 6 Professor Harring, that land policy in the province  
12:46:10 7 continues to be animated by what is described here  
12:46:12 8 as broad social policy; is that fair?

12:46:16 9 A. I mean, broad social policy of  
12:46:20 10 course is a relatively undefined set of broad  
12:46:27 11 social policies.

12:46:28 12 Q. Well, in this case, the policy of  
12:46:31 13 Morin -- let's just step back. Morin had been one  
12:46:37 14 of the reformers in the 1830s; is that correct?

12:46:40 15 A. Right, yes.

12:46:40 16 Q. In fact, he is one of the authors  
12:46:43 17 of the 92 articles, and he had actually, you know,  
12:46:45 18 taken up arms as part of the rebellion in 1837; is  
12:46:50 19 that correct?

12:46:50 20 A. Yes, I believe so.

12:46:52 21 Q. So he is a reformer; is that fair?

12:46:54 22 A. Yes.

12:46:54 23 Q. That is his place in the political  
12:46:58 24 firmament; is that fair? And the policy he was  
12:47:02 25 espousing was one of trying to make lands available



12:47:04 1 for sort of the small-scale farmer so that the new  
12:47:07 2 generation of sons would have land to go on to --

12:47:10 3 A. Well, land on credit is about as  
12:47:13 4 accessible as it gets.

12:47:13 5 Q. Right.

12:47:14 6 A. Yes.

12:47:14 7 Q. And he seems to take the view as  
12:47:22 8 the Crown Commissioner that in that world of  
12:47:26 9 dealing with lands on the frontier and a new  
12:47:29 10 colony, squatting is an unavoidable evil; is that  
12:47:33 11 fair?

12:47:33 12 A. That is exactly what the text  
12:47:35 13 says.

12:47:35 14 Q. And it is not that his policy of  
12:47:39 15 opening up lands and making lands accessible is  
12:47:42 16 intended to encourage squatting. He just accepts  
12:47:45 17 that as part of the world that he is operating in,  
12:47:50 18 in trying to effect his policy; is that fair?

12:47:52 19 A. Well, there we may -- I think it  
12:47:55 20 is more complicated than that, that if you are  
12:47:58 21 going back -- this is, what is it, '54, isn't it?  
12:48:01 22 I am just forgetting the date.

12:48:02 23 Q. It is October 1854.

12:48:04 24 A. Okay, if you go back to, say,  
12:48:06 25 1840, just this, the period just before this, the

12:48:10 1 ten or fifteen years just before this, you have a  
12:48:13 2 problem that -- you know, I referred to the runaway  
12:48:17 3 squatting or the squatting that is uncontrolled,  
12:48:20 4 all over the frontier.

12:48:22 5 And he has -- he here is talking about  
12:48:27 6 some way to bring that under control. I mean, it  
12:48:29 7 is clear. I mean, if you can get land on credit,  
12:48:34 8 you don't need to squat, if you could pay for it,  
12:48:37 9 right.

12:48:38 10 But there is another problem you can  
12:48:39 11 see looming in that, and we see that happening with  
12:48:43 12 the Treaty 72 lands, that people got it on credit  
12:48:46 13 or cheaply, sorry, cheaply -- sorry, Treaty 72 was  
12:48:53 14 sold. They were getting land on credit around it,  
12:48:55 15 but not in Treaty 72. They then can't -- they  
12:48:58 16 can't make the payments and it gets repossessed and  
12:49:00 17 you have got the instability circulating with  
12:49:03 18 different types of instabilities, including  
12:49:06 19 squatting, you know, moving around the fringes of  
12:49:10 20 this, wherever they can, because they are not  
12:49:12 21 disappearing.

12:49:14 22 Q. Right. So Professor Haring, you  
12:49:15 23 would agree that, you know, the freedom of action  
12:49:19 24 of the government at this time with respect to land  
12:49:21 25 policy is constrained by the fact that there are

12:49:24 1 bodies of lands that are to be sold for various  
12:49:27 2 beneficiaries; is that correct?

12:49:28 3 A. Yes.

12:49:29 4 Q. And that includes the clergy; is  
12:49:32 5 that right?

12:49:32 6 A. Yes.

12:49:32 7 Q. It includes the school system?

12:49:35 8 A. Yes.

12:49:36 9 Q. It includes Indian lands also;  
12:49:39 10 isn't that fair?

12:49:39 11 A. That is fair.

12:49:40 12 Q. So there is a limit on, you know,  
12:49:42 13 how far they can go in making land freely  
12:49:45 14 available; you agree with that proposition?

12:49:46 15 A. Yes.

12:49:47 16 Q. And you would agree with the  
12:49:49 17 proposition that Morin's policy, the policy adopted  
12:49:53 18 by this government and adopted and implemented by  
12:49:55 19 the previous government, was actually directed in  
12:49:58 20 part but indirectly to relieving the pressure in  
12:50:03 21 terms of squatting by making land more readily  
12:50:06 22 available to a wider class of settler as  
12:50:12 23 landowners, part of the point would be to make it,  
12:50:14 24 you know -- obviate the need to squat to get land;  
12:50:18 25 is that fair?

12:50:19 1 A. After 1854. I mean --

12:50:22 2 Q. Well, when they adopt the policy.

12:50:23 3 A. Yeah, after this period.

12:50:24 4 Q. Well, you would agree with me that

12:50:26 5 they adopted the credit system earlier, going back

12:50:28 6 to the 1840s, and had been in place for some time;

12:50:33 7 is that fair?

12:50:33 8 A. Okay, yes.

12:50:37 9 THE COURT: It is 10 minutes to 1:00.

12:50:39 10 You can finish up your point, though, sir, if you

12:50:41 11 want to.

12:50:43 12 MR. LEMMOND: Okay, I will, Your

12:50:44 13 Honour.

12:50:44 14 THE COURT: Yes.

12:50:45 15 BY MR. LEMMOND:

12:50:48 16 Q. So I would suggest to you,

12:50:50 17 Professor Harring, that to the extent that this

12:50:52 18 policy has as an indirect object, you know, a

12:50:57 19 reduction in squatting, it is not through the

12:50:59 20 mechanism of enforcement; it is through land policy

12:51:03 21 and making land available? It is getting at an

12:51:06 22 underlying economic and sociopolitical problem, as

12:51:10 23 opposed to treating it as an enforcement problem;

12:51:13 24 is that correct?

12:51:13 25 A. I mean, I think it is all part of

12:51:20 1 a package. I mean, it is an allocation problem and  
12:51:26 2 an enforcement problem, and of course they are  
12:51:28 3 interrelated because you are going back to Gates in  
12:51:31 4 the beginning. Had there been easier availability  
12:51:35 5 of land, say, from the time of the 1820s, you  
12:51:39 6 wouldn't have had the squatter problem that  
12:51:41 7 developed. And that is the issue regarding the  
12:51:46 8 1854 surrender.

12:51:47 9 This is too late for the 1854  
12:51:50 10 surrender.

12:51:50 11 Q. Well, if you accept that the  
12:51:52 12 policy, the credit policy was implemented in late  
12:51:56 13 1840s, I would suggest it is relevant to the 1854  
12:51:59 14 surrender. If the policy is in place in, say,  
12:52:02 15 1848, it is germane to considering what was going  
12:52:05 16 on, on the ground, right in the adjacent lands in  
12:52:09 17 1854; isn't that right?

12:52:11 18 A. Okay, yes.

12:52:16 19 MR. LEMMOND: I'm almost done, Your  
12:52:17 20 Honour. Actually, I can leave it at this point for  
12:52:19 21 our break.

12:52:19 22 THE COURT: We'll adjourn until 2:15.

12:52:22 23 -- RECESSED AT 12:50 P.M.

14:15:55 24 -- RESUMED AT 2:15 P.M.

14:15:55 25 THE COURT: Please go ahead.

14:15:56 1 BY MR. LEMMOND:

14:15:57 2 Q. Good afternoon, Your Honour, and  
14:15:59 3 Professor Harring.

14:15:59 4 A. Good afternoon.

14:16:00 5 Q. Professor Harring, I would like to  
14:16:01 6 continue with our discussion of land policy in  
14:16:03 7 Upper Canada and Canada West, and I am going to  
14:16:08 8 bring you back to the Gates book, which is now  
14:16:11 9 Exhibit 4271, at PDF page 309, which is hard copy  
14:16:19 10 page 305. I'm sorry, 4309, my apologies, I misread  
14:16:33 11 it, and it is PDF 309, hard copy number 305.

14:16:49 12 Now, Professor Harring, you would agree  
14:16:52 13 that in her conclusion, Dr. Gates spends some time  
14:16:55 14 providing a summary of the various ups and downs of  
14:16:58 15 land policy in the colony; is that correct?

14:17:01 16 A. Yes.

14:17:01 17 Q. So we are going to pick up part of  
14:17:04 18 the way through that journey through the land  
14:17:07 19 policies at the paragraph that is highlighted, and  
14:17:12 20 just to set the stage at this point, if you take a  
14:17:15 21 look at this section, I think you will see that we  
14:17:18 22 are talking about the period in the early 19th  
14:17:20 23 century, before 1841.

14:17:25 24 A. Yes.

14:17:25 25 Q. So I am just going to go through

14:17:28 1 that highlighted paragraph with you:

14:17:32 2 "In fact, the effects of the  
14:17:33 3 land policies pursued on either side  
14:17:35 4 of the border were similar."

14:17:38 5 So just to pause for a moment, at this  
14:17:40 6 juncture in her conclusion, she is engaging in  
14:17:43 7 something of a comparison between land practices in  
14:17:46 8 Upper Canada and the States?

14:17:48 9 A. In 1826.

14:17:49 10 Q. Right.

14:17:50 11 A. Yes.

14:17:50 12 Q. "On the American side, first  
14:17:53 13 the credit system then the cash sale  
14:17:55 14 systems favoured speculation; on the  
14:17:58 15 Canadian side, the free grant system  
14:18:00 16 in force until 1826 produced the  
14:18:03 17 same result, and so did both the  
14:18:05 18 credit and the cash sale system when  
14:18:08 19 they were adopted."

14:18:10 20 So you would agree, Professor Harring,  
14:18:12 21 that what she is lightly touching upon here is that  
14:18:15 22 a variety of policies were tried in both American  
14:18:19 23 jurisdictions and Canadian jurisdictions,  
14:18:21 24 particularly Upper Canada; is that correct?

14:18:23 25 A. Yes.

14:18:23 1 Q. And then she asks -- well, just to  
14:18:30 2 pause, actually, before we go. And what she is  
14:18:33 3 particularly noting is that these policies end up  
14:18:35 4 favouring speculation. She is concerned with  
14:18:37 5 speculation in particular in this passage; is that  
14:18:40 6 right?

14:18:41 7 A. Yes.

14:18:42 8 Q. Then she asks:

14:18:45 9 "What would have worked? One  
14:18:47 10 is tempted to conclude that the  
14:18:48 11 opening up of a new country is not  
14:18:50 12 an orderly process. Without  
14:18:52 13 efficient law enforcement, it is  
14:18:54 14 something like opening the strings  
14:18:56 15 of a gigantic grab bag."

14:19:01 16 And this is a passage that you refer to  
14:19:03 17 in your report?

14:19:04 18 A. Yes.

14:19:04 19 Q. And I am going to ask you to go  
14:19:12 20 with me to a passage from your book "White Man's  
14:19:17 21 Law," and it is Exhibit 4271. I am going to bring  
14:19:22 22 you to page 41, which is PDF page 55, and I will  
14:19:35 23 just read through it:

14:19:37 24 "The term 'squatters' loosely  
14:19:38 25 applied to anyone who moved on to



14:19:40 1 any lands without a legal title;  
14:19:43 2 thus, it was understood by all at  
14:19:45 3 the time as a legal category. While  
14:19:47 4 now the term has a pejorative  
14:19:49 5 meaning, this was not as true in the  
14:19:51 6 nineteenth century. Government  
14:19:52 7 reports put squatters into two  
14:19:55 8 categories, deserving and  
14:19:56 9 undeserving, and, in the context of  
14:19:58 10 the land shortage of the time, a  
14:20:00 11 large proportion of  
14:20:02 12 early-nineteenth-century Upper  
14:20:03 13 Canadian farmers started off as  
14:20:05 14 squatters."

14:20:06 15 So I take it, Dr. Harring, that what  
14:20:08 16 you are saying here and what you are recognizing is  
14:20:11 17 that squatting was a major contributor to the  
14:20:16 18 actual successful settlement of the province? Many  
14:20:20 19 Canadian farmers started off as squatters; is that  
14:20:23 20 fair?

14:20:23 21 A. Yes.

14:20:24 22 Q. It wasn't intended to be the case,  
14:20:28 23 but that proved to be the case in practice; is that  
14:20:31 24 fair?

14:20:31 25 A. Yes.

14:20:32 1 Q. "Upper Canada gained nearly one  
14:20:37 2 million people in the fifty years  
14:20:39 3 between 1800 and 1851."

14:20:42 4 So I take it your point here, Professor  
14:20:44 5 Harring, is that, you know, there was an immense  
14:20:47 6 appetite for land driven by just a mind-bogglingly  
14:20:53 7 fast increase in population; is that fair?

14:20:58 8 A. Yes.

14:20:58 9 Q. And then you say:

14:20:59 10 "The legal regulation of this  
14:21:01 11 huge influx of settlers, often in  
14:21:04 12 frontier areas far from government  
14:21:06 13 offices and courts, was a difficult  
14:21:08 14 matter even with the best of  
14:21:09 15 intentions to protect Indian land  
14:21:11 16 rights."

14:21:15 17 So I would suggest, Professor Harring,  
14:21:19 18 that what you are conveying in this passage is  
14:21:23 19 that, you know, on a frontier area, efficient law  
14:21:27 20 enforcement was a real practical challenge?

14:21:30 21 A. It clearly was. I have said that  
14:21:33 22 a few times yesterday and the day before in  
14:21:38 23 examination.

14:21:39 24 Q. And I am going to bring you back  
14:21:42 25 now to the Gates volume, Exhibit 4309 at the prior

14:21:47 1 page, which is PDF 309, page 305, continuing with  
14:21:53 2 that passage:

14:21:54 3 "Those whom the late Professor  
14:21:56 4 Edwin F. Gay once described as 'the  
14:22:00 5 men with a hard cutting edge' grab  
14:22:03 6 what they can and find their way  
14:22:05 7 through whatever maze of regulations  
14:22:07 8 may be created in an effort to  
14:22:09 9 restrict them. The less fortunate  
14:22:10 10 pick up the bits and pieces of the  
14:22:13 11 good things that are left and hang  
14:22:14 12 on to them - if they can."

14:22:16 13 So a couple of things I would like to  
14:22:19 14 suggest to you here.

14:22:22 15 One, firstly, this is still in the  
14:22:25 16 context of a passage where Dr. Gates' primary  
14:22:28 17 concern is speculation. She is really talking  
14:22:31 18 about the ability of speculators to wind their way  
14:22:33 19 through the regulations and still make out  
14:22:38 20 successfully?

14:22:38 21 A. Well, "men with a hard cutting  
14:22:38 22 edge."

14:22:40 23 Q. Right, and so it is primarily in  
14:22:42 24 relation to speculation, not squatting, per se; is  
14:22:44 25 that correct?

14:22:44 1 A. Well, she is talking about --  
14:22:46 2 well, in fact, she is talking about the opposite  
14:22:48 3 when she talks about "The less fortunate pick up  
14:22:51 4 the bits and pieces of the good things that are  
14:22:54 5 left and hang on to them - if they can"; that is  
14:22:56 6 where she is talking about squatting, isn't it?

14:22:59 7 Q. Right, and the further point she  
14:23:01 8 seems to be making here is that, you know, a  
14:23:04 9 variety of policies were adopted, different  
14:23:07 10 administrative techniques for managing the sale,  
14:23:10 11 granting of lands, but whatever was tried, it  
14:23:14 12 appears that these hard-cutting men were able to  
14:23:17 13 make their way through despite the best efforts of  
14:23:21 14 government; is that fair?

14:23:22 15 A. I mean, it is fair. It is --  
14:23:26 16 again, I mean, we are kind of -- well, it connects  
14:23:31 17 to so many different things, doesn't it, without  
14:23:34 18 even talking about today.

14:23:36 19 And it really is the balance between  
14:23:44 20 government and hard-cutting men who will challenge  
14:23:48 21 government on every stage, isn't it, at every --  
14:23:50 22 probably every stage of our history, and then how  
14:23:55 23 do you -- how does government protect the less  
14:23:59 24 fortunate, either white settlers or Indians in this  
14:24:05 25 process.

14:24:06 1 And I think it doesn't mean that they  
14:24:08 2 don't. It means that it is challenging. And they  
14:24:11 3 need regulations and a regulatory regime capable at  
14:24:15 4 each stage of dealing with this -- these  
14:24:19 5 hard-cutting men, right.

14:24:20 6 Q. You would agree that in a new  
14:24:22 7 colony, where the civil administration is in its  
14:24:27 8 infancy, government is just in the process of being  
14:24:30 9 developed, civil enforcement is being developed, in  
14:24:33 10 that kind of context it is particularly difficult  
14:24:37 11 to control the actions of these kinds of  
14:24:41 12 characters; is that fair?

14:24:42 13 A. It is particularly difficult, yes.

14:24:43 14 Q. And just proceeding through:

14:24:48 15 "In Upper Canada, however, it  
14:24:49 16 was not the system of free grants to  
14:24:51 17 immigrants that had failed, as  
14:24:54 18 Wakefield was fair enough to point  
14:24:55 19 out, but the practice of using the  
14:24:58 20 land to reward UE loyalists [...]"

14:25:04 21 And just to be clear, "UE" stands for  
14:25:07 22 United Empire, correct?

14:25:07 23 A. [Witness nods his head.]

14:25:10 24 Q. [...] militia men, and  
14:25:14 25 officials already resident in the

14:25:16 1 colony. Not one-sixth as much land  
14:25:18 2 was granted to later immigrants as  
14:25:20 3 to these classes of privileged  
14:25:22 4 persons."

14:25:23 5 So, Professor Harring, you would agree  
14:25:25 6 that in terms of identifying a failure in Upper  
14:25:27 7 Canadian land policy, the primary area of criticism  
14:25:31 8 for Dr. Gates is those early grants, the United  
14:25:36 9 Empire Loyalist grants and the militia grants; is  
14:25:40 10 that fair?

14:25:40 11 A. She is saying, what, it tied up  
14:25:42 12 five-sixths of the land if you do the opposite  
14:25:45 13 of --

14:25:45 14 Q. Yes.

14:25:46 15 A. Yes.

14:25:46 16 Q. And it is particularly those kind  
14:25:47 17 of grants, Empire Loyalists and militia, that she  
14:25:54 18 is singling out here?

14:25:55 19 A. Yes.

14:25:55 20 Q. So the Empire Loyalists grants go  
14:26:01 21 back to the 1790s; that's correct?

14:26:03 22 A. Immediately after the American  
14:26:05 23 Revolution.

14:26:05 24 Q. And the militia grants go to the  
14:26:08 25 War of 1812; that's correct?

14:26:10 1 A. Yes.

14:26:10 2 Q. And soon afterwards. So we are  
14:26:14 3 dealing with land policies. She is dealing with  
14:26:18 4 land policies and discussing land policies that go  
14:26:21 5 back literally one or two generations before the  
14:26:24 6 officials involved in managing land in the 1840s  
14:26:27 7 and 1850s; is that fair?

14:26:31 8 A. Yes.

14:26:31 9 Q. And you would agree with me that,  
14:26:34 10 you know, the world in 1790 in Upper Canada was a  
14:26:37 11 very different world than even the 1850s?

14:26:40 12 A. Yes.

14:26:41 13 Q. You would agree that at that point  
14:26:43 14 in time, settlement was clustered along the narrow  
14:26:48 15 strip of lands by the lake shores?

14:26:49 16 A. You mean in 1790?

14:26:53 17 Q. Yes.

14:26:55 18 A. Yes.

14:26:55 19 Q. In the earlier period, sorry.

14:26:58 20 A. Yes.

14:26:58 21 Q. And it hadn't expanded that much  
14:27:00 22 beyond the lake shore by the War of 1812; is that  
14:27:06 23 fair?

14:27:06 24 A. Yes.

14:27:06 25 Q. Now, seeing the world from that

14:27:08 1 point in time through the eyes of an official, you  
14:27:12 2 are seeing the world in which there is a vast  
14:27:15 3 expanse of untamed forest to the north and south of  
14:27:17 4 the settlement in Upper Canada; is that fair?

14:27:20 5 A. Yes.

14:27:21 6 Q. And now, this is forest that is  
14:27:22 7 more or less untouched but seen at the time and  
14:27:24 8 recognized at the time as being fit for axe and  
14:27:27 9 plow; is that fair?

14:27:29 10 A. If you are comparing, I mean, 1790  
14:27:31 11 with 1850, you get a bunch of -- you know, a bunch  
14:27:36 12 of stages in between. It might be fairer to talk  
14:27:40 13 about 1790 as opposed to 1814, say 1820s, 1830s,  
14:27:46 14 1840s, because it is a fast-moving situation with  
14:27:49 15 different policy options at each stage.

14:27:51 16 Q. But even by 1850, you would agree  
14:27:53 17 that there is still a very large territory to the  
14:27:55 18 north of the frontier settlement that is as of yet  
14:27:59 19 untapped for settlers?

14:28:01 20 A. Yes.

14:28:02 21 Q. So when they are granting lands,  
14:28:05 22 Empire Loyalists and militia grants, they are doing  
14:28:07 23 so in a world in which they see an immense  
14:28:10 24 reservoir of potential further settlement land?

14:28:12 25 A. Yes.



14:28:13 1 Q. And you would agree that by the  
14:28:18 2 time officials are dealing with land policy in the  
14:28:21 3 1850s and 1860s, they are dealing with what are the  
14:28:25 4 legacies of the policies that were adopted and  
14:28:28 5 implemented years before when the situation was  
14:28:32 6 very, very different with respect to this prospect  
14:28:35 7 of wide open lands?

14:28:36 8 A. They are, but in Gates' context,  
14:28:44 9 she is talking about failures in each succeeding,  
14:28:49 10 you know, generation of -- so it is a series of  
14:28:52 11 failures over a series of years. You don't go from  
14:28:59 12 1790 to 1850 in one jump, and each of these stages,  
14:29:04 13 the colonial administrators understood what was  
14:29:06 14 happening, that, you know, squatting was massive  
14:29:12 15 and out of control and to different degrees they  
14:29:16 16 either tolerated it or adopted policies that were  
14:29:21 17 unsuccessful or partly successful, but couldn't get  
14:29:25 18 control of it.

14:29:26 19 Q. But would you agree that she  
14:29:28 20 identifies the root of the problem as these  
14:29:30 21 foundational decisions made in the early days of  
14:29:32 22 the colony?

14:29:33 23 A. I guess the root of any land  
14:29:39 24 policy is going to be the original land grants, so  
14:29:41 25 I would agree with that.

14:29:42 1 Q. And would you agree that  
14:29:43 2 successive generations of officials tried and  
14:29:47 3 adopted different policies; they experimented, and  
14:29:51 4 those policies, those land policies, were driven,  
14:29:53 5 as we have discussed beforehand, by a whole range  
14:29:56 6 of very significant broader policy concerns?

14:29:59 7 A. Yes.

14:30:00 8 Q. Just continuing to the bottom of  
14:30:10 9 that paragraph:

14:30:15 10 "What did settle the country -  
14:30:18 11 apart from the assisted settlement -  
14:30:21 12 was squatting. Clergy Reserves,  
14:30:23 13 Crown Reserves, Crown land, Indian  
14:30:28 14 land, and private land were occupied  
14:30:29 15 by squatters both before and after  
14:30:31 16 1841, and pre-emption privileges had  
14:30:34 17 subsequently to be allowed them."

14:30:36 18 So do you agree what she is saying here  
14:30:40 19 is that squatting was ubiquitous across all classes  
14:30:44 20 of land throughout the period; no matter really  
14:30:46 21 what policies had been adopted, it continued to be  
14:30:49 22 a feature of settlement in what became Ontario  
14:30:52 23 during this period?

14:30:53 24 A. Again, the answer to that is yes,  
14:31:00 25 but at each stage the government is clearly aware

1 of the squatting problem, we all agree on that, and  
2 the question is what actions are being taken, you  
3 know, I argued not many, given the other  
4 responsibilities of the government, particularly  
5 having to protect, you know -- well, having to  
6 protect, among other things, Indian land from  
7 squatters, and, you know, there are a number of  
8 policy decisions involved in making those choices.

9 Q. Would you agree that without  
10 having been an official government intention or  
11 policy, the practical reality was that to a very  
12 considerable extent, the colony was settled by  
13 squatting?

14 A. Yes.

15 Q. I am going to take you to page 311  
16 on the PDF, and page 307. It is the very last page  
17 of her conclusion. So this brings us forward in  
18 time and we are now discussing events in the 1840s,  
19 going into the 1850s. I am just going to start at  
20 the beginning of the paragraph:

21 "It must be admitted that those  
22 who opposed free grants or cheap  
23 land for immigrants and settlers  
24 with limited resources were often  
25 justified by the results. To

14:32:36 1 entrust land to the unco-ordinated  
14:32:38 2 efforts of such settlers was not to  
14:32:40 3 ensure the rapid development of  
14:32:42 4 prosperous agricultural communities  
14:32:44 5 or the most efficient use of the  
14:32:45 6 resources of the province."

14:32:48 7 So in this passage you would agree that  
14:32:51 8 she is recognizing -- she is first elaborating what  
14:32:54 9 some of these policies were, free grants, cheap  
14:32:57 10 land for immigrants, and then she is recognizing  
14:33:01 11 that there were legitimate concerns in respect to  
14:33:06 12 those policies; is that fair?

14:33:07 13 A. Yes.

14:33:08 14 Q. Then she continues:

14:33:12 15 "But these persons were not  
14:33:14 16 merely 'instruments of production' -  
14:33:17 17 labor - they were human beings. The  
14:33:20 18 steam-boats and wagons that carried  
14:33:22 19 them to their destination were  
14:33:24 20 freighted not only with their  
14:33:26 21 pitiful possessions but with their  
14:33:28 22 high hopes as well. A paternalistic  
14:33:32 23 government might advise such  
14:33:33 24 settlers in all sincerity that it  
14:33:35 25 would be better for them to work as

14:33:37 1 labourers for some years before  
14:33:39 2 going on the land; otherwise, debts  
14:33:41 3 might deprive them of their hard-won  
14:33:43 4 equities in the end. On the other  
14:33:44 5 hand, a government indifferent to  
14:33:46 6 their wishes might prefer to risk  
14:33:48 7 entrusting the land to township  
14:33:49 8 promoters or land companies instead;  
14:33:52 9 this was a risk, as the experience  
14:33:54 10 of Upper Canada proved."

14:33:56 11 So would you agree, Professor Harring,  
14:33:58 12 again, she is touching upon a variety of policies  
14:34:00 13 that were adopted over time but linking them to,  
14:34:05 14 you know, some of the concerns, some of the  
14:34:07 15 problems that those policies brought with them,  
14:34:10 16 that none of these policies are without costs; that  
14:34:14 17 is another way of putting it? Would you agree with  
14:34:17 18 that proposition?

14:34:17 19 A. Yes.

14:34:21 20 Q. Then she continues:

14:34:22 21 "But, given the values of the  
14:34:27 22 societies out of which most of the  
14:34:30 23 settlers came, what they wanted,  
14:34:31 24 what they had taken the risk of  
14:34:33 25 uprooting themselves for, was a

14:34:35 1 chance at land and independence in  
14:34:37 2 the New World, or, in the case of  
14:34:39 3 native sons, on the newest frontier.  
14:34:41 4 Some of them made it - some didn't.  
14:34:43 5 For government, imperial or  
14:34:44 6 provincial, the ultimate question  
14:34:45 7 was the one posed by Robert  
14:34:47 8 Baldwin:"  
14:34:48 9 And just to pause there, Robert Baldwin  
14:34:50 10 is the reform politician; is that correct?  
14:34:53 11 A. Yes.  
14:34:53 12 Q. "What kind of society would the  
14:34:56 13 resources of Canada be used to  
14:34:57 14 create?"  
14:35:00 15 So would you agree, Professor Harring,  
14:35:03 16 that viewed through this prism, land policy in  
14:35:10 17 Upper Canada, Canada West, as it unfolded between  
14:35:15 18 1790 and 1850s went to probably the most profound  
14:35:18 19 policy question that colonial government faced:  
14:35:21 20 What kind of society would the resources of Canada  
14:35:24 21 be used to create?  
14:35:25 22 A. Again, there is a context here.  
14:35:32 23 This statement -- I mean, the book is ending  
14:35:35 24 actually on this. This is the -- we call it the  
14:35:38 25 agrarian myth, I think, you know, the great

1 American or Canadian agrarian myth, that it was  
2 these hard-working small farmers that gave these  
3 countries their unique character, and I think we  
4 all -- you know, I think it is part of the psyche  
5 of all of us.

6 The question not asked here -- I mean,  
7 what kind of society is -- there is no reference,  
8 you know, to agreements the government might have  
9 made with Indians in this analysis, and this  
10 analysis doesn't include what accommodations might  
11 have legally been required to deal with Indians  
12 either through, you know, whatever Canadian law was  
13 -- or British law was applicable at the time or the  
14 Royal Proclamation of 1763.

15 So you could agree with everything in  
16 this paragraph. It is wonderful history, but it is  
17 leaving out the whole question of what about the  
18 government's legal responsibility to Indians.

19 Q. But you would agree that that is  
20 but one part of the remit of officials at the time,  
21 both elected and appointed, that it is just one  
22 part of what they had to deal with in governing a  
23 province with all the complexity of governing a  
24 province at the time; do you agree with that?

25 A. I agree with that, but it is also

14:36:59 1 just left out of this.

14:37:00 2 Q. Would you agree that at the end of  
14:37:08 3 the day, as officials steered the colony through  
14:37:12 4 its birth pangs and into childhood, they recognized  
14:37:18 5 clearly that what they did in relation to the  
14:37:21 6 management of land was of profound significance for  
14:37:25 7 the broad future and shape of the colony?

14:37:27 8 A. They clearly recognized it was  
14:37:33 9 profoundly significant for the broad future and  
14:37:35 10 shape of the colony looking at it from the  
14:37:37 11 standpoint of a white settler colony. You know, I  
14:37:44 12 absolutely agree with that.

14:37:46 13 Q. I am going to change the subject  
14:37:49 14 matter now, Professor Haring.

14:37:51 15 A. I am having a little bit of  
14:37:52 16 trouble hearing you.

14:37:53 17 Q. Oh, sorry, I'll try and speak up,  
14:37:55 18 hopefully close enough to the mic without popping  
14:37:59 19 the mic.

14:37:59 20 I'm going to bring you to another  
14:38:02 21 subject area, which is the 1837 rebellions which  
14:38:08 22 you discussed during your examination in-chief and  
14:38:10 23 which you touch upon in your report.

14:38:11 24 A. Just touch upon.

14:38:13 25 Q. So I am going to bring up, to



14:38:15 1 begin, a document that is SC1154, and it is the  
14:38:31 2 second page of this document and I am focussing on  
14:38:35 3 the bottom of the first enclosure that is listed  
14:38:38 4 under the document. So we need to go further.

14:38:42 5 And, Your Honour, I would ask for this  
14:38:45 6 document to be made an exhibit.

14:38:46 7 THE COURT: Can you more fully describe  
14:38:50 8 it, sir?

14:38:51 9 MR. LEMMOND: Yes, it is "First  
14:38:53 10 Enclosure No. 60, From Copies or Extracts of  
14:38:59 11 Despatches From Sir Francis Bond Head on the  
14:39:03 12 Subject of Canada."

14:39:07 13 THE COURT: Is there a date?

14:39:08 14 MR. LEMMOND: Yes, the volume is  
14:39:11 15 ordered by the House of Commons to be printed 22nd  
14:39:15 16 March 1839.

14:39:17 17 THE COURT: Mr. Registrar?

14:39:18 18 THE REGISTRAR: Exhibit No. 4310.

14:38:52 19 EXHIBIT NO. 4310: "First Enclosure No.  
14:38:54 20 60, From Copies or Extracts of  
14:38:59 21 Despatches From Sir Francis Bond Head  
14:39:02 22 on the Subject of Canada," with a  
14:39:24 23 printing date of March 22, 1839.

14:39:24 24 BY MR. LEMMOND:

14:39:24 25 Q. Now, I don't know if you are

14:39:25 1 familiar with this document, this enclosure. If  
14:39:27 2 you are not, do you want to take a moment to go  
14:39:29 3 through it and look at it?

14:39:31 4 A. If --

14:39:32 5 Q. I can take you to the specific  
14:39:33 6 passages.

14:39:34 7 A. I don't see the document. I  
14:39:35 8 believe -- you don't mean this document? You mean  
14:39:37 9 the longer document?

14:39:39 10 Q. I mean the enclosure that starts  
14:39:40 11 here, but then we have a further page, so this is  
14:39:42 12 the beginning of the document. It begins "My dear  
14:39:47 13 Sir Francis" and it continues on to the next page.

14:39:50 14 THE COURT: Just so I understand, so  
14:39:51 15 this sidebar is "Enclosure No. 1"?

14:39:56 16 MR. LEMMOND: Yes, Your Honour.

14:39:57 17 THE COURT: And that is the document  
14:39:58 18 you are referring to?

14:40:00 19 MR. LEMMOND: Yes, Your Honour.

14:40:00 20 THE WITNESS: It is just a short  
14:40:01 21 paragraph?

14:40:01 22 BY MR. LEMMOND:

14:40:02 23 Q. Well, that is the beginning of the  
14:40:02 24 document.

14:40:03 25 A. Sorry, I can't tell.

14:40:04 1 Q. So if we could actually take a  
14:40:07 2 look at the -- I take it you have gone through the  
14:40:09 3 first paragraph, so we'll bring up the rest of the  
14:40:11 4 document and give you a chance to digest that and  
14:40:14 5 then I can ask you some questions.

14:40:16 6 A. [Witness reviews document.]

14:40:21 7 Q. And just please let Ms. Benson  
14:40:24 8 know when you need it scrolled down so you can read  
14:40:27 9 the end of the document. It is not that long of a  
14:40:29 10 document.

14:40:30 11 A. Sure.

14:40:30 12 [Witness reviews document.]

14:40:38 13 You can please scroll it.

14:40:40 14 [Witness reviews document.]

14:40:41 15 Q. So I'll begin at the bottom.  
14:40:44 16 Unless you want more time, Professor Harring?

14:41:22 17 A. [Witness reviews document.]

14:41:28 18 I have read it. I have not seen it  
14:41:30 19 before. I don't recognize it. I haven't seen it  
14:41:32 20 before.

14:41:33 21 Q. Okay.

14:41:33 22 A. But I have read it.

14:41:34 23 Q. Well, let's start at the bottom.  
14:41:36 24 You will see it is signed by J. Colborne. Would  
14:41:40 25 you recognize that as John Colborne, the military

14:41:43 1 officer commanding in Lower Canada at the time?

14:41:46 2 A. I don't recognize the name, but I  
14:41:48 3 will accept that that was his responsibility.

14:41:50 4 Q. And if you go to the front of the  
14:41:51 5 enclosure, it is addressed to Sir Francis, so that  
14:41:55 6 would be Sir Francis Bond Head?

14:41:57 7 A. Yes, the Lieutenant Governor.

14:41:59 8 Q. So I am going to go through the  
14:42:02 9 first paragraph:

14:42:03 10 "As to the Intentions of  
14:42:07 11 Mr. Papineau, it is not of much  
14:42:11 12 Importance what they may have been;  
14:42:13 13 the Effect of his Agitation,  
14:42:15 14 however, the Province now feels  
14:42:18 15 acutely; and Disaffection, which has  
14:42:20 16 penetrated deeper than you may  
14:42:23 17 imagine, brings the Agitator nearer  
14:42:26 18 his avowed Object."

14:42:27 19 So this is Colborne reporting to the  
14:42:30 20 Governor Sir Francis Bond Head on his perception of  
14:42:32 21 the state of affairs in Lower Canada at the time?

14:42:34 22 A. Okay, and "the Agitator" is whom?

14:42:37 23 Q. Papineau.

14:42:40 24 A. Papineau, okay.

14:42:41 25 Q. So this is just to set the stage a

14:42:42 1 little bit more. This is as things are heating --  
14:42:44 2 would you agree with me that things are starting to  
14:42:46 3 heat up as a matter of political tension and  
14:42:48 4 disturbance in Canada East at this point, and it is  
14:42:52 5 November 1837, early November?

14:42:54 6 A. Yes.

14:42:54 7 Q. And this is part of it, would you  
14:42:56 8 agree this is Colborne reporting to Francis on his  
14:42:59 9 perception that things are essentially starting to  
14:43:01 10 heat up and it is getting serious; do you agree?

14:43:05 11 A. Yes.

14:43:06 12 Q. I am going to go to the paragraph  
14:43:13 13 on the next page that begins:

14:43:15 14 "Your Determination of  
14:43:16 15 liberating the 24th Regiment will  
14:43:19 16 produce the best Effect. Sir Colin  
14:43:21 17 Campbell will act on a similar  
14:43:23 18 Principle; I believe he will call on  
14:43:25 19 the Militia to do the Military  
14:43:28 20 Duties till reinforcements may  
14:43:31 21 arrive from the Mother Country, and  
14:43:32 22 send every Company he can spare to  
14:43:35 23 Quebec from Halifax."

14:43:37 24 So you would agree that in this  
14:43:39 25 paragraph he is discussing something of the

14:43:40 1 deployment of military force to respond to this  
14:43:44 2 perceived crisis in Canada East?

14:43:47 3 A. Right.

14:43:48 4 Q. Sorry, that is two words, sorry,  
14:43:51 5 Lower Canada.

14:43:51 6 A. Right, he is assessing what forces  
14:43:54 7 he might have available in Upper and Lower Canada  
14:43:57 8 and Halifax, and then depending on the availability  
14:44:04 9 of reinforcements, whenever they might arrive from  
14:44:07 10 the mother country.

14:44:08 11 Q. And at the beginning of the  
14:44:09 12 paragraph he says:

14:44:10 13 "Your Determination of  
14:44:11 14 liberating the 24th Regiment [...]"  
14:44:14 15 We'll get a little bit more into it  
14:44:16 16 later in the document, if need be, but would you  
14:44:18 17 agree that he is speaking to Bond Head about a  
14:44:21 18 regiment that is being deployed from Upper Canada  
14:44:23 19 to Lower Canada?

14:44:24 20 A. Yes, I believe from Kingston.

14:44:26 21 Q. The next paragraph:

14:44:28 22 "The Alarm in this District is  
14:44:30 23 great and rapidly increasing; in  
14:44:32 24 fact, the Counties between Longueuil  
14:44:35 25 and the upper Part of the Richelieu

14:44:37 1 are in a State of Revolt; many  
14:44:39 2 Persons who have distinguished  
14:44:40 3 themselves for their Loyalty and as  
14:44:42 4 Friends of Order are menaced and  
14:44:44 5 compelled to join the Disaffected,  
14:44:46 6 or permit their Property to be  
14:44:48 7 injured; I have received several  
14:44:50 8 Applications for Protection."

14:44:51 9 Would you agree that in this paragraph  
14:44:57 10 he is conveying to Bond Head his sense that this is  
14:44:59 11 becoming a really serious crisis on a fairly  
14:45:03 12 considerable scale?

14:45:04 13 A. Yes, and apparently people who had  
14:45:13 14 "distinguished themselves for their Loyalty and  
14:45:15 15 Friends of Order are menaced and compelled to join  
14:45:18 16 the Disaffected" on the threat that their property  
14:45:22 17 might be injured, so even loyal supporters of the  
14:45:25 18 Crown are, dare I say, switching sides.

14:45:28 19 Q. Okay.

14:45:30 20 A. He is agitated.

14:45:35 21 Q. Going down to the paragraph:

14:45:37 22 "I have ordered the 24th  
14:45:40 23 Regiment to proceed without delay to  
14:45:42 24 the Carillon and Montreal; One  
14:45:43 25 Company, however, must be left at

14:45:46 1 Fort Henry."

14:45:46 2 Fort Henry would be Kingston; correct?

14:45:48 3 A. Yes.

14:45:48 4 Q. "Fifty Soldiers composing the  
14:45:51 5 Garrison of that Fort will not in  
14:45:53 6 any respect take away from the  
14:45:54 7 Effect of your Plans and Policy."

14:45:56 8 So just to summarize, you would agree,  
14:45:58 9 Professor Harring, that what we get from this  
14:45:59 10 letter is that the authority in Lower Canada  
14:46:03 11 perceives things to be blowing into serious  
14:46:06 12 rebellion, he uses the term "revolt," and he is  
14:46:11 13 starting -- they are starting to collect, trying to  
14:46:13 14 collect military resources to respond to what is  
14:46:15 15 perceived as an acute crisis?

14:46:17 16 A. Yes, and he seems completely able  
14:46:21 17 to do that within the normal course of business,  
14:46:25 18 even in the crisis.

14:46:26 19 Q. And I am going to bring you to  
14:46:31 20 another document, Professor Harring, and this one  
14:46:32 21 is SC1153. And I am also going to ask for this to  
14:46:48 22 be made an exhibit. It is a "Copy of a Despatch  
14:46:52 23 from Sir F.B. Head to Lord Glenelg from Copies or  
14:46:59 24 Extracts of Despatches from Sir F.B. Head on the  
14:47:05 25 Subject of Canada" dated and ordered by the House



1 of Commons to be printed the 22nd March 1839.

2 THE COURT: Mr. Registrar?

3 THE REGISTRAR: Exhibit No. 4311.

4 EXHIBIT NO. 4311: Document entitled  
5 "Copy of a Despatch from Sir F.B. Head  
6 to Lord Glenelg from Copies or Extracts  
7 of Despatches from Sir F.B. Head on the  
8 Subject of Canada", dated and ordered  
9 by the House of Commons to be printed  
10 the 22nd March 1839.

11 BY MR. LEMMOND:

12 Q. Now, this is a longer document  
13 that runs a couple of pages, three or four pages,  
14 actually. What I propose to do, Professor Haring,  
15 is to bring you through discrete sections, but if  
16 at any point you want to just pause and look at it  
17 more largely, tell me and I'll pause.

18 A. Thank you.

19 Q. Okay, thank you.

20 So to start at the beginning, this is a  
21 despatch from Francis Bond Head to Lord Glenelg and  
22 he is the colonial secretary at the time; correct?

23 A. Yes.

24 Q. So he is the person that Francis  
25 Bond Head answers to in the Imperial

14:47:56 1 administration?

14:47:57 2 A. Yes.

14:47:57 3 Q. It is dated Toronto 18th November

14:48:01 4 1837:

14:48:04 5 "My Lord,

14:48:04 6 Being sensible that your Lordship  
14:48:07 7 will be desirous to receive  
14:48:08 8 authentic Information, not only on  
14:48:10 9 the general State of Affairs in the  
14:48:12 10 Canadas, but of the particular  
14:48:13 11 Course of Policy which is being  
14:48:14 12 pursued in each of the Provinces, I  
14:48:16 13 have the Honour to enclose to your  
14:48:19 14 Lordship a Copy of a Second Letter  
14:48:20 15 which has been expressly dispatched  
14:48:23 16 to me by Sir John Colborne, with a  
14:48:27 17 Copy of my Reply thereto."

14:48:28 18 So we have an exchange of letters that  
14:48:31 19 is attached to this despatch; is that correct?

14:48:34 20 A. Yes.

14:48:34 21 Q. And then Francis Bond Head  
14:48:36 22 summarizes a key point in this next paragraph, I  
14:48:40 23 would suggest:

14:48:40 24 "These Letters, short and  
14:48:42 25 familiar as they are, contain a

1 Moral of considerable Importance,  
2 for they indisputably show that the  
3 Canadas are each acting on a  
4 Principle diametrically opposed to  
5 the other; the Lower Province  
6 centripetally drawing to itself as  
7 much Military Force as it can  
8 collect; the Upper Province  
9 centrifugally discarding every  
10 British Soldier from its Territory."

11 So would you agree, Professor Harring,  
12 that his starting point for this discussion is to  
13 contrast very different policies being adopted in  
14 the two provinces with respect to how they are  
15 responding to increased political disturbance?

16 A. In this particular context, yes.

17 Q. I am going to bring you some  
18 distance through the document to the bottom of the  
19 next page, and it is the paragraph that begins "By  
20 addressing [...]" Please continue, Ms. Benson.

21 There we go:

22 "By addressing the People in  
23 homely Language, I revived the loyal  
24 Spirit of Upper Canada; and by  
25 resorting to Reason, instead of to

14:49:52 1 Military Force, I became at last  
14:49:54 2 enabled, by the Assistance of the  
14:49:56 3 former, to dismiss the latter from  
14:49:58 4 the Province.

14:50:00 5 I mention these Facts to your  
14:50:02 6 Lordship for the Purpose of showing  
14:50:03 7 the Impolicy of our now allowing  
14:50:06 8 Mr. Papineau to enjoy the Triumph,  
14:50:10 9 by making it appear that we retain  
14:50:12 10 Possession of the Lower Province  
14:50:13 11 only by Force of Arms.

14:50:15 12 If Lower Canada were to be  
14:50:16 13 governed by Reason, instead of by  
14:50:18 14 Force, I beg leave to ask, how could  
14:50:20 15 it possibly separate itself from the  
14:50:21 16 British Empire?"

14:50:24 17 So would you agree, Professor Harring,  
14:50:26 18 the point that Bond Head appears to be making here  
14:50:29 19 is that he is holding out his policy of response in  
14:50:35 20 Upper Canada as being one that depends upon reason,  
14:50:38 21 not military force?

14:50:41 22 A. Yes, and I was, as I read this, I  
14:50:44 23 was thinking of course about Bond Head in his  
14:50:47 24 letters in the Mackenzie Rebellion where he  
14:50:49 25 celebrates the fact that he was able to mobilize a

14:50:52 1 local militia of incredible force, adequate -- more  
14:50:58 2 than adequate to defend the province.

14:51:00 3 So this is a political dispute or --  
14:51:04 4 this is Bond Head celebrating his own  
14:51:09 5 administrative brilliance here against what is  
14:51:12 6 going on in Lower Canada and, you know, trying to  
14:51:17 7 demonstrate to his superiors, you know, how much  
14:51:21 8 better and more democratically I guess he is  
14:51:24 9 governing Upper Canada.

14:51:25 10 Q. Okay. I am going to continue on  
14:51:29 11 to the next page, please, continuing down to the  
14:51:32 12 paragraph that begins at "The Force [...]" There  
14:51:35 13 we go:

14:51:37 14 "The Force at present in Lower  
14:51:40 15 Canada is unnecessary; but we have  
14:51:41 16 had recourse to it from the same  
14:51:44 17 unfortunate Aberration that has  
14:51:46 18 hitherto induced us, not only to  
14:51:49 19 submit to Mr. Papineau's Insults,  
14:51:52 20 but to bow before them in proportion  
14:51:54 21 to the Insolence with which they  
14:51:56 22 have been inflicted. From the  
14:51:57 23 Extreme of Submission we have  
14:51:58 24 suddenly flown to the Extreme of  
14:52:00 25 Anger, and influenced in both

14:52:02 1 Instances by our Passions, Reason  
14:52:03 2 and Justice, which in Government are  
14:52:06 3 invincible, have been passed  
14:52:08 4 unheeded.

14:52:10 5 It is now late in the Day to  
14:52:12 6 repent of our Policy; but there is  
14:52:14 7 yet Time, not only to confess but to  
14:52:16 8 correct the Errors we have been  
14:52:17 9 guilty of.

14:52:18 10 My Lord, I respectfully recommend  
14:52:20 11 Her Majesty's Government immediately  
14:52:22 12 to abstract all the Troops from  
14:52:24 13 Lower Canada, excepting those  
14:52:26 14 necessary to garrison Quebec and  
14:52:29 15 Montreal.

14:52:37 16 As soon as the political  
14:52:39 17 Atmosphere shall be thus purified,  
14:52:40 18 let Mr. Papineau, if he dare, attack  
14:52:43 19 the Queen's Government and the  
14:52:44 20 British Population; let him, if he  
14:52:47 21 dare, take forceable Possession of  
14:52:48 22 the Lower Province. Instead of  
14:52:50 23 encouraging the loyal Inhabitants of  
14:52:53 24 both provinces ignominiously to lean  
14:52:57 25 upon our Troops, let us allow them

14:52:58 1 to fight, if necessary, for  
14:53:00 2 themselves, for their Families, and  
14:53:01 3 for their Liberties; and if this  
14:53:03 4 Policy be mildly but firmly pursued,  
14:53:05 5 the civilized World will cheer us on  
14:53:05 6 our Path, and, as I have before  
14:53:08 7 ventured to assure your Lordship, a  
14:53:08 8 brilliant moral Victory will be the  
14:53:13 9 Result."

14:53:13 10 So will you agree that, you know,  
14:53:15 11 reduced to the basic points, he is encouraging the  
14:53:19 12 Imperial Government not to use force in Quebec and  
14:53:22 13 more broadly he is, you know, strongly reluctant to  
14:53:29 14 see force used to respond to the rebellion in  
14:53:32 15 either province?

14:53:36 16 A. That is here. I agree that is  
14:53:39 17 here. I mean, obviously this is completely  
14:53:43 18 interwoven with a great deal of Canadian politics  
14:53:47 19 of the day. For example, he has a problem  
14:53:48 20 apparently with Quebec and some things going on  
14:53:52 21 there which might have to do with French and  
14:53:56 22 Catholics and other things, and I really can't get  
14:54:00 23 into that.

14:54:00 24 I think that the common thing we  
14:54:04 25 probably agree on is that by the 1830s anyone

14:54:08 1 operating in a British, or I was going to say  
14:54:14 2 democratic, but this isn't fully democratic, would  
14:54:18 3 recognize that any government, especially after the  
14:54:21 4 American Revolution, any government wants to govern  
14:54:23 5 legitimately with as little violence as possible.  
14:54:26 6 And they would, we hope, have finally figured this  
14:54:29 7 out by the late 1830s. So there has been an  
14:54:32 8 overreaction in Upper Canada due to, you know, some  
14:54:35 9 of these forces that I think we all know about.

14:54:37 10 And he is trying to get his superiors  
14:54:40 11 to clearly understand the nature of the  
14:54:41 12 overreaction, and to essentially trust his  
14:54:46 13 government, his governance, his administrative  
14:54:49 14 abilities, and to put some confidence in the people  
14:54:53 15 who are loyal would be the right thing to do.

14:54:57 16 So that is all here.

14:54:58 17 Q. Well, actually, I want to pull  
14:55:00 18 back a little bit, Professor Haring, and try to  
14:55:02 19 place this in the larger context of Anglo American  
14:55:08 20 legal and constitutional discourse in the 17th and  
14:55:11 21 18th century, because I think you have started to  
14:55:13 22 do that.

14:55:15 23 And would you agree with me, Professor  
14:55:17 24 Haring, that one of the hallmarks of that Anglo  
14:55:22 25 American discourse at a constitutional and



14:55:23 1 political level from the 17th century through the  
14:55:26 2 18th century to the early 19th century is a deep  
14:55:29 3 and abiding concern over the use and even the  
14:55:34 4 existence of standing armies as a potential tool of  
14:55:37 5 tyranny in the hands of the executive?

14:55:40 6 A. I mean, it is probably -- I mean,  
14:55:53 7 it is probably true. It is an oversimplification,  
14:55:56 8 I think. It is probably true if your executive is  
14:55:59 9 a King, and even the flip side of that, even if  
14:56:03 10 your executive is freely elected, is hypothetically  
14:56:08 11 a democratic president, you would worry about a  
14:56:15 12 democratically elected president sort of usurping  
14:56:18 13 the power of the King, and the military would be a  
14:56:19 14 key way to do that.

14:56:20 15 So you are right, absolutely right that  
14:56:22 16 there is a reluctance to relying on a powerful  
14:56:27 17 executive with a standing army to govern as opposed  
14:56:32 18 to allowing an educated, hard-working literate  
14:56:41 19 populace to come to better and cheaper results  
14:56:44 20 themselves. There was just a lot more going on  
14:56:48 21 than that.

14:56:48 22 Q. Okay. Well, let me break that  
14:56:50 23 down into constituent parts, Professor Haring.

14:56:55 24 Let's go back, and I will do this  
14:56:58 25 briefly, to the mid 17th century. Will you agree

14:57:00 1 that the common law protectorate under Cromwell  
14:57:05 2 left a very deep imprint upon the English-speaking  
14:57:08 3 political memory?

14:57:09 4 A. Yes.

14:57:09 5 Q. And the central feature of that  
14:57:12 6 was that parliament won a civil war through the  
14:57:16 7 creation of a standing army, the new model army;  
14:57:20 8 that's correct?

14:57:20 9 A. Yes.

14:57:20 10 Q. And that army then went on to  
14:57:22 11 create what amounted to military dictatorship? I  
14:57:27 12 know I'm oversimplifying, but if you reduce it down  
14:57:30 13 to the gist, is that about right?

14:57:31 14 A. Yes.

14:57:32 15 Q. And that army kept Cromwell in  
14:57:35 16 power?

14:57:35 17 A. Yes.

14:57:36 18 Q. And the last vestiges of  
14:57:38 19 parliamentary oversight ended in 1651 when  
14:57:42 20 parliament -- sorry, when Cromwell literally sent  
14:57:47 21 in the troops into the House of Commons and cleared  
14:57:49 22 it out?

14:57:49 23 A. Yes.

14:57:49 24 Q. Would you agree that that  
14:57:51 25 historical experience and its mark upon

1 English-speaking political, legal, and  
2 constitutional thought was revived and at the front  
3 of events with the so-called glorious revolution of  
4 1688?

5 A. I would agree with that. Here I  
6 want to maybe confess error.

7 THE COURT: Before you do that, because  
8 Counsel is on her feet. Ms. Guirguis, yes?

9 MS. GUIRGUIS: Your Honour, it seems to  
10 me just the questions that are being asked about  
11 the 17th century are straying outside of the  
12 subject matter that this witness is called to opine  
13 on.

14 THE COURT: It may be straying outside  
15 this gentleman's accepted expertise, it occurs to  
16 me. Anyway, sir, what do you have to say about  
17 that?

18 MR. LEMMOND: I would say, Your Honour,  
19 that these are basic pieces of understanding the  
20 constitutional history of the late 18th and early  
21 19th century in the American context, it brings us  
22 into the American Revolution and the impact upon  
23 Upper Canada.

24 If you are to speak with authority as  
25 an expert on legal history and constitutional

14:59:00 1 history, these are things one would expect you to  
14:59:03 2 know.

14:59:03 3 THE COURT: Well, his qualification was  
14:59:06 4 not that broad.

14:59:08 5 MR. LEMMOND: Okay.

14:59:08 6 THE COURT: I can bring up my note of  
14:59:11 7 it, but I know it is not that broad. Just give me  
14:59:14 8 a moment.

14:59:42 9 It was very specifically tied to the  
15:00:11 10 late 18th and 19th century, and someone, and I  
15:00:15 11 pause over whether it was you or Mr. Beggs,  
15:00:17 12 objected to the earlier period being outside his  
15:00:20 13 expertise, and now we are back in the 16th century.  
15:00:22 14 Now I'm not suggesting --

15:00:23 15 MR. LEMMOND: 17th century, Your  
15:00:25 16 Honour.

15:00:25 17 THE COURT: I am not suggesting that  
15:00:26 18 there couldn't be some legitimate continuity back  
15:00:32 19 behind the period that he was qualified for, and I  
15:00:35 20 am going to permit you to continue, but I had the  
15:00:39 21 same thought process as Ms. Guirguis, which was  
15:00:42 22 that we did seem to be straying outside both the  
15:00:48 23 relevant context and also his credentials.

15:00:51 24 MR. LEMMOND: In any event, Your  
15:00:53 25 Honour, I intend to go right to the late 18th

15:00:57 1 century now.

15:00:57 2 THE COURT: All right, please go ahead.

15:01:00 3 BY MR. LEMMOND:

15:01:00 4 Q. Thank you.

15:01:01 5 Professor Harring, would you recognize  
15:01:02 6 that these aspects of Anglo American  
15:01:05 7 constitutional, legal and political thought that we  
15:01:06 8 have been talking about centred upon concerns over  
15:01:08 9 a standing army and tyranny were a component of the  
15:01:13 10 American Revolution?

15:01:14 11 A. Yes.

15:01:14 12 Q. And one of the reactions to those  
15:01:16 13 concerns was that when the United States was formed  
15:01:18 14 after the American Revolution, it had no standing  
15:01:21 15 army?

15:01:21 16 A. Right, because of the discussion  
15:01:24 17 we just had, that there was a fear that George  
15:01:27 18 Washington would somehow become Cromwell or King.

15:01:32 19 Q. And in fact, the American  
15:01:34 20 constitution expressly provided for a right to bear  
15:01:37 21 arms, and would you agree that was a reflection of  
15:01:40 22 placing faith in a militia that could resist  
15:01:43 23 tyranny, at least in part?

15:01:45 24 A. Yes, in the democratic populism of  
15:01:47 25 the day.

1 Q. So I am just going to bring you  
2 back to the letter now to the further page,  
3 please, and we are now into the enclosure under  
4 "Postscript." If you continue on to the next page,  
5 please. There, "If Mr. Papineau [...]" -- in fact,  
6 I'll just go to the next paragraph here.

7 But before I proceed to it, would you  
8 agree with me that some of these political  
9 traditions that we have been speaking of that we  
10 have traced into the American Revolution were  
11 operative in the Canadas too, that they were part  
12 of the political inheritance of specifically  
13 English-speaking Canada at the time?

14 A. Yes.

15 Q. And they continue to be part of  
16 the political inheritance of Britain itself?

17 A. Yes.

18 Q. So Bond Head writes:

19 "I submit to your Lordship,  
20 that no Government is justified in  
21 attacking its own Citizens until it  
22 has previously gone through the Form  
23 of endeavouring to govern them by  
24 Firmness and Reason.

25 A Government need not be firm,

15:03:13 1 nor need it be reasonable; but the  
15:03:15 2 fatal Consequence of its being  
15:03:18 3 neither one nor the other is that it  
15:03:20 4 exists in an unfit State suddenly to  
15:03:22 5 put down Rebellion by Force; for  
15:03:25 6 what is Despotism but Government  
15:03:28 7 sans Reason?"

15:03:29 8 And then it continues a few paragraphs

15:03:32 9 lower:

15:03:33 10 "My Lord, I conceive that no  
15:03:35 11 Quantity of British Troops would be  
15:03:36 12 sufficient to put down Agitation in  
15:03:38 13 Lower Canada, or even to protect  
15:03:39 14 every Person in that Province from  
15:03:41 15 open Violence. The cumbersome  
15:03:44 16 Attempt on our Part to do all this  
15:03:45 17 by Soldiers would appear to the  
15:03:47 18 World a Series of Aggressions which  
15:03:49 19 would sooner or later excite  
15:03:51 20 Sympathy in favour of Mr. Papineau  
15:03:52 21 and his Adherents.

15:03:55 22 On the other hand, if, sheathing  
15:03:57 23 the Sword, we were at once to place  
15:03:59 24 ourselves on the defensive, and  
15:04:00 25 openly await the very Evils we are

15:04:02 1 now trying to avert, Mr. Papineau  
15:04:04 2 would then be driven either to give  
15:04:06 3 up Agitation or to become the  
15:04:09 4 Aggressor, in which latter Case we  
15:04:11 5 should instantly gain in moral Power  
15:04:14 6 infinitely more than we had laid  
15:04:17 7 aside in Military Force."

15:04:18 8 And then he continues to go on.

15:04:21 9 I am not going to go further through  
15:04:22 10 that document, but would you agree with me,  
15:04:24 11 Professor Harring, that we can see Bond Head  
15:04:26 12 operating within that political tradition we have  
15:04:29 13 been speaking about, this reluctance to use  
15:04:32 14 military force, particularly in the form of regular  
15:04:38 15 troops, in maintaining civil order and quelling  
15:04:42 16 civil disturbances?

15:04:43 17 A. He is reluctant to do it unless he  
15:04:45 18 needs to. There is a sentence in the middle that  
15:04:47 19 you scrolled past where he says that, that you  
15:04:50 20 don't want to use force unless you have to, unless  
15:04:53 21 there is no choice.

15:04:54 22 Q. Right.

15:04:55 23 A. But he is recognizing that, you  
15:04:58 24 know, I mean, all government relies on the  
15:05:00 25 legitimate use of force, but this, you know, we



15:05:04 1 have -- our discussion has gone this far so far, is  
15:05:09 2 very smart colonial politics in the context of the  
15:05:11 3 day. You don't want to use force unnecessarily.

15:05:16 4 There is an argument that, you know,  
15:05:18 5 the whole -- the officials in Upper Canada at this  
15:05:22 6 time are all acutely aware of the American  
15:05:25 7 Revolution, which is 50 years before, 60 years  
15:05:28 8 before -- yeah, 50 years before, and clearly  
15:05:32 9 probably -- clearly, not "clearly probably,"  
15:05:36 10 clearly recognizing that mistakes had been made in  
15:05:40 11 colonial administration in what was now the United  
15:05:43 12 States, so that they could be avoided by not doing  
15:05:45 13 that here.

15:05:51 14 Q. Okay, thank you, Professor. I  
15:05:53 15 want to bring you to just one more document in  
15:05:55 16 connection with these events and that is SC1150.  
15:05:58 17 It comes from the same series. It is entitled, if  
15:06:07 18 we can go to the next page, "Extract of a Despatch  
15:06:11 19 [...]" -- in fact, to make this easier, I think,  
15:06:15 20 Your Honour, I am going to ask for this to be made  
15:06:17 21 an exhibit entitled "An Extract of a Despatch from  
15:06:24 22 Lieutenant Governor Sir F.B. Head to Lord Glenelg,  
15:06:28 23 dated Toronto, 19th December 1837."

15:06:32 24 THE COURT: Mr. Registrar?

15:06:34 25 THE REGISTRAR: Exhibit No. 4312.

15:06:18 1 EXHIBIT NO. 4312: Document entitled  
15:06:19 2 "An Extract of a Despatch from  
15:06:24 3 Lieutenant Governor Sir F.B. Head to  
15:06:27 4 Lord Glenelg, dated Toronto, 19th  
15:06:30 5 December 1837."  
15:06:38 6 BY MR. LEMMOND:  
15:06:39 7 Q. Now, you'll see the date,  
15:06:40 8 Professor?  
15:06:40 9 A. Yes.  
15:06:40 10 Q. So this is after the Mackenzie  
15:06:43 11 Rebellion has happened?  
15:06:44 12 A. After he has put down the  
15:06:46 13 Mackenzie Rebellion.  
15:06:46 14 Q. Right.  
15:06:47 15 A. Giving himself a great deal of  
15:06:49 16 credit for his work.  
15:06:50 17 Q. And he is reporting to Lord  
15:06:53 18 Glenelg on what has gone on?  
15:06:55 19 A. Yes.  
15:06:55 20 Q. Essentially that is the point of  
15:06:56 21 it?  
15:06:57 22 A. Yes.  
15:06:57 23 Q. And I won't drag you through all  
15:06:59 24 the text, but part of what has happened is he has  
15:07:02 25 very deliberately and intentionally dispatched

1 practically the entire regular garrison of Upper  
2 Canada to Lower Canada?

3 A. Right.

4 Q. So he has gotten all the regular  
5 troops out and he is very self-consciously standing  
6 on the support of the militia?

7 A. Yes.

8 Q. And at this time, you know, that  
9 effectively amounts to relying upon a vote of  
10 confidence from able-bodied men in the province  
11 that they are going to stand by the lawful  
12 authorities?

13 A. Yes.

14 Q. And I am just going to take you to  
15 one paragraph on the next page, and it begins "On  
16 Wednesday morning [...]"; there we go, so just to  
17 set it up a bit, he describes how he eventually  
18 calls out the militia. He says he is surprised  
19 when the rebellion actually starts. You know, he  
20 knew generally that there were things going on and  
21 there was --

22 A. Yes, they didn't believe the  
23 rebellion was going to happen as quickly or -- you  
24 see, you even saw in the first line he is talking  
25 about that there was supposed to be 3,000 of them,

15:08:15 1 and it turns out he thought more like 500.

15:08:18 2 Q. Yes.

15:08:18 3 A. But they are still disputing --  
15:08:21 4 you know, the scale of it still at 500 is great,  
15:08:23 5 but it was a surprise.

15:08:25 6 Q. Okay. Actually I am going to go  
15:08:27 7 back to an earlier page, the first page of the  
15:08:33 8 despatch, and it is the paragraph that begins "In a  
15:08:35 9 former despatch [...]":

15:08:39 10 "In a former despatch, I  
15:08:40 11 respectfully stated to your  
15:08:42 12 Lordship, as my opinion, that a  
15:08:43 13 civil war must henceforward every  
15:08:43 14 where be a moral one; and that, in  
15:08:43 15 this hemisphere in particular,  
15:08:43 16 victory must eventually declare  
15:08:49 17 itself in favour of moral and not of  
15:08:50 18 physical preponderance."

15:08:52 19 So in this passage, Bond Head is  
15:08:55 20 connecting what he did with what he said he was  
15:08:58 21 going to do.

15:08:58 22 A. Yes.

15:08:59 23 Q. Okay.

15:09:03 24 A. He is also mentioning there that  
15:09:05 25 he met there with a musket on his shoulder the

1 Chief Justice of the province.

2 Q. I am going to bring you to where  
3 we were previously on the subsequent page:

4 "On Wednesday morning we were  
5 sufficiently strong [...]"

6 Just to pause again, by this point he  
7 has gathered what he says immediately before, we  
8 mustered about 300 men and in the course of the day  
9 the numbers increased to about 500.

10 "In the night [...]" -- sorry, I think  
11 we should go up one paragraph, I might as well read  
12 it. Thank you. So I have been reading that  
13 paragraph:

14 "In the night an advanced  
15 piquet," so sort of an advanced  
16 group, "commanded by Mr. Sheriff  
17 Jarvis, was attacked within the  
18 precincts of the city by the rebels,  
19 who were driven back, one of their  
20 party being killed and several  
21 wounded."

22 So here he is saying they have gathered  
23 together about 500 men and there has been a  
24 skirmish initiated by the rebels; is that correct?

25 A. Yes.

15:10:01 1 Q. And he goes on:

15:10:02 2 "On Wednesday morning we were  
15:10:03 3 sufficiently strong to have ventured  
15:10:05 4 on an attack, but being sensible of  
15:10:08 5 the strength of our position, being  
15:10:09 6 also aware how much depended upon  
15:10:11 7 the contest in which we were about  
15:10:12 8 to be engaged, and feeling the  
15:10:13 9 greatest possible reluctance at the  
15:10:15 10 idea of entering upon a civil war, I  
15:10:19 11 despatched two gentlemen to the  
15:10:21 12 rebel leaders, to tell them that  
15:10:22 13 before any conflict should take  
15:10:24 14 place, I parentally called upon  
15:10:26 15 them, as their governor, to avoid  
15:10:27 16 the effusion of human blood."

15:10:30 17 So in this instance he is making a  
15:10:33 18 further effort to diffuse the situation and avoid  
15:10:36 19 bloodshed?

15:10:37 20 A. Yes.

15:10:37 21 Q. He is coming to blows reluctantly;  
15:10:40 22 is that fair?

15:10:41 23 A. Yes. He is being a great  
15:10:43 24 statesman, I guess, in the context.

15:10:45 25 Q. And I won't take you to the

15:10:49 1 passage, but later on he notes in this that there  
15:10:52 2 is eight regular soldiers in the garrison and he  
15:10:54 3 doesn't call them out because they are regular  
15:10:56 4 soldiers. Does that sound familiar?

15:10:59 5 A. Yes, and, of course, if he raised  
15:11:02 6 300 people overnight and then increased to 500  
15:11:04 7 during the day, he doesn't think he needs to. He  
15:11:09 8 is commanding adequate forces in his informal  
15:11:12 9 militia.

15:11:12 10 Q. And, Professor Haring, would you  
15:11:14 11 agree that it is fair to characterize how he  
15:11:17 12 intended to handle the rebellion and how he handled  
15:11:20 13 the rebellion as a matter of him consciously  
15:11:24 14 exercising very considerable forbearance in using  
15:11:29 15 force against civil unrest?

15:11:31 16 A. I am trying to think of it. He is  
15:11:36 17 trying to avoid a civil war, yes.

15:11:39 18 Q. And would you agree that that  
15:11:42 19 contrasts quite markedly with what happens in  
15:11:45 20 Canada East?

15:11:46 21 A. Yes.

15:11:46 22 Q. And a major reason for that is  
15:11:49 23 that the rebellion in Canada East is much more  
15:11:52 24 widespread; is that fair?

15:11:54 25 A. I am not that familiar with the

15:11:59 1 details of the rebellion in Canada East to be able  
15:12:02 2 to say that, but I'll accept your word for it.

15:12:05 3 Q. Okay, I'll ask one further  
15:12:07 4 question to see if you know, and, if not, that is  
15:12:09 5 fine. Is it your understanding that the stronger  
15:12:11 6 response in Canada -- sorry, Lower Canada, I keep  
15:12:15 7 on saying Canada East -- Lower Canada was also  
15:12:19 8 formed by the fact that there was an ethnic divide  
15:12:23 9 involved in that the preponderance of the  
15:12:26 10 rebellion, especially in the rank and file, were  
15:12:29 11 drawn from the habitants, the French Canadians?

15:12:36 12 A. Yes.

15:12:37 13 Q. I am very close to being done,  
15:12:49 14 Professor Haring, so I think we'll be able to  
15:12:51 15 finish before the break.

15:12:52 16 I don't have any further questions for  
15:12:55 17 you about the rebellions. I am going to ask you,  
15:13:08 18 Professor Haring, to go back to Exhibit 4292. We  
15:13:17 19 might ask Ms. Benson to pull that up.

15:13:19 20 And that is the correspondence from  
15:13:24 21 Lieutenant Colonel Bruce to Anderson from 1851.  
15:13:50 22 Now, you were brought to this in your examination  
15:13:53 23 in-chief, and I think the passage you went to was:

15:14:03 24 "I [concur] with you in  
15:14:05 25 thinking that the powers vested in



15:14:06 1 the Commissioner by the Indians  
15:14:09 2 Protection Act should be exercised  
15:14:10 3 with caution and [forbearance], and  
15:14:13 4 that it will be [more] for the  
15:14:15 5 interest of the Indians that  
15:14:16 6 advantages, should be taken of the  
15:14:18 7 present opportunity to give full  
15:14:20 8 publicity to its provisions,  
15:14:22 9 particularly those of a public  
15:14:23 10 character, then to [carry] them very  
15:14:29 11 [rigidly] into effect [...]"  
15:14:31 12 And I don't think you went to the  
15:14:32 13 subsequent portion of this sentence, Professor  
15:14:34 14 Harring, that reads:  
15:14:35 15 "[...] provided that ample  
15:14:37 16 [distribution] be made to the  
15:14:39 17 Indians by parties who have  
15:14:40 18 contravened the same."  
15:14:42 19 And then it continues:  
15:14:45 20 "As far as the Law admits you  
15:14:47 21 will endeavour to act in this  
15:14:49 22 spirit, giving it [however] to be  
15:14:51 23 clearly understood that hereafter it  
15:14:53 24 will be strictly enforced, as indeed  
15:14:55 25 your letters afford convincing proof

15:14:57 1 how much the Indians Property stood  
15:14:59 2 in need of such measure of  
15:15:01 3 protection."

15:15:01 4 Just focussing on the middle part:

15:15:03 5 "[...] provided that ample  
15:14:37 6 [distribution] be made to the  
15:14:39 7 Indians by parties who have  
15:14:40 8 contravened the same."

15:15:09 9 Do you understand that to mean that  
15:15:11 10 this forbearance depended in part upon the Indians  
15:15:14 11 receiving benefits in some form, cash payment or  
15:15:17 12 otherwise, from the people who were on their lands?

15:15:19 13 A. For -- you are saying forbearance  
15:15:29 14 meant -- I'm sorry, I am not understanding.

15:15:31 15 Q. So I'll just go up a little bit:

15:15:36 16 "[...] the powers vested in the  
15:15:37 17 Commissioner by the Indians [...] should be exercised with caution and  
15:15:38 18 [forbearance] [...]"

15:15:41 19 So that is the general direction  
15:15:43 20 provided by Bruce; correct?

15:15:44 21 A. Right.

15:15:45 22 Q. And then he adds a qualification:

15:15:50 23 "[...] provided that ample  
15:15:51 24 [distribution] be made to the

1 Indians by parties who have  
2 contravened the same."

3 Is that qualification a matter of him  
4 suggesting that to the extent we are going to show  
5 forbearance, it depends, at least in part, upon the  
6 Indians receiving benefits from the parties who are  
7 in contravention?

8 A. It is an interesting way to think  
9 about it. What benefits would the Indians have  
10 gotten in that context?

11 Q. Well, I am not going to pull it  
12 up, but do you remember page 34 of your report  
13 where you have that list from Rankin identifying  
14 nine lots upon which there are settlers?

15 A. Okay, yes.

16 Q. And they said "sold to," "sold  
17 to."

18 A. Right.

19 Q. Is that what Bruce is speaking of  
20 here, that kind of arrangement?

21 A. I am not sure. It is not obvious.  
22 Let's just say it might be -- it is not obvious  
23 what he has in mind.

24 Q. I am going to bring you to one  
25 further document -- actually, I am just going to

15:17:03 1 talk about it as opposed to bringing you to it.

15:17:07 2 During the course of your direct  
15:17:09 3 examination and cross-examination you discussed  
15:17:11 4 exchanges involving Gleason, between Anderson and  
15:17:15 5 Gleason; is that correct?

15:17:16 6 A. Yes.

15:17:17 7 Q. This is in relation to the mill,  
15:17:18 8 and if I recall correctly, you discussed two  
15:17:21 9 letters?

15:17:23 10 A. Okay, I have looked at three or  
15:17:25 11 four, but I may have only discussed two.

15:17:27 12 Q. Okay, and that is just my further  
15:17:29 13 point. You would agree that, you know, after the  
15:17:31 14 second of the two that I think you discussed in the  
15:17:34 15 examination, there is a third, an exchange on the  
15:17:41 16 7th of January 1853. Do I have that right? I  
15:17:54 17 believe so.

15:17:55 18 So just the further point really is  
15:17:58 19 this, that you would acknowledge that there are  
15:18:00 20 further exchanges and this continues to be an  
15:18:03 21 ongoing discussion?

15:18:04 22 A. Yes.

15:18:04 23 Q. Actually, I am going to bring you  
15:18:08 24 to the third of those. I had -- sorry, I  
15:18:11 25 misidentified the exhibit I wanted to go to. This

15:18:13 1 is the one that -- the letter that you did not go  
15:18:16 2 to on your examination. It is Exhibit 1967. And  
15:18:21 3 it is the one dated from January. It is difficult  
15:18:27 4 to read, but I have transcribed it. I am not going  
15:18:34 5 to go through the entire thing. I am just going to  
15:18:36 6 bring you to the bottom.

15:18:36 7 A. Okay.

15:18:37 8 Q. Where it says -- sorry, it is  
15:18:42 9 further down on the document. Sorry, I am just  
15:18:47 10 trying to track this a little bit more cleanly.  
15:18:55 11 One moment.

15:18:55 12 I was just sorting out the confusion  
15:19:09 13 because in my mind, to be clear, it goes over to a  
15:19:12 14 subsequent page, which is where I am bringing you  
15:19:17 15 to.

15:19:17 16 So you can see in that first top line  
15:19:28 17 the mention of Walker Smith?

15:19:29 18 A. Yes.

15:19:30 19 Q. If you go down a bit, it's three  
15:19:35 20 lines down, and I am going to read my  
15:19:41 21 transcription. If you think I have gotten it  
15:19:43 22 wrong, let me know.

15:19:43 23 A. Okay.

15:19:44 24 Q. Okay:

15:19:45 25 "And besides it is well known

15:19:47 1 to everyone who choose to make"  
15:19:50 2 something in brackets, I think it  
15:19:51 3 says the inquiry, "that no Indian  
15:19:54 4 has a right to grant any permission  
15:19:56 5 of the kind without leave from the  
15:19:58 6 Honourable the Superintendent  
15:19:59 7 General of Indian Affairs, and if  
15:20:01 8 you had had such leave and presented  
15:20:04 9 it to me when you received my  
15:20:06 10 letter, all would have been right."

15:20:08 11 [As read.]

15:20:09 12 Does that seem like a correct reading  
15:20:12 13 of the text?

15:20:13 14 A. I think it is a correct reading of  
15:20:15 15 it. I am not --

15:20:18 16 Q. Well, the point I wanted to bring  
15:20:20 17 up with you, Dr. Haring, if you accept that is an  
15:20:23 18 accurate reading of it, does it suggest that there  
15:20:25 19 is an ongoing dialogue about the status of  
15:20:30 20 Gleason's claims to be legally on the land and  
15:20:33 21 there is at least an openness on Anderson's part to  
15:20:37 22 getting some indication that he has received some  
15:20:39 23 form of official sanction from the Superintendent  
15:20:43 24 General of Indian Affairs? It is not a closed  
15:20:46 25 discussion yet on that point, is it?

15:20:48 1 A. No, in fact, Gleason, remember,  
15:20:50 2 insists that he is not a squatter and he has a  
15:20:53 3 right to be there, so this discussion goes on, I  
15:20:57 4 think, several years.

15:20:58 5 Q. Okay, and do you know what the  
15:21:00 6 final end result is? I know Mr. Beggs brought you  
15:21:02 7 to materials that show that sometime I think in  
15:21:06 8 1856 this property is sold, but do you know what  
15:21:09 9 happens in between this letter and the sale of the  
15:21:12 10 lands, particularly as a matter of the occupancy of  
15:21:15 11 that site by Mr. Gleason?

15:21:16 12 A. Well, it doesn't -- I don't know.

15:21:20 13 Q. And you didn't look into it?

15:21:21 14 A. Well, I tried to find it.

15:21:22 15 Q. Okay, you didn't find it?

15:21:24 16 A. I didn't find it. My point was  
15:21:26 17 simply it goes back and forth about him being a  
15:21:30 18 squatter for several years without him being  
15:21:32 19 ejected, even though he has the legal power to  
15:21:34 20 eject him.

15:21:35 21 Q. But you would agree that Gleason  
15:21:37 22 continues to hold out some grounds, spurious or  
15:21:40 23 not --

15:21:40 24 A. Yes.

15:21:41 25 MR. LEMMOND: Okay. Your Honour, I

1 have no further questions.

2 THE COURT: Thank you. Ms. Guirguis,  
3 do you have any re-examination for this gentleman?

4 MS. GUIRGUIS: Yes, Your Honour, I do  
5 have a few.

6 THE COURT: Please go ahead.

7 RE-EXAMINATION BY MS. GUIRGUIS:

8 Q. Good afternoon, Professor Harring.

9 A. Good afternoon.

10 Q. So I just have a few questions for  
11 you.

12 These are all with respect to questions  
13 that my friend Mr. Beggs asked you on Thursday,  
14 October 3rd. He brought you to Exhibit 4302. This  
15 was the collection of responses from various law  
16 enforcement for several counties to the Attorney  
17 General's letter asking what additional law  
18 enforcement resources might be required in 1882; do  
19 you recall that document?

20 A. Yes.

21 Q. Okay. I am not going to bring it  
22 up again. I just wanted to make sure that you had  
23 memory of it. And my friend, Mr. Beggs, took you  
24 through the issue of whether there was sufficient  
25 or the responses that they received from constables



1 about constables in Huron, Bruce, Grey.

2 Can you explain to us who decided where  
3 there were constables located in the years leading  
4 up to 1854?

5 A. This would have been a political  
6 decision.

7 Q. And political decisions by whom?

8 A. By whatever -- the different  
9 levels of the localities, with different localities  
10 having different levels of political authority, but  
11 they would have been at the level of the county  
12 primarily. But before counties are organized,  
13 whatever local authorities are in control, and this  
14 was changing again rapidly as Canada developed.

15 Q. So in 1854, in the mid-19th  
16 century, could you tell us who that would be?

17 A. Yes.

18 Q. And who would -- so who would have  
19 been making those political decisions?

20 A. It would have been the counties,  
21 the same people who were responding to the  
22 questionnaire.

23 Q. Okay, thank you. So to your  
24 knowledge and from your review of the historical  
25 record, have you seen any similar questions being

1 put to the Saugeen Indians to inquire about their  
2 law enforcement needs between 1836 and 1854?

3 A. Not -- no.

4 Q. Mr. Beggs also asked you whether  
5 the task of removing squatters was not something  
6 lightly to provide monetary remuneration for  
7 constables that seemed to require them to act. And  
8 my apologies, I'm paraphrasing because we only have  
9 the rough transcripts, but it was along those lines  
10 he asked you that question.

11 A. Yes.

12 Q. Based on your research, and your  
13 review of the record, your understanding of the  
14 record, who determined the kind of monetary reward  
15 that would be associated with a service for a  
16 constable in the mid-19th century?

17 A. The local authorities, and we saw  
18 that at the Manitoulin Island expedition that  
19 involved 12, 22 or 27 authorities where they had to  
20 pay the special constables two or three dollars a  
21 day because it was -- they had to pay more money  
22 because it was a less interesting and remote job,  
23 but they were able to pay them more money.

24 Q. Do you know what the fee for  
25 service, if any, was set for eviction of

1 trespassers or squatters from Crown or Indian lands  
2 in the mid-19th century?

3 A. No.

4 MS. GUIRGUIS: Thank you, those are my  
5 questions, Professor, and thank you, Your Honour.

6 THE COURT: Thank you. Sir, I have a  
7 question. Who has control of this? Does Ontario  
8 still have control of the system? Could you just  
9 bring up Exhibit 4277. Sir, that is your errata  
10 document, so you might have it sitting right in  
11 front of you. Do you?

12 THE WITNESS: I don't have it.

13 THE COURT: Okay. Well, let's just get  
14 it up.

15 There it is. You were asked by Ms.  
16 Guirguis and indicated that you prepared this  
17 document. Can you just give me a high-level  
18 description of the process you underwent to prepare  
19 this document?

20 THE WITNESS: The purpose?

21 THE COURT: The process that you  
22 underwent to prepare your errata.

23 THE WITNESS: I went back through  
24 documents to find -- where a mistake had been made,  
25 I went back through piles of documents, many

15:26:13 1 documents, to find out what had gone wrong, because  
15:26:16 2 this is -- you know, this was -- you know, no legal  
15:26:21 3 historian likes to clear up errata, but I went  
15:26:23 4 through lots of documents.

15:26:24 5 THE COURT: Well, sir, how did you know  
15:26:26 6 it was needing of being cleared up in the first  
15:26:28 7 place? You said when a mistake has been made. How  
15:26:31 8 do you know there was a mistake in the first place  
15:26:34 9 to prepare this document?

15:26:35 10 THE WITNESS: Oh, I received a sheet.

15:26:38 11 THE COURT: A sheet?

15:26:39 12 THE WITNESS: Sorry, I got a list of  
15:26:42 13 mistakes that I believe someone working for the  
15:26:46 14 Crown had found, and I went -- I was charged with  
15:26:50 15 finding, tracking them down and fixing them, of  
15:26:53 16 finding out what the problem was.

15:26:55 17 THE COURT: So I'm just trying to get a  
15:26:57 18 sense, because a number of times over the last few  
15:27:00 19 days, in answer to questions, you have emphasized  
15:27:03 20 the fact that it has been some five years since you  
15:27:05 21 wrote your report and I was trying to understand  
15:27:11 22 how that --

15:27:15 23 THE WITNESS: That made it more  
15:27:16 24 difficult.

15:27:16 25 THE COURT: Well, how that did or

15:27:18 1 didn't relate to the preparation of this document,  
15:27:21 2 which I would have thought did require a review of  
15:27:23 3 your report.

15:27:25 4 THE WITNESS: Well, I had to go back to  
15:27:26 5 the -- the documents were in -- they were in my  
15:27:30 6 barn.

15:27:30 7 THE COURT: Sorry, Mr. Lemmond is  
15:27:33 8 standing up.

15:27:34 9 MR. LEMMOND: Sorry, Your Honour, I  
15:27:35 10 might be able to help clarify the process.

15:27:37 11 THE COURT: You don't need to, sir.  
15:27:39 12 Have a seat.

15:27:39 13 A very specific question, sir, and I  
15:27:42 14 will just ask it one more time.

15:27:44 15 THE WITNESS: Sorry.

15:27:45 16 THE COURT: I was trying to understand  
15:27:46 17 the relationship, if any, between your testimony  
15:27:50 18 where you commented from time to time that it had  
15:27:52 19 been five years since you looked at the material  
15:27:56 20 and what seemed to me that you may have looked at  
15:27:58 21 it more recently to prepare the errata sheet.

15:28:00 22 THE WITNESS: Okay, and now I  
15:28:01 23 understand --

15:28:02 24 THE COURT: I am just trying to  
15:28:03 25 understand that, sir. If you could explain how

15:28:05 1 those two things did or didn't relate to each  
15:28:07 2 other.

15:28:07 3 THE WITNESS: I am happy to. I wrote  
15:28:09 4 the document, it is dated 2013. Then I didn't --  
15:28:13 5 it went aside, and I didn't -- I did other things.

15:28:16 6 And then I got this errata sheet and I  
15:28:20 7 went back to my barn where I have the documents in  
15:28:23 8 boxes, and then many of the documents are on the  
15:28:26 9 common archival base now too. In fact, documents I  
15:28:29 10 did not have in 2013 are on the document base now,  
15:28:33 11 because the document base has been enlarged over  
15:28:36 12 the last five years.

15:28:40 13 THE COURT: So if I understand you,  
15:28:41 14 sir, it wasn't that you reviewed every reference in  
15:28:44 15 your entire report. You reviewed a specific list?

15:28:46 16 THE WITNESS: No, I only did exactly  
15:28:47 17 what was asked of me.

15:28:49 18 THE COURT: Okay, that answers my  
15:28:50 19 question, sir.

15:28:51 20 THE WITNESS: Okay, sorry.

15:28:52 21 THE COURT: Ms. Guirguis, do you have  
15:28:53 22 any questions arising from my questions?

15:28:55 23 MS. GUIRGUIS: No, Your Honour.

15:28:56 24 THE COURT: Mr. Beggs?

15:28:57 25 MR. BEGGS: No, Your Honour.

15:28:58 1 THE COURT: Mr. Lemmond?

15:28:59 2 MR. LEMMOND: No, Your Honour.

15:29:00 3 THE COURT: All right, thank you, that

15:29:01 4 concludes your evidence, sir. Thank you very much.

15:29:04 5 THE WITNESS: Thank you.

15:29:04 6 THE COURT: You may step down.

15:29:06 7 All right, I think we resume with the

15:29:16 8 voir dire of Dr. von Gernet which we tried but

15:29:23 9 could not bring forward from its currently

15:29:25 10 scheduled time of Friday?

15:29:27 11 MR. BEGGS: Yes, Your Honour.

15:29:28 12 THE COURT: Now, counsel who is

15:29:29 13 attending on that may not be in the room. I don't

15:29:32 14 know, Ms. Guirguis, if it is you?

15:29:34 15 MS. GUIRGUIS: It is me.

15:29:35 16 THE COURT: It is you?

15:29:36 17 MS. GUIRGUIS: Yes.

15:29:37 18 THE COURT: I had, at the first motion

15:29:38 19 that we did over that witness, asked counsel for

15:29:41 20 some time estimates. At this point I cannot recall

15:29:44 21 whether we discussed time estimates for the second

15:29:47 22 stage, which is what we are doing on Friday. It

15:29:51 23 will comprise obviously of some testimony first and

15:29:56 24 cross-examination presumably and then some

15:29:59 25 submissions.

1 I think for the purposes of planning, I  
2 would like to ask counsel for a rough estimate of  
3 how long that is going to take. If you haven't  
4 consulted with each other, you can do it after  
5 Court and send me a message, if that is preferable,  
6 that is fine.

7 What is your submission on that, Ms.  
8 Guirguis? It is your witness.

9 MS. GUIRGUIS: Your Honour, I think if  
10 I recall correctly, I had estimated that I would  
11 take about one hour for cross-examination and then  
12 probably about ten minutes for submissions.

13 THE COURT: Okay, and Mr. Beggs, did  
14 you also give me an estimate for your voir dire  
15 in-chief? I just don't have a note of it.

16 MR. BEGGS: I did, but I don't recall  
17 what it is, but I think it wouldn't be longer than  
18 an hour, it would be shorter than an hour.

19 THE COURT: Okay. Is Ontario going to  
20 sit quietly on Friday, or is it taking part?

21 MR. LEMMOND: Yes, Your Honour.

22 THE COURT: Yes to which of those two  
23 things?

24 MR. LEMMOND: Quietly.

25 THE COURT: Sitting quietly, all right.



1 I am not suggesting you can't make a submission if  
2 you wish, but you are not going to be conducting  
3 any or making a request for what would have to be  
4 an extended chief of some kind?

5 MR. LEMMOND: That's correct, Your  
6 Honour.

7 THE COURT: So I guess what I am  
8 hearing is we'll have a couple of hours of evidence  
9 followed by submissions; is that the gist of it?

10 MS. GUIRGUIS: That's correct, Your  
11 Honour.

12 THE COURT: Okay, thank you.

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14 -- Adjourned at 3:32 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 18th day of October, 2019



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