Court File No. 94-CQ-50872CM

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

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

Plaintiffs

- and -

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

Defendants

Court File No. 03-CV-261134CM1

A N D B E T W E E N:

CHIPPEWAS OF NAWASH UNCEDED FIRST NATION and SAUGEEN FIRST NATION

Plaintiffs

- and -

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

Defendants

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--- This is the ROUGH DRAFT transcript of VOLUME 99 / DAY 99 of the trial proceedings in the above-noted matter, being held via Zoom virtual platform, on the 20th day of October, 2020.

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B E F O R E:

The Honourable Justice Wendy M. Matheson

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

| | |
|---|---|
| H.W. Roger Townshend, Esq., | for the Plaintiffs, |
| & Benjamin Brookwell, Esq., | The Chippewas of |
| & Renee Pelletier, Esq., | Saugeen First |
| & Cathy Guirguis, Esq., | Nation, and the |
| & Jaclyn McNamara,, Esq., | Chippewas of Nawash |
| & Krista Nerland, Esq., | First Nation. |
| | |
| Michael Beggs, Esq., | for the Defendant, |
| & Michael McCulloch, Esq., | Attorney General |
| & Barry Ennis, Esq., | of Canada. |
| & Alexandra Colizza, Esq. | |
| | |
| David Feliciant, Esq., | for the Defendant, |
| & Richard Ogden, Esq., | Her Majesty the |
| & Julia McRandall, Esq., | Queen in Right of |
| & Jennifer Lepan, Esq, | Ontario. |
| & Peter Lemmond, Esq. | |
| | |
| | |
| Jill Dougherty, Esq., | for the Corporation |
| Debra McKenna, Esq. | of the Township of |
| | Georgian Bluffs |

A P P E A R A N C E S: (continued)

Greg Stewart, Esq. for the Corporation of the Municipality of Northern Bruce Peninsula, the Corporation of the Town of South Bruce Peninsula, and the Corporation of the Town of Saugeen Shores.

Tammy Grove-McClement, Esq., for the County of Bruce.

ALSO PRESENT:

Mr. Shaule, Ms. Prokos, Kelly Matharu, Keshika Ramlochun, Monica Singh

REPORTED BY: Helen Martineau, CSR.

**I N D E X**

**PAGE**

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

**MS. ROBERTS:** Good morning. This is a virtual hearing using Zoom. Today is Tuesday, October 20th, 2020, resuming for closing arguments in the trial of two actions: The first is the Chippewas of Saugeen First Nation et al. and the Attorney General of Canada, et al. and the second is the Chippewas of Nawash Unceded First Nation et al. and the Attorney General of Canada et al. day 99.

The file numbers of these proceedings are 03-CV-26-1134CM1 and 94-CQ-50872CM. Justice Matheson presiding. If a technical problem is encountered during the hearing and the connection is disconnected, counsel will receive instructions by email and the hearing will resume once the matter is resolved. The live streaming of this proceeding is made available on YouTube for public assess. The links for each day are available through the court and from Arbitration Place on its website at arbitration.com/broadcastlinks.

Thank you and I'm now turning it over to Justice Matheson.

**THE COURT:** Thank you, Ms. Roberts.

Ms. Roberts is the host of the Zoom hearing, under my direction.

I remind everyone that as with any trial this hearing is being recorded by the court. No one else is permitted to photograph or record or take a screen shot of this hearing without permission under section 136 of the Courts of Justice Act and no permission has been sought or granted.

I also remind everyone that you may notice that I am not always looking directly at the screen. Like any in-courtroom trial, I will be taking notes and doing documents relevant to this trial while the trial progresses.

Ms. Guirguis, please proceed.

**MS. GUIRGUIS:** Thank you, Your Honour. Good morning.

So, Your Honour, this morning I just wanted to start off by answering -- following up on a couple of issues that you asked about yesterday.

The first one was a question with respect to harvesting rights on the peninsula. You had raised a question about evidence that had been provided by Mr. Doran Ritchie and

Mr. Paul Nadjiwan. Mr. Ritchie testified on May 31st, so that is volume 16 of the evidence and Mr. Paul Nadjiwan testified on June 3rd, which is volume 17.

And you had asked a question for our position with respect to whether you needed to make a decision about their hunting, harvesting practices and the incompatibility with private lands and what they had said about trespass and so on.

So to summarize, both say that they hunt and harvest both on public and private lands and they provided evidence on when they would not or when they would access lands.

So they would not access lands when the properties are marked with no trespass signs or red markers, which they -- which they explained that some property owners use red spray paint to indicate no trespassing.

Mr. Ritchie mentioned that a fence would not be enough because that often just signals that it is a division in properties. So to him, it doesn't mean to stay off. Both also gave evidence of exercising safety precautions, avoiding cattle, and also coming to agreements

and notifying land owners that they were harvesting on their properties.

That is what their evidence is about land being compatible with harvesting.

As for what Your Honour needs to do with this evidence we would submit there is no need to make a determination as to whether these are examples of what would be visibly incompatible with continued harvesting, rather what we would suggest is, as Ontario suggests, that no further judicial intervention is required at this point, other than making a declaration that whatever harvesting rights existed in 1854 were not extinguished or terminated by Treaty 72.

And as far as what is compatible or not that would, in our view, only be required to be determined by a court on a case-by-case basis, say in response to disputed charges, which is the typical way that these issues tend to be resolved.

**THE COURT:** Thank you, counsel. I had not intended to restrict my question to whether or not the parties thought I needed to make a decision about this issue.

So let me elaborate to say that in order that I can understand the plaintiffs' position on the proper interpretation of the Treaty as regards harvesting rights, it would be helpful to me to know what the plaintiff says about the practices that were put in evidence before me and whether or not they would be incompatible in your submission so that I can understand what you mean by "incompatible".

Now, I recognize that there could be a myriad of other factual situations that are not before me that I'm not asking you to comment on, but I had intended to ask for your position about whether what those two gentlemen testified about was, in your submission, compatible or incompatible in terms of your position on the treaty.

**MS. GUIRGUIS:** In terms of your position on the treaty, Your Honour, our position is that what they testified to would be compatible.

**THE COURT:** So you would say that hunting on private land is not incompatible where the land is not marked "no trespassing" or with a red mark?

**MS. GUIRGUIS:** That's correct.

**THE COURT:** Thank you.

**MS. GUIRGUIS:** Thank you. The other issue that I wanted to revisit briefly was with respect to the question about our pleading or claim of breach of treaty versus breach of fiduciary duty and why we are not arguing a breach of Treaty 45 1/2.

The answer that I gave yesterday, when I reviewed the transcript and thought this over last night, I wanted to make sure that I was clear as we can be on this point and I think that it bears clarifying how this is connected, particularly to remedies in particular, that the Saugeen Ojibway are, through this claim, seeking a remedy of some lands.

So just to back up, we have advancing a claim that the promise in Treaty 45 1/2 created a fiduciary duty. This duty we are saying was breached by the Crown's failure to protect the peninsula and was breached by the Crown's conduct leading up to the surrender of the peninsula in Treaty 72.

However, we have also said that is not -- that the peninsula could never have been

subject to a future treaty, rather we are saying that what led to Treaty 72 was conduct that amounts to a breach of the Crown's fiduciary duties to SON.

And, yes, that conduct would also amount to a breach of the Treaty promise to SON. The same facts that we say demonstrate the Crown's breach of fiduciary duty would also demonstrate that the Crown breached a treaty promise. So when we were thinking of how to frame this claim, we of course have in mind the remedies available to SON if successful.

And the priority for SON has always been lands. So bringing this forward as a breach of treaty claim with the objective of a remedy that includes return of lands on the peninsula would, as we thought about it, lead us down the path of saying, because of the breach of treaty promise, Treaty 72 is not legally valid. And that we thought would have more negative impact on private parties.

By framing this as a fiduciary claim, that the failure to protect and the conduct of the Crown leading up to Treaty 72, is a breach of their fiduciary duties that allowed us to

seek equitable remedies that leave Treaty 72 legally intact, but provides a remedy of a constructive trust over Crown hands, municipal road allowances only.

So even though, yes, the facts that establish the breach of fiduciary duty would, we agree, establish that the Crown breached the treaty, for the reasons that I've just given, that is why the claim is framed the way it is, with the remedies in mind.

**THE COURT:** Thank you. I have two questions arising from that answer.

First of all in your written submissions you ask that I actually find a breach of Treaty 45 1/2. It's not just a possible outcome. You are asking for that finding, which seems, at least unnecessary if not inconsistent with what you just said.

**MS. GUIRGUIS:** I would have to take a look, Your Honour, to see -- I don't recall precisely where we would have found that, but I can check in with my team.

**THE COURT:** All right. That's fine.

And the other question that arises is with respect to remedies. It is always up to a

plaintiff to choose and pick what remedies they are asking for, but you seem to be saying that if you proceeded with a breach of treaty you would have lost that ability and somehow inevitably there would be some particular remedies. Is there a reason for that?

**MS. GUIRGUIS:** There is not one that comes to mind. The theory of this has been framed, as you know the claim was brought in 1993, 1994, the theory or what went into that I don't have at my fingertips right now.

**THE COURT:** To be clear, I don't need to know the theory that went into it.

**MS. GUIRGUIS:** Right.

**THE COURT:** I just need to understand your position now, but I do appreciate your effort in that regard.

All right. Go ahead.

**MS. GUIRGUIS:** If you would like, Your Honour, it's something I can take back and if there's time --

**THE COURT:** No. I think you have given me the high level explanation.

**MS. GUIRGUIS:** Okay. Thank you, Your Honour.

**THE COURT:** Were there other questions you wanted to address before resuming your main submissions?

**MS. GUIRGUIS:** Those are the ones that I intend to address. I know after my main submissions, Ms. Township and Ms. Pelletier have answers with respect to the title.

**THE COURT:** All right. Please go ahead.

**MS. GUIRGUIS:** Okay.

One point, Your Honour -- sorry, I'm just getting a note from my colleagues with respect to the first question you asked in terms of the finding of the breach of Treaty 45 1/2. I think that the reference is at paragraph 3 of our submissions where we say that:

> "The second action is based on a promise made by the Crown in Treaty 45 1/2 in 1836 to protect the Saugeen (Bruce) Peninsula for SON forever. This promise was breached leading up to and during the negotiations [...]"

And we seek remedies for this breach. So I think what we intended to say there is that the promise was breached and, as we've

mentioned, the promise gave rise to the fiduciary duty. So those are the breaches that we have focused on versus the breach of the Treaty.

**THE COURT:** What paragraphs did you say? 9?

**MS. GUIRGUIS:** No, paragraph 3.

**THE COURT:** Thank you, please go ahead.

**MS. GUIRGUIS:** Thank you, Your Honour.

So getting back to my main submissions, where I had left off yesterday was in the second section of my submissions where I was talking about our allegations of the Crown's breaches of fiduciary duties. And I was at the third point in that.

Where I'd like to focus and discuss how the Crown breached its duties by obtaining a surrender through threats and misinformation.

The Crown in acting in respect of the peninsula has the duties of loyalty and honesty towards the Saugeen Ojibwe Nation, or SON. In particular, they have the duty of utmost loyalty to SON in respect of their interest to the peninsula, which meant they were required to

give priority to SON's interests and not any other -- and not any other interest; being honest in relation to matters concerning SON's interest in the peninsula, in other words not misleading or lying or bullying SON into a surrender; and finally not accepting a surrender made in exploitative conditions.

In our argument we point to T.G. Anderson's conduct and we point to Laurence Oliphant's conduct on behalf of the Crown in respect of the Crown's breaches.

So with respect to Anderson we address this in our final argument from paragraphs 799 to 811.

I'm not going to review this in detail, but I just want to highlight two points of disagreement that we have with the Crown defendants. The first is with respect to Anderson's threats and SON's counterproposal. Anderson met with SON seeking a surrender of the peninsula in August of 1854. We have Anderson's report to his superior and also his speech dated August 2nd, 1854. We have this at Exhibit 2175 at page 12, and if I may, I'll ask Ms. Prokos to bring that up and go to the relevant page.

So in his August 16th, 1854, report to Lord Elgin, this is at page 12 of Exhibit 2175, Anderson writes:

> "They at first declared ["they" being the Saugeen Ojibeway] at first declared that they would not sell an inch but having pointed out to them the folly of their retaining so a large tract of land from which they were drive deriving no advantage the possibility of the whites taking possession of it without deriving half the profit they would from the government."

We say that this passage suggests the following, that SON said no to Anderson's request for a surrender of the peninsula, and that then Anderson made his speech, which is laid out later in this document and which records the following statement, if we can scroll down. So starting at the bottom of this page:

> "You complain that the whites not only cut and take your timber from your lands, but that they are

commencing to settle upon it, and you cannot prevent them, and I certainly do not think the Government will take the trouble to help you while you remain thus opposed to your own interest. The Government, as your guardian, have the power to act as it please with your reserve, and I will recommend that the whole, excepting the parts marked on the map in red and blue, be surveyed for the good of yourselves and children."

According to Anderson's report, he said that after a long discussion SON began to waiver from their initial no.

Then, in his report, what he says is that after an hour of private deliberation SON came back with their counterproposal. SON's counterproposal is found at Exhibit 2105. The transcript is at Exhibit 4796, and it's written as an answer to the fifth question that's been put to them by T.G. Anderson. The date below the counterproposal is August 81, 1854, so the same date as Anderson's speech that's recorded here in this report.

In her testimony Dr. Reimer agreed very clearly this was the chronology: That we have a "no" from SON, we have Anderson's speech, and then a counterproposal.

That evidence is cited in our final argument and it's also cited in our reply in the chart that we provide at the end with respect to the Treaty.

Canada and Ontario both dispute this chronology. Both of them say that Anderson's speech came after SON's counterproposal. In our view Canada's and Ontario's position does not line up with the evidence that we've summarized, rather the balance of the evidence supports that the counterproposal only took -- only happened after Anderson's threats to SON, particularly because this was the first time that SON agreed to a sizeable surrender, the inland wedge. And we submit that is because that threat had an impact.

However, it is important to note that regardless of whether or not the threat was before or after the counterproposal, what we are talking about here in respect of Anderson's conduct is a matter of the standard of conduct.

Making such threats would be a breach no matter what, or when they happened in the course of the surrender process or whether there were other factors that led to a surrender.

If this Court concludes that the threats came after SON's counterproposal, that still would have meant the difference between them only agreeing to an inland wedge surrender versus the surrender of the whole peninsula the next time that Oliphant came asking.

So again, we submit that the evidence is that the threat had a significant impact.

This is the second point that I want to discuss a bit more, the impact of the threats and excusing the breach. The Crown defendants have both, roughly paraphrasing, suggested that Anderson's statements were not threats. And if they were, SON did not believe them. Their suggestion is that ultimately Anderson's misconduct should be excused as not having an impact on SON, the beneficiary's decision to surrender their lands.

There are a few problems with this. This issue arises because Dr. Reimer made the assertion on the stand that SON would not have

believed Anderson's threats. In our view that opinion is not based on any evidence. According to the evidence that we do have, it is much more likely that SON did believe Anderson's threats.

We've summarized this evidence and cited it at paragraphs 803 to 807 of our final argument. And just briefly I would note now that there is no mention in Anderson's report of the August council to indicate that SON made any comment or to indicate that they said anything that they did not believe him.

On the other hand, Professor Driben, the expert anthropologist that we've called to provide testimony, he testified that SON would have understood this as an existential threat. Professor Driben testified that SON would have believed the threat that the government could take their lands without their consent given that they would have been aware of the U.S., the United States, removing First Nations from their lands, for example.

After hearing the threats, SON did in fact, after saying no so many times before, come back with a counteroffer to surrender the inland wedge of the peninsula.

And when Oliphant returned in October 1854 he, in our submission, echoed the essence of Anderson's threat by a saying that the Crown could not stop squatters from taking SON's lands and SON then agreed to the surrender. This is evidence that they did believe that the lands would no longer be protected for them, that they did believe the threat.

The Crown defendants have pressed the position that SON had agency and were good negotiators. And so they use this to downplay the results of the threat on the resulting surrender.

This disregards some key points about fiduciary law. A fiduciary's breach of their standard of conduct cannot be excused. Threats are not consistent with the standard of conduct to which equity holds a fiduciary. Even if SON had agency or were good negotiators, they were in a vulnerable position vis-a-vis the Crown, being the beneficiary in this fiduciary relationship and relying entirely on the Crown's actions to protect the Reserve.

The analysis of whether there has been

a breach of fiduciary duty focuses exclusively on the conduct of the fiduciary; it does not turn on the beneficiary's decision making and conduct.

A good summary of this is found in Rotman's Fiduciary Law which we've excerpted for Your Honour at our Book of Authorities at tab 192. And it's summarized at page 299 of Fiduciary Law.

Essentially Rotman says that:

> "[...] there is no need to look beyond the fiduciaries' conduct in order to ensure the integrity of fiduciary relations. The fiduciaries' manner of fulfilling their obligations dictates whether the integrity of the interaction in question is maintained. This is an objective assessment that measures fiduciaries' actions against the standards imposed by the fiduciary concept. By looking only to the actions of fiduciaries, the fiduciary concept differs from other forms of action, such as contract or tort, which examine the actions of all

parties to the interactions falling within their respective mandates."

This is part of the way that equity operates to deter breaches of fiduciary duty, by imposing this strict standard of conduct on fiduciaries.

The assessment of whether SON would have entered Treaty 72 in any event is only relevant in assessing remedies; it is not relevant in terms of determining that there is a breach.

**THE COURT:** Counsel, just on that very last thought from the textbook you're reading, say that the question of whether SON would have entered into Treaty 72 anyway is only relevant to remedy, but in your written submissions you say that it is not necessarily for the Court to make a finding about whether or not SON would have entered into Treaty 72. So I'm just trying to understand how those two thoughts go together.

**MS. GUIRGUIS:** It's not relevant in terms of determining that there was a breach of fiduciary duty.

**THE COURT:** I understand that, but are

you saying that it may be necessary in Phase 2 to have a finding but it is not necessary in Phase 1?

**MS. GUIRGUIS:** In Phase 2 when we're determining -- if we get to Phase 2, if we're determining the amount of compensation of the lands, the remedies that are owed, the assessment of the benefit, for example, that SON received would be used in terms of offsetting those remedies.

So I think it's only relevant insofar as assessing whether there's an offset to the remedies or the amount of compensation.

**THE COURT:** But the reason I'm asking the question is that if it is the case that, whether or not SON would have entered into Treaty 72 anyway is going be relevant to the determinations in this trial, then does it not make sense that the finding be made? It seems counter-intuitive to say that whoever the judge is that's hearing Phase 2, many, many years from now, is going to be asked to make that factual finding.

So I'm trying to reconcile that with your written submissions saying that the factual

finding is not needed.

**MS. GUIRGUIS:** Right. Yes. I think I -- I understand and I think that it's pulling -- it's pulling against one another because we're saying that it's not needed to find that there's a fiduciary breach, that there is a fiduciary duty.

So it's -- this goes back to, I think, the question of causation. It would certainly be convenient to have a finding with respect to causation as to whether SON would have entered Treaty 72 but for the threats, but it's not necessary.

**THE COURT:** All right.

**MS. GUIRGUIS:** So turning to Oliphant's conduct, which is summarized at our final argument at paragraphs 816 to 856, I mentioned earlier that our position is that when Oliphant arrived in October to secure a surrender of the peninsula, we submit that he confirmed what SON had heard from Anderson. Anderson's speech, as quoted, said that he told SON about white settlers:

> "[...] that they are commencing to settle upon it, and you cannot

prevent them, and I certainly do not think the Government will take the trouble to help you [...]".

While we don't have a verbatim similar speech from Oliphant in his report, we have his report at Exhibit 2175, so the one we have up on the screen, at page 4 where he talks about what he said at the proceeding.

He says he opened the proceedings by referencing "the avidity with which the neighbouring lands were taken up by whites", and that he represented the extreme difficulty, if not impossibility of preventing such unauthorized intrusions.

This, we submit, is not so different from what Anderson said two months earlier. SON would have understood this as a confirmation of Anderson's statements. The government would not protect their lands, and they had no choice but to surrender it or lose their lands without getting any benefit from it.

There is no evidence that Oliphant or anyone else on behalf of the Crown advised SON that Anderson's statements were not true or would not be acted on. Very fact that Oliphant

returned a few months later asking for a surrender of the whole peninsula and making these statements representing the extreme difficulty, if not impossibility, of preventing such unauthorized intrusions, that in itself would have confirmed to SON the seriousness of Anderson's threats.

In addition, in our argument we highlighted Oliphant's misconduct that he misrepresented the demand for lands on the peninsula, and that he lied or misled when he said that there was nothing the Crown could do to stop squatters. He knew there were measures that he could have taken and, indeed, he took them right after the surrender was completed.

So I can ask Ms. Prokos to take down this document now.

And I would note to Your Honour that we've replied to Canada's attack on our pleading in the written reply and I don't intend to cover that unless Your Honour has any questions with respect to that. But I just want to elaborate on what we mean when we say that Oliphant lied.

So that he lied that he knew that he was not telling the truth. We say that based on

the evidence the Court can infer that Oliphant was aware that he was misrepresenting the demand for lands on the peninsula and the Crown's capacity to protect those lands for SON in order to wring their assent.

Alternatively, we are saying that Oliphant essentially lied, because he should have known in the circumstances that what he was saying was not true. And if he did not subjectively have that knowledge -- even if he did not subjectively have that knowledge, so a kind of willful blindness.

Otherwise it's a failure to ask further questions. So even if not dishonest ran afoul of the standard of care required of a fiduciary. A person managing his own affairs would have made inquires about whether the supposed demand for lands was real or whether they could have done more to protect the lands prior to concluding there was no alternative to the surrender.

This is similar to a case that I referred to before, *Jim Shot Both Sides*. I referred you to paragraph 378 of that decision which is at tab 30 of our original book of

authorities.

**THE COURT:** Which paragraph of the decision?

**MS. GUIRGUIS:** Paragraph 378.

**THE COURT:** And the tab of the book of authorities?

**MS. GUIRGUIS:** 30.

**THE COURT:** Thank you.

**MS. GUIRGUIS:** In *Jim Shot Both Sides*, the paragraph I referred you to, Your Honour, talks about the finding of the court that the Crown official, when they came and told the Blood Tribe or the representatives of the Blood Tribe that the Reserve was actually too large than it was actually intended to be, the Crown found they were misleading them, or they had failed to find out the appropriate information and that they should have. And that was a breach of fiduciary duty. We submit that this is similar to that situation.

**THE COURT:** And just on that question, can you clarify whether or not you say that Oliphant was entitled to take into account the circumstances surrounding the big land sale that he encountered on his journey to the peninsula?

**MS. GUIRGUIS:** Not in preference to the interest of protecting SON's interest. So, again it's -- you can't merely be a referee, but keeping in mind that he has that fiduciary -- the Crown has the fiduciary standard -- like the fiduciary obligation to put the best interests of SON before that. So while you can take that into account, there's demand for lands, the first question that needs to be asking is how do we protect the interest in the peninsula for SON? Not just how do we balance these two in a convenient way.

So Oliphant going, he knew that he could take actions, as he did the very next day, to alert the sheriff, to send notices about removing squatters and to put up more protections for the lands, to use their own laws to be able to do that.

**THE COURT:** I'm trying to understand a different point. You say he knew certain things. I understand that point. You also say that at a minimum -- and that's my summary of what you say, at a minimum, he failed to ascertain the appropriate information. And so this is your submission about what he failed to

do, not what he already knew.

And I'm just trying to understand what sort of information you say he failed to ascertain.

**MS. GUIRGUIS:** Well, I think that this is in the alternative --

**THE COURT:** I understand that.

**MS. GUIRGUIS:** So if it's in the alternative, if he didn't -- if he took at face value that the encounters he had on his way demonstrated an extreme demand for lands, he failed to ascertain or make inquiries about the fact that the lands to the north of the peninsula, a large amount of the lands were not suitable for settlement at all. So they wouldn't have been high in demand.

So that's the information that he failed to ascertain.

So presenting the situation to SON as he did resulted then in an exploitative surrender, which the Crown had a fiduciary duty to scrutinize, and the Crown should not accept that exploitative surrender. Again, similar to a case we've discussed before, the Makwa First Nation case which is at our book of authorities,

our original one at tab 44. And I've already discussed that case briefly yesterday and how the facts of that case apply here.

Another case that I referred to yesterday was *Semiahmoo* which is in our original book of authorities at tab 99 and is also instructive on this point. About -- sorry, Your Honour, you're on mute.

**THE COURT:** Which case? The second case?

**MS. GUIRGUIS:** *Semiahmoo*.

**THE COURT:** Sorry, in the book of authorities tab 99?

**MS. GUIRGUIS:** So in that cast the surrender was deemed exploitative and the Court found that the Crown had a duty to refuse it. And in that duty, the fiduciary Crown must be held to a strict standard of conduct. So at paragraph 45 of Semiahmoo the Court says:

> "I should emphasize that the Crown's fiduciary obligation is to withhold its own consent to surrender where the transaction is exploitative. In order to fulfill this obligation,

the Crown itself is obliged to scrutinize the proposed transaction to ensure that it is not an exploitative bargain. As a fiduciary, the Crown must be held to a strict standard of conduct. Even if the land at issue is required for a public purpose, the Crown cannot discharge its fiduciary obligation simply by convincing the Band to accept the surrender, and then using this consent to relieve itself of the responsibility to scrutinize the transaction. The Trial Judge's findings of fact, however, suggest that this is precisely what the respondent did. I note, for example, the first sentence of her reasons for judgment reads: 'The issue in this case is whether the defendant breached its fiduciary duty to the plaintiffs when it encouraged (required) the surrender of part of the plaintiffs' reserve.' In failing to alleviate the Band's sense of powerlessness in the decision-making process, the

respondent failed to protect, to the requisite degree, the interests of the Band."

**THE COURT:** Just so I understand, counsel when you say that the course of events resulted in an exploitative surrender and that quote that you just read suggests that the exploitative nature of the surrender was process-related rather than the actual terms of the surrender being exploitative; have I got that correct, counsel?

**MS. GUIRGUIS:** That's correct, Your Honour.

**THE COURT:** So I take it, counsel, that your position would be that if the course of conduct was as you described that the actual terms of the surrender wouldn't matter? In other words, if it was a wonderful package for someone that would not have any impact or at least until the remedy stage?

**MS. GUIRGUIS:** That's correct, Your Honour.

**THE COURT:** All right.

**MS. GUIRGUIS:** So before I close out my submissions on breaches on this section, one

of the themes that comes up in the submissions of both Canada and Ontario, Canada and Ontario's arguments, is that this Court should avoid applying hindsight or what Ontario calls "presentism" to evaluate the conduct of the Crown officials like Anderson or Oliphant.

We submit that they both overstate this principle considerably.

It is true that there are cases that warn about evaluating a fiduciary's conduct through the lens of hindsight but this has a particular meaning in case law.

There are two decisions that are cited, I believe, in both of the Crown defendants arguments. The first one is the Supreme Court of Canada's 2009 decision in Ermineskin which is at tab 43 of Ontario's book of authorities.

In that case Samson and Ermineskin First Nations had argued that the Crown had breached its fiduciary duty through the manner in which it held and paid interest on First Nations' oil and gas revenues.

Their basic claim was that the Crown should have invested the royalties in a

diversified portfolio rather than holding them in a consolidated revenue fund and paying out an interest rate equivalent to a government bond rate.

The Supreme Court rejected this argument, rejected the claim and it held that the way the government chose to hold the revenues was defensible at the time, and that it was prudent and not be evaluated through the lens of what turned out to be hindsight to have yielded higher returns.

The same is true in Blueberry River, which is at our book of authorities at tab 9, in. That case one of the issues before the Court was whether the sale of the Blueberry River Reserve to the director of the Veteran's Land for $70,000 was a breach of the Crown's fiduciary duty.

At paragraph 51 of that decision Chief Justice McLaughlin held that this was not a breach, even though in hindsight it turned out to be unfortunate because oil and gas were discovered on the land that was sold, it was at the time a reasonable choice.

She says at the time the sale of land

was a defensible choice, indeed it can be argued that the sale of the surface rights was the only alternative that met the Band's apparent need to obtain land near its trap lines. In retrospect, the decline in trapping and the discovery of oil and gas, the decision may be argued to have been unfortunate but at the time it may be defended as a reasonable solution to the problems the Band faced.

So what does this tell us about the role of hindsight? We submit that it means that when you assess whether a fiduciary met the standard of care, the ordinary prudence of a person managing their own affairs, you don't assess it in terms of how things turned out. You assess whether the decision-making process was reasonable and the choice made was prudent in light of what the fiduciary knew or ought to have known at that time.

But contrary to what the Crowns assert, it does not mean this Court should apply the law of fiduciary duties as it stood in the 19th century to assess there was a breach.

In Ermineskin and Blueberry the Court applied the contemporary case law, not the case

law as it stood when the Crown was making the decisions challenged by the Band. The doctrine that governs is the law as it exists today.

**THE COURT:** We've had some challenges in this trial because the evidence on law, to the extent that such evidence is admissible, was called to describe certain obligations at certain times in distant history, not with the suggestion that that law controls today or is a current legal opinion about which evidence is not permitted, but to -- I'm going to describe it this way -- explain the context of various actors in historical events.

Do you agree that historical legal principles or frameworks are appropriate to consider in that way? I believe the plaintiffs have done this themselves in their submissions through extensive references to legal structures that were historically in place that affected the way indigenous peoples could or could not proceed, notwithstanding that those legal -- that legislation legal principles are no longer the law today.

So I want to understand if you're saying that that context is relevant as opposed

to a some binding legal principle on me.

**MS. GUIRGUIS:** Yes, we do agree with that, Your Honour, that it's relevant but it's not a binding principle on you.

**THE COURT:** So when the conduct of the Crown was mentioned, as you put it, with respect to what the fiduciary knew or ought to have known at the time, would you say that context would include whatever the legal structures were at that time? I think you did say that in other parts of your argument.

**MS. GUIRGUIS:** Yes.

**THE COURT:** But I want to find out if you say that here as well.

**MS. GUIRGUIS:** Yes.

**THE COURT:** So you have submitted that Oliphant, for example, either knew or ought to have known about legislative options for enforcement of the promise made in Treaty 45 1/2, and that was law that was applicable then but it no longer exists today. That is an example of context that you would say would be properly taken into account even though it is law?

**MS. GUIRGUIS:** Yes, that's correct.

**THE COURT:** Even though it's been displaced completely?

**MS. GUIRGUIS:** Yes, that's correct, Your Honour.

**THE COURT:** Thank you for clarifying that. Please go ahead.

**MS. GUIRGUIS:** Now, Your Honour I would like to move to the third section to discuss the honour of the Crown and laches. So beginning with the honour of the Crown, as an alternative --

**THE COURT:** Counsel, sorry to interrupt you. I overlooked a question yesterday. It may well be a question for one of your colleagues, but I'm going to mention it so that if it is for one of your colleagues they can start considering it. Let me just find that question.

There may be more than one question. I'm going to try and give them to you now. Let me know if you don't understand them.

I had asked you to consider or one of your colleagues to consider the legal impact of the decision of Regina v. Jones from 1993. And in that same territory of the Aboriginal

right to fish, which is what that case is about, I had intended to ask the plaintiffs if they agree that harvesting rights are location specific, which is a part of the submissions of, I believe, Ontario.

So if you could add that to someone's list.

**MS. GUIRGUIS:** Yes, I believe Mr. Township can answer that.

**THE COURT:** All right. And the other question perhaps also for your colleagues is, there were submissions yesterday about -- I won't get the exact wording but I believe both Mr. Township and Ms. Pelletier were talking about the Anishinaabe. Certainly Mr. Township in his submissions made the point that SON's primary identity is Anishinaabe, and then described more lower level, if I can call it that, other criteria or identity factors.

But he said the primary identity was Anishinaabe. And I had intended to ask someone what the reach of the Anishinaabe were geographically in that period leading up to 1763. Not in the distant past but just in that period.

I suspect both of those questions are for someone else on your team.

**MS. GUIRGUIS:** Yes, but I will -- we will --

**THE COURT:** They are listening carefully I'm sure. You are going to move on to Crown immunity. Go ahead.

**MS. GUIRGUIS:** Honour of the Crown.

**THE COURT:** Oh, honour of the Crown.

**MS. GUIRGUIS:** Yes. Crown immunity I believe Mr. Township addressed it briefly.

**THE COURT:** I see. Fine.

**MS. GUIRGUIS:** So the honour of the Crown, we have argued this as an alternative, but that if the Court concludes that there was no breach of the Crown's fiduciary duty, then we say there was a breach of the Crown's honour. We deal with this in our final argument paragraphs 1219 to 1241.

So I want to just briefly discuss the honour of the Crown generally first, followed by dealing with one key argument that the Crown defendants have raised in respect of the honour of the Crown.

So a brief overview of the doctrine of

the honour of the Crown is that it arises over the interaction of the Crown's assertion of sovereignty and de facto control of lands and resources that were in the hands of Indigenous people.

Generally speaking, it requires the Crown to act honourably in its dealings with Indigenous peoples. What it means to act honourably depends on the circumstances. In some circumstances, like when the Crown makes an undertaking to protect Indigenous lands or when the Crown undertakes discretionary and control over Indigenous lands, it gives rise to a fiduciary duty which is what we say applies here.

But in the alternative, there are at least three other aspects of the honour of the Crown that are engaged by the Crown's conduct in this case. The first is the duty to avoid sharp dealing in the Treaty-making process, which we say was breached by Anderson's threats in August of 1854. It was breached by Oliphant's failure to disassociate himself with those threats and, indeed, his decision to echo them. It was breached by the various tactics Oliphant used

during the October 1854 Treaty Council to rush the proceedings and pressure SON into accepting the surrender.

The second is the duty to take a broad and purposive interpretation of treaty promises. We say that this means that the Crown is required to interpret the promise to protect in Treaty 45 1/2 broadly and purposefully; that is as a guarantee to respect and secure to SON the land on the peninsula, and not merely just for compensation of lands.

This is how SON would have understood what Bond Head had promised them in August of 1836 when they agreed to Treaty 45 1/2 and to open up 1.5 million acres of their territory to settlement.

And the third is the duty to act diligently to fulfill treaty promises. We say this was breached by the Crown's pattern of inaction and disregard for SON's rights on the peninsula and in the peninsula. It was breached by its decision not to use the means at its disposal to address squatting and other encroachments despite the promise they had made to do so.

So I want to deal with one of the arguments that the Crown defendants have raised in relation to the honour of the Crown. Both Canada and Ontario have argued that this Court should assess the events leading up to Treaty 72 through the lens of the honour of the Crown only rather than the Crown's fiduciary duty.

Ontario, in particular, argues that because Treaty 45 1/2 engaged the honour of the Crown, it is not necessary for the Court to impose a fiduciary duty on top of or in addition to the already negotiated treaty term in order to guide the conduct of the Crown.

Ontario also argues that there is no precedent for imposed fiduciary duty on treaty making, and to do so would push the Court into a political sphere because it would open up the potential that First Nations could access equitable remedies for these breaches.

So there are four things I would like to say about these arguments. The first is the honour of the Crown gives rise to different obligations in different contexts. One of those obligations is the fiduciary duty. The case law does not say that unless the duty would arise in

the context of a treaty.

Here the fiduciary duty arose. As a result of the Crown's discretionary control over SON's Reserve on the peninsula, or as a result of the Crown's undertaking in Treaty 45 1/2 to protect the peninsula, either way the duty arose as a result of the commitments made in Treaty 45 1/2 and attached to SON's interest in the peninsula.

The duty applied in respect of subsequent Crown decisions, actions, and its inactions in relation to the peninsula, regardless of whether those actions involved events in the run-up to making a treaty. The fiduciary duty did not disappear when the Crown began the process of negotiating the Treaty.

There is no legal support or basis for the Crown defendants to assert that the fiduciary duty did not apply to the conduct leading up to Treaty 72.

Also, I would note that the Crown, in our submission, had already breached some of its fiduciary duties prior to the actual negotiation of the Treaty by failing to take steps to protect the peninsula from squatting and timber

theft.

So the breaches of the Crown's duties began well before Oliphant arrived at Saugeen on October 13, 1854.

Second --

**THE COURT:** Just on that first point, so I understand what you're saying.

I understand that the plaintiffs' submit that the promise to protect in Treaty 45 1/2 gave rise to a fiduciary duty. And your last submission just now that failing to fulfill that promise was a breach of that fiduciary duty, I understand that position.

I'm trying to understand, and then there are later steps which aren't part of that position. Are you saying the honour of the Crown is somehow relevant to the failure to protect the peninsula, in addition to fiduciary duty?

**MS. GUIRGUIS:** Yes, in the alternative.

**THE COURT:** Also in the alternative.

**MS. GUIRGUIS:** In the alternative. We say that the honour of the Crown, gives rise to different things in different context.

**THE COURT:** I understand that. But the primary focus of your written material on honour of the Crown relates to the process leading up to Treaty 72. And you've described today the highlights of what you say was flawed and inappropriate in that process, which is a different course of events than the failure to meet the promise that you've also put forward. So I'm trying to understand if you say honour of the Crown had a role there as well.

I'm not sure -- I know it's in the alternative, in any event, but what is -- I haven't heard submissions saying that what was not done in regard to the promise to protect was a breach of the honour of the Crown in particular.

**MS. GUIRGUIS:** So I think how I would clarify that is if we say -- if we imagine that, okay, putting the fiduciary duty aside, the facts that establish the breach of fiduciary duty would also establish breach of the honour of the Crown because the breach -- the honour of the Crown also requires, even where a fiduciary duty doesn't arise or -- it requires broad and purposive interpretation of treaty promises and

that the Crown act diligently to fulfill the Treaty promises.

But the facts that we say create a breach of the fiduciary duty, or rise to a breach of fiduciary duty, also are the same facts that we rely on to say, in the alternative it is a breach of the honour of the Crown at least.

**THE COURT:** Thank you.

**MS. GUIRGUIS:** So, second, we disagree that a declaration that the Crown has breached its honour would, as Ontario asserts, be sufficient enough to guide the Crown in the manner in which it fulfills its treaty promises to First Nations.

This is, of course, in part because we are in large part in disagreement with our friend, but it is also because the fiduciary duty comes with stricter enforcement through more robust remedies. That strict enforcement and robust remedies are there in order to deter breaches.

And it provides meaningful redress to First Nations who have been seriously harmed by the Crown's failure to keep its promises.

Where there are serious material harms that flow from the Crown's breach, like loss of Reserve lands, the equitable remedies that are available in the context of fiduciary duty may be essential to do justice between the parties.

The third issue that we have with our friends' submissions is that -- in respect of Ontario's argument that imposing a fiduciary duty will be pushing into a political sphere. It's not entirely clear to me what Ontario means, so perhaps this is something we have to visit on reply. But if Ontario means that a favourable decision for SON in this case would open up some type of floodgate such that they are warning of some political consequences, we can only say that these kinds of considerations are for elected officials and policy makers.

So too would be the decision to foreclose on the availability of equitable remedies by refusing to apply fiduciary law in any fact pattern that touches on treaty making.

Also equitable remedies are always discretionary and the Court always has the authority to determine whether they are warranted on the particular facts of the case.

So I would submit that there is no concern about floodgates here. In every case the court will be called on to determine whether they apply or not depending on the specific equities of the case. What we are asking this Court to do is to look at the particular facts and evidence of this case and to make an assessment of whether those facts give rise to a fiduciary duty and a breach of that fiduciary duty.

Fourth, when Ontario says there is no precedent for applying fiduciary duty in the context of treaty making, it is a bit misleading. There are cases that apply fiduciary duty law to impose obligations on the Crown in the context of land surrenders. One example is Guerin. In Guerin, which is at our book of authorities at tab 29, our original one, the Musqueam First Nation agreed to surrender a portion of their valuable Reserve in Vancouver to a lease to a golf club on a set of particular terms. These terms were agreed to orally but were not recorded on the surrender document. After taking the surrender, the Crown leased the land on a less advantageous set of terms.

The Supreme Court found that fiduciary duties attached to the Crown's lands and how it dealt with surrendered lands, particularly that the Crown was bound to implement the agreement it had come to with the First Nation about the terms of the surrender.

The Crown here was held to the terms of its surrender by fiduciary law and not by honour of the Crown. A similar situation arose in Makwa, which is at our book of authorities at tab 44, original book of authorities, where the Crown found that the -- where the Court found that the Crown had breached its fiduciary duty in the process by which it took a surrender of the Reserve for the purposes of a railway and a town site.

We submit that there's no principled reason to distinguish between land surrenders and treaties, categories that often overlap and between which no bright line can be drawn. Fiduciary law may, on the right facts, apply in either case.

For these reasons we would submit to you, Your Honour, not to accept Ontario's argument that the honour of the Crown ought to

be preferred to the fiduciary duty analysis and fact situations that deal with treaties and treaty making.

So, Your Honour, I would like to now move to my last section to deal with laches.

**THE COURT:** Just before you do that, counsel, Canada I believe in its submission on honour of the Crown allows for the possibility of a nonfiduciary duty and honourable dealing as an honour of the Crown, but submits that by 1937 this was not a cause of action.

So what is your response to the submission that honour of the Crown today is not a cause of action? And how does that fit with your claims?

**MS. GUIRGUIS:** Sorry, Your Honour, you're referring to a submission that by 1937 it was not --

**THE COURT:** I got a note of the date, but set aside the date and just say as of today and the currency of this action, that Canada is not saying there is no such obligation as honour of the Crown, but I believe they said, and I'm trying to find it, that it's not a cause of action. I don't want to misstate it, and

Mr. Beggs would certainly tell me if I was.

Paragraph 938 where Canada submits:

> "The principle of the honour of the Crown helps to define a relationship between the Crown and Indigenous people. The honour of the Crown is not a cause of action in and of itself but can be a source of legally enforceable duties in particular circumstances."

So I want to understand the plaintiffs' response to the proposition that honour of the Crown is not a cause of action in and of itself.

**MS. GUIRGUIS:** That's right. I think that --

**THE COURT:** Bearing in mind that it's an alternative argument that SON makes, it suggests to me that you're saying, we submit that a remedy should be available for breach of fiduciary duty, but in the alternative for honour of the Crown would suggest to me that you're saying that it is a free-standing claim or cause of action.

**MS. GUIRGUIS:** Well, the Manitoba

Métis Federation, the Supreme Court of Canada did say it is not a cause of action, but that it's still -- legally enforceable duties in a particular circumstances, as Canada puts it, can give rise to a declaration. So that's what we're seeking from our alternative argument with respect to the honour of the Crown.

**THE COURT:** All right. Thank you.

**MS. GUIRGUIS:** So the last issue that I plan to deal with in my submissions today are laches. Canada has stated that it relies on laches with regard to damages, or equitable compensation but they made no other submissions in this phase on this point. Ontario has made written submissions arguing that the treaty claim is entirely barred by laches.

Laches is a discretionary equitable bar to release that can arise in certain circumstances where there has been significant delay in bringing an action, but delay alone is not enough to establish a defence of laches.

To successfully establish a laches defence, the Crown must show that either some acquiesced to the status quo or that the defendants have changed their position in a way

that prejudices them because they have recently relied on the status quo. We submit that neither apply here.

Acquiescence is like a form of implied waiver of rights. So the question is, can we really with say that SON sat on its rights in relation to this claim in such a way that it effectively said, we are okay with what happened. We accept the status quo. We waive our rights to this.

SON started this claim in 1993, but in the time prior to this we submit that it cannot be said that SON sat on its rights. The law is clear that SON, or any other plaintiff, can't be said to acquiesce to a wrong committed against them unless it had knowledge that on the fact -- of the facts of the claim and the rights they held that they had the capacity to bring the claim and the freedom to bring the claim.

So I just want to unpack a bit what that means. Respective knowledge Ontario says that SON was aware of the basic facts underpinning this claim in 1854 and, therefore, this claim should be barred by laches.

This is simply not correct. In 1854

SON was not aware that the Crown could have taken steps to address squatting. Taking a surrender of the peninsula -- and that they were not aware that taking surrender of the peninsula was not the only option that they had.

SON was not aware of this because Anderson and Oliphant misrepresented the Crown's capacity. And it was not until the law developed later in the 20th century and this claim was researched in the late 20th century that that became clear.

Second, knowledge in the context of laches means not just facts, knowledge of facts but also of legal rights. We've cited a case from the Supreme Court of Canada, or actually Ontario has at its tab 79 -- I believe we cite it as well in our reply -- KM v. HM at paragraph 101, and it talks about the question is whether it is reasonable for a plaintiff to be ignorant of her legal rights given her knowledge of the underlying facts relevant to a possible legal claim?

In this treaty claim Guerin is the watershed moment here. Before Guerin was decided in 1984 by the Supreme Court of Canada,

a claim like this one was considered a matter of political trust, essentially not justiciable.

So how can be it be unreasonable to not have brought a claim before Guerin? How can you be said to have waived your rights to bring such a claim when it was not recognized? When the Courts can offer no remedy for a particular wrong, it cannot be considered to be unreasonable to not bring the claim in the courts.

**THE COURT:** When you say nonjusticiable, that suggests that there was an express bar to a court claim, so either a decision which said you cannot litigate this or a bar. I am not aware of either thing.

**MS. GUIRGUIS:** So Guerin the Federal Court of Appeal said that this is a matter that can't be -- a claim like this one was a matter of a political trust. It is not something that can be brought before the courts and enforced here.

**THE COURT:** That was in Guerin. But once Guerin was final, it did not stand for that proposition. But prior to Guerin I'm just asking what is the bar? I am unaware of the

prior decision that said you cannot litigate this or legislative bar that would make it nonjusticiable before that case came out.

**MS. GUIRGUIS:** It was only --

**THE COURT:** Is it not the converse?

**MS. GUIRGUIS:** That Guerin was the first one -- when it got to the Supreme Court of Canada --

**THE COURT:** Guerin was the first one as opposed to that it had been prohibited?

**MS. GUIRGUIS:** Yes.

**THE COURT:** Because "nonjusticiable" is a very technical phrase.

If what you're saying is that the plaintiffs don't have to move forward until someone else succeeds in doing something that hadn't been done before, that's what you're saying, that is not a matter of justiciability, it is a matter of whether or not a plaintiff is entitled to sit back and wait until someone else establishes it rather than doing it themselves. It is a different concept than justiciability.

So I'm trying to understand where your argument falls.

**MS. GUIRGUIS:** So let me see if I can

phrase this differently to be a bit more clear. What I'm saying is that it wasn't actually until the Supreme Court of Canada's decision in Guerin that this could go ahead, and even just prior to that the Federal Court of Appeal had laid out the reasons why this was something that a court -- that this was something that wouldn't be brought before a court and shouldn't be. We are saying that was a watershed moment.

**THE COURT:** Sure, so Guerin was the first time that this fiduciary duty was recognized by the court, which doesn't mean that if someone had tried 20 years earlier it wouldn't have also turned out the same way. It just means it hadn't happened yet.

So it's got nothing to do with justiciability. It has to do with whether or not -- maybe nothing to do is an overstatement. But I think your point is that was the first time a court in another case recognized this duty, rather than if someone had tried 20 years earlier it wouldn't have necessarily turned out that same way.

**MS. GUIRGUIS:** Yes, but what I think I'm trying to qualify there is that Guerin,

Supreme Court of Canada overruled the political trust finding from the Federal Court of Appeal which was a statement of the correct law at that time, that prevented them.

**THE COURT:** Yes, I mean that is what the Federal Court of Appeal thought the law was but that didn't last very long.

I had understood that the part of Ontario's submission was that parties aren't entitled to wait until someone else establishes a legal principle in the court process before taking steps. What is your response to that?

**MS. GUIRGUIS:** Again it calls -- it brings to mind what I think it was Professor McHugh had said that if they could have sued they would have. So there was this feeling that there was this bar, there was this sense that the law at the time didn't allow for it.

**THE COURT:** But there are a whole bunch of factors put forward.

**MS. GUIRGUIS:** Yes.

**THE COURT:** And a number of which are not germane to this rather narrow legal issue that I have raised with you, which is whether or not a litigant is entitled to wait until someone

else establishes a favourable legal principle before commencing their proceeding. I just need to know one way or the other. Are there cases that deal with that expressly? What the plaintiffs' position is on that?

**MS. GUIRGUIS:** I think they are all in the context of looking at the other factors that where relevant here too.

So whether or not -- I mean the general principle of taking it outside of the context of -- whether litigants are able to wait until it's otherwise proven, it is a difficult question to answer because I can't -- I don't have any authority that supports that, but otherwise referring to the authorities in Semiahmoo or Manitoba Métis Federation, ^ where they talk about this in the context of reconciliation and the other barriers that Indigenous people were facing.

**THE COURT:** So I'm going to try and characterize in a very, very general way I understand the plaintiffs' position on laches, which is that since that it is equitable and discretionary that the Court should look at the whole picture of the circumstances giving rise

to the timing, and part of that picture is a legal development. It is only part of the picture but you would say that's relevant context to consider. Is that a fair big picture summary?

**MS. GUIRGUIS:** Yes, that is.

**THE COURT:** I understand. Please go ahead.

**MS. GUIRGUIS:** Thank you, Your Honour.

So continuing on that point is the significance of Guerin for laches and limitation was -- has been considered by the court, one of them that I mentioned was Semiahmoo which is at tab 99 of our original book of authorities. And the court speaks to this at paragraph 86. The Court states:

> "[...] I find it important to bear in mind that it is only in the last approximately fifteen years that Indian bands have been able to exercise the same degree of diligence with respect to their legal rights as might be expected of an ordinary member of society. To be more specific, it was not until the Supreme

Court's 1984 decision in Guerin that courts clearly began to recognize a cause of action against the Crown for breach of fiduciary duty in land surrenders."

But it's important to know that in the years leading up to Guerin that SON did not sleep on its rights.

SON was engaged in trying to get back unsold surrendered lands through other mechanisms. This process began in the late to mid-1960s when SON began gathering information about the unsold surrendered landed on the peninsula and passed a number of resolutions seeking the return of those lands.

It continued through various negotiation processes until it became clear that the Crown would not agree to return SON's land through these processes.

The second factor of capacity refers to SON's practical ability to bring a claim like this, and the third, freedom, refers to removing the obstacles that prevent them from doing so.

In our submission, these factors too meant it was simply not possible until the late

20th century to bring this claim.

We've heard extensive evidence in this trial about the ways in which SON in particular, and First Nations more generally, face serious obstacles in bringing claims for historic wrongs committed against them by the Crown, from strict legal barriers like the ban on hiring lawyers without the consent of the Indian Department in place from 1927 to 1951, to the role of domination of the Indian Agent in preventing community leaders from researching, planning and articulating claims, to serious socioeconomic barriers such as lack of access to education and poverty, and finally the horrific and intergenerational impact of residential schools.

This evidence is set out in detail between paragraphs 74 to 149 of SON's reply argument.

Ontario accepts that these obstacles existed but says that by the early 1970s SON was in a position to bring these claims. And it is true that at least some of these obstacles were starting to abate by the 1970s. The Indian Agent had been pushed out of the community; it was lawful to hire a lawyer

without having to get permission from Indian Affairs.

But the lifting of these obstacles is not like flipping a switch. After a hundred years or more there is a lasting effect. It's not like the Indian Agent leaves the community on Monday and then on Tuesday the community is in a position to begin to consider bringing a claim like this for all of the actions available to them to address this sort of wrong.

There is a process of rebuilding capacity that has to take place first. For example, it was only in the 1970s that SON began to have access to legal counsel provided by the Union of Ontario Indians. It was only in the late 1950s and 1960s that more community members began graduating from high school. Without this type of education, navigating a foreign justice system is difficult if not impossible.

Prior to having access to such education and such resources SON was not equipped to bring this lawsuit against the government. It's not an easy task when your opponent on the other side is the one

responsible for the institutional barriers, including education. We heard from Darlene Johnston about her role as a land claims co-ordinator, how pain staking a process it was to gather information to begin to formulate this plan.

Over the course of the trial Ontario's counsel asked many of our community witnesses whether they had spoken to Darlene Johnston about the claim and about their history.

Putting aside whatever Ontario is trying to insinuate with respect to that question or what that means, Darlene Johnston, a member of SON, a member of the Chippewas of Nawash, did have a legal education, did have knowledge in the 1980s to '90s, and having this kind of knowledge within the community did help make putting together a claim like this possible. It was only when pieces like this fell into place, where there was overcoming of those historical obstacle and impacts that SON could begin the process of formulating a claim like this.

Once the capacity was there, then the process of research can begin. Saugeen member

Jim Ritchie explained how SON began laying the groundwork for this claim after the Indian Agent left the community. A quote from his testimony he says:

> "That's how I'm looking at it. Like, if you're going to go somewhere and fight somebody, you need some information. So you have to get information to go make your claim. You have to understand what you're doing. You need people that know the law that exists today. So you have to put a process in place of how you're going to fight this. You have to get all your ducks in order to go. So from '76 to '86 to whenever, we had to get our ducks in order, line them up."

Darlene Johnston testified about how SON's efforts to secure information about unsold surrendered lands spanned decades. SON began asking for information about unsold surrendered lands in the 1950s. They got nothing and so they asked again and again in the late 1960s and '70s. Professor Johnson confirmed that it wasn't until the early 1990s that they

received an inventory of these lands that they had been asking for.

And so it was at this point in the early 1990s when a claim like this became more possible, when the obstacles under the Indian Act and the Indian Agent had abated. SON had developed the internal capacity and was able to access the legal support to navigate a claim like this through the Euro-Canadian Justice system. SON had done enough research to understand more fully what had happened in the years leading up to 1854, and the law evolved to the point where it became reasonable to bring a claim for breach of fiduciary duty in relation to those events and very soon after SON launched its claim.

Far from an unreasonable delay or acquiescence of the status quo, this is a story of a community moving quickly to vindicate their rights in the face of considerable and sustained obstacles.

Now I would like to address some the arguments that Ontario makes that SON was capable of bringing the claim earlier than they did.

I see that it's 11:30, Your Honour.

**THE COURT:** Yes, just before you embark on that, we are going to take a break. Before we take a break, as I understand it, when you are completed we will have counsel back to answer some questions, is that correct?

**MS. GUIRGUIS:** That is correct.

**THE COURT:** I want to add a question to the list so that you all have time to consider it. And I think it was Mr. Township that dealt with the municipalities. In the plaintiffs' written material in the reply at paragraph, I think, it's 464.

> "The plaintiff submits that some of the municipal defendants had notice of SON's interest in the land as early with at 1922."

So I would like you to clarify which. It says "some of them" but it does not indicate which. We will break for 20 minutes.

**MS. GUIRGUIS:** Thank you, Your Honour.

**MS. ROBERTS:** Thank you, Your Honour. We will break for 20 minutes.

-- RECESSED AT 11:29 A.M. --

-- RESUMED AT 11:50 A.M. --

**THE COURT:** Please go ahead.

**MS. GUIRGUIS:** I would like to address some of Ontario's arguments that SON was capable of bringing this claim earlier than they did.

Ontario says that because SON made other kinds of complaints in the years following Treaty 72, for instance, about the borders of the Reserve or to press for the sale of their lands, SON could have and should have brought this claim.

The central question, as we've noted in laches, is whether there was unreasonable delay or acquiescence to the status quo.

Simply because SON's complaints were not specific enough or specific to this issue does not mean that they unreasonably delayed or acquiesced to the situation.

Right after the Treaty, SON brought other kind of complaints about the status quo. It was not sleeping on its rights.

These complaints, plus the subsequent complaints over the next 150 years, are, in our view, enough to demonstrate that SON did not think the situation of the status quo was equitable.

It is unclear what kind of complaint or words would satisfy Ontario.

It may be true that SON did not specifically say, you're not selling the lands which means there isn't the demand Anderson and Oliphant said there was, and that means they lied to us to get a surrender.

What we know from the record is that they complained that their lands were not being sold. We know from the record that they made complaints against Anderson that they wouldn't deal with him the year following Treaty 72. But Ontario focuses on SON not complaining about the validity of the Treaty. There are reasons, we submit, why we don't see the complaints framed in this way.

First, a reversal or challenge to the Treaty itself would have seemed futile to them. Dr. Reimer testified that in all her years of study she had never come across a case where the Crown Reserve reversed a land surrender treaty.

SON had been told the demand for their lands was overwhelming and surrender was their only option. In the face of this, it would be reasonable to conclude that seeking the return

of the lands would be futile.

Ontario raises it's own complaint about Treaty 82, another land surrender that happened after Treaty 72. The complaint that seems to have been made is that the Treaty was not signed by the Governor General. This is discussed in Reimer's evidence on February 13th at page 10746. In the Exhibit she cites about this in her evidence is Pennefather's discussion of their complaints in a report, which is Exhibit 2590 at page 383.

We don't seem to have the complaint itself in the record. We have Exhibit 2568, which is a series of complaints from Cape Croker in 1860, but there's no reference to this particular complaint. It's not clear who made the complaint from Cape Croker and under what circumstances. In any case, this seems to be a technical complaint that there was no signature.

We don't see evidence on the record of substantive fairness complaints about the Treaty, for example, that it was unfair or they were lied to.

And we don't see a response of a reversal of this Treaty. The point being ^ it

complained of, the Crown was not in the business of reversing treaties and land surrender.

So in terms of the relevance of SON raising a complaint like this with respect to Treaty 82, but not with respect to Treaty 72, it's unclear how this would somehow be what makes the difference now in terms of Ontario's argument that laches should apply.

Second, the validity of Treaty 72 was not in question, nor is it now. This is a breach of fiduciary duty claim. And as we've noted, the legal technology to bring the claim simply wasn't available at the time right after the Treaty was concluded.

It would have been impossible to complain about a breach of the Crown's fiduciary duty because there was, in 1854, so such thing at law.

The third response that I have to this is the fact that SON was trying to get some benefit from the Treaty by ensuring it received compensation for the lands that were lost. That does not mean that it was satisfied with the process by which the Treaty was negotiated.

It simply means that SON wanted to get

whatever benefits it could for what was lost. It is important to remember that SON went through hard times in the years following the Treaty. In this context, it makes sense that they would try to make sure they got at least some money for the surrendered lands.

Finally, elements of this claim, as I mentioned, such as the fact that Anderson and Oliphant misled SON about their ability to protect the peninsula from squatting, may not have been evident to SON in the years immediately after the Treaty.

All of this taken together suggests the fact that SON complained about some of the things at sometimes between 1854 and 1994, does not suggest and it does not mean that they could be said to have waived their rights to bring a claim about the Crown's conduct in the years leading up to October 1854.

Ontario does agree that historical issues and barriers had a profound effect and negative impact on SON's ability to advance its claims until the 1970s. We would point out that despite that, SON started to tried and gather information about unsold surrendered

lands and to assert their rights earlier than the 1970s. SON was always doing what they could. Once the choices were available to them, they did what they could to advance their rights. As soon as they could hire a lawyer, they did. SON engaged in negotiations with the Crown as soon as the Crown was willing.

This Court has heard evidence and we've noted in our written reply submissions that any negotiations and talks were stalled until after 1986 due to ongoing talks between Canada and Ontario about lands and resources.

When the Crown made clear that they would not discuss the return of lands through those negotiations and at a time when now the legal technology was available, SON brought this claim.

**THE COURT:** Ms. Guirguis, can I just understand what you mean by legal technology?

**MS. GUIRGUIS:** The decision in Guerin.

**THE COURT:** All right.

**MS. GUIRGUIS:** Now, I'd like to turn to the second branch of the laches analysis which deals with prejudice.

A laches defence may arise where the

defendants have reasonably relied on the status quo and changed their position to their detriment. Canada has not argued this and we submit that Ontario has not established that such prejudice arose here. This is dealt with in detail at paragraphs 264 to 275 of our reply submissions and I don't plan to repeat the arguments here.

On the issue of prejudice, I want to make one simple point. Ontario attempts, in its argument, to deal with the issue of prejudice as a bar to SON's claim that the Crown breached its fiduciary duties generally. However, most of the arguments it relies upon address prejudice that would result only if Ontario were called upon to return specific tracts of land.

This requires a fact-specific consideration for each parcel, which is contemplated for another phase of this trial.

Ontario's submissions do not make clear how a declaration that the Crown has breached its fiduciary duties would lead to any prejudice. Such a declaration would not in any way disrupt the status quo on which Ontario says it has reasonably relied. And that is the only

remedy that the Court is called upon to consider in this phase of the proceedings.

To the extent that Ontario has expended resources or constructed improvements on particular parcels, the Court will be better equipped to deal with this during Phase 2 when it has the full record in relation to each specific parcel held by the Crown. Only then can the Court fairly consider the equities at play.

It is also worth noting and it is related to the question of whether SON slept on its rights in a way that caused prejudice that the record includes correspondence about SON alerting Ontario about its rights respecting lands that Ontario was turning into Provincial Parks, for example.

For example, at Exhibit 3861, there's a letter dated December 6th, 1985 to the then Minister of Natural Resources from the SON Chiefs that these lands -- that with respect to these lands that they were planning to turn into Provincial Parks, there were issues of compensation for SON's claim that had not been yet dealt with.

The fact is that SON flagged to the Crown once SON became aware of the Crown's dealings with these lands that SON asserted rights to. That should be taken into consideration when assessing whether there's specific prejudice.

Finally, Ontario seems to suggest in its submissions that the fact that most of the land on the peninsula was sold to third parties constitutes a factor going to prejudice. But SON has not claimed lands in the hands of bona fide purchasers. There is no prejudice that can arise in relation to those lands because the status quo in relation to those lands is not challenged.

So by way of a conclusion on laches, I'd like draw the Court's attention to some of the broader principles that I briefly referred to earlier that we submit should shape the application of laches in this case.

So in the second Restoule case, which is at tab 149 of Ontario's Book of Authorities, Justice Hennessy wrote about the purposes of limitations in the context of the Indigenous claims against the Crown interpreting the

Supreme Court of Canada's decision in Manitoba Métis Federation and her words have application here in respect of laches.

At paragraph 190, Justice Hennessy says, "Since those decisions," she's referring to the decisions Lameman and Wewaykum and Manitoba Metis Federation:

> "[...]the Court has considered the goal of reconciliation as a competing policy rationale. The majority in MMF notes that the goals of reconciliation and honour of the Crown must also be considered in some cases before deciding whether an Aboriginal claim can or should be statute barred on the basis of an applicable limitation period, writing: Despite the legitimate policy rationales in favour of statutory limitation periods, in the Aboriginal context, there are unique rationales that must sometimes prevail."

We submit the same applies when considering the defence of laches.

In Chippewas of Sarnia, which is at

our Book of Authorities, our original one, at tab 14, the Ontario Court of Appeal made a similar point. In that case they were talking about Aboriginal title. They note that:

> "In the case of a claim to aboriginal title, a court must approach the issue of delay with extreme caution and with due regard to the nature of the right at issue. Aboriginal claims often arise from historical grievances. These claims reflect the disadvantages long suffered by aboriginal communities in the failure of our society and our legal system to provided adequate responses. There is a significant risk that the denial of claims on grounds of delay will only add insult to injury. It is plainly not the law that Aboriginal law claims will be defeated on grounds of delay alone. The reasons and [...]."

Sorry, go ahead, Your Honour.

**THE COURT:** Go ahead and finish your quote, counsel.

**MS. GUIRGUIS:** It says:

"The reason and any explanation for the delay must be carefully considered with due regard to the historically vulnerable position of aboriginal peoples."

**THE COURT:** Now, that was in the context of Aboriginal title and if I understand the defendants' positions, no one suggests that laches stands in the way of a declaration of Aboriginal title.

I'm just going to make sure I have that correctly by calling on Ontario and Canada to confirm or correct me.

Mr. Beggs?

**MR. BEGGS:** That's correct, Your Honour.

**THE COURT:** All right. Mr. Feliciant?

**MR. FELICIANT:** That's correct, Your Honour.

**THE COURT:** Thank you.

Now, I understand, counsel, you're saying that this analysis would also apply to the breaches that you've alleged in the Treaty case.

**MS. GUIRGUIS:** That's correct, Your Honour.

**THE COURT:** All right. Please go ahead.

**MS. GUIRGUIS:** Thank you, Your Honour.

So by analogy, what SON is submitting is that -- we are asking the Court to be sensitive to the historic disadvantage that SON and other First Nations have suffered and continue to suffer in evaluating the meaning and implications of any delay in bringing these claims.

Because First Nations, including SON, were historically marginalized and disadvantaged because of the historic and continuing power imbalance between First Nations and the Crown. And because the legal system has long failed to provide First Nations with any recourse for the wrongs they have endured. And, finally, because SON did in fact try assert their rights and claims in any way that they could from continuing traditional activities in the face of restrictions and prosecutions to submitting claims, letters, petitions, to whatever mechanism of the day that was being provided by

Canada and Ontario, Indian Claims Commission, specific claims, claims were launched and rejected. And even still SON pressed for negotiations to seek a resolution.

In our submission, it would be unfair and inaccurate to say SON delayed or slept on its rights or that they somehow signaled that they thought the status quo was equitable.

What the evidence shows is that when SON was in a position to begin overcoming historical obstacles and barriers, they sought out what opportunities were available to them to do so as part of their larger objective of always defending and fighting for their territory.

When the choices to seek justice in court became available to SON, they took them. And it wasn't easy.

As mentioned, when you have opponents that are largely responsible for the historical barriers that can immunize themselves from claims, they did what they could to defend their territory to bring their claim forward when they could.

So for these reasons, Your Honour,

we're asking that you reject Ontario's arguments with respect to laches.

So those are the submissions I've prepared, Your Honour. So subject to any questions you have for me or any of my colleagues, both my colleagues are prepared to answer the questions that you posed earlier, starting with Mr. Townshend.

**THE COURT:** Just before you virtually sit down, counsel, I'm just going to check my notes for questions that might apply to your portion of the argument. I think you've covered everything, but I am going to check.

Yes, that does seem to cover my current questions, Ms. Guirguis. Thank you very much.

Is it Mr. Townshend who's going next?

**MS. GUIRGUIS:** That's correct, Your Honour.

**THE COURT:** Very good. Go ahead, Mr. Townshend.

**MR. TOWNSHEND:** Good afternoon, Your Honour. I have a number of questions to respond to and they're more or less in random order.

There were questions about the

international boundary and suggestions of it being artificial or arbitrary. If the question is where did we get the boundaries from? Most specifically that would be the 1976 Band Council Resolution, which is in Exhibit 3810.

But going beyond there, the defendants are, I guess, specifically Canada is saying that this is an arbitrary modern boundary and refers to at paragraph 57 of their title argument, refers to four of our witnesses.

The only one of those who used the term "imaginary" was Frank Shawbedees. And the context of that was that he thought Indigenous people should be free to cross the Canada/US border without immigration controls. That's what he was speaking about, not about that whether there were boundaries between the territories of First Nations.

The other witnesses referred to at that point are Paul Jones, James Ritchie and Vernon Roote, and they said the boundary was about respecting the territories of First Nations in Michigan.

And that we say is rooted in their relationship with those First Nations. And Vern

Roote gave evidence of being taken to visit such First Nations by his father in the early 1950s. And the reference to that is the transcript of May 13th, pages 448 to 450.

And nor we say is this just a modern relationship. At paragraph -- in our argument at paragraphs 389 to 392, we have references for navigating open water by canoe, which includes a reference to a lake crossing by canoe from Saginaw Bay in Michigan to Goderich in the 1820s.

So it would be a mistake to think that the Anishinaabe never went out into the middle of lakes. I'm not saying it was often, but it did happen.

Now, if I can move on, your questions about the R v. Jones case and how it interacted with this case. As Your Honour knows, that case found there was a treaty and an Aboriginal right to commercial fishing. No one has challenged the existence of this right, so we say this action does not affect the Jones case.

And in Ontario's argument, paragraphs 449 to 451 affirms that idea, saying that the

Jones case was the foundation of a fisheries management regime, which is still ongoing.

Now, the Jones case did make findings of fact about the continuity of the SON community at paragraph 44. And that's set out in our argument at paragraph 126.

It also expressed the opinion that Aboriginal title would be overreaching the evidence in that case. And that's at paragraph 55. And Canada is -- has quoted that in their argument and are relying on it.

So is any of this binding in the res judicata or estoppel sense? We say no. The right parties just weren't before the Court. The parties were two individuals charged under the Provincial Offences Act. The First Nations weren't party, Canada wasn't a party, even a question I suppose if Ontario was a party, because there's a rather confusing line of case law about whether the Crown, as prosecutor, is the same Crown as the civil Crown for the purpose of the application of doctrines of estoppel.

So what then do we say we do with these? We say the findings of fact about

continuity of SON's presence in its territory are fundamental to the Court ruling in Jones that there was an Aboriginal right to commercial fishing and we say that should be given some weight.

The comments that Jones made about Aboriginal title was unnecessary for the Court's decision and, therefore, we say obiter. And further, it was made without the benefit of the Aboriginal title test, which was really first set out in Dalgamuukw.

There's also far more evidence before this Court than was in that case. So we say the comments about Aboriginal title are of little assistance in that context.

**THE COURT:** Mr. Townshend, I'm a bit unclear on how if the parties were different and as you say res judicata or issue of estoppel doesn't apply, how any of the findings can have any relevance in this trial? I don't mean by that to suggest that the Court's ultimate decision on that prosecution is open for debate, because clearly it isn't. But you're talking about the factual substratum to that finding.

**MR. TOWNSHEND:** Yes.

**THE COURT:** If it's not binding on the parties, why should it be anything more than findings of fact in a different case that aren't binding in this trial?

You may say they're persuasive, but that's not what you just said. You said I should give them some weight, notwithstanding that it was a trial involving different parties. That's an unusual submission.

**MR. TOWNSHEND:** Well, there is evidence in this trial of the commercial fishing right.

**THE COURT:** I know. There's a lot of evidence, which I'm very happy to have regard for. There's no issue there.

As you say, there's no issue -- neither Canada nor Ontario are saying that SON has no commercial fishing, Aboriginal rights. ^That's not at issue.

So that leaves us really with the factual findings in this case. And why do you say I should give any of them any weight?

**MR. TOWNSHEND:** The commercial -- there being an Aboriginal right to commercial fishing, if you look at how that could come

about, that depends on, among other things, a finding of continuity of present territory. And that's really what I think should have some weight. No, it's not binding, but it's something that can be regarded.

**THE COURT:** The difficulty I have -- I don't have any problem with the submission that it has some -- it can be referred to. I have a little difficult with the idea that it could be binding.

I have a completely different -- I mean, I'm without knowing, but I have to assume that I have a completely different record in front of me that I should pay close attention to over the finding in another case involving other parties with respect to the facts.

**MR. TOWNSHEND:** That's right. We agree it's not binding.

**THE COURT:** All right. The other question I had asked, sir, about this subject matter was whether you agreed that an Aboriginal right to fish is location specific?

**MR. TOWNSHEND:** Yes, we do.

There was another question about the geographic scope of the Anishinaabe and we

touched on that briefly in paragraph 101 of our argument referring to Professor Driben locating Anishinaabe generally in the Great Lakes area and some out in the west.

He seemed to be talking about the present day at that point, but there is a historic map in his report. So if I could have that map up there? It's Exhibit 4324 and page 133.

**THE COURT:** Exhibit, did you say 4234?

**MR. TOWNSHEND:** It is Exhibit 4324.

**THE COURT:** Thank you.

**MR. TOWNSHEND:** This is Professor Driben's report. And this map is taken from a book by Charles Cleland and that book is Exhibit 4326, but I put this one up here.

And that gives some sense of location around 1763 of land use and occupancy.

Not all the Nations represented on those are Anishinaabe. Six Nations is there, for example, which is clearly not Anishinaabe. But if you look at the Ojibwa, which is sort of in yellow diagonal slashes, the Mississauga Ojibwa which is in the sort of bluish colour and the Ottawa which is a reddish colour and the

Potawotami, solid green, you are in fact getting pretty well all around the Great Lakes.

Is that sufficient answer?

**THE COURT:** Yes. Just looking. Yes, that's very helpful, thank you.

So south of Lake Ontario, we have the Ottawa Wyandot which I thought the evidence was was Anishinaabe, is that correct?

**MR. TOWNSHEND:** The Ottawa are Anishinaabe. They were alive the Wyandot. The Wyandot is the true name for the Huron. And they were alive with each other, but they are different. Quite a different culture.

**THE COURT:** All right. So that's why you didn't especially identify that in your description?

**MR. TOWNSHEND:** Yes.

**THE COURT:** All right. Thank you, sir.

**MR. TOWNSHEND:** You can take the map down now.

Your questions about notice to Municipality. There is a request to admit at Exhibit 3942, which has a memo attached to it. So if I could have that up, please?

If we can scroll down to the memo, which is two or three pages in. That one. This is a memo to me about excerpts from various documents. Those documents can all be found at Exhibit 3944.

So the question asked about 1922 and who was aware of some kind of an Indigenous interest in the -- in the shores, it was correspondence with a solicitor for the Townships of Amabel, Wiarton and Albermarle, which are all predecessors of the Municipality of South Bruce Peninsula. So the answer to who was involved in 1922, it's South Bruce.

**THE COURT:** All right.

**MR. TOWNSHEND:** Your Honour asked about a list of references in the argument or evidence to Chantry Island and Barrier Island. I've prepared a list of those. The list is three pages long. So I would propose to put it up and make it a lettered exhibit.

**THE COURT:** Have other counsel been provided with your list?

**MR. TOWNSHEND:** I sent that this morning.

**THE COURT:** All right. So let me just

have a look at it. Can we move down slowly through the document? Keep going. Okay.

Now, Mr. Beggs for Canada, do you have any difficulty with this being marked as a lettered Exhibit?

**MR. BEGGS:** I don't have a difficulty with it being marked as a lettered Exhibit.

I have seen it, I haven't had time to follow up on the resource on what it references, so I don't know if they're accurate, but as a lettered Exhibit that's fine.

**THE COURT:** All right. Mr. Feliciant?

**MR. FELICIANT:** I would adopt the same position, Your Honour.

**THE COURT:** Anyone from the Municipalities have any objection to this being marked as a letter exhibit? I'm not hearing any objection.

**MS. DOUGHERTY:** No, Your Honour.

**THE COURT:** Thank you.

Mr. Brookwell, can you please tell me the next lettered Exhibit number? I think it would be, is it 05?

**MR. BOOKWELL:** Yes, that's correct, Your Honour.

**THE COURT:** All right. So this list of references to evidence already in the record in this trial shall be Exhibit O5.

Thank you, Mr. Townshend.

EXHIBIT NO. O5: List of references to evidence already in the record prepared by Mr. Townshend.

**MR. TOWNSHEND:** The final thing I have to address was Your Honour asked a question about private ownership of ^butter lots within the perimeter of the Aboriginal title claim area. We looked through -- we could not find any evidence in the record about that and we didn't put any in because they're not claimed. And the order we seek, which -- and what we put in in the end of our argument incorporates a schedule in the Statement of Claim which has an explicit exclusion for any land which is owned by private parties to be simple. So that was the thinking on that.

Now in Phase 2, there is a bit of this coming in that seeking compensation for lands not claimable, but because they are in private hands, then that -- we would have to come to that.

**THE COURT:** All right.

**MR. TOWNSHEND:** Those are the questions that I had on my list and Ms. Pelletier has a question on hers.

**THE COURT:** Ms. Pelletier, please go ahead.

**MS. PELLETIER:** Thank you, Your Honour.

Yesterday you asked me to comment on the significance of the fact that water is not a substance like land and that the claim area has boundaries that at least superficially appear inconsistent with the concept of a connection with particular waters.

And I think part of my struggle with the question Your Honour at the time was that SON would not think of their relationship to water in this way.

So I answered yesterday that perhaps the better way to think about SON's connection to water is to think about SON's connection to the water within its territory. And perhaps an even better way to articulate that is to think about it in terms of SON has a connection to the waters of a particular place.

And I think a good illustration of this would be to think back to the witnesses.

**THE COURT:** Sorry, I didn't hear the last sentence.

**MS. PELLETIER:** To think of it in terms of SON has a connection to the waters of a particular place.

And so I think a good illustration of this would be to think back to the witnesses we had in this trial who spoke about the importance of the waters at Naotkamegwanning, as an example.

So I'm thinking in particular to Paul Keeshig and Karl Nadjiwon who both testified about the healing properties of the waters at Naotkamegwanning and they spoke about the ceremonies that are conducted there.

Now the water at Naotkamegwanning at any given day is different. And as Your Honour pointed out yesterday, the water moves and flows in and out of the territory.

So to use Naotkamegwanning as an example, it's not the molecules of the particular water that are sacred. It's the waters when they are in that place. So the

waters at Naotkamegwanning are healing when they are there. But the specific particles, per se, aren't healing once they leave.

Now, we're obviously not arguing that all waters within the SONUTL are healing like they are at Naotkamegwanning, but I believe this is a useful illustration of the Indigenous perspective on the issue.

So it's the location of the water rather than the water particles themselves that form part of that relationship.

So we aren't denying, of course, that there's a relationship with all water, but there is a special relationship with water as it moves through the SONUTL. And when it's there, SON has special responsibility to those waters.

**THE COURT:** Thank you.

**MS. PELLETIER:** So unless Your Honour has other questions, I believe that's all from the plaintiff.

**THE COURT:** All right, thank you.

I thank the plaintiffs for very well prepared oral submissions and for answering all of those questions so promptly.

Looking at the time and bearing in

mind the schedule, I'd be inclined to take the lunch break and have Canada begin afterwards, unless anyone objects to that. Starting with Mr. Beggs for Canada who I believe is going next.

**MR. BEGGS:** No objection. That's fine.

**THE COURT:** Is that all right with everybody? I think in the circumstances, we'll break now and we'll start at 2:00 p.m.

-- RECESSED AT 12:29 P.M. --

-- RESUMED AT 2:01 P.M. --

**THE COURT:** Please go ahead, Mr. Beggs.

**UNKNOWN:**

**MS. DOUGHERTY:** Madam Justice Matheson, before Mr. Beggs starts, I wonder if I might ask one question for the municipal defendants?

**THE COURT:** Certainly.

**MS. DOUGHERTY:** Thank you. The municipal defendants just want to clarify that the arguments that the plaintiffs propose to advance relating to their claims against the municipal defendants are the ones that they have

put in their written submissions thus far.

And I simply want to clarify that because there hasn't really been any discussion of the plaintiffs' claim as it relates to the municipal defendants and in particular the road allowances. So I just want to be clear about that to make sure that we're proceeding on the right understanding.

**THE COURT:** All right. Mr. Townshend, my understanding was that you were supplementing your written submissions and I assumed, therefore, that what you had to say about the municipalities was as set out in them. Is that correct?

**MR. TOWNSHEND:** That's correct.

**THE COURT:** And you just haven't dwelled on it in oral submissions but you are not in any way abandoning the submissions you have already made.

**MR. TOWNSHEND:** No, we are certainly not abandoning, and we may have a reply depending on what the municipalities say.

**MS. DOUGHERTY:** And I guess the reason for my question was just to make sure that the reply wasn't going to be anything different than

is already set out in the written materials, because the municipalities want to make sure they have an opportunity to respond to whatever position the plaintiffs are taking in respect of the municipal road allowances.

**THE COURT:** Mr. Townshend, could you respond to that, please?

**MR. TOWNSHEND:** That's what I would expect, yes.

**THE COURT:** All right.

**MS. DOUGHERTY:** Thank you.

**THE COURT:** Thank you, Ms. Dougherty.

Over to you, Mr. Beggs.

**MR. BEGGS:** Thank you, Your Honour.

Good afternoon, Your Honour. Canada's submissions will be made by myself and Mr. Michael McCulloch. By agreement between the defendants, Canada will take the first day and a quarter of the allotted three days; Ontario will take the next day and a quarter; and I understand the municipal defendants will complete the submissions of the defendants, approximately 90 minutes in their submissions.

I would like to start out with a roadmap of Canada's final submissions. I'm

going to begin, firstly, with some introductory remarks about some overarching themes that pervade the two cases before us. I'll then set out some points which we agree with the plaintiffs, and I will explain and comment on some of the differences between Canada and Ontario's positions. I will then turn to commenting on the evidence of the various witnesses who testified before the trial and making any requests for adverse credibility findings, as necessary.

And then I have some remarks with respect to the spiritual evidence that was heard before the court.

The second part of my submissions will be with respect to the title action. It's Canada's position that the deep time evidence is irrelevant because it doesn't pertain to the time period around the date of sovereignty, but nonetheless, without repeating our written submissions, I have some remarks to make with respect to the evidence pertaining to geomythology, archeology and linguistics.

I will then turn it over to my colleague Mr. McCulloch who will be addressing

the New France period up to and including Pondiac's war and the Royal Proclamation. I will return to the microphone to start with the events at the Congress at Niagara and shortly thereafter.

I will not spend much time going over the legal test for Aboriginal title as it currently exists. I've understood from your discussions with my friends that there's -- you're very familiar with it. There is little dispute over it, and we address it in our written submissions.

I will, of course, be answering any questions the Court may have.

Similarly, we do not intend to spend a lot of time on Canada's alternative argument regarding the interplay of Aboriginal title with the public right of navigation. It's Canada's position that the evidence alone in the title, with respect to the test for Aboriginal title has not been met but I do have some comments responding to the plaintiffs.

So after some final remarks on title, I will then turn to the third part which is the Treaty case. I'll begin by addressing some

principles of fiduciary duty that have been raise and honour of the Crown in light of the remarks of my friend.

I'll discuss the forever promises, the forever promise and what that entailed. I'll address whether the Crown upheld its end of the bargain with respect to the promise to protect against encroachment. That was addressed in some detail in Canada's submissions, but in light of the reply and the plaintiff's oral submissions there are a few points I need to address.

I'll then turn to the conduct of the negotiations and finally to the question of harvesting rights. Not much will be said about that, but I will have a few comments and answer any questions.

And then the final portion of my submissions will be largely miscellaneous dealing with a few remaining issues pertaining to the books of authorities, the secondary sources, factual issues arising out of the laches argument or limitations argument.

And then I will draw the submissions to a close.

Your Honour, as we all know we have two cases before the Court: A title claim seeking the Aboriginal title to beds of large portions of Lake Huron and Georgian Bay, and a breach of fiduciary duty claim concerning Treaty 72. Through the course of the trial we've heard of the 150 years of problems, grievances and distrust which has developed, and I wish to say that those -- that evidence has indeed been heard not just by the Court but by the Crown.

At a more fundamental level the two cases before the Court concern reconciliation. The breach of fiduciary duty claim is based on -- well, the sui generis fiduciary duty is based on the honour of the Crown and the ultimate purpose of the honour of the Crown is reconciliation of pre-existing Aboriginal societies with the assertion of Canadian sovereignty.

Similarly, with respect to Aboriginal title, it is a section 35 right and the Courts have said that the grand purpose of section 35 is the reconciliation of Aboriginal and non-Aboriginal Canadians and a mutually respectful long-term relationship.

It is hoped that whatever the result of this trial is, it will be a step forward for reconciliation and understanding.

We refer in our written submissions to how the Courts have addressed the significant evidentiary challenges that concern historical Indigenous rights. I will not repeat them here but they appear starting at paragraph 27 of Canada's treaty submissions.

One point I do wish to address, however, is the onus of proof. It wouldn't seem that I would need to make submissions about it because the law is clear that the onus of the proof, whether it's Aboriginal title of breach of fiduciary duty, lies on the plaintiffs and while the Court will always makes efforts to make sure an impossible burden is not imposed the onus does remain with the plaintiffs.

At times in their submissions the plaintiffs appear to start with an assumption that they were present at any given time. The defendants do not have to prove that the plaintiffs were not present in 1763 or that they did not occupy or control or exclude others from the claim area. Our view is that the evidence

shows that, shows such as an absence and lack of control, but that is not the defendants' burden. That is for the plaintiffs to prove.

The plaintiffs say absence of evidence is not evidence of absence, a maxim that has some significant caveats. But more importantly absence of evidence is not, in fact, evidence at all. The plaintiffs must provide real evidence to the Court, be it through oral history -- and oral history is a valuable form of evidence -- documentary or expert opinion to prove the requisite elements of Aboriginal title on balance of probabilities. It is not, in fact, a heavy burden but it is a burden that must be met.

Similarly, the defendants do not have to prove that Treaty 72 was not an exploitative bargain. It is for the plaintiffs to demonstrate otherwise on a balance of probabilities.

Another theme that pervades the cases is one mentioned by my friends under the heading of "presentism" or hindsight.

It has been a common theme throughout this trial that the past must be understood in

the context of its own time. And I will say right away that it is not our position that the law of fiduciary duty to be applied is whatever the law might have been in 1854. The law of fiduciary duty to apply certainly is that of today.

But, if we want to know how historical actors behaved as they did, we must know the historical context. If we want to appreciate whether historical actors acted in a measure commensurate with the honour of the Crown, for example, one must understand the society in which those people lived.

The Canada in which Treaty 72 was negotiated was a different Canada from what we live in today not just constitutionally. Many witnesses throughout the trial have described this difference. There was no organized police system. There was very little democratic government. Frontier communities were isolated from what small cities existed. Transportation was limited and often still water-based. There was no administrative state funded by income tax.

It's a common pitfall and one which

many of the witnesses in this trial fell to in assume that what we think today, what we believe, what we understand is the same as it was long ago.

I think everybody intuitively understands this problem. Most of the experts we heard from cautioned against it, but it is still very easy to fall into that trap.

Did the Anishinaabe words as understood by Professor Corbiere, a modern day translator have the same meaning in 1836 or 1854 as they do today? Does Professor Driben's experiences living among Anishinaabe today give him any insight into how the Anishinaabe lived in the 18th century?

Do the fishing patterns or harvesting practice of Nawash or Saugeen today tell us anything about the fishing patterns and harvesting practices in the 1700s?

And perhaps most significant, does the presence of the Saugeen Ojibwe Nation on the peninsula today lead us to conclude that they were here 10,000 years ago?

Some points on which we agree with the plaintiffs. We agree, I think, on the basic

elements of the Aboriginal title test. From what I -- apparently we disagree on whether those tests -- I'm not sure where the evidence -- or the submissions ended up yesterday, but it's Canada's position that those elements are, in fact, required.

The reference to them being used as a lens comes from the Tsilhqot'in case. And if I might have a moment the Tsilhqot'in case -- just read it, I won't take it out. At paragraph 32 it says:

> "In my view the concepts of sufficiency, continuity, exclusivity provide useful lenses through which to view the question of Aboriginal title."

So that is paragraph 32 of Tsilhqot'in, but the very next sentence in paragraph 33 refers to these elements as a "requirement". So there's really no doubt that the three parts of the Tsilhqot'in test are required elements, whatever being lenses might mean.

We agree and have since the beginning on the date of sovereignty.

**THE COURT:** Actually, Mr. Beggs, before you go on, you mentioned this already but I want to make sure it's clear. As I read your Aboriginal title submissions, you submit that should this be the test that applies with the three requirements as you've just described them, that on the evidence the test has not been satisfied. That's your primary argument?

**MR. BEGGS:** That's right, Your Honour.

**THE COURT:** And then you've left open the alternative argument about whether or not there should be recognized such a right in the first place. Is that a fair summary?

**MR. BEGGS:** That's fair, Your Honour, yes.

**THE COURT:** And similarly Ontario has, as its primary response to the plaintiffs, that the Tsilhqot'in test has not been met on the evidence, and also submits with more emphasis on the second point that in any event such a right should not be recognized.

Is that the gist of it, Mr. Feliciant?

**MR. FELICIANT:** Yes, Your Honour.

**THE COURT:** All right. Thank you, I just wanted to get that clear. Please go ahead.

You were about to move on to a new point.

**MR. BEGGS:** Yes, Your Honour. So we also agree on the date of sovereignty being the Treaty of Paris in February of 1763.

With respect to some of the points raised yesterday, I believe I can say that we are in agreement that we -- well, Canada agrees that there is a fiduciary duty, a sui generis fiduciary duty. We disagree as to whether there is on ad hoc fiduciary duty as well.

There appears to have been misunderstanding about one point with respect to Treaty 45 1/2. We agree with the plaintiffs that Treaty 45 1/2 should be read as protecting the entire peninsula, and we agree that it should be read as protecting the peninsula on behalf of the SON today, but then it was Saugeen's in the Treaty.

It is not our position that the Treaty was limited to cultivated lands. We do say in our written materials, and this may have been the source of confusion, that it is a reasonable interpretation of Treaty 45 1/2 to say it was on the wording limited to cultivated lands, but as my friends pointed out, treaty interpretation

principles wouldn't favour an interpretation of that type where there is ambiguity, and it appears there was.

What we do say about the importance of cultivation is that it would have assisted in protecting the peninsula from encroachment. It was very much in the minds of Bond Head and the First Nations assembled at Manitoulin that settlers would intrude on what appeared to be unoccupied land, whereas if land was cultivated squatters would be less likely to interfere.

So it was the hope following Treaty 45 1/2 that cultivation would occur on a large scale. And as the evidence shows, it didn't. That doesn't mean that the Treaty was void. It wasn't a condition precedent of the treaty that cultivation take place, but it is an explanation for why it was so difficult to protect the Reserve.

Similarly there was mention of the promise being conditional on immigration and emigration by other Indigenous people to the peninsula. Our position is that was, again, something that would help protect the Reserve, something that was hoped for, but it was not a

condition precedent. It was not a requirement in order to -- for the promise.

While I'm on the subject of agreements, I will mention what was discussed I think yesterday and today, the Jones case. Canada's position on the Jones case is that it is not binding in any way on this court. Res judicata and abuse of process do not apply. We refer to a passage from the Jones case dealing with the consideration of Aboriginal title, but that is at best an illustration of how a court looked at it. It is by no means binding on this court, and as you said there is presumably quite a different evidentiary record from that trial, which Canada wasn't part of.

**THE COURT:** And do you agree, Mr. Beggs, that neither -- well, let me just ask you for Canada. Canada is not challenging in this case SON's Aboriginal right to fish?

**MR. BEGGS:** That is absolutely correct. We don't want to interfere with the rights that have been acknowledged. It was a decision that took place in the early years of Aboriginal jurisprudence prior to the Van der Peet test, but absolutely no desire on the part

of the Crown to interfere with the rights that have been recognized on behalf of the plaintiffs and the arrangements that Ontario has entered into them with subsequently.

From what I have just said it will be apparent on some points as to what I disagree or differ at least with Ontario.

As I mentioned, Canada accepts that there is a sui generis fiduciary duty; Ontario's position is that there is not. There doesn't appear to be so much difference between the positions on the facts as a lot of the facts and issues and principles that we consider in the context of fiduciary duty are discussed in the context of the honour of the Crown by Ontario, but we don't go that far.

One other difference that I should note is at paragraph 146 of Ontario's submissions. It is stated that the parties agree -- all parties agree that some members of the plaintiffs were present in the land adjacent to the claim area in 1763 and that is unfortunately not correct. Canada does not go that far. Does not agree to that statement.

It is possible that some individuals

who were generically connected to the plaintiffs were present in the area at that time, but genealogical connection would not be the basis on which Aboriginal title should be held. And we don't feel that the evidence demonstrates that there was anybody -- well, who of anybody was there in 1763 or around that time period.

The third major difference -- perhaps before I get to the third major difference I'll go to a minor difference. As I mentioned with respect to the plaintiffs, Canada is not arguing that a general Reserve was created. Ontario is. That is not our view of the evidence. That is a Reserve created by Treaty 45 1/2. We do agree that a Reserve was created. We just accept the plaintiffs' position that it was for the Saugeen.

The third major difference between Canada and Ontario is on the question of harvesting rights, and here we differ with both Ontario and the plaintiffs.

As I'll address in some more detail later, Canada's view is that the evidence does not support an interpretation of Treaty 72 that maintains harvesting rights, if they exist, over

the surrendered land.

We do not feel on a legal basis that harvesting rights can be acknowledged where they have not been adequately identified. Ontario in their written submissions disagrees with that.

**THE COURT:** What do you mean "not adequately identified"?

**MR. BEGGS:** Well, the plaintiffs have never defined or limited what harvesting rights they are asking for. From the evidence we have heard that it pertains to fishing, to hunting, to gathering of plants, gathering of medicines, gathering of rocks. There's no identification of -- or at least clear identification of species or types or where exactly beyond the whole area, they are claiming.

**THE COURT:** My impression, sir, was that the plaintiffs were simply saying that whatever their harvesting rights were unaffected by the Treaty except when lands were put to an incompatible use. I'm sure Mr. Townshend will correct me if I have that wrong. Is that -- what do you have to say about that, Mr. Townshend?

**MR. TOWNSHEND:** Yes, that is correct

as you stated.

**THE COURT:** So the plaintiffs are not looking for an order or a declaration of what those Aboriginal harvesting rights are which I understand would need to be specific and Mr. Townshend acknowledges this morning, at least with respect to location, but I imagine with respect to a number of other things.

There is no affirmative declaration being sought that says the following are the SON's Aboriginal harvesting rights. I think the word "harvesting" is being used in the manner defined in the law, which is hunting, fishing and gathering, I believe. So I'm still unclear why would you need to know all of those details if the submission is whatever they are, they are unaffected except where incompatible. And that's the way I heard it.

**MR. BEGGS:** So the reason that we need to know that is Treaty 72 is silent on this issue. There is no mention of it in the text. There is no mention of it in any of the surrounding records of the Treaty.

So instead we would turn to look at the intent of the Treaty. And the plaintiffs

would say that there wouldn't be an intent to eliminate their livelihood of the plaintiffs or their sustenance or their spiritual means.

But in the face of that we have a plan for active settlement, for the clearing of the land, for the establishing of farms and for actual occupation by farmers. There is no intention to leave vast tracts of land uninhabited. Now, as it happened tracts were left uninhabited. But at the time of the treaty it was contemplated that farming would take place intensively.

So if you were to say, if one were to say well, the question is, does that conflict with the harvesting rights that they might exercise? Would it necessarily extinguish those rights?

Well, in the case of perhaps ceremonies along the shorelines probably not at all. There is no reason why that could not take place. The gathering of rocks may not be a problem at all either. However, hunting may well be interfered with, may well be inconsistent with. And that's the question that has to be answered at the outset. It can't be

postponed to a later assessment of, is a particular action incompatible with the way that the land is being used.

**THE COURT:** That was the question I asked, but it gives rise to a second question. I heard voluminous evidence about the nature of SON's harvesting on and around the peninsula, encompassing specifics about, I would say fishing would be the most predominant in the evidence, but also hunting and harvesting for -- I'm not going to be able to give you a list, but things like rock and other plants and so forth.

So we do have a robust record of the nature of those activities. And for the most part it is particularized with respect to location. It is, as you observed, mostly in modern day, but not all of it. Some of it is within the context of practices passed down.

Are you also submitting that that robust evidentiary record doesn't give us enough context for the treaty interpretation question?

**MR. BEGGS:** Well, I mean it tells us what is happening today, certainly. I mean it's an open question as to whether that is reflective of -- and I don't want to go too far

with this because there is no frozen rights doctrine and they don't have to be exercised in the same manner as they were exercised back then, but there has to be some basis for rights that were exercised at an earlier period that would have been recognized or at least exempted from Treaty 72.

When I turn, for example, in the written submissions for Canada I point to a variety of evidence which shows that there was an intention on the part of the plaintiffs, or at least acceptance on the part of the plaintiffs, to surrender their hunting rights. There are several documents mentioned there were they have written to the Crown saying, now that we've surrendered our hunting rights we need to do this, or we need to do that.

So that may be different from gathering rights. There is no such correlating evidence with gathering rights, and certainly no evidence with respect to fishing. I would submit that there seems to have been -- there was an expectation that fishing would continue, if that were the harvesting right that was being claimed.

**THE COURT:** The thing is I don't recall -- I mean, the fishing evidence is not limited to the lake.

**MR. BEGGS:** No.

**THE COURT:** But it is largely about the lake. I don't know if maybe Mr. Townshend's team can make a note to tell me at some point in their reply whether there's specific evidence about fishing within the surrendered lands under Treaty 72. But certainly the overwhelming bulk of the evidence was around the coastal peninsula.

**MR. BEGGS:** We have a letter -- I don't have my fingertips on the exact date, I can find it -- following the Treaty in which -- well, there was an exchange. Vandusen wanted some money for the Bands because they were having difficulty foodwise. And Anderson's reply to that was, well you may not be able to be hunting any more but you certainly could have been fishing so what's the problem? So certainly there was a contemplation that fishing would continue to be a major source of sustenance after Treaty 72.

**THE COURT:** If you can just give me

the exhibit number or the paragraph number in our written argument, sir, when you have a minute. You can give it to me tomorrow if you would like.

**MR. BEGGS:** Okay. While we are on the harvesting question may as well tie it up a bit more.

The test set forth by Ontario or the limitation set forth by Ontario sounds entirely reasonable. It does appear to be somewhat difficult implementation to determine what would be incompatible.

The feeling is -- the feeling among the witnesses appears to be that farming is not incompatible, so they are free to go on to farm land. As a matter of courtesy they do speak to the landowners. As you indicated in your discussion, some witnesses such as Mr. Ritchie, Mr. Doran Ritchie, indicated that fences wouldn't necessarily indicate a reason to keep out, but signs were more likely to be obeyed.

I believe Mr. Ritchie's evidence was that he wouldn't even stop at a sign, that what was required in his view was a red dot under his reading of the Trespass Act. And that was

actually a misunderstanding of what the Trespass Act says. The Trespass Act says that a red dot is one form of essentially saying no trespassing, a real no trespassing sign serves the same purpose.

But a test for incompatibility doesn't easily reconcile with the interests of private property owners.

If they feel -- and I should say there is no real concern about incompatibility with respect to the parks, which there is a large portion of lands from federal parks. There has been cooperation between park officials and Band members for some time.

But with respect to private property owners, it's not clear that simply someone not wanting you on their land would itself be incompatible with the exercising of that right. Why would it? If the land is otherwise suitable for hunting or gathering, why would the desire of the land owner that you not intrude make it incompatible?

**THE COURT:** I take your point to be that it's not clear where to draw the line, but doesn't that depend on -- we'll hear from

Ontario in due course, but I heard evidence of individual witnesses about what they personally believe they could or couldn't do and why. The plaintiffs' position is if there is, in fact, a conflict that should be dealt with then and not now.

But those are only -- those assume that there aren't any big-picture issues, which assumption hadn't been tested.

So I'll hear from Mr. Feliciant, but I have the impression from that submission that there are lines that can be drawn because they are big-picture lines, not idiosyncratic lines, along the lines of -- if the purpose of the Treaty was to sell land to third parties who would then farm it and so on, that that may well be incompatible with hunting on that same land. But I'll wait to hear from Mr. Feliciant.

I mean, if your point is that it becomes complex to figure out what is incompatible I understand your point.

**MR. BEGGS:** There is one final point I wish to make with respect to the harvesting right and I don't have any particular desire to be the fly in the ointment, but the -- I believe

it was yesterday my friend referred to -- when mentioning the question of an incompatibility test said that is the law, that is what the Supreme Court says.

There isn't a free-standing principle of that nature that -- there is no idea that where something -- a treaty is silent, there is incompatibility test implied into it. I can't recall what case that might be, but I seem to think that it pertains to a specific treaty. And many treaties do have written into them specifically the limitation. The Robertson -- the Robinson Huron and Robinson Superior Treaties have limitation written into them, a taking-up clause, and many of the western treaties do as well.

So this treaty cannot simply be assumed to have the same provision or at least that's a larger assumption to make.

I would like to now turn to the question of the credibility of the witnesses. With respect to Canada's witnesses, and I won't be commenting on them this way for defendants' witnesses. I'll make only some general comments with respect to what the plaintiffs suggested in

their appendix of their written materials.

It appears that the plaintiffs confuse politeness with credibility or a refusal to accept the way the plaintiffs characterize something as being uncooperative. And that's not necessarily true. It's our position that Canada's witnesses were well qualified, honest and helpful to the Court. To the extent any particular witness appeared to have a position on an academic issue, that's not the same thing as being biased.

And of course this came up most strongly with respect to Dr. von Gernet, and all I would say is there's been a lot said about Dr. von Gernet during the course of the trial so I don't feel I need to add much to it. I would simply ask that the Court to take his evidence for what it is, what he actually says.

The plaintiffs in their appendix tried to put words in his mouth and tried to make him out to be saying something that he's not. I ask only that the Court look at what he actually says and weigh that accordingly.

With respect to the plaintiffs' witnesses, I'm going to leave Professors Driben,

Benn and Hinderaker to the comments of my colleague Mr. McCulloch. We have no comment on Professor Green -- or sorry, Mr. Green. We believe his evidence is irrelevant to this trial.

With respect to Dr. McCarthy, much of her evidence is undisputed. We noted in our materials that her conclusions with respect to the salinity of Georgian Bay or Lake Hough at the time was a theory and -- but that doesn't matter for the purposes of this litigation. We don't dispute that theory.

We have essentially no difficulty with her geological evidence. We do have concerns with some aspects of her more specific testimony. She was asked and did not answer why she believed the breach of the Nadoway Barrier was within a day or hours. She was askings whether there was a consensus among geologists and her only answer was that she did not see why it wouldn't have happened that way. And this appears at page 1049 to 1050 of the transcript of day 9.

Her evidence that the salinity of Lake Hough would have tasted like tears, well it had

the appearance of being rehearsed. And that was at page 1028 of the transcript.

Her statement as to the tunnel-like effect of the hypothetical trees covering the pop up came on reply, and through somewhat leading questions this appears at pages 1089 to 1094. And finally it became clear under cross-examination that some of the statements she made in her report were entirely speculative. For example, she stated as a fact in her report that humans used the salt of Lake Hough to preserve meat but under cross-examination she admitted that she was merely asked by archeologist as to why human remains would be found in a particular location, and she off the cuff guessed that maybe they were there for the salt. And that was at page 1038 to 1041 of the transcript.

So, in summary, we have no trouble with her geology evidence. We believe her speculations should be given less weight.

With respect to Dr. Williamson, we do cover this a fair amount in our written materials so I won't repeat that. We compare Ms. Morden's evidence to Dr. Williamson. The

plaintiffs regard Ms. Morden's evidence in an unfavourable way saying she is less experienced, but we believe the record shows she has ample experience for the subject she was asked to testify about, which was the methodology.

And her evidence reveals that Dr. Williamson, whatever his qualifications, casts the archeological evidence in too confident a fashion. Evidence which was mere speculation or was theory was set forth as indisputable fact.

The evidence of Ms. Morden, Dr. Reimer and Dr. Williamson cumulatively reveals that the field of archeology is a lot more speculative than the lay person might assume.

So we ask that Dr. Williamson's evidence on the archeology be given less weight as it pertains to his conclusions.

His summary of archeology is fine, as is his documentary analysis, although I would point out that with respect to his documentary analysis he is no more qualified than Dr. Reimer. They are both well placed to review the key relevant documentation.

With respect to Professor Valentine,

his evidence is novel. It is evidence which has not been accepted or not been introduced, so far as I know, before any other court.

We didn't challenge his admissible, we didn't say it is novel evidence which should be excluded and we don't second guess that decision now, but we do say that his evidence, based on what he provided, should be given little weight.

He freely admitted that his work was not like radio carbon dating and he was quite right about that. Had he left his evidence at a general level, that the First Nations had been here a long time, nobody could have any difficulty with that. After all, there is no dispute between any of the parties that the parties have been here for at least 200 years or on the peninsula for at least 200 years.

But Dr. Valentine gave an estimate of 200 to 400 years, perhaps more. And no doubt he thought he was being helpful when he provided that evidence but it gave a superficial precision to his estimates.

There is no reason, or at least it's not apparent on his evidence how one goes from minor differences in grammar and vocabulary to a

figure which says 200 to 400 years. It's not clear why it would not be a 150 years or a 100 years or 500 years. It really seems to be an arbitrary figure. And as an expert he has to explain his methodology.

He was asked in cross-examination about various factors he should have taken into account for controls and he took none of them into account. He didn't consider any of the means that the population might be interacting with other communities, whether through family, through commerce, through -- well, whatever reason they may have had. Professor Valentine himself teaches courses on Anishinaabe and may very well have had these people as students.

The fact that there are minor differences between the people of the peninsula and Manitoulin Island really tells us nothing. It doesn't give us any indication of how long they'd been there. It provides no support to the claim of continuity. So in that respect we ask that Professor Valentines' evidence be given little weight.

With respect to Professor Corbiere, Ms. Corbiere was put in a difficult situation.

She was given, either explicitly or implicitly, certain assumptions as to what happened at Treaty 72 and Treaty 45 1/2. She assumed there was a single translator, that that translator was doing a word-for-word translation, that no explanations were being given, and that there were no other observers who could act as a check on that translation.

Essentially her evidence is to put words in the mouths of the historical actors. She was forced to speculate what people might have said, what terms they might have used, and then whether those terms, which she herself had identified, were sufficient to convey them the meaning that was intended. That evidence is far too speculative. And while we are sure Professor Corbiere was genuine in her evidence we feel her evidence should be given little weight in this proceeding.

With respect to Professor Brownlie, his evidence -- well, was mostly credible. I will have to take a detour a bit to explain my concerns with him.

Treaty 72 and Treaty 45 are so named because of the peculiar numbering system that

was adopted by the Indian Department in the 1890s when it organized and published a compendium of treaties and surrenders. And this was explained by Canada's witness Jean-Pierre Morin. Prior to that time, prior to the publication, neither Treaty 72 nor Treaty 45 1/2 were called that, and that's why none of the documents that were shown to the Court prior to the 1890s make any reference to Treaty 72 or Treaty 45 1/2. They use different terms to describe the Treaties.

And that's a basic bit of information. It's not something the lay person would necessarily know, but it's something any historian that worked with these documents would know. They would have to know that. And I would submit that any historian that did not know that displays an incomplete and threadbare understanding of their subject matter.

Now we asked this question to Professor Brownlie, not as a trick question but to be helpful with the Court, to simply explain, why are we talking about Treaty 72? And surprisingly he didn't know it, and he claimed an entirely different answer. And that appears

in volume 32 at pages 3357 to 3360.

So then we had a misstatement on the evidentiary record. So the same question was posed to Professor Harring, again not meant to be a trick question, just to correct the record, and he also didn't understand what the numbering significance -- numbering system was. And his evidence is in volume 48 at pages 6071 to 6075.

So that may seem like a minor point but it's emblematic of some of the problems with both Professor Harring and Professor Brownlie.

Now as we say we do find Professor Brownlie's evidence mostly credible despite the fact that he had an imperfect understanding of the Treaty discussions.

He had a tendency to speculate, mostly negatively with respect to Crown officials. For example, he felt that the civilization policy of the government in the early 19th century was simply a way for Indian Department officials to keep their jobs. And there's no reason -- no evidence to suggest such a thing. So there are some biases, but I don't believe they unduly impact on his evidence and most of his evidence is credible.

With respect to Professor Harring, there are more significant concerns. When Professor Harring was being qualified, I took him to a historical article that he wrote about Indigenous man who had been executed in the early 20th century. I pointed out that he stated in that article that the individual had confessed on the stand to the crime and that wasn't true.

He accepted it wasn't true, but dismissed it as being a technical point of no relevance. Whether an accused confessed to murder on the stand is not a mere technical point, and I would suggest that it was more than that and that was his approach to his evidence before this Court.

Professor Harring used as his sources a fishing newsletter and a document being submissions on behalf of the plaintiffs to a treaty claim. He explained that he used these documents because they were noncontroversial facts and the documents merely said what he wanted them to, which was exactly the problem. He was willing to use any source, regardless of its reliability, as long as it supported what he

said.

On key points, on controversial points such as his assertion that scholars agree that there was no enforcement of the protection statutes, he cited only one paper, a paper by John ^Leslie. And that paper, as was pointed out to him, said nothing of the sort and his response to such questions was that he wrote his report a long time ago and he just didn't remember.

Another example is that he wrote about the Manitoulin incident of 1963 in both his report and his book, White Man's Law. When differences were pointed out to him, he claimed he had learned more by the time he wrote his report. But the book cited several sources and the report only cited one, which had been used in the book. Neither the book nor the report included the most important source, the official report of what happened on Manitoulin. When I showed him this document, he had never seen it before.

Now Professor Harring said his report that no commissioners were appointed and he had to correct this in his testimony. He said that

no notices were posted and they were. He did not differentiate between squatters on the Reserve and elsewhere. He treated people who had permission to be present as squatters.

So when Professor Harring says that he looked as hard as he could for evidence of enforcement, I submit that should be given no weight. He has displayed unreliability in his expert evidence, and I would ask for an adverse inference of credibility with respect to Professor Harring.

**THE COURT:** Mr. Beggs, to make sure I understand, there is a difference between credibility and reliability. Can you parcel your submission out separating those two things?

You say you want adverse inference on both? Or one? Or whatever.

**MR. BEGGS:** That's a fair question.

**THE COURT:** If you want to think about it and get back to me later, that's fine.

**MR. BEGGS:** That's fine. I'm not sure where to draw the line with respect to Professor Harring but thank you.

I would like to turn to the oral history evidence that we heard.

Now, the plaintiffs are suggesting that Canada takes a too-narrow approach to oral history. And, again, I believe this stems from misunderstanding of Canada's position.

There is a difference when it comes to oral history between admissibility and weight. And we have not objected to any evidence being admitted on whatever basis for oral history evidence whether we might believe it is oral history evidence or not.

We adopted an open approach to oral history and I believe that's reflected in the case law, that there should not be that barrier or hurdle to evidence particularly from Indigenous witnesses.

There, indeed, should be -- oral history a valuable aspect of evidence in these trials and to some extent I would suggest in this trial it is among the most valuable evidence with respect to certain points.

When it comes to the long-term occupation of the peninsula I believe the oral history is the most -- is the best evidence that has been presented to the Court. It is superior to the evidence provided by the archeologists,

linguists or geologists.

We do disagree about what constitutes oral history evidence. The plaintiffs have said that if my grandfather told me whatever, that was what was said yesterday, that is oral history. We would disagree.

The plaintiffs argue in their reply that there is no need for Anishinaabe knowledge holders to be recognized by their communities. This is contrary to the answers given by the plaintiffs in their interrogatories, as read in by Ontario at Exhibit 4899, pages 5 to 10.

Those questions and answers make clear that the community opinion on reliability of any witness is necessary for someone to be recognize as a knowledge holder. So to be clear, we're not imposing a standard that was developed in BC about their -- oral transmission of oral history. We are using the evidence provided by the plaintiffs themselves. And in their answers to those interrogatories, they explain in detail how a knowledge holder is recognized by their community.

And in particular I would refer to page 10 of that document, which is the answer to

question 162 referring to the Rule 36 witnesses.

And what that says is accordingly:

"The community opinion of reliability for the Rule 36 witnesses was verified by asking each Rule 36 witness about the knowledge held by each other."

So the plaintiffs acknowledged then that they needed to tell the Court who was recognized as knowledge holder and how they were recognized.

They may have done that to some extent with respect to the Rule 36 witnesses. There was virtually no evidence about that with respect to the live trial witnesses.

**THE COURT:** Well, there was quite a wide variety of types of evidence from the community witnesses and I think that was acknowledged by the plaintiffs this week, at least generally, when they discussed fact that just like documents they range in their importance and weight and so may oral history and so forth.

I'm wondering about the level of formality that you submit is needed. So I'll

give you an example. We had quite a number of community witnesses who either were chiefs or had been chiefs or whose father or grandfather was a chief. Now I'm generalizing because I don't have any numbers in front of me. Do you say that recognition as a knowledge keeper needs to be specific to that position or can it be inferred from a position like chief?

**MR. BEGGS:** That is an interesting question and one that I wanted to make submissions on. It's -- we don't have the evidence of one person saying another person is respected as a knowledge holder. That's just largely asked.

What we do have is that people are in different positions. So we have, as you say, people who are chiefs; we have people who are pipe carriers with certain roles there. We have people who are part of the Midewiwin lodge and have advanced to a degree of some significance. And to some extent one would think that these roles would allow the individuals to have knowledge that another person might not.

I wish it had been better brought out in the record as to what knowledge they might

have, but I would acknowledge that it's fair enough for the court to assume, to some extent, that some of these people did acquire certain knowledge. And I think the only way to address the oral history evidence is more by individual characters, not the persons, but the way -- the basis of the knowledge for any particular thing.

So --

**THE COURT:** Well, that's certainly -- that's certainly an applicable legal principle. I think what you mean to say is that you accept that I may infer that someone was a knowledge keeper depending on particular evidence about how that person got whatever knowledge they got or if they got it from a knowledge keeper.

Because we have quite a wide range of evidence. You've mentioned, for example, the Midewiwin lodge where I have a detailed recounting of the process through which that gentleman proceeded with his levels in that context. Whereas someone else might have just said, I believe X. And without a lot of information let alone a source. So we have a full range.

**MR. BEGGS:** Yes.

**THE COURT:** So I'm interested to hear from you what principle you say should apply? The plaintiffs say that every single person does not have to have the rigor of that type of knowledge that was described coming out of British Columbia, but I think the cases don't require that every single person have that rigor with respect to their oral history. Would you agree with that?

And then it becomes a matter of the particular facts?

**MR. BEGGS:** I would agree. And I can give several examples. For Karl Keeshig, for example, he was the first witness. He was a third degree member of the Midewiwin lodge and he did explain a great deal of his responsibilities. And he gave quite detailed testimony about -- I'm not sure if it would fall into oral history because it was about the Creation Story and various beliefs.

But I think his -- he has demonstrated that certain -- adequate, more an adequate qualification to do so. He also made some off the cuff remarks with respect to treaties. He learned them from his grandfather, Alec

Johnston.

There's -- it's a fair assumption that there is a certain value to that evidence from his grandfather. It might not be as valuable as the evidence from Howard Jones' -- or sorry, Fred Jones' -- Howard Jones' grandfather was also Fred Jones's father, Karl Kegedonce Jones, who was a hundred years, old born in 1852. Learning from Karl Kegedonce Jones maybe should be given more weight because of his obvious knowledge of a long period of history. That is not a reflection on Mr. Alec Johnston, he just may not have had the same perspective. We don't know.

Karl Keeshig's sister, Joyce -- no, Joanne Keeshig was also a third-degree member of the Midewiwin lodge, she is well qualified to talk about the water ceremonies she described.

Another sister, Lenore Keeshig was a storyteller. It's not clear how she became a storyteller other than we heard that she became through her dreams but we don't have detail about that; but she was well placed to describe stories she had heard; and she was forthcoming in admitting where she added on to those

stories, such as adding on the location to Rose Nadjiwon's story about salty tears.

So there are many different scenarios. Doran Ritchie talked about grandparents hunting with him and telling him about hunting sites. That is an excellent form of oral history for that purpose.

Somebody talking about the Treaties where the person -- where the witness testifies that they really didn't pay attention because they were a kid and just weren't interested at the time. That evidence should probably be given less weight.

So it's completely natural for the role of a judge to assess it on that basis. And that's all that we're asking, that oral history, once admitted, does not become unquestionable.

**THE COURT:** Well, I'm just looking at my notes from yesterday, and as I understand the plaintiffs submissions they're not in any way inconsistent to what you said, because what they mention was Mitchell, and advocated for its statement that when you're giving oral history, equal and due treatment to historical documents, there is a spectrum of reliability for oral

history just as there is for historical documents, ranging, as the case put it, from highly compelling to highly dubious.

And given that submission to me yesterday is that not consistent with what you're also -- I mean, I appreciate the parties may apply those principles differently to any piece of evidence, but as far as a matter of principle I take it you would agree with if plaintiffs?

**MR. BEGGS:** Yes, we do. In fact I believe we cite those cases in our own materials.

**THE COURT:** All right.

**MR. BEGGS:** The one exception we have with respect to the evidence is not actually oral history evidence at all, and that was the evidence of Mr. Marshall Nadjiwon. And there have been various exchanges throughout the trial about his evidence.

Now, he was or is a Pipe Carrier, which presumably has certain roles as well. But where we wish to question his evidence is not with respect to oral history but with respect to his actual experiences. Mr. Nadjiwon was the

only witness who testified to having witnessed an Indian Agent burning records.

There was many other stories, and those stories would be more in the nature of oral history by various people who heard in some manner about this incident that allegedly took place. There was a considerable variety in this evidence. The plaintiffs explained the variety by saying it happened a lot of times, but I would suggest that's less plausible than the fact that there is simply some distortion taking place as the story gets passed around.

Now, Mr. Nadjiwon, Mr. Marshall Nadjiwon -- and I guess I should say the reason I'm addressing this is it comes up in the context of the limitation period argument of the plaintiffs. We are not, as you know, pursuing the limitation period argument on a legal basis or laches, and the only reason we are addressing it is because it deals with Crown misconduct and we wanted to deal with the factual record.

So Mr. Marshall Nadjiwon says that when he was a young man he was painting the house or office of the local Indian Agent and Marshall Nadjiwon was at the Nawash Reserve, the

Cape Croker Reserve. He says this happened in 1962 and then he told a story which, we would submit, is implausible.

According to Mr. Nadjiwon a number of cars drove up in a hurry, people rushed out, yelled at the Indian Agent about documents needing to be burned the documents were burned.

Mr. Marshall Nadjiwon saved the documents. He told his father, Wilmer Nadjiwon, who was the Chief at the time. His father then received a midnight phone call from somebody threatening his life and Wilmer Nadjiwon than ran out of the house and disappeared for a number of years.

We would submit that this story is implausible and it's the contradicted by the evidence. We have the evidence of Jim Ritchie who tells the story that he learned from Marshall Nadjiwon and in that story Marshall Nadjiwon doesn't appear -- or sorry, does appear. In that story Marshall Nadjiwon is the one who is burning the documents on behalf of the agent.

Most importantly perhaps is the fact that there was no Indian Agent office in 1962 in

Cape Croker. The office was relocated to merge with the office at Chippawa Hill on the Saugeen Reserve on July 1st, 1958, so we know that it didn't happen in 1962.

And it was put to Marshall Nadjiwon that maybe it happened in 1958. His answer was, Well, we didn't live on the Reserve in 1958.

It was put to him that most of the witnesses -- or most people told the story that Marshall Nadjiwon was the one who tried to save the documents, and that Marshall Nadjiwon in his own autobiography claims to have been the one to have saved the documents, whereupon Mr. Marshall Nadjiwon submits that it was -- that happened too, it was another incident, and in any event his father didn't remember things properly.

Wilmer Nadjiwon was the Chief in the 1960s and he did not disappear for large periods of time, for years at a time. So we would submit that the evidence provided by Marshall Nadjiwon, with respect to the burning of records, is implausible and contradicted by the evidence and should be rejected. We have no concerns about his other evidence with respect to spirituality or other aspects.

**THE COURT:** Mr. Beggs, just getting back to a question I asked counsel to look into about a month ago. And without getting into it in detail, I think that five pages of what are believed to be the records that were saved were introduced by the plaintiffs into the evidence of this trial there then ensued a difficulty about disclosure that was resolved after co-operative steps taken by the parties.

Your account of the evidence adds an additional question mark to my inquiry already made of counsel. Just for purposes of people who don't know what I'm talking about, I've wanted to be directed to the part of the transcript where it was reported back to me that the parties have taken certain co-operative steps and were satisfied that these books and records and inventory for which is in the trial record, were not needed for Phase 1 of this trial. But, nonetheless, the evidence is that a considerable volume of books and records were either on this occasion or some other occasion retrieved and remain in safe keeping.

I think given your submission I will remove the option of not following up, that I

introduced last week where I said as long as everyone agrees that the issue was resolved on the basis that these collection of books and records were not relevant to Phase 1, so disclosure issues did not need to be addressed, I didn't need you the find that bit of the transcript, but I will ask that you -- after closings are completed because we're not adding to the transcript we're just looking for something, if you can please identify that in the transcript.

**MR. BEGGS:** Yes, Your Honour.

**THE COURT:** I can't recall at the moment, Mr. Beggs, but you may as you've obviously looked over this evidence, whether the evidence is that that collection of documents is in fact the documents that were obtained, by whomever obtained them, at the time of the events that were recounted by this witness, and based on his evidence, if accepted. Or if they were -- if it was unknown if that is where they came from. Do you know what the evidence is on that score?

**MR. BEGGS:** Yes, I believe I do. So Canada and Ontario, in general terms, dispute

the chain of custody, if you will, has been established between the documents, which are now existing and identified and the documents which were purported to have been saved by someone.

Now, Mr. Marshall Nadjiwon, I believe, testified that in the 1990s he visited the -- I don't recall the location, where at that time the documents were in a safe. I don't remember which building they were in, but they were in a safe.

He says -- so he says he looked at the documents with -- along with a lawyer from the Jones Fishing Trial, Peggy Blair, and the two of them saw the documents in the safe; and he believed they were the same documents. I think that was Marshall Nadjiwon's testimony on that subject.

**THE COURT:** I believe there is also something on the record in this trial that the five pages of those documents that are an exhibit are not themselves showing any evidence of being burned.

**MR. BEGGS:** That's correct. There's an agreed statement of facts.

**THE COURT:** You have that on your

to-do list, just to identify that in the record, to the extent that it hadn't been done already.

Please go ahead.

**MR. BEGGS:** Your Honour, we started at a different time at two o'clock and it's 3:30 now.

**THE COURT:** Yes, so we can stop now for the afternoon break. We'll resume in 20 minutes.

-- RECESSED AT 3:31 P.M. --

-- RESUMED AT 3:53 P.M.

**THE COURT:** Please go ahead, Mr. Beggs.

**MR. BEGGS:** Thank you, your Honour.

Your Honour, over the break I discovered that I misspoke in one respect earlier. While discussing Marshall Nadjiwon and his father Wilmer Nadjiwon, I referred to Marshall Nadjiwon in his autobiography and I should have meant -- I meant Wilmer Nadjiwon's autobiography called "Not Wolf, Nor Dog" at that time.

So I was referring to Marshall's father Wilmer who wrote an autobiography and who many witnesses attributed the burning record

episode to begin to evolve. So I just want to correct that.

I'd like to turn now to questions of deep time or prehistory, if you will. Again, we don't feel that this subject is particularly relevant since the date of sovereignty is 1763 and the most probative evidence would be evidence around that time period.

I've already commented on our concerns about the linguistics evidence, so I won't return to that.

I believe the geomythology evidence has actually been well discussed both during the trial and in the written submissions. So I don't believe there's anything further to add, unless you have questions about the geomythology.

And I only have a few comments to make about the archeology evidence, just elaborating on how I felt that Dr. Williamson was speaking with too much confidence on various issues.

The most significant issue with the archeology --

**THE COURT:** I'm sorry to interrupt you, Mr. Beggs, but I don't want to lose the

thought.

You had said earlier this afternoon that Canada was not asserting latches at this stage of these proceedings and there is in the plaintiffs' written reply at paragraph 70, subparagraph (c) a statement of Canada's position in regard to laches. And I'd like to know whether you accept the plaintiffs' statement of Canada's position as set out there?

If you want to make a note of the paragraph and let me know tomorrow morning, that's fine.

**MR. BEGGS:** Yes, I'll double check it. Mr. Townshend did review it with me prior to that, so I think it's likely that I'm in agreement with it, but I'll double check it.

**THE COURT:** All right.

**MR. BEGGS:** Thank you.

With respect to the archeological evidence, one of the most contentious items, I believe, in the trial was what people have called the "Bead Report", which pertains to glass beads that were found at the River Mouth Speaks archeological site. And the bead report, in my submission, is exactly the type of

evidence, of expert evidence, that the case law cautions us about.

It's a highly scientific method, it's literally nuclear science, that raises the danger of being given more weight than appropriate.

Now, the danger is of a real danger when it comes to a jury. It's less of a problem when it comes to a judge.

But as there continues to be an exchange back-and-forth and submissions about the bead report, I just want to clarify our understanding of what it is and what it says.

So there were a number of glass beads that were discovered at the River Mouth Speaks site, which were discovered in disturbed fills, essentially jumbled archeological assemblages, some more jumbled than others.

Some of these beads -- a large proportion of the beads were sent for nuclear testing. The nuclear testing gave a chemical composition to those beads.

So the testing doesn't actually tell us a date. It's not like radiocarbon dating. It doesn't give an exact date or even an

approximate date. It just gives us a composition.

So the composition is then -- well, two things can happen with the composition. One is that it can be compared to, mainly based on colour, to a particular place and time of manufacture, if that information is available.

So what that will give the archeologist is the earliest possible date of manufacture. And so that's solid scientific foundation, I believe.

The beads then are taken from the nuclear testing -- well, the data from the beads, the beads are whatever happens to them normally, but the data from the beads is put into a database regarding similar beads that have been discovered through a variety of archeological sites in Canada. And that database does a comparison based on parameters which are set by the person operating the database.

And so the beads then -- they're compared -- certain beads that are in the database will have dates. Those dates might or might not be reliable. If a bead, for example,

was found with a easily-dateable object, then you can approximate the date of the deposit of the bead, but other beads may not have that data. So by comparison of these beads, you can get a suggested time period in which the bead could have been deposited.

And as you can imagine, the larger this database becomes the more reliably statistically this type of information might be. I believe the evidence is that there are approximately 4,000 beads in the database. That seems low to be able to put a statistically significant probability to it, but it's a work in progress.

So basically the bead database gives us an approximation of a date period in which the beads could have been deposited. That doesn't mean that they weren't deposited earlier or later, it's just a suggestion that has some foundation. It's not a -- there's no way to determine a statistical probability of the accuracy of that bead -- of that information.

So this becomes particularly significant --

**THE COURT:** Mr. Beggs, I'm trying to

remember the evidence here. Is there expert evidence that no statistically significant dating can come out of the database?

**MR. BEGGS:** No, I don't believe there's evidence that there is not a statistically significant number. There was no evidence about the probabilities or statistics at all, I believe.

**THE COURT:** All right. So maybe what you could do is repeat your prior submission, bearing in mind what the evidence does and doesn't include?

You said that the database gave an approximation of the period in which beads could have been deposited, that may have some foundation, and then you went on to talk about statistical significance.

Perhaps you could resume there, bearing in mind whatever the evidence is?

**MR. BEGGS:** Certainly.

What I am trying to say is that the bead report has a great deal of detail and a great deal of numbers and that can give the illusion of accuracy. But there was no evidence that the estimates which were given that the

products being determined for the various beads that were tested was reliable within a certain percentage, as one might expect. So we don't know how likely or how unlikely it is that this number is accurate.

**THE COURT:** So what you're saying is if I go back to the bead report, I am not going to find it containing conclusions about the statistical significance of the data or lack thereof? It's not in there?

**MR. BEGGS:** That's my understanding, yes.

**THE COURT:** All right.

**MR. BEGGS:** So the bead report becomes significant in the plaintiffs' case because they identify a certain bead deposit as having been made in the late 1660s or 16 -- up to 1670. And Dr. Williamson relies on that evidence --

**THE COURT:** Sorry, what was the time period, counsel?

**MR. BEGGS:** It was the late 1660s to 1670. So I believe 1670 is the outside date.

So that is used as evidence by Dr. Williamson that the Odawa had reoccupied the site, which is located near the mouth of the

Saugeen River, after the invasion by the Haudenosaunee in the 16th -- late 1640s.

So Dr. Williamson feels that it was the Odawa that reoccupied the site based on certain artifacts that were found there, but also simply because he believes that when sites are reoccupied that must be by the same people because otherwise they wouldn't know the same locations.

In fact, Dr. Williamson's own report tells us who was there at that time period. Dr. Williamson's report, his first report is Exhibit 4239, and on page 85 of his report, he refers to oral history that he has gathered. And he states:

> "A 19th century Ojibwa oral tradition recorded by George Copway, however, places an Iroquois village at the mouth of the Saugeen River within the SONTL between the early 1650s and 1660."

So I would suggest that the fact the beads were found in the approximate time period, the 1660s, it's just as likely to have come from the Iroquois that were identified by George

Copway, as noted by Dr. Williamson, as it was to have come from any Odawa that may have settled there at a later date.

The problem of course with deposits and with glass beads is they can be dropped at any time. And unless there is an outside way of determining the date of the object, it really tells you nothing about the time period.

I think that's all I will comment on about archeology. I believe the rest of my comments are in my written materials. So if you have any questions about archeology, I will answer, but otherwise I will turn it over to Mr. McCulloch.

Mr. McCulloch, are you still on line?

**THE COURT:** Mr. McCulloch, please go ahead.

**MR. McCULLOCH:** Thank you, Your Honour.

As we commented in our closing submissions, it's at paragraph 322, but I don't need to go to it, the plaintiffs insisted -- in fact requested a finding of fact that the Anishinaabe continued to control southern Ontario from 1701 to 1763.

Now, it's interesting that they asked for this finding of fact without advancing any evidence.

However, they have in fact -- the plaintiffs have in fact addressed the French period, the 18th century, in their reply evidence. So that in fact we are going to have to address the issues raised by the era of New France. So that's the first thing I'm going to do.

The second thing that I plan to do is to make a very passing comment, essentially an application of the law to the facts about the Royal Proclamation of 1763.

And I plan to conclude with, again, a very specific identification of crucial issues in any kind of analysis of Pondiac's war.

I do not, of course, in pursuing these objectives, plan to take the Court one more time to the very extensive evidence that the Court has heard. But I will be discussing particular items of evidence in asking to make the Court findings about usually reliability of certain experts as compared to other experts.

So that's what I plan to do. I'm not

sure I will be able to get it all done today, but I will make my best efforts to be concise, contingent of course on any questions Your Honour may choose to ask.

Well, let's first of all nail down what the crucial issue is for this, the French period.

I don't think there's much doubt that the plaintiffs have committed themselves to a particular metaphor. Indeed, I'd actually like to ask Ms. Matharu to put paragraphs 565 -- sorry, paragraph 922(c) of the plaintiffs' final submission on the screen.

Kelly? Sorry, that should be 922(a) I think. Yes, there we are.

This is a finding of fact that the plaintiffs are asking the Court to make. Indeed, they're asking to make a finding of fact about an analogy and a simile. This is an important point because what they're asking for sets a very high standard for the conclusion they're looking for.

And I'm concerned that Mr. Townshend's, my friend's submissions earlier today may have slightly confused what it is the

plaintiffs are asking the Court to find.

You will notice that what the plaintiffs are asking for as a fact is the argument that the Anishinaabe control of access points to Lake Huron, Georgian Bay, was analogous to fencing land.

They have also asked the Court to find that in this way, Lake Huron and Georgian Bay was like a gated community of Anishinaabe groups, of which the SON was one.

And, indeed, in paragraphs 565, 566, we can go there if you want, they make it clear that this gated community, so-called, is a pretty thoroughly institutionalized community, with security councils and security guards. In fact, I think it's worth making the point that in using the metaphor, the simile, of gated community is a little misleading, in that we're talk about Lake Huron and Georgian Bay. We are not talking about a suburban development.

Indeed, if we're going to take the analogy of the fencing, this is not a gated community but a walled country. This is far beyond, in terms of scope, what the metaphor gated community or what the simile gated

community would seem to suggest.

So I'd like to make the point that in terms of the sheer scale of what they are claiming to have enclosed by control of the strategic access points makes the whole issue of what constituted control of those strategic access points.

I note that the plaintiffs are no longer relying on the portage that connects Georgian Bay to Lake Huron as a strategic access point. They list places like obviously the French River.

But, Your Honour, I don't think it comes as any surprise that the crucial issues are the front gate and the back gate, and that's Detroit and Michilimackinac.

So that those are going to be the primary focus of my discussion of the evidence that will form part of my consideration of findings of reliability about particular witnesses.

And I would like to start my discussion with Professor Driben.

In our pleadings at paragraph 368 to 370, we discuss his treatment of the Voyage of

the Griffon. Do we need to take you to it on the screen?

**THE COURT:** No.

**MR. McCULLOCH:** We have chosen this, and this was done very deliberately, because what we have done here, what we're presenting, is representative of the kind of evidence that Professor Driben offered. It's a particularly good illustration of his methodology.

And to anticipate a question, Your Honour, we're not challenging his credibility so much as his reliability. And I would like to explain what I mean and what Canada means by that distinction.

We are not challenging his professional honesty. There's nothing before the Court that tells us whether or not his methodology is standard within his particular school of anthropology. So we're not in any way impugning his professional credibility within his profession.

What we are suggesting to -- we are urging the Court to accept is that because of his methodology, it's not reliable evidence such that it could form part of an evidentiary basis

for a finding of fact.

Because, Your Honour, and here I don't think I am advancing any controversial positions, the Supreme Court in the cases we've discussed, Dalgamuukw and Tsilhqot'in, make it very clear that what the Court needs is reliable evidence of facts about who was doing what, where and when. In this case, those having exclusive occupation of where in 1763.

Now, if we could go to the Griffon episode at paragraph 368 of Canada's final submissions, you'll see that the essential technique that Professor Driben applies is he presents his opinion as a fact and then builds a further opinion on that fact, which is essentially an opinion.

He presented, in his account of the Griffon, oh, the facts are well-known. When in fact he was challenged, he explained, well, I'm not a historian or an accountant. He said these were the ethnohistorical facts and finally admitted we don't know the facts.

As I said, this is not unique in history of Professor Driben's evidence. We've seen that it is his basic methodology that says

that on the basis of his field work and the latter part of the 20th century, he can enter into the mind of a 17th century Odawa on the French River encountering for the first time the French. Just as easily as he can tell you that when an Anishinaabe Chief, in the middle of the 19th century, is discussing agricultural development that that Anishinaabe Chief is no true Anishinaabe.

Again, I want to emphasize that we are not impugning the sincerity of Professor Driben's belief in this particular methodology. We are not asking the Court to express any opinion on a standing of this methodology within the discipline of anthropology. We're simply saying that this evidence can't be relied upon because ultimately it cannot be tested. It rests on Professor Driben's own personal experience based understanding of the Anishinaabe mind across time and space and, therefore, cannot properly be assessed, properly be weighed, because essentially what he is saying is my inner experience tells me this is a fact and that cannot be challenged because I am an ethnohistorian.

So we are asking, first, that the evidence of Professor Driben, I'm using the New France era as a point of departure, but we're speaking here generally, that the evidence of Professor Driben should be given little or no weight because it's not reliable and that it does not deal with facts that can be tested, but rather opinion presented as fact.

**THE COURT:** Mr. McCulloch, as I recall, this gentleman had experience living obviously in this century with -- or at least recently with Anishinaabe communities. And I think this was a gentleman who said that while he had no prior experience with SON, and while he had not read oral history from SON before he prepared his report, he did read it after he prepared his report.

So I'm trying to understand what you say when you say there was no evidence. So that's a difficult --

**MR. McCULLOCH:** There's no reliable evidence.

**THE COURT:** No reliable evidence.

**MR. McCULLOCH:** Yes, because all of this comes from inside of Professor Driben's

entirely subjective understanding of what Anishinaabe means and that cannot be tested. It is as I said, opinion presented as fact that then acts as a basis for further opinion. And that makes it unreliable.

**THE COURT:** Well, an expert can express an opinion based on experience. That is acceptable. Weight is another issue.

And he, as I did remember it, did have some experience, but his experience was not --

**MR. McCULLOCH:** And in a different time at a different place.

**THE COURT:** Help me with -- different time, I remember it being modern. Different place? I remember that he did not have any first-hand experience with SON.

**MR. McCULLOCH:** His field work was in the 1970s and '80s to the north of Lake Superior.

**THE COURT:** And he indicated at some point, having said in, I think, cross-examination, that in fact he had read the oral histories, although he didn't do so until after he had expressed his opinion. Did he indicate whether he took them into account?

**MR. McCULLOCH:** I'm sorry, Your Honour, I'm having some difficulty in hearing you.

**THE COURT:** Sorry, about that.

**MR. McCULLOCH:** I hope you're hearing me.

**THE COURT:** I can hear you perfectly clearly. I'll speak up.

I'm trying to recall whether Professor Driben, having described his experience in the first instance, as you've just described it, but then saying after he prepared his report, he also read certain oral histories regarding SON. So that -- I'm not sure if that was the entirety of his claimed experience. And you can clarify that for me.

**MR. McCULLOCH:** That is my recollection. I will, however, verify it. I don't believe he had any direct intensive experience with SON, either in terms of their archeology, their historical documentation, but I will verify tomorrow.

I see we're getting very close to 4:30 and my plan involves going onto the very large and important issue of the respective

credibility and reliability of Professors Beaulieu and Morin.

**THE COURT:** All right. Well, that is a different topic so we will adjourn for the day and resume tomorrow morning at 10:00 o'clock.

**MR. McCULLOCH:** Thank you, Your Honour.

**MR. FELICIANT:** Thank you.

--- Whereupon the proceeding was adjourned at 4:28 p.m.