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

--- This is the ROUGH DRAFT transcript of VOLUME 100 / DAY 100 of the trial proceedings in the above-noted matter, being held via Zoom virtual platform, on the 21st day of October, 2020.

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.

ZOOM MODERATOR: Liz Roberts

I N D E X

PAGE

--- Upon commencing at 10:01 a.m.

MS. ROBERTS: This is a virtual hearing using Zoom. Today is Wednesday, October 21st, 2020. Resuming for closing arguments in the trial of two actions, the Chippewas of Saugeen First Nation et al. and the Attorney General of Canada et al. The second the Chippewas of Nawash Unceded First Nation et al. and the Attorney General of Canada et al. Day 100.

The file numbers are 03-CV-261134CM1, and 94CQ-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 access. The links for each day are available through the court and from Arbitration Place on its website at arbitrationplace.com/broadcastlinks.

I turn it over to Justice Matheson.

THE COURT: Good morning, all. I wish

to remind everyone that as with any trial, this hearing is being recorded by the court and no one else is permitted to photograph or record or take a screen shot of this hearing without permission, as required under section 136 of the Courts of Justice Act. No permission has been sought nor granted.

On this 100th day of this trial, I want to take a moment to thank all counsel.

This trial has been characterized by cooperation between counsel to the common goal of a fair adjudication of these issues. That cooperation is so important to the orderly conduct of a long trial like this, as it is important in every trial.

So I take this opportunity to thank all counsel for your part in what I have found to be an extraordinary, positive attitude upon all of you in the orderly progress of this matter.

I then move back to the matter at hand, which is the continued final submissions of Canada at this time, I believe, with Mr. McCulloch continuing with his submissions with what I think he called yesterday the French

period.

Please go ahead.

MR. McCULLOCH: Thank you, Your Honour.

Before I proceed to my submissions, there's one matter left over. Yesterday you asked me if I could identify the places in the record where Professor Driben's past experience and work with the Anishinaabe, and particularly the plaintiffs, and I have the relevant page numbers from the transcript, but I don't believe it's necessary to actually pull them up. But volume 55, page 7076 identifies where Professor Driben did his field work. Page 7080 of the same volume is where Professor Driben explains that he did not review or analyze any oral history from community members for the purposes of his report. Page 7092 of the same volume where Professor Driben explains that he reviewed recorded oral histories in -- after his report. And finally, pages 6748 to 6749 where Professor Driben confirms that he has never done any field work with the plaintiffs.

THE COURT: Thank you, Mr. McCulloch.

MR. McCULLOCH: I would like to now

return to the era of New France. And I would like to call up the plaintiffs' reply, paragraph 331.

This paragraph states that Canada's arguments rests on the idea that the French did not believe they needed to ask for permission to use territory of the Indigenous Nations. Canada essentially asks this court to draw the inference that the French, therefore, would not have asked permission to use the territory in the Upper Great Lakes. They say this goes to the plaintiffs' control of the Great Lakes period, leading up to the British assertion of sovereignty.

In making this argument Canada relies heavily on the evidence of Professor Beaulieu and it goes on to say, paragraph 332.:

> "This ignores the fact that Professor Beaulieu's evidence focused on how the French perceived their legal rights [...]"

All I can say is this is simply not correct.

I would ask if we could have Professor Beaulieu's Great Lakes report, that's Exhibit

4380 at PDF page 3. This is the table of contents of Professor Beaulieu's report on who used the Great Lakes in the period ending in 1774.

The legal argument is in -- the argument or the evidence, rather, about the legal issues is only one of the three questions Professor Beaulieu addressed; it's a small part of the report. Overwhelmingly the report is about who was doing what on the Great Lakes in the period antecedent to the assertion of British sovereignty.

And yes, Your Honour, we do rely heavily on Professor Beaulieu's evidence, but it's about what actually happened. Yes, the legal element is important in terms of understanding French thoughts so as to be able to interpret their actual actions, but the description of Canada's argument is, I repeat, simply not correct.

If we could go back to the plaintiffs' reply and go to paragraph 333. This is a continuation of their critique of Professor Beaulieu in which they suggest that he does not properly address the evidence, including what

information is available about the Indigenous perspective. I would like to remind the court that Professor Beaulieu made it very clear, both in his report and in his evidence, that he addressed all of the evidence that was available from the historical record. This includes documents in which we have inevitably French accounts of the Indigenous perspective, such as the voyages -- Champlain's account of his own voyages.

In that sense, as we discussed with Professor Morin, the only avenue to the Indigenous perspective in the 17th and 18th century is through first the documentary record and, secondly, the oral traditions that Professor Beaulieu examined in his second report on the Congress at Niagara. So again, I'm afraid that paragraph 333 is also simply not correct.

Now, in the same section the plaintiffs say, ah ha, you should prefer the opinion of Professor Morin because he studies the legal stuff. And that's been his principle focus and, therefore, his opinion should be preferred above that of Professor Beaulieu

because after all, French conduct was governed by the Law of Nations.

Well, Your Honour, again, I would like to emphasize that when I criticize Professor Morin's evidence, I'm doing it in the context of reliability rather than credibility in that I am sure Professor Morin's approach to his particular type of legal history is entirely legitimate and accepted in some circles.

It's really a question of does it provide a useful evidentiary basis for the court to conclude and make a finding of fact?

And, Your Honour, without going through all of the details, which you're very familiar with, I think it can be established that Professor Morin's methodology involves attempting to identify legal categories devised by a handful of scholars over a period of 250 years, only one of which was French and that one, Marc Lescarbot, didn't believe in the Law of Nations as defined by Professor Morin.

In short, in Professor Morin's report and testimony, he provided no evidence that these ideas of the Law of Nations had any impact on French thought, let alone conduct. And

again, without going to the particulars, when he was brought to specific documents, it's clear he simply ignored parts of those documents in which the French declared their will to rule New France. To set up their own courts, to enforce their laws on everyone, to own and govern what was essentially an empire.

Now, that brings me to my next point, if I could ask to have the plaintiffs' reply at paragraph 359 put on the screen?

In this paragraph, the plaintiffs make arguments about the purposes of Forts. Again, it's not my intention to review evidence, however, here it's a question of again defending the reliability of an expert, in this case Professor Karl Benn, an expert proffered by the plaintiffs. Because the evidence about the Forts being projectors of Imperial power in fact comes from Professor Benn.

I can give the reference. Your Honour, would you like it put on the screen? I think it might be useful. It's the transcript of volume 40, page 4655.

THE COURT: Counsel, it's up to you to decide if you want to put it on the screen.

MR. McCULLOCH: I would like actually to put it on the screen, lines 3 to 23. Here Professor Benn quotes his report.

> "Land-based fortifications and other bases were part of the effort to control Lake Huron and Georgian Bay. They symbolized sovereignty and they enabled belligerents to defend strategic locations and water passages, project power by sending forces out from them, protect supply lines, and serve as depots [...]"

If the plaintiffs actually are repudiating Professor Benn's evidence and disavowing it, then this should be done expressly, which indeed they appear to do further on in their reply where they address Professor Benn's evidence about the dependency of Indigenous peoples on trade and gifts for their survival. That is indeed Professor Benn's evidence. The plaintiffs argue that that's simply about 1812 and evidence that he moved back -- backdated, somehow, to 1763.

Again, if the plaintiffs are disavowing Professor Benn's evidence, which was

in both his report as well as in his testimony, then they should do so expressly, as Professor Benn will have fully qualified as a military historian.

And while it's true that Professor Hinderaker in his evidence attempted to qualify his original use of the word "dependent" in his own publications, there is no real doubt about the extent to which the Indigenous peoples of the Great Lakes had incorporated European goods into their daily life, particularly in hunting and of course when it comes to war, particularly in guns.

So if the plaintiffs really want to disavow their experts and deny the degree in which Indigenous peoples had integrated western technology, then they should do so explicitly.

I would simply like to remind the court of the testimony about Neolin's spiritual movement to try to purge Indigenous peoples of their reliance on European technology.

That is, in fact, the end of my discussion about the whole Forts' control. I don't think I need to go much further in establishing that Detroit was more than just a

Fort. Michilimackinac was more than just a Fort.

We have the testimony of Professor Hinderaker that, in fact, the Indigenous people who settled in the vicinity of Fort Pontchartrain came at the invitation of the French. We have Professor Morin's testimony that there was no dominant group at the Detroit area.

In fact, Your Honour, I think unless the plaintiffs are prepared to disavow Professors Hinderaker and Benn and Morin that, in fact, the argument that the strategic points were under Anishinaabe control collapses on the basis of evidence proffered by experts identified by the plaintiffs and whose reports the plaintiffs served.

I have one last detail about the French regime to cover. In the transcripts -- actually, in their submissions yesterday, both Mr. Townshend and Ms. Pelletier seemed to be remarking or identifying, or at least asserting, that the plaintiffs were present at the encounter with Champlain.

I would like to take the court to

Professor Williamson's testimony --
Dr. Williamson's testimony, transcript volume 44, page 5430.

Ms. Matharu, is there a problem?

MS. MATHARU: There's a technical difficulty right now.

MR. McCULLOCH: Well, if I may, Your Honour, I will simply summarize Dr. Williamson's testimony. In fact, it covers five pages in which he cites a variety of well-established academics and presents his own opinion that the period succeeding French contact in 1615 through the 17th and into the 18th century was a period of profound demographic and cult -- demographic instability for the Indigenous peoples of Great Lakes. He talks about how groups split then joined, and how population collapse -- well, Dr. Williamson -- sorry, Professor Hinderaker suggested by as much as 90 percent. Professor Benn by as much as -- as little at 50 percent.

And Dr. Williamson testified about the tremendous drop in population and the extent to which socially units were in flux.

It seems to me on the basis of this testimony, again, it's Dr. Williamson's

testimony, but Professor Hinderaker and Professor Benn also support this, that for the period between first contact in 1615 and the assertion of British sovereignty, the assumption should be that particular small groups did not have a continuous, discrete, separate identity. That, in fact, as elsewhere, the responsibility is to demonstrate, in the face of the circumstances of the period, that there was that kind of societal continuity.

I'd like to move on very quickly now to the one point I intended to make about the Royal Proclamation of 1763. Your Honour has heard a great deal of evidence and, in particular, you have heard evidence about the question of the effect of the Quebec Act on the normative force of the Royal Proclamation.

Just to wrap that point up, I would like to go to the Ontario Court of Appeal's decision in Chippewas of Sarnia. That's at tab 14 of the plaintiffs' book of authorities. There are multiple paragraphs. Paragraph 19 -- if we go to paragraph 19 -- sorry, let me just check.

There are multiple other paragraphs in

the decision that repeat this point. The Ontario Court of Appeal is saying we've said this before, we're saying it again, the Quebec Act repealed the Indian provisions, as they're often called, the surrender provisions of the Royal Proclamation of 1763.

And I would simply like to remind the court that the Supreme Court refused leave to appeal the Ontario Court of Appeal's decision in Chippewas of Sarnia twice. So while not absolutely binding, it is very clearly authoritative law that the Royal Proclamation was repealed by the Quebec Act. I don't believe I have anything further to say about the Royal Proclamation.

And finally, I simply have one more point that I would like to raise in terms of framing Pondiac's war. It's our understanding of the evidence that has led us to the conclusion that Pondiac's war is in fact a coda of the French period. That while Montreal capitulated in 1760 until the summer of 1763 when news not only of the Treaty of Paris arrived with Pondiac and his followers, but also the stark declaration by the French governor of

Louisiana, that there would be no supplies of gun powder.

In short, it's our assertion of the evidence, supported by that much quoted speech of Chief Minavavana about how the King of France will wake from his sleep and destroy the British utterly, that Pondiac's resistance to the British was only viable as long as there was the possibility of another European supplier of such essentials as gun powder; that when the French made it clear that not only were they surrendering New France to the British, but that they were not going to sustain any kind of guerilla resistance, that's the end of Pondiac.

I will leave the Congress at Niagara, where all of this became manifest, to my colleague, Mr. Beggs, but absent any questions from Your Honour, that concludes my share of Canada's submissions.

THE COURT: Thank you, Mr. McCulloch.

Please go ahead, Mr. Beggs.

MR. BEGGS: Thank you, Your Honour.

Before I return to the historical context, I'm going to respond to a number of questions that were posed yesterday simply so I

don't lose track of them.

The first concerned a letter, which I mentioned in the context of harvesting rights, from Captain Anderson regarding a request by Reverend Conrad Van Dusen for food.

The request for food by Reverend Van Dusen is Exhibit 4303, and the details of that letter don't particularly concern us, except that he reports that a severe frost has destroyed the potato crop of the Nawash, and this is in December of 1856. So following the Treaty 72 surrender.

Van Dusen didn't write directly to Anderson because he was -- he was trying to circumvent Anderson, for reasons that became apparent through the trial.

He instead wrote to Pennefather and Pennefather referred the matter to Anderson and Anderson replied and the document is Exhibit 4305. And that was dated December 27th, 1856, and that's the letter I'm referring to in the context of fishing.

Now can people still hear me? My screens are frozen.

THE COURT: I heard you say your

screen was frozen, Mr. Beggs. If you said anything after that, I have not heard.

THE COURT REPORTER: I apologize to interrupt, Your Honour. It's Helen the Court Reporter. Mr. Beggs' audio is cutting in and out slightly. I just wanted to put that on the record.

THE COURT: Thank you, Ms. Martineau.

Mr. Beggs, are you still frozen? We're not hearing anything from you.

All right, it does appear that there is a technical problem with Mr. Beggs' set up.

What we're going to do is we're going to take a five-minute recess.

And, Mr. McCulloch, are you still on line? Mr. McCulloch?

We may have lost him as well.

I'm going to have Ms. Roberts work with Mr. Beggs. Ms. Roberts, I think perhaps Mr. Beggs should use telephone for his audio.

MS. ROBERTS: I'll be in touch with Mr. Beggs. He has disconnected from the Zoom connection, so I'll contact him on break.

THE COURT: Okay. Well, people could remain ready to resume and Ms. Roberts will call

us back when the connection has been reestablished.

Please go ahead.

MS. ROBERTS: Thank you, Your Honour.

-- RECESSED AT 10:34 A.M. --

-- RESUMED AT 10:48 A.M.

THE COURT: Thank you, Ms. Roberts, for working to correct the technical problem.

Mr. Beggs, when I was unable to hear you, you had just begun to talk about Exhibit 4305. Perhaps you could begin that submission again and so I make sure I have the entirety of it.

MR. BEGGS: Thank you, Your Honour.

So Exhibit 4305 was a letter from Captain Anderson dated December 27, 1856. And it was a letter that I had mentioned yesterday in the context of harvesting and whether fishing had continued to be recognized after Treaty 72.

And at the bottom of that Exhibit, I don't intend to call it up, but at the bottom of page 3 of the letter, Captain Anderson writes:

> "If the Indians at Nawash Village are badly off for food it precedes from their own improvidence for they

can lay up a store of fish if they would exert themselves to do so. But if they are in the destitute condition stated by Mr. Van Dusen, I'm of the opinion 50 pounds of their annuity judiciously laid out in the purchase of provisions and properly divided amongst them would afford them sufficient relief."

So my interpretation of that letter, so far as relevance to the harvesting discussion, was that Captain Anderson was recognizing that fishing was still permissible and continued after the Treaty 72 surrender.

Now, it's not entirely clear whether he distinguishes between inland or fishing off the shores, but it is what it's worth. And the reference to that in our submissions was at paragraph 996 of our treaty submissions.

The second point I wanted to address was a correction of something I said yesterday. And I referred to Doran Ritchie as giving evidence that he ignored no trespassing signs as long as there was no red dot and I mentioned that that was contrary to the Trespass to

Property Act.

And re-reading Mr. Ritchie's evidence, I see that at page 1394, he was asked about what a sign had to say to prohibit harvesting. And he said:

> "There are numerous signs but the minimum requirement is a red dot visible, I believe, at eye view."

So I was incorrect in saying that he didn't explicitly say that he would ignore a sign unless there was a red dot. He, in fact, was still speaking in the context of there being a sign. So that is a mistake and I apologize for that misunderstanding.

There was an additional witness the following day, Chief Paul Nadjiwon, at 1503 who also referred to the red dots. And he was asked?

> "ANSWER: So if there's a property where you see that red mark would you not hunt in that area?"

And his answer was?

> "ANSWER: If we had permission we would so that's something you have to check out. But it also means, that

the owner of that property, you know, generally doesn't hunt in that land either. So they can't reserve it for themselves, mark it as nonhunting and then hunt it. There's certain rules that have to follow."

So I identify that passage simply because it touches on the concern I had about the harvesting rights and how the -- how it would be applied in certain circumstance. That circumstance being if lands were suitable for hunting and in fact were being used for hunting by the owner Mr -- or Chief Nadjiwon would indicate that they should be open for harvesting.

Another point yesterday with respect to Professor Haring, I was asked Canada's position on whether we were seeking an adverse finding of -- with respect to his credibility or his reliability, and I just wanted to clarify, it's reliability I was speaking with Professor Haring.

And I believe the last question that I have noted was I was asked to comment on the laches submissions in paragraph 70(c) of the

plaintiffs' reply submissions. And I wanted -- I'm confirming, yes, it is accurate. We will be addressing compensation and equitable factors in Phase 2 as well as any equitable factors dealing with the constructive trust.

Yes, so returning now to the title submissions. As Mr. McCulloch indicated, we're moving from the Royal Proclamation -- well, really the Treaty of Paris, being the date of sovereignty in February 1763, to the Royal Proclamation in October of 1763, and then to the Congress of Niagara in the summer of 1764.

And before passing on the Royal Proclamation, I did want to say one item with respect to the plaintiffs' submissions. They stated that the Royal Proclamation prohibits travel through the Indian lands that are identified in the Proclamation and that is not accurate.

The Royal Proclamation prohibits settlement, except under certain condition. It regulates matters of trade, but it does not prohibit travel.

So to the extent my friends raised it as a point in which the public right of

navigation was limited, the Royal Proclamation doesn't speak to that. And the Royal Proclamation is available at Exhibit 538. It's also available in the plaintiffs' book of authorities at tab 136.

Now, there is a great deal of evidence about the Royal -- sorry, about the Congress of Niagara, and we discuss it fairly thoroughly in our written submissions, so I just want to respond to a few points.

My friends indicated in their reply submissions that they felt that Professor Hinderaker's report on Niagara, which is Exhibit 4020, is a complete reply to Professor Beaulieu's detailed report. But I would submit that Professor Hinderaker's report is almost entirely legal argument about whether what occurred at the Congress at Niagara was a treaty or not.

And I wanted to be clear, and I think we were clear in our submissions, that Professor Beaulieu can only assist the court in that question. To the extent the debate is whether there is a Treaty of Niagara in a legal sense, that is entirely up to the court. And it

wouldn't be proper for either Professor Hinderaker or Professor Beaulieu to give an answer to that question.

Professor Beaulieu's submissions -- or evidence and opinions about the Treaty of -- or about Congress of Niagara is based on historical analysis and his view of it as a historian. It doesn't necessarily decide the issue on the basis of legal determinations.

THE COURT: Just before you move on, I'm a bit confused by that. So because you're talking variously about two different people here.

So with respect to Professor Hinderaker, you say that his report contains legal argument, and I understood that submission. But then you went and switched to Professor Beaulieu, and I'm not clear on your submission with respect to his opinion on the Congress at Niagara.

Are you trying to contrast them? I'm not sure what you're trying to do.

MR. BEGGS: Yes, Your Honour, I'm trying to contrast them.

Professor Beaulieu's report, I

believe, sets out the historical details of what occurred at Niagara as well as does an analysis of how the belief that there was a treaty developed anachronistically.

So I'm simply indicating that Professor Beaulieu's report is a historical analysis and it's not purporting to apply, for example, the test in Sioui or any other case law that determines legally whether there's a treaty or not.

THE COURT: Thank you.

MR. BEGGS: And to be clear, the question of whether there's a Treaty of Niagara has been addressed twice by the Ontario Court of Appeal. At tab 14 of the plaintiffs' Book of Authorities is the Chippewas of Sarnia case of the Ontario Court of Appeal, and at paragraphs 54 to 56, it refers to there being a Treaty of Niagara. Now -- and leave to appeal was dismissed. It was refused in that case.

And we submit that the Chippewas of Sarnia case is an obiter decision on that point. It wasn't squarely before the court as to whether there was a Treaty of Niagara, nor was it important to the analysis.

By contrast, the Mississaugas of Scugog case, which is at tab 34 in Canada's Book of the Authorities, is another decision of the Ontario Court of Appeal and there was a direct question about whether there was a Treaty of Niagara. And in that case, the court actually decided it didn't need to get into it, but did conclude at paragraph 52 that:

> "The Covenant Chain and the Treaty of Niagara, at best, reflect the general nature of the relationship between the Crown and First Nations at the time and confirm the basic common law doctrine of inherent aboriginal rights."

So the Sioui test is -- the Sioui case is at tab 85 of the plaintiffs' materials and it's a relatively straightforward test. My friends discuss it. I would agree that Sir William Johnson would have been regarded as having the power to enter into a treaty, but I would discuss -- I would suggest that it's not clear who the other party to the overarching Treaty of Niagara would be.

At times it appeared from the evidence

that the suggestion was it was a treaty with all Indigenous peoples, whether friends or enemies, whether Iroquois or Anishinaabe. But to be a proper treaty, the Indigenous Nations would have to be represented there and we've heard evidence that not everybody was there. And certainly there's no evidence that the plaintiffs were there.

The evidence provided by Professor Driben would suggest that any leaders which attended at Niagara would have to consult with their followers and they may be a considerable distance from home.

No Indigenous Nations were told in advance that there would be a treaty at Niagara except for those enemy treaties -- or the Seneca and the Wyandot.

As Professor Beaulieu noted in his report, several of the Nations attended only by chance. And to demonstrate this, I wanted to take you to an actual invitation to attend at Niagara, which was recorded by Alexander Henry in his book. The same book in which he records Chief Minavavana; speech. This is at Exhibit 476. And I'd ask that -- good. It's a large

document, so it might be a bit clunky. And if I could go to page 173 of the PDF, which is page 166 of the document. As I say, it's a large document, so perhaps it's having trouble loading.

Well, if it's not going to load, I will leave it to Your Honour to have a look at it. Essentially at that page, which as I say is page 173 of the PDF and page 166 of the actual book, it describes how Alexander Henry was at Sault Ste. Marie when messengers from Sir William Johnson arrived and told him -- or not it wasn't directed to him at all. It was directed to the Indigenous people he was with, but extended the invitation to attend at Niagara. And there's no indication that there was any idea that it would be a treaty that would be entered into.

Apart from that, and respect to the various factors that take place in the Sioui test, we simply rely on the evidence that has been indicated by Professor Beaulieu in his testimony and in his report, essentially that there was no intention to create an overarching treaty.

Johnson intended only to create treaties with the enemies who were suing for peace; that he recorded the actual treaties with -- not just with wampum, but with also written documents; that the strategy of the British was to divide the assembled Nations and not to unite them. And the majority of his letters to his superiors indicated that he had not entered into a treaty with the western Nations. And that is, as I say, in his report and evidence.

So going straight -- going to the legal test of Aboriginal title, as I say, the elements are straightforward and I believe well accepted.

As I indicated, Canada does not agree with the assumption that the plaintiffs were present in or around 1763 in the claim area. Keeping in mind, of course, that the claim area is the water and not the mainland. It's far from clear that even if there were individuals on the peninsula at the time what extent they traveled the extent of the peninsula to the tip, down to the bottom. It's certainly doubtful as to how many Indigenous people would have

traveled out to the international boundary.

My friend, yesterday, referred to a -- an example of a canoe travelling from Saginaw Bay to Goderich, and that example comes from Dr. Reimer's first report, which is Exhibit 4576. It refers to an event which is dated in 1829 and it comes from a book which is also an Exhibit, 4614. But the book doesn't give any information as to how the authors obtained this detail.

It refers to a purportedly huge canoe which was mistaken for a schooner and had main sails and top sails.

So, as I say, this was a 19th century example and is clearly not an example of the precontact vessels which would have been used earlier or even as late as 1763.

There's also the question of what islands would be within the claim area. And of course my friends earlier this week clarified that the only two islands they are seeking are Chantry Island and Barrier Island, or Barrier or Rabbit Island.

Now, I have reviewed the references that my friends supplied in a lettered Exhibit

yesterday with respect to these two islands. And the evidence with respect to these two islands is strictly in the late 19th century.

There is no evidence that these islands, or indeed any other islands, were in use prior to the 19th century or that they were in use around 1763, or earlier.

They are not too far from the shore, so perhaps some assumptions could be drawn. But there has been no oral history which suggests that these islands were within the territory. There's no documentation in the 18th century referring to these islands. There's simply no evidence for an Aboriginal title point of view to include these in a declaration of Aboriginal title.

Now, in 1847, of course, we have the declaration by Lord Elgin, and that declaration declared that all islands within seven miles of the peninsula -- of the Saugeen tract, were the lands of the First Nations. So an initial problem is Chantry Island is actually to the south of that.

So as Ontario said yesterday, the 1847 declaration arguably created a Reserve.

Canada's position is that the Reserve was created as of 1836, but, in any event, the Reserve as described in 1847 was thought to be north of the boundary line, and Chantry Island was south. So there is some doubt as to whether Chantry Island would have been included as a Reserve.

My friends did identify various discussions in the lettered Exhibit, documents throughout the testimony, which pertain to Alexander McNabb trying to obtain a surrender of the island and ultimately there's no Order in Council in which the negotiation between McNabb and the Saugeen is validated.

So I'd have to say that whether or not Chantry Island was Reserve land, which was then properly surrendered or not, is an open question and one that hasn't been before the court. And I would suggest you don't need to deal with that. The only question you're being asked is whether it is an Aboriginal title property.

Another complicating factor is my friends excluded any privately-held lands. The ownership of Chantry Island and Barrier Island is not actually in evidence before the court,

and I understand that it is unclear as to who owns the property.

Barrier Island, which I believe is located on the other side of the peninsula, is within the territory described in the 1847 declaration, so arguably is or was Reserve land at that time. And, as I say, there is some 19th century documentation dealing with it.

So, again, there could be an issue of whether Barrier Island was properly surrendered or not or if it remains in the lands of the First Nation, but that is a separate question from whether it is Aboriginal title, and I would submit that there's simply no evidence about whether Barrier Island falls -- or whether there is any occupation or other evidence about Aboriginal title on Barrier Island.

Now, my friends have asserted essentially that the British stayed out of the territory and really didn't go into the claim area until 1788. And I would suggest that is actually contrary to the evidence. We don't know the exact routes people took. We do know that the tendency was to avoid the peninsula. And if you were coming from Detroit, you would

travel on the west side of the -- of Lake Huron up to Michilimackinac. And if you were coming from the French River, you would travel towards Manitoulin Island.

But we do know from the report of Professor Carl Benn, which is Exhibit 4195, that British traders had attempted to reach Michilimackinac. Well, in fact, they did reach Michilimackinac as early as 1685 and subsequently they were kept out of Lake Huron, not by the Indigenous peoples but by the French, and that was at page 52 of Professor Benn's report.

We know that the British occupied Detroit after the conquest. We know the British sent troops to the Fort at Michilimackinac in 1761. We know that Alexander Henry traveled to Michilimackinac and that he was joined, according to his book, by -- joined separately by two other English merchants from Montreal, ^Stanley Goodard and Ezekiel Solomons, which appear in his book.

And then various individuals starting surveying Lake Huron according to Professor Benn.

There was Lieutenant ^Hutchins in 1762, which is at page 59, and I don't know the other off to top of my head.

We know that it was difficult to get a large vessel to Huron -- into Lake Huron because it couldn't pass the sandbar, but that was accomplished by 1764. We know that again Alexander Henry met an English explorer named Robert Dover on a voyage of curiosity while travelling the waters.

That at the time of the attack in June of 1763 on Michilimackinac, there were several other English merchants there, ^Henry Boswick, Ezekiel Solomons, Mr. Tracey and someone from Detroit. And then even after the attack, three more canoes arrived with more English merchants.

So -- and I could go on with after -- later dates, in 1766, we know that Captain Jonathan Carver started travelling. Again this appears in Professor Benn's report. And in the 1760s, the British army started getting vessels into Lake Huron, larger vessels. Prior to that, it was batteaux and other smaller craft. But of course there were lots of private individuals.

So my point is, there were lots of people travelling the waters of Lake Huron and Georgian Bay. And there is no evidence that the plaintiffs or anyone related to them ever attempted to interfere or demand permission of any of these people who travelled through those waters.

A couple of minor points with respect to occupation. Some of the evidence with respect to the archeology is tied to occupation, as Mr. Townshend said, on the basis that the plaintiffs would never leave the graves of their ancestors as Anishinaabe. But in fact we do know that the Anishinaabe did, when necessary, depart from those graves. There's evidence of large migration of Potawotami into Canada. Even onto the Reserve, there's evidence of people from Manitoulin Island, people from Coldwater and from people from the Credit, all Anishinaabe, all relocating to the peninsula presumably away from the graves of their ancestors.

Another minor point. My friends referred to an example of continuity being established by the biography of Verna Johnston

which referred to Verna Johnston's Potawotami ancestors joining an Odawa group led by Chief Wahbahdik and this was supposed to show continuity with the 17th century. And what I would like to observe is that this biography refers to episodes in the 19th century. And of course there's no continuity disputed in the 19th century on.

So the plaintiffs have given five examples of how they have established continuity -- or exclusivity.

Champlain has already been addressed. There's is no evidence that they were with Champlain as they claim.

To be honest, I originally understood their submission that they were the Cheveux Relevées who met Champlain, but I understand from their submissions earlier this week that they are saying that they accompanied the Cheveux Relevées who were located in Collingwood.

With respect to the exclusion of the Haudenosaunee, I had submitted that the evidence in archeology is discussed in our written submissions does not provide much support there.

And again, in my view, the strongest evidence of this example comes from the oral history.

With respect to the Pondiac's war, as my colleague discussed, there is no evidence that the plaintiffs participated in Pondiac's war. It became apparent in the cross-examination of Professor Driben that the document he was relying on in Exhibit 4046 didn't refer to the plaintiffs and didn't actually indicate that the people were involved in that episode were -- sorry, that became kind of convoluted.

The letter which Professor Driben referred to at Exhibit 4046 was a group led by an individual named ^Showanakapawy and he said he was representing the Chippewas near Toronto.

So there's no evidence that they were the same group that the plaintiffs are, but Showanakapawy^ said they had not participated in Pondiac's war and it would be a stretch to say that that evidence proves that they were involved, which was Professor Driben's contention.

My friends said that because they were involved in Champlain's greeting in 1615, you

can infer that they were involved in Pondiac's war and that's not hard to imagine, why wouldn't they be?

Well, there were many reasons why someone wouldn't want to join Pondiac's war and they were discussed in the various expert reports. Participating in a war for the Indigenous people meant hardship, apart from the question of risk. It took them away from their lands where they needed to harvest through hunting and fishing to support their families. So there were many reasons why they would not want to join Pondiac's war, regardless of what their feelings were about the English at all.

There's no evidence that they attended at the Congress of Niagara. And as I say, there's no evidence that there was a treaty -- well, there's -- we would argue there was no Treaty of Niagara, which granted permission to use Lake Huron.

But I want to turn to an issue raised by my friends, which is the role of the Aboriginal perspective and the lens in applying the test for Aboriginal title.

Now, as I mentioned yesterday, this

comes from the Tsilhqot'in case at paragraph 32. And the Tsilhqot'in case is at tab 108 of the plaintiffs' Book of Authorities.

I'm not sure if Canada's computers are working, oh great, excellent.

If we could go to paragraph 32 of this case. So if we could scroll up just a little bit. Sorry, down, so I can see part of paragraph 33. Thank you, that's good.

So as I say -- as I said earlier, paragraph 32, which discusses the role of the lenses of sufficiency, continuity and exclusivity is followed by paragraph 33 which refers to these as requirements. So there's no doubt that they are required elements.

So paragraph 32 says:

> "In my view, the concepts of sufficiency, continuity and exclusivity provide useful lenses through which to view the question of Aboriginal title. This said, the court must be careful not to lose or distort the Aboriginal perspective by forcing ancestral practices into the square boxes of common law concepts,

thus frustrating the goal of faithfully translating pre-sovereignty Aboriginal interests into equivalent modern legal rights. Sufficiency, continuity and exclusivity are not ends in themselves, but inquiries that shed light on whether Aboriginal title is established."

So what does that mean? If these are lenses, if these are not ends in themselves, but they are still requirements, what is the court trying to tell us? What it's telling us is that the ultimate goal is faithfully translating these pre-sovereignty interests, practices, laws into modern Common Law concepts. It's a translation.

It means the law should faithfully reflect the practices and not the other way around, which would be to modify the practices or the evidence of the practices to fit the legal requirements. What the court is saying is we should not distort what actually happened just to be able to check off the boxes for the test.

And in practice what that means is if

you're talking about something that's non-exclusionary, you are not talking about title, you're talking about rights. And you shouldn't try and distort what you have to go into title, but instead should recognize what you do have, a faithful translation of the practices. And the practices that we've heard about with respect to the claim area, which again is water, or the lands under the water, the practices we've heard about are fishing and that has been a recognized Aboriginal right. And we've heard about spiritual ceremonies.

And we would submit that if you find there was sufficient occupancy of the peninsula at the relevant times, that probably what we're talking about is not title but something else. Title, as you mentioned, and as the courts have said many times, is on a spectrum and the title is the end of the spectrum and rights can appear at various points on that spectrum.

My friends do refer to the decision of -- or to the -- sorry, did you have a question, Your Honour?

THE COURT: Yes, just before you move forward and it may be that plaintiffs' counsel

can shed some light on this in their reply.

But, you know, it has been a long trial and my recollection may be incomplete. I recall evidence about spiritual ceremonies that were conducted at the shoreline. What I'm trying to recall is whether or not there is evidence of spiritual ceremonies that were conducted in the lake or the bay and not on the shoreline or the riverbank.

And I'll accept your recollection, Mr. Beggs, but I think I probably need Ms. Pelletier's help in the end and she can deal with that in her reply.

MR. BEGGS: Yes, I'm sure my friends can better identify any evidence, but I seem to have the recollection, I don't want to distort the evidence, but my recollection is that Chief Vernon Roote spoke a great deal about tobacco and using tobacco in various fashions.

And I can't recall, but I thought there might have been references to scattering tobacco when travelling, but that's all I can recall off the top of my head.

THE COURT: That's fine, Mr. Beggs. There's no reason why your memory should be

better than mine. I will no doubt hear from Ms. Pelletier in reply with respect to any additional matters that the plaintiffs are relying on.

Yes, please go ahead.

MR. BEGGS: Sorry, the one point and I see that we're approaching the break time.

But one point I just did recall is of course the Nochemowenaing location. That's the site which had the whirlpools and the healing waters and there was a description of how people might be sent out on rafts or some sort of craft into the waters and they would be cleansed and healed.

So it appears at least with respect to the Nochemowenaing location, which is up on the northeast side of the peninsula, there was a great deal of discussion about practices in that particular spot.

THE COURT: Thank you.

Now, we are going to take the morning break at this time, but because we've already had an unanticipated break, I'm going to say 15 minutes.

Ms. Roberts, if you can close the

courtroom.

MS. ROBERTS: Thank you, Your Honour. We'll resume in 15 minutes.

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

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

THE COURT: Please proceed, Mr. Beggs.

MR. BEGGS: Thank you, Your Honour.

One of the last points with respect to the test -- or well with Aboriginal title and the question of an Aboriginal perspective is, my friends referred to the decision of Justice LeBel in the Marshall and Bernard case and the Marshall and Bernard case is at tab 79 of their book of authorities. And I just wanted to point out that Justice LeBel does give a lengthy description or discussion of the role of the Aboriginal perspective, but he is speaking as the minority in that decision, and his comments have not been adopted in a wider fashion. So just simply they would have to be taken for what they are worth.

Turning to the question of the alternative argument by Canada, that is the public right of navigation and the translation of Indigenous practices, my friends -- I

actually don't intend to make much submissions on this because it is a fairly lengthy discussion in our written materials, but my friends did say that we were ignoring the decisions of the New Zealand Court of Appeal, among other cases, and that's true.

We are not following or arguing any of the international jurisprudence. We don't believe that that is helpful in that discussion because of the differences between each jurisdiction with respect to the way Aboriginal title is treated and the way waters are treated.

With respect, they said we are ignoring the overwhelming weight of academic opinion, which they refer to at paragraph 1,055 of their submissions and that is also true. We disagree with that -- the opinion which is cited.

I would note that four of those articles are all by Peggy Blair who was counsel for the plaintiffs in the Jones and Nadjiwon case, and so she's essentially just arguing her client's case through publications.

But what we do rely on is Justice La Forest's work and his decisions in cases such as

the Friends of the Old Man River, which have been adopted wider, and his work on water law, which has been accepted by the Supreme Court of Canada, and obviously Justice La Forest is quite an authority on issues of water law.

He, of course, is not speaking at all of the interrelationship of Aboriginal title and water law, which is the novel issue that could be before the Court.

So I didn't intend to make any other submissions, but I did want to be available for any questions you might have about that alternative argument. Thank you, Your Honour.

So I'll turn to the treaty case. And as I indicated at the outset, Canada accepts that there is a sui generis fiduciary duty created, but taking a step back for a moment, because, as Your Honour has pointed out, there is a question of a treaty and the possibility that maybe that the Treaty was being breached. And I feel that some of the discussions that have occurred have confused the two, whether we're talking about a breach of treaty or whether we're talking about a breach of fiduciary duty.

And I think my friends at Ontario pointed this out in their written submissions that they are not the same and they should not be confused.

We would submit, of course, that in effect neither is the problem. There is no breach of treaty and there is no breach of fiduciary duty. There is no breach of honour of the Crown for that matter.

But if we're talking about a breach of a treaty, my friends talked about their reasons for choosing the cause of action that they did, and that's of course their choice, but we disagree with the way they characterized breach of treaty law in the last few days.

If there was a breach of treaty, it does not mean that the treaty is void. Orderly a treat breach is remedied by fulfillment of the breach, if possible. Now, of course in this situation we would be talking about a breach of Treaty 45 1/2, the promise to protect the land, and Treaty 45 1/2 was superseded by Treaty 72 which my friends, the plaintiffs, admit.

It's possible theoretically that there could have been a breach between these two

periods, but the creation of Treaty 72 essentially eliminated that breach. It made whether there was a breach of Treaty 45 1/2 moot and it essentially disposed of a potential cause of action for breach of treaty.

Another point I would make about breach of treaty though is that there is also no damages available, at least no court has found that there is damages available for breach of treaty, unless the law has changed very recently, which I'm unaware. Now, whether courts in the future might find that it is entirely possible. But, again, breach of treaty is usually remedied by fulfillment of the breach.

In that way perhaps it's similar to honour of the Crown in which honour of the Crown, which is not a cause of action but still has a moral authority on the Crown to require some action.

THE COURT: Mr. Beggs, I take it that even though Canada submits that honour of the Crown is not a cause of action, they seem to also accept that it could give rise to a declaration, is that correct?

MR. BEGGS: Yes, absolutely. That was the decision in the Manitoba Métis Federation case, which I am sure is in the book of authorities. I don't know off the top of my head.

THE COURT: It is.

MR. BEGGS: But the Court certainly found that there was a declaration there and it was appropriate in those circumstances to make that declaration. And then essentially left it to the parties as to what steps would be necessary to -- not exactly -- not to respond but to implement, if you will, the declaration in an honourable fashion.

And I actually don't recall off the top of my head what happened subsequently to the Manitoba Métis people.

So turning back to fiduciary duty, again we say that the question of whether -- whether the specific term of Treaty 45 1/2 was met or not, and again we've said that treaty interpretation principles would be that, in our view -- and this is where we differ from Ontario, as I understand it -- but in our view cultivation is not a requirement. There's no

limitation on the territory beyond the peninsula or the peninsula -- the entire peninsula is covered by the promise to protect.

But when we look at what the fiduciary duty might be, as I've already addressed and I don't want to repeat and it's in our materials, there is a difference between on ad hoc fiduciary duty and a sui generis fiduciary duty. We say there is a sui generis fiduciary duty.

And there was a discussion with my friends a few days ago about -- and I believe the question was posed to us as well, whether there was a difference between pre-Reserve and post-reserve fiduciary duties. Essentially the Wewaykum case involved both. The Wewaykum case, part of the events in that case pertained to things that happened before a reserve was created and certain fiduciary duties were imposed. And then it turned to the question of what happens after the Reserve was created.

And I believe we reserved our comment on that until our submissions because I thought it would require some explanation. I think the law is very clear that there is a difference between pre- and post-reserve creation. The

Wewaykum case says that pretty explicitly.

And what it says is that once -- you have certain duties, the ordinary principle, honesty, diligence, that sort of thing are the general duties that you would have pre-Reserve creation. Once Reserve creation has occurred, there is an additional duty which is imposed and that's the duty of -- to prevent an exploitative bargain. And so there is a difference.

And so what we have here, as I've said, Canada's position is that there was a reserve created in 1836. So in general I would agree that an exploitative bargain, preventing an exploitative bargain is part of the conduct or the standard to which the Crown would be held for the relevant time period.

I wanted to make a bit of a caveat for the purpose of accuracy. I don't think it affects the analysis in this case. Which is, in the pre-Reserve situation, actually I said there were certain duties, but of course there still has to be a finding that there was a fiduciary duty at all, right? Prior to there being a -- it's not clear, for example that there was a fiduciary duty prior to 1836. There might have

been, but that's not necessarily automatic.

In 1836 the land was surrendered and in 1843 the surveying and the boundaries were completed.

As you know, the evidence shows that there was a dispute about where the boundaries would be, or not really dispute but the First Nations were concerned that the Saugeen village was being excluded. If you actually took a direct west line north of Owen Sound, it would exclude the mouth of the Saugeen River. And that's what the surveyors were doing and that upset the First Nations who asked that it be corrected. And the Crown agreed that it should be corrected and that they should have the Saugeen village.

And I note that that -- the Saugeen village was the best lands in the area. So the Crown wasn't trying to hoard the best land for potential settlers; it was trying to serve the interest of the First Nation in that respect by giving them what they wished.

So during that period, 1836 to 1843 it is arguable that we are in the pre-Reserve creation situation that occurred in Wewaykum.

There is a reserve being grant or acknowledged, but the precise boundaries haven't been sorted out. I say that only from a theoretical perspective. It doesn't turn on anything. Nobody was trying to surrender the rest of the territory during that time period, so there is no issue whether there was an exploitative bargain. But just for the sake of clarity I wanted to point out that pre 1836 there may not have been a fiduciary duty; post 1836, prior to 1843, there would have been a pre-Reserve interest fiduciary duty; post 1843 there was a fiduciary duty which included the obligation to protect against an exploitative bargain.

THE COURT: Just before you move on from that, the plaintiffs also submitted that from the standpoint of the law that speaks about the government's ability to an obligation to have regard for other interests, especially the general public interest at play, sometimes called the law of many hats, that in their submission that did not apply regardless of whether the fiduciary duty was ad hoc or sui generis. What is your submission about that?

MR. BEGGS: Yes, I think I will have

to give a bit of a nuanced answer.

I do believe that the sui generis fiduciary duty allows for the many hats concept and allows for the combination of different -- balancing of different requirements. And that is set out in the Wewaykum case which is at tab 113 of -- paragraph 96 refers to the many hats principle.

Now, I believe that our materials may have confused the issue a bit, because we say that the sui generis fiduciary duty, which does include the many hats principle, required a balancing of the interest of the settlers with the First Nations. And the use of the term "settlers" perhaps was not the best choice. Because as sometimes pointed out, it wouldn't have been proper for the Crown to balance the interests, at least from Canada's point of view, the squatters against the First Nation.

Canada couldn't do -- on the basis of what the terms of what Treaty 45 1/2 were, couldn't do what happened in the various cases cited by the plaintiffs, the Williams Lake and Jim Shot Both Sides, and Makwa.

They couldn't prefer the interest of

squatters who had no legitimate rights, particularly when Treaty 45 1/2 said we will protect you against the encroachment of those squatters. The interests that the Crown was balancing was the wider interest of organized settlement.

So in exercising the sui generis fiduciary duty, wearing many hats, Canada could take into account the needs of its land policy to ensure an organized settlement. It could take into account immigration policies and the idea of developing a new country, of promoting emigration to the benefit of the economy and of the country as a whole.

It could and it did take those into account. So when the plaintiffs suggest that the Crown should have -- I'm not sure the plaintiffs are suggesting this any more because they seem to disavow it in their reply, but the evidence of Professor Harring at least was that Canada should have enacted different policies with respect to land and emigration and other macro policies, which would have -- the way that land titles were held, all of this created an environment, according to Professor Harring

which aggravated the pressure on the peninsula.

In my submission, those are all legitimate concerns for the Crown. That is the Crown wearing its many hats role. It can decide that on Crown lands it will tolerate squatting if it has a reason to do so.

The fact that the tolerance of squatting on Crown lands later leads people to believe that they can squat with impunity on Indian lands might be an unfortunate consequence but it doesn't mean that the Crown couldn't make that initial step, initial decision.

What the Crown doesn't do is it doesn't prefer the interest of squatters in this case. The Crown doesn't say, as it did in the cases that were cited by my friends, yeah, there's squatters on the land and we don't want to kick them off, you have to surrender your land.

Whenever a squatter was drawn to the attention of the Crown, it sent them warnings and presumably took whatever action was necessary. When somebody wrote to the Crown and asked, can we go ahead and squat on the lands? The Crown said, no, absolutely not. When people

brought deals that they rendered on the side with various Band members, the Crown said, no, we will not tolerate this, this is impermissible. When bad deals were presented, the Crown rejected them.

So the Crown didn't prefer the interest of squatters. It did balance the interests of wider settler society. And because it was doing that, it has to be a sui generis fiduciary duty.

The actual term of Treaty 45 1/2 protects against the encroachments of whites. It doesn't protect against an ultimate settlement or ultimate surrender. It doesn't protect against whatever arrangements might happen or future events might occur.

So that was a bit of a long-winded answer, but essentially yes -- well, I disagree with the plaintiffs. The many hats principle is part of the test for sui generis. I think it has to be balanced reasonably. The Crown can't act -- can't just simply favour one side over another and say that that was balancing it.

If I could actually ask that the Wewaykum case be called up? It is tab 113. If

I could go to paragraph 100.

So at this point in the decision the judge has already said -- the Court has already said post-reserve creation you have to protect against an exploitative bargain. And I thought the words of the Court here were particularly helpful.

At paragraph 100 it says:

> "It is in the sense of 'exploitative bargain,' I think, that the approach of Justice Wilson in Guerin should be understood. Speaking for herself, Ritchie and McIntyre, Justice Wilson stated that prior to any disposition the Crown has 'a fiduciary obligation to protect and preserve the Bands' interests from invasion or destruction'."

And Guerin was itself a sui generis fiduciary situation.

The Court then says:

> "The 'interests' to be protected from invasion or destruction, it should be emphasized, are legal interests, and the threat to their

existence, as in Guerin itself, is the exploitative bargain [which refers to the lease with the golf club]. This is consistent with Blueberry River and Lewis. Justice Wilson's comments should be taken to mean that ordinary diligence must be used by the Crown to avoid invasion or destruction of the band's quasi-property interest by an exploitative bargain with third parties or, indeed, exploitation by the Crown itself."

So I mention that because the plaintiffs say that the promise in Treaty 45 1/2 was not a promise to protect the legal interests, and that's true. And that's where you have to distinguish the Treaty promise versus the fiduciary duty that might have been imposed.

The fiduciary duty to protect against an exploitative bargain was to protect the legal interest. Everybody understood the preference was to keep the land. Given the, I'll say prejudices of the time it's perhaps conceivable that the Crown officials didn't appreciate how

much the land meant to the Indigenous peoples. We certainly saw that with Anderson's comments and Oliphant's comments, that they didn't understand the attachment, but they knew that the land was what the First Nations wanted.

And so the first step was always to protect that, but failing that, when it became impossible, the Crown did the next best thing, which was to try to protect the legal interest, the value of the land that was at stake.

And that was not an ideal solution but it was the solution that the parties eventually came to.

So I have discussed the forever promise in some detail. I do want to mention that with respect to the handwritten copy, the changes are discussed in our written materials. But I do think it's perhaps worth noting that on the handwritten copy, which is Exhibit 1132, it does explain the changes and it says, "The alterations in this document" so if we can flip to the next page?

It's sort of a marginalia. Sorry, it's very faint, on that page. So it's faintly written just above the signatures. And what it

says is:

"The alterations in this document were made previous to signing and the copy given to the Indians was the fair one."

So I just wanted to particularly mention that because I believe in some of the evidence from the witnesses there was some concern that changes were made to the document that may not have reflected the agreement. So the explanation for the changes is that they were made prior to the signing and essentially they were innocent.

THE COURT: While we are on the subject of this treaty, you advance an objection to -- let me get it out. Both sides are making pleadings objections at this stage.

The plaintiffs complain of Canada and Ontario's new theory about the scope of the protection clause, but I think, as I understand your current position, you do not take the position that it's geographically limited, is that correct?

MR. BEGGS: That's right. We never took that position.

THE COURT: So there is no pleading issue now that you've clarified that. All right.

Please go ahead.

MR. BEGGS: Thank you, Your Honour. I'm still talking in terms of the legal theory, with respect to the exploitative bargain and details of how exploitative bargains work is provided in the Blueberry River case at tab 9 and in particular paragraph 35, but I won't pull that up. But whether there is an exploitative bargain is a balance between the extremes of autonomy and protection.

The Court does not want to impose itself on the free will of the First Nations to come to an agreement and the Crown, as a fiduciary, should only be ensuring that any bargain is not foolish or improvident.

And if the facts were to later develop that it turned out to be a bad deal, but at the time it was seen as a good deal, that's not a case in which that standard has been breached.

At the time Treaty 72 was entered into, it was the best deal any First Nation had got, monetarily-wise. Other treaties had all

provided annuities, but this treaty would give the First Nations the actual sales of the -- the profits from the sale, which would be distributed -- the interest would be distributed annually or semi-annually.

So it promised -- the expectation was that it would be very profitable if the monetary motive was your main concern.

So it wasn't a bad deal in that sense. Was it a bad deal in the sense that the plaintiffs felt they had little choice? Well, the circumstances may have caused that. The plaintiffs could see the huge crowds that were gathering at the border with respect to the September big land sale. They were aware that people were trying to encroach and that it was going to get worse. All the experts agreed on that.

So, yes, there was pressure on the First Nations. That doesn't mean that the Crown had an obligation to reject it or to not accept a surrender simply because the First Nations felt themselves under external pressure.

Now, of course, the plaintiffs go farther than that. They say that the Crown

itself put pressure on and, in fact, they say that the Crown made up the threat itself. But to the extent that the Court finds that there was a realistic pressure on the First Nations, from the explosive colonization which was described by Professor ^McCallum and the great land boom and the huge demand that appeared to all observers to exist in 1854, that is not a basis for rejecting or for saying it was an exploitative bargain.

The fact that there was a bubble which burst in 1857, according to Professor McCallum -- and his evidence is undisputed on this -- that the land market fell in 1857, and again, through no fault of anybody's except for perhaps Charles Rankin, the surveys hadn't been completed and the land sales hadn't begun until 1856. So the combination of circumstances led to the market not being what it should have been. And it didn't recover. So that fact doesn't mean that it was an exploitative bargain.

It should not be looked at in hindsight to say, in reality the settler demand didn't turn out to be what people thought it

would be.

Now, the plaintiffs essentially boiled down their allegations of breach of fiduciary duty into three points, as I understand it. There is the allegation that the Crown didn't do -- didn't attempt to protect the First Nation, didn't attempt to fulfill the promise Treaty 45 1/2. And we argue, and it's all that the south in our written materials, that the Crown did. The Crown took many actions.

The Crown implemented legislation; the Crown posted notices; the Crown appointed commissioners. Commissioners heard complaints. Warnings were issued. Timber theft was dealt with. The Crown is not required to do a perfect solution.

Now I believe in our written materials we refer to that statement perfect -- or remedy perfect solution in the Williams Lake case. And my friends have pointed out that that language is from the dissent and that is correct. And we put that in our errata. I thank them for pointing that out. But that doesn't -- we still say that that point is valid, that a perfect solution was not required, nor could it be in a

breach of fiduciary duty.

My friends say that what is required is the ordinary persons diligence, and they give us an example. Well, how did the Crown deal with their own lands? And I would suggest that doesn't make the point that they contend.

Because Professor Harring was very clear that he thought that the Crown did a lousy job of protecting its own lands. Most of the examples of squatters he gave were squatters on Crown lands not Indian lands.

He thought that the land policies of tolerating squatters on Crown lands was an aggravating factor.

So according to Professor Harring the Crown did not do much to protect its own lands. That doesn't mean it didn't have to do something for Indigenous lands, it certainly did. But if you're using the Crown lands as an example, it doesn't help you that much.

Now, my friends give the example of what happened after Treaty 72 and say, well, with those Crown lands they were very diligent. But, again, that's not the same thing. The lands which were surrendered by Treaty 72 were

to be sold for the profit of the First Nations, unlike the lands which had been surrendered in Treaty 45 1/2. The lands which were to be sold, the profits to go to the Saugeen and the Nawash, the Crown had a duty to protect that interest and it did take actions, yes, after the surrender.

And those actions were to protect the plaintiff; they weren't to protect the Crown. So the suggestion that the Crown differed in the way it treated its own property versus the way it treated the plaintiffs' property doesn't get very far.

And I suppose while I'm on the topic and I mention that topic, often what comes up is the question of the sheriff's letter, which in the opening was described as the key moment that the plaintiffs' counsel decided there was a good case.

Again I think this is pretty well explained in our written submissions, what our view of the sheriff's letter is. It's a mistake to think of the sheriff's letter as the day after the surrender suddenly people leap into action. Our submission is that people were in

action all along the way. At most the sheriff's letter was just a continuation of the ongoing policies.

My friends say that Oliphant was a Superintendent and, therefore, was a Justice of the Peace under the 1850 legislation and, therefore, could have issued a warrant to the sheriff, but that's all speculative.

Oliphant was not a Superintendent that could do so under the Act. It's a trivial point but the Act under section 9 says that they have the jurisdiction in the county they worked, or the County they lived, neither of which pertained to Oliphant and the peninsula. He wasn't trying to serve a warrant. He was sending a notice to the sheriff and he was asking the sheriff to circulate that notice, and he was doing so because he had run into squatters both going to and from Saugeen.

And we can actually see this if we are able to call up the document. Are we able to call up Exhibit 2332? Or is that not possible?

So what this is is a letter from Richard Carney, and what he is -- it's in 1856. And Richard Carney, in addition to many other

roles he played in this litigation, was the publisher of the Owen Sound times, which was a rival newspaper to the Owen Sound Chronicle run by Van Dusen's son.

This is a request for payment. And if we can scroll down to the second page, and starting with the paragraph beginning with "with respect". So Carney had asked for money because he posted some ads about the notice and now he was -- and that was rejected so now he's explaining why.

So he says with respect to some of the printing order:

> "The first item was a notice from Mr. Oliphant to prevent squatting and trespassing in the newly surrendered Indian territory. The poster bills were printed at the common office [so at the rival newspaper's office] and one was given to myself as I passed the said office by the sheriff of the county saying there was an order for its insertion in the Times and he can not recollect the circumstances although I am confident of the fact.

I took the bill direct from him to the times office."

And then he inserted it and published it and wants to be paid.

So we see that the sheriff is doing exactly what he was asked. He is letting people know that there is going to be a sale of lands and that squatting on those lands won't be tolerated. He is not springing into action to arrest squatters or to evict anybody. All he's doing is spreading the word. And that's what Oliphant expected him to do.

The statutes are very clear. You have to complaints, you have to have evidence, a notice of the nature that Oliphant gave is just notice that indicates there was a change in the circumstances. It was well-known that once the lands were likely to be sold, people would rush in to get the best properties.

Prior to that time there would be squatters or there would be attempted squatters, but it would be a hit or miss deal. Once the lands were up for, sale, people were going to start coming in large numbers. And we do see that in the evidence.

Now, another point with respect to what efforts the Crown should have taken, as I say, again the Crown took many efforts to protect and the Court will decide whether those efforts were reasonable or not.

One thing I think many of the witnesses didn't take into account is, who was going to pay for all this? It appears from the plaintiffs' submissions that their view is that the Crown should have spared no expense to prevent encroachment. They should have hired permanent constables; they should have flooded the land with notices. They should have, if necessary, sent in the army. But these things would cost money.

And from a modern perspective it seems natural to say, well, of course the government should pay for it. We have a large government apparatus funded by taxes. It seems natural for the government to pay. But that was not an inevitable conclusion in the 1800s.

And the evidence shows, in fact, that the expectation was that the First Nations would have to pay for any expenses incurred in protecting their property.

We've heard from Professor Brownlie that the Indian Department was not well funded. There were only a few employees. Anderson was responsible for a wide territory.

So when, for example, Chief Wahbahdik asks for a document he can show people to keep them out of his lands in 1843, Chief Superintendent Jarvis suggested that the only way to effectively protect encroachment was to appoint a magistrate, and a magistrate was appointed a couple of years later. But it was a remote location and Jarvis said that such a person would, of course, expect to be paid liberally for his services. And that was Exhibit 1431.

And he's not saying that, you know, the Crown should be penny pinching and not take that expense; he's saying that the First Nation should not have to pay for expenses which would be unnecessary.

And this is clear in a document from 1846 which is Exhibit 1585. And we don't have to call this up, but it's a letter to Anderson from -- I can't recall who the responsible person would have been at that time, maybe

Higginson, but Anderson had wanted to have a lawyer, Mr. Turner, come with him when he went around looking for squatters.

And in this letter, in Exhibit 1585 the author rejects that proposal because they don't want to put the Bands to the expense. And what the letter says is:

> "It would involve the Indians in an expense which it is hoped it may be avoided. It should be borne in mind that the entire cost falls upon the funds of the tribes to whom the lands respectively belong and it is requisite, therefore, that law proceedings should be carried out with as small an outlay as practicable which you will not be ^setted."

So as I say, from a modern perspective this may seem like the Crown is penny pinching, but from the prospect of the actors involved they had to take into account that somebody had to pay for these things. Law proceedings were expensive; if things could be resolved without law proceedings, all the better.

So it is our submission that the Crown

did take reasonable efforts to protect the peninsula. And so the first allegation for breach of fiduciary duty fails.

The plaintiffs then take two allegations with respect to the actual negotiation. They say there was bullying, pressure of various kinds, and secondly they say there was lying.

Now, with respect to the bullying, of course, the prominent item is the speech by Anderson where he threatens, to use their words, to take away their lands if the -- well, to take control of their lands to sell them for their benefit.

Now, my friends have raised the suggestion that things happened in a different order. That at the August 1854 negotiations the plaintiffs, as I understand it are saying that there was a lot of discussion, the discussion went overnight. Then Anderson threatened them. And it was only after the threat that the plaintiffs say that they then returned with a counterproposal, which was rejected.

But the evidence has been very clear all along the way that it didn't happen in that

order. The evidence has been clear that there was negotiations. At some point the First Nations make a counter proposal, and at the very end of the negotiations Anderson gives a speech and in that speech he says that he's going to advise that the Crown take control of their property, which of course didn't happen. But it was said.

Now, how do I know that it happened in that order? Well, most importantly is Exhibit 2102 which is the speech. And it is entitled "A Speech Given at the Close of the Discussions". So that the document itself says it happened at that time, at the end.

Professor Brownlie took the position it happened at the end. In his report, Exhibit 4118 at pages 3 and 13 and 14 he makes clear the order of events.

Even more explicitly we have Professor Driben who gives some detail about this order of events in his report, which is Exhibit 4324, at pages 253 and 274 to 276. And it was particularly memorable in his testimony where he said that the First Nations came ready with their proposal, that they were planning on

giving this counterproposal in advance.

And I would suggest that there's an implicit support for this in the letter by Reverend ^Cribbs in October of 1854 which is Exhibit 2114.

So it would be merely speculation to say that it happened in any other order. You would have to reject the actual documents and the expert evidence.

With respect to the allegation of lying, which is, as Your Honour noted, one of the pleading issues that Canada has raised, or -- it is -- I don't know if it is the only one, but it is one that Canada has raised.

THE COURT: And just to be clear on this, the plaintiffs confirmed that having read everything they maintain their objection on a different point. Is that the case for you on this point as well? Having read the reply delivered by SON, which addresses your concern about pleadings, are you maintaining your objection?

MR. BEGGS: Yes. I'm not persuaded by the plaintiffs' reply.

I should say that in some sense it

doesn't matter too much because the allegation of lying is premised on the first allegation that the Crown didn't take reasonable steps.

If the Crown took reasonable steps, then Oliphant wasn't lying. So if the Court finds that the first allegation of breach of fiduciary duty that the Crown didn't undertake reasonable steps fails, then how could Oliphant have been lying when he said there was nothing we could do?

I don't see that the allegation of lying can survive without first finding that the Crown failed to take reasonable steps.

But with respect to my friend's reply to the allegation of lying, well first of all, I want to make clear that there is no evidence of any lie. There's no admission by Oliphant that he lied. There is no evidence that Oliphant said one thing in private and another thing in public. We don't even know the words that Oliphant used precisely in his negotiations. So it's an ambitious and rather serious allegation to make, 176 years after the fact, when you don't know what those words were.

Now, what he reported to Lord Elgin

was that:

"I opened the proceedings by stating to them the reasons which have induced her Excellency to recommend the surrender of so large a portion of their territory. The evidence of their own senses was sufficient to bear me out in the truth of my assertions in reference to the avidity with which the neighbouring lands were taken up by whites. They were compelled to admit that squatters were even then locating themselves without permission either from themselves or the Department upon the Reserve. I represented the extreme difficulty if not impossibility of preventing such unauthorized intrusions."

So it's the last sentence which is the lie, supposedly.

"Oliphant represented the extreme difficulty if not impossibility of preventing such unauthorized intrusions."

And that's why I say it depends on the

first allegation. Because if they did take reasonable steps to protect the Reserve, then his assessment that there was -- it was impossible to do more was not a lie.

THE COURT: Well, I think what the plaintiffs say is that the steps he took immediately following the Treaty Council demonstrate that he knew steps could be taken. And you've already addressed the notice that the plaintiffs rely on. Do you have anything else to add to that?

MR. BEGGS: No, the only thing is that the plaintiffs' response about the pleading issue does not satisfy what was necessary to prove whether there was lying or not -- or sorry, to prove that -- they didn't give a proper pleading to allege a lie occurred.

We were very diligent about pursuing any allegation of dishonesty in this proceeding. And, yes, there were witnesses that mentioned lying and the plaintiffs' point to Karl Keeshig. But Karl Keeshig was not talking about -- well he mentions lying twice. He mentions that his grandfather Alec Johnston told him about lying, that they lied to us. And that is the entirety

of the sentence. "They lied to us."

The first time he mentions it, he is not even talking about Treaty 72; he is talking about other treaties. The second time he mentions it, he is talking about implementation. He's not talking about the negotiations. So that is not any evidence at all.

So yes, there were passing comments that people said they lied, but since it wasn't part of the claim we didn't need to cross-examine on it because it wasn't an allegation.

Now, I don't know if I can get a copy of -- well, I won't pull it up, but in the trial record there is a copy of the current Statement of Claim. And at page 14, paragraph 22, the allegations of breach of fiduciary duty are set out. What it does say in 22(b), as currently amended, is that Crown negotiators made statements grossly exaggerating the benefits, and that was limited only to the allegation that they were promised carriages on streets of gold, which pretty much has been disproven.

But what was originally there that you can see from the striking out is that it

originally said Crown negotiators significantly misrepresented the benefits, and that was amended. It was removed.

And so what would have the Crown have done if we had heard an allegation that there was lying? We would have done what we did there which was we asked for particulars on paragraph 22(b). So at tab 14 of the trial record Canada asked for particulars about those misrepresentations. And we asked extensive questions about it.

And that's what we would have done if we had been told, in the past 20 plus years that there was going to be a direct allegation that there was lying. And allegations of lying matter and that's why there are the rules in the pleadings about them.

And my friends also refer to the fact that in the opening statement Mr. Townshend himself said something about this. No mention of a lie, but in the reply at paragraph 438 the quote from his opening statement, and it refers to the letter of the sheriff. And Mr. Townshend says, that was the "a-ha" moment for me, to me it said the Crown was deceiving the SON in this

treaty.

Now the fact that Mr. Townshend had an opinion about that was not -- is not relevant. In fact, at the time it was an objectionable statement but we weren't inclined to jump up in the middle of the opening statement.

It's objectionable to put in evidence or in your opening statement or in your closing statement, which it now appears in both, for counsel to put their own credibility at issue, which is what Mr. Townshend was doing.

So, yes, we think that the plaintiffs did not follow the proper pleadings proceeding and that is a simple way of dealing with this issue.

But we also --

THE COURT: I'm struggling with the idea that Mr. Townshend put his credibility at issue. I was expecting you to say that in opening -- well, let's stick with our situation in closing statements.

Counsel should be making submissions about the trial evidence, and not what their own personal views might be and what the law is as applied to that.

I don't see the audiences of expressing a personal opinion, although maybe technically not proper, certainly doesn't cause me to question counsel's credibility.

MR. BEGGS: No, Your Honour, I agree. It's the type of thing that would be more concerning to a jury and certainly not to a judge.

And perhaps I'm blurring together a couple of concepts there.

THE COURT: Well, I think I have your point, which is that our Rules of Civil Procedure require specificity when allegations of this sort are made and that the history of this matter didn't provide that in your submission and you're prejudiced because you haven't taken certain steps that you would have taken if you had been given specific notice.

I think that's the gist of it. Is that the gist of it, Mr. Beggs?

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

THE COURT: And you've given examples of what you would have done and so forth. So let's leave credibility out of it.

MR. BEGGS: Well, what we would have done is we would have cross-examined witnesses, including the Rule 36 witnesses, about --

THE COURT: Just while you were pausing, very few witnesses, Rule 36 witnesses or otherwise, had anything at all to say about the circumstances around Treaty 72. So we're talking about -- I don't know how many, but maybe one or two witnesses. I understand your point, which is whichever witnesses did say something about those circumstances you might have cross-examined.

MR. BEGGS: Yes. And this is what puts me in a bit of a quandary. Actually the Rule 36 witnesses did say a variety of things which are not part of the allegations, so a lot of their evidence was ignored, right. We had evidence about --

THE COURT: That's fine, but let's just stick to this one point.

MR. BEGGS: Sure but my point is that we actually asked questions on interrogatories about these questions raised that were raised by the plaintiffs -- by the witnesses in Rule 36.

Those questions and answers have not

been read into evidence. So we did take steps to follow-up with them. That's what we would have done and what we did do where there were extraneous allegations.

And we also wrote to the plaintiffs saying, some of your documents -- some of your allegations seem -- your evidence in interrogatories or expert reports seem to suggest you're suggesting some sort of fraud. Are you?

THE COURT: Let's take a pause there.

MR. BEGGS: Yes.

THE COURT: Are you now talking about things not in the trial record?

MR. BEGGS: Yes, Your Honour.

THE COURT: Well, I think for now I have a number of points that are in the trial record that you've raised. And I'd ask that you limit yourself to those things.

MR. BEGGS: Yes, Your Honour.

THE COURT: If you have anything else to say about this particular subject, I'm going to invite you to do that otherwise I think we should take our break. Anything else on these pleadings points?

MR. BEGGS: No, that's it, Your Honour.

THE COURT: And I shouldn't say it. I mean, if you have another quick point you want to make before one o'clock you should go ahead, but if you are embarking on a whole new subject matter area now would be a convenient time to break.

MR. BEGGS: No, Your Honour. I pretty much completed the treaty section of my submissions and my -- I was just going to turn to some miscellaneous items before closing.

THE COURT: Do you have any short ones?

MR. BEGGS: No, it will probably be about 20 to 30 minutes.

THE COURT: All right. And just remind me, Mr. Beggs, as I recall the outline that would conclude Canada's submissions? Is that correct?

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

THE COURT: So maybe 20 or 30 minutes after lunch. I just wanted to point that out so Mr. Feliciant has dusted off his submissions

over lunch. All right. We'll resume at 2:15.

-- RECESSED AT 12:56 P.M. --

-- RESUMED AT 2:16 P.M. --

THE COURT: Mr. Beggs, please proceed.

MR. BEGGS: Thank you, Your Honour.

Before the lunch break, I made a statement that my team suggests I should make some correction. Apparently when I stated that the Treaty 72 surrender had the best financial terms of a surrender of the period that invoked some sort of professional rivalry and some people think that the Six Nations deals might have been more profitable.

But just to be clear, I was simply referring to the statement by -- well, Dr. McCalla quoted from Peter Schmalz in his report. And this appears in our submissions at paragraph 933, so that's where my suggestion came from.

In an issue that sort of overlaps between the fiduciary duty and the laches arguments, I understood from my friends earlier this week that, first of all, events by the plaintiffs subsequent to the breach, in this case, the events that took place at the

negotiation, they argue that those are irrelevant and that because the -- the beneficiary of the fiduciary duty is not -- doesn't have to justify themselves essentially. It's what the actions of the fiduciary are that are important.

Which -- and certainly the actions of the fiduciary are important, but we do refer to a number of events that followed the Treaty negotiation. In particular, a number of petitions and resolutions and declarations that were issued by the Bands or portions of the Bands.

And the reason we do so is not to say that the beneficiaries are necessarily at fault for anything or to say that they demonstrate that limitation periods should apply. We're not arguing that.

The reason we mention these subsequent events is as evidence of what we say actually occurred at the negotiation. In other words, if the Band members felt that they did not have sufficient time, this would have appeared in their petitions when they complained.

If they felt that they were bullied or

pressured into it, this would have appeared in their complaints that followed the Treaty. That's our argument. The plaintiffs disagree. But that's why we refer to these events and we do believe they have some relevance in determining what actually did occur and how people reacted in 1854.

Related to that, the plaintiffs said earlier this week that one thing that the Saugeen and Nawash did do was circumvent Captain Anderson following the Treaty. That they refused to deal with him. And as I mentioned earlier today, Reverend Van Dusen led that movement to not deal with Captain Anderson.

But I think it is apparent from all the documentation and all the evidence that we've heard about the negotiations that the Band members were not always unified in what they did. There were some members that wanted to do some things and other members that wanted to do other things.

And for example, Chief Peter Jones Kegedonce -- or sorry, Peter Kegedonce Jones, in March of 1854, wanted -- well, recommended a surrender and said to Anderson that he was in

favour of it. We don't know what size he had in mind, but he did -- he was in favour of a surrender.

And following the Treaty, Chief Jones did continue to co-operate with Captain Anderson. And so it's only the groups that were associated with Captain -- sorry, with Conrad Van Dusen that tended to circumvent Captain Anderson. The people around Chief Kegedonce Jones didn't.

And I would note that the plaintiffs -- most of the community witnesses from Nawash are in fact descended from Chief Jones and from the brother of Charles Keeshig. So their ancestors are, in fact, the ones that were most in favour of a surrender.

But turning to the remaining miscellaneous topics, I've already talked about harvesting rights and our position on them.

The only further comment I wish to make was, in the reply argument, the written reply, the plaintiffs, under the heading of "Limitations and Laches", include a section dealing with the declaration of harvesting rights.

Now, I'm a bit confused because, first of all, Canada is the one arguing about this and we are not arguing that there is any limitation or laches on a declaration that harvesting rights survived. But I also feel, more importantly, that that portion of the reply is completely irrelevant. It's why the plaintiffs decided to amend their pleadings in -- around 2004 is completely irrelevant to how the Treaty should be interpreted. It makes no difference and since nobody's arguing limitations or laches, the whole section, in my view is irrelevant.

Turning to a correction I wanted to identify. This appears in our errata, but it was an item that the plaintiffs identified in their reply argument and it struck me as important enough to draw to your attention specifically. And that was at paragraph 483 of our title factum. We make a statement about -- I can't remember the first person, but the second -- the problematic statement is that we say that Professor Benn expressed a certain opinion about the scholarship on whether there's a Treaty of Niagara. And that is incorrect, so

in our errata we ask that that be struck out. And I just wanted to make sure that it caught your attention because the plaintiffs helpfully pointed out that we had misattributed something to Professor Benn.

With respect to a few items pertaining to the factual issues in the limitations arguments, one item is simply a clarification about the statute -- the Indian Act provision that is said to have banned the hiring of lawyers. Now, my friends quote from the statute and so it's there and certainly the Act is part of the materials as well, but everybody tends to use a shorthand to say, well, the Act banned the hiring of lawyers. And just for the purpose of correctness, what the Act did was it prohibited lawyers from taking money from First Nations for land claims without first getting leave from the Crown.

Now, I'm not saying that's any better. I'm not saying that gives -- that affects at all the ability of the plaintiffs to bring forward their case. I'm just making sure that it's understood what the statute actually said as opposed to the shorthand of banning. It didn't

prohibit the plaintiffs from doing anything. It prohibited the lawyers, but as I say, it may have had the same effect.

The second point with respect to the factual underpinnings of the limitations arguments is with respect to the allegation of burning documents. And I've already dealt with this earlier in my discussion about Mr. Nadjiwon's testimony. And I just wanted to make clear what Canada's position was on whether this event happened.

I submit that we can't know at this date what exactly happened, but the evidence seems to suggest a certain scenario, which is on July 1st, 1858, the Nawash office closed down and was merged with the office at Saugeen.

It is plausible, I submit, that in closing down the office, the employees of the office decided to burn either duplicate or documents that they felt were unnecessary for whatever reason.

And certainly there was a lot of people who have given versions of what happened and I would submit that those versions, largely, are consistent with that scenario. In

particular, the autobiography of Wilmer Nadjiwon he actually identifies 1958 as the year in which he was involved in watching some documents burn.

So again, I'm not commenting on whether that improved things or not, but I submit that it's entirely possible that it wasn't done in a malicious manner, but was done by employees perhaps thoughtlessly disposing of documents.

A minor point I wish to raise is that in the Book of Authorities, there's a particular Exhibit which seems to have caused some problems -- sorry, in the Exhibits there's an Exhibit, but this Exhibit also appears in the Book of Authorities. Exhibit 4338 was a paper written by Professor Darlene Johnston. When it was made an Exhibit, it was agreed that a single page would appear in the evidence as an Exhibit.

By mistake that was introduced in its entirety in the REDI database. And you may have seen as the errata passed back and forth over the last months that instructions were given that it be fixed so that it be the single page, again.

Unfortunately, this has resulted in a

single page version being there, as well as a multiple page version being there which is highlighted by the plaintiffs, because the plaintiffs rely on much more than the single page in that Exhibit. They rely on it for factual purposes. They also cite the same article in its entirety in their Book of Authorities. So I just wanted to draw that to your attention and submit that it has no place in the Book of Authorities as a factual document and that anything other than the single page should be ignored in the Exhibit record.

THE COURT: Well, let's the deal with it, Mr. Beggs. I assume you've drawn this to the attention of plaintiffs' counsel?

MR. BEGGS: Yes, I drew it to them that the wrong -- that the entire document was there, yes.

THE COURT: And did you get a reply?

MR. BEGGS: Yes, they agreed to reduce it to a single page.

THE COURT: It may just be a technical anomaly, sir, because, as I know, our database contains the trial exhibits but also contains, for some documents, a second copy, showing

passages that were put to a witness.

Now, I can't comment on this particular document, but it may be an incomplete deployment of instructions that that second copy remains.

Is it the same Exhibit number?

MR. BEGGS: I believe so.

THE COURT: So that may be all there is to it. Let me ask Mr. Townshend.

Mr. Townshend, assuming you've looked at this and the exhibit was a single page, then obviously any marked up version should also be limited to that same page. Do you agree with that?

MR. TOWNSHEND: Yes, I'd like to ask Mr. Brookwell to speak to that.

THE COURT: All right. That's a good idea. Mr. Brookwell?

MR. BROOKWELL: Yes, Your Honour. The exhibit has been corrected but the marked up copy, Mr. Beggs is correct, was not removed, which is an oversight on the instructions given to ^Mr. Crossley.

THE COURT: All right. Well, I take it that can be readily corrected. Is that --

can you take care of that, Mr. Brookwell?

MR. BROOKWELL: Yes, I can, Your Honour.

THE COURT: Thank you, Mr. Brookwell, and thank you, Mr. Townshend.

Mr. Beggs, that only leaves the question of the habit of some to -- not just these parties, to put certain kinds of documents in books of authorities and the use that can be made of them, which is a matter of legal principle.

So if I was to say that no reports could appear in books of authorities, that would affect more than just this one document. The more pertinent question is what use can be made of it as something that is not in evidence. And you're welcome to make a submission about that if you wish to do so.

MR. BEGGS: Yes, Your Honour. I submit that the document as it appears in the Book of Authorities, which is the paper by Darlene Johnston, has factual descriptions of the customary practices, in particular, I believe, with respect to fishing and whatnot. And that such references as factual matters are

not properly in a Book of Authorities and should not be relied upon in the written materials.

THE COURT: In the written materials?

MR. BEGGS: In the written submissions. The plaintiffs' written submissions.

THE COURT: Well, I would assume you take the same position if it was relied upon in oral argument, is that not the case?

MR. BEGGS: That's correct, yes.

THE COURT: So I understand your point. It's not really a matter of whether it's in the Book of Authorities or not. I think what you're saying is that factual statements in a document not in evidence are not in evidence.

MR. BEGGS: Yes, Your Honour.

THE COURT: Unless they're in evidence in some other way. And I understand that position and we can move on from that.

If the plaintiffs have anything they want to say about it, they can do that in reply.

MR. BEGGS: Thank you, Your Honour, that's clearer than I put it, yes.

The only remaining item, pending any questions you may have, is with respect to a

question that was posed to the plaintiffs by yourself a few days ago with respect to what land is being sought in the Treaty claim.

And you clarified with the plaintiffs that it was only Crown land, Canada's land, Ontario's land, or perhaps Municipal road allowances or such.

That differs from the plaintiffs' materials in which they rely -- which in addition to those lands, they were also seeking lands which are held -- well, the way they put it is they're not seeking lands which are held by bona fide purchasers for sale without notice or -- yeah.

And the point is that there is a category of people who arguably are -- who the plaintiffs might argue are private land holders but who have had notice. And I take it from Mr. -- from the answer that the plaintiffs gave that they are no longer pursuing those individuals. The individuals who might have certificates of pending litigation placed on their properties.

THE COURT: Well, first of all, I think it was either Ms. Pelletier or

Ms. Guirguis who I asked that question.

Is counsel who I asked that question able to come on line? I'm not sure who's here right at the moment.

MR. TOWNSHEND: Yes, I could answer that.

THE COURT: Thank you for offering, but was it Ms. Pelletier who's sitting right there who I asked the question of. Ms. Guirguis perhaps?

MS. GUIRGUIS: It was me, Your Honour.

THE COURT: Ms. Guirguis, all right.

MS. GUIRGUIS: Yes.

THE COURT: Well, Mr. Townshend I'll give you a second crack at it if necessary, but I think I'll start with Ms. Guirguis who I did ask the question, and I did use the phrase "private parties".

So, Ms. Guirguis, Mr. Beggs is asking for some clarification which is, is there a subset of what might be called private parties over who you are seeking a constructive trust on their lands. And be careful how you answer my question because I may be asking next why they are not sued?

MS. GUIRGUIS: So, Your Honour, for private parties, with respect to the issue that Mr. Beggs is pointing to where private parties have purchased land and have notice of the claim and this has happened in the case of road allowances, unopened --

THE COURT: Yeah. I'm not worried about the road allowances and the open roads because the Municipalities are defendants to this lawsuit and that is why they are defendants. They're not said to have done anything wrong. They just happen to be the owners of certain properties that are the subject of a potential constructive trust claim.

No other defendants, however, so that gives rise to my question.

MS. GUIRGUIS: That's correct, Your Honour. And so with respect to what Mr. Beggs is speaking about with the certificate of pending litigation, where private parties have sought to purchase lands that were subject to the claim, the plaintiffs have provided the consent to do so subject to registration of the certificate of pending litigation on those lands.

THE COURT: And you would say those are not what I call bona fide purchasers of good value without notice because they had notice.

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

THE COURT: So to recap what you and I discussed earlier this week, the lands over which you are seeking a constructive trust are four categories, not three.

So lands held by Canada, lands held by Ontario, lands held by the Municipalities, and lands held by private landowners who you submit had advance notice of the claim before they purchased their properties, is that about right?

MS. GUIRGUIS: That's about right. And if I can leave it to Mr. Townshend to correct me if I misstated that or if there's anything else that you have.

THE COURT: All right. Well, I'll give him that chance.

Mr. Townshend, do you have difficulty with that?

MR. TOWNSHEND: What I want to clarify is these parcels of lands were road allowances sold by Municipalities. So we were prepared to

let that happen on the condition of a --

THE COURT: All right. So are they limited to road allowances that were sold by the Municipalities?

MR. TOWNSHEND: Yes.

THE COURT: All right. And what is your answer to the question of why those new owners are not before the court?

MR. TOWNSHEND: That would be a matter of Phase 2. Well, I guess that would be a matter of --

THE COURT: Well, no, it wouldn't.

MR. TOWNSHEND: If they had wanted --

THE COURT: No, no, no, no.

MR. TOWNSHEND: There's a long history of this case that began with the Township of Keppel conveying a lot of parcels of land to individual landowners, us intervening in that, having by-laws quashed. We made decisions about joinder much earlier when the position was different.

I would submit that agreeing to a certificate of pending litigation is sort of acknowledging that there's something going on. And if at that point they had said, we want to

be in the litigation, well, I guess that would be part of the negotiation. That was part of the deal that we were willing to let those conveyances go forward.

THE COURT: Well, I don't have any evidence about any of that. I only have the overarching fairness issue that parties against whom you seek a remedy, and especially something like this, should be before the court if you want to get the relief or you don't get it. Now, there may be more to it than that, so I'll leave you to think that over.

But I do appreciate Mr. Beggs drawing it to my attention. And it is helpful to note that they were road allowances, so they started off in the hands of the parties to this litigation, but I'm not sure that that totally resolves the issue.

But I do appreciate your stepping in in the middle and clarifying that, and if you want to say anything more about it, I'm happy to hear from you in your reply.

All right. Thank you, Mr. Beggs, for drawing that to my attention, please go ahead.

MR. BEGGS: Thank you, Your Honour.

That was the last of my miscellaneous items and actually completes the submissions I wish to make, but obviously I am open to your questions.

THE COURT: I did check at the lunch, but I'm going to check one more time to see if there are any outstanding questions.

The only other question I have which is not technically outstanding, that I raised offline with the parties, Mr. Beggs, but perhaps you can help me. What's the status of answering my question about the authenticity agreement? I think I posed it last week by email. Is that being discussed? I haven't heard anything.

MR. BEGGS: Yes, there has been discussion between Mr. Townshend and Mr. Lemmond and I can't recall if I participated or if I was just a silent observer, but there has been discussion. I'm not sure if we've come to a final statement on it though.

THE COURT: Well, I'd like to hear a report of where counsel are. And I've given where we are in the argument. I'd like to hear that by midday tomorrow sometime, after lunch perhaps.

MR. BEGGS: Well, I could give what I

understand to be the issue.

THE COURT: No, no, no. So thank you for offering. I'd rather let you all finish and hear how it turned out.

All right, I then turn it over to I think Mr. Feliciant is speaking first for Ontario, is that correct?

MR. FELICIANT: Yes, Your Honour, good afternoon.

I'll just start by saying my name is David Feliciant. I'm counsel for Ontario in this matter, along with my colleagues. I'll provide just a very brief couple of words about the claim and then I'll also set out our order of presentation.

So I'm going to start with those brief words. Mr. Ogden, Richard Ogden, will follow with submissions about the Aboriginal title action. Peter Lemmond will then speak to the harvesting rights issue in the Treaty action. I will then speak to the breach of fiduciary duty and breach of the honour of the Crown claims in the Treaty action. Peter Lemmond will return to address Crown immunity. Julia McRandall will address the first consideration under the laches

test. And Jennifer Lepan will then finish with a discussion about the second consideration under the laches test.

Ontario is committed to reconciliation and does prefer that matters resolve outside of litigation where possible. Unfortunately there are cases that cannot settle for a wide variety of reasons or cannot be resolved without resorting to litigation.

It is the case that these are two such pieces of litigation. With respect to the Aboriginal title action, Ontario's defence of the Aboriginal title action should not be interpreted as a reluctance to acknowledge Aboriginal rights where they are established by reference to the evidence and the law.

But in this particular case, with respect to this Aboriginal title claim that we face in this litigation, an Aboriginal title right to the bed of one of the Great Lakes, the evidence tendered in this trial does not support a finding that the plaintiffs in fact have Aboriginal title. Furthermore, it's not a right that can be reconciled with the Common Law.

With respect to the Treaty claim in

this case, which seeks declarations that the Crown breached its fiduciary duty and the honour of the Crown in relation to the making of Treaty 72, we find ourselves in litigation that requires the parties in the court to critically exam and evaluate evidence in order to make a proper determination.

Ontario's position in this case, upon an examination of the evidence presented to the court in this trial, is that the evidence and the applicable law does not support a finding that the Crown breached its fiduciaries or the honour of the Crown.

So at this point, I turn it over to Mr. Ogden who will address the plaintiffs' Aboriginal title action.

MR. OGDEN: Good afternoon, Your Honour.

And it is appropriate for me to say bonjour to the members of the Chippewas of Saugeen First Nation and the members of the Chippewas of Nawash Unceded First Nation and say again, Miigwetch for the hospitality in hosting us for two weeks last year at the Saugeen Reserve and the Neyaashiinigmiing Reserve near

Cape Croker in this proceeding.

So it's very appropriate for me to acknowledge the Mississaugas of the Credits. I am in Mississauga at the moment within sight of the Credit River on lands that they occupied.

Your Honour, I expect I will take about 45 minutes or an hour, subject to any questions that you have.

Mr. Lemmond has given our position. We also rely on our written submissions which you have.

Today, though, I'm going to address our submissions in a different order than set out in our written submissions.

I'm going to start with some basic overview of the principles for examining the facts and determining the existence of an Aboriginal right. And then I'm going to look at the facts and then I'm going to address briefly justification of infringement and some of the matters that have arisen this week in the plaintiffs' reply submissions.

And I'm doing this because I want to spend more time on what the Common Law is doing when it recognizes an Aboriginal right.

Before getting into the process of recognizing Aboriginal rights, it's important to recognize a couple of key principles. It's not always clear what role they play, but they should be acknowledged to be guiding principles.

There are three. That's the honour of the Crown, reconciliation and then the purpose of section B5, which is reconciliation in a mutually respectful relationship.

I'll turn to my submission on the recognition of Aboriginal rights and ask Ms. Singh, who's assisting me, to show the court paragraph 50 of the Tsilhqot'in decision which is at tab 108 of SON's Book of Authorities. And if she can enlarge it, please? And there this is Chief Justice McLachlin speaking for the Supreme Court. And she says:

> "The claimant group bears the onus of establishing Aboriginal title. The task is to identify how pre-sovereignty rights and interests can properly find expression in modern common law terms."

Another quote I'd like to read is from the R. v. Marshall; R. v. Bernard case, also

written by Chief Justice McLachlin, and it precedes the Tsilhqot'in quote. The R. v. Marshall; R. v. Bernard case is at SON's Book of Authorities at tab 79.

I'll ask Ms. Singh to turn that up as well, please. It's paragraph 48 of the R. v. Marshall; R. v. Bernard case. So it's a slightly longer extract, but I will read it. Enlarge it, please.

> "The Court's task in evaluating a claim for an aboriginal right is to examine the pre-sovereignty aboriginal practice and translate that practice, as faithfully and objectively as it can, into a modern legal right. The question is whether the aboriginal practice at the time of assertion of European sovereignty (not, unlike treaties, when a document was signed) translates into a modern legal right, and if so, what right? The exercise involves both aboriginal and European perspectives. The Court must consider the pre-sovereignty practice from the perspective of the aboriginal people.

But in translating it to a common law right, the Court must also consider the European perspective; the nature of the right at common law must be examined to determine whether a particular aboriginal practice fits it. The exercise in translating aboriginal practices to modern rights must not be conducted in a formalistic or narrow way. The Court should take a generous view of the aboriginal practice and should not insist on exact conformity to the precise legal parameters of the common law right. The question is whether the practice corresponds to the core concepts of the legal right claimed."

Thank you, Ms. Singh.

So when the court was talking about the task, Supreme Court was talking about the task, it was talking about the court's task. The task is translation into a modern legal right. And when it's talking about pre-sovereignty rights and interests, I submit it's talking about pre-sovereignty Indigenous

practices, customs, laws and traditions. That's what I'm going to be talking about. And we're not talking about pre-sovereignty rights and interests, because before sovereignty there was no Common Law, so we talk about matters of fact that become translated into rights.

So the task for a court addressing an Aboriginal rights claim is to identify how pre-sovereignty Indigenous practices, customs, laws and traditions can properly find expression in modern Common Law terms.

The court must take the evidence, determine the facts from it, and then identify how those facts can be expressed in modern Common Law terms.

So what the court is doing, I submit, is to actively determine how to express those facts in Common Law terms.

Of course, the claimant bears the onus. The onus of proof means that it cannot be assumed there are sufficient facts found in Common Law rights, but also means that it cannot be assumed that the Common Law is able to express those rights in modern Common Law terms.

So the point is the court must seek to

accommodate Indigenous experience with rights. And that's the process of reconciliation.

However, there are limits to the accommodation to the Common Law by the Indigenous experience. Expression must be in modern common law terms, must make sense to the law. And as the Supreme Court said in Tsilhqot'n, that translation, that expression of modern Common Law terms must be done properly. I submit that means an expression cannot be forced.

This is the same as the idea in R. v. Marshall; R. v. Bernard that the pre-sovereignty practice must fit modern Common Law right.

There's another part of R. v. Marshall; R. v. Bernard that I'll ask Ms. Singh to turn up at paragraph 69. Starting at "Having evaluated."

> "Having evaluated the evidence, the final step is to translate the facts found and thus interpreted into a modern common law right. The right must be accurately delineated in a way that reflects common law traditions, while respecting the aboriginal

perspective."

Thank you, Ms. Singh.

The Supreme Court earlier expressed this idea will properly find expression in modern Common Law terms in the Van der Peet case. That's at paragraph 49 of that case. And the case is found in SON's book of authorities at tab 89. And there it said that the claimed Aboriginal rights:

> "[...] must be framed in terms cognizable to the Canadian legal constitutional structure."

Again that's the same idea that's being expressed there.

I submit that these ideas are properly find expression are fit and cognizable to the constitutional Common Law in Common Law structure of the idea of giving effect to the non-Indigenous Common Law perspective.

The requirement to consider both perspectives comes from the fact that Aboriginal rights are -- to achieve reconciliation. That is the goal. And as was said in Delgamuukw at paragraph 81 Aboriginal rights of which Aboriginal title is one, are there to bridge

Aboriginal and non-Aboriginal cultures. And this idea was expressed in Van der Peet, at paragraph 42, as that these rights are inter-societal rights.

So the requirement to consider both perspectives arises from the honour of the Crown. This means that it would be dishonourable not to consider the Indigenous perspective. But by the same token, it is not dishonourable to consider the non-Indigenous Common Law perspective.

Indeed, as the Supreme Court said in Tsilhqot'in at paragraph 14, the dual perspectives bear equal weight.

Now, it sounds straight forward. We start off with the facts and determine the facts and then we see whether they fit the modern Common Law right. But it's not always a two-step linear process. For a start, the court must consider what sort of factual findings it has to make. And this analysis is determined in part by the nature of the rights claimed.

For example, we know for Aboriginal to dry land from Delgamuukw and R. v. Marshall; R. v. Bernard and Tsilhqot'in that the court should

look for facts of occupation and exclusivity. The court must consider those facts from the perspective of the claimant First Nation in a sensitive manner, but the task is to find facts of occupation and exclusivity. And these concepts come from the Common Law perspective about the right claimed.

More specifically, with a right sought is a right to exclude, there must be facts proving exclusivity. The Common Law perspective is that a right to exclude must be founded on facts at sovereignty that the First Nation had the actual capacity to exclude.

And if I can ask Ms. Singh to turn up paragraph 155 of Delgamuukw, which is at tab 18 of SON's Book of Authorities.

If we start from the 6th line down:

> "Exclusivity, as an aspect of the aboriginal title, vests in the aboriginal community which holds the ability to exclude others from the lands held pursuant to that title. The proof of title must, in this respect, mirror the content of the right. Were it possible to prove

title without demonstrating exclusive occupation, the result would be absurd, because it would be possible for more than one aboriginal nation to have aboriginal title over the same piece of land, and then for all of them to attempt to assert the right to exclusive use and occupation over it."

Thank you, Ms. Singh.

Now, in relation to this quotation, I note in SON's submission this week that it is theoretically possible that lack of exclusivity as a matter of fact would not preclude a finding of exclusive occupation. That submission, Your Honour, is contrary to the quote I have just read.

At most, one of the lenses can supplement the others. Proof from one of the lenses can supplement one of others.

In R. v. Marshall; R. v. Bernard, the Supreme Court --

THE COURT: Just before you go on, my impression, I discussed that with counsel was that she would was not saying that you could utterly fail and still establish title, but she

was saying that it may be that looking at the three aspects of the test, the three lenses, and some may be stronger or weaker other than others that you could still see. Maybe that's a nuance, but that's what I heard. I didn't hear that they would meet the test in Tsilhqot'in without any demonstration of exclusivity.

But while I've interrupted you, I'm going to ask this question now, since we're talking about it. In Van der Peet, Chief Justice Lamer said the first thing you have to do before you do anything else is identify the nature of the right being claimed.

And I said to counsel earlier this week, that it seemed to me that the right being claimed, and I'll leave aside the two islands, that the right being claimed was Aboriginal title to submerged land, which has never been dealt with in Canada. Now, I'd like your submission as to whether you think that is the right being claimed. I know your submission whether it's been dealt with in Canada.

There's two places this argument can be addressed, as you have pointed out in your written material. The application of the

Tsilhqot'in test as already stated, and as the plaintiffs' submit ought to be applied, itself has room to have regard for the nature of the land claimed.

And the other approach, which is in your material, is to say, well, you have to begin at the beginning and say, is there an Aboriginal right and Chief Justice Lamer says you have to begin by saying what is the right being claimed? And work from there.

MR. OGDEN: Thank you, Your Honour. There are two parts to that I will address.

The first is to note by way of context that the statement in Van der Peet arose in these cases, in this trilogy of cases in the mid-1990s in context of regulatory prosecutions.

And the Supreme Court dialed back a little bit from that in the context of civil actions seeking a declaration as to right. For example Delgamuukw and R. v. Marshall; R. v. Bernard and then Tsilhqot'in.

Lax Kw'alaams, which is in the authorities, was a prosecution and there Justice Binnie says the best thing to do is to determine

what rights to claims, give a fair assessment of what rights are being claimed.

My point is, you need to start with something. There's a claim. It's a civil action, but then it's an iterative process. There's a little bit of backwards and forwards here.

And if I move on then -- so it's not straightforward.

THE COURT: No, but I think at least I need your response to my suggestion that the right being claimed here is Aboriginal title to submerged land.

MR. OGDEN: Yes, so I do have a response to that, Your Honour. If you give me a moment.

THE COURT: All right. And sorry, which of Justice Binnie's cases were you referring to just now?

MR. OGDEN: It's called Lax Kw'alaams, the X is a hard X, L-A-X.

THE COURT: You can get to it when you get to it, Mr. Ogden.

MR. OGDEN: I appreciate that, Your Honour, and it won't be long. And the reason I

will do that is because the next submission I was going to make is about the Common Law perspective as to occupation and what it is that's being occupied.

And the -- I've made a submission about the Common Law perspective as to exclusivity, but there has to be actual exclusivity. That the claimant group must have been able to exclude others if it could have had sovereignty. And that is the ultimate facts that must be proven.

The requirements for the proof of occupation similarly come from the Common Law perspective on the rights sought.

And the Common Law perspective informs the requirements for proof of this right. And the perspective is that it's sovereignty of -- the First Nation actually used the land and enjoyed its benefits.

And so before turning to the question of what SON actually claims, I'd like to ask Ms. Singh is to turn up paragraph 38 of Tsilhqot'in.

This gets the Common Law perspective which requires that the First Nation objectively

use the land and enjoyed its benefits in a way that could have been perceived by an observer. So this is the Common Law perspective coming in at an early stage of the translation process.

So:

> "To sufficiently occupy the land for purposes of title, the Aboriginal group in question must show that it has historically acted in a way that would communicate to third parties that it held the land for its own purposes. This standard does not demand notorious or visible use akin to proving a claim for adverse possession, but neither can the occupation be purely subjective or internal. There must be evidence of a strong presence on or over the land claimed, manifesting itself in acts of occupation that could reasonably be interpreted as demonstrating that the land in question belonged to, was controlled by, or was under the exclusive stewardship of the claimant group. As just discussed, the kind of

acts necessary to indicate a permanent residence and intention to hold and use the land for the group's purposes are dependent on the manner of life of the people and the nature of the land."

Just by way of an aside, evidence of nonphysical interaction is irrelevant. We're not making that submission. But the evidence of Indigenous laws and the Indigenous practice or customs, Indigenous laws, can only inform how the court assesses and weighs actual objectively perceivable interaction with the claimed resource. The claimed resource we say here is the lake bed.

Now, while we're on this quote, which contains the statement that occupation cannot be purely subjective or internal, which SON in its submissions acknowledges, SON proposed a new test, which I submit would be to reject the Tsilhqot'in test and move, as my friend said, from an objective to a subjective test.

And which I understand to be -- that the question to be, did SON believe, based on its Indigenous perspective that its activities

demonstrated exclusive occupation of its territory? And this, I submit, would be to ask whether SON considered that it satisfied the factual requirement for proof. And that would be inconsistent with the Tsilhqot'in test.

So there are -- what I've been covering the last few minutes is to show that the Common Law perspective informs the notion of occupation, what is necessary for occupation and what is necessary for exclusivity. But there are additional aspects of the Common Law perspective that arise in this case.

The first is the -- the main one really is that the lands are submerged and the Common Law treats water spaces differently from dry land spaces.

Now, another aspect is that the lands are in the Great Lakes. We cover that in our written submissions, so I'm not going to go into that in any greater depth here, unless you wish me to.

These additional aspects of the Common Law perspective influence the type of facts that are necessary for proof and the ultimate right that is available.

An important part of the Common Law perspective is that at Common Law there is a paramount right, public right, of navigation -- the public right to navigate is a right to be in and to travel over a space, if that space is navigable water.

And Ontario submits, as we have in our own submissions, that such a right is directly inconsistent with and opposite to a right to exclude all people and all purposes from that space which is what SON is asserting in its claim.

The question is what does the court do with this inconsistency? Ontario submits that because of the public right of navigation, the Common Law cannot accept the Aboriginal title right to exclude all people and all purposes from the space above the lake bed. Even if the evidence showed that SON could, at sovereignty, exclude other people from the claim area that fact could not be given effect in Common Law terms.

THE COURT: I'm having trouble, Mr. Ogden, with the terminology, "cannot accept".

Now, the question, as I understand it from the case law, is you must decide whether or not there is such an Aboriginal right. Not every custom or practice will meet the requirements to be an Aboriginal right.

And in deciding that, you made some submissions about the role of the Common Law, but the test isn't whether the Common Law accepts something. The question is whether the custom or practice ought to be recognized as an Aboriginal right. And built into that is a question of whether it can appropriately be translated into a modern legal right.

So the point you make still applies. I just -- I have some difficulty with the terminology.

MR. OGDEN: Well, I think it's important to step back from the idea of finding an Aboriginal right that is then translated into a Common Law right.

THE COURT: Well, I wouldn't put it that way.

MR. OGDEN: Sorry?

THE COURT: I wouldn't put it that way.

Aboriginal right is a legal term in our constitutional law. It is a conclusion, not a beginning.

So, for example, these First Nations have an Aboriginal right to fish, which is constitutionally protected. They don't start off with the Aboriginal right and then move forward. They demonstrated and concluded that they had the right. So maybe it's just terminology.

But the cases say the first step is to set forth the right claim, I don't have it yet but I'm claiming it, in this case title to the lake bed, and then start asking the questions about whether such an Aboriginal right should be recognized or not.

In this instance, it has not yet been recognized in this country. At least not narrowly as title to submerged land, that there is such an Aboriginal right to begin with.

Do you have a problem with that way of looking at it?

MR. OGDEN: No, that makes sense, Your Honour, in the case law.

I'm quite specifically and

intentionally referring to the fact of exclusion because what I'm saying is that the Aboriginal title that is claimed, which is beneficial ownership of the lake bed, the right to exclude everyone for all purposes from the lake bed, that's the Aboriginal title claim, that's the end result, is not available.

THE COURT: I understand that. I understand your point, which is whether you proceed in the order I've articulated or in some other order, you have to ask the question whether or not the custom, practice or tradition that predated 1763, applying the established Aboriginal right law, as opposed to Aboriginal title law, because that's the next step, can and should be recognized as a modern legal right.

And in doing that you have to consider both perspectives so you're focused on how the Common Law perspective would be incompatible with recognizing such a right, as I understand it. Is that about it?

MR. OGDEN: Yes, that's correct.

THE COURT: All right. Please go ahead.

MR. OGDEN: Thank you.

A slightly different analytical approach to focusing on the Common Law perspective is to ask what incidents of sovereignty --

THE COURT: Just -- can I just interrupt?

Mr. Townshend, were indicating you wanted to say something? No?

MR. TOWNSHEND: No, I'm sorry no.

THE COURT: Don't apologize. Just don't want to miss out on a request to speak if you're making one.

Back to you, Mr. Ogden.

MR. OGDEN: I might ask though if Mr. Townshend is not going to say something, whether he might turn his camera off, please?

THE COURT: We have a representative of each party with their camera on, Mr. Ogden.

MR. TOWNSHEND: That's right. And I think he was suggesting that Ms. Pelletier and I should not both be on.

THE COURT: Oh, I see.

MR. TOWNSHEND: The difficulty is that we both dealt with Aboriginal title in different aspects and we're not always clear what

Mr. Ogden is going to say next.

THE COURT: Mr. Ogden, can you manage?

MR. OGDEN: Yes, Your Honour, certainly.

THE COURT: All right, please go ahead.

MR. OGDEN: Thank you. I'm not always sure either, Your Honour, so I understand why there might need to be two people.

The -- Your Honour has been referred to in at least in the written submissions an extract or a quote from the Mitchell and NMR case where Chief Justice McLachlin talked about the doctrine of continuity and said that Aboriginal rights survived this notion of sovereignty except where they are incompatible with the Crown's assertion of sovereignty or surrendered voluntarily by the Treaty process or extinguished by the government.

In that case, as in SON's Book of Authorities, tab 48, and the paragraph was 10.

And I say that this idea of incompatibility with the Crown's assertion of sovereignty is the same idea expressed differently as the Common Law perspective about

the nature -- the nature of the right that is available, irrespective of what pre-sovereignty facts can be demonstrated.

So Ontario submits that the public right of navigation is an incident of the sovereignty that the Crown asserted in 1963 -- or 1763.

So what follows from all of this is that any interest that SON had at 1763 in the use and exclusion from the claim area must be disaggregated when translated into Common Law Aboriginal rights.

That is, any such interest must be considered in parts in this context, the Great Lakes and submerged lands within the Great Lakes.

And this disaggregation follows not just from the Common Law perspective about exclusion from the claim area, but also from the Common Law perspective, and that's the right of navigation.

But also from the Common Law perspective about the type of resources in relation to which are rights to exclude can exist.

In Canada's written submission, they note that there is no right that Common Law to ownership of flowing water, that's an example.

So the Common Law perspective, I submit, defines the resources that can be subject to an Aboriginal title claim.

SON's claim appears to accept this, Your Honour, that the context is different and that the Common Law perspective is different, but SONs seeks a right to the lake bed.

And SON says that incidents of its Aboriginal title are rights to the water above the lake bed, the contents of the water above the lake bed, including the fish, the contents of the land below the lake bed, rocks, minerals, sand, and also the rights to keep people out of the space above that lake bed.

SON is not claiming Aboriginal title to the water and saying that it has as an incidence of that right to the water, rights to the contents of the water, rights to the land below the water, to the contents of the land below the water, and then the rights to keep people from coming onto or into that water.

SON's primary claim is to the lake bed

because, it appears, SON understands that Common Law rights to ownership or resources within an area are framed primarily in terms of land.

This focus on the lake bed as the claimed resource has an impact on the relevance of the evidence and the facts that prove title to that resource.

In Tsilhqot'in at paragraph 50, the Supreme Court said, I'll just read this out:

> "In determining what constitutes sufficient occupation, one looks to the Aboriginal culture and practices, and compares them in a culturally sensitive way with what was required at common law to establish title on the basis of occupation."

Paragraph 42 --do you have a question, sorry, Your Honour?

THE COURT: Yes, but I'm going to wait to hear about paragraph 42 first.

MR. OGDEN: There will be another paragraph also from R. v. Marshall; R. v. Bernard.

THE COURT: Well, this seems to illustrate the overlap that I was mentioning,

which is Tsilhqot'in is about dry land and we know what the test is for dry land, at least as of Tsilhqot'in. So when you're talking about what it said about occupation it is in the context of dry land. And it's open to be argued that what it says about the three branches of the test should be adjusted or considered from the standpoint of submerged land and there's rhetoric to that effect.

Whereas what I thought you were talking about is whether or not there should be recognized an Aboriginal right to title to submerged lands in the first place, which also requires a consideration of these same factors.

So I don't have any problem with you referring to Tsilhqot'in. I just wanted to make sure I understand, are you saying that you're ^^ arguing Tsilhqot'in now or you're just picking up useful principles from Tsilhqot'in and saying they apply in both places?

MR. OGDEN: I'm not saying that that Tsilhqot'in applies directly.

What I am trying to do is to show the way that the court, Supreme Court, has -- conducts translation, how it looked at the right

that is needed to be claimed and what it says a trial court must look for. And then why it says that a court must look for those things.

So here it's saying a trial court must look for what was required at Common Law. So it's looking at the Common Law perspective. And then the next two quotes I think might help a little bit here.

So I'm doing two things here. You're right, with respect, Your Honour. One I'm saying there's no Aboriginal title to lake beds. And then I'm saying, because you can't have a right that would be inconsistent with the paramount right of navigation. And that is the -- an inconsistency would arise on the basis of the right that SON claims, which is to exclude all people for all purposes.

But also if you were to get past that, and in addition to that, there is a question of how do you prove occupation. What it means to prove occupation in this context. And it must take into account the Common Law perspective that submerged lands are different.

So also then at paragraph 42 in Tsilhqot'in, the Supreme Court said:

"[...] a culturally sensitive approach suggests that regular use of the territories for hunting, fishing, trapping and foraging is 'sufficient' use to grant Aboriginal title, provided that such use, on the facts of the particular case, evinces an intention on the part of the Aboriginal group to hold or possess the land in a manner comparable to what would be required to establish title at common law."

And here again, I say we have submerged land, so you need to look at what would be required to establish title to submerged lands at Common Law.

And then paragraph 66 of R. v. Marshall; R. v. Bernard, it reads:

"In each case, the question is whether a degree of physical occupation or use equivalent to common law title has been made out."

So these -- the Common Law cases, and we list them at paragraph 93 of our written submissions, outside of the Aboriginal law

context that deal with occupation of submerged lands are almost, without exception, focused on physical interaction with the lake bed.

Your Honour, I just want to note there's an administrative matter, as it were. SON and Ontario cite a case called Roberts and Swan Road Estates and there is a decision of the England and Wales high court from 2007.

And Ontario refers to that at paragraph 93 of its submission and SON refers to it at paragraph 1029(b). And there is, in fact, also a decision in that proceeding from the England and Wales Court of Appeal, which I'll give for the record as ^Roberts v. Crown Estate Commissioners, 2008 EWCA, COV98. And it doesn't bear directly on the submissions that the parties have made, but it should be there for completeness.

I also note that Ontario's referred to the lower court decision in paragraphs 164 to 165 and 224, but also wishes to add reference to 167, paragraph 167 and 182.

I refer to this case because this is the one case in that list of cases we gave at paragraph 93 in which there may be no direct

context with the land that is claimed.

It talks about shooting over land. It's not clear, however, what that land was and SON uses the case in support of the position that occupation ^ title ^ so it's not clear that the land was submerged at all times or from the facts of the case how the shooting took place.

So this is a lower court decision in England, but we provide it for the sake of completeness.

Otherwise our submission is that the Common Law perspective in relation to occupation of submerged land is that occupation requires, to some degree, physical interaction with the lake bed.

THE COURT: We're about to take the afternoon break. Before we do that, Mr. Ogden, on the break, take a look again, I'm sure you've looked at it before, at the Lax Kw'alaams case that you mentioned earlier at paragraph -- I think it's 46, where there is summary of certain steps. I might ask you a question about that after the break.

MR. OGDEN: Yes, Your Honour.

THE COURT: All right, we'll take 20

minutes.

-- RECESSED AT 3:26 P.M. --

-- RESUMED AT 3:48 P.M. --

THE COURT: So, Mr. Ogden, you will have seen at that paragraph of Justice Binnie's decision a summary of the steps required to prove an Aboriginal right, and it is the first step that I have been asking you about, which is to define, as put by Justice Binnie, the precise nature of the claim.

Now you did make a submission to me before the break, which may well be an answer to my question. You said the claim was for the lake bed of one of the Great Lakes, which is more precise than what I asked you about which is simple title to submerged land more generally.

But I wanted just to give you another chance, if I've missed something, to indicate what you say the precise nature of the claimed right is. And perhaps it is what you said before the break, but you can clarify that for me.

MR. OGDEN: There are two parts. I would ask Ms. Singh to show us that page,

please, that paragraph from the Lax Kw'alams. The first thing, as I said before, this is dealing with a claim to an activity rights, to an Aboriginal right, that is not an Aboriginal title. An Aboriginal title is a title of Aboriginal right, but I don't take this and haven't taken this to be the description of the approach to proof of Aboriginal title.

THE COURT: That's where we seem to be missing each other. Before you set about proving whether or not you have Aboriginal title, you must first prove that there is an Aboriginal right to title to submerged lands. And that is the novel legal issue that is in front of me.

I understand Ontario's main position which is I don't need to decide it, because if one accepts the plaintiffs' position, which is that one simply applies the test for dry land to submerged land, then it hasn't been met. I understand that's your main position.

But the alternative position gives rise to this question. And one of the things that I want to make sure I understand from counsel is, what do you say is the precise

nature of the claimed right?

MR. OGDEN: Just, I'll answer that directly first then. The precise nature is, it's called Aboriginal title, but let's call it a right to exclude all people for all purposes from the place above the lake bed, and a right to beneficial ownership of the lake bed and all resources above it and below it.

THE COURT: So does Ontario concede that there is -- the possibility of Aboriginal title in submerged land?

MR. OGDEN: No. So what I'm --

THE COURT: Because you are presume that there is a right when you answer my question in that way, and you move on to describe what bundle of rights the plaintiffs will get if they are successful. And that is not what I'm talking about.

MR. OGDEN: No, I understand, Your Honour.

I'm not presuming that there is such a right available. I'm still at the stage of describing what right is claimed.

And Lax Kw'alams here did not deal with the question of what can be claimed, and

I -- to turn back to Tsilhqot'in, this approach was not adopted in Tsilhqot'in.

THE COURT: It did not need to be adopted.

MR. OGDEN: No, but it hasn't --

THE COURT: Because it had already been established in prior case law that there was an Aboriginal right to Aboriginal title and the only question remaining was, had the necessary components been met to afford that right in that particular case? That was all that had to be dealt with.

There are earlier cases, one of which we talked about earlier in the week, which explain that Aboriginal rights fall on a spectrum; that at one extreme end of the spectrum is the Aboriginal right to Aboriginal title and so forth. And I don't have any problem with your primary position which says, okay, let's apply the law as the plaintiffs have submitted and both governments say on an evidentiary basis the test hadn't been met.

And I understand your position that it may be I can stop there. But if for whatever reason I feel I can't stop there, I do want to

at least have the position on, okay, what is the right being claimed? Let's not assume that it has already been recognized.

And I characterized it earlier in the week with the plaintiffs as a right to title to submerged land. And it would have the same characteristics, presumably, as Aboriginal title for dry land. You said this afternoon I thought another slightly narrower version of that which was the lake bed to the Great Lakes. Now, which is certainly also a correct description of what's being claimed and maybe arguably on this quote more precise.

But I think if you go on ahead I think I have probably got what I can get on the subject of the precise nature of the right being claimed.

MR. OGDEN: Well, I think Your Honour, there are two parts or three parts. First is, I really don't have an answer that I can give because a lot of this is not readily answerable in terms of authority and legal rights, and part of the issue is that the idea that the Common Law perspective does not allow for a right to exclude from submerged lands, is not easily --

should not be categorized as a legal submission, per se. It is part of the process of finding the intersocietal right.

And I want --

THE COURT: But it is part of this process too as set out in the Lax case. It is not omitted. It is four-square part of the question.

I was trying to think of an analogy, but the danger there is that it could be -- to be outside my facts it could be sort of too far outside.

But what we have here is admittedly novel issue of the question of whether or not an Aboriginal right should be recognized if the right requested is title to what I called submerged land -- today you call it the lake bed of one of the Great Lakes -- at all.

And it has never come up before and the necessary consequence of that is that there may well be difficult issues that have to be confronted, and I understand Ontario's position, which is that maybe it's not necessary to go there.

But there's no question that your

submissions on the Common Law and navigation are part of that analysis.

MR. OGDEN: Your Honour, I agree and if we look at subparagraph 1 in paragraph 46, the part that says "refine the characterization of the rights on terms that are fair to all parties," and that is open to what -- to many interpretations. And it is difficult, it's lose in some respects.

THE COURT: I don't think it's intended to be, that last phrase, anything more than saying you should be fair when you're characterizing a right. So that's fine. I can take care of that.

But the reality is that -- again, I'm trying to think of an example. But if someone came forward from a First Nation and said, I claim the Aboriginal right to fish in such-and-such a lake in such-and-such a county in the Province of Ontario, that would be the contours but you wouldn't have to spend a lot of time considering whether or not an Aboriginal right to fish might be within the contours of something that might be recognized, that's happened before, and that you would have a nice

discussion about whether the contours made any difference.

And I think that is really what the plaintiff is saying here. They're saying there has been recognized an Aboriginal right called Aboriginal title, and yes it's derived from discussion of dry land, but we say those principles should be applied here. There is no need to go back to first principles and ask whether the right should be recognized at all; that is the plaintiffs' position.

And Ontario's position is a more nuanced on that second step saying, wait a second, we have some issues here whether there should be such a thing. So that's why I have the question. But I think -- I'm going to leave it for now and you can -- assuming that Ontario won't be finished today, talk to your colleagues about it and if you want to come back later that's fine.

MR. OGDEN: Thank you. Well, I'll ask Ms. Singh to take down that quote.

I do want to, at this point, draw Your Honour's attention to paragraph 40 of Lax

Kw'alams, and I won't go to it but that's where Justice Binnie says that it's important that the quote not adopt a commission of inquiry approach to the litigation.

And I do think that is tied to paragraph 46. When you are trying to see what is fair to all parties, you are being fair to the claimants who have brought the claim to court and are seeking something and present a lot of evidence, and fair to the defendants who have responded to that evidence. And that's part of what being fair is, Your Honour.

That's just a caution that I offer that we would say the right that is being claimed is a right to exclude from the lake bed and beneficial ownership and so on, and that it cannot exist.

There's a stage that's not contained in that Lax Kw'alams structure which is that the law won't recognize that. And whether you incorporate that under what is fair or legislature that Justice Binnie did not include because of the nature of writing he was addressing, it needs to be addressed.

And then the question is, well, is it

fair, based on the nature of the proceeding so far, for the Court to say, well, they can't claim the lake bed and so let's see what the claim is really about. It's something else. If the Common Law gets involved and says, you can't have a right to exclude from the bed of the lake maybe it's something else.

And I just offer the caution of Justice Binnie at paragraph 40 there. And then I'll move on and consider this overnight likely, Your Honour.

THE COURT: But why is it not included in Justice Binnie's analysis? Because it's included in subparagraph 3 precisely.

MR. OGDEN: Ms. Singh, can you bring that up, please.

THE COURT: You have to determine whether the claimed modern right has a reasonable degree of continuity with the integral practice, and it goes on to say, through -- a lot of the same terminology that you referred to before the break.

MR. OGDEN: I think the subparagraph on to continuity there is a different point.

THE COURT: All right. I'm going to

let you think it over and if you have anything more to say -- and I'm trying to think of whether it was Van der Preet or one of the other early cases that -- I know it was Chief Justice Lamer, but they are talking about the fact that there could be a range of rights. And it does have to be put through the decision tree of what would be the Common Law right and does it make sense and so forth.

MR. OGDEN: Thank you, Your Honour.

I'm going to turn now, Your Honour, to some submissions about the evidence and proof of occupation and proof of exclusivity.

Ontario has accepted in its written submissions that SON or the immediate ancestors of SON were present in the land adjacent to the claim area in 1763, but Ontario is not able to conclude that there was occupation of the claim area.

Now, first station presence after sovereignty can infer -- a First Nation's occupation after sovereignty can infer occupation at the time of sovereignty, but it is only an inference. So it remains up to the trier of fact.

And here we have evidence of occupation of the land adjacent to the claim area, the peninsula and the surrounds, and the claim area, some of it, close to shore.

And then a dispersal, when there was a conquest by the Haudenosaunee and then the reconquest of the land. And that makes it difficult to determine when the land was reoccupied and when the claim area adjacent to that land was reoccupied.

And there is limited evidence on the dates at which reoccupation occurred. So it makes it hard to work back and say that any occupation of the date of sovereignty -- were presence and use of the land of the date of sovereignty was regular and permanent at that point. And that's largely why Ontario submits that occupation is not proven.

Ontario also makes submissions as contained in our written submissions about the nature of the interaction with the claimed land, which is submerged land, and needed to be physical interaction in terms of weights and fishing and launching of craft and so on.

There is a discussion about -- I will

just touch on this briefly -- and Delgamuukw and Tsilhqot'in about fishing being the basis for proof of Aboriginal title. And I think it's clear that they could be referring to fishing from the land into the water as support for a claim to land, so I don't take that to be support for a claim to submerged land.

I'll move to -- well, last point here is that historical documentary evidence does not indicate that SON asserted a nonphysical or what might be called a spiritual relationship with the bed of Lake Huron or Georgian Bay.

So Ontario's submission in respect of exclusivity is that SON did not have the intention to control the claim area at 1763. and on this point, in relation to our earlier submissions, there is no documentary evidence in the historical record of a SON assertion of a right to the lake bed.

The evidence does not support the conclusion that SON participated in Pondiac's war or through that war sought to exclude the British from the claim area.

There were many Anishinaabe communities that did not participate, the

Toronto Mississaugas, the Odawa at L'Arbre Croche, the Nipissings, the Potawotami of Detroit appeared to have been forced to participate under threat of attack on themselves by Pondiac. And there's been a discussion of one document, Exhibit 591 that Dr. Hinderaker relied on, that supported the proposition that the SON were involved and relied on in our written submissions.

THE COURT: Which exhibit was that?

MR. OGDEN: 591, Your Honour. It is the discussion involving Shawanaxcapowee who came from the Georgian Bay area which was known as being near Toronto at the time.

I want to then go to capacity to exclude Your Honour, that Mr. Townshend earlier this week gave in his oral submissions gave five examples of what he said demonstrated control. And my submission is that they at the most show intent to control rather than actual control and capacity to exclude.

Our submission is that SON did not have the capacity to control the claim area. They could not exclude at 1763 the British from it. The British had the capacity to travel to

Lake Huron in larger vessels and also in batteaux at the time.

So even if SON were in alliance with other Anishinaabe in Pondiac's war, the facts of that war indicate that Anishinaabe were not able to exclude the British.

The expert attended by SON said he was unable to conclude that Anishinaabe controlled the Detroit and St. Clair river access to lake Huron in February 1763.

THE COURT: Which expert are you referring to now?

MR. OGDEN: Dr. Hinderaker, Your Honour, was asked whether an Anishinaabe effort to exclude the British would have been successful if made prior to May 1763 and he responded, "I can not say." That is contained in our written submissions.

And Ontario submits that the facts that Pondiac did commence the siege of Detroit demonstrates that he and Anishinaabe did not have control over access to Lake Huron. Pondiac would not have needed to commence the war if he in fact had control and if the argument is that the war was a manifestation of that control,

then it failed and Pondiac and the Anishinaabek did not have capacity to exclude.

Dr. Hinderaker testified that some or all of the First Nations, prior to Pondiac, changed their goal during the siege from exclusion of the British to controlling the terms of British re-entry to the posts. This is contained in Ontario's submissions at paragraphs 286 to 288.

And that change occurred when those First Nations who changed their goal realized that the French were not returning.

So it follows that at least by the mid-summer of 1763 those First Nations' own assessment of their capacity to exclude the British was that they could not do so by themselves. They knew that they could not without the French control access to Lake Huron.

And this is strong evidence, Ontario submits, for the conclusion that in February of 1763 those First Nations could not exclude the British without outside help.

Ontario has discussed in its written submissions Dr. Hinderaker's testimony about a siege of Detroit. The SON has replied and I

want to cover a small point because it's important. Dr. Hinderaker was asked in cross-examination about his contention in his main report, which is Exhibit 4017, that, to quote him:

> "In 1763 Anishinaabe peoples controlled all the access points to Lake Huron and Georgian Bay."

He replied in answer that he was not referring to all of 1763. He said:

> "Yeah, I did not mean December 31st, 1763. Although the British had not yet breached the -- had not yet sailed the schooner, that schooner into Lake Huron in 1763, but yes, by the terms of surrender at Fort, at the Fort of Detroit effectively the British regained access to the waterway at that point -- regained uncontested access."

That was his quote, in response to a question about control.

So it's clear from this testimony that Anishinabek peoples did not control the St. Clair River access point in December of 1736.

THE COURT: And what was the evidence reference for that or was there a paragraph reference for that?

MR. OGDEN: The evidence reference, Your Honour, is -- there were two. The first part is Exhibit 4017, which was put to him at page 48, and that is his main report, Hinderaker main report.

The testimony references are to June 12, page 2042 and I'll give it just broadly to 2045. But Ontario addresses these in its submissions at paragraphs 286 to 288.

So at the end of 1763, the British had uncontested access to Lake Huron. That was Dr. Hinderaker's evidence. The Anishinaabe did not control at that point the access to Lake Huron. The British had access and their access was uncontested.

It is important to note that the British had uncontested access at that time even though their large vessels had not yet sailed into Lake Huron. The facts that these large vessels had not yet sailed into Lake Huron did not mean the British lacked access. Having access did not depend on actually having sailed

these large vessels into Lake Huron.

And so the facts that these large vessels had not yet sailed into Lake Huron in February 1763, the assertion of sovereignty, does not mean by itself that the British did not have access.

In February 1763 there was no contestation of British access. At that time the British had uncontested access. Dr. Hinderaker's evidence was that the siege was a contestation of British access. And by that at Detroit -- was the contestation, and by that they controlled the St. Clair River access and in the middle of 1763 controlled the access to Lake Huron. But after that, after the surrender, to use his word, British regained uncontested access.

SON asserts in their reply submissions that Ontario's got the evidence about Detroit and the St. Clair River and control all wrong. SON says that Ontario is arguing, wrongly SON says, that a ^person had control of the waterways before and after Pondiac's war. Ontario is not arguing that the fact that the British had uncontested access means that the

British controlled the waterways.

Control of the waterways and access points is not an either/or proposition where either Anishinabek had it or the British had it. It could be that at the start and the end of 1763 neither Anishinabek nor the British had control of the waterways. Ontario submits that because of its naval power, Britain did in fact have control of the waterways at the start of 1763, however Ontario submits it's not necessary for the Court to make this finding.

Ontario says it is enough to find that neither Anishinabek nor British had control. At the very least Ontario submits the evidence shows that Anishinabek did not control the waterways; they did not control access to Lake Huron.

And that by itself should be enough to dispose of the claim to the lake bed to the international boundary.

It is important to note that the ability to contest access is not enough to prove control. The Supreme Court said in R. v. Marshall; R. v. Bernard, and I quoted it earlier, that all that is required is

demonstration of effective control of the land by the group from which a reasonable inference can be drawn that it could have excluded others had it chosen to. That is R. v. Marshall; R. v. Bernard in paragraph 65.

So you don't need to show acts of exclusion, but what you do need to show and which evidence of acts of inclusion may prove is the capacity to exclude if they had chosen do so. That is required.

SON relies on the covenant chain at the Congress of Detroit and Niagara as proof of capacity to exclude. SON says that even if Pondiac's war did not exclude the British, it forced the British to the negotiating table at Niagara for which an agreement perhaps was made.

But, Your Honour, Niagara was not a negotiation to end the conflict. Pondiac, the main Indigenous instigator for the conflicts, did not even attend. The Potawotami who fought with Pondiac did not attend.

The Congress at Niagara did not result in an agreement giving the British permission to enter.

Mr. Townshend earlier this week

referred to a quote, the statement by Sir William Johnson that "the Indians know we cannot be a match for them in an extensive woody country."

Well, the first point is that lakes are not a woody country. And secondly recognized this fact as Johnson said in Niagara to the assembled First Nations, the Crown had all the doors and thereby controlled access to Lake Huron.

It is clear on the documentary evidence that the British stated at Niagara that they did not need permission. They did not consider that they needed permission, and they did not ask for permission.

It was apparent in the evidence of Dr. Hinderaker who said that most attendees at Niagara were happy to agree to the terms offered by William Johnson. And this, I submit, makes clear the relative capacity of the Crown and the Anishinabek to control access to Lake Huron.

Dr. Hinderaker said that the terms agreed at Niagara were not terms offered by the First Nations. And it's important to note, Your Honour, that although Anishinaabe, Anishinaabe

at Niagara may have influenced the terms for the British re-entry into the Great Lakes they did not set the terms.

On the first because there is a part of Tsilhqot'in paragraph 3 where the Supreme Court said that the Tsilhqot'in Nations set terms for the European traders that came on their lands. And Dr. Hinderaker was asked in cross-examination to agree that it was not -- Your Honour, I pause because I think we have lost Mr. Beggs.

THE COURT: Can you hear us, Mr. Beggs?

MR. BEGGS: Yes, I'm back, just a bit of connection issue.

THE COURT: Thank you for noticing that, Mr. Ogden. Please go ahead.

MR. OGDEN: Dr. Hinderaker was asked in cross-examination to agree that it was not accurate to say that the First Nations set the terms.

And he couldn't reply directly to that. He said, "I would say that the First Nations influenced the terms." And this is a key point. Anishinaabe did not do what the

Supreme Court said in Tsilhqot'in. They did not set the terms. At most I submit they influenced the terms. They did not, thereby, have control over the lake.

What happened at Niagara was a reaffirmation of the covenant chain. It was a geographical extension of it to include the Odawa L'Arbre Croche, and the Menominee from the Bay who helped the British during Pondiac's war. The covenant chain does not concern property rights and lake bed or recognize any priority of claims to resources.

Dr. Hinderaker's evidence, in his second supplementary report, which is Exhibit 4020 at page 4, described the covenant chain as:

> "A set of mutual obligations to secure and protect trade, to seek justice through diplomatic channels and to act as allies in times of war."

After the war, Pondiac's war, First Nations did not control access, they still had a capacity to contest access.

The SON have to meet the test for control before or after Pondiac's war but they still have a capacity to contest it.

And what Johnston wanted was for the Anishinabek to affirm under the covenant chain that they would not contest access. It was clear to Johnston, as he said, they control all the doors. And it was clear what the outcome of the contestation of access would be, But he wanted affirmation that the British would not have to bear the cost of that contestation. Such an agreement however does not prove capacity to control.

There's a reference in ^Tsilhqot'in at paragraph 48 to the role of an agreement about access. Which I will ask Ms. Singh to show us please. I submit that this paragraph does not support SON's case.

> "Whether a claimant group had the intention and capacity to control the land at the time of sovereignty is a question of fact for the trial judge. And depends on various factors, such as the characteristics of the claimant group, the nature of other groups in the area and the characteristics of the land in question. Exclusivity can be established by proof that others

were excluded from the land, or by proof that others were only allowed access to the land with the permission of the claimant group. The fact that permission was requested and granted, or refused, or that treaties were made with other groups, may show intention and capacity to control the land. Even the lack of challenges to occupancy may support an inference of an established groups intention and capacity to control."

And I refer to this because Johnston, on the evidence at Niagara, did not request permission. He said he didn't need -- it was clear on the evidence that he did not need permission. He was not asking for permission. An agreement such as a covenant chain might be enough but not will be enough.

And here we have evidence of Pondiac's showing a lack of capacity to exclude.

Your Honour, I'm going to make a submission before the break, if I may, a brief submission about the significance of the land to the kind of community -- thank you Ms. Singh,

you can take it down.

The useful double check, your Honour, as to whether or not SON has proven exclusive occupation is to apply the overarching section B5 test.

Aboriginal title is a form of Aboriginal right. Aboriginal rights exist to protect precontact practices that were of central significance to the claimant community, and resources and interests that were of central significance.

In Delgamuukw, paragraphs 94, 137, 150 and 151. And then also in R. v. Adams, paragraph 26, and R. v. Marshall; R. v. Bernard, paragraph 67.

This largely comes from Delgamuukw, paragraph 150, Chief Justice Lamer said that a claim to aboriginal title was made out where the group demonstrated their connection to the land was of central significance to their culture.

Ontario submits that the existence at trial, the evidence at trial shows that SON's claim to Aboriginal title to the lake bed does not reflect the nature of their relationship with the claim area of the Crown's assertion of

sovereignty.

Lake Huron and Georgian Bay Fishery was of central significance to SON's culture, but the bed of Lake Huron and Georgian Bay was not.

At 1763 when Britain asserted sovereignty, SON's relationship to the claimed submerged land was not akin to ownership; was not a relationship of the use of all resources, occupation of all places and of exclusion and control. It was a relationship of the potential for those things.

Whatever means may exist to reconcile this Indigenous perspective in the Common Law perspective it is not an Aboriginal title rights to the lake bed.

This might be an appropriate place to pause, Your Honour.

The remaining submissions are about justification and infringement and then some response to matters raised in oral submissions and in reply.

THE COURT: Now, I understand Mr. Ogden, that you aren't the only speaker, we have various members of your team following you,

but I still ask you, since you're virtually on your feet, to give me an estimate for tomorrow because the counsel to the Municipalities should have some reasonable amount of advance notice before they have to begin.

MR. OGDEN: It is entirely probable that they will be up at some point tomorrow, Your Honour. That is the best I can do I'm afraid.

THE COURT: Is Ms. Dougherty here at the moment? Recalling my order that you don't have to be. Ms. Dougherty, I invite you, off-line, to communicate with Ontario tomorrow morning to continue to get updates from them.

I don't want to put Mr. Ogden on the spot because he is indirectly being asked to estimate for four other people, which is tricky. But perhaps I'll leave it to the two of you to communicate with each other.

MS. DOUGHERTY: Happy to do that, Your Honour.

THE COURT: We'll resume tomorrow morning at 10:00 o'clock.

--- Whereupon the proceedings was adjourned at 4:28 p.m..