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 101 / DAY 101 of the trial proceedings in the above-noted matter, being held via Zoom virtual platform, on the 22nd 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 10:00 a.m.

MS. ROBERTS: Good morning. Resuming for closing arguments in the trial of two actions. First is the Chippewas of Saugeen First Nation et al. and the Attorney General of Canada et al. And the second, the Chippewas of Nawash Unceded First Nation et al. and the Attorney General of Canada et al. day 101. The file numbers are 03-CV-261134CM1, and 94-CQ-50872CM. Justice Matheson presiding.

If a technical problem is encountered during the hearing and the connection is disconnected, counsel will receive instructions by email and the hearing will resume once the matter is resolved.

The live streaming of this proceeding is made available on YouTube for public access. The links for each day are available through the court and from Arbitration Place on its website at arbitrationplace.com/broadcastlinks.

I'll now turn it over to Justice Matheson.

THE COURT: Good morning. I wish to remind everyone that as with any trial, this

hearing is being recorded by the court, however no one else is permitted to photograph or record or take a screen shot of this hearing without permission as required by section 136 of the Courts of Justice Act. No permission has been sought and none has been granted.

Please go ahead, Mr. Ogden.

MR. OGDEN: Good morning, Your Honour, thank you.

I want to start by making sure I addressed your question about the rights claimed so I'm going to cover that briefly.

I submit --

THE COURT: Mr. Ogden, I'm getting a bit of an echo.

MR. OGDEN: I think I'm the only one with my microphone on. So if you permit for one second, I will turn down the volume at my end and see if that helps. Does that help, Your Honour?

THE COURT: Yes.

MR. OGDEN: Okay, thank you.

I submit that the rights claimed should be characterized as Aboriginal title to the bed of the Great Lakes. And we know from

earlier cases, that Aboriginal right with the rights to the land so the right is a right to the claim is a right to bed of the Great Lakes. And there's incidence of this right. SON claims the rights to the water above the bed, the rights to the contents of the water, the rights to the content of the land below the bed, and the rights to exclude people from the space above and below the bed.

Specifically, and I'll return to this, it's a right to exclude all people for all purposes.

That is essentially the right prescribed in the Aboriginal title cases to date.

THE COURT: Just one clarification. As I understood, I think it was Ms. Pelletier, they're not claiming title to the water. In other words, their claim for Aboriginal title does not include a claim for ownership of the water. I'm going to just -- I want to make sure I'm clear on this, so I'm going to just ask Ms. Pelletier, who is present, if she can indicate whether I have that correctly or not.

MS. PELLETIER: Yes, that's correct,

Your Honour.

THE COURT: All right. Thank you, Ms. Pelletier.

So, Mr. Ogden, right -- I think you said SON claims the right to the contents of the water. I understand what you mean by that, the fish; the land below the water; and, I think not the water itself, as just confirmed. But, yes, the right to exclude people, including above and below the submerged lands, so that would include excluding people from the use of the water.

MR. OGDEN: Yes, Your Honour, thank you.

THE COURT: All right.

MR. OGDEN: This is a fair characterization based on the pleadings and in light of the evidence.

In the second part about the evidence, which I take from Lax Kw'alams in paragraph 46 means that the court should bear in mind the presentation of the evidence when it's characterizing the rights. What the parties, by their evidence, say the claim was about. And this, as I say, is an unfortunately subjective part of the analysis as set out based on Lax

Kw'alams.

It's not an opportunity for the court -- for a court to revise the claimed right in a manner that makes the claim slightly more or less likely to succeed.

I'm going to spend some time talking about Lax Kw'alams, Your Honour, briefly, because we discussed it yesterday before I turn to my justification of infringement discussion.

Your Honour, as Justice Binnie said in paragraph 40 of Lax Kw'alams, in rejecting the Commission of inquiry approach, as he called it:

> "The court does not look at the evidence and then see what rights may be made out. A court cannot at the end of the introduction of evidence say, or consider, whether the court has defined the right too narrowly because it may appear to the court that the plaintiffs have not met the right. The characterizing of the rights in that manner would not be fair to the defendants in the litigation process."

And that is the danger that Justice

Binnie was warning about.

I'd like Ms. Singh now to bring up paragraph 46 of Lax Kw'alams, please. And I want to say this about Lax Kw'alams, none of the parties to this Aboriginal title claim referred to the case as an authority in their submissions about Aboriginal title. Canada has referred to it as an authority in its harvesting rights submission in the Treaty 72 case. And the fact that the parties have not referred to it suggests that the parties do not consider it to the a helpful authority for this case.

Now, Your Honour, that might be because the claim is for Aboriginal title and there have been cases on Aboriginal title and what the claimed right might be and so we don't need to characterize the claim. And I say, Your Honour, that's partly correct.

Lax Kw'alams should be seen as an Aboriginal rights case in the sense of distinct from Aboriginal title. I think it is, Your Honour, I say it is an effort by the court, in particular Justice Binnie, to provide some correction and clarity in relation to the Van der Peet integral to a distinctive culture test

and its usefulness is largely limited to activity rights. Aboriginal title is a claim to a resource, in particular land, and not to undertake an activity.

Justice Binnie did not in his reasons in Lax Kw'alams refer at all to giving way to the Indigenous and non-Indigenous perspective. That's in spite of this being a key part of the law since Van der Peet and through affirmed in R.v Marshall; R. v. Bernard and into Tsilhqot'in. He did not refer to the concept of translation, which was part of R.v Marshall; R. v. Bernard, which was before Lax Kw'alams.

Justice Binnie did not sit in R.v Marshall; R. v. Bernard where the idea of translation was introduced by Chief Justice McLachlin. But Chief Justice McLachlin returned to the idea of translation in Tsilhqot-in after Lax Kw'alams.

So the idea of translation is a very important part as with the Indigenous and non-Indigenous perspective of proof of Aboriginal rights, including Aboriginal title. But it wasn't covered in Lax Kw'alams.

So Lax Kw'alams is part of the law and

it's helpful, but it's not the structure that I would suggest this court adopt.

In this paragraph which we see now, 46 of Lax Kw'alams, Justice Binnie in subparagraph 2 on the next page, please, refers to the practice -- precontact practice traditional custom. This is the specific context in which he's talking about. In both subparagraphs (a) and (b) talks about the practice and he continues to talk about it in paragraph 3. This is the case about activity rights rather than Aboriginal title.

He's also talking about, you'll see there, the integrality that the practice was integral to the distinctive precontact Aboriginal society. The precontact timing is specific to Aboriginal activity rights and distinct from the pre-sovereignty test of Aboriginal title.

In subparagraph 3, Justice Binnie refers to continuity between the practice and the modern rights. But I say there he's talking about -- sorry, he also refers to engaging the essential elements of the modern rights. But this is not a place, I submit, Your Honour,

where the idea of translation was incorporated. This is Justice Binnie talking about the continuation of a practice, the connection across time from precontact to now, or at least till 1982.

He says there in the middle of the fifth line down:

> "Reasonably regarded as a continuation of, the precontact practice."

That's in subparagraph 3 of paragraph 46.

Now, such continuation is not an issue in Aboriginal title where the right to prove in its sovereignty generally continues to the present irrespective of anything that happens in between. As a matter of fact, of course, it can be extinguished at law.

Now, there's some parallels between the approach set up here in Lax Kw'alams and the approach of Chief Justice McLachlin in R.v Marshall; R. v. Bernard and Tsilhqot'in. They're addressing the same process, but I say from different perspectives.

Justice Binnie here was trying to

provide some guidance to trial courts in respect of Aboriginal rights to an activity. Chief Justice McLachlin was trying to provide some doctrinal constitutional justification for broad-reaching territorial rights affecting provincial and territorial legislative practices.

And in comparison here, Justice Binnie is more interested in practicalities and Chief Justice McLachlin in principles. But the two -- one should not be preferred over the other. Neither provides a complete answer to this court.

Now, if I want to go down further, please, Ms. Singh, to subparagraph 4 of paragraph 46 of Lax Kw'alams. And this is an interesting paragraph. Here Justice Binnie says that the right should be delineated, this is by the court, even after it is proven as a matter of fact.

He says that if there is a commercial right proven, the right should be narrowed to account for the fact of non-Indigenous -- that a non-Indigenous people may have historically relied on the resource. And he says that

narrowing, I call it narrowing, he says "delineation" should occur because -- and he has emphasized this, in the right circumstances such objectives are in the interest of all Canadians and more importantly the reconciliation of Aboriginal societies with the rest of Canadian society may well depend on the successful attainment.

This is an extract from the case Harvey Gladstone which, as Justice Binnie notes, concerns Chief Justice Lamer's discussion about justification, which ordinarily occurs after the right has been proven to exist. And Chief Justice Lamer in Gladstone said that it might be appropriate to limit a right through the justified infringement process to distribute a resource amongst Indigenous people but also non-Indigenous people who have relied on the resource.

Justice Binnie here was trying to avoid reconciliation through justified infringement as a result of legislation. He's trying to avoid that process by bringing it forward into the definition or delineation of the right, where the right was existing. And he

says this is necessary for reconciliation.

Now, I would submit that this dicta^ in Lax Kw'alams does not provide guidance for this honourable court on how to reconcile the claimed Aboriginal title and non-Indigenous interests. Aboriginal title is different from the Aboriginal right at issue in Lax Kw'alams.

The purposive approach adopted in respect of Aboriginal rights, but particularly Aboriginal activity rights, focuses more on a finding of what the right was in 1982. Requires finding integral aspects of pre-contact Indigenous culture.

And then, as Justice Binnie said, if there are non-Indigenous people who have been relying on the resource in some manner and the Indigenous rights that would otherwise be proven as a commercial right which might, somehow, exclude non-Indigenous people, then that should be factored in when describing the rights that was existing in 1982. That's the process he's setting forward here.

And that cannot be done with Aboriginal title. Aboriginal title does not have a focus on 1982 in the same way. It's

about the right of the surviving the assertion of sovereignty. A different time.

And it does not matter what happened historically between sovereignty in 1982 in terms of non-Indigenous -- sorry, in terms of non-Indigenous reliance on the resource.

Supreme Court has said in Delgamuukw in paragraph 153 that:

> "Displacement of Indigenous occupation by post-sovereignty non-Indigenous occupiers does not mean that there is no Aboriginal title. So Aboriginal right cannot be delineated based on pre-sovereignty non-Indigenous reliance on the resource."

Ms. Singh, you can take that down please.

Reconciliation in respect of Aboriginal rights must occur -- sorry, Aboriginal title must occur through the process of justified infringement if the right was proven to be existing at 1982.

And we submit that the Aboriginal title here was not existing at 1982. It was a

claimed right. The Aboriginal title right was a right to exclude all people for all purposes and that right is inconsistent with the paramount public right of navigation and so the Common Law could not recognize that Aboriginal right in the Aboriginal title. Consequently the Aboriginal title was not existing in 1982. Could not be recognized and affirmed by the Constitution Act.

This does not mean, however, that the characterization of the right was not correct or was not fair. This means that the claim was not made out. The court can provide guidance, as the Supreme Court did in Delgamuukw, about the type of rights that may be made out. But the court cannot, I submit, as if in a Commission of inquiry find what rights would have been made out if they had been properly claimed.

I'm going to move on to my submissions about infringement and justification, unless you have any questions about those submissions.

THE COURT: Yes. So as you well no doubt know, the reason why I've been asking what the claim is is for that precise reason. That's the starting point. It's not for the court to substitute the view of what the claim is.

That very last bit that you read is consistent with what I was saying yesterday. What do the parties say is claimed here?

And so that's fine. But, I mean, I hear what you're saying, but Lax does not say these principles are limited to activity-based Aboriginal rights. I understand that the argument can be made and I understand why you've characterized it that way.

I'm not sure that there is as much of a difference as you may suggest there is between legal steps to take to ascertain whether a claimed activity right, as you put it, ought to be recognized and whether a claimed Aboriginal title right, which is itself an Aboriginal right, ought to be recognized.

I've heard what you said. I'm not sure that issue has ever been confronted directly. What we do have is Chief Justice Lamer saying that Aboriginal rights fall upon a spectrum and what you have been describing as activity rights would be, let's just say, in the middle of the spectrum in contrast to an Aboriginal title Aboriginal right, which would be at the far end of the spectrum, but they're

still on the same spectrum. And you still have to establish what was the right being claimed, not in hindsight, the judge making it fit, but by the party and then go through the analysis.

I'm always assisted by understanding where the position is coming from, but it almost sounds like Ontario is saying, as the plaintiffs are saying, just apply the three part test in Tsilhqot'in. You don't have to consider the threshold issue of whether such an Aboriginal right should be recognized, but I know from your written material that is not your position.

Now, you don't have to repeat what you've already said, but if you have anything to add that's, fine too.

MR. OGDEN: It's not -- it shouldn't be treated as a threshold question, Your Honour. As a matter of principled approach, the approach should always be to see what is claimed and see what the Indigenous perspective is first and then try and translate that.

And my submissions yesterday were directed at saying -- I do not -- there is not a clear answer in the case law here. And so it was helpful to address Lax Kw'alams because

that's one way of going about it.

And the less, if I may say, precise approach of Chief Justice McLachlin in Tsilhqot'in and R.v Marshall; R. v. Bernard is another way.

But within the Common Law perspective, some reference must be made to the Common Law to what might prove occupation of submerged lands and to the right of navigation. And it may be unfortunate, but at the end of this process, the court says, well, the Common Law perspective means that in spite of this Indigenous experience, pre-sovereignty, the rights cannot be made out.

And it's not a clean approach of these are the facts and these are the law, so why don't we just jump to the law because the law says you can't do it anyway? It's not linear in that fashion. That's one submission.

The other submission, I'd say, in respect of the spectrum is that, yes, they are. And there are some activity rights that can be closer to Aboriginal title. For example, an Aboriginal right to fish commercially would have given effective control of the fishing resource.

And this was the concern that Chief Justice Lamer recognized in Gladstone and Justice Binnie here in Lax Kw'alams.

But if you have --

THE COURT: Justice -- Chief Justice McLachlin has made it clear that if what is demonstrated is an Aboriginal right to fish, for example, commercially, then that is the right that is implicated. It's not, without more, immediately become an Aboriginal right to take title to a lake bed.

MR. OGDEN: Well, that's correct.

THE COURT: So, I mean, I'll consider all of your submissions, but I'm not sure that there is as much of a difference between what you're describing as activity rights and Aboriginal title with respect to the steps you have to walk through.

There is a considerable difference when it comes to the evidentiary issues and what the evidence shows are the factors that have to be taken into -- what has to be demonstrated and so forth. There's obviously a substantial difference.

MR. OGDEN: I think you're right, Your

Honour. I'm sorry if -- there is not considerable difference. They are all Aboriginal rights and in respect of a right to land, Aboriginal title, the Supreme Court has said they can adjust the test, in some manner.

And I've given other examples of difference such as the continuity requirement may be different in respect of Aboriginal title.

So they're not completely different, but care should be taken in applying one framework to the other context.

THE COURT: Well, obviously.

MR. OGDEN: Yes.

THE COURT: Because the distinction you're drawing is interesting, but it is not set out in these the Supreme Court of Canada cases.

MR. OGDEN: No, it's not Your Honour. I don't think I can help you more than that.

THE COURT: All right, that's fine. Please go ahead.

MR. OGDEN: Thank you.

So SON says that infringement and justification, that analysis is the appropriate place to reconcile the constitutional Aboriginal right to exclude and the public right to

navigate. But the problem with this submission is that the Aboriginal title it asserts, as I have said, is a right to exclude all people for all purposes. And that is the constitutional right that exists. But that's an absolute right.

And SON's submission assumes and requires that there was, at 1982, an existing Aboriginal title with a right to exclude all people for all purposes.

Otherwise that right could not be part of the justification for the infringement analysis, it has to have been existing in 1982. But such a right, Ontario says, could not -- could by definition not have been subject to a Common Law public right of navigation. It could not have been existing at 1982.

In SON's formulation, that right is and was an absolute right that did not co-exist with the public right.

SON's submission -- SON's submission skips the prior question, which is whether there was, at 1763 and existing through to 1982, a Common Law Aboriginal title containing such an Aboriginal right. And for the reasons I've

already given, there was not at 1982 an existing Common Law Aboriginal title right to exclude all people for all purposes. That right was not enforceable at Common Law. It did not exist.

Such a right was inconsistent with the sovereignty asserted at 1763. And any evidence demonstrating exclusive control of the lake bed could not be translated into a Common Law right.

THE COURT: Just to be painfully clear about this, because I am now a little -- anyway.

The steps that you advocate for of identifying the claimed right, the Aboriginal perspective and then asking the question, does that translate into a Common Law right, that you spoke about yesterday, would be as of 1763?

MR. OGDEN: Yes.

THE COURT: Or are you saying that they must be as of 1982?

MR. OGDEN: As of 1763 and then the answer is no, it could not be translated.

THE COURT: Yes.

MR. OGDEN: And then between 1763 and 1982, there was no Aboriginal title that could be recognized and affirmed.

Now, in any event, the justified

infringement analysis would be inappropriate for reconciling Aboriginal title and the public right of navigation. The Supreme Court has developed the justified infringement analysis in respect of legislation, and perhaps other executive Acts, but it has not suggested that it can be applied to or otherwise applied it to a general Common Law public right such as the right to navigate or the right to fish.

I will address briefly some points that have arisen in SON's reply submissions and in oral submissions this week.

Firstly, Your Honour, in respect of Chantry Island, there is a list which my friends have provided to the court of evidence relating to Chantry Island at Exhibit O5. And we accept that list. I note that none of SON's experts discussed the surrender in their reports.

And Ontario cross-examined --

THE COURT: What surrender are you now talking about?

MR. OGDEN: Purported surrender, I should say.

THE COURT: Which -- okay, we have a lot of surrenders in this case. I want you to

be very specific.

MR. OGDEN: Thank you. Purported surrender of Chantry Island in October 1854. None of SON's experts discussed such a surrender, purported surrender, of Chantry Island in their reports.

THE COURT: Are you talking about Treaty 72 or something else?

MR. OGDEN: Your Honour, there was evidence of a -- what might be called a side agreement dated --

THE COURT: Yeah, okay, all right. I understand about that.

This is where I'm asking you to be specific about what surrender you're talking about. So there was a surrender in Treaty 72. You're not talking about that.

So please proceed to be extremely specific. You say there is another surrender, not in that treaty, please go ahead.

MR. OGDEN: So I'm talking about there's a cession, a purported sale of Chantry Island. And none of SON's experts addressed this purported sale. Ontario calls it a sale of Chantry Island in their reports that were filed

as evidence.

And Ontario cross-examined Dr. Brownlie about this sale of Chantry Island and he testified that he was not in fact aware of this sale. That was on August the 14th, 2019, page 4131, lines 7 to 17.

Ontario submits that there is no evidence that Chantry Island was not in fact sold in October 1854 -- surrendered for sale in 1854. There is no evidence that SON did not intend to surrender Chantry Island for sale or that such a surrender for sale of Chantry Island was, in some other manner, void.

SON submitted in oral submissions this week that Ontario's not pleaded the International Boundary Waters Act.

THE COURT: Are you moving on from Chantry Island?

MR. OGDEN: Yes, I am, Your Honour.

THE COURT: I am at a bit of a disadvantage because, as everyone on the Zoom hearing knows, these two islands were not particularly focused on in the trial, so I need to ask a couple of questions. You've answered one of them already. But I would also like your

submission on whether you say that the evidence that was put forward by the plaintiffs establishes Aboriginal title to this island where there is no issue about the applicable law, which is Tsilhqot'in.

So what is Ontario's position about that?

MR. OGDEN: That there was not because occupation has not been demonstrated at 1763, primarily because the -- although Ontario accepts that within the claim area, SON or SON's ancestors were present, Ontario does not accept that that presence was sufficiently regular to found Aboriginal title.

THE COURT: Regular on the island or regular in the peninsula?

MR. OGDEN: Regular on the island.

THE COURT: So you accept that they were present on the island, but not --

MR. OGDEN: Well, yes. I can accept that, although there's less evidence. We can infer that, but we're not talking about presence, I mean, of indeterminate duration. There is evidence that there were people described by French as Mississaugas of

Matchedash Bay around the 1720s. And they likely traveled through to the peninsula and areas around. So their presence is different from occupation.

THE COURT: Yes, I know that. But a little -- I'm asking about what the evidence is not what can be inferred from it.

The reason I'm asking is because this has not been the subject of particular attention in this trial. And you've obviously looked over the evidence the plaintiffs have gathered together. Does it or does it not include evidence of actual occupation of this island?

MR. OGDEN: Your Honour, I'm not aware of any.

THE COURT: All right, that's fine. So you were moving on to something else?

MR. OGDEN: Yes.

THE COURT: Are you going to deal with the other island as well?

MR. OGDEN: I'm not aware of any -- I'm not aware of any evidence in respect of occupation of Barrier or Rabbit Island.

THE COURT: All right.

MR. OGDEN: That is, I cannot say for

certain, Your Honour, that there is not, but I do not recall any at this point.

THE COURT: All right.

MR. OGDEN: So in respect of the International Boundary Waters Act, SON says that Ontario didn't plead it. Ontario raised it in our responding submissions after SON raised it in their own submissions.

SON said that it might have extinguished the right to exclude and for the purpose of commerce and Ontario says it did extinguish for all purposes.

So --

THE COURT: Where has SON raised that in their written submissions?

MR. OGDEN: One moment please, Your Honour.

THE COURT: If you don't have it handy, sir, you can tell me after the break.

MR. OGDEN: I do actually. It's paragraph 967.

THE COURT: All right.

MR. OGDEN: SON referred to the doctrine -- this is another point, Your Honour. SON referred to the doctrine of dedication as

discussed in the Caldwell case and the Gibbs case. I don't propose to make any submissions on that, but Your Honour should be aware of an Ontario Court of Appeal decision, which we can hand up virtually to you. I'm not going to take you to it, but I will give you the citation for it and we can provide it to you.

It's Skerryvore Rate Payer's Association v. Shawanaga Indian Band, and that's 1993, 16 Ontario Reports, third, series 390. And leave to the appeal to the Supreme Court was dismissed in 1994, SCCA number 63. And that case stands for the point that the doctrine of dedication is inapplicable to unsurrendered Indian land. I just wish to make Your Honour aware of that decision.

THE COURT: Assuming it is on CanLII, you do not need to send me a copy. Is it on CanLII?

MR. OGDEN: Yes, it is.

THE COURT: All right.

MR. OGDEN: SON in their reply submissions questioned whether or not -- Your Honour, sorry, I apologize, I'm not going to cover this point. I'm going to move to a

different point.

SON in their reply submissions at page 235, fact number 26, said that Ontario cited no evidence for the proposition that the northern part of the peninsula was less hospitable. And the evidence for that, Your Honour, is Dr. Reimer's volume 2 report, Exhibit 4702, pages 32 to 33, where she refers to the Gother Mann map.

And there was a point on that map marked "A" in the north of the peninsula and a notation at the base of the map which says, and I'm paraphrasing, that the whole coast around the north, there's no campground or landing place. That's some evidence in response to SON's submission there.

Finally, Your Honour, a point in respect of oral histories. SON characterized Ontario's submission as being that SON have not shown any oral history. That's not Ontario's submission, Your Honour. Ontario's position is that SON has not identified what testimony it submits is oral history and what testimony is not.

And I think it has not to this point.

THE COURT: Well, there are references here and there throughout your main argument of SON sometimes called oral traditions, but there is, at the beginning of their material, an explanation of that term.

And I assumed, and I'll ask plaintiffs' counsel to correct me if I'm wrong, that references to oral traditions were submissions that that fact should be treated as oral history.

There may have been other terms used as well, but certainly that one was used.

Ms. Pelletier, is that correct?

MS. PELLETIER: That's correct, Your Honour, I believe it provided a definition --

THE COURT: Well, there's a discussion about, if I can put it this way, the more general legal term of world history encompassing some other terms that are used variously in the evidence, including oral tradition, leaving aside the nuance of oral tradition that is temporal.

But can I assume, Ms. Pelletier, that when your written submissions say that "oral tradition", you're referring to oral history or

something else?

MS. PELLETIER: No, that's correct, Your Honour. We have defined oral history and oral addition. We're not distinguishing between the two.

THE COURT: There may be other terms as well. I'm not saying there are not, Mr. Ogden, but I think at least that term is used in the submissions.

MR. OGDEN: That's fine, thank you, Your Honour.

THE COURT: All right.

MR. OGDEN: Ontario accepts the testimony about, for example, stories that circulate around the community, for example, or statements given to a witness by their grandfather may be oral history.

Within the evidence, the two parts, there are measures of reliability given for oral history by the plaintiffs. One is in the answers to undertakings, Ontario's read-ins of SON's answers to interrogatories, I apologize, at Exhibit 4899. And in that there is a definition of an Akendaasijck, or knowledge of it, and the statement given there is that a

community opinion on who is trustworthy ensures reliability.

In respect of Mr. Kahgee, former Chief Randall Kahgee's evidence, there was a standard given for reliability. A lot of the evidence, much of it does not purport to reach that standard.

Now, that is not to say that it cannot -- that the remainder of the evidence which does not purport to reach that standard is not reliable in any manner, but it is difficult for the court, this is our submission, to assess the reliability of such evidence.

I would like lastly, Your Honour, to ask Ms. Singh to put up an extract from a text "Constitutional Litigation in Canada" by Lokan and Fenrick. And this is in Canada's authorities at tab 73 and was also in the Joint Brief of Authorities provided to you at the outset of trial.

This is an exact about oral history in Aboriginal law cases. There are two pages that I wish to refer you to, which are 8-39 and 8-40.

THE COURT: What was the second page number? What were the page numbers?

MR. OGDEN: Sorry, Your Honour, I didn't hear that. 8-39 and 8-40.

So this reads, the second of the first main paragraph, starting paragraph on page 39:

> "Oral history evidence may be admitted more ready, or given more weight if a strong foundation is laid to establish its reliable. Because oral history evidence from Aboriginals is in a form unfamiliar to most judges they cannot assess its reliability solely on the basis of traditional credibility factors. Nor can they take judicial notice of the cultural traditions and understandings that may affect its reliability. In these circumstances, it is helpful, and perhaps even necessary to hear evidence as to the reasons why the particular oral history evidence offered should be accepted and given credence by the court. This may be provided by an explanation from the oral history witnesses themselves, or others from the community, as to the

rituals or circumstances that company the passing down of the oral history."

And then the next page, page 840, at the top:

> "Oral history evidence of a less formal nature without the same hallmarks of authenticity, may not be given the same weight."

Your Honour, there is a reference there, footnote 171, and unfortunately -- well, sorry, the last bullet there -- strike that. The last bullet says that less weight may be given if the oral history has been distorted by self-interest, loss of language and traditions or and publication of historical accounts and opinions. And that's a reference to that footnote 180. And unfortunately, Your Honour, this extract we provided you at the start of trial, if you go down further please, Ms. Singh, to the bottom of the page, does not include the cases cited in footnote 180, but Ontario does provide you with a case in its materials, R v. Peeace, which is at 1998, volume 3, CNLR.

THE COURT: Hold on for a second. I thought you said you had given it to me.

MR. OGDEN: I have. I can stop there, Your Honour.

THE COURT: Well, what I'd like to know, if you've given it to me, is the tab in the Book of Authorities.

MR. OGDEN: Ontario did not tab its authorities. They are all in alphabetical order, Your Honour.

THE COURT: All right. Give me the name again.

MR. OGDEN: R. v. Peeace. And we have cited paragraph 57 of that case.

So Ontario has accepted the oral history evidence provided as admissible, but what Ontario says is that much, not all, is not oral history because it is based ultimately on personal research and as such it is simply hearsay.

Where such research forms relatively less of a story or a recollection of a witness, then it may be oral history, but it should be given less weight.

Your Honour, I don't have any more submissions, unless you have any questions.

THE COURT: No, thank you very much.

MR. OGDEN: Thank you, Your Honour.

THE COURT: Which of your counsel team is speaking next?

MR. OGDEN: Mr. Lemmond will make submissions, Your Honour, as to the harvesting rights in Treaty 72.

THE COURT: All right. Please go ahead, Mr. Lemmond.

MR. LEMMOND: Morning, Your Honour.

As you know, I'm going to address harvesting rights and I'm going to begin, Your Honour, by first stating Ontario's position and that I think that can be, you know, reduced down to four essential points.

The first point is that it's Ontario's position that Treaty 72 did not extinguish SON's harvesting rights over the ceded lands.

The second point is that it does not, however, follow that Treaty 72 did not affect those harvesting rights.

We say, and I believe SON agrees, that the effect of Treaty 72 is that those harvesting rights are subject to displacement over time by settlers putting portions of the ceded lands to uses that are visibly incompatible with the

exercise of those harvesting rights.

And, Your Honour, I use the word "displaced" quite deliberately, so I'm just going to pause for a moment on that point.

And what I mean by that, Your Honour, is this, the fact that lands have been taken up from time-to-time, to use language from another treaty, does not mean that those lands are forever put beyond the reach of SON in the exercise of their harvesting activities.

If the lands at some point are no longer used in a way that's physically incompatible with the exercise of those harvesting activities, they become available for the exercise of those harvesting activities.

The two further points are, first -- I should probably just say three, Your Honour. The third point is subject to safety considerations, that is the exercise of harvesting rights, be they Aboriginal or treaty, is always subject to safety considerations.

Fourthly, the exercise of harvesting rights, be they Aboriginal or treaty rights, is also subject to potential application of conservation measures.

And where such conservation measures infringe the exercise of a right, that infringement may be justified by the Crown.

So I'm going to focus my submissions, Your Honour, on the first two points, beginning with this question of whether Treaty 72 would have extinguished the SON's harvesting rights as they may have existed in 1854.

And I would suggest, Your Honour, the starting point for consideration of the question is the text of the Treaty itself, particularly given that Canada places a great deal of reliance upon the language of the text of the Treaty in arguing that Treaty 72 served to extinguish SON's harvesting rights.

I'm not going to bring it to you, I'll just mention that a printed copy of the text can be found at Exhibit 2145, but the relevant part of the text reads as follows:

> "It's highly desirable for us (the us being referred to being SON) to make full and complete surrender subject to certain restrictions and reservation to be hereinafter set forth."

And there's no express reservation in the Treaty concerning harvesting rights.

So with that in mind, Your Honour, I'd like to compare that language to the language of Treaty 20 of 1818 as discussed in the decision in R v. Taylor and Williams, which is a decision of the Ontario Court of Appeal. I'm not going to pull it up, I'm just going to read you the provision as it's found in that decision at paragraph 5, and for your reference the decision is found in the SON brief of authorities or Book of Authorities at tab 88.

So at paragraph 5 of the decision, we find a quotation from the treaty text and it reads as follows:

> "And the said Buckquaquet, Pishikinse, Pahtosh, Cahgahkishinse, Cahgagewin and Pininse, as well for themselves as for the Chippewa Nation inhabiting and claiming the said tract of land as above described, do freely, fully and voluntarily surrender and convey the same to His Majesty without reservation or limitation in perpetuity."

So I would suggest to Your Honour, we can see a similarity in the language used between the two treaties. And this kind of -- it's sometimes described as a basket clause as very robust language, everything is being ceded.

Now, if we follow this decision through, you know, you'll know that the conclusion reached by the court was that treaty number 20 of 1818 did not extinguish the harvesting rights of the Chippewa signatories. In fact, those rights were preserved over the ceded lands as treaty rights.

So I think the point that follows is fairly straightforward and obvious, the cession of Indian lands, to use more modern language, lands potentially subject to an Aboriginal title interest through a treaty, does not necessarily mean that there has been an extinguishment of the ability to harvest over those lands. That can be preserved. The two are discrete things.

And at the risk of belabouring the point, I'll perhaps explain it this way, borrowing from a metaphor that was used by a treaty commissioner in a different context, but nonetheless which I find to be helpful language.

The language was this, Your Honour, it was suggested that when dealing with the cession of Indian land, it should be considered as something akin to, well, the government buying the land, and it's like buying a horse, but until such time as the settlers need to use the horse, the Indians can still use the horse.

And I put it in that language because I think it helps convey that the concept, the notion, is not a terrifically difficult concept to convey.

THE COURT: I think that case is instructive but, you know, you have not mentioned that in that case a speech made at the Treaty Council by one of the Chiefs specifically said that they hoped that the arrangements would not stop it from harvesting. And we don't have that. And I -- counsel to Canada, I believe, made the observation --

MR. LEMMOND: That's absolutely right, Your Honour.

THE COURT: -- it's not just that the text was silent, but in fact nothing in the proceedings raised the issue either. So it's not quite the same as --

MR. LEMMOND: I agree and that's the point I was about to explore, Your Honour. That is the chief distinction between the two circumstances. In this case we don't have a memorial of the Treaty discussions in 1854 that even touches upon the topic and that is clearly unlike immemorial of the Treaty discussions that's part and parcel and key to the decision in Taylor and Williams.

But I would suggest, Your Honour, that that silence is something that we have to listen to or should listen to, in any event.

But to understand that proposition, I think one has to turn to what we would turn to in any event as a matter of considering this question, the broader context, not just the Treaty proceedings, but the broader context in which the Treaty proceedings took place.

And the key component of that context is the fact that we have considerable evidence, I would suggest, Your Honour, that there is continued harvesting activities across the ceded lands, by members of the SON during the 1830s, 40s and 50s.

And as one specific reference to that

point, Your Honour, it's discussed in Dr. Reimer's first report, which is Exhibit 4576 at page 228, 233, -- sorry, 228 to 233. And in that, overlapped some of the primary documents that SON has cited in its reply submissions on this point.

And that evidence points out incidents in which SON members continued to hunt and sugar and do other things across the lands that were subsequently ceded in 1854 and this is in the period of the 1830s, 40s and 50s.

And I think that evidence underscores the fact that the use of those lands for their own survival, for their own support, continues to be an important consideration for the SON at this time. And that conclusion is reinforced if one considers that evidence in light of the broader evidence about the Ojibwe economy, the traditional Ojibwe economy. That's also discussed by Dr. Reimer. It was discussed by other experts, but a citation in respect of Dr. Reimer's report, same report, volume 1, Exhibit 4576, page 25 to 26.

And we have there a description of the Ojibwe seasonal cycle, traditional way of life,

and part and parcel of that is a well-known practice of moving from the shoreline inland during the winter to familial harvesting areas. So the larger Band group in its break out and disperse and clearly hunting on the landscape, particularly during the winter period is an important part of the established lifeways of the Ojibwe.

And that seems to be something that's continuing into this period. It's in transition. It may not be attained to the same degree in relation to all families, but it's something that the evidence does speak to.

So from that we don't have the direct discussion in the minutes of the Treaty negotiations, but we have a broader context that, I suggest, provides a sound foundation for inferring that harvesting activities are still quite important to the SON at the time of the making of the Treaty.

And if that's the case, Your Honour, it begs the question of now why is there silence on this issue in 1854? And I suggest further, Your Honour, that one way of looking at it is as simple as this, if something had been said

during the Treaty negotiations conveying to the SON that at least the Crown understood that the consequence of Treaty 72 would be that the SON would no longer have available to them the ceded lands to hunt over, to gather over, as of right, that would have provoked some form of reaction.

It was important to them. As an immediate event it stood to effect the members of the SON potentially in significant ways. So it follows from that that it's unlikely that such a notion was communicated in any kind of clear-cut way by Crown officials during the negotiations in October 1854.

The more reasonable inference to draw is that nothing was said that alarmed the SON that it's more likely that, and we see this elsewhere in the terms of the history of treaty making, including some of the language used by Bond Head in 1836, it's more likely that to the extent it was discussed, the idea that was communicated was along the lines of, well, you'll continue to be able to harvest across these lands. Nothing's going to change tomorrow, but you full well know also that the lands are going to be settled and over time that

will affect your ability to use the lands for harvesting activities.

And I would suggest, Your Honour, that it follows from that that such a notion would not have been alarming to the SON, would not have provoked a reaction. It's much more likely to not have impacted upon the record of the Treaty negotiations. It would have been much more in the way of a nonevent.

I think that's all I have to say on that point, Your Honour.

I am going to pass on to some -- it's a related point, however.

THE COURT: Does it still relate to harvesting rights, sir?

MR. LEMMOND: Yes, it does, Your Honour.

THE COURT: I do have a question but I'll wait.

MR. LEMMOND: Okay, Your Honour.

What I'm going to focus on now are some of the points raised by Canada in relation to evidence following the making of the Treaty as a reflection of whether or not it was understood or conveyed that Treaty 72 served to

extinguish harvesting rights off Reserve.

And to do this in a fairly quick way, Your Honour, Canada's submissions, beginning at paragraph 986, these are the Treaty submissions, going through 987, further on, 989, Canada refers to a number of documents, declarations, et cetera, and I'm actually going to pull it up.

And Mr. Beggs referred to these yesterday as evidence that SON understood that their hunting rights had been surrendered.

In their written submissions at paragraph 986, Your Honour, Canada puts the proposition this way:

> "Shortly after the Treaty 72 surrender, the Saugeen and Nawash indicated several times that they believed they no longer had the right to hunt over this surrendered territory."

And then in the next paragraph, one of these documents, a declaration sent to the Governor in October 1856 is discussed. But before I go to the quote taken from that document put in these submissions, I just want to highlight the point that I'm trying to hit,

Your Honour, which is this, it's this distinction between a cession of hunting grounds understood as a cession of a property right, an exclusive right to those lands, versus the notion of extinguishment of harvesting rights over those lands.

And what the document says as quoted by Canada is:

> "We the Indians residing in Owen Sound and Saugeen country declare that having disposed of all our hunting grounds, not rights, Your Honour, grounds, we can no longer live by the chase and therefore wish to settle upon farms."

And it continues, "Abandon our hunting and roving habits no longer as minors to be treated."

Now, Your Honour, this declaration, and there are other materials similar to it including some mentioned directly by Canada in their submissions, is consistent with the notion that the Saugeen, to some extent, have an appreciation that their harvesting activities are going to diminish following the Treaty.

But it doesn't necessarily follow that they're going to be diminished as a consequence of the extinguishment of the ability to exercise those rights.

It's at least as reasonable to understand the statement as a reflection of an appreciation that the exercise of those rights will be limited over time by being displaced through the taking up of the lands and also through their own voluntary adoption of different life ways, different economy adapting to farming, as a voluntary matter.

But, no, that's quite distinct from the notion that as of October 13, 1854, there was a sudden change manifested as a matter of an extinguishment of the legal right to use those lands while unoccupied.

In Canada's submissions on this theme, Your Honour, they conclude by referring to the allocation of the hunting Reserves in 1896. And I would suggest, Your Honour, that a similar point can be made in relation to the setting aside of a Township in 1896 as a hunting Reserve.

The fact that it's set aside doesn't

necessarily mean that the Saugeen understood that they had no ability to hunt elsewhere on the peninsula. It's equally consistent that, and in fact I would suggest more consistent when placed in the context of the near complete sale of lands on the peninsula in the 1890s, that the Saugeen asked for a setting aside of a hunting Reserve as a reflection of their appreciation that lands had been taken up and were coming to the end of that process. There were fewer and fewer lands available to them to harvest over by virtue of the sale of those lands leading up to the 1890s.

It's also consistent with the Saugeen appreciating that there may be less use, but nonetheless, a standing and continuing desire to hunt at that time.

I would also suggest, Your Honour, the fact that they're asking for the Reserve underscores the continuing importance of hunting activities in the 1890s, notwithstanding the general policy direction of the civilization policy, even to the extent that that, to some degree, was adopted among Saugeen members themselves.

Those, Your Honour, are my comments in relation to this question of extinguishment.

I'm going to proceed on to the question of visible compatible use and what that means. You had a number of questions to the other parties over the last few days on that point, but before I go there, does Your Honour have any questions in relation to extinguishment?

THE COURT: No. My question relates to your next topic which you may well answer before I need to ask it.

MR. LEMMOND: On this point, Your Honour, Mr. Beggs in his submissions I believe suggested that one of the -- his concerns, I don't think he pitched it as anything higher than a concern, about the incompatible use test is that it's vague, it's indeterminate, and I think that concern connects to some of the questions you were putting to counsel over the last few days. What are the boundaries of such a test, if it's the applicable test?

And I think a good way of addressing that point, Your Honour, is through the Badger decision. I'm not going to bring it up. I'll

just read through the relevant passages, Your Honour, but I'll give you the reference for it. It's tab 70 of the SON Book of Authorities. And where I'm going to begin, Your Honour, is on page 807 of that paragraph 63.

And it's a passage that we at Ontario have highlighted in blue. It reads as follows:

> "The visible incompatible use approach which focuses on the use being made of the land is appropriate and correct. Although it requires that the particular land use be considered in each case the standard is neither unduly vague nor unworkable."

So at least we have Justice Cory suggesting that it's a workable standard, but I think it would be helpful to, nonetheless, go forward and clarify what some of the guiding principles are. But before I go to that, Your Honour, I just want to underline the importance of remembering that it's a case-by-case approach and what I'm about to speak to really is in the reference of a general guidance. When it comes to assessing each incident it can be very

specific and complicated, but I'll amplify that in a moment, Your Honour.

I'm going to bring you forward to paragraph 67 in that decision. And this is where the court actually discusses the particular circumstances relating to the three defendants. And more specifically, the circumstances on the ground that we're concerned with as a matter of the application visible and compatibility test.

So it says:

> "The first is Mr. Badger. He was hunting on land covered with second growth willow and scrub. Although there were no fences and signs posted on the land, a farmhouse was located only one quarter of a mile from the place the moose was killed. The residence did not appear to have been abandoned. Second, Mr. Kiyawasew was hunting on a snow covered field. Although there was no fence, there were rundown barns nearby and signs were posted on the land."

And I think this touches upon a point

that has been touched upon previously, the importance of signage and the ability of property owners to put up signage.

Continuing with the passage.

> "In these situations presented in both cases, it seems clear that the land was visibly being used. Since the pallets did not have a right of access to these particular tracts of land, their treaty right to hunt for food did not extend to hunting there."

So there we have now an example of the application of the visible and compatible test, and it does show some of the considerations, the relevance of the proximity of dwellings, of fencing, of signage, such as no trespassing signs, and those are all exactly the kind of considerations that should be applied in each specific case.

As I cautioned earlier, Your Honour, one must be careful in the clear application. And this goes to something Ms. Guirguis said. Now not all fences are created equal, is a way of putting it. Having a rusted old boundary marker of a wire or fence covered by shrubbery

in the back corner of a hundred acre lot is something quite different than having a 10 foot chain link all around the perimeter that -- there is some discretion in the application of the general principles and there really has to be.

I'm going to move to paragraph 68, Your Honour, which provides something more of an illustration to the application in the principles:

> "However, Mr. Ominayak's appeal presents a different situation. He was hunting on uncleared muskeg. No fences or signs were present. Nor were there any buildings located near the site of the kill. Although it was privately owned, it is apparent that this land was not being put to any visible use that would be incompatible with the Indian right to hunt for food."

So I would suggest, Your Honour, that that helps to grab some sense of how the visible and compatible use test is applied and that it does provide reasonable guidance, albeit on a

case-by-case manner.

I just wanted to remind Your Honour -- no, sorry, I don't.

Before I proceed, Your Honour, I just wondered if you have any questions on that point?

THE COURT: What Ontario seems to be submitting is, and I think this is what SON is also submitting, is that silence in Treaty 72 should be interpreted to mean -- in all the contexts, not just silence, but starting with silence and considering all the surrounding circumstances, that harvesting rights and the one that is most germane here is hunting, because of the nature of the plan, were not abruptly terminated on that day in 1834.

But could well in the future be terminated on an ad hoc basis depending on the compatibility test that you just described.

Is that a fair summary of what you say the effect of Treaty 72 was?

MR. LEMMOND: Close, Your Honour, and my caution is this that I don't think we have in the collection, I have to look, but there's a decision from the Supreme Court in Mikisew

number 1 that discussed the taking up of lands in relation to one of the numbered treaties. And one of the cautions -- that was primarily a consultation case. And it was about consultation in respect to displacement of harvesting rights by virtue of lands being taken up.

And one of the cautions stated by Justice Binnie in that decision was that, you have to -- this is a paraphrase, but one does have to be mindful of taking up proceeding to an extent that potentially renders the right meaningless.

THE COURT: Which right are you talking about?

MR. LEMMOND: The harvesting right.

THE COURT: So you're saying that if the entirety of the surrendered lands were, as expressly contemplated in the Treaty text, redeployed for farms, which didn't happen but as a hypothetical, farms incompatible with hunting, that that somehow should not have happened?

MR. LEMMOND: No --

THE COURT: That's exactly what was contemplated by the Treaty.

MR. LEMMOND: Yes, Your Honour, and I think in our Treaty, it is distinguishable from that numbered treaty in Mikisew because this was a vast territory, I think that was treaty 8.

And here what we're looking at is a parcel of land that's smaller, and as you've said, it was contemplated that most of it -- not perhaps all of it would be fully taken up, given some of the concerns that emerged and were actually present in people's minds with respect to some of the quality of the territory.

So what I would say is this, Your Honour, that in this case, Ontario is of the view that taking up probably go much further that it would in other treaties, but to say categorically that any ability to hunt could be extinguished is something I would be cautious to of venturing on. I would want to pause before we cross that boundary. And it has not happened. In fact, there are still lands available for harvesting even after the occupation of lands for purposes of farming.

THE COURT: That is the case, but it wasn't the desired outcome as is reflected in a lot of evidence about unhappiness of SON

predecessors about the failure to redeploy the land and also the failure to require settlement.

My other question or concern about this theory is that it seems at least possibly counter-intuitive to say that the expectation at the time of the Treaty was that after the Treaty, every single event of hunting would result in a factual, ad hoc determination of what could and couldn't occur, which seems to be what you're advocating for.

I mean, there is an element of impracticality to that.

MR. LEMMOND: I appreciate that, Your Honour.

THE COURT: That seems not just small but considerable.

MR. LEMMOND: And I think, Your Honour, the point to be made is that doesn't seem to be an obstacle in the adoption of exactly that kind of language in the treaties where you have an express taking up provision, the numbered treaties and the Robinson Treaties, for that matter.

THE COURT: We've got a whole lot of treaties around, some of which expressly provide

the continuation of the right to hunt. And if we're going to get into a context of different treaties, I think we're going to get outside of the important principles of treaty interpretation law.

If what Ontario is saying is -- it seems to me there is -- and I know the Badger case, which of course is a -- anyway -- it seems hard to imagine that one of the factors of the Treaty interpretation is to have regard for the parties were expecting to occur based on the context and the Aboriginal rights law on treaty interpretation. And the Indigenous perspective is an important part of that and so forth.

And it seems hard to imagine that what they expected was that in perpetuity into the future, on an ad hoc every day I go out to every place basis, there will be an ad hoc determination of whether or not there is a continuing a right to hunt.

Now, I would not be surprised if Ontario came forward and said, well, sometimes it will be ad hoc, but a lot of things are not ad hoc.

And so an example of that is the

plaintiffs have said forcefully that they accept that they must comply with all safety regulations. So that's a bright line, if I can call it that.

Similarly, someone could say, and I think one of our community witnesses did say that from his standpoint, if there was a mark or sign or fence, that he would consider that sufficient to not hunt on that property.

But I think what you're saying is every day is different, every place is different, every person is different. And I'm struggling with that a little bit.

MR. LEMMOND: And, Your Honour, I didn't mean to put it in that extreme form. I do think you're right. There are general principles of guidance that do provide a fair degree of clarity, such as signage, the proximity of buildings and the emergent safety concerns and they're the safety concerns straight up.

So I didn't mean to present it as such a radically ad hoc exercise. There are general principles.

I'm just cautious of overstating that

in the reverse direction because ultimately when these -- when it comes to dealing with this on the ground, it's an issue dealt with by enforcement staff and by prosecutors. And a lot of consideration goes into these particular factors as they play out in each instance, both as a matter of the laying of the charges and the continuance of the prosecution.

So there are general principles, they provide a lot of guidance, and some of them can operate at a pretty heuristic level, such as signage, such as proximity of inhabited houses.

So and it seems in practice not to be so difficult. And actually brings me, I think, to a point about Badger.

I understand your point, Your Honour, in relation to concern about transposing what's concluded in relation to one treaty in one set of historical circumstances across a number of treaties in different historical circumstances.

And I think the answer to that, Your Honour, is that there's a high degree of similarity. And the same problems is being dealt with in its fundamentals across Canada through the treaty making process.

Where it was most overt and dealt with most clearly was in relation to those treaties, beginning with the Robinson Treaties and picking up from the numbered treaties following Confederation, where there's on the one hand finally an express recognition of the continuance of the harvesting rights, but a necessity of reconciling that with the opening of the lands for settlement.

And just to pause there, that's done expressly through the terms of the treaties that I just mentioned. The significance of the ^Arlington case that we referred to in our submissions is that in that particular instance, the court recognized that it's a necessary implication where you have the continuance of harvesting rights, but at the same time the opening up the land for settlement. There has to be some device that allows for the reconciliation of those two things.

Because stated in an absent form, they don't necessarily fit in an unlimited ability to continue to hunt without restriction versus an unlimited unrestricted ability to take up the lands.

And in that particular case, I won't bring you to it right now. It's in our collection of authorities, it's discussed in the submissions. It dealt with the 1701 Nanfan Treaty which provided for express harvesting rights and the court came up with a test that is very similar to the Badger test. That it's not a question of legal incompatibility, it's a question of incompatibility of the actual land use. Determining whether those Nanfan rights can continue to be exercised over the ceded territories or the territories gifted to the Crown, the language of the treaty's a little bit different.

What I'm suggesting, Your Honour, is that this set of circumstances is commonplace across the process. To some disagree it's inherent in the nature of the treaty making process of opening up lands for settlement involving lands on which Indigenous peoples have depended for their sustenance through hunting and fishing.

And once we get to the point where it's being dealt with expressly, we have the language in the treaties themselves to give us

some sense of what was seen as adequate for providing guidance on this.

So that the language of Treaty 8, Your Honour, is found at paragraph 31 of Badger.

THE COURT: You've already taken me to it.

MR. LEMMOND: I don't think I took you to actual taking up language in Badger for Treaty 8, Your Honour. I can leave it.

THE COURT: I'm going to interrupt you anyway.

MR. LEMMOND: Yes, Your Honour.

THE COURT: Because I'm familiar with the Badger case.

MR. LEMMOND: Okay.

THE COURT: This is not going to be able to be dealt with on the basis that we should look broadly at what other treaties do because I don't have that evidence in front of me to begin with, and its role with respect to treaty interpretation is limited.

And I will ask you to give me the citation for the Supreme Court of Canada case you mentioned regarding Treaty 8 because it is not in the authorities, so you can provide me

with that.

MR. LEMMOND: It's Badger, Your Honour.

THE COURT: I thought you said there was another case that was not in the authorities.

MR. LEMMOND: Oh, yes the Mikisew case. Yes, I'll get it. I'm not sure if it is. I will make sure it is that I get you the cite. That's Mikisew number 1.

THE COURT: So if I can reformulate what you're saying now, you're not saying that every single case has to be adjudicated upon on its particular facts all of the time because there could be some general principles and guidance that would assist ordinary people in understanding what they could and couldn't do before they get to the problems you've pointed out, which seem to me desirable to avoid, which is individual prosecutions.

It seems to me more than unlikely that the parties 1854 were intent on designing a system that would be judged how ever many years later in individual prosecutions. Sometimes it can't be avoided, but it's never planned.

In any event, if you can get me that Supreme Court of Canada citation.

We'll have the morning break and you can pick up with your next topic after the morning break.

MR. LEMMOND: Certainly, Your Honour.

THE COURT: All right, 20 minutes.

MS. ROBERTS: Thank you, Your Honour. Resuming in 20 minutes.

-- RECESSED AT 11:27 A.M. --

-- RESUMED AT 11:49 A.M. --

THE COURT: Please go ahead Mr. Lemmond.

MR. LEMMOND: Yes, Your Honour. I have the reference for you. It does turn out that Mikisew Cree, number 1 decision, is in Ontario's collection of authorities. In terms of the numeration of that collection, it's number 85. The full cite, if you want it, is 2005 SCC69. And I also have for you from that decision the specific reference I was going to earlier in my decision. It's paragraph 40 of the decision.

And, Your Honour, I'll read the relevant portion:

"The 'meaningful right to hunt' is not ascertained on a treaty-wide basis (all 840,000 square kilometres of it) but in relation to the territories over which a First Nation traditionally hunted, fished and trapped, and continues to do so today. If the time comes that in the case of a particular Treaty 8 First Nation 'no meaningful right to hunt' remains over *its* traditional territories, [with emphasize on its] the significance of the oral promise that 'the same means of earning a livelihood would continue after the treaty as existed before it' would clearly be in question, and a potential action for treaty infringement, including the demand for a Sparrow justification, would be a legitimate First Nation response."

So that is the relevant concern, Your Honour. I understand we are in different circumstances given the extent to which, on our record, it is clear that it was anticipated that much, if not virtually all, of the peninsula

would eventually be sold and likely occupied to some degree, and also given the absence of an oral promise that is that specific.

But I think the consideration is still a valid one in thinking on the extent to which harvesting rights might be displaced.

I have just one other point to touch on, Your Honour, in relation to harvesting rights and it goes to the question you asked in relation to R v Jones. I'm just confirming, Your Honour, that Ontario shares a similar view as the other parties. Now we don't view Your Honour as being bound by the decision, but we accept that you can take notice of the findings made in that decision.

THE COURT: Including findings of fact?

MR. LEMMOND: You can consider them, Your Honour.

THE COURT: In what way? I mean obviously they are relevant to understand the decision that Court made, but if you're saying that they can be treated as evidence in my trial --

MR. LEMMOND: No, not in that sense.

Sorry, no I didn't mean to --

THE COURT: All right.

MR. LEMMOND: Subject to further questions, Your Honour, those are my submissions in relation to harvesting rights.

THE COURT: Thank you, Mr. Lemmond.

MR. LEMMOND: You're welcome.

THE COURT: Who is next up in -- is it Mr. Feliciant?

MR. LEMMOND: It is, Your Honour.

THE COURT: Please go ahead, Mr. Feliciant.

MR. FELICIANT: Good morning, Your Honour.

Before I begin the main body of my submissions there is a couple of points that I would rather not leave hanging and I'd like to address. If we could bring up the rough draft transcript from October 20th, page 68, lines 7 to 13 please? And this is an excerpt from Ms. Guirguis' submission to you on that day.

THE COURT: You can bring up if you wish, sir, but perhaps you can simply remind me. It was only a day or two ago.

MR. FELICIANT: Then that's not

necessary.

Basically the submission was that it was a comment that Ms. Guirguis wasn't sure what was being insinuated by the questions counsel for Ontario were asking the community witnesses in respect of their discussions with Darlene Johnston.

And I just wanted to be clear that nothing was being insinuated. The questions were relevant in terms of how much -- what the source of the information was from those witnesses, how much of that evidence was informed by oral history, and how much was informed by legal research or other forms of research conducted by Darlene Johnston such that it wouldn't be oral history necessarily.

So there was nothing -- I don't know what that meant to say what was being insinuated, but that was the purpose of the questioning was.

The other point that I didn't want to leave hanging was in -- and I can direct Your Honour's attention to it. In appendix E where the plaintiffs have provided you with their summaries of their views on the various

witnesses' evidence, their summary for Dr. Reimer the last page, basically I think it might even be the last sentence, says something along the lines of "conveniently" these changes are more in line with Ontario's position.

Now, that comment may lead one to conclude that maybe some form of impropriety took place. I don't know that that was the intention. I don't think it was, but it could lead another person reading it to think that. These are public documents.

I just want to be clear, there is no evidence of that. Dr. Reimer, in her evidence, was very clear why she made the changes and that they were her changes. She wasn't doing it as a result of any pressure from counsel at all. That never came out in her evidence and it wasn't established.

So in light of the fact it was in these written submissions, I'd ask you not to accept that and, in fact, reject it.

Now, and just as a reminder, her explanation for making those changes is in Exhibit 4706 and her evidence in-chief where she explained her reasons for making the changes, is

the transcript of February 13th, 2020, starting at page 10,706. So those are the two points I just wanted to clear the deck with and get out of the way.

Now, in a case like this it's easy to get lost in the forest of evidence. And so it was important, at least from my perspective, to try and conceptualize what the plaintiffs are alleging in the Treaty action. And I have done in two ways. And the way I look at it is in terms of broad allegations the term in the first one is the plaintiffs are basically saying that the term in Treaty 45 1/2 that contains the agreement that the Crown would protect the peninsula from encroachment from whites gave rise to more than a treaty obligation but a fiduciary duty. And it was breached by the Crown at some point between 1836 and 1854.

The second broad allegation or grouping of allegations concern the actual negotiation in the making of Treaty 72, and they are saying basically -- the plaintiffs are saying the actual negotiation and making of Treaty 72 gave rise to a fiduciary duty and that this duty was breached.

The plaintiffs also claim that the honour of the Crown was engaged and breached.

Now, with respect to the honour of the Crown, Ontario agrees that the honour of the Crown gave rise to specific obligations in each scenario, both with respect to the Treaty obligation and with respect to the conduct of the negotiations. But it's Ontario's position that the honour of the Crown was not breached in either case.

And Ontario is asking you to find, and I believe you have sufficient evidence to find that it did not cause -- if there was a breach, it did not cause the plaintiffs to enter into Treaty 72.

In terms of the analysis, first I'm going to address whether a fiduciary duty arises. So does a fiduciary duty arise in relation to protection from encroachment? And Ontario says, no.

The obligation at issue is whether the Treaty promise to protect the peninsula from encroachment of the whites is a fiduciary obligation. The Supreme Court has said that we need to focus on the particular obligation or

interest and to identify the Aboriginal interest at stake with care. That's Wewaykum paragraph 83 and 52.

So I'd like to start, Your Honour, by reminding us, because there has been a bit of a gap between Ms. Guirguis' presentation and now, what the obligation is. And if we could pull up Exhibit 1132? And now I can say this is reproduced in text at Dr. Reimer's report at Exhibit 4703 at page 42 which is a much easier read, but this version is the version that was -- well, the original version and it doesn't contain the comma and so on.

So to remind us what that says, it says, the relevant portion:

> "I now propose to you that you should surrender to your Great Father the Sauking territory you at present occupy and that you should repair either to this island or to that part of your territory which lies on the north of Owen Sound upon which proper houses shall be built for you and proper assistance given to enable you to become civilized and to cultivate

land which your Great Father engages forever to protect for you from the encroachment of the whites."

So this is the promise to protect from encroachment. It's probably helpful at this point to deal with the issue of cultivation.

And similar to what Mr. Beggs submitted, we're not suggesting that the promise to protect the peninsula applied only to cultivated lands. What we do say in the alternative argument that we make, we use it in relation to the type of fiduciary duty that might arise and what that might apply to. So we make an alternative argument that if Your Honour does find that an ad hoc fiduciary duty arises in the circumstances of this case, it could only apply to cultivated lands.

I don't propose to say more about that at the moment, and I may not touch on it, but I want to make clear it's an alternative argument and it's made in connection with what a fiduciary duty would apply to, a particular fiduciary duty would apply to.

So the other point I'd like to address at this point is whether Treaty 45 1/2 created a

Reserve. Now, regarding the creation of the Reserve it's important to remember, Your Honour, that when Bond Head made the Treaty in 1836 he was not acting under specific instructions. He went to Manitoulin to distribute presents.

Dr. Reimer's evidence was that the decision to continue with the Manitoulin establishment was not final. And for that reason the Treaty 45 1/2 agreement was not final, but rather provisional. And the agreement itself, I won't bring it up, but if you look at the last page of exhibit, for example, Exhibit 1130, which is the original document, the last page it actually calls itself a provisional agreement.

Dr. Reimer discusses this in her evidence at volume 3 of her main report at Exhibit 4703.

I would like to pull up now if I could the Wewaykum paragraph 13 from the decision of the Supreme Court in Wewaykum. That is at SON tab 113.

THE COURT: Mr. Feliciant, just while your assistant is doing that, I have a note to ask you about something in this general area,

and I just think I would be better off if I ask you now before you get into the detail. And it is a very specific note.

So in Ontario's written submissions on the treaty action, and I have it as paragraph 447 sub (f), there is a submission that appears to say that Treaty 45 1/2 set aside the peninsula "as a Reserve". That phrase is used. And then over to Ontario 509, the thought is that "even if the peninsula could be described as a Reserve," so I made a note because those two thoughts seemed inconsistent with one another, and I'm confident that as you deal with this issue you can clarify it for me.

MR. FELICIANT: And I think it will. I think the short answer, before I get into it, is that the parties would refer to it as a -- as an informal Reserve.

When we say it wasn't created as a Reserve, we're talking about it in the formal, legal big "R" Reserve sense.

THE COURT: So perhaps what you could do, because as the reader it wasn't apparent to me that the word was used in different ways, is perhaps at the lunch one of your counsel group

could assist you in letting me know when it's being used informally, because I don't -- it's going to be difficult for me to get -- not difficult, but I may not able to appreciate the nuance that you just described.

You need not interrupt your submissions, but at some point I need to understand when you're not using that word in its legal, consequential way because it is an issue in this case.

MR. FELICIANT: I understand, Your Honour. Yes, we'll look at that.

THE COURT: All right. Please go ahead.

MR. FELICIANT: So I brought up the Wewaykum decision, which recites the test that was set out in Ross River Dena Council. And what the Court says was:

> "The legal requirements for the creation of a reserve within the meaning of the *Indian Act* were considered by this Court in Ross River Dena v. Canada [...] released June 20, 2002. They include an act by the Crown to set apart Crown land for use

of an Indian Band combined with an intention to create a reserve on the part of persons having authority to bind the Crown and practical steps by the Crown and the Indian band to realize that intent."

So I've already touched on the fact that Lieutenant Governor Bond Head didn't have authority at that point to create a reserve.

THE COURT: Before you get into that, Mr. Feliciant, obviously in our case we're not talking about a Reserve as defined in the Indian Act which did not exist.

MR. FELICIANT: That is correct.

THE COURT: Are you saying that Ontario submits that the test is identical? Even though what Ross River expressly dealt with is what does it mean in the Indian Act, which doesn't apply here.

MR. FELICIANT: No, I agree that it doesn't apply. We're not talking about the Indian Act.

But there still is -- it applies to the extent that the person creating the Reserve has to have authority to specifically intend to

set it aside as a Reserve. And in this case what's happened is, when you look at the construction of Treaty 45 1/2, the peninsula is not being surrendered -- sorry, the territory of the Saugeen was not being surrendered in its entirety, including the reserve, and then a portion of it being set apart for the Band's use.

Rather when you read Treaty 45 1/2 what's happening is the territory you at present occupy, and I put that in quotes, is surrendered, that means the southern portion. And the Bands are asked to repair to the territory that lies north of Owen Sound.

So the territory that lies north of Owen Sound isn't being surrendered and set aside as a Reserve. They are repairing to that part of their territory.

The other issue that we have is the vague -- the boundaries from the evidence is described as being vague. And those metes and bounds are not actually settled upon, as Dr. Reimer points out in her report, until the 1847 Royal Declaration.

Now when we talk about this

distinction between a formal legal reserve and an understanding that this would be the territory that they're using and residing upon, I'd like to draw your attention to the transcript of March 5th, 2020, which is day 90, and it occurs at page 11,530.

Ms. Guirguis cross-examined Dr. Reimer on Exhibit 1322, which is the minutes of a general counsel held at the River Credit in January of 1840 at which SON and Samuel Jarvis, Chief Superintendent of Indian Affairs, were present.

Dr. Reimer was directed to a portion of the minutes which recorded a request by the Chiefs, including SON, for titles to their lands, and to extend the Reserve at the Saugeen River for the benefit of all Indian tribes who might wish to emigrate. Samuel Jarvis' answer was that it was under consideration.

But the -- what Dr. Reimer said, and this she said at page 11,533, lines 12 to 19, she said:

> "I think that this is -- can also be interpreted as a petition for formal reserve status of the peninsula

and extension and acknowledgment by the government official of reserve status so that there would be greater confidence of other Indigenous groups to emigrate to that place knowing that it had the formal sanction as a reserve."

So this suggests that in Dr. Reimer's opinion there was a recognition that it was not a formal reserve at least in 1840.

It's my submission that the formal status as a Reserve was achieved with the 1847 declaration because that clearly was created by persons who had authority, but more than that it confirmed their use and possession of the reserve; it confirmed the metes and bounds; and it confirmed that the lands, upon surrender, if sold the proceeds would go to the benefit of the Bands.

So we certainly have a clear articulation that this is now being considered to be a reserve.

This should not be interpreted as me saying that the Bands -- people weren't referring to it as a reserve as that word is

often more informally used. We're talking about the formal creation of it, given what one might say is a legal interest in the reserve.

So there also was an intention, I might add, that other First Nations would be welcome. And I want to address a comment Ms. Guirguis made that Dr. Reimer said the creation of a general reserve was just an idea.

I don't think, Your Honour, that is really a fair characterization of her evidence. Her evidence was far more than that and, in fact, it is a central part of her theory as to why SON ended up surrendering in Treaty 72, because it was recognized that that hope would not materialize, that more people would come.

So on cross-examination on day 90 at pages 11,561 to 11,565 Ms. Guirguis asked Dr. Reimer about this. And Dr. Reimer's first response was that it was an implied term, which certainly suggests far more than an idea. It was only later, after some considerable back and forth, did Ms. Guirguis suggest that it was not formally created, and Dr. Reimer again was clear that it was an implicit understanding. And ultimately Ms. Guirguis framed it as an idea or

proposal, and Dr. Reimer agreed, yes it was an idea or proposal.

I do not think from the evidence in its totality that it can be reduced to Dr. Reimer thinking that this was just an idea.

So if I can move on now to the promise to protect from encroachment? That's the fiduciary duty that the plaintiffs say is at issue. And before discussing the test for whether those duties arise, and we say those duties don't arise, I would like to make some general observations about fiduciary duties.

Now, I also want to be clear that Ontario is not saying there was no obligation to protect the peninsula. There was an obligation. It was in Treaty 45 1/2. So there's clearly an obligation. It's just not a fiduciary obligation.

So the first observation I would make is that an Aboriginal interest in land giving rides to a fiduciary duty cannot be established by a treaty; it is predicated on historic use and occupation. We find this in Manitoba Métis at paragraph 58. We find it quoted in Williams Lake at paragraph 53.

The interesting situation we have here is that the Treaty term to protect arose from -- is a treaty term, but it also arose from and is related to another treaty term that the Saugeen repair to that part of their territory, which was accepted from the surrender.

So we actually have two treaty terms; one you could even say gave rise to the treaty term to protect. So the treaty term that said the community would repair to their territory north of Owen Sound resulted in a treaty term to protect the peninsula.

So it still could be predicated on historic use and occupation. So the question I think you have to ask is, well, was the historic use and occupation in 1836 sufficient to give rise to a fiduciary duty in this case?

Now, we do know that this was considered the -- the peninsula was considered to be part of SON's territory. We also know that they used that territory. You certainly heard evidence about that connected to the Aboriginal title case.

The question is with respect to occupation and the focus of this trial was not

on the historic use and occupation of the peninsula leading up to 1836. There's a lot of evident about it but that was not the -- I don't know even if there is a lot of evidence, but there is evidence of use. It wasn't focused on occupation. So can we draw any conclusions about the nature of SON's occupation of the peninsula in 1836 to allow you to say that this promise to protect is predicated upon the historic use and occupation of the peninsula?

Now, we go to know that historic use and occupation does not have to rise to the level of Aboriginal title, but I don't know how much that helps us. It still has to rise to a level that gives rise to a fiduciary duty. There's an absence in this case of that factor. So that's my first general observation about fiduciary duties.

My second one is a fiduciary obligation arises from the honour of the Crown when the Crown assumes control over a specific Aboriginal interest. So I'd emphasize "assumes control over" and "specific", but also I'd like to at this point also address something that Ms. Guirguis said, that SON is of the view, the

plaintiffs are of the view, that an ad hoc duty does arise from the honour of the Crown, and I believe Ms. Guirguis made that submission on Monday.

So the language in Manitoba Métis at paragraph 73, page 662, item 1 is very specific.

THE COURT: Mr. Feliciant, which paragraph in Manitoba Métis?

MR. FELICIANT: Paragraph 73. That language is very specific. And you have to remember that that language occurs in the context of a decision which also sets out the test for on ad hoc duty.

So the Court is very careful to say, a fiduciary obligation arises from the honour of the Crown when the Crown assumes control over a specific Aboriginal interest which is the sui generis part of the test. It is not the language used in relation to an undertaking to act in the best interest.

So the third observation I would make about fiduciary duties that we can glean from the cases that seem to pertain to the issue that we have is that not every interaction in a fiduciary relationship gives rise to a fiduciary

duty. That can be found at Wewaykum paragraph 83, Manitoba Métis paragraph 48. In this case neither a sui generis nor ad hoc duty arises.

Similarly not every breach of duty is a breach of a fiduciary duty, and I refer you also to Rotman on fiduciary law which is SON tab 192, page 73. But that makes sense, that not every breach of an obligation is a breach of a fiduciary obligation.

The fourth observation is that the Court has said in at least three cases, probably more but at least three that I found, is that the hallmark of a fiduciary duty is that another person's legal interest -- or another party's legal interest is at the mercy of another party's discretion. And I would highlight the words "at the mercy of another party's discretion." And that comes from Guerin -- I don't have paragraph numbers unfortunately -- that comes from Guerin, Wewaykum and Semiahmoo.

THE COURT: What was the third case you mentioned after Wewaykum?

MR. FELICIANT: I'm probably not pronouncing it correctly, Semiahmoo. That's S-E-M-I-A-H-M-O-O, the Federal Court of Appeal.

The fifth observation comes from Wewaykum at paragraph 83. Justice Binnie wrote that:

> "It is necessary, then, to focus on the particular obligation or interest that is the subject matter of the particular dispute and whether or not the Crown had assumed discretionary control in relation thereto sufficient to ground a fiduciary obligation."

So I would emphasize here not just that we focus on the particular obligation, but also that it has to be sufficient to ground a fiduciary obligation.

So it has to be sufficient to give rise to the imposition of a fiduciary duty. So it's not any amount of control; it must be sufficient.

It's interesting -- it's difficult to apply that to a treaty obligation to protect from encroachment.

The last observation is that where the interest at stake is not the disposition of the interest in land, or the interposing of the

Crown between the Indian Band and non-Indians, or where the Crown is not a faithless fiduciary with respect to disposition of a Band asset, Justice Binnie and Wewaykum at paragraph 92 tells us that the court should exercise caution before imposing a fiduciary duty.

So there is emphasis on disposition. And that's understandable because the Band is at its most vulnerable and it's faced with a threat to the legal interests which would be the exploitative bargain.

I would also suggest that caution, and this isn't in the case, I'm just thinking cautious needs to be imposed when looking at imposing a duty that may add to or change an existing treaty term.

I'm finished with my observations now about fiduciary duty.

THE COURT: Just before you move on, I have two questions about those submissions.

Taking the last comment you made, caution is needed when a duty may add or change a treaty term, is that what you say would happen here? And if so why?

In other words, is the

characterization or the imposition of a fiduciary duty in relation to that aspect of Treaty 45 1/2, in your submission, add or change the treaty term?

MR. FELICIANT: I think there is a risk that, certainly depending on the nature of the fiduciary duty you would find exists, that it could impact the obligations that the Crown may think it has under that treaty term. So it would -- it may impact what the parties may expect the Crown is reasonably required to do.

And I am going to get into that actually right now.

THE COURT: Before you do that, I'm going to ask my other question. You said it would be hard to apply the principle that you have to consider whether the interests the Crown assumed and the control the Crown assumed is sufficient to ground a future obligation. You said it would be hard to apply that principle to a treaty obligation to protect from encroachment, but you did not say why it would be hard to apply it.

This is in connection with your reference to paragraph 83 of Wewaykum.

Necessary to focus on the particular interest and whether or not the Crown had assumed discretionary control sufficient to ground fiduciary obligation, about which you observed that it would be hard to apply this principle to this particular treaty obligation, and I'm wondering why.

MR. FELICIANT: Part of that comes from the lack of specificity around protection and that it's easier when you're dealing with a lease or a sale and you know what steps are involved, what obligations are involved.

This is a situation where it's a bit more vague. It's protection. And I think that is the source of my observation.

THE COURT: You are going to move on to something else, you said?

MR. FELICIANT: Connected but a little bit, more to talk about the context. I think we really need to focus on the context here. And if we can pull up Exhibit 1190, please? And this is actually something that appeared in the plaintiffs' submission as well, and it is the 1837 plan of the Bond Head treaty.

MR. OGDEN: Your Honour, I'm sorry, I

have to speak now because our documents clerk Ms. Singh has had to leave the building in response to a fire alarm, and so the task falls to me.

THE COURT: Are you able to do it, Mr. Ogden?

MR. OGDEN: We shall see. If you bear with me shortly we shall see.

THE COURT: Well, I'm happy to have you step in and if there are problems, Mr. Feliciant, I also -- there you go Mr. Ogden.

MR. FELICIANT: That's excellent work. Very impressed.

THE COURT: Does that include Mr. Ogden being able to change its orientation? It's all right. I can read the words on it.

MR. FELICIANT: The words are less important, Your Honour. No, no, don't bring it in. Defeats the purpose of my using it.

In any event, this is the context. And we have to remember when the promise to protect the peninsula from encroachment was made that was the piece of land we're talking about.

It's big but it's more than its big. From the perspective of the people at the time,

it's 450,000 acres. Before I get to the perspective of the people at the time, we viewed the peninsula. We went on a sort of a officially-sanctioned viewing with Your Honour and all the parties went and did that to better appreciate the evidence. And we drove around in a motorized coach.

Even driving around in a motorized coach all day we may have seen five or six very specific sites. So that gives some perspective to how big it is. Now in 1836 there was approximately 350 to 400 people in the two communities.

Dr. Reimer discussed the population of the communities at this time in volume 1 of her report, at Exhibit 4576, pages 275 to 276.

The Chippewas of Saugeen had 200 to 250 people, and the Chippewas of Nawash in 1845 had 130. I think we can roughly assume it would have been the same. So 350 to 400 people in the two communities.

When Treat 45 and Treaty 45 1/2 were negotiated, the whole idea was to separate the Indigenous people from the whites.

If there was -- if there were large or

even small European communities on the peninsula at the time that wouldn't have worked. So we can assume that there weren't Europeans on the peninsula. So the people who were repairing to that part of their territory, you're talking about 400 people.

You could walk probably for miles and never see another soul. Now, we also have to remember at the time there were no security cameras, no drones, no cars to monitor what was going on. There was no organized police force with patrol cars. There were no, certainly, modern-day paved roads. I'm not saying there weren't travel routes and -- but there were no paved roads as we know them today. And people understood that.

The honour of the Crown requires that -- and places on the Crown, there's an assumption that the Crown is going to fulfill its treaty promises.

So when we're thinking about the Crown's conduct in protecting the peninsula and what it would mean to fulfill that obligation, you have to ask yourself, okay, what was meant by and what is a realistic interpretation of

protecting the peninsula from encroachment, knowing that it's this big and taking into account the resources at the time. And taking into account the fact that things could be happening on one part of the peninsula unbeknownst to anybody.

And it may very well be the case that things happened that even SON don't know about and we don't know about today. We just don't know.

In those circumstances the Crown did not and could not provide a guarantee against that kind of loss.

And now is a convenient time to just address something Ms. Guirguis said, and I won't burden Mr. Ogden with this, at the rough draft transcript of October 20th. Ms. Guirguis had said -- this is at lines 4 to 11 at page 45 of the rough draft transcript of October 20th, Ms. Guirguis said:

> "The second is the duty to take a broad and purposive interpretation of treaty promises. We say that this means that the Crown is required to interpret the promise to protect in

Treaty 45 1/2 broadly and purposefully; that is as a guarantee to respect and secure to SON the land on the peninsula, and not merely just for compensation [...]."

Now in Manitoba Métis at paragraph 82 -- and we probably can take the map down now.

At Manitoba Métis, paragraph 82 the Court held that:

> "Not every mistake or negligent act in implementing a constitutional obligation to an aboriginal people brings dishonour to the Crown. Implementation, in the way of human affairs, may be imperfect. However, a persistent pattern of errors and indifference that substantially frustrates the purposes of a solemn promise may amount to a betrayal of the Crown's duty to act honourably in fulfilling its promise."

And this is the important part, Your Honour:

> "Nor does the honour of the Crown constitute a guarantee that the

purposes of the promise will be achieved, as circumstances and events may prevent fulfillment, despite the Crown's diligent efforts."

THE COURT: Just to be clear, Mr. Feliciant, so I have -- I'm not going to bring up the transcript and I'm not suggesting that you should, but if Ms. Guirguis' submission, in which she used the word "guarantee" to secure the land, was in the context of fiduciary duty, I think her submission was as well clear that the standard that she submitted should be undertaken is reasonableness not perfection. So I'm just a little confused about how these two things fit together.

MR. FELICIANT: I think it's the use of the term "guarantee", that somehow the term in Treaty 45 1/2 to protect from encroachment is a guarantee to secure to SON the peninsula, and that gets us to the question of, does that mean any and all manner of encroachments? Any and all manner of intrusions?

THE COURT: I'm pretty sure that Ms. Guirguis specifically said that it did not

mean that.

I'm going to ask Ms. Guirguis if I have that right so we don't get burdened write down.

Ms. Guirguis am I recalling correctly that you are not submitting that every and all measure had to be taken and instead it was some sort of a reasonableness standard?

MS. GUIRGUIS: That's correct, Your Honour, it was ordinary diligence.

THE COURT: So your use of the word "guarantee" might have been, to use an earlier example, informal?

MS. GUIRGUIS: That's correct.

THE COURT: Thank you for clarifying that, Ms. Guirguis.

MS. GUIRGUIS: Thank you, Your Honour.

THE COURT: Please go ahead, Mr. Feliciant.

MR. FELICIANT: So the interest here is what I would say is a more general interest in the security of the peninsula as a whole from encroachment. Being a security of interest in the peninsula as a whole we then look at -- I think we can talk about now the application of

the test.

In order for the Court to find a sui generis fiduciary duty, it required the plaintiffs to establish, as stated in Manitoba Métis, SON tab 45 at paragraph 51, that:

> "[...] the Crown administers lands or property in which Aboriginal peoples have an interest, [...] the duty [arises] if there is (1) a specific or cognizable Aboriginal interest, and (2) a Crown undertaking of discretionary control over that interest."

And the Court cites other cases that say those things.

Ontario says there is no sui generis duty in this case for three reasons. The Treaty term "to protect from encroachments" did not result in an assumption by the Crown of the responsibility for administering the lands or property as contemplated by the cases that involved surrendered reserve land that is being disposed of in some manner, whether for sale or lease.

In this situation the particular

vulnerability of SON to its interest being disposed of is absent. There was no risk of an exploitative bargain. That's the first point.

The second point is that the Crown did not assume discretionary control over the peninsula such that their actions or inactions would result in the loss of SON's interest in the peninsula. Put in another way, SON was not at the mercy of the Crown's exercise of discretion, which is the hallmark of the fiduciary relationship. The Crown was not selling the property. The Crown was not leasing it in a way that would create enforceable legal rights in third parties, which would encroach upon SON's legal interest in the peninsula.

THE COURT: Well, as I understand SON's submission, and I'm going to generalize, it was that by failing to fulfill the undertaking the Crown was permitting squatting and the impact of permitting squatting did cause -- at least there is evidence that it caused rights to be displaced in different ways. Two things come to mind, timber theft and the other that comes to mind is that it did appear that, at least in some cases, squatters had a

better chance to acquire the land because of their unsanctioned activity.

So is that materially different from the proposed sale and lease of land, in your submission?

MR. FELICIANT: The people that are stealing timber are acting contrary to the law. They are not --

THE COURT: So were the squatters acting contrary to the law. There is no question about that.

MR. FELICIANT: And so are the squatters. But they are not actually obtaining any interest in the land. I'm not sure that the evidence makes out that squatters had a better -- on the Saugeen Peninsula were having a better chance of getting legal rights because they were squatting. I think that was certainly the fear. I don't know that that's been actually established that that happened.

But certainly with respect to SON's interest in the peninsula, the security of the peninsula as a whole, it is a different order of vulnerability to be sure.

Finally, we can't forget that a

fiduciary duty in this case would be in addition to a treaty promise. We can't forget that there is already a treaty obligation that the Crown protect the peninsula, so it is less clear in these circumstances to me whether the Court needs to intervene and impose an additional obligation of a fiduciary duty in those circumstances.

THE COURT: I did want to ask about that point, Mr. Feliciant. Is there any -- has that issue been confronted by any case where there was an express treaty obligation and the claimant was saying that it should be enhanced by a fiduciary duty?

MR. FELICIANT: Not that I am aware of.

Now, I'm going to leave that and now talk a bit about the test for the ad hoc duty. I think we covered this very well in our submissions, so it's pretty thorough. And certainly for the benefit of the virtual gallery, we did file 500 pages or so of submissions so the submission I'm making today are very much narrowed in those circumstances.

So Ontario basically takes the

position that no ad hoc fiduciary duty arises for the reasons stated in our written submissions, but there's certainly no promise here to forsake the interests of all others. And as the Supreme Court has stated, cases in which the Crown will undertake to forsake the interests of all others will be rare.

And Ms. Guirguis, when talking about on ad hoc fiduciary duty, had indicated that the many hats principle in connection with an ad hoc fiduciary duty, she wasn't aware of it being applied in relation to on ad hoc fiduciary duty in another case.

I think the closest I could come to finding a case where you could say that happened was Ermineskin. I won't take you to it, but refer you to paragraphs 130 to 131. And in those paragraphs the Court did advert to and recognize that the Crown does have obligations to all Canadians.

So this is not to say, as I've said before, that the Crown had no obligation in the circumstances. The parties addressed the obligation by way of a treaty term. And Ontario agrees that this would engage the honour of the

Crown even if it did not engage a fiduciary duty.

The appropriate duty in the matter of the protection from encroachment is the duty arising from the honour of the Crown to act diligently in carrying out its promises as set out in Mikisew Cree at paragraph 24 and Manitoba Métis at paragraphs 78, 79 and 82. So there is a duty arising from the honour of the Crown that the Crown act diligently in carrying out its promises.

In Mikisew the Court at paragraph 24 said:

> "This Court has repeatedly found that the honour of the Crown governs treaty making and implementation, and requires the Crown to act in a way that accomplishes the intended purposes of treaties and solemn promises it makes to Aboriginal peoples."

It goes on to say that:

> "Treaty agreements are sacred; it is always assumed that the Crown intends to fulfill its promises. No

appearance of 'sharp dealing' will be permitted."

In Manitoba Métis the Court also reiterated that the Crown has to act diligently in pursuit of its solemn obligations and that it must, in paragraph 79:

> "[...] endeavour to ensure its obligations are fulfilled."

So the question then arises, if Your Honour finds that there was a fiduciary duty, we have to address ourselves to the question of was it breached?

Ontario takes the position that it wasn't.

THE COURT: Just so I'm clear on this, Mr. Feliciant, Ontario accepts, it had a affirmative treaty obligation and it accepts that in fulfilling that obligation it had to do so within the principles of honour of the Crown, which does set out certain positive obligations and the manner of which that obligation would be fulfilled.

MR. FELICIANT: Yes.

THE COURT: So we have those two things that you accept. In the alternative, if

there is on ad hoc fiduciary duty, is it your submission that it would increase the obligations beyond those two things or not?

MR. FELICIANT: The concern is it may change them in the sense that it would change the reasonable expectations of the parties that would be required in the circumstances, in the context of the entirety of the peninsula.

And it would prevent the Crown, for example, in allocating resources, balancing interest and rights of others that on a sui generis fiduciary duty or on an honour of the Crown basis it could do.

So it would change the practical implementation of the treaty term. And so to a certain extent, it would be imposing on the Crown duties to act and take steps that in 1836 it might not have thought it had to do. It's a much higher standard of conduct.

THE COURT: So do you agree that the many hats principles do not apply to on ad hoc fiduciary duty? Because those principles would permit the consideration of those other matters.

MR. FELICIANT: Well, if you're going to accept that an ad hoc duty is a different

duty with different and higher obligations, I can see the plaintiffs arguing that, well, even if the many hats principle does apply, it applies differently and the threshold standard of conduct is that much higher to which it applies.

And so it does change the nature of the promise and the relationship.

THE COURT: So the bottom line is the answer is yes?

MR. FELICIANT: Yes.

THE COURT: So you would say that if you take your Treaty obligation and you add to it, the affirmative duties that arise from honour of the Crown, that it would still be another additional duty if you add to that fiduciary duty?

MR. FELICIANT: Yes.

THE COURT: They are not basically the same thing.

MR. FELICIANT: That's right.

THE COURT: All right.

MR. FELICIANT: So it's a few minutes to 1:00, Your Honour, and it is now into a totally different section of the breach of

treaty submissions. Would now be a good time to break?

THE COURT: We can. I wish to remind you that Ontario is -- you need to finish today as well. Are you on track?

MR. FELICIANT: There is no question that we will finish.

THE COURT: And when we do return at 2:15 I will hear from whatever counsel to deal with it, I'd like to hear about the authenticity agreement.

MR. FELICIANT: That will be Mr. Lemmond.

THE COURT: Okay. 2:15.

-- RECESSED AT 12:54 P.M. --

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

THE COURT: Welcome back, Mr. Lemmond, are you addressing the issue discussed before the lunch break.

MR. LEMMOND: I am, Your Honour.

THE COURT: Please go ahead.

MR. LEMMOND: And where we got to as between the main parties, so the plaintiffs, Ontario and Canada, is that the reference to "historical" in the authenticity agreement can

be taken as referencing documents prior to the commencement of the Treaty claim, 1994.

And we can also assure the court that none of those three parties have any issues with the authenticity of any of the materials that are now in the record under that agreement.

Now, I have not closed this off expressly with the Municipal parties, it just wasn't something I had the opportunity to do, so I can at least speak to the three main parties' concerns on that.

THE COURT: If any of the Municipalities have any difficulty they should indicate that in their closing submissions. They were also aware that I had raised the question.

MR. LEMMOND: Thank you, Your Honour.

THE COURT: Please go ahead, Mr. Feliciant.

MR. FELICIANT: Thank you, Your Honour.

A couple of points before we get back. You had asked about the manner in which we use the word "reserve" in our submission.

Now, there are 200 instances of the

word "Reserve". So an easier way of dealing with this, I think that would be accurate is when we use the word prior to 1847, and in connection with events prior to 1847, it would be in the small "r" sense when talking about the peninsula; and after 1847 and when, of course, we talk about surrendering the Reserve under Treaty 72 it would be in the big "R" sense. If that is sufficient I'll leave it at that.

If not it would require more time than I think we have between today and tomorrow to provide a list.

THE COURT: That's fine. That's fine. I think what you're saying is until 1847 it's Ontario's position that there was not formally a Reserve, and any attendant obligations didn't arise prior to that time. Is that the gist of it?

MR. FELICIANT: That's right.

THE COURT: That's fine.

MR. FELICIANT: The other point I wanted to clarify is that you had asked me about if I was aware of another case in which a fiduciary duty has been tacked on to a treaty promise that would expand the obligations or may

expand the obligations, and I said, no.

Now, there is a confusion -- there is a confusing duo of cases, and I should clarify this.

And I will simply draw your attention to them because it addresses the issue in a way -- not addresses the issue, it is what you're talking about.

The first one is -- I call it Restoule 1, it's a decision of Justice Hennessy at tab 93 of SON's book of authorities. In that case the court rejected the plaintiffs' claim for a sui generis fiduciary duty but did impose on ad hoc fiduciary duty.

What becomes confusing is the second decision of Justice Hennessy at Restoule 2, which is at Ontario tab 149, paragraph 85, at paragraph 85 Justice Hennessy says, referring back to her previous decision, "as I found a sui generis fiduciary duty." So there's some confusion there. But I would draw your attention to those two decisions in answer to your question of what -- if there's another case I'm aware of.

THE COURT: And I assume Ontario was a

party to those decisions?

MR. FELICIANT: Yes.

THE COURT: I think that one of them is referred to in your factum as being under appeal?

MR. FELICIANT: That's correct.

THE COURT: Let me put it this way, are one or both of them under appeal?

MR. FELICIANT: I will say my understanding is both. But Mr. Lemmond, if I'm correct, he is very familiar with it, could jump in. But my understanding is both are.

MR. LEMMOND: They are both under appeal with the schedule -- with an appeal scheduled in the stage 1 decision for January.

THE COURT: That's not going to help us now very much is it?

Okay. Thank you for -- and you're saying that this -- incorporating its potential confusion, since it's a treaty case, which it is.

MR. FELICIANT: It is.

THE COURT: That -- I mean, I've read Restoule but remind me, is there discussion in it about this precise question that you and I

are discussing.

MR. FELICIANT: I'd have to say not that I recall, but I'm not intimately familiar with it. Not the precise issue we're talking about.

THE COURT: Well, it is there and I have read it. I can always look at it again. Thank you for clarifying that.

MR. FELICIANT: I was about to move on to whether or not there is a breach in this case. I'd start out by pointing out that Justice Binnie in Wewaykum, at paragraph 92 pointed out, quoting another case that:

> "Not all fiduciary relationships and not all fiduciary obligations are the same, these are shaped by the demands of the situation."

Now the court in Williams Lake, and this is -- this follows from a discussion a bit you had with Ms. Guirguis, I don't know if it was Monday or yesterday, about Ms. Guirguis had said we had somehow confused the standard of conduct with the standard of care.

But in any event, Williams Lake in paragraphs 46, 47 and 48 addresses the issue of

the standard of conduct in and standard of care.

So in paragraph 46:

> "The standard of conduct to which equity holds a fiduciary is embodied in duties of loyalty good faith and full disclosure."

The standard of care is that of a man of ordinary prudence in managing his own affairs. What Ontario, however, also did, and what we interpreted it to mean as well, is what the court says in paragraphs 55 and paragraph 100. Because in paragraphs 55 and 100 it identifies and applies a standard of conduct being one of the fair balancing of interests.

In any event, however you characterize the duty, the conduct, I would suggest the Crown has met the standard.

But we still have to identify what the conduct is that's being scrutinized, and that's at paragraph 47 of the decision where it tells us that:

> "The conduct of the fiduciary that is scrutinized is its exercise of discretionary control over the specific and cognizable interest."

In this case the best way I think to describe the conduct of the fiduciary here would be the manner in which the Crown protected the peninsula from encroachment.

Now, the Crown fulfills its obligation by meeting the prescribed standard of conduct not by delivering a particular result, so it didn't have to be the case that the peninsula was fully and completely protected; but we would have to either be shown to fairly balance interest or, on the test articulated in the other paragraph, show loyalty -- demonstrate loyalty good faith and full disclosure.

Now, we have to keep in mind, Your Honour that the onus is on the plaintiffs. We've talked about this. Assuming that protection from encroachment didn't require a sealing off of the peninsula, we have to consider what level of encroachment and the nature of the encroachment triggered the duty.

And then we have to ask ourselves, what conduct on the part of the Crown would constitute a breach of that duty?

So bearing in mind that the onus is on the plaintiffs, I'm going to ask some rhetorical

questions, first about squatters and then about taking timber.

So how many squatters were there? When did they start squatting? Where specifically? It's not enough for the Crown to act, but where specifically -- who knows where on the peninsula, but where? Did they place structures on the land or tents? Were they temporary? Were they permanent? How long did they stay? Were they seasonal? Were they all year? Other than the ones that have been identified in the records so far who are the others? Do we know their names?

So with respect to timber taking I would ask similar types of questions. How many people we're taking timber? Where did people enter the peninsula to take the timber? Where was the timber taken from? Which is a slightly different question. How much timber was taken? What years was timber being taken? What months? Do we know who these people were and was that communicated with specificity to the Crown so that the Crown could actually take a particular step?

Now, in a case -- it's not an

Aboriginal case but in a Supreme Court case called Valard Construction at tab 181 of Ontario book of authorities, paragraph 89 the court articulated the question that you have ask.

The question is not what -- in this case the person's name was Bird, not what Bird could have ideally done in this case but what Bird should reasonably have done in the circumstances.

So in the absence of evidence providing specifics, in answer to all of those questions I asked, you're not in a very good position to conclude what reasonably should have been done in the circumstances because, to a certain extent, that has to be driven by the nature of the problem, the frequency of its incidents and the severity -- the general severity of it.

THE COURT: That may be so, Mr. Feliciant, but as I remember the expert evidence from all parties, many of the experts were asked to acknowledge that due to the nature of squatting, which is an illegal activity, it is not surprising that there isn't a great deal of evidence about who was actually doing it.

And I, at this stage, can't remember any expert who had that put to them who didn't agree.

So we have some evidence, and I think a noncontested opinion that it would not be -- I'm not going to characterize it as reasonable to expect that there would be robust evidence.

So are you saying that an inference should not be drawn? Or is it going back to the 19th century and saying, the standard for the Crown can't be ascertained?

MR. FELICIANT: I think what I'm saying is that even if we accept that squatting is illegal and so there may have been squatting and we wouldn't know about it, and that's understandable, that cannot lead to a conclusion about the extent of the problem.

Your Honour has to rely on the evidence that you have of the incidents that we know about and against -- and measure against those incidents whether or not the Crown's conduct meets the standard. It can't be measured against what we don't know. I suppose that's --

THE COURT: Perhaps you would agree there is an exception to that. So the

plaintiffs' say, we have this evidence and ask me to draw certain inferences from it.

I don't think the plaintiffs have asked that I draw an inference of an extreme nature, by which I mean that there were a large number of squatters on the Reserve land.

I think that the plaintiffs would say that they've demonstrated that there were some, but also problems and situations and dynamics suggesting more were coming.

But similarly either Ontario or Canada, or both of you, have said if you look at the available evidence on squatting and focus on the actual Reserve lands as opposed to other areas around it that in fact it hasn't been prove that the squatting hadn't reached the peninsula yet.

So those are both -- when I say "the peninsula" I mean the Treaty 45 1/2 lands.

So those are both invitations for me to draw inferences from the evidence. And the evidence includes the expert evidence that all agree that one would not reasonably expect the evidence to be complete. So those are all things that are open to me, are they not?

MR. FELICIANT: Yes, that's right.

THE COURT: And I understand your -- Ontario's position which is that, as I just said it.

You're now talking about a slightly different subject which is, how does the court ascertain the scope of what -- what was actually required for the Crown to do?

MR. FELICIANT: That's right.

THE COURT: Well, all the court can do is work with the evidence and draw or not draw the inferences that are available, but not that there's nothing to work with. There's some evidence.

MR. FELICIANT: There's some evidence and I would say that the weight of that evidence suggests that the point at which it became a problem that needed more urgent addressing is 1854, where we have Anderson saying, you know, telling the communities, people have commenced settling on your lands.

So I wanted to point out something that Ms. Guirguis indicated in her submissions, and she pointed to the fact that a Mr. Withers was prosecuted computed. I would simply refer

you to paragraph 747 on page 313 of Ontario's submissions. And in fact Mr. Withers was not prosecuted. So I would simply refer you to that.

So that brings me to -- and I'm not going to talk about the efforts that the Crown made to deal with the issue of squatting, it's well set out in the written materials.

My next point is no fiduciary duty arises in relation to negotiating a treaty. Now, this is the other broad allegation that's been made. I don't know if Ms. Singh is now able to pull up Manitoba Métis paragraph 73:

> "The honour of the Crown governs treaty making [...]" So this is paragraph 73, subsection 3, "The honour of the Crown governs treaty making and implementation. Leaving to requirement such as honourable negotiation and the avoidance and the appearance of sharp dealing."

Now, if you scroll up a little bit to number one, two subparagraphs before that the court says:

> "The honour of the Crown gives

rise to a fiduciary duty when the Crown assumes discretionary control over a specific Aboriginal interest."

The court is specifically pointing to the honour of the Crown governing treaty making and implementation, and it has provided for duties such as honourable negotiation and the avoidance and appearance of sharp dealing.

Even if you find that a fiduciary duty arises in respect of protecting the peninsula, negotiating a treaty is an entirely different exercise. One cannot look to the fiduciary duty with respect to protection of the peninsula and turn it into what the courts have talked about as being an overarching fiduciary duty where the negotiation of the Crown is then also captured by that fiduciary duty. Now, different circumstances, different duties.

Ms. Guirguis says it's all part of the duty to prevent an exploitative bargain. So you can examine the treaty-making process from the perspective that the duty to prevent an exploitative bargain reaches back and somehow imposes a fiduciary obligation on the treaty-making process.

What I would suggest is that changes preventing a duty -- a duty that prevents an exploitative bargain, so the duty to prevent it, that changes it into a duty not to engage in a process that may result in one, and it's not the same thing. It would be a different kind of duty.

There are also the issues with respect to divided loyalties. And in a treaty negotiation the Crown truly does have to balance a multitude of interests, to the point where imposing a fiduciary duty adds nothing to the duty already imposed by the honour of the Crown.

So in Ontario's submission there is no breach of fiduciary duty in the negotiation, if you were to find that there was a fiduciary duty related to negotiation beyond the honour of the Crown.

I would like to draw your attention, and this is just one last point on this subject, because Mr. Beggs very comprehensively took you through the issue of Anderson, and what he said and when he said it, so this is the issue of the timing of Anderson's comments.

There is one more piece of evidence

that I think you need to be aware of that I think answers the question entirely. If Ms. Singh could pull up Exhibit 2175 and start on page 12 please? Your Honour I don't know if we can make these things bigger, I guess not because you might lose the edges.

So you will see at the top the blue underlining:

> "The Saugeen Band having arrived, I opened the Council, and brought the subject before them on the 1st instant."

So that's August the 1st, that's what he's talking about. So he opened the council and then in the next paragraph he talks about what happened at the council. And what happens at the council is that they have their hour of deliberation, and all of that paragraph deals with the 1st of August.

So if you go down now to the bottom of the page we have Anderson's address. It's August 2nd and then he says:

> "My friends, being after talking all day yesterday and nearly all last night[...]."

So yesterday was August the 1st, all last night was the night of August the 1st, and August the 2nd Anderson makes that speech. So it's clearly after and at the end.

Now, dealing with Anderson is delicate. You can take that down now please.

Nobody wants to be seen as condoning anything that is unpleasant or subject to criticism. And certainly the comment about "the government will surely not help you", you know, Ontario says that was borne out of frustration. The plaintiffs say there was more to it than that. But I would raise this with respect to the other party where Anderson says:

> "I'm going to recommend to the government that they simply take your lands and pay you the money that's owed as a result of taking it."

I only say this, it's not unheard of that people in government and government officials, I suppose anybody, have bad ideas. They come up with dumb ideas, they think of things that actually may not comply with government regulations.

So Anderson, likely out of

frustration, according to Dr. Reimer, but in any event, has the thought that I really think this is in the best interest of the First Nation so maybe I'm just going to recommend to the government to go ahead and do it. And he articulates that bad idea to the First Nations.

The factor that I think Your Honour needs to think about when you decide whether you frame it as, he shouldn't have said that, is simply the point that he actually did end up recommending it.

So he told them he was going to do it and he did. It and the government did what it was supposed to do and said, we're not agreeing with this. We're not doing it that way. So was it a good exercise in judgment all around? Probably not.

Was it a breach of fiduciary duty? Can you really say if he was planning on doing it he shouldn't have told the First Nations? It kind of raises in my mind an old adage, you know, I won't use the word but condemned if you do, condemned if you don't. If he tells them he's condemned and if he doesn't tell them he is open to criticism that he made a recommendation

of such seriousness and he didn't tell them. So that is all I would say about that. I'm not trying to necessarily to defend him but I think that perspective is an important one.

Now, you've heard submissions already with respect to whether we think the First Nations, after their decades of history dealing with treaties and the Crown officials, and their general familiarity with what's going on in the province and Canada at the time, whether they believed it or not. That's all I say about Anderson.

Then we get to what the plaintiffs allege with respect to Laurence Oliphant. He didn't tell the communities in advance that he was coming. That is one complaint. But we don't know that. That's not been established. Dr. Reimer thinks it's unlikely. Even if he didn't tell them I am not sure that can be characterized as a breach of fiduciary duty. I certainly don't think it can be characterized as dishonourable.

He arrived, he called for them, they came. No one ever complained about it after the fact. So, again, this is one of those things

that even if it is -- even if he did it, which I don't think you can find, it's maybe an exercise in bad judgment at most.

The issue that drew more attention was the meeting with Chief Madwayosh in private with likely an interpreter, so I'm not sure how private but with Chief Madwayosh.

We actually have evidence about why they met, to find out the nature of the opposition he was likely to face and to prepare him for the proposal he was going to make. We don't know what was said at that meeting so I don't know what inferences can be drawn about what would have occurred, whether it was pressure. All we know is that he felt still feeling -- expressing dissent, so whatever happened didn't change his mind.

Today mediators have private caucuses all the time. But in the past Dr. Reimer also said it wasn't unusual. And I would actually refer you to a decision of the Chippewas of Sarnia, it's an Ontario Court of Appeal decision, it's at SON tab 14. And I would refer you specifically to paragraph 63 to 65. Actually could we pull that up? It is a very

small print. If you look at paragraph 65:

> "Indian Department officials would meet with key Chiefs prior to Council meetings in an effort to gain their support on the matters that were to be considered at the council meeting."

So what Oliphant did was not unusual.

Mr Beggs dealt with the allegation of lying so all I intend to do, Your Honour, is draw your attention to two documents. One is a McNabb letter to Anderson of August 1854 at Exhibit 2113 where McNabb is expressing to Anderson that he wouldn't be surprised if settlers took forcible possession of the peninsula.

The other document I would refer you to is the Mohawks at Tyendinaga at Exhibit 2117 where Anderson writes to the Mohawks:

> "Stormy times are coming and we may not be able to retain for you all your Reserves at Owen Sound."

And I would refer you to our submissions at paragraph 665 and 776.

Another allegation was with respect to

the pecuniary interests of Mr. Jacobs, we dealt with that in our written submissions and I don't propose to address that.

The one hour of deliberation got considerable attention, but at the end of the day it's not -- there's no evidence to say, at least it's insufficient to be able to conclude that there was a direction that it take only one hour, that they were somehow forced to take only one hour. There's nothing to suggest that it wasn't anything other than the time that they needed to take.

And having said that, it's not enough to say, which is really the upshot of Professor Brownlie's evidence, that, well, other situations they took longer. It just sounds like it's not enough. Well, that can't be correct.

And finally I just end on this note, that evidence, taken together, does not lead to the conclusion that there was a breach of fiduciary duty. The conduct of the Crown, at most, may be said to be at times indicators of bad judgment from time-to-time, some of it is actually not a problem as far as I'm concerned,

but it doesn't reach the level of a breach of fiduciary duty; and it certainly doesn't turn the proposal that was ultimately approved into an exploitative bargain.

The First Nations had their own reasons to surrender. They were -- they've been articulated in the various reports you've read. And at best I'd suggest that many of the -- not many -- at least some of the key allegations are requiring you to make factual assumptions that you just cannot make and are not borne out on the evidence.

So, Your Honour, very cognizant of the time, those are my submissions. Forgive me if I say that with some happiness after a hundred days of trial.

THE COURT: Mr. Feliciant, which of your counsel group are making submissions next?

MR. FELICIANT: Mr. Lemmond will now be addressing Crown immunity.

THE COURT: I remind Mr. Lemmond, and I think the other two members of the Ontario counsel team that you need to finish today.

MR. LEMMOND: Yes, Your Honour.

THE COURT: The Crown immunity

argument is not a long one in this observation, but I was struck by its length and detail in the written submissions.

MR. LEMMOND: Yes, Your Honour, and for precisely that reason I intend to keep my remarks very, very brief.

As Your Honour is aware, there are two recent Ontario Superior Court decisions that deal with the issue of the immunity of the Crown on alleged breaches of fiduciary duty dating back to July of this year. And in one of those decisions, the Restoule decision, which we've already touched upon, deals with allegations of breach of fiduciary duty in relation to the implementation of a treaty involving Indigenous people.

Just by way of information, I was very recently informed or updated that currently the hearing for the appeal of that decision is scheduled for June before the Court of Appeal, so that's in relation to stage 2. So phase 1 is being heard in January by the Court of Appeal and the appeal of the stage 2 decision, dealing with Crown immunity and limitations, is scheduled for June of 2021.

Now, Your Honour, we understand that given these decisions they aren't strictly absolutely binding on you, but the general principle is that they are to be followed unless you conclude they are plainly wrong.

We argue that on the basis of the submissions put before you in our written factum there is a basis for concluding that they're plainly wrong, but if you do not conclude that they're plainly wrong that suffices to dispose of the issue for the purposes of this trial.

And those, in sum, are my submissions, Your Honour.

THE COURT: Thank you Mr. Lemmond, could you then let me know which counsel if proceeding next?

MR. LEMMOND: I believe it is Ms. McRandall.

THE COURT: Please go ahead, Ms. McRandall.

MS. McRANDALL: Thank you, your Honour, and good afternoon.

I intend to focus my submissions today with respect to latches and acquiescence on the treaty claim, as Ontario is not submitting that

latches would bar a declaration of aboriginal title, and any potential consequential relief in respect of the title claim to which latches may apply would be the subject of phase 2.

As you know, SON commenced their Treaty action about a century and half after the material facts arose in and around 1854. A delay in commencing an action is not, on it's own sufficient to trigger the application of latches.

In determining whether the delay amounts to latches there are two considerations or braches. I will be addressing the first branch, that is acquiescence by the claimant. My colleague, Jennifer Lepan, will be addressing the second branch concerning changes in position by the defendants resulting in prejudice, or in a situation that would be unjust to disturb.

Ontario also relies on our written closing submissions, in particular at paragraphs 984 to 1060.

I intend to highlight key points from Ontario's submission and to respond to some particular points raised by the plaintiffs' reply, and in Ms. Guirguis' oral submissions

from earlier this week.

First, I will address the nature of acquiescence, then I will turn to certain timing issues raised by SON with respect to when they became aware of certain facts, and the impact of a Supreme Court's 1984 decision in Guerin, and then I will address the barriers SON says prevented them from commencing their claims earlier than they did.

The Supreme Court in Wewaykum described acquiescence as, where the party has, by their conduct, done what might be fairly regarded as equivalent to waiver.

I do not intend to turn up that case but for reference I was paraphrasing from paragraph 111.

And that case is in SON's book of authorities at tab 113.

THE COURT: Rest assured that I have read the material so you don't need to repeat it. Please go ahead.

MS. McRANDALL: I will move a bit forward to the issue in acquiescence is not only a delay in commencing legal proceeding specifically, a failure to raise matters with

the Crown in a manner appropriate to the time period can also be taken into account. That is clear from the case Chippewas of Sarnia. I won't go into detail with that because it is in our written submissions, but the paragraph references for that case are 273, and 298 to 302.

Similarly, SON raised many complaints with the Crown from October 1854, and well into the 20th century, but they did not complain about the propriety of the negotiation of Treaty 72 or about is validity, equitable or otherwise.

We cannot speculate about what would have happened if SON had made those kind of complaints. However, if there had been complaints made that that vein and the Crown refused them, there would have at least been an argument that SON had not acquiesced the conduct now complained of, but we don't see such complaints here.

As mentioned, SON did raise issues with the Crown on a variety of other matters, and details of those complaints are in our written submissions so today I will only highlight a few.

Ms. Guirguis submitted that SON's complaints show that in effect they were not acquiescing, I submit that they show the opposite. SON complained that the Treaty 72 lands should be sold faster and that actual settlement conditions should be attached, which is entirely opposite to the idea that the lands should have been returned to SON.

The plaintiffs also complained about various treaty implementation issues such as Reserve boundaries, which is quite different from the propriety of the Treaty itself or how it was negotiated.

We do not see evidence that SON complained before the late 20th century that the Crown pressured or coerced SON into signing Treaty 72, that the treaty-making process was flawed, that SON failed to -- sorry, that the Crown failed to follow treaty-making protocols, that SON had insufficient time or that the treaty was invalid.

Now, SON submits that it would have seemed futile to them to try to get Treaty 72 reversed. The plaintiffs have not pointed to any evidence that SON wanted the Treaty

reversed, or that they had put the Crown on notice until the later half of the 20th century.

Ontario submits that SON had the knowledge, capacity and freedom to raise complaints in a manner appropriate to the time period, and that they did so on a variety of other matters.

Also the return of certain unsold lands for the purposes of hunting reserves in the late 19th century is not evidence against acquiescence, as the plaintiffs appear to suggest at paragraph 169 of their reply. This appears to be a reference to, as Dr. Reimer put it in volume 4 of her report, that in 1896 blocks of land in the northern townships were disposed of as grazing pastures or were taken off the market in order to create a hunting reserve for the Saugeen Nawash Bands. And that's at page 76 of Dr. Reimer's volume 4, which is Exhibit 4704.

SON is seeking the return of unsold lands does not indicate that they were seeking the return of further lands sold or not; and it does not indicate that they had any complaints about other lands that had been sold up to that

point. To the contrary, even after that point SON continued to complain about the pace of land sales. For example, in 1900 they asked that remaining unsold lands be disposed of at any price. There was no suggestion that SON had an issue with Treaty 72 at that point.

So in the absence of complaints from SON about the propriety of Treaty 72 there is no basis upon which the Crown would have been aware of what SON is now saying are essentially competing equitable allegations. On the one hand the Crown had an equitable and legal obligation to sell the lands pursuant to Treaty 72, but now SON is saying that they had an equitable obligation to restore the lands to SON.

The plaintiffs have also asserted that in 1854 they were not aware that the Crown could have taken other steps to address squatting on the peninsula and that Anderson and Oliphant misrepresented this matter.

They assert that it was not until research was conducted in the late 20th century this they knew this. They have not provided a more specific date but evidence indicates they

were conducting research and had legal counsel by the early 1970s at the latest.

Mr. Feliciant addressed earlier how the Crown dealt with squatting and that there was no misrepresentation. In any event, Ontario submits the plaintiffs were aware of the material facts underlying their claim for breach of fiduciary duty from around or shortly after 1854.

With respect to Anderson, SON had dealt with Anderson themselves and they likely knew that Crown policy was to seek Indigenous agreement to surrenders despite what he said in August of 1854. And this is addressed in Ontario's written submissions at paragraphs 778 to 783.

SON was also aware of squatting and timber thefts on the peninsula and had interactions with settlers themselves leading up to the signing of Treaty 72 in 1854. They were aware of events such as the Big Land Sale as well in Southampton in September of 1854.

After Treaty 72 was signed the evidence suggests that notices were published concerning the surrender and warning against

trespassing and squatting on the newly-surrendered lands. I won't go to the exhibits but that can be seen at Exhibits 2357 and 2306.

It can be reasonably inferred that SON would have been aware that the Crown took those actions. Therefore, SON was in a position right away to question the Crown's position on what it did and did not do about squatting or what it could or could not have done.

The plaintiffs also refer to some documents which they say they were not able to obtain until the 1990s, those were documents with respect to unsold surrendered lands. There was a reference to Exhibit 3807, for example, which was a 1976 request for an inventory of unsold lands, and it referred to a similar request made in 1950. Although there is some subject matter overlap in that those documents of course also concerned Treaty 72, that is a separate issue from the breach of fiduciary duty claim. SON seeking Treaty 72 lands that were never sold is not inconsistent with the Crown understanding of Treaty 72.

There's no question of the negotiation

of Treaty 72 being improper or an attempt to recover lands that had been sold for the benefit of SON. I will not go into it any further but an example of that distinction being drawn can also be seen in Exhibit 3869.

Also that kind of documentation on unsold, surrendered lands it doesn't appear that it would illuminate anything about squatting before or after Treaty 72 or about the conduct of Oliphant or Anderson.

And at least some of the documents that the plaintiffs rely on in their assertions concerning Oliphant would have been accessible in the 19th century. One of those documents is Oliphant's memoir, which is Exhibit 2966. It contains some of the information about Peter Jacobs allegedly having some kind of interest in the outcome of the Treaty, and that memoir was published in 1887.

In any event, perfect knowledge of every potentially-relevant document or detail is not required in order to commence a claim or to raise a complaint. The uncovering of more documents and information in the course of litigation is common and expected.

The plaintiffs also described the 1984 Supreme Court decision of Guerin as a "watershed moment" and asserted that prior to it SON effectively could not have brought a breach of fiduciary duty claim.

Now, this is addressed in our written submissions at paragraphs 997 to 1001, so I'll just state at a fairly high level that essentially Ontario's position is that an evolution in the law does not render laches inapplicable; if it did that would effectively mean that a party with knowledge of material facts, that could support a possible claim, can delay in the hopes that the law will eventually develop as a result of someone else succeeding in a claim that they chose not to bring themselves. In Ontario's submission that is not an adequate reason for delay.

Further, a claim might have also been possible based on the same material facts under a different cause of action. The plaintiffs chose to frame this claim in 1994 as a breach of fiduciary duty claim but, for example, what they say is a failure to implement a promise in Treaty 45 1/2 could potentially have been framed

as a breach of treaty claim.

The plaintiffs also commented in their reply at paragraph 146 that it was not until 1997 that Aboriginal oral history was recognized as evidence to be placed on equal footing with other historical evidence, and that this made bringing claims practically more difficult.

There is little oral history evidence relating to the details of the negotiation of Treaty 72 in this trial. Two expert witnesses who were called by SON, Professor Brownlie and Dr. Driben, both spoke about not using the oral history in preparing their reports. And Dr. Brownlie -- pardon me, Professor Brownlie specifically said that there were fairly good written records with respect to the Treaty. And his testimony on that was on July 22nd, and August 14th, and I can provide more specific references if that would be of assistance.

While on the subject of Professor Brownlie's evidence, I wanted to quickly address a comment on the last page of SON's reply, just so as not to leave it hanging. SON summarized a point from paragraph 1047 of Ontario's submissions as:

"Ontario claims that Dr. Brownlie did not cite any evidence for his opinion that SON did not know that the ban on hiring lawyers came to an end in 1951."

SON's response was that Professor Brownlie referred to SON's oral history in reaching his opinion. Professor Brownlie did refer to SON's oral history indicating that there was a belief in the community that they were banned from hiring lawyers. Ontario's submission was that Dr. Brownlie did not cite evidence about when that belief came to an end so it is a more specific temporal point. And that can be seen from the portion of the transcript that SON cites in their reply.

Turning back to SON's comment about oral history evidence, there is evidence that SON was aware oral traditions could constitute relevant and admissible historical evidence, at least since 1983. And one example of that is Exhibit 3849, which is a 1983 letter from Paul Williams, who was counsel for SON at the time. And that's at the PDF page 6 of that document, though I won't turn to it.

Ontario submits that SON was capable of bringing a claim before Guerin and the Treaty claim was of course brought before 1997.

In any event, as previously discussed, laches takes into account more than when the legal proceeding were initiated, including an absence of complaints.

In the reply, and the oral submissions, the plaintiffs have made submissions about various barriers they say SON faced in bringing litigation. Ontario does not dispute that Indigenous peoples have faced such barriers in various time periods, or that some of these barriers have aftereffects.

The evidence in this trial of such barriers has largely been general rather than specific to SON. Also certain barriers existed and had varying impacts at varying times, not throughout the entire period from 1854 to 1994. For example, any barriers that may have existed in the late 19th century did not prevent SON from expressing the complaints that they did, when they had them, to the Crown.

Also the plaintiffs had legal counsel since at least the early 1970s, more than 20

years before the Treaty claim was commenced and 30 years before the title claim was commenced. In Ontario's submission there has not been an explanation for this length of delay and there is substantial evidence of acquiescence.

Those are my submissions, Your Honour, subject to any questions you may have before my colleague Ms. Lepan speaks about the other branch of laches.

THE COURT: Thank you, Ms. McRandall, for your submissions and for pointing that out.

I turn then to your colleague, Ms. Lepan, for the other branch of laches.

Ms. Lepan.

MS. LEPAN: Good afternoon, Your Honour.

THE COURT: Please go ahead.

MS. LEPAN: Good afternoon, your Honour.

So, as was mentioned, I will be speaking to the second branch of laches. Ontario's position is that this branch of laches has been made out on the facts of this case. And I'm going to try to keep my submissions brief. I'm hoping for about 15 to 20 minutes

and I will aim to finish before the afternoon break.

So in terms of a roadmap, today my submissions will focus on four considerations that Ontario says are relevant to the court's analysis on the second branch of laches.

First, the Crown sold Treaty 72 lands.

Second, the Crown purchased patented lands.

Third, the impact of the plaintiffs' fiduciary duty claim on the public interest.

And lastly, fourth, the impact of SON's complaints regarding the implementation of Treaty 72.

THE COURT: I'm just going to interrupt you, Ms. Lepan. It may be that I can adjust the volume but are you moving back-and-forth with your mic? I don't know if you realize that your volume is -- your volume is going up and down.

MS. LEPAN: I don't, Your Honour. Perhaps I will adjust my volume. Is that any better?

THE COURT: It's really fine in the sense that I can hear you so that's what

matters. I just thought I would mention it to the extent that you might be moving around. And we're all getting used to the realities associated with technology.

If you can you go over your four-point outline for me once again? Please go ahead.

MS. LEPAN: So first, I will address the Crown selling Treaty 72 land.

Second, the Crown purchase patented lands.

Third, the impact of the plaintiffs' fiduciary duty claim on the public interest.

And fourth, the impact of SON's complaints regarding the implementation of Treaty 72.

So turning to my first submission. Ontario's position is that the Crown altered their position by selling the lands surrendered under Treaty 72.

The evidence is that between 1856 to 1900 the Crown sold the majority of lands surrendered under Treaty 72, and indeed the plaintiffs urged them to do so. The proceeds of those sales were then provided to the plaintiffs.

We say if the plaintiffs had raised their complaints about Treaty 72, which are at issue in this action, in the approximately 50 years after the surrender the Crown could have changed course to halt the sale of all or a portion of the surrendered lands.

The plaintiffs now seek compensation from the Crown for $80 billion for the value of lands surrendered under Treaty 72 that are in the hands of private parties, or for the loss of use of lands subject to Treaty 72 from 1854 to the present. They also seek $10 billion in punitive damages.

Ontario says that this causes an unfairness in the form of Crown exposure to damages that it might have otherwise avoided or mitigated had it not sold the land to private parties.

It should be noted that with the passing of time the potential quantum of those damages increases. This is the result of changes in market values of lands, improvements made to lands of private parties, which the Crown may now be required to compensate the plaintiffs for, and longer periods where the

plaintiffs lost the use of lands.

We understand the plaintiffs' position that they will offset any compensation the Crown is held accountable for with the proceeds of land sales paid to them historically. However, this offset won't necessarily account for the potentially increased compensation owed due to the passage of time.

THE COURT: Just one clarification on that, Ms. Lepan. Your submission was that the amounts received were paid to SON, and leaving aside whether or not that was the case, is it not more fair to say that there's no dispute in this action that the terms were complied with?

MS. LEPAN: Yes.

THE COURT: Because we don't have a massive evidentiary record about payments.

MS. LEPAN: Yes, Your Honour.

THE COURT: So would you agree with that slightly different characterization?

MS. LEPAN: I do. And that is a more accurate characterization of what I said.

THE COURT: Please go ahead.

MS. LEPAN: So I'll turn to my second submission now, which is that the Crown

purchased patented lands.

Ontario submits that the Crown altered their position in reliance on the status quo when they purchased patented lands which had previously been sold pursuant to Treaty 72. The Crown expended public funds if purchase those lands.

The plaintiffs assert that those lands are now in the hands of the Crown so there is no prejudice as it can simply return the lands in lieu of providing compensation, if the SON is successful in this action. This position doesn't take into account the fact that public funds were expended in making those purchases. The Crown will not recover those public funds if the plaintiffs are successful in this action.

Accordingly, there is a prejudice in that money which came from the public purse was spent that otherwise might not have been.

Moreover, if SON had provided some kind of notice to the Crown of their complaints the Crown may not have purchased those lands and could have put those public funds towards some other public purpose or benefit. This is a prejudice that can't simply be offset in

determining the quantum of compensation, as the plaintiffs have suggested.

So I'm turning now to the third submission I'll make. The evidence before this court is that Canada and Ontario have created and operated parks in the peninsula, and specifically there are five operating parks and nine nonoperating parks.

The Crown operates and manages all those parks in the public interest. Meaning, they operate those parks for public use and enjoyment, including recreational, educational and research purposes. And there is evidence that the public does use both operating and nonoperating parks for various activities, including hiking, nature enjoyment, camping, educational programs, cross country skiing, I won't go on, but there is various other ways that the public uses those parks.

The Crown also operates those parks for the protection of cultural heritage. For example, Mr. Ron Gould gave evidence of a cemetery in Inverhuron National Park. And the Crown also manages those parks in the interest of ecological integrity and species protection,

and they do so in a connection with a broader network of Crown parks and protected areas throughout Ontario.

The loss of those parks, if the plaintiffs are successful in their claim for a beneficial ownership in the lands, means the loss of these public benefits, including benefits to third-party users of the parks.

There is also evidence that the Crown issues licenses to third parties for various activities in the parks. These licences include the operation of, among other things, of ports and harbours, docks, retaining walls and boat channels. This action could have the practical effect of invalidating those leases and licences leading to prejudice to those parties.

In the Chippewas of Sarnia case at paragraph 258, and I won't turn it up, but the Court of Appeal states:

> "The rights of a party aggrieved by the error must be reconciled with the interests of third parties and the interest of orderly administration."

And then further in that paragraph the court says:

"A remedy must be refused where delay by the aggrieved party in asserting the claim would result in hardship or prejudice to the public interest, or to third parties who have acted in good faith upon the impugned actor decision."

The plaintiffs make the submission that the Crown's operation of Provincial Parks alone is simply possession of land which does not amount to prejudice.

Ontario submits that the loss of these parks, which the Crown manages for the public, would result in hardship or prejudice to public interest and third parties such that laches should apply.

And I'll move on now to my final submission. The last consideration we ask the court to balance when addressing the second branch of laches is the effect of the complaints made by the plaintiffs in the years following the surrender.

In these complaints SON advocated for the implementation of the Treaty and relied on its terms when urging the Crown to take certain

action. They made complaints about the location and size of Reserves saying that Treaty 72 required different boundaries. They made complaints about the slow pace of land sales saying Treaty 72 required the land to be sold promptly for their benefit. They made complaints about the nature of the way in which the surrendered lands were sold saying Treaty 72 required a different procedure. They made complaints demanding the Reserve lands be surveyed and title deeds issued for each member, relying on an unwritten term of Treaty 72.

And, in fact, there's nothing in the record, in the roughly one hundred years or so follow the surrender, of anything other than the SON insisting that they obtain what was due to them under the terms of Treaty 72.

At the same time the Crown was under legal and equitable obligations to implement the Treaty. The Crown could have equally been accused of having breached its trust obligations, or duties under the honour of the Crown, or fiduciary obligation in failing to fulfill its treaty promises. And, in fact, SON has brought several actions to that effect which

were commenced in 1988, 1989 and 1991.

In the one hundred or so years following the Treaty SON's actions only served to confirm the Crown's understanding that it was legally duty bound to implement the Treaty. The Crown reasonably relied on this for many decades.

The plaintiffs have now changed course. At paragraph 271 of their reply submissions they allege that, as of October 14, 1854, the Crown had an obligation to return the land to SON as a result of the breaches that they allege in this action.

In essence the plaintiffs now say the Crown had a conflicting duty or obligation. This raises fairness considerations that Ontario says the court should consider. In Manitoba Métis at paragraph 146, which is at SON's main book of authorities at 145, the majority adopted a statement by Justice La Forest in MK v. MH which stated:

> "Two circumstances always important in such cases are the length of the delay and the nature of the acts done during the interval, which

might affect either party and cause a balance of justice or injustice in taking the one course or the other so far as relates to the remedy."

In this case when we look at the acts done in the interval, the record ws show the plaintiffs petitioned the Crown to sell the lands for roughly a hundred years, at which point they then brought this action and alleged the Crown had the opposite obligation to return the lands to SON.

There's a dissonance there which we say the court should consider when determining if laches should apply.

And, Your Honour, subject to any questions that you may have, those are my submissions.

THE COURT: Thank you, Ms. Lepan. I don't have any questions.

Are those also Ontario's submissions.

MS. LEPAN: Yes. So subject to any other questions you have for any of my other colleagues that concludes Ontario's closing submissions.

THE COURT: Thank you very much. I'm

look at the time. We will take our afternoon break.

Is it Ms. Dougherty for the Municipalities as I recall?

MS. DOUGHERTY: Yes, that's right, Your Honour.

THE COURT: And you will speak for all of the Municipalities?

MS. DOUGHERTY: That's correct.

THE COURT: We'll resume in 20 minutes.

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

-- RESUMED AT 3:47 P.M. --

THE COURT: Ms. Dougherty, please go ahead.

MS. DOUGHERTY: Thank you, Your Honour. My name is Jill Dougherty and together with my colleague Deborah McKenna I represent the Township of Georgian Bluffs.

I'm making these oral closing submissions on behalf of Georgian Bluffs and the other remaining municipal defendants, including the Municipality of Northern Bruce Peninsula, the Town of South Bruce Peninsula, and the Town of Saugeen Shores which are all represented by

Mr. Greg Stewart. And also on behalf of the County of Bruce which is represented by Ms. Tammy Grove-McClement. And, of course, the preparation of the oral submissions and the previous written ones were a collaborative effort involving all council for the municipal defendants.

As previously noted, the plaintiffs claim as against Grey County has been resolved. Much as I am appreciative of having the opportunity to make submissions on this matter, the remaining municipal defendants also would have preferred to have resolve this dispute and not just because of the expense and effort of more than 25 years of litigation.

The municipal defendants recognize the importance of the goal of reconciliation with the SON. That goal is especially significant for the municipal defendants because the municipalities and the SON, that is to say many of their residents and members, live in close proximity and work together in the same small communities.

In short, reconciliation is important and valuable not just as a matter of principle

but as a practical matter to live together with mutual respect and in a manner that is fair for both the municipalities and the SON.

However, these municipal defendants have more than a couple of roads that are subject to the plaintiffs' claim. They have hundreds, hundreds of roads, hundreds of kilometres of road allowances, hundreds of kilometres of assumed, improved travelled roads.

In these submissions, I don't, of course, propose to retread what has already been covered in our written submissions, but I do want to make some points on the following subjects. First, I want to make a couple of brief comments in submissions regarding the nature of the roads included in the claim.

Second, I propose to make a couple of submissions regarding the obligations of the municipalities to improve and maintain the roads.

Third, I want to make a few submissions on why we say that the municipalities are analogous to bona fide purchasers for value without notice.

Fourth, I want to address the point

made by my friend in oral and written reply submissions about when the municipalities received notice of this claim.

Fifth, I want to comment on why this bona fide purchaser issue isn't simply a remedial question.

Sixth, I want to make a very short comment relating or in response to my friend's submissions relating to constructive trusts.

And then lastly a brief comment on why the municipalities cannot be equated to the Crown.

In making these submissions, most of the submissions will be responding to the written reply provided by the plaintiffs because the bulk of the plaintiffs' submissions relating to the municipalities are in the reply, and for that reason they haven't been as fully covered in the municipality's responding submissions, which were made before the reply.

So first, then, a couple of comments on the nature of the roads included in the claim. So the plaintiffs, of course, are claiming beneficial interest of the entire road network at least as established by way of

original Crown survey, of each of the municipalities within the Treaty 72 area.

And so that includes county roads, which are public traveled arterial roads vested in the upper-tiered municipality, so in this case the County of Bruce, and are generally wider and maintained to a higher standard than lower-tier municipal roads. This is covered in the municipality's written submissions at paragraphs 42 to 43, and the relevant exhibits are Exhibits 4898 and 4896.

Then, of course, there are the lower-tier municipal roads that are improved and assumed for maintenance; the lower-tier Municipal unassumed roads, which even the one assumed are still subject to public rights of use, for example for access, recreation, hiking, snowmobiling, ATVs. And depending on the nature and extent of the public use, the evidence was that those may actually be improved and maintained by the municipalities to some degree.

And then, of course, shore road allowances along the shore of particularly the Township of Georgian Bluffs.

And the last point that I make just on the general nature of the roads in issue is that, of course, they don't exist in isolation. They link together as a network for the travelling public, and they are connected to provincial Highway 6, which runs up through the peninsula and is, of course, under the jurisdiction of the Province of Ontario.

So overall they are the road transportation system in these municipalities both for the travelling public and also of course for residents, including the SON.

Now, the second point that I want to briefly address is the obligations that municipalities have relating to improving and maintaining roads. And specifically I want to address the plaintiffs suggestion in their reply submissions, and this is at paragraphs 444 and 445 of the reply submissions of the SON.

And I want to address the suggestion that the municipalities only have obligations to maintain roads once they assume a road, and that this remains effectively a matter of discretion as to whether to assume and maintain a road or not.

And I would say a couple of things. Firstly, a number of the roads that were transferred to the municipalities in 1913 when the statutory vesting occurred were already improved travel roads, meaning that the obligation of the municipality who received them was to maintain them and continue to maintain them indefinitely, unless and until the roads were stopped up and closed by by-law.

Moreover, and this is covered in the Municipality's written submissions, at paragraphs 21 to 31, many of the roads were opened in the sense of being approved and assumed -- improved and assumed by the municipalities to facilitate the Crown's promise under Treaty 72 to sell the lands to settlers and give the proceeds to the SON. The lots to be sold were defined by the roads laid out on the original Crown surveys, and the lands couldn't have been settled and sold without actual road access being provided.

So the Municipalities constructed, improved and maintained the roads to meet those needs. And that benefited both the Crown and the SON. Well, correspondingly it imposed a

significant obligation on the Municipalities that they have shouldered for over a hundred years.

And in talking about the whole issue of improving and maintaining roads, it's worth highlighting that the Municipalities don't hold these road allowances for their own financial advantage or profit; they hold the road allowances, to paraphrase the Supreme Court of Canada in City of Vancouver v. Burchill, as trustee for the public. And that's in the Municipality's written closing submissions at paragraph 71 to 74, and the citation for the case is at paragraph 71.

Now, I just remind, Your Honour, that in addition the evidence was that even regarding certain unassumed roads which sometimes the parties and in the plaintiffs' submissions, sometimes they are referred to as unopened road allowances, but technically there's no such thing. All road allowances established on an original Crown survey are open, and they're legally roads and highways and subject to a public right of access, unless they are formally closed.

But the evidence was that even regarding certain unassumed roads, the Municipalities nevertheless shouldered maintenance obligations as a matter of prudence and safety where those roads were, in fact, being used by members of the public.

Because, again, even if a road allowance is not assumed for maintenance by the municipality and improved, it's still subject to a public right of access and, in fact, many of these road allowances are used for various access and recreational purposes by residents of the municipality. The evidence in that regard was the evidence of Wendi Hunter on day 95, volume 95 on March 12, 2020, and also the evidence of Miguel Pelletier on March 12, 2020 at pages 12,365, line 24 to 25, and 12,368 line 1 to 9.

The last thing that I would say before moving to the next issue is that in my submission it is not accurate to characterize a municipalities decision as to whether to assume or improve or maintain a road as just a matter of choice. While of course it's true that a municipality has discretion in that regard, in

the sense that it doesn't have an obligation to assume and maintain a particular road allowance if it isn't already assumed and maintained, establishing and maintaining a municipal road system that meets the needs of the community, and in particular the public, is a basic responsibility of any municipality.

And in that context and consistent with the purposes of the Municipal Act, the municipality exercises its discretion. In other words, the perspective within which the Municipalities' discretion about whether or not to improve and maintain roads is exercised is a perspective of its obligations under the Municipal Act to, among other things, improve and maintain some sort of municipal road system to serve the members of the public for whom it holds the roads.

Now, I want to turn to then the third point, which is the submission that the Municipalities are akin to bona fide purchasers for value without notice. And this is dealt with in the Municipality's written submissions at paragraphs 85 through 100.

Now, to deal, first of all, with the

requirement of bona fides, in my submission there's no suggestion that the plaintiff -- by the plaintiffs that the Municipalities didn't act in good faith in relation to acquiring, building, or maintaining the roads in issue. There's no allegation that they acted improperly or not in accordance with the statutory framework.

And the plaintiffs agree that Municipal defendants played no role in the signing or negotiation of any of the treaties that are the subject matter of this litigation, and in particular Treaty 72. And that is dealt with in the agreed statement of facts entered into between the municipal defendants and the plaintiffs. It's Exhibit 3933, document SC00009, paragraphs 1, 11 and 12.

And, of course, the plaintiffs don't advance a claim for breach of fiduciary duty against the Municipalities or any other claim of wrongdoing. And they have acknowledged that the Municipal defendants don't owe the SON any free-standing fiduciary duties or share any of the fiduciary duties or other special duties imposed on the Crown in relation to SON.

And that is dealt with in the Municipality's written closing submissions at paragraph 16, and it's also acknowledged in the plaintiffs' response to request to admit at paragraphs B1 and B2, and that's Exhibit 3933.

Now, in short my submission is that on the issue of whether the Municipalities acted bona fide, they did in acquiring the title to the roads and building, maintaining and improving them. And again, I note that the Municipalities in doing that were acting as trustees for the general public, and they held and continue to hold the roads in trust for the members of the public. And it is that general public interest that underpins the Municipalities' actions regarding the roads. And that's covered by paragraphs 55 and 71 to 74 of our written submissions.

So the next point that I want to address is the issue of "for value". So we acquired the roads bona fide. Did we acquire and maintain them for value? And in my submission, yes, we did. That's covered at paragraphs 85 to 100 of the Municipalities' written submissions.

The road allowances were vested in the Municipalities in 1913. And contrary to the plaintiffs' contention, the Municipalities weren't mere volunteers and they didn't get the road allowances for free or for nominal or modest consideration, so to speak.

The price, so to speak, for the Municipalities which they have been paying for over a hundred years now, was to assume a number of onerous and expensive obligations, to construct, improve and maintain the roads.

And these are obligations -- if you're thinking about this statutory transfer as a bargain of sorts, these are obligations that otherwise would have had to have been assumed by the Crown, meaning Ontario, after 1867, in relation to this these roads.

And, again, as a practical matter, it's not as if Ontario could have said, well, you know what? We're just not going to build any roads because realistically it was necessary to have roads built for the public and in order to also discharge obligations toward the SON under Treaty 72.

So as discussed in paragraphs 29 to 37

of the Municipalities' written submissions, the evidence shows that the construction of municipal roads was not just an essential component of fulfilling Treaty 72, because the Crown couldn't have sold the lands and generated proceeds for the SON without a road network to facilitate settlement, but also that the Municipalities shouldered the burden of maintaining and improving the roads since at least 1913 when ownership was vested in them.

Now, the plaintiffs in their written reply submissions -- sorry, Your Honour did you have a question? I saw you -- no? Okay.

So at paragraph 446 of the plaintiffs' written reply submissions, they argue that maintenance obligations alone, assuming maintenance obligations alone are insufficient to constitute value for the road allowances for purposes of making the Municipal defendants bona fide purchasers for value.

But the statement of agreed facts between the plaintiffs and the Municipalities contains the agreement by the plaintiffs that the Municipalities expended significant resources, building, maintaining and repairing

roads and highways. And that is, again, Exhibit 3933.

Now, in addition to the Municipal defendants led evidence, which is summarized at paragraphs 38 to 47 of their closing submissions, of the work that they have done to build, maintain and repair the roads.

So it's obvious that -- as admitted by the plaintiffs, doing that work required the Municipalities to expend significant resources; for example, to purchase and lease equipment and vehicles, hire and pay in-house staff and sometimes outside experts to construct, pave, plow, sand roads, lay down gravel, grade, clear brush, maintain bridges and culverts.

Georgian Bluffs alone has 382 kilometers of improved roads and also does maintenance and grading work on some of its unassumed or unimproved roads of which there are 240 kilometres.

And Bruce County has approximately 140 kilometres of improved roads within the claims' area and, of course, they have all been discharging these obligations for more than a hundred years.

And the evidence on that, in addition to paragraphs 38 to 47 of the written submissions, is also the evidence of Mr. Pelletier, March 12, 2020, volume 95, page 12,370, lines 19 to 24.

So my submission on this point is that the law regarding what bona fide purchaser for value means doesn't require the Municipalities to show payment by cash or payment on a parcel-by-parcel basis for each road allowance and that the parcel-by-parcel payment argument is set out at the plaintiffs' written reply submissions at paragraph 451 where they say, well, you have to have evidence that will demonstrate payment on a parcel-by-parcel basis.

And in my submission there is no foundation in law for that, and as a practical matter, the roads were received together in a single act of transfer by statutory vesting. And the significant resources that the plaintiffs' agree the Municipalities spent weren't incurred on a road-by-road, parcel-by-parcel basis. So in my submission it is not necessary for the Municipalities to lead that sort of evidence in order to demonstrate

that they provided value in return for these roads.

And the last point that I would make on that, in addition to the ones that are covered in the Municipality's closing submissions at paragraphs 93 to 95, is that given the unique nature of road allowances and the way that Municipalities acquired them, it's not appropriate to look at it as if it were a typical real estate purchase or transaction. And, in fact, the Supreme Court of Canada cautioned against that approach in the Vancouver v. Burchill case. And you need not turn it up but it is quoted at paragraph 71 of the Municipalities' written submissions.

And what the Supreme Court of Canada says on this point is:

> "We are unable to accede to the proposition which would, in that respect, assimilate the municipality to an ordinary land-owner [...] Under statutes where the fee simple is vested in them, the municipalities are in a sense owners of the streets. They are not, however, owners in the full

sense of the word, and certainly not to the extent that a proprietor owns his land."

And then the Court goes on to say:

"It holds them as trustee for the public."

And so my point is simply that streets are in -- and roads are unique in that respect. It is not as if they could have been conveyed to the Municipalities in a conventional way. And it is, in my submission not necessary for the Municipalities to pay for them in a conventional way.

The assumption of the obligations and expending significant resources building, maintaining and repairing them is enough to constitute the value necessary to be not only bona fide but for value purchasers.

Which brings me to "without notice". Now, the requirement, of course, for purposes of a bona fide purchaser for value without notice is the requirement that the municipalities take the roads without notice of any competing claim being asserted to the road allowances by the SON.

And on this I want to refer first of all to the Municipalities' written closing submissions at paragraph 103. And that is the Guerin case, which is quoted at paragraph 103. And I've relied on Guerin, or we've relied on Guerin with respect to the without notice point simply for the proposition that where, as here, you have an absolute surrender as occurred in Treaty 72. Guerin says that the surrender itself doesn't give rise to a constructive trust.

> "Although the nature of Indian title coupled with the discretion vested in the Crown are sufficient to give rise to a fiduciary obligation, neither an express nor an implied trust arises upon surrender."

And so my point in referencing Guerin on this issue is simply the fact that the road allowances had been part of land surrendered under Treaty 72 and then surveyed and subsequently vested in the Municipalities was not something that would suggest to the recipient Municipalities that there was any trust in favour of the SON. In other words,

that that the roads that they were getting were impressed with any sort of residual proprietary interest in the roads by the SON.

And in addition to the fact of the surrender not being such as to put the Municipalities on notice of any competing interest by the SON, in fact to the contrary, the Municipalities are getting these roads after they have been surrendered, surveyed by the Crown surveyors, and then conveyed by statute. So there is no way -- no reason that the Municipalities would have had any concern, in my submission, about whether there was any competing claim being asserted in relation to the road allowances.

Now, the issue of the notice is covered both at paragraph 103 of the Municipalities closing submissions and also at paragraph 48 of the Municipalities' written closing submissions.

And with some trepidation, I want to address the point raised by my friends about notice in the oral submissions and also in the reply submissions at paragraph 464. And that is the suggestion that the -- that some of the

Municipal defendants, at least South Bruce Peninsula, the predecessors to South Bruce Peninsula, more correctly, had notice of SON's claim of beneficial interest in the shore road allowance as early at September 19th of 1922.

And in my submission that is not correct. And the Municipal defendants have not in any way conceded that in the paragraph of their submissions where they talk about notice, which is at paragraph 48 of the Municipal defendants' submissions. To the contrary what the Municipal defendants say is that they got notice of this claim, that is the fact that the SON were claiming a -- as they put it, beneficial and possessory interest in road allowances in 1993.

Now, as you've heard from Ms. Lepan, when she was making submissions on behalf of Ontario there had, of course, been a good deal of correspondence back and forth, so to speak. I won't go into it in detail, but a good deal of correspondence in which the SON talked about its -- what I'll call compensatory interest or monetary interest in the road allowances, by which I mean where the SON indicated that if the

Municipalities were going to close and sell any of those road allowances, as they are entitled to do under the *Municipal Act* if they followed the formal procedure there, then the proceeds from the sale should be paid to the benefit of SON. So certainly there was correspondence about that sort of interest under the terms of Treaty 72 in the proceeds of sale.

But notice of an actual proprietary interest in the road allowances, no, not until 1993. Now, at the risk of completely trying your patience, I am going to try and quickly explain this. My friend pointed you to a letter dated September 19th of 1922, and I'm not going to bring all of these documents up because there is a lot of them to get them in context and a number of them are almost impossible to read. So this one is Exhibit 4873.

And it's a September 1922 letter. And the plaintiffs, as I understand it, suggest that this letter is evidence that at least the predecessors to South Bruce Peninsula received some sort of notice that the plaintiffs were claiming an actual property interest in the road allowances, similar to what they are claiming

now, back in 1922.

And I will give you the list of documents to look at, but here is the kind of thousand foot view of what these documents say.

What was going on in that 1922 correspondence and the surrounding correspondence was a lawyer for those three municipalities, that are now South Bruce Peninsula, was inquiring into putting a road across a certain strip of land. And there was confusion about the status of the land. And in fact the lawyer had done some digging and was concerned that the lands were parcels that had been set aside for the use of the Chippewas of Saugeen and Owen Sound. So that they were lands set aside for the use of quote "the Indians" as he put it.

And so he's writing to the Superintendent of Indian Affairs to try and figure out the status of the lands. And not surprisingly, since the municipal lawyer says, I think that these are lands set aside for the use of the Indians, there was some indication that the Cape Croker Band wanted to also have a claim to those lands considered.

The point is not a road allowance --

THE COURT: I am just going to interrupt you. I think Mr. Townshend is attempting to object to something. Is that correct, sir?

MR. TOWNSHEND: Yes, there were certain letters from the record, but I'm not sure that all this context that is coming is in the record. If it is, maybe you can point us to the reference.

THE COURT: Are you asking -- sorry. Mr. Townshend is not entitled to ask Ms. Dougherty to point to anything.

Thank you, Mr. Townshend for making that observation. Ms. Dougherty you mentioned that you were going to give a list of exhibits, and I hope you are staying within the four corners of what the trial record includes or what can be reasonably inferred from the documents that you're talking about.

MS. DOUGHERTY: Yes, but I will give you the list of the exhibits right now so that Your Honour will have them. So Exhibit 3522, 3942, 3944, 39 -- I'm sorry, 3498, 3520, 4873, 4874.

And the reference to the belief that these were lands set apart for use of the Chippewas of Saugeen and Owen Sound or unpatented Indian Crown lands, as the lawyer refers to them, is a direct quote from the letter that is Exhibit 4873.

And then the reference to the claim to the benefit of the lands being asserted by the Cape Croker Band is in Exhibit 4874 which is a September 23rd, 1922, letter in which curiously the same lawyer who acts for the township is also bringing to the attention of the Superintendent the wishes of the Cape Croker Band. And then the further context, and I'm going to do my best to summarize this, but the further context is in Exhibits 3498 and 3520, which I've already given you, as well as in the other exhibit numbers that I provided to you.

But the bottom line is that ultimately it was explained that the lands, in fact, had been patented out by the Crown so they were not reserved apparently. They had been patented out by the Crown. The patents went to the water's edge and there was no road allowance in the vicinity of the area that the municipalities

were inquiring about. Although as I read the letters, they're not saying we want to put a road across a road allowance, they're saying we want to put a road across these other lands and we're not clear what the status of them is.

Anyway, all of this, a very -- you know kind of long round about way of saying, this is not correspondence where the SON are saying we have a claim to a beneficial proprietary interest in a road allowance at all. And this is not notice to the Municipalities in 1922 that the SON were advancing this sort of claim, rather the notice of the current claims, as set out in paragraph 48 of the Municipalities closing submissions, was in 1993.

So I have covered bona fide purchasers for value without notice. I see it is 4:28. I'm in your hands, Your Honour. I am thinking I have probably 50 minutes to go.

THE COURT: I heard 50, like almost an hour?

MS. DOUGHERTY: That's right.

THE COURT: That's fine. We're not going to be doing 50 minutes today, obviously. So that's fine.

We'll adjourn today to resume at 10:00 o'clock tomorrow morning. Thank you, counsel.

--- Whereupon the proceeding was adjourned at 4:30 p.m.