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 102 / DAY 102 of the trial proceedings in the above-noted matter, being held via Zoom virtual platform, on the 23rd day of October, 2020.

B E F O R E:

The Honourable Justice Wendy M. Matheson

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

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

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

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

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

ALSO PRESENT:

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

REPORTED BY: Helen Martineau, CSR.

ZOOM MODERATOR: Liz Roberts

I N D E X

PAGE

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

MS. ROBERTS: Good morning. This is a virtual hearing using Zoom. Today is Friday, October 23rd, 2020, resuming for closing arguments in the trial of two actions, the Chippewas of Saugeen First Nation et al. and the Attorney General of Canada et al., and the Chippewas of Nawash Unceded First Nation et al. and the Attorney of Canada et al. Day 102.

The file numbers of these proceedings 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 livestreaming of this proceeding is made available on YouTube for public access. The links 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: Thank you, Ms. Roberts.

Good morning. I wish to remind all concerned 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 screenshot of this hearing without permission under Section 136 of the *Courts of Justice Act*.

No permission has been sought and none has been granted.

We then proceed with the continuation of the Municipalities' oral closing.

Ms. Dougherty, please go ahead.

MS. DOUGHERTY: Thank you, Justice Matheson.

Just a final reference on the notice point which I had been addressing yesterday, which is notice to the Municipalities. That is dealt with at paragraph 48 of the Municipal Defendants' closing submission.

And the documents that constituted notice are summarized at footnote 58 to paragraph 48, but I just wanted to also note that the documents that didn't constitute notice, if you will, the prior correspondence

where the SON indicated that their claim was to the proceeds of the road allowances in the event that a road allowance was stopped up, closed and sold, that is all summarized at the same paragraph at footnote 59 with the relevant exhibit numbers.

And I won't turn those up, but those are authority for my submission yesterday about the nature of those communications.

Now, I want to then turn to the fifth point, which is that in my submission, the question about whether the road allowances are in the hands of bona fide purchasers, that is to say whether the Municipalities themselves are akin to bona fide purchasers, is not just a remedies issue, as the plaintiffs have suggested.

It is an issue that really goes to whether these road allowances are within or outside the scope of the plaintiffs' claim, as they have seen fit to frame it, for all kinds of, presumably, legal and strategic reasons.

And I don't in any way wish to suggest that there's anything wrong with a strategic decision to frame a claim a certain way. It's

just that, of course, in my submission, it then confines how you can litigate the case.

And the plaintiffs have specifically framed their claim, in my submission, to exclude lands that are in the hands off bona fide purchasers.

And so if the Municipalities are in a position that is equivalent to that of a bona fide purchaser, then the road allowances fall into that category.

And just for reference, I won't take you through it, but it is referenced in the plaintiffs' opening statement in the April 25th, 2019, transcript, Volume 1, Day 1, page 26, lines 5 to 9; page 29, lines 7 to 9, and also in the plaintiffs' written opening statement at page 31, paragraph 80.

And it's not just that the plaintiffs have expressed this view in argument. It's that they have also pled the case that way. And in particular, paragraph 25 of the plaintiffs' Fresh as Amended Statement of Claim regarding -- which refers back to the paragraph 4 claim about the Municipal road allowances indicates that the plaintiffs are claiming a declaration of

beneficial ownership over all lands subject to Treaty 72 for which there is no bona fide purchaser for value of the legal estate without notice.

So my submission is that the only lands that are relevant to consider in the Phase 2 remedy stage where the constructive trust issue is to be addressed are lands that aren't in the hands of bona fide purchasers.

And the question of whether, therefore, the Municipalities are bona fide purchasers and the road allowances are subject to that carveout is properly is a threshold Phase 1 issue.

And my further submission on that point is there's no unfairness here because the Municipalities have pled that they are bona fide purchasers, and they addressed it in their opening submissions and in their written opening submissions and also, of course, in their closing submissions that they are bona fide purchasers for value without notice. And we led evidence on the point.

Now, just to address the suggestion at the plaintiffs' reply submissions, paragraph 442

where they suggest that this is a motion for summary judgment on Phase 2 issues. In my submission, this is anything but a motion for summary judgment.

We have had a full trial. We are now at Day 102. We said at the outset of the trial that we would be raising this issue as a Phase 1 issue. The Municipalities have been in the litigation for more than 25 years, so there's nothing summary about this and no surprise or unfairness.

Now, in submitting, as the plaintiffs do, that this bona fide purchaser issue should be addressed in Phase 2, in my submission, they're really conflating two distinct issues; namely, the issue of whether the road allowances are in the hands of bona fide purchasers, in which case I say that they're outside the scope of this claim and outside the whole Phase 2 process, and the separate issue of whether the plaintiffs are entitled to a constructive trust with respect to particular parcels of land, which is a remedy issue to be considered in Phase 2.

Now --

THE COURT: Ms. Dougherty --

MS. DOUGHERTY: Yes.

THE COURT: -- on that -- I'm a little uncertain about what you mean on that point. In the first category, as you've described it, the land is outside the claim.

Are you saying that there could nonetheless be a constructive trust claim over the land?

MS. DOUGHERTY: No, Your Honour, not if it is outside of the claim. But to the extent --

THE COURT: So I'm not sure that SON is conflating two issues. I think if they're hoping for a constructive trust over the land, then they need it to be in the claim.

Now, I understand from your standpoint there are two separate issues.

MS. DOUGHERTY: Right.

THE COURT: So anyway, I do understand your point. I'm just not sure that that's how I would characterize the SON position.

They basically say these lands are inside the claim, and, therefore, a constructive trust argument may be made. And if there's

going to be one made, it should be in Phase 2.

MS. DOUGHERTY: So I would simply say that there are of course other lands that are the subject of this claim. There are lands held by Ontario, there are lands held by Canada, there are Provincial roads.

So to the extent that there are other lands that are not in the hands of a bona fide purchaser, what I was intending to indicate is that that is a proper Phase 2 issue, because, of course, Phase 2 --

THE COURT: Yeah, no, I understand that, counsel.

MS. DOUGHERTY: Okay.

THE COURT: Counsel, I understand that.

MS. DOUGHERTY: Okay.

THE COURT: Please go ahead.

MS. DOUGHERTY: So lastly, the decision to specifically carve out lands that are in the hands of bona fide purchasers is also something that is consistent with the comments made by Ms. Guirguis in the plaintiffs' oral argument.

In answer to Your Honour's questions

about the issue of whether they were advancing or why they had decided not to advance, I guess, a breach of treaty claim, and although I don't have the exact wording in front of me, the gist of Ms. Guirguis' comments was that they had decided to not advance this as a breach of treaty claim, but rather as a breach of fiduciary duty claim because, among other things, they wanted to avoid invalidating Treaty 72 and impacting third-party rights.

And so in my submission, those sort of third-party bona fide purchaser property rights are what is impacted if one leaves these Municipal road allowances in the Phase 2 process.

And I also flag that indirectly it's also the property rights of the private property owners that the plaintiffs indicated they didn't want their claim to impact because, of course, people buy lands on Municipal roads in the expectation that they will continue to have road access to their properties and that if there is a road there, it will continue to be there, in my submission.

THE COURT: Again, that may be so, but

I'm confident that the SON will submit that that will be properly considered in Phase 2, among the many other reasons that a constructive trust remedy may or may not be appropriate.

Anyway, I understand your point.

MS. DOUGHERTY: Thank you. And the last thing that I want to turn up on this point is -- or perhaps not ask Your Honour to turn up, but I'm going to turn it up myself and give you the reference. It is at page -- I'm sorry, paragraph 17 of the Municipalities' written submission.

And it is a quote from Chief Justice McLachlin in the Haida Nation case, and it is referring to the Chief Justice's comments at paragraph 55 and to some extent 54 of that decision.

And without asking Your Honour to turn it up, the case is at the Municipalities' book of authorities at tab 4. And what Justice McLachlin, what Chief Justice McLachlin says is that -- she says:

"Finally it is suggested, per Finch, CJBC, that third parties should be held to the duty in order to [...]"

Referring to the duty to consult that flows from the honour of the Crown:

> "[...] to provide an effective remedy. The first difficulty with this suggestion is that remedies do not dictate liability. Once liability is found, the question of remedy arises. But the remedy tail cannot wag the liability dog. We cannot sue a rich person simply because the person has deep pockets or can provide a desired result."

And in my submission, that is exactly what is happening here. There is no claim against the Municipalities for any wrongdoing. There's no suggestion that we're the Crown. There's no suggestion we have fiduciary duties of the nature that the Crown has to the First Nations. There's no suggestion of any fault.

We're just here because the remedy tail is wagging the liability dog, and the Municipalities are viewed as being able to provide a desired result; which is to say, the road allowances. And in my submission, that is what the Supreme Court of Canada cautioned

against in the Haida case.

Which brings me to my next point, which is some comments responding to the submissions made by my friends relating to constructive trust.

And in particular, I'm referring to the submission by the plaintiffs in their written reply submission at paragraph 443 where the plaintiffs contend that the starting point for evaluating whether the Municipalities are bona fide purchasers is that trust property remains trust property unless and until the Municipalities show that they are bona fide purchasers regarding the roads.

And in my submission, that puts the cart before the horse. There has not yet been a determination that the road allowances are the subject of or impressed with any sort of trust other than the general trust in favour of the public that applies to all road allowances. They are not shown to be trust property.

And the reason that I had referred to the Guerin case earlier in my submissions yesterday was just to make the point that where there is an absolute surrender of lands, as

there was with Treaty 72, which is not said to be invalid, even if it is an absolute surrender on the basis that the Crown is going to sell the lands and provide the proceeds to the SON, there is no trust in the sense of a constructive trust that attaches to the lands that flows from that surrender.

So I simply flag that in saying there's no trust on these lands. They are not shown to be subject to a constructive trust. And Guerin says that the fact that they were surrendered, subject to obligations to sell and remit the proceeds does not mean that the lands are subject to a constructive trust.

It just imposes a fiduciary duty and a treaty obligation on the Crown to fulfill the terms of the treaty. But it doesn't create a trust that runs with the land, so to speak.

So in my submission, the plaintiffs can't assert as a fact that the roads, when they came to the Municipalities, were trust property and, therefore, can traced into the hands of the Municipalities, so to speak.

When they came into the Municipalities' hands, they were surrendered

lands under Treaty 72 that had been surveyed, and the roads had been established by Crown surveyors on the original Crown surveys.

So there was no trust and no information to put the Municipalities on notice in any way that there might be some residual claim in favour of the SON in relation to those roads. And we say nothing in subsequent interactions up to 1993.

And on this I would also like to simply flag the comments of the Supreme Court of Canada in the Haida Nation case. And again, it is at tab 4 of the book of authorities of the Municipal defendants and at paragraph 54.

And this was sort of a case where an analogous trust-type argument was advanced in order to try and fix a third-party, Weyerhaeuser, the forestry contractor, with the duty to consult and some of the obligations of the Crown, so to speak, in relation to logging in Haida Gwaii.

And at paragraph 54 what the court says is:

"It is also suggested (per Lambert J.A.), that third parties

might have a duty to consult and accommodate on the basis of the trust law doctrine of 'knowing receipt'. However, as discussed above, while the Crown's fiduciary obligations and its duty to consult and accommodate share roots in the principle that the Crown's honour is engaged in its relationship with Aboriginal peoples, the duty to consult is distinct from the fiduciary duty that is owed in relation to a particular cognizable Aboriginal interests. As noted earlier, the Court cautioned in Roberts against assuming that a general trust or fiduciary obligation governs all aspects of relations between the Crown and Aboriginal peoples. Furthermore, this Court in Guerin made it clear that the trust-like relationship between the Crown and Aboriginal peoples is not a true trust, noting that the law of trusts is a highly developed specialized branch of the law."

And here is the provision that I particularly rely on:

> "There is no reason to graft the doctrine of knowing receipt onto the special relationship between the Crown and Aboriginal peoples. It is also questionable whether businesses acting on licence from the Crown can be analogized to persons who knowingly turned trust funds to their own ends."

And my submission is that similarly, the Municipalities cannot be fixed with a trust-like duty or have a trust impressed on road allowance lands that come to them. There is no reason to engraft these trust obligations onto the statutory vesting of the road allowances in the Municipalities in my submission.

Now, the last thing or I guess the second-last point that I want to address is the plaintiffs' reply submissions at paragraphs 456 regarding the availability of a constructive trust remedy.

And what the plaintiffs have suggested is that the municipal defendants misunderstand

the law regarding availability of a constructive trust in making reference to the Guerin case.

I won't -- I won't rehash the Guerin case because I've made my submissions on why we rely on Guerin. But as I understand the plaintiffs' suggestion on this point, they are suggesting that the Municipal defendants have misunderstood the law of constructive trust and are suggesting that a constructive trust can only be imposed if there is some unjust enrichment established. And in my submission, that is not the case.

The point is dealt with in the Municipal defendants' written submissions at paragraphs 114 to 116. And essentially, the Municipal defendants' submissions on that point recognize that there are other circumstances in which a constructive trust can be available aside from unjust enrichment.

So at paragraph 114, citing to Soulos and Korkontzilas, we summarize the two situations in which a constructive trust may be available as a remedy; one, if the property has been obtained by a wrongful act by the defendants. So in this case the Municipalities,

and that is not alleged here.

Or, two, if even though he is not a wrongdoer the defendant would be unjustly enriched to the plaintiffs' detriment by being permitted to keep the disputed property.

And so we've submitted that on those two categories of constructive trust, we don't fall within either of them.

And the other point that I would make on that constructive trust issue, and here I am referring to Soulos and Korkontzilas, which of course is a decision of the Supreme Court of Canada involving, essentially, a real estate agent who was acting for a party and ended up scooping the opportunity and buying the property himself.

And so the -- and the value of the property went down after the purchase, so there was no unjust enrichment. And so the question was, could you in the absence of unjust enrichment impose a constructive trust, and the Supreme Court of Canada of course says, yes.

And in particular, it talks about the availability of a constructive trust. So the relevant paragraphs are 34, 36 and 45. And at

paragraph 36 the Supreme Court of Canada says that:

> "The situations where the judge may consider in deciding whether good conscience requires imposition of a constructive trust may be seen as falling in two general categories. The first category concerns property obtained by a wrongful act of the defendant; notably, breach of fiduciary obligation or breach of duty of loyalty."

So stopping there, none alleged as against the Municipal defendants.

> "And two, the second category concerns situations where the defendant has not acted wrongfully in obtaining the property, but where he would be unjustly enriched to the plaintiffs' detriment by being permitted to keep the property himself."

THE COURT: Mr. Dougherty --

MS. DOUGHERTY: Yes.

THE COURT: -- I'm a little confused.

You just went through that precise law a moment ago. Is there some reason why we're doing it again?

MS. DOUGHERTY: No. I was going to go to one further point at paragraph 45, which is the point that the Court makes then with respect to the constructive trust for -- based on wrongful conduct.

And the fourth requirement of that constructive trust based on wrongful conduct is that there must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case.

And I highlight that simply because the plaintiffs have suggested that the issue of whether there are equities in favour of the Municipalities, so to speak, that weigh against the granting of a constructive trust, is wholly a function of the Municipalities being able to mount and bear the burden of proof for a successful bona fide purchaser defence at the remedy stage.

And in addition to the submissions I've made about the bona fide purchaser being -- issue being a threshold question in Phase 1, I

would also point out that it actually is an onus on the plaintiffs to demonstrate that there were no factors which would render imposition of a constructive trust unjust in all the circumstances of the case. That is baked in, if you will, to the test for a constructive trust.

Now, I want to very quickly address my next point, which is that the Municipalities are not the Crown, because I anticipate the plaintiffs might say, well, we haven't alleged wrongdoing against the Municipalities, but we do allege it against the Crown, and you got the road allowances from the Crown by way of statutory vesting.

And I simply flag that -- and this is dealt with in paragraphs 15 to 16 of the Municipalities' submission. And in a nutshell, the Municipalities are not in fact the Crown. They are creatures of statute created under the Municipal Act of course, and they are not subject to the special duties of the Crown.

I have taken you to the Court's comments on that point in the Haida case, which talks about the distinction between the fiduciary duties and the honour of the Crown

that are applicable to the Crown and distinguishes between those obligations which apply to the Crown and the ones that apply to third parties. And I'll get to that in a second.

The plaintiffs haven't asserted, and in fact they acknowledge, that the Municipal defendants don't owe the SON any free-standing fiduciary duties, and they don't share any of the fiduciary duties or special duties imposed on the Crown in relation to the SON.

And that is dealt with at paragraph 16, and the relevant citations are there from our submissions.

I want to then very briefly go to the Neskonlith case, which is at tab 22 of the joint book of authorities. And I'm not asking to have Your Honour turn this up, but I do want to highlight a couple of points from it because it addresses the issue of whether the Municipalities stand in the same position as a third party for purposes of the Crown's duty to First Nations.

It's a decision of the British Columbia Court of Appeal. And the argument

advanced in that case by the Neskonlith Indian Band was essentially that the municipality, in that case the City of Salmon Arm, had various duties to consult flowing from the honour of the Crown and should at least, in some respects, be viewed as an emanation of the Crown or in some fashion fixed with those Crown duties.

And the British Columbia Court of Appeal analyzes that issue and rejects the argument. Just to give you reference for context to see the arguments that were advanced by Neskonlith Indian Band, they are at paragraph 61 to 65 to give context to what the Court is then ruling on.

And then the Court at paragraph 66 rejects the argument. It says:

> "These are all strong arguments. There are, however, even more powerful arguments, both legal and practical, that in my view militate against inferring a duty to consult on the part of municipal governments."

And the Court observes that firstly, the Neskonlith's position seems to run clearly contrary to Haida and Rio Tinto, Rio Tinto

being, of course, another Supreme Court of Canada decision regarding the duty to consult.

In Haida the Court stated expressly that while the Crown may delegate procedural aspects of consultation, the ultimate legal responsibility for consultation and accommodation rests with the Crown. The honour of the Crown cannot be delegated.

And then again referring to Haida, the B.C. Court of Appeal says it rejected the notion that third parties who were in a position to provide an effective remedy should, for that reason alone, be held to the duty.

And then the Court goes on to say:

> "In addition, municipalities lack that ability."

And then over the paragraph 68 of the Neskonlith decision. The Court after referring to the Rio Tinto case says:

> "It seems to me that the Court's reasoning provides a full answer to Mr. Underhill's argument on behalf of the Neskonlith that the duty to consult may arise upstream of the statutory provisions by which a

municipality or local government is created and attaches not because the duty has been delegated, but automatically because the municipality is making a decision said to affect Aboriginal rights or interests. It also, with respect, disposes of the notion that the duty to consult is analogous to the duty to apply the Charter."

And skipping down:

> "Such powers have not been granted to municipalities just as they have not been granted to quasi-judicial tribunals."

And then lastly at paragraph 71, the Court of Appeal, B.C. of Court of Appeal goes on to emphasize that:

> "As creatures of statute, municipalities do not in general have the authority to consult with and, if indicated, accommodate First Nations as a specific group in making the day-to-day operational decisions that are the diet of local governments."

And then goes on at paragraph 71 to 72 to talk about the many reasons why it makes no sense at a practical level either to impose those duties on municipal governments.

And I submit that just as the duty to consult and the honour of the Crown doesn't automatically attach to municipalities, so any obligations that may arise out of the Crown's fiduciary duty or out of any alleged breaches of fiduciary duty or alleged breaches of treaty obligations or alleged breaches of the honour of the Crown, those don't automatically attach to the Municipalities, and they don't run with the land, so to speak, if the Municipalities receive the road allowances from the Crown.

They don't -- the Crown doesn't -- the road allowances do not come impressed with any special trust or duties by reason of that either. The special fiduciary duty stays with the Crown, in my submission.

Now, the last thing I want to address, and by my calculation I have seven minutes, and then I'm sitting down, subject of course to any questions Your Honour might have.

But the last thing that I want to do

is look at the issue of what I'll call the previous jurisprudence and the underlying policy issue concerning whether the bona fide purchaser position of the Municipalities is appropriate to recognize.

And in my submission, it has been applied in similar circumstances, and it is fully appropriate to view the Municipalities as bona fide purchasers and to recognize this as a -- both a defence to the principles of constructive trust and as something that brings the road allowances outside of the scope of that whole remedy phase of the hearing.

And just to contextualize it, I mean, it may be obvious, but it probably bears saying anyway. I think one of the few things that all of the parties in this case agree is that the complexity and length of Phase 1 of this litigation may well pale in comparison to the complexity and the length of the sort of adjudication or hearing that would have to go on in relation to Phase 2.

You know, to do a parcel-by-parcel analysis of every road allowance in the Municipalities that was shown on the -- that

started as a road allowance on an original Crown survey is going to be an enormous exercise that will be akin to running hundreds of separate *Boundaries Act* applications.

It is going to require an enormous amount of work, and it is not something that the Municipalities are going to be able to be able to sit back and wait to prepare for. So the burden of having to participate in Phase 2, I think it's fair to say, is going to be crushing for the Municipalities.

Now, of course, the fact that litigation is difficult and expensive is no reason why you shouldn't have to participate in it if there's a finding of liability made. You know, if it comes to pass that there's a finding of liability made against Canada or Ontario, then it's fair enough that they will have to go through the remedy portion of the hearing.

But there is no prospect, in my submission, of a liability finding being made against the Municipalities, and I can say that with confidence because there's no claim against them. And so in that context, it's not fair for the Municipalities to have to go into this

enormous Phase 2, and it is very much the remedy tail wagging the liability dog.

Now, just to quickly highlight a couple of points from the submissions about the appropriateness of recognizing the Municipalities as bona fide purchasers.

I've already taken you to the Guerin case, and I won't rehash it other than to point out that it is one example of a situation where there has been -- there is a breach of fiduciary duty by the Crown, in that case by leasing land to a golf course on less favourable terms than the Band had approved without first consulting the Band.

But by the time the matter gets to court, the golf course, which is the third party in that case, has spent hundreds of thousands of dollars to improve the land. And there's no suggestion of a constructive trust being appropriate in that case; rather, it is a finding of damages for breach of fiduciary duty. That's dealt with at paragraph 108 of the Municipalities' written submissions.

The second case I want to refer to is dealt with at paragraphs 98 to 100 and paragraph

109 and 110 of the Municipalities' submissions. And that is Chippewas of Sarnia, and that is a situation where land that actually hadn't been properly surrendered was patented out in the absence of a surrender, which made the Crown patent void ab initio.

And even then, even though there was no valid surrender, the Court concluded that a constructive trust was not appropriate in that case and recognized that there was no reason why the good faith purchaser for value defence shouldn't be applied to preclude the First Nation in that case from asserting claims against current landowners.

And I distinguish that from the Semiahmoo case -- I'm sorry, Semiahmoo case, which is at -- dealt with at paragraphs 111 to 113 of the Municipalities' submissions.

And the only point that I would make on Semiahmoo is that that is a case where there actually is no bona fide purchaser for value without notice. The hands have not -- or the lands have not yet passed into the hands of third parties; rather, they were being retained by the Crown in circumstances where the lands

had been surrendered for the purposes of building an expanded Customs facility, and then the Crown proceeded not to use the lands for that purpose and retained them unused.

And I emphasize that that is not the situation here. The road allowances are not in the hands of the Crown. They're in the Municipalities'.

The last thing that I wanted to say on that point is in a quote from the Chippewas of Sarnia case. And the relevant quote is set out at paragraph 87 of the Municipalities' submission.

THE COURT: Ms. Dougherty, I hope you aren't going to read it if it's quoted in your submissions.

MS. DOUGHERTY: I'm not going to read it.

THE COURT: I assume you're wrapping up at this point.

MS. DOUGHERTY: I am. I've got literally one or two minutes, and then I'm done.

And my submission based on the Chippewas of Sarnia case is that the -- in recognizing the defence of good faith purchaser

for value without notice in that case and holding that it was a full defence to a proprietary claim against lands that were in the hands of bona fide purchasers, the Court talked about the policy underpinning the bona fide purchaser concept, which is that it protects the security of title to land acquired without notice of claim, and it reflects a basic societal value -- or I'm sorry, a basic social value that protects the rights of innocent parties. And the defence is based in simple fairness.

And my submission, all of those underpinning policy reasons for the bona fide purchaser principles apply to the Municipalities. There's no reason not to accord security of title to road allowances acquired without notice of claim.

The security of the municipal title to these road allowances is, in my submission, every bit as important, if not more important in many instances, than private property rights in a piece of land.

And I say that because road allowances are held in trust for the public; they are used

by the public; they are subject to perpetual rights of public use and access. And so the policy reasons for protecting that interest in land are every bit as compelling, and my submission is that the Municipalities should be recognized as bona fide purchasers for value without notice.

And in my submission, what flows from that is taking the Municipal road allowances outside the scope of the plaintiffs' claim and outside the remedy exercise in Phase 2.

Subject to any questions that Your Honour may have, those are the submissions on behalf of the Municipal defendants.

THE COURT: Thank you, counsel.

Mr. Townshend, who is addressing reply from your group?

MR. TOWNSHEND: Yes, the order for reply is Ms. Guirguis, Ms. Pelletier and myself on different --

THE COURT: All right. Thank you.

Ms. Guirguis, please go ahead.

MS. GUIRGUIS: Thank you, Your Honour, good morning. So, Your Honour, I have four points in reply to Canada's submissions with

respect to the Treaty claim and four points in respect to Ontario's submissions about the Treaty claim.

The first point in respect of Canada's submissions: Mr. Beggs talked about Crown actions in respect of squatters on the peninsula, that whenever they had knowledge of a squatter there would be warnings and notices sent.

He then said that presumably the Crown would take follow-up actions. I have one point in reply to this: There is no evidence of these presumed follow-up activities. Canada has not cited evidence that demonstrates that there were follow-up actions such as escalating warnings, evictions, arrests on the peninsula.

We disagree with the submission that the absence of evidence -- that in the absence of evidence that there can be any inference that such follow-up occurred.

And in our written submissions, Your Honour -- I'll just wait because Mr. Beggs.

THE COURT: Come again. Oh, Mr. Beggs. I see.

MR. BEGGS: Your Honour --

THE COURT: Please go ahead.

MR. BEGGS: Yes. I believe this was addressed in their written reply submissions.

THE COURT: I was wondering. Of course counsel is aware of two things: One is that this is not an opportunity to repeat what you've already said in your primary submissions but also in your written reply submissions.

Please bear that in mind.

MS. GUIRGUIS: Yes, Your Honour.

So the second point that I wanted to reply to is that Mr. Beggs went to paragraph 100 of Wewaykum in his submissions, which refers to Justice Wilson's concurring reasons in Guerin.

And in this paragraph it attempts to explain the content of a fiduciary obligation to protect and preserve the Band's interest in the Reserve from invasion or destruction.

This paragraph, Wewaykum clarified that the interest Justice Wilson was referring to were legal interests.

In his submissions Mr. Beggs suggested that this meant that the fiduciary duty that attaches to Reserve land does not necessarily require the Crown to protect the land but

instead to protect the legal interest, which can be the value of the land.

We submit, Your Honour, that the language of legal interest doesn't mean that the obligation to protect the Reserve is exhausted by ensuring a First Nation gets value for its sale.

The Court, in our view, uses the words "legal interest" because First Nations do not own their land outright in a fee simple sense; rather, they have what Wewaykum refers to as quasi-proprietary interest that is a legal interest that burdens land owned by the Crown.

So we submit that fiduciary obligation requires protecting the quasi-proprietary interest in the land itself, not just the money value of the land.

Your Honour, the third point in terms of reply was in respect of Mr. Beggs' issues with our pleadings; however, that's detailed in our written reply at paragraphs 427 to 439, and I don't intend to repeat that but just to draw attention to them.

The last point of reply to Canada's submissions, Mr. Beggs raised the issue of costs

of who was expected to pay for the protection of the peninsula in his submissions.

He noted that in the 1850s it was a different Canada without the same size government or income tax and so on. And he said that it was expected at the time that costs or enforcement against squatters or trespassers would be paid for by the Indians themselves.

In support of this submission Mr. Beggs pointed to one letter from Higginson to Anderson which is at Exhibit 1585.

We would note -- yes.

THE COURT: Did you say 1585?

MS. GUIRGUIS: Yes, that's correct.

THE COURT: All right.

MS. GUIRGUIS: So we would note in reply that this is only one letter, Your Honour, and there has not been other evidence about this point heard by the Court that this was the expectation or the practice that the Indians would be responsible for paying for enforcement themselves.

We would submit that it's not clear from this one example that this was indeed the practice or that we can infer that this was in

fact the policy or the requirement. And to my recollection, Your Honour, this was not tested or the subject of testimony of a witness at this trial.

In addition in reply to this point, Mr. Beggs had noted that the Crown preferred where possible to resolve issues with encroachments on Indian Reserves they would do it without expending money. But if the resolution wasn't possible without expending money, we would submit, Your Honour, that the fiduciary acting with ordinary diligence is required to do what they would have done if the land was their own.

And we've pointed to examples of that in other places in our submissions. For example, Exhibit 4450, which is a letter from David Thornburn, Superintendent for Six Nations that lists payments for some constables. We submit that this demonstrates that it was modest and manageable in terms of an expense.

And then finally in reply to this point, Your Honour, this assertion that it would fall to the Saugeen Ojibwe Nation to cover the cost of protecting the peninsula, we would

submit, itself runs afoul of the Crown's promise to protect the peninsula.

Treaty 45 1/2 stated:

> "Your Great Father engages forever to protect the peninsula for SON from the encroachment of Whites."

Which includes squatting and settlement. So we would submit that it is difficult and incorrect to read this promise in light of the context of the evidence that we've provided about the negotiations between Crown -- the Crown and SON that it would require SON to cover the cost of this protection.

So that is my reply with respect to Canada's submissions.

In respect of Ontario's submissions about the Treaty claim, I also have four points for reply.

The first is in respect of harvesting rights. We agree with the submissions of Ontario made by Mr. Lemmond. We want to clarify one point in respect of our position in reply.

We submit that the fact that lands are being put to visibly incompatible use doesn't extinguish SON's harvesting right. It is a

limit, but the right is not terminated by that incompatibility. In some cases it might displace the right or make it impossible to exercise while the land is being put to an incompatible use, but if the land were to revert to a different use, we would submit the right would continue.

My second point for reply with respect to Ontario's submissions is in respect to treaties founding and fiduciary duty.

Your Honour, yesterday you asked whether there had been any cases where there was a treaty obligation, and the claimant said that the obligation was enhanced by a fiduciary duty. And Mr. Feliciant pointed you to the Restoule case. We would just like to refer you especially to paragraphs 520 to 528 as relevant to that discussion.

So the third point I'd like to reply to, and I apologize, I realize I misnumbered this, and I have five points in reply. So the third point is a clarification regarding the case law about treaties that give rise to -- about -- sorry, clarification about our submissions respecting what gives rise to the

fiduciary duty.

Mr. Feliciant said during his submissions the plaintiffs are saying the actual negotiation and making of Treaty 72 gave rise to a fiduciary duty and that this duty was breached.

Just to be clear, that is not our position. We say the fiduciary duty arose out of the promise to protect in Treaty 45 1/2, and it was breached in how the Crown dealt with SON's interest in the peninsula in the years leading up to and during the negotiation of what became Treaty 72.

Fourth, regarding the historic use and occupation of the peninsula, yesterday Mr. Feliciant said during his submissions that, one, an Aboriginal interest in land capable of grounding a fiduciary duty could not arise out of treaty but had to arise out of historic use and occupation.

And number two, that there was not necessarily enough evidence of historic use and occupation in this case to ground a fiduciary duty. Mr. Feliciant said something short of Aboriginal title was required but suggested that

there may not be enough here.

First, we would disagree with that. We would submit that the evidence does demonstrate historic use and occupation of the peninsula.

For example, the archeological record includes various sites on the peninsula. We have references to this evidence at paragraph 309 of our reply. We would also point to the surrounding negotiations in 1836, which we've discussed before, about SON's connection to its homelands. That evidence is referenced at paragraphs 660 to 670 of our final argument and paragraphs 390 to 391 of our reply submissions.

And finally, we point to the evidence provided by SON members and oral history evidence of historic use and occupation and the connection to the territory.

I also have two legal points in respect of this point made by Mr. Feliciant. The first is that there are examples in the case law where a First Nation has an interest in a Reserve created by treaty and that this was found to be sufficient to ground a fiduciary duty. For example, Jim Shot Both Sides, which

is at tab 35 of SON's original book of authorities, the relevant paragraph 361.

The second legal point is that on this issue of the kind of First Nations occupation that can ground a fiduciary duty, I would refer Your Honour to Wewaykum, where a sui generis fiduciary duty was found to attach to lands, A), outside of the two First Nations' traditional territories, and B), before the Reserve was created.

I would submit that if a fiduciary duty could attach there, then it could surely attach to the peninsula within SON's territory and on the Reserve.

The final and fifth point that I'd like to make in reply to Ontario is in respect of Ms. Lepan's submissions on laches.

Yesterday Ms. Lepan made a submission in respect of the prejudice branch for laches. She said something to the effect that the passage of time amounts to a prejudice to Ontario because of SON's claim for compensation for loss of use of the lands.

And she suggested that this compensation was increasing year-by-year, and

her submission suggested that this compensation could or would not be offset by the benefit SON received from sale of the lands in 1854.

So I have a few issues with this submission. One is I would submit it's incorrect, but secondly and more importantly, it's an assertion that's not based on any evidence in the record.

Ontario has not led any evidence in support of this assertion that amounts calculated for loss of use of lands would not be offset by bringing forward the past amount SON received from the sale of lands.

So I would submit that Ontario's assertion of prejudice here is just an assertion, and we submit that it should be disregarded.

So, Your Honour, subject to any questions you have, those are my reply submissions.

THE COURT: Thank you, Ms. Guirguis, for your focused reply.

Please go ahead, Ms. Pelletier.

MS. PELLETIER: Thank you, Your Honour. Good morning.

Before I begin my reply submissions I do have one administrative matter, which is that it's come to our attention that the document found in REDI at Exhibit 4022 is not the correct document. Exhibit 4022 was a map annotated by Dr. Hinderaker, and the document that is actually found at Exhibit 4022 is the unannotated version.

So the transcript reference, if you'd like it, to where the Exhibit is actually annotated by Dr. Hinderaker and then entered as an Exhibit, is transcript Volume 19, which is the date of June 10, 2019, page 1559, line 25 to page 1563, line 19.

So we've advised our friends on this issue, and both Ontario and Canada, I understand, have confirmed this morning that they have no problem with the correction being made. So I'm asking for your direction that the annotated map be replaced with the -- that the unannotated map be replaced with the annotated map at Exhibit 4022.

THE COURT: Thank you, Ms. Pelletier.

Do counsel for any of the Municipalities object, and if so, please turn on

your microphone and indicate that you object. If not, you can remain silent.

No? All right.

Thank you for putting that on the record, Ms. Pelletier. I give my permission to correct that image in the database.

MS. PELLETIER: Thank you, Your Honour. I'd like to begin my submissions by addressing some of the points raised in Canada's submissions.

So to begin, during the submissions of my friend from Canada, Mr. McCulloch, he repeatedly suggested that SON had somehow disavowed its experts and called on the plaintiffs to do so expressly.

Now, with respect, my friend misunderstands the evidence given by our experts, and I'd like to touch on some of those points now.

The first such issue was with Professor Benn's evidence respecting the role of forts in Lake Huron and Georgian Bay.

The quote that my friend took us to on Tuesday in his submissions and also took Professor Benn to in his cross-examination comes

from page 31 of his report, which is at Exhibit 4195, and is quite clearly about the British period, not the French period, as my friend had suggested.

The analysis that follows is entirely respecting Great Britain and America, and the citations are to texts respecting the War of 1812.

So in our submission, there is no contradiction between this statement and the submissions SON has made in reply respecting the role of French forts during the French period.

Similarly, my friend claims SON has disavowed the evidence of Professor Benn respecting Indigenous reliance on trade and goods in 1763.

In fact, SON's position is consistent with Professor Benn's that Indigenous peoples in 1763 were partially dependent on gifts and trade. This dependence, to quote Professor Benn, only increased in the decades between 17 -- 1760s and 1810s.

And that's found at page 33 of his report, Exhibit 4195.

My friends have taken a statement he

made respecting 1812 and applied it to 1763 when he was explicit that the level of dependence between the two periods was not the same.

Moving on, your friend -- sorry, when my friend from Canada, Mr. Beggs, during his submissions, Your Honour, asked whether there was any evidence of spiritual ceremonies conducted on the water, Mr. Beggs correctly advised that there is evidence of people being sent out on rafts into the water in front of Nebenaigoching to be cleansed and healed and that there was evidence about laying tobacco while fishing.

So I'd like to provide you, Your Honour, with a bit more detail on those points and where you can find these references in the evidence.

Respecting the laying of tobacco, Paul Jones testified about fishing for food and ceremonial purposes, putting tobacco down to pay respect to the water and the spirit of the fish. And that's in transcripts Volume 27, at pages 2641 to 2642.

Karl Keeshig testified about using tobacco when you are taking from the land or the

water. And that is transcript Volume 3, page 288 and 289.

Vernon Roote also testified about the responsibility of Anishinaabe men to water to offer, quote, "tobacco to that water from time to time", stating that it's just -- that it's not just -- sorry, that it's just at specific ceremonial times or that -- sorry, my apologies, stating that it's not just at specific ceremonial times, but that Anishinaabe men need to be constantly aware of the importance and the cleanliness of the water and give thanks through tobacco in the water.

Now, to be transparent, Your Honour, what Mr. Roote did not specify in his testimony whether this had to be done on the water. I suppose it's possible that this could be done from the shore. But I do offer this reference as well for your consideration.

And that's found at transcript Volume 5, page 485, line 15 to page 459.

And finally on this point at Exhibit --

THE COURT: Sorry, counsel. I heard 485 to 459. That seems unlikely.

MS. PELLETIER: Sorry, 45 -- that is unlikely. 485, line 15 to page 459, my apologies.

THE COURT: Please go ahead.

MS. PELLETIER: Also, at Exhibit 4322, which is an article entitled "On Food Security and Access to Fish in the Saugeen Ojibwe Nation, Lake Huron Canada", it's a 2017 article with four authors, one of whom was a witness in this trial, Ryan Lauzon.

And this also discusses the spiritual aspect of fishing and the practice of some fish harvesters of sprinkling tobacco on the water. And that is at the first paragraph on page 177 of that article.

We've also talked about subsistence and ceremonial fishing in paragraphs 308 to 318 of our closing submission.

With respect to ceremonies in the waters in front of Nebenaigoching, I draw Your Honour's attention to Joanne Keeshig's testimony respecting healing taking place at Nebenaigoching where an ill person in a canoe would be pushed out into the water towards the whirlpool. And that is found at Volume --

transcript Volume 28, page 2727, line 21 to page 2728, line 7.

And then, finally Karl Keeshig testified about his uncle telling him about sick individuals being pushed -- put in a canoe and being pushed towards the whirlpool in front of Nebenaigoching. And that reference is transcript Volume 2, page 196, line 8 to page 197, line 21.

Now I'd like to move to the submissions made by Canada on the bead report. Now Mr. Beggs in his submission on Tuesday stated that the bead report relies on a highly scientific method. And to quote the rough transcript, he said:

> "It's literally nuclear science that raises the danger of being given more weight than appropriate."

Now, in reality though, the nuclear science behind the bead report is entirely uncontentious. Mr. Townshend spoke to this at the outset of Dr. Williamson's testimony.

And Your Honour may remember this. I can pull up the transcript reference -- or the transcript if you'd like, but if that's not

necessary, Your Honour, I'll quote what Mr. Townshend said. He said:

> "Your Honour, I want to make one note about this. This report has four co-authors, and because of the different disciplines that it involves, it includes, for example, substantial parts of nuclear physics and statistical correlational analysis. Our understanding is that that part is not -- that part of it is not contested. Those are the parts that Dr. Williamson is not particularly expert in. If they were contested, we would call one of the other co-authors as well, Dr. Brandy McDonald."

So I'll get to the statistical correlation analysis piece in a moment.

THE COURT: What's the transcript reference for that?

MS. PELLETIER: Oh, my apologies. That is transcript Volume 43 beginning at page 5238 to 5239.

Now, respecting the nuclear physics,

Canada's own witness, Ms. Morden, confirmed this understanding that the science was uncontested both in her report and later in her testimony when she gave evidence that the methods used to test the beads, being and XRF and INAA, both had widespread acceptance and are commonly used.

The transcript reference for that is transcript Volume 70, page 9130, lines 15 to 22, and also in Ms. Morden's report at Exhibit 4452, pages 9 to 11.

So an in-depth explanation of these methods is given in the bead report, the procedure being described at page 7 of the bead report, and the analysis for the specific groups of beads is found throughout the report.

So in short, the defendants' own expert had access to the appropriate information to assess the testing done and had no criticisms of it. So the nuclear physics aspect of the bead analysis is not in dispute.

And moving on to the statistical significance of findings in the bead report, my friend from Canada pointed out that there are approximately 4,000 beads in the database and during his submissions gave his opinion that

this seems low to be able to put a statistically significant probability to it.

I note that in saying this, Mr. Beggs is contradicting the evidence of Canada's own expert, Ms. Morden, who gave evidence that 4,000 beads was, quote, "a good statistical sample".

And the reference for that, Your Honour, is transcript volume 70, page 9143, lines 19 to 25.

My friend then made submissions that there was no evidence in the bead report about whether the dating done using the bead database were statistically significant or any evidence about probabilities or statistics at all.

And Your Honour asked whether in the bead report there are conclusions about the statistical significance of the data or lack thereof, to which Mr. Beggs replied that there were not.

So there are in fact statistical analyses and conclusions respecting the statistical significance of the data in the bead report.

I draw Your Honour's attention to graphs 3 through 9 which show statistical

correlations and graphically demonstrate how tight the correlations are between the chemistry of the beads found at River Mouth Speaks and those of the other sites in the database.

I would draw Your Honour's attention specifically to graph 4, for example, which notes that a -- notes a 95 percent confidence interval between the black beads at River Mouth Speaks and the group 4 site components.

So in other words, there is a 95 percent probability that the beads from River Mouth Speaks associated with -- associate with those group 4 site components and therefore date to the same time range.

My friend also suggested that the glass beads found at River Mouth Speaks that were dated to the mid-second half of the 17th century could just as likely have come from the Iroquois as they could have come from any Odawa.

He bases this comment -- he bases this on a comment in Dr. Williamson's first report, which is at Exhibit 4239, about an oral tradition about the presence of the Iroquois at the mouth of the Saugeen River in the 1650s

and 1660s.

First, I note that despite being extensively cross-examined on the bead report and his findings respecting the beads at River Mouth Speaks, Dr. Williamson was not cross-examined on this issue, and no other expert in this trial has provided an opinion that the Iroquois were just as likely to have been the group that deposited the beads at River Mouth Speaks.

This essentially calls into question the identification of the site as Odawa. For my friend's argument to work, the Iroquois would have had to be not just in the general area, as the quote from Dr. Williamson's report suggests they were, but specifically at River Mouth Speaks.

The site was clearly identified as Odawa by Dr. Williamson, and the excavation report contains no findings to suggest an Iroquois presence on the site.

In SON's submission, it is inappropriate to make this argument without any expert evidence and without providing Dr. Williamson the opportunity to address the

criticism.

I'd like to move on to reply to some of the submissions from Ontario.

I'd like to begin with Ontario's argument that SON needs to show occupation and use of the actual lakebed in order to succeed in its claim.

The first thing that I would point out, Your Honour, is SON did have direct contact with the lakebed where ^ fishing nets were used, and Ontario has acknowledged this. So I would point to SON's closing argument at paragraph 629 where we discuss this.

That being said, Mr. Ogden spoke at length about the requirements of what -- or what he perceived to be the requirements of the Common Law with respect to the need to ground occupation in the actual beds of the lake.

And I would just highlight that the Supreme Court of Canada has been clear that Aboriginal title is a sui generis right.

Tsilhqot'in also tell us that when viewing title through the lens of sufficiency, the expected level of use is impacted by the nature of the land and what types of occupation

are practical on it, as well as the technological ability at the time.

It would not be practical to expect evidence of extensive use of the lakebed from 1763. The technology at the time simply would not have supported such use.

The other consideration is when we look at the lens of exclusive occupation, which looks at, of course control of territory.

With water territory the control would necessarily have been on the surface of the water as opposed to the lakebed.

In SON's submission, Ontario's argument takes an overly rigid view of title that is inappropriate in light of the Supreme Court's guidance that the Court must not force pre-sovereignty Aboriginal interests into the square boxes of Common Law concepts.

Now, it may be that there are a number of adverse possession cases at Common Law that deal with evidence of use of the bed of the lake, although I note, as acknowledged by Ontario's counsel, not all of them do.

But even if you accept that an element of the Common Law -- that this is an element of

the Common Law, the Common Law is not the only perspective that must be considered in applying the test for Aboriginal title.

SON submits that Ontario's approach ignores the Aboriginal perspective in this case, which has been on this issue that SON views its water territory no differently than it does its dry territory.

I would like to address some of the other submissions made by my friend for Ontario on the Aboriginal title test.

First, it was suggested that when we made our submissions about what it means to consider title from the Indigenous perspective that we were proposing a new subjective test for Aboriginal title.

So to be clear, I was not proposing a new test, but, rather, I was proposing a way to give effect to McLachlin's direction in Tsilhqot'in that we need to consider the perspective of the Aboriginal group who might conceive of possession of dry land in a somewhat different manner than did the Common Law.

So the subjective question that I posed of did SON believe that its activities

demonstrated exclusive occupation was only intended to assist in ascertaining their perspective on title as required by Tsilhqot'in.

Second, I want to address some of the comments my friend made about the need to disaggregate any exclusionary interest SON has in the lakebed from any Aboriginal right ^.

So in order to address this, I will start by saying that on Tuesday, Your Honour correctly stated our position on title, which is that there has been a -- been recognized an Aboriginal right called Aboriginal title, and it's derived from the discussion respecting dry land.

But we say those principles should be applied here, and so there is no reason to go back to first principles. Mr. Townshend has already explained that within the test there are avenues through which the rights included in Aboriginal title can be reconciled with competing rights.

And our submission was that those avenues would be the appropriate way to reconcile Aboriginal title to submerged land with, for instance, the public right of

navigation should a court find that the two are indeed compatible. You already have our submissions on that.

But in response to Your Honour's question you posed to Ontario about how it would define the nature of the right claim, Ontario made submissions about how any interest that SON had at 1763 in the use and exclusion from the claim area would need to be disaggregated when translated into Common Law Aboriginal rights.

Our submission on this is that if you are inclined to treat title to submerged lands as a new right separate from the test for Aboriginal title to dry land, which I think we all agree is not binding on you, then it is open to you to determine what would be included in the newly defined right for title to submerged lands.

As is clear from Lax Kw'alaams the characterization of an Aboriginal right is based on the pleadings. And in this case SON submits that the right as defined in the pleadings, includes all aspects of what would be included in title to dry land.

Now, while SON's position is that

public navigation is compatible with Aboriginal title, if you are inclined to accept the defendants' arguments that title to submerged lands is incompatible with Common Law rights of public navigation, this doesn't mean that there cannot be title.

Rather, you could simply define title to submerged lakebeds to not include the right to exclude the public for the purposes of navigation over water. The remaining rights in the bundle of rights that would make up Aboriginal title as it currently is defined to dry land, we submit, would remain.

These rights would include, for example, mineral rights and exclusive fishery, the right to decide if structures are built on the lakebed, the rights to protect the water from pollution or other environmental damage.

In our submission, these rights can be seen as a faithful translation of pre-sovereignty practices, specifically relating to the right to make decisions about the territory, and the sacred and spiritual obligations to protect the territory.

You have heard evidence, for example,

from Vernon Roote, Marshall Nadjiwon and Joanne Keeshig about how their responsibility to look after the SON UTL includes protecting it from pollution and keeping it clean to the best of their abilities.

And that evidence is included in our closing submissions at paragraphs 216 to 226.

Subject to any questions, Your Honour, those are my reply submissions.

THE COURT: Thank you very much, Ms. Pelletier.

Now before we proceed, Mr. Townshend, could you please give me an estimate on the length of time you require for your reply submissions.

MR. TOWNSHEND: Perhaps half an hour.

THE COURT: All right. We'll take a short break in that case. I think in the circumstances, I'll say 15 minutes.

Thank you, Ms. Roberts. If you could adjourn.

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

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

-- RESUMED AT 11:46 A.M. --

THE COURT: Mr. Townshend, please go ahead.

MR. TOWNSHEND: Thank you, Your Honour.

First point I want to make is, Your Honour asked during the defendants' submissions if there was specific evidence about fishing within the internal waters of the peninsula. At paragraph 340 of our final argument, there is a chart of harvesting activities, and I have a number of items in that chart that would relate to that, and that's items 12, 18, 19, 23, 25, 26, 28 and 52.

My next points are about Professor Driben's testimony. My friend made a point about his testimony about -- in relation to the ^Grifon incident. There was a point made in Canada's written argument about that, which we considered a misstatement and had noted it in our reply, but that was repeated again in orally, so I want to refer Your Honour to -- there are two misstatement charts at the end of our reply.

The first one of them relates to title, and on page 227 chart item 8 deals with

that matter.

Also on Professor Driben, my friend stated his qualifications as his fieldwork being in Northern -- north of Lake Superior. What he said was most of his fieldwork was north of Lake Superior but that he also had done -- he had fieldwork in 22 communities involving the Northern Ojibwa, the Plains Ojibwa, the Southwestern Ojibwe, the Southeastern Ojibwa, and including fieldwork on Georgian Bay.

And the reference to that, we have citations in our Appendix E to our final submissions, tab 7, paragraph 4.

Also on Professor Driben, my friends seem to be impugning the entire methodology of ethnohistory, and we have a chapter, Chapter 3 of our final argument that deals with the various disciplines, which we refer you to that.

Now, regarding the Royal Proclamation, Mr. Beggs pointed out the Royal Proclamation does not prohibit travel. He's correct. I had overstated that.

More precisely, at paragraph 998 where I'm making that point in our argument, there is an article by Professor Walters that's referred

to, and that explains in some detail the effect of the Royal Proclamation, which was that public entry generally was restricted. All settlers were ordered to leave and rights of entry were limited to licensed traders, Indian Department officials and military personnel.

So I would still make the point that that result is out of tune with the idea that unfettered public navigation rights are vital to sovereignty.

I have a couple of points about Chantry Island. Mr. Beggs thought there was doubt about its current ownership. I was surprised by that, but if it is owned by a person or private party, it would be excluded by the proposed language of the order we are asking for, which excludes any land within the perimeters we're defining that is owned by private parties in fee simple. So that should not be a particular concern.

Ontario, ^I made the submission that there was no evidence that Chantry Island had not been validity surrendered for sale in 1854, and we would point to such evidence to be -- the cross-examination of Dr. Reimer, and that's one

of the items listed in Exhibit O5.

Concerning Barrier Island, Ontario said it was not aware of evidence of occupation of Barrier Island. Our submissions on that are that it was within the 1847 declaration boundaries. There's no evidence of any surrender of that island, and there are continuing use events referred to in Exhibit O5.

Now, regarding whether Anishinaabe would leave graves of their ancestors, Mr. Beggs gave some examples of when that had happened.

What I had said was that Anishinaabe would never willingly abandon the graves of their ancestors. The biggest example Mr. Beggs gave was the Potawotami, and that was not a voluntary movement.

For the other examples given, I was not suggesting that individual Anishinaabe never move. They clearly did and do when, for example, they marry someone of another community. But that is not a voluntary, permanent abandonment by a community. And that is what I was meaning to say.

Now, regarding Exhibit 4338, which was the article by Professor Darlene Johnston, which

we had -- by in error there had been some pages in it that should not have been there, we did identify and have now been removed.

We did identify three places where it had been referred to in our submissions. One of them was to the page that is still in the exhibit. The other two are not, so I would like to correct that.

And if I could have our closing submissions at paragraph 237 for a moment?

THE COURT: I'm not clear on what you're doing, Mr. Townshend. Are you correcting the text of your closing?

MR. TOWNSHEND: I wish to withdraw part of it because it refers to Professor Johnston's article and for a factual matter.

THE COURT: I see. You can put them on the screen if you wish to or just tell me what the references are.

MR. TOWNSHEND: It's on the screen now.

The second sentence of paragraph 237 and the quote that follows, which is an indirect quote from the Jesuit Relations, are cited to Professor Johnston's article, and that is not

otherwise in the record. So I wanted to withdraw that part.

THE COURT: All right.

MR. TOWNSHEND: And over to paragraph 238 on the next page, that is another quote from the Jesuit Relations, Father LeJeune. It is cited to Darlene Johnston's article. I would like to replace that reference to a reference to Exhibit 82, which is in fact the original of that.

THE COURT: Thank you.

MR. TOWNSHEND: You can take that down. Thank you.

I wanted to clarify what seemed to be a misunderstanding of our position about the Cheveux Relevéz whom Champlain met in 1615. We do say that SON were some of the Cheveux Relevéz met by Champlain, but we are not saying that all 300 warriors were SON warriors. That would be too large for an Anishinaabe Band.

Our submission is that there would have been other Odawa there too who were not from SON, but some of the Cheveux Relevéz were from SON.

Now, the point about dedication of

land: Mr. Ogden gave a new case, the Skerryvore Ratepayers Association v. Shawinigan Indian Band, and that the principle that the doctrine of dedication does not apply to unsurrendered Indigenous land because of its nonalienable nature.

Now that Mr. Ogden has reminded me of this case, I do accept it as compelling, and I wish to abandon the idea that the doctrine of dedication could be a way of reconciling Indigenous custom and Common Law.

I continue to say the example I gave of dedication, which I explain in the -- about the Gibbs v. Grand Bend case, illustrates that it is conceptually possible to have an exclusive property right coexisting with a right of public access.

I would also say that in this branch of the argument, Ontario is using the noalienability principle of Indigenous lands to argue that Aboriginal title cannot coexist with public access and therefore cannot be recognized.

The principle of nonalienability was developed for the protection of Indigenous land

interests, and Ontario was pressing the Court to use this doctrine as a stepping stone to prevent Aboriginal title from being recognized in the first place. I say that's not in harmony with the purpose of the doctrine, for whatever that's worth.

The means of reconciling Indigenous custom and Common Law remain, in my submission, treaty, clear and plain legislation before 1982 and justified infringement after 1982.

Now to move to the Municipal submissions, our primary submission remains that the argument the Municipalities are making is a Phase 2 argument. It's a defence to our claim for beneficial ownership. We are precluded from seeking that relief in this phase.

At this Court's request we set out in a supplement to our final argument an explanation of why the Municipalities were joined to this action.

That's what it is. It's an explanation of why they were joined, a high-level summary of part of the argument we would make in Phase 2 about beneficial ownership. It's not the argument we would make

about entitlement to beneficial ownership because we're precluded from making that argument in this phase, and we're seeking no relief in this phase in this regard.

So I say this Court should not give effect to a municipal defence before we can even fully argue -- advance the arguments we would make for beneficial interest.

That's why I've characterized this is in substance a motion for summary judgment in Phase 2, which is something they are free to do, but they have to do it by the appropriate procedure. They could in fact have done that 25 years ago, and they will be able to do it later if they wish.

Now, the Municipalities say that our claim was defined or redefined to exclude bona fide purchasers for value of the legal estate without notice. I'm just going to call them bona fide purchasers for the rest of this argument for convenience, but I mean the whole -- the full doctrine.

So they're saying it becomes a matter of the scope of the lands claimed. Now, that's explained in the supplement to our final

argument starting at paragraph 9. The Statement of Claim defines what lands are claimed, and it includes road allowances in paragraph 4.

The paragraph my friend pointed you to in that paragraph 25 refers back to paragraphs 2 to 4 as being a more detailed way of saying what paragraph 25 is supposed to be saying. So it should not be read to contradict what paragraph 4 is saying.

We say that we're not claiming lands in the hands of bona fide purchasers because we say Municipalities are not such a thing. The Municipalities disagree with that.

Perhaps they will succeed in that argument. What that would mean is that that part of our claim would have failed and that we had made an error in how we described the implications of our claim to that extent.

But it doesn't mean that the statement that we are not claiming lands from bona fide purchasers somehow amounts to a pleading amendment.

Now, in the alternative, if this Court does entertain the substantive argument of whether the Municipalities are bona fide

purchasers, they have the onus to prove this, and they have failed to do so.

It's the value part that we're disputing. Were they purchasers for value?

My friend quoted an agreed statement of fact at Exhibit 3933 as an agreement that the Municipalities had expended significant resources on roads and highways. There's an important qualification in that same sentence: The municipalities had expended significant resources on roads and highways on some of these road allowances. That's paragraph 14 of Exhibit 3933.

And that, I say, reveals the entire disagreement here. The Municipal argument depends on treating the whole road network as one parcel of land. That does not describe what SON claims.

The Statement of Claim lists each road allowance separately. That's in the trial record, the Statement of Claim at tab 1, pages 270 to 342 of that tab.

Nor, I submit, does the idea of all of the road network being one parcel of land describe the reality of what happened. There's

evidence of roads being assumed, and decisions about that are made road by road.

When a road is built, it's that road that's built, not the entire road network at once. There's evidence of portions of roads being stopped up and sold, and those decisions are made for individual parcels.

And when we look at the roads in that light, we see that many roads are not assumed. In fact, 38 percent of the road allowances in Georgian Bluffs are not assumed. That's in our reply paragraph 447.

The Municipalities have no maintenance obligations for such roads, while occasionally they perform some minimal maintenance. That's in our reply at paragraph 448.

And finally, some roads are not passable and not used by the public at all. That's set out in our reply at paragraph 450.

So my submission is it's quite possible that for some roads Municipalities will succeed in their argument that they're bona fide purchasers, but we just don't know for which ones. That's the kind of thing we have to investigate in Phase 2.

And the Municipalities are trying to prevent that inquiry by treating the entire road network as one parcel of land. And they have, in my submission, cited no authority for that -- that it should be considered in that way.

Now I want to move a question Your Honour asked us about road allowance lands held by private landowners with notice where there are certificates of pending litigation on that land.

The background to this is -- was covered during the examination of Ms. Wendi Hunter. And her evidence on that is in the transcript volume 95, pages 12313 to 12315.

And from that transcript I take Georgian Bluffs has a policy and a procedure to follow in order to convey a road allowance. The process is usually started by a landowner who is abutting the road allowance who advises that he wishes to buy a portion of the road allowance in the Municipality.

That request goes to the municipal council. If they are in agreement, then the purchaser is required to obtain SON's consent to the transfer and to register a certificate of

pending litigation on the land.

Once those steps are taken, along with any other administrative steps needed, the municipal council will pass a by-law and convey that portion of the road allowance. And this process was developed in response to this litigation.

So I have a number of submissions on and explanations of why we have not joined the private landowners in this situation to this action.

Firstly, private landowners, having asked for and obtained SON's consent to the conveyance and having registered a CPL on their property, are plainly aware of this litigation. None of them have sought to be added to this litigation.

Secondly, and these -- the next few points are based in case law, which I'll refer to you in a minute, we submit that requiring such private owners to join the lawsuit in this phase, given its length -- I see Ms. Dougherty has something.

THE COURT: Please go ahead, Ms. Dougherty. You seem to be walking around.

So I'm not sure, did you want to say something?

MS. DOUGHERTY: Again, I'm just lifting my computer up so I can stand. My apologies.

This is -- I recognize that my friend answered a question in relation to this in response to Your Honour's inquiries during their previous submissions.

But this is not something that is proper reply. And if we are now going to be further addressing or if my friend is seeking to further address the decision not to join private landowners, there's a long story to that, and it goes back long before the individuals during this litigation who have certificates of pending litigation on their property.

So that's my concern is this is not proper reply.

THE COURT: Well, I -- I think I may have invited Mr. Townshend to comment on this in reply because my question would have been unexpected.

But, in any event, Mr. Townshend is limited to the record in this trial, which would foreclose going much further than he does -- has

already, with respect to the process evidence.

So I am going to permit him to finish. I am not going to permit him to get into a whole bunch of evidence I don't have. And that would also apply to you, Ms. Dougherty.

MS. DOUGHERTY: Yes. Thank you.

THE COURT: Go ahead, Mr. Townshend.

MR. BEGGS: Sorry, Your Honour.

THE COURT: Oh, Mr. Beggs, yes.

MR. BEGGS: While there's a break in this, I wanted to make an objection to an earlier statement. Mr. Townshend referred to the evidence of professor -- or referred to an article by Professor Walters which is not in evidence, and I just wanted to make that objection, Your Honour.

THE COURT: Mr. Beggs, is that the substitute article that Mr. Townshend referred to when he was replacing the objected-to article? Is that what you're talking about.

MR. BEGGS: It was the article which explained his position on the Royal Proclamation.

THE COURT: All right. Well, if it's not in evidence, it's not in evidence. That's

straightforward.

Please go ahead, Mr. Townshend.

MR. TOWNSHEND: I was intending to refer to that for a legal authority. But Your Honour can decide if that is proper legal authority or not.

THE COURT: Right. Please complete your comments on the private landowners, and, of course, be very careful not to go beyond the evidence we have. I know that you've referred to some that we do have.

MR. TOWNSHEND: Yes, and I was not planning to speak about any more evidence. I was going to speak about law.

THE COURT: All right.

MR. TOWNSHEND: Maybe I'll start that.

There are two cases which speak to this issue that I can send to you if you wish. There is a Haida Nation v. British Columbia, 2017BCSC, 1665, and Cowichan Tribes v. Canada, Attorney General, 2017, BCSC, 1575.

I've sent these around to my friends yesterday. These cases are dealing with requests by the Crown that plaintiff First Nations deliver notices to private property

owners of the plaintiffs' Aboriginal title proceeding.

The Court determined that notice was not required in either of these instances for some of the following reason: That requiring private parties to join a daunting lawsuit, such as the claim for Aboriginal title, would impose an undue burden on them, and meaningful participation by such parties is doubtful.

That's Haida at paragraph 34. That's a different Haida than the other Haida Nation case we've talked about.

Secondly, that giving notice to private parties of Aboriginal title claims that do not yet affect their property could create unnecessary fear in the non-Aboriginal community given that actions for ejectment may never actually be brought.

That's Haida at paragraph 51.

And thirdly, private owners can have an opportunity to make all arguments, including that they were not given formal notice to any subsequent proceedings against them if any such proceedings are brought. And that's Cowichan paragraph 24.

So I'm saying that bears on this. That was talking about notice. In this case the 18 landowners who seek the ^ plainly have notice, and the issue is should they be joined as parties.

So in the cases, for the reasons stated in these cases, the Court in most cases thought it wasn't even necessary to give them notice, that it would impose an undue burden on them, that it would create unnecessary fear, and that if they want to bring up a matter when -- at a point when it does begin to affect them more directly, such as in Phase 2 of this proceeding, they can do that, and they can include objections that they should have been in this phase for whatever that's worth at that point.

So those are my submissions on that point. And those are all my submissions unless there's anything else about this case that I can assist Your Honour with.

THE COURT: No, thank you very much, Mr. Townshend.

That brings us to the somewhat momentous recognition that the -- this trial is

now complete. I will be taking this interesting and serious matter under reserve and will release a decision in writing in due course.

Earlier this week I took the opportunity to commend counsel for the way they deported themselves with each other during this long trial, and before we turn off the cameras of this virtual hearing, I wanted also to commend the many court staff from both Toronto and Owen Sound and the many members of these two First Nation communities who were involved in our hearings in Cape Croker and Southampton.

It took an extraordinary effort by everyone, including the parties, to have those hearings in the communities and was important to provide more access to the hearings for members of these First Nations.

I also want to thank, once again, counsel for adapting quickly to our pandemic situation in the spring and facilitating a conclusion of the evidence virtually in April of this year.

Thank you all. This concludes this trial.

--- Whereupon the proceedings were

concluded at 12:15 p.m.