

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

DAY 82 VOL 82
February 10, 2020



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1 Court File No. 94-CQ-50872CM
2 ONTARIO
3 SUPERIOR COURT OF JUSTICE

4 B E T W E E N:

5 THE CHIPPEWAS OF SAUGEEN FIRST NATION, and THE
6 CHIPPEWAS OF NAWASH FIRST NATION
7 Plaintiffs

8 - and -

9 THE ATTORNEY GENERAL OF CANADA,
10 HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO,
11 THE CORPORATION OF THE COUNTY OF GREY, THE
12 CORPORATION OF THE COUNTY OF BRUCE, THE CORPORATION
13 OF THE MUNICIPALITY OF NORTHERN BRUCE PENINSULA,
14 THE CORPORATION OF THE TOWN OF SOUTH BRUCE PENINSULA,
15 THE CORPORATION OF THE TOWN OF SAUGEEN SHORES, and
16 THE CORPORATION OF THE TOWNSHIP OF GEORGIAN BLUFFS
17 Defendants

18 Court File No. 03-CV-261134CM1

19 A N D B E T W E E N:

20 CHIPPEWAS OF NAWASH UNCEDED FIRST NATION and
21 SAUGEEN FIRST NATION

22 Plaintiffs

23 - and -

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

Defendants

26 --- This is VOLUME 82/DAY 82 of the trial
27 proceedings in the above-noted matter, being held at the Superior
28 Court of Justice, Courtroom 5-1, 330 University
29 Avenue, Toronto, Ontario, on the 10th day of
30 February, 2020.

31 -----
32 B E F O R E: The Honourable Justice Wendy M.
33 Matheson

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

H. W. Roger Townshend, Esq., for the Plaintiffs,
& Renée Pelletier, Esq., The Chippewas of
& Benjamin Brookwell, Esq., Saugeen First Nation,
and the Chippewas of
Nawash First Nation.

Barry Ennis, Esq., for the Defendant,
& Michael McCulloch The Attorney General &
& Michael Beggs, Esq., of Canada.

Peter Lemmond, Esq., for the Defendant,
& Julie McRandall, Esq., Her Majesty the
Queen in Right of
Ontario.

REPORTED BY: Deana Santedicola, RPR, CSR, CRR

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I N D E X

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Supplementary Ruling by the Court
Re Mr. Graves' review of documents prior
to cross-examination..... 10477 - 10481

CANADA'S MOTION FOR LEAVE TO CROSS-EXAMINE
DR. REIMER:

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09:52:38 1 -- Upon commencing at 10:02 a.m.

09:27:53 2
10:01:58 3 THE COURT: Good morning.

10:02:00 4 MR. McCULLOCH: Good morning.

10:02:02 5 THE COURT: Are you standing because
10:02:02 6 you are arguing the motion this morning?

10:02:04 7 MR. McCULLOCH: Yes, Your Honour.

10:02:06 8 THE COURT: That makes perfect sense,
10:02:07 9 but I am going to ask you to sit down for a minute
10:02:09 10 because I'm just going to put something on the
10:02:11 11 record that arose from our trial steps last week.

10:02:14 12 Mr. Graves testified last week and,
10:03:30 13 subject to an agreed statement of fact that I
10:03:33 14 understand may be forth coming from Ontario, his
10:03:37 15 examination in-chief was concluded.

10:03:39 16 There will be a few-week delay before
10:03:42 17 he is cross-examined in order to facilitate
10:03:46 18 additional preparation time for the Plaintiffs, and
10:03:49 19 that delay was agreed to.

10:03:51 20 At the end of Mr. Graves' examination
10:03:55 21 in-chief, Ontario counsel requested that in advance
10:03:58 22 of his return he be permitted to review his report,
10:04:03 23 the material it refers to and, as well, about a
10:04:09 24 hundred new productions that were very recently
10:04:12 25 produced to Plaintiffs' counsel in relation to his

10:04:17 1 evidence.

10:04:17 2 At the time, I permitted the first two
10:04:22 3 requests, specifically, that he could review his
10:04:26 4 report and its related material. Those two
10:04:28 5 requests were not objected to.

10:04:31 6 However, Plaintiffs' counsel did object
10:04:34 7 to the third request - that he be permitted to
10:04:36 8 review those recent productions. In part,
10:04:42 9 Plaintiffs' counsel relied on a ruling I made in
10:04:45 10 relation to Dr. Brownlie in this trial and at my
10:04:49 11 request, they have provided me with the transcript
10:04:52 12 reference for that ruling.

10:04:56 13 Having reviewed the transcript, I
10:04:57 14 conclude that it is not comparable. With respect
10:05:01 15 to Dr. Brownlie, there was no request that he be
10:05:03 16 permitted to review documents and there was no
10:05:09 17 discussion or reasons for a decision in that
10:05:12 18 regard.

10:05:12 19 As I said last week, Mr. Graves is
10:05:21 20 before this Court as an expert, and he has duties
10:05:23 21 and responsibilities to this Court which, in my
10:05:27 22 view, address some of the concerns that might be
10:05:30 23 raised with respect to his review of material
10:05:33 24 before cross-examination. As well, it serves the
10:05:39 25 efficient course of this trial that he be prepared.

1 I have since come to understand that
2 Plaintiffs' counsel's objection is based on
3 something different from what I had assumed last
4 week. Last week, I assumed, as it might be
5 properly the plan of a cross-examining counsel,
6 that perhaps Plaintiffs' counsel wished to take
7 this witness by surprise in some questioning on
8 those documents, and I forget the phrase I used
9 last week, but essentially benefit from that
10 surprise.

11 Plaintiffs' counsel has since clarified
12 to me that that is not what stands behind their
13 objection. Plaintiffs' counsel is concerned that
14 he might volunteer some additional opinion evidence
15 during his cross-examination, arising from those
16 documents, even though not solicited by
17 cross-examining counsel.

18 The background to that concern is
19 briefly as follows.

20 Earlier this year Ontario delivered a
21 supplementary expert report of Mr. Graves. That
22 report apparently contained some additional opinion
23 evidence. After discussion between counsel about
24 that supplementary report, Ontario agreed to
25 withdraw the supplementary report and not put that

1 additional opinion evidence forward as part of
2 their defence.

3 It seems that it is that supplementary
4 opinion that Plaintiffs' counsel is concerned might
5 be volunteered during cross-examination and perhaps
6 the chances of that happening would be increased if
7 this gentleman reviewed those documents.

8 I certainly understand why Plaintiffs'
9 counsel do not wish to have that supplementary
10 opinion arise in that fashion given that Ontario
11 already agreed to withdraw the supplementary report
12 and not put that opinion forward.

13 However, given the duties and
14 responsibilities of this expert and especially
15 given that I now understand from cross-examining
16 counsel that this is not an area that they are
17 planning to explore, so they are truly concerned
18 about some sort of volunteering that may occur from
19 the witness, I have decided that it is desirable
20 that he be properly prepared. Given his
21 responsibilities as an expert, I am prepared to
22 permit him to review those documents. However,
23 should the concern that Plaintiffs' counsel have
24 arise in the course of the cross-examination, I ask
25 Plaintiffs' counsel to immediately draw it to my

10:08:47 1 attention for any further rulings that might be
10:08:55 2 required to ensure that there isn't some sort of
10:08:58 3 unfairness arising from that opinion coming forward
10:09:00 4 in that fashion, given the agreement between
10:09:03 5 counsel.

10:09:04 6 And that concludes my supplementary
10:09:08 7 ruling in relation to Mr. Graves' preparation to
10:09:13 8 return here.

10:09:14 9 Now, Mr. Lemmond, is that ASF ready?
10:09:20 10 Can we deal with that, or do you want to wait until
10:09:22 11 tomorrow?

10:09:23 12 MR. LEMMOND: Your Honour, we are just
10:09:24 13 waiting upon one further consent.

10:09:26 14 THE COURT: Okay. You might have
10:09:27 15 someone email that party and say I raised the issue
10:09:29 16 this morning.

10:09:30 17 MR. LEMMOND: Yes, Your Honour.

10:09:31 18 THE COURT: All right.

10:09:32 19 There was a second matter raised last
10:09:34 20 week which I need to make a ruling on with respect
10:09:37 21 to my severance order. I will get back to you
10:09:40 22 about that as soon as possible. I am not going to
10:09:42 23 be dealing with that this morning.

10:09:43 24 That means we are over to you, sir, for
10:09:47 25 Canada's motion for leave to cross-examine

1 Dr. Reimer.

2 MR. McCULLOCH: Thank you, Your Honour.

3 The jurisprudence on leave to
4 cross-examine a co-Defendant's witness is very
5 clear and well established and, I believe, is not
6 in dispute.

7 I will not take you through all of the
8 jurisprudence --

9 THE COURT: Well, I read your brief, so
10 you can proceed on that basis.

11 MR. McCULLOCH: I would simply like to
12 highlight two things in the jurisprudence.

13 First, that the case law is very clear
14 that the adversity of interest can be between the
15 evidence of witnesses. It need not be found in the
16 pleadings.

17 And more importantly, that the
18 fundamental policy of the rule is to prevent a
19 co-Defendant using the greater latitude of
20 cross-examination to cooper up a co-Defendant's
21 witness. Thus, the requirement for the
22 demonstration of adversity of interest.

23 THE COURT: Well, I know what cooperating
24 up means, but perhaps for the record, can we say
25 "fix" or "improve" or --

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MR. McCULLOCH: "Strengthen".

THE COURT: -- "strengthen" or --

MR. McCULLOCH: "Solidify".

THE COURT: "Solidify", okay.

MR. McCULLOCH: I like "solidify",
actually.

THE COURT: All right.

MR. McCULLOCH: So, therefore, the only
issue is the extent to which Dr. Reimer's evidence
on what happened at Niagara in 1764 is adverse in
interest, that is to say, directly contrary and not
only contrary in appearance to the evidence of
Professor Beaulieu given both in testimony and in
his report, and secondly, whether or not the
evidence given in her report by Dr. Reimer is truly
adverse in interest to the evidence given in both
his report and his testimony by Professor McHugh.

Your Honour had asked us to present an
outline of the points of difference. They have
been uploaded into the database as SC1860.

THE COURT: And is this a copy of what
I received by email on Friday?

MR. McCULLOCH: Yes, Your Honour.

THE COURT: And everyone else received
by email on Friday? Yes?

10:12:37 1 MR. McCULLOCH: Yes, Your Honour.

10:12:38 2 THE COURT: So if one shrunk this even
10:12:40 3 more so I could see more of the document, I would
10:12:44 4 see two points. Is that what we have got here?

10:12:50 5 All right. Okay. Thank you. Please
10:12:55 6 go ahead.

10:12:55 7 MR. McCULLOCH: I am not sure that I
10:12:58 8 can improve much on my colleague's drafting. I
10:13:02 9 would simply like to underline the extent to which
10:13:06 10 Dr. Reimer's evidence is fundamentally inconsistent
10:13:11 11 with the evidence of Professor Beaulieu.

10:13:15 12 Dr. Reimer posits, without any actual
10:13:19 13 references, a general treaty of peace and
10:13:24 14 friendship in 1764 between the British Crown and
10:13:32 15 the Indigenous peoples there assembled.

10:13:34 16 Professor Beaulieu in his report and in
10:13:36 17 his testimony produced evidence that there were in
10:13:42 18 fact two treaties, one with the Detroit Wyandot,
10:13:47 19 one with the Genesee Seneca, which were treaties of
10:13:55 20 defeat, treaties imposed as a result of the Wyandot
10:13:59 21 and Seneca's open and public support for Pontiac's
10:14:04 22 rebellion.

10:14:06 23 The difference in the portrait of the
10:14:08 24 historical events as understood at the time is, I
10:14:13 25 think, Your Honour, fairly stark.

1 On the second point, the disagreement
2 between Dr. Reimer's checklist of procedural and/or
3 legal requirements as understood at the time, and
4 Professor McHugh's perception of the prerogative as
5 being self-policing and policy-based as articulated
6 in the dispatch of Lord Glenelg in 1838 which
7 disavowed any kind of procedural requirements is,
8 again, we feel fundamental in that the former seems
9 to have an administrative law model of
10 treaty-making that Professor McHugh argues was
11 fundamentally inconsistent with the
12 Crown-Indigenous relations as they were understood
13 at the time of Treaty 45 1/2 and Treaty 72.

14 So it is our submission that on its
15 face there is a fundamental opposition between the
16 views of Dr. Reimer and the evidence that we have
17 heard from Professor McHugh and Professor Beaulieu
18 and, therefore, we feel that we have met the
19 requirements for leave to cross-examine Dr. Reimer
20 on these two points.

21 THE COURT: And is it you, sir, who is
22 doing that cross-examination or one of your
23 colleagues?

24 MR. McCULLOCH: At the moment, we
25 haven't decided.

10:16:05 1 THE COURT: All right. That is fine.

10:16:09 2 Anything further?

10:16:10 3 MR. McCULLOCH: Absent any further
10:16:12 4 questions, Your Honour, those are Canada's
10:16:14 5 submissions.

10:16:15 6 THE COURT: All right. Plaintiffs'
10:16:16 7 counsel. Mr. Townshend.

10:16:25 8 MR. TOWNSHEND: Good morning, Your
10:16:26 9 Honour. I'll be referring to Canada's Book of
10:16:29 10 Authorities and also to the trial record.

10:16:31 11 THE COURT: Yes, which particular part
10:16:33 12 of the trial record would you like me to have? I
10:16:36 13 have got the whole thing up here, but which volume
10:16:38 14 or volumes?

10:16:40 15 MR. TOWNSHEND: It is the trial record
10:16:41 16 pertaining to the Treaty action. It is that one.

10:16:45 17 THE COURT: The thick one, yes, and
10:16:46 18 also the supplementary or just this one?

10:16:49 19 MR. TOWNSHEND: No, just that one.

10:16:50 20 THE COURT: All right. I have got it.

10:16:52 21 MR. TOWNSHEND: As my friend said, the
10:17:02 22 test for cross-examining a co-Defendant's witness
10:17:05 23 is being adverse in interest, and this motion --
10:17:10 24 and we don't dispute that. That's true.

10:17:13 25 On the facts, though, we do dispute

10:17:16 1 that Canada and Ontario are adverse on the issue
10:17:19 2 which Canada seeks to cross-examine, and the
10:17:24 3 concept of adversity is flexible, the cases say,
10:17:27 4 and depends on facts.

10:17:28 5 But when we look at the facts of the
10:17:32 6 cases cited, one gets a different picture. The
10:17:37 7 adversity there is found on an issue that would
10:17:45 8 affect the apportionment of liability between the
10:17:48 9 co-Defendants.

10:17:50 10 And it is my submission that simply
10:17:54 11 disagreeing with what a witness called by another
10:17:58 12 said does not necessarily constitute adversity of
10:18:00 13 interest. If it did, there would really be no
10:18:03 14 limit to cross-examining witnesses of a
10:18:06 15 co-Defendant since one would only seek to do that
10:18:09 16 if there was some disagreement.

10:18:16 17 And I do not agree with what my friend
10:18:18 18 said that the adversity can simply be between what
10:18:26 19 two witnesses said alone.

10:18:28 20 THE COURT: Well, it certainly did come
10:18:30 21 up, and I am trying to find my note as to which of
10:18:32 22 the cases that I read that.

10:18:35 23 MR. TOWNSHEND: The cases said -- for
10:18:38 24 example, Chamberland v. Provincial says it may
10:18:40 25 arise in the course of the evidence. That is

1 different than -- and many of them said they need
2 not actually have cross-claims against each other.

3 THE COURT: Just remind me, I thought
4 there was a cross-claim in this case between Canada
5 and --

6 MR. TOWNSHEND: Yes, there is a
7 cross-claim.

8 THE COURT: So some of these cases say
9 that that is pretty much close to all you need, is
10 it not?

11 MR. TOWNSHEND: The issues on which
12 they are seeking to cross-examine, in my
13 submission, is not relevant to the cross-claims.

14 THE COURT: I see.

15 MR. TOWNSHEND: Or to the apportionment
16 of liability. The cross-claim is -- is this on?

17 THE COURT: I do wonder if it is on.

18 Well, I can hear you, which is great,
19 but Mr. Registrar, do you know the trick to getting
20 those back on? Would you mind stepping out and
21 looking in to that?

22 Before you do, though, sir, before you
23 step out, I would like to mark that document as the
24 next lettered exhibit, the document that sets out
25 the two areas that Canada seeks leave on. So,

1 Mr. Registrar, could you just give us a lettered
2 exhibit for that before you step out?

3 THE REGISTRAR: S-3.

4 THE COURT: S-3, all right.

5 EXHIBIT NO. S-3: Outline of points of
6 difference in the evidence of expert
7 witnesses.

8 THE COURT: Madam Reporter, if you
9 can't hear, please do speak up. We'll ask
10 Mr. Townshend to speak up. I could hear him fine,
11 but maybe a little higher, Mr. Townshend.

12 MR. TOWNSHEND: I believe what I was
13 saying that Madam Reporter asked about was the
14 cross-claim has been deferred to Phase 2.

15 THE COURT: Yes, it has, but the record
16 in Phase 1 is part of the record in Phase 2.

17 MR. TOWNSHEND: That is correct.

18 THE COURT: But I just noted your
19 perhaps main submission on the cross-claim is that
20 this evidence is not relevant to the cross-claim.
21 Is that your main submission?

22 MR. TOWNSHEND: That's correct, yes.

23 THE COURT: All right. I am just
24 looking, sir -- you mentioned Chamberland. I mean,
25 it is a general statement in Chamberland, but it

1 does say at paragraph 11:

2 "Adversity between defendants
3 may arise from the pleadings, by the
4 nature of relief sought by the
5 plaintiff or may arise during the
6 testimony at trial of a defendant or
7 witness [...]"

8 MR. TOWNSHEND: Yes.

9 THE COURT: And I think that latter
10 point is what Canada is relying on, the adversity
11 arising from the testimony of certain expert
12 witnesses that are in conflict with the upcoming
13 expert witness.

14 MR. TOWNSHEND: The case says it may
15 arise during the testimony.

16 THE COURT: Well, the testimony in this
17 case was the testimony of Professor Beaulieu and
18 McHugh.

19 MR. TOWNSHEND: And adversity might
20 arise during what a witness says, but what I want
21 to go on and talk about is whether the difference
22 in those evidence actually constitute an adversity
23 of interest.

24 THE COURT: Please go ahead.

25 MR. TOWNSHEND: So I would like to talk

1 about each of the authorities briefly.

2 The first one in the Book of
3 Authorities is Marchand, which is an archetypal
4 case of doctors and nurses blaming each other in a
5 medical malpractice case, and the Court of Appeal
6 there remarked that the doctors would undoubtedly
7 seek to establish that they weren't negligent,
8 rather than any negligence was the responsibility
9 of the nurses, and the nurses would undoubtedly do
10 the opposite. Thus, there was an adversity of
11 interest about the apportionment of liability.

12 The second case in the book is Trizec,
13 and the Plaintiff hired the co-Defendants to work
14 on a construction project. The construction
15 project didn't go so well, resulting in delay, and
16 the Plaintiffs sued the two Defendants.

17 And to successfully defend, each
18 Defendant needed to know it was not negligent, and
19 one way to do that was to show that there was
20 negligence on the part of the other Defendants.
21 And that is made clear at paragraph 7.

22 Chamberland, which we talked about a
23 minute ago, about the law, the facts of it were
24 there were co-Defendant lottery winners that were
25 sued by the Plaintiffs who said they were

10:23:45 1 improperly left out of the division of the
10:23:49 2 winnings, and one of the Defendants,
10:23:55 3 Mr. McLaughlin, argued that another,
10:23:57 4 Mr. Provincial, was the one responsible, if at all,
10:23:58 5 for the Plaintiffs being excluded.

10:24:01 6 And in that case, Mr. McLaughlin was --
10:24:06 7 or his counsel was permitted to cross-examine
10:24:10 8 Mr. Provincial but not permitted to cross-examine
10:24:12 9 any of the other co-Defendants.

10:24:14 10 And then tab 4 is the Moore v. Bertuzzi
10:24:24 11 case. This is not the context of cross-examination
10:24:28 12 but in the context of a right of co-Defendants to
10:24:31 13 conduct separate medical examinations in a personal
10:24:35 14 injury case stemming from a hit in a hockey game.

10:24:40 15 Oh, here we have --

10:24:43 16 THE COURT: We have sound.

10:24:45 17 MR. TOWNSHEND: -- sound.

10:24:46 18 And at examinations for discovery, the
10:24:50 19 Defendant Bertuzzi gave evidence that the coach had
10:24:55 20 told him to make Mr. Moore "pay the price", was the
10:24:59 21 term used. That evidence could implicate the
10:25:06 22 co-Defendant, the Vancouver Canucks hockey club,
10:25:12 23 who were responsible for the management and
10:25:13 24 coaching staff.

10:25:14 25 So in that sense, they were considered

10:25:17 1 adverse in interest, although they had had
10:25:20 2 cross-claims, and they settled the cross-claims,
10:25:22 3 but that evidence would nonetheless affect the
10:25:26 4 apportionment of liability between them.

10:25:30 5 THE COURT: The portion of that case
10:25:31 6 that Canada relies on is a quote from a textbook.
10:25:35 7 Do you have any difficulty with the statement of
10:25:37 8 law as set out in that quote from that textbook?
10:25:44 9 It is at paragraph 72.

10:25:52 10 MR. TOWNSHEND: Give me a moment,
10:26:06 11 please.

10:26:08 12 THE COURT: Go ahead. At the bottom of
10:26:11 13 page 15, over to the top of page 16.

10:26:13 14 MR. TOWNSHEND: Yes.

10:26:14 15 No, I do not have a problem with that
10:26:20 16 statement of law.

10:26:25 17 THE COURT: All right.

10:26:26 18 MR. TOWNSHEND: The next tab is
10:26:34 19 Cheesman, which was another medical malpractice
10:26:38 20 case involving doctors and nurses blaming each
10:26:40 21 other.

10:26:42 22 In this case, the nurse Defendants had
10:26:45 23 settled with the Plaintiffs, so any judgment
10:26:49 24 against the doctors would be limited to the
10:26:53 25 percentage of liability that the jury found the

10:26:57 1 doctors would be responsible for, and the liability
10:27:01 2 of the nurses was no longer in issue since that was
10:27:05 3 fixed by the settlement agreement.

10:27:06 4 As a result, the doctors would have an
10:27:11 5 interest in attributing as much liability as
10:27:14 6 possible to the nurses, and the Plaintiff really
10:27:16 7 had no particular reason even to call the nurses as
10:27:20 8 witnesses.

10:27:21 9 So the doctors might have to call the
10:27:24 10 nurses as witnesses, and in that case, because
10:27:31 11 their interests were diverging, the court permitted
10:27:35 12 them to cross-examine them, even if they called
10:27:37 13 them themselves.

10:27:38 14 The sixth case is Elder v. Rizzardo,
10:27:48 15 which is a slip and fall case, and the
10:27:50 16 co-Defendants are the owner of a parking lot and
10:27:54 17 the contractor who was contracted to do maintenance
10:28:01 18 of the parking lot. And they did cross-claim
10:28:06 19 against each other, and then before trial, they
10:28:10 20 conditionally settled the cross-claim.

10:28:13 21 The court was satisfied that the
10:28:15 22 litigation landscape was very much non-adversarial
10:28:19 23 between them, but there were a couple of points
10:28:21 24 that the court made an exception of. One is the
10:28:25 25 precise scope of the contract for winter

1 maintenance, and the other is about the design of
2 the parking lots.

3 And those evidentiary issues had the
4 potential to shift some portion of the liability
5 between them. And the court permitted
6 cross-examination on those narrow issues only.

7 THE COURT: They were evidentiary
8 issues, though.

9 MR. TOWNSHEND: Yes.

10 THE COURT: In an otherwise
11 low-conflict defence.

12 MR. TOWNSHEND: That's correct.

13 THE COURT: So in that narrow sense,
14 comparable to this situation.

15 MR. TOWNSHEND: They were adverse on
16 those points.

17 THE COURT: On those two evidentiary
18 points.

19 MR. TOWNSHEND: Yes.

20 THE COURT: So that is comparable to
21 the situation before me.

22 MR. TOWNSHEND: I would submit not.

23 THE COURT: Two factual matters about
24 which co-Defendants disagree.

25 MR. TOWNSHEND: In the Elder v.

1 Bertuzzi case, the difference in the evidence might
2 shift the apportionment of liability.

3 THE COURT: Yes, that is why I said
4 limited because I know that is not your whole
5 argument, but in a limited way. In other words,
6 there were two factual matters about which they
7 took different positions. That is the same as this
8 case.

9 And you have a second point, which is
10 that these two factual matters I take it, you say,
11 don't make any difference; is that the gist of it?
12 It doesn't matter which expert's evidence I prefer
13 to the outcome of this trial?

14 MR. TOWNSHEND: I will come to that in
15 a minute, but whichever expert's evidence is
16 preferred or neither, for that matter, would not
17 shift the apportionment of liability and would not
18 affect the cross-claim, and I would like to explain
19 why I say that.

20 THE COURT: Go ahead.

21 MR. TOWNSHEND: So I'll first talk
22 about the point about the procedural fairness of
23 the Treaty 72 surrender.

24 THE COURT: All right.

25 MR. TOWNSHEND: First, we are saying

10:30:39 1 the adversity has to be between the interests of
10:30:44 2 the parties. That is not necessarily the same as
10:30:48 3 the position of their experts. The party may or
10:30:51 4 may not adopt the position of their experts, but
10:30:55 5 the expert's opinion itself is not the position of
10:30:58 6 a party.

10:31:00 7 The party might not like everything its
10:31:02 8 own expert says. That is just the way things go.
10:31:06 9 So the fact that their experts disagree about
10:31:09 10 something is not the sole factor, in my submission.

10:31:14 11 So as I have been explaining about the
10:31:18 12 fact pattern in the cases, there has to be some
10:31:22 13 interest such as apportionment of liability or some
10:31:25 14 other tangible interest that that decision would
10:31:30 15 affect.

10:31:34 16 And on the issue of the procedural
10:31:35 17 fairness of Treaty 72, both Defendants are arguing
10:31:40 18 that it was done fairly. They simply have
10:31:44 19 different lines of reasoning to reach that
10:31:46 20 conclusion.

10:31:48 21 By contrast, the Plaintiffs say the
10:31:50 22 events surrounding Treaty 72 constitute a breach of
10:31:56 23 fiduciary duty.

10:31:58 24 Which route is taken, if any, to a
10:32:01 25 conclusion about the procedural fairness of Treaty

10:32:05 1 72 does not, in my submission, have anything to do
10:32:09 2 with the cross-claims between the Defendants or the
10:32:13 3 apportionment of their liability to the Plaintiffs,
10:32:16 4 regardless of whether this Court adopts the
10:32:20 5 opinions of Dr. Reimer or Professor McHugh or
10:32:22 6 neither.

10:32:27 7 THE COURT: I am just struggling with
10:32:28 8 that a bit, sir. It is going to be awhile before
10:32:35 9 anyone knows the outcome of the Plaintiffs' claim
10:32:42 10 that steps taken in advance of entering into Treaty
10:32:45 11 72 were as alleged, a breach of fiduciary duty, but
10:32:49 12 there is no question that the Plaintiffs' case is,
10:32:54 13 at least in part, seriously founded on the
10:32:56 14 assertion that there were unfairnesses in the
10:32:59 15 process.

10:33:00 16 MR. TOWNSHEND: Yes.

10:33:01 17 THE COURT: And I have more than one
10:33:03 18 expert witness describing what ought to have been
10:33:05 19 done and whether it was done or not, and that is
10:33:09 20 going to be something I have to deal with.

10:33:12 21 And you are saying it matters not at
10:33:14 22 all that there are two experts that disagree with
10:33:16 23 each other about that because they are defence
10:33:20 24 experts and not Plaintiffs' experts?

10:33:23 25 MR. TOWNSHEND: I am saying they both

1 lead to the same conclusion --

2 THE COURT: Well, they may both have a
3 similar opinion in their reports, but they have
4 also got a different opinion on the subject of what
5 was required to arrive at a treaty, and that sounds
6 pretty important to your case and as between the
7 Defendants to their defences, including -- well,
8 we'll hear from them about the cross-claim, but if
9 they say -- if one expert says it is fair to do A,
10 and that is Canada's expert, and Ontario's expert
11 says, No, that is incorrect, it is not fair to do
12 A, you must do B, how is that not an adversity on
13 the evidence that matters to the defence positions,
14 each of them?

15 MR. TOWNSHEND: We'll only reach the
16 apportionment of liability or a cross-claim if the
17 Plaintiffs' claim succeeds, that there was a breach
18 of fiduciary duty.

19 THE COURT: The one thing these cases
20 do not say, sir, is that you must have either an
21 apportionment of liability or a cross-claim in
22 order to get leave. They do not say that. They
23 say it is very helpful if you have a cross-claim
24 but not necessary.

25 And they say it is fact-specific, and

10:34:47 1 yes, a number of these cases are about
10:34:50 2 apportionment of liability, but it is not a
10:34:51 3 requirement.

10:34:52 4 MR. TOWNSHEND: They don't say that as
10:34:54 5 a matter of law. In my submission, they all on the
10:34:56 6 facts have that.

10:34:58 7 THE COURT: But that is just what came
10:34:59 8 up in those cases. It is not -- I take that into
10:35:04 9 account, but it is not a legal principle. The
10:35:06 10 legal principles are quite the contrary. The legal
10:35:09 11 principles are this is a broad fact-specific
10:35:13 12 question. It is helpful if you have a cross-claim
10:35:16 13 but not determinative. These cases do not say that
10:35:20 14 it has to be about apportionment of liability.

10:35:24 15 MR. TOWNSHEND: I submit it is
10:35:25 16 revealing that no one has put a case in front of
10:35:28 17 you that does not engage apportionment of
10:35:31 18 liability. That is because neither of us have
10:35:33 19 found such a case.

10:35:37 20 THE COURT: Well, that may be so, but
10:35:39 21 that doesn't make it a criteria. The textbook, the
10:35:45 22 excerpt we just looked at, certainly does not say
10:35:47 23 that, it must be relevant to apportionment of
10:35:50 24 liability.

10:35:52 25 And, sir, that would be the same as

10:35:55 1 saying there must be a cross-claim, and one of
10:35:57 2 these cases says foursquare you do not need a
10:36:01 3 cross-claim, so that you are conflict with these
10:36:03 4 cases when you say that. You could make the
10:36:05 5 observation, sir, but these cases do not suggest it
10:36:08 6 is a determinative factor.

10:36:12 7 MR. TOWNSHEND: In my submission, it is
10:36:13 8 not the same as a cross-claim. In some of them,
10:36:17 9 there were cross-claims that settled. In some of
10:36:19 10 them, there weren't cross-claims. But even without
10:36:23 11 a cross-claim, the apportionment of liability can
10:36:29 12 be affected.

10:36:29 13 THE COURT: That is true, but it is not
10:36:30 14 a necessary criteria as stated in these cases.

10:36:35 15 MR. TOWNSHEND: I am saying that is the
10:36:36 16 context of all these cases, and that is what should
10:36:42 17 be inferred from the facts of those cases.

10:36:45 18 THE COURT: So your submission is that
10:36:46 19 I should proceed on the basis that as a matter of
10:36:50 20 legal principle, if the conflict on the evidence
10:36:54 21 doesn't go to apportionment of liability, it should
10:36:57 22 not be permitted? That is your submission, as
10:37:02 23 opposed to that that is a relevant factor?

10:37:05 24 MR. TOWNSHEND: I am not sure I quite
10:37:07 25 understood that. I'm sorry.

1 THE COURT: What you seem to be saying
2 is that in the absence of an impact on
3 apportionment of liability, there should be no
4 leave, and that the cases don't say that, but I
5 take it you are submitting I should find that legal
6 principle.

7 MR. TOWNSHEND: Yes.

8 THE COURT: All right. Well, I have
9 some difficulty with that, but if you have anything
10 more to say about that. The cases don't say it,
11 and one of the cases at least is in conflict with
12 it.

13 MR. TOWNSHEND: My submission is, read
14 in context, it should not be taken to mean it that
15 broadly. It should be held more tightly to the
16 fact pattern in it. And that is the case with all
17 of these authorities.

18 THE COURT: All right. Anything
19 further?

20 MR. TOWNSHEND: Yes. I wanted to
21 address the other issue about the Congress of
22 Niagara.

23 THE COURT: Just before you do that,
24 you have not addressed Sopinka, which of course is
25 one of our country's leading textbooks on evidence,

10:38:31 1 and it says something quite different from your
10:38:34 2 submission, so I would ask you to address it. It
10:38:37 3 is the last tab of the Book of Authorities. And it
10:38:42 4 puts it in terms of essentially a presumptive right
10:38:45 5 to cross-examine, which I may take away rather than
10:38:52 6 the converse.

10:38:59 7 MR. TOWNSHEND: My submission depends
10:39:18 8 on distinguishing between the interests of the
10:39:23 9 parties and the precise opinions of the witnesses.

10:39:33 10 THE COURT: Do you want to explain that
10:39:35 11 a bit, please, because what Sopinka says is that
10:39:39 12 even if they have similar interests, they get to
10:39:43 13 cross-examine unless I say no.

10:39:48 14 MR. TOWNSHEND: Oh, yes, the Court has
10:39:50 15 discretion.

10:39:50 16 THE COURT: Yes, but even where there
10:39:52 17 are similar interests, which I think is your
10:39:57 18 submission here, that there are similar interests
10:40:00 19 between these two Defendants.

10:40:06 20 MR. TOWNSHEND: Yes, where there are
10:40:07 21 similar interests, the trial judge has discretion,
10:40:11 22 and we are asking you --

10:40:12 23 THE COURT: Discretion to refuse
10:40:14 24 cross-examination.

10:40:14 25 MR. TOWNSHEND: Yes.

1 THE COURT: In other words, they
2 presumptively have it, which is a great distance
3 from your submission.

4 MR. TOWNSHEND: I am asking this Court
5 to exercise that discretion to refuse.

6 THE COURT: All right. Please go
7 ahead.

8 MR. TOWNSHEND: For the Congress at
9 Niagara, I do want to go to the trial record.

10 THE COURT: All right.

11 MR. TOWNSHEND: The Plaintiffs'
12 pleading about the Congress at Niagara is on page
13 10 of the trial record at paragraph 14A. It is
14 very short. I'll just read it.

15 THE COURT: Well, I have it out. So it
16 is tab 1, page 10 of the Statement of Claim?

17 MR. TOWNSHEND: Page 10 of the
18 Statement of Claim, yes.

19 THE COURT: All right. Please go
20 ahead.

21 MR. TOWNSHEND: Paragraph 14A, we
22 plead:

23 "The terms of the Royal
24 Proclamation were explained to
25 representatives of the Saugeen

1 Ojibway Nation (and to other

2 Aboriginal nations) at the Treaty of

3 Niagara in 1764."

4 And I want then to put that up against
5 Ontario's pleading, which is at page 370 of the
6 trial record.

7 THE COURT: What tab is it?

8 MR. TOWNSHEND: That would be tab 2.

9 THE COURT: My trial record, just so
10 you know, doesn't have ascending page numbers.

11 MR. TOWNSHEND: Oh.

12 THE COURT: Which is fine, because if
13 you give me a tab number and a page number --

14 MR. TOWNSHEND: I apologize for that.
15 I thought we corrected that.

16 THE COURT: Well, it is no problem,
17 sir. Just give me the tab number, and I can find
18 it.

19 MR. TOWNSHEND: It is tab 2, and it is
20 paragraph 11(a) of Ontario's Statement of Defence.

21 THE COURT: Please go ahead.

22 MR. TOWNSHEND: And that is their
23 pleading concerning paragraph 14A of the Fresh as
24 Amended Statement of Claim. Ontario states that:

25 "(a) there were a number of

10:42:32 1 councils involving Crown officials
10:42:33 2 and the representatives of various
10:42:35 3 Aboriginal peoples that took place
10:42:37 4 at or near the Niagara River during
10:42:39 5 1764; (b) the chief purpose of these
10:42:45 6 councils was to settle peace and
10:42:47 7 alliances following Pontiac's
10:42:48 8 uprising; (c) a number of distinct
10:42:51 9 but related Treaties of Peace and
10:42:54 10 Friendship were entered into by the
10:42:56 11 Crown and various Aboriginal peoples
10:42:57 12 through these councils; (d) the
10:42:58 13 extent to which aspects of the Royal
10:43:01 14 Proclamation may have been
10:43:01 15 communicated by Crown officials to
10:43:04 16 Aboriginal representatives in some
10:43:05 17 form during these dealings remains
10:43:07 18 unclear; and (e) Ontario does not
10:43:09 19 know whether representatives of the
10:43:13 20 plaintiffs' predecessors were
10:43:14 21 present at the councils at Niagara
10:43:17 22 of 1764."

10:43:20 23 Then I want to go to Canada's pleading
10:43:22 24 on the point, which is at tab 3, paragraph 8(a).

10:43:41 25 THE COURT: Okay.

10:43:42 1 MR. TOWNSHEND: "Pleading to paragraph
10:43:45 2 14A of the Fresh as Amended Statement
10:43:49 3 of Claim, this Defendant has no
10:43:51 4 knowledge whether the ancestors of the
10:43:52 5 Plaintiffs sent representatives to the
10:43:55 6 Niagara meeting. Further, this
10:43:57 7 Defendant denies that there is any such
10:43:59 8 treat as the 'Treaty of Niagara'. This
10:44:01 9 Defendant admits only that various
10:44:03 10 councils occurred at Niagara in 1764,
10:44:05 11 but has no knowledge of what, if
10:44:07 12 anything, was said to any
10:44:08 13 representatives or ancestors of the
10:44:10 14 Plaintiffs regarding the Royal
10:44:12 15 Proclamation at that time."

10:44:16 16 Now, comparing Ontario and Canada's
10:44:19 17 pleadings about this, they both say they don't know
10:44:24 18 whether the Royal Proclamation was read at the
10:44:28 19 Treaty of Niagara --

10:44:29 20 THE COURT: I thought you withdrew your
10:44:30 21 position that it had been at the outset of this
10:44:33 22 trial; is that incorrect, or is that something
10:44:36 23 else? It may not matter, so if you don't think it
10:44:42 24 matters --

10:44:43 25 MR. TOWNSHEND: We are not -- maybe I

10:44:46 1 should alter that. We did withdraw that.

10:44:49 2 THE COURT: I mean, it may not change
10:44:50 3 this issue. I am just trying to understand your
10:44:53 4 position now.

10:44:54 5 MR. TOWNSHEND: Yes, I think I should
10:44:55 6 have said the terms were explained rather than --

10:44:59 7 THE COURT: Than read out loud?

10:45:01 8 MR. TOWNSHEND: Yes.

10:45:02 9 THE COURT: Okay.

10:45:03 10 MR. TOWNSHEND: And both Ontario and
10:45:04 11 Canada said they don't know about that. Ontario
10:45:08 12 says there were treaties of peace and friendship at
10:45:10 13 Niagara but does not say there was a Treaty of
10:45:15 14 Niagara, and as was pointed out, Professor Beaulieu
10:45:19 15 also said there were two peace treaties made at
10:45:22 16 Niagara in 1764.

10:45:26 17 And both Canada and Ontario's pleadings
10:45:30 18 say they don't know if the Plaintiffs were there or
10:45:32 19 not.

10:45:32 20 In contrast, the Plaintiffs say the
10:45:37 21 Treaty of Niagara is one of the facts relied on to
10:45:41 22 establish a breach of -- to establish a fiduciary
10:45:47 23 duty by the Crown to the Plaintiffs, and if you
10:45:49 24 need a reference for that, it is the Statement of
10:45:52 25 Claim, paragraphs 19(a) and 20.

1 And finally, again, I submit that the
2 subject of Niagara has no bearing whatever on the
3 cross-claims or the apportionment of liability to
4 the Plaintiffs. Those issues -- what we are using
5 Treaty of Niagara for is a fiduciary duty by the
6 Crown, which at the time, at all relevant times,
7 was an undivided Crown. After 1867, the Crown was
8 divided, and issues of apportionment of liability
9 and of cross-claims only arise after 1867, long
10 after -- not terribly long after, but well after
11 the events which are the key subject of this trial.

12 And our submission is that if this
13 Court prefers the evidence of Dr. Reimer or of
14 Professor McHugh or neither, does not, in my
15 submission, affect the apportionment of liability
16 or the cross-claims.

17 That is pretty much what I have to say,
18 and I am saying that the interests of the parties
19 have to be adverse and that that is not necessarily
20 the same as witnesses saying slightly different
21 things that, in my submission, lead to the same
22 conclusion.

23 THE COURT: Thank you, sir.

24 Reply?

25 MR. McCULLOCH: No, Your Honour.

1 THE COURT: Well, you are not going to
2 get off that lightly, sir, because I want to know
3 your position on the cross-claim. I presume it is
4 in here somewhere. Yes?

5 MR. McCULLOCH: Oh, definitely. I just
6 don't know the paragraph numbers. I agree with my
7 friend that the issues upon which we seek to
8 cross-examine Dr. Reimer are not immediately and
9 directly relevant to the cross-claim, although the
10 formulation -- the different formulations of the
11 underlying relationship between the Crown and
12 Indigenous peoples may have some indirect
13 relevance.

14 THE COURT: And what do you say to
15 Mr. Townshend's submission that I should take it as
16 a legal restriction on your right to cross-examine
17 that there must be an issue either in the
18 cross-claim or an issue of apportionment of
19 liability before you can have leave?

20 MR. McCULLOCH: I would prefer to stick
21 by the line of the jurisprudence that this --

22 THE COURT: Well, he says that it's
23 implicit in the jurisprudence.

24 MR. McCULLOCH: I beg your pardon?

25 THE COURT: He said it was implicit, my

1 word, but that if you read the jurisprudence, every
2 single case falls into that --

3 MR. McCULLOCH: Well, I would disagree
4 because I feel that the jurisprudence -- in fact,
5 it is our submission that the jurisprudence is
6 unanimous about the objective of the Court's
7 discretion to refuse the right to cross-examination
8 and that is to prevent an unfairness in the
9 presentation of evidence.

10 THE COURT: Anything further?

11 MR. McCULLOCH: No, Your Honour.

12 THE COURT: Any other party wish to
13 make submissions? I assumed not because no one
14 stood up.

15 MR. LEMMOND: No, Your Honour.

16 THE COURT: Well, I am going to take a
17 bit of time this morning and see if I can prepare a
18 ruling this morning. So I guess what I will say
19 is, looking at the time, that counsel should be
20 around at 11:30 to learn that either I am or am not
21 going to give a ruling this morning.

22 All right? If I don't do it this
23 morning, I'll do it tomorrow morning.

24 -- RECESSED AT 10:50 A.M.

25 -- RESUMED AT 11:30 A.M.

11:33:26 1 THE COURT: Just while we are waiting
11:33:45 2 for my computer, can we pick a time for our TMC
11:33:49 3 tomorrow afternoon? Anyone have a suggestion? And
11:33:56 4 someone can send me information for it.

11:33:59 5 MR. TOWNSHEND: You suggested 2:00 or
11:34:00 6 2:15, and either of those are fine with the
11:34:03 7 Plaintiffs, and as far as I know, with everyone
11:34:05 8 else.

11:34:05 9 THE COURT: Anybody have any --
11:34:10 10 everyone is nodding their head.

11:34:11 11 My suggestion was accompanied by a
11:34:17 12 desire to give you all more time to try and work
11:34:20 13 scheduling issues out and give me something before
11:34:23 14 the call. If you want, 2:30, 3:00 o'clock, you
11:34:29 15 know, something to give you more time; otherwise, I
11:34:33 16 assume I'll get something before 2:15.

11:34:37 17 Everyone is sitting blankly.

11:34:43 18 MR. BEGGS: 2:15 would be sufficient
11:34:45 19 time.

11:34:46 20 THE COURT: Would be sufficient time.

11:34:47 21 MR. BEGGS: Mr. Brookwell has already
11:34:50 22 circulated a new --

11:34:51 23 THE COURT: A new idea?

11:34:52 24 MR. BEGGS: A new idea.

11:34:53 25 THE COURT: All right. And

1 Mr. Townshend, you are okay with 2:15.

2 MR. TOWNSHEND: Yes, Your Honour.

3 THE COURT: So if someone could just
4 circulate the dial-in information, that would be
5 helpful.

6 And, Madam Reporter, my reasons for a
7 decision and ruling are as follows.

8 Canada seeks leave to cross-examine an
9 upcoming expert witness being called by Ontario.
10 Specifically, Canada seeks leave to cross-examine
11 Dr. Reimer.

12 The two points on which leave is sought
13 are set out in Exhibit S-3. The Plaintiffs object.

14 There is no dispute about the
15 applicable legal principles, with one major
16 exception that I will get to in a minute.

17 Beginning with the agreed legal
18 principles, Plaintiffs' counsel agrees with a
19 quotation in one of Canada's authorities.
20 Specifically, Moore v. Bertuzzi, 2012 ONSC 5008, at
21 paragraph 72, contains a quote from the textbook by
22 J.W. Morden and P.M. Perell, The Law of Civil
23 Procedure in Ontario. I will read that quotation
24 without citations as follows:

25 "Who is adverse in interest is

11:37:46 1 determined by the pleadings and upon
11:37:47 2 the state of the record as a whole
11:37:49 3 [...] and co-defendants may be
11:37:55 4 adverse in interest on some issues.
11:37:58 5 The classic definition of adverse in
11:38:00 6 interest was provided by Chancellor
11:38:07 7 Boyd, who stated:

11:38:08 8 'An actual issue in tangible form
11:38:10 9 spread upon the record is not
11:38:11 10 essential, so long as there is a
11:38:13 11 manifest adverse interest in one
11:38:16 12 defendant as against another
11:38:17 13 Defendant. "Adverse interest"
11:38:21 14 is a flexible term, meaning
11:38:23 15 pecuniary interest, or any other
11:38:25 16 substantial interest in the
11:38:26 17 subject matter of litigation.'"

11:38:27 18 The textbook goes on as follows:

11:38:31 19 "In the case law, the idea of
11:38:33 20 an "adverse interest" tends to be
11:38:37 21 given a broad scope, and this
11:38:39 22 approach expands the rights of
11:38:40 23 parties to examine other parties for
11:38:42 24 discovery, for example, a defendant
11:38:46 25 may have a right to examine a

11:38:47 1 co-defendant without there being a
11:38:50 2 cross-claim."

11:38:54 3 In support of its motion, Canada says
11:38:56 4 that there is an adversity of interest with Ontario
11:39:00 5 on those two specific points about which they seek
11:39:04 6 leave. The Plaintiffs say there is no adversity of
11:39:09 7 interest.

11:39:12 8 As stated in the quotation I just read,
11:39:22 9 adversity of interest is given a broad scope. The
11:39:28 10 Plaintiffs agree that the concept of adversity of
11:39:31 11 interest is flexible and is dependent on the facts
11:39:35 12 of each case.

11:39:37 13 Further, as set out in the above quote,
11:39:43 14 there may be an adversity of interest between
11:39:45 15 co-defendants even where there is no cross-claim
11:39:49 16 between them. Here there is a cross-claim but
11:39:54 17 Canada does not rely on it on this motion and the
11:39:59 18 Plaintiffs submit that it is not affected by the
11:40:03 19 two points about which leave is sought.

11:40:09 20 The Plaintiffs submit that for there to
11:40:12 21 be an adversity of interest, the evidence must go
11:40:15 22 to the apportionment of liability as between the
11:40:19 23 two Defendants. The Plaintiffs make this
11:40:23 24 submission because the cases before me are
11:40:25 25 generally along those lines from a standpoint of

11:40:29 1 the facts in those cases and the nature of the
11:40:34 2 issues between those parties. However, none of
11:40:41 3 those cases state that legal proposition. As well,
11:40:46 4 I find it inconsistent with the accepted law.

11:40:53 5 In that regard, I note that
11:40:57 6 apportionment of liability is often sought in a
11:41:00 7 cross-claim and the above law provides that a
11:41:03 8 cross-claim is not required. The proposition that
11:41:12 9 it must go to apportionment of liability is also in
11:41:15 10 conflict with the law which provides that adversity
11:41:18 11 of interest is a broad concept and a flexible one
11:41:23 12 that is fact-dependent.

11:41:28 13 I also note that the Plaintiffs'
11:41:31 14 submission is inconsistent with Sopinka, The Law of
11:41:41 15 Evidence in Canada, 5th Edition, which takes a much
11:41:46 16 broader view about the right to cross-examine than
11:41:51 17 the cases do that are before me.

11:41:55 18 In Sopinka, at paragraph 16.158,
11:42:02 19 principles are summarized that amount to saying
11:42:07 20 that these co-defendants have a presumptive right
11:42:11 21 to cross-examine witnesses called by the other
11:42:16 22 co-defendant separately represented, even if their
11:42:22 23 interests in the case are similar, but that I as
11:42:28 24 the trial judge have the discretion to refuse that
11:42:30 25 right to cross-examine.

1 I find that I do not need to take the
2 more extreme position set out in Sopinka to say
3 that the Plaintiffs' submission that the issue must
4 go to apportionment of liability is not supported
5 by the case law and I do not accept it as a legal
6 principle.

7 Lastly, I note the case of Chamberland
8 v. Provincial, 2008 CanLII 58414, which also
9 contains the summary of the law in this area at its
10 paragraphs 8 through 11.

11 I make only two quotations from this
12 excerpt. First, again omitting citations, the case
13 states at paragraph 9 the following:

14 "There is some uniformity in
15 the jurisprudence and text
16 authorities reviewed that adversity
17 of interest is a pre-condition for
18 the right of one defendant to
19 cross-examine another defendant. If
20 such adverse interest exists or
21 arises during trial, a defendant
22 appears to have the right to
23 cross-examine the other defendant
24 with whom such adversity exists,
25 provided they have separate

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counsel."

And then moving to paragraph 11:

"Adversity between defendants may arise from the pleadings, by the nature of relief sought by the plaintiff or may arise during the testimony at trial of a defendant or witness of a defendant."

Considering those legal principles, I now move to the two points upon which Canada wishes leave to cross-examine.

In my view, there is no doubt that there is an adversity of interest that has arisen in the evidence in this trial. Specifically, the adversity relates to evidence given by two experts called by Canada as compared to the upcoming evidence of Dr. Reimer.

Although Dr. Reimer has not yet testified, on consent her reports will be marked as trial evidence, as has been done generally with the experts in this trial, with only minor exceptions. The adversity is apparent on the face of Volume 3 of her many reports.

Without attempting to summarize the submissions in their entirety, I say generally that

11:46:03 1 the first topic relates to what happened at Niagara
11:46:08 2 in 1764, and the second topic relates to Dr.
11:46:13 3 Reimer's checklist of procedural and other
11:46:16 4 requirements that she states related to
11:46:21 5 treaty-making at the time of the two treaties
11:46:24 6 that are central to this case, specifically
11:46:27 7 Treaty 45 1/2 and Treaty 72.

11:46:30 8 The Plaintiffs submit that these two
11:46:34 9 factual matters and the related dispute between
11:46:39 10 these experts does not amount to an adversity of
11:46:43 11 interest between Canada and Ontario. The
11:46:47 12 Plaintiffs submit that since both Defendants say
11:46:50 13 that Treaty 72 was arrived at fairly, it does not
11:46:53 14 matter how they get there and it does not matter
11:46:58 15 that the evidence put forward by each of the two
11:47:01 16 Defendants is different with respect to what was
11:47:05 17 required in arriving at Treaty 72.

11:47:08 18 Similarly, the Plaintiffs submit that
11:47:11 19 the disagreement between these experts about what
11:47:13 20 happened at Niagara is not shown as an adverse
11:47:19 21 interest in the pleadings, which are of a much more
11:47:24 22 general nature.

11:47:25 23 Lastly, the Plaintiffs submit that
11:47:28 24 neither of these two matters have a bearing on the
11:47:31 25 cross-claim or apportionment of liability.

1 I find the Plaintiffs' submission
2 narrow and inconsistent with the established legal
3 principles as discussed earlier in this ruling.
4 The adversity of interest has arisen in the trial
5 evidence. I am not prepared to conclude mid-trial
6 that these two points are of no consequence to
7 these two Defendants and their interests as regards
8 each other. We have had considerable evidence on
9 both subject matters which suggests to me that they
10 are potentially important.

11 I therefore conclude that fairness and
12 the search for the truth are in favour of granting
13 leave, provided, of course, that it be narrowly
14 limited to these two points and provided that the
15 cross-examination be conducted before the
16 Plaintiffs are called upon to cross-examine.

17 Therefore, bearing everything in mind
18 in the exercise of my discretion, I grant leave to
19 cross-examine on these two points. I remind the
20 Plaintiffs that they should be ready to object if
21 Canada strays outside the limits of my grant of
22 leave.

23 Madam Reporter, that concludes my
24 reasons for decision and decision on that ruling.

25 Now, just on Dr. Reimer who is coming

1 on Wednesday, whomever is going to be
2 cross-examining her for Canada should be prepared
3 to proceed this week and also should be prepared
4 right now to give us an estimate so the Plaintiffs
5 will know what to expect of about how long you
6 expect to be.

7 Can that be provided now?

8 MR. McCULLOCH: Your Honour, we expect
9 it will take at a maximum two hours.

10 THE COURT: All right. I also note for
11 the record that even though Dr. Reimer is here for
12 three days, which is a long time, that even if that
13 process of the examination in-chief and
14 cross-examination by Canada is completed before the
15 end of the week, I am not requiring the Plaintiffs
16 to commence their cross-examination at that time.
17 You are not required to commence the
18 cross-examination until -- anyone have the date
19 handy?

20 MR. TOWNSHEND: March 3rd.

21 THE COURT: March 3rd. Thank you,
22 Mr. Townshend.

23 Is there anything else that can be
24 addressed this morning?

25 MR. LEMMOND: Yes, Your Honour. I have

1 an update regarding Mr. Graves' Agreed Statement of
2 Fact. We have heard back from municipal counsel
3 who has indicated that their instructing client is
4 not available to give consent until February 19th.

5 THE COURT: Well, when is he due back?

6 MR. LEMMOND: He is due back on the
7 20th.

8 THE COURT: Well, is this person -- I
9 mean, not available in an electronic world is an
10 odd proposition.

11 MR. LEMMOND: I believe the person in
12 question is out of the country.

13 THE COURT: Well, that doesn't these
14 days change anything.

15 Would you, please, go back to whomever
16 it is, counsel to whomever it is, and ask for a
17 more detailed explanation being that these days
18 being out of the country is no impediment?

19 MR. LEMMOND: Yes, Your Honour.

20 THE COURT: That perhaps there is
21 another reason more particularly. All right?

22 Otherwise -- well, let's find out what
23 the reason is.

24 MR. LEMMOND: Yes, Your Honour.

25 THE COURT: All right.

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Anybody else? Mr. Townshend, do you
have anything this morning?

MR. TOWNSHEND: No, Your Honour.

THE COURT: All right. Nobody else?
All right. We'll adjourn to Wednesday at 10
o'clock for Dr. Reimer.

-- Adjourned at 11:51 a.m.

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REPORTER'S CERTIFICATE


I, DEANA SANTEDICOLA, RPR, CRR,
CSR, Certified Shorthand Reporter, certify:

That the foregoing proceedings were
taken before me at the time and place therein set
forth, at which time the witness was put under oath
by me;

That the testimony of the witness
and all objections made at the time of the
examination were recorded stenographically by me
and were thereafter transcribed;

That the foregoing is a true and
correct transcript of my shorthand notes so taken.

Dated this 12th day of February, 2020.



NEESONS, A VERITEXT COMPANY

PER: DEANA SANTEDICOLA, RPR, CRR, CSR

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