

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

DAY 73 VOL 73
January 14, 2020



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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 VOLUME 73 / DAY 73 of the trial
proceedings in the above-noted matter, being
held at the Superior Court of Justice, 330
University Avenue, Courtroom 5-1 Toronto,
Ontario, on the 14th day of January 2020.

B E F O R E:

The Honourable Justice Wendy M. Matheson

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

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& Jaclyn McNamara, Esq., the Chippewas of
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Nation, and the
Chippewas of Nawash
First Nation.

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

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

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I N D E X

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WITNESS: ALEXANDER VON GERNET

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INDEX OF EXHIBITS

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4502	Article in American Antiquity authored by Robert McGhee.	9460
4503	Article entitled "Impossible to Disprove Yet Impossible to Believe", authored by David Henige.	9485
4504	Book by Ronald Mason entitled "Inconstant Companions: Archeology and North American Indian Oral Traditions", published 2006.	9495

1 --- Upon commencing at 10:06 a.m.

2 THE COURT: Go ahead, please.

10:06:17 3 MR. BEGGS: Thank you, Your Honour.

10:06:18 4 ALEXANDER VON GERNET:

10:06:18 5 PREVIOUSLY AFFIRMED.

10:06:18 6 EXAMINATION IN-CHIEF BY MR. BEGGS:

10:06:18 7 (Continued)

10:06:19 8 Q. Good morning, Dr. von Gernet.

10:06:20 9 A. Good morning.

10:06:22 10 Q. Yesterday we ended with the
10:06:24 11 migration story related in the Mishomis book by
10:06:30 12 Edward Benton-Banai. I'd like to call up your
10:06:34 13 extract report which contains many of these
10:06:37 14 migration stories, and that was Exhibit 4501.

10:06:44 15 And we'll be on page 51 of the
10:06:47 16 document, which is page 53 of the PDF. If we
10:06:51 17 can scroll down. I see there's a -- after the
10:06:57 18 Benton-Banai variant you describe a Wisconsin or
10:07:00 19 Megis variant. Could you briefly tell us how
10:07:08 20 that differs from Benton-Banai's account?

10:07:11 21 A. Well, this is the mid-19th
10:07:16 22 century version that is closely related to the
10:07:21 23 Benton-Banai version in that it is -- it not
10:07:35 24 only precedes it but also influenced it.

10:07:38 25 This version was recorded by one of

10:07:40 1 those Anishinaabe historians who were literate
10:07:43 2 and who sat down and -- with the Elders and
10:07:49 3 actually attended a Midewiwin ceremony, and he
10:07:54 4 heard this story. And so it was recorded in his
10:07:59 5 book on the history of the Ojibwe people
10:08:04 6 sometime between 1849 and 1852.

10:08:10 7 And it kind of became -- because it
10:08:12 8 was written down it became kind of a canonical
10:08:18 9 version that many others later relied on.

10:08:29 10 And I suppose the principal
10:08:33 11 differences between it and some of the later
10:08:34 12 versions are the locations of the stopping
10:08:36 13 points along the way from the Atlantic to
10:08:43 14 Madeline Island.

10:08:44 15 So these earlier versions have --
10:08:50 16 often have less stopping places and they
10:08:52 17 don't -- they don't show sort of micro
10:08:57 18 migrations along the way. And that's the
10:09:03 19 obvious consequence of the story having been
10:09:05 20 told originally at Madeline Island where Warren
10:09:11 21 was born, the author of this book.

10:09:17 22 So the emphasis and the origination of
10:09:20 23 this story was on Madeline Island. And so you
10:09:32 24 don't get an awful lot of detail about what
10:09:34 25 happened further east because the story was

1 basically told by people who were trying to give
2 a story of their origins on Madeline Island.

3 And the Madeline Island terminus, of
4 course, is also one that ended up in the
5 Benton-Banai version, as I explained yesterday.
6 So there are differences and there are
7 similarities, and the differences are primary
8 ones that Benton-Banai introduced to the
9 original Warren story by doing additional
10 research.

11 According to Benton-Banai's own
12 testimony in his book he not only listened to
13 the Elders' story, but also did additional
14 research on old maps and on scholarly books that
15 he referred to. So as an example of where you
16 have a written version that's extant already and
17 then you supplement that with what your Elders
18 tell you, plus you do some additional research.

19 The fact is, is that many of these
20 Elders who tell these stories today are part of
21 a technological matrix in which they are
22 influenced by not merely purely oral sources but
23 by much of the literature that's out there.

24 Q. Thank you. And a few pages down
25 in the extract report on page 54 of the report,

1 which I think is page 56 of the PDF, so little
2 farther down there's mention of a Minnesota or
3 otter variant. How does that differ from the
4 other two?

5 A. Well, that's another variant that
6 Warren paraphrased. And it -- instead of having
7 a Megis shell, which in the original version had
8 sort of served as the beacon by which the
9 migrants were led in their westward journey, the
10 Megis shell would occasionally pop up or appear
11 and lead them along the way.

12 In this variant, which I call the
13 "otter variant", which comes from Minnesota,
14 it's an otter rather than a Megis shell. And
15 it's also the case that the -- there's a few
16 other details that are different, the terminal
17 point, of course. As I said yesterday,
18 depending on who tells the story they're going
19 to focus on different geographical references.

20 Q. And one last variant I wanted to
21 raise with you. On the next page of the extract
22 report towards the bottom there's mention of an
23 account by Basil Johnston, who you've already
24 mentioned in your testimony. His account is set
25 out there so we won't go through it. But

1 basically is it consistent with the other
2 accounts that we've heard?

3 A. Well, it's partially consistent
4 with those, but what Basil Johnston did is he
5 added a precursor to this story by having the
6 migrants moving from west to east before they go
7 in the opposite direction.

8 So part of this, I think, was the
9 consequence of a kind of cognitive dissonance
10 within Anishinaabe understanding, and that is,
11 you have these disparate ideas.

12 There are some Anishinaabe people who
13 insist that according to the Elders they have
14 been in the places they were at since time
15 immemorial, so they were always in situ; whereas
16 others point to their own migration stories
17 about coming from the Atlantic Coast.

18 And so in order to reconcile these
19 traditions some, like Basil Johnston, made an
20 effort to kind of have a compromise solution;
21 and that is to have them being in the area at
22 the beginning and then moving from the west to
23 the east coast and then back again.

24 So these are -- these are efforts to
25 reconcile different views of in situ versus

1 migratory traditions. And it's not that
2 uncommon to find that phenomenon occurring
3 whenever you have disputes among -- within a
4 group of culturally-related people who have
5 different stories about where they came from.

6 Q. Thank you. I'd like to move now
7 from the question of migration to a different
8 topic, which is, are there any assumptions
9 necessary in order to consider deep-time oral
10 tradition claims accurate accounts of what
11 transpired?

12 A. Well, yes, of course there are a
13 number of assumptions. And I outlined -- in my
14 original report I outlined what those
15 assumptions are in relation to the particular
16 deep-time oral traditions claims that are
17 evidently being proffered in these proceedings.

18 Q. And what would those assumptions
19 be?

20 A. Well, the first assumption, of
21 course, is that there were human eyewitnesses to
22 the early Holocene conditions or species or
23 environment or geological events.

24 That, of course, is a reasonable
25 assumption since we do in fact have

1 archeological evidence of human occupation of at
2 least parts of Ontario and Michigan during the
3 -- that period in question. So that assumption
4 I think is a reasonable one.

5 The second assumption is that there is
6 a connection between the raconteurs who related
7 the story, or the stories, and the early
8 Holocene people who were living or frequented
9 the area around what we would now call Lake
10 Huron, Lake Superior. And so there is an
11 assumption that the two ends of the temporal
12 spectrum are connected.

13 Keep in mind that -- what I said
14 yesterday, the stories that are told about all
15 of these things are products of the present in
16 which they're told. So the assumption is, is
17 that you connect -- you can connect the people
18 who tell those stories in the present with the
19 ancient peoples who frequented the region.

20 And connecting those is some kind of
21 unbroken chain of transmission within a single
22 tradition-bearing community or population that
23 was basically moving through time in more or
24 less the same space.

25 So sometimes it's unclear whether this

1 is to be seen as an assumption or whether it is
2 the conclusion reached. And this is where it
3 once again becomes somewhat of a circular
4 argument.

5 So if, for example, you say that
6 Nanabush's salty tears are a reference to the
7 brackish conditions in Georgian Bay you're
8 basically saying that Rose Nadjiwon's story, as
9 related by Lenore Keeshig, began as an
10 eyewitness observation in the same place, in the
11 Georgian Bay area or the Bruce Peninsula area.

12 And so what you're really saying is
13 that the stories preserve something that
14 happened in the Bruce Peninsula environs over
15 8,000 years ago, or 8,200 years ago at minimum.

16 So to avoid the circular reasoning
17 that occurs when you do this the evidence of the
18 ancient eyewitnesses that were apparently these
19 ancestors of the modern raconteurs cannot be
20 used, or the antiquity cannot be assumed from
21 the stories themselves. You have to have
22 something else.

23 You cannot simply assume that the
24 stories are ancient a priori, because then your
25 assumption becomes your conclusion, or the

1 conclusion is based on an assumption that you
2 make. And, again, you get into circular
3 reasoning.

4 Now, in this instance, of course,
5 there's no question that Anishinaabe peoples had
6 ancestors and that these ancestors have been
7 around in North America for a long time. And
8 there's no question that Paleo-Indians are, in a
9 very general sense, ancestral to all Indigenous
10 peoples in Eastern North America, although we
11 cannot actually make any links between any given
12 Paleo-Indian population and any given historic
13 Indigenous group. So as a general proposition
14 you can say that but it doesn't get you anywhere
15 because there is no evidence of a -- of an in
16 situ resident population that you can trace over
17 the course of 8,000 years.

18 Q. If I could interrupt for a
19 moment? Yesterday in that vein you mentioned an
20 author by the name of McGhee?

21 A. Yes.

22 Q. Who is McGhee?

23 A. McGhee is an archeologist who is
24 well-known for his use of the -- what was
25 originally called the National Museum of Man and

1 later became the Museum of Civilization, and
2 then more recently the Canadian Museum of
3 History in its various incarnations. And he was
4 a -- or is a prominent specialist particularly
5 in Arctic archeology, but he also has made
6 contributions to archeological theory. And he
7 wrote an influential article in "American
8 Antiquity" a number of years ago on the paradigm
9 of Aboriginalism.

10 Q. If I could call up SC1490? Is
11 this the article to which you refer?

12 A. Yes.

13 Q. Your Honour, could I ask that
14 this be made the next exhibit?

15 THE COURT: Mr. Registrar.

16 THE REGISTRAR: Exhibit Number 4502.

17 EXHIBIT NO. 4502: Article in American
18 Antiquity authored by Robert McGhee.

19 BY MR. BEGGS:

20 Q. If I could go to page 583 of the
21 document, which I think is page 8 of the PDF?
22 Yes. So on the right-hand side the paragraph
23 beginning "However":

24 "However, history and archeology
25 attest that assumptions regarding the

10:24:38 1 endurance of unchanging local cultural
10:24:38 2 identities are unlikely to reflect
10:24:38 3 what actually happened in the past.
10:24:38 4 On the contrary, the accumulated
10:24:42 5 evidence of history demonstrates that
10:24:44 6 all of our ancestors have at some
10:24:46 7 point lost their homelands, taken over
10:24:48 8 the homelands of others, mixed with
10:24:51 9 other societies and changed beyond
10:24:53 10 recognition over time."

10:24:59 11 What do you understand to be the basis
10:25:02 12 for Dr. McGhee's conclusions here?

10:25:05 13 A. Well, this is of course axiomatic
10:25:09 14 in my profession. This is something that you
10:25:15 15 hardly need citation to support because it's so
10:25:23 16 clear from anthropological evidence throughout
10:25:26 17 the world, including in Indigenous North
10:25:32 18 America. And the consequence, of course, is
10:25:38 19 what he says next, and that is that:

10:25:40 20 "Claims of Aboriginal uniqueness
10:25:43 21 like those of national, or any other
10:25:46 22 ethnic distinctiveness, that are based
10:25:48 23 on belief in the persistence of
10:25:51 24 ancient and unchanged societies are
10:25:54 25 clearly untenable from the viewpoint

1 of western historical and scientific
2 scholarship."

3 So this is what -- this is part of
4 what he refers to as the paradigm of
5 Aboriginalism. It's this -- what he's
6 responding to here is a relatively recent trend
7 to turn Indigenous societies into some kind of
8 unchanging, long-term, in situ peoples, when in
9 fact their history is complicated by the same
10 kind of history that you see anywhere else on
11 the planet; and that is a history of change, a
12 history of constant fission and fusion of
13 groups, a history of migrations.

14 That's not to suggest that there's no
15 continuity, but the evidence of continuity
16 should not be given such preferential treatment
17 that it obscures the evidence of discontinuity.
18 And the evidence for discontinuity is
19 significant in every culture on the planet.

20 Q. Thank you. I think I interrupted
21 you while you were talking about the second
22 assumption. Did you have anything else to add
23 about the second assumption?

24 A. Only to just reiterate, once
25 again, that the stories of migrations and, you

10:27:47 1 know, some of these stories of migrations are
10:27:50 2 really products of the imagination and there's
10:27:56 3 simply no evidence that they took place. But --
10:27:58 4 and there's also considerable evidence that
10:28:02 5 Anishinaabe peoples did migrate in history.

10:28:08 6 So the fact that you have any evidence
10:28:13 7 at all of migration, whether it's in the form of
10:28:15 8 stories told by Elders, or whether it's in the
10:28:17 9 form of ethnohistorical evidence from early
10:28:21 10 records, or whether it's in the form of
10:28:24 11 archeological evidence, the fact that you have
10:28:25 12 any of it is in and of itself -- renders the
10:28:34 13 assumption of a connection between modern
10:28:38 14 raconteurs and ancient eyewitnesses in the same
10:28:46 15 place or same region problematic. So the
10:28:48 16 assumption is not one that is without its
10:28:56 17 problems, and it's not one that should be
10:29:03 18 accepted uncritically.

10:29:07 19 You simply cannot assume that the
10:29:09 20 ancestors of the modern Anishinaabe who -- whose
10:29:15 21 selected stories that have been picked for the
10:29:18 22 purposes of these proceedings even lived in the
10:29:26 23 places where supposedly they were -- their
10:29:30 24 ancestors were eyewitnesses.

10:29:36 25 Q. Are there any other assumptions

10:29:38 1 that are required?

10:29:42 2 A. The other assumption is, of
10:29:48 3 course, that the stories were never the subject
10:29:53 4 of cultural diffusion.

10:29:58 5 I testified yesterday about cultural
10:30:02 6 diffusion and the manner in which various
10:30:05 7 Indigenous peoples borrow stories, or story
10:30:09 8 elements, or folk motifs, or features of stories
10:30:12 9 from other people. So the assumption that
10:30:17 10 underlies the deep-time oral traditions claim is
10:30:20 11 that all of these stories have not been the
10:30:23 12 subject of cultural diffusion.

10:30:32 13 But not only do humans migrate but
10:30:35 14 stories are subject to diffusion from one place
10:30:37 15 to another. And the deep-time oral traditions
10:30:39 16 claim assumes that neither of these things
10:30:44 17 happened.

10:30:46 18 Those are highly problematic
10:30:49 19 assumptions to make in order to sustain that
10:30:52 20 kind of argument, because in both cases we have
10:30:55 21 evidence that suggests the problematic nature of
10:31:01 22 those assumptions.

10:31:12 23 Q. Is that all of the assumptions
10:31:13 24 that are necessary?

10:31:14 25 A. No, there's others. There's -- a

10:31:16 1 fourth assumption is that these geological
10:31:29 2 events, or paleo-environmental conditions or
10:31:38 3 eyewitness -- or apparent eyewitness
10:31:40 4 observations of these various events were deemed
10:31:43 5 important enough to actually generate stories
10:31:45 6 about them.

10:31:51 7 So, for example, I can understand,
10:31:54 8 perhaps, you know, a dramatic event like the --
10:32:07 9 you know, the Nadoway Barrier breach 9,100 years
10:32:12 10 ago why that might stimulate some interest and
10:32:14 11 stories at the time.

10:32:22 12 But then again, history is much less
10:32:24 13 than the past. In other words, things that
10:32:26 14 people choose to memorialize in some fashion by
10:32:33 15 handing down the information to another
10:32:35 16 generation varies and it can be quite arbitrary.

10:32:47 17 Like I said yesterday, in the 19th
10:32:49 18 century the vast majority of stories that we
10:32:52 19 have related by Anishinaabe peoples actually
10:32:55 20 relate to wars and migrations; and there's
10:32:57 21 nothing about their peaceful relations with many
10:32:59 22 of their neighbours.

10:33:02 23 We would like to have a lot more
10:33:04 24 information if we were to reconstruct things
10:33:07 25 from an Indigenous perspective other than

1 stories about migrations and war, but that's
2 what they chose to emphasize.

3 So, as I said, history is less than
4 the past. We do not memorialize everything
5 about the past. There are only certain select
6 things that we do.

7 So this raises the question, of
8 course, of whether anyone would at any point in
9 time want to record, for posterity, a brackish
10 condition in Georgian Bay, for example.
11 Perhaps, but we should never assume that that's
12 the case.

13 What that really, to me, suggests is
14 not only are you ignoring the possibility that
15 that assumption is incorrect, that is the
16 assumption that people will record the
17 brackishness of a Bay, not only are you not
18 questioning that assumption but what you're
19 doing basically is actually the reverse, is
20 you're taking the story, and it is you in a
21 modern era who's trying to find a parallel in
22 the past.

23 Q. Does that complete the necessary
24 assumptions?

25 A. There's a fifth assumption, and

10:35:10 1 that's that the stories reflecting eyewitnesses
10:35:17 2 or that -- the assumption basically is that the
10:35:20 3 stories reflect some kind of eyewitness
10:35:25 4 observations about the early Holocene events.
10:35:28 5 And then you have an unbroken transmission over
10:35:31 6 the course of generations covering a period for
10:35:37 7 as long as 9,100 years, which is the date of the
10:35:43 8 Nadoway Barrier breach.

10:35:54 9 And so this assumption really depends,
10:35:56 10 of course, on whatever happens in history. And
10:35:58 11 there are so many exigencies of history that I
10:36:01 12 need not remind everyone that history doesn't
10:36:03 13 always furnish the kind of favourable conditions
10:36:05 14 that are required to sustain such a lengthy
10:36:07 15 period of transmission of information.

10:36:14 16 Elders often pass before opportunities
10:36:16 17 present themselves for communicating their
10:36:19 18 knowledge. There's no question that traditions
10:36:24 19 die out. One of the reasons why many of the
10:36:26 20 Anishinaabe historians in the 19th century chose
10:36:29 21 to write down their stories in books was because
10:36:34 22 the Elders were encouraging them to do so
10:36:37 23 because they were afraid these traditions were
10:36:40 24 dying out.

10:36:51 25 There was also a Mide practice of

1 actually burying -- or burning the birch bark
2 scrolls that they used to help them recall their
3 oral traditions of the migrations.

4 Q. Sorry, you said Mide?

5 A. Yeah, the Mide, M-I-D-E. They
6 were the -- I guess the English translation
7 would be a priest or a religious leader of the
8 Midewiwin religion.

9 Q. Thank you.

10 A. They had a practice for -- just
11 to give an example, of burying and burning some
12 of these scrolls. But every culture thrives on
13 traditions and so what happens is when old
14 traditions die out new ones are invented,
15 because you always want traditions.

16 The whole concept of invented
17 traditions is actually very well-known in
18 anthropological literature. Entire books have
19 been written about it on how various cultures
20 invent new traditions when old ones die out.
21 And this happens in European cultures, it
22 happens in Indigenous cultures.

23 All of that -- what we know from
24 experience throughout the world would have to be
25 ignored in an assumption that assumes an

10:38:29 1 intergenerational transmission that goes back so
10:38:34 2 many thousands of years.

10:38:36 3 You have to always keep in mind that
10:38:39 4 what we're dealing with here are memories of
10:38:41 5 memories of memories of memories of memories.
10:38:48 6 We're talking about the encoding and retrieval
10:38:57 7 of memories over the course of hundreds of
10:39:04 8 generations, over thousands of years; and these
10:39:12 9 originate with the human brain.

10:39:18 10 And we know enough about how memory
10:39:20 11 works that we should at least ponder the
10:39:26 12 problematic nature of the assumption that at
10:39:31 13 each and every generation all of these ideal
10:39:34 14 conditions persisted.

10:39:39 15 And yet the deep-time oral traditions
10:39:42 16 claim doesn't even address this as a problem.
10:39:45 17 Rather, it assumes that such an
10:39:52 18 intergenerational transmission is unproblematic
10:39:56 19 and indeed persisted.

10:40:00 20 Again, if the claim is made to
10:40:04 21 actually reach this as a conclusion then the
10:40:09 22 argument, again, becomes circular. If it's an
10:40:17 23 assumption it's problematic. If it's a
10:40:20 24 conclusion then it's circular.

10:40:27 25 Now, again, I'm not in any way

1 denying, and I concede that it's theoretically
2 possible that some kernel of truth, as it's
3 sometimes referred to in the literature, that
4 some kernel of truth survived these
5 extraordinary periods of time and are somehow,
6 in a very complex, or symbolic, or metaphoric
7 way preserved within a tradition told in recent
8 times.

9 But, on the other hand, there's a good
10 reason why claims like this involving a
11 10,000-year-old tradition, oral tradition among
12 hunter-gatherers is so rare and seldomly
13 persuasive. What this is is an extraordinary
14 claim. And as Carl Sagan often put it, an
15 extraordinary claim requires extraordinary
16 proof.

17 Now, another assumption is that each
18 set of these raconteurs or listeners in each of
19 these generations had the same understanding of
20 the purpose of this. That's an assumption that
21 you need to have because if you don't have that
22 assumption think of the implications.

23 The assumption has to be that the
24 purpose of the story is to preserve some kind of
25 kernel of truth to posterity. If you don't --

10:42:26 1 if each and every generation doesn't have that
10:42:29 2 assumption think of the consequences.

10:42:33 3 And here -- I mean, just think of a
10:42:40 4 storyteller like Elder Rose Nadjiwon who told
10:42:44 5 stories like this to Lenore Keeshig. Elder
10:42:53 6 Nadjiwon regarded the Nanabush stories as
10:42:57 7 fiction, as entertainment, things that you tell
10:43:00 8 your children.

10:43:02 9 Now, just imagine if any one of these
10:43:05 10 storytellers in any of these chains of
10:43:08 11 transmission had that understanding of what
10:43:15 12 these stories were about. There would be no
10:43:19 13 need whatsoever or desire to preserve the kernel
10:43:26 14 of truth that I was talking about.

10:43:34 15 You could change any aspect of the
10:43:36 16 story to suit your audience, which is in fact
10:43:39 17 the evidence we have when we look at many
10:43:43 18 traditions that are clearly related to one
10:43:45 19 another.

10:43:51 20 So what guarantees are there that this
10:43:54 21 kernel of truth will survive? The deep-time
10:44:03 22 oral traditions claim carries an assumption that
10:44:09 23 none of these storytellers or their audiences
10:44:22 24 understood these stories as being for
10:44:27 25 entertainment purposes or for some other

10:44:31 1 purposes other than carriers of fact or
10:44:36 2 containers of historicity.

10:44:39 3 Q. While we're talking about the
10:44:41 4 kernel of truth I'd like to pull up the
10:44:48 5 transcript of Dr. Williamson from September
10:44:51 6 16th, 2019, day 43, and looking at page 5252 of
10:45:03 7 the transcript.

10:45:10 8 If we could -- so first of all, are
10:45:14 9 you familiar with Dr. Williamson?

10:45:18 10 A. Dr. Williamson is an old friend
10:45:20 11 of mine. We were classmates as graduate
10:45:23 12 students at McGill University. Together we had
10:45:28 13 the same thesis advisor, Professor Bruce
10:45:32 14 Trigger. And I worked with him as early as
10:45:35 15 going back to 1978 at the Draper site, an
10:45:40 16 archeological site here in Ontario. So he and I
10:45:43 17 go back a long way.

10:45:49 18 Q. Now, in the examination of
10:45:55 19 Dr. Williamson counsel put a portion of your
10:46:00 20 report, which was Exhibit Q-2, to Dr. Williamson
10:46:06 21 and asked him to comment on that.

10:46:08 22 And I'd like you to read
10:46:15 23 Dr. Williamson's answer beginning on line 11
10:46:19 24 with respect to his comments on your report.

10:46:27 25 THE COURT: What page is it?

10:46:29 1 MR. BEGGS: This is page 5252 of the
10:46:31 2 transcript.

10:46:31 3 BY MR. BEGGS:

10:46:32 4 Q. Just let us know when to scroll
10:46:34 5 up.

10:46:35 6 A. (Witness reading the document.)

10:47:14 7 Yeah, I understand what he's saying.

10:47:16 8 Q. And do you have any response to
10:47:18 9 what he testified?

10:47:19 10 A. Well, as far as I can tell what
10:47:21 11 he's saying is that he's agreeing with me
10:47:23 12 that -- because I provided numerous examples in
10:47:32 13 my earlier report that he read of how the
10:47:38 14 gist -- what he refers to as the "gist" of the
10:47:43 15 story can change over the course of time.

10:47:49 16 But in his view you can find examples
10:47:52 17 in which the gist does not change, and I don't
10:47:56 18 have any problem with that; that's all the more
10:47:59 19 reason not to carry an a priori assumption that
10:48:04 20 the gist of oral traditions does not change.

10:48:11 21 The fact that you can find many
10:48:15 22 examples where it does change, and these are --
10:48:19 23 I gave lengthy lists of examples in my own
10:48:23 24 experience, having worked in this field for over
10:48:26 25 30 years, where the gist of a story changes

10:48:32 1 demonstrably. There's no question.

10:48:37 2 I can show that by giving you the
10:48:39 3 tradition as told by a -- an Elder in the year
10:48:44 4 1980 and the same story told again by the same
10:48:50 5 individual in the year 2000 and the gist of the
10:48:54 6 story has changed entirely.

10:48:58 7 Now, mind you, there's also the
10:49:00 8 problem of how do you define the gist of a
10:49:04 9 story? And that in and of itself is also
10:49:09 10 problematic. But at the end of the day I think
10:49:12 11 it would be a serious mistake to -- from a
10:49:21 12 scientific vantage, to examine the historicity
10:49:27 13 of oral traditions based on an a priori
10:49:30 14 assumption that the gist of the story never
10:49:34 15 changes.

10:49:39 16 That is not a scientific conclusion
10:49:41 17 that -- or assumption that one should have in
10:49:46 18 this kind of scholarly inquiry.

10:49:51 19 Q. Thank you. And again I had
10:49:54 20 interrupted you. Were there any other
10:49:57 21 assumptions you wished to draw the court's
10:49:59 22 attention to?

10:50:03 23 A. Well, I just wanted to point out
10:50:05 24 in relation to the -- to what we were just
10:50:09 25 talking about, that is the -- I guess the

10:50:14 1 seventh assumption that I just talked about, and
10:50:20 2 that is that everyone -- both the storyteller
10:50:23 3 and the listener have the same understanding of
10:50:26 4 what the story is about and that this happens in
10:50:32 5 every generation.

10:50:34 6 I don't need to speculate on this at
10:50:36 7 all because I can demonstrate as a fact that
10:50:41 8 there are Anishinaabe traditions, including
10:50:48 9 variants of the story of Nanabush and his
10:50:52 10 journey, his first journey from the Atlantic
10:50:57 11 into the west, how there are references in some
10:51:06 12 traditions to waterfalls and in other traditions
10:51:09 13 there are no references to waterfalls. So
10:51:11 14 there's no question that there are differences
10:51:19 15 between these traditions, differences in details
10:51:22 16 which may -- where some might point to in making
10:51:32 17 euhemeristic claims about the historicity of the
10:51:37 18 traditions based on specific details.

10:51:49 19 Now, the other thing I wanted to say
10:51:51 20 is that -- also in relation to the same point is
10:51:53 21 that, you know, it's really fair to ask, given
10:51:58 22 that there are so many different versions of
10:52:00 23 this -- of these traditions, and here I'm
10:52:05 24 referring specifically to Nanabush and the Giant
10:52:08 25 Beaver and the dam stories, it's fair to ask

1 which variant of these traditions contains the
2 kernel of truth about the Nadoway Barrier.

3 Is it, for example, the story that was
4 recorded in 1923 which seems to refer to a dam
5 somewhere in the vicinity of the Nadoway Point
6 and Gros Cap?

7 Or is it the story that was recorded
8 two and a half centuries earlier which specifies
9 two dams, one of them at the rapids 28
10 kilometres downstream and another dam even
11 further downstream?

12 So what I'm suggesting is, is that if
13 you're going to cherry-pick these stories so
14 that you can create parallels or correspondences
15 with geological evidence, on what grounds do you
16 cherry-pick one story or variant and not
17 another? And I think one of the comments I
18 made, this might not be fatal to the argument,
19 but it certainly, I think, highlights the highly
20 problematic nature of the assumptions which are
21 made.

22 Overall I don't think these kinds of
23 claims really have any regard for how oral
24 traditions actually vary in time and space.

25 So those are a list of various

10:53:57 1 assumptions that are required to sustain the
10:54:00 2 deep-time oral traditions' claim and my reasons
10:54:03 3 why I think those assumptions are problematic
10:54:06 4 and should, at the very least, have been
10:54:08 5 considered and discussed.

10:54:15 6 Q. Thank you.

10:54:16 7 And the -- so for the different
10:54:22 8 deep-time oral tradition claims that we've
10:54:30 9 identified you've given a series of different
10:54:32 10 alternative possibilities. How does one weigh
10:54:36 11 between these different possibilities? Is there
10:54:38 12 any tools that one can use?

10:54:40 13 A. Well, the possibilities that
10:54:40 14 you're referring to are possibilities for
10:54:48 15 explaining the same data set; that is, a data
10:54:51 16 set that's been selected by someone in which on
10:54:54 17 the one side you've got Anishinaabe, particular
10:54:58 18 stories -- a particular selection of stories or
10:55:01 19 snippets of stories, and then on the other side
10:55:08 20 you have certain geological evidence. So that's
10:55:10 21 a data set and you postulate some kind of
10:55:16 22 parallels between them.

10:55:17 23 So the possibilities for explaining
10:55:19 24 that data set are many. One of them is an
10:55:26 25 explanation that I have collectively referred to

1 as the deep-time oral traditions' claim; that
2 is, that stories reflect, in some manner or
3 another, original eyewitness observations of the
4 events that happened between 8,200 years ago and
5 over 10,000 years ago. That's one possibility.

6 The many other possibilities that I
7 have referenced throughout my testimony must
8 also be considered. And I've -- throughout I've
9 conceded that the deep-time oral traditions'
10 claim is theoretically possible so I don't rule
11 it out.

12 But what we have here is a series of
13 possibilities and it's simply not tenable to put
14 them all on par with one another. This is not a
15 matter of what in academia might be referred to
16 as a question of equafinality, or a problem
17 where you've got a multiplicity of possibilities
18 and they're all of equal weight and you can't
19 really decide on which one is of greater weight.
20 That's not what we have here.

21 We can, in fact, place these various
22 possibilities on a scale of probability. And I
23 want to emphasize here more -- and this is
24 probably a point that is more important than
25 anything else that I have had to say today or

10:57:13 1 yesterday, and that is, in science and in
10:57:16 2 history we are confronted with endless
10:57:21 3 possibilities. And, yes, we have an interest in
10:57:24 4 possibilities, but what scientists and
10:57:32 5 historians are far greater interested in and
10:57:35 6 where they focus their attention is
10:57:38 7 probabilities not possibilities.

10:57:41 8 And so we necessarily need to look at
10:57:43 9 all of these different possibilities in terms of
10:57:47 10 their relative probability; and that's what I
10:57:49 11 tried to do in the conclusions of my original
10:57:57 12 report.

10:58:06 13 And one of the -- to answer your
10:58:08 14 question in short, one of the tools we have is
10:58:11 15 the principle of parsimony, which is a
10:58:20 16 commonly-used principle that is used in the
10:58:22 17 scientific method. It's also known as "Occam's
10:58:29 18 razor".

10:58:33 19 And basically what this principle is
10:58:35 20 is that, all things being equal, the simplest
10:58:45 21 explanation for anything is the one that
10:58:46 22 requires the fewest assumptions. Or, I should
10:58:54 23 say, the simplest explanation of a phenomenon
10:58:57 24 that requires the fewest assumptions is the
10:59:00 25 preferred explanation, until, of course, you can

10:59:07 1 disprove it in some fashion.

10:59:10 2 So let's say, for example, we apply
10:59:13 3 this principle to "Nanabush Grieves", the story
10:59:18 4 told by Rose Nadjiwon to Lenore Keeshig, who
10:59:23 5 then related it in these proceedings about the
10:59:28 6 salty tears. Well, one of the many
10:59:32 7 possibilities is that it's a work of fiction.
10:59:38 8 And that possibility is not one that I
10:59:41 9 necessarily came up with immediately, it's one
10:59:45 10 that the teller of the story came up with, Elder
11:00:00 11 Nadjiwon herself.

11:00:01 12 Now, on the one -- on the other hand
11:00:02 13 we can go through that lengthy list of
11:00:04 14 assumptions that I just detailed in this
11:00:06 15 morning's testimony. And we can go through that
11:00:09 16 list and we can say, well, the deep-time oral
11:00:11 17 traditions' claim requires all of those
11:00:12 18 different assumptions to hold in all the various
11:00:17 19 generations over thousands of years.

11:00:22 20 And here is a much simpler explanation
11:00:34 21 of the story of "Nanabush Grieves", which the
11:00:40 22 teller of the story herself held, and that is
11:00:48 23 that it's an entertaining story that is in the
11:00:51 24 nature of fiction.

11:01:01 25 And you apply the same kinds of

1 principles to mythical beavers, dams. And what
2 I want to stress is that those claims, in my
3 view, should not be rejected on the grounds that
4 they somehow posit an impossible scenario; they
5 don't. These are not impossible scenarios, but
6 they should be rejected because they defy
7 Occam's razor. These are not stories that
8 require such an incredible number of assumptions
9 to arrive at that possibility. There are so
10 many other possibilities which are not.

11 Considered and which I have
12 considered, which, in my view, are far more
13 probable. For example, the fact that
14 Anishinaabe peoples referred to giant beaver
15 dams in various places in their geography.

16 Sure, there's a possibility that
17 there's a kernel of truth that goes back to the
18 early Holocene Nadoway Barrier, or some other
19 geological features along anywhere within their
20 geography. But, in my view, it's far more
21 probable that these are etiological tales.
22 These are stories that people relate about their
23 environment in which they tell about the origins
24 of natural features using empirical evidence and
25 analogical reasoning.

11:03:11 1 And the reason why that's more
11:03:12 2 probable is because etiological tales are
11:03:15 3 ubiquitous throughout the world and we know how
11:03:19 4 they work; they're everywhere, and Anishinaabe
11:03:21 5 peoples had thousands of them.

11:03:28 6 The reason why ^Red Willows exist is
11:03:32 7 because at one point in Nanabush's travels he
11:03:38 8 burned his bum, wiped his hands, which became
11:03:43 9 bloody, and then walked through the fields with
11:03:49 10 his bloody hands, and from that time on you had
11:03:52 11 Red Willows.

11:04:00 12 There are countless etiological tales
11:04:02 13 like that. The beaver dam stories are that same
11:04:06 14 genre. To me that is a far -- that is on an
11:04:12 15 order of much higher probability than to
11:04:17 16 postulate that these stories are the result of
11:04:22 17 some kind of thousands-year-old memories of
11:04:25 18 memories through hundreds of generations of
11:04:27 19 human transmitters.

11:04:34 20 So, in my view, the most troubling
11:04:36 21 part of the deep-time oral traditions claim is
11:04:39 22 not that it chooses a possibility or an
11:04:47 23 explanation that requires a huge number of
11:04:50 24 assumptions, but that it doesn't even
11:04:52 25 contemplate the possibility that there are other

1 possibilities which might be on a higher level
2 of probability.

3 Q. I'd like to move now to a -- one
4 final area of questions, and that's simply the
5 approach that you've outlined and taken in your
6 research for this litigation is that unique
7 among academics?

8 A. Well, there are two answers to
9 that. It's unique in the sense that the vast
10 majority of my colleagues in my profession would
11 simply dismiss this outright and not bother with
12 it because it's -- not so much because it's --
13 it shouldn't be taken seriously, but, rather
14 because it's not worth the effort because they
15 already understand the problematic nature of the
16 claim.

17 That said, there are a number of my
18 colleagues who have taken it seriously and who
19 have, in fact, critiqued this -- not this
20 particular claim but similar claims of deep-time
21 oral traditions, particularly in Indigenous
22 North America but also in other parts of the
23 world.

24 The fact is, as I said at the
25 beginning of my testimony yesterday, there are

11:06:54 1 credentialed academics who have advanced these
11:06:58 2 kinds of claims. And so, not surprisingly, once
11:07:05 3 academics have done that -- well, generally if a
11:07:09 4 nonacademic does it then it becomes, you know,
11:07:11 5 it's not really worth the effort because it's,
11:07:14 6 you know, seen as being in the nature of what it
11:07:19 7 is, and that is pseudoscience and so they don't
11:07:22 8 bother with pseudoscience.

11:07:25 9 But if there are some academics who do
11:07:28 10 make the claims then you begin to have a -- an
11:07:32 11 academic literature that critiques these claims.

11:07:36 12 And so in that sense I'm not unique at
11:07:39 13 all because there is an academic literature
11:07:42 14 critiquing these kinds of claims, including by
11:07:47 15 both archeologists like Ronald Mason and oral
11:07:56 16 historiographers like David Henige.

11:08:07 17 Q. You mentioned Dr. Henige
11:08:09 18 yesterday. I'd like to call up a document, it's
11:08:26 19 SC1613. You said that Dr. Henige was an oral --
11:08:44 20 sorry, what did you say he was?

11:08:44 21 A. He's an oral historiographer.
11:08:49 22 His specialty is theories and methods when it
11:08:54 23 comes to the use of oral tradition in historical
11:08:56 24 reconstruction. He's written books about this,
11:08:59 25 one book back in the 1970s. So he's been

1 around a long time.

2 He originally was an -- interested in
3 oral traditions that were precolonial traditions
4 in Africa. So he started as an Africanist but
5 then he also began looking into Indigenous North
6 American context.

7 And so he's known all over the world
8 as somebody who's dealt with the issue of how
9 oral tradition is used in historical
10 reconstruction.

11 Q. Are you familiar with this
12 particular article?

13 A. Yes, I am. It was one of the
14 articles I introduced in my report.

15 Q. Your Honour, I'd like to make
16 this the next exhibit. It's an article entitled
17 "Impossible to Disprove Yet Impossible to
18 Believe" by David Henige.

19 THE COURT: Mr. Registrar.

20 THE REGISTRAR: Exhibit Number 4503.

21 EXHIBIT NO. 4503: Article entitled
22 "Impossible to Disprove Yet Impossible
23 to Believe", authored by David Henige.

24 BY MR. BEGGS:

25 Q. If I could go to the second-last

1 page, which is page 233 of the document and page
2 108 of the PDF?

3 THE COURT: What page of the document?

4 MR. BEGGS: It's page 233 of the
5 document.

6 BY MR. BEGGS:

7 Q. And in this paragraph beginning:

8 "If history really does repeat
9 itself [...]"

10 In the middle of the paragraph he
11 says:

12 "I chose the title of this paper
13 specifically to concede that the case
14 I offer is undemonstrable in most
15 cases but also to emphasize that the
16 opposite is no less so, although,
17 overall and in context, probabilities
18 based on the available evidence favour
19 the skeptical argument decisively."

20 Now, yesterday you defined your
21 approach with skepticism. Do you know if --
22 what -- Dr. Henige's skepticism, is it the same
23 as yours?

24 A. Well, I think what -- if you read
25 this in the context of the whole article what

11:11:44 1 he's referring to is that one needs to approach
11:11:48 2 these claims with a skeptical methodology or
11:11:51 3 approach.

11:11:56 4 So, as I said earlier, skepticism is
11:12:00 5 really an approach to claims or it's a
11:12:02 6 methodology, it's not a position. And in that
11:12:07 7 sense he's basically saying the same thing as I
11:12:10 8 am.

11:12:11 9 What he did in this article -- which
11:12:13 10 is very, very long -- it's well over 100
11:12:15 11 pages -- is he looked at many of these claims of
11:12:22 12 deep-time oral traditions in Indigenous North
11:12:26 13 America and -- or in the scholarship about
11:12:36 14 Indigenous North America. And he looked at --
11:12:38 15 just as I did he looked at all the various
11:12:42 16 possibilities and the assumptions underlying the
11:12:44 17 claims. And he basically favours the -- what he
11:12:52 18 calls the "skeptical argument" decisively even
11:12:56 19 though in many cases you really can't
11:13:00 20 demonstrate any of this outright one way or the
11:13:03 21 other.

11:13:04 22 And I should emphasize this again, the
11:13:07 23 reason why he finds the whole thing impossible
11:13:11 24 to disprove is because how do you know or how
11:13:19 25 would you know whether any of these assumptions

11:13:24 1 actually hold when we have -- none of us has any
11:13:31 2 direct access to the past?

11:13:37 3 So you can only talk about
11:13:39 4 probabilities. And the probabilities lead you
11:13:41 5 to being skeptical about the 9- or
11:13:50 6 10,000-year-old eyewitness kernels of truth
11:13:57 7 having survived into modern times. It doesn't
11:14:00 8 mean that it's impossible that it happened, it
11:14:09 9 simply means that you need to approach this
11:14:17 10 skeptically and with an eye on the probabilities
11:14:20 11 of one scenario happening over another.

11:14:34 12 Q. If I could move to a different
11:14:35 13 page of the article? It's page 226 of the text,
11:14:37 14 which I believe would be 101 of the PDF. Yes.
11:14:48 15 So if we can scroll down to the paragraph
11:14:51 16 beginning, "Scholars"? And if I could ask you
11:14:53 17 to the read that paragraph and then the first
11:15:09 18 paragraph on the next page.

11:15:10 19 A. "Scholars might seem to have --".

11:15:10 20 Q. Sorry, I didn't mean out loud.
11:15:10 21 You can read it to yourself.

11:16:12 22 A. Oh, I'm sorry.

11:16:12 23 (Witness reading the document).

11:16:12 24 Yes.

11:16:13 25 Q. I'd just like to ask you, how do

1 you find -- does Dr. Henige's approach compare
2 to yours?

3 A. Well, for the most part I agree
4 with his approach. I may not actually go quite
5 as far as he does perhaps because I'm a little
6 more conservative, and I am more willing to
7 accept the possibility of deep-time oral
8 tradition but -- or at least the possibility.
9 It all depends on the context of course. In
10 some cases we can actually be very -- how should
11 I put it? Confident in our conclusions.

12 I mentioned earlier in my testimony,
13 for example, that there are traditions about
14 these large beasts in the Midwest among the
15 Indigenous populations there. And we know as a
16 fact that those traditions about these creatures
17 could not have come about by actually
18 encountering them because the fossilized remains
19 of these creatures suggest that they were here
20 millions of years before any human was. So in
21 that kind of context you can be quite certain.

22 I think that in this particular
23 instance with the giant beavers and dams, and so
24 forth, as I said earlier, there is no reason to
25 question the assumption that humans and such

1 creatures coexisted at some point in Ontario's
2 early history.

3 So that's a slightly different kind of
4 deep-time oral tradition claim. It's not the
5 kind, for example, that Vine Deloria has
6 propounded, and that is, is that humans were
7 coexistent with dinosaurs because the Elders
8 talk about dinosaurs.

9 So there are nuances depending on how
10 the claim is made from place to place so we
11 can't really generalize that much.

12 But, on the other hand, you know, I
13 completely agree with Henige's approach; and
14 that is, we need to be highly skeptical in terms
15 of our approach to the claim and look at all the
16 various different possibilities. And in my view
17 you can actually come up with more probable
18 scenarios.

19 Henige didn't have, for example, the
20 advantage that I had of examining etiological
21 tales as a possibility. And I think the fact of
22 an etiological tale, Dorothy Vitaliano's second
23 type of geomythology, the fact that they exist
24 can make it easier for us to talk about what is
25 more probable.

1 Sometimes Henige gives me the
2 impression that, you know, we're never really
3 going to find out one way or the other so at the
4 end of the day everything is inconclusive. But
5 if we know more about how these traditions
6 operate within Indigenous contexts, how they're
7 used, how they originate, I think we can come
8 closer to probabilities.

9 So my short answer is, is I agree in
10 general with almost everything he has to say,
11 although sometimes he takes it a little further
12 even than I would.

13 Q. And I think the other name you
14 mentioned was an archeologist by the name of
15 Mason, is that correct?

16 A. Yes.

17 Q. If I could call up SC -- sorry,
18 S1130. Can we go to the first page? No, sorry,
19 not of the chapter but page 1 of the document.

20 Is this the work that you had in mind?

21 A. Yes. It's another one of the
22 sources that I used, Ronald Mason. I actually
23 know him personally because he consulted with me
24 prior to writing this book and so I knew it was
25 coming out, and it came out quite some time ago.

1 But he's an archeologist who is
2 perhaps, aside from this, best known for his
3 work on the archeology of the Great Lakes
4 region.

5 Q. If I could go to page 150, which
6 I think was around page 70 of the PDF? No.
7 Page 80 maybe. Yes.

8 Since it's short I'll just read it.
9 This chapter begins with:

10 "With few exceptions", and some
11 citations, "archeologists today reject
12 Indian claims that their oral
13 traditions preserve knowledge often
14 described as memories of extinct
15 animals and geological events that
16 date back to the late Pleistocene
17 times some 10,000 years ago."

18 What is the late Pleistocene?

19 A. Well, that's the terminal end of
20 the ice age, the last part of the ice age. The
21 Pleistocene is during the ice age but we're
22 talking about the end of the --

23 Q. Okay. So we've mostly been
24 talking about the early Holocene? Is that --

25 A. Yes. So the Pleistocene is

11:24:36 1 basically the end of the period; and then you've
11:24:40 2 got the early Holocene which -- I know it
11:24:52 3 becomes confusing because some authors refer to
11:24:54 4 the Pleistocene as continuing into the period
11:24:57 5 when humans started -- or Paleo-Indians started
11:25:01 6 emerging in the record over 10,000 years ago.

11:25:06 7 But geologists refer to the early
11:25:10 8 Holocene as starting before that. So, in any
11:25:14 9 event, if you use the term 10,000 years ago
11:25:18 10 that's more or less in the same ballpark.

11:25:21 11 Q. So is -- to your knowledge is
11:25:26 12 Dr. Mason's assertion here accurate about what
11:25:33 13 archeologists do or believe?

11:25:35 14 A. Well, yes. As I indicated
11:25:37 15 earlier, the vast majority of them don't even
11:25:43 16 look into it in any detail because their
11:25:50 17 experience has already led them to conclude that
11:25:54 18 it's not really worth the effort.

11:25:58 19 On the other hand Mason, like Henige,
11:26:06 20 is of the opinion that we should at least take
11:26:10 21 these seriously enough to produce some lengthy
11:26:13 22 articles or books on a critique of them.

11:26:18 23 It's sort of similar to what happened
11:26:20 24 in the United States and Great Britain when it
11:26:26 25 came to evolutionism and creationism. You know,

11:26:31 1 there's a -- there's a long history of
11:26:40 2 creationist views, particularly in the United
11:26:42 3 States, which is contrary to the science
11:26:50 4 curriculum in schools and which, you know, is
11:26:54 5 contrary to biological understanding of human
11:27:00 6 origins.

11:27:01 7 And there are different ways in which
11:27:06 8 scholars approach that. There are some scholars
11:27:10 9 who simply say, you know, this is not even
11:27:12 10 worth -- it's not worth it because, you know,
11:27:15 11 why even get into that?

11:27:18 12 For example, Richard Dawkins, who is
11:27:22 13 perhaps the best well-known of the British
11:27:26 14 biologists, will never get involved in this. He
11:27:30 15 doesn't want to debate creationists.

11:27:37 16 But there are many biologists in the
11:27:39 17 United States who say, well, we should take this
11:27:41 18 seriously enough to confront it. And so they
11:27:43 19 publish critiques of it.

11:27:45 20 And similarly here, you know, you've
11:27:48 21 got a great number of my colleagues who just
11:27:52 22 will not even get into this by choice; but
11:28:01 23 others, like Mason, who address it, in this case
11:28:06 24 in an entire book, although this chapter is the
11:28:11 25 one that relates specifically to the

11:28:13 1 remembrances of Pleistocene or early Holocene
11:28:20 2 events.
11:28:21 3 Q. Thank you.
11:28:26 4 MR. BEGGS: Your Honour, I'd like to
11:28:28 5 make this the next exhibit, it's a book by
11:28:31 6 Ronald Mason, "Inconstant Companions: Archeology
11:28:35 7 and North American Indian Oral Traditions".
11:28:38 8 THE COURT: Published when?
11:28:41 9 MR. BEGGS: 2006.
11:28:42 10 THE COURT: Mr. Registrar.
11:28:43 11 THE REGISTRAR: Exhibit Number 4504.
11:28:45 12 EXHIBIT NO. 4504: Book by Ronald
11:28:46 13 Mason entitled "Inconstant Companions:
11:28:46 14 Archeology and North American Indian
11:28:46 15 Oral Traditions", published 2006.
11:28:47 16 BY MR. BEGGS:
11:28:48 17 Q. Thank you, Dr. von Gernet, those
11:28:49 18 are my questions.
11:28:50 19 MR. BEGGS: Thank you, Your Honour.
11:28:57 20 THE COURT: Now, we might as well take
11:28:58 21 our morning break at this time.
11:28:59 22 Before we do so, sir, I know you've
11:29:02 23 testified before but I wish to remind you that
11:29:05 24 during the entirety of the rest of your
11:29:08 25 testimony, commencing immediately, you must

1 occupy yourself outside of the witness box on
2 anything else but the subject matter of your
3 testimony in this lawsuit, which means really
4 you should do nothing at all about it except
5 during your evidence.

6 I suspect you're familiar with that,
7 sir?

8 THE WITNESS: Yes, I am, and thank you
9 for the reminder.

10 THE COURT: So consider that to
11 commence now. I have permitted expert witnesses
12 on both sides to still be around the lawyers for
13 purposes of things like getting cups of coffee,
14 and so on, because these are professionals and
15 they will not engage you. So I've permitted
16 that. But other than whatever your preferred
17 other topics are keep it to those other things.

18 THE WITNESS: The Raptors are a good
19 subject.

20 THE COURT: I was going to say, sir, I
21 mean, for a good part of this trial we were able
22 to talk about the Raptors but not lately.
23 That's a popular topic here for certain.

24 So take 20 minutes at this time.

25 Are you all set, counsel?

11:30:28 1 MS. PELLETIER: I am, Your Honour.

11:30:30 2 THE COURT: Thank you, Ms. Pelletier.

11:30:30 3 -- RECESSED AT 11:30 A.M. --

11:30:30 4 -- RESUMED AT 11:55 A.M. --

11:55:51 5 THE COURT: Yes, go ahead,

11:55:52 6 Ms. Pelletier.

11:55:53 7 MS. PELLETIER: Thank you, Your

11:55:54 8 Honour.

11:55:54 9 CROSS-EXAMINATION BY MS. PELLETIER:

11:55:54 10 Q. Good morning, Dr. von Gernet.

11:55:56 11 A. Good morning.

11:55:57 12 Q. My name is Renée Pelletier, I'm

11:55:59 13 counsel for the plaintiff and I'll be asking you

11:56:01 14 some questions this morning.

11:56:03 15 A. Pleased to meet you.

11:56:04 16 Q. Nice to meet you as well.

11:56:06 17 I want to begin by talking a little

11:56:07 18 bit about what you said about the scientific

11:56:09 19 approach.

11:56:10 20 Now, you've mentioned a number of

11:56:11 21 times today and yesterday the importance of

11:56:14 22 taking a scientific approach to evaluating the

11:56:18 23 historical value of oral traditions, correct?

11:56:27 24 A. Yes, if oral traditions are being

11:56:32 25 used for historical reconstruction and are

11:56:36 1 claimed to have historicity.

11:56:40 2 Q. Thank you for that clarification.

11:56:42 3 So I want to confirm with you what
11:56:45 4 that scientific approach is. Now, when you're
11:56:48 5 talking about a scientific approach is that the
11:56:52 6 same thing as the scientific method?

11:56:57 7 A. No. Generally the scientific
11:57:03 8 method in its singular form refers to what in
11:57:12 9 philosophical terms is known as the
11:57:13 10 "hypothetico-deductive method"; that is, you
11:57:20 11 formulate hypotheses and test those hypotheses
11:57:23 12 and then you deduce some form of conclusion from
11:57:30 13 your testing. That's the scientific method as
11:57:38 14 described in most of the natural sciences, for
11:57:40 15 example.

11:57:46 16 What I'm referring to is science writ
11:57:49 17 large. Science writ large is not exclusively
11:57:55 18 the hypothetico-deductive method, rather it is
11:57:59 19 an approach to understanding the real world,
11:58:03 20 which is rigorous, skeptical, evidence-driven;
11:58:12 21 and while it recognizes the presence of
11:58:21 22 subjectivities it also postulates that
11:58:28 23 objectivity is a -- something one should strive
11:58:32 24 for.

11:58:36 25 Q. Do you agree then, in talking

1 about the scientific method, if one were to
2 apply the scientific method to oral history,
3 oral traditional stories that purport to retain
4 a memory of the past, that you would develop a
5 hypothesis and then you would test that
6 hypothesis to see if it could be disproven?

7 I'm going to suggest that that appears
8 to be what you were doing. You are looking at a
9 hypothesis of -- if you take any of the -- what
10 you call "deep-time stories" from the
11 plaintiffs, and you assume the hypothesis is
12 that they preserve a memory of a historical
13 event, you -- you would look to disprove that,
14 is what you would do if you were using the
15 scientific method. Would you agree with that?

16 A. Well, that's not actually what I
17 did. And, as I said, I look at science in a
18 broader sense and it's not specific to the
19 hypothetico-deductive method.

20 My archeological training clearly
21 provided me with the skills to engage in the
22 hypothetico-deductive method and I was
23 encouraged to do so early in my career, but even
24 archeology does not always proceed by what you
25 would refer to as a scientific method.

1 And certainly not -- I wouldn't
2 characterize what I did in this case as being
3 the hypothetico-deductive method. It's -- I
4 didn't consciously go out to produce a
5 hypothesis and then try and disprove it or test
6 it in any way. I did as what I described in my
7 testimony over the last two days.

8 Q. Would you agree with me that in
9 order to disprove a hypothesis you would need to
10 test it and find evidence that actually
11 disproves it before you can completely discard
12 it?

13 A. Well, I would never completely
14 discard. As I said, I still entertain the
15 possibilities.

16 I don't think there is evidence that's
17 sufficient to be able to disprove even the
18 historicity of the deep-time oral traditions'
19 claim, rather we can only speak of possibility
20 and probabilities. It's not a question of
21 disproving. We can neither prove nor disprove
22 in this instance.

23 I suppose there are means by which you
24 can -- there are means by which you could, I
25 suppose, find evidence or formulate arguments

12:02:15 1 that would function towards a conclusion that a
12:02:27 2 claim cannot be disproven.

12:02:33 3 Q. I wonder if you'd agree with me,
12:02:36 4 to your comment just now that you can't disprove
12:02:39 5 or prove deep-time, that in some instances you
12:02:42 6 could disprove?

12:02:45 7 You gave examples today of if you had
12:02:48 8 an oral tradition that purported to contain the
12:02:52 9 historical fact of being -- roaming the earth
12:02:56 10 with dinosaurs; that that hypothesis, that this
12:03:00 11 story about the time when we were roaming the
12:03:03 12 earth with dinosaurs, that could be disproven
12:03:06 13 because there's no -- we know that humans and
12:03:07 14 dinosaurs weren't on earth at the same time?

12:03:10 15 A. Yes, that would be an example of
12:03:11 16 what I'm talking about; is there may be means in
12:03:19 17 some cases to disprove something to the
12:03:21 18 satisfaction of the vast majority of people.

12:03:24 19 You're not going to be able to
12:03:25 20 convince everyone, but -- because, you know,
12:03:34 21 there are still some people who do not believe
12:03:37 22 that the chronological sciences are accurate so
12:03:43 23 that's why they can claim that dinosaurs and
12:03:47 24 humans coexisted, right?

12:03:50 25 So -- but from a strictly scientific

12:03:52 1 vantage I think you can disprove a claim like
12:03:55 2 the one that you've just articulated. And that
12:03:57 3 is if -- you know, if you find somebody claiming
12:04:01 4 that dinosaurs and humans coexisted, which Vine
12:04:07 5 Deloria claimed, you can disprove that through a
12:04:15 6 pretty clear record.

12:04:16 7 Q. So you said -- I believe
12:04:19 8 yesterday and this morning you said a number of
12:04:21 9 times that you agree that there's a theoretical
12:04:27 10 possibility that the deep-time stories told by
12:04:32 11 Lenore Keeshig could preserve memories of
12:04:35 12 historical events?

12:04:36 13 A. Yes.

12:04:37 14 Q. And would you agree with me -- or
12:04:40 15 perhaps I'll put it another way. Is what you
12:04:44 16 were also saying is it is an acknowledgement
12:04:47 17 that you have not found evidence to disprove
12:04:50 18 that hypothesis?

12:04:55 19 A. No, I have not found evidence to
12:04:57 20 disprove it definitively; I've only found
12:05:01 21 evidence that places it on a low scale of
12:05:05 22 probability.

12:05:07 23 Q. So we'll get to that a little bit
12:05:09 24 later, but I just wanted to have a better
12:05:11 25 understanding of the scientific approach to

1 testing oral tradition.

2 You've mentioned that there is a
3 debate, a scholarly debate about the approach
4 and I wanted to have a better understanding of
5 yours, and I think I have that so thank you.

6 I want to now discuss what you said
7 about etiological or explanatory myths.

8 Now, you've acknowledged that oral
9 traditions can be used to explain aspects of
10 territory, and this is what you've referred to
11 as etiological myths, is that right?

12 A. Well, etiological narratives are
13 more than about territory, they're about the
14 origins of many different things, such as --
15 such as mentioned earlier today the origins of
16 the Red Willow. There's, you know, the origins
17 of the -- why rabbits look the way they look.
18 There's all kinds of stories so it's not just
19 the landscape.

20 But certainly origins of natural
21 features of the landscape are one of the very
22 common features of etiological narratives.

23 THE COURT: I want to make sure I
24 heard you. Did you say "rapids" or "rabbits"?

25 THE WITNESS: Rabbits as in the

12:06:41 1 animal.

12:06:42 2 THE COURT: The animal. Got it.

12:06:43 3 THE WITNESS: Yes.

12:06:43 4 THE COURT: Thank you.

12:06:46 5 BY MS. PELLETIER:

12:06:46 6 Q. So in this case would you agree
12:06:49 7 that it is plausible -- I think you'll agree to
12:06:52 8 this -- that the Saugeen Anishinaabe have these
12:06:54 9 stories, the stories told by Lenore Keeshig, to
12:06:58 10 explain the geological formations in their
12:07:01 11 territory? I think that is one of your
12:07:04 12 alternate explanations for the existence of
12:07:07 13 these stories, is that right?

12:07:11 14 A. I have no reason to believe why
12:07:13 15 the Anishinaabe of the Saugeen or Bruce
12:07:18 16 Peninsula are any different from other
12:07:21 17 Anishinaabe with respect to the telling of
12:07:24 18 etiological narratives.

12:07:27 19 Q. And having looked at some of the
12:07:29 20 evidence in this trial, would you agree that if
12:07:33 21 you assume that the stories are of an
12:07:36 22 etiological nature that they are stories about a
12:07:39 23 territory where the plaintiffs believe they have
12:07:42 24 always lived?

12:07:50 25 A. Well, I -- an etiological

12:07:55 1 narrative that is about features of a local
12:07:58 2 landscape is not in and of itself evidence of
12:08:04 3 any kind of long-term association with that
12:08:08 4 territory.

12:08:09 5 They're in fact etiological narratives
12:08:13 6 about areas that are vast. You know, there's
12:08:18 7 that one tale that I gave, one of the variants
12:08:21 8 in my report where, you know, the beaver has its
12:08:24 9 lodge at Thunder Bay and ends up dead at
12:08:30 10 Montreal; and all along the way there are
12:08:33 11 etiological references to the origins of certain
12:08:37 12 features. That's not the territory of any one
12:08:39 13 individual nation, it's the regular route by
12:08:47 14 which many different First Nations travelled.

12:08:49 15 And so etiological narratives are not
12:08:53 16 necessarily connected to a Nation's land or
12:08:57 17 territory, they're also told about areas outside
12:09:02 18 of that.

12:09:05 19 Now, if you're asking whether
12:09:06 20 Anishinaabe peoples believed their narratives
12:09:13 21 about geological or other features are evidence
12:09:17 22 of their ancient connection to those lands, that
12:09:20 23 may well be but that's a different question.

12:09:23 24 Q. Would you agree with me that,
12:09:24 25 sir, that having etiological stories, and

1 particularly a number of them, could indicate a
2 long-time, historical connection with the
3 territory?

4 A. It could, but it could also not.
5 It's not necessarily the case.

6 Etiological narratives arise not
7 necessarily because people want stories about
8 landscapes they have lived or travelled in for
9 great lengths of time, but simply because they
10 want stories about their landscape irrespective
11 of how long they'd been there.

12 Q. But would you agree that just
13 because it's an etiological myth or an
14 explanatory myth that doesn't mean that it's
15 recent?

16 A. That the -- I'm not sure what you
17 mean by "recent". The story itself is --

18 Q. That's right. Even if it's not
19 indicative of deep-time --

20 A. Yes.

21 Q. -- but rather is an explanatory
22 myth, that by its nature doesn't mean it's a
23 recent development?

24 You could have an explanatory myth
25 that, I would suggest, was first told hundreds

1 of years ago, perhaps even thousands of years
2 ago. Would you not agree with that?

3 A. Well, I would agree that
4 explanatory or etiological tales are not
5 necessarily invented every time there's a new
6 feature that needs to be told the story about.

7 So in that sense, yes, you know, some
8 of these stories associated with particular
9 features may be very old; I don't have any
10 problem with that but it is not necessarily the
11 case that they are old.

12 Q. Thank you. Would you agree with
13 me that when an oral tradition or history
14 is told the teller may sometimes assume that
15 their audience has certain knowledge?

16 A. I'm sorry, can you repeat that?

17 Q. Would you agree with me that when
18 on oral tradition or history is told that the
19 teller may assume their audience has certain
20 knowledge?

21 A. Yes, of course.

22 Q. So, in other words, the teller
23 may not bother to explain aspects that they
24 think their audience is familiar with or aspects
25 that they think their audience will understand

12:12:06 1 without explanation?

12:12:08 2 A. Yes, I think that's reasonable.

12:12:10 3 Q. And that some of those
12:12:11 4 unexplained aspects could be cultural, would you
12:12:14 5 agree with that?

12:12:16 6 A. Yes.

12:12:17 7 Q. So some of the meaning of the
12:12:19 8 oral tradition or history could be implicit and
12:12:23 9 obvious to the members of a community and so
12:12:25 10 would remain unspoken?

12:12:28 11 A. Yes, I think that's fair to say.

12:12:31 12 Q. And would you also agree that the
12:12:33 13 cultural context of an oral tradition or history
12:12:37 14 can be important to have any complete
12:12:40 15 understanding of it?

12:12:47 16 A. I think that context, as much as
12:12:50 17 we can reconstruct it, is always important.
12:12:53 18 Which is why I -- in part why my report is
12:12:59 19 350-pages long.

12:13:01 20 You cannot simply take one story or
12:13:04 21 one snippet and try to get meaning from it, you
12:13:09 22 have to place it in its proper context. And
12:13:13 23 that -- to the extent that it's possible that
12:13:15 24 might include having to place it in its cultural
12:13:17 25 context.

12:13:19 1 Q. You've already acknowledged --
12:13:20 2 this was in your voir dire -- that you don't
12:13:23 3 have a lot of experience doing fieldwork with
12:13:26 4 Indigenous communities, that's correct?

12:13:30 5 A. Well, I've done oral history
12:13:32 6 interviews in Indigenous communities, but my
12:13:37 7 main work has been involving claims made by
12:13:49 8 various interests in support of various
12:13:54 9 arguments, which are -- the evidence for which
12:13:58 10 has already been tendered in written form and
12:14:03 11 has already been transcribed.

12:14:10 12 So, you know, I don't go out into the
12:14:12 13 communities and actually record these things
12:14:14 14 myself.

12:14:15 15 Q. So no fieldwork with the Saugeen
12:14:17 16 Ojibwe Nation?

12:14:20 17 A. That's fair to say, yes.

12:14:21 18 Q. So it's possible then that you
12:14:23 19 could have misunderstood some of the cultural
12:14:25 20 context of the oral traditions that you have
12:14:27 21 opined on, would you agree?

12:14:31 22 A. Well, that's always possible
12:14:35 23 because, you know, I am an outsider. And there
12:14:41 24 are certain disadvantages but also advantages to
12:14:44 25 being an outsider.

1 I would have hoped and would have
2 thought that any context that it was necessary
3 to understanding the historicity of the oral
4 traditions, which were tendered as evidence,
5 would have already been produced in the original
6 2013, or whatever date it was, report by Lenore
7 Keeshig, who originally drew attention to these
8 materials.

9 Q. Would you agree that to the
10 extent that you may have misunderstood some of
11 the cultural context that it could impact your
12 interpretation of some of the oral traditions?

13 A. I think that's always a
14 possibility, that cultural context, or a better
15 understanding of cultural context can lead to
16 other insights into the meanings of stories.

17 Q. I'd like to bring up the
18 transcript for what I believe is day 2 of this
19 trial, April 29, 2019. It's the testimony of
20 Karl Keeshig.

21 Now, Dr. von Gernet, you spoke about
22 the migration story or stories, plural, and you
23 seem to have interpreted the migration story to
24 be about a literal migration of Anishinaabe
25 people and their ancestors.

12:16:28 1 So I'd like to give you an opportunity
12:16:29 2 to review what Karl Keeshig, who is -- I'm sure
12:16:33 3 you're familiar, an Elder for the plaintiffs and
12:16:36 4 who testified in this trial about that story.
12:16:39 5 I'd like to give you an opportunity to read what
12:16:42 6 he says.

12:16:43 7 So we'll begin at page 217 of this
12:16:46 8 transcript, please. I'll give you a few
12:16:54 9 moments. Dr. von Gernet. Please let me know
12:16:58 10 when you'd like me to move the page.

12:17:00 11 A. So where do you want me to start?

12:17:03 12 THE COURT: It seems to start on the
12:17:04 13 previous page.

12:17:06 14 BY MS. PELLETIER:

12:17:07 15 Q. This was where I had intended,
12:17:08 16 but if you want to see anything before that,
12:17:11 17 Dr. von Gernet, let me know. The question is,
12:17:13 18 "So as the migration was taking place [...]"

12:17:20 19 THE COURT: Well I see, I assume, what
12:17:20 20 the witness sees. And since you can't see
12:17:21 21 what's above it he can't really tell you whether
12:17:22 22 he wants to read it because he can't see it.

12:17:31 23 MS. PELLETIER: Fair enough.

12:17:31 24 THE COURT: What was it that we were
12:17:31 25 looking at a minute ago? Okay, at the top of

12:17:31 1 the page.

12:17:36 2 BY MS. PELLETIER:

12:17:37 3 Q. So I believe yesterday,
12:17:37 4 Dr. von Gernet, you talked about the dating of
12:17:39 5 the migration story?

12:17:40 6 A. Yes.

12:17:41 7 Q. Would you like to see the
12:17:42 8 previous page? My question was --

12:17:50 9 THE COURT: Well, I'm at least going
12:17:51 10 to need to see it. Because --

12:17:52 11 MS. PELLETIER: Sure.

12:17:52 12 THE COURT: -- you're asking about
12:17:54 13 migration, which comes up in a partial answer
12:17:59 14 where I can't see the entire sentence.

12:18:12 15 MS. PELLETIER: Sorry, that was an
12:18:13 16 extract so we'll pull up the actual transcript.
12:18:16 17 Sorry.

12:18:18 18 THE COURT: That's all right.

12:18:21 19 BY MS. PELLETIER:

12:18:22 20 Q. Perhaps we can begin with page
12:18:23 21 216. There we go.

12:18:54 22 A. (Witness reading the document.)

12:18:54 23 Yes.

12:20:46 24 Q. Okay. And then the next page,
12:20:46 25 please.

12:20:46 1 A. (Witness reading the document.)

12:20:46 2 Q. Based on this, Dr. von Gernet,
12:20:48 3 would you agree that Mr. Keeshig is explaining
12:20:51 4 the migration story as being a migration of the
12:20:54 5 Midewiwin culture?

12:20:56 6 THE COURT: I didn't hear that.

12:20:57 7 BY MS. PELLETIER:

12:20:58 8 Q. Based on this, would you agree
12:20:59 9 that Mr. Keeshig explains the migration story as
12:21:01 10 being a migration of the Midewiwin culture?

12:21:11 11 A. Well, he responds "yes" to a
12:21:12 12 question about whether the Midewiwin
12:21:17 13 tradition -- whether it is the Midewiwin
12:21:23 14 tradition that moved more than a Nation, so in
12:21:25 15 that sense he is saying "yes".

12:21:29 16 He's dating it to -- he's clearly
12:21:33 17 giving it historicity in the sense that he's
12:21:36 18 dating it to a period prior to 1492 on the
12:21:40 19 grounds that, you know, prior to that time
12:21:43 20 nobody knew that the earth was round; although
12:21:48 21 here I remind everyone that the Greeks knew the
12:21:51 22 earth was round thousands of years earlier, but
12:21:56 23 that's, I suppose, a minor point.

12:21:59 24 It appears that he is here deviating
12:22:03 25 from the Benton-Banai understanding; which was

12:22:06 1 clearly that it was a movement of the people
12:22:08 2 themselves. In fact, almost all of the
12:22:11 3 Midewiwin stories about the migration from the
12:22:16 4 Atlantic Coast to the West are given by
12:22:29 5 individuals who believe in the historicity of an
12:22:34 6 actual migration of people rather than a
12:22:38 7 tradition.

12:22:39 8 I'm not sure what the difference here
12:22:41 9 really is, unless you -- he's saying that the
12:22:46 10 people are there already and it's only the
12:22:49 11 religion that's moved.

12:22:51 12 Q. I would suggest to you, and one
12:22:53 13 interpretation of this is that people would have
12:22:55 14 moved with the tradition. So there was an
12:22:58 15 actual migration of people moving, spreading the
12:23:00 16 word of the Midewiwin faith but that they
12:23:03 17 weren't moving into unoccupied land.

12:23:07 18 Would you agree that that -- do you
12:23:08 19 take that from what is -- what is said by
12:23:11 20 Mr. Keeshig here?

12:23:18 21 A. Well, that could be one
12:23:20 22 interpretation of what he believes. It's not
12:23:22 23 the interpretation that's given by other Elders
12:23:25 24 who have told this same story.

12:23:28 25 I never got that impression in either

12:23:33 1 the story as related by William Warren or by
12:23:36 2 Elder Benton-Banai.

12:23:40 3 Q. So Elder Eddie Benton-Banai's
12:23:44 4 interpretation of this story was put to ^Karl in
12:23:48 5 his examination. So I'd like to pull up that
12:23:51 6 portion of the transcript to give you a moment
12:23:53 7 to review that. And that is on the next day, so
12:23:57 8 day 3. If I could have the transcript for April
12:24:03 9 30th, please?

12:24:08 10 We'll begin at page 376. Actually,
12:24:25 11 let's do 375. This is on re-examination
12:24:28 12 beginning at the bottom of the page.

12:25:21 13 A. (Witness reading the document.)

12:25:21 14 Yes.

12:26:44 15 Q. So you'd agree here that what
12:26:47 16 Karl is saying is that to the extent Eddie
12:26:51 17 Benton-Banai may have at one point told the
12:26:53 18 story as a literal migration, he is currently of
12:26:57 19 the view that it was not a mass migration into
12:26:59 20 vacant land?

12:27:00 21 MR. OGDEN: Your Honour --

12:27:01 22 THE COURT: Mr. Ogden?

12:27:03 23 MR. OGDEN: We have Mr. Keeshig's
12:27:04 24 evidence, and I don't see how it's helpful to
12:27:07 25 the court to have this expert witness giving his

12:27:10 1 evidence about what Mr. Keeshig intended, or
12:27:14 2 ought to have said, or intended, or might have
12:27:17 3 said in his testimony.

12:27:19 4 So my objection is that the question
12:27:27 5 is seeking speculative and irrelevant testimony
12:27:33 6 from the witness.

12:27:43 7 THE COURT: Just before you respond to
12:27:44 8 that, Ms. Pelletier, can we go back to page 376
12:27:47 9 of the transcript? Stop there.

12:28:05 10 And what is your submission, counsel?

12:28:08 11 MS. PELLETIER: I wasn't asking what
12:28:10 12 he thought Karl meant. I was asking if he
12:28:12 13 agreed that that's what Karl said; that Karl
12:28:14 14 said that Eddie Benton-Banai's --

12:28:21 15 THE COURT: Well -- and how does that
12:28:23 16 help you?

12:28:26 17 MS. PELLETIER: My next question,
12:28:27 18 which perhaps I'll ask it so you can understand
12:28:30 19 why -- where I'm going with this, Your Honour.

12:28:33 20 BY MS. PELLETIER:

12:28:33 21 Q. I'm wondering, Dr. von Gernet, if
12:28:35 22 you would agree that based on this transcript
12:28:37 23 that you have misinterpreted the story of the
12:28:39 24 migration and you have taken it out of its
12:28:42 25 intended cultural context?

12:28:44 1 THE COURT: Okay. So thank you for
12:28:45 2 that.

12:29:01 3 Just before Mr. Ogden replies, I'm
12:29:01 4 struggling, Ms. Pelletier, for a couple of
12:29:03 5 reasons. I remember this evidence. And as I
12:29:08 6 remember the witness began by specifically and
12:29:08 7 fairly stating that he had not asked the author
12:29:13 8 of the book about this. And, frankly, even if
12:29:15 9 he had as you know that hearsay evidence is
12:29:18 10 problematic.

12:29:24 11 So that he had not asked him about it
12:29:26 12 is the first problem; that there's some problems
12:29:29 13 with the admissibility of the evidence if he
12:29:32 14 had, which he hadn't, and the rest of these
12:29:36 15 couple of pages are his testimony about his
12:29:39 16 views on things in that context.

12:29:49 17 And in my head we're sort of three
12:29:51 18 steps out of a very small branch. So if you
12:29:54 19 could respond to that and then I'll ask if Mr.
12:29:57 20 Ogden has anything to say.

12:30:01 21 And I have to say that that -- those
12:30:02 22 things I just raised do not necessarily affect
12:30:04 23 your second question at all, as I heard your
12:30:07 24 second question.

12:30:09 25 MS. PELLETIER: And the issues you

1 raise are fair, Your Honour.

2 What I'm trying to demonstrate is the
3 migration story as told by the plaintiffs was
4 intended to be metaphorical.

5 THE COURT: Well, I understand that
6 but that was not your question. Your question
7 was whether this witness would agree that
8 Mr. Keeshig -- and I can't remember if that was
9 the way we described him on the day -- was
10 saying something in particular.

11 Well, Mr. Keeshig has said whatever it
12 is he has said in this trial, and unless there's
13 some archeological expertise required to
14 interpret it I am pausing over why this witness
15 should be commenting on it.

16 And then there's those two other
17 issues that I raised.

18 MS. PELLETIER: I was attempting, Your
19 Honour, to point out in response to
20 Dr. von Gernet's point that the story
21 originally, as he claims, originally told by
22 Eddie Benton-Banai was intended a certain way.

23 To the extent that that's a suggestion
24 that the plaintiffs were unaware of that
25 interpretation I'm highlighting Karl Keeshig's

12:31:17 1 views on that.

12:31:19 2 THE COURT: It just wasn't your
12:31:20 3 question.

12:31:20 4 MS. PELLETIER: That's fair. I was
12:31:21 5 not clear.

12:31:22 6 THE COURT: All right. Mr. Ogden, do
12:31:23 7 you have anything to say?

12:31:27 8 MR. OGDEN: No, Your Honour.

12:31:31 9 THE COURT: Well, as I look at your
12:31:32 10 question you're asking this witness to agree
12:31:38 11 that another witness was saying that the extent
12:31:41 12 that a third party, not present in this trial,
12:31:44 13 in person at least, may have told a story one
12:31:47 14 way that that third party has a different view.

12:31:51 15 And you may do what you wish with
12:31:57 16 Mr. Keeshig's evidence. You can ask this
12:32:02 17 gentleman to make an assumption and talk to me
12:32:06 18 at the end of the trial about whether it's
12:32:07 19 proved or not. But I think your question as
12:32:11 20 posed is improper and I will uphold the
12:32:14 21 objection.

12:32:15 22 MR. OGDEN: Thank you, Your Honour.

12:32:16 23 MS. PELLETIER: Okay.

12:32:17 24 BY MS. PELLETIER:

12:32:17 25 Q. The question that I actually care

1 about is my last one.

2 THE COURT: It's the next question.

3 BY MS. PELLETIER:

4 Q. Which is, would you agree with
5 me, Dr. von Gernet, that it is possible that you
6 have misinterpreted the story of the migration
7 from the plaintiffs' perspective and taken it
8 out of its intended cultural context?

9 A. I have not addressed the story
10 from the plaintiffs' perspective; that was not
11 the role that I had in this -- these
12 proceedings.

13 My role was to assess the migration
14 story as it was introduced by Lenore Keeshig and
15 as it's given in this book by Benton-Banai,
16 which story originates with William Warren.

17 And I've looked at both the William
18 Warren and the Benton-Banai books and in both
19 cases they assume the historicity of an actual
20 population migration of the Anishinaabe people
21 at datable times in the past, as I testified
22 yesterday.

23 Q. So --

24 A. Now, I don't deny that there may
25 be other interpretations of these same stories,

1 or same genre of migration stories that may not
2 assume the historicity of the actual migration
3 of individuals and may see it in a more
4 metaphoric fashion.

5 The transcript that you placed before
6 me suggests to me that indeed someone like Karl
7 Keeshig believes that the Benton-Banai story can
8 be, in his words, "revisited, revised and added
9 to", as he says at line 8 of the transcript.
10 That's entirely in accord with what I've said
11 over the course of my testimony; and that is
12 that these stories are constantly being
13 revisited, revised and added to by various
14 parties in various places.

15 So I don't have any problem with the
16 possibility that the plaintiffs or others can
17 see this metaphorically. But that does not
18 vitiate the fact, the demonstrable fact that
19 these stories are taken more literally and less
20 metaphorically by earlier writers.

21 Q. Dr. von Gernet, I believe you
22 just said that your task was to look at the
23 story as told by Lenore Keeshig. Are you aware
24 that Lenore Keeshig did not in fact tell the
25 migration story when she testified; that the

1 source for the migration story in this trial is
2 that before you, the evidence of Karl Keeshig?

3 A. No. Lenore Keeshig referred to,
4 and I don't recall whether the -- in the
5 transcript of her more recent testimony whether
6 she broached the subject again, but certainly in
7 the original report that she wrote, which I --
8 which served as the basis for engaging in this
9 project to begin with, she did in fact refer to
10 the migration story in that original report.

11 Q. But not in testimony?

12 A. I don't recall whether she did in
13 testimony or not, but that's how it came up and
14 one of the reasons why it occurs in my report.

15 And then I used that to further
16 illustrate my other point, which was that the
17 existence of such migration stories in and of
18 themselves should have been considered when
19 making assumptions about the in situ presence of
20 Anishinaabe peoples in one place over the course
21 of 8 or more thousand years ago.

22 Q. Yes, and we will discuss that a
23 little bit later today.

24 I want to take a look at Lenore
25 Keeshig's stories for a moment and discuss some

1 of what you've said about them.

2 So, for the story of Nanabush and the
3 Giant Beaver I'm wondering if you'd agree with
4 me that if the hypothesis in this story is that
5 Nanabush and the giant beaver preserves a memory
6 of the Anishinaabe and a giant species of beaver
7 that became extinct roughly 10,000 years ago,
8 would you agree that there is geological
9 evidence that supports that hypothesis?

10 A. If you formulate a hypothesis
11 that the giant beaver actually existed as a
12 species, separate from *Castor canadensis*, and
13 that there was a dam somewhere in the region
14 that burst at some point; if you hypothesize
15 that are -- those contain historicity, then you
16 can indeed find geological evidence in support
17 of that, just as you can find geological
18 evidence in support of virtually every single
19 feature of every -- every single feature of the
20 landscape mentioned in every myth in every story
21 on every continent.

22 Of course, if you look for parallels
23 you're going to find parallels.

24 Q. But not every myth. You'd agree
25 that a myth that speaks of ancestors of a

12:39:15 1 particular people roaming with the dinosaurs,
12:39:18 2 that is not supportable?

12:39:25 3 A. Well, you will find evidence of
12:39:27 4 dinosaurs, it's just that you will not be able
12:39:29 5 to demonstrate -- or you won't even be able to
12:39:33 6 raise the possibility that it has historicity
12:39:38 7 because of the chronological impediments.

12:39:48 8 Q. Yes. So what I'm suggesting is
12:39:49 9 that you just said that you can find geological
12:40:03 10 evidence in support of virtually every single
12:40:05 11 feature of every single landscape mentioned in
12:40:07 12 every myth and every story on every continent.

12:40:11 13 And:

12:40:11 14 "Of course, if you look for
12:40:12 15 parallels you're going to find
12:40:13 16 parallels."

12:40:14 17 That is not true of all myths.

12:40:18 18 A. Well, myths that refer to
12:40:21 19 geological features of the landscape of course
12:40:26 20 you'll be able to find some kind of parallel.

12:40:32 21 You know, let's say, you know, you
12:40:34 22 have a myth about Noah's Ark landing on a high
12:40:41 23 mountain; and lo and behold you go to the region
12:40:46 24 and you find Mount Ararat; of course what will
12:40:56 25 come to mind to many people, and in fact has

12:40:58 1 come to minds of some people, some writers, is
12:41:00 2 that Noah's Ark landed on Mount Ararat.

12:41:06 3 You're going to find -- if you look
12:41:07 4 hard enough you're going to find features of the
12:41:10 5 landscape found in mythology that can be found
12:41:14 6 in an actual geological record.

12:41:17 7 Q. Would you agree here that for the
12:41:19 8 story of Nanabush and the Giant Beaver that you
12:41:22 9 said it speaks to -- it makes two claims.

12:41:25 10 First, that the Anishinaabe, or the
12:41:27 11 ancestors of the plaintiff, once roamed the
12:41:32 12 earth with the giant beaver; the other claim is
12:41:35 13 about Nadoway Barrier.

12:41:36 14 So putting aside the Nadoway Barrier
12:41:38 15 for a moment, I'm assuming that you'd agree that
12:41:41 16 the presence of the giant beaver is not a
12:41:44 17 feature of the landscape?

12:41:50 18 A. Well, beavers are features of the
12:41:52 19 landscape, the question is the size obviously.

12:41:57 20 Q. So the question that I asked is,
12:41:58 21 if the hypothesis is that the story of Nanabush
12:42:02 22 and the giant beaver preserves a memory of the
12:42:05 23 Anishinaabe of a giant species of beaver that
12:42:08 24 became extinct roughly 10,000 years ago, you
12:42:11 25 would agree that there's geological evidence

12:42:14 1 that supports that hypothesis?

12:42:15 2 A. Well, it's a circular argument.
12:42:17 3 Because as soon as you date it to 10,000 years
12:42:21 4 ago you've already referred to the geological
12:42:24 5 evidence that you're seeking; because there's no
12:42:30 6 other way that you're going to be able to
12:42:33 7 demonstrate that the giant beaver existed unless
12:42:38 8 you referred to the paleontological or fossil
12:42:43 9 record.

12:42:45 10 Q. I don't agree with you that
12:42:46 11 that's circular. I think if the story is -- if
12:42:48 12 the Anishinaabe had a story that they used to
12:42:50 13 roam the earth or about giant beavers --

12:42:54 14 A. Yes.

12:42:54 15 Q. -- and they were not aware that
12:42:55 16 there had been giant beavers ever to exist and
12:42:58 17 then later that became known to them --

12:43:01 18 A. Yes.

12:43:01 19 Q. -- could you not say that there
12:43:03 20 is evidence to support that hypothesis? Putting
12:43:08 21 aside whether you believe it to be probable or
12:43:11 22 true, would you not agree that there is evidence
12:43:14 23 to support this hypothesis?

12:43:16 24 A. There is evidence -- there would
12:43:17 25 -- you'd have to characterize it this way, if

12:43:20 1 the Anishinaabe people had a story about giant
12:43:23 2 beavers and you're not historicizing it at all,
12:43:28 3 but then you went and you found evidence that
12:43:33 4 over 10,000 years ago there were in fact giant
12:43:36 5 beavers that existed, then you would -- it's at
12:43:47 6 that point that you would formulate a hypothesis
12:43:50 7 that the stories contain a kernel of truth, or
12:43:54 8 some kind of vestige of an eyewitness
12:44:00 9 observation on the ground 10,000 years ago.

12:44:05 10 Q. You testified yesterday that
12:44:07 11 remains of the giant beaver were present in
12:44:10 12 Ontario, correct?

12:44:12 13 A. Yes. There are two discoveries
12:44:15 14 of remains of giant beavers, one that is far too
12:44:22 15 old to be coeval with humans but the other
12:44:30 16 possibly so.

12:44:31 17 Q. And you said the other was dated
12:44:33 18 to roughly 10,000 years ago?

12:44:35 19 A. Well, that's the guess that the
12:44:37 20 paleontologists make based on the assumption
12:44:39 21 that it went extinct at about that time.

12:44:43 22 Q. And I believe you testified that
12:44:45 23 we begin to see evidence of humans in what is
12:44:48 24 now Ontario as early as 11,700 years ago?

12:44:53 25 A. Yes.

12:44:54 1 Q. And so you agree that it is
12:44:56 2 possible that ancestors of the present-day
12:45:00 3 occupants of the SONTL, the territory of the
12:45:05 4 plaintiffs, may have actually seen the giant
12:45:06 5 beaver?

12:45:11 6 A. Well, I don't know whether at
12:45:13 7 that point in time they -- the territory was
12:45:21 8 occupied by humans. I know that there were
12:45:26 9 Paleo-Indians in the vicinity. It's possible
12:45:31 10 that those Paleo-Indians witnessed giant
12:45:36 11 beavers. I've testified to that earlier in my
12:45:41 12 testimony.

12:45:42 13 Q. And would you agree that that
12:45:43 14 could have given rise to this story?

12:45:50 15 A. I said that it's theoretically
12:45:52 16 possible.

12:45:52 17 Q. Would you agree that there is no
12:45:54 18 evidence actually disproving this hypothesis?

12:45:57 19 A. Well, that's a bit of a non
12:45:59 20 sequitur.

12:46:00 21 Q. We'll get to that in a moment.

12:46:03 22 I'm merely asking you whether you'd
12:46:04 23 agree that there is no evidence actually
12:46:07 24 disproving this hypothesis, such as humans and
12:46:10 25 giant beavers were not on the earth at the same

12:46:13 1 time, that would be evidence that would disprove
12:46:15 2 this hypothesis. There is no such evidence?

12:46:17 3 A. Yes.

12:46:17 4 Q. Thank you.

12:46:18 5 Now, same story but with respect to
12:46:24 6 the Nadoway Barrier. Now, if the hypothesis was
12:46:27 7 that the same story also preserves a memory of a
12:46:31 8 breach of a natural dam, you would agree that
12:46:34 9 there is also geological evidence supporting
12:46:37 10 this hypothesis as well?

12:46:43 11 A. Well, as I said, with respect
12:46:44 12 to -- I mean, there is of course a geological
12:47:00 13 feature that resembles a dam at a certain
12:47:04 14 location, which matches the location of some of
12:47:06 15 the variants of the story of Nanabush and the
12:47:08 16 giant beaver.

12:47:10 17 And to the extent that you cherry-pick
12:47:15 18 those versions, yes, you can postulate a
12:47:20 19 hypothesis that there -- that the story is the
12:47:30 20 consequence of an eyewitness observation that
12:47:34 21 somehow has been preserved over the course of
12:47:37 22 several thousand years.

12:47:41 23 Q. And you are aware that
12:47:42 24 Dr. McCarthy has given evidence that the breach
12:47:45 25 of the Nadoway Barrier would have created a

12:47:47 1 number of islands in Lake Superior and in Lake
12:47:50 2 Huron?

12:47:56 3 A. I don't specifically recall that
12:47:59 4 testimony but I do remember reading it in her
12:48:05 5 report, and, irrespective of that, it stands to
12:48:10 6 reason.

12:48:11 7 Q. And the creation of islands is
12:48:13 8 also a part of the story told by Lenore Keeshig?

12:48:19 9 A. We're talking about the 30,000
12:48:20 10 islands?

12:48:21 11 Q. Yes.

12:48:24 12 A. Yeah, I -- that's quite correct.
12:48:28 13 And I introduced a number of other
12:48:30 14 variants in which the same islands were the
12:48:33 15 result of Nanabush's efforts that had nothing to
12:48:39 16 do with the dam.

12:48:41 17 Q. And we'll get to your variants a
12:48:43 18 little bit later today.

12:48:44 19 But for the purposes of this question
12:48:45 20 you would agree that there is no evidence
12:48:47 21 disproving this hypothesis that the giant
12:48:51 22 beaver -- Nanabush and the giant beaver story
12:48:54 23 preserves a memory of the breaching of the
12:48:57 24 Nadoway Barrier?

12:49:08 25 A. Well, as I said, I speak in terms

1 of possibilities of abilities. There is no way
2 of either proving or disproving in any final
3 sense in either way.

4 Q. You could disprove, we've talked
5 about that. It's possible to disprove?

6 A. Once you concede that there's a
7 coequality of humans and giant beavers, or the
8 Nadoway Barrier and humans it becomes
9 increasingly difficult to disprove.

10 Q. If there was no evidence of the
11 Nadoway Barrier, if there was no Nadoway Barrier
12 there would be -- you would have nothing to
13 support that story. It would not be based in
14 anything?

15 A. Well, no, that's not true at all.
16 It would be based on -- well, from an
17 etiological perspective there is no need to
18 postulate the existence of an actual geological
19 barrier in order to formulate the story. So the
20 story is not contingent on the actual existence
21 of a barrier.

22 Q. But in order to suggest that it
23 preserves a memory of a historical event you
24 need to demonstrate that there was such a
25 historical event?

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12:51:37 23
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12:51:44 25

A. Well I suppose by definition,
yes.

Q. And so there's no evidence
disproving -- I appreciate you prefer other
explanations, which we will get to. I promise.

But there's no evidence disproving the
hypothesis that this story preserves a memory of
the breach of the Nadoway Barrier?

A. Well, I'd just repeat what I just
said earlier, once you accept that -- the
theoretical possibility then -- and given that
we can't -- we don't have a time machine we
can't disprove it. We can only talk about
possibilities and probabilities.

Q. I am going to take it that you
agree with me that there is no evidence
disproving this hypothesis, and we will get to
probabilities and possibilities a bit later.

I'll move on to my next question. The
next question is about the story about "Nanabush
grieves". Now, one of the hypotheses about this
story is that it documents an observed change in
the salinity in what is now Georgian Bay.

And you testified yesterday that you
are aware of the geological evidence that around

1 8,300 years ago the lake existing where Georgian
2 Bay is now was brackish or slightly -- or had
3 slightly saline conditions, is that right?

4 A. Yes.

5 Q. Okay. And I recognize that you
6 have pointed out a number of reasons why you
7 think it is unlikely that the hypothesis that
8 this story preserves a memory of that event;
9 that you don't believe that that hypothesis is
10 likely correct. But would you agree with me
11 that there is no evidence disproving this
12 hypothesis?

13 A. Again, you know, as in all
14 extraordinary claims the burden of proof is
15 actually on those who claim.

16 And so, you know, the best I can say
17 is that -- or the most that I can say is that
18 looking for something to disprove it is less
19 valuable than looking for scales of probability.

20 Q. But looking to disprove is the
21 scientific method. I appreciate you appear to
22 have done some hybrid of that but you would
23 agree that all we can do in science is try to
24 disprove a hypothesis?

25 A. Well, again, you're referring to

12:53:16 1 the hypothetico-deductive method, which is not
12:53:20 2 one that I actually am referring to here. But
12:53:23 3 that's -- in a Popperian sense you have to, of
12:53:27 4 course, try and disprove a hypothesis.

12:53:33 5 But what I'm dealing with here are
12:53:35 6 claims which can, based on the assumptions held
12:53:38 7 in those claims, can be placed in a -- on a
12:53:43 8 spectrum of probability.

12:53:46 9 Sure, I suppose it's possible for some
12:53:50 10 scientist to try and disprove it. That was not
12:53:58 11 the approach that I took.

12:53:59 12 Q. Would you agree, Dr. Von Gernet,
12:54:04 13 and as I said we will get to probabilities and
12:54:06 14 possibilities in a moment, but that if there had
12:54:10 15 been evidence to disprove any of the hypotheses
12:54:15 16 presented in these stories you would not have
12:54:17 17 even gotten to the question of probabilities and
12:54:19 18 possibilities? You would have simply said, I
12:54:21 19 don't need to consider this, it's impossible.

12:54:26 20 A. Well, I'm desperately -- and
12:54:29 21 throughout your entire cross-examination,
12:54:30 22 desperately trying to think of some ingenious
12:54:34 23 ways in which you can test the hypothesis and,
12:54:37 24 hence, come to a disproof. I suggest to you
12:54:38 25 that would be an exceedingly difficult thing to

12:54:50 1 do.

12:54:51 2 Q. I remind you of your own example,
12:54:52 3 Dr. Von Gernet, of a story that purports to
12:54:52 4 preserve a memory of a time when humans walked
12:54:52 5 the earth with dinosaurs. That is the type of
12:54:58 6 hypothesis that could be disproven.

12:55:00 7 A. Yes, but that's not the case
12:55:01 8 here.

12:55:12 9 Q. In any of these stories if there
12:55:14 10 was proof of migration of the people on the
12:55:16 11 SONTL such that we knew for a fact that the
12:55:21 12 present-day population was not present at the
12:55:23 13 time of these historical events, would that not
12:55:26 14 be another way that you could disprove these
12:55:30 15 hypotheses?

12:55:40 16 A. It would depend on how definitive
12:55:42 17 the proof of the migration was, obviously.

12:55:45 18 If you can rule it out -- if you can
12:55:47 19 rule out a human presence in the area entirely
12:55:50 20 then we're back to the dinosaurs again.

12:55:54 21 But since we cannot rule that out in
12:55:57 22 this instance, which is a point I keep making
12:56:00 23 about the theoretical possibility, it's not akin
12:56:05 24 to the dinosaur-human analogy.

12:56:12 25 Q. But if you had evidence of the

12:56:14 1 presence of humans but there was also evidence
12:56:16 2 that those humans were not linked -- the humans
12:56:18 3 that were there, Paleo-Indian times, were not
12:56:21 4 linked to the present-day occupants due to a
12:56:24 5 migration, due to a mass extermination and a
12:56:26 6 replacement by other people, would that not be
12:56:29 7 evidence disproving the hypotheses that a story
12:56:33 8 preserved in memory of an actual historical
12:56:36 9 event?

12:56:37 10 A. That's a lot of hypotheticals,
12:56:39 11 all of which are highly unlikely but, yes, you
12:56:43 12 may end up with a means to disprove in the
12:56:49 13 manner you suggest.

12:56:50 14 Q. Well, I'm going to suggest to you
12:56:51 15 it's not a number of hypotheticals. I would
12:56:54 16 assume that the reason you began looking at
12:56:58 17 probabilities and possibilities with respect to
12:57:02 18 each of these stories is because you didn't have
12:57:04 19 evidence before you that disproved any of them.
12:57:08 20 In fact your evidence has been that it's
12:57:10 21 theoretically possible.

12:57:11 22 A. Yes.

12:57:21 23 Q. Thank you. Now, moving onto the
12:57:22 24 story about the tunnel to Manitoulin.

12:57:27 25 THE COURT: Well, I'm just going to

12:57:27 1 pause before we do that and ask you how long you
12:57:28 2 will be discussing that story. If you're going
12:57:31 3 to be five minutes, that's fine, go ahead.

12:57:33 4 MS. PELLETIER: That entirely depends
12:57:34 5 on Dr. Von Gernet.

12:57:37 6 THE COURT: Not entirely but if you
12:57:38 7 think it's a possibility, use that popular word,
12:57:43 8 or I think more probable.

12:57:46 9 MS. PELLETIER: It's probably a good
12:57:47 10 time, I would say, to take the lunch break, Your
12:57:48 11 Honour. It may take more than five minutes.

12:57:51 12 THE COURT: I'm sure we have no timing
12:57:55 13 issues, isn't that correct?

12:57:55 14 MS. PELLETIER: That's correct.

12:57:59 15 -- RECESSED AT 12:58 P.M. --

12:57:59 16 -- RESUMED AT 2:19 P.M.

02:19:32 17 THE COURT: Go ahead.

02:19:33 18 MS. PELLETIER: Thank you, Your
02:19:33 19 Honour.

02:19:34 20 BY MS. PELLETIER:

02:19:34 21 Q. Welcome back, Dr. von Gernet.

02:19:37 22 A. Good afternoon.

02:19:39 23 Q. I'd like to talk to you a little
02:19:40 24 bit about circular reasoning. You've stated
02:19:43 25 that using geological evidence as evidence of

02:19:48 1 deep-time oral traditions is circular reasoning.
02:19:53 2 And, in your view, to avoid circular reasoning
02:19:57 3 the evidence that the Anishinaabe have been in
02:20:00 4 the territory for 10,000 years can't come from
02:20:03 5 the stories themselves. Have I gotten that
02:20:05 6 right?

02:20:06 7 A. No, not quite. I don't say
02:20:09 8 anywhere -- I don't recall saying anywhere that
02:20:12 9 using geological evidence in and of itself is
02:20:18 10 circular reasoning.

02:20:19 11 I think what is -- what becomes
02:20:22 12 circular reasoning is if you have an assumption
02:20:33 13 of 10,000 year old antiquity a priori and then
02:20:41 14 you try and find geological evidence in support
02:20:44 15 of that. Then it becomes circular reasoning
02:20:47 16 because the only way that you can have the
02:20:50 17 assumption is to have the geological evidence to
02:20:54 18 begin with. So that's more what I'm getting at.

02:21:00 19 Q. So would you agree then that it's
02:21:02 20 not circular reasoning if you have a story,
02:21:06 21 let's take the giant beaver story, about having
02:21:12 22 once been alive at the time of giant beavers;
02:21:16 23 you don't know whether giant beavers even exist
02:21:19 24 or whether they ever existed; and your story is
02:21:23 25 simply that there was once upon a time giant

02:21:27 1 beavers. And then later people discover,
02:21:31 2 scientists discover that in fact there were
02:21:35 3 giant beavers and they date back 10,000 years.

02:21:38 4 Would you agree with me that using the
02:21:41 5 geology to suggest that the people have been
02:21:45 6 present for 10,000 years, that the story
02:21:51 7 preserves the memory is not in fact circular
02:21:53 8 reasoning?

02:22:02 9 A. Well, it can be formulated with
02:22:04 10 the right language so that it does not amount to
02:22:06 11 circular reasoning.

02:22:07 12 But the problem is, is that often
02:22:08 13 there is an a priori assumption that the story
02:22:10 14 as told in the present has antiquity. But the
02:22:16 15 only way to demonstrate that antiquity, rather
02:22:20 16 than assume it, is to have some kind of external
02:22:23 17 test like geological evidence or archeological
02:22:26 18 evidence.

02:22:28 19 Q. And when you have that
02:22:28 20 archeological evidence would you agree then it
02:22:32 21 no longer becomes circular reasoning because
02:22:34 22 you're looking to something outside of the story
02:22:37 23 to corroborate the story? Or to corroborate,
02:22:42 24 sorry, the hypothesis held within the story,
02:22:46 25 that the story itself preserves a memory of deep

02:22:49 1 time?

02:22:50 2 A. Well, if your story starts --
02:22:53 3 sorry, if your hypothesis starts with the
02:22:56 4 premises that the story has antiquity and then
02:22:58 5 you use geology to demonstrate its antiquity
02:23:01 6 that is circular reasoning.

02:23:03 7 Q. That's not the hypothesis or
02:23:04 8 that's not what I'm suggesting the starting
02:23:08 9 point of the story is.

02:23:09 10 I'm asking in a situation as the
02:23:11 11 example I gave with the giant beaver. If your
02:23:14 12 story is you had stories about when once your
02:23:17 13 ancestors roamed the earth with giant beavers,
02:23:21 14 and there's no necessarily hypothesis within
02:23:25 15 that, there's no 10,000 year date, it's just a
02:23:28 16 story of back when you used to roam the earth
02:23:30 17 with giant beavers; and then geological evidence
02:23:33 18 is discovered that says -- that demonstrates
02:23:34 19 that giant beavers existed 10,000 years ago,
02:23:38 20 that suddenly that can become a corroboration
02:23:40 21 for the hypothesis that in fact if your people
02:23:44 22 held a belief that you've always been there that
02:23:47 23 becomes proof of that belief or can be proof of
02:23:50 24 that belief?

02:23:51 25 A. As I said, if you word it in that

02:23:54 1 kind of fashion then you can avoid some of the
02:23:58 2 circular reasoning that's inherent in some of
02:24:01 3 these claims.

02:24:06 4 Q. Do you agree with me that true
02:24:07 5 circular reasoning would be if I said to you, I
02:24:14 6 have a story that my ancestors have been here
02:24:16 7 for 10,000 years and the proof of that, that
02:24:20 8 they have been here for 10,000 years, is that I
02:24:22 9 have a story about them being here for 10,000
02:24:25 10 years.

02:24:26 11 And that's -- as I understand what you
02:24:27 12 were saying about circular reasoning that I
02:24:30 13 would suggest is what you're getting at, that
02:24:36 14 the only proof is contained within the story.
02:24:38 15 Is that not true circular reasoning?

02:24:40 16 A. Well, that's not the only form of
02:24:42 17 circular reasoning. The one that you just
02:24:43 18 mentioned is actually a more limited form which
02:24:46 19 might be referred to as "bootstrapping". That
02:24:50 20 is, you're trying to raise yourself by your own
02:24:52 21 bootstraps.

02:24:59 22 Q. Okay. Which is also -- which is
02:25:00 23 a form of circular reasoning?

02:25:02 24 A. Yes.

02:25:08 25 Q. Now, if you assume, as I had put

02:25:11 1 to you, that the starting point is not an
02:25:13 2 assumption of antiquity, and then you use the
02:25:16 3 geology to prove the story to, but more a
02:25:18 4 question of you always had a story about giant
02:25:23 5 beaver and then you discover that in fact that
02:25:24 6 there were giant beaver that existed and they
02:25:27 7 existed 10,000 years ago.

02:25:31 8 Acknowledging that that is a form
02:25:33 9 of -- well, first, do you acknowledge that that
02:25:35 10 would be a form of corroboration of that story?
02:25:42 11 Of the hypothesis contained in that story?

02:25:45 12 A. Well, I'm not sure how you're
02:25:47 13 using term "hypothesis" because --

02:25:56 14 Q. The hypothesis that it
02:25:56 15 preserves -- the hypothesis being that that
02:25:58 16 story, the story of the giant beaver, preserves
02:26:00 17 a memory of a historical event, being that once
02:26:04 18 upon a time the ancestors of the plaintiffs
02:26:08 19 lived on earth with giant beavers.

02:26:12 20 A. The problem is is that your use
02:26:15 21 of the term "hypothesis" is actually more
02:26:17 22 properly known as an assumption, because you're
02:26:25 23 assuming that the story has antiquity and then
02:26:27 24 you're going out to try and demonstrate it
02:26:29 25 through external means.

02:26:30 1 Q. I'm not assuming. I'm going to
02:26:35 2 get to your assumptions in a minute. I'd
02:26:36 3 suggest to you that's not what I'm trying to do
02:26:37 4 here at all.

02:26:39 5 What I'm saying is you have a story.
02:26:39 6 There's no assumptions in the story, it's simply
02:26:41 7 a story. It's a story and perhaps the people
02:26:44 8 who tell the story believe it to be true but
02:26:46 9 there's no evidence to support it. It's just a
02:26:48 10 story that's always been told.

02:26:50 11 And it's about how many, many, many
02:26:51 12 years ago -- they don't know how long ago, but a
02:26:53 13 long time ago we used to have giant beavers.
02:26:56 14 And then later it's discovered that there's
02:26:58 15 proof of that that giant beavers are a real
02:27:00 16 thing and they existed and they existed 10,000
02:27:03 17 years ago.

02:27:04 18 Would that not be -- putting aside
02:27:05 19 whether you think it's probable or possible, is
02:27:07 20 that fact not -- the geological fact not a
02:27:11 21 corroboration for the premise that that original
02:27:13 22 story could have preserved a memory of a time
02:27:17 23 when the Anishinaabe lived with giant beaver?

02:27:20 24 A. It's not a corroboration. What
02:27:23 25 it is is a piece of external evidence leading to

02:27:31 1 a possible interpretation of the story as having
02:27:37 2 historicity.

02:27:40 3 Q. I will confess that that sounds a
02:27:41 4 lot like what I consider to be corroboration, so
02:27:44 5 I think we're agreed on that. A piece of
02:27:48 6 external evidence that supports, to me, is
02:27:50 7 corroboration.

02:27:53 8 Now, so I'd suggest to you that we
02:27:55 9 have that here. We have a piece of external
02:27:58 10 evidence that supports -- that supports the
02:28:02 11 historicity of the story.

02:28:06 12 And -- but what I would point out to
02:28:08 13 you, Dr. von Gernet, is I believe you testified
02:28:10 14 in your voir dire that there are occasions that
02:28:15 15 oral traditional evidence can be given
02:28:23 16 independent weight?

02:28:24 17 A. There are on some occasions. I
02:28:28 18 mean, in terms of my own experience, you know,
02:28:36 19 I've interviewed Elders and I've listened to
02:28:39 20 their stories and I've -- there are times when I
02:28:41 21 found no good reason to question that what they
02:28:48 22 recall their grandfather telling them was true
02:28:52 23 in a sense of being in accord with an external
02:28:57 24 reality and not merely some kind of imagination.
02:29:05 25 So I concede that, you know, that's not a -- but

02:29:07 1 that's not what we're talking about here.

02:29:09 2 Q. Well, what we're talking about
02:29:10 3 here is, I'm wondering if you would agree with
02:29:13 4 me, that this is in fact not a story or not a
02:29:21 5 situation where the stories are being put
02:29:25 6 forward absent of any evidence in support of
02:29:29 7 them. It's not a situation where the stories
02:29:33 8 are being put forward and are -- need to be
02:29:36 9 assessed and given independent weight but in
02:29:39 10 fact we do have evidence in support of these
02:29:41 11 stories?

02:29:47 12 A. Well, no. What you have in this
02:29:48 13 instance is not evidence being put forward in
02:29:51 14 support of the historicity of the story.

02:29:53 15 What you have are efforts to select
02:30:00 16 certain stories that are parallel or purportedly
02:30:05 17 parallel with certain geological conclusions
02:30:09 18 reached by scientists. And from that then is
02:30:15 19 made an argument that the stories have
02:30:18 20 antiquity.

02:30:18 21 And I can only assume that the
02:30:24 22 corollary is, is that Anishinaabe stories have
02:30:29 23 historicity going back 8 or 10,000 years.
02:30:34 24 That's the conclusion that we are to reach from
02:30:36 25 this intellectual process.

02:30:38 1 Q. But would you not agree, and you
02:30:41 2 spoke in your voir dire about the -- you
02:30:43 3 clarified that your position is not that oral
02:30:45 4 traditional stories should never be given
02:30:47 5 independent weight, that to give a story
02:30:49 6 independent weight you would simply need to
02:30:52 7 accept it without pointing to anything in
02:30:55 8 support of it. That's truly giving a story
02:30:59 9 independent weight.

02:31:00 10 A. There are times when we really
02:31:02 11 have no choice at all, and there are times when
02:31:16 12 it is moreover apparent that the probability of
02:31:18 13 a story being correct is quite high and that it
02:31:21 14 is in fact a reasonable reconstruction of what
02:31:26 15 happened. But these tend to be relatively
02:31:32 16 short-term traditions often of a generation or
02:31:42 17 two.

02:31:43 18 The reason why we can have some
02:31:44 19 confidence in these stories is because of the
02:31:46 20 context in which they're told and their content.

02:31:51 21 Q. That wasn't really my question,
02:31:53 22 Dr. von Gernet, but I think I'm able to move on.

02:32:15 23 I would like to move on to discuss
02:32:16 24 some of the alternative explanations of the
02:32:18 25 deep-time stories provided by Lenore Keeshig

02:32:21 1 that you've proposed.

02:32:24 2 So first let's talk about the giant
02:32:31 3 beaver and dam story. You've offered five
02:32:34 4 different possible explanations of that story in
02:32:35 5 addition to the possibility -- and I believe
02:32:41 6 you've acknowledged there is the possibility
02:32:43 7 that that story stems from live encounters with
02:32:47 8 giant beavers.

02:32:47 9 So the first, as I understand it, is
02:32:49 10 that since the adjective "giant" in the
02:32:54 11 Anishinaabe myth tells us nothing about the
02:32:57 12 genus species or antiquity it may simply refer
02:33:02 13 to an abnormally large modern beaver. Have I
02:33:06 14 captured that correctly?

02:33:10 15 A. Yes.

02:33:11 16 Q. But you would agree that you have
02:33:12 17 not tested this theory? You have not set up
02:33:21 18 testing to rigorously attempt to disprove it?

02:33:35 19 A. There is no reason to actually
02:33:38 20 test it because the only purpose of presenting
02:33:42 21 the possibilities is to illustrate the
02:33:46 22 problematic nature of sticking with one
02:33:50 23 assumption, or set of assumptions, and then
02:33:53 24 letting confirmation bias and circular reasoning
02:33:56 25 do the rest.

02:33:58 1 The reason for providing these
02:34:01 2 possibilities, these alternate possibilities for
02:34:04 3 the same data set is only for that
02:34:08 4 illustration -- for that purpose.

02:34:13 5 It is a demonstrable fact that there
02:34:18 6 are -- that *Castor canadensis* can range in size
02:34:26 7 from very small to very large and, hence, you do
02:34:29 8 have giant beavers that are common to our
02:34:33 9 every-day experience. There's no need to test
02:34:37 10 that proposition. It's demonstrable by looking
02:34:44 11 at any of the literature on the biology of
02:34:46 12 *Castor canadensis*.

02:34:48 13 Q. But you also have no evidence in
02:34:49 14 support of that alternative theory. There's no
02:34:53 15 evidence, for example, that there were sightings
02:34:55 16 of an abnormally large beaver in the SONTL that
02:34:59 17 could have inspired this oral tradition?

02:35:02 18 A. I don't have evidence that -- of
02:35:04 19 that, no, but I have evidence of Anishinaabe
02:35:07 20 having seen giant beavers in the 18th century,
02:35:12 21 the 19th century and the 20th century.

02:35:17 22 Q. Are they members of the
02:35:19 23 plaintiffs' community?

02:35:21 24 A. Not as far as I know, but to me
02:35:24 25 it stands to reason that if it happens among

02:35:27 1 other Anishinaabe peoples it can happen
02:35:29 2 anywhere.

02:35:30 3 But, in short, I don't need to have
02:35:37 4 definitive evidence -- as nice as it might be I
02:35:39 5 don't need to have definitive evidence of a
02:35:42 6 sighting in a particular group at a particular
02:35:48 7 time to raise this as a plausible alternative
02:35:59 8 explanation.

02:36:00 9 Q. I believe, Dr. von Gernet, that
02:36:01 10 your answer to my question has led into your
02:36:05 11 second alternative explanation, which is giant
02:36:08 12 beaver sightings.

02:36:09 13 So as I understand then your first
02:36:11 14 alternative explanation was simply that there's
02:36:16 15 a story about Nanabush and a giant beaver. We
02:36:19 16 don't know for sure that they're referring to
02:36:21 17 the giant beaver that is now extinct. It could
02:36:24 18 just be a very big beaver.

02:36:26 19 Second alternative explanation is the
02:36:28 20 story may have been inspired by sightings in the
02:36:31 21 20th and 21st century of abnormally large
02:36:35 22 beaver. Is that correct? And perhaps I'll give
02:36:37 23 you a moment to look over your original report.

02:36:44 24 A. Yes. Yeah, I mean, the sightings
02:36:45 25 may be real or imagined. Either way they give

02:36:48 1 rise to stories about giant beavers. That's --
02:36:51 2 I was able to establish that by just looking at
02:36:54 3 the literature on the subject.

02:36:58 4 Q. But, again, the literature on the
02:36:59 5 subject does not make any reference to members
02:37:01 6 of the plaintiffs' communities?

02:37:08 7 A. Not as far as I'm aware. It
02:37:09 8 deals with Anishinaabe in various other places.

02:37:11 9 Q. You have no evidence linking
02:37:13 10 Lenore Keeshig's stories to a 20th or 21st
02:37:17 11 century report of a giant beaver sighting?

02:37:19 12 A. No.

02:37:23 13 Q. So this hypothesis that the story
02:37:26 14 is inspired by 20th or 21st century sightings of
02:37:30 15 abnormally large beavers rests on the assumption
02:37:32 16 that, one, the original teller of the story,
02:37:37 17 Ms. Keeshig -- the original teller of the story
02:37:40 18 that Ms. Keeshig tells heard about a modern
02:37:44 19 beaver sighting; and, two, based on that made up
02:37:49 20 an elaborate Nanabush story; and, three, the
02:37:52 21 assumption that that teller would have failed to
02:37:55 22 share what inspired that story when telling it.

02:38:01 23 Would you agree that those assumptions
02:38:02 24 are necessary to accept the alternative theory?

02:38:08 25 A. No.

02:38:10 1 Q. Okay, let's go through them then.

02:38:17 2 The hypothesis that the story is
02:38:19 3 inspired by 20th or 21st century sightings of an
02:38:23 4 abnormally large beaver, I would suggest to you,
02:38:24 5 rests on the assumption that the original story
02:38:26 6 told by Ms. Keeshig came about after a sighting
02:38:32 7 of a giant beaver, based on that the person who
02:38:35 8 saw it made up an elaborate story about Nanabush
02:38:38 9 and then failed to share what inspired the story
02:38:40 10 when telling it.

02:38:53 11 A. No, because the possibility
02:38:57 12 arises from a demonstrable fact that stories
02:39:02 13 about giant beavers have in fact been inspired
02:39:06 14 in other places in Anishinaabe territory by
02:39:15 15 either real or imagined sightings of large
02:39:17 16 beavers.

02:39:19 17 That is a reasonable assumption then
02:39:32 18 to make that such a scenario could happen
02:39:35 19 anywhere.

02:39:36 20 Q. But it's an assumption. You can
02:39:38 21 say it's reasonable but that's what I'm asking
02:39:40 22 you to agree with me, is that you need to make
02:39:42 23 assumptions to accept that alternative
02:39:45 24 explanation.

02:39:46 25 A. Yes. The assumption would be not

02:39:48 1 that stories arise from real or imagined
02:39:58 2 sightings, because that's a demonstrable fact,
02:40:02 3 that need not be the assumption.

02:40:04 4 The assumption is, is that you take
02:40:05 5 the demonstrable, historical cases of that and
02:40:09 6 assume that it can happen elsewhere as well.
02:40:11 7 That's where the assumption comes in and I think
02:40:13 8 that's a reasonable assumption.

02:40:15 9 Q. Well, it's not a demonstrable
02:40:17 10 fact for the plaintiffs' communities. You
02:40:19 11 haven't demonstrated that there were in fact
02:40:22 12 20th or 21st century sightings of abnormally
02:40:26 13 large beavers; you have evidence in other
02:40:29 14 places.

02:40:29 15 And, in fact, many of the stories that
02:40:34 16 you point to as evidence of this alternative
02:40:37 17 theory are stories about precisely that, the
02:40:39 18 sighting of an abnormally large beaver. This
02:40:43 19 story is not about that.

02:40:44 20 A. No. The stories that emerge
02:40:46 21 after the fact don't necessarily characterize
02:40:52 22 the reasons why the story originated to begin
02:40:55 23 with.

02:40:56 24 The stories simply are the stories.
02:40:59 25 You get stories of giant beavers but you also

02:41:05 1 have sightings of giant beavers.

02:41:09 2 So you have to -- I mean, it's a
02:41:12 3 matter of common sense. If you see giant
02:41:15 4 beavers somewhere, either real or imagined, it's
02:41:19 5 a reasonable assumption to make that it's going
02:41:22 6 to give rise to stories and indeed that is
02:41:26 7 exactly what we find.

02:41:29 8 Q. Sure, except you don't have
02:41:30 9 evidence of real or imagined sightings here. So
02:41:33 10 you're asking us --

02:41:36 11 A. On the Bruce Peninsula I don't
02:41:38 12 have any stories of actual or imagined
02:41:43 13 sightings. You're absolutely correct.

02:41:45 14 But it's not unusual in my field, and
02:41:49 15 in fact it's a necessity, to draw reasonable
02:41:54 16 inferences from data that is germane even if
02:42:06 17 it's not direct.

02:42:10 18 Q. The point I was trying to make is
02:42:11 19 there is no evidence and you're asking, in order
02:42:14 20 to accept this alternative one must make a
02:42:17 21 number of assumptions.

02:42:19 22 A. Well, the first thing I'm asking
02:42:20 23 is that anyone who has a -- makes a beeline
02:42:34 24 towards to a deep-time oral tradition
02:42:37 25 historicity explanation to consider the

02:42:39 1 possibility, the alternative possibility that's
02:42:42 2 based on reasonable expectations and drawn from
02:42:45 3 actual facts, whether they are facts that come
02:42:49 4 from related context or the very same context.

02:42:55 5 Keep in mind that the oral tradition
02:43:00 6 that we're talking about about Nanabush and the
02:43:04 7 giant beaver does not just occur on the Bruce
02:43:07 8 Peninsula it occurs in the many other places.
02:43:10 9 So it's perfectly reasonable to draw analogies
02:43:15 10 from other places in the Anishinaabe world.

02:43:16 11 And so, you know, I reject the notion
02:43:18 12 that one has to find your possibilities only
02:43:26 13 within the confines of this artificial little
02:43:30 14 geographical region that happens to be the focus
02:43:39 15 of the matters at bar.

02:43:41 16 Q. I didn't suggest that to you,
02:43:41 17 Dr. von Gernet. You have proposed a number of
02:43:44 18 alternative explanations. You've repeatedly
02:43:47 19 said that you've done the hard work of examining
02:43:49 20 the explanations of the plaintiff, and I'm
02:43:51 21 merely going through your explanations and
02:43:52 22 trying myself to do the hard work with you to
02:43:55 23 take a closer look at the alternatives that
02:43:57 24 you've provided.

02:43:58 25 So with that I'd like to move on to

02:43:59 1 the third alternative that you propose, which is
02:44:02 2 that the stories were inspired by the discovery
02:44:04 3 of fossils.

02:44:07 4 And you would agree that there is
02:44:09 5 similarly, within the SONTL, no evidence of a
02:44:12 6 discovery of giant beaver bones or beaver
02:44:15 7 fossils?

02:44:18 8 THE COURT: Just so I understand,
02:44:19 9 counsel, so you're drawing -- we have a map in
02:44:21 10 this room somewhere, Exhibit P, there's a claim
02:44:27 11 area. So these questions when you say "SON" you
02:44:30 12 mean that geographic area?

02:44:33 13 MS. PELLETIER: That's correct.

02:44:34 14 THE COURT: That specific geographic
02:44:36 15 area?

02:44:37 16 MS. PELLETIER: That's correct. I
02:44:37 17 would invite Dr. von Gernet to let me know if
02:44:41 18 there's evidence in the surrounding areas. I'm
02:44:42 19 sure he --

02:44:43 20 THE COURT: Dr. von Gernet is here to
02:44:45 21 answer your questions. He's doing that. That's
02:44:48 22 what we're doing here. But I need to be clear
02:44:50 23 because that question -- I think that Dr. von
02:44:56 24 Gernet understands it because he said something
02:44:59 25 in his prior answer that follows along those

02:45:02 1 lines, but I wanted to make sure I also
02:45:04 2 understood it because we've had a lot of other
02:45:06 3 evidence in this trial, which I'm not going to
02:45:08 4 mention in front of the witness. Please go
02:45:13 5 ahead.

02:45:14 6 MS. PELLETIER: Thank you.

02:45:15 7 BY MS. PELLETIER:

02:45:15 8 Q. Just to repeat my question,
02:45:17 9 Dr. von Gernet, you would agree that there is no
02:45:18 10 evidence of any discovery of fossils of giant
02:45:22 11 beavers in the SONTL?

02:45:27 12 THE COURT: Sir, that is an acronym
02:45:29 13 counsel uses to -- the plaintiffs have defined
02:45:32 14 it as the TL, traditional lands.

02:45:40 15 The status of the lands is at issue in
02:45:43 16 this trial so I have no trouble with counsel
02:45:46 17 using the acronym as long as, in addition to the
02:45:49 18 other complications here, you don't understand
02:45:52 19 that to mean a conclusion. It is a description
02:45:56 20 of the claim area. All right?

02:45:59 21 THE WITNESS: Yes, I understand that.

02:46:01 22 THE COURT: As long as you understand
02:46:03 23 that it is a description of the claim area which
02:46:06 24 is in dispute in this trial I have no trouble
02:46:09 25 with Ms. Pelletier using the acronym. All

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right?

THE WITNESS: Yes, Your Honour, that's how I understood it.

THE COURT: All right.

THE WITNESS: And I assumed that it included the Bruce Peninsula from which some of these stories emerged.

THE COURT: Well, just so there's no ambiguity, you've got a map behind you with a "P" on the top, right-hand corner.

THE WITNESS: Yes.

THE COURT: And that is the claim area. Now, there's a lot of extra detail on that map, so maybe I'll ask counsel, since it's her map, to accurately, for the record, tell the witness which pieces of the map are what you are calling, counsel, SONTL.

MS. PELLETIER: So the SONTL refers to the areas on map "P" demarcated in light blue, yellow and light green.

THE COURT: All right. So now that everyone understands things you can use that acronym. Please go ahead.

MS. PELLETIER: Thank you, Your Honour.

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BY MS. PELLETIER:

Q. I've lost track of whether you answered my question, Dr. von Gernet.

A. Well, you may ask it again.

Q. Okay, let's try one more time.

Would you agree with me that there is no evidence of fossils of giant beavers having been discovered in the SONTL?

A. I, in my work, did not encounter any discoveries of fossils of giant beavers within that area that we just discussed on the map, but that would never and did not preclude me from raising this as a plausible alternative explanation for the data set.

Q. In fact, would you agree that only two fossils of giant beavers have been found in Ontario? I believe you spoke to that in your testimony.

A. Yes. And as I testified earlier this week, again the discovery of actual fossils of *Castoroides ohioensis* does not preclude raising the possibility of any kind of large animal remains having been found leading to the origination of stories about giant animals in the past.

02:49:02 1 Q. I believe you said the discovery
02:49:03 2 of mastodon fossils, for example?

02:49:10 3 A. Yes.

02:49:11 4 Q. And mammoth --

02:49:11 5 A. Yes.

02:49:11 6 Q. -- I believe is the other example
02:49:13 7 that you gave, could have led to stories about
02:49:16 8 giant beavers.

02:49:17 9 To your knowledge is there any
02:49:19 10 evidence of the discovery of any of those
02:49:21 11 fossils in the SONTL?

02:49:23 12 A. Well, it never occurred to me to
02:49:25 13 limit the investigation to the SONTL because I
02:49:31 14 do not share the assumption that Indigenous
02:49:36 15 peoples lived in that one area as a single unit,
02:49:45 16 cultural unit, for 8 to 10,000 years.

02:49:48 17 So it's perfectly -- in the same way
02:49:52 18 that you'd refer to Paleo-Indians in a wider
02:49:54 19 sense that range all over eastern North America,
02:49:58 20 you do not limit your inquiries to a particular
02:50:04 21 geographical area, which I described earlier as
02:50:07 22 being the subject of the current litigation.

02:50:10 23 Q. You would agree that there is no
02:50:12 24 evidence of a mass migration of the plaintiffs?

02:50:20 25 THE COURT: The plaintiffs?

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BY MS. PELLETIER:

Q. The plaintiffs' ancestors?

THE COURT: Well, I suppose the witness might know what you mean by "the plaintiffs".

BY MS. PELLETIER:

Q. The Anishinaabe who are and were present on the Bruce Peninsula. There is no evidence of a mass migration.

You spoke earlier this morning about archeological evidence across the continent of population movements and mass migration, and I'm asking you to confirm that there is no such evidence with respect to the plaintiffs or their ancestors?

A. What I can say --

THE COURT: Just a moment please. Actually, Mr. Registrar, can you hand me the trial record please or one of them?

So, counsel, I have no problem with your question but I'm going to ask you to restate it in terms that are not ambiguous.

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

THE COURT: You were speaking about

02:51:28 1 Anishinaabe who are or were present on the Bruce
02:51:30 2 Peninsula. That's interesting but the
02:51:32 3 plaintiffs in this case are certain groups that
02:51:32 4 are modern, if I can use that word.

02:51:42 5 I think you tried to capture that in
02:51:44 6 some of your other words but may I suggest that
02:51:47 7 you might wish to ask the question in a way that
02:51:51 8 I will be able to understand the answer.

02:52:00 9 So I got a little side-tracked by the
02:52:02 10 shortcut. It's a perfectly fine shortcut for
02:52:05 11 some questions but this question, I think,
02:52:06 12 requires more specificity than Chippewas of
02:52:10 13 Saugeen First Nation and Chippewas of Nawash
02:52:17 14 First Nation, those names which certainly don't
02:52:20 15 go back into the distance that you're talking
02:52:22 16 about.

02:52:28 17 So I'll give you a minute to
02:52:34 18 reformulate.

02:52:35 19 MS. PELLETIER: Thank you, Your
02:52:36 20 Honour.

02:52:37 21 THE COURT: Thank you, Mr. Registrar.

02:52:53 22 And just while you're thinking, I
02:52:56 23 paused because the beginning of the question was
02:52:58 24 the Anishinaabe who are or were present on the
02:53:00 25 Bruce Peninsula.

02:53:01 1 And we've had, at this point, a large
02:53:05 2 amount of evidence in this trial which makes it
02:53:08 3 difficult for me to understand who you're
02:53:09 4 referring to because of various evidence that
02:53:17 5 I'm not going to mention.

02:53:50 6 BY MS. PELLETIER:

02:53:50 7 Q. Dr. von Gernet, I wonder if you
02:53:52 8 would agree with me that for the Odawa living in
02:53:55 9 and around the Bruce Peninsula that there is not
02:53:58 10 any archeological evidence to suggest a mass
02:54:02 11 migration of those people?

02:54:05 12 A. Well, I did not look at the
02:54:11 13 history of the presence of the Odawa on the
02:54:15 14 Bruce Peninsula in relation to my research in
02:54:21 15 preparing this report.

02:54:23 16 What I can say is that what I said
02:54:26 17 earlier in my testimony is that Anishinaabe
02:54:29 18 peoples in general have a history of actual
02:54:37 19 migrations.

02:54:37 20 There is Bands who were fluid. There
02:54:40 21 was a fission and fusion process in most Bands
02:54:45 22 which results in some people migrating in, some
02:54:53 23 people migrating out, sometimes entire groups
02:54:56 24 migrating.

02:55:03 25 We know that there were Odawa or

02:55:05 1 people referred to, or what Champlain refers to
02:55:08 2 as Odawa, living on what is now the Bruce
02:55:11 3 Peninsula at periods in history? You know
02:55:16 4 Champlain refers to some of the -- as I recall
02:55:20 5 the "high hairs" when he emerged at the mouth of
02:55:25 6 the French River.

02:55:28 7 So there are allusions to people who
02:55:32 8 we now refer to as Odawa in the early 17th
02:55:35 9 century, but where they were actually located at
02:55:38 10 any point in time was not the subject of my
02:55:40 11 inquiries.

02:55:41 12 Q. Thank you.

02:55:42 13 A. And so I cannot really give you a
02:55:43 14 better answer than that.

02:55:48 15 Q. Thank you. I'd like to go back
02:55:50 16 to the giant beaver fossils and ask whether you
02:56:00 17 would agree that there is no record -- let me
02:56:05 18 put this another way.

02:56:07 19 Do you agree that the stories
02:56:08 20 themselves are not about the discovery of giant
02:56:13 21 beaver bones?

02:56:18 22 A. The stories themselves I agree do
02:56:21 23 not refer to the discovery of giant beaver
02:56:25 24 bones.

02:56:25 25 Q. And in fact some of the examples

02:56:27 1 that you provided -- I believe you mentioned
02:56:30 2 yesterday in your testimony that some of the
02:56:39 3 Mi'kmaq traditions that speak of giant beavers,
02:56:40 4 the stories are in fact about having found the
02:56:43 5 giant beaver bones?

02:56:44 6 A. Well, many of the Mi'kmaq giant
02:56:49 7 beaver stories have no references whatsoever to
02:56:53 8 giant beaver bones, but there are some comments
02:56:57 9 made by Mi'kmaq from time-to-time who have
02:57:02 10 alluded to the discovery of what they thought
02:57:05 11 were giant beaver bones.

02:57:09 12 Q. And have you found similar
02:57:10 13 comments here?

02:57:13 14 A. Have I found similar comments
02:57:15 15 where?

02:57:16 16 Q. In the -- your review of the
02:57:19 17 Nanabush and giant beaver stories in and around
02:57:26 18 Lake Superior, for example? You did a thorough
02:57:29 19 review. You presented a number of variants. Do
02:57:33 20 any of those variants -- I'm going to suggest to
02:57:35 21 you those variants do not speak about the
02:57:37 22 discovery of bones.

02:57:47 23 A. That would be fair to say, yes.

02:57:48 24 Q. Now, your fourth hypothesis or,
02:57:49 25 sorry, alternative explanation, as I understand

02:57:51 1 it, is that the augmentation of the size of the
02:57:54 2 beaver was done to match the size of Nanabush.
02:57:59 3 So basically an oversized hero needs an
02:58:02 4 oversized beaver to contend with, is that right?

02:58:07 5 A. In simple terms, yes.

02:58:10 6 In the real life of an Indigenous
02:58:16 7 story these things depend on the person who
02:58:25 8 actually relates the story, whether they
02:58:28 9 emphasize the foe as being of greater or lesser
02:58:37 10 stature, but in general terms, yes.

02:58:42 11 In most tales about culture heroes
02:58:45 12 that we find in the Indigenous literature the
02:58:49 13 foes that the culture heroes have to contend
02:58:54 14 with tend to be formidable.

02:58:57 15 Q. So, again, here I would suggest
02:59:00 16 you don't have any evidence that supports that
02:59:03 17 this is the explanation in this case. This is
02:59:07 18 simply a suggestion made up by you.

02:59:11 19 A. Well, it's not a suggestion made
02:59:14 20 up by me, it's an observation that has been made
02:59:18 21 over and over again by anthropologists and
02:59:21 22 folklorists who have studied this material.

02:59:26 23 The idea of a giant foe for the giant
02:59:35 24 hero is something that's well established in the
02:59:38 25 literature. I'm not making it up.

02:59:40 1 What I am suggesting is that it raises
02:59:43 2 this other possibility and that it's the
02:59:53 3 adjective -- actually I think it was -- I think
03:00:01 4 it was Irving Hallowell, an anthropologist who
03:00:07 5 worked among the Anishinaabe in the Barron's
03:00:09 6 River area, who actually came up with this; who
03:00:13 7 noticed that there's often an augmentative --
03:00:26 8 that there was a prefix to many of these
03:00:28 9 creatures which indicated their large size.

03:00:31 10 So it was like a -- it was something
03:00:32 11 you did not because of an empirical observation
03:00:34 12 but rather as a folkloristic device.

03:00:46 13 Q. That's fine. What I'm getting
03:00:46 14 at, Dr. von Gernet, for this particular
03:00:46 15 alternative explanation it's just that, an
03:00:49 16 alternative explanation, there isn't any
03:00:51 17 evidence to support it.

03:00:53 18 You haven't, for example, found
03:00:54 19 somewhere in the documentary record an interview
03:00:56 20 with someone who's Anishinaabe who explains how
03:00:59 21 the story came to be? That it is a figment of
03:01:03 22 someone's imagination; that it's entirely made
03:01:05 23 up and fictitious; that they're augmenting the
03:01:10 24 size of the beaver to match the size of
03:01:14 25 Nanabush; it's simply an alternative suggestion.

03:01:17 1 A. Well, with respect, you keep
03:01:19 2 saying that but it is not necessary to postulate
03:01:22 3 the possibility. It would be nice, of course,
03:01:26 4 if we had that kind of direct evidence but the
03:01:30 5 fact is is that we rarely do.

03:01:32 6 But none of this precludes raising the
03:01:38 7 possibility as a plausible alternative and then
03:01:43 8 placing it on the scale of probability.

03:01:48 9 Yes, of course. I mean if -- in the
03:01:52 10 best case scenario you'd have Rose Nadjiwon
03:01:55 11 telling us about a giant beaver skull that she
03:01:58 12 found on the Bruce Peninsula in 1953. We don't
03:02:07 13 have that sort of -- we don't have the luxury of
03:02:09 14 that but that has never prevented us from
03:02:12 15 postulating reasonable possibilities of what
03:02:14 16 could have happened.

03:02:16 17 Q. Would you agree with me that
03:02:17 18 evidence increases where you would put something
03:02:19 19 on the scale of probabilities?

03:02:22 20 A. I'm sorry, say that again.

03:02:25 21 Q. Evidence increases where you
03:02:26 22 would put something on the scale of
03:02:28 23 probabilities?

03:02:32 24 A. Evidence increases?

03:02:33 25 Q. You said that you have a number

03:02:35 1 of alternative theories and then you place them
03:02:38 2 on the scale of probabilities.

03:02:40 3 What I'm asking is, would you agree
03:02:42 4 that if you have a number of alternative
03:02:44 5 theories and you have evidence to support one,
03:02:48 6 that makes it more probable? Or that would at
03:02:51 7 least be considered when you later do the
03:02:53 8 exercise of balancing which alternative
03:02:57 9 explanation you prefer.

03:03:10 10 A. Well, obviously if you find
03:03:13 11 evidence that is sufficient to support one
03:03:23 12 possibility more so than another then, yes, it
03:03:28 13 would assist you in placing various
03:03:31 14 possibilities on a scale of probability.

03:03:41 15 Q. And moving to your next and, I
03:03:43 16 believe, final alternative theory and that is of
03:03:47 17 cultural diffusion.

03:03:50 18 And here, as I understand this
03:03:51 19 alternative theory it is that references in a
03:03:56 20 story to a giant beaver were the product of
03:03:59 21 borrowing or cultural diffusion rather than the
03:04:03 22 product of a live encounter. Have I accurately
03:04:06 23 stated that?

03:04:10 24 A. Yes, for the most part.

03:04:13 25 Q. And so the idea being then that

03:04:17 1 the story told by Ms. Keeshig is not a story
03:04:20 2 unique to the SON, the Saugeen Ojibwe Nation,
03:04:22 3 but rather originated elsewhere?

03:04:34 4 A. Well, it's a matter of -- it's
03:04:34 5 not a matter of speculation that the story has
03:04:39 6 variants elsewhere, that's a demonstrable fact.

03:04:46 7 What is an assumption, or I should say
03:04:49 8 a possibility is that the reasons for the
03:04:59 9 geographical spread of the variants is the
03:05:02 10 consequence of cultural diffusion or borrowing.

03:05:06 11 That's a completely reasonable
03:05:08 12 assumption that one can make. I cannot rule it
03:05:13 13 out in every case; I can rule it out in some
03:05:16 14 cases.

03:05:22 15 Q. Now, to consider this point you
03:05:24 16 said yesterday that you set out to find all of
03:05:27 17 the stories you could about a culture hero
03:05:30 18 fighting a giant beaver who creates a giant dam?

03:05:35 19 A. Yes. It's not always the beaver
03:05:36 20 that creates the giant dam. Sometimes it's the
03:05:40 21 culture hero who creates the dam in order to
03:05:43 22 keep the beaver from escaping and then the
03:05:46 23 beaver cuts through the dam.

03:05:50 24 Q. Would you agree that of the
03:05:52 25 stories that you collected that they do not all

03:05:54 1 contain all of these elements, being culture
03:05:58 2 hero, giant beaver, dam?

03:06:08 3 A. As I said, the various
03:06:09 4 storytellers will either add or omit or modify
03:06:13 5 stories as they see fit. And, in some cases, of
03:06:17 6 course, the stories emerge independently of one
03:06:20 7 another so one shouldn't expect every detail to
03:06:23 8 be the same.

03:06:27 9 But for the most part we're dealing
03:06:29 10 with a culture hero and a beaver who are
03:06:31 11 struggling with one another in some fashion. In
03:06:35 12 many of those instances, but not all, it also
03:06:38 13 involves a dam.

03:06:43 14 Q. Would you agree that some of the
03:06:44 15 stories you have included are just about a dam
03:06:47 16 or just about a beaver?

03:06:51 17 A. I'm not sure what you're
03:06:53 18 referring to.

03:06:53 19 Q. They don't all include both a dam
03:06:55 20 and a beaver.

03:06:56 21 If you would like to take a moment to
03:07:03 22 review the variants you've included in your
03:07:07 23 short report, Dr. von Gernet?

03:07:09 24 A. Are we talking about variants
03:07:11 25 across North America or just the ones that

03:07:18 1 involve Nanabush and a giant beaver in the
03:07:22 2 vicinity of the Anishinaabe-speaking world?

03:07:27 3 Q. Talking for now about all of the
03:07:29 4 stories that you created, I began this line of
03:07:32 5 questioning with that you pointed out yesterday
03:07:34 6 that your starting point was to find all of the
03:07:37 7 stories you could.

03:07:42 8 A. There are some stories elsewhere
03:07:44 9 in North America where the stories are about the
03:07:49 10 origins of certain geological features in the
03:07:54 11 landscape and, in some instances, there's no dam
03:07:59 12 involved but there is a beaver and a culture
03:08:02 13 hero.

03:08:04 14 In some other instances there is a dam
03:08:07 15 and a culture hero and no beaver, but I tried to
03:08:13 16 find most of the ones that had all three of
03:08:18 17 those ingredients.

03:08:21 18 Q. You just mentioned that some of
03:08:22 19 your stories are stories that you call
03:08:24 20 "variants" and they had a closer geological link
03:08:28 21 to the stories of Lenore Keeshig, they were
03:08:33 22 stories on Lake Superior.

03:08:35 23 Putting aside those for a moment, I
03:08:37 24 believe you confirmed or you said in your
03:08:38 25 testimony, but I'd like you to confirm, that

03:08:39 1 you're not suggesting that all of these stories
03:08:42 2 originated from the same source, is that right?

03:08:51 3 A. I think I went to some length to
03:08:52 4 try and show that some of these stories are, in
03:08:55 5 all probability, linked to one another in the
03:08:59 6 sense that they do have a single original source
03:09:04 7 while others were independently formulated.

03:09:07 8 So, for instance, all the ones that
03:09:10 9 refer to Nanabush's female companion, such as
03:09:16 10 the wife or the mother or the grandmother, who
03:09:22 11 is set in place at a certain point in the
03:09:25 12 episode to -- with a task to keep the beaver
03:09:30 13 from escaping, I think those stories contain
03:09:36 14 enough detail to suggest that they do have a
03:09:40 15 single source.

03:09:41 16 But then others which don't have the
03:09:44 17 detail about Nanabush's female companion but do
03:09:52 18 have other ingredients, like attributing to the
03:09:57 19 beaver some of the local geological features and
03:10:00 20 having the beaver create those features as a
03:10:04 21 consequence of a fight with Nanabush, they may
03:10:08 22 be independently invented. They occur as far
03:10:12 23 afield as Anishinaabe who were a part of the
03:10:18 24 Algonquin Nation on the Quebec side of the
03:10:20 25 Ottawa River. That's as far east as they go and

03:10:25 1 as far west as Thunder Bay.

03:10:32 2 Some of those I suspect may have been
03:10:35 3 independently invented and I would distinguish
03:10:37 4 those from ones that seem to have been derived
03:10:46 5 from the story of the origins of the rapids of
03:10:50 6 the Sault.

03:10:56 7 Q. For all the stories that you
03:10:57 8 collected I'm assuming that for the most part
03:10:59 9 you don't know about the background of the
03:11:01 10 stories, is that right?

03:11:06 11 A. What do you mean "background"? I
03:11:08 12 provided as much information as I could about
03:11:11 13 where these stories came from, who told them,
03:11:15 14 who recorded them, how they originated.

03:11:20 15 If you mean by "background" something
03:11:22 16 else such as --

03:11:24 17 Q. Who the storyteller -- or you
03:11:26 18 haven't spoken to the storytellers? Let's start
03:11:28 19 with that question.

03:11:29 20 A. Well, in some cases the stories
03:11:31 21 are centuries old. I know I look old but I
03:11:34 22 don't quite have that antiquity.

03:11:40 23 In the more recent cases -- in fact
03:11:44 24 there are none that are within my lifetime
03:11:46 25 except for perhaps the ones that Lenore Keeshig

03:11:54 1 related that came from her Elders.

03:11:57 2 Q. You spoke yesterday about oral
03:11:59 3 traditional stories can be told for different
03:12:03 4 purposes. And so here with the stories that
03:12:06 5 you've gathered would you agree that you don't
03:12:08 6 know the purpose for which they were told?

03:12:20 7 A. Well, I know -- well, I shouldn't
03:12:22 8 say I know. Although I'm ostensibly here as an
03:12:27 9 expert I actually don't know that much.

03:12:28 10 What I can tell you is that from my
03:12:30 11 experience, and the experience of many other
03:12:33 12 anthropologists, is that I know an etiological
03:12:38 13 tale when I see one. I know what a story was
03:12:42 14 intended to do.

03:12:43 15 And that's quite manifest from the
03:12:50 16 story itself because the stories that are told,
03:12:56 17 when you look at them in their complete entity,
03:12:58 18 and also when you look at them in their -- in
03:13:03 19 all their variants, clearly try to explain or
03:13:08 20 provide a story about the origins of particular
03:13:12 21 features of the landscape. That is their intent
03:13:16 22 is to explain.

03:13:22 23 Now, after that we can debate about
03:13:25 24 whether they're trying to explain in metaphoric
03:13:29 25 terms an actual eyewitness description or

03:13:32 1 whether they're trying to reconstruct something
03:13:34 2 after the fact.

03:13:36 3 Q. Or whether they were based on an
03:13:38 4 actual eyewitness -- or eyewitness account?

03:13:39 5 A. Yeah. And I think that's where
03:13:41 6 you can have a reasonable debate.

03:13:43 7 But one thing I don't think is really
03:13:45 8 under debate, and that is that they have an
03:13:48 9 explanatory function. That is, they are created
03:13:51 10 in order to explain something and that something
03:13:56 11 is certain features of the environment.

03:13:58 12 Now, I'm not saying all of them do
03:14:01 13 because I'm not convinced, for example, that the
03:14:03 14 snippet about Nanabush's salty tears has any
03:14:07 15 explanatory value. We don't know whether it was
03:14:09 16 part of an etiological tale. It's only four
03:14:12 17 sentences long. I just can't conclude that.

03:14:15 18 But certainly in the case of Nanabush
03:14:17 19 and the giant beaver, because we see that theme
03:14:20 20 over and over again throughout Anishinaabe
03:14:22 21 country and every time it's told it's used to
03:14:25 22 explain certain local conditions, certain local
03:14:31 23 features, a rock here, a rapids there or a lake
03:14:35 24 there, because that's its central feature.

03:14:42 25 I can conclude with some confidence

03:14:45 1 that these tales were intended to explain
03:14:47 2 natural features in the environment.

03:14:48 3 Q. In your voir dire, Dr. von
03:14:50 4 Gernet, you discussed with my colleague,
03:14:53 5 Ms. Guirguis, internal checks and how I believe
03:14:56 6 you acknowledged that sometimes internal checks
03:14:59 7 can be sufficient to ensure the -- I don't
03:15:03 8 believe you used the word "ensure". I don't
03:15:04 9 want to misquote you.

03:15:04 10 I'm going to paraphrase and you let me
03:15:07 11 know if I get this accurately.

03:15:10 12 To assist with the reliability -- why
03:15:17 13 don't I ask you if you recall what you said
03:15:20 14 about internal checks? I believe that you
03:15:23 15 acknowledged that sometimes they can help with
03:15:25 16 lending credibility to the -- or it allows you
03:15:30 17 to have more confidence in the historical
03:15:33 18 accuracy of a story. Am I capturing what you've
03:15:37 19 said?

03:15:37 20 A. Well, throughout my career I have
03:15:41 21 commented on that very issue. And what I have
03:15:44 22 said has been in response to claims that
03:15:49 23 internal checks are evidence of -- I should say,
03:15:55 24 a claim that evidence for internal checks is
03:16:00 25 sufficient to make an argument for the

1 circumstantial reliability of the tradition.

2 And my response to that has always been, it
3 ain't necessarily so.

4 The fact is, is that when you look at
5 these internal checks, and here we're talking
6 about -- I guess the best example are the ones
7 that were raised in the Delgamuukw trial, the
8 original trial back when Justice McEachern was
9 the judge in that trial where there was evidence
10 of the Gitksan and Wet'suwet'en people in
11 British Columbia having had these elaborate
12 protocols that involved Elders sitting around
13 and providing a forum for the discussion of the
14 traditions, and opportunities for critiquing
15 errors or detecting errors in the traditions.
16 That was the claim made then.

17 These are kinds of internal checks
18 that would provide the circumstantial
19 probability of reliability. Sort of akin to,
20 you know, one of the exceptions in hearsay, as
21 you would have it, in your profession.

22 And so that's how, you know, I was
23 first introduced to that whole subject of -- it
24 was the claim made that such internal checks
25 provide evidence for reliability.

03:17:45 1 And I've always been somewhat
03:17:47 2 skeptical that, (a), that these internal checks
03:17:51 3 always have existed; and, (b) whether they are
03:18:00 4 really that effective.

03:18:02 5 I've never precluded the possibility
03:18:04 6 that they would enhance the reliability but I
03:18:08 7 have always been, at the same time, very
03:18:10 8 suspicious that they actually did.

03:18:12 9 And, in fact, as it turned out in the
03:18:14 10 Delgamuukw case, once the evidence actually came
03:18:18 11 in, the actual -- the system of these internal
03:18:23 12 checks actually did not aspire to the promises
03:18:32 13 that had been made by counsel of what the
03:18:38 14 evidence would actually consist of so --

03:18:41 15 Q. Dr. von Gernet, I'm going to
03:18:43 16 interrupt you because we don't need to get into
03:18:45 17 all of that to answer my question. And, I
03:18:47 18 apologize, I should have had a copy of your
03:18:51 19 transcript from the voir dire in front of me
03:18:53 20 before asking you my previous question.

03:18:55 21 If you'd like me to pull it up I can.
03:18:57 22 I'm just going to cite a couple of lines and you
03:19:00 23 can tell me if you want to see the larger
03:19:02 24 context.

03:19:02 25 A. Fair enough.

03:19:02 1 Q. I believe that you said with
03:19:03 2 respect to oral checks that --

03:19:10 3 THE COURT: So I --

03:19:11 4 MS. PELLETIER: Would you like me to
03:19:11 5 pull it up, Your Honour?

03:19:11 6 THE COURT: Oral checks?

03:19:12 7 MS. PELLETIER: Oral checks. The
03:19:13 8 protocols in place --

03:19:13 9 THE COURT: No, it's just that the
03:19:13 10 previous question didn't refer to oral checks.

03:19:16 11 MS. PELLETIER: Oh, did it not? I
03:19:16 12 might have called it -- it's been called both
03:19:16 13 oral protocols and oral checks.

03:19:26 14 THE COURT: You called it internal
03:19:27 15 checks.

03:19:27 16 MS. PELLETIER: I may have misspoke.

03:19:27 17 THE COURT: It's fine. You've already
03:19:27 18 explained that.

03:19:27 19 MS. PELLETIER: Thank you. I
03:19:27 20 apologize.

03:19:27 21 THE COURT: I'm just trying to make
03:19:29 22 sure I understand what you're talking about.
03:19:33 23 Maybe you better put the transcript up since
03:19:37 24 you've offered to do so.

03:19:38 25 MS. PELLETIER: Court's indulgence for

03:19:42 1 one moment please.

03:19:57 2 THE COURT: If it's not handy, I
03:19:58 3 certainly have no objection to you reading it
03:20:00 4 and then handing your paper copy to the witness
03:20:02 5 so he can have it in front of him.

03:20:03 6 Oh, you found it.

03:20:04 7 MS. PELLETIER: I found it.

03:20:04 8 BY MS. PELLETIER:

03:20:04 9 Q. Now, this is just an excerpt.
03:20:05 10 And again, Dr. von Gernet, I don't intend to
03:20:07 11 rehash the whole -- to what extent are internal
03:20:14 12 oral checks helpful. I just want to remind you
03:20:21 13 what you said and then I'm going to ask a
03:20:23 14 different question.

03:20:24 15 So at page 6501 at the bottom of the
03:20:52 16 page the question -- and here it looks like
03:20:54 17 Ms. Guirguis was referring to them as "internal
03:20:57 18 checks" so I'll try to remember to do the same
03:20:59 19 here. The question is.

03:21:01 20 "QUESTION: Then you would agree with
03:21:02 21 me that there are cases where internal
03:21:04 22 checks within an Indigenous community
03:21:06 23 are sufficient to guarantee historical
03:21:09 24 reliability?

03:21:11 25 "ANSWER: They may be sufficient not

03:21:13 1 to guarantee historical reliability
03:21:16 2 but to provide confidence that on a
03:21:17 3 balance of probabilities they are
03:21:20 4 historically reliable."
03:21:21 5 That's what I was trying to paraphrase
03:21:23 6 or remember before.
03:21:25 7 My point is that I believe you
03:21:26 8 acknowledged -- actually I'm going to take you
03:21:29 9 to another section before I ask my question.
03:21:31 10 You say a little bit more about the
03:21:42 11 internal checks, and for that we'll go to page
03:21:44 12 6521, which was the document we just had up.
03:22:05 13 And here the question was:
03:22:07 14 "QUESTION: But then let's come back
03:22:08 15 to the question I just recently asked
03:22:09 16 you about your testimony in courts
03:22:09 17 with respect to oral history evidence.
03:22:12 18 You have not concluded that they
03:22:14 19 should be treated as independently
03:22:16 20 credible, given independent weight
03:22:26 21 outside of corroboration?"
03:22:37 22 And then you answer -- I'll give you a
03:22:37 23 moment. I'll highlight the sentence that I'm
03:22:37 24 interested in in a moment but I'll give you a
03:22:37 25 chance to refresh your memory.

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A. Yes.

Q. So here what I'm interested in is when you say:

"ANSWER: So, what do you do with it? Well, then it becomes really a matter of a case-by-case basis. It depends on the context of the telling, who is telling it, where it is being told and you make a judgment. It's not easy."

And I would assume, Dr. von Gernet, that part of the context of the telling would include considering whether or not the internal checks are present, would it not?

A. Well, we almost never have evidence of that kind of context. That is, how -- I mean, I don't think I've ever seen a single Anishinaabe tradition or corpus of tradition where it was made manifest what kind of internal checks were made prior to the telling of the story; so we just don't have that luxury.

So the best that one can hope for is that somebody in the present suggests that, well, in our tradition we have this, that or the other thing.

03:23:53 1 And then -- but this does not
03:23:57 2 necessarily decrease the problem because I think
03:24:06 3 as Henige has pointed out, and others have
03:24:09 4 pointed out, how can we possibly guarantee that
03:24:13 5 even if he had such internal checks that they
03:24:19 6 always prevailed in each generation where we
03:24:23 7 have no direct access to those contexts?

03:24:27 8 Q. I'm not suggesting that we need
03:24:29 9 to look for a guarantee, Dr. von Gernet. I'm
03:24:32 10 merely saying even that evidence of, as you say,
03:24:34 11 In our tradition we have this, that or the other
03:24:37 12 thing, for the variants that you've pulled you
03:24:40 13 don't have any of that background for those
03:24:42 14 stories, is that correct?

03:24:44 15 A. Nobody has.

03:24:51 16 Q. So you don't know which of the
03:24:53 17 stories might be historically accurate and which
03:24:56 18 may be historically inaccurate?

03:25:08 19 A. Well, that's a totally different
03:25:10 20 question.

03:25:10 21 Q. Let me rephrase that question. I
03:25:10 22 realized after it came out of my mouth that's
03:25:12 23 not how I intended it to come out.

03:25:14 24 Going back to the purposes for which
03:25:17 25 stories are told. Sometimes stories are told

03:25:19 1 and are intended to preserve a memory of a
03:25:21 2 historical event. You mentioned sometimes
03:25:24 3 stories are told for entirely other reasons, for
03:25:27 4 amusement, etiological reasons, et cetera, et
03:25:30 5 cetera.

03:25:32 6 Without any background on the stories
03:25:33 7 you've pulled you aren't able to determine which
03:25:38 8 are intended to be historically accurate, which
03:25:41 9 are intended to be for amusement, which
03:25:45 10 categories these stories may fall into. Would
03:25:47 11 you agree with that?

03:25:53 12 A. Well, for the most part we have
03:25:55 13 no evidence whatsoever one way or the other.
03:26:01 14 But, you know, as the phrase goes, just because
03:26:03 15 the light is not dazzling is no reason for
03:26:08 16 sulking in the dark.

03:26:09 17 We do have clues and the clues are in
03:26:12 18 the stories themselves about what the intention
03:26:18 19 was.

03:26:18 20 Q. Yes. However, I will suggest to
03:26:20 21 you, Dr. von Gernet, that we've looked at an
03:26:23 22 example this morning where you yourself did not
03:26:25 23 understand the intention as presented by the
03:26:28 24 plaintiffs, and that being the migration story
03:26:30 25 example.

03:26:31 1 So without the cultural context you
03:26:32 2 would agree that sometimes you can misread the
03:26:35 3 clues, would you not?

03:26:36 4 A. Well, again, you know, with
03:26:39 5 respect, to be fair to me, you can't present me
03:26:43 6 with evidence that came after I did my
03:26:45 7 inquiries.

03:26:49 8 I was given to believe that if there
03:26:54 9 was any context to these stories they would have
03:26:57 10 come out in Lenore Keeshig's original report.
03:27:01 11 After all, the whole purpose of that report was
03:27:03 12 to make the argument.

03:27:04 13 So, you know, you can't suddenly say
03:27:10 14 that I didn't consider the context of viva voce
03:27:15 15 testimony that I had not the advantage of seeing
03:27:22 16 at the time I did my inquiries.

03:27:23 17 Q. I don't intend it to be a
03:27:23 18 criticism, Dr. von Gernet. I'm merely pointing
03:27:25 19 out that it's a perfect example that without
03:27:27 20 that additional background, that you're correct,
03:27:29 21 that you didn't have at the time of preparing
03:27:31 22 your report, you can make mistakes. That you
03:27:33 23 can be -- you can be wrong about the intention
03:27:36 24 of a story.

03:27:38 25 A. I don't think I was -- even with

03:27:41 1 the caveat I don't think that I was wrong,
03:27:43 2 because what I was commenting on were the
03:27:53 3 stories about -- that were reiterated by
03:27:56 4 Benton-Banai.

03:28:02 5 Q. Yes, but here we were looking --
03:28:03 6 you were relating the story -- you were basing
03:28:06 7 your opinion on the story as related by
03:28:11 8 Benton-Banai but you were intending to interpret
03:28:13 9 a story as related by the plaintiffs. And
03:28:16 10 without the additional context --

03:28:17 11 THE COURT: I'm just going to
03:28:18 12 interrupt you because I know it's
03:28:20 13 cross-examination but the plaintiffs -- I mean,
03:28:24 14 again this gentleman has said that he made his
03:28:30 15 report based on a story told by Lenore Keeshig.
03:28:33 16 It wasn't "the plaintiffs", it was an individual
03:28:37 17 who put forward a report. Now, the report was
03:28:40 18 put forth by the plaintiffs.

03:28:43 19 MS. PELLETIER: Sorry, I think I'm
03:28:45 20 struggling, Your Honour, because this particular
03:28:48 21 story was not told by Lenore. And so Dr. von
03:28:50 22 Gernet based his -- my understanding is, based
03:28:53 23 his opinion on a story found by Eddie
03:28:54 24 Benton-Banai who was not a member of the
03:28:56 25 plaintiff community.

03:28:58 1 THE COURT: I see. So that's the
03:28:59 2 distinction you're making.

03:29:00 3 MS. PELLETIER: So, yes, it's the
03:29:00 4 position of the -- the version that the
03:29:02 5 plaintiffs -- yes, I can start referring to
03:29:05 6 Lenore but that is not the story.

03:29:07 7 THE COURT: I've explained my
03:29:08 8 confusion. It may be that the witness has
03:29:12 9 perfect clarity on all of this.

03:29:13 10 But if the distinction you're drawing
03:29:17 11 is that there's an account in the Mishomis book
03:29:20 12 which you want to put at arm's length as
03:29:28 13 different from the plaintiffs' position, because
03:29:30 14 I presume you mean both the author and the
03:29:32 15 source of that story are not part of -- are not
03:29:35 16 Anishinaabe, but that can't be right. You're
03:29:38 17 saying they're not part of these two particular
03:29:40 18 First Nations?

03:29:41 19 MS. PELLETIER: The story in evidence
03:29:43 20 about the migration was told by ^Karl Keeshig
03:29:46 21 and it's not the exact same story.

03:29:49 22 THE COURT: No, no, no, that was this
03:29:50 23 morning's problem.

03:29:52 24 MS. PELLETIER: Right.

03:29:52 25 THE COURT: Because he was -- and I'm

03:29:53 1 not going to repeat what I said this morning.

03:29:55 2 I understand what you're saying now
03:29:57 3 but I do find it -- for me to understand the
03:30:00 4 answers it's probably more important but -- or
03:30:03 5 the same importance that the witness understand
03:30:05 6 the question.

03:30:10 7 So if you're trying to distinguish
03:30:12 8 between members of these two First Nations and
03:30:15 9 the gentleman who wrote this book, or the
03:30:18 10 gentleman from whom that gentleman obtained his
03:30:22 11 story, I really need you to be a bit more
03:30:25 12 specific.

03:30:26 13 MS. PELLETIER: Sure, thank you, Your
03:30:27 14 Honour.

03:30:27 15 THE COURT: Now, what I'm going to do
03:30:28 16 is take the afternoon break and you can think
03:30:30 17 about whether or not you got what you were
03:30:33 18 trying to get.

03:30:33 19 MS. PELLETIER: Thank you.

03:30:33 20 THE COURT: We'll take 20 minutes.

03:30:33 21 -- RECESSED AT 3:31 P.M. --

03:30:33 22 -- RESUMED AT 3:54 P.M. --

03:54:57 23 THE COURT: Please go ahead.

03:54:59 24 MS. PELLETIER: Thank you, Your
03:54:59 25 Honour.

03:55:00 1 BY MS. PELLETIER:

03:55:00 2 Q. Okay, Dr. von Gernet, I think we
03:55:02 3 can move off the migration story for now.

03:55:05 4 And I just wanted to remind you that
03:55:07 5 earlier today you agreed with me that
03:55:10 6 cultural -- the cultural context of an oral
03:55:13 7 tradition can be important to having a complete
03:55:15 8 understanding of it.

03:55:17 9 And I would just wonder if you could
03:55:19 10 agree with me that here, with respect to all of
03:55:22 11 the variants, you in fact do not have that
03:55:25 12 cultural context?

03:55:30 13 A. Well, we do have cultural
03:55:32 14 context. It may not be all of it because rarely
03:55:36 15 are the stories that we have that are extant in
03:55:44 16 the literature accompanied by every conceivable
03:55:50 17 contextual piece of information that we might,
03:55:54 18 in hindsight, deem valuable.

03:55:58 19 But we do have context for at least
03:56:04 20 some of the stories; in the sense that we know
03:56:10 21 the period in which they were collected; we know
03:56:13 22 the communities from which they were collected;
03:56:16 23 and in some cases we know the informants and
03:56:19 24 their names, we know who they were in the
03:56:22 25 community.

03:56:26 1 And to the extent that we have that
03:56:29 2 limited information I did include it in my
03:56:34 3 inquiries. But unfortunately, you know, we
03:56:39 4 simply don't have everything that we might want
03:56:42 5 surrounding the telling of a story.

03:56:45 6 Q. Do you acknowledge that to the
03:56:46 7 extent you have any cultural context that that
03:56:53 8 information is in fact limited?

03:57:01 9 A. I think that would be fair to
03:57:02 10 say. Limited in the sense that when compared to
03:57:07 11 the wide possibilities but that's true of every
03:57:14 12 historical inquiry. We always want more context
03:57:18 13 and we can always envision there being more
03:57:20 14 context.

03:57:34 15 Q. Okay. So I'd like to understand
03:57:35 16 a bit more about the purpose for which you've
03:57:41 17 gathered these variants.

03:57:44 18 Now, I understand that you are not
03:57:45 19 suggesting that of all the variants you gathered
03:57:48 20 that they are all the product of cultural
03:57:50 21 diffusion, is that correct?

03:57:54 22 A. Yes.

03:57:55 23 Q. And am I correct then that you
03:57:56 24 believe that it is only those stories which
03:57:58 25 have -- which feature a female companion that

03:58:02 1 are the product of cultural diffusion? Do I
03:58:06 2 have that correct?

03:58:11 3 A. I don't think it's as simple as
03:58:13 4 that.

03:58:14 5 I'd have to refer back to my written
03:58:23 6 opinion because I don't recall in precise detail
03:58:29 7 which particular aspects of those variants led
03:58:32 8 me to the conclusion.

03:58:37 9 What I did say is that common to seven
03:58:41 10 of the variants is a reference to a dam
03:58:44 11 specifically at the Sault; and in eight of the
03:58:48 12 variants the culture hero's female companion,
03:58:51 13 who was a wife, a mother or a grandmother,
03:58:54 14 depending on the variant, is left at or near the
03:58:58 15 dam to prevent the beaver from escaping; and
03:59:02 16 then in six variants her incompetence results in
03:59:06 17 severe injury or death at the hands of Nanabush.

03:59:12 18 And then what I concluded is that
03:59:14 19 narratives containing a sequence of such
03:59:16 20 specific details are unlikely to have had
03:59:19 21 independent origins. And it stands to reason
03:59:22 22 that the original versions of that oral
03:59:24 23 tradition had a culture hero who partly or
03:59:27 24 completely destroyed a giant beaver dam located
03:59:31 25 at the Sault Ste. Marie rapids.

03:59:34 1 The myth was likely invented and
03:59:37 2 perpetuated to explain the origins of the rapids
03:59:40 3 themselves. And then each raconteur added to,
03:59:45 4 subtracted from or altered the story in various
03:59:53 5 creative ways. And then one or more moved the
03:59:56 6 setting to other folklore-inspiring features of
04:00:02 7 the local landscape, such as the impressive gap
04:00:03 8 between Nadoway Point and Gros Cap.

04:00:07 9 And I went on to say that:

04:00:08 10 "In my opinion the story was
04:00:10 11 conceived in a manner similar to the
04:00:12 12 etiological tales found among other
04:00:12 13 indigenous peoples, which also explain
04:00:12 14 local landscapes with reference to a
04:00:12 15 hero, a giant beaver and a dam.

04:00:21 16 In this instance the initial
04:00:23 17 conception could have occurred at any
04:00:25 18 time prior to the date of a first
04:00:28 19 recorded variant, which is 1669.

04:00:30 20 There's no necessity whatsoever
04:00:33 21 to postulate its origins in an over
04:00:36 22 9,000-year-old eyewitness observation
04:00:39 23 made at the time the Nadoway Barrier
04:00:39 24 was breached."

04:00:43 25 Q. And so now to accept this

04:00:44 1 alternative theory of cultural diffusion we must
04:00:48 2 assume then that all of these variants, that you
04:00:52 3 say are the product of cultural diffusion,
04:00:55 4 originated from the same stories, is that right?

04:01:03 5 A. In my opinion, given the
04:01:06 6 specificity of some of these details, it is more
04:01:10 7 probable that the story has a common origin.

04:01:16 8 Q. And you don't know whether that
04:01:17 9 common origin may have been a story that
04:01:19 10 originated with the Saugeen Ojibwe?

04:01:29 11 A. Well, I don't know whether the
04:01:31 12 Saugeen Ojibwe existed in 1669.

04:01:34 13 Q. The ancestors of the Saugeen
04:01:36 14 Ojibwe.

04:01:41 15 A. I don't know who the ancestors of
04:01:44 16 the Saugeen Ojibwe were so I'm unable to link
04:01:47 17 them to the origin of this particular story.

04:01:54 18 Q. You don't know the origin of the
04:01:56 19 particular story?

04:01:58 20 A. All I know is that -- is that
04:02:00 21 it's more likely -- it's more than likely to
04:02:02 22 have been a local population in the Sault Ste.
04:02:05 23 Marie area because they -- generally etiological
04:02:11 24 tales that focus and are specific to particular
04:02:18 25 rapids in this case are more likely to be local;

04:02:20 1 although I can't be certain of that it's more
04:02:28 2 probable than not.

04:02:29 3 Q. And are versions of what you have
04:02:30 4 called the variants -- some of the versions that
04:02:33 5 you call variants include islands which are in
04:02:38 6 Georgian Bay, or islands elsewhere.

04:02:47 7 A. Well, there -- some of these
04:02:50 8 stories include the origination of islands in
04:02:54 9 Lake Superior. Some of them include islands
04:02:57 10 along the north shore of Lake Huron.

04:03:06 11 Then, of course, there's a variant
04:03:08 12 that was told at Rama which did not include --
04:03:12 13 actually had the origins of the same islands,
04:03:21 14 the 30,000 islands, originating in a different
04:03:24 15 way other than through the bursting of a dam or
04:03:28 16 any other dam-like structure. So, yeah, there
04:03:38 17 are many variants.

04:03:39 18 And there are, of course, other
04:03:41 19 variants that have dams at different locations
04:03:43 20 such as along the French River and along the
04:03:46 21 Mattawa and Ottawa Rivers. So it varies from
04:03:56 22 place to place.

04:03:58 23 But, yes, some of them -- as I said,
04:04:00 24 at least seven variants have a reference to a
04:04:02 25 dam specifically at the Sault, the Sault rapids.

04:04:10 1 Q. Now, in talking about variants
04:04:12 2 and you've used the fact that there are variants
04:04:16 3 to the stories, a reason to doubt the
04:04:19 4 reliability of that story or doubt the fact that
04:04:22 5 this story may preserve an actual memory of a
04:04:25 6 historical event --

04:04:27 7 A. I didn't -- I don't think I've
04:04:28 8 ever said that. I don't use these stories to
04:04:31 9 doubt anything.

04:04:32 10 I use these stories to raise the
04:04:34 11 possibility -- to raise other possible
04:04:36 12 explanations for the same data set as the one
04:04:40 13 that is postulated by the deep-time oral
04:04:42 14 traditions claim.

04:04:45 15 Q. Thank you for that clarification,
04:04:48 16 that's helpful.

04:04:49 17 I'd like to move now to the story of
04:04:51 18 the tunnel to Manitoulin, which I will point out
04:04:54 19 you've noted has no other variants that you
04:04:58 20 could find?

04:05:03 21 A. Yeah. I mean, it's not for want
04:05:05 22 of looking but I couldn't find anything that was
04:05:13 23 a variant of that story. The only one that I
04:05:16 24 could find was the one that first appeared in
04:05:23 25 Lenore Keeshig's report and which I understand,

04:05:28 1 according to that report, originated with her
04:05:32 2 father.

04:05:33 3 And since then, of course, I've read
04:05:35 4 Lenore Keeshig viva voce testimony, and I've
04:05:42 5 learned more about its origins and was intrigued
04:05:45 6 to find that her father had originally told it
04:05:52 7 to the geologist Blasco and that's eventually
04:05:57 8 how Lenore learned of it. That's about all I
04:06:00 9 know in terms of its origin and, as I said, I
04:06:05 10 haven't seen any other similar story from any
04:06:08 11 other source.

04:06:09 12 Q. So my understanding of your
04:06:10 13 alternative theory for this story is that it is
04:06:14 14 entirely fiction?

04:06:24 15 A. No, don't get me wrong. I mean,
04:06:26 16 I didn't -- nowhere have I said that it's
04:06:28 17 entirely fiction.

04:06:30 18 What I think I did say is that the
04:06:33 19 story -- first of all it's a stretch to suggest
04:06:42 20 there is a "parallel" of some sort between the
04:06:44 21 tunnel and the geological feature; and I also
04:06:53 22 indicate a few other problems with making such a
04:06:56 23 stretch.

04:06:56 24 Q. I believe, Dr. von Gernet, you
04:06:59 25 said that the reason it was a stretch suggesting

04:07:01 1 there was a parallel is because in your view the
04:07:03 2 story's about a tunnel and the geological
04:07:07 3 evidence is not of a tunnel but rather of a land
04:07:09 4 bridge and, therefore, you can't make the link.
04:07:12 5 Is that right? Is that why you believe it's a
04:07:15 6 stretch?

04:07:16 7 A. Well, I think for any reasonable
04:07:20 8 person it is a stretch.

04:07:22 9 And surely I'm not the only one to
04:07:25 10 suggest that there's a difference between --
04:07:28 11 well, I wouldn't be the only one to suggest that
04:07:32 12 a tunnel connotes an image of something
04:07:36 13 underground, and if it's between Tobermory and
04:07:40 14 Manitoulin Island, it's actually under water.

04:07:44 15 It's a stretch to turn that kind of
04:07:46 16 image or -- of a tunnel into some kind of
04:07:53 17 trench-like structure that was -- that existed
04:07:56 18 on land.

04:08:02 19 Q. If we spoke -- or you spoke
04:08:04 20 earlier, I believe it was in your evidence
04:08:10 21 in-chief, about the idea or the gist of a story
04:08:12 22 surviving, or I believe you also said kernel of
04:08:17 23 truth.

04:08:18 24 If the gist or kernel of truth of the
04:08:20 25 story of the tunnel to Manitoulin is that once

04:08:22 1 upon a time you could walk from the Bruce
04:08:24 2 Peninsula to Manitoulin, would you not agree
04:08:27 3 that there is in fact a parallel between the
04:08:30 4 story and the geological evidence?

04:08:50 5 A. Well, I guess it all depends on
04:08:53 6 how you define "gist". The story is so
04:08:57 7 fragmentary that it's hard to understand what
04:08:59 8 the gist might be.

04:09:00 9 It has very specific terms that are
04:09:08 10 used. One is that it's a journey from one side
04:09:17 11 to another via a tunnel, which if you don't have
04:09:26 12 the geological evidence intruding on it can only
04:09:31 13 mean an underwater tunnel between Tobermory and
04:09:37 14 Manitoulin Island.

04:09:38 15 So the gist is that there's somehow --
04:09:42 16 there was a tunnel underneath a body of water
04:09:45 17 that linked two pieces of land.

04:09:50 18 Q. Well, Dr. von Gernet, I'm going
04:09:51 19 to suggest to you I'm not sure you're in a
04:09:54 20 position to opine on what the gist of the story
04:09:59 21 is without again the cultural context. But I
04:10:00 22 think you've acknowledged that details of a
04:10:02 23 story can change and in fact do change?

04:10:12 24 A. Yes. But, with respect, you were
04:10:13 25 actually asking me about the gist of the story

04:10:15 1 and wanting me to opine on it.

04:10:17 2 Q. No, I asked if you accept that
04:10:19 3 the gist of the story -- or perhaps put another
04:10:20 4 way, the kernel of truth that survived is that
04:10:23 5 there was once a time when you could walk from
04:10:25 6 the Bruce Peninsula to Manitoulin that in fact
04:10:28 7 that kernel of truth is supported by the
04:10:31 8 geological evidence?

04:10:32 9 A. Well, I don't know if it's a
04:10:34 10 kernel of truth and I don't know whether it's
04:10:36 11 supported by the geological evidence because, I
04:10:39 12 as I said, it's a stretch.

04:10:47 13 I mean, as I testified earlier, you
04:10:48 14 can find virtually any story in the Anishinaabe
04:10:53 15 repertoire and voluminous corpus of literature
04:10:56 16 and associate any one of the named or identified
04:11:00 17 features in the landscape with something that
04:11:04 18 happened in our geology, in our geological
04:11:08 19 history.

04:11:09 20 So, you know --

04:11:12 21 Q. Are you suggesting that this is
04:11:13 22 an explanatory myth?

04:11:15 23 A. I don't know what it is. It's
04:11:17 24 too short to be able to determine exactly what
04:11:19 25 it is. Whether it's -- I mean, neither Lenore

04:11:25 1 Keeshig or her father gave any further context
04:11:28 2 for it, so we can't reconstruct the reasons for
04:11:32 3 telling it.

04:11:32 4 All I can say is that before Donald
04:11:36 5 Keeshig spoke to Dr. Blasco it didn't occur to
04:11:44 6 him that it was -- that it had historicity, so
04:11:51 7 presumably he didn't tell as if it had
04:11:53 8 historicity.

04:11:55 9 Q. Or presumably, would you accept,
04:11:56 10 that he also may not have known that in fact the
04:11:59 11 story was supported by the geological evidence?

04:12:07 12 A. Well, that raises more questions
04:12:11 13 than it answers, as I testified yesterday.
04:12:13 14 Consider the implications of that. If he didn't
04:12:16 15 know, or his father didn't know, or whoever he
04:12:19 16 heard it from didn't know --

04:12:21 17 Q. I said that it was supported by
04:12:23 18 the geological evidence not that they didn't
04:12:24 19 believe that it was true. This --

04:12:26 20 A. There is no evidence that he
04:12:27 21 believed it was true. I haven't heard any
04:12:29 22 evidence of that so I can't even go that far.

04:12:35 23 But let's assume for the sake of your
04:12:37 24 argument that he assumed it to be true, that
04:12:41 25 there was an actual tunnel, I fail to see how

04:12:48 1 that's supported by the geological evidence
04:12:51 2 because the geological evidence is not about a
04:12:55 3 tunnel.

04:12:55 4 So that the most you can say, I
04:12:57 5 suppose, is that there was a means by which
04:13:01 6 human locomotion as opposed to -- or I should
04:13:05 7 say bipedal locomotion, as opposed to a paddling
04:13:12 8 a boat, would get you from Tobermory to
04:13:16 9 Manitoulin Island. That's the most one could
04:13:18 10 say.

04:13:18 11 Q. And accepting that details of a
04:13:20 12 story can change over time, I've asked if you
04:13:22 13 accept that -- I've asked you to accept that for
04:13:25 14 the purposes of this story the kernel of truth
04:13:28 15 I'm putting to you is that there was once a time
04:13:30 16 that you could walk from Manitoulin Island to
04:13:32 17 the Bruce Peninsula and that is supported by the
04:13:36 18 geological evidence.

04:13:39 19 A. Well --

04:13:42 20 Q. Could you, once upon time,
04:13:43 21 according to the geological evidence, walk from
04:13:45 22 the Bruce Peninsula to Manitoulin Island?

04:13:49 23 A. Well, neither the Bruce Peninsula
04:13:51 24 or Manitoulin Island existed at the time when
04:13:55 25 this was possible, but you could walk to --

04:13:59 1 between what is now land of Tobermory to what is
04:14:04 2 now land at Manitoulin Island during periods
04:14:08 3 between 8,200 years ago and 11,000 years ago.

04:14:15 4 Q. Okay. Thank you.

04:14:19 5 I'd like to move now to the story of
04:14:22 6 Nanabush grieves.

04:14:27 7 Now, as I understand it, again in
04:14:29 8 terms of an alternative hypothesis or an
04:14:31 9 alternative explanation to the hypothesis, that
04:14:36 10 this story preserves a memory of a historical
04:14:40 11 event. From what I can tell the only
04:14:42 12 alternative that you provide is, again, that
04:14:45 13 this story is merely fictional, is that correct?

04:14:50 14 A. Well, here we are greatly limited
04:14:53 15 by the fact that the snippet is four sentences
04:14:57 16 long, literally, so we have very little to go
04:15:03 17 on.

04:15:05 18 What little we do have to go on
04:15:08 19 suggests that the context -- the only context
04:15:17 20 that we have is that this story was told during
04:15:21 21 a presentation of Anishinaabe stories and
04:15:27 22 geological research.

04:15:32 23 It's when Elder Rose Nadjiwon was
04:15:36 24 present and it was in that context that she told
04:15:41 25 Lenore Keeshig that she didn't believe that

04:15:45 1 these Nanabush stories were true. And she
04:15:49 2 thought her parents and others told these
04:15:51 3 stories to keep the children quiet and to make
04:15:59 4 them laugh. That's when -- that's the context
04:16:01 5 in which she told this story. So that's
04:16:04 6 basically all we know.

04:16:05 7 We know that Lenore Keeshig was
04:16:10 8 already involved in trying to find parallels
04:16:13 9 between geological processes and Anishinaabe
04:16:18 10 stories. And we know that Rose Nadjiwon, who
04:16:26 11 told the story, was the -- that this Elder
04:16:29 12 herself did not think the story was true. It
04:16:32 13 was Lenore Keeshig who offered the possibility
04:16:41 14 that it was true.

04:16:42 15 Q. Now, Dr. von Gernet, when you say
04:16:44 16 that the Elder Rose did not believe the story
04:16:48 17 was true you don't understand the -- you don't
04:16:53 18 understand Lenore to have told the story to
04:16:56 19 suggest that in fact Nanabush cried into
04:17:00 20 Georgian Bay and that is how it once had a
04:17:05 21 brackish quality?

04:17:10 22 Do you understand the story to be
04:17:11 23 taken literally or do you accept that in fact
04:17:14 24 there are fictional elements to that story?

04:17:16 25 A. Well, the way I understand it is

04:17:18 1 that not all of the story is claimed to contain
04:17:27 2 historicity.

04:17:29 3 There is a -- I'm sure that somewhere
04:17:33 4 in the Bruce Peninsula, which I've visited many
04:17:37 5 times, there are places where all kinds of rocks
04:17:40 6 fall, boulders fall. And so somebody might come
04:17:48 7 up with a parallel with boulders and rocks that
04:17:50 8 you find in this snippet of the story.

04:17:54 9 But the one -- so there's a picking
04:17:57 10 and choosing of which portions of these stories
04:18:01 11 contain historicity and which ones we are to
04:18:04 12 assume are mythological or folkloristic
04:18:10 13 elements.

04:18:11 14 And I'm assuming here that the only
04:18:14 15 portion of the story that Lenore Keeshig
04:18:20 16 identified as having historicity of some sort
04:18:23 17 was the saltiness of the tears.

04:18:26 18 It's rather arbitrary because you
04:18:28 19 could just as easily have focused on the rocks
04:18:31 20 and boulders or you could have focused on some
04:18:34 21 other aspect of it, but that's the nature of
04:18:36 22 these kind of claims.

04:18:37 23 Q. Well, Dr. von Gernet, I suggest
04:18:39 24 to you it's not arbitrary. I think you know
04:18:42 25 that Ms. Keeshig's evidence was that she had

04:18:44 1 heard the story and it wasn't until discovering
04:18:47 2 that in fact there was geological evidence that
04:18:51 3 once upon a time the Bay of Georgian Bay had a
04:18:54 4 saline-like solution that she made the
04:18:57 5 connection between the story and the geological
04:19:00 6 evidence.

04:19:11 7 A. Yes, but it's based on a
04:19:12 8 presupposition that the story -- that Rose
04:19:14 9 Nadjiwon is mistaken about the nature of the
04:19:30 10 story and that in fact Lenore Keeshig is correct
04:19:35 11 in that it has historicity.

04:19:40 12 Q. Do you accept that Lenore Keeshig
04:19:41 13 understood some elements of the story to be
04:19:44 14 fictional?

04:19:46 15 A. I'm assuming so otherwise she
04:19:49 16 would have highlighted other aspects of the
04:19:51 17 story that she felt had historicity, because it
04:19:55 18 would have bolstered the confirmation bias that
04:20:00 19 she appears to have had when she went to look
04:20:03 20 for specific stories that had parallels with
04:20:06 21 geological evidence.

04:20:15 22 Q. I don't believe there's any
04:20:16 23 evidence to suggest, Dr. von Gernet, that Lenore
04:20:18 24 was -- Ms. Keeshig was going out to look for
04:20:31 25 specific stories that had parallels with

04:20:33 1 geological evidence.

04:20:34 2 I'm going to suggest to you that
04:20:36 3 that's not a fair characterization of what her
04:20:39 4 evidence has been in this trial.

04:20:40 5 You mentioned you looked over her
04:20:42 6 transcripts?

04:20:43 7 A. I would actually suggest the
04:20:44 8 contrary, because if you looked at this body of
04:20:49 9 data fairly and with intellectual honesty you
04:20:59 10 would not end up with the selection of oral
04:21:06 11 traditions that we ended up with as part of the
04:21:14 12 claim.

04:21:15 13 You would have done the hard work that
04:21:17 14 I did to look for any and all variants of the
04:21:21 15 story. You would have pondered the
04:21:27 16 possibilities that I suggested.

04:21:39 17 Clearly this particular selection of
04:21:42 18 material is the consequence not of an open
04:21:52 19 collection of material and a reflection on the
04:21:59 20 corpus of oral traditions, rather it's a
04:22:02 21 selection of particular -- historians would
04:22:06 22 refer to it as cherry picking. It's a cherry
04:22:10 23 picking of particular snippets or portions of
04:22:19 24 the Anishinaabe corpus of oral traditions,
04:22:23 25 which -- for which one can postulate parallels.

04:22:32 1 And, mind you, she could have gone
04:22:34 2 further and found more, to be fair. As I said,
04:22:41 3 you could find so-called parallels between
04:22:44 4 Anishinaabe stories and geological evidence in
04:22:48 5 almost any corpus of stories.

04:22:56 6 So what I'm saying is that this is --
04:22:58 7 this is not anything -- perhaps this is
04:23:00 8 something that Lenore Keeshig, you know, thinks
04:23:03 9 might be an appropriate way to proceed and make
04:23:07 10 such an argument, but it's not one that I would
04:23:10 11 accept because details matter, variants matter
04:23:23 12 and other possibilities matter.

04:23:25 13 Q. And so here there are no
04:23:26 14 variants -- other variants to the Nanabush
04:23:28 15 grieves story?

04:23:30 16 A. Yes.

04:23:31 17 Q. And you have proposed no other
04:23:33 18 alternative theories other than it is entirely
04:23:36 19 fictional, correct?

04:23:43 20 A. Well, I'm not the one that said
04:23:45 21 it was fictional. I think the relator of the
04:23:48 22 story herself, the Elder who told it, saw it as
04:23:50 23 a work of fiction so I certainly can't be blamed
04:23:53 24 for seeing that as a possibility.

04:23:55 25 Q. And that is the only possibility

04:23:56 1 that you propose?

04:23:58 2 A. Well, again, I can't -- as with
04:24:00 3 all of these, I cannot rule out that it
04:24:03 4 originated with an eyewitness observation of the
04:24:07 5 brackish conditions of the early Holocene.

04:24:10 6 I just don't think, as I said in my
04:24:15 7 previous testimony, on a balance of
04:24:18 8 probabilities it is far more likely that we
04:24:22 9 should take the Elder's word for it and not put
04:24:28 10 together lengthy series of assumptions to come
04:24:31 11 up with a parallel between the tears of a
04:24:36 12 culture hero and the brackish conditions of a
04:24:43 13 body of water, as translated on the human pallet
04:24:47 14 of somebody living over 8,000 years ago.

04:25:10 15 Q. Okay. I'd like to move to the
04:25:10 16 account about --

04:25:23 17 THE COURT: Just before you do that
04:25:23 18 counsel, I appreciate your willingness to
04:25:23 19 continue but there are a couple of scheduling
04:25:25 20 matters I want to raise with counsel before we
04:25:29 21 complete today.

04:25:30 22 So by all means if you want to start
04:25:30 23 something, but I can't promise I'm going to be
04:25:30 24 able to let you finish it.

04:25:30 25 MS. PELLETIER: No, and it will be

04:25:30 1 more than the seven minutes we have remaining so
04:25:30 2 if it's okay with you, Your Honour, I would
04:25:33 3 prefer to end here for today, thank you.

04:25:36 4 THE COURT: All right, that's fine.
04:25:47 5 Sir, that concludes your
04:25:47 6 cross-examination. You can step down.

04:25:49 7 There's nothing about these scheduling
04:25:49 8 matters that you shouldn't hear, so if you want
04:25:49 9 to stick around that's fine.

04:25:49 10 Counsel, I just want to raise two
04:25:49 11 things. In addition to what is already on our
04:25:51 12 schedule for this week, I need to schedule a
04:25:54 13 follow-up to the discussion last week about
04:25:58 14 Ontario expert reports. You may recall that I
04:26:01 15 said I would have a follow-up on that.

04:26:04 16 And I also want to schedule a block of
04:26:05 17 time to give my ruling on the motion from last
04:26:10 18 week.

04:26:11 19 Now, both of these things can take
04:26:13 20 place -- let me take them separately. The
04:26:17 21 ruling can take place later this week but I am
04:26:19 22 concerned that the discussion about the expert
04:26:21 23 reports not get delayed in a manner that makes
04:26:24 24 it more difficult, especially for the
04:26:26 25 plaintiffs. And I certainly don't want to it to

04:26:31 1 be reserved until the moment before Ontario
04:26:34 2 opens its case because that might create other
04:26:36 3 problems.

04:26:37 4 So I was just going to suggest that
04:26:39 5 you all confer with each other today before you
04:26:42 6 leave or however you wish to do that about what
04:26:48 7 you might suggest.

04:26:50 8 Since we now have lots of company in
04:26:52 9 this facility I will be having to take steps to
04:26:55 10 make a room available rather than our luxury of
04:27:02 11 having no one else here which meant we could
04:27:04 12 just go and find a room in this facility. So I
04:27:07 13 can't count on doing that any more.

04:27:10 14 So I wondered if perhaps you could all
04:27:12 15 think about it and maybe someone can send my
04:27:15 16 office an email tomorrow morning or if you need
04:27:19 17 more time just say so, about how you would
04:27:23 18 propose the rest of the week unfold, bearing in
04:27:26 19 mind those two matters that I've raised. Okay?

04:27:31 20 Does anyone have any difficulty with
04:27:33 21 approaching it that way?

04:27:36 22 I'm not proposing that we get together
04:27:39 23 in another building or something but I would
04:27:41 24 want just enough planning to make sure that we
04:27:46 25 have a physical room and that we do that Ontario

04:27:48 1 discussion before the end of the week unless
04:27:50 2 it's been resolved. I should ask. No. I see
04:27:53 3 shaking heads on the plaintiffs' side.

04:27:55 4 All right, so I'm going to leave that
04:27:56 5 with you to consider and if you can send me --
04:27:59 6 try and make some options so that we can fit it
04:28:02 7 into our week. All right? Thank you.

8 --- Whereupon the proceedings were
9 adjourned at 4:28 p.m.

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REPORTER'S CERTIFICATE

I, HELEN MARTINEAU, CSR, Certified
Shorthand Reporter, certify;

That the foregoing proceedings were
taken before me at the time and place therein
set forth;

That the testimony of the witness and
all objections made at the time of the
examination were recorded stenographically by me
[Note: Not all quotes have been verified
against source document, but transcribed as
read into the record];

That the foregoing is a true and
accurate transcript of my shorthand notes so
taken. Dated this 22nd day of January 2020.



PER: HELEN MARTINEAU
CERTIFIED SHORTHAND REPORTER

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