

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

DAY 71 VOL 71
January 08, 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 71 / DAY 71 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 8th 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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& Krista Nerland, Esq., the Chippewas of
& Benjamin Brookwell, Esq., Nation, and the
& Renée Pelletier, Esq, Chippewas of Nawash
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Michael Beggs, Esq., for the Defendant,
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I N D E X

PAGE

Submissions by Mr. Townshend.....9198
Submissions by Mr. Beggs.....9231
Submissions by Mr. Feliciant.....9251
Submissions by Ms. McKenna.....9264
Reply submissions by Mr. Townshend.....9280
Further submissions by Mr. Beggs.....9293
Further submissions by Mr. Feliciant.....9294
Further submissions by Ms. McKenna.....9296

INDEX OF EXHIBITS

NO. / DESCRIPTION

PAGE

NONE MARKED.

11:21:23 --- Upon commencing at 11:21 a.m.

11:21:28 THE COURT: Morning, Mr. Townshend.

11:21:31 MR. TOWNSHEND: Morning, Your Honour.

11:21:37 THE COURT: Please go ahead.

11:21:40 MR. TOWNSHEND: Your Honour, this is a
11:21:40 motion for direction about phasing and I intend
11:21:43 to be referring to my submissions and my motion
11:21:48 record.

11:21:49 THE COURT: Yes. I should say I'm
11:21:53 just going to look into this a bit more, but in
11:21:56 preparing for today and looking at the trial
11:21:58 record it came to my attention that I was given
11:22:01 two copies of the trial records for these two
11:22:04 actions, and I have myself a copy of the two
11:22:07 supplementary trial records.

11:22:09 So there's no problem. I've got
11:22:11 everything but Mr. Registrar does not have a
11:22:14 copy of the two supplementary records.

11:22:17 MR. TOWNSHEND: All right.

11:22:18 THE COURT: So we'll try and see if --

1 I don't remember if I got two or not but I may
2 be coming back to you next week and saying,
3 could you bring an extra one so I don't forget.

4 MR. TOWNSHEND: Okay. Certainly we'll
5 supply those.

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

8 MR. TOWNSHEND: So preparing this
9 litigation for trial took about 25 years. Along
10 the way, believe it or not, we took various
11 steps to try to keep the trial in manageable
12 chunks and now some of those things are
13 threatening to come undone.

14 So I need to explain how things came
15 to be the way they are and why they came to be
16 that way in order to explain this properly.

17 So I wanted to start at paragraph 14
18 of my submissions. The central issue of the
19 treaty action is, did the Crown breach its duty
20 in the course of making Treaty 72? There were
21 other questions on the table before that. So,
22 were the terms of Treaty 72 properly fulfilled?
23 That involves a whole other set of evidence,
24 none of which has been before this court.

25 And before this action was started

11:23:46 1 there were five actions my clients had started,
11:23:50 2 some in federal court, some in Ontario court,
11:23:53 3 which did put in issue whether Treaty 72 had
11:23:57 4 been properly fulfilled in various instances.

11:24:04 5 Rather than plead those as
11:24:05 6 alternatives, which we could have done in this
11:24:08 7 litigation, that would have made it even more
11:24:12 8 complex than it already is and we probably
11:24:14 9 wouldn't be ready for trial yet. So what we
11:24:19 10 chose to do was to stay those five actions, and
11:24:22 11 that was done on consent, pending the result of
11:24:25 12 this litigation.

11:24:28 13 The result was if the plaintiffs win
11:24:33 14 on the issue of breach and get a remedy that
11:24:37 15 puts them in the position they would have been
11:24:42 16 in had they not entered Treaty 72; then a claim
11:24:45 17 based on the nonfulfillment of the terms of
11:24:48 18 Treaty 72 would clearly be inconsistent with
11:24:51 19 that and would be res judicata, and that would
11:24:54 20 be the end of those five actions.

11:24:57 21 However, if my clients were not
11:24:59 22 successful in this litigation the stays of those
11:25:04 23 five actions would expire and they would --
11:25:07 24 could continue to pursue claims about whether
11:25:11 25 Treaty 72 has been properly fulfilled, either in

1 court or, perhaps more appropriately, in the
2 specific claims process.

3 I'm not sure if Your Honour is
4 familiar with it?

5 THE COURT: Well, I know that it
6 exists, yes.

7 MR. TOWNSHEND: Okay. That's enough.

8 So consistent with this plan we
9 explicitly disavowed any reliance on treaty
10 fulfillment or nonfulfillment issues in this
11 litigation.

12 THE COURT: Well, in this phase of the
13 litigation.

14 MR. TOWNSHEND: In any of this
15 litigation.

16 THE COURT: So I have a question about
17 that that you can help me with.

18 Some months ago in past examination --
19 anyway, some months ago plaintiffs' counsel put
20 in an exhibit that was a few pages from some
21 books and records that are in the possession of
22 the First Nations regarding land transactions,
23 and there was a -- an issue arose because --
24 well, as I recall it, some years, maybe decades
25 ago, plaintiffs' counsel were told that they

11:26:29 1 existed, that they hadn't formally been produced
11:26:31 2 and I sent everyone off to talk to each other.

11:26:34 3 And correct me if I'm wrong, but my
11:26:37 4 recollection is that the result of that
11:26:40 5 discussion amongst counsel was agreement that
11:26:44 6 those records, which showed the land
11:26:48 7 transactions, were not relevant to Phase 1 of
11:26:51 8 this trial, by which I mean what we're doing
11:26:54 9 now, Phase 1A. They may be relevant to Phase 2,
11:27:00 10 but because it wasn't relevant to Phase 1A the
11:27:03 11 question of their production and review was no
11:27:05 12 longer going to stand in the way.

11:27:07 13 Is that roughly correct, that
11:27:09 14 recollection, sir?

11:27:11 15 MR. TOWNSHEND: I don't believe there
11:27:12 16 was a formal agreement but I think everyone -- I
11:27:16 17 think everyone was satisfied that there wasn't
11:27:18 18 an issue in this phase.

11:27:20 19 THE COURT: In this phase. But I just
11:27:22 20 remembered that it was left that they could be
11:27:24 21 relevant to Phase 2.

11:27:26 22 And, if that's possible, I was trying
11:27:32 23 to understand how that lined up with the
11:27:34 24 submission here on this motion, that the steps
11:27:40 25 taken with respect to land transactions under

1 Treaty 72 is not at issue at all at any point in
2 this matter, not Phase 2, not 1B.

3 And it may -- so any one of you when
4 you make your submissions can correct me if I
5 have this wrong, but I did want to ask you that
6 question.

7 MR. TOWNSHEND: In my submission
8 nonfulfillment, in the sense of an argument that
9 the treaty required a certain step to be done
10 and it wasn't done proper -- it wasn't done or
11 it wasn't done properly or fully, that has been
12 expressly disavowed in our pleading.

13 So perhaps I should take you to --

14 THE COURT: Well, I certainly read in
15 your record -- and if you want to take me to the
16 pleadings by all means -- a statement that I
17 think you put in Canada's opening that -- to the
18 effect that the fulfillment of the terms --

19 MR. TOWNSHEND: Yes.

20 THE COURT: -- of Treaty 72 was not
21 going to be at issue in the trial in front of
22 me. It's a little ambiguous because I don't
23 think at the time you were talking about or
24 distinguishing between the actions or the
25 bifurcation of the actions.

1 But certainly as of now I understand
2 that, in Phase 1A at least, not longer, that's
3 not an issue. But I did have the impression
4 when those records popped up that they were
5 going to be relevant later on.

6 MR. TOWNSHEND: The remedy we are
7 seeking is a constructive trust, or something
8 like that, in relation to land still in the
9 hands of governments where there's no bona fide
10 purchaser.

11 THE COURT: Still or again?

12 MR. TOWNSHEND: Pardon me?

13 THE COURT: Still or again?

14 MR. TOWNSHEND: Still or again, yes.

15 THE COURT: Still or again.

16 MR. TOWNSHEND: Either one of those.

17 THE COURT: That's how I understood
18 it.

19 MR. TOWNSHEND: Yes. Plus
20 compensation for those lands which cannot be
21 returned, plus compensation for loss of use of
22 those lands from 1854 to the present, offset by
23 lands (sic) received from the sale of lands.

24 So to that extent the total amount of
25 money received by the plaintiffs from the sale

1 of lands, that part of fulfillment, if you wish,
2 is -- it would be part of Phase 2 because that's
3 the compensation calculation.

4 But issues of whether the land was
5 sold for fair market value, whether that money
6 ended up -- all that money ended up in the trust
7 accounts, whether the -- there were -- the
8 expenditures from the trust accounts were proper
9 or not, in my submission, are not relevant to
10 this -- any part of this litigation.

11 Now, Canada disagrees with that.

12 THE COURT: We'll hear from Canada in
13 due course.

14 MR. TOWNSHEND: Yeah.

15 THE COURT: Is this a good time to ask
16 you my one other question about this issue about
17 what's not at issue?

18 MR. TOWNSHEND: Yes.

19 THE COURT: I understand what you're
20 saying about compliance with the terms of Treaty
21 72. So your submission is that the question of
22 whether or not the governments fulfilled their
23 obligations under Treaty 72, in your submission,
24 is not at issue. That's your position?

25 MR. TOWNSHEND: Yes.

11:31:51 1 THE COURT: And indeed you say as well
11:31:55 2 that that is at issue in the five stayed
11:31:57 3 actions?

11:31:59 4 MR. TOWNSHEND: Yes, it is.

11:32:00 5 THE COURT: Okay. I understand that.

11:32:00 6 It has also come up in this trial that
11:32:06 7 the plaintiffs in this trial do not challenge
11:32:09 8 the validity of Treaty 72, which is different
11:32:12 9 from whether it was -- the obligations were
11:32:15 10 fulfilled.

11:32:20 11 And I need to understand just where
11:32:22 12 that fits in, if at all. You may say, well,
11:32:24 13 that's irrelevant to this situation. But I
11:32:28 14 wasn't sure if for the other five actions, in
11:32:30 15 addition to saying the governments failed to
11:32:33 16 comply with their obligations, they also alleged
11:32:38 17 that the treaty was invalid. Is that a
11:32:41 18 distinction as well?

11:32:46 19 MR. TOWNSHEND: It's been some time
11:32:48 20 since I read -- I've never read them for that
11:32:51 21 particular point. I don't believe that they
11:32:52 22 challenge the validity of the treaty. They
11:32:54 23 believe -- they challenge the fulfillment of the
11:32:58 24 treaty and they assume the treaty was done
11:33:01 25 properly.

11:33:03 1 THE COURT: Maybe what you could do,
11:33:04 2 since we'll inevitably be going over the lunch
11:33:07 3 break, is ask one of your team, because we have
11:33:10 4 great attendance today on this motion, to do
11:33:13 5 that review of the pleadings so that I can fully
11:33:17 6 understand the distinction between the two.

11:33:19 7 So in this one it's not challenged.
11:33:21 8 I'm not sure that it matters but I do want to
11:33:24 9 understand if it's challenged on the other five.
11:33:29 10 Maybe that can be looked at over lunch?

11:33:32 11 MR. TOWNSHEND: That's fine.
11:33:33 12 Certainly my understanding is that it's not
11:33:35 13 challenged.

11:33:37 14 In this litigation it's -- no, we're
11:33:43 15 not directly challenging the legal validity of
11:33:47 16 Treaty 72; but, in effect, the remedy we are
11:33:49 17 asking for in a way rolls back the effects of
11:33:52 18 Treaty 72, because we are claiming a breach of
11:33:56 19 fiduciary duty in the course of taking Treaty
11:34:00 20 72.

11:34:02 21 THE COURT: You're not saying it's
11:34:03 22 invalid you're just saying that as a result of
11:34:06 23 the way it was entered into, being breaches of
11:34:10 24 fiduciary duty, that remedy should flow?

11:34:13 25 MR. TOWNSHEND: Yes.

11:34:14 1 THE COURT: All right. Thank you for
11:34:15 2 clarifying that. Please go ahead.

11:34:24 3 MR. TOWNSHEND: I was about to go to
11:34:25 4 the pleading in the motion record. At tab 3 is
11:34:31 5 the reply.

11:34:37 6 THE COURT: Yes.

11:34:39 7 MR. TOWNSHEND: And at paragraph 16 of
11:34:41 8 that -- this is the pleading I'm referring to:

11:34:47 9 "All of the remedies sought
11:34:49 10 relate to breaches of duty in the
11:34:50 11 making of Treaty 72. The plaintiffs
11:34:53 12 do not seek any remedies related to
11:34:55 13 the fulfillment or nonfulfillment of
11:34:58 14 the terms of Treaty 72 and are not
11:35:01 15 putting the fulfillment of the terms
11:35:04 16 of Treaty 72 in issue in this
11:35:07 17 litigation."

11:35:16 18 So that's what I'm having to say about
11:35:18 19 the way we have scoped this litigation and why
11:35:21 20 we have scoped it that way.

11:35:24 21 Then we move to phasing. Why did we
11:35:30 22 decide on a phase 2? Well, even with the scope
11:35:35 23 the way we have it a full litigation of all
11:35:39 24 issues in this litigation would be huge because
11:35:42 25 the remedy needs determination which land is

1 returnable; the value of the land that isn't
2 returnable; the value of the loss of use; and
3 offset by the money received for lands. All
4 that would have to be calculated.

5 And that would mean, and here I'm at
6 paragraphs 18 through 20 of my submissions, that
7 would include a detailed analysis of land
8 transaction history of the whole peninsula; a
9 detailed economic model for loss of use of the
10 peninsula; and a detailed accounting of money
11 received.

12 So we came to the idea of doing it in
13 phases and we came to a consent order about that
14 in 1996. And Phase 1 could be called "liability
15 plus", and the "plus" meaning there would be
16 enough remedial issues resolved that probably
17 Phase 2 would be negotiated rather than
18 litigated.

19 Or, if not, it could be done as a
20 reference, which is what the 1996 order
21 contemplated, Phase 2 as a reference.

22 THE COURT: And how do you see that as
23 any different than a trial? "Reference" is
24 another name for trial.

25 MR. TOWNSHEND: I believe the

1 reference would not necessarily be to a judge.

2 THE COURT: It might not necessarily
3 be to a judge but it might be to a judge.

4 MR. TOWNSHEND: Could be.

5 THE COURT: Could be.

6 MR. TOWNSHEND: I would --

7 THE COURT: Would you agree that it's
8 fair to describe it this way, that a reference
9 could be anything from another trial in front of
10 a judge, with the basic contours of a trial,
11 through to, you know, perhaps a master or some
12 other decision-maker, but normally it would have
13 many of the same components as a trial?

14 MR. TOWNSHEND: Yes, it would be
15 dealing with evidence.

16 The point of the Phase 1, as it was
17 defined in that phase, was the principles
18 related to remedy would be dealt with. At least
19 that's our submission of how that order was
20 intended.

21 And the detailed analysis of how the
22 principles apply to specific parcels of land or
23 specific calculations, that would be what was
24 off in Phase 2. But that Phase 1 would get far
25 enough in the remedies that it would establish

11:38:21 1 the nature -- the principle which would be used
11:38:25 2 in Phase 2.

11:38:28 3 I'm not sure how much turns on this
11:38:29 4 because this order is no more, but that was how
11:38:34 5 the plaintiffs understood it and that is how, I
11:38:37 6 submit, the order was worded.

11:38:42 7 The result of that is that the Phase 1
11:38:44 8 judge would decide liability and would decide
11:38:47 9 the principles applicable to the remedy. And
11:38:50 10 it's the details of the remedy that would be off
11:38:55 11 to Phase 2.

11:38:59 12 So what happened then was we realized
11:39:03 13 in the lead-up to this trial that we had very
11:39:07 14 significant differences about the interpretation
11:39:09 15 of that 1996 order.

11:39:13 16 And we took that to Justice Gans, who
11:39:16 17 was case managing at the time, and he basically
11:39:19 18 told us to start over and do a new phasing
11:39:22 19 order.

11:39:23 20 THE COURT: Just before you get into
11:39:23 21 that, the original order was for the treaty
11:39:28 22 action only.

11:39:30 23 MR. TOWNSHEND: That's correct.

11:39:31 24 THE COURT: Of course the other action
11:39:32 25 hadn't been commenced yet.

11:39:34 1 MR. TOWNSHEND: That's right.

11:39:35 2 THE COURT: And then based on the
11:39:35 3 trial record I see that there was an order --
11:39:37 4 after the second action was commenced there was
11:39:41 5 an order consolidating the two actions.

11:39:44 6 MR. TOWNSHEND: That's right.

11:39:45 7 THE COURT: And there was an order
11:39:46 8 that they be case managed together.

11:39:50 9 MR. TOWNSHEND: Yes.

11:39:50 10 THE COURT: But I didn't see in the
11:39:51 11 trial record, up until this year's order, any
11:39:54 12 other order that was a -- I guess you're calling
11:40:01 13 it a "phasing order", or a "severance order" in
11:40:03 14 relation to the second action.

11:40:05 15 Was there another order or was it just
11:40:08 16 the treaty action that had that order?

11:40:10 17 MR. TOWNSHEND: It's just the treaty
11:40:12 18 action --

11:40:13 19 THE COURT: Up until now?

11:40:17 20 MR. TOWNSHEND: The order -- the 2019
11:40:21 21 order, all of the issues in the Aboriginal title
11:40:27 22 action are in Phase 1A.

11:40:30 23 THE COURT: It's another way of saying
11:40:31 24 the same thing.

11:40:33 25 MR. TOWNSHEND: Yes.

11:40:35 1 THE COURT: So we have action number
11:40:37 2 1; we have a severance order in action number 1.
11:40:41 3 MR. TOWNSHEND: Yes.
11:40:41 4 THE COURT: We have action number 2.
11:40:44 5 We have a consolidation order in actions number
11:40:46 6 1 and 2 but no severance order.
11:40:48 7 MR. TOWNSHEND: Yes.
11:40:48 8 THE COURT: And even today the focus
11:40:50 9 is still on action number 1.
11:40:52 10 MR. TOWNSHEND: The end of this Phase
11:40:53 11 1A everything about the Aboriginal title action
11:40:58 12 should be resolved.
11:41:00 13 THE COURT: So I just want to make
11:41:01 14 sure I haven't missed an order in there
11:41:03 15 somewhere.
11:41:04 16 MR. TOWNSHEND: No, you haven't.
11:41:05 17 THE COURT: So as of, say, arbitrarily
11:41:07 18 a year ago when this matter was actively being
11:41:11 19 case managed by Justice Gans, at that time those
11:41:14 20 were the main orders, the ones I've just listed?
11:41:18 21 MR. TOWNSHEND: Yes.
11:41:18 22 THE COURT: And then the new order
11:41:20 23 from -- I think it was March of this year.
11:41:34 24 MR. TOWNSHEND: I think it was January
11:41:34 25 but -- it's in the motion record.

11:41:34 1 THE COURT: I don't think it was
11:41:34 2 January. If it was January you waited a long
11:41:34 3 time to give it to me. It was --
11:41:34 4 MR. TOWNSHEND: It's February.
11:41:34 5 THE COURT: -- February 25th.
11:41:38 6 So that's the first time we have an
11:41:40 7 order formally that is in both actions and deals
11:41:43 8 with the issue of what we can call "phasing".
11:41:49 9 MR. TOWNSHEND: Yes.
11:41:49 10 THE COURT: Okay. Thank you.
11:41:51 11 And your submission about the second
11:41:54 12 action is the answer to the question, everyone
11:41:57 13 is focused on the first action only?
11:41:59 14 MR. TOWNSHEND: Yes.
11:42:00 15 THE COURT: All right. Please go
11:42:01 16 ahead.
11:42:13 17 MR. TOWNSHEND: I'm now at paragraph
11:42:14 18 22 of my submissions. And the 2019 order by
11:42:18 19 Justice Gans had three phases, and we call them
11:42:23 20 Phase 1A, Phase 1B and Phase 2.
11:42:26 21 And, generally speaking, Phase 1A
11:42:28 22 would address liability and would address issues
11:42:33 23 of limitations and laches that were not tied to
11:42:35 24 any particular parcels of land. So cause of
11:42:38 25 action limitations and laches arguments would be

11:42:41 1 in this phase.

11:42:45 2 Phase 1B would decide the entitlement
11:42:47 3 of the plaintiffs to beneficial ownership of
11:42:50 4 seven specific parcels of land that we set out,
11:42:53 5 and that would include limitations and laches
11:42:58 6 issues related to those specific parcels of
11:43:00 7 land.

11:43:02 8 And Phase 2 would deal with the
11:43:05 9 remainder of the land claim and with the
11:43:07 10 calculations of compensation claim, including
11:43:11 11 limitations and laches issues relevant to those
11:43:16 12 particular parcels of land.

11:43:18 13 And that order also provided that the
11:43:21 14 evidence in each phase would be treated as
11:43:24 15 evidence in all the later phases.

11:43:36 16 Now, at least in the view of the
11:43:39 17 plaintiffs, Phase 1B was designed as setting out
11:43:44 18 seven parcels that we thought could be test
11:43:46 19 cases. And we believe that having decisions
11:43:53 20 about those seven parcels would give a lot of
11:43:57 21 guidance to the parties and enable them -- would
11:44:01 22 encourage a negotiated settlement for the rest
11:44:04 23 of the land so that Phase 2 might not need to be
11:44:10 24 litigated.

11:44:12 25 And I also note that none of the lands

11:44:13 1 claimed against the municipalities are in Phase
11:44:16 2 1B. All of those issues related to lands
11:44:20 3 claimed against the municipalities are still in
11:44:22 4 Phase 2.

11:44:30 5 Now, getting decisions on these cases
11:44:33 6 we viewed as test cases, getting decisions that
11:44:35 7 would be useful required getting rulings on
11:44:38 8 limitations and laches as applied to individual
11:44:42 9 parcels.

11:44:44 10 If that type of issue was not resolved
11:44:46 11 in Phase 1B and, you know, all we had was a
11:44:51 12 decision on liability, supposing it was
11:44:56 13 favourable and we tried to negotiate a remedy,
11:44:58 14 we would simply face arguments that for any
11:45:01 15 particular parcel of land there'd be some
11:45:04 16 circumstances that would preclude recovery in
11:45:07 17 relation, for example, to limitations and
11:45:09 18 laches.

11:45:10 19 THE COURT: Didn't Canada abandon that
11:45:12 20 defence?

11:45:17 21 MR. TOWNSHEND: Not entirely.

11:45:18 22 THE COURT: Not entirely. All right.
11:45:18 23 But abandoned it in large part at the outset of
11:45:20 24 this trial?

11:45:24 25 MR. TOWNSHEND: It abandoned

11:45:24 1 limitations. It did not abandon laches about
11:45:30 2 the land or the compensation, and Ontario has
11:45:39 3 not abandoned any of those.

11:45:46 4 So the result of not resolving
11:45:50 5 limitations and laches issues about the
11:45:54 6 particular parcels in Phase 1B would be, in my
11:45:57 7 submission, that it would be more likely for
11:46:00 8 Phase 2 to need to be litigated fully, which was
11:46:04 9 exactly what we were trying to prevent by having
11:46:06 10 a Phase 1B.

11:46:17 11 Now, implications for evidence about
11:46:21 12 this approach, the facts about fiduciary duty
11:46:28 13 and about its breach, are of course relevant to
11:46:31 14 remedy. So these are going to be -- squarely to
11:46:38 15 be dealt with in both Phase 1A, Phase 1B and
11:46:43 16 Phase 2. That will -- that evidence will affect
11:46:46 17 all of those phases.

11:46:48 18 And similarly, the limitations and
11:46:50 19 laches evidence, we've heard considerable
11:46:53 20 evidence that was intended to go to those issues
11:46:56 21 already in Phase 1A. There may be more evidence
11:47:01 22 specific to different parcels of land about
11:47:05 23 limitations and laches in Phase 1B and 2, but
11:47:10 24 all of the limitations and laches evidence is
11:47:12 25 still going to be at issue in all three of those

11:47:15 1 phases .

11:47:17 2 So our submission is that the result
11:47:20 3 of that is that it's desirable and efficient for
11:47:23 4 the same judge to hear as much as possible of
11:47:27 5 these phases. And that's why, in fact, we
11:47:31 6 styled Phase 1B "Phase 1B" which, of course,
11:47:37 7 subject to the court's discretion of how it
11:47:40 8 wants to change that.

11:47:40 9 And it's also why the current order
11:47:43 10 calls for Phase 1B to be heard before appeals of
11:47:51 11 Phase 1A, so there is not a gap of years while
11:47:56 12 appeals work their way up. That's the evidence
11:48:05 13 implications of why the current order is the way
11:48:08 14 it is, in our submission.

11:48:13 15 So why should we retain Phase 1B which
11:48:15 16 is at issue in this today? I've set out a
11:48:19 17 number of reasons for that at paragraph 33 in my
11:48:22 18 submissions.

11:48:22 19 And the highlights of that are that if
11:48:35 20 we don't have a Phase 1B we're less likely to be
11:48:38 21 able to negotiate a resolution to Phase 2 and,
11:48:43 22 therefore, it's more likely that Phase 2 is
11:48:46 23 going to be litigated in full, which would be a
11:48:54 24 huge piece of litigation, much bigger than Phase
11:48:57 25 1A.

11:49:02 1 And also that even if the plaintiffs
11:49:02 2 win on liability, if there's no Phase 1B the
11:49:06 3 plaintiffs will still face many years of
11:49:08 4 litigation before getting any remedy whatsoever.

11:49:18 5 So it's to avoid the consequences of
11:49:20 6 not having a Phase 1B that we submit that Phase
11:49:23 7 1B is a desirable and efficient means to move
11:49:27 8 this litigation ahead.

11:49:46 9 I want to move now to the scope of
11:49:49 10 Phase 1B, which is also a matter in issue today.
11:49:57 11 Canada wishes to put in evidence whether the
11:50:05 12 terms of Treaty 72 were properly fulfilled, and
11:50:07 13 including whether the land was sold for fair
11:50:10 14 market value; whether the money was deposited in
11:50:13 15 the plaintiffs' trust accounts; and on what the
11:50:16 16 money was spent once it was in the trust
11:50:18 17 accounts.

11:50:19 18 These are exactly the kinds of issues
11:50:21 19 in the five pieces of state litigation that we
11:50:25 20 talked about earlier. And I have detailed
11:50:29 21 references to these to those statements of claim
11:50:33 22 that are set out at the references at the end of
11:50:36 23 paragraph 39 of my submissions.

11:50:48 24 And continuing on with my submissions,
11:50:49 25 starting at paragraph 40, these are also the

11:50:52 1 issues of which we have pleaded expressly that
11:50:57 2 we are not relying, and I've read that bit to
11:51:02 3 you.

11:51:02 4 So the result of that is we're
11:51:06 5 inviting the court to decide the case on the
11:51:08 6 basis of what the result will be even if the
11:51:12 7 terms of Treaty 72 had been implemented
11:51:15 8 perfectly. That is what we're asking.

11:51:20 9 Given that, our submission is no
11:51:23 10 evidence is needed about whether the terms of
11:51:26 11 Treaty 72 were properly implemented.

11:51:41 12 As I think I've mentioned, the total
11:51:42 13 amount of money received by the plaintiffs in
11:51:44 14 respect of land sales is relevant to Phase 2
11:51:50 15 where it functions as a setoff to the
11:51:53 16 compensation otherwise.

11:51:59 17 And my further submission is that if
11:52:01 18 there are claims that expenditures from the
11:52:05 19 plaintiffs' trust fund were made which were
11:52:08 20 improper, that is it's really a completely
11:52:11 21 different claim with different facts about that,
11:52:16 22 that would be a misappropriation of funds
11:52:20 23 argument and that -- the evidence for that is
11:52:23 24 quite separate from whether taking Treaty 72 was
11:52:27 25 a breach of fiduciary duty.

1 Now, the consequences of going forward
2 with the scope for Phase 1B that Canada is now
3 suggesting, and in fact they're not suggesting
4 going forward with 1B, they are suggesting
5 because of its scope it really should go into
6 Phase 2.

7 But what they see as relevant to Phase
8 1B they say would take 117 trial days, which is
9 probably more than Phase 1A is going to take in
10 total. We say that's probably low. It would
11 probably take more than that.

12 And here I'm at paragraph 27 of my
13 submissions. And the reason I say this is
14 because if the fulfillment of Treaty 72 is on
15 the table we would need to fully engage on all
16 issues involving the fulfillment or not of
17 Treaty 72 or risk those being res judicata.

18 And to avoid that risk we would need
19 to revive the five stayed actions, we. Need to
20 do comprehensive research if there are other
21 instances of nonfulfillment of the treaty and,
22 if so, then plead all of this stuff in the
23 current litigation. That's what we need to do
24 to protect ourselves from res judicata. And the
25 scope of doing that would be huge, as I'm sure

1 Your Honour can see.

2 Turning to Ontario's proposed scope,
3 that is not -- we do not take great issue with
4 what Ontario is proposing for Phase 1B. We only
5 had a -- one question about some of the
6 environmental issues that they were raising.

7 And I appreciate that it's a
8 high-level overview of what Ontario is
9 proposing, but just that there are environmental
10 sensitivities alone is not enough to make it
11 relevant, in my submission. There had to be
12 evidence that somehow a change in ownership
13 would impact on the environment.

14 And, as I've noted at paragraph 45 of
15 my submissions, you know, all the standard,
16 generally-applicable environmental protection
17 legislation would still apply.

18 So that's just more of a question of
19 qualification from Ontario. We're not generally
20 taking issue with the evidence Ontario proposes,
21 and we're in the same ballpark of how long we
22 think that would take at trial and how long we
23 think it would take to prepare for that.

24 THE COURT: Just let me understand
25 what that means, because Ontario says it was two

1 to three weeks for its evidence only, 10 to 15
2 days for its evidence. Are you submitting that
3 you would anticipate your evidence would be in
4 that same ballpark, another 10 to 15 days?

5 MR. TOWNSHEND: Yes.

6 THE COURT: All right. And Ontario
7 said they'd be ready by July of 2021. Is that
8 also your submission?

9 MR. TOWNSHEND: Approximately, yes.

10 THE COURT: Approximately. All right.

11 MR. TOWNSHEND: Now, the evidence we
12 are proposing is set out starting at paragraph 7
13 of my submissions.

14 First, what we think is the key
15 evidence is the land transaction history of the
16 seven parcels set out in the phasing order,
17 which likely could be done through an agreed
18 statement of fact.

19 And then we need evidence to respond
20 to the defendants' evidence, and we can't
21 identify that until we have a ruling on this --
22 on this request for directions.

23 At -- I've already mentioned what
24 Canada's proposed scope. Then we get to such a
25 level of evidence that it would probably defeat

11:57:41 1 the purpose of having a phasing order. It would
11:57:45 2 just -- it wouldn't fulfill a purpose any more
11:57:49 3 of doing something in a reasonably compact
11:57:55 4 amount of time that would then encourage
11:57:59 5 negotiations.

11:58:00 6 For the proposed evidence responding
11:58:05 7 to Ontario I have set that out at paragraph 9 in
11:58:10 8 my submissions.

11:58:11 9 We would put the use -- evidence about
11:58:14 10 the use of the lands by the plaintiffs, possibly
11:58:18 11 including expert evidence. We would then put in
11:58:22 12 evidence about the plaintiffs' environmental
11:58:24 13 protection ethic, and the various environmental
11:58:30 14 advocacy and environmental management activities
11:58:33 15 that the plaintiffs have engaged in to protect
11:58:35 16 the environment in lands throughout their
11:58:38 17 territory, to rebut the inference that the
11:58:42 18 environment suffered under the plaintiffs'
11:58:44 19 ownership.

11:58:50 20 And the proposed order of steps I then
11:58:52 21 set out at paragraph 10 in my submissions.

11:58:58 22 Complete Phase 1A; do a Phase 1A final argument;
11:59:02 23 we do the trial of evidence in Phase 1B; Phase
11:59:05 24 1B final argument; get a court decision for both
11:59:11 25 Phase 1A and Phase 1B; possible appeals of that;

11:59:14 1 attempts to -- attempts to negotiate Phase 2;
11:59:17 2 and, only if necessary, litigation in Phase 2.

11:59:30 3 So why is a decision about these
11:59:32 4 things needed right now? If we are correct
11:59:35 5 about the proper scope of Phase 1B phase 1B can
11:59:39 6 be done in what I submit is a reasonable amount
11:59:41 7 of time and fulfill the purpose of the phasing.

11:59:44 8 But deferring a decision on
11:59:45 9 admissibility, particularly of the evidence
11:59:49 10 Canada is proposing, would mean we would all
11:59:51 11 have to prepare on the basis of Canada's scope.
11:59:55 12 And at that point then Phase 1B would no longer
12:00:00 13 be done in a reasonable time and would not
12:00:03 14 fulfill the purpose of phasing.

12:00:08 15 And, in fact, Canada seems to
12:00:11 16 understand that and is not suggesting that Phase
12:00:14 17 1B be run as a separate phase in that event.
12:00:18 18 They think it should just all go into Phase 2.

12:00:22 19 THE COURT: Well, I need to understand
12:00:23 20 what you think is reasonable. All right?

12:00:24 21 So Ontario and the plaintiffs 10 to 15
12:00:33 22 days. When you build up to your submission that
12:00:36 23 the entirety would be reasonable, what amount of
12:00:38 24 time did you allocate for Canada and the
12:00:43 25 municipalities?

12:00:47 1 MR. TOWNSHEND: The municipalities are
12:00:48 2 not engaged in Phase 1B, as far as I can see.

12:00:52 3 THE COURT: Well, they've asked for
12:00:53 4 some trial time, not surprising perhaps, a
12:00:59 5 minority of the time.

12:01:00 6 But I need just to understand how you
12:01:02 7 reach your submission that it's reasonable. You
12:01:05 8 must have an estimate in your mind about how
12:01:07 9 many trial days would be required, and I just --
12:01:16 10 I want to understand what that is before I hear
12:01:19 11 from the defendants.

12:01:19 12 It's obviously this 10 to 15 days for
12:01:22 13 you and Ontario but some amount for the other
12:01:24 14 defendants. And what is it that you submit is
12:01:26 15 reasonable?

12:01:29 16 MR. TOWNSHEND: At 10(c) I suggested
12:01:31 17 one to two months for the totality of the
12:01:37 18 evidence in Phase 1B.

12:01:41 19 THE COURT: But that's not consistent
12:01:42 20 with 10 to 15 days for each of you and Ontario,
12:01:44 21 which is fine. I don't have any problem with,
12:01:47 22 you know, development of the argument. I just
12:01:49 23 need to know where you are now if one to two
12:01:55 24 months isn't enough for you and Ontario --

12:02:04 25 MR. TOWNSHEND: I'm not sure I'm

1 following here.

2 THE COURT: Are you saying 40 trial
3 days? Are you saying all together 20 trial
4 days? What is it, roughly speaking, you say is
5 reasonable for everybody to do everything in
6 this --

7 MR. TOWNSHEND: I mean, it's in that
8 range.

9 THE COURT: In which range?

10 MR. TOWNSHEND: 20 to 40.

11 THE COURT: 20 to 40? That's a
12 pretty big range.

13 MR. TOWNSHEND: I mean, obviously at
14 this stage everything is an estimate.

15 THE COURT: Of course.

16 MR. TOWNSHEND: The point I'm making
17 is that we're dealing with something that is
18 shorter than the current phase not longer than
19 the current phase.

20 THE COURT: That's not the test, sir.

21 MR. TOWNSHEND: No.

22 THE COURT: No. I mean, when we
23 started down this road in March, when I first
24 became aware of all of this, the parties were
25 far apart and they still are.

1 The biggest change is that the
2 plaintiffs are not saying it's extremely short,
3 and that's fine. But when you say it's
4 reasonable, and there's two components to
5 reasonable, the length of the hearing and the
6 length of the delay.

7 So you're saying 20 to 40 days. So
8 that's, let's say, a two-month trial, which
9 would be in July of 2021 followed by submissions
10 and -- so you're saying that neither of those
11 delays you think are problematic? Neither the
12 July 2021 or another two-month trial?

13 MR. TOWNSHEND: That's correct. And
14 in the context of this litigation, which has
15 been going for 25 years and it's been at trial
16 for -- we'll be at trial for at least a year --

17 THE COURT: I understand that context,
18 sir, but I think perhaps there's another context
19 that must be addressed, which is trials in this
20 court occur after not before completion of
21 discovery and exchange of expert reports. The
22 reason they do that is obvious.

23 MR. TOWNSHEND: Yes.

24 THE COURT: Because that process is
25 important to the process of making sure that

1 everybody's ready to go.

2 Because once you get started there's a
3 certain amount of, you know, inefficiency
4 associated with any delays.

5 And so now what I'm asked to consider
6 is an order that, first of all, acknowledges
7 that none of that has been done. It's right in
8 the order. It says that discovery and expert
9 reports can be -- you know, take place after the
10 commencement of the trial.

11 And also, in your submission, another
12 trial, the length of which I'm not surprised, is
13 still uncertain because you haven't finished
14 that process, that wouldn't even commence until
15 the middle of 2021.

16 MR. TOWNSHEND: Yes.

17 THE COURT: And I hear your submission
18 that it's reasonable, but that isn't measured
19 against when the action was started; it's
20 measured against the way our system, for
21 fairness reasons, runs trials. And we don't
22 normally run trials where we have a lengthy
23 delay and uncertainty about what's required.

24 MR. TOWNSHEND: That was the purpose
25 of this motion, to give more certainty.

12:05:49 1 THE COURT: I know. But I just want
12:05:50 2 to make sure I understand why you say it's
12:05:53 3 reasonable, apart from the fact that this has
12:05:54 4 been around for a long time, which it clearly
12:05:57 5 has been.

12:05:58 6 MR. TOWNSHEND: It's also reasonable
12:05:59 7 in relation to what would happen if there
12:06:04 8 weren't a phase 1B; there would be a Phase 2,
12:06:07 9 which would take far, far more than 40 days'
12:06:12 10 litigation and far, far more than a year and a
12:06:15 11 half getting ready for. That's why I'm
12:06:22 12 submitting --

12:06:27 13 THE COURT: That's a part of the
12:06:28 14 lawsuit. It's not an add-on. In other words,
12:06:30 15 this lawsuit was commenced encompassing all of
12:06:32 16 that work.

12:06:34 17 MR. TOWNSHEND: Yes.

12:06:36 18 THE COURT: It's not extra. It's not
12:06:39 19 optional normally. So it is as big as it is if
12:06:45 20 the lawsuit includes --

12:06:48 21 MR. TOWNSHEND: Yes, but the purpose
12:06:49 22 of Phase 1B, in our submission, is to get
12:06:52 23 decisions that could result in Phase 2 never
12:06:55 24 needing to be litigated that we could then
12:06:58 25 negotiate a settlement.

12:07:00 1 THE COURT: No, I understand that
12:07:01 2 submission.

12:07:01 3 MR. TOWNSHEND: That's why we think
12:07:02 4 it's reasonable.

12:07:03 5 THE COURT: All right.

12:07:03 6 MR. TOWNSHEND: I believe those are my
12:07:08 7 submissions.

12:07:14 8 THE COURT: Thank you for clarifying
12:07:16 9 those things.

12:07:18 10 Who is going on the other side? Is it
12:07:19 11 you, Mr. Beggs? Or Mr. Feliciant? Or...

12:07:25 12 MR. BEGGS: Yes, it is me, Your
12:07:26 13 Honour.

12:07:29 14 THE COURT: Please go ahead.

12:07:31 15 MR. BEGGS: Thank you, Your Honour.

12:07:31 16 I don't propose to go through the
12:07:33 17 history of how we got here today, but I will
12:07:35 18 address some of the points that were -- or
12:07:39 19 questions that were raised with my friend.

12:07:43 20 With respect to what Canada had
12:07:46 21 taken -- what position Canada had taken with
12:07:49 22 respect to limitations, I just -- I would agree,
12:07:51 23 I think my friend characterized it fairly.

12:07:56 24 Limitation periods are withdrawn for
12:07:58 25 everything. Laches remains in place for the

12:08:04 1 land and damages in both the treaty and the
12:08:10 2 title actions. Declarations with respect to
12:08:16 3 Aboriginal rights or Aboriginal title, laches
12:08:21 4 isn't relevant to those. So that's where we
12:08:30 5 were.

12:08:31 6 With respect to a question you raised
12:08:33 7 about where the parties were with respect to the
12:08:36 8 documents that indicate -- that pertain to land
12:08:40 9 sales the situation -- I agree with my friend,
12:08:45 10 that there was no formal agreement as to how it
12:08:48 11 was proceeding, except that we exchanged -- or
12:08:53 12 Canada sent interrogatories, we received
12:08:56 13 responses, and Canada will be reading in certain
12:09:03 14 responses. And that's the extent of the
12:09:04 15 necessity for Phase 1.

12:09:07 16 THE COURT: Well, I think I know what
12:09:08 17 both of you mean by "formal agreement", but it
12:09:11 18 remains the case that I require the parties,
12:09:15 19 when the issue came up in the trial, to have a
12:09:18 20 dialogue about it and to report back to me about
12:09:21 21 what relevance, if any, those books and records
12:09:25 22 were either agreed or not agreed to have.

12:09:30 23 And a report back was made to me in
12:09:33 24 open court. And, you know, you may not think
12:09:38 25 that's a formal agreement between you but as far

12:09:40 1 as I'm concerned, you know, as far as this trial
12:09:43 2 is concerned you must live with what you told
12:09:48 3 me.

12:09:49 4 MR. BEGGS: Yes, and I have
12:09:50 5 identified --

12:09:51 6 THE COURT: I mean, I suppose subject
12:09:52 7 to something coming up, which it may, but I
12:09:57 8 wasn't able in the time available to put my
12:09:59 9 hands on the transcript at which time the
12:10:02 10 parties reported back to me to get the exact
12:10:05 11 wording.

12:10:06 12 MR. TOWNSHEND: Yes, Your Honour, I
12:10:07 13 have those references for you. They appear at
12:10:13 14 page -- for the plaintiffs the answers appear at
12:10:17 15 page 4355 and 4372.

12:10:28 16 THE COURT: Do you have the date?
12:10:28 17 4355 and 4372?

12:10:33 18 MR. BEGGS: Yes, I believe that's
12:10:34 19 August 16th of 2019. And for Canada it was page
12:10:43 20 4359 on the same day.

12:10:48 21 THE COURT: Can you summarize the gist
12:10:49 22 of what was said or --

12:10:51 23 MR. BEGGS: The gist of what was said
12:10:52 24 was that it -- everybody had -- well, it more or
12:10:59 25 less came to an agreement that the book, the

1 materials were not relevant for Phase 1 but may
2 be relevant for Phase 1B and 2.

3 THE COURT: That's my recollection as
4 well, not that there was a certainty about it.

5 MR. BEGGS: Yes.

6 THE COURT: Except that they were not
7 relevant for Phase 1A, which was the matter of
8 most pressing concern given disclosure issues.

9 MR. BEGGS: Yes. It was -- Canada had
10 felt that it -- was stating that it was
11 relevant, and my friend said it may be relevant.

12 Another point of clarification with
13 respect to the title action and the order of
14 Justice Gans, my friend said that all issues
15 were to occur in Phase 1. That's not entirely
16 accurate.

17 I believe the order is at tab --

18 THE COURT: Which order?

19 MR. BEGGS: The order of Justice Gans.

20 THE COURT: I have it right here.

21 MR. BEGGS: Yes. So tab 9 on page 161
22 of the book, paragraph 2(c)(vi) and (vii), the
23 monetary components of the title action are
24 postponed in Phase 2. So the entitlement for
25 compensation and the accounting of revenues is

12:12:30 1 postponed to Phase 2.

12:12:34 2 THE COURT: And your point is that
12:12:34 3 that applies to both actions?

12:12:37 4 MR. BEGGS: Well, those allegations
12:12:38 5 are only for the title action.

12:12:39 6 THE COURT: Oh, I see.

12:12:41 7 MR. BEGGS: So Roman numerals 1 to 5
12:12:43 8 are for the treaty action and 6 and 7 are for
12:12:46 9 the title action, but that doesn't affect
12:12:53 10 anything that's been decided today.

12:12:55 11 THE COURT: Yes, I think that was
12:12:57 12 Mr. Townshend's main point, which is it doesn't
12:13:01 13 really engage the issue of Phase 1B.

12:13:14 14 MR. BEGGS: That's right. So as I
12:13:26 15 read the materials I don't see that there's any
12:13:28 16 difference between the law in which the parties
12:13:31 17 have raised with respect to constructive trusts.

12:13:35 18 My friends have produced the Soulos
12:13:37 19 case which is, of course, the leading case on
12:13:38 20 constructive trusts with respect to land.

12:13:41 21 Canada was relying on the Sun Indalex
12:13:45 22 case, which is a Supreme Court case from 2013,
12:13:47 23 simply because it was more relevant, but it is
12:13:50 24 not a case that involves land; it is a case
12:13:52 25 involving -- a case of constructive trust for

12:13:58 1 breach of fiduciary duty.

12:14:02 2 And I would correct my friend's
12:14:04 3 statement in their submissions that a remedial
12:14:11 4 constructive trust only applies to unjust
12:14:14 5 enrichment. I think the law, although the
12:14:17 6 wording is somewhat jumbled in the case law, the
12:14:20 7 law -- remedial constructive trusts can apply to
12:14:26 8 both unjust enrichment allegations and breaches
12:14:32 9 of fiduciary duty.

12:14:34 10 And that -- again, I don't think that
12:14:37 11 it makes a difference because we both are
12:14:39 12 relying on the same test, which is a four-point
12:14:42 13 test originating in Soulos.

12:15:15 14 The second point of the four-point
12:15:17 15 test is that:

12:15:18 16 "The assets in the hands of the
12:15:19 17 defendant must be shown to have
12:15:21 18 resulted from deemed or actual agency
12:15:23 19 activities of the defendant in breach
12:15:26 20 of his equitable obligation to the
12:15:29 21 plaintiff."

12:15:32 22 And I believe my friend would say that
12:15:33 23 it's fairly obvious in this case because the
12:15:36 24 surrendered land, you know, made the land
12:15:38 25 available for sale, and if the surrender of land

1 was itself a breach of fiduciary duty then that
2 logic automatically flows.

3 But I would suggest it's not so
4 simple, particularly where the land is not still
5 in the hands of the Crown but was sold for fair
6 market value, perhaps several times, before
7 ending up in the hands of the Crown 100 years
8 after the original sale. So it is not so easy
9 to say that there is that direct connection or
10 direct result.

11 And in the Sun Indalex case itself at
12 page -- or paragraph 230 it emphasizes that a
13 "connection" between the assets and the breach
14 is not enough, that it has to be a direct result
15 of the breach.

16 And so I would suggest that a lot of
17 the evidence Canada is proposing to offer
18 pertains to establishing whether it's a direct
19 result of that breach.

20 Where Canada was under a positive
21 obligation to sell -- or the Crown, I should
22 say, was under a positive obligation to sell the
23 properties and though the action has been
24 referred to, as the stayed actions themselves
25 allege, that Canada had that obligation, then

12:17:11 1 where they did sell it and fair market value or
12:17:14 2 more was received, and that money was passed on
12:17:18 3 to the plaintiffs, and the use of that money was
12:17:23 4 directed by the plaintiffs, then it's hard to
12:17:27 5 say that it is -- that there's a direct result
12:17:34 6 between the asset -- or a direct connection
12:17:36 7 between the asset and the breach -- alleged
12:17:40 8 breach of fiduciary duty.

12:17:42 9 I would also suggest it applies to the
12:17:44 10 fourth item on the Soulos list, which is:

12:17:49 11 "There must be no factors which
12:17:51 12 would render imposition of a
12:17:54 13 constructive trust unjust in all of
12:17:55 14 the circumstances of the case [...]."

12:17:58 15 And I note that in the Sun Indalex
12:18:10 16 case, which again is not a land case, there was
12:18:11 17 a majority and a minority and a dissent, but the
12:18:15 18 minority said that it was a -- concluded in that
12:18:17 19 case that the constructive trust would be:

12:18:29 20 "[...] so grossly
12:18:30 21 disproportionate to the breach so as
12:18:33 22 to be unreasonable."

12:18:33 23 As stated at paragraph 240.

12:18:36 24 "A judicially ordered
12:18:38 25 constructive trust, imposed long after

12:18:39 1 the fact, is remedy [...]"

12:18:42 2 And, of course, this is a commercial

12:18:43 3 case.

12:18:43 4 "[...] that tends to destabilize

12:18:45 5 the certainty which is essential for

12:18:49 6 commercial affairs [...]"

12:18:50 7 And very important in this fact

12:18:50 8 situation."

12:18:54 9 And I would suggest that imposing

12:18:55 10 constructive trust long after the fact is itself

12:19:00 11 an exceptional request and remedy in this case

12:19:05 12 where we have 150 years having passed.

12:19:08 13 And in that scenario we have to wade

12:19:13 14 through a lot of material that would pertain to

12:19:17 15 the justice of the scenario whether it would be

12:19:21 16 unjust to impose a constructive trust or not,

12:19:24 17 because the Crown is not simply a landlord or a

12:19:31 18 commercial party which owns property, it's a

12:19:34 19 party that holds property for the general

12:19:38 20 public.

12:19:40 21 And in this case there are two

12:19:43 22 properties identified for Phase 1B which pertain

12:19:46 23 to Canada, both of which are associated with the

12:19:52 24 national park which has -- there is a great deal

12:19:58 25 of that evidence we would need to offer with

12:20:00 1 respect to the development of that park and the
12:20:08 2 purposes for which it serves, all of which would
12:20:12 3 tend to go to the justice of whether a
12:20:14 4 constructive trust could be imposed.

12:20:17 5 The -- in that regard I might mention
12:20:22 6 that I brought a large map, which I might ask
12:20:28 7 leave to gesture towards, which indicates that
12:20:32 8 the property lots, at least with respect to
12:20:37 9 St. Edmunds Township and the two lots that
12:20:40 10 pertain to Canada, are in the -- there's sort of
12:20:46 11 a line that goes diagonally, and that's the
12:20:50 12 line, I believe, indicating the border of
12:20:52 13 St. Edmunds Township.

12:20:56 14 And in the top -- but the top right of
12:21:07 15 St. Edmunds Township are some -- okay. So right
12:21:17 16 around here is a lot that is owned by Canada,
12:21:19 17 having been sold to private purchaser and
12:21:23 18 repurchased, as I say, in the next century.

12:21:30 19 And around here is the other lot which
12:21:33 20 is identified for Phase 1B. It's a different
12:21:39 21 colour because it is land which is owned by
12:21:42 22 Canada but -- or sorry, not owned by Canada,
12:21:44 23 owned by Ontario but is -- there's an agreement
12:21:52 24 between Ontario and Canada to have Canada manage
12:21:54 25 the property as part of the national park.

1 And the official transfer of that
2 property never occurred, largely, I expect,
3 because of the ongoing claims. But that gives
4 an idea of where the property is that is raised
5 by Canada, or involves Canada. The other five
6 properties all pertain to other properties owned
7 by Ontario.

8 So the -- my friend -- it's
9 undeniable, I think, that my friend has put in
10 his pleadings that he does not wish to rely on
11 the implementation of the treaty as a cause of
12 action.

13 I did indeed mention that in the
14 second opening that Canada gave at the end of
15 that case. I mentioned it at that time because
16 of -- there had been evidence pertaining to
17 implementation, given largely by a number of
18 community witnesses, but had been alluded to by
19 some of the expert witnesses as well.

20 And even in the opening on the first
21 day, April 25th, my friend alluded to
22 implementation with respect to Phase 1.

23 And this was on page 22 of the
24 transcript at the time of 10:26 in the morning.
25 Again, that's April 25th, and it was just after

12:23:50 1 my friend referred to his aha moment in the
12:23:52 2 case. And he states that:

12:23:57 3 "The land was mostly unsuitable
12:23:59 4 for farming."

12:24:00 5 And he says:

12:24:00 6 "[...] and the demand for the
12:24:01 7 land did not prove to be nearly as
12:24:03 8 high as it was pitched at the time.
12:24:05 9 And 17 years after the treaty almost
12:24:06 10 half the land was still unsold. And
12:24:08 11 it was 50 years after the treaty
12:24:10 12 before the unsold land portion dropped
12:24:12 13 below 3 percent."

12:24:15 14 So I don't actually think there's been
12:24:17 15 evidence of that -- those facts in the case so
12:24:20 16 far, but my friend did raise them and so
12:24:28 17 presumably thought they were relevant to raise
12:24:30 18 them at that time.

12:24:31 19 I think the difference between Canada
12:24:34 20 and the plaintiffs on whether this material is
12:24:36 21 relevant, the buying and selling and the use, is
12:24:42 22 a confusion between the cause of action, which
12:24:45 23 my friend is relying on, and the defence, which
12:24:48 24 Canada is relying on.

12:24:51 25 My friend has not alleged a cause of

1 action based on implementation; that's true.

2 However, the allegation which has been made of

3 breach of fiduciary duty in -- and seeking the

4 remedy of a constructive trust does raise -- or

5 Canada does have the option of bringing a

6 defence based on implementation.

7 And the defence is based on the

8 reasoning I've indicated of being unjust or

9 being directly connected, or a direct result of

10 the breach. But both those factors would make

11 Canada's defence relevant to the evidence that

12 it would offer with respect to buying and

13 selling, use of the trust funds.

14 THE COURT: I think I understand your

15 position, which is simply that you submit that

16 to achieve a remedy in particular constructive

17 trusts certain evidence is relevant to whether

18 the plaintiff should be given that.

19 You would say that certain

20 circumstances are properly put forward as to

21 whether -- well, you have put two of the four

22 elements of the test, but I saw, at least in the

23 written material, at least one of them mentioned

24 as -- not as a cause of action or defence to a

25 cause of action but as to the appropriateness of

12:26:19 1 that particular remedy.

12:26:21 2 MR. BEGGS: Yes.

12:26:21 3 THE COURT: As opposed to, say,
12:26:22 4 damages, for example.

12:26:24 5 MR. BEGGS: Yes, exactly.

12:26:25 6 THE COURT: I understand that
12:26:25 7 position.

12:26:26 8 MR. BEGGS: Yes. Okay. Then I don't
12:26:26 9 think there's much more I need to address. I do
12:26:30 10 want to -- I did want to mention --

12:26:33 11 THE COURT: Well, there are a couple
12:26:34 12 of things I need you --

12:26:37 13 MR. BEGGS: Sure.

12:26:37 14 THE COURT: The same things that I
12:26:39 15 asked Mr. Townshend to address, and don't sit
12:26:42 16 down without addressing them.

12:26:44 17 MR. BEGGS: Yes.

12:26:44 18 THE COURT: Which is, you know,
12:26:44 19 recognizing that there's some dispute about
12:26:47 20 aspects of what this second trial would look
12:26:50 21 like, how long do you say it's going to take and
12:26:54 22 what do you say about the factors I should take
12:27:00 23 into account in considering whether that should
12:27:03 24 be done now or later?

12:27:04 25 I know your position, which is it

12:27:06 1 should be done later. But you've heard from
12:27:08 2 Mr. Townshend that he's submitting that there
12:27:10 3 could be, for example, a one- to two-month trial
12:27:14 4 in a year from July. And he's laid out in his
12:27:16 5 factum exactly what steps should be taken in
12:27:20 6 what order.

12:27:21 7 And I would want your submission on
12:27:23 8 those matters before you sit down.

12:27:26 9 MR. BEGGS: Certainly.

12:27:27 10 THE COURT: Also, of course, he relies
12:27:28 11 on the prospect of settlement.

12:27:30 12 MR. BEGGS: Yes.

12:27:31 13 THE COURT: As the -- one of the
12:27:32 14 reasons for proceeding in this fashion. So I
12:27:34 15 assume you're going to deal with that.

12:27:37 16 MR. BEGGS: Yes. Before I get to
12:27:57 17 those there were a few minor points to clean up.

12:28:07 18 My friend, in respect to Ontario's
12:28:08 19 position, which we generally support, we support
12:28:16 20 Ontario's position but -- raised the issue of
12:28:17 21 whether a change of ownership would impact the
12:28:22 22 environmental legislation.

12:28:23 23 And I actually would suggest that's an
12:28:25 24 open question, given that it's not clear what
12:28:27 25 the nature of the land would be after a

12:28:29 1 constructive trust was imposed, whether it would
12:28:31 2 be reserve land, 91(24) land; and, thereby, it
12:28:37 3 can't be automatically assumed that provincial
12:28:39 4 legislation would apply. So that's an issue
12:28:42 5 that would need to be addressed.

12:28:49 6 With respect to the stay of cases I
12:28:56 7 simply had an observation, my friend mentioned
12:28:59 8 in his submissions that the Ontario cases -- or
12:29:02 9 that some the cases have "without prejudice"
12:29:05 10 clauses in them pertaining to res judicata and
12:29:15 11 abuse of process.

12:29:16 12 THE COURT: I think only two of them
12:29:17 13 do.

12:29:19 14 MR. BEGGS: Yes, it's two cases and
12:29:19 15 those are the two cases --

12:29:19 16 THE COURT: Out of five.

12:29:19 17 MR. BEGGS: -- involving Ontario. The
12:29:19 18 other three are the ones involving Canada and
12:29:22 19 the federal court.

12:29:23 20 And perhaps since it's not -- since
12:29:25 21 I'm not involved in those two cases my opinion
12:29:28 22 may not weigh much, but it seems to me that the
12:29:32 23 clauses the plaintiffs are referring to do not
12:29:36 24 reserve the rights of the plaintiff to bring the
12:29:39 25 claim back but preserve the rights of the

12:29:42 1 defendant to raise an abuse of process because
12:29:45 2 they say without prejudice to the defence of res
12:29:48 3 judicata.

12:29:51 4 THE COURT: A stay, by its nature,
12:29:53 5 allows for the resumption of an action.

12:29:56 6 MR. BEGGS: I would think, yes.

12:29:58 7 THE COURT: So I'm not sure how far
12:29:59 8 you go with that.

12:30:00 9 MR. BEGGS: Well, I mean -- it's not
12:30:02 10 my case so I won't pursue it further.

12:30:08 11 So returning to the points that you
12:30:09 12 were raising, in our materials we suggested that
12:30:14 13 a total of 117 days would be the length of the
12:30:24 14 trial.

12:30:30 15 THE COURT: Yes. This was before you
12:30:30 16 saw the material. So obviously if Ontario says
12:30:32 17 10 to 15 days you don't need to arbitrarily
12:30:35 18 assign a longer --

12:30:37 19 MR. BEGGS: No. And so --

12:30:37 20 THE COURT: I mean, I understand what
12:30:37 21 you did is you took your own estimate and
12:30:40 22 multiplied it by three.

12:30:41 23 MR. BEGGS: Right.

12:30:41 24 THE COURT: But you have more
12:30:42 25 information now.

1 MR. BEGGS: Yes. So in that case,
2 totaling those numbers, our estimate of 39 days
3 with the two estimates of 15 days would total 69
4 days of trial.

5 THE COURT: Well, in fairness to
6 Mr. Townshend, I think he said if you were
7 allowed to do what you intended to do his case
8 might expand; so that might be at the lower end.

9 But what's the total of that?

10 MR. BEGGS: 69.

11 THE COURT: 69.

12 MR. BEGGS: We did set out in our
13 materials -- and I apologize that it wasn't in
14 the form of a factum. I'd understood that it
15 could be done informally. But we set out on
16 page 4 the steps we have taken with respect to
17 preparing for trial and how long it will take to
18 complete those steps of gathering discovery
19 documents and expert reports.

20 That put us, as you say, before seeing
21 anybody else's materials, at February of 2022.
22 It's possible it would move up toward the end of
23 2021 or the last half of 2021.

24 And regardless of -- it's material --
25 my friend recognized that, you know, it's

12:32:01 1 material that -- well, perhaps not if it's
12:32:07 2 relevant, but a lot of the work could be done
12:32:09 3 for Phase 2 -- is being done for Phase 2, so
12:32:12 4 it's being done anyway.

12:32:13 5 We're doing this work in preparation
12:32:16 6 whether Phase 1B proceeds or phase 2 as to the
12:32:18 7 larger scale of the land transactions.

12:32:30 8 THE COURT: Mr. Townshend is
12:32:30 9 optimistic that Phase 2 never will have to take
12:32:34 10 place.

12:32:34 11 MR. BEGGS: Yes. And that would
12:32:37 12 always be preferable. I'm not as optimistic as
12:32:41 13 my friend that Phase 1B will be the catalyst for
12:32:45 14 that.

12:32:49 15 Phase 1B -- to do that Phase 1B has to
12:32:52 16 be representative enough that the parties can
12:32:56 17 draw sufficient conclusions on -- to extrapolate
12:33:06 18 to the whole of the peninsula at large with
12:33:09 19 respect to Crown properties.

12:33:13 20 We were not -- we were skeptical when
12:33:20 21 the phasing order was put together that Phase 1B
12:33:22 22 would accomplish that, and that's why there's
12:33:24 23 only two properties out of seven that pertain to
12:33:27 24 Canada, because we didn't offer any properties.

12:33:29 25 But the work we've done to look at

12:33:32 1 those two properties has reinforced our view
12:33:35 2 that paradoxically the property -- each property
12:33:41 3 is so unique, at the same time it's
12:33:44 4 interconnected with the other properties,
12:33:46 5 particularly in the case of the national park,
12:33:51 6 that looking at isolated properties will not
12:33:57 7 provide sufficient guidance to actually advance
12:33:59 8 the cause of negotiations and settlement.

12:34:03 9 That said, we are -- I believe that
12:34:09 10 the determination of the liability from Phase 1
12:34:14 11 would encourage settlement. And if, for
12:34:21 12 example, liability were found, that parties
12:34:23 13 would be much more productively engaged in
12:34:29 14 settling it without having to go into Phase 2 in
12:34:33 15 its entirety because it is -- Phase 2 in its
12:34:36 16 entirety is a large undertaking.

12:34:41 17 I hope I didn't forget any of those
12:34:43 18 questions that you asked.

12:34:45 19 THE COURT: Well, you covered the
12:34:46 20 timing one -- yes, I think you did cover them
12:34:51 21 both actually.

12:34:52 22 MR. BEGGS: Okay. I think those would
12:34:56 23 be my submissions then, Your Honour, if there's
12:34:59 24 no other questions.

12:35:19 25 THE COURT: Is it you, Mr. Feliciant?

12:35:38 1 MR. FELICIANANT: Your Honour, I don't
12:35:39 2 propose, again, like my friend from Canada, to
12:35:39 3 go over the history of how we got here either,
12:35:40 4 and much of what I was going to say I think has
12:35:43 5 largely been addressed.

12:35:44 6 One of the main points that Ontario
12:35:45 7 has focused on, we have to remember that because
12:35:48 8 we served our materials all at the same time I
12:35:50 9 didn't have the benefit of knowing what
12:35:52 10 everybody's positions were, so we probably put
12:35:55 11 in some material addressing issues that actually
12:35:56 12 may not be issues.

12:35:59 13 But, to summarize, Ontario's concern
12:36:00 14 was it's not as straightforward a proposition to
12:36:03 15 say that if there is a declaration of a breach
12:36:07 16 of fiduciary duty that that automatically
12:36:09 17 results in a particular type of equitable
12:36:10 18 remedy, which in this case Mr. Townshend would
12:36:13 19 say is a constructive trust.

12:36:14 20 And the cases do seem to suggest that
12:36:21 21 the nature of the fiduciary duty is going to
12:36:24 22 vary with the circumstances of any piece of
12:36:28 23 litigation. So that may in fact be relevant to
12:36:37 24 the submissions on whether a constructive trust
12:36:39 25 is an appropriate remedy. So having a decision

1 on the fiduciary duty claim may actually assist
2 us in better appreciating the constructive trust
3 case.

4 The other point I wanted to make
5 also --

6 THE COURT: Just wait for a moment.
7 Under Justice Gans' order it specifically
8 articulates certain remedies, the entitlement to
9 which would be decided in Phase 1A, all of which
10 are declaratory.

11 MR. FELICIANANT: That's right.

12 THE COURT: There is no other type of
13 remedy.

14 MR. FELICIANANT: That's right.

15 THE COURT: And entitlement to a
16 constructive trust of any kind is not one of
17 those things that are listed.

18 MR. FELICIANANT: That's correct.

19 THE COURT: However, beneficial
20 ownership is on the table in 1B, which I think
21 that all of you seem to agree is accomplished
22 through a constructive trust.

23 MR. FELICIANANT: It may very well be.
24 That's correct.

25 THE COURT: Is that the gist of it?

12:37:57 1 MR. FELICIANANT: That's the gist of it.

12:37:58 2 And I think that the point being that there may
12:38:04 3 be some benefit in knowing the outcome of Phase
12:38:08 4 1A prior to dealing with this issue of whether
12:38:13 5 that's the appropriate remedy, because at that
12:38:16 6 point we would have the benefit of your reasons,
12:38:18 7 we'd have the benefit of knowing exactly what,
12:38:22 8 if any -- of course we're not conceding there
12:38:25 9 was a breach, but what, if any, breach of
12:38:27 10 fiduciary duty there was and what the scope of
12:38:29 11 that was.

12:38:29 12 And one could make then the arguments
12:38:34 13 that you might see in some of the cases that
12:38:37 14 suggest that perhaps it's -- a constructive
12:38:39 15 trust would be a disproportionate remedy, or
12:38:44 16 compensation would be a more appropriate remedy.

12:38:48 17 That only goes to the suggestion by
12:38:50 18 Canada that it may be better to take Phase 1B
12:38:54 19 and amalgamate it into Phase 2.

12:38:57 20 THE COURT: Well, it also goes to the
12:38:59 21 question that Mr. Townshend has put forward, a
12:39:05 22 helpful kind of list of steps that he would
12:39:07 23 propose be taken; and, roughly speaking, that
12:39:17 24 worry too much about the -- somewhat the
12:39:21 25 different estimates. What he's talking about is

12:39:29 1 no decision until 2022, after which that would
12:39:37 2 go all the way up.

12:39:41 3 MR. FELICIANANT: That's right.

12:39:42 4 THE COURT: Obviously subject to
12:39:43 5 settlement, always subject to settlement making
12:39:46 6 any of those things unnecessary.

12:39:53 7 Mr. Beggs didn't say anything, that's
12:39:57 8 his call, about that idea. But if you have any
12:40:00 9 submissions you can make them about that
12:40:02 10 concept.

12:40:05 11 MR. FELICIANANT: Well, the ordering --
12:40:06 12 I think my point is that -- we will -- if that
12:40:10 13 is the order of things that we do when we finish
12:40:17 14 this Phase 1A, if we call it that, proceeding,
12:40:18 15 then jump right into Phase 1B, and then --

12:40:23 16 THE COURT: Well, there is no jumping
12:40:24 17 right into anything.

12:40:25 18 MR. FELICIANANT: Well, I meant jumping
12:40:26 19 in terms of --

12:40:28 20 THE COURT: One of the things I've
12:40:29 21 learned through this process is that everybody
12:40:31 22 agrees that some significant delay will be
12:40:36 23 caused.

12:40:36 24 MR. FELICIANANT: Yes.

12:40:37 25 THE COURT: The amount of delay is not

12:40:38 1 the same. There are very varied points of view
12:40:45 2 about that but the minimum seems to be July of
12:40:47 3 2021, and that's only based on information
12:40:52 4 presently in hand and --

12:40:53 5 MR. FELICIANANT: That's correct.

12:40:53 6 THE COURT: -- has to be considered in
12:40:54 7 the context that something may occur that one
12:40:57 8 party or another says, from a matter of fairness
12:41:01 9 I need a new expert, or whatever. So that's 18
12:41:05 10 months from now, and that would be the
12:41:07 11 commencement of another hearing.

12:41:11 12 MR. FELICIANANT: That's correct.

12:41:12 13 The point I was making was that if we
12:41:14 14 do it in that way without the benefit of your
12:41:17 15 reasons from this portion -- I suppose jumping
12:41:24 16 into it was not the best term, although from our
12:41:27 17 perspective workwise it probably is, we wouldn't
12:41:31 18 have the benefit of those reasons. So I just
12:41:34 19 say that might be a factor that may suggest it
12:41:37 20 might be better heard in Phase 2.

12:41:39 21 The other concern we've raised, and I
12:41:45 22 don't -- maybe it isn't a concern but it's
12:41:48 23 certainly something we've been thinking about as
12:41:50 24 the -- and I think we referenced it in our
12:41:52 25 submissions, the concern to which there would be

1 overlapping evidence in these two proceedings.

2 What we have come to realize, through
3 the work we've done to prepare for where we are
4 now, is these parcels are -- form parts of
5 larger blocks of land. So, for example, there
6 was -- there's a parcel in the middle of Black
7 Creek Provincial Park.

8 THE COURT: Yes, I read your summary.

9 MR. FELICIAN: And we are concerned
10 that there would be a duplication of evidence
11 and would that lead to inconsistent findings of
12 fact? Would it pose problems for the calling of
13 that evidence at a later trial? How much
14 duplication will there be? Would Ontario be
15 prejudiced by the fact that we may have to call
16 some evidence about surrounding parcels that
17 relate to the subject parcel? But we're not
18 calling all of the evidence with respect to
19 those parcels.

20 And then when we get to Phase 2 and we
21 have to do that, is having this split going to
22 cause us some prejudice or certainly some
23 confusion? I haven't completely mapped out how
24 we would do that.

25 If the trial judge in Phase 1B

1 determined that certain portions of one of our
2 witness' evidence was not helpful, or one of our
3 experts weren't credible, would we have to then
4 go out and engage another expert?

5 So there are some practical and
6 potential difficulties that could arise that
7 would be avoided by Phase 2.

8 THE COURT: You've raised an issue
9 that I didn't ask Mr. Townshend about because I
10 know his position, but he can deal with it in
11 reply if he wishes.

12 But Justice Gans' order is very
13 specific. It says that:

14 "[...] the timing of the trial of
15 Phase 1B shall remain at the
16 discretion of the trial judge [...]"
17 That's fine, but that's not what I'm
18 getting at.

19 "[...] including but not limited
20 to adjourning the issues covered in
21 paragraph 2(b) herein to Phase 2."

22 So his order leaves open a three-step
23 process instead of a two-step process.

24 Now, I understand that Canada and
25 Ontario are not advocating for that, they are

12:44:01 1 advocating for a two-step process, is that
12:44:04 2 correct?

12:44:05 3 MR. FELICIANANT: That's correct.

12:44:06 4 THE WITNESS: So you're not saying the
12:44:07 5 decision on liability would be helpful and,
12:44:09 6 therefore, let's do Phase 1B as a separate
12:44:13 7 trial? You're saying, no, we should still do it
12:44:17 8 as Phase 2?

12:44:19 9 Because that is an option that seems
12:44:20 10 to be open under this order. And I think he was
12:44:24 11 trying not to constrain the options.

12:44:28 12 MR. FELICIANANT: It's -- it is possible
12:44:29 13 that you could order that phase -- if I think I
12:44:34 14 understand your point, you could order that
12:44:37 15 Phase 1B proceed, after a ruling on this phase,
12:44:40 16 but not make it part of Phase 2, and just set it
12:44:46 17 far enough down the road that you will have had
12:44:48 18 time to render a decision on this matter. I
12:44:51 19 mean, those are options. Like, I --

12:44:52 20 THE COURT: I raise it because you
12:44:53 21 made two submissions, only one of which drives
12:44:58 22 towards the requested outcome.

12:45:00 23 One submission is that it might be
12:45:01 24 useful, helpful, efficient to get the liability
12:45:04 25 decision before the Phase 1B trial. I

1 understand that submission.

2 But that does not mean that Phase 1B
3 therefore should be down to Phase 2. It just
4 means that the order that Mr. Townshend has
5 proceeded or proposed should be amended, whereas
6 your second argument, which was inconsistent
7 findings of fact and possible prejudice, seemed
8 to be more in the view of not just will benefit
9 from a liability decision, but also we will be
10 disadvantaged if remedy is split into two
11 pieces.

12 MR. FELICIANANT: That's correct.

13 They're two different arguments --

14 THE COURT: All right. That's fine.

15 MR. FELICIANANT: -- that suggest two
16 different outcomes.

17 Our preferred outcome is to avoid a
18 process that's going to cause all of these other
19 concerns around splitting the evidence and
20 duplication.

21 I'd like to address -- I know you
22 asked about the settlement prospects. I'm not
23 sure that that should drive what you decide;
24 that's a very speculative prospect. Maybe it'll
25 settle, maybe it won't. Maybe there will be

12:46:18 1 discussions, maybe there won't. You can't, as
12:46:20 2 the trial judge, know that. We as litigation
12:46:22 3 lawyers don't necessarily know that.

12:46:25 4 So we can only decide how to structure
12:46:27 5 this process in accordance with really what is
12:46:30 6 best in terms of fairness and an orderly and
12:46:35 7 efficient process.

12:46:39 8 I would share Mr. Beggs' observation,
12:46:43 9 however, that because the case law is fairly
12:46:45 10 clear that, you know, the equities will be
12:46:48 11 considered on a case-by-case basis; but also,
12:46:51 12 with respect to this kind of a scenario,
12:46:52 13 potentially on a parcel-by-parcel basis,
12:46:56 14 depending on the land transaction history and
12:46:59 15 the use of the particular parcel, and impacts on
12:47:03 16 either the governments or surrounding
12:47:06 17 stakeholders. I don't know that it's clear that
12:47:09 18 a decision on one of these parcels would give us
12:47:12 19 much guidance in any event. So that's an open
12:47:15 20 question.

12:47:19 21 And given that it is a bit speculative
12:47:21 22 and it is an open question it's probably best
12:47:23 23 not to have that factor drive the decision.

12:47:33 24 Now, the two affidavits we swore, one
12:47:35 25 we provided was from Ron Gould. I mean, it is

1 an unchallenged affidavit and he does attach
2 maps, which I hope illustrate for Your Honour
3 exactly the interconnectedness of these parcels.

4 These are not just isolated islands in
5 and of themselves. So he will have attached
6 maps to his affidavit that show you his parcel
7 in relation to the surrounding lands. So it
8 really is impossible to simply treat these as
9 islands where you have an ecosystem that would
10 know no particular boundary like that.

11 In terms of timing we provided an
12 affidavit from one of our senior lawyers,
13 Ms. Wall, who was co-counsel on Williams with
14 me.

15 She set out the typical time it takes
16 us to retain an expert. I would point out that
17 there's actually an already existing precedent
18 in this trial of a report that took that long,
19 and it was the report of Mr. -- Professor
20 Driben. He started his report in April 2012 and
21 it wasn't provided until October 2013.

22 That's --

23 THE COURT: I read that affidavit and,
24 you know, it's fine to put it forward. I must
25 say that another not unusual feature of this

1 trial is the reality that expert reports tend to
2 create the need for other expert reports, and
3 they tend to create the need for reply expert
4 reports or supplementary expert reports.

5 And I'm repeating myself by saying
6 that it's one of the many reasons why one
7 doesn't usually embark on this trial process
8 until all of that has been either largely or
9 entirely completed.

10 MR. FELICIAN: And that's also why,
11 in our submission, what we said was that it
12 shouldn't be scheduled before mid-2021. We
13 didn't say we'd necessarily be ready. We said
14 it can't be scheduled before that date because
15 there are a lot of variables that have to be
16 taken into account.

17 If an expert is looking at all of
18 these parcels, and all of the ecology, and all
19 of the environmental issues that Ontario
20 believes is relevant; all of the, for example,
21 management of these lands that may involve
22 contracts with third parties, and all of these
23 different things that go into managing the
24 lands, and we don't get that report until 20 --
25 January 2021, Mr. Townshend no doubt is going to

12:50:20 1 need an expert to respond to that or want an
12:50:23 2 expert.

12:50:24 3 So it does get into a cycle of getting
12:50:27 4 these reports and not knowing exactly when we'll
12:50:29 5 be ready.

12:50:31 6 I certainly would be very reluctant at
12:50:34 7 this stage to commit to saying, well, we're
12:50:36 8 definitely -- if you set October 1st, 2021,
12:50:39 9 we're all going to be ready to go. I don't
12:50:42 10 think any of us can say that. I think it's an
12:50:46 11 aspirational date. We certainly can case manage
12:50:49 12 our way towards a date like that or whatever
12:50:51 13 date, but I don't think we're in a position to
12:50:54 14 set it.

12:50:54 15 THE COURT: Well, fortunately for you
12:50:56 16 this motion for directions does not include
12:50:58 17 setting of a trial date. I shouldn't say it
12:51:01 18 that way but, you know, we're not doing that
12:51:10 19 this morning.

12:51:11 20 MR. FELICIANANT: No.

12:51:11 21 THE COURT: I think your point is
12:51:11 22 perhaps I'm treating July 2021 as more firm than
12:51:15 23 you might prefer?

12:51:17 24 MR. FELICIANANT: Yes.

12:51:17 25 THE COURT: All right.

12:51:17 1 MR. FELICIANANT: I think that that's
12:51:18 2 correct.

12:51:28 3 So I think now that -- sort of, I
12:51:28 4 think we're on common ground that this will be a
12:51:32 5 trial that does require evidence, and it will
12:51:34 6 require some expert evidence, and we'll have
12:51:36 7 time to get it.

12:51:37 8 The question then becomes do we have a
12:51:41 9 separate phase or not? And in our view, I
12:51:43 10 think, from an orderly process and avoiding
12:51:48 11 creating issues where none have to be created,
12:51:52 12 it would be better to do it in Phase 2. But if
12:51:56 13 you're going to do it before Phase 2 it should
12:51:59 14 be done after the decision in this phase so that
12:52:03 15 we have the benefit of your reasons.

12:52:05 16 So those would be the two positions I
12:52:08 17 take.

12:52:11 18 THE COURT: Who is making submissions
12:52:12 19 for the municipalities today?

12:52:16 20 Very good of you to take the labouring
12:52:18 21 oar for your colleagues once again. I suppose
12:52:24 22 geography probably has something to do with
12:52:27 23 that. Yes.

12:52:52 24 MS. MCKENNA: I had said that I needed
12:52:52 25 15 minutes for my submission but I know we're 10

12:52:52 1 minutes from the lunch break and I'm sure I can
12:52:52 2 get through it. I don't want to repeat much of
12:52:52 3 what my friends have said.

12:52:52 4 THE COURT: If you don't mind, it
12:52:52 5 would be helpful because I'm going to take the
12:52:52 6 lunch break to give the plaintiffs a chance to
12:52:52 7 get their reply organized, and it would be
12:52:52 8 better if they'd heard from you. We can go to
12:52:52 9 1:05 if that -- if it matters.

12:52:52 10 MS. MCKENNA: Yeah, I think I can --
12:52:52 11 I've heard a lot of my friends' submissions. I
12:52:54 12 agree with many of them. I agree with the
12:52:56 13 position of -- we agree with the position of
12:52:56 14 Canada and Ontario that Phase 1B should be
12:53:01 15 collapsed or deferred to part of Phase 2 for a
12:53:03 16 number of reasons.

12:53:06 17 First, I want to -- before I start on
12:53:07 18 those submissions I want to address a couple of
12:53:10 19 questions that you had raised earlier.

12:53:13 20 Firstly, about the relevance of that
12:53:15 21 particular document that went back in July or
12:53:17 22 August that was produced to the municipalities,
12:53:19 23 and we came to court and there was discussion
12:53:21 24 and submissions made about the relevance.

12:53:26 25 THE COURT: You're talking about the

12:53:27 1 excerpt from the books and records that were --

12:53:29 2 MS. MCKENNA: Correct.

12:53:30 3 THE COURT: Some sample pages.

12:53:31 4 MS. MCKENNA: That is correct.

12:53:33 5 THE COURT: All right.

12:53:33 6 MS. MCKENNA: The submissions that
12:53:34 7 were made on that particular day, and that were
12:53:36 8 directed towards the issue of relevance, was it
12:53:39 9 was put on the record that the position of the
12:53:41 10 plaintiffs was that those documents had not been
12:53:44 11 disclosed in these proceeding, and to the
12:53:46 12 municipalities in particular, because they
12:53:48 13 weren't relevant to Phase 1A or Phase 1B
12:53:52 14 perhaps, but that they were relevant to a later
12:53:54 15 phase in trial. And that was the explanation
12:53:57 16 that was given as to why they had not been
12:54:00 17 disclosed. That's the first thing that I wanted
12:54:01 18 to address.

12:54:04 19 With respect to the plaintiffs'
12:54:06 20 submissions about the phasing order, one of the
12:54:10 21 issues that was raised in the municipalities'
12:54:13 22 submissions, and is of significance to them,
12:54:15 23 relates to this issue about the court making
12:54:17 24 general comments about limitations and laches.
12:54:21 25 And at the conclusion of Phase 1A and Phase 1B

12:54:24 1 that -- you know, that the court would provide
12:54:27 2 some guidance about what potentially could lead
12:54:30 3 to settlement of Phase 2.

12:54:32 4 And the reason why that is of
12:54:34 5 particular concern to the municipalities is
12:54:37 6 because this issue about limitations and laches,
12:54:41 7 for sure when it comes to properties related
12:54:43 8 that are owned by the municipalities that is
12:54:46 9 deferred to Phase 2.

12:54:48 10 And my friends are correct that the
12:54:49 11 municipalities -- none of the properties that
12:54:51 12 are in Phase 1B are properties that the
12:54:55 13 municipality owns but they are properties that
12:54:57 14 are located within the municipality; and so
12:55:00 15 there may be some evidence that the
12:55:01 16 municipalities may want to lead or cross-examine
12:55:04 17 on with respect to the significance of those
12:55:07 18 properties located in their area; issues related
12:55:12 19 to economic benefits; and why people live there;
12:55:15 20 and why people travel there; and why people
12:55:15 21 visit there.

12:55:17 22 So I leave open that municipalities
12:55:18 23 may be calling evidence, or potentially could
12:55:20 24 call evidence in Phase 1B that go to, you know,
12:55:24 25 treaty implementation and evidence that's

12:55:25 1 required for that.

12:55:27 2 The other point that I would like to
12:55:29 3 make is that the problem with the approach about
12:55:33 4 limitations and laches being dealt with, in a
12:55:35 5 general way, after Phase 1A or phase -- 1A and
12:55:38 6 1B is that the doctrine of laches in particular
12:55:48 7 is a defence.

12:55:48 8 And so the issue of --

12:55:52 9 THE COURT: And so are limitation
12:55:53 10 periods.

12:55:54 11 MS. MCKENNA: Sorry?

12:55:54 12 THE COURT: So are limitation periods.

12:55:55 13 MS. MCKENNA: Correct, but in
12:55:56 14 particular with respect to laches is the idea
12:55:58 15 that if the plaintiff has delayed in taking
12:56:00 16 action and prosecuting, or pursuing an equitable
12:56:03 17 claim in particular, the defendant can resist
12:56:06 18 that equitable claim on the basis that the
12:56:09 19 plaintiff has, one, either acquiesced to the
12:56:12 20 conduct or the status quo; or the delay has
12:56:17 21 caused the defendant to alter their position
12:56:19 22 such that they are relying on the plaintiff's
12:56:21 23 acquiescence, or their acceptance of the status
12:56:25 24 quo, and that they've otherwise allowed a
12:56:28 25 situation to arise that would be unjust to

12:56:32 1 disturb.

12:56:32 2 And so that is particularly
12:56:34 3 significant to the municipalities because, of
12:56:37 4 course, in this case there is no allegation made
12:56:38 5 that the municipalities acted in some improper
12:56:43 6 way. There is no claim for breach of fiduciary
12:56:46 7 duty against the municipalities. There is no
12:56:47 8 allegation that they were engaged in any kind of
12:56:50 9 misconduct.

12:56:51 10 They came into possession of these
12:56:53 11 lands by investing through statute; they've
12:56:56 12 invested significant sums of money over more
12:57:00 13 than 100 years without any notice that there was
12:57:03 14 a claim on these lands.

12:57:04 15 And so when we talk about making
12:57:06 16 general comments about the availability of
12:57:09 17 laches or limitations defences after, none of
12:57:12 18 the evidence that the municipalities would plead
12:57:15 19 about those issues, that is a significant
12:57:19 20 problem for them.

12:57:20 21 THE COURT: So what do you have to say
12:57:21 22 then about Justice Gans' order, which says in
12:57:26 23 paragraph 2(a)(ii)?

12:57:34 24 MS. MCKENNA: I left it at the desk.

12:57:34 25 THE COURT: That's okay.

12:57:34 1 MS. MCKENNA: But my recollection is
12:57:34 2 that --

12:57:34 3 THE COURT: Someone can hand it to
12:57:34 4 you. It's the section that says under:

12:57:36 5 "Phase 1A: the issue of
12:57:38 6 liability to the Plaintiffs, including
12:57:38 7 [...]
12:57:40 8 (ii) limitations or laches defenses
12:57:44 9 applicable [...] to the causes of
12:57:47 10 action in general [...]"

12:57:51 11 MS. MCKENNA: There is no cause of
12:57:52 12 action against the municipalities, firstly.

12:57:54 13 THE COURT: Oh, so you're saying that
12:57:54 14 you're not concerned about that because there's
12:57:56 15 no causes of action.

12:57:58 16 MS. MCKENNA: Right.

12:57:59 17 THE COURT: But you are concerned
12:58:00 18 about it in relation to Phase 1B?

12:58:03 19 MS. MCKENNA: Yes.

12:58:06 20 THE COURT: It isn't actually -- it's
12:58:06 21 not expressly stated there, although certainly
12:58:09 22 Mr. Townshend submitted that it would form part
12:58:12 23 of that phase.

12:58:14 24 MS. MCKENNA: What the order says is:
12:58:15 25 "[...] limitations or laches

12:58:16 1 defenses applicable to any of the
12:58:18 2 Plaintiffs' causes of action in
12:58:19 3 general, or applicable to the
12:58:22 4 entitlement [...]"

12:58:25 5 THE COURT: Where are you reading from
12:58:26 6 now?

12:58:26 7 MS. MCKENNA: I'm looking at paragraph
12:58:27 8 2(ii), laches and limitations.

12:58:31 9 THE COURT: Yes.

12:58:32 10 MS. MCKENNA: "[...] defences
12:58:33 11 applicable to any of the Plaintiffs'
12:58:34 12 causes of action in general, or the
12:58:38 13 applicable entitlement of the
12:58:39 14 Plaintiffs to compensation for
12:58:42 15 breaches of fiduciary duty of the
12:58:43 16 pre-Confederation Crown, save and
12:58:45 17 except [...]"

12:58:47 18 So --

12:58:49 19 THE COURT: So you're saying that
12:58:51 20 you're worried that there will be some findings
12:58:54 21 in Phase 1B when you're not there so you need to
12:58:57 22 be there because they could slip over top of 2.

12:59:03 23 MS. MCKENNA: They could. Those
12:59:05 24 rulings or finding could have an impact on
12:59:07 25 what's happening in Phase 2.

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THE COURT: Right.

MS. MCKENNA: The plaintiffs certainly want that to happen. They have made a submission to you that the court made comments that give guidance for settlement of Phase 2.

THE COURT: So you have to be there for Phase 1B, is what you're saying, if there is that prospect?

MS. MCKENNA: Correct.

THE COURT: And I'm trying to remember what you said that amounted to in days.

MS. MCKENNA: It's not clear because it would really depend on the scope of the evidence that's called in Phase 1B.

THE COURT: Well, everyone has to manage with it's not clear, counsel. But, you know, give me your qualified estimate. I mean, if -- let's just assume, because all these numbers are so qualified, if there was a 40-day trial, which is more than the plaintiffs would hope for, and dramatically less than some of the other defendants would suggest. Okay. So that's a two-month trial, not including your participation. What would you submit, on a qualified basis, might be required? Another

01:00:14 1 week? Another two weeks? Another day?

01:00:21 2 MS. MCKENNA: I guess it would really
01:00:26 3 depend on the nature of the ruling that this
01:00:29 4 court intends to make after the end of Phase 1B,
01:00:32 5 because the reason why Phase 2 is intended to
01:00:34 6 be, or expected to be so large is because it
01:00:37 7 involves a large number of lands that have a
01:00:40 8 variety of different interests that are attached
01:00:42 9 to those lands.

01:00:44 10 And so when we're talking about the
01:00:45 11 municipalities' lands, or we're talking about
01:00:47 12 any of the lands that are located within the
01:00:49 13 municipality that perhaps they don't own but
01:00:52 14 they have an interest in, and in the sense that
01:00:54 15 they're in their municipalities, you know,
01:00:56 16 having evidence that addresses interest on
01:00:59 17 almost each one of those properties is, you
01:01:00 18 know, difficult to predict how much time the
01:01:03 19 municipalities would need.

01:01:04 20 THE COURT: No, and certainly I
01:01:05 21 understand that. But remember that we began
01:01:07 22 this process last March with me asking all of
01:01:10 23 you a series of questions to do with how long it
01:01:17 24 would take to become ready to do Phase 1B and
01:01:23 25 how long Phase 1B would take?

01:01:24 1 And although I think counsel were
01:01:26 2 trying to be responsive it became very clear
01:01:28 3 that no one really knew the answers to either of
01:01:30 4 those two questions, which made perfect sense
01:01:34 5 because no one had done discovery or otherwise
01:01:37 6 worked them up.

01:01:38 7 So I said at the time, and I can't
01:01:40 8 remember if you were there but I'm sure someone
01:01:42 9 was on that call, and it got confirmed by all
01:01:51 10 parties that there would be no prejudice to
01:01:56 11 deferring the issue until 2020 so that the
01:01:59 12 parties could make investigations and work up an
01:02:02 13 understanding of what evidence would be
01:02:02 14 required, so that they could answer my questions
01:02:04 15 about how long it would take to get ready for it
01:02:06 16 and all that would take.

01:02:07 17 So that's how we get to be here today.
01:02:09 18 A hundred qualifiers still apply, counsel, but I
01:02:12 19 have required all the parties to give me some
01:02:15 20 kind of range of numbers and I think you should
01:02:17 21 be doing that too.

01:02:21 22 It's all obviously qualified, but
01:02:25 23 that's what I have to deal with is what is your
01:02:28 24 reasonable estimate today? If I just picked
01:02:31 25 arbitrarily 40 days, because it's in the middle

01:02:34 1 of the range, if there was to be an eight-week
01:02:39 2 trial, which would give you a sense of how long
01:02:41 3 the other parties were going to be. You know,
01:02:43 4 you tell me.

01:02:44 5 MS. MCKENNA: I think that if it was
01:02:45 6 set at 40 days, given the interest --

01:02:49 7 THE COURT: How much more time --

01:02:49 8 MS. MCKENNA: Ten days of that 40 days
01:02:50 9 would be --

01:02:52 10 THE COURT: You would require two
01:02:53 11 weeks?

01:02:54 12 MS. MCKENNA: Yes.

01:02:54 13 THE COURT: It's not out of the 40
01:02:56 14 days, it would be in addition to it.

01:02:58 15 MS. MCKENNA: In addition to the 40
01:02:59 16 days.

01:03:00 17 THE COURT: Anyway, it doesn't matter.
01:03:00 18 I'm just trying to get what ballpark you're in,
01:03:02 19 and that's your ballpark. You're sort of in a
01:03:03 20 two-week ballpark after everyone else is
01:03:06 21 finished. All right.

01:03:07 22 MS. MCKENNA: So I just want to
01:03:08 23 address one other point very quickly about the
01:03:11 24 constructive trust remedy that the plaintiffs
01:03:13 25 are seeking.

01:03:15 1 And I reiterate what my friends have
01:03:19 2 said, is that this is a remedy that is obviously
01:03:22 3 discretionary; and that it is a discretionary
01:03:25 4 remedy that requires a case-by-case analysis and
01:03:29 5 evidence that requires a balancing of the
01:03:32 6 equities and interests in play.

01:03:35 7 The plaintiffs have put forward the
01:03:39 8 Soulos case; that has the test that the court
01:03:43 9 would apply in order to determine whether a
01:03:46 10 constructive trust remedy is appropriate in the
01:03:49 11 circumstances; and in particular under the
01:03:50 12 fourth part of the test a consideration by the
01:03:53 13 court with respect to the -- any unjust result
01:03:55 14 that could result from the imposition of a
01:03:57 15 constructive trust.

01:03:58 16 And so I go back to my primary
01:04:01 17 submission which is, at the end of Phase 1A and
01:04:04 18 Phase 1B if the court is going to make comments,
01:04:06 19 or make some discussion about guidance that is
01:04:10 20 intended to drive settlement discussions between
01:04:12 21 the parties, it's difficult for the
01:04:13 22 municipalities to take any of those comments and
01:04:16 23 apply them to the circumstances because, again,
01:04:18 24 they are uniquely situated here.

01:04:20 25 There is no breach of fiduciary duty

01:04:22 1 alleged against them; they stand in a different
01:04:25 2 position with respect to how they became in the
01:04:27 3 possession of these lands; and there is great
01:04:29 4 injustice that could result in the imposition of
01:04:32 5 the constructive trust with respect to lands
01:04:35 6 over which they own.

01:04:36 7 And so we agree that evidence is
01:04:42 8 required in respect of putting forward any kind
01:04:45 9 of considered conclusions about what Phase 1B
01:04:50 10 would look like and the impact it might have on
01:04:53 11 driving settlement of Phase 2.

01:04:55 12 THE COURT: But doesn't the problem
01:04:56 13 you've raised apply equally to Phase 1A based on
01:05:01 14 this order?

01:05:03 15 MS. MCKENNA: Sorry, ask me that --

01:05:04 16 THE COURT: Well, that same paragraph
01:05:05 17 that you were just reading from.

01:05:08 18 MS. MCKENNA: Yes.

01:05:09 19 THE COURT: As you point out, it goes
01:05:11 20 beyond -- it talks about defences to causes of
01:05:16 21 action. And, as you've said, you're not faced
01:05:19 22 with any causes of action.

01:05:21 23 MS. MCKENNA: Right.

01:05:21 24 THE COURT: You're here because you're
01:05:23 25 the owner of some of the claimed lands.

01:05:26 1 MS. MCKENNA: Correct.

01:05:27 2 THE COURT: And, of course, the

01:05:28 3 municipalities didn't exist at the time.

01:05:30 4 MS. MCKENNA: Did not.

01:05:32 5 THE COURT: But then, as you point

01:05:33 6 out, it goes on to say :

01:05:35 7 "[...] or applicable to the

01:05:36 8 entitlement of the Plaintiffs to

01:05:38 9 compensation for breaches of fiduciary

01:05:41 10 duty of the pre-Confederation Crown

01:05:44 11 [...]"

01:05:45 12 Now, your submission would be, well,

01:05:48 13 those aren't your breaches.

01:05:50 14 MS. MCKENNA: Correct.

01:05:52 15 THE COURT: But isn't that argument

01:05:53 16 the same for that proposition that that could

01:05:56 17 also have an impact on later discussion about

01:06:01 18 availability of remedies?

01:06:05 19 I'm just not sure why your argument is

01:06:10 20 located only in Phase 1B as opposed to just a

01:06:12 21 general problem.

01:06:14 22 MS. MCKENNA: It's a general problem

01:06:16 23 in the sense that if the court makes a --

01:06:16 24 reaches a conclusion that extends beyond just a

01:06:16 25 finding of liability after Phase 1, any comments

01:06:16 1 that are made, or conclusions or findings for
01:06:22 2 which the municipalities have not put forward
01:06:24 3 evidence, or have not had an opportunity to make
01:06:27 4 submissions on, could affect them; except that
01:06:31 5 as the order currently stands, and no one is
01:06:35 6 talking about changing it, is that the
01:06:37 7 limitations and laches arguments reserved to the
01:06:40 8 lands for which the municipalities do own is in
01:06:42 9 Phase 2., and that's where our evidence will be
01:06:45 10 led.

01:06:46 11 And so anything -- findings made in
01:06:51 12 Phase 1, either Phase 1 or with Phase 1B, if
01:06:54 13 they go beyond what could reasonably be
01:06:57 14 contemplated by the evidence and affect what
01:06:59 15 affects the municipalities in Phase 2, that is
01:07:01 16 an injustice or a prejudice that they face at
01:07:04 17 that time.

01:07:06 18 THE COURT: And so how do you say
01:07:07 19 they -- undergoing of Phase 1B is going to
01:07:13 20 affect that possible prejudice?

01:07:15 21 MS. MCKENNA: Well, the plaintiffs are
01:07:16 22 urging on you that you make findings, or the
01:07:20 23 judge that deals with Phase 1B makes findings
01:07:23 24 that guide the future court with respect to
01:07:26 25 Phase 2; and also the parties coming to some

01:07:29 1 conclusion or resolution that would necessitate
01:07:33 2 or not necessitate Phase 2 being -- taking
01:07:35 3 place. But the reality is Phase 2 is where the
01:07:38 4 municipalities will have an opportunity to lead
01:07:40 5 evidence on the properties for which they own.

01:07:50 6 THE COURT: All right. Anything
01:07:51 7 further?

01:07:52 8 MS. MCKENNA: No.

01:07:52 9 THE COURT: Okay. So we'll take the
01:07:54 10 lunch break at this time, and we'll have reply
01:08:21 11 after lunch.

02:17:04 12 -- RECESSED AT 1:08 P.M. --

02:17:09 13 -- RESUMED AT 2:17 P.M. --

02:17:52 14 THE COURT: Yes, sir. Go ahead.

02:17:54 15 MR. TOWNSHEND: Thank you. I have a
02:17:55 16 few points of reply.

02:17:58 17 I did search through the five stayed
02:18:02 18 actions and none of them make any allegation of
02:18:04 19 treaty and validity.

02:18:15 20 Now, in reply to Mr. Beggs' point that
02:18:18 21 evidence of treaty fulfillment goes to whether
02:18:21 22 there is a direct connection between the land
02:18:26 23 and the breach, I've already mentioned that
02:18:32 24 we're inviting the court to decide the case on
02:18:34 25 the basis that even if the treaty were fulfilled

02:18:42 1 perfectly we still think the results we suggest
02:18:47 2 follow, but that's one point.

02:18:49 3 Another point is that there is
02:18:51 4 authority that when there's a fiduciary in
02:19:00 5 breach who parts with the land, which is subject
02:19:04 6 to the breach, and then gets it back again some
02:19:07 7 other way, that that reinstates the
02:19:10 8 constructive trust.

02:19:11 9 And that's a case called Van Wagner
02:19:14 10 v. Findlay, which I just shared with my friends,
02:19:18 11 and I can pass it up if you like.

02:19:21 12 THE COURT: Yes, please.

02:19:24 13 MR. TOWNSHEND: It is an 1876 decision
02:19:26 14 of the Upper Canada Court of Chancery. And
02:19:37 15 probably the clearest places in that case to
02:19:40 16 look would be paragraph 7 and the last three
02:19:44 17 lines of the long paragraph on page 2.

02:20:12 18 Another point that Mr. Beggs made was
02:20:14 19 that even if we don't have treaty nonfulfillment
02:20:18 20 as part of our case it can be part of the
02:20:20 21 defence's case.

02:20:21 22 And in principle I think that's
02:20:23 23 correct, but we're still asking even if it was
02:20:27 24 perfectly fulfilled and the court can proceed on
02:20:31 25 that basis we still say this is the result. So

02:20:37 1 in that case I -- in my submission, evidence is
02:20:40 2 not required. The court may just proceed on
02:20:42 3 that basis.

02:20:44 4 THE COURT: Including at Phase 2?

02:20:49 5 MR. TOWNSHEND: Yes.

02:21:12 6 THE COURT: At least one point made by
02:21:13 7 Mr. Beggs was that, in ascertaining whether or
02:21:18 8 not it was appropriate to order a constructive
02:21:20 9 trust in the particular circumstances justice
02:21:24 10 would require knowing that part of the story
02:21:28 11 about how that piece of land was dealt with
02:21:30 12 after the treaty. Are you conceding that it was
02:21:36 13 done properly?

02:21:38 14 MR. TOWNSHEND: For the purposes of
02:21:39 15 this litigation, yes. I mean, if this
02:21:44 16 litigation is not successful we would want to
02:21:46 17 take up the -- or perhaps take up the five
02:21:48 18 stayed actions again.

02:21:50 19 But in this litigation, yes, we are --

02:21:54 20 THE COURT: Including in Phase 2?

02:21:56 21 MR. TOWNSHEND: Yes.

02:22:14 22 On a related point, Mr. Beggs
02:22:16 23 mentioned that I had, in opening, made a point
02:22:18 24 about the length of time it had taken to sell
02:22:21 25 land. That was not a complaint or anything from

02:22:28 1 which a remedy would flow, it was a matter of
02:22:30 2 that goes to whether it's true that the pressure
02:22:35 3 from settlers was so overwhelming that the only
02:22:38 4 thing possible would be to agree to a surrender.
02:22:43 5 That was our purpose of pointing to that.

02:22:59 6 Now I want to talk about negotiations.
02:23:03 7 If we supposedly get a decision on liability and
02:23:08 8 we say, Well, let's negotiate. And we go into a
02:23:12 9 room and we say, Well, all of the land should be
02:23:15 10 returned; and the defendants say, Well, none of
02:23:18 11 it should. Those aren't negotiations that are
02:23:22 12 going very well, very far.

02:23:25 13 And if there were a decision from a
02:23:27 14 court on these seven parcels how could that not
02:23:31 15 help the negotiations? It would be additional
02:23:37 16 information which could not help but to assist.
02:23:41 17 Maybe it won't be successful but it would
02:23:43 18 assist.

02:23:45 19 And courts have repeatedly said that
02:23:48 20 especially in Aboriginal litigation that
02:23:53 21 negotiation is a better way of reconciling
02:23:57 22 interests than litigating.

02:23:59 23 So it is appropriate, in my view, to
02:24:01 24 consider a structure that would do as much as
02:24:04 25 possible to encourage negotiations.

02:24:10 1 THE COURT: Not at the expense though
02:24:11 2 of a fair trial.
02:24:12 3 MR. TOWNSHEND: Of course not.
02:24:13 4 THE COURT: I think all Ontario was
02:24:14 5 saying was it's speculative, and it is
02:24:17 6 speculative.
02:24:20 7 Not only don't I know, I can't know
02:24:22 8 about negotiations that have or will transpire.
02:24:25 9 And one thing we all know is that it's very
02:24:31 10 unpredictable. Your point is it might be
02:24:39 11 helpful.
02:24:39 12 MR. TOWNSHEND: Yes.
02:24:41 13 THE COURT: All right.
02:24:42 14 MR. TOWNSHEND: Now, Your Honour made
02:24:43 15 a suggestion about the ordered steps and
02:24:45 16 suggested getting a decision in Phase 1A before
02:24:50 17 the hearing on the evidence of Phase 1B.
02:24:52 18 THE COURT: Well, it's not so much a
02:24:54 19 suggestion coming from me, it's something that
02:24:56 20 appeared to me to be a door left open by the
02:24:59 21 order, because the order does not say, leave it
02:25:05 22 to Phase 2. It says "or otherwise", or I forget
02:25:09 23 the words now, but you know what they say.
02:25:12 24 MR. TOWNSHEND: Yes.
02:25:13 25 THE COURT: Yes. So I'm not

02:25:13 1 suggesting it. I'm just saying it seems to be a
02:25:16 2 door left open and I wanted to understand what
02:25:18 3 Ontario's position was, which was not to go
02:25:21 4 there.

02:25:23 5 And if you have anything to add from
02:25:25 6 your standpoint now would be a good time.

02:25:29 7 MR. TOWNSHEND: That order would suit
02:25:31 8 us as well as the order --

02:25:32 9 THE COURT: As an alternative.

02:25:33 10 MR. TOWNSHEND: -- that I set out.

02:25:35 11 THE COURT: So that would be finish
02:25:36 12 this trial, I render a decision, and then at
02:25:39 13 some later date after some suitable case
02:25:42 14 management you have Phase 1B? Is that the idea?

02:25:46 15 MR. TOWNSHEND: Yes, with the idea
02:25:46 16 that we hold the appeal of 1A until after 1B.
02:25:50 17 That's the key to us.

02:25:57 18 THE COURT: Isn't that a mixed -- I
02:25:57 19 mean, you don't know so that's fair, but
02:25:57 20 depending on the outcome it may or may not be a
02:26:01 21 good idea to hold the appeal, right? I don't
02:26:03 22 know.

02:26:04 23 MR. TOWNSHEND: Well, if there's no
02:26:05 24 liability found then there's no point in 1B.

02:26:08 25 THE COURT: You know, I haven't --

02:26:10 1 well, you raise an interesting question that I
02:26:26 2 perhaps should have put to your friends as well,
02:26:28 3 which is, on this motion for directions where
02:26:31 4 everyone has said, here is what we think should
02:26:34 5 happen to Phase 1B, the plaintiffs have said
02:26:39 6 full steam ahead; the defendants have said,
02:26:42 7 leave it to Phase 2.

02:26:45 8 Those two scenarios don't give rise to
02:26:47 9 this issue about a finality, but the third
02:26:51 10 option that seemed to be open in the order does.
02:26:57 11 So your position is not only is it open in the
02:26:59 12 order to say, finish the liability trial and
02:27:04 13 then 1B could still occur, but that you would
02:27:08 14 wish to reserve the part of the order that says
02:27:10 15 that -- well, it doesn't work though, does it,
02:27:15 16 sir?

02:27:21 17 How does that work? You get your
02:27:23 18 liability finding, you go and do phase B, that
02:27:26 19 takes minimum a year or maybe two.

02:27:29 20 MR. TOWNSHEND: Yes.

02:27:29 21 THE COURT: You don't exercise any of
02:27:31 22 your appeal rights.

02:27:32 23 MR. TOWNSHEND: Well, we need an order
02:27:33 24 extending --

02:27:35 25 THE COURT: Well, this order does that

02:27:36 1 already.

02:27:36 2 MR. TOWNSHEND: Yes, yes, it would
02:27:37 3 extend the appeal time, yes. And I'd like that
02:27:39 4 preserved.

02:27:57 5 THE COURT: Well, I think in fairness
02:27:58 6 what I ought to do, it may turn out to be
02:28:01 7 completely unimportant because I'm not
02:28:02 8 suggesting that that order would necessarily be
02:28:04 9 made by me, but I haven't made a decision at all
02:28:07 10 and I want to make sure I have all the input I
02:28:10 11 need in order to make one.

02:28:12 12 Your position is clear, which is that
02:28:14 13 in the alternative to proceeding as contemplated
02:28:16 14 by the existing order, if it was to be amended
02:28:20 15 you would not object to -- or agree to an
02:28:23 16 amendment that there be a liability decision
02:28:26 17 made before Phase 1B but that an appeal should
02:28:31 18 still be deferred. That's your position?

02:28:34 19 MR. TOWNSHEND: That's correct.

02:28:35 20 THE COURT: Well, after you're done
02:28:35 21 I'm going to have to ask the governments for
02:28:38 22 their position because it didn't occur to me
02:28:41 23 until you raised it. It is a good question.

02:28:42 24 Please go ahead.

02:28:49 25 MR. TOWNSHEND: Now, in relation to

02:28:50 1 the municipalities' submissions I want to
02:28:52 2 clarify we are not intending to ask for general
02:28:59 3 comments or guidance as a free-standing thing in
02:29:03 4 Phase 1B.

02:29:09 5 We're intending to ask for a decision
02:29:11 6 on those seven parcels of land, and we believe a
02:29:18 7 decision on those seven parcels of land will
02:29:18 8 function as guidance to the parties. And if the
02:29:22 9 municipalities are concerned that something in
02:29:23 10 that will affect them they are free to
02:29:26 11 participate as they wish.

02:29:28 12 And if they even want to have some
02:29:30 13 parcels in Phase 1B added to engage lands in
02:29:36 14 which they are -- claim in relation to them
02:29:40 15 we're open to doing that as well.

02:29:53 16 And, finally, on the point raised of
02:29:54 17 the risk of inconsistent findings of fact
02:29:59 18 between Phase 1B and Phase 2, well, a Phase 2
02:30:04 19 judge would have the decision in Phase 1B in
02:30:07 20 front of him or her. So one would expect it
02:30:09 21 would get considerable -- serious consideration.

02:30:16 22 THE COURT: But the Phase 2 judge
02:30:18 23 would presumably have a larger evidentiary
02:30:24 24 record.

02:30:25 25 MR. TOWNSHEND: Yes.

02:30:27 1 THE COURT: And as such would not be
02:30:29 2 bound by --

02:30:32 3 MR. TOWNSHEND: No, I'm not saying
02:30:33 4 bound, I'm saying would -- would, I expect, give
02:30:40 5 considerable credit to a Phase 1B decision. And
02:30:46 6 if there was a reason to depart from it it would
02:30:50 7 have to be clarified what that was.

02:30:54 8 But really that was a ramp-up to the
02:30:57 9 idea, if there's a problem with that and we
02:31:03 10 collapse 1B we have at least as big a problem
02:31:05 11 about inconsistent -- the potential for
02:31:08 12 inconsistent findings between Phase 1 and Phase
02:31:12 13 2, because this court has already heard a lot of
02:31:16 14 evidence going to limitations and laches, which
02:31:19 15 are going to figure largely, I'm guessing, an
02:31:25 16 important factor in Phase 2.

02:31:27 17 And also that the general findings of
02:31:28 18 the fiduciary duty and its breach are also going
02:31:31 19 to relate to the remedy.

02:31:34 20 THE COURT: But those aren't going to
02:31:35 21 be the subject of change.

02:31:38 22 MR. TOWNSHEND: Right.

02:31:38 23 THE COURT: Those will be over with.

02:31:41 24 MR. TOWNSHEND: Limitations and laches
02:31:42 25 might be.

02:31:44 1 THE COURT: Well, I agree that the
02:31:46 2 limitations and laches is in a different
02:31:49 3 character. And your submission is that it has a
02:31:52 4 potential relevance to each of the three steps.

02:31:55 5 MR. TOWNSHEND: Yes.

02:31:55 6 THE COURT: At a different level, and
02:31:57 7 that makes it more complicated.

02:32:00 8 MR. TOWNSHEND: Yes.

02:32:01 9 THE COURT: And I'm assuming, without
02:32:03 10 knowing, that at the end of the liability trial
02:32:05 11 on the subject of that part of Justice Gans'
02:32:08 12 order that talks about that trial, including
02:32:12 13 limitations and laches, among other things, I
02:32:14 14 may hear submissions like the submissions I
02:32:17 15 heard today from a municipality saying, don't go
02:32:21 16 this far because if you go this far there's
02:32:23 17 going be a problem down the road. You can only
02:32:26 18 go this far, or whatever. Those would be
02:32:28 19 relevant submissions to be made.

02:32:31 20 Now, if I was to get it wrong and you
02:32:36 21 had your appeals deferred until after Phase 1B,
02:32:42 22 you know, it would be interesting to see how you
02:32:47 23 would deal with that because you would say,
02:32:49 24 Well, she's wrong, to the Phase 1B judge four
02:32:53 25 years from now. I'm just making this up, but I

02:32:56 1 haven't exercised my appeal rights because that
02:32:58 2 was the arrangement.

02:33:00 3 It gets a bit messy, doesn't it? I'm
02:33:04 4 just saying at the end of this trial, this
02:33:06 5 liability trial, I'm assuming that some of the
02:33:08 6 submissions on limitations and laches will be
02:33:10 7 about the goalposts of the things that can be
02:33:13 8 decided at each of the three stages and where
02:33:16 9 those --

02:33:17 10 MR. TOWNSHEND: Yes, but some of the
02:33:18 11 evidence may deal with the same -- it may be
02:33:21 12 some of the same evidence that deals with each
02:33:23 13 of the three things.

02:33:25 14 THE COURT: It may be, but since
02:33:27 15 whatever the date of Justice Filler's order was
02:33:31 16 you all signed up for that problem.

02:33:33 17 MR. TOWNSHEND: Yes.

02:33:34 18 THE COURT: As we discussed before
02:33:35 19 this trial started, irregardless of any of these
02:33:40 20 issues, I raised with you the question of
02:33:42 21 whether you were reasonably expecting you would
02:33:44 22 have the same trial judge for Phase 2, because
02:33:48 23 that was potentially a problem. And you all
02:33:49 24 said no, which was the right answer because it
02:33:52 25 could be five or six years and you can't be sure

02:33:54 1 of that.

02:33:55 2 So as soon as you walk down that road
02:33:57 3 you have the possibility -- you have two --
02:34:01 4 minimum two different judges on your matter.

02:34:04 5 MR. TOWNSHEND: Yes.

02:34:05 6 THE COURT: Yes. Well, that's the way
02:34:06 7 this was set up, so --

02:34:07 8 MR. TOWNSHEND: My point is that Phase
02:34:08 9 1B doesn't make that any worse.

02:34:12 10 THE COURT: I guess the one submission
02:34:14 11 that was raised in that regard is the
02:34:16 12 difference, is that Phase 1B and Phase 2 are
02:34:19 13 both about remedy, which at least someone
02:34:26 14 submits makes it worse. I can't think of
02:34:28 15 whether it's just Ontario or if it's both
02:34:31 16 Ontario and Canada, at least Ontario says it
02:34:33 17 makes it worse. You may take a different view.
02:34:37 18 Your point being, we already have this problem.

02:34:40 19 MR. TOWNSHEND: Yes.

02:34:40 20 THE COURT: It's not a new problem.

02:34:41 21 MR. TOWNSHEND: Yes.

02:34:42 22 THE COURT: I see.

02:35:03 23 MR. TOWNSHEND: Thank you. Those are
02:35:04 24 my submissions.

02:35:05 25 THE COURT: Now, I'm going to give you

02:35:05 1 the last word after I hear from the others about
02:35:05 2 that question that I asked.

02:35:05 3 So, Mr. Beggs, you haven't addressed
02:35:08 4 this at all, but you heard me ask Mr. Feliciant
02:35:11 5 about that last phrase in Justice Gans' order,
02:35:14 6 which doesn't limit this dialogue to what you've
02:35:18 7 requested, it allows for other orders.

02:35:20 8 What, if any, submission do you have
02:35:22 9 about what you just heard about a sort of
02:35:24 10 three-step process instead of two?

02:35:30 11 MR. BEGGS: Well, so it would be
02:35:33 12 helpful, from my point of view, to have the
02:35:36 13 ruling from Phase 1A and to have three steps of
02:35:45 14 Phase 1B and 2 after the ruling would be fine.

02:35:48 15 With respect to the suggestion that
02:35:48 16 the appeal rights be deferred until after Phase
02:35:59 17 1B, I take it it's -- from where I stand now it
02:36:10 18 seems like it might be a feasible approach.

02:36:13 19 There's challenges in all approaches,
02:36:15 20 as my friend says or indicated. So I think it's
02:36:21 21 a possibility to operate -- to have that
02:36:28 22 three-step approach in the way that was
02:36:31 23 suggested.

02:36:36 24 One thing I'm wondering is if -- and
02:36:38 25 this may be a self-evident question, but if

02:36:41 1 the -- if there's no liability found in Phase 1A
02:36:50 2 do we immediately go to appeal rights? Or do we
02:36:52 3 proceed with Phase 1B on the assumption that if
02:36:55 4 there is liability that the appeal might change
02:36:58 5 if we get all the facts from Phase 1B?

02:37:00 6 I would prefer the former, to simply
02:37:02 7 move after Phase 1A to appeals if no liability
02:37:05 8 is found. But, in any event, I think the
02:37:12 9 three-step process is an option that the parties
02:37:16 10 can work with.

02:37:20 11 THE COURT: All right. Mr. Feliciant?

02:37:29 12 MR. FELICIAN: My initial reaction is
02:37:30 13 to think about the efficiency element and the
02:37:36 14 cost to the parties. And it's hard to avoid at
02:37:39 15 least thinking about that that the risk you're
02:37:42 16 assuming in having a Phase 1B prior to hearing
02:37:47 17 any appeal is that the outcome of the appeal
02:37:50 18 could have affected how you would have conducted
02:37:52 19 Phase 1B, if at all. And then you're talking
02:37:55 20 about --

02:37:55 21 THE COURT: I have to say that is a
02:37:56 22 concern of mine. I'm giving Mr. Townshend the
02:38:02 23 last word, but if I make findings of liability
02:38:05 24 and ultimately when you get upstairs they say,
02:38:08 25 Well, that's very interesting but we don't

02:38:10 1 agree, you know, with the way the fiduciary duty
02:38:15 2 was approached or the legal principles that were
02:38:19 3 applied to the lake bed claims. And I realize
02:38:22 4 that's not probably the biggest or best example,
02:38:25 5 but, anyway, don't agree and that Phase 1B is
02:38:29 6 run based on -- you know, I observed that is the
02:38:36 7 way the order is currently set up.

02:38:37 8 It's currently set up that this will
02:38:40 9 all be part of Phase 1A. You get a decision,
02:38:43 10 they'll take it all upstairs. And all
02:38:46 11 Mr. Townshend is doing is saying, if there's two
02:38:49 12 decisions instead of one I still want to deal
02:38:51 13 with it in the same fashion. So it's not much
02:38:53 14 different.

02:38:56 15 MR. FELICIAN: It's hard to -- it's
02:38:56 16 hard when you're dealing with a trial of this
02:38:59 17 magnitude and this cost. If it was a one-week
02:39:05 18 trial I don't think it would be as significant a
02:39:07 19 concern as it is.

02:39:08 20 But it's a massive undertaking to get
02:39:10 21 this ready just to find out that somehow it has
02:39:13 22 to be either redone in some fashion. We can't
02:39:17 23 lose sight of that.

02:39:19 24 So is it possible to do it that way?
02:39:21 25 It's possible. Is it a good idea? I don't

02:39:23 1 know. I think we should be cautious about
02:39:30 2 thinking that's a good idea. That's all I say.

02:39:34 3 THE COURT: All right. Madam back
02:39:38 4 there? The municipalities?

02:39:45 5 MS. MCKENNA: This is not an issue in
02:39:46 6 which I have consulted with my colleagues.

02:39:49 7 THE COURT: Yes, Ms. McKenna, I could
02:39:50 8 tell that -- I could tell from the look on your
02:39:51 9 face. I know that you're only able to speak
02:39:55 10 either with permission or on behalf of your own
02:40:00 11 clients.

02:40:01 12 So if you want to write to me that's
02:40:05 13 entirely fair.

02:40:07 14 MS. MCKENNA: Thank you.

02:40:08 15 THE COURT: I would ask, however, that
02:40:13 16 you do it quickly.

02:40:15 17 MS. MCKENNA: I can do it this
02:40:17 18 afternoon.

02:40:18 19 THE COURT: That's very satisfactory.

02:40:22 20 And then I'm going to do it this way,
02:40:24 21 Mr. Townshend. I'm going to ask that you
02:40:27 22 respond to Canada and Ontario now because you've
02:40:29 23 heard from them. And only if there is something
02:40:32 24 new raised by the municipalities that is
02:40:34 25 different from Canada and Ontario, I would also

02:40:35 1 obviously give you an opportunity to respond to
02:40:37 2 it in writing after receiving this. All right?

02:40:44 3 Thank you. Please go ahead if you
02:40:46 4 have anything more to say in response to Canada
02:40:50 5 and Ontario.

02:40:51 6 MR. TOWNSHEND: Thank you. I have no
02:40:52 7 further comments I haven't already made.

02:41:00 8 THE COURT: Thank you.

02:41:00 9 So Ms. McKenna will communicate the
02:41:03 10 municipalities' position to everyone and me,
02:41:06 11 after which, Mr. Townshend, just let us know if
02:41:10 12 you wish to say anything and when.

02:41:12 13 I would give you some time but I
02:41:13 14 really think this decision needs to be released
02:41:16 15 by me and I have to consider all of these
02:41:19 16 difficult issues, prepare it, and obviously I
02:41:21 17 would like to have a full plate so I'm not
02:41:27 18 inefficient. So if we could try and wrap it up
02:41:31 19 in the next couple of days, that would be
02:41:34 20 desirable. Is that all right?

02:41:35 21 MR. TOWNSHEND: Yes.

02:41:35 22 THE COURT: I appreciate all the hard
02:41:36 23 work all of you put into this difficult issue.

02:41:42 24 Just before we adjourn to Monday is
02:41:45 25 there anything else anyone wishes to raise?

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I have one thing I overlooked this morning, asking someone to please send out a list of to-dos's from our case conference. And if someone can do that please?

MR. FELICIAN: We can do that, Your Honour.

THE COURT: I'd appreciate that as well. Okay. See you on Monday.

--- Whereupon the proceedings were adjourned at 2:42 p.m.

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 19th day of January, 2020.



PER: HELEN MARTINEAU
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1	1:08 9280:12	9290:21,24 9292:9,12 9293:14,17 9294:3,5,16,19 9295:5	2012 9261:20	4355 9233:15, 17
1 9202:7 9209:14 9210:16,24 9211:7 9213:2, 6,9 9232:15 9234:1,15 9235:7 9241:22 9250:10 9278:25 9279:12 9289:12	1A 9202:9,10 9204:2 9212:22 9213:11 9214:20,21 9217:15,21 9218:11,25 9221:9 9224:22, 25 9234:7 9252:9 9253:4 9254:14 9266:13,25 9268:5 9270:5 9276:17 9277:13 9284:16 9285:16 9293:13 9294:1, 7 9295:9	1st 9263:8	2013 9235:22 9261:21	4359 9233:20
10 9223:1,4 9224:21 9225:21 9226:12,20 9247:17 9264:25	1B 9203:2 9214:20 9215:2, 17 9216:2,11 9217:6,10,15,23 9218:6,10,15,20 9219:2,6,7,10 9221:2,4,8 9222:4 9224:23, 24,25 9225:5, 12,17 9226:2,18 9230:8,22 9234:2 9235:13 9239:22 9240:20 9249:6, 13,15,21 9252:20 9253:18 9254:15 9256:25 9257:15 9258:6, 15,25 9259:2 9265:14 9266:13,25 9267:12,24 9268:6 9270:18 9271:21 9272:7, 14 9273:4,24,25 9276:18 9277:9 9278:20 9279:12,19,23 9284:17 9285:14,16,24 9286:5,13 9287:17 9288:4, 13,18,19 9289:5,10	2	2019 9212:20 9214:18 9233:19	4372 9233:15, 17
10(c) 9226:16		2	2020 9274:11	45 9222:14
100 9237:7 9269:13		2 9202:9,21 9203:2 9205:2 9208:22 9209:17,21 9210:24 9211:2, 11 9213:4,6 9214:20 9215:8, 23 9216:4 9217:8,16,23 9218:21,22 9220:14 9221:6 9225:1,2,18 9230:8,23 9234:2,24 9235:1 9249:3, 6,9 9250:14,15 9253:19 9255:20 9256:20 9257:7, 21 9258:8,16 9259:3 9264:12, 13 9265:15 9267:3,9 9271:22,25 9272:5 9273:5 9277:11 9279:9, 15,25 9280:2,3 9281:17 9282:4, 20 9284:22 9286:7 9288:18, 22 9289:13,16 9291:22 9292:12 9293:14	2021 9223:7 9228:9,12 9229:15 9248:23 9255:3 9262:25 9263:8, 22	5
10:26 9241:24		2(a)(ii) 9269:23	2022 9248:21 9254:1	5 9235:7
117 9221:8 9247:13		2(b) 9257:21	22 9214:18 9241:23	50 9242:11
11:21 9198:6		2(c)(vi) 9234:22	230 9237:12	6
14 9199:17		2(ii) 9271:8	240 9238:23	6 9235:8
15 9223:1,4 9225:21 9226:12,20 9247:17 9248:3 9264:25		20 9209:6 9227:3,10,11 9228:7 9262:24	25 9199:9 9228:15	69 9248:3,10,11
150 9239:12			25th 9214:5 9241:21,25	7
16 9208:7			27 9221:12	7 9223:12 9235:8 9281:16
161 9234:21			2:17 9280:13	72 9199:20,22 9200:3,16,18,25 9203:1,20 9205:21,23 9206:8 9207:16, 18,20 9208:11, 14,16 9219:12 9220:7,11,24 9221:14,17
16th 9233:19			2:42 9298:10	9
17 9242:9			3	9 9224:7 9234:21
18 9209:6 9255:9			3 9208:4 9242:13	91(24) 9246:2
1854 9204:22			33 9218:17	A
1876 9281:13			39 9219:23 9248:2	a.m. 9198:6
1996 9209:14, 20 9211:15			4	abandon 9216:19 9217:1
1:05 9265:9			4 9248:16	abandoned 9216:23,25 9217:3
			40 9219:25 9227:2,10,11 9228:7 9230:9 9274:25 9275:6, 8,13,15	
			40-day 9272:19	

Aboriginal 9212:21 9213:11 9232:3 9283:20	9270:10,12,15 9271:2,12 9277:21,22	adjourning 9257:20	9231:14 9280:14 9286:6 9287:24 9297:3	apologize 9248:13
abuse 9246:11 9247:1	actions 9198:19 9200:1, 10,20,23 9203:24,25 9206:3,14 9212:5 9213:5 9214:7 9221:19 9232:2 9235:3 9237:24 9280:18 9282:18	admissibility 9225:9	allegation 9243:2 9269:4,8 9280:18	appeal 9285:16,21 9286:22 9287:3, 17 9291:1 9293:16 9294:2, 4,17
acceptance 9268:23	actively 9213:18	advance 9250:7	allegations 9235:4 9236:8	appeals 9218:10,12 9224:25 9290:21 9294:7
accomplish 9249:22	activities 9224:14 9236:19	advocacy 9224:14	allege 9237:25	appeared 9284:20
accomplished 9252:21	actual 9236:18	advocating 9257:25 9258:1	alleged 9206:16 9238:7 9242:25 9277:1	applicable 9211:9 9270:9 9271:1,3,11,13 9278:7
accordance 9260:5	add 9285:5	affect 9217:16 9235:9 9279:4, 14,20 9288:10	allocate 9225:24	applied 9216:8 9295:3
account 9244:23 9262:16	add-on 9230:14	affected 9294:18	allowed 9248:7 9268:24	applies 9235:3 9236:4 9238:9
accounting 9209:10 9234:25	added 9288:13	affects 9279:15	alluded 9241:18,21	apply 9210:22 9222:17 9236:7 9246:4 9274:18 9276:9,23 9277:13
accounts 9205:7,8 9219:15,17	addition 9206:15 9275:14,15	affidavit 9261:1,6,12,23	alter 9268:21	alternatives 9200:6
accurate 9234:16	additional 9283:15	affidavits 9260:24	alternative 9285:9 9287:13	amalgamate 9253:19
achieve 9243:16	address 9214:22 9231:18 9244:9, 15 9259:21 9265:18 9266:18 9275:23	afternoon 9296:18	alternatives 9200:6	ambiguous 9203:22
acknowledge s 9229:6	addressed 9228:19 9246:5 9251:5 9293:3	agency 9236:18	amended 9259:5 9287:14	amalgamate 9253:19
acquiesced 9268:19	addresses 9273:16	agree 9210:7 9231:22 9232:9 9252:21 9265:12,13 9277:7 9283:4 9287:15 9290:1 9295:1,5	amendment 9287:16	ambiguous 9203:22
acquiescence 9268:23	addressing 9244:16 9251:11	agreed 9223:17 9232:22	amount 9204:24 9220:13 9224:4 9225:6,23 9226:13 9229:3 9254:25	amended 9259:5 9287:14
acted 9269:5	adjourn 9297:24	agreement 9202:5,16 9232:10,17,25 9233:25 9240:23	amounted 9272:11	amendment 9287:16
action 9199:19,25 9211:22,24 9212:4,14,16, 18,22 9213:1,2, 4,9,11 9214:12, 13,25 9229:19 9234:13,23 9235:5,8,9 9237:23 9241:12 9242:22 9243:1, 24,25 9247:5 9268:16	adjourned 9298:9	agrees 9254:22	analysis 9209:7 9210:21 9276:4	amounted 9272:11
		aha 9242:1	answers 9233:14 9274:3	analysis 9209:7 9210:21 9276:4
		ahead 9198:9 9199:7 9208:2 9214:16 9219:8	anticipate 9223:3	amounted 9272:11
				analysis 9209:7 9210:21 9276:4
				answers 9233:14 9274:3
				anticipate 9223:3
				approach 9217:12 9268:3 9293:18,22
				approached 9295:2
				approaches 9293:19
				appropriately 9201:1
				appropriateness 9243:25
				Approximately 9223:9,10
				April 9241:21, 25 9261:20
				arbitrarily 9213:17 9247:17

9274:25	attached 9261:5 9273:8	basic 9210:10	bit 9198:15 9220:2 9260:21 9291:3	<hr/> C <hr/>
area 9267:18	attempts 9225:1	basically 9211:17	Black 9256:6	calculated 9209:4
argument 9203:8 9220:23 9224:22,24 9226:22 9259:6 9278:15,19	attendance 9207:4	basis 9220:6 9225:11 9260:11,13 9268:18 9272:25 9280:25 9281:25 9282:3	blocks 9256:5	calculation 9205:3
arguments 9214:25 9216:14 9253:12 9259:13 9279:7	attention 9198:17	bed 9295:3	bona 9204:9	calculations 9210:23 9215:10
arise 9257:6 9268:25	August 9233:19 9265:22	began 9273:21	book 9233:25 9234:22	call 9214:8,19 9254:8,14 9256:15 9267:24 9274:9
arose 9201:23	authority 9281:4	Beggs 9231:11,12,15 9233:4,18,23 9234:5,9,19,21 9235:4,7,14 9244:2,5,8,13, 17 9245:9,12,16 9246:14,17 9247:6,9,19,23 9248:1,10,12 9249:11 9250:22 9254:7 9281:18 9282:7, 22 9293:3,11	books 9201:21 9232:21 9266:1	called 9209:14 9272:14 9281:9
arrangement 9291:2	automatically 9237:2 9246:3 9251:16	begs 9231:11,12,15 9233:4,18,23 9234:5,9,19,21 9235:4,7,14 9244:2,5,8,13, 17 9245:9,12,16 9246:14,17 9247:6,9,19,23 9248:1,10,12 9249:11 9250:22 9254:7 9281:18 9282:7, 22 9293:3,11	bound 9289:2, 4	calling 9212:12 9256:12,18 9267:23
articulates 9252:8	availability 9269:16 9278:18	Beggs' 9260:8 9280:20	boundary 9261:10	calls 9218:10
ascertaining 9282:7	avoid 9219:5 9221:18 9259:17 9294:14	behalf 9296:10	breach 9199:19 9200:14 9207:18 9217:13 9220:25 9236:1, 19 9237:1,13, 15,19 9238:7,8, 21 9243:3,10 9251:15 9253:9 9269:6 9276:25 9280:23 9281:5, 6 9289:18	Canada 9205:11,12 9216:19 9219:11 9221:2 9225:10,15,24 9231:20,21 9232:12,13 9233:19 9234:9 9235:21 9237:17,20,25 9239:23 9240:10,16,22, 24 9241:5,14 9242:19,24 9243:5 9246:18 9249:24 9251:2 9253:18 9257:24 9265:14 9281:14 9292:16 9296:22,25 9297:4
aspects 9244:20	avoided 9257:7	believes 9262:20	breaches 9207:23 9208:10 9236:8 9271:15 9278:9, 13	Canada's 9203:17 9223:24 9225:11 9243:11
aspirational 9263:11	avoiding 9264:10	beneficial 9215:3 9252:19	break 9207:3 9265:1,6 9280:10	case 9211:17 9212:8 9213:19
asset 9238:6,7	aware 9227:24	benefit 9251:9 9253:3,6,7 9255:14,18 9259:8 9264:15	bring 9199:3 9246:24	
assets 9236:16 9237:13	<hr/> B <hr/>	benefits 9267:19	bringing 9243:5	
assign 9247:18	back 9199:2 9207:17 9232:20,23 9233:10 9246:25 9265:21 9276:16 9281:6 9296:3	bifurcation 9203:25	brought 9240:6	
assist 9252:1 9283:16,18	balancing 9276:5	big 9227:12 9230:19 9289:10	build 9225:22	
assume 9206:24 9245:15 9272:18	ballpark 9222:21 9223:4 9275:18,19,20	bigger 9218:24	buying 9242:21 9243:12	
assumed 9246:3	based 9200:17 9212:2 9243:1, 6,7 9255:3 9277:13 9295:6	biggest 9228:1 9295:4		
assuming 9290:9 9291:5 9294:16				
assumption 9294:3				
attach 9261:1				

9220:5 9232:18 9235:19,22,24, 25 9236:6,23 9237:11 9238:14,16,19 9239:3,11,21 9241:15 9242:2, 15 9247:10 9248:1,7 9250:5 9251:18 9252:3 9260:9 9263:11 9269:4 9276:8 9280:24 9281:9, 15,20,21 9282:1 9285:13 9298:3	change 9218:8 9222:12 9228:1 9245:21 9289:21 9294:4 changing 9279:6 character 9290:3 characterized 9231:23 chose 9200:10 chunks 9199:12 circumstance s 9216:16 9238:14 9243:20 9251:22 9276:11,23 9282:9 claim 9200:16 9215:9,10 9219:21 9220:21 9246:25 9252:1 9268:17,18 9269:6,14 9288:14 claimed 9216:1,3 9277:25 claiming 9207:18 claims 9200:24 9201:2 9220:18 9241:3 9295:3 clarification 9234:12 clarified 9289:7 clarify 9288:2 clarifying 9208:2 9231:8 clauses 9246:10,23 clean 9245:17	clear 9245:24 9260:10,17 9272:12,16 9274:2 9287:12 clearest 9281:15 clients 9200:1, 21 9296:11 co-counsel 9261:13 collapse 9289:10 collapsed 9265:15 colleagues 9264:21 9296:6 colour 9240:21 commence 9229:14 commenced 9211:25 9212:4 9230:15 commencem ent 9229:10 9255:11 commencing 9198:6 comments 9266:24 9269:16 9272:4 9276:18,22 9278:25 9288:3 9297:7 commercial 9239:2,6,18 commit 9263:7 common 9264:4 communicate 9297:9 community 9241:18 compact 9224:3	compensatio n 9204:20,21 9205:3 9215:10 9217:2 9220:16 9234:25 9253:16 9271:14 9278:9 complaint 9282:25 complete 9224:22 9248:18 completed 9262:9 completely 9220:20 9256:23 9287:7 completion 9228:20 complex 9200:8 compliance 9205:20 complicated 9290:7 comply 9206:16 components 9210:13 9228:4 9234:23 comprehensi ve 9221:20 conceding 9253:8 9282:12 concept 9254:10 concern 9234:8 9251:13 9255:21,22,25 9267:5 9294:22 9295:19 concerned 9233:1,2 9256:9 9270:14,17 9288:9 concerns 9259:19	concluded 9238:18 conclusion 9266:25 9278:24 9280:1 conclusions 9249:17 9277:9 9279:1 conduct 9268:20 conducted 9294:18 conference 9298:3 confirmed 9274:9 confusion 9242:22 9256:23 connected 9243:9 connection 9237:9,13 9238:6 9280:22 consent 9200:11 9209:13 consequence s 9219:5 9221:1 considerable 9217:19 9288:21 9289:5 consideratio n 9276:12 9288:21 considered 9255:6 9260:11 9277:9 consistent 9201:8 9226:19 consolidating 9212:5 consolidation 9213:5 constrain 9258:11
---	--	---	--	---

constructive 9204:7 9235:17, 20,25 9236:4,7 9238:13,19,25 9239:10,16 9240:4 9243:4, 16 9246:1 9251:19,24 9252:2,16,22 9253:14 9275:24 9276:10,15 9277:5 9281:8 9282:8	9295:17	9263:15,21,25 9264:18 9265:4, 23,25 9266:3,5, 23 9267:1 9268:9,12 9269:21,25 9270:3,13,17,20 9271:5,9,19 9272:1,4,6,10, 15 9273:4,20 9275:7,10,13,17 9276:8,13,18 9277:12,16,19, 24 9278:2,5,15, 23 9279:18,24 9280:6,9,14,24 9281:12,14,24 9282:2,4,6,20 9283:14 9284:1, 4,13,18,25 9285:9,11,18,25 9286:21,25 9287:5,20 9288:22 9289:1, 13,20,23 9290:1,6,9 9291:14,18 9292:6,10,20, 22,25 9294:11, 21 9296:3,7,15, 19 9297:8,22 9298:7	9267:16	dealt 9210:18 9217:15 9268:4 9282:11
counsel 9201:19,25 9202:5 9272:16 9274:1,18	counsel 9201:19,25 9202:5 9272:16 9274:1,18		Crown 9199:19 9237:5, 7,21 9239:17 9249:19 9271:16 9278:10	decades 9201:24
couple 9244:11 9265:18 9297:19	couple 9244:11 9265:18 9297:19		current 9218:9,13 9221:23 9227:18,19	decide 9208:22 9211:8 9215:2 9220:5 9259:23 9260:4 9280:24
court 9198:7,9, 14,25 9199:6,24 9200:2 9201:1, 5,12,16 9202:19 9203:14,20 9204:11,13,15, 17 9205:12,15, 19 9206:1,5 9207:1,21 9208:1,6 9209:22 9210:2, 5,7 9211:20,24 9212:2,7,10,19, 23 9213:1,4,8, 13,17,22 9214:1,5,10,15 9216:19,22 9220:5 9222:24 9223:6,10 9224:24 9225:19 9226:3, 19 9227:2,9,11, 15,20,22 9228:17,20,24 9229:17 9230:1, 13,18 9231:1,5, 8,14 9232:16,24 9233:6,16,21 9234:3,6,18,20 9235:2,6,11,22 9243:14 9244:3, 6,11,14,18 9245:10,13 9246:12,16,19 9247:4,7,15,20, 24 9248:5,11 9249:8 9250:19, 25 9252:6,12, 15,19,25 9253:20 9254:4, 16,20,25 9255:6 9256:8 9257:8 9258:20 9259:14 9261:23	court 9198:7,9, 14,25 9199:6,24 9200:2 9201:1, 5,12,16 9202:19 9203:14,20 9204:11,13,15, 17 9205:12,15, 19 9206:1,5 9207:1,21 9208:1,6 9209:22 9210:2, 5,7 9211:20,24 9212:2,7,10,19, 23 9213:1,4,8, 13,17,22 9214:1,5,10,15 9216:19,22 9220:5 9222:24 9223:6,10 9224:24 9225:19 9226:3, 19 9227:2,9,11, 15,20,22 9228:17,20,24 9229:17 9230:1, 13,18 9231:1,5, 8,14 9232:16,24 9233:6,16,21 9234:3,6,18,20 9235:2,6,11,22 9243:14 9244:3, 6,11,14,18 9245:10,13 9246:12,16,19 9247:4,7,15,20, 24 9248:5,11 9249:8 9250:19, 25 9252:6,12, 15,19,25 9253:20 9254:4, 16,20,25 9255:6 9256:8 9257:8 9258:20 9259:14 9261:23		cycle 9263:3	decided 9235:10 9252:9 9291:8
consulted 9296:6			cycle 9263:3	decision 9216:12 9224:24 9225:3, 8 9251:25 9254:1 9258:5, 18,25 9259:9 9260:18,23 9264:14 9281:13 9283:7, 13 9284:16 9285:12 9287:9, 16 9288:5,7,19 9289:5 9295:9 9297:14
contemplated 9209:21 9279:14 9287:13			D	decision 9216:12 9224:24 9225:3, 8 9251:25 9254:1 9258:5, 18,25 9259:9 9260:18,23 9264:14 9281:13 9283:7, 13 9284:16 9285:12 9287:9, 16 9288:5,7,19 9289:5 9295:9 9297:14
context 9228:14,17,18 9255:7			damages 9232:1 9244:4	decision- maker 9210:12
continue 9200:24			date 9233:16 9262:14 9263:11,12,13, 17 9285:13 9291:15	decisions 9215:19 9216:5, 6 9230:23 9295:12
continuing 9219:24			day 9233:20 9241:21 9266:7 9273:1	declaration 9251:15
contours 9210:10			days 9221:8 9223:2,4 9225:22 9226:9, 12,20 9227:3,4 9228:7 9247:13, 17 9248:2,3,4 9272:11 9274:25 9275:6, 8,14,16 9297:19	Declarations 9232:2
contracts 9262:22		court's 9218:7		declaratory 9252:10
copies 9198:18		courts 9283:19		deemed 9236:18
copy 9198:19, 23		cover 9250:20		defeat 9223:25
correct 9202:3,13 9203:4 9211:23 9225:4 9228:13 9236:2 9252:18, 24 9255:5,12 9258:2,3 9259:12 9264:2 9266:2,4 9267:10 9268:13 9272:9 9278:1,14 9281:23 9287:19		covered 9250:19 9257:20		defence 9216:20 9242:23 9243:6, 7,11,24 9247:2 9268:7
cost 9294:14		create 9262:2, 3	days' 9230:9	defence's 9281:21
		created 9264:11	deal 9215:8 9239:24 9245:15 9257:10 9274:23 9290:23 9291:11 9295:12	
		creating 9264:11	dealing 9210:15 9227:17 9253:4 9295:16	
		credible 9257:3	deals 9214:7 9279:23 9291:12	
		credit 9289:5		
		Creek 9256:7		
		cross- examine		

defences 9269:17 9271:10 9277:20	DESCRPTIO N 9198:2	directed 9238:4 9266:8	disturb 9269:1	easy 9237:8
defendant 9236:17,19 9247:1 9268:17, 21	designed 9215:17	direction 9198:11	doctrine 9268:6	ecology 9262:18
defendants 9226:11,14 9272:22 9283:10 9286:6	desirable 9218:3 9219:7 9297:20	directions 9223:22 9263:16 9286:3	document 9265:21	economic 9209:9 9267:19
defendants' 9223:20	desk 9269:24	directly 9207:15 9243:9	documents 9232:8 9248:19 9266:10	ecosystem 9261:9
defenses 9270:8 9271:1	destabilize 9239:4	disadvantage d 9259:10	door 9284:20 9285:2	Edmunds 9240:9,13,15
deferred 9265:15 9267:9 9287:18 9290:21 9293:16	detailed 9209:7,9,10 9210:21 9219:20	disagrees 9205:11	doubt 9262:25	effect 9203:18 9207:16
deferring 9225:8 9274:11	details 9211:10	disavowed 9201:9 9203:12	dramatically 9272:21	effects 9207:17
defined 9210:17	determinatio n 9208:25 9250:10	disclosed 9266:11,17	draw 9249:17	efficiency 9294:13
delay 9228:6 9229:23 9254:22,25 9268:20	determine 9276:9	disclosure 9234:8	Driben 9261:20	efficient 9218:3 9219:7 9258:24 9260:7
delayed 9268:15	determined 9257:1	discovery 9228:21 9229:8 9248:18 9274:5	drive 9259:23 9260:23 9276:20	eight-week 9275:1
delays 9228:11 9229:4	development 9226:22 9240:1	discretion 9218:7 9257:16	drives 9258:21	element 9294:13
demand 9242:6	diagonally 9240:11	discretionary 9276:3	driving 9277:11	elements 9243:22
depart 9289:6	dialogue 9232:20 9293:6	discussed 9291:18	dropped 9242:12	else's 9248:21
depend 9272:13 9273:3	difference 9235:16 9236:11 9242:19 9292:12	discussion 9202:5 9265:23 9276:19 9278:17	due 9205:13	embark 9262:7
depending 9260:14 9285:20	differences 9211:14	discussions 9260:1 9276:20	duplication 9256:10,14 9259:20	emphasizes 9237:12
deposited 9219:14	difficult 9273:18 9276:21 9297:16,23	disproportion ate 9238:21 9253:15	duty 9199:19 9207:19,24 9208:10 9217:12 9220:25 9236:1, 9 9237:1 9238:8 9243:3 9251:16, 21 9252:1 9253:10 9269:7 9271:15 9276:25 9278:10 9289:18 9295:1	enable 9215:21
describe 9210:8	difficulties 9257:6	dispute 9244:19	discrimination 9206:18 9207:6	encompassin g 9230:15
	direct 9237:9, 10,14,18 9238:5,6 9243:9 9280:22	dissent 9238:17	distinction 9206:18 9207:6	encourage 9215:22 9224:4 9250:11 9283:25
		distinguishin g 9203:24	disturb 9269:1	end 9200:20 9213:10 9219:22 9241:14 9248:8, 22 9273:4 9276:17 9290:10 9291:4
			E	ended 9205:6

ending 9237:7	estimates 9248:3 9253:25	exchanged 9232:11	9270:21	fairly 9231:23 9236:23 9260:9
engage 9221:15 9235:13 9257:4 9288:13	ethic 9224:13	exercise 9286:21	extend 9287:3	fairness 9229:21 9248:5 9255:8 9260:6 9287:5
engaged 9224:15 9226:2 9250:13 9269:8	event 9225:17 9260:19 9294:8	exercised 9291:1	extending 9286:24	familiar 9201:4
enrichment 9236:5,8	everybody's 9229:1 9251:10	exhibit 9201:20	extends 9278:24	farming 9242:4
entered 9200:16 9207:23	evidence 9199:23 9210:15 9215:14,15 9217:11,16,19, 20,21,24 9218:12 9219:11 9220:10,23 9222:12,20 9223:1,2,3,11, 15,19,20,25 9224:6,9,11,12, 23 9225:9 9226:18 9237:17 9239:25 9241:16 9242:15 9243:11,17 9256:1,10,13, 16,18 9257:2 9259:19 9264:5, 6 9267:15,23, 24,25 9269:18 9272:14 9273:16 9274:13 9276:5 9277:7 9279:3, 9,14 9280:5,21 9282:1 9284:17 9289:14 9291:11,12	EXHIBITS 9198:1	extent 9204:24 9232:14	fashion 9245:14 9295:13,22
entirety 9225:23 9250:15,16	entitlement 9215:2 9234:24 9252:8,15 9271:4,13 9278:8	exist 9278:3	extra 9199:3 9230:18	favourable 9216:13
environment 9222:13 9224:16,18	environment 9222:6,9,16 9224:12,13,14 9245:22 9262:19	existed 9202:1	extrapolate 9249:17	feasible 9293:18
equally 9277:13	equitable 9236:20 9251:17 9268:16,18	existing 9261:17 9287:14	extremely 9228:2	feature 9261:25
equities 9260:10 9276:6	evidentiary 9288:23	exists 9201:6	face 9216:14 9219:3 9279:16 9296:9	February 9214:4,5 9248:21
essential 9239:5	exact 9233:10	expand 9248:8	faced 9277:21	federal 9200:2 9246:19
establish 9210:25	examination 9201:18	expect 9241:2 9288:20 9289:4	fact 9218:5 9221:3 9223:18 9225:15 9230:3 9239:1,7,10 9251:23 9256:12,15 9259:7 9288:17	Feliciant 9231:11 9250:25 9251:1 9252:11,14,18, 23 9253:1 9254:3,11,18,24 9255:5,12 9256:9 9258:3, 12 9259:12,15 9262:10 9263:20,24 9264:1 9293:4 9294:11,12 9295:15 9298:5
establishing 9237:18	exceptional 9239:11	expected 9273:6	factor 9255:19 9260:23 9289:16	felt 9234:10
estimate 9226:8 9227:14 9247:21 9248:2 9272:17 9274:24	excerpt 9266:1	expecting 9291:21	facts 9217:12 9220:21 9242:15 9294:5	fide 9204:9
	exchange 9228:21	expenditures 9205:8 9220:18	factum 9245:5 9248:14	fiduciary 9207:19,24 9217:12 9220:25 9236:1, 9 9237:1 9238:8 9243:3 9251:16, 21 9252:1 9253:10 9269:6 9271:15
		expense 9284:1	failed 9206:15	
		expert 9224:11 9228:21 9229:8 9241:19 9248:19 9255:9 9257:4 9261:16 9262:1,2,3,4,17 9263:1,2 9264:6	fair 9205:5 9210:8 9219:13 9237:5 9238:1 9284:2 9285:19 9296:13	
		experts 9257:3		
		expire 9200:23		
		explain 9199:14,16		
		explanation 9266:15		
		explicitly 9201:9		
		expressly 9203:12 9220:1		
			F	

9276:25 9278:9 9281:4 9289:18 9295:1 figure 9289:15 Filler's 9291:15 final 9224:22, 24 finality 9286:9 finally 9288:16 find 9295:21 finding 9271:24 9278:25 9286:18 findings 9256:11 9259:7 9271:20 9279:1, 11,22,23 9288:17 9289:12,17 9294:23 Findlay 9281:10 fine 9207:11 9226:21 9228:3 9257:17 9259:14 9261:24 9293:14 finish 9254:13 9285:11 9286:12 finished 9229:13 9275:21 firm 9263:22 firstly 9265:20 9270:12 fits 9206:12 flow 9207:24 9283:1 flows 9237:2 focus 9213:8 focused 9214:13 9251:7	follow 9281:2 forget 9199:3 9250:17 9284:22 form 9248:14 9256:4 9270:22 formal 9202:16 9232:10,17,25 formally 9202:1 9214:7 fortunately 9263:15 forward 9221:1,4 9243:20 9253:21 9261:24 9276:7 9277:8 9279:2 found 9250:12 9285:24 9294:1, 8 four-point 9236:12,14 fourth 9238:10 9276:12 free 9288:10 free-standing 9288:3 friend 9231:19, 23 9232:9 9234:11,14 9236:22 9241:8, 9,21 9242:1,16, 23,25 9245:18 9246:7 9248:25 9249:13 9251:2 9293:20 friend's 9236:2 friends 9235:18 9265:3 9267:10 9276:1 9281:10 9286:2 friends' 9265:11 front 9203:21 9210:9 9288:20	fulfill 9224:2 9225:7,14 fulfilled 9199:22 9200:4, 25 9205:22 9206:10 9219:12 9280:25 9281:24 fulfillment 9201:10 9203:18 9205:1 9206:23 9208:13,15 9221:14,16 9280:21 full 9208:23 9218:23 9286:6 9297:17 fully 9203:11 9207:5 9217:8 9221:15 function 9288:8 functions 9220:15 fund 9220:19 funds 9220:22 9243:13 future 9279:24	9269:16 9270:10 9271:3, 12 9278:21,22 9288:2 9289:17 generally 9214:21 9222:19 9245:19 generally- applicable 9222:16 geography 9264:22 gesture 9240:7 get all 9294:5 gist 9233:21,23 9252:25 9253:1 give 9214:3 9215:20 9229:25 9260:18 9265:6 9272:5,17 9274:19 9275:2 9286:8 9289:4 9292:25 9297:1, 13 giving 9294:22 goalposts 9291:7 good 9205:15 9264:20 9285:6, 21 9287:23 9295:25 9296:2 Gould 9260:25 governments 9204:9 9205:22 9206:15 9260:16 9287:21 great 9207:4 9222:3 9239:24 9277:3 grossly 9238:20 ground 9264:4 guess 9212:12	9273:2 9292:10 guessing 9289:15 guidance 9215:21 9250:7 9260:19 9267:2 9272:5 9276:19 9288:3,8 guide 9279:24
<hr/> H <hr/>				
				half 9230:11 9242:10 9248:23 hand 9255:4 9270:3 hands 9204:9 9233:9 9236:16 9237:5,7 happen 9230:7 9272:3 9286:5 happened 9211:12 happening 9271:25 hard 9238:4 9294:14 9295:15,16 9297:22 hear 9205:12 9218:4 9226:10 9229:17 9290:14 9293:1 heard 9217:19 9218:10 9245:1 9255:20 9265:8, 11 9289:13 9290:15 9293:4, 9 9296:23 hearing 9228:5 9255:11 9284:17 9294:16 helpful 9253:22 9257:2 9258:5,24
<hr/> G <hr/>				
		Gans 9211:16 9213:19 9214:19 9234:14,19 Gans' 9252:7 9257:12 9269:22 9290:11 9293:5 gap 9218:11 gathering 9248:18 gave 9241:14 general 9239:19 9266:24 9268:5		

9265:5 9284:11 9293:12	9294:2	20 9290:12	interconnect edness 9261:3	issue 9199:18 9200:3,14 9201:23 9202:18 9203:1, 21 9204:3 9205:16,17,24 9206:2 9208:16 9214:8 9216:10 9217:25 9218:16 9219:10 9222:3, 20 9232:19 9235:13 9245:20 9246:4 9253:4 9257:8 9266:8,23 9267:6 9268:8 9270:5 9274:11 9286:9 9296:5 9297:23
high 9242:8	impact 9222:13 9245:21 9271:24 9277:10 9278:17	inconsistent 9200:18 9256:11 9259:6 9288:17 9289:11,12	interest 9273:14,16 9275:6	issues 9201:10 9205:4 9208:24 9209:16 9212:21 9214:22 9215:6, 11 9216:2 9217:5,20 9219:18 9220:1 9221:16 9222:6 9234:8,14 9251:11,12 9257:20 9262:19 9264:11 9266:21 9267:18 9269:19 9291:20 9297:16
high-level 9222:8	impacts 9260:15	Indalex 9235:21 9237:11 9238:15	interesting 9286:1 9290:22 9294:25	item 9238:10
highlights 9218:19	implementati on 9241:11,17, 22 9243:1,6 9267:25	INDEX 9198:1	interests 9273:8 9276:6 9283:22	
history 9209:8 9223:15 9231:17 9251:3 9260:14	implemented 9220:7,11	indicating 9240:12	interpretation 9211:14	
hold 9285:16, 21	implications 9217:11 9218:13	individual 9216:8	interrogatorie s 9232:12	
holds 9239:19	important 9228:25 9239:7 9289:16	inefficiency 9229:3	invalid 9206:17 9207:22	
Honour 9198:8,10 9201:3 9222:1 9231:13,15 9233:12 9250:23 9251:1 9261:2 9284:14 9298:6	impose 9239:16	inefficient 9297:18	invested 9269:12	
hope 9250:17 9261:2 9272:21	imposed 9238:25 9240:4 9246:1	inevitably 9207:2	investigation s 9274:12	
huge 9208:24 9218:24 9221:25	imposing 9239:9	inference 9224:17	investing 9269:11	
hundred 9274:18	imposition 9238:12 9276:14 9277:4	informally 9248:15	inviting 9220:5 9280:24	
I	impossible 9261:8	information 9247:25 9255:3 9283:16	involve 9262:21	
idea 9209:12 9241:4 9254:8 9268:14 9285:14,15,21 9289:9 9295:25 9296:2	impression 9204:3	initial 9294:12	involved 9246:21	
identified 9233:5 9239:22 9240:20	improper 9220:20 9269:5	injustice 9277:4 9279:16	involves 9199:23 9235:24 9241:5 9273:7	
identify 9223:21	include 9209:7 9215:5 9263:16	input 9287:10	involving 9221:16 9235:25 9246:17,18	
ii 9270:8	includes 9230:20	instances 9200:4 9221:21	irregardless 9291:19	
illustrate 9261:2	including 9215:10 9219:13 9224:11 9257:19 9270:6 9272:23 9282:4,	intend 9198:11	irrelevant 9206:13	January 9213:24 9214:2 9262:25
immediately		intended 9210:20 9217:20 9248:7 9273:5 9276:20	islands 9261:4,9	judge 9210:1, 3,10 9211:8 9218:4 9256:25 9257:16 9260:2 9279:23 9288:19,22
		intending 9288:2,5	isolated 9250:6 9261:4	
		intends 9273:4		
		interconnect ed 9250:4		

9290:24 9291:22	L	9277:3,5,25 9279:8 9288:13	level 9223:25 9290:6	13,15 9205:10 9207:14 9208:17,19,23, 24 9218:24 9219:4,8,19 9221:23 9225:2 9228:14 9230:10 9251:23 9260:2 9282:15,16,19 9283:20
judges 9292:4	labouring 9264:20	large 9216:23 9240:6 9249:18 9250:16 9273:6, 7	liability 9209:14 9211:8 9214:22 9216:12 9219:2 9250:10,12 9258:5,24 9259:9 9270:6 9278:25 9283:7 9285:24 9286:12,18 9287:16 9290:10 9291:5 9294:1,4,7,23	live 9233:2 9267:19
judicata 9200:19 9221:17,24 9246:10 9247:3	laches 9214:23,25 9215:5,11 9216:8,18 9217:1,5,19,23, 24 9231:25 9232:3 9266:24 9267:6 9268:4, 6,14 9269:17 9270:8,25 9271:8 9279:7 9289:14,24 9290:2,13 9291:6	largely 9241:2, 17 9251:5 9262:8 9289:15	limit 9293:6	located 9267:14,18 9273:12 9278:20
judicially 9238:24	laid 9245:4	larger 9249:7 9256:5 9288:23	limitation 9231:24 9268:9, 12	logic 9237:2
July 9223:7 9228:9,12 9245:4 9255:2 9263:22 9265:21	lake 9295:3	law 9235:16 9236:5,6,7 9260:9	limitations 9214:23,25 9215:5,11 9216:8,17 9217:1,5,18,23, 24 9231:22 9266:24 9267:6 9268:4 9269:17 9270:8,25 9271:8 9279:7 9289:14,24 9290:2,13 9291:6	long 9214:2 9222:21,22 9230:4 9238:25 9239:10 9244:21 9248:17 9261:18 9273:23,25 9274:15 9275:2 9281:17
jumbled 9236:6	land 9201:22 9202:6,25 9204:8 9205:4 9208:25 9209:1, 7 9210:22 9214:24 9215:4, 7,9,12,23 9216:15 9217:2, 22 9219:13 9220:14 9223:15 9232:1, 8 9235:20,24 9236:24,25 9237:4 9238:16 9240:21 9242:3, 7,10,12 9245:25 9246:2 9249:7 9256:5 9260:14 9280:22 9281:5 9282:11,25 9283:9 9288:6,7	lawsuit 9230:14,15,20	limit 9293:6	longer 9202:12 9204:2 9225:12 9227:18 9247:18
jump 9254:15	landlord 9239:17	lawyers 9260:3 9261:12	limited 9257:19	looked 9207:10
jumping 9254:16,18 9255:15	lands 9204:20, 22,23 9205:1 9209:3 9215:25 9216:2 9224:10, 16 9261:7 9262:21,24 9269:11,14 9273:7,9,11,12	lead 9256:11 9267:2,16 9280:4	lined 9202:23	lose 9295:23
justice 9211:16 9213:19 9214:19 9234:14,19 9239:15 9240:3 9252:7 9257:12 9269:22 9282:9 9290:11 9291:15 9293:5		lead-up 9211:13	lines 9281:17	loss 9204:21 9209:2,9
K		leading 9235:19	list 9238:10 9253:22 9298:3	lot 9215:20 9237:16 9239:14 9240:16,19 9249:2 9262:15 9265:11 9289:13
key 9223:14 9285:17		learned 9254:21	listed 9213:20 9252:17	lots 9240:8,9
kind 9252:16 9253:22 9260:12 9269:8 9274:20 9277:8		leave 9240:7 9267:22 9284:21 9286:7	litigated 9209:18 9215:24 9217:8 9218:23 9230:24	low 9221:10
kinds 9219:18		leaves 9257:22	litigating 9283:22	lower 9248:8
knew 9274:3		led 9279:10	litigation 9199:9 9200:7, 12,22 9201:11,	lunch 9207:2, 10 9265:1,6
knowing 9251:9 9253:3,7 9263:4 9282:10 9290:10		left 9202:20 9269:24 9284:20 9285:2		
		legal 9207:15 9295:2		
		legislation 9222:17 9245:22 9246:4		
		length 9228:5, 6 9229:12 9247:13 9282:24		
		lengthy 9229:22		

9280:10,11	manage 9240:24 9263:11 9272:16	9292:4	minor 9245:17	municipalitie S 9216:1,3 9225:25 9226:1 9264:19 9265:22 9266:12 9267:5, 8,11,16,22 9269:3,5,7,18 9270:12 9273:15,19 9276:22 9278:3 9279:2,8,15 9280:4 9288:9 9296:4,24
<hr/> M <hr/>	manageable 9199:11	matters 9207:8 9245:8 9265:9	minority 9226:5 9238:17, 18	municipalitie s' 9266:21 9273:11 9288:1 9297:10
Madam 9296:3	managed 9212:8 9213:19	Mckenna 9264:24 9265:10 9266:2, 4,6 9268:11,13 9269:24 9270:1, 11,16,19,24 9271:7,10,23 9272:2,9,12 9273:2 9275:5, 8,12,15,22 9277:15,18,23 9278:1,4,14,22 9279:21 9280:8 9296:5,7,14,17 9297:9	minutes 9264:25 9265:1	municipality 9267:13,14 9273:13 9290:15
made 9200:7 9220:19 9232:23 9236:24 9243:2 9258:21 9265:24 9266:7 9269:4 9272:3,4 9274:4 9279:1, 11 9281:18 9282:6,23 9284:14 9287:9, 17 9290:19 9297:7	management 9224:14 9262:21 9285:14	meaning 9209:15	misappropriation 9220:22	<hr/> N <hr/>
magnitude 9295:17	managing 9211:17 9262:23	means 9203:16 9219:7 9222:25 9259:4	misconduct 9269:9	national 9239:24 9240:25 9250:5
main 9213:20 9235:12 9251:6	map 9240:6	meant 9254:18	missed 9213:14	Nations 9201:22
majority 9238:17	mapped 9256:23	measured 9229:18,20	mixed 9285:18	nature 9211:1 9245:25 9247:4 9251:21 9273:3
make 9203:4 9213:13 9222:10 9230:2 9243:10 9252:4 9253:12 9254:9 9258:16 9268:3 9273:4 9274:12 9276:18,19 9279:3,22 9280:18 9287:10,11 9292:9 9294:23	maps 9261:2,6	mentioned 9220:12 9223:23 9241:15 9243:23 9246:7 9280:23 9282:23	Monday 9242:1 9252:6	necessarily 9210:1,2 9260:3 9262:13 9287:8
majority 9238:17	March 9213:23 9227:23 9273:22	mention 9240:5 9241:13 9244:10	monetary 9234:23	necessitate 9280:1,2
make 9203:4 9213:13 9222:10 9230:2 9243:10 9252:4 9253:12 9254:9 9258:16 9268:3 9273:4 9274:12 9276:18,19 9279:3,22 9280:18 9287:10,11 9292:9 9294:23	MARKED 9198:4	meant 9254:18	money 9204:25 9205:5, 6 9209:3,10 9219:14,16 9220:13 9238:2, 3 9269:12	necessity 9232:15
makes 9236:11 9278:23 9279:23 9290:7 9292:14,17	market 9205:5 9219:14 9237:6 9238:1	measured 9229:18,20	months 9201:18,19 9226:17,24 9255:10	needed 9220:10 9225:4 9264:24
making 9199:20 9208:11 9227:16 9228:25 9254:5 9255:13 9264:18 9266:23 9269:15 9290:25	massive 9295:20	mentioned 9220:12 9223:23 9241:15 9243:23 9246:7 9280:23 9282:23	morning 9198:7,8 9241:24 9263:19 9298:2	needing 9230:24
majority 9238:17	master 9210:11	meant 9254:18	motion 9198:11,12 9202:24 9207:4 9208:4 9213:25 9229:25 9263:16 9286:3	negotiate 9216:13 9218:21 9225:1 9230:25 9283:8
majority 9238:17	material 9239:14 9242:20 9243:23 9247:16 9248:24 9249:1 9251:11	meant 9254:18	mid-2021 9262:12	
majority 9238:17	materials 9234:1 9235:15 9247:12 9248:13,21 9251:8	meant 9254:18	middle 9229:15 9256:6 9274:25	
majority 9238:17	matter 9203:2 9213:18 9219:10 9234:7 9255:8 9258:18 9275:17 9283:1	meant 9254:18	mind 9226:8 9265:4	
majority 9238:17		meant 9254:18	mine 9294:22	
majority 9238:17		meant 9254:18	minimum 9255:2 9286:19 9292:4	
majority 9238:17		meant 9254:18	minor 9245:17	
majority 9238:17		meant 9254:18	minority 9226:5 9238:17, 18	
majority 9238:17		meant 9254:18	minutes 9264:25 9265:1	
majority 9238:17		meant 9254:18	misappropriation 9220:22	
majority 9238:17		meant 9254:18	misconduct 9269:9	
majority 9238:17		meant 9254:18	missed 9213:14	
majority 9238:17		meant 9254:18	mixed 9285:18	
majority 9238:17		meant 9254:18	model 9209:9	
majority 9238:17		meant 9254:18	moment 9242:1 9252:6	
majority 9238:17		meant 9254:18	Monday 9297:24 9298:8	
majority 9238:17		meant 9254:18	monetary 9234:23	
majority 9238:17		meant 9254:18	money 9204:25 9205:5, 6 9209:3,10 9219:14,16 9220:13 9238:2, 3 9269:12	
majority 9238:17		meant 9254:18	months 9201:18,19 9226:17,24 9255:10	
majority 9238:17		meant 9254:18	morning 9198:7,8 9241:24 9263:19 9298:2	
majority 9238:17		meant 9254:18	motion 9198:11,12 9202:24 9207:4 9208:4 9213:25 9229:25 9263:16 9286:3	
majority 9238:17		meant 9254:18	move 9208:21 9219:7,9 9248:22 9294:7	
majority 9238:17		meant 9254:18	multiplied 9247:22	
majority 9238:17		meant 9254:18		

negotiated 9209:17 9215:22	occur 9228:20 9234:15 9255:7 9286:13 9287:22	opening 9203:17 9241:14,20 9282:23	ordered 9238:24 9284:15	P
negotiation 9283:21	occurred 9241:2	operate 9293:21	ordering 9254:11	p.m. 9280:12, 13 9298:10
negotiations 9224:5 9250:8 9283:6,11,15,25 9284:8	October 9261:21 9263:8	opinion 9246:21	orderly 9260:6 9264:10	pages 9201:20 9266:3
nonfulfillment 9200:17 9201:10 9203:8 9208:13 9221:21 9281:19	offer 9237:17 9239:25 9243:12 9249:24	opportunity 9279:3 9280:4 9297:1	orders 9213:20 9293:7	paradoxically 9250:2
note 9215:25 9238:15	official 9241:1	opposed 9244:3 9278:20	organized 9265:7	paragraph 9199:17 9208:7 9214:17 9218:17 9219:23,25 9221:12 9222:14 9223:12 9224:7, 21 9234:22 9237:12 9238:23 9257:21 9269:23 9271:7 9277:16 9281:16,17
noted 9222:14	offset 9204:22 9209:3	optimistic 9249:9,12	original 9211:21 9237:8	paragraphs 9209:6
notice 9269:13	one- 9245:3	option 9243:5 9258:9 9286:10 9294:9	originating 9236:13	parcel 9216:15 9256:6,17 9260:15 9261:6
number 9213:1,2,4,5,9 9218:17 9241:17 9265:16 9273:7	one-week 9295:17	optional 9230:19	outcome 9253:3 9258:22 9259:17 9285:20 9294:17	parcel-by- parcel 9260:13
numbers 9248:2 9272:19 9274:20	ongoing 9241:3	options 9258:11,19	outcomes 9259:16	parcels 9210:22 9214:24 9215:4, 6,12,18,20 9216:9 9217:6, 22 9223:16 9256:4,16,19 9260:18 9261:3 9262:18 9283:14 9288:6, 7,13
numerals 9235:7	Ontario 9200:2 9217:2 9222:4,8,19,20, 25 9223:6 9224:7 9225:21 9226:13,20,24 9240:23,24 9241:7 9246:8, 17 9247:16 9251:6 9256:14 9257:25 9262:19 9265:14 9284:4 9292:15,16 9296:22,25 9297:5	order 9199:16 9209:13,20 9210:19 9211:4, 6,15,19,21 9212:3,5,7,11, 12,13,15,16,20, 21 9213:2,5,6, 14,22 9214:7,18 9215:13 9218:9, 13 9223:16 9224:1,20 9229:6,8 9234:13,17,18, 19 9245:6 9249:21 9252:7 9254:13 9257:12,22 9258:10,13,14 9259:4 9266:20 9269:22 9270:24 9276:9 9277:14 9279:5 9282:8 9284:21 9285:7,8 9286:10,12,14, 23,25 9287:8, 11,14 9290:12 9291:15 9293:5 9295:7	outset 9216:23	parcel 9216:15 9256:6,17 9260:15 9261:6
O	Ontario's 9222:2 9245:18, 20 9251:13 9285:3	order 9199:16 9209:13,20 9210:19 9211:4, 6,15,19,21 9212:3,5,7,11, 12,13,15,16,20, 21 9213:2,5,6, 14,22 9214:7,18 9215:13 9218:9, 13 9223:16 9224:1,20 9229:6,8 9234:13,17,18, 19 9245:6 9249:21 9252:7 9254:13 9257:12,22 9258:10,13,14 9259:4 9266:20 9269:22 9270:24 9276:9 9277:14 9279:5 9282:8 9284:21 9285:7,8 9286:10,12,14, 23,25 9287:8, 11,14 9290:12 9291:15 9293:5 9295:7	overlapping 9256:1	overlooked 9298:1
oar 9264:21	open 9232:24 9245:24 9257:22 9258:10 9260:19,22 9267:22 9284:20 9285:2 9286:10,11 9288:15	order 9199:16 9209:13,20 9210:19 9211:4, 6,15,19,21 9212:3,5,7,11, 12,13,15,16,20, 21 9213:2,5,6, 14,22 9214:7,18 9215:13 9218:9, 13 9223:16 9224:1,20 9229:6,8 9234:13,17,18, 19 9245:6 9249:21 9252:7 9254:13 9257:12,22 9258:10,13,14 9259:4 9266:20 9269:22 9270:24 9276:9 9277:14 9279:5 9282:8 9284:21 9285:7,8 9286:10,12,14, 23,25 9287:8, 11,14 9290:12 9291:15 9293:5 9295:7	overview 9222:8	overview 9222:8
object 9287:15	Ontario's 9222:2 9245:18, 20 9251:13 9285:3	order 9199:16 9209:13,20 9210:19 9211:4, 6,15,19,21 9212:3,5,7,11, 12,13,15,16,20, 21 9213:2,5,6, 14,22 9214:7,18 9215:13 9218:9, 13 9223:16 9224:1,20 9229:6,8 9234:13,17,18, 19 9245:6 9249:21 9252:7 9254:13 9257:12,22 9258:10,13,14 9259:4 9266:20 9269:22 9270:24 9276:9 9277:14 9279:5 9282:8 9284:21 9285:7,8 9286:10,12,14, 23,25 9287:8, 11,14 9290:12 9291:15 9293:5 9295:7	overwhelmin g 9283:3	overwhelmin g 9283:3
obligation 9236:20 9237:21,22,25	Ontario's 9222:2 9245:18, 20 9251:13 9285:3	order 9199:16 9209:13,20 9210:19 9211:4, 6,15,19,21 9212:3,5,7,11, 12,13,15,16,20, 21 9213:2,5,6, 14,22 9214:7,18 9215:13 9218:9, 13 9223:16 9224:1,20 9229:6,8 9234:13,17,18, 19 9245:6 9249:21 9252:7 9254:13 9257:12,22 9258:10,13,14 9259:4 9266:20 9269:22 9270:24 9276:9 9277:14 9279:5 9282:8 9284:21 9285:7,8 9286:10,12,14, 23,25 9287:8, 11,14 9290:12 9291:15 9293:5 9295:7	owned 9240:16,21,22, 23 9241:6 9267:8	owned 9240:16,21,22, 23 9241:6 9267:8
obligations 9205:23 9206:9, 16	open 9232:24 9245:24 9257:22 9258:10 9260:19,22 9267:22 9284:20 9285:2 9286:10,11 9288:15	order 9199:16 9209:13,20 9210:19 9211:4, 6,15,19,21 9212:3,5,7,11, 12,13,15,16,20, 21 9213:2,5,6, 14,22 9214:7,18 9215:13 9218:9, 13 9223:16 9224:1,20 9229:6,8 9234:13,17,18, 19 9245:6 9249:21 9252:7 9254:13 9257:12,22 9258:10,13,14 9259:4 9266:20 9269:22 9270:24 9276:9 9277:14 9279:5 9282:8 9284:21 9285:7,8 9286:10,12,14, 23,25 9287:8, 11,14 9290:12 9291:15 9293:5 9295:7	owner 9277:25	owner 9277:25
observation 9246:7 9260:8	open 9232:24 9245:24 9257:22 9258:10 9260:19,22 9267:22 9284:20 9285:2 9286:10,11 9288:15	order 9199:16 9209:13,20 9210:19 9211:4, 6,15,19,21 9212:3,5,7,11, 12,13,15,16,20, 21 9213:2,5,6, 14,22 9214:7,18 9215:13 9218:9, 13 9223:16 9224:1,20 9229:6,8 9234:13,17,18, 19 9245:6 9249:21 9252:7 9254:13 9257:12,22 9258:10,13,14 9259:4 9266:20 9269:22 9270:24 9276:9 9277:14 9279:5 9282:8 9284:21 9285:7,8 9286:10,12,14, 23,25 9287:8, 11,14 9290:12 9291:15 9293:5 9295:7	ownership 9215:3 9222:12 9224:19 9245:21 9252:20	ownership 9215:3 9222:12 9224:19 9245:21 9252:20
observed 9295:6	open 9232:24 9245:24 9257:22 9258:10 9260:19,22 9267:22 9284:20 9285:2 9286:10,11 9288:15	order 9199:16 9209:13,20 9210:19 9211:4, 6,15,19,21 9212:3,5,7,11, 12,13,15,16,20, 21 9213:2,5,6, 14,22 9214:7,18 9215:13 9218:9, 13 9223:16 9224:1,20 9229:6,8 9234:13,17,18, 19 9245:6 9249:21 9252:7 9254:13 9257:12,22 9258:10,13,14 9259:4 9266:20 9269:22 9270:24 9276:9 9277:14 9279:5 9282:8 9284:21 9285:7,8 9286:10,12,14, 23,25 9287:8, 11,14 9290:12 9291:15 9293:5 9295:7	owns 9239:18 9267:13	owns 9239:18 9267:13
obvious 9228:22 9236:23	open 9232:24 9245:24 9257:22 9258:10 9260:19,22 9267:22 9284:20 9285:2 9286:10,11 9288:15	order 9199:16 9209:13,20 9210:19 9211:4, 6,15,19,21 9212:3,5,7,11, 12,13,15,16,20, 21 9213:2,5,6, 14,22 9214:7,18 9215:13 9218:9, 13 9223:16 9224:1,20 9229:6,8 9234:13,17,18, 19 9245:6 9249:21 9252:7 9254:13 9257:12,22 9258:10,13,14 9259:4 9266:20 9269:22 9270:24 9276:9 9277:14 9279:5 9282:8 9284:21 9285:7,8 9286:10,12,14, 23,25 9287:8, 11,14 9290:12 9291:15 9293:5 9295:7		Pardon 9204:12
	open 9232:24 9245:24 9257:22 9258:10 9260:19,22 9267:22 9284:20 9285:2 9286:10,11 9288:15	order 9199:16 9209:13,20 9210:19 9211:4, 6,15,19,21 9212:3,5,7,11, 12,13,15,16,20, 21 9213:2,5,6, 14,22 9214:7,18 9215:13 9218:9, 13 9223:16 9224:1,20 9229:6,8 9234:13,17,18, 19 9245:6 9249:21 9252:7 9254:13 9257:12,22 9258:10,13,14 9259:4 9266:20 9269:22 9270:24 9276:9 9277:14 9279:5 9282:8 9284:21 9285:7,8 9286:10,12,14, 23,25 9287:8, 11,14 9290:12 9291:15 9293:5 9295:7		park 9239:24 9240:1,25 9250:5 9256:7
	open 9232:24 9245:24 9257:22 9258:10 9260:19,22 9267:22 9284:20 9285:2 9286:10,11 9288:15	order 9199:16 9209:13,20 9210:19 9211:4, 6,15,19,21 9212:3,5,7,11, 12,13,15,16,20, 21 9213:2,5,6, 14,22 9214:7,18 9215:13 9218:9, 13 9223:16 9224:1,20 9229:6,8 9234:13,17,18, 19 9245:6 9249:21 9252:7 9254:13 9257:12,22 9258:10,13,14 9259:4 9266:20 9269:22 9270:24 9276:9 9277:14 9279:5 9282:8 9284:21 9285:7,8 9286:10,12,14, 23,25 9287:8, 11,14 9290:12 9291:15 9293:5 9295:7		part 9205:1,2, 10 9216:23 9230:13

9240:25	9268:10,12	9258:6,8,13,15, 16,25 9259:2,3	pitched 9242:8	pleadings 9203:16 9207:5 9241:10
9258:16	permission 9296:10	9264:9,12,13,14	place 9229:9	point 9203:1
9265:15	perspective 9255:17	9265:14,15	9231:25	9206:21
9270:22	pertain 9232:8	9266:13,15,25	9249:10 9280:3	9210:16
9276:12	9239:14,22	9267:3,9,12,24	places	9225:12
9281:20	9240:10 9241:6	9268:5 9270:5, 18,23 9271:21, 25 9272:5,7,14	9281:15	9227:16
9282:10	9249:23	9273:4,5,24,25	plaintiff	9234:12 9235:2, 12 9236:14
9286:14	pertaining 9241:16	9276:17,18	9236:21	9252:4 9253:2,6
9290:11 9295:9	9246:10	9277:9,11,13	9243:18	9254:12
participate 9288:11	pertains 9237:18	9278:20,25	9246:24	9255:13
participation 9272:24	phase 9201:12	9279:9,12,15, 19,23,25	9268:15,19	9258:14
parties 9215:21	9202:7,9,10,18, 19,21 9203:2	9280:2,3	plaintiff's 9268:22	9261:16
9227:24 9232:7, 18 9233:10	9204:2 9205:2	9282:4,20	plaintiffs	9263:21 9268:2
9235:16	9208:22	9284:16,17,22	9200:13	9275:23
9249:16	9209:14,17,21	9285:14 9286:5, 7,18 9287:17	9204:25 9206:7	9277:19 9278:5
9250:12	9210:16,17,24	9288:4,13,18, 19,22 9289:5, 12,16 9290:21, 24 9291:22	9208:11 9211:5	9280:20 9281:2, 3,18 9282:6,22, 23 9284:10
9262:22	9211:2,7,11	9292:8,12	9215:3,17	9285:24
9274:10,12,19	9212:22	9293:13,14,16	9219:1,3	9288:16 9292:8, 18 9293:12
9275:3 9276:21	9213:10	9294:1,3,5,7,16, 19 9295:5,9	9220:13	pointing 9283:5
9279:25 9288:8	9214:20,21	phases	9224:10,15	points 9231:18
9294:9,14	9215:1,2,8,14, 17,23 9216:1,4, 11 9217:6,8,10, 15,16,21,23	9209:13	9225:21 9228:2	9245:17
parts 9256:4 9281:5	9218:6,10,11, 15,20,21,22,24	9214:19	9233:14 9238:3, 4 9242:20	9247:11 9251:6
party 9239:18, 19 9255:8	9219:2,6,10	9215:15	9246:23 9265:6	9255:1 9280:16
pass 9281:11	9220:14 9221:2, 6,7,9 9222:4	9217:17 9218:1, 5	9266:10 9270:6	popped 9204:4
passed 9238:2 9239:12	9224:22,23,25	phasing	9271:14 9272:2, 20 9275:24	portion 9242:12
past 9201:18	9225:1,2,5,12, 16,17,18	9198:11	9276:7 9278:8	9255:15
pending 9200:11	9226:2,18	9208:21	9279:21 9286:5	portions 9257:1
peninsula 9209:8,10 9249:18	9227:18,19	9211:18	plaintiffs'	pose 9256:12
people 9267:19,20	9230:8,22,23	9212:13 9214:8	9201:19,25	position 9200:15
percent 9242:13	9232:15 9234:1, 2,7,15,24	9223:16 9224:1	9219:15	9205:24
perfect 9274:4	9235:1,13	9225:7,14	9220:19	9231:21
perfectly 9220:8 9281:1, 24	9239:22	9249:21	9224:12,18	9243:15 9244:7, 25 9245:19,20
periods 9231:24	9240:20	9266:20	9266:19 9271:2, 11	9257:10
	9241:22 9249:3, 6,9,13,15,21	phrase 9293:5	plan 9201:8	9263:13
	9250:10,14,15	picked 9274:24	plate 9297:17	9265:13 9266:9
	9252:9 9253:3, 18,19 9254:14, 15 9255:20	piece 9218:24	play 9276:6	9268:21 9277:2
	9256:20,25	9251:22	plead 9200:5	9285:3 9286:11
	9257:7,15,21	9282:11	9221:22	9287:12,18,22
		pieces 9219:19 9259:11	9269:18	9297:10
			pleaded 9220:1	
			pleading 9203:12 9208:4, 8	

positions 9251:10 9264:16	9249:5	problems 9256:12	properties 9237:23 9239:22 9241:6 9249:19,23,24 9250:1,4,6 9267:7,11,12, 13,18 9273:17 9280:5	provincial 9246:3 9256:7
positive 9237:20,22	prepare 9222:23 9225:11 9256:3 9297:16	proceed 9258:15 9281:24 9282:2 9294:3	public 9239:20	public 9239:20
possession 9201:21 9269:10 9277:3	preparing 9198:16 9199:8 9248:17	proceeded 9259:5	purchaser 9204:10 9240:17	purpose 9224:1,2 9225:7,14 9229:24 9230:21 9283:5
possibility 9292:3 9293:21	present 9204:22	proceeding 9232:11 9245:14 9254:14 9266:11 9287:13	property 9239:18,19 9240:8,25 9241:2,4 9250:2	purposes 9240:2 9282:14
possibly 9224:10	presently 9255:4	proceedings 9256:1 9298:9	propose 9231:16 9251:2 9253:23	pursue 9200:24 9247:10
postponed 9234:24 9235:1	preserve 9246:25	proceeds 9249:6	proposed 9222:2 9223:24 9224:6,20 9259:5	pursuing 9268:16
potential 9257:6 9289:11 9290:4	preserved 9287:4	process 9201:2 9228:24, 25 9229:14 9246:11 9247:1 9254:21 9257:23 9258:1 9259:18 9260:5, 7 9262:7 9264:10 9273:22 9293:10 9294:9	proposes 9222:20	put 9200:3 9201:19 9203:17 9219:11 9224:9, 11 9233:8 9241:9 9243:20, 21 9248:20 9249:21 9251:10 9253:21 9261:24 9266:9 9276:7 9279:2 9286:2 9297:23
potentially 9260:13 9267:2, 23 9291:23	pressing 9234:8	produced 9202:1 9235:18 9265:22	proposing 9222:4,9 9223:12 9225:10 9237:17	puts 9200:15
practical 9257:5	pressure 9283:2	production 9202:11	proposition 9251:14 9278:16	putting 9208:15 9277:8
pre-confederatio n 9271:16 9278:10	prevent 9217:9	productively 9250:13	prosecuting 9268:16	<hr/> Q <hr/>
precedent 9261:17	primary 9276:16	Professor 9261:19	prospect 9245:11 9259:24 9272:8	qualification 9222:19
preclude 9216:16	principle 9211:1 9281:22	proper 9203:10 9205:8 9225:5	prospect 9245:11 9259:24 9272:8	qualified 9272:17,19,25 9274:22
predict 9273:18	principles 9210:17,22 9211:9 9295:2	productively 9250:13	prospects 9259:22	qualifiers 9274:18
prefer 9263:23 9294:6	prior 9253:4 9294:16	properly 9199:16,22 9200:4,25 9203:11 9206:25 9219:12 9220:11 9243:20 9282:13	protect 9221:24 9224:15	question 9201:16 9202:11 9203:6 9205:16,21 9214:12 9222:5,
preferable 9249:12	private 9240:17		protection 9222:16 9224:13	
preferred 9259:17	problem 9198:21 9226:21 9268:3 9269:20 9277:12 9278:21,22 9289:9,10 9290:17 9291:16,23 9292:18,20		prove 9242:7	
prejudice 9246:9 9247:2 9256:22 9259:7 9274:10 9279:16,20	problematic 9228:11		provide 9250:7 9267:1	
prejudiced 9256:15			provided 9215:13 9260:25 9261:11,21	
preparation				

18 9232:6 9245:24 9253:21 9260:20,22 9264:8 9286:1 9287:23 9291:20 9293:2, 25	read 9203:14 9206:20 9220:2 9235:15 9256:8 9261:23	RECESSED 9280:12	reiterate 9276:1	remain 9257:15
questions 9199:21 9231:19 9250:18,24 9265:19 9273:23 9274:4, 14	reading 9232:13 9271:5 9277:17	recognized 9248:25	relate 9208:10 9256:17 9289:19	remainder 9215:9
quickly 9275:23 9296:16	ready 9200:9 9223:7 9229:1 9230:11 9262:13 9263:5, 9 9273:24 9274:15 9295:21	recognizing 9244:19	related 9208:12 9210:18 9215:6 9216:2 9267:7, 18 9282:22	remains 9231:25 9232:18
quo 9268:20,24	realize 9262:1 9280:3	recollection 9202:4,14 9234:3 9270:1	relates 9266:23	remedial 9209:16 9236:3, 7
R	realized 9211:12	reconciling 9283:21	relation 9204:8 9212:14 9216:17 9230:7 9261:7 9270:18 9287:25 9288:14	remedies 9208:9,12 9210:25 9252:8 9278:18
raise 9242:16, 17 9243:4 9247:1 9258:20 9286:1 9297:25	reality 9262:1 9280:3	record 9198:13,17 9203:15 9208:4 9212:3,11 9213:25 9266:9 9288:24	released 9297:14	remedy 9200:14 9204:6 9207:16,24 9208:25 9210:18 9211:9, 10 9216:13 9217:14 9219:4 9239:1,11 9243:4,16 9244:1 9251:18, 25 9252:13 9253:5,15,16 9259:10 9275:24 9276:2, 4,10 9283:1 9289:19 9292:13
raised 9231:19 9232:6 9235:17 9241:4 9245:20 9255:21 9257:8 9265:19 9266:21 9277:13 9287:23 9288:16 9291:20 9292:11 9296:24	realize 9256:2 9295:3	records 9198:18,20,23 9201:21 9202:6 9204:4 9232:21 9266:1	relevance 9232:21 9265:20,24 9266:8 9290:4	remember 9199:1 9251:7 9272:10 9273:21 9274:8
raising 9222:6 9247:12	reasonable 9225:6,13,20,23 9226:7,15 9227:5 9228:4,5 9229:18 9230:3, 6 9231:4 9274:24	recovery 9216:16	relevant 9202:7,9,10,21 9204:5 9205:9 9215:11 9217:13 9220:14 9221:7 9222:11 9232:4 9234:1,2,7,11 9235:23 9242:17,21 9243:11,17 9249:2 9251:23 9262:20 9266:13,14 9290:19	remembered 9202:20
ramp-up 9289:8	reason 9221:13 9228:22 9267:4 9273:5 9289:6	redone 9295:22	reliance 9201:9	render 9238:12 9258:18 9285:12
range 9227:8, 9,12 9274:20 9275:1	reasoning 9243:8	reference 9209:20,21,23 9210:1,8	relies 9245:10	repeat 9265:2
reach 9226:7	reasons 9218:17 9229:21 9245:14 9253:6 9255:15,18 9262:6 9264:15 9265:16	referenced 9255:24	reluctant 9263:6	repeatedly 9283:19
reaches 9278:24	recall 9201:24	referred 9237:24 9242:1	rely 9241:10	repeating 9262:5
reaction 9294:12	received 9204:23,25 9209:3,11 9220:13 9232:12 9238:2	referring 9198:12 9208:8 9246:23	relying 9220:2 9235:21 9236:12 9242:23,24 9268:22	reply 9208:5 9257:11 9262:3 9265:7 9280:10, 16,20
	receiving 9297:2	regard 9240:5 9292:11		
		Registrar 9198:22		
		reinforced 9250:1		
		reinststitutes 9281:7		

report 9232:20,23 9261:18,19,20 9262:24	9216:10	RESUMED 9280:13	S	senior 9261:12
reported 9233:10	resolving 9217:4	resumption 9247:5	sale 9204:23, 25 9236:25 9237:8	sense 9203:8 9273:14 9274:4 9275:2 9278:23
reports 9228:21 9229:9 9248:19 9262:1, 2,4 9263:4	respect 9202:25 9220:14 9231:20,22 9232:2,6,7 9234:13 9235:17,20 9240:1,8 9241:22 9243:12 9245:18 9246:6 9248:16 9249:19 9256:18 9260:12 9266:19 9267:17 9268:14 9276:13 9277:2, 5,8 9279:24 9293:15	retain 9218:15 9261:16	sales 9220:14 9232:9	sensitivities 9222:10
representative 9249:16	reputed 9240:18	returnable 9209:1,2	sample 9266:3	separate 9220:24 9225:17 9258:6 9264:9
repurchased 9240:18	request 9223:22 9239:11	returned 9204:21 9283:10	satisfactory 9296:19	series 9273:23
requested 9258:22 9293:7	require 9232:18 9264:5, 6 9275:10 9282:10	returning 9247:11	satisfied 9202:17	served 9251:8
required 9203:9 9216:7 9226:9 9229:23 9268:1 9272:25 9274:14,19 9277:8 9282:2	respond 9223:19 9263:1 9296:22 9297:1	revenues 9234:25	save 9271:16	serves 9240:2
requires 9276:4,5	responding 9224:6	review 9202:11 9207:5	scale 9249:7	set 9199:23 9215:4 9218:16 9219:22 9223:12,16 9224:7,21 9248:12,15 9258:16 9261:15 9263:8, 14 9275:6 9285:10 9292:7 9295:7,8
res 9200:19 9221:17,24 9246:10 9247:2	response 9297:4	revive 9221:19	scenario 9239:13,15 9260:12	setoff 9220:15
research 9221:20	responses 9232:13,14	rights 9232:3 9246:24,25 9286:22 9291:1 9293:16 9294:2	scenarios 9286:8	setting 9215:17 9263:17
reserve 9246:2,24 9286:14	responsive 9274:2	risk 9221:17,18 9288:17 9294:15	scheduled 9262:12,14	settle 9259:25
reserved 9279:7	rest 9215:22	road 9227:23 9258:17 9290:17 9292:2	scope 9208:22 9219:9 9221:2, 5,25 9222:2 9223:24 9225:5, 11 9253:10 9272:13	settlement 9215:22 9230:25 9245:11 9250:8, 11 9254:5 9259:22 9267:3 9272:5 9276:20 9277:11
resist 9268:17	result 9200:11, 13 9202:4 9207:22 9211:7 9217:4 9218:2 9220:4,6 9230:23 9237:10,14,19 9238:5 9243:9 9276:13,14 9277:4 9281:25	rolls 9207:17	scoped 9208:19,20	settlers 9283:3
resolution 9218:21 9280:1	resulted 9236:18	Roman 9235:7	search 9280:17	settling 9250:14
resolved 9209:16 9213:12	results 9251:17 9281:1	Ron 9260:25	section 9270:4	severance 9212:13 9213:2, 6
		room 9283:9	seek 9208:12	share 9260:8
		roughly 9202:13 9227:4 9253:23	seeking 9204:7 9243:3 9275:25	shared 9281:10
		ruling 9223:21 9258:15 9273:3 9293:13,14	self-evident 9293:25	
		rulings 9216:7 9271:24	sell 9237:21,22 9238:1 9282:24	
		run 9225:17 9229:22 9295:6	selling 9242:21 9243:13	
		runs 9229:21	send 9298:2	

short 9228:2	9240:17	start 9199:17 9211:18 9265:17	structure 9260:4 9283:24	submits 9292:14
shorter 9227:18	sort 9240:10 9264:3 9275:19 9293:9	started 9199:25 9200:1 9227:23 9229:2, 19 9261:20 9291:19	stuff 9221:22	submitted 9270:22
show 9261:6	sought 9208:9	starting 9219:25 9223:12	styled 9218:6	submitting 9223:2 9230:12 9245:2
showed 9202:6	Soulos 9235:18 9236:13 9238:10 9276:8	state 9219:19	subject 9218:7 9233:6 9254:4,5 9256:17 9281:5 9289:21 9290:11	successful 9200:22 9282:16 9283:17
shown 9236:17	speak 9296:9	stated 9238:23 9270:21	submission 9202:24 9203:7 9205:9,21,23 9210:19 9214:11 9217:7 9218:2,14 9220:9,17 9222:11 9223:8 9225:22 9226:7 9229:11,17 9230:22 9231:2 9245:7 9258:23 9259:1 9262:11 9264:25 9272:4 9276:17 9278:12 9282:1 9290:3 9292:10 9293:8	suffered 9224:18
sic 9204:23	speaking 9214:21 9227:4 9253:23	statement 9203:16 9223:18 9236:3	sufficient 9249:17 9250:7	suggested 9237:3,16 9238:9 9239:9 9245:23 9251:20 9253:14 9255:19 9259:15 9272:22 9281:1
side 9231:10	specific 9201:2 9210:22, 23 9215:4,6 9217:22 9257:13	statements 9219:21	suggest 9237:3,16 9238:9 9239:9 9245:23 9251:20 9253:14 9255:19 9259:15 9272:22 9281:1	suggested 9226:16 9247:12 9284:16 9293:23
sight 9295:23	specifically 9252:7	states 9242:2	status 9268:20,23	suggesting 9221:3,4 9225:16 9285:1 9287:8
signed 9291:16	speculative 9259:24 9260:21 9284:5, 6	stating 9234:10	statute 9269:11	suggestion 9253:17 9284:15,19 9293:15
significance 9266:22 9267:17	split 9256:21 9259:10	status 9268:20,23	staying 9200:10 9246:6 9247:4	suit 9285:7
significant 9211:14 9254:22 9269:3, 12,19 9295:18	splitting 9259:19	statute 9269:11	stayed 9206:2 9221:19 9237:24 9280:17 9282:18	suitable 9285:13
similarly 9217:18	squarely 9217:14	stays 9200:22	stays 9200:22	summarize 9233:21 9251:13
simple 9237:4	St 9240:9,13,15	steam 9286:6	step 9203:9	summary 9256:8
simply 9216:14 9235:23 9239:17 9243:15 9246:7 9261:8 9294:6	stage 9227:14 9263:7	steps 9200:22 9255:25 9258:21 9264:18 9265:11,18,24 9266:6,20,22 9279:4 9288:1 9290:14,19 9291:6 9292:24	submit 9211:6 9219:6 9225:6 9226:14 9243:15 9272:24	sums 9269:12
sir 9202:14 9227:20 9228:18 9280:14 9286:16	stages 9291:8	straightforwa rd 9251:14		Sun 9235:21 9237:11
sit 9244:15 9245:8	stakeholders 9260:17			
situated 9276:24	stand 9202:12 9277:1 9293:17			
situation 9206:13 9232:9 9239:8 9268:25	standard 9222:15			
skeptical 9249:20	standpoint 9285:6			
slip 9271:22	stands 9279:5			
sold 9205:5 9219:13 9237:5				

9238:15	9269:15 9283:6	thought	top 9240:14	23 9294:22
supplementa	talked 9219:20	9215:18	9271:22	9295:11
ry 9198:20,23	talking	9242:17	total 9204:24	9296:21 9297:6,
9262:4	9203:23	threatening	9220:12	11,21
supply 9199:5	9253:25	9199:13	9221:10	Townshend's
support	9265:25	three-step	9247:13 9248:3,	9235:12
9245:19	9273:10,11	9257:22	9	Township
suppose	9279:6 9294:19	9293:10,22	totaling	9240:9,13,15
9233:6 9255:15	talks 9277:20	9294:9	9248:2	transaction
9264:21	9290:12	tied 9214:23	totality	9209:8 9223:15
supposedly	team 9207:3	time 9203:23	9226:17	9260:14
9283:7	Ten 9275:8	9205:15	Townshend	transactions
supposing	tend 9240:3	9206:19	9198:7,8,10,24	9201:22 9202:7,
9216:12	9262:1,3	9211:17	9199:4,8	25 9249:7
Supreme	term 9255:16	9213:19 9214:3,	9201:7,14	transcript
9235:22	terms 9199:22	6 9224:4	9202:15 9203:7,	9233:9 9241:24
surprised	9200:17	9225:7,13,24	19 9204:6,12,	transfer
9229:12	9203:18	9226:4,5 9230:4	14,16,19	9241:1
surprising	9205:20	9233:8,9	9205:14,18,25	transpire
9226:4	9208:14,15	9241:15,24	9206:4,19	9284:8
surrender	9219:12 9220:7,	9250:3 9251:8	9207:11,25	travel 9267:20
9236:25 9283:4	10 9254:19	9258:18	9208:3,7	treat 9261:8
surrendered	9260:6 9261:11	9261:15 9264:7	9209:25 9210:4,	treated
9236:24	territory	9273:18 9274:7	6,14 9211:23	9215:14
surrounding	9224:17	9275:7 9278:3	9212:1,6,9,17,	treating
9256:16	test 9215:18	9279:17	20,25 9213:3,7,	9263:22
9260:16 9261:7	9216:6 9227:20	9280:10	10,16,21,24	treaty 9199:19,
swore 9260:24	9243:22 9276:8,	9282:24 9285:6	9214:4,9,14,17	20,22 9200:3,
system	12	9287:3 9297:13	9216:21,25	16,18,25 9201:9
9229:20	there'd	times 9237:6	9223:5,9,11	9203:1,9,20
<hr/>	9216:15	timing 9250:20	9226:1,16,25	9205:20,23
T	thing 9212:24	9257:14	9227:7,10,13,	9206:8,17,22,24
<hr/>	9266:17 9283:4	9261:11	16,21 9228:13,	9207:16,18,19
tab 9208:4	9284:9 9288:3	title 9212:21	23 9229:16,24	9208:11,14,16
9234:17,21	9293:24 9298:1	9213:11 9232:2,	9230:6,17,21	9211:21
table 9199:21	things	3 9234:13,23	9231:3,6	9212:16,17
9221:15	9199:12,14	9235:5,9	9233:12	9219:12 9220:7,
9252:20	9225:4 9231:9	to-dos's	9244:15 9245:2	11,24 9221:14,
takes 9261:15	9244:12,14	9298:3	9248:6 9249:8	17,21 9232:1
9286:19	9252:17 9254:6,	today 9198:16	9251:18	9235:8 9241:11
taking 9207:19	13,20 9262:23	9207:4 9213:8	9253:21 9257:9	9242:9,11
9220:24	9290:13 9291:7,	9218:16	9259:4 9262:25	9267:25
9222:20	13	9219:10	9270:22	9280:19,21,25
9268:15 9280:2	thinking	9231:17	9280:15	9281:19
talk 9202:2	9255:23	9235:10	9281:13 9282:5,	9282:12
	9294:15 9296:2	9264:19	14,21 9284:3,	trial 9198:16,
		9274:17,24	12,14,24	18,20 9199:9,11
		9290:15	9285:7,10,15,23	9200:9 9202:8
		told 9201:25	9286:20,23	9203:21 9206:6,
		9211:18 9233:2	9287:2,19,25	
			9288:25 9289:3,	
			22,24 9290:5,8	
			9291:10,17	
			9292:5,8,19,21,	

7 9209:23,24 9210:9,10,13 9211:13 9212:3, 11 9216:24 9221:8 9222:22 9224:23 9226:4, 9 9227:2,3 9228:8,12,15,16 9229:10,12 9232:19 9233:1 9244:20 9245:3 9247:14 9248:4, 17 9256:13,25 9257:14,16 9258:7,25 9260:2 9261:18 9262:1,7 9263:17 9264:5 9266:15 9272:20,23 9275:2 9284:2 9285:12 9286:12 9290:10,12 9291:4,5,19,22 9295:16,18	turns 9211:3 two-month 9228:8,12 9245:3 9272:23 two-step 9257:23 9258:1 two-week 9275:20 type 9216:10 9251:17 9252:12 typical 9261:15	undertaking 9250:16 9295:20 undone 9199:13 unimportant 9287:7 unique 9250:3 uniquely 9276:24 unjust 9236:4, 8 9238:13 9239:16 9243:8 9268:25 9276:13 unnecessary 9254:6 unpredictabl e 9284:10 unreasonable 9238:22 unsold 9242:10,12 unsuitable 9242:3 unusual 9261:25 Upper 9281:14 upstairs 9294:24 9295:10 urging 9279:22	vary 9251:22 view 9215:16 9250:1 9255:1 9259:8 9264:9 9283:23 9292:17 9293:12 viewed 9216:6 vii 9234:22 visit 9267:21	wondering 9293:24 word 9293:1 9294:23 worded 9211:6 wording 9233:11 9236:6 words 9230:14 9284:23 work 9218:12 9230:16 9249:2, 5,25 9256:3 9274:12 9286:15,17 9294:10 9297:23 worked 9274:6 workwise 9255:17 worried 9271:20 worry 9253:24 worse 9292:9, 14,17 wrap 9297:18 write 9296:12 writing 9297:2 written 9243:23 wrong 9202:3 9203:5 9290:20, 24
trials 9228:19 9229:21,22 true 9243:1 9283:2 trust 9204:7 9205:6,8 9219:15,16 9220:19 9235:25 9236:4 9238:13,19,25 9239:10,16 9240:4 9243:4, 13 9246:1 9251:19,24 9252:2,16,22 9253:15 9275:24 9276:10,15 9277:5 9281:8 9282:9 trusts 9235:17, 20 9236:7 9243:17 turn 9287:6 Turning 9222:2	<hr/> U <hr/> ultimately 9294:24 uncertain 9229:13 uncertainty 9229:23 unchallenged 9261:1 undeniable 9241:9 undergoing 9279:19 understand 9202:23 9204:1 9205:19 9206:5, 11 9207:6,9 9222:24 9225:16,19 9226:6,10 9228:17 9230:2 9231:1 9243:14 9244:6 9247:20 9257:24 9258:14 9259:1 9273:21 9285:2 understandin g 9207:12 9274:13 understood 9204:17 9211:5 9248:14	<hr/> V <hr/> validity 9206:8,22 9207:15 9280:19 Van 9281:9 variables 9262:15 varied 9255:1 variety 9273:8	<hr/> W <hr/> wade 9239:13 Wagner 9281:9 wait 9252:6 waited 9214:2 walk 9292:2 Wall 9261:13 wanted 9199:17 9252:4 9266:17 9285:2 week 9199:2 9273:1 weeks 9223:1 9273:1 9275:11 weigh 9246:22 whatsoever 9219:4 Williams 9261:13 win 9200:13 9219:2 wishes 9219:11 9257:11 9297:25 withdrawn 9231:24 witness' 9257:2 witnesses 9241:18,19	<hr/> Y <hr/> year 9213:18, 23 9228:16 9230:10 9245:4 9286:19 year's 9212:11 years 9199:9 9201:24 9218:11 9219:3 9228:15 9237:7 9239:12 9242:9,

11 9269:13
9290:25
9291:25