

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

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VOL 26 DAY 26  
July 12, 2019

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1 Court File No. 94-CQ-50872CM

2 ONTARIO

3 SUPERIOR COURT OF JUSTICE

4 B E T W E E N:

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

Plaintiffs

7 - and -

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

Defendants

17 Court File No. 03-CV-261134CM1

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

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

Plaintiffs

21 - and -

22 THE, ATTORNEY GENERAL, OF CANADA and HER MAJESTY  
23 THE QUEEN IN RIGHT OF ONTARIO

Defendants

24 -----  
25 --- This is VOLUME 26 / DAY 26 of the  
transcript 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 12th day  
of July 2019.

26 B E F O R E:

The Honourable Justice Wendy M. Matheson

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

2 Cathy Guirguis, Esq., for the Plaintiffs,  
3 & Renee Pelletier, Esq., The Chippewas of  
4 & H.W. Roger Townshend, Esq. Saugeen First  
5 & Benjamin Brookwell, Esq., Nation, and the  
6 & Chris Evans, Esq., Chippewas of Nawash  
7 First Nation.

8  
9 Michael Beggs, Esq., for the Defendant,  
10 & Michael McCulloch, Esq., Attorney General  
11 & Barry Ennis, Esq., of Canada.

12  
13  
14 David Feliciant, Esq., for the Defendant,  
15 & Jennifer Le Pan, Esq., Her Majesty the  
16 & Richard Ogden, Esq., Queen in Right of  
17 & Julia McRandall, Esq., Ontario.

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INDEX OF EXHIBITS

NO. / DESCRIPTION

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NONE MARKED.

09:33:11 1 --- Upon commencing at 10:02 a.m.

10:03:10 2 THE COURT: Morning, Mr. Beggs.

10:03:12 3 MR. BEGGS: Morning, Your Honour.

10:03:19 4 THE COURT: Before you begin your

10:03:20 5 motion I will confirm I have received the

10:03:22 6 material from both sides. In your case the

10:03:24 7 factum, motion record, book of authorities, and

10:03:28 8 updated report of your expert witness. Is there

10:03:31 9 anything else I should have received from you,

10:03:32 10 sir?

10:03:33 11 MR. BEGGS: Not for the motion, Your

10:03:34 12 Honour.

10:03:36 13 THE COURT: I think for the voir dire

10:03:38 14 I just have a second book of authorities, is

10:03:40 15 that correct?

10:03:41 16 MR. BEGGS: That's correct, Your

10:03:42 17 Honour.

10:04:18 18 THE COURT: Who is doing the motion

10:04:19 19 for the plaintiffs?

10:04:22 20 MS. PELLETIER: I am, Your Honour.

10:04:23 21 THE COURT: Ms. Guirguis.

10:04:25 22 MS. PELLETIER: Pelletier.

10:04:26 23 THE COURT: Sorry. Right.

10:04:29 24 Ms. Pelletier. Didn't see your name.

10:04:32 25 MS. PELLETIER: Morning.

10:04:33 1 THE COURT: All right.

10:04:34 2 MS. PELLETIER: Ms. Guirguis will be  
10:04:35 3 doing the voir dire.

10:04:44 4 THE COURT: I knew one of you was  
10:04:44 5 doing each of them.

10:04:54 6 Just while my computer is starting,  
10:04:56 7 I'll just go through, Ms. Pelletier. So in your  
10:05:00 8 case I have a compendium, a three-volume record,  
10:05:03 9 a factum, a book of authorities and a  
10:05:07 10 supplementary case that came by e-mail.

10:05:10 11 MS. PELLETIER: That should be it,  
10:05:11 12 Your Honour.

10:05:13 13 THE COURT: Okay. All right.  
10:05:21 14 Mr. Beggs, please go ahead.

10:05:25 15 MR. BEGGS: Thank you, Your Honour.  
10:05:25 16 As you know, this morning is a motion pursuant  
10:05:32 17 to Rule 53.08(1), seeking leave, if necessary,  
10:05:38 18 for the filing of the larger or full  
10:05:47 19 Dr. von Gernet report.

10:05:52 20 As my friend pointed out, and she can  
10:05:56 21 speak to it as she wishes, but we provided a  
10:05:59 22 revised copy of that report earlier this week, I  
10:06:06 23 think. And so she's only had the opportunity to  
10:06:10 24 review mostly the 2018 report and so most of the  
10:06:15 25 discussion will pertain to that 2018 report,

10:06:18 1 except as noted by Your Honour.

10:06:21 2 THE COURT: Well, you know, I don't  
10:06:21 3 want to waste everyone's time, which is what it  
10:06:25 4 starts to feel like if we're going to have a  
10:06:27 5 motion over a report that is not the report that  
10:06:30 6 you're asking the court to give you leave for.

10:06:33 7 So, if that's the situation then we're  
10:06:35 8 going to have to deal with it right now because  
10:06:37 9 there is no point to it.

10:06:38 10 Now, having received Ms. -- the letter  
10:06:42 11 was Ms. Pelletier's letter, I noticed that at  
10:06:46 12 the very, very beginning of that report was a  
10:06:49 13 discussion about the reasons for which an  
10:06:54 14 updated report was prepared. And, counsel, I  
10:06:57 15 understand that that should be discussed this  
10:07:02 16 morning; but if what you're saying is that  
10:07:04 17 you're not making a motion on the report you  
10:07:06 18 want leave for then we better stop right now.

10:07:09 19 So what is your position?

10:07:17 20 MS. PELLETIER: Your Honour, Mr. Beggs  
10:07:18 21 and I had a chance to e-mail about this  
10:07:21 22 yesterday. And what I would propose be the  
10:07:23 23 appropriate way to go forward is to have the  
10:07:25 24 motion be about the October 2018 report, for a  
10:07:28 25 few reasons.



1                   Number one, it's the one that we  
2 prepared our materials to respond to; but also,  
3 just practically speaking, the first argument  
4 that Canada's raising is that the report is not  
5 late and that it is in reply to McCarthy.

6                   Should Your Honour wish to actually  
7 get into the weeds of that and take a look at  
8 the report to determine whether or not it is  
9 responsive to McCarthy, I'm not sure how you can  
10 do that by looking at the 2019 report. Just  
11 from a practical perspective that poses a  
12 problem.

13                  But I would think that the appropriate  
14 way to go forward, and I believe Mr. Beggs  
15 agrees with me, would be for Canada to seek  
16 leave -- or to seek the enter the 2018 report.  
17 Should that be granted then it is up to Canada  
18 to seek leave to file an amended report, being  
19 the 2019 report.

20                  THE COURT: Then we have two motions,  
21 which is inefficient, so I can't imagine.

22                  MS. PELLETIER: I would hope that we  
23 could deal with the leave to file an amended  
24 report, in the event that they get the first  
25 report in, perhaps on consent, but I'm afraid I

10:08:30 1 can't commit to that because I haven't had a  
10:08:32 2 chance to review the 2019 the report in detail.

10:08:36 3 THE COURT: Why is it that -- well,  
10:08:37 4 maybe this is for Mr. Beggs and not you, but why  
10:08:37 5 is it that we should deal with this today in  
10:08:43 6 that situation?

10:08:44 7 I mean, I completely understand  
10:08:45 8 because I have, you know, done this with the new  
10:08:47 9 report and it does not indicate in any visual  
10:08:51 10 way what's been changed, and it's 300 pages  
10:08:55 11 long. So, no, I do not expect that you would  
10:08:57 12 have had a chance, short of asking Mr. Beggs for  
10:09:00 13 a black-line, which I presume is open to you.

10:09:04 14 MS. PELLETIER: Which I was going to  
10:09:04 15 do, yes.

10:09:05 16 THE COURT: To familiarize yourself  
10:09:07 17 with the comprehensive changes because there's  
10:09:09 18 no way to see them, so that's fine.

10:09:13 19 But I'm very reluctant to have a  
10:09:16 20 significant ruling on what will turn out to be  
10:09:18 21 an academic issue.

10:09:24 22 MS. PELLETIER: Well, I would imagine,  
10:09:24 23 Your Honour, that in the event the 2018 report  
10:09:26 24 gets in, the only issue that remains is what  
10:09:30 25 version of that gets filed? Presumably if it's

1 not -- if after having had a closer review of  
2 the 2019 report the plaintiffs take issue with  
3 some parts of it we can address that. I can't  
4 imagine that it's going to result in no report  
5 getting filed.

6 THE COURT: Have a seat because I  
7 really should be examining Mr. Beggs.

8 Mr. Beggs, here's my concern. Just as  
9 it does not surprise me that plaintiff's counsel  
10 have not had enough time to properly review this  
11 updated report, it also does not surprise me  
12 that, as discussed in the opening section of the  
13 new report, where it is directly addressed why  
14 there is a new report, it does not surprise me  
15 to read, as I did in that section, that this  
16 gentleman's old report was based on other old  
17 reports which have since been themselves  
18 changed, or removed, or updated and are no  
19 longer part of this trial.

20 So if I read that section of your  
21 expert report correctly, what he said, among  
22 other things, was that he wrote his 2018 report  
23 in response to a report by Dr. McCarthy, or  
24 excuse me, Professor McCarthy, who has now  
25 testified in this trial and a different report

10:10:55 1 from her is in evidence here.

10:10:58 2 And the significance of that is  
10:11:00 3 unknown because the plaintiffs haven't had a  
10:11:02 4 chance to look it over.

10:11:05 5 So the thing I'm concerned about is  
10:11:08 6 why are we having this motion over an old  
10:11:12 7 report, based on other old reports?

10:11:15 8 The issue for me -- as I understand it  
10:11:17 9 under the Rules there's two issues. One is,  
10:11:19 10 were you late with the old report? But the  
10:11:22 11 other, and the one that the parties have spent  
10:11:24 12 the most time on is, if you were late, or if  
10:11:27 13 this new report is late, there's a test under  
10:11:29 14 the Rules under which I will consider whether or  
10:11:32 15 not you can go ahead. And that test is not  
10:11:36 16 considered in hindsight back in 2018 it is  
10:11:39 17 considered as of today; and as of the evidence  
10:11:44 18 in this trial now; and as of the report of  
10:11:47 19 Professor McCarthy that was made an exhibit in  
10:11:50 20 this court a month ago, not what the situation  
10:11:52 21 was in October of last year.

10:11:54 22 So how is it helpful to have a motion  
10:11:59 23 over the old report, which is not what you  
10:12:02 24 intend to use in this trial at this time anyway?  
10:12:07 25 I'm not saying you can't have a motion I'm just

10:12:10 1 puzzled about how we should be going ahead with  
10:12:13 2 it now.

10:12:14 3 MR. BEGGS: Yes, Your Honour.

10:12:15 4 THE COURT: Unless the parties --  
10:12:15 5 sorry, I'm going to continue. Unless the  
10:12:18 6 parties have agreed that it can be based on the  
10:12:20 7 new report, which has not been agreed, as I  
10:12:23 8 understand it, from plaintiff's counsel.

10:12:26 9 MR. BEGGS: Yes, Your Honour. All of  
10:12:27 10 what you've said is correct. And in light of  
10:12:35 11 that there hasn't been agreement. In light of  
10:12:40 12 that perhaps it would be necessary to do -- just  
10:12:43 13 stand down the motion to another date to give,  
10:12:46 14 in fairness, Ms. Pelletier time to the review  
10:12:54 15 it. And we would, as suggested, provide a  
10:12:58 16 marked copy to draw attention to any changes.

10:13:02 17 THE COURT: Okay. So you would  
10:13:03 18 provide an annotated, or underlined, or marked,  
10:13:05 19 or black-lined copy?

10:13:07 20 THE WITNESS: Yes, Your Honour.

10:13:09 21 THE COURT: That would pinpoint every  
10:13:10 22 change?

10:13:11 23 MR. BEGGS: Yes, Your Honour.

10:13:14 24 THE COURT: And when could you do  
10:13:15 25 that? Presumably it would not take long because

1 a computer can produce that.

2 MR. BEGGS: Yes, that can be done --  
3 today's Friday so presumably it can be done by  
4 Tuesday.

5 THE COURT: All right. Tuesday? Not  
6 Monday?

7 MR. BEGGS: Well, it probably depends  
8 on how early we get out of here today, but yes,  
9 it could --

10 THE COURT: The reason I'm asking  
11 about it is, having read all of the materials,  
12 and thank you all for preparing very  
13 well-prepared material, leaving aside the  
14 question which I will have to decide about  
15 whether the old report was late and how that  
16 fits, given that there's now a new report. The  
17 test under the Rules that I'm obliged to provide  
18 is as of today not as of October 2018, so I  
19 don't see how I can decide the motion on --  
20 well, let me change that.

21 If I was to decide the motion based on  
22 the old report it would seem to me a rather  
23 academic exercise since if you read the first  
24 six pages of your expert report he says clearly  
25 that for some reasons, which are specified, it

1 makes sense to update his report.

2 So, hearing that you did try to talk  
3 to each other, which is great, but you did not  
4 conclude, for perfectly good reasons, that you  
5 could go ahead today on the new report, which  
6 would have been fine with me. I'm really quite  
7 troubled at the utility of going ahead now.

8 Here's a question really for  
9 plaintiff's counsel not for you. Ms. Pelletier,  
10 if you were able to get the black-line say by  
11 Monday -- have a seat, Mr. Beggs -- we have time  
12 next Friday, you know, it's not a long delay.

13 We have a very -- we have a gap day on  
14 Friday, I've already put one short matter in  
15 there, but do you think that if you received a  
16 black-line on Monday, or even if possible this  
17 afternoon, but I wouldn't require that, that  
18 would give you adequate time to consider the  
19 revised report, which is the report that Canada  
20 is seeking leave for ultimately? Would you  
21 think that would be enough time, counsel?

22 MS. PELLETIER: I imagine that would  
23 be, Your Honour. I guess my practical question  
24 is, you've read our materials, they're talking  
25 about the 2018 report. Would you like the

10:15:45 1 parties to file revised materials that are  
10:15:49 2 specific to the 2019 report? I mean, I imagine  
10:15:53 3 you would.

10:15:53 4 THE COURT: Well, let me put it  
10:15:55 5 another way, in any motion like this both sides  
10:15:58 6 always need to focus on the entire chronology,  
10:16:01 7 and that chronology inevitably includes that  
10:16:04 8 report.

10:16:05 9 So, even though it would not be the  
10:16:07 10 report that today Canada is seeking leave for  
10:16:10 11 it's still a relevant part of that story. And  
10:16:14 12 so I would regard everything I've received as  
10:16:16 13 relevant, but I would certainly allow either or  
10:16:20 14 both of you to file any supplementary material  
10:16:24 15 that you felt necessary to adequately brief the  
10:16:27 16 significance, if any, of the revisions to the  
10:16:31 17 report made recently. So I have no problem with  
10:16:36 18 that.

10:16:37 19 You know, you can send in -- I  
10:16:39 20 wouldn't redo anything, I think that's  
10:16:40 21 unnecessary, but you can send in, you know,  
10:16:43 22 supplementary, short supplementary material, or  
10:16:47 23 long supplementary material, it doesn't really  
10:16:50 24 matter, but something that deals with whatever  
10:16:52 25 you discover beyond that introductory section of



10:16:55 1 this gentleman's updated report. That's fine.

10:16:58 2 MS. PELLETIER: That works for me,  
10:16:59 3 Your Honour.

10:17:01 4 THE COURT: And, Mr. Beggs, I take it  
10:17:03 5 that would be satisfactory from your standpoint?

10:17:06 6 MR. BEGGS: Yes, Your Honour, I don't  
10:17:07 7 believe we'll need any supplementary materials.

10:17:12 8 THE COURT: Well, you know, never say  
10:17:12 9 never.

10:17:12 10 Okay. I think the only practical  
10:17:14 11 thing to do in these circumstances is to adjourn  
10:17:17 12 this motion to next Friday, and I would ask that  
10:17:19 13 if either or both of you do wish to file any  
10:17:22 14 supplementary material that you get it over  
10:17:25 15 to -- I can't remember what we're doing on  
10:17:32 16 Thursday at the moment.

10:17:38 17 MR. BEGGS: I think it was part of  
10:17:40 18 Lenore Keeshig's evidence.

10:17:43 19 THE COURT: Yes, and we don't know how  
10:17:45 20 long that will go, or whether we'll have time.

10:17:50 21 I guess in the circumstances what I  
10:17:51 22 would ask is that if we're sitting on Thursday  
10:17:54 23 through the day that you bring it to court so I  
10:17:58 24 can have it by midday. If we get done  
10:18:04 25 Ms. Keeshig early then I would ask for it to be

1 sent over to my office in the morning of the  
2 Thursday so I would have time to review it. All  
3 right?

4 So here's the hard question for you,  
5 Mr. Beggs, when is your witness coming to be  
6 voir dire?

7 MR. BEGGS: Well, he is here right now  
8 if we can proceed today with that, in any event  
9 so he doesn't --

10 THE COURT: Is he ready to go? Is  
11 that him in the back?

12 MR. BEGGS: That is him, yes.

13 MR. VON GERNET: Yes, Your Honour.

14 THE COURT: Good morning, sir.

15 MR. VON GERNET: Good morning.

16 THE COURT: So is there any difficulty  
17 with continuing with our other agenda item from  
18 today?

19 MS. PELLETIER: No difficulty, just  
20 one clarification question. Will you still have  
21 before you the 2018 report to deal with was it  
22 properly in reply to McCarthy, and/or is it late  
23 question? Will we be dealing with two reports?

24 THE COURT: Let me put it this way,  
25 given that Mr. Beggs has confirmed to me this

10:19:05 1 morning that it is the 2019 report about which  
10:19:08 2 he ultimately wishes to put in front of this  
10:19:10 3 court as evidence, it's not surprising, given  
10:19:14 4 the reasons for its preparation, then the 2018  
10:19:19 5 report becomes part of the story, if you will,  
10:19:22 6 and relevant, I assume, part of the factual  
10:19:25 7 basis upon which this motion will proceed.

10:19:30 8 In other words, I would assume  
10:19:31 9 Mr. Beggs may still stand up and say the 2018  
10:19:35 10 report was on time and I should consider that as  
10:19:38 11 part of the reason why leave should be granted.

10:19:42 12 MS. PELLETIER: Understood.

10:19:43 13 THE COURT: Is that correct,  
10:19:43 14 Mr. Beggs?

10:19:44 15 MR. BEGGS: Yes, Your Honour.

10:19:45 16 THE COURT: Any other loose ends. I  
10:19:48 17 see Ms. Guirguis standing up, she's the one who  
10:19:52 18 would be dealing with the next subject matter.  
10:19:54 19 What have you got to say, counsel.

10:19:56 20 MS. GUIRGUIS: Good morning, your  
10:19:56 21 Honour. So the only issue in terms of  
10:19:57 22 proceeding with the voir dire is that I was  
10:20:00 23 going to refer to Dr. von Gernet's report, the  
10:20:04 24 October 2018 report. I can, I suppose, refer to  
10:20:07 25 the July 2019 but it provides -- it creates some

10:20:12 1 confusion in terms of proceedings.

10:20:14 2 THE COURT: So you're saying that you  
10:20:16 3 were going to cross-examine him on the 2018  
10:20:18 4 report?

10:20:21 5 MS. GUIRGUIS: Yes.

10:20:21 6 THE COURT: Which you can still do.

10:20:23 7 MS. GUIRGUIS: Which I can still do.

10:20:24 8 THE COURT: So the question then  
10:20:25 9 becomes, counsel, do you wish in this voir dire  
10:20:29 10 to also use the 2019 report? I guess you  
10:20:36 11 probably don't know.

10:20:37 12 MS. GUIRGUIS: I probably don't know.  
10:20:39 13 I think that the -- I think the parts that I'm  
10:20:45 14 going to refer to have not changed, except for  
10:20:56 15 the references and so on.

10:20:57 16 THE COURT: Well, it's your call  
10:20:58 17 counsel. If your submission is that you would  
10:21:00 18 need time as well to confront the 2019 report in  
10:21:05 19 the context of the voir dire then so be it, but  
10:21:09 20 you're going to have to make that decision and  
10:21:11 21 tell me what you want. And then we can explore  
10:21:15 22 whether or not Dr. von Gernet is available next  
10:21:19 23 Friday. No, he's not.

10:21:22 24 We don't need to do -- Dr. von Gernet,  
10:21:26 25 sorry about all of this. Not of your making or

1 mine, I should say. It was a convenience that  
2 we were doing the two together not a necessity.

3 So you, counsel, will have to tell me,  
4 if you wish more time to prepare for your  
5 cross-examination, having regard for the fact  
6 that it's the new report and not the old report  
7 that's put forward then just say so, but I'm not  
8 going to make that decision for you.

9 MS. GUIRGUIS: Can you give me a  
10 moment, Your Honour, to consult?

11 (Discussion amongst counsel.)

12 Unfortunately, Your Honour I think  
13 that I will want to consult the 2019 report  
14 prior to proceeding.

15 THE COURT: Mr. Beggs, are you taking  
16 any objection to that being deferred as well?

17 MR. BEGGS: No, Your Honour. We'll  
18 look for the earliest available time for  
19 Dr. von Gernet.

20 THE COURT: Well, I do think that  
21 fairness requires that the plaintiffs have time  
22 to review the report that's actually being the  
23 subject of the motion, and obviously the voir  
24 dire is on the report that would be tendered.

25 So, I agree with the position of the

10:23:17 1 plaintiffs that they need more time for both  
10:23:20 2 matters. And I think that we'll still be able  
10:23:23 3 to do the motion on -- next Friday, which will  
10:23:26 4 significantly advance the entire project,  
10:23:28 5 because then plaintiff's counsel will know what  
10:23:33 6 they're dealing with.

10:23:35 7 So that is a partial solution and  
10:23:40 8 Mr. Beggs will be alive to the need to fit in  
10:23:45 9 the voir dire at some point. So I'm sorry about  
10:23:48 10 all that because I think we were going to get  
10:23:51 11 lots done today and it's now going to be  
10:23:53 12 deferred, but next Friday was available so that  
10:23:55 13 is helpful.

10:23:56 14 Doctor, very nice that you came today,  
10:24:00 15 thank you. Sorry that we're not able to proceed  
10:24:03 16 with your matter. Perhaps if -- I don't know if  
10:24:05 17 one of Canada's counsel wants to step out and,  
10:24:09 18 while we talk about other matters, if they want  
10:24:14 19 to explain all of this to their expert that's  
10:24:17 20 fine, it's up to you.

10:24:20 21 So that's fine. And now I'm just  
10:24:23 22 wanting, since we're all here, to raise the  
10:24:25 23 question of going over our plan for next week.  
10:24:30 24 Which of you is calling the expert who's coming  
10:24:33 25 on Monday, whose name temporarily escapes me.

10:24:43 1 MR. TOWNSHEND: It is not an expert,  
10:24:45 2 Your Honour, it's Paul Jones who's a lay  
10:24:48 3 witness.

10:24:48 4 THE COURT: Thank you, Mr. Townshend,  
10:24:48 5 let me go through my schedule. There is an  
10:24:51 6 expert coming next week, is there not?

10:25:00 7 MR. TOWNSHEND: No, Your Honour.

10:25:00 8 THE COURT: No, there's not. So we  
10:25:01 9 have three fact witnesses next week.

10:25:04 10 MR. TOWNSHEND: That's correct.

10:25:06 11 THE COURT: And then Professor  
10:25:06 12 Brownlie the following week.

10:25:14 13 When is the U.S. law expert coming.

10:25:18 14 MR. TOWNSHEND: He is coming in  
10:25:19 15 September, I think at the very end of September,  
10:25:21 16 if I recall correctly.

10:25:23 17 THE COURT: I'm not seeing him  
10:25:23 18 actually on the schedule.

10:25:23 19 MR. TOWNSHEND: The 1st of October.

10:25:42 20 THE COURT: Oh, is it Greene?

10:25:42 21 MR. TOWNSHEND: Yes. We canvassed the  
10:25:43 22 idea of trying to call him earlier to fill in  
10:25:46 23 the time but he's not available.

10:25:55 24 THE COURT: Because all of the other  
10:25:56 25 witnesses are long witnesses.

10:25:59 1 MR. TOWNSHEND: Yes.

10:26:00 2 THE COURT: I'm just thinking about  
10:26:01 3 next week and if there's anything else, but I  
10:26:03 4 guess if we're going to do this motion on the  
10:26:04 5 Friday that partly fills the schedule for next  
10:26:18 6 week.

10:26:19 7 Is there anything else we can do since  
10:26:19 8 we got together this morning?

10:26:23 9 MR. BEGGS: Yes, Your Honour, I can  
10:26:23 10 advise -- I had indicated a rough order of  
10:26:25 11 witnesses. I can advise that we know our first  
10:26:27 12 witness now would be Professor Beaulieu.

10:26:34 13 THE COURT: Is he from Quebec?

10:26:36 14 MR. BEGGS: Yes, he is, and he's also  
10:26:37 15 a witness that had health concerns.

10:26:39 16 THE COURT: Yes.

10:26:40 17 MR. BEGGS: So we'll be starting with  
10:26:42 18 him -- now that we've been able to discuss the  
10:26:46 19 matter with him we'll start with him. He is a  
10:26:50 20 lengthy witness though. And I'm not sure if it  
10:26:56 21 needs to be resolved today but we might be  
10:26:59 22 asking for four days a week for him to -- due to  
10:27:03 23 his weakened health.

10:27:07 24 THE COURT: As I recall this gentleman  
10:27:09 25 it wasn't so much that you wanted to call him



10:27:12 1 sooner is that you thought you might have to  
10:27:13 2 call him later.

10:27:15 3 MR. BEGGS: We did originally believe  
10:27:16 4 that, but now we've learned that it works out  
10:27:19 5 better for his arrangements to proceed before  
10:27:23 6 Christmas.

10:27:25 7 THE COURT: Well, that should be no  
10:27:27 8 problem. Let me put it this way, sir, I said to  
10:27:33 9 counsel a few weeks ago, primarily you, that it  
10:27:37 10 was time for defendant's counsel to start  
10:27:41 11 confronting their time estimates.

10:27:44 12 MR. BEGGS: Yes, Your Honour.

10:27:45 13 THE COURT: Which had not been  
10:27:46 14 addressed in any fashion and looked like they  
10:27:49 15 needed to same focused attention that  
10:27:51 16 plaintiff's counsel were giving to their time  
10:27:53 17 estimates.

10:27:55 18 So what I'd like to see, I'm going to  
10:27:57 19 say by next Friday, is an updated schedule  
10:28:04 20 through to the end of the year, including the  
10:28:07 21 witnesses, having already discussed between you  
10:28:09 22 the revised time estimates.

10:28:12 23 Now, the difficulty -- obviously if  
10:28:17 24 this gentleman needs accommodation for health  
10:28:20 25 reasons that's fine. All right? That doesn't

1 mean we would sit four days a week necessarily,  
2 but it would mean we would have him four days a  
3 week.

4 I am concerned about the number of  
5 down days we're having. Now, that can be  
6 partially addressed at least by you all having a  
7 discussion about your upcoming time estimates,  
8 taking a hard look at them. If we can make some  
9 progress on that then it will be an easier  
10 situation when we get to the need to have breaks  
11 later in the year.

12 MR. BEGGS: Yes, Your Honour. It's  
13 possible to make use of that extra day of that  
14 fifth day in the week.

15 THE COURT: Because he's a very long  
16 witness. I'm looking at the -- I'm hoping that  
17 this estimate will not be, after careful  
18 attention, the same, for the same reasons as  
19 I've been urging plaintiff's counsel to be more  
20 efficient in their examinations in-chief given  
21 that the reports are going in.

22 MR. BEGGS: Yes, Your Honour, all of  
23 the estimates for the examinations in-chief will  
24 be reduced.

25 THE COURT: All right. So why don't

1 we do it this way, you all have your  
2 discussions, and thank you in advance because I  
3 know they're always productive, about the  
4 estimates.

5 And then you, sir, will have to do  
6 some work on the layout.

7 And before -- I know that Professor  
8 Brownlie is going to be more than a week so the  
9 following week is going to be full, so it would  
10 be convenient if maybe next Thursday or Friday  
11 if we have a gap we could use that to have a  
12 case conference over the schedule. That means  
13 you all have to get on it, but unfortunately or  
14 fortunately, depending on how you look at it,  
15 you will have all day today to make some head  
16 way. All right?

17 Is there anything else that anyone  
18 wishes to raise? Let me just look at my list.  
19 I always have something.

20 THE COURT: Let me ask about the  
21 status of the sealing motion.

22 MR. McCULLOCH: Your Honour, I'm in  
23 the process of drawing up the affidavit so I  
24 expect that the materials will be filed by the  
25 predicted date in August.

10:30:32 1 THE COURT: Can you remind me when  
10:30:34 2 that was, sir?

10:30:35 3 MR. McCULLOCH: The 15th.

10:30:36 4 THE COURT: The 15th of August?

10:30:39 5 MR. McCULLOCH: Yes.

10:30:47 6 THE COURT: Now, on the -- thank you,  
10:30:48 7 counsel, for conferring, I think this is  
10:30:51 8 Mr. Brookwell's world. And coming up with what  
10:30:54 9 I was shown this morning by Mr. Crossman was a  
10:30:57 10 very helpful solution to the marking up of the  
10:31:02 11 exhibits.

10:31:04 12 So Mr. Crossman showed me on a video  
10:31:09 13 link, whatever you call that, computer link,  
10:31:12 14 what it would look like. It's not presently  
10:31:15 15 part of our system but I thought it was fine so  
10:31:18 16 I think he is now going to implement that.

10:31:22 17 MR. BROOKWELL: Thank you, Your  
10:31:23 18 Honour.

10:31:23 19 THE COURT: And he says counsel has  
10:31:24 20 worked out the logistics.

10:31:27 21 MR. BROOKWELL: Yes, he sent us an  
10:31:29 22 email this morning and we all confirmed that  
10:31:30 23 we're content with him making the changes, and  
10:31:34 24 he expects they will be up and running early  
10:31:37 25 next week.

1 THE COURT: Yes.

2 MS. PELLETIER: I did have one thing,  
3 Your Honour. And, I'm sorry, there is one  
4 thing, Your Honour, so I did read as you had  
5 directed the sort of beginning section of the  
6 2009 report and had began to sort of skim  
7 through the rest.

8 One of the concerns that I anticipate  
9 that the plaintiffs will have is in the  
10 introduction section Dr. von Gernet says that he  
11 is not -- this new report is not responsive to  
12 the McCarthy 2019 report. He makes a point of  
13 saying that, and there are several instances  
14 where he does respond to the report and  
15 challenges some of her evidence. So that to  
16 me -- I imagine what the plaintiffs might want  
17 to do with that is suggest that there are  
18 certain portions that are outside of his  
19 expertise that those portions should be struck.

20 When would you like us to raise those  
21 issues? Because I appreciate we have a Motion  
22 that is supposed to be about prejudice and  
23 53.08, or lateness, and then we have a voir dire  
24 that is limited to bias. I'm just trying to  
25 figure out if that is the result of our review,

10:32:51 1 when would you like us to deal with those kinds  
10:32:53 2 of issues?

10:32:54 3 THE COURT: Well, I think what you're  
10:32:56 4 talking about is the scope of this gentleman's  
10:32:59 5 expertise. So we've already had one expert  
10:33:03 6 witness who was a qualified expert in certain  
10:33:07 7 areas but there was an additional area that  
10:33:09 8 there was a dispute that she had the requisite  
10:33:11 9 expertise so she was qualified in some but not  
10:33:15 10 all areas. Ordinarily that would get raised at  
10:33:18 11 the time of the tender.

10:33:19 12 But if that does reveal itself as a  
10:33:22 13 result of your review, I think it would be more  
10:33:25 14 efficient to combine that with the voir dire  
10:33:27 15 that's already going to be taking place.

10:33:30 16 MS. PELLETIER: Thank you.

10:33:31 17 THE COURT: So you should notify  
10:33:32 18 Canada that in addition to the already planned  
10:33:37 19 challenge that there would be a challenge on  
10:33:39 20 scope, and that way the ruling on the voir dire  
10:33:43 21 would cover off all matters preceding the exam  
10:33:46 22 in-chief. All right.

10:33:49 23 MS. PELLETIER: Thank you.

10:33:50 24 THE COURT: Anything else? No? No?

10:33:55 25 MS. PELLETIER: Oh. One other thing,

10:33:56 1 Your Honour. We seem to not be in agreement,  
10:34:01 2 Canada and the plaintiffs, on whether or not  
10:34:03 3 Dr. von Gernet would still need to be qualified  
10:34:06 4 in the event the longer report is not admitted  
10:34:09 5 and he is confined to his short report. The  
10:34:13 6 plaintiffs view that given that there is no  
10:34:15 7 opinion evidence, it is not an expert report,  
10:34:17 8 that there would be no need for a qualification.

10:34:20 9 And I can ask Mr. Beggs -- he can  
10:34:23 10 speak for himself -- but Canada does not take  
10:34:25 11 that position, I understand, and intends to try  
10:34:27 12 and qualify Dr. von Gernet the same, whether  
10:34:31 13 it's shorter report or longer report. When  
10:34:34 14 would you like to deal with that issue?

10:34:37 15 THE COURT: Again, that would probably  
10:34:38 16 be addressed at the voir dire stage.

10:34:41 17 MS. PELLETIER: Thank you.

10:34:41 18 THE COURT: The important thing is to  
10:34:42 19 make sure that Canada knows all of the bases  
10:34:46 20 upon which you would object to him being  
10:34:49 21 qualified as an expert witness and that they all  
10:34:52 22 be done at the same time. So that's an  
10:34:54 23 efficiency that comes out of all of this, right?

10:34:57 24 One more chance. No? Okay. Well,  
10:35:00 25 I'm not thrilled about this day being not used

10:35:04

1 but in the circumstances I think that's what's

10:35:05

2 going to happen.

3 --- Whereupon the proceedings were

4 adjourned at 10:35 a.m.

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REPORTER'S CERTIFICATE

I, HELEN MARTINEAU, CSR, Certified  
Shorthand Reporter, certify;

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

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

That the foregoing is a true and  
accurate transcript of my shorthand notes so  
taken. Dated this 21st day of July 2019.



PER: HELEN MARTINEAU  
CERTIFIED SHORTHAND REPORTER

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