

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

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VOL 29 DAY 29  
July 19, 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

- and -

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

Defendants

13 Court File No. 03-CV-261134CM1

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

15 CHIPPEWAS OF NAWASH UNCEDED FIRST NATION and  
16 SAUGEEN FIRST NATION

Plaintiffs

- and -

17 THE, ATTORNEY GENERAL, OF CANADA and HER MAJESTY  
18 THE QUEEN IN RIGHT OF ONTARIO

Defendants

19 --- This is VOLUME 29 / DAY 29 of the trial  
20 proceedings in the above-noted matter, being  
21 held at the Superior Court of Justice, 330  
22 University Avenue, Courtroom 5-1 Toronto,  
23 Ontario, on the 19th day of July 2019.

24 B E F O R E:

25 The Honourable Justice Wendy M. Matheson

1       A P P E A R A N C E S :  
2       Benjamin Brookwell, Esq.,     for the Plaintiffs,  
3       & Roger Townshend, Esq.,     The Chippewas of  
4       & Chris Evans, Esq.,         Saugeen First  
5       & Renee Pelletier, Esq.     Nation, and the  
6                                     Chippewas of Nawash  
7                                     First Nation.

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

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

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I N D E X

PAGE

Submissions on motion.....2859

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INDEX OF EXHIBITS

NO. / DESCRIPTION

PAGE

NONE MARKED.

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

10:01:59 2 THE COURT: Which books should I have  
10:02:00 3 handy, Mr. Beggs?

10:02:33 4 MR. BEGGS: Yes, Your Honour. Well,  
10:02:33 5 first of all, I should say that we handed up a  
10:02:33 6 copy of the marked-up report this morning.

10:02:33 7 THE COURT: Thank you.

10:02:33 8 MR. BEGGS: We also have a USB copy if  
10:02:33 9 you need it. We can pass that along later. As  
10:02:36 10 far as -- did you want to cover the inventory or  
10:02:36 11 just --

10:02:36 12 THE COURT: No, I'm sure I've got  
10:02:36 13 everything, and I understand from counsel  
10:02:36 14 there's no additional materials --

10:02:36 15 MR. BEGGS: No.

10:02:36 16 THE COURT: -- other than the ones I  
10:02:36 17 received last week. So which of the documents  
10:02:36 18 in the file that I have from you should I have  
10:02:36 19 handy?

10:02:36 20 MR. BEGGS: From me there is a white  
10:02:37 21 volume, the motion record of the defendant the  
10:02:40 22 Attorney General of Canada.

10:02:41 23 THE COURT: Yes.

10:02:42 24 MR. BEGGS: As well as the plaintiffs'  
10:02:43 25 volume 3 of the responding record which is --

10:02:45 1 sorry, my apologies, volume 1.

10:02:59 2 THE COURT: Okay.

10:03:00 3 MR. BEGGS: And then a copy of the  
10:03:02 4 expert report. I'm using a copy which has green  
10:03:02 5 on the copy, but we should be able to identify.  
10:03:02 6 That's the 2019 report. And I may have call to  
10:03:10 7 refer to my friends' factum, which is also in  
10:03:13 8 green, a small, thin volume.

10:03:16 9 THE COURT: All right.

10:03:19 10 Well, this is the motion by Canada for  
10:03:21 11 leave to use the July 2019 report of  
10:03:32 12 Dr. von Gernet. And I understand there's two  
10:03:40 13 main issues. One is whether its predecessor was  
10:03:44 14 timely. And the other is that, in any event,  
10:03:47 15 whether I should grant leave for you to proceed  
10:03:50 16 with this report under the rules.

10:03:51 17 Please, go ahead.

10:03:53 18 MR. BEGGS: Thank you, Your Honour.

10:03:55 19 I know that Your Honour has reviewed  
10:03:56 20 all of this material, so I don't intend to go  
10:03:59 21 through the factual material in depth. I know  
10:04:01 22 it's somewhat convoluted, but I think there's --  
10:04:03 23 the facts -- the essential facts are  
10:04:04 24 straightforward.

10:04:06 25 The deadline for the Dr. von Gernet

1 report after extensions, her original report,  
2 was February 29th, 2016. Canada did not meet  
3 that deadline and no report -- that report was  
4 never served.

5 The plaintiffs' deadline for filing  
6 reports was September 30th, 2013. The  
7 plaintiffs served the McCarthy report on  
8 September 2nd, 2018. Six weeks later Canada  
9 filed the report of Dr. von Gernet that's at  
10 issue, the -- explicitly replying to  
11 Dr. McCarthy, but which, admittedly, used a  
12 great deal of material from the previous report.

13 So I won't spend too much time on the  
14 facts. There was two points that I wanted to  
15 address from my friends' materials. One is that  
16 my friends say that Canada's first deadline was  
17 March 31, 2014. That would be somewhat unfair  
18 to the defendants because the plaintiffs -- the  
19 deadline was set out in the order of Master  
20 Hawkins, dated 14th of January, 2013.

21 But that deadline was an extension of  
22 the plaintiffs' deadline and the plaintiff --  
23 which plaintiffs were unable to meet, but their  
24 reports were -- that batch of reports was  
25 completed in January of 2014. So it was not



1 really expected on the parties, and everyone  
2 proceeded on the assumption that Canada and  
3 Ontario didn't need to meet the March 31st  
4 deadline after getting the reports by January.  
5 So none of the parties returned to the case  
6 management master until March 2015.

7 Secondly, the implication that the  
8 first McCarthy report, which my friends have  
9 helpfully included, was only about geology is  
10 simply incorrect. The McCarthy report, the  
11 original McCarthy report had -- was filled with  
12 comments about the stories, and in that respect  
13 I would take you to my friends' record, volume  
14 1.

15 THE COURT: Yes.

16 MR. BEGGS: It's tab I of volume 1.  
17 It's Dr. McCarthy's original report. And  
18 looking at page 2, which is page 105 of the  
19 report -- or sorry, 105 of the record, at the  
20 bottom of this report it states:

21 "The purpose of this report is to  
22 examine the stories of the Anishinaabe  
23 people in light of recent discoveries  
24 of the Lake Huron basin and assess  
25 whether the myths and legends appear

1 to have basis in historical  
2 events/processes."

3 So Dr. McCarthy was not limiting  
4 herself at that time to simply geology.

5 So with those corrections though, I  
6 would leave the factual record as it is and move  
7 on to the legal test of admitting a late report.

8 Now, of course we're relying on  
9 section -- or rule 53.08 sub 1 and 2, and sub 2  
10 identifies the rules that are live. And sub 2,  
11 sub 5 states that sub rule 53.03 sub 3, the  
12 failure to serve expert reports, and by  
13 implication in a time -- on the timelines,  
14 requires leave from the judge.

15 THE COURT: You're looking at 53.08  
16 sub 1?

17 MR. BEGGS: I'm sorry?

18 THE COURT: You're looking at 53.08  
19 sub 1?

20 MR. BEGGS: Well, I'm just quoting  
21 from 53.08 sub 2, but now I'm looking at 53.08  
22 sub 1. So 53.08 sub 2, sub 5 makes this issue  
23 --

24 THE COURT: All right.

25 MR. BEGGS: -- one that this rule

10:08:30 1 applies to. So 53.08 sub 1 states:

10:08:35 2 "If evidence is admissible only  
10:08:37 3 with the leave of the trial judge,  
10:08:38 4 under provision listed in sub rule 2,  
10:08:42 5 Leave shall be granted on such terms  
10:08:45 6 as are just and with an adjournment if  
10:08:46 7 necessary, unless to do so would cause  
10:08:48 8 prejudice to the opposite party or  
10:08:51 9 will cause undue delay in the conduct  
10:08:52 10 of the trial."

10:09:00 11 So my friends have stated in their  
10:09:03 12 materials that they're not arguing that this  
10:09:05 13 report, being the full report being submitted,  
10:09:09 14 would cause undue delay, and that's very  
10:09:12 15 helpful. We appreciate that.

10:09:15 16 With respect to prejudice, my friends  
10:09:17 17 have identified some points that they regard as  
10:09:20 18 causing prejudice.

10:09:23 19 I would suggest that these types of  
10:09:24 20 prejudices identified by the plaintiffs are not  
10:09:27 21 the types that would normally be considered at  
10:09:29 22 this -- in this type of motion. My friends  
10:09:34 23 indicate that case management deadlines are to  
10:09:36 24 be respected and that granting leave to admit  
10:09:40 25 this report would essentially give Canada a

10:09:46 1 blank cheque to defy case management orders.

10:09:52 2 In that respect I would say it's an  
10:09:54 3 unfortunate reality that sometimes in litigation  
10:09:57 4 expert reports are late due to reasons beyond  
10:10:00 5 anyone's control.

10:10:03 6 I've already indicated that my friends  
10:10:07 7 filed a late McCarthy report. They filed other  
10:10:10 8 reports as well that were late, and we didn't  
10:10:13 9 object to those. Instead we chose to reply with  
10:10:17 10 Dr. von Gernet's report. To be specific,  
10:10:24 11 another example would be the report of  
10:10:27 12 Dr. Williamson served on July 31st, 2017.

10:10:33 13 My friends state that they have  
10:10:34 14 suffered prejudice by withdrawing the Keeshig  
10:10:38 15 report, the Lenore Keeshig report and revising  
10:10:41 16 the McCarthy report. I'm somewhat surprised at  
10:10:47 17 this. We never asked them to do either thing.  
10:10:52 18 We had a position that Lenore Keeshig was not  
10:10:57 19 qualified to opine on questions of geology and  
10:11:04 20 paleobotany and such and also that there was  
10:11:08 21 real concerns with a member of the plaintiff  
10:11:10 22 First Nation who stood to benefit being  
10:11:13 23 considered an expert under the Rules of Civil  
10:11:16 24 Procedure.

10:11:16 25 We of course didn't have any objection

10:11:21 1 to her testifying, as she has, providing us the  
10:11:25 2 benefit of her oral traditions.

10:11:31 3 THE COURT: Remind me, I'm just  
10:11:33 4 looking for my notes for the document on which  
10:11:38 5 the plaintiffs rely, which is a minute arising  
10:11:44 6 out of the case management process. I'm just  
10:11:52 7 looking for it from Justice Gans. I think it's  
10:12:00 8 in your material. I know I've read it.

10:12:15 9 Yes, so it's in volume 3, tab T. It's  
10:12:25 10 a proposal. They contemplate that leave may be  
10:12:37 11 sought from the trial judge, it's part of the  
10:12:40 12 proposal. I didn't see any other document that  
10:12:43 13 listed these. It appeared to me from the  
10:12:44 14 record, and I'm sure we'll hear from plaintiffs'  
10:12:44 15 counsel if she disagrees, that whatever the  
10:12:58 16 arrangements were at the time they included the  
10:13:01 17 right to make a motion like this.

10:13:03 18 MR. BEGGS: Yes, Your Honour, we  
10:13:04 19 always understood that. In fact, our position  
10:13:05 20 all along had been that the admission of  
10:13:07 21 evidence by an expert was within the  
10:13:12 22 jurisdiction of the trial judge.

10:13:14 23 And so we resisted the case management  
10:13:18 24 judge absolutely excluding a report.

10:13:29 25 THE COURT: Now, help me with this.

1 Was there an order of Justice Gans?

2 MR. BEGGS: No, Your Honour, there was  
3 no order officially released. There was just  
4 the compromise he expressed, and I think you  
5 have correctly identified that as being the  
6 document that expresses the compromise.

7 THE COURT: All right. Go ahead.

8 MR. BEGGS: Now, I might be mistaken,  
9 but I took my friends to suggest that there was  
10 a deal that had been reneged upon by Canada and  
11 that the deal perhaps included a term that we  
12 would not challenge or we would not reargue or  
13 raise the issue of lateness, that essentially  
14 we'd just be arguing leave.

15 And if that's the case I'm -- I regret  
16 that there was some misunderstanding, but our  
17 understanding, we never conceded that it was  
18 late.

19 Certainly Justice Gans expressed his  
20 opinion that it was late, and if that's binding  
21 --

22 THE COURT: I didn't find it. I  
23 looked for that.

24 MR. BEGGS: Yes.

25 THE COURT: I couldn't find a ruling

1 of his of any kind.

2 MR. BEGGS: No, no, ruling, but he is  
3 clear in the document you have identified, I  
4 believe --

5 THE COURT: I mean, we have to -- I'm  
6 not saying that a comment like that may not have  
7 been made by him. But there's a difference  
8 between a comment being made in a case  
9 management context and a ruling.

10 MR. BEGGS: Yes.

11 THE COURT: You can get a ruling in  
12 case management if you want it to be seen as a  
13 determination of an issue, but I couldn't find a  
14 ruling.

15 So I think I have an informal opinion  
16 not expressed as a result of argument and not in  
17 a court order or endorsement of any kind.

18 MR. BEGGS: Yes, Your Honour. I would  
19 agree with that.

20 So, Your Honour, we would suggest that  
21 no real prejudice has been caused by the -- if  
22 in fact it was late. The fact that this report  
23 was served in October, I believe it was October  
24 15th, 2018, was still six months before trial.  
25 It's a year before the witness is testifying.

1 And if there is prejudice it could be  
2 remedied as the rule contemplates on terms that  
3 are just and could be remedied by offering the  
4 plaintiffs the opportunity to submit a reply  
5 report from an expert.

6 Perhaps it would be -- if it was  
7 Lenore Keeshig or Dr. McCarthy, we would have  
8 our objections to their qualifications. Perhaps  
9 it would be Dr. Valentine, who has indicated  
10 that he has a database of oral history  
11 materials, or whoever the plaintiffs might  
12 select.

13 But I believe such a solution would  
14 not cause undue delay in the trial if such an  
15 expert was added on in reply. There's already  
16 an expert scheduled to reply if necessary,  
17 Professor Benn.

18 THE COURT: Does that mean that Canada  
19 is consenting to a properly qualified reply  
20 expert by the plaintiffs?

21 MR. BEGGS: Yes, Your Honour.

22 Now, in my materials of course I  
23 somewhat blended together the issues of allowing  
24 an expert with the issues of the lateness test  
25 under 53.08. I refer to the necessity and the



10:17:37 1 relevance of the materials. Obviously whether  
10:17:42 2 Dr. von Gernet is a properly qualified expert is  
10:17:47 3 going to be dealt with in a voir dire. I'm not  
10:17:49 4 aware of an exclusionary rule as identified by  
10:17:53 5 the White Burgess or the Mohan tests.

10:17:55 6 With brief comments with respect to  
10:17:57 7 relevance and necessity, I think it is a matter  
10:17:59 8 that's relevant. My friend has identified in  
10:18:01 9 their opening materials that they will be  
10:18:05 10 explicitly drawing the connections between the  
10:18:08 11 evidence of Lenore Keeshig and the evidence of  
10:18:11 12 Dr. McCarthy to ask the court to draw  
10:18:13 13 conclusions on it.

10:18:17 14 They -- that was evident even in the  
10:18:21 15 evidence of Lenore Keeshig a couple days ago,  
10:18:24 16 that she had her own views on that.

10:18:29 17 So the connection will be asked of the  
10:18:31 18 court to be made. And so I believe it's  
10:18:35 19 relevant and Dr. McCarthy -- sorry,  
10:18:39 20 Dr. von Gernet, I mean, his report essentially  
10:18:45 21 will explain why it's relevant. But in the  
10:18:48 22 introduction to his report I think it perhaps  
10:18:50 23 expresses better than I could why it's  
10:18:52 24 necessary.

10:18:53 25 So if I could go to the report of Dr.

10:18:57 1 von Gernet at page 14. My copy starts with "By  
10:18:59 2 now". I hope that's what everyone has.

10:19:25 3 THE COURT: I have the July 2019  
10:19:31 4 report, which is the subject of the motion  
10:19:33 5 without any blacklining --

10:19:34 6 MR. BEGGS: That's the one I'm  
10:19:34 7 referring to, Your Honour.

10:19:34 8 THE COURT: Is that the one I should  
10:19:35 9 be accessing on page 14?

10:19:38 10 MR. BEGGS: Page 14, yes.

10:19:42 11 THE COURT: And that's in the  
10:19:43 12 introductory section where he discusses updating  
10:19:47 13 his report?

10:19:48 14 MR. BEGGS: Yes, Your Honour.

10:19:49 15 THE COURT: Now, where are you reading  
10:19:50 16 from, sir?

10:19:51 17 MR. BEGGS: I'm just reading from that  
10:19:52 18 first paragraph. I'm skipping the first  
10:19:55 19 sentence, "By now". I'm starting at "Rather":

10:19:57 20 "Rather, I show how the  
10:19:58 21 uncritical conjoining of such evidence  
10:19:58 22 in the service of a deep-time oral  
10:20:01 23 traditions claim -- whether this is  
10:20:03 24 done in the context of litigation or  
10:20:04 25 in the scientific literature -- is or

10:20:08 1 would be highly problematic. That  
10:20:09 2 modern Indigenous stories contain  
10:20:09 3 intergenerationally transmitted  
10:20:11 4 observations about the real world  
10:20:13 5 which originated with eyewitnesses who  
10:20:16 6 lived 8, 9, or 10,000 years ago is an  
10:20:17 7 extraordinary claim. It is however  
10:20:20 8 not so outlandish as to warrant  
10:20:22 9 outright or casual dismissal. Indeed,  
10:20:26 10 a small minority of credentialed  
10:20:26 11 scholars have been purveyors of  
10:20:29 12 similar claims elsewhere in North  
10:20:30 13 America, although it is not difficult  
10:20:37 14 to find blistering scholarly rebukes  
10:20:39 15 of these claims by other mainstream  
10:20:42 16 authorities. The existence of such  
10:20:43 17 academic debate among those who  
10:20:44 18 specialize in reconstructing the past  
10:20:44 19 should in and of itself be sufficient  
10:20:49 20 reason to resist leaving the matter to  
10:20:51 21 legal argument."

10:20:57 22 So as you can see, Dr. von Gernet is  
10:21:00 23 not suggesting that someone should just dismiss  
10:21:03 24 the claim outright, that they should just find  
10:21:07 25 it preposterous that these events can be linked.

1 He regards it as possible but offers his  
2 opinions as to what considerations should be  
3 taken into account in evaluating that evidence.

4 And of course the converse is true  
5 too. He also doesn't believe it should be  
6 accepted uncritically.

7 So given that it's not a question of  
8 simply juxtaposing the two sets of evidence, the  
9 oral history evidence with the geology evidence,  
10 I would submit that it is necessary to have an  
11 expert such as Dr. von Gernet assisting the  
12 court.

13 And in general it is necessary for  
14 this matter to be heard on its merits and  
15 determined on its merits for this evidence to go  
16 in.

17 Those actually are my submissions,  
18 unless you have any questions, Your Honour.

19 THE COURT: I take it that as far as  
20 you're aware there's no objections based  
21 specifically on the recent updating of the  
22 report?

23 MR. BEGGS: I'm not aware of any, Your  
24 Honour.

25 THE COURT: Okay. Thank you, sir.

1 Please go ahead, counsel.

2 I take it that Ontario is supporting  
3 but otherwise not making submissions on this  
4 motion?

5 MR. OGDEN: Yes, Your Honour.

6 THE COURT: All right. Thank you.

7 MS. PELLETIER: Okay. Good morning,  
8 Your Honour.

9 THE COURT: Good morning,  
10 Ms. Pelletier.

11 MS. PELLETIER: So I think the only  
12 documents I will take you to or materials I will  
13 take you to is the von Gernet, the 2019 report,  
14 if you have that handy, Canada's book of  
15 authorities.

16 THE COURT: Yes.

17 MS. PELLETIER: And we also sent a  
18 case in after filing our book of authorities  
19 last month, the Mohawk Council --

20 THE COURT: Yes, I have that actually.

21 MS. PELLETIER: Excellent.

22 THE COURT: And just before you begin,  
23 I'd confirm with you as well that the objections  
24 are not specifically based on the recent  
25 updating of the report.

1 MS. PELLETIER: No, however we -- I  
2 will be making submissions about how the 2019,  
3 the recent update does cause additional  
4 prejudice in our view.

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

7 MS. PELLETIER: Great, thank you. So,  
8 Your Honour, my submissions today will focus on  
9 two points. The first is that in the  
10 plaintiffs' submission Canada's report is late  
11 and is not a reply to Professor McCarthy's 2018  
12 report. My submissions on this point will be  
13 brief.

14 And the second point is, after three  
15 months of trial, granting Canada leave to file  
16 Dr. von Gernet's report would, in the  
17 plaintiffs' submission, prejudice the plaintiffs  
18 by forcing them to consider recalling several  
19 witnesses, an act that would have the unfair  
20 effect of highlighting the contents of  
21 Dr. von Gernet's report, and it would distort  
22 the way the plaintiffs have chosen to present  
23 their case.

24 Granting leave would also completely  
25 defeat years of case management, and it would

1 render the pre-trial compromise SON made with  
2 Canada meaningless.

3 Finally, I will close by making brief  
4 submissions on the authorities cited by Canada  
5 in its factum.

6 THE COURT: Just before you launch  
7 into all of that, do you agree that the --  
8 whatever you want to call it, but the proposal  
9 made by Justice Gans, which appears to have been  
10 accepted, included the right of Canada to seek  
11 leave to put this report in?

12 MS. PELLETIER: Yes, it included --  
13 Canada, of course, has that right under the  
14 rules. My submissions --

15 THE COURT: You know, I'm concerned  
16 with something you've just said, because I've  
17 been managing this trial now for -- I don't  
18 know, since at least February, and this is the  
19 first I hear that such a leave application  
20 should be made, should have been made before  
21 now. And I think you're about to say that.

22 MS. PELLETIER: That -- no, I --

23 THE COURT: Because otherwise why  
24 would there -- well, anyway, why don't you fit  
25 it into your argument.

1 MS. PELLETIER: Sure.

2 THE COURT: But if you're going to  
3 argue that the timing of this leave motion puts  
4 you to some prejudice, then this is the first  
5 I'm hearing that it should have been done  
6 sooner.

7 MS. PELLETIER: I think from the  
8 plaintiffs' perspective, the compromise that we  
9 reached with Canada that was brokered by Justice  
10 Gans would have done away with the need to seek  
11 leave.

12 THE COURT: It's right in the  
13 compromise.

14 MS. PELLETIER: Yes, that they had the  
15 right to.

16 THE COURT: Yes.

17 MS. PELLETIER: And I think also that  
18 our hope had been that Your Honour would  
19 consider the compromise in weighing against the  
20 granting of the leave.

21 THE COURT: Well, it's difficult to do  
22 that if the compromise includes the right to  
23 seek leave, counsel.

24 MS. PELLETIER: Sure.

25 THE COURT: It's right there in black



10:25:58 1 and white.

10:25:59 2 MS. PELLETIER: I appreciate that. I'm  
10:26:01 3 not standing here today saying that this was  
10:26:04 4 completely unexpected. I'm saying we think that  
10:26:05 5 there was -- the prejudice warrants you not  
10:26:07 6 granting the leave motion. But perhaps I can --

10:26:10 7 THE COURT: Yes, go back to your plan.

10:26:12 8 MS. PELLETIER: -- address it in my  
10:26:13 9 submissions.

10:26:14 10 So beginning first then with this  
10:26:16 11 point that Dr. von Gernet's report is late, as  
10:26:18 12 outlined in our factum the plaintiffs understood  
10:26:21 13 that Canada might try to seek leave to file the  
10:26:24 14 longer von Gernet report. But the plaintiffs  
10:26:27 15 did not understand that Canada would try to use  
10:26:30 16 this as an opportunity to reargue that the  
10:26:32 17 report was actually served on time.

10:26:35 18 And in fact the compromise agreement  
10:26:38 19 between SON and Canada, which was brokered by  
10:26:41 20 Justice Gans in case management, specifically  
10:26:44 21 acknowledged that Canada reserved the right to  
10:26:46 22 seek leave to tender the longer von Gernet  
10:26:49 23 report, not reargue that the report is properly  
10:26:53 24 in reply to a report of the plaintiffs that we  
10:26:55 25 have since withdrawn.

10:26:56 1 THE COURT: You know, you've heard my  
10:26:58 2 questions of Mr. Beggs. There's no ruling.  
10:27:02 3 There was no motion. There was no endorsement  
10:27:05 4 even of Justice Gans making any kind of decision  
10:27:07 5 on that point.

10:27:11 6 MS. PELLETIER: It is absolutely open  
10:27:12 7 to Your Honour to find that the report was in  
10:27:14 8 fact on time and in reply to Professor McCarthy.  
10:27:18 9 We're not trying to argue that Justice Gans made  
10:27:21 10 a ruling that you are bound by.

10:27:24 11 THE COURT: It is not even a matter of  
10:27:26 12 being bound by it. It's, you know, case  
10:27:27 13 management is a process that requires that  
10:27:32 14 counsel think about the difference between the  
10:27:34 15 informal discussions with a judge resulting in  
10:27:38 16 agreements, usually on consent, and disputed  
10:27:42 17 matters where an endorsement or a ruling is  
10:27:45 18 sought, which is also perfectly permitted.  
10:27:47 19 There is none.

10:27:48 20 MS. PELLETIER: Yes.

10:27:49 21 THE COURT: So I don't have a  
10:27:50 22 situation where someone can say, we thought this  
10:27:56 23 issue had been decided and was not going to be  
10:27:58 24 opened again.

10:27:59 25 MS. PELLETIER: And sorry if I

10:28:01 1 misspoke, Your Honour. We are not taking the  
10:28:03 2 position that this is decided and is not open to  
10:28:06 3 being decided by you.

10:28:07 4 We are simply saying that from the  
10:28:09 5 plaintiffs' perspective an agreement had been  
10:28:12 6 reached. Yes, it allowed for the possibility  
10:28:14 7 that Canada could exercise its right under the  
10:28:16 8 rules, but given even the wording of the  
10:28:19 9 compromise, that they had the right to seek  
10:28:22 10 leave, to the plaintiffs suggested that if  
10:28:25 11 anything they would be seeking leave under  
10:28:28 12 53.08, which they have done, but we did not  
10:28:30 13 anticipate this additional argument.

10:28:33 14 That being said, I have submissions on  
10:28:35 15 whether or not it was in fact in reply, should  
10:28:38 16 Your Honour decide to decide the motion that  
10:28:40 17 way.

10:28:41 18 THE COURT: Well, you should make  
10:28:42 19 whatever submissions you wish to make, counsel.

10:28:45 20 MS. PELLETIER: Okay.

10:28:46 21 THE COURT: I just -- when I read your  
10:28:47 22 material, it sounded to me like you were saying  
10:28:48 23 that there was either an agreement that the  
10:28:50 24 issue was behind you or a ruling, and there is  
10:28:53 25 none, neither of those two things.

1 MS. PELLETIER: If anything, our  
2 position is that the plaintiffs understood that  
3 although leave could be sought, that leave would  
4 be sought, not that we would be revisiting the  
5 issue of whether or not this was properly in  
6 reply.

7 But as I said, I'm still prepared to  
8 make submissions on that point, acknowledging  
9 that it's within your right, of course, to  
10 decide this motion on that basis.

11 THE COURT: So I think where we are is  
12 the same place that Mr. Beggs was, which is that  
13 if there -- he said if there was a  
14 misunderstanding about this, that's regrettable,  
15 it wasn't intended.

16 MS. PELLETIER: Sure.

17 THE COURT: It sounds like there was a  
18 misunderstanding.

19 MS. PELLETIER: Yes.

20 THE COURT: All right.

21 MS. PELLETIER: So I'm merely  
22 highlighting that misunderstanding, and I'll  
23 proceed.

24 So on the issue of -- and should Your  
25 Honour be contemplating revisiting the issue of

1 was it late, was it in reply, we wish to  
2 highlight the following.

3 Dr. McCarthy is a geologist and her  
4 first report was 18 pages. Dr. von Gernet is  
5 trained in anthropology, not geology, and his  
6 report said to be in reply is 361 pages.

7 Prior to the initial disclosure of  
8 Dr. von Gernet's report by Canada it had already  
9 served a report replying to Dr. McCarthy, and  
10 that was a 16-page report from Dr. Bowman, who  
11 is an assistant professor of Greek and Roman  
12 studies.

13 The plaintiffs submit that the long  
14 von Gernet report purported to be in reply to  
15 McCarthy is actually the report that Canada  
16 commissioned several years prior but did not  
17 serve. And we take this position because,  
18 firstly, Canada's instructions to von Gernet  
19 were the same in 2014.

20 Canada itself has acknowledged that  
21 the initial report was intended to be a response  
22 to the plaintiffs' traditional knowledge  
23 evidence, including that of Lenore Keeshig. And  
24 the 2018 version of the report almost entirely  
25 refers to the two reports synonymously, so in

10:30:56 1 terms such as the "Keeshig/McCarthy theory" and  
10:30:59 2 the "Keeshig/McCarthy claims".

10:31:06 3 But to the extent that Your Honour may  
10:31:08 4 find that the long von Gernet report did in fact  
10:31:11 5 respond to the geomythology present in Dr.  
10:31:14 6 McCarthy's first report, it should be noted that  
10:31:16 7 the plaintiffs withdrew that evidence, which  
10:31:17 8 eliminated or should have eliminated the need  
10:31:20 9 for his reply report entirely.

10:31:23 10 THE COURT: It was withdrawn later.

10:31:25 11 MS. PELLETIER: As part of the  
10:31:26 12 compromise. Mr. Beggs mentioned that the  
10:31:28 13 initial, first McCarthy report had geology and  
10:31:31 14 also spoke to geomythology, which was the reason  
10:31:34 15 Canada said it needed to follow von Gernet. And  
10:31:37 16 as part of the compromise the plaintiffs said,  
10:31:38 17 okay, in that case what if we took out the  
10:31:40 18 geomythology? That should do away with your  
10:31:43 19 need to file the longer von Gernet report, which  
10:31:47 20 led to then the abridged report, et cetera.

10:31:49 21 THE COURT: The thing is, counsel, you  
10:31:53 22 may well be right, but what we have here is -- I  
10:31:55 23 mean, you're calling it a compromise, I'm sure  
10:31:59 24 it was.

10:32:00 25 There's no Minutes of Settlement. I

10:32:05 1 don't have a document that says that that report  
10:32:10 2 was withdrawn and as a compromise, irregardless  
10:32:14 3 of the dispute about its appropriateness in the  
10:32:17 4 first place, whether these people were qualified  
10:32:20 5 to talk about these things or not, which there  
10:32:22 6 is a record that that was the subject of an  
10:32:24 7 objection. So I think you can only go so far  
10:32:33 8 with the idea that this was all a compromise.

10:32:36 9 MS. PELLETIER: Well, Your Honour, the  
10:32:36 10 exhibit, Exhibit T that you referred to when  
10:32:39 11 Mr. Beggs was speaking lays out what Justice  
10:32:41 12 Gans was proposing as a compromise, and that  
10:32:45 13 later formed the basis of the agreement. And  
10:32:46 14 that does speak to the withdrawing of the  
10:32:49 15 McCarthy report, refileing one that was limited  
10:32:51 16 to geology, withdrawing Lenore Keeshig as an  
10:32:56 17 expert.

10:32:56 18 THE COURT: It does, but Dr. McCarthy  
10:32:59 19 isn't qualified to talk about anything other  
10:33:03 20 than geology --

10:33:04 21 MS. PELLETIER: Well, with respect,  
10:33:04 22 Your Honour, she has taught -- I mean, we  
10:33:05 23 haven't tried to tender her as an expert to  
10:33:05 24 speak to geomythology, but we could have. She's  
10:33:05 25 taught courses in mythology.

1 THE COURT: Well --

2 MS. PELLETIER: She does have some  
3 expertise, but, again, as part of the compromise  
4 we agreed not to go there.

5 THE COURT: Well, the thing is, I  
6 don't have the things I need to have if I was  
7 inclined to go back behind the situation, you  
8 know, and from either side.

9 There is a record that shows that  
10 there were objections made to these two  
11 witnesses' reports as regards to the scope of  
12 their reports. There is no ruling about those  
13 objections. That similarly suggests that that  
14 was at least part of the dialogue. It is not a  
15 situation where someone just said, well, I'm  
16 going to give you this and take that. It's not  
17 that simple.

18 As far as what counsel had in their  
19 mind, I don't have evidence of that, all right?  
20 So I think you can only go so far with all of  
21 this.

22 MS. PELLETIER: Again, Your Honour,  
23 I'm not trying to suggest that these were  
24 decisions that were made and you're bound to  
25 honour them.



1 THE COURT: It's not -- that is a bad  
2 word, counsel. I mean --

3 MS. PELLETIER: I'm saying it's not.  
4 I'm not trying to say that you are bound by any  
5 of these and that Canada is precluded from  
6 seeking leave now. There's an acknowledgment  
7 that they have that right, they always have that  
8 right under the rules.

9 Providing you with the background,  
10 because from our perspective this goes to  
11 prejudice as of today. This history and the  
12 compromises that were made has now put the  
13 plaintiffs in a position where we have  
14 additional prejudice.

15 THE COURT: You know, when you come to  
16 an agreement that says the other side has leave  
17 to put the report forward, it's more than a  
18 little difficult to say, but we wouldn't have  
19 done any of these things if they could put the  
20 report forward, because they clearly were  
21 entitled to do that.

22 MS. PELLETIER: Yes. What I would  
23 submit, though, Your Honour, is in light of the  
24 compromise though, they should have recognized  
25 that in coming forward that we now have

10:34:55 1 additional prejudice.

10:34:56 2 THE COURT: Okay, well, you're going  
10:34:58 3 to have some difficulty persuading me that what  
10:35:01 4 we do know about the deal you struck should be  
10:35:03 5 disregarded because it -- you know, it infers  
10:35:07 6 that the outcome -- it infers the outcome.

10:35:09 7 So if what you're saying is, yes, and  
10:35:11 8 it's clear that we agree that leave could be  
10:35:14 9 sought but you can't grant it because if you  
10:35:16 10 grant it, given our compromise, there will be  
10:35:19 11 prejudice, that is not open to you having said  
10:35:22 12 the leave could be sought.

10:35:24 13 MS. PELLETIER: Yes --

10:35:24 14 THE COURT: You say it's void of any  
10:35:26 15 meaning because the necessary effect of our deal  
10:35:28 16 is that you shouldn't grant it.

10:35:32 17 MS. PELLETIER: I'm not saying -- I'm  
10:35:32 18 sorry, and I'm not saying that leave is --  
10:35:35 19 cannot be sought. I'm saying it shouldn't be  
10:35:38 20 granted, and that's the difference.

10:35:38 21 THE COURT: I know, but you can't say  
10:35:40 22 in the same breath, we did a deal that said you  
10:35:43 23 could seek leave, but if you look at our deal,  
10:35:45 24 you know, it presumptively should not be granted  
10:35:48 25 because of the prejudice in our deal. I mean,

10:35:50 1 that just doesn't make any sense.

10:35:53 2 MS. PELLETIER: Well, I think the deal  
10:35:55 3 has created the additional prejudice, and that's  
10:35:56 4 what I'm trying to speak to.

10:35:57 5 THE COURT: Well, that's your  
10:35:58 6 position. All right. Please go ahead.

10:36:00 7 MS. PELLETIER: Okay. So I'd like to  
10:36:01 8 actually turn to that right now, Your Honour,  
10:36:02 9 which is the prejudice the plaintiffs will  
10:36:05 10 suffer if the report is let in.

10:36:11 11 So I will begin by discussing the  
10:36:13 12 prejudice that the plaintiffs will suffer for  
10:36:14 13 having relied on case management specifically.

10:36:17 14 This case has been intensively case  
10:36:20 15 managed since 2011. Case management was  
10:36:23 16 essential for a proceeding of this size and  
10:36:25 17 magnitude. And as Your Honour knows, the  
10:36:27 18 purpose of case management is to reduce  
10:36:29 19 unnecessary cost and delay through the  
10:36:32 20 intervention of a judge or master when  
10:36:34 21 necessary. Setting and enforcing deadlines is a  
10:36:36 22 crucial part of this task.

10:36:36 23 In Balansingham -- I won't take you to  
10:36:44 24 that case, but it's at tab 2, for your  
10:36:44 25 reference, of our book of authorities -- the

10:36:44 1 court identified the late service of expert  
10:36:46 2 reports as a recurring problem. Now, if  
10:36:48 3 litigants can simply ignore case management  
10:36:52 4 orders, then what is the point of case  
10:36:54 5 management?

10:36:55 6 In this case not only would years of  
10:36:58 7 time and effort go to waste, but SON would be  
10:37:00 8 prejudiced for having relied on a case  
10:37:02 9 management timeline and the fact that entering  
10:37:05 10 into trial it thought it had received all the  
10:37:08 11 expert reports upon which Canada intended to  
10:37:10 12 rely.

10:37:17 13 Now, Your Honour, I'm not trying to  
10:37:18 14 say that timetables need always be enforced in  
10:37:21 15 the strictest of senses. In all cases parties  
10:37:23 16 will request extra time, and in fact in this  
10:37:24 17 very case all parties requested and agreed to  
10:37:25 18 many extensions.

10:37:26 19 But here we aren't talking about  
10:37:29 20 Canada being a few months late. We are talking  
10:37:31 21 about receiving what is now Canada's lengthiest  
10:37:34 22 expert report in the middle of the plaintiffs'  
10:37:36 23 case.

10:37:38 24 THE COURT: That's not fair, counsel.  
10:37:39 25 I've looked at the blackline. You've had most

1 of this report since last October.

2 MS. PELLETIER: It was not filed.

3 THE COURT: It doesn't matter.

4 Reports are noticed. I'm sure you realize that  
5 as counsel. The purpose of an expert report is  
6 to put you on notice of the findings, opinions  
7 and conclusions that an expert may testify  
8 about, and you have been on notice since last  
9 October.

10 MS. PELLETIER: I will get to how the  
11 new version that we literally got last week has,  
12 from our perspective, created additional  
13 prejudice, but what I would say about being on  
14 notice, is yes, we were served with the report  
15 and then what Canada filed and has been relying  
16 on is an abridged report. So --

17 THE COURT: Well, that was part of the  
18 arrangements that were made.

19 MS. PELLETIER: Yes.

20 THE COURT: You cannot say that you  
21 received this report in the middle of this  
22 trial. The purpose of the report is to put  
23 counsel on notice. You were put on notice last  
24 October.

25 Now, I understand your position that

10:38:42 1 that was late. Rest assured I understand that.

10:38:46 2 And I certainly understand that you may say that

10:38:49 3 some of the updates are in a different category.

10:38:54 4 But for the most part you were put on notice in

10:38:56 5 October of last year.

10:38:58 6 MS. PELLETIER: Even if -- I mean,  
10:39:00 7 let's imagine we were arguing this in October of  
10:39:03 8 last year. Our position would not be much  
10:39:05 9 different than it is today. There is additional  
10:39:07 10 prejudice, from our perspective, from the new  
10:39:10 11 report.

10:39:10 12 THE COURT: I know you're going to get  
10:39:11 13 to that.

10:39:12 14 MS. PELLETIER: Okay. But even  
10:39:13 15 October was not much notice, given how long this  
10:39:17 16 case, a case of this magnitude has been in the  
10:39:19 17 courts, even October was several years late.

10:39:24 18 So if SON had received this expert  
10:39:26 19 report either when it was due or at least close  
10:39:29 20 to when it was due, it would have had time to  
10:39:32 21 properly decide how to respond rather than have  
10:39:36 22 to scramble to try to come up with a reply  
10:39:38 23 report.

10:39:39 24 It would have had time to find and  
10:39:41 25 select the best expert for this job rather than

10:39:44 1 picking someone -- picking whomever is available  
10:39:47 2 to do something on short notice.

10:39:49 3 THE COURT: I have no evidence of any  
10:39:50 4 of that, counsel. It was open to you for this  
10:39:53 5 motion to put forward an affidavit saying, you  
10:39:55 6 know, we made reasonable inquiries and are  
10:39:58 7 unable to come up with someone. That would have  
10:40:02 8 been relevant evidence. I have nothing.

10:40:04 9 So it's not for you to stand there at  
10:40:06 10 the podium and say, there may be prejudice.  
10:40:07 11 Your obligation is to demonstrate prejudice.

10:40:11 12 MS. PELLETIER: Okay. I'm not sure  
10:40:12 13 that evidence exists, Your Honour, given that we  
10:40:14 14 haven't --

10:40:15 15 THE COURT: Well, I can tell you that  
10:40:16 16 there's no reason to assume it doesn't. It's --  
10:40:19 17 there's nothing unusual about it.

10:40:23 18 MS. PELLETIER: Sorry, there's nothing  
10:40:24 19 unusual about?

10:40:25 20 THE COURT: There's nothing unusual  
10:40:25 21 about coming forward on a motion and saying, you  
10:40:27 22 know, Your Honour, one of the reasons I've been  
10:40:29 23 prejudiced is that since I got this report I  
10:40:31 24 have taken the following steps or my colleague  
10:40:33 25 has to try and find someone to deal with it, and

1 we can't for the following reasons.

2 MS. PELLETIER: Fair. Fair, Your  
3 Honour. And I --

4 THE COURT: I have nothing like that.

5 MS. PELLETIER: That's fair. I don't  
6 have that evidence. I had hoped that you could  
7 take notice of the fact that an expert report  
8 that is 361 pages long and has 851 footnotes is  
9 not something that -- we can't just turn around  
10 a reply report in a matter of -- you know, in a  
11 month, that this is a -- it took -- arguably  
12 took Dr. von Gernet years to complete his  
13 report. So this is --

14 THE COURT: I don't have that either,  
15 counsel. Let's stick with the record.

16 MS. PELLETIER: Okay, okay. As I'm  
17 sure you can imagine, in a complex and lengthy  
18 trial such as this one all parties plan their  
19 case well in advance of trial in a way that  
20 addresses the evidence filed by the parties.  
21 The plaintiffs structured their case, retained  
22 its experts and sought out witnesses in reliance  
23 of the fact that Canada had abandoned  
24 Dr. von Gernet and would --

25 THE COURT: Tell me about that.



10:41:31 1 MS. PELLETIER: Let me just find it in  
10:41:32 2 our record.

10:41:34 3 THE COURT: We know as of Justice  
10:41:35 4 Gans' document that he was not abandoned.

10:41:39 5 MS. PELLETIER: I meant prior to that.  
10:41:40 6 So the extension was -- yes --

10:41:42 7 THE COURT: So prior to October of  
10:41:43 8 2018?

10:41:44 9 MS. PELLETIER: That's right. When  
10:41:44 10 the deadline was missed, that's right.

10:41:48 11 THE COURT: All right.

10:41:49 12 MS. PELLETIER: So had SON known  
10:41:51 13 sooner that Canada intended to serve the report  
10:41:53 14 we have before us today, and I mean prior to  
10:41:55 15 October, 2018, then SON may have made different  
10:41:59 16 strategic decisions about the evidence it would  
10:42:01 17 lead or how it might lead certain evidence.

10:42:05 18 THE COURT: Again, that's coming from  
10:42:09 19 the podium. What am I supposed to do with that?

10:42:14 20 MS. PELLETIER: Well, the fact is, we  
10:42:16 21 don't know, Your Honour, what choices might have  
10:42:19 22 been made.

10:42:20 23 THE COURT: Well, you can't meet the  
10:42:21 24 requirements of demonstrating prejudice by  
10:42:23 25 saying something may have happened. Something

10:42:25 1 may have been done differently. You have to  
10:42:27 2 demonstrate prejudice, all right? Now, it can  
10:42:31 3 be inferred. I'm fine with that. But standing  
10:42:35 4 up and saying, maybe this, maybe that, maybe the  
10:42:38 5 other thing is not prejudice.

10:42:40 6 MS. PELLETIER: Okay. Then perhaps  
10:42:41 7 I'm asking you to infer, Your Honour, that a  
10:42:43 8 case of this magnitude, and I would hope that  
10:42:45 9 you could appreciate, and you can infer this if  
10:42:48 10 you need to, that parties plan their cases based  
10:42:51 11 on the evidence of other parties. And this is a  
10:42:54 12 big one. This isn't a small report.

10:42:55 13 THE COURT: Yeah, okay. Let's see  
10:42:59 14 where that goes.

10:43:00 15 MS. PELLETIER: Well, this is the  
10:43:02 16 prejudice that the plaintiffs will suffer if --  
10:43:03 17 in not being able to rely on case management.  
10:43:05 18 It's a lost opportunity and it's a type of  
10:43:08 19 prejudice that, in our submission, cannot be  
10:43:12 20 remedied.

10:43:13 21 So Dr. von Gernet's report relates to  
10:43:15 22 every single witness the plaintiffs have called  
10:43:17 23 to date who have shared traditional knowledge  
10:43:20 24 evidence. That is 13 witnesses so far.

10:43:22 25 The plaintiffs will need to seriously

10:43:25 1 consider recalling some or possibly all of these  
10:43:27 2 witnesses. And further, some of these witnesses  
10:43:29 3 needed to testify in the community due to their  
10:43:31 4 health concerns.

10:43:33 5 THE COURT: Well, again, counsel,  
10:43:35 6 first of all, those fact witnesses -- well, it's  
10:43:49 7 not at all clear to me that some general  
10:43:54 8 submission about how you might have to call some  
10:43:56 9 witnesses and recalling the evidence of all of  
10:43:59 10 those witnesses I think is extremely unlikely.  
10:44:01 11 Extremely unlikely.

10:44:06 12 Again, a general submission about what  
10:44:08 13 might occur isn't what I am expecting to hear  
10:44:15 14 from a party that says there was prejudice. If  
10:44:18 15 your submission today is that inevitably the  
10:44:24 16 report delivered for the first time last October  
10:44:27 17 would cause you prejudice in all manner of  
10:44:30 18 potential ways, then you should have brought a  
10:44:33 19 motion last October to get a ruling that it was  
10:44:38 20 out. Because if the prejudice was inevitable,  
10:44:42 21 as you suggest, once you start your case, call  
10:44:47 22 your witnesses and so on, then why is it that  
10:44:49 23 the plaintiffs agreed that the defendant could  
10:44:52 24 seek leave at trial?

10:44:54 25 MS. PELLETIER: But, Your Honour, it

1 wasn't in. Why would we have brought --

2 THE COURT: Seeking leave. All right.  
3 It's really, I'm just repeating myself. Because  
4 what I said a few minutes ago was that if the  
5 outcome in your submission of a motion for leave  
6 was inevitably going to be, there's all this  
7 prejudice so no, then why would you agree to  
8 them seeking leave in the first place? Which  
9 you did.

10 MS. PELLETIER: Well, I mean, I  
11 appreciate this isn't in evidence, but -- it's  
12 agreeing to them having sought leave. I mean,  
13 this was something that Justice Gans -- it was a  
14 deal that he brokered, and it was an  
15 acknowledgment that they always have the right  
16 under 53.08. But this wasn't a situation where  
17 we were like, yes, please, you know, we can't  
18 wait to receive your leave materials.

19 THE COURT: Okay. Well, I want you to  
20 tell me right now, witness by witness, why you  
21 say any of these witnesses need to be recalled.

22 MS. PELLETIER: Well, I have --

23 THE COURT: The fact that there's  
24 overlapping, that some of them talking about  
25 stories is not by itself an entitlement to

10:46:04 1 recall anybody.

10:46:05 2 MS. PELLETIER: Okay. I will give  
10:46:06 3 you --

10:46:07 4 THE COURT: You certainly can ask a  
10:46:08 5 fact witness about any opinion evidence, and as  
10:46:13 6 explained to me, that is the crux of the  
10:46:18 7 difference between the two reports.

10:46:21 8 MS. PELLETIER: Dr. von -- first of  
10:46:23 9 all, I can give you specific examples.

10:46:26 10 THE COURT: Let's start with that.

10:46:27 11 MS. PELLETIER: Okay, let's start with  
10:46:29 12 that. Okay. So two of our witnesses, Karl  
10:46:38 13 Keeshig and Lenore Keeshig, discussed the  
10:46:42 14 Mishomis Book, which is a source of Anishinaabe  
10:46:45 15 traditional sacred stories. The book is written  
10:46:48 16 by Eddie Benton-Banai, so this has come up in  
10:46:52 17 two of our witnesses' testimony to date.

10:46:54 18 So if you could take your copy, Your  
10:46:56 19 Honour, of Dr. von Gernet's 2019 report?

10:47:00 20 THE COURT: Yes.

10:47:15 21 MS. PELLETIER: And at page 244, the  
10:47:16 22 bottom of page 244 there is the heading, "B  
10:47:19 23 floods". And it begins:

10:47:21 24 "According to the Plaintiffs'  
10:47:21 25 Memorandum, one of the Anishinaabe

10:47:21 1 stories Lenore Keeshig will tell is  
10:47:24 2 called 'The Flood, Rebuilding the  
10:47:26 3 Earth on the Back of a Turtle.' This  
10:47:28 4 popular story has been recorded in  
10:47:30 5 countless variance and while I have no  
10:47:32 6 knowledge of which one Ms. Keeshig  
10:47:34 7 will tell at trial, for now I assume  
10:47:37 8 it will be the same one she drew  
10:47:39 9 attention to in her 2013 report. This  
10:47:41 10 was not told by her relatives from her  
10:47:43 11 own community, but was derived from a  
10:47:46 12 children's book."

10:47:49 13 So, Your Honour, describing the  
10:47:51 14 Mishomis Book as a children's book is offensive.  
10:47:54 15 It devalues what many of SON's witnesses see as  
10:47:58 16 a source of their teachings, and this is  
10:48:00 17 something that we did not -- we did not lead  
10:48:02 18 evidence on how the plaintiffs would describe  
10:48:04 19 the Mishomis Book because it never occurred to  
10:48:07 20 us that we needed to.

10:48:08 21 We had no way of knowing that Canada  
10:48:10 22 would try to characterize it as a --  
10:48:12 23 characterize what is the source of Anishinaabe  
10:48:14 24 traditional teachings as a children's book, and  
10:48:17 25 nor did Canada put this characterization to

10:48:19 1 either Lenore or Karl Keeshig on  
10:48:21 2 cross-examination.

10:48:22 3 THE COURT: Well, that's fine. They  
10:48:24 4 don't have to. If you find it offensive, I  
10:48:27 5 suspect you're okay with that.

10:48:30 6 MS. PELLETIER: Sorry?

10:48:31 7 THE COURT: If you find it offensive,  
10:48:32 8 I suspect you're fine with the idea that Canada  
10:48:35 9 didn't put it to your witnesses.

10:48:36 10 MS. PELLETIER: But now Your Honour  
10:48:37 11 doesn't have evidence about what the nature of  
10:48:39 12 the Mishomis Book is. All you have is an  
10:48:42 13 assertion from Dr. von Gernet.

10:48:44 14 THE COURT: We don't have anything yet  
10:48:45 15 from this gentleman. Like I told you a minute  
10:48:49 16 ago, this is a report that intended to give you  
10:48:51 17 notice about what this gentleman's opinions  
10:48:53 18 might be, all right? Don't interrupt me,  
10:48:56 19 counsel. I know you're trying to say something.

10:49:00 20 If what you are saying is that you  
10:49:02 21 would have asked each of these witnesses how  
10:49:06 22 they would characterize this book, I believe the  
10:49:08 23 first person who talked about it did talk about  
10:49:11 24 how he would characterize this book and talked  
10:49:14 25 about it in the context of answering some

10:49:18 1 questions about the book itself.

10:49:20 2 But if what you're saying is that that  
10:49:22 3 is an example, then that's fine, you can make  
10:49:25 4 that submission.

10:49:30 5 You all seem to be overlooking another  
10:49:33 6 issue, and I'm going to mention it because I  
10:49:34 7 don't know why you're overlooking it. But there  
10:49:38 8 are two different steps to this process. Step  
10:49:41 9 number one is -- it's the subject of this  
10:49:44 10 motion, which is, will Canada be allowed to use  
10:49:49 11 this report? And then, you know, call this  
10:49:56 12 gentleman to testify to these subject matters.

10:49:58 13 There is a completely separate step  
10:49:59 14 which we are not dealing with this morning,  
10:50:02 15 although you better make a submission about it  
10:50:05 16 if this is the way you're going; which is,  
10:50:07 17 whether or not the report itself would become  
10:50:09 18 evidence, which as you know is not automatic.

10:50:15 19 You seem to be assuming that it will  
10:50:17 20 become evidence. I did not read in Canada's  
10:50:20 21 Notice of Motion that they were trying to bridge  
10:50:23 22 the second step today. Perhaps they were. I  
10:50:27 23 didn't ask Mr. Beggs. All we're doing today is  
10:50:31 24 saying, can this gentleman be called to talk  
10:50:33 25 about the subject matters about which you were



1 given notice in this report?

2 So, yes, if we get to that second step  
3 and if the report goes in, that piece of  
4 evidence that you are unhappy about would go in  
5 and there might be an issue, but I'm not dealing  
6 with that this morning, counsel.

7 MS. PELLETIER: Okay.

8 THE COURT: All I'm dealing with is  
9 whether under the rule and the test under the  
10 rule there has been prejudice that would mean  
11 that this gentleman cannot come to this court  
12 and testify about the findings, opinions and  
13 conclusions that are set out in this document.

14 MS. PELLETIER: Your Honour, I'd just  
15 point out that Canada's motion is for an order  
16 for leave to file in evidence the full revised.

17 THE COURT: Thank you for drawing that  
18 to my attention. I see them as two separate  
19 subjects. So Mr. Beggs didn't deal with that,  
20 but I think I see them as things that are --  
21 it's not under the rule, if you will. I see  
22 this as a motion under the rule. The rule has  
23 nothing to do with that second step.

24 Obviously if leave is granted to  
25 permit this gentleman to testify about the

1 findings, opinions and conclusions that are  
2 reflected in his lengthier report, the next  
3 subject is going to be will the report itself go  
4 in or part of it and so forth?

5 MS. PELLETIER: We've responded to the  
6 motion as put forward by Canada so, yes, I  
7 confess, Your Honour, I thought today was a  
8 motion about filing the report, so some of my  
9 submissions are directed to that.

10 THE COURT: All right. Please go  
11 ahead.

12 MS. PELLETIER: So I would like to  
13 give you another example. This is not about a  
14 community witness but rather about one of our  
15 experts, Dr. McCarthy.

16 Now, I won't have you turn to this  
17 again, this is again in Dr. von Gernet's report.  
18 Mr. Beggs read to you from the mandate and  
19 purpose section where Dr. von Gernet  
20 acknowledges that he's not engaging with the  
21 McCarthy 2019 report. He refers to it, but he  
22 trusts that -- he sort of lets the science speak  
23 for itself. So I won't take you to that again.

24 But I will take you to page 341 of his  
25 report.

1 THE COURT: Yes.

2 MS. PELLETIER: And this here -- I'll  
3 take you to the sentence in a moment, but here  
4 Dr. von Gernet is addressing Dr. McCarthy's  
5 evidence about the breach of the Nodaway  
6 Barrier, and here in our submission he is in  
7 fact responsive to the McCarthy report. So the  
8 very last sentence on 341 begins with, "It is  
9 not":

10 "It is not even certain how long  
11 it took for the Nodaway Barrier to  
12 breach. Francine McCarthy states  
13 variously that the breach occurred  
14 'within days' or 'quickly within  
15 days/weeks' although her source says  
16 no more than 'abruptly', and she  
17 provides no evidence that geology is  
18 even capable of narrowing the scope to  
19 a daily level. Other scientists who  
20 write of a 'rapid' or 'sudden' failure  
21 of the dam estimate it could have  
22 taken as long as a century or two."  
23 So again, here, Your Honour, this is a  
24 position that the plaintiffs had no knowledge  
25 of. If we had --

10:53:49 1 THE COURT: You keep saying that,  
10:53:50 2 counsel.

10:53:53 3 MS. PELLETIER: This is the new stuff  
10:53:54 4 from 2019.

10:53:57 5 THE COURT: Yes, because Dr. McCarthy  
10:54:00 6 filed a new report.

10:54:01 7 MS. PELLETIER: No.

10:54:01 8 THE COURT: Yes.

10:54:01 9 MS. PELLETIER: Oh, yes, okay, fine.  
10:54:02 10 But the information about the Nodaway Barrier,  
10:54:06 11 all the new report, McCarthy's new report did  
10:54:09 12 was take out the geomythology from her geology  
10:54:10 13 report.

10:54:15 14 THE COURT: So you're saying there's  
10:54:15 15 some additional discussion in the new report?

10:54:15 16 MS. PELLETIER: Yes. So this issue of  
10:54:18 17 what other scientists have said about how long  
10:54:21 18 it would have taken for the Nodaway Barrier to  
10:54:24 19 breach is something that if we had received  
10:54:26 20 notice, we could have put some of what these  
10:54:27 21 other scientists have said preemptively to  
10:54:31 22 Dr. McCarthy in-chief. She wasn't crossed on  
10:54:34 23 this by Canada at all.

10:54:36 24 THE COURT: I thought your position  
10:54:36 25 was that this gentleman isn't qualified to talk

1 about that.

2 MS. PELLETIER: He isn't.

3 THE COURT: So why would you be doing  
4 it?

5 MS. PELLETIER: Well, if the report  
6 goes in --

7 THE COURT: Okay, you're -- again, we  
8 have a separate issue before the court, which is  
9 that the plaintiffs take the position that  
10 either all or some parts of the report should  
11 not be permitted for other reasons.

12 MS. PELLETIER: Uhm-hmm.

13 THE COURT: I'm not dealing with that.

14 MS. PELLETIER: I understood, Your  
15 Honour.

16 THE COURT: This is an example where  
17 you have to acknowledge that you have a second  
18 ground, which is, you know, for reasons that  
19 don't matter this morning, that is available to  
20 you to address that potential prejudice that  
21 you're discussing.

22 MS. PELLETIER: Yes, fair. As the  
23 report reads now, that in our submission is  
24 additional prejudice, that was something we were  
25 given no notice of. There is the possibility

10:55:29 1 that Your Honour will find that it's properly  
10:55:31 2 within his expertise.

10:55:33 3 So we're just letting you know that  
10:55:34 4 that is an example of a place where we would  
10:55:37 5 feel we would need to recall Dr. McCarthy to  
10:55:41 6 address that.

10:55:42 7 THE COURT: Well, these are all  
10:55:43 8 very -- not as concrete, shall we say, as what  
10:55:47 9 we usually hear when people say they are  
10:55:50 10 prejudiced.

10:55:51 11 MS. PELLETIER: Well, to recap, Your  
10:55:53 12 Honour, with respect to the prejudice caused by  
10:55:55 13 the lateness of the report, the plaintiffs  
10:55:57 14 submit that they are prejudiced in three ways.

10:56:01 15 So the recalling of witnesses would  
10:56:02 16 have the unfair effect of highlighting the  
10:56:04 17 contents of Dr. von Gernet's report, and it  
10:56:07 18 would distort the way that the plaintiffs have  
10:56:10 19 chosen to present --

10:56:11 20 THE COURT: Are you saying that I'm  
10:56:12 21 not capable of taking that into account --

10:56:15 22 MS. PELLETIER: Of course --

10:56:15 23 THE COURT: This is not a jury trial,  
10:56:16 24 counsel.

10:56:17 25 MS. PELLETIER: Of course you are.

10:56:18 1 THE COURT: You are though, counsel.

10:56:19 2 You're saying that I am not capable of looking  
10:56:22 3 at a reply witness' focus in the full context of  
10:56:26 4 the other evidence. And that is not the way  
10:56:30 5 that nonjury trials work.

10:56:38 6 MS. PELLETIER: I understand, Your  
10:56:38 7 Honour, and I'm not trying to suggest that.

10:56:38 8 THE COURT: That's the only  
10:56:39 9 unfairness, is if I'm not capable, then there  
10:56:41 10 might be an unfairness. That might be a  
10:56:42 11 legitimate position in a jury trial where juries  
10:56:45 12 are unsophisticated and especially in a long  
10:56:48 13 trial. But this is not a jury trial.

10:56:51 14 MS. PELLETIER: That's right, Your  
10:56:52 15 Honour. My point is just, it's giving this  
10:56:54 16 report a lot of airtime. And from the  
10:56:56 17 plaintiffs' submission, if we had received this  
10:56:58 18 in a timely fashion and had notice, we would  
10:56:59 19 have addressed all of these issues with our  
10:57:01 20 witnesses and not had to recall witnesses solely  
10:57:05 21 to talk about Dr. von Gernet.

10:57:07 22 THE COURT: That remains to be seen  
10:57:08 23 whether that will be necessary. Anyway, please  
10:57:11 24 go ahead.

10:57:12 25 MS. PELLETIER: Additional prejudice

10:57:12 1 is that it limits the plaintiffs to experts who  
10:57:12 2 are -- this is for reply, in our attempts to  
10:57:16 3 find a reply expert, to experts that are  
10:57:18 4 available on short notice and not necessarily  
10:57:21 5 experts who are the most appropriate.

10:57:23 6 THE COURT: Again, reply would be a  
10:57:25 7 year from now, so that's a hard sell.

10:57:29 8 MS. PELLETIER: The other point, Your  
10:57:30 9 Honour, is that the plaintiffs will not have the  
10:57:31 10 benefit of having a reply expert to assist with  
10:57:35 11 cross-examination. Canada has given its list of  
10:57:37 12 witnesses, and Dr. von Gernet will be up before  
10:57:39 13 the end of this calendar year.

10:57:41 14 And even with the ability to have a  
10:57:46 15 reply -- someone -- to engage someone to have a  
10:57:50 16 reply report, it is very unlikely that we would  
10:57:52 17 have such a report in advance of  
10:57:54 18 Dr. von Gernet's testimony. So we would be  
10:57:57 19 prejudiced in our ability to prepare for cross.

10:57:59 20 THE COURT: Well, those are two  
10:58:00 21 different things. The first thing is that an  
10:58:02 22 expert may be of assistance to counsel in  
10:58:04 23 preparing a cross-examination. There is no  
10:58:06 24 report requirement for that.

10:58:08 25 MS. PELLETIER: Yes.



1 THE COURT: Indeed the expert does not  
2 even have to be a testifying expert at all.

3 MS. PELLETIER: Yes.

4 THE COURT: All right. It would seem  
5 to me that if that was real, which we don't know  
6 because I have no evidence that those inquiries  
7 have been even attempted, that that could be  
8 addressed by dealing with the order of Canada's  
9 witnesses because Canada will not be -- they may  
10 commence their case this year, but they are  
11 certainly not going to be closing it this year.

12 MS. PELLETIER: Thank you, Your  
13 Honour. And my apologies, I wasn't trying to  
14 suggest that we needed a reply report done in  
15 time. I just meant the time for any reply  
16 expert to have reviewed the materials and be in  
17 a position to be able to assist us with  
18 cross-examination in a few months was unlikely.

19 So now to the point of the prejudice  
20 that by filing the 2019 report it would  
21 eviscerate the compromise agreement that SON  
22 reached with Canada, and again not taking the  
23 position that this was an agreement that Your  
24 Honour isn't -- it was a compromise. But in our  
25 view the compromise has created additional

10:59:10 1 prejudice.

10:59:10 2 So first to note that SON objected to  
10:59:14 3 admissibility of the von Gernet report as soon  
10:59:17 4 as it was served in 2018. Justice Gans held  
10:59:20 5 three case management conferences where he tried  
10:59:23 6 to mediate an agreement. He had SON and Canada  
10:59:26 7 make written and oral submissions on the  
10:59:28 8 admissibility of the report.

10:59:30 9 I note, Your Honour, when Mr. Beggs  
10:59:31 10 was up, you noted correctly that it was Justice  
10:59:33 11 Gans' opinion, it was not an order, but I  
10:59:36 12 believe you said that it was not as a result of  
10:59:37 13 argument and --

10:59:38 14 THE COURT: I mean, I may have said  
10:59:39 15 the word "opinion", but in our court what we  
10:59:42 16 have to be correct about is the difference  
10:59:49 17 between a dialogue, which did occur and what  
10:59:53 18 might have been said informally, and an order,  
10:59:57 19 ruling, endorsement, none of which were made  
11:00:00 20 here. Even a written agreement, which was also  
11:00:03 21 not made here. I'm not saying it was required,  
11:00:05 22 but none of them were made here.

11:00:08 23 MS. PELLETIER: Yes, we acknowledge  
11:00:08 24 that. I guess I'm just pointing out that there  
11:00:11 25 was a day in chambers where we were asked to

11:00:13 1 make oral submissions. So it wasn't just casual  
11:00:17 2 phone conversations.

11:00:18 3 THE COURT: No, no, I didn't use the  
11:00:18 4 word "casual".

11:00:19 5 MS. PELLETIER: Okay.

11:00:19 6 THE COURT: I did say "informal"  
11:00:19 7 because I think that's the distinction that we  
11:00:19 8 have to focus on.

11:00:23 9 MS. PELLETIER: That's fair, that's  
11:00:23 10 fair.

11:00:23 11 Now, Canada said that the von Gernet  
11:00:25 12 report responded to opinion evidence in the  
11:00:27 13 McCarthy -- sorry the Keeshig report and  
11:00:30 14 McCarthy report number 1. When SON proposed  
11:00:33 15 withdrawing these reports and calling  
11:00:36 16 Ms. Keeshig as a lay witness, Canada said it  
11:00:39 17 still needed the primary sources in the von  
11:00:42 18 Gernet report to cross-examine her.

11:00:45 19 SON therefore agreed to let Canada  
11:00:46 20 file the abridged von Gernet report which  
11:00:49 21 contained these sources. So this allowed Canada  
11:00:52 22 to put into evidence -- put in the evidence it  
11:00:55 23 claimed was necessary and thus, in our  
11:00:58 24 submission, addressed any prejudice that Canada  
11:01:00 25 might have experienced had it not filed the

1 report at all.

2 So SON -- the point here is, SON  
3 withdrew reports as a part of this compromise.  
4 It took out some of its evidence. It did this  
5 to eliminate the need for the longer von Gernet  
6 report. Now, three months into trial, or even  
7 if you look at October 2018, Canada seeks to  
8 enter in -- well, now it's a further amended  
9 report. And in effect this renders, from our  
10 position, the pre-trial compromise SON made with  
11 Canada meaningless.

12 THE COURT: I'm just going to give you  
13 one more chance to address that. Because how  
14 can it be meaningless if you agreed to it? And  
15 you did.

16 MS. PELLETIER: Well, we agreed to it  
17 knowing that you would take the compromise into  
18 account in deciding --

19 THE COURT: Well, you can't have it  
20 both ways. You agreed to it.

21 MS. PELLETIER: Well, Your Honour, we  
22 also -- yes, we also agreed --

23 THE COURT: I'm not saying it was the  
24 wrong decision.

25 MS. PELLETIER: Clearly it was.

1 THE COURT: No, that's not for me to  
2 say. I'm not going to go back behind, you know,  
3 informal discussions between counsel. And I  
4 think these counsel have shown themselves very  
5 able on all sides in that regard.

6 The reality is that it's a really  
7 difficult argument to make that to do something  
8 that the agreement expressly contemplates would  
9 compromise the agreement itself. It's right  
10 there.

11 MS. PELLETIER: Your Honour, I mean,  
12 also consider that Canada agreed to this.  
13 Canada agreed to file an abridged report.  
14 Canada agreed to this compromise as well.

15 THE COURT: They did and they agreed  
16 to do that, and then they had preserved their  
17 right to seek leave, and that's what's happened.

18 MS. PELLETIER: Perhaps, Your Honour,  
19 we can turn to tab T of our materials?

20 THE COURT: Yes, that's the document I  
21 asked Mr. Beggs about. It's an interesting  
22 statement to me because it's not just that leave  
23 may be sought, counsel. It says:

24 "Leave may be sought to seek to  
25 introduce such an opinion [...]"

11:03:06 1 That's a reference to the long report.

11:03:07 2 "[...] based on the evidence then  
11:03:09 3 elicited in the trial."

11:03:10 4 It goes further than just saying leave  
11:03:12 5 can be sought. It contemplates that it can be  
11:03:15 6 sought after the commencement of this trial,  
11:03:17 7 which is exactly what's happening.

11:03:19 8 MS. PELLETIER: Then let's read number  
11:03:20 9 4:

11:03:21 10 "I'm further of the opinion that  
11:03:22 11 such a conclusory opinion is not  
11:03:26 12 proper because it not only offends the  
11:03:28 13 timelines described above, but in any  
11:03:30 14 event does not assist the trial judge  
11:03:32 15 since it is a conclusion that she may  
11:03:34 16 hold that is within the realm of human  
11:03:41 17 experience in any event."

11:03:43 18 THE COURT: We don't know what that --  
11:03:44 19 you know, there's a number of problems with  
11:03:45 20 that. First of all, it's an observation by the  
11:03:49 21 case management judge only. Second of all, it  
11:03:52 22 doesn't say anything at all about what he's  
11:03:54 23 specifically referring to, and I don't think he  
11:03:56 24 is going chapter and verse through this 300-page  
11:04:00 25 report. And third of all, it doesn't change

11:04:02 1 anything today.

11:04:03 2 Today I have to consider whether, and  
11:04:05 3 it's expressly contemplated here, Canada should  
11:04:08 4 have leave. That's what we're deciding. Now,  
11:04:10 5 thank you for correcting me on they're also  
11:04:14 6 wishing to put in the report. I assumed that  
11:04:16 7 that would happen as well eventually.

11:04:18 8 That's not necessarily -- that's not  
11:04:22 9 under the rule, put it that way. So all we're  
11:04:26 10 doing today is exactly what was contemplated by  
11:04:28 11 this compromise you've been discussing.

11:04:31 12 MS. PELLETIER: Sure. I point out  
11:04:32 13 paragraph number 4 because perhaps that speaks  
11:04:34 14 to what the plaintiffs assume would be the  
11:04:37 15 likelihood of a leave application.

11:04:39 16 THE COURT: Well, it doesn't matter  
11:04:39 17 if --

11:04:41 18 MS. PELLETIER: I'm not here today  
11:04:43 19 saying that they should never have brought this  
11:04:44 20 motion, they have no right. That's not my  
11:04:45 21 position.

11:04:46 22 THE COURT: Counsel should not be  
11:04:47 23 called upon to handicap the chances. They  
11:04:50 24 agreed that there should be leave. There's  
11:04:52 25 going to be a motion. Here we are.

11:04:54 1 So I've given you another chance on  
11:04:56 2 that question, and have you got anything to add?

11:05:00 3 MS. PELLETIER: No, Your Honour, I  
11:05:00 4 mean, other than you said a few times that we  
11:05:03 5 agreed that they should be given leave. That is  
11:05:05 6 not what we agreed. We did not agree --

11:05:06 7 THE COURT: No, given the opportunity  
11:05:07 8 to seek leave.

11:05:07 9 MS. PELLETIER: Yes.

11:05:07 10 THE COURT: If I misspoke, then I  
11:05:08 11 think you know what I mean.

11:05:11 12 MS. PELLETIER: Yes. I mean, really,  
11:05:11 13 they have the right under the rules. It was an  
11:05:14 14 acknowledgment of that. It was no more. And in  
11:05:17 15 our submission, does the compromise mean they  
11:05:19 16 can't seek leave? No, I've not once said that  
11:05:22 17 this morning.

11:05:23 18 What I'm saying is the compromise and  
11:05:24 19 the fact that we withdrew evidence, allowed them  
11:05:27 20 to file an abridged report, all of that is a  
11:05:29 21 part of the story that we're asking you to  
11:05:31 22 consider.

11:05:32 23 THE COURT: All right. Thank you.

11:05:34 24 MS. PELLETIER: So, now, those are my  
11:05:36 25 submissions on prejudice. What I would like to



1 do is quickly turn to the cases cited -- some of  
2 the cases cited in Canada's factum. So the  
3 first is the Mitchell decision.

4 THE COURT: Do you want the actual  
5 case or -- do I have to take it out, or do you  
6 want me to understand your position on the case?

7 MS. PELLETIER: You can take out the  
8 case, please.

9 THE COURT: Okay. I have it open.  
10 Mitchell.

11 MS. PELLETIER: So at paragraph 39,  
12 which is at page 939 of the decision -- so  
13 Canada's relied on this case to make the point  
14 that Dr. von Gernet is an experienced expert,  
15 that the Supreme Court of Canada has cited and  
16 they also rely on this case to make the point  
17 that the Supreme Court endorsed the principles  
18 of his methodology on oral, traditional  
19 evidence.

20 So this motion before you is, of  
21 course as you know, Your Honour, is about our  
22 rule 53.08 and whether the plaintiffs have  
23 established prejudice. So I don't want to spend  
24 too much time on this, but I do think it's  
25 necessary to flag for Your Honour that the

1 approach to the treatment of oral traditional  
2 evidence upheld by the Supreme Court of Canada  
3 in this case is not attributed to Dr. von  
4 Gernet.

5 So I did want to read paragraph 39.  
6 And this is the paragraph that Canada cites in  
7 its factum for the proposition that Dr. von  
8 Gernet's approach is upheld. So paragraph 39  
9 reads:

10 "There is a boundary that must  
11 not be crossed between a sensitive  
12 application and the complete  
13 abandonment of the rules of evidence.  
14 As Binnie, J., observed in the context  
15 of treaty rights, 'Generous rules of  
16 interpretation should not be confused  
17 with the vague sense of after-the-fact  
18 largesse.' In particular, the Van der  
19 Peet approach does not operate to  
20 amplify the cogency of evidence  
21 adduced in support of an Aboriginal  
22 claim. Evidence advanced in support  
23 of Aboriginal claims has been, [next  
24 page]like the evidence offered in any  
25 case, from the gamut of cogency from

11:07:34 1 the highly compelling to the highly  
11:07:36 2 dubious. Claims must still be  
11:07:39 3 established on the basis of persuasive  
11:07:42 4 evidence demonstrating their validity  
11:07:42 5 on the balance of probabilities.  
11:07:44 6 Placing due weight on the Aboriginal  
11:07:46 7 perspective or ensuring its supporting  
11:07:46 8 evidence and equal footing with more  
11:07:50 9 familiar forms of evidence means  
11:07:51 10 precisely what these phrases suggest,  
11:07:54 11 equal and due treatment. While the  
11:07:55 12 evidence presented by Aboriginal  
11:07:57 13 claimants should not be undervalued  
11:07:59 14 'simply because that evidence does not  
11:08:01 15 conform precisely with the evidentiary  
11:08:04 16 standards that would be applied in,  
11:08:06 17 for example a private law torts case,  
11:08:08 18 neither should it be artificially  
11:08:10 19 strained to carry more weight than it  
11:08:13 20 can reasonably support. If this is an  
11:08:15 21 obvious position it must nonetheless  
11:08:18 22 be stated."

11:08:19 23 So I'd like to now turn to where  
11:08:21 24 Canada -- sorry, the Supreme Court of Canada  
11:08:23 25 does mention Dr. von Gernet. And that's at

1 paragraphs 46 and 48, and that's also  
2 acknowledged by Canada. I'd like to take you to  
3 paragraph 48, which is at page 944 of the  
4 Mitchell decision. The very bottom of the page,  
5 here the court says:

6 "The trial judge preferred the  
7 evidence of Dr. Venables and Chief  
8 Mitchell when it conflicted with that  
9 of Dr. von Gernet. He properly  
10 admitted the testimony of Chief  
11 Mitchell relaying the oral history of  
12 his people correctly stating in  
13 accordance with Van der Peet that the  
14 weight he accorded to oral history and  
15 to documentary evidence does not  
16 depend on the form in which the  
17 evidence was presented to the court."

18 So here the Supreme Court of Canada is  
19 saying that the trial judge correctly applied  
20 the Van der Peet analysis in weighing oral  
21 traditional evidence. So I'd like to take a  
22 look at what the trial judge said about the Van  
23 der Peet analysis and the weight that should be  
24 given to oral traditional evidence, and that's  
25 the case that --

11:09:28 1 THE COURT: Just before you do that,  
11:09:28 2 I'm not clear on where you're going with this.

11:09:33 3 MS. PELLETIER: I'm about to make that  
11:09:34 4 very clear, I hope.

11:09:35 5 THE COURT: All right.

11:09:50 6 MS. PELLETIER: So paragraph -- this  
11:09:50 7 is the Mohawk Council of Akwesasne decision, so  
11:09:50 8 the trial decision of Mitchell. So paragraph  
11:09:51 9 90, which is at page 23 of 74 of the decision.

11:09:56 10 THE COURT: Sorry, the trial decision  
11:09:58 11 is in the same tab?

11:09:59 12 MS. PELLETIER: No, this is the case  
11:10:00 13 that I submitted after having --

11:10:02 14 THE COURT: Right, I have that.

11:10:03 15 MS. PELLETIER: Just to recap, Your  
11:10:05 16 Honour, Canada has stated in their factum that  
11:10:08 17 the Supreme Court of Canada has endorsed von  
11:10:12 18 Gernet's approach to oral traditional evidence,  
11:10:14 19 the interpretation of oral traditional evidence,  
11:10:16 20 they put up Mitchell as an example of that.

11:10:20 21 What I've pointed out to you is that  
11:10:21 22 in their section in the case about the treatment  
11:10:23 23 of oral traditional evidence they don't -- they  
11:10:27 24 don't attribute that to von Gernet. What they  
11:10:29 25 do is they say they will correctly apply -- that

1 the trial judge correctly applied Van der Peet.

2 And so now I want to see how the judge correctly  
3 applied Van der Peet.

4 THE COURT: I read that already, so  
5 you don't have to read it out loud. In my  
6 printout it's 90 to 94. Is there something more  
7 than that, or...

8 MS. PELLETIER: 93.

9 THE COURT: Well, 93, 94?

10 MS. PELLETIER: Yes. Sorry --

11 THE COURT: All right. So what's the  
12 point that you ask me to draw from those  
13 paragraphs?

14 MS. PELLETIER: Well, here what I'm  
15 saying again, and this goes to the point that  
16 Mr. Beggs spoke to necessity, I think this  
17 motion is about prejudice.

18 So I don't want to spend much time on  
19 this, but what the Supreme Court of Canada is  
20 saying here is that the trial judge correctly  
21 applied Van der Peet in weighing oral  
22 traditional evidence and that the Supreme Court  
23 of Canada endorses the trial judge's approach.  
24 And as we can see from this passage, the trial  
25 judge's approach was to reject von Gernet's

11:11:25 1 approach and not to adopt it. So I simply -- I  
11:11:27 2 want to flag that for Your Honour.

11:11:29 3 And finally, just a quick note about  
11:11:31 4 two of Canada's other cases.

11:11:33 5 THE COURT: Yes.

11:11:34 6 MS. PELLETIER: So at paragraphs -- I  
11:11:36 7 won't take you to them, but at paragraphs 40 and  
11:11:39 8 41 of its factum, Canada cites Juvag [ph] v.  
11:11:42 9 Vurke [ph] and Tracey v. Moore to argue that a  
11:11:42 10 trial judge should admit a late report if its  
11:11:47 11 admission is necessary to assist the trier of  
11:11:49 12 fact.

11:11:49 13 And I just point out, as Your Honour  
11:11:51 14 knows, necessity is not determinative and  
11:11:54 15 certainly does not do away with the need to  
11:11:56 16 consider prejudice under Rule 53.08.

11:12:00 17 So in closing, Your Honour, the  
11:12:02 18 plaintiffs submit that Canada's report is late  
11:12:05 19 and is not in -- a reply report to Professor  
11:12:09 20 McCarthy's report. That after three months of  
11:12:11 21 trial granting Canada leave to file von Gernet's  
11:12:14 22 report would prejudice the plaintiffs by forcing  
11:12:17 23 them to consider recalling several witnesses; an  
11:12:21 24 act that would have the unfair effect of  
11:12:23 25 highlighting the contents of Dr. von Gernet's

1 report and distort the way the plaintiffs have  
2 chosen to present their case.

3 It would create prejudice by  
4 completely defeating years of case management,  
5 and in our submission it would render the  
6 pre-trial compromise SON made with Canada  
7 meaningless.

8 THE COURT: Thank you, counsel.

9 MS. PELLETIER: Thank you.

10 THE COURT: Any reply?

11 MR. BEGGS: Yes, Your Honour, just two  
12 things. One minor thing with respect to  
13 Dr. McCarthy and the passage that was identified  
14 in the new report, the July 2019 report dealing  
15 with the question of days and weeks.

16 Of course Dr. McCarthy is a qualified  
17 geologist and Dr. von Gernet is not.  
18 Dr. McCarthy was cross-examined on the issue  
19 that's referred to in that paragraph, the length  
20 of time in which the breaking of the Nodaway  
21 Barrier occurred. And she actually gave the  
22 evidence that it could be hours, and that's her  
23 evidence and that's what is before the court. I  
24 think that -- well, perhaps I'll just leave it  
25 there that she was cross-examined on that point.



1                   The only other point would be whether  
2 I should comment at this point whether the  
3 report, as you said, should become evidence or  
4 not. It sounds to me as if my friend has  
5 specific objections to parts of the report. I  
6 had intended to ask for it all, but to ask for  
7 the admission of the written report as well as  
8 in the same manner that other written reports  
9 have been dealt with in this case.

10                   I'm not clear if there's specific  
11 objections to parts of it. I suppose that could  
12 be dealt with at the time of the voir dire I  
13 suppose.

14                   Unless you have questions, further  
15 questions, I'll leave it at that, Your Honour.

16                   THE COURT: All right. Counsel, I'm  
17 going to take this under reserve and give you a  
18 decision later. I am aware of the fact that  
19 there is probably, at least in the examples  
20 given by plaintiffs' counsel, foreshadowing of  
21 some of plaintiffs counsel's concerns that fall  
22 within a different category, although I'm not  
23 saying today that they can't be raised.

24                   There is contemplated a separate  
25 consideration of whether, for reasons associated

1 with the qualification of an expert, the scope  
2 of his or her testimony and their impartiality,  
3 that this gentleman's evidence should be heard  
4 at all or only in part, shall we say.

5 And I will be considering all of the  
6 submissions today, but it may be that some of  
7 these objections are more properly addressed in  
8 that context. And counsel, I asked you for the  
9 examples, so don't feel that you shouldn't have  
10 given them to me, Ms. Pelletier, but, you know,  
11 if it is the case that this gentleman is hoping  
12 to give opinion evidence about geology, it might  
13 be that that's going to come up at the voir  
14 dire. And quite independently of this  
15 situation, he may not be permitted to do so.

16 All right. I know that you've -- you  
17 have to bring things up now just in case. So  
18 that's -- let me just say, it remains to be  
19 seen.

20 On the other issue that I raised,  
21 which corrected by plaintiffs' counsel, I guess  
22 it was part of this motion although I didn't see  
23 it as being given any attention at all in the  
24 factum, that this document would itself become  
25 evidence.

1 As you I'm sure know, that is not  
2 automatic. And it may well be a good idea,  
3 depending on what the other issues are and how  
4 they are resolved and whether all or part of the  
5 report will be admitted. But do not assume that  
6 it will be entirely addressed in this motion,  
7 rather than the subject of further attention.

8 Now, the last thing I want to raise is  
9 that I have asked counsel, I believe by the end  
10 of next week, to get back to me on our fall  
11 schedule. And I don't recall -- I take it from  
12 Ms. Pelletier that this gentleman is on the fall  
13 schedule. I don't have it handy. But there is  
14 another report from this gentleman that is in on  
15 consent. So I am assuming that regardless of  
16 the outcome of any of these, unless the  
17 plaintiffs are able to persuade me that he  
18 should not be able to testify -- in fact,  
19 counsel, Ms. Pelletier, it wouldn't affect that  
20 report at all because that's a factual report,  
21 yes?

22 MS. PELLETIER: Yes, and we saw it as  
23 part of the compromise, Your Honour.

24 THE COURT: Again, that is --

25 MS. PELLETIER: I know. Yes, that's

11:17:55 1 right. We aren't trying to punt that, the  
11:17:58 2 abridged report we agreed to.

11:18:01 3 THE COURT: So the Mohan test was --  
11:18:03 4 White Burgess and so on only applies to opinion  
11:18:06 5 evidence and does not apply to factual evidence.

11:18:08 6 MS. PELLETIER: That's correct. Yes,  
11:18:08 7 that's right.

11:18:09 8 THE COURT: So this gentleman is going  
11:18:11 9 to be coming along one way or the other.

11:18:13 10 MS. PELLETIER: Correct.

11:18:14 11 THE COURT: And you would be entitled  
11:18:15 12 to cross-examine him on his, I'm going to call  
11:18:18 13 it, abridged report, in any event. Is that  
11:18:21 14 everyone's understanding?

11:18:22 15 MR. BEGGS: Yes, Your Honour.

11:18:23 16 THE COURT: Well, I'll try not -- I  
11:18:25 17 mean, I don't like to make promises because it  
11:18:29 18 could get in the way of other aspects of this  
11:18:31 19 trial. But in a perfect world I'll give you a  
11:18:34 20 ruling next week so that you could start to  
11:18:36 21 factor whatever that is into the next steps.  
11:18:39 22 And we've already discussed dealing with a voir  
11:18:41 23 dire in August, so that's going to be nice and  
11:18:44 24 early, okay?

11:18:46 25 Is there any other matter that anyone

11:18:48

1 wishes to raise? Anyone? Anyone? No. Okay.

11:18:51

2 So we resume on Monday with Professor Brownlie,

11:18:56

3 and we'll go from there.

4 --- Whereupon the proceedings were  
5 adjourned at 11:19 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;

That the submissions, comments, et  
cetera 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 30th day of July 2019.



PER: HELEN MARTINEAU

CERTIFIED SHORTHAND REPORTER

<b>1</b>	<b>23</b> 2922:9	<b>7</b>	<b>academic</b> 2872:17	2908:19 2910:8 2912:24 2927:7 2928:6
<b>1</b> 2860:1 2862:14,16 2863:9,16,19,22 2864:1 2912:14	<b>244</b> 2898:21,22	<b>74</b> 2922:9	<b>accepted</b> 2873:6 2876:10	<b>addresses</b> 2893:20
<b>10,000</b> 2872:6	<b>29th</b> 2861:2	<b>8</b>	<b>accessing</b> 2871:9	<b>addressing</b> 2904:4
<b>105</b> 2862:18,19	<b>2nd</b> 2861:8	<b>8</b> 2872:6	<b>accordance</b> 2921:13	<b>adduced</b> 2919:21
<b>10:01</b> 2859:1	<b>3</b>	<b>851</b> 2893:8	<b>accorded</b> 2921:14	<b>adjourned</b> 2930:5
<b>11:19</b> 2930:5	<b>3</b> 2859:25 2863:11 2866:9	<b>9</b>	<b>account</b> 2873:3 2907:21 2913:18	<b>adjournment</b> 2864:6
<b>13</b> 2895:24	<b>300-page</b> 2915:24	<b>9</b> 2872:6	<b>acknowledge</b> 2906:17 2911:23	<b>admissibility</b> 2911:3,8
<b>14</b> 2871:1,9,10	<b>30th</b> 2861:6	<b>90</b> 2922:9 2923:6	<b>acknowledge</b> <b>d</b> 2878:21 2882:20 2921:2	<b>admissible</b> 2864:2
<b>14th</b> 2861:20	<b>31</b> 2861:17	<b>93</b> 2923:8,9	<b>acknowledg</b> <b>s</b> 2903:20	<b>admission</b> 2866:20 2924:11 2926:7
<b>15th</b> 2868:24	<b>31st</b> 2862:3 2865:12	<b>939</b> 2918:12	<b>acknowledgi</b> <b>ng</b> 2881:8	<b>admit</b> 2864:24 2924:10
<b>16-page</b> 2882:10	<b>341</b> 2903:24 2904:8	<b>94</b> 2923:6,9	<b>acknowledg</b> <b>ment</b> 2886:6 2897:15 2917:14	<b>admitted</b> 2921:10 2928:5
<b>18</b> 2882:4	<b>361</b> 2882:6 2893:8	<b>944</b> 2921:3	<b>act</b> 2875:19 2924:24	<b>admittedly</b> 2861:11
<b>2</b>	<b>39</b> 2918:11 2919:5,8	<b>A</b>	<b>actual</b> 2918:4	<b>admitting</b> 2863:7
<b>2</b> 2862:18 2863:9,10,21,22 2864:4 2888:24	<b>4</b>	<b>a.m.</b> 2859:1 2930:5	<b>add</b> 2917:2	<b>adopt</b> 2924:1
<b>2011</b> 2888:15	<b>4</b> 2915:9 2916:13	<b>abandoned</b> 2893:23 2894:4	<b>added</b> 2869:15	<b>advance</b> 2893:19 2909:17
<b>2013</b> 2861:6,20 2899:9	<b>40</b> 2924:7	<b>abandonmen</b> <b>t</b> 2919:13	<b>additional</b> 2859:14 2875:3 2880:13 2886:14 2887:1 2888:3 2890:12 2891:9 2905:15 2906:24 2908:25 2910:25	<b>advanced</b> 2919:22
<b>2014</b> 2861:17, 25 2882:19	<b>41</b> 2924:8	<b>ability</b> 2909:14,19	<b>address</b> 2861:15 2878:8 2906:20 2907:6 2913:13	<b>affect</b> 2928:19
<b>2015</b> 2862:6	<b>46</b> 2921:1	<b>Aboriginal</b> 2919:21,23 2920:6,12	<b>addressed</b>	<b>affidavit</b> 2892:5
<b>2016</b> 2861:2	<b>48</b> 2921:1,3	<b>abridged</b> 2883:20 2890:16 2912:20 2914:13 2917:20 2929:2, 13		<b>after-the-fact</b> 2919:17
<b>2017</b> 2865:12	<b>5</b>	<b>abruptly'</b> 2904:16		<b>agree</b> 2868:19 2876:7 2887:8 2897:7 2917:6
<b>2018</b> 2861:8 2868:24 2875:11 2882:24 2894:8, 15 2911:4 2913:7	<b>5</b> 2863:11,22	<b>absolutely</b> 2866:24 2879:6		<b>agreed</b> 2885:4 2889:17 2896:23 2912:19
<b>2019</b> 2860:6,11 2871:3 2874:13 2875:2 2898:19 2903:21 2905:4 2910:20 2925:14	<b>53.03</b> 2863:11			
	<b>53.08</b> 2863:9, 15,18,21,22 2864:1 2869:25 2880:12 2897:16 2918:22 2924:16			

2913:14,16,20, 22 2914:12,13, 14,15 2916:24 2917:5,6 2929:2	<b>anyone's</b> 2865:5	<b>aspects</b> 2929:18	2876:4 2888:25	2929:15
<b>agreeing</b> 2897:12	<b>apologies</b> 2860:1 2910:13	<b>assertion</b> 2900:13	<b>automatic</b> 2901:18 2928:2	<b>begin</b> 2874:22 2888:11
<b>agreement</b> 2878:18 2880:5, 23 2884:13 2886:16 2910:21,23 2911:6,20 2914:8,9	<b>appeared</b> 2866:13	<b>assess</b> 2862:24	<b>aware</b> 2870:4 2873:20,23 2926:18	<b>beginning</b> 2878:10
<b>agreements</b> 2879:16	<b>appears</b> 2876:9	<b>assist</b> 2909:10 2910:17 2915:14 2924:11	<b>B</b>	<b>begins</b> 2898:23 2904:8
<b>ahead</b> 2860:17 2867:7 2874:1 2875:6 2888:6 2903:11 2908:24	<b>application</b> 2876:19 2916:15 2919:12	<b>assistance</b> 2909:22	<b>back</b> 2878:7 2885:7 2899:3 2914:2 2928:10	<b>benefit</b> 2865:22 2866:2 2909:10
<b>agreements</b> 2879:16	<b>applied</b> 2920:16 2921:19 2923:1, 3,21	<b>assistant</b> 2882:11	<b>background</b> 2886:9	<b>Benn</b> 2869:17
<b>airtime</b> 2908:16	<b>applies</b> 2864:1 2929:4	<b>assisting</b> 2873:11	<b>bad</b> 2886:1	<b>Benton-banai</b> 2898:16
<b>Akwesasne</b> 2922:7	<b>apply</b> 2922:25 2929:5	<b>assume</b> 2892:16 2899:7 2916:14 2928:5	<b>balance</b> 2920:5	<b>big</b> 2895:12
<b>allowed</b> 2880:6 2901:10 2912:21 2917:19	<b>approach</b> 2919:1,8,19 2922:18 2923:23,25 2924:1	<b>assumed</b> 2916:6	<b>Balansingha m</b> 2888:23	<b>binding</b> 2867:20
<b>allowing</b> 2869:23	<b>appropriateness</b> 2884:3	<b>assuming</b> 2901:19 2928:15	<b>Barrier</b> 2904:6, 11 2905:10,18 2925:21	<b>Binnie</b> 2919:14
<b>amended</b> 2913:8	<b>arguably</b> 2893:11	<b>assumption</b> 2862:2	<b>based</b> 2873:20 2874:24 2895:10 2915:2	<b>black</b> 2877:25
<b>America</b> 2872:13	<b>argue</b> 2877:3 2879:9 2924:9	<b>assured</b> 2891:1	<b>basin</b> 2862:24	<b>blackline</b> 2889:25
<b>amplify</b> 2919:20	<b>arguing</b> 2864:12 2867:14 2891:7	<b>attempted</b> 2910:7	<b>basis</b> 2863:1 2881:10 2884:13 2920:3	<b>blacklining</b> 2871:5
<b>analysis</b> 2921:20,23	<b>argument</b> 2868:16 2872:21 2876:25 2880:13 2911:13 2914:7	<b>attempts</b> 2909:2	<b>batch</b> 2861:24	<b>blank</b> 2865:1
<b>Anishinaabe</b> 2862:22 2898:14,25 2899:23	<b>arising</b> 2866:5	<b>attention</b> 2899:9 2902:18 2927:23 2928:7	<b>based</b> 2873:20 2874:24 2895:10 2915:2	<b>blended</b> 2869:23
<b>answering</b> 2900:25	<b>arrangement s</b> 2866:16 2890:18	<b>Attorney</b> 2859:22	<b>basin</b> 2862:24	<b>blistering</b> 2872:14
<b>anthropology</b> 2882:5	<b>artificially</b> 2920:18	<b>attribute</b> 2922:24	<b>basis</b> 2863:1 2881:10 2884:13 2920:3	<b>book</b> 2874:14, 18 2888:25 2898:14,15 2899:12,14,19, 24 2900:12,22, 24 2901:1
<b>anticipate</b> 2880:13		<b>attributed</b> 2919:3	<b>batch</b> 2861:24	<b>books</b> 2859:2
		<b>August</b> 2929:23	<b>Beggs</b> 2859:3, 4,8,15,20,24 2860:3,18 2862:16 2863:17,20,25 2866:18 2867:2, 8,24 2868:2,10, 18 2869:21 2871:6,10,14,17 2873:23 2879:2 2881:12 2883:12 2884:11 2901:23 2902:19 2903:18 2911:9 2914:21 2923:16 2925:11	<b>bottom</b> 2862:20 2898:22 2921:4
		<b>authorities</b> 2872:16 2874:15,18		<b>bound</b> 2879:10,12 2885:24 2886:4
				<b>boundary</b> 2919:10
				<b>Bowman</b> 2882:10



<b>breach</b> 2904:5, 12,13 2905:19	2899:21,25 2900:8 2901:10 2903:6 2905:23 2909:11 2910:9, 22 2911:6	2927:11,17	<b>cited</b> 2876:4 2918:1,2,15	<b>complete</b> 2893:12 2919:12
<b>breaking</b> 2925:20	2912:11,16,19, 21,24 2913:7,11 2914:12,13,14 2916:3 2918:15 2919:2,6 2920:24 2921:2, 18 2922:16,17 2923:19,23 2924:8,21 2925:6	<b>cases</b> 2889:15 2895:10 2918:1, 2 2924:4	<b>cites</b> 2919:6 2924:8	<b>completed</b> 2861:25
<b>breath</b> 2887:22	<b>Canada's</b> 2861:16 2874:14 2875:10 2882:18 2889:21 2901:20 2902:15 2910:8 2918:2,13 2924:4,18	<b>casual</b> 2872:9 2912:1,4	<b>Civil</b> 2865:23	<b>completely</b> 2875:24 2878:4 2901:13 2925:4
<b>bridge</b> 2901:21		<b>category</b> 2891:3 2926:22	<b>claim</b> 2871:23 2872:7,24 2919:22	<b>complex</b> 2893:17
<b>bring</b> 2927:17		<b>caused</b> 2868:21 2907:12	<b>claimants</b> 2920:13	<b>compromise</b> 2867:4,6 2876:1 2877:8,13,19,22 2878:18 2880:9 2883:12,16,23 2884:2,8,12 2885:3 2886:24 2887:10 2910:21,24,25 2913:3,10,17 2914:9,14 2916:11 2917:15,18 2925:6 2928:23
<b>brokered</b> 2877:9 2878:19 2897:14		<b>causing</b> 2864:18	<b>claimed</b> 2912:23	<b>compromises</b> 2886:12
<b>brought</b> 2896:18 2897:1 2916:19		<b>century</b> 2904:22	<b>claims</b> 2872:12,15 2883:2 2919:23 2920:2	<b>conceded</b> 2867:17
<b>Brownlie</b> 2930:2		<b>cetera</b> 2883:20	<b>clear</b> 2868:3 2887:8 2896:7 2922:2,4 2926:10	<b>concerned</b> 2876:15
<b>Burgess</b> 2870:5 2929:4		<b>challenge</b> 2867:12	<b>close</b> 2876:3 2891:19	<b>concerns</b> 2865:21 2896:4 2926:21
<b>C</b>		<b>chambers</b> 2911:25	<b>closing</b> 2910:11 2924:17	<b>conclusion</b> 2915:15
<b>calendar</b> 2909:13		<b>chance</b> 2913:13 2917:1	<b>closure</b> 2910:11 2924:17	<b>conclusions</b> 2870:13 2890:7 2902:13 2903:1
<b>call</b> 2860:6 2876:8 2896:8, 21 2901:11 2929:12	<b>capable</b> 2904:18 2907:21 2908:2, 9	<b>chances</b> 2916:23	<b>coagency</b> 2919:20,25	<b>conclusory</b> 2915:11
<b>called</b> 2895:22 2899:2 2901:24 2916:23	<b>carry</b> 2920:19	<b>change</b> 2915:25	<b>colleague</b> 2892:24	<b>concrete</b> 2907:8
<b>calling</b> 2883:23 2912:15	<b>case</b> 2862:5 2864:23 2865:1 2866:6,23 2867:15 2868:8, 12 2874:18 2875:23,25 2878:20 2879:12 2883:17 2888:13,14,15, 18,24 2889:3,4, 6,8,17,23 2891:16 2893:19,21 2895:8,17 2896:21 2910:10 2911:5 2915:21 2918:5, 6,8,13,16 2919:3,25 2920:17 2921:25 2922:12,22 2925:2,4 2926:9	<b>chapter</b> 2915:24	<b>commence</b> 2910:10	<b>conduct</b> 2864:9
<b>Canada</b> 2859:22 2860:10 2861:2, 8 2862:2 2864:25 2867:10 2869:18 2875:15 2876:2, 4,10,13 2877:9 2878:13,15,19, 21 2880:7 2882:8,15,20 2883:15 2886:5 2889:11,20 2890:15 2893:23 2894:13		<b>characterizati on</b> 2899:25	<b>commencem ent</b> 2915:6	<b>conferences</b> 2911:5
		<b>characterize</b> 2899:22,23 2900:22,24	<b>commencing</b> 2859:1	<b>confess</b> 2903:7
		<b>cheque</b> 2865:1	<b>comment</b> 2868:6,8 2926:2	
		<b>Chief</b> 2921:7, 10	<b>comments</b> 2862:12 2870:6	
		<b>children's</b> 2899:12,14,24	<b>commissione d</b> 2882:16	
		<b>choices</b> 2894:21	<b>community</b> 2896:3 2899:11 2903:14	
		<b>chose</b> 2865:9	<b>compelling</b> 2920:1	
		<b>chosen</b> 2875:22 2907:19 2925:2		

<b>confirm</b> 2874:23	<b>control</b> 2865:5	<b>countless</b> 2899:5	2917:7,10,23 2918:4,9,15,17 2919:2 2920:24 2921:5,17,18 2922:1,5,10,14, 17 2923:4,9,11, 19,22 2924:5 2925:8,10,23 2926:16 2928:24 2929:3, 8,11,16	<b>dated</b> 2861:20
<b>conflicted</b> 2921:8	<b>conversation</b> s 2912:2	<b>couple</b> 2870:15		<b>day</b> 2911:25
<b>conform</b> 2920:15	<b>converse</b> 2873:4	<b>courses</b> 2884:25		<b>days</b> 2870:15 2904:14 2925:15
<b>confused</b> 2919:16	<b>convoluted</b> 2860:22	<b>court</b> 2859:2,7, 12,16,23 2860:2,9 2862:15 2863:15,18,24 2866:3,25 2867:7,22,25 2868:5,11,17 2869:18 2870:12,18 2871:3,8,11,15 2873:12,19,25 2874:6,9,16,20, 22 2875:5 2876:6,15,23 2877:2,12,16, 21,25 2878:7 2879:1,11,21 2880:18,21 2881:11,17,20 2883:10,21 2884:18 2885:1, 5 2886:1,15 2887:2,14,21 2888:5 2889:1, 24 2890:3,17,20 2891:12 2892:3, 15,20 2893:4, 14,25 2894:3,7, 11,18,23 2895:13 2896:5 2897:2,19,23 2898:4,10,20 2900:3,7,14 2902:8,11,17 2903:10 2904:1 2905:1,5,8,14, 24 2906:3,7,8, 13,16 2907:7, 20,23 2908:1,8, 22 2909:6,20 2910:1,4 2911:14,15 2912:3,6 2913:12,19,23 2914:1,15,20 2915:18 2916:16,22	<b>days/weeks'</b> 2904:15	
<b>conjoining</b> 2871:21	<b>copy</b> 2859:6,8 2860:3,4,5 2871:1 2898:18		<b>courts</b> 2891:17	<b>deadline</b> 2860:25 2861:3, 5,16,19,21,22 2862:4 2894:10
<b>connection</b> 2870:17	<b>correct</b> 2911:16 2929:6, 10		<b>cover</b> 2859:10	<b>deadlines</b> 2864:23 2888:21
<b>connections</b> 2870:10	<b>corrected</b> 2927:21		<b>create</b> 2925:3	<b>deal</b> 2861:12 2867:10,11 2887:4,15,22, 23,25 2888:2 2892:25 2897:14 2902:19
<b>consent</b> 2879:16 2928:15	<b>correcting</b> 2916:5		<b>created</b> 2888:3 2890:12 2910:25	<b>dealing</b> 2901:14 2902:5, 8 2906:13 2910:8 2925:14 2929:22
<b>consenting</b> 2869:19	<b>corrections</b> 2863:5		<b>credentialed</b> 2872:10	<b>dealt</b> 2870:3 2926:9,12
<b>consideratio</b> n 2926:25	<b>correctly</b> 2867:5 2911:10 2921:12,19 2922:25 2923:1, 2,20		<b>cross</b> 2909:19	<b>debate</b> 2872:17
<b>consideratio</b> ns 2873:2	<b>cost</b> 2888:19		<b>cross-</b> <b>examination</b> 2900:2 2909:11, 23 2910:18	<b>decide</b> 2880:16 2881:10 2891:21
<b>considered</b> 2864:21 2865:23	<b>Council</b> 2874:19 2922:7		<b>cross-</b> <b>examine</b> 2912:18 2929:12	<b>decided</b> 2879:23 2880:2, 3
<b>contained</b> 2912:21	<b>counsel</b> 2859:13 2866:15 2874:1 2877:23 2879:14 2880:19 2883:21 2885:18 2886:2 2889:24 2890:5, 23 2892:4 2893:15 2896:5 2900:19 2902:6 2905:2 2907:24 2908:1 2909:22 2914:3,4,23 2916:22 2925:8 2926:16,20 2927:8,21 2928:9,19		<b>cross-</b> <b>examined</b> 2925:18,25	<b>deciding</b> 2913:18 2916:4
<b>contemplate</b> 2866:10			<b>crossed</b> 2905:22 2919:11	<b>decision</b> 2879:4 2913:24 2918:3,12 2921:4 2922:7, 8,9,10 2926:18
<b>contemplated</b> 2916:3,10 2926:24			<b>crucial</b> 2888:22	<b>decisions</b> 2885:24 2894:16
<b>contemplates</b> 2869:2 2914:8 2915:5			<b>crux</b> 2898:6	
<b>contemplatin</b> g 2881:25				
<b>contents</b> 2875:20 2907:17 2924:25			<b>D</b>	
<b>context</b> 2868:9 2871:24 2900:25 2908:3 2919:14 2927:8	<b>counsel's</b> 2926:21		<b>daily</b> 2904:19	
			<b>dam</b> 2904:21	
			<b>database</b> 2869:10	
			<b>date</b> 2895:23 2898:17	

<b>deep-time</b> 2871:22	2911:17	<b>disregarded</b> 2887:5	<b>eliminated</b> 2883:8	<b>event</b> 2860:14 2915:14,17 2929:13
<b>defeat</b> 2875:25	<b>difference</b> 2868:7 2879:14 2887:20 2898:7 2911:16	<b>distinction</b> 2912:7	<b>end</b> 2909:13 2928:9	<b>events</b> 2872:25
<b>defeating</b> 2925:4	<b>differently</b> 2895:1	<b>distort</b> 2875:21 2907:18 2925:1	<b>endorsed</b> 2918:17 2922:17	<b>events/ processes</b> 2863:2
<b>defendant</b> 2859:21 2896:23	<b>difficult</b> 2872:13 2877:21 2886:18 2914:7	<b>document</b> 2866:4,12 2867:6 2868:3 2884:1 2894:4 2902:13 2914:20 2927:24	<b>endorsement</b> 2868:17 2879:3, 17 2911:19	<b>eventually</b> 2916:7
<b>defendants</b> 2861:18	<b>difficulty</b> 2887:3	<b>documents</b> 2859:17 2874:12	<b>endorses</b> 2923:23	<b>everyone's</b> 2929:14
<b>defy</b> 2865:1	<b>dire</b> 2870:3 2926:12 2927:14 2929:23	<b>documentary</b> 2921:15	<b>enforced</b> 2889:14	<b>evidence</b> 2864:2 2866:21 2870:11,15 2871:21 2873:3, 8,9,15 2882:23 2883:7 2885:19 2892:3,8,13 2893:6,20 2894:16,17 2895:11,24 2896:9 2897:11 2898:5 2899:18 2900:11 2901:18,20 2902:4,16 2904:5,17 2908:4 2910:6 2912:12,22 2913:4 2915:2 2917:19 2918:19 2919:2, 13,20,22,24 2920:4,8,9,12, 14 2921:7,15, 17,21,24 2922:18,19,23 2923:22 2925:22,23 2926:3 2927:3, 12,25 2929:5
<b>delay</b> 2864:9, 14 2869:14 2888:19	<b>directed</b> 2903:9	<b>draw</b> 2870:12 2923:12	<b>engaging</b> 2903:20	
<b>delivered</b> 2896:16	<b>disagrees</b> 2866:15	<b>drawing</b> 2870:10 2902:17	<b>engage</b> 2909:15	
<b>demonstrate</b> 2892:11 2895:2	<b>disclosure</b> 2882:7	<b>drawings</b> 2870:10 2902:17	<b>engaging</b> 2903:20	
<b>demonstratin g</b> 2894:24 2920:4	<b>discoveries</b> 2862:23	<b>drew</b> 2899:8	<b>enter</b> 2913:8	
<b>depend</b> 2921:16	<b>discussed</b> 2898:13 2929:22	<b>dubious</b> 2920:2	<b>entering</b> 2889:9	
<b>depending</b> 2928:3	<b>discusses</b> 2871:12	<b>due</b> 2865:4 2891:19,20 2896:3 2920:6, 11	<b>entitled</b> 2886:21 2929:11	
<b>depth</b> 2860:21	<b>discussing</b> 2888:11 2906:21 2916:11		<b>entitlement</b> 2897:25	
<b>der</b> 2919:18 2921:13,20,23 2923:1,3,21	<b>discussion</b> 2905:15	<b>early</b> 2929:24	<b>equal</b> 2920:8, 11	
<b>derived</b> 2899:11	<b>discussions</b> 2879:15 2914:3	<b>Earth</b> 2899:3	<b>essential</b> 2860:23 2888:16	
<b>describe</b> 2899:18	<b>dismiss</b> 2872:23	<b>Eddie</b> 2898:16	<b>essentially</b> 2864:25 2867:13 2870:20	
<b>describing</b> 2899:13	<b>dismissal</b> 2872:9	<b>effect</b> 2875:20 2887:15 2907:16 2913:9 2924:24	<b>established</b> 2918:23 2920:3	
<b>determinatio n</b> 2868:13	<b>dispute</b> 2884:3	<b>effort</b> 2889:7	<b>estimate</b> 2904:21	
<b>determinative</b> 2924:14	<b>disputed</b> 2879:16	<b>elicited</b> 2915:3	<b>evaluating</b> 2873:3	
<b>determined</b> 2873:15		<b>eliminate</b> 2913:5		
<b>devalues</b> 2899:15				
<b>dialogue</b> 2885:14				

**E**

<b>examples</b> 2898:9 2926:19 2927:9	<b>explained</b> 2898:6	2918:2 2919:7 2922:16 2924:8 2927:24	<b>fine</b> 2895:3 2900:3,8 2901:3 2905:9	<b>G</b>
<b>Excellent</b> 2874:21	<b>explicitly</b> 2861:10 2870:10	<b>failure</b> 2863:12 2904:20	<b>firstly</b> 2882:18	<b>gamut</b> 2919:25
<b>excluding</b> 2866:24	<b>expressed</b> 2867:4,19 2868:16	<b>fair</b> 2889:24 2893:2,5 2906:22 2912:9, 10	<b>fit</b> 2876:24	<b>Gans</b> 2866:7 2867:1,19 2876:9 2877:10 2878:20 2879:4, 9 2884:12 2897:13 2911:4
<b>exclusionary</b> 2870:4	<b>expresses</b> 2867:6 2870:23	<b>fall</b> 2926:21 2928:10,12	<b>flag</b> 2918:25 2924:2	<b>Gans'</b> 2894:4 2911:11
<b>exercise</b> 2880:7	<b>expressly</b> 2914:8 2916:3	<b>familiar</b> 2920:9	<b>Flood</b> 2899:2	<b>gave</b> 2925:21
<b>exhibit</b> 2884:10	<b>extension</b> 2861:21 2894:6	<b>fashion</b> 2908:18	<b>floods</b> 2898:23	<b>general</b> 2859:22 2873:13 2896:7, 12
<b>existence</b> 2872:16	<b>extensions</b> 2861:1 2889:18	<b>February</b> 2861:2 2876:18	<b>focus</b> 2875:8 2908:3 2912:8	<b>Generous</b> 2919:15
<b>exists</b> 2892:13	<b>extent</b> 2883:3	<b>feel</b> 2907:5 2927:9	<b>follow</b> 2883:15	<b>gentleman</b> 2900:15 2901:12,24 2902:11,25 2905:25 2927:11 2928:12,14 2929:8
<b>expected</b> 2862:1	<b>extra</b> 2889:16	<b>file</b> 2859:18 2875:15 2878:13 2883:19 2902:16 2912:20 2914:13 2917:20 2924:21	<b>footing</b> 2920:8	<b>gentleman's</b> 2900:17 2927:3
<b>expecting</b> 2896:13	<b>extraordinary</b> 2872:7	<b>filed</b> 2861:9 2865:7 2890:2, 15 2893:20 2905:6 2912:25	<b>footnotes</b> 2893:8	<b>geologist</b> 2882:3 2925:17
<b>experience</b> 2915:17	<b>extremely</b> 2896:10,11	<b>filling</b> 2861:5 2874:18 2903:8 2910:20	<b>forcing</b> 2875:18 2924:22	<b>geology</b> 2862:9 2863:4 2865:19 2873:9 2882:5 2883:13 2884:16,20 2904:17 2905:12 2927:12
<b>experienced</b> 2912:25 2918:14	<b>eyewitnesses</b> 2872:5	<b>filled</b> 2862:11	<b>form</b> 2921:16	<b>geomytholog y</b> 2883:5,14,18 2884:24 2905:12
<b>expert</b> 2860:4 2863:12 2865:4, 23 2866:21 2869:5,15,16, 20,24 2870:2 2873:11 2884:17,23 2889:1,11,22 2890:5,7 2891:18,25 2893:7 2909:3, 10,22 2910:1,2, 16 2918:14 2927:1	<b>F</b>	<b>finally</b> 2876:3 2924:3	<b>formed</b> 2884:13	<b>Gernet</b> 2860:12,25 2861:9 2870:2, 20 2871:1 2872:22 2873:11 2874:13
<b>expertise</b> 2885:3 2907:2	<b>fact</b> 2866:19 2868:22 2878:18 2879:8 2880:15 2883:4 2889:9,16 2893:7,23 2894:20 2896:6 2897:23 2898:5 2904:7 2917:19 2924:12 2926:18 2928:18	<b>find</b> 2867:22,25 2868:13 2872:14,24 2879:7 2883:4 2891:24 2892:25 2894:1 2900:4,7 2907:1 2909:3	<b>forms</b> 2920:9	
<b>experts</b> 2893:22 2903:15 2909:1, 3,5	<b>factor</b> 2929:21	<b>findings</b> 2890:6 2902:12 2903:1	<b>forward</b> 2886:17,20,25 2892:5,21 2903:6	
<b>explain</b> 2870:21	<b>facts</b> 2860:23 2861:14		<b>Francine</b> 2904:12	
	<b>factual</b> 2860:21 2863:6 2928:20 2929:5		<b>friend</b> 2870:8 2926:4	
	<b>factum</b> 2860:7 2876:5 2878:12		<b>friends</b> 2861:16 2862:8 2864:11,16,22 2865:6,13 2867:9	
			<b>friends'</b> 2860:7 2861:15 2862:13	
			<b>full</b> 2864:13 2902:16 2908:3	

2878:14,22 2882:4,14,18 2883:4,15,19 2893:12,24 2900:13 2903:19 2904:4 2908:21 2909:12 2911:3 2912:11,18,20 2913:5 2918:14 2919:4 2920:25 2921:9 2922:24 2925:17	<b>ground</b> 2906:18 <b>guess</b> 2911:24 2927:21 <hr/> <b>H</b> <hr/> <b>handed</b> 2859:5 <b>handicap</b> 2916:23 <b>handy</b> 2859:3, 19 2874:14 2928:13 <b>happen</b> 2916:7 <b>happened</b> 2894:25 2914:17 <b>happening</b> 2915:7 <b>hard</b> 2909:7 <b>Hawkins</b> 2861:20 <b>heading</b> 2898:22 <b>health</b> 2896:4 <b>hear</b> 2866:14 2876:19 2896:13 2907:9 <b>heard</b> 2873:14 2879:1 2927:3 <b>hearing</b> 2877:5 <b>held</b> 2911:4 <b>helpful</b> 2864:15 <b>helpfully</b> 2862:9 <b>highlight</b> 2882:2 <b>highlighting</b> 2875:20 2881:22 2907:16 2924:25	<b>highly</b> 2872:1 2920:1 <b>historical</b> 2863:1 <b>history</b> 2869:10 2873:9 2886:11 2921:11,14 <b>hold</b> 2915:16 <b>honour</b> 2859:4 2860:18,19 2866:18 2867:2 2868:18,20 2869:21 2871:7, 14 2873:18,24 2874:5,8 2875:8 2877:18 2879:7 2880:1,16 2881:25 2883:3 2884:9,22 2885:22,25 2886:23 2888:8, 17 2889:13 2892:13,22 2893:3 2894:21 2895:7 2896:25 2898:19 2899:13 2900:10 2902:14 2903:7 2904:23 2906:15 2907:1, 12 2908:7,15 2909:9 2910:13, 24 2911:9 2913:21 2914:11,18 2917:3 2918:21, 25 2922:16 2924:2,13,17 2925:11 2926:15 2928:23 2929:15 <b>hope</b> 2871:2 2877:18 2895:8 2922:4 <b>hoped</b> 2893:6 <b>hoping</b> 2927:11 <b>hours</b> 2925:22	<b>human</b> 2915:16 <b>Huron</b> 2862:24 <hr/> <b>I</b> <hr/> <b>idea</b> 2884:8 2900:8 2928:2 <b>identified</b> 2864:17,20 2867:5 2868:3 2870:4,8 2889:1 2925:13 <b>identifies</b> 2863:10 <b>identify</b> 2860:5 <b>ignore</b> 2889:3 <b>imagine</b> 2891:7 2893:17 <b>impartiality</b> 2927:2 <b>implication</b> 2862:7 2863:13 <b>in-chief</b> 2905:22 <b>inclined</b> 2885:7 <b>included</b> 2862:9 2866:16 2867:11 2876:10,12 <b>includes</b> 2877:22 <b>including</b> 2882:23 <b>incorrect</b> 2862:10 <b>independentl y</b> 2927:14 <b>Indigenous</b> 2872:2 <b>inevitable</b> 2896:20 <b>inevitably</b>	2896:15 2897:6 <b>infer</b> 2895:7,9 <b>inferred</b> 2895:3 <b>infers</b> 2887:5,6 <b>informal</b> 2868:15 2879:15 2912:6 2914:3 <b>informally</b> 2911:18 <b>information</b> 2905:10 <b>initial</b> 2882:7, 21 2883:13 <b>inquiries</b> 2892:6 2910:6 <b>instructions</b> 2882:18 <b>intend</b> 2860:20 <b>intended</b> 2881:15 2882:21 2889:11 2894:13 2900:16 2926:6 <b>intensively</b> 2888:14 <b>interesting</b> 2914:21 <b>intergenerati onally</b> 2872:3 <b>interpretation</b> 2919:16 2922:19 <b>interrupt</b> 2900:18 <b>intervention</b> 2888:20 <b>introduce</b> 2914:25 <b>introduction</b> 2870:22 <b>introductory</b> 2871:12
--	---	---	---	---

<b>inventory</b> 2859:10	2911:4,10	<b>launch</b> 2876:6	2898:13 2899:1 2900:1	
<b>irregardless</b> 2884:2	<b>Juvag</b> 2924:8	<b>law</b> 2920:17		<b>M</b>
<b>issue</b> 2861:10 2863:22 2867:13 2868:13 2879:23 2880:24 2881:5, 24,25 2901:6 2902:5 2905:16 2906:8 2925:18 2927:20	<b>juxtaposing</b> 2873:8	<b>lay</b> 2912:16	<b>lets</b> 2903:22	<b>made</b> 2868:7,8 2870:18 2876:1, 9,20 2879:9 2885:10,24 2886:12 2890:18 2892:6 2894:15,22 2911:19,21,22 2913:10 2925:6
<b>issues</b> 2860:13 2869:23,24 2908:19 2928:3	<hr/> <b>K</b> <hr/>	<b>lays</b> 2884:11	<b>letting</b> 2907:3	<b>magnitude</b> 2888:17 2891:16 2895:8
	<b>Karl</b> 2898:12 2900:1	<b>lead</b> 2894:17 2899:17	<b>level</b> 2904:19	<b>main</b> 2860:13
	<b>Keeshig</b> 2865:14,15,18 2869:7 2870:11, 15 2882:23 2884:16 2898:13 2899:1, 6 2900:1 2912:13,16	<b>leave</b> 2860:11, 15 2863:6,14 2864:3,5,24 2866:10 2867:14 2875:15,24 2876:11,19 2877:3,11,20,23 2878:6,13,22 2880:10,11 2881:3 2886:6, 16 2887:8,12, 18,23 2896:24 2897:2,5,8,12, 18 2902:16,24 2914:17,22,24 2915:4 2916:4, 15,24 2917:5,8, 16 2924:21 2925:24 2926:15	<b>light</b> 2862:23 2886:23	<b>mainstream</b> 2872:15
	<b>Keeshig/ mccarthy</b> 2883:1,2	<b>leaving</b> 2872:20	<b>likelihood</b> 2916:15	<b>make</b> 2866:17 2880:18,19 2881:8 2888:1 2901:3,15 2911:7 2912:1 2914:7 2918:13, 16 2922:3 2929:17
<hr/> <b>J</b> <hr/>	<b>kind</b> 2868:1,17 2879:4	<b>led</b> 2883:20	<b>limited</b> 2884:15	<b>makes</b> 2863:22
<b>January</b> 2861:20,25 2862:4	<b>knowing</b> 2899:21 2913:17	<b>legal</b> 2863:7 2872:21	<b>limiting</b> 2863:3	<b>making</b> 2874:3 2875:2 2876:3 2879:4
<b>job</b> 2891:25	<b>knowledge</b> 2882:22 2895:23 2899:6 2904:24	<b>legends</b> 2862:25	<b>limits</b> 2909:1	<b>managed</b> 2888:15
<b>judge</b> 2863:14 2864:3 2866:11, 22,24 2879:15 2888:20 2915:14,21 2921:6,19,22 2923:1,2,20 2924:10	<hr/> <b>L</b> <hr/>	<b>legitimate</b> 2908:11	<b>linked</b> 2872:25	<b>management</b> 2862:6 2864:23 2865:1 2866:6, 23 2868:9,12 2875:25 2878:20 2879:13 2888:13,15,18 2889:3,5,9 2895:17 2911:5 2915:21 2925:4
<b>judge's</b> 2923:23,25	<b>Lake</b> 2862:24	<b>length</b> 2925:19	<b>list</b> 2909:11	<b>managing</b> 2876:17
<b>July</b> 2860:11 2865:12 2871:3 2925:14	<b>largesse.'</b> 2919:18	<b>lengthier</b> 2903:2	<b>listed</b> 2864:4 2866:13	<b>mandate</b> 2903:18
<b>juries</b> 2908:11	<b>late</b> 2863:7 2865:4,7,8 2867:18,20 2868:22 2875:10 2878:11 2882:1 2889:1,20 2891:1,17 2924:10,18	<b>lengthiest</b> 2889:21	<b>literally</b> 2890:11	<b>manner</b> 2896:17 2926:8
<b>jurisdiction</b> 2866:22	<b>lateness</b> 2867:13 2869:24 2907:13	<b>lengthy</b> 2893:17	<b>literature</b> 2871:25	
<b>jury</b> 2907:23 2908:11,13		<b>Lenore</b> 2865:15,18 2869:7 2870:11, 15 2882:23 2884:16	<b>litigants</b> 2889:3	
<b>Justice</b> 2866:7 2867:1,19 2876:9 2877:9 2878:20 2879:4, 9 2884:11 2894:3 2897:13			<b>litigation</b> 2865:3 2871:24	
			<b>live</b> 2863:10	
			<b>lived</b> 2872:6	
			<b>long</b> 2882:13 2883:4 2891:15 2893:8 2904:10, 22 2905:17 2908:12 2915:1	
			<b>longer</b> 2878:14,22 2883:19 2913:5	
			<b>looked</b> 2867:23 2889:25	
			<b>lost</b> 2895:18	
			<b>lot</b> 2908:16	
			<b>loud</b> 2923:5	

<b>March</b> 2861:17 2862:3,6	<b>meaning</b> 2887:15	<b>misundersta nding</b> 2867:16 2881:14,18,22	<b>mythology</b> 2884:25	<b>number</b> 2901:9 2912:14 2915:8,19 2916:13
<b>marked-up</b> 2859:6	<b>meaningless</b> 2876:2 2913:11, 14 2925:7	<b>Mitchell</b> 2918:3,10 2921:4,8,11 2922:8,20	<hr/> <b>N</b> <hr/>	<hr/> <b>O</b> <hr/>
<b>master</b> 2861:19 2862:6 2888:20	<b>means</b> 2920:9	<b>modern</b> 2872:2	<b>narrowing</b> 2904:18	<b>object</b> 2865:9
<b>material</b> 2860:20,21 2861:12 2866:8 2880:22	<b>meant</b> 2894:5 2910:15	<b>Mohan</b> 2870:5 2929:3	<b>Nation</b> 2865:22	<b>objected</b> 2911:2
<b>materials</b> 2859:14 2861:15 2864:12 2869:11,22 2870:1,9 2874:12 2897:18 2910:16 2914:19	<b>mediate</b> 2911:6	<b>Mohawk</b> 2874:19 2922:7	<b>nature</b> 2900:11	<b>objection</b> 2865:25 2884:7
<b>matter</b> 2870:7 2872:20 2873:14 2879:11 2890:3 2893:10 2906:19 2916:16 2929:25	<b>meet</b> 2861:2,23 2862:3 2894:23	<b>moment</b> 2904:3	<b>necessarily</b> 2909:4 2916:8	<b>objections</b> 2869:8 2873:20 2874:23 2885:10,13 2926:5,11 2927:7
<b>matters</b> 2879:17 2901:12,25	<b>member</b> 2865:21	<b>Monday</b> 2930:2	<b>necessity</b> 2869:25 2870:7 2923:16 2924:14	<b>obligation</b> 2892:11
<b>Mccarthy</b> 2861:7,11 2862:8,10,11 2863:3 2865:7, 16 2869:7 2870:12,19 2879:8 2882:3, 9,15 2883:13 2884:15,18 2903:15,21 2904:7,12 2905:5,22 2907:5 2912:13, 14 2925:13,16, 18	<b>mention</b> 2901:6 2920:25	<b>month</b> 2874:19 2893:11	<b>needed</b> 2883:15 2896:3 2899:20 2910:14 2912:17	<b>observation</b> 2915:20
<b>Mccarthy's</b> 2862:17 2875:11 2883:6 2904:4 2905:11 2924:20	<b>mentioned</b> 2883:12	<b>months</b> 2868:24 2875:15 2889:20 2910:18 2913:6 2924:20	<b>nice</b> 2929:23	<b>observations</b> 2872:4
	<b>merits</b> 2873:14,15	<b>Moore</b> 2924:9	<b>Nodaway</b> 2904:5,11 2905:10,18 2925:20	<b>observed</b> 2919:14
	<b>methodology</b> 2918:18	<b>morning</b> 2859:6 2874:7,9 2901:14 2902:6 2906:19 2917:17	<b>nonetheless</b> 2920:21	<b>obvious</b> 2920:21
	<b>middle</b> 2889:22 2890:21	<b>motion</b> 2859:21 2860:10 2864:22 2866:17 2871:4 2874:4 2877:3 2878:6 2879:3 2880:16 2881:10 2892:5, 21 2896:19 2897:5 2901:10, 21 2902:15,22 2903:6,8 2916:20,25 2918:20 2923:17 2927:22 2928:6	<b>nonjury</b> 2908:5	<b>occur</b> 2896:13 2911:17
	<b>mind</b> 2885:19	<b>move</b> 2863:6	<b>North</b> 2872:12	<b>occurred</b> 2899:19 2904:13 2925:21
	<b>minor</b> 2925:12		<b>note</b> 2911:2,9 2924:3	<b>October</b> 2868:23 2890:1, 9,24 2891:5,7, 15,17 2894:7,15 2896:16,19 2913:7
	<b>minority</b> 2872:10		<b>noted</b> 2883:6 2911:10	<b>offends</b> 2915:12
	<b>minute</b> 2866:5 2900:15		<b>notes</b> 2866:4	<b>offensive</b> 2899:14 2900:4, 7
	<b>minutes</b> 2883:25 2897:4		<b>notice</b> 2890:6, 8,14,23 2891:4, 15 2892:2 2893:7 2900:17 2901:21 2902:1 2905:20 2906:25 2908:18 2909:4	<b>offered</b> 2919:24
	<b>Mishomis</b> 2898:14 2899:14,19 2900:12		<b>noticed</b> 2890:4	
	<b>missed</b> 2894:10			
	<b>misspoke</b> 2880:1 2917:10			
	<b>mistaken</b> 2867:8			

<b>offering</b> 2869:3	2911:11,18	<b>parties</b> 2862:1, 5 2889:15,17 2893:18,20 2895:10,11	2915:8 2916:12, 18 2917:3,9,12, 24 2918:7,11 2922:3,6,12,15 2923:8,10,14 2924:6 2925:9 2927:10 2928:12,19,22, 25 2929:6,10	2865:21
<b>offers</b> 2873:1	<b>orders</b> 2865:1 2889:4	<b>parts</b> 2906:10 2926:5,11		<b>plaintiffs</b> 2861:7,18,23 2864:20 2866:5 2869:4,11,20 2875:17,22 2878:12,14,24 2880:10 2881:2 2882:13 2883:7, 16 2886:13 2888:9,12 2893:21 2895:16,22,25 2896:23 2899:18 2904:24 2906:9 2907:13,18 2909:1,9 2916:14 2918:22 2924:18,22 2925:1 2926:21 2928:17
<b>officially</b> 2867:3	<b>original</b> 2861:1 2862:11, 17	<b>party</b> 2864:8 2896:14		
<b>OGDEN</b> 2874:5	<b>originated</b> 2872:5	<b>pass</b> 2859:9	<b>people</b> 2862:23 2884:4 2907:9 2921:12	
<b>Ontario</b> 2862:3 2874:2	<b>outcome</b> 2887:6 2897:5 2928:16	<b>passage</b> 2923:24 2925:13	<b>perfect</b> 2929:19	
<b>open</b> 2879:6 2880:2 2887:11 2892:4 2918:9	<b>outlandish</b> 2872:8	<b>past</b> 2872:18	<b>perfectly</b> 2879:18	
<b>opened</b> 2879:24	<b>outlined</b> 2878:12	<b>Peet</b> 2919:19 2921:13,20,23 2923:1,3,21	<b>permit</b> 2902:25	
<b>opening</b> 2870:9	<b>outright</b> 2872:9,24	<b>Pelletier</b> 2874:7,10,11, 17,21 2875:1,7 2876:12,22 2877:1,7,14,17, 24 2878:2,8 2879:6,20,25 2880:20 2881:1, 16,19,21 2883:11 2884:9, 21 2885:2,22 2886:3,22 2887:13,17 2888:2,7 2890:2,10,19 2891:6,14 2892:12,18 2893:2,5,16 2894:1,5,9,12, 20 2895:6,15 2896:25 2897:10,22 2898:2,8,11,21 2900:6,10 2902:7,14 2903:5,12 2904:2 2905:3, 7,9,16 2906:2,5, 12,14,22 2907:11,22,25 2908:6,14,25 2909:8,25 2910:3,12 2911:23 2912:5, 9 2913:16,21,25 2914:11,18	<b>permitted</b> 2879:18 2906:11 2927:15	
<b>operate</b> 2919:19	<b>overlapping</b> 2897:24		<b>person</b> 2900:23	
<b>opine</b> 2865:19	<b>overlooking</b> 2901:5,7		<b>perspective</b> 2877:8 2880:5 2886:10 2890:12 2891:10 2920:7	<b>plaintiffs'</b> 2859:24 2861:5, 22 2866:14 2875:10,17 2877:8 2880:5 2882:22 2889:22 2898:24 2908:17 2926:20 2927:21
<b>opinion</b> 2867:20 2868:15 2898:5 2911:11,15 2912:12 2914:25 2915:10,11 2927:12 2929:4	<b>P</b>		<b>persuade</b> 2928:17	
<b>opinions</b> 2873:2 2890:6 2900:17 2902:12 2903:1	<b>page]like</b> 2919:24		<b>persuading</b> 2887:3	<b>plan</b> 2878:7 2893:18 2895:10
<b>opportunities</b> 2869:4 2878:16 2895:18 2917:7	<b>pages</b> 2882:4, 6 2893:8		<b>persuasive</b> 2920:3	<b>podium</b> 2892:10 2894:19
<b>opportunity</b> 2869:4 2878:16 2895:18 2917:7	<b>paleobotany</b> 2865:20		<b>ph</b> 2924:8,9	<b>point</b> 2875:12, 14 2878:11 2879:5 2881:8 2889:4 2902:15 2908:15 2909:8 2910:19 2913:2 2916:12 2918:13,16 2923:12,15 2924:13 2925:25 2926:1, 2
<b>opposite</b> 2864:8	<b>paragraph</b> 2871:18 2916:13 2918:11 2919:5, 6,8 2921:3 2922:6,8 2925:19		<b>phone</b> 2912:2	
<b>oral</b> 2866:2 2869:10 2871:22 2873:9 2911:7 2912:1 2918:18 2919:1 2921:11,14,20, 24 2922:18,19, 23 2923:21	<b>paragraphs</b> 2921:1 2923:13 2924:6,7		<b>phrases</b> 2920:10	
<b>order</b> 2861:19 2867:1,3 2868:17 2902:15 2910:8	<b>part</b> 2866:11 2883:11,16 2885:3,14 2888:22 2890:17 2891:4 2903:4 2913:3 2917:21 2927:4, 22 2928:4,23		<b>picking</b> 2892:1	
			<b>piece</b> 2902:3	
			<b>place</b> 2881:12 2884:4 2897:8 2907:4	
			<b>Placing</b> 2920:6	
			<b>plaintiff</b> 2861:22	



<b>pointed</b> 2922:21	2888:3,9,12 2890:13 2891:10	<b>printout</b> 2923:6	<b>proposing</b> 2884:12	<b>quick</b> 2924:3
<b>pointing</b> 2911:24	2892:10,11 2894:24 2895:2, 5,16,19	<b>prior</b> 2882:7,16 2894:5,7,14	<b>proposition</b> 2919:7	<b>quickly</b> 2904:14 2918:1
<b>points</b> 2861:14 2864:17 2875:9	2896:14,17,20 2897:7 2902:10 2906:20,24 2907:12 2908:25 2910:19 2911:1 2912:24 2917:25 2918:23 2923:17 2924:16,22 2925:3	<b>private</b> 2920:17	<b>providing</b> 2866:1 2886:9	<b>quoting</b> 2863:20
<b>popular</b> 2899:4		<b>probabilities</b> 2920:5	<b>provision</b> 2864:4	<hr/> <b>R</b> <hr/>
<b>position</b> 2865:18 2866:19 2880:2 2881:2 2882:17 2886:13 2888:6 2890:25 2891:8 2904:24 2905:24 2906:9 2908:11 2910:17,23 2913:10 2916:21 2918:6 2920:21	<b>prejudiced</b> 2889:8 2892:23 2907:10,14 2909:19	<b>problem</b> 2889:2	<b>punt</b> 2929:1	<b>raise</b> 2867:13 2928:8 2930:1
<b>possibility</b> 2880:6 2906:25	<b>prejudices</b> 2864:20	<b>problematic</b> 2872:1	<b>purported</b> 2882:14	<b>raised</b> 2926:23 2927:20
<b>possibly</b> 2896:1	<b>prepare</b> 2909:19	<b>problems</b> 2915:19	<b>purpose</b> 2862:21 2888:18 2890:5, 22 2903:19	<b>rapid</b> 2904:20
<b>potential</b> 2896:18 2906:20	<b>prepared</b> 2881:7	<b>Procedure</b> 2865:24	<b>purveyors</b> 2872:11	<b>reached</b> 2877:9 2880:6 2910:22
<b>pre-trial</b> 2876:1 2913:10 2925:6	<b>preparing</b> 2909:23	<b>proceed</b> 2860:15 2881:23	<b>put</b> 2876:11 2886:12,17,19 2890:6,22,23 2891:4 2892:5 2899:25 2900:9 2903:6 2905:20 2912:22 2916:6, 9 2922:20	<b>read</b> 2866:8 2880:21 2901:20 2903:18 2915:8 2919:5 2923:4,5
<b>precisely</b> 2920:10,15	<b>preposterous</b> 2872:25	<b>proceeded</b> 2862:2	<b>puts</b> 2877:3	<b>reading</b> 2871:15,17
<b>precluded</b> 2886:5	<b>present</b> 2875:22 2883:5 2907:19 2925:2	<b>proceeding</b> 2888:16	<hr/> <b>Q</b> <hr/>	<b>reads</b> 2906:23 2919:9
<b>predecessor</b> 2860:13	<b>presented</b> 2920:12 2921:17	<b>proceedings</b> 2930:4	<b>qualification</b> 2927:1	<b>real</b> 2865:21 2868:21 2872:4 2910:5
<b>preemptively</b> 2905:21	<b>preserved</b> 2914:16	<b>process</b> 2866:6 2879:13 2901:8	<b>qualifications</b> 2869:8	<b>reality</b> 2865:3 2914:6
<b>preferred</b> 2921:6	<b>presumptivel y</b> 2887:24	<b>professor</b> 2869:17 2875:11 2879:8 2882:11 2924:19 2930:2	<b>qualified</b> 2865:19 2869:19 2870:2 2884:4,19 2905:25 2925:16	<b>realize</b> 2890:4
<b>prejudice</b> 2864:8,16,18 2865:14 2868:21 2869:1 2875:4,17 2877:4 2878:5 2886:11,14 2887:1,11,25	<b>previous</b> 2861:12	<b>promises</b> 2929:17	<b>qualified</b> 2865:19 2869:19 2870:2 2884:4,19 2905:25 2925:16	<b>realm</b> 2915:16
	<b>primary</b> 2912:17	<b>proper</b> 2915:12	<b>question</b> 2873:7 2917:2 2925:15	<b>reargue</b> 2867:12 2878:16,23
	<b>principles</b> 2918:17	<b>properly</b> 2869:19 2870:2 2878:23 2881:5 2891:21 2907:1 2921:9 2927:7	<b>questions</b> 2865:19 2873:18 2879:2 2901:1 2926:14, 15	<b>reason</b> 2872:20 2883:14 2892:16
		<b>proposal</b> 2866:10,12 2876:8		<b>reasonable</b> 2892:6
		<b>proposed</b> 2912:14		<b>reasons</b> 2865:4 2892:22 2893:1 2906:11, 18 2926:25

<b>Rebuilding</b> 2899:2	<b>reference</b> 2888:25 2915:1	<b>remedied</b> 2869:2,3 2895:20	5,14,16,21,22 2891:11,19,23 2892:23 2893:7, 10,13 2894:13 2895:12,21 2896:16 2898:19 2899:9 2900:16 2901:11,17 2902:1,3 2903:2,3,8,17, 21,25 2904:7 2905:6,11,13,15 2906:5,10,23 2907:13,17 2908:16 2909:16,17,24 2910:14,20 2911:3,8 2912:12,13,14, 18,20 2913:1,6, 9 2914:13 2915:1,25 2916:6 2917:20 2924:10,18,19, 20,22 2925:1,14 2926:3,5,7 2928:5,14,20 2929:2,13	<b>reserve</b> 2926:17
<b>rebukes</b> 2872:14	<b>referred</b> 2884:10 2925:19	<b>Remind</b> 2866:3	<b>reserved</b> 2878:21	<b>resist</b> 2872:20
<b>recall</b> 2898:1 2907:5 2908:20 2928:11	<b>referring</b> 2871:7 2915:23	<b>render</b> 2876:1 2925:5	<b>resisted</b> 2866:23	<b>resolved</b> 2928:4
<b>recalled</b> 2897:21	<b>refers</b> 2882:25 2903:21	<b>renders</b> 2913:9	<b>resolved</b> 2928:4	<b>respect</b> 2862:12 2864:16 2865:2 2870:6 2884:21 2907:12 2925:12
<b>recalling</b> 2875:18 2896:1, 9 2907:15 2924:23	<b>refiling</b> 2884:15	<b>reneged</b> 2867:10	<b>respected</b> 2864:24	<b>respond</b> 2883:5 2891:21
<b>recap</b> 2907:11 2922:15	<b>reflected</b> 2903:2	<b>repeating</b> 2897:3	<b>responded</b> 2903:5 2912:12	<b>responding</b> 2859:25
<b>receive</b> 2897:18	<b>regard</b> 2864:17 2914:5	<b>reply</b> 2865:9 2869:4,15,16,19 2875:11 2878:24 2879:8 2880:15 2881:6 2882:1,6,14 2883:9 2891:22 2893:10 2908:3 2909:2,3,6,10, 15,16 2910:14, 15 2924:19 2925:10	<b>response</b> 2882:21	<b>response</b> 2882:21
<b>received</b> 2859:17 2889:10 2890:21 2891:18 2905:19 2908:17	<b>regret</b> 2867:15	<b>replying</b> 2861:10 2882:9	<b>reports</b> 2861:6,24 2862:4 2863:12 2865:4,8 2882:25 2885:11,12 2889:2,11 2890:4 2898:7 2912:15 2913:3 2926:8	<b>responsive</b> 2904:7
<b>receiving</b> 2889:21	<b>regrettable</b> 2881:14	<b>report</b> 2859:6 2860:4,6,11,16 2861:1,3,7,9,12 2862:8,10,11, 17,19,20,21 2863:7 2864:13, 25 2865:7,10, 11,15,16 2866:24 2868:22 2869:5 2870:20,22,25 2871:4,13 2873:22 2874:13,25 2875:10,12,16, 21 2876:11 2878:11,14,17, 23,24 2879:7 2882:4,6,8,9,10, 14,15,21,24 2883:4,6,9,13, 19,20 2884:1,15 2886:17,20 2888:10 2889:22 2890:1,	<b>responding</b> 2859:25	<b>Rest</b> 2891:1
<b>recent</b> 2862:23 2873:21 2874:24 2875:3	<b>reject</b> 2923:25	<b>reporting</b> 2861:10 2882:9	<b>result</b> 2868:16 2911:12	<b>resulting</b> 2879:15
<b>recognized</b> 2886:24	<b>relates</b> 2895:21	<b>reporting</b> 2861:10 2882:9	<b>resulting</b> 2879:15	<b>resume</b> 2930:2
<b>reconstructin g</b> 2872:18	<b>relatives</b> 2899:10	<b>reporting</b> 2861:10 2882:9	<b>resulting</b> 2879:15	<b>retained</b> 2893:21
<b>record</b> 2859:21,25 2862:13,19 2863:6 2866:14 2884:6 2885:9 2893:15 2894:2	<b>relaying</b> 2921:11	<b>reporting</b> 2861:10 2882:9	<b>resulting</b> 2879:15	<b>returned</b> 2862:5
<b>recorded</b> 2899:4	<b>released</b> 2867:3	<b>reporting</b> 2861:10 2882:9	<b>resulting</b> 2879:15	<b>reviewed</b> 2860:19 2910:16
<b>recurring</b> 2889:2	<b>relevance</b> 2870:1,7	<b>reporting</b> 2861:10 2882:9	<b>resulting</b> 2879:15	<b>revised</b> 2902:16
<b>reduce</b> 2888:18	<b>relevant</b> 2870:8,19,21 2892:8	<b>reporting</b> 2861:10 2882:9	<b>resulting</b> 2879:15	<b>revising</b> 2865:15
<b>refer</b> 2860:7 2869:25	<b>reliance</b> 2893:22	<b>reporting</b> 2861:10 2882:9	<b>resulting</b> 2879:15	<b>revising</b> 2865:15

<b>revisiting</b> 2881:4,25	<b>scramble</b> 2891:22	<b>sets</b> 2873:8	2891:18	2923:18
<b>rights</b> 2919:15	<b>section</b> 2863:9	<b>Setting</b> 2888:21	2894:12,15	<b>spoke</b> 2883:14
<b>Roman</b> 2882:11	2871:12	<b>Settlement</b> 2883:25	2910:21 2911:2, 6 2912:14,19	2923:16
<b>rule</b> 2863:9,11, 25 2864:4	2903:19	<b>shared</b> 2895:23	2913:2,10	<b>stand</b> 2892:9
2869:2 2870:4	2922:22	<b>short</b> 2892:2	2925:6	<b>standards</b> 2920:16
2902:9,10,21,22	<b>seek</b> 2876:10	2909:4	<b>SON's</b> 2899:15	<b>standing</b> 2878:3 2895:3
2916:9 2918:22	2877:10,23	<b>show</b> 2871:20	<b>sooner</b> 2877:6	<b>start</b> 2896:21
2924:16	2878:13,22	<b>shown</b> 2914:4	2894:13	2898:10,11
<b>rules</b> 2860:16	2880:9 2887:23	<b>shows</b> 2885:9	<b>sort</b> 2903:22	2929:20
2863:10	2896:24	<b>side</b> 2885:8	<b>sought</b> 2866:11	<b>starting</b> 2871:19
2865:23	2914:17,24	2886:16	2879:18 2881:3, 4 2887:9,12,19	<b>starts</b> 2871:1
2876:14 2880:8	2917:8,16	<b>sides</b> 2914:5	2893:22	<b>state</b> 2865:13
2886:8 2917:13	<b>seeking</b> 2880:11 2886:6	<b>similar</b> 2872:12	2897:12	<b>stated</b> 2864:11
2919:13,15	2897:2,8	<b>similarly</b> 2885:13	2914:23,24	2920:22
<b>ruling</b> 2867:25	<b>seeks</b> 2913:7	<b>simple</b> 2885:17	2915:5,6	2922:16
2868:2,9,11,14	<b>select</b> 2869:12	<b>simply</b> 2862:10 2863:4	<b>sounded</b> 2880:22	<b>statement</b> 2914:22
2879:2,10,17	2891:25	2873:8 2880:4	<b>sounds</b> 2881:17 2926:4	<b>states</b> 2862:20
2880:24	<b>sell</b> 2909:7	2889:3 2920:14	<b>source</b> 2898:14	2863:11 2864:1
2885:12	<b>sense</b> 2888:1	2924:1	2899:16,23	2904:12
2896:19	2919:17	<b>single</b> 2895:22	2904:15	<b>stating</b> 2921:12
2911:19	<b>senses</b> 2889:15	<b>sir</b> 2871:16	<b>sources</b> 2912:17,21	<b>step</b> 2901:8,13, 22 2902:2,23
2929:20	<b>sensitive</b> 2919:11	2873:25	<b>speak</b> 2884:14, 24 2888:4	2903:22
<hr/> <b>S</b> <hr/>	<b>sentence</b> 2871:19 2904:3, 8	<b>situation</b> 2879:22 2885:7, 15 2897:16	2903:22	<b>speaking</b> 2884:11
<b>sacred</b> 2898:15	<b>separate</b> 2901:13	2927:15	<b>speaks</b> 2916:13	<b>steps</b> 2892:24
<b>schedule</b> 2928:11,13	2902:18 2906:8	<b>size</b> 2888:16	<b>specialize</b> 2872:18	2901:8 2929:21
<b>scheduled</b> 2869:16	2926:24	<b>skipping</b> 2871:18	<b>specific</b> 2865:10 2898:9	<b>stick</b> 2893:15
<b>scholarly</b> 2872:14	<b>September</b> 2861:6,8	<b>small</b> 2860:8	2926:5,10	<b>stood</b> 2865:22
<b>scholars</b> 2872:11	<b>serve</b> 2863:12	2872:10	<b>specifically</b> 2873:21	<b>stories</b> 2862:12,22
<b>science</b> 2903:22	2882:17	2895:12	2874:24	2872:2 2897:25
<b>scientific</b> 2871:25	2894:13	<b>solely</b> 2908:20	2878:20	2898:15 2899:1
<b>scientists</b> 2904:19	<b>served</b> 2861:4, 7 2865:12	<b>solution</b> 2869:13	2888:13	<b>story</b> 2899:4
2905:17,21	2868:23	<b>SON</b> 2876:1	2915:23	2917:21
<b>scope</b> 2885:11	2878:17 2882:9	2878:19 2889:7	<b>spend</b> 2861:13	<b>straightforwa rd</b> 2860:24
2904:18 2927:1	2890:14 2911:4		2918:23	<b>strained</b> 2920:19
	<b>service</b> 2871:22 2889:1			<b>strategic</b> 2894:16
	<b>set</b> 2861:19			<b>strictest</b>
	2902:13			

2889:15	<b>suggest</b>	2908:21	2905:24	<b>transmitted</b>
<b>struck</b> 2887:4	2864:19 2867:9	<b>talked</b>	<b>time</b> 2861:13	2872:3
<b>structured</b>	2868:20	2900:23,24	2863:4,13	<b>treatment</b>
2893:21	2885:23	<b>talking</b>	2866:16	2919:1 2920:11
<b>studies</b>	2896:21 2908:7	2889:19,20	2878:17 2879:8	2922:22
2882:12	2910:14	2897:24	2889:7,16	<b>treaty</b> 2919:15
<b>stuff</b> 2905:3	2920:10	<b>task</b> 2888:22	2891:20,24	<b>trial</b> 2864:3,10
<b>subject</b> 2871:4	<b>suggested</b>	2896:16	2896:16	2866:11,22
2884:6 2901:9,	2880:10	2910:15	2910:15	2868:24
12,25 2903:3	<b>suggesting</b>	2918:24	2918:24	2869:14
2928:7	2872:23	2923:18	2923:18	2875:15
<b>subjects</b>	<b>suggests</b>	2925:20	2925:20	2876:17
2902:19	2885:13	2926:12	2926:12	2889:10
<b>submission</b>	<b>support</b>	<b>timeline</b>	<b>timeline</b>	2890:22
2875:10,17	2919:21,22	2889:9	2889:9	2893:18,19
2895:19 2896:8,	2920:20	<b>timelines</b>	<b>timelines</b>	2896:24 2899:7
12,15 2897:5	<b>supporting</b>	2863:13	2863:13	2907:23
2901:4,15	2874:2 2920:7	2915:13	2915:13	2908:11,13
2904:6 2906:23	<b>suppose</b>	<b>timely</b> 2860:14	<b>timely</b> 2860:14	2913:6 2915:3,
2908:17	2926:11,13	2908:18	2908:18	6,14 2921:6,19,
2912:24	<b>supposed</b>	<b>times</b> 2917:4	<b>times</b> 2917:4	22 2922:8,10
2917:15 2925:5	2894:19	<b>timetables</b>	<b>timetables</b>	2923:1,20,23,24
<b>submissions</b>	<b>Supreme</b>	2889:14	2889:14	2924:10,21
2873:17 2874:3	2918:15,17	<b>timing</b> 2877:3	<b>timing</b> 2877:3	2929:19
2875:2,8,12	2919:2 2920:24	<b>today</b> 2875:8	<b>today</b> 2875:8	<b>trials</b> 2908:5
2876:4,14	2921:18	2878:3 2886:11	2878:3 2886:11	<b>trier</b> 2924:11
2878:9 2880:14,	2922:17	2891:9 2894:14	2891:9 2894:14	<b>true</b> 2873:4
19 2881:8	2923:19,22	2896:15	2896:15	<b>trusts</b> 2903:22
2903:9 2911:7	<b>surprised</b>	2901:22,23	2901:22,23	<b>turn</b> 2888:8
2912:1 2917:25	2865:16	2903:7 2916:1,	2903:7 2916:1,	2893:9 2903:16
2927:6	<b>suspect</b>	2,10,18 2926:23	2,10,18 2926:23	2914:19 2918:1
<b>submit</b> 2869:4	2900:5,8	2927:6	2927:6	2920:23
2873:10	<b>synonymousl</b>	<b>tests</b> 2870:5	<b>told</b> 2899:10	<b>Turtle.'</b> 2899:3
2882:13	<b>y</b> 2882:25	<b>theory</b> 2883:1	2900:15	<b>type</b> 2864:22
2886:23		<b>thin</b> 2860:8	<b>torts</b> 2920:17	2895:18
2907:14	<b>T</b>	<b>thing</b> 2865:17	<b>Tracey</b> 2924:9	<b>types</b> 2864:19,
2924:18		2883:21 2885:5	<b>traditional</b>	21
<b>submitted</b>		2895:5 2909:21	2882:22	<b>U</b>
2864:13	<b>tab</b> 2862:16	2925:12 2928:8	2895:23	
2922:13	2866:9 2888:24	<b>things</b> 2880:25	2898:15	<b>Uhm-hmm</b>
<b>sudden</b>	2914:19	2884:5 2885:6	2899:24	2906:12
2904:20	2922:11	2886:19	2918:18 2919:1	<b>unable</b>
<b>suffer</b> 2888:10,	<b>taking</b> 2880:1	2902:20	2921:21,24	2861:23 2892:7
12 2895:16	2907:21	2909:21	2922:18,19,23	<b>uncritical</b>
<b>suffered</b>	2910:22	2925:12	2923:22	2871:21
2865:14	<b>talk</b> 2884:5,19	2927:17	<b>traditions</b>	<b>uncritically</b>
<b>sufficient</b>	2900:23	<b>thought</b>	2866:2 2871:23	2873:6
2872:19	2901:24	2879:22	<b>trained</b> 2882:5	
	2905:25	2889:10 2903:7		

<p><b>understand</b>                      2859:13                      2860:12                      2878:15                      2890:25 2891:1,                      2 2908:6 2918:6</p> <p><b>understandin                      g</b> 2867:17                      2929:14</p> <p><b>understood</b>                      2866:19                      2878:12 2881:2                      2906:14</p> <p><b>undervalued</b>                      2920:13</p> <p><b>undue</b> 2864:9,                      14 2869:14</p> <p><b>unexpected</b>                      2878:4</p> <p><b>unfair</b> 2861:17                      2875:19                      2907:16                      2924:24</p> <p><b>unfairness</b>                      2908:9,10</p> <p><b>unfortunate</b>                      2865:3</p> <p><b>unhappy</b>                      2902:4</p> <p><b>unnecessary</b>                      2888:19</p> <p><b>unsophisticat                      ed</b> 2908:12</p> <p><b>unusual</b>                      2892:17,19,20</p> <p><b>update</b> 2875:3</p> <p><b>updates</b>                      2891:3</p> <p><b>updating</b>                      2871:12                      2873:21                      2874:25</p> <p><b>upheld</b> 2919:2,                      8</p> <p><b>USB</b> 2859:8</p>	<hr/> <p><b>V</b></p> <hr/> <p><b>vague</b> 2919:17</p> <p><b>Valentine</b>                      2869:9</p> <p><b>validity</b> 2920:4</p> <p><b>Van</b> 2919:18                      2921:13,20,22                      2923:1,3,21</p> <p><b>variance</b>                      2899:5</p> <p><b>variously</b>                      2904:13</p> <p><b>Venables</b>                      2921:7</p> <p><b>verse</b> 2915:24</p> <p><b>version</b>                      2882:24                      2890:11</p> <p><b>view</b> 2875:4                      2910:25</p> <p><b>views</b> 2870:16</p> <p><b>void</b> 2887:14</p> <p><b>voir</b> 2870:3                      2926:12                      2927:13                      2929:22</p> <p><b>volume</b>                      2859:21,25                      2860:1,8                      2862:13,16                      2866:9</p> <p><b>von</b> 2860:12,25                      2861:9 2865:10                      2870:2,20                      2871:1 2872:22                      2873:11                      2874:13                      2875:16,21                      2878:11,14,22                      2882:4,8,14,18                      2883:4,15,19                      2893:12,24                      2895:21 2898:8,                      19 2900:13                      2903:17,19                      2904:4 2907:17</p>	<p>2908:21                      2909:12,18                      2911:3 2912:11,                      17,20 2913:5                      2918:14 2919:3,                      7 2920:25                      2921:9 2922:17,                      24 2923:25                      2924:21,25                      2925:17</p> <p><b>Vurke</b> 2924:9</p> <hr/> <p style="text-align: center;"><b>W</b></p> <hr/> <p><b>wait</b> 2897:18</p> <p><b>wanted</b>                      2861:14</p> <p><b>warrant</b>                      2872:8</p> <p><b>warrants</b>                      2878:5</p> <p><b>waste</b> 2889:7</p> <p><b>ways</b> 2896:18                      2907:14                      2913:20</p> <p><b>week</b> 2859:17                      2890:11                      2928:10                      2929:20</p> <p><b>weeks</b> 2861:8                      2925:15</p> <p><b>weighing</b>                      2877:19                      2921:20                      2923:21</p> <p><b>weight</b> 2920:6,                      19 2921:14,23</p> <p><b>white</b> 2859:20                      2870:5 2878:1                      2929:4</p> <p><b>whomever</b>                      2892:1</p> <p><b>Williamson</b>                      2865:12</p> <p><b>wishes</b> 2930:1</p> <p><b>wishing</b>                      2916:6</p>	<p><b>withdrawing</b>                      2865:14                      2884:14,16                      2912:15</p> <p><b>withdrawn</b>                      2878:25                      2883:10 2884:2</p> <p><b>withdrew</b>                      2883:7 2913:3                      2917:19</p> <p><b>witness'</b>                      2908:3</p> <p><b>witnesses</b>                      2875:19                      2893:22                      2895:24 2896:2,                      6,9,10,22                      2897:21                      2898:12                      2899:15 2900:9,                      21 2907:15                      2908:20                      2909:12 2910:9                      2924:23</p> <p><b>witnesses'</b>                      2885:11                      2898:17</p> <p><b>word</b> 2886:2                      2911:15 2912:4</p> <p><b>wording</b>                      2880:8</p> <p><b>work</b> 2908:5</p> <p><b>world</b> 2872:4                      2929:19</p> <p><b>write</b> 2904:20</p> <p><b>written</b>                      2898:15 2911:7,                      20 2926:7,8</p> <p><b>wrong</b> 2913:24</p> <hr/> <p style="text-align: center;"><b>Y</b></p> <hr/> <p><b>year</b> 2868:25                      2891:5,8                      2909:7,13                      2910:10,11</p> <p><b>years</b> 2872:6                      2875:25</p> <p>2882:16 2889:6                      2891:17                      2893:12 2925:4</p>
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