

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

DAY 52 VOL 52
October 11, 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
7 Plaintiffs

8 - and -

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

18 Court File No. 03-CV-261134CM1

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

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

23 - and -

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

27 -----
28 --- This is VOLUME 52/DAY 52 of the trial
29 proceedings in the above-noted matter, being held
30 at the Superior Court of Justice, Courtroom 5-1,
31 330 University Avenue, Toronto, Ontario, on the
32 11th day of October, 2019.

33 -----
34 B E F O R E: The Honourable Justice Wendy M.
35 Matheson

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

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

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

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

REPORTED BY: Deana Santedicola, RPR, CSR, CRR

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I N D E X

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

09:41:24 2
10:03:21 3 THE COURT: As previously set up, this
10:03:25 4 morning we are going to have a voir dire with
10:03:28 5 respect to a proposed expert witness put forward by
10:03:34 6 Canada, Dr. von Gernet.

10:03:37 7 Mr. Beggs, please go ahead.

10:03:41 8 MR. BEGGS: Thank you, Your Honour. I
10:03:43 9 would like to call Dr. Alexander von Gernet to the
10:03:47 10 stand, please.

10:03:48 11 DR. ALEXANDER VON GERNET; AFFIRMED.

10:04:16 12 EXAMINATION IN-CHIEF BY MR. BEGGS:

10:04:49 13 Q. Good morning, Dr. von Gernet.

10:05:11 14 A. Good morning.

10:05:11 15 Q. I would like to call up document
10:05:16 16 SC0751 to the screen. Dr. von Gernet, if you could
10:05:29 17 look at the monitor, can you confirm that this is
10:05:32 18 your CV?

10:05:33 19 A. Yes.

10:05:34 20 Q. Thank you. I would like to ask
10:05:37 21 that this be made the next exhibit, Your Honour.

10:05:40 22 THE COURT: Mr. Registrar?

10:05:42 23 THE REGISTRAR: Exhibit No. 4313.

10:05:46 24 EXHIBIT NO. 4313: CV of Dr. Alexander
10:05:48 25 von Gernet.

10:05:48 1 BY MR. BEGGS:

10:05:49 2 Q. So I'll be returning to that in a
10:05:51 3 moment, but if I could call up document SC0776.
10:06:10 4 Your Honour, this is a proposed qualification
10:06:12 5 statement for Alexander von Gernet. I would like
10:06:17 6 to make it a lettered exhibit until it has been
10:06:22 7 approved by the Court, Your Honour.

10:06:23 8 THE COURT: So is this what I would
10:06:24 9 call a tender?

10:06:26 10 MR. BEGGS: Yes, Your Honour.

10:06:27 11 THE COURT: Mr. Registrar, what is the
10:06:29 12 next lettered exhibit?

10:06:30 13 THE REGISTRAR: Lettered Exhibit V-1.

10:06:34 14 EXHIBIT NO. V-1: Proposed
10:06:12 15 qualification statement for Dr.
10:06:14 16 Alexander von Gernet.

10:06:37 17 BY MR. BEGGS:

10:06:38 18 Q. Dr. von Gernet, could you look at
10:06:39 19 that qualification statement for a moment.

10:06:42 20 A. Yes.

10:06:42 21 Q. Is that familiar to you?

10:06:45 22 A. Yes, it is.

10:06:46 23 Q. Could you tell me what an
10:06:48 24 ethnohistorian is?

10:06:50 25 A. An ethnohistorian is one who uses

1 ethnohistorical methodology to arrive at
2 reconstructions of the past.

3 THE COURT: Sir, you need to keep your
4 voice up. Pretend you are teaching, all right?

5 THE WITNESS: I will do so.

6 THE COURT: You see that gentleman in
7 the back row, two gentlemen, they need to be able
8 to hear you.

9 THE WITNESS: I will endeavour to so.

10 THE COURT: All right.

11 THE WITNESS: Thank you.

12 An ethnohistorian is somebody who uses
13 ethnohistorical methodology to reconstruct past
14 events. There is no degree that one gets in
15 ethnohistory. Rather, it is a methodology that is
16 shared among professionals who are either
17 anthropologists or historians.

18 And ethnohistory was a set of methods
19 that developed probably in the early 1950s in
20 response to the need in the United States for
21 expertise in the Indian Claims Commission
22 proceedings.

23 Anthropologists were, along with
24 historians, were commissioned to participate as
25 experts in the Indian Claims Commission, and so

10:08:28 1 much of ethnohistorical investigation actually
10:08:32 2 started that way, and in fact, the journal
10:08:36 3 Ethnohistory began in about that time.

10:08:38 4 As I said, ethnohistorians are not --
10:08:44 5 there is no field that we get a degree in. It is
10:08:49 6 just simply a methodology. And what it is, is it
10:08:53 7 brings together the insights that anthropologists
10:08:55 8 bring about the history of Indigenous peoples with
10:09:03 9 historical experience in the use of historical
10:09:10 10 materials to reconstruct the past.

10:09:12 11 So it is somewhat interdisciplinary.
10:09:19 12 It also considers a variety of sources of
10:09:22 13 information, including archaeological evidence,
10:09:25 14 written documentation and oral histories and
10:09:28 15 traditions.

10:09:31 16 BY MR. BEGGS:

10:09:31 17 Q. Thank you. I am going to take you
10:09:33 18 to your CV now. So that was 4313, Exhibit 4313.

10:09:47 19 I am going to take a look at your
10:09:50 20 education, which is under section B on page 1.
10:10:00 21 Now, could you tell me about your graduate degrees,
10:10:03 22 please?

10:10:04 23 A. I have a masters of arts in
10:10:09 24 anthropology from McGill University. At that time,
10:10:14 25 I specialized in the archaeology of Indigenous

10:10:19 1 peoples in North America.

10:10:22 2 And subsequent to that, I went on to do
10:10:24 3 a Ph.D. at McGill University which I defended and
10:10:35 4 completed in 1989. My specialization was in the
10:10:44 5 ethnohistory and archaeology of Indigenous peoples
10:10:47 6 in North America.

10:10:48 7 Q. Thank you. I am going to jump up
10:10:50 8 to page 9, which comes under your publications, and
10:10:59 9 ask you to look at item 5. Is that your Ph.D.
10:11:06 10 dissertation?

10:11:06 11 A. Yes.

10:11:07 12 Q. And can you tell us briefly what
10:11:14 13 that was about?

10:11:14 14 A. Well, I developed an interest in
10:11:19 15 how pipes and tobacco and smoking originated, how
10:11:27 16 it developed as a cultural complex among all
10:11:32 17 Indigenous peoples in North America, and how
10:11:35 18 eventually it was appropriated by Europeans and
10:11:39 19 then became a means by which natives and newcomers
10:11:46 20 interacted with one another.

10:11:50 21 And also, how it impacted the
10:11:55 22 intellectual boundaries between what in the 19th
10:11:58 23 century was referred to as savagery and
10:12:03 24 civilization.

10:12:03 25 And so the Ph.D. was very broad in

10:12:09 1 scope. It was not geographically focussed. It
10:12:14 2 dealt with the entirety of the continent, and
10:12:19 3 through it I was exposed to the vast literature on
10:12:24 4 the ethnography, ethnohistory, archaeology of
10:12:32 5 Indigenous peoples throughout the continent,
10:12:35 6 including primary sources and secondary sources.

10:12:39 7 Q. And who was your Ph.D. supervisor?

10:12:42 8 A. It was Bruce Trigger, the late
10:12:47 9 Bruce Trigger, who at the time was probably
10:12:52 10 Canada's foremost ethnohistorian, and he was my
10:12:59 11 mentor for some eight years, and he is known -- or
10:13:07 12 was known principally for his work in
10:13:11 13 archaeological theory and on ethnohistory with a
10:13:16 14 focus on Indigenous peoples in Ontario and Quebec.

10:13:21 15 Q. And how would you describe his
10:13:24 16 influence on you?

10:13:25 17 A. Well, he had a major influence on
10:13:27 18 me, since anyone who serves as your advisor for
10:13:31 19 eight years as a graduate student clearly has an
10:13:38 20 influence. I helped him with some of his books.
10:13:43 21 He was a great friend and mentor, and he had very
10:13:48 22 few students. I think there were only 12 of us in
10:13:51 23 total in his career, and I was very privileged to
10:13:55 24 be one of them.

10:14:00 25 Q. And through your education, what

10:14:06 1 has your main area of interest been?

10:14:10 2 A. My main area of interest has
10:14:13 3 always been focussed on the methods that we use to
10:14:23 4 reconstruct the past; more specifically, Indigenous
10:14:31 5 cultures and their history, and also their contact
10:14:35 6 with European newcomers and that history.

10:14:42 7 And so the species of evidence that I
10:14:47 8 am interested in are all three of the major ones;
10:14:50 9 that is, the archaeological data, the written
10:14:55 10 documents, and also oral histories and oral
10:15:01 11 traditions.

10:15:05 12 Q. Thank you. I would like to turn
10:15:07 13 to your next section in your CV, back on page 1,
10:15:11 14 which is "Awards, Fellowships and Research Grants".
10:15:16 15 Could you tell us about item number 4, the Gold
10:15:23 16 Medal, briefly?

10:15:23 17 A. This was -- the Gold Medal is a
10:15:35 18 medal that is given to the person who has the
10:15:39 19 highest marks in the graduating class, which at the
10:15:42 20 time was called University of Western Ontario,
10:15:44 21 today it is called just Western, and it was that
10:15:49 22 award that actually -- that was the reason why
10:16:02 23 Professor Trigger invited me to be a student at
10:16:03 24 McGill.

10:16:04 25 Q. And, sorry, was that the whole

10:16:08 1 graduating class or just your anthropology class?

10:16:11 2 A. That was the graduating class I
10:16:14 3 believe in all of the anthropological fields,
10:16:18 4 because there was several fields and sub-fields.

10:16:20 5 Q. And could you tell me briefly
10:16:24 6 about number 7, the Social Sciences and Humanities
10:16:30 7 Research Council of Canada Doctoral Fellowship?

10:16:32 8 A. That is a competitive fellowship.
10:16:40 9 There are very few of these that are handed out
10:16:43 10 every year to students, so I had the good fortune
10:16:48 11 of having my entire graduate studies paid for by
10:16:58 12 these scholarships, both at the masters level and
10:17:01 13 at the doctoral level. And they are highly
10:17:06 14 competitive because you are competing against
10:17:09 15 students in many different fields.

10:17:13 16 Q. And is number 10 the same
10:17:16 17 institution?

10:17:17 18 A. Yes. I also was awarded a
10:17:23 19 post-doctoral fellowship after I -- at the time I
10:17:27 20 completed my Ph.D., and it was actually already
10:17:34 21 given before I actually finished the Ph.D.

10:17:40 22 After I had defended it, but before I
10:17:42 23 graduated, I had received this post-doctoral
10:17:47 24 fellowship which I used at both McGill University
10:17:53 25 and the University of Toronto in the late '80s,

10:17:56 1 early '90s.

10:17:57 2 Q. Thank you. I am going to turn to
10:17:59 3 the next section in your CV, section D, which I
10:18:03 4 believe is on page 2, and deals with "Academic
10:18:07 5 Appointments". Could you tell me what institutions
10:18:09 6 you have been associated with?

10:18:11 7 A. I was a lecturer at Concordia
10:18:19 8 University in Montreal, a teaching assistant at
10:18:20 9 McGill University. I was also a lecturer at McGill
10:18:27 10 University. As was just noted, I was also a Social
10:18:29 11 Sciences and Humanities Research Council
10:18:32 12 post-doctoral fellow at McGill University, and also
10:18:38 13 at the University of Toronto, I was a lecturer at
10:18:43 14 the University of Toronto, an assistant professor,
10:18:46 15 an adjunct professor, an associate member of the
10:18:49 16 Graduate Faculty of the School of Graduate Studies
10:18:52 17 University of Toronto.

10:18:55 18 Q. Are these full-time positions at
10:18:59 19 the University of Toronto?

10:19:00 20 A. No, they were all part-time
10:19:05 21 positions. I had -- I have always had the good
10:19:09 22 fortune to have been -- not to have to rely on
10:19:17 23 full-time employment to sustain my life. And I
10:19:25 24 always resisted the temptation to accept a tenure
10:19:34 25 track position, but I taught at the University of

1 Toronto Mississauga for nearly a quarter of a
2 century.

3 Q. And are you currently a professor?

4 A. No, I do not teach anymore at the
5 university.

6 Q. So the correct designation would
7 be Doctor rather than Professor; is that correct?

8 A. That would be fine, yes, thank
9 you.

10 Q. If we could take a look at number
11 10, can you tell us what Ontario Archaeology is?

12 A. Ontario Archaeology is the
13 scientific journal of the Ontario Archaeological
14 Society, and during the mid to late 1990s, I was
15 the editor of that scientific journal, and
16 basically my responsibilities involved supervising
17 the peer review process and editing the
18 contributions that came into -- onto my desk for
19 purposes of publication.

20 It has been around for a very long
21 time, and it basically is the main outlet for
22 scientific contributions on both the pre-contact
23 and post-contact Indigenous peoples of Ontario.

24 Q. Sorry, what is the Ontario
25 Archaeological Society?

10:21:16 1 A. Well, it is a society that
10:21:21 2 basically is an organization that deals exclusively
10:21:28 3 with the archaeology of Ontario. These are -- they
10:21:36 4 are both credentialed academics who are members of
10:21:41 5 the society, but also avocational archaeologists
10:21:48 6 who are also members of the society. And as I
10:21:54 7 said, the main outlet, the research outlet for the
10:21:57 8 society is a journal called Ontario Archaeology.
10:22:01 9 It also has several other publications, but Ontario
10:22:05 10 Archaeology, the journal, is the most important one
10:22:10 11 because it is peer-reviewed and gives an
10:22:17 12 opportunity for contributions by various authors
10:22:24 13 dealing with Indigenous peoples in Ontario, not
10:22:31 14 only prior to contact with the Europeans, but also
10:22:37 15 afterwards.

10:22:37 16 So there are things published in that
10:22:41 17 journal that are not only purely archaeological in
10:22:44 18 nature, but also more ethnohistorical in the sense
10:22:48 19 that they also deal with written documents,
10:22:52 20 cartography, and so forth.

10:22:55 21 Q. Now, if I could go to the next
10:23:04 22 section, which is your "University Teaching", I am
10:23:09 23 going to skip over the entries for McGill and go on
10:23:11 24 to page 3 where it starts your courses that you
10:23:17 25 taught at the University of Toronto.

10:23:18 1 If I could take you to item 9, you
10:23:31 2 taught this course for 20 years; is that correct?

10:23:34 3 A. That's correct.

10:23:35 4 Q. And can you tell me what this
10:23:37 5 course was about, briefly?

10:23:38 6 A. Well, at the time it was called
10:23:43 7 Aboriginal Peoples of North America. That title
10:23:48 8 would probably change were it taught today.

10:23:49 9 It basically dealt with -- it was a
10:23:54 10 second-year course, and it dealt with everything to
10:23:57 11 do with Indigenous peoples, their past, their
10:24:00 12 present. It touched on examples of archaeological,
10:24:11 13 ethnological, ethnohistorical approaches, and I
10:24:17 14 generally brought in examples from throughout North
10:24:21 15 America while teaching the course, but because I
10:24:26 16 have, you know, particular interests in Ontario,
10:24:29 17 many of my examples actually were local.

10:24:35 18 Q. And what sorts of Indigenous
10:24:37 19 groups were covered by the course?

10:24:38 20 A. Well, as I said, the examples come
10:24:41 21 from all over North America, but because of my --
10:24:47 22 because I live in Ontario and my interest has been
10:24:51 23 in Ontario, most of the examples were either
10:25:00 24 Iroquoian or Anishinaabe.

10:25:04 25 Q. Okay. If you could go to item 10

1 on your list, could you tell me briefly what this
2 course covered?

3 A. This was a third-year course which
4 was intended as a follow-up course to the
5 second-year course. So the second-year course had
6 anywhere from 50 to 200 students in it. The
7 second-year -- or sorry, the third-year course that
8 you are inviting attention to had far fewer
9 students and dealt with the subject in much greater
10 depth.

11 And so the course is called Change and
12 Continuity in Canadian Aboriginal Societies, and as
13 the name implies, you are focussed not only on
14 aspects of Indigenous culture that continue over
15 the course of time but also aspects of culture that
16 change over the course of time, for various
17 reasons.

18 And we also talked specifically about
19 the contact between Europeans and various First
20 Nations, and again, the emphasis was an
21 ethnohistorical and ethnographic source materials,
22 as well as oral histories and traditions. My focus
23 was primarily from the 16th to the 20th centuries.

24 Q. And did it have any particular
25 geographic or First Nation focus?

10:26:47 1 A. Once again, the case studies that
10:26:51 2 I used were from all over North America, but by
10:26:57 3 virtue of my interests, most of them were either
10:27:03 4 Haudenosaunee or Anishinaabe, who at the time we
10:27:10 5 called Ojibwe.

10:27:14 6 Q. If I could scroll down to item 14
10:27:17 7 on your list, this is a course entitled Forensic
10:27:26 8 Anthropology and Aboriginal Peoples. Could you
10:27:28 9 tell us what forensic anthropology is?

10:27:32 10 A. Well, normally it would conjure up
10:27:35 11 images of skeletal remains and expert witnesses who
10:27:39 12 talk about what happened to a recently deceased.
10:27:52 13 And there is a forensic anthropology that deals
10:27:55 14 exclusively with that, and many of my colleagues
10:27:56 15 were forensic anthropologists in that sense; that
10:27:59 16 is, they dealt with actual skeletal materials.

10:28:02 17 But this course was not like that.
10:28:06 18 This course dealt with the application of
10:28:08 19 anthropological knowledge to legal problems in
10:28:11 20 general, and so the focus was on the methods that
10:28:19 21 were used by anthropologists to reconstruct past
10:28:24 22 cultures, specifically for the purposes of
10:28:27 23 assisting Courts who are mandated to adjudicate
10:28:31 24 various Indigenous issues like land claims and
10:28:36 25 treaty rights and Aboriginal rights and so forth.

1 And so the case studies, some of them
2 drew on my own work, and others involved other
3 examples of how anthropological knowledge
4 contributes to legal issues.

5 Q. And from the number, I take it it
6 is a third-year course as well?

7 A. Yes.

8 Q. I am going to skip the next few
9 sections of your CV which deal with field work and
10 laboratory and museum experience, and I would like
11 to go to section H on page 5, which is your
12 "Consulting Experience".

13 Now, you list a variety of clients you
14 have worked for. If I could go to the next page,
15 page 6, you list groups researched. Are any of
16 those groups -- well, could you identify which
17 groups of those are the Anishinaabe?

18 A. In the paragraph "Groups
19 Researched"?

20 Q. Yes, sorry.

21 A. So the Anishinaabeg are identified
22 as such in that paragraph, but they -- at the
23 various time periods in which I conducted my
24 research, they were also called by other ethnonyms,
25 including Ojibwe, Chippewa, Saulteaux, Mississauga

10:30:58 1 and Amikwa. And in addition to those, there are
10:31:04 2 related groups, such as the Odawa or Odaawaa, and
10:31:11 3 there are also related groups such as the
10:31:14 4 Algonquin, and there I am not referring to the
10:31:17 5 language family which would be spelled
10:31:22 6 A-l-g-o-n-q-u-i-a-n. I am referring to the
10:31:26 7 Algonquin of the Ottawa valley, and they are
10:31:31 8 spelled A-l-g-o-n-q-u-i-n.

10:31:41 9 Q. And I see under "Consulting
10:31:43 10 Subjects", the third item is "Analysis of
10:31:46 11 Indigenous oral histories and oral traditions."
10:31:50 12 Was that something you dealt with frequently as a
10:31:53 13 consultant?

10:31:54 14 A. Yes, very much so. Certainly it
10:32:04 15 started becoming an issue in the early 1990s and
10:32:08 16 continued to grow as an issue that -- or a subject
10:32:19 17 of consultation because of a number of Supreme
10:32:26 18 Court of Canada decisions which then generated an
10:32:33 19 increased demand for expertise on those species of
10:32:37 20 evidence.

10:32:47 21 Q. Now, if I could go back up to page
10:32:49 22 5 under "Other Clients", you list the Royal
10:33:00 23 Commission on Aboriginal Peoples. Could you tell
10:33:01 24 us what your involvement was there?

10:33:03 25 A. I was one of the policy advisors

10:33:05 1 and a contributing author to the final report.

10:33:14 2 Many people don't realize that these Royal

10:33:19 3 Commission reports are not necessarily actually

10:33:25 4 written by the Commissioners themselves, but are

10:33:27 5 actually commissioned by individuals like myself

10:33:31 6 who actually write the reports.

10:33:33 7 So I was a contributing author of the

10:33:37 8 Volume 1 of the RCAP report.

10:33:42 9 Q. And can you -- the following

10:33:49 10 section is section I "Expert Witness". Can you

10:33:53 11 tell me how you distinguish between consulting

10:33:55 12 experience and expert witness categories.

10:34:03 13 A. Well, a variety of interested

10:34:07 14 parties phone me up on a regular basis to consult

10:34:11 15 with me on various complex matters involving

10:34:14 16 reconstruction of past events, and sometimes, but

10:34:21 17 certainly by no means always, these end up

10:34:26 18 becoming -- or being converted into a role as an

10:34:34 19 expert witness in a litigation.

10:34:37 20 As I said, the consulting doesn't start

10:34:44 21 off that way, but in some cases it ends as a

10:34:49 22 service as an expert witness.

10:34:52 23 Now, in the case of when an interested

10:34:57 24 party, let's say a counsel for a particular party

10:35:07 25 contacts me and asks for my advice, and it is

10:35:12 1 clearly in the context of litigation, I right from
10:35:22 2 the beginning make it clear that I am willing to
10:35:26 3 assist on one major condition, and that is if the
10:35:34 4 potential client accepts that they give me free
10:35:41 5 reign to conduct my inquiries and that they accept
10:35:46 6 that I cannot guarantee that the results of my
10:35:51 7 research may or may not be prejudicial to whatever
10:35:55 8 legal interests they might have.

10:35:57 9 So that is -- I make that a standard
10:36:02 10 condition before I agree to any consultation, if
10:36:08 11 the matter is being contemplated for litigation,
10:36:14 12 which it isn't always. There are many, many
10:36:17 13 consultations that I do that do not eventuate in
10:36:23 14 litigation.

10:36:26 15 Q. And that is a condition you use
10:36:39 16 when retained by government bodies?

10:36:44 17 A. Absolutely.

10:36:45 18 Q. Would you be willing to be
10:36:53 19 retained by First Nations?

10:36:55 20 A. Absolutely, and I have been.

10:36:58 21 Q. Have you included the First
10:37:05 22 Nations that you have been retained by in your CV?

10:37:10 23 A. If you scroll up on that page, you
10:37:16 24 will see I'm a consultant and was a consultant in
10:37:21 25 several confidential files involving First Nations

10:37:25 1 clients.

10:37:27 2 Q. And can you tell us why you
10:37:33 3 haven't given details on that?

10:37:35 4 A. I could give details on at least
10:37:40 5 one of them, since a great deal of time has passed,
10:37:46 6 but the fact is that these were consultations where
10:37:55 7 I was retained by First Nations for purposes of
10:38:00 8 contemplated litigation which may or may not still
10:38:06 9 be in the process.

10:38:10 10 So I haven't been given permission to
10:38:15 11 reveal who they are, although in one case, given
10:38:23 12 how much time has passed, I suppose I could. I
10:38:27 13 just don't know about the propriety.

10:38:30 14 Q. If I could move to the next
10:38:35 15 section then, your expert witness experience, now
10:38:56 16 could you perhaps just tell us about this first
10:38:59 17 item, this case involving Walter Patrick Twinn and
10:39:08 18 Sawridge and perhaps who you were retained by?

10:39:11 19 A. Yes, this was the very first time
10:39:13 20 that I was contacted, and this was the result of
10:39:20 21 someone getting a hold of my department head at U
10:39:23 22 of T and asking whether there was somebody who was
10:39:30 23 familiar with ethnohistorical methodology on staff.
10:39:34 24 And so that is how I was contacted.

10:39:38 25 This was a case involving Bill C-31,

10:39:45 1 which was an amendment to the Indian Act, and it
10:39:48 2 was a case that involved a claim by a First Nation,
10:39:58 3 actually a group of First Nations.

10:40:04 4 Bill C-31 tried to -- or was in fact a
10:40:08 5 piece of legislation that removed some of the
10:40:14 6 discriminatory provisions of the Indian Act of
10:40:20 7 1876. That Act had allowed a native man to marry
10:40:31 8 out without losing his Indian status, but the
10:40:33 9 reverse did not hold for women. If a woman married
10:40:37 10 out, she lost her Indian status.

10:40:39 11 So Bill C-31 in 1985 was an effort to
10:40:45 12 reverse that discriminatory provision. The
10:40:49 13 Plaintiffs in this particular case challenged the
10:40:56 14 bill partly on the grounds that in their
10:40:59 15 traditions, in their native traditions, they always
10:41:04 16 kicked the women out of the band if they married
10:41:06 17 out. And so in essence, they were attempting to
10:41:11 18 support the original discriminatory provisions
10:41:15 19 while in their effort to challenge Bill C-31.

10:41:25 20 So the expertise in that trial involved
10:41:29 21 an anthropologist from -- I believe was from
10:41:35 22 Florida who testified that indeed the Cree kicked
10:41:39 23 their women out upon marriage, and my investigation
10:41:49 24 into the records of Cree past practices revealed
10:41:54 25 that that was not the case at all.

1 And an intervener in that case was the
2 Native Women's Council of Canada, and they also
3 used my report because it was in their interest to
4 preserve Bill C-31.

5 So that is, in short, what that case
6 was all about. It was my first introduction to
7 litigation, Aboriginal litigation in Canada.

8 Q. And I see in your list of 34
9 entries that you have included the Indigenous group
10 that was involved in each; is that correct?

11 A. Yes, it is highlighted in bold.

12 Q. Now, with respect to where you
13 have put Anishnaabeg, can you tell me what
14 geographic area that would apply to, at items 3,
15 11, 15, for example?

16 A. Yeah, it depends on the case.

17 So in item 3, it is the Chippewas of
18 Sarnia, so they are a group in the Sarnia area.

19 In the case of I guess number 11, that
20 is a group of Anishinaabe I believe in the Treaty 3
21 area of Northwestern Ontario.

22 In the case of number 15, those are
23 Anishinaabeg known as the Mississaugas of Scugog
24 Island First Nation.

25 In the case of number 24, those involve

1 Anishinaabeg in the Treaty 3 area of Ontario.

2 At number 27, those are also
3 Anishinaabeg of the Treaty 3 area.

4 In the case of number 30, those are
5 Anishinaabeg who were at the northern extent of
6 Anishinaabe territory at the time of Treaty 8 --
7 sorry, Treaty 9.

8 And then finally, number 33, those are
9 Anishinaabeg in the Robinson Huron and Robinson
10 Superior Treaty area of Ontario.

11 Q. If I could ask you to look at
12 number 31, you say the Chippewas and Mississaugas,
13 would they also be Anishinaabe?

14 A. Yes. Well, "Chippewas" is simply
15 a term that is very closely related to Ojibwe. If
16 you say the two terms rapidly in succession, they
17 sound almost the same. The Mississaugas originated
18 along the north shore of Lake Huron where there is
19 a river that is still of the same or similar name,
20 but eventually in the early 18th century migrated
21 south to Southern Ontario where they came to be
22 known as Mississaugas.

23 So both of those spoke -- well, it used
24 to be called the Ojibwe language. Now it is called
25 Anishinaabemowin. So they too would in that sense

1 be Anishinaabeg.

2 Q. And what geographic area was the
3 Alderville case about?

4 A. Well, the Alderville case was
5 about an area that was covered by the Williams
6 Treaties of 1923, and the areas they covered were
7 from the Ottawa River in the east to Georgian Bay
8 in the west and from Lake Nipissing and the French
9 River and the Mattawa River in the north down all
10 the way to Lake Ontario in the south, including
11 some areas that have been the subject of previous
12 treaties.

13 Q. And jumping back to item 30, Chief
14 John Fletcher, it says in that entry "Viva Voce
15 Testimony as Member of Joint Expert Panel". Could
16 you tell us briefly what that was about or how that
17 worked?

18 A. Yes, that was a case involving
19 Treaty No. 9, and under some innovative new Court
20 rules, the Judge in that case decided that there
21 would be a joint expert conferencing.

22 Now, I had done this before at least
23 six -- on six previous occasions. The joint expert
24 conferencing is a unique kind of way in which
25 evidence gets brought to Court, and I had the

10:48:40 1 privilege of being a member of these panels several
10:48:45 2 times.

10:48:46 3 In this instance, what happened is the
10:48:52 4 experts who were retained by the various parties,
10:48:56 5 in this case, by Canada, by Ontario and by the
10:49:00 6 First Nations, were given a mandate to get together
10:49:06 7 and produce a joint expert opinion, which we did.

10:49:13 8 When it came time to testify, we did
10:49:18 9 not -- well, in addition to testifying
10:49:23 10 individually, we also testified as a joint panel,
10:49:25 11 and the way that worked is an unusual practical
10:49:30 12 solution was found by the Judge in which the three
10:49:33 13 of us experts sat at the bench, and the Judge sat
10:49:40 14 in the witness chair, and the Judge questioned us,
10:49:47 15 and we gave our responses jointly as one voice, or
10:49:53 16 I should say one of us acted as a spokesperson on
10:49:56 17 behalf of the other two, although all three were
10:50:01 18 present.

10:50:01 19 So that is an example of how testimony
10:50:09 20 in Courts have evolved in various ways, and in this
10:50:16 21 instance, it decreased the tendency to have things
10:50:23 22 turn into a battle of experts. And throughout my
10:50:30 23 career, I have always been an advocate of that
10:50:32 24 approach because it to me seems much more
10:50:38 25 satisfactory.

10:50:38 1 Q. And have you co-authored any other
10:50:48 2 joint reports or opinions?

10:50:49 3 A. Yes, I have, at least seven or
10:50:52 4 eight of these joint expert opinions. Not all of
10:50:59 5 them were -- most of them were for litigation. In
10:51:04 6 some cases, the same model has been used outside of
10:51:07 7 litigation. For example, in the case I did
10:51:15 8 involving a claim to the Cold Lake Weapons Reserve,
10:51:26 9 which is partially in northern Saskatchewan and
10:51:32 10 involved the Buffalo Narrows First Nations. We had
10:51:36 11 that kind of joint expert conferencing as well, but
10:51:39 12 that was not in litigation.

10:51:44 13 Q. And what did that project require
10:51:46 14 you to do?

10:51:47 15 A. Well, I, together with my
10:51:51 16 colleagues who were retained by other parties, went
10:51:57 17 to Buffalo Narrows and interviewed the Elders,
10:52:04 18 prepared transcripts of the interviews. We sat
10:52:09 19 there. We brought the Elders in. We listened to
10:52:12 20 them. We transcribed their evidence, videotaped
10:52:17 21 their evidence, and then we prepared a joint report
10:52:23 22 on our findings which we presented to the disputing
10:52:26 23 parties.

10:52:31 24 Q. Now, with respect to cases where
10:52:34 25 you have provided evidence, are you familiar with

10:52:37 1 the Ontario Rules of Civil Procedure with respect
10:52:41 2 to the duties of an expert?

10:52:42 3 A. Yes, of course.

10:52:45 4 Q. And how do you understand your
10:52:49 5 duty to the Court?

10:52:50 6 A. Well, the same way that I
10:52:56 7 understand the Federal Court rules, which are
10:52:58 8 slightly differently worded.

10:53:00 9 In general, the way I understand it is
10:53:03 10 that an expert witness like myself, who is retained
10:53:09 11 by a particular party, has an overriding duty to
10:53:19 12 present objective, independent, impartial evidence
10:53:24 13 to a Court, and that duty prevails or -- in the
10:53:40 14 federal wording it is a little different, but in
10:53:42 15 Ontario, I think the word is "prevails" over the
10:53:45 16 duty that I may have to the client or party that
10:53:50 17 retained me.

10:53:51 18 That is the way I understand it.

10:53:58 19 So in short, my expert reports that I
10:54:00 20 write are really written for the Court. They are
10:54:02 21 not written for the party that retained me.

10:54:04 22 Q. If I could move to -- I'll skip
10:54:17 23 your community-based experience, and I'll move to
10:54:19 24 your publications starting on page 8.

10:54:31 25 Now, I am not going to take you through

10:54:34 1 them, but are cases in which you have dealt with
10:54:40 2 oral traditions been identified in these entries?

10:54:47 3 A. Yes.

10:54:47 4 Q. And following what we have just
10:54:56 5 referred to, do some of them involve joint expert
10:55:02 6 reports that you have written with other experts?

10:55:05 7 A. Yes.

10:55:05 8 Q. Do any of them deal with what you
10:55:21 9 have described in your report as deep-time oral
10:55:26 10 traditions?

10:55:27 11 A. None of the previous reports that
10:55:36 12 I have done in the context of litigation have dealt
10:55:41 13 with the type of deep-time oral traditions that I
10:55:47 14 was confronted with in the current proceedings.

10:55:51 15 However, the subject was not new to me,
10:55:56 16 and indeed, I looked at the scientific literature
10:56:06 17 on the debates surrounding that issue as early as
10:56:10 18 1996 in a report that I did that was published and
10:56:18 19 is listed at item 32, with the French translation
10:56:26 20 at 33.

10:56:32 21 So in short, the issue of deep-time
10:56:39 22 oral traditions, or long-term oral traditions as I
10:56:44 23 also call them, is something that I dealt with
10:56:51 24 outside of litigation but has now for the first
10:56:55 25 time, as far as I recall, been an issue in a

10:57:01 1 context in which I have been involved in that is a
10:57:05 2 litigation context.

10:57:07 3 Q. Now, I'm actually going to jump
10:57:13 4 back a bit to the beginning of your "Expert
10:57:18 5 Witness" entry on page 6, the sub-heading "I",
10:57:25 6 there is a "General qualification statement". I am
10:57:31 7 not sure if this is identical to what we have
10:57:34 8 marked as a lettered exhibit, but is this -- what
10:57:38 9 do you mean by "General qualification statement"?

10:57:41 10 A. Well, this is the statement that
10:57:47 11 has been used in most of the cases in which I have
10:57:49 12 served as an expert witness. It is not always
10:57:53 13 precisely this wording, but it is usually
10:58:03 14 variations of this wording.

10:58:05 15 Q. And where it says "parts of the
10:58:09 16 United States", what parts would you be referring
10:58:13 17 to?

10:58:19 18 A. The parts I would be referring to
10:58:23 19 are the ones that I am most familiar with and the
10:58:28 20 ones that I have researched, and they are primarily
10:58:31 21 in what is now New York State and Ohio.

10:58:38 22 Q. And have you been accepted as an
10:58:43 23 expert witness on this statement before any Courts?

10:58:51 24 A. Yes.

10:58:52 25 Q. And any Courts in Ontario?

10:58:55 1 A. Yes.

10:58:55 2 Q. Can you estimate how many?

10:58:58 3 A. Well, I would think all of the
10:59:07 4 ones that are in Ontario. As I said, I am not sure
10:59:13 5 about the precise wording, but it is more or less
10:59:18 6 similar wording.

10:59:19 7 Q. Now, you have been retained by
10:59:51 8 Canada in this proceeding; is that correct?

10:59:53 9 A. That's correct.

10:59:55 10 Q. And you are presumably being paid
11:00:00 11 by Canada for your services here?

11:00:01 12 A. That's correct.

11:00:03 13 Q. And does that affect the opinion
11:00:13 14 you have expressed in your report?

11:00:14 15 A. It has no bearing on it
11:00:18 16 whatsoever. Not only am I sworn to the oath, which
11:00:28 17 in my view includes the wording of the duties that
11:00:34 18 I have to this Court, but I also would produce
11:00:45 19 precisely the same product and have the same
11:00:50 20 testimony if I had been retained by another party,
11:01:00 21 whether government or otherwise.

11:01:01 22 Q. Now, are you familiar with the
11:01:32 23 term "confirmation bias"?

11:01:35 24 A. Yes, of course. I referred to
11:01:41 25 that term in my report that I prepared in relation

11:01:44 1 to these proceedings and also defined it in that
11:01:48 2 report.

11:01:48 3 Q. And could you briefly tell us what
11:01:54 4 your understanding is of confirmation bias?

11:01:58 5 A. Well, a confirmation bias is often
11:02:00 6 considered the mother of all cognitive biases and
11:02:04 7 one that any and all scientists need to be acutely
11:02:12 8 aware of. It is basically the tendency to seek and
11:02:29 9 find confirmatory evidence for your pre-existing
11:02:33 10 beliefs while ignoring or re-interpreting
11:02:46 11 non-confirmatory evidence.

11:02:49 12 And so what happens is you have a
11:02:53 13 blinder on that keeps you from exploring
11:02:59 14 alternatives because you have an a priori belief
11:03:05 15 set that determines what kind of material you use
11:03:10 16 to support views you already have.

11:03:13 17 So if I can give an example, I mean, we
11:03:16 18 all have confirmation bias in some way or another.
11:03:21 19 Sometimes it is more subtle than not. For example,
11:03:27 20 I have a tendency to watch CNN and ignore Fox News,
11:03:38 21 and that may contribute to my own confirmation bias
11:03:41 22 when it comes to American politics.

11:03:45 23 But in my professional circles, I have
11:03:52 24 to constantly keep that in check, and so the best
11:03:57 25 way to do that is through reading. Somebody who

11:04:04 1 maintains a confirmation bias reads only things,
11:04:09 2 books, articles, that are in accord with their
11:04:13 3 pre-existing beliefs.

11:04:19 4 An objective researcher will avoid that
11:04:23 5 and read material that may be contrary to their
11:04:31 6 pre-existing beliefs. A confirmation bias does not
11:04:37 7 necessarily mean that you are equally receptive to
11:04:45 8 two diametrically opposed positions. All it means
11:04:49 9 is that you need to be aware of the existence of
11:05:00 10 these diametrically opposed positions and then you
11:05:05 11 can decide after that what position you'll take.

11:05:11 12 So the best way to get around
11:05:14 13 confirmation bias is to read widely, and when I sit
11:05:25 14 down in front of a TV, I don't flip channels to
11:05:28 15 Fox, but if I am working on a report, I do flip
11:05:33 16 back and forth between all the various views and
11:05:37 17 the various types of evidence that apply to the
11:05:44 18 particular problem that I am investigating.

11:05:49 19 So that is my understanding of
11:05:51 20 confirmation bias. We all have it, but as a
11:05:56 21 professional, I take steps to avoid it because it
11:06:02 22 is a necessary aspect of science.

11:06:11 23 Q. And if you were presented
11:06:19 24 evidence, perhaps new evidence that contradicts
11:06:23 25 your present view on a subject, would you be

11:06:28 1 willing to reconsider?

11:06:29 2 A. Well, absolutely. I mean, I think
11:06:35 3 the report that I wrote for this case I think is a
11:06:39 4 good example of that because the way I looked at it
11:06:46 5 is -- there is two ways of looking at it.

11:06:49 6 One is you are confronted with a claim,
11:06:53 7 and your confirmation bias will simply need you to
11:06:58 8 dismiss it a priori, as absurd or as, you know,
11:07:09 9 complete nonsense.

11:07:11 10 But the proper way to do it is not to
11:07:15 11 dismiss it but to take it seriously and then
11:07:18 12 analyze it, consider it in detail, look at
11:07:23 13 alternative interpretations of the same data set,
11:07:30 14 and then come to a conclusion at the end as to
11:07:33 15 which one you prefer based on certain logical
11:07:38 16 reasoning.

11:07:43 17 Dismissing something out of hand
11:07:51 18 without investigating it at all is how confirmation
11:07:59 19 biases start and how they flourish.

11:08:03 20 So to avoid that, even what on the
11:08:07 21 surface or on its face may seem like a totally
11:08:10 22 unreasonable claim or a preposterous claim, even in
11:08:19 23 that instance you should never dismiss it but look
11:08:24 24 at it seriously and make a decision after due
11:08:30 25 reflection on it and study.

11:08:56 1 MR. BEGGS: Thank you, Your Honour.

11:08:58 2 Those are my questions. I understand my friend has
11:09:01 3 some cross-examination.

11:09:01 4 THE COURT: All right.

11:09:05 5 CROSS-EXAMINATION BY MS. GUIRGUIS:

11:09:27 6 Q. Good morning, Your Honour. Good
11:09:52 7 morning, Dr. von Gernet.

11:09:52 8 A. Good morning.

11:09:53 9 Q. My name is Cathy Gurguis. I'm one
11:09:55 10 of the lawyers for the Plaintiffs, and I'm going to
11:09:56 11 be asking you some questions this morning. So you
11:10:01 12 have gone through with my friend, Mr. Beggs, that
11:10:04 13 you have testified in more than 30 cases; that's
11:10:06 14 correct?

11:10:06 15 A. Yes.

11:10:06 16 Q. And he has also asked you
11:10:08 17 questions about the fact that you well
11:10:12 18 understand -- you understand very well your duties
11:10:13 19 to the Court here, to provide objective and
11:10:17 20 non-partisan opinion evidence?

11:10:18 21 A. Yes.

11:10:18 22 Q. You would agree with me that
11:10:22 23 coming to an impartial opinion and providing that
11:10:25 24 evidence requires that you have an open mind going
11:10:27 25 into your assessment?

11:10:28 1 A. Yes.

11:10:28 2 Q. And that you conduct an assessment
11:10:30 3 by looking at all possibilities?

11:10:32 4 A. All possibilities that are
11:10:36 5 available to me, yes.

11:10:38 6 Q. So I would like to turn to the
11:10:44 7 report that you have prepared for this Court, for
11:10:46 8 this case, your July 2019 report, which is SC0772.

11:10:52 9 A. Yes.

11:10:52 10 Q. Your Honour, I think it would be
11:10:55 11 helpful to mark the report as a lettered exhibit at
11:10:59 12 this time.

11:10:59 13 THE COURT: We can do that. I am just
11:11:04 14 pausing. The copy I have been using is the
11:11:13 15 black-lined copy.

11:11:14 16 MS. GUIRGUIS: Oh, okay.

11:11:15 17 THE COURT: Which isn't a problem so
11:11:16 18 much as it means there might be a page number
11:11:20 19 challenge. I am not sure that I ever received the
11:11:25 20 un-black-lined copy. You don't have parallel
11:11:32 21 numbers, I surmise.

11:11:33 22 MS. GUIRGUIS: No, I don't.

11:11:34 23 THE COURT: So first of all,
11:11:35 24 Mr. Registrar, we are going to mark the July 2019
11:11:40 25 report of this witness as the next lettered

1 exhibit, so what is that letter?

2 THE REGISTRAR: Lettered Exhibit V-2.

3 EXHIBIT NO. V-2: Expert Report of Dr.

4 Alexander von Gernet dated July 2019.

5 THE COURT: V-2?

6 THE REGISTRAR: V-2.

7 THE COURT: Just a moment. I am just
8 going to take a minute and see if I have that
9 version handy. We can use it on the screen anyway
10 because I'm familiar with it.

11 MS. GUIRGUIS: Okay.

12 THE COURT: So you can proceed, but in
13 the meantime, I'll have my CSO look and see if I
14 have that copy as well.

15 MS. GUIRGUIS: And perhaps what we can
16 do is come up with parallel page numbers for you,
17 if that would be helpful.

18 THE COURT: I think it will be fine
19 because I have a general understanding of what is
20 there.

21 MS. GUIRGUIS: Okay.

22 THE COURT: So you can go ahead, and I
23 will use the screen.

24 MS. GUIRGUIS: Great.

25 THE COURT: And in the meantime, please

1 go ahead.

2 BY MS. GUIRGUIS:

3 Q. Okay. Thank you, Your Honour. So
4 Dr. von Gernet, if we turn to your report, at pages
5 61 to 64 of your July 2019 report, you discuss how
6 your methods have been received by other Judges.
7 So this is under your section that you entitle
8 "Application of approach to legal settings", and if
9 you turn to page 62 of the report -- or I am just
10 going to ask my colleague, Ms. Prokos, to take away
11 the sidebar there of the PDF. Thank you.

12 And we can zoom in a little bit, if
13 possible, just to make it a little more readable.
14 Thank you.

15 So on this page, you cite three Court
16 cases, and the three cases that you cite are Queen
17 v. Drew, R. v. Benoit and Chief Victor Buffalo v.
18 The Queen, and you provided an expert opinion in
19 all three of these cases; is that correct?

20 A. Yes.

21 Q. And it was on behalf of the Crown
22 parties for all of these cases?

23 A. Yes.

24 Q. So if we flip to page 63, you
25 provided excerpts of the cases that talk about

1 accepting your approach, and you cite a section
2 that says:

3 "It is necessary to adopt Dr.
4 von Gernet's approach to oral
5 history and tradition".

6 And it is accurate that in all three
7 cases that was their opinion, that they adopt your
8 approach?

9 A. Yes.

10 Q. So these are the three cases that
11 you have cited in your 2019 expert report to this
12 Court in support of yourself, in support of the
13 approach that you are advocating, but you are aware
14 that other judges and courts have commented on your
15 methodology; correct?

16 A. I am aware that some Courts have
17 adopted my approach; others have ignored it; and
18 some have not commented on it at all.

19 Q. Okay. So I would like to turn to
20 a couple of the comments made by other courts that
21 you didn't include in your expert report.

22 You testified in Mitchell v. Canada,
23 which was a Federal Court case that made its way up
24 to the Supreme Court of Canada; correct?

25 A. Yes.

1 Q. And you were retained by Canada in
2 that case as well?

3 A. Yes.

4 Q. So I want to turn quickly to the
5 trial judge's decision in that case, a short
6 excerpt that we have at SC0774. Your Honour, I
7 would like to add this excerpt of Mitchell v.
8 Canada as the next exhibit.

9 THE COURT: All right. Mr. Registrar?

10 THE REGISTRAR: Exhibit No. 4314.

11 EXHIBIT NO. 4314: Excerpt from the
12 decision Mitchell v. Canada.

13 BY MS. GUIRGUIS:

14 Q. Now, if we turn to paragraph 93 of
15 that decision, which is page 2 of the PDF, just
16 scroll down, Justice McEwan held, he says:

17 "In my view, Dr. von Gernet's
18 opinion on oral histories is
19 contrary to the position of the
20 Supreme Court of Canada, which has
21 directed that oral narratives or
22 oral histories shall be accepted as
23 any documentary evidence would in
24 cases involving aboriginal peoples."
25 So you are aware of this judge's

1 comment about your opinion?

2 A. Yes. I am also aware that this
3 opinion was overturned by the Supreme Court of
4 Canada.

5 Q. This opinion, or you mean the
6 decision?

7 A. The decision.

8 Q. The decision.

9 A. I'm sorry, the decision, yes.

10 Q. But you are not saying that this
11 opinion, this statement was overturned?

12 A. Well, I don't know what the scope
13 of the -- I don't recall. This was quite some time
14 ago. I don't recall what the scope of the Supreme
15 Court of Canada decision was with respect to oral
16 narratives except to say that I do recall -- I
17 mean, the Supreme Court of Canada decisions speak
18 for themselves. I don't know if I need to explain
19 my understanding of them.

20 Q. No, you don't.

21 A. But I don't think that -- well,
22 just to backtrack for a moment, this note -- or
23 this paragraph at 91 refers to the study of oral
24 narratives that was completed in 1996.

25 Q. Uhm-hmm.

11:17:41 1 A. My expert opinion report had only
11:17:44 2 been completed in 1995, so that is why it was not
11:17:48 3 included as part of my supporting documents in the
11:17:55 4 Mitchell case. It is a matter of chronology.

11:18:00 5 By the time it came time for the trial
11:18:07 6 judge to decide, my report had in fact been
11:18:10 7 published. I don't know how it got into the
11:18:15 8 record, but that is the chronology.

11:18:18 9 And so I did not actually speak to the
11:18:25 10 issue of oral traditions based on that 1996 report.
11:18:31 11 It was not extant at the time that I testified, as
11:18:36 12 I recall, and certainly not at the time that I
11:18:41 13 wrote the report.

11:18:44 14 So my role in the Mitchell case had
11:18:47 15 very little to do with oral histories and oral
11:18:50 16 traditions.

11:18:50 17 Q. Okay. That is fine. My question
11:18:55 18 really was about that you are aware of this
11:18:58 19 statement from the Court in this case with respect
11:19:02 20 to your opinion and what Justice McEwan calls your
11:19:07 21 opinion on oral histories; you are aware of this
11:19:09 22 statement?

11:19:10 23 A. Well, now that you have shown it
11:19:12 24 to me, I do recall it.

11:19:16 25 Q. And you didn't include this

1 judge's comment about your opinion in the expert
2 report that you prepared for this case?

3 A. Well, no, it is not -- well, aside
4 from the fact that the decision itself was
5 overturned by the Supreme Court, I saw no need to.

6 Q. Okay. Thank you. You testified
7 also in the Tsilhqot'in Nation v. British Columbia?

8 A. Yes.

9 Q. Which is an Aboriginal title case
10 that eventually made its way up to the Supreme
11 Court of Canada?

12 A. That's correct.

13 Q. And you were again working for
14 Canada in that case?

15 A. Well, as I testified earlier, my
16 reports are actually written for the benefit of the
17 Court, but I was retained by Canada.

18 Q. Okay. Thank you.

19 So I would like to turn to the trial
20 judge's decision in that case, an excerpt of it.
21 This is in the REDI database as document SC0775,
22 and Your Honour, I would like to add this document
23 as the next exhibit. It is an excerpt of
24 Tsilhqot'in Nation v. British Columbia.

25 THE COURT: Mr. Registrar?

11:20:29 1 THE REGISTRAR: Exhibit No. 4315.

11:20:32 2 EXHIBIT NO. 4315: Excerpt from the

11:20:25 3 Tsilhqot'in Nation v. British Columbia
11:20:34 4 decision.

11:20:34 5 BY MS. GUIRGUIS:

11:20:36 6 Q. So if we turn to paragraph 154,
11:20:40 7 which is page 4 of the PDF, and this is a comment
11:20:43 8 by Justice Vickers with respect to the opinion
11:20:46 9 evidence that you provided there, and Justice
11:20:48 10 Vickers says:

11:20:50 11 "Despite what Canada has
11:20:51 12 argued, I was left with the
11:20:52 13 impression that Dr. von Gernet would
11:20:54 14 be inclined to give no weight to
11:20:55 15 oral tradition evidence in the
11:20:57 16 absence of some corroboration. His
11:20:59 17 preferred approach, following
11:21:03 18 Vansina, involves the testing of
11:21:05 19 oral tradition evidence produced in
11:21:07 20 court by reference to external
11:21:09 21 sources such as archaeology and
11:21:11 22 documentary history. In the absence
11:21:12 23 of such testing, he would not be
11:21:13 24 prepared to offer an opinion on the
11:21:15 25 weight to be given any particular

1 oral tradition evidence. If such
2 testing does not reveal some
3 corroborative evidence, it is highly
4 unlikely that he would give any
5 weight to the particular oral
6 tradition evidence. This approach
7 is not legally sound. Trial judges
8 have received specific directions
9 that oral tradition evidence, where
10 appropriate, can be given
11 independent weight. If a court were
12 to follow the path suggested by Dr.
13 von Gernet, it would fall into legal
14 error on the strength of the current
15 jurisprudence."

16 So Dr. von Gernet, you did not include
17 this judge's comment about your opinion in the
18 expert report that you provided to this Court;
19 correct?

20 A. That's correct.

21 Q. And so you didn't include any
22 excerpts of Court decisions that have rejected your
23 opinion evidence?

24 A. Well, I have no problem with
25 Courts rejecting my opinions. I can easily -- I

1 mean, they are all in my CV. They are easy enough
2 to find. I take issue with the impression that was
3 left by this learned judge. I don't think there is
4 anything in any of my reports or in my testimony
5 that actually should leave any judge with this
6 impression.

7 I have never had this opinion, at least
8 in the manner in which it is articulated here, but
9 it is what it is. If a judge was left with that
10 impression, then that is to be respected.

11 Q. Well, sir, what I am hoping you
12 can help me out with is, in this report that is
13 giving a preview of your impartial expert evidence
14 that is going to be given in this Court, you have
15 given only one side of the story with respect to
16 the receipt of your opinion evidence before; would
17 you agree with me on that?

18 A. No, I would not agree with that
19 because I am not -- in this report, the issue of
20 bias has nothing to do with the presentation of my
21 examples of how my work has been used in legal
22 settings.

23 If you look at page 61 of my report,
24 the reason I introduce all of these is not to
25 provide a global history of my work in litigation.

11:24:13 1 The reason is I say on page 61:

11:24:18 2 "I pause here to put on record
11:24:20 3 an early version of my efforts, if
11:24:22 4 only to compare it with my current
11:24:23 5 thinking."

11:24:24 6 And that is when I talk about the
11:24:27 7 approach that I took to oral histories and oral
11:24:30 8 traditions in the late 1990s and how that was
11:24:36 9 endorsed by the courts, and the courts took a
11:24:46 10 publication of mine and reproduced it verbatim into
11:24:51 11 three different decisions by three different
11:24:56 12 courts.

11:25:01 13 Q. Now, sir, in describing that,
11:25:02 14 though, you haven't included the other side of how
11:25:05 15 your reports have been received by other courts;
11:25:09 16 correct?

11:25:13 17 A. That's correct, but that was not
11:25:15 18 the intended purpose of this entire section of my
11:25:20 19 report. As I said, it was not intended to explore
11:25:26 20 each and every decision that was made by each and
11:25:29 21 every court in the some 30 or more cases in which I
11:25:38 22 have been involved in.

11:25:41 23 I have nothing to hide here. These are
11:25:43 24 all in the public record and can be accessed by
11:25:50 25 anyone, including yourself. So the last thing I

1 want to leave the impression with is that I am
2 trying to hide previous court decisions. I mean, I
3 am not so stupid as to think that a Judge is not
4 going to be familiar with previous court decisions.
5 I have nothing to hide.

6 But this, the purpose, as I said, of
7 the section on legal application of my views has
8 nothing to do with a review of the entire record of
9 my involvement in these proceedings.

10 Q. No, sir, and I am not intending to
11 suggest that you are stupid or that you are
12 implying that you can hide the public record of
13 courts. I am simply saying that the purpose in
14 this part of the report is to describe your
15 approach, and what you provided is three positive
16 reviews, and you have agreed with me that you have
17 left out other comments.

18 But I want to turn back to your July
19 2019 report, since we are talking about this
20 subject matter, and at page 64, if you can turn to
21 page 64, you have a heading here called "A
22 cautionary tale", and you provide a rather detailed
23 account of your role in a case called R. v.
24 Marshall.

25 A. Yes.

11:27:16 1 Q. And Dr. von Gernet, your caution
11:27:18 2 is addressed to this Court; correct?

11:27:20 3 A. Well, my entire report, as I said,
11:27:25 4 is done for the benefit of assisting the Court.

11:27:30 5 Q. And you are arguing in this
11:27:33 6 section that the Court should exercise caution in
11:27:35 7 how it weighs and accepts any oral history
11:27:38 8 evidence?

11:27:38 9 A. Well, my caution is broader than
11:27:45 10 that. My caution is not just for a judge in this
11:27:53 11 Court but for anyone who deals with oral histories
11:28:00 12 and traditions that are purported to be about real
11:28:05 13 past events.

11:28:06 14 Q. But this caution here is in the
11:28:08 15 expert report that is provided to this Court, not
11:28:11 16 being used anywhere else?

11:28:12 17 A. Well, I think it would be a
11:28:15 18 caution to all the parties and the Court.

11:28:17 19 Q. So the cautionary tale, you
11:28:23 20 describe a trip you took to Vatican City to look
11:28:25 21 for evidence to discredit oral history regarding a
11:28:31 22 wampum belt; is that right?

11:28:33 23 A. That is utterly incorrect.

11:28:35 24 Q. My reading of it is that in the
11:28:38 25 course of this case, there was a wampum belt, and

11:28:41 1 you went to Vatican City to look at records with
11:28:44 2 respect to this same belt; is that correct?

11:28:48 3 A. That would be more accurate, but
11:28:50 4 the first characterization implied a confirmation
11:28:53 5 bias; that is, I went to the Vatican to discredit
11:28:59 6 this belt. That had never been my intention, and
11:29:03 7 in fact, it came to me as a complete surprise.

11:29:05 8 Q. So you were travelling to Vatican
11:29:07 9 City, let's say, more accurately, to find evidence
11:29:12 10 about the oral history regarding the wampum belt;
11:29:17 11 is that fair to say?

11:29:19 12 A. No, I did not travel to the
11:29:20 13 Vatican to look for oral history about this belt.
11:29:23 14 I travelled to the Vatican because it was important
11:29:27 15 to try and locate the original belt, a facsimile
11:29:34 16 copy of which had been presented as an exhibit in
11:29:38 17 court. The witness, who was a Putus or the
11:29:44 18 official keeper of the oral traditions and wampum
11:29:48 19 of the Mi'kmaq Grand Council, he had brought this
11:29:58 20 replica of this belt to Court, and he gave an
11:30:01 21 elaborate story based on this mnemonic device.

11:30:06 22 So my role in going to the Vatican and
11:30:11 23 my purpose was to see if I could find the original
11:30:16 24 and any documentation associated with it as a
11:30:23 25 matter of due diligence.

11:30:25 1 Q. Okay. So what you have just
11:30:27 2 recited, and the cautionary tale as you have
11:30:30 3 described it in this expert report, it has nothing
11:30:34 4 to do with the facts of this case; correct?

11:30:36 5 A. Well, it is manifestly clear that
11:30:46 6 there is no Vatican wampum belt in this case.

11:30:49 7 Q. So let's turn to page 67 of your
11:30:52 8 July 2019 report, and here at the top you remark:

11:30:57 9 "This episode should serve as a
11:30:58 10 sober reminder that even the most
11:31:00 11 elaborate internal checks within an
11:31:04 12 Indigenous community are an
11:31:07 13 insufficient guarantee of historical
11:31:09 14 reliability."

11:31:09 15 So the purpose of having this
11:31:14 16 cautionary tale here is to caution this Court about
11:31:19 17 the danger of giving oral history evidence any
11:31:22 18 independent weight; correct?

11:31:24 19 A. No, that is not what the sentence
11:31:26 20 said. You have just completely re-read it.

11:31:28 21 Q. Well, I am reading it in
11:31:30 22 combination with the rest of the tale, too, and
11:31:33 23 what I understand this purpose of -- the purpose of
11:31:35 24 the expert report that you said is to advise the
11:31:37 25 Court.

11:31:39 1 A. I think I make it clear throughout
11:31:41 2 my report that even a cautionary tale is
11:31:48 3 insufficient to generate a generalization that all
11:31:54 4 oral histories and traditions are unreliable.

11:31:57 5 A cautionary tale is just that. A
11:32:00 6 cautionary tale generates in my mind, and I should
11:32:08 7 think in the mind of any reasonable person, a
11:32:14 8 skepticism and a cautious approach. It does not at
11:32:28 9 all generate an a priori view that all oral
11:32:37 10 histories and traditions are historically
11:32:41 11 unreliable.

11:32:42 12 Q. So, sir, you say that you think
11:32:45 13 you have made it clear in your report that it is
11:32:49 14 insufficient to generate a generalization, this
11:32:51 15 cautionary tale. But these are your words on the
11:32:54 16 top of page 67 that:

11:32:56 17 "This episode should serve as a
11:32:57 18 sober reminder that even the most
11:33:00 19 elaborate internal checks within an
11:33:02 20 Indigenous community are an
11:33:03 21 insufficient guarantee of historical
11:33:04 22 reliability."

11:33:05 23 You would agree with me that is a
11:33:06 24 generalization? That is a pretty absolute
11:33:09 25 statement, "even the most elaborate internal

1 checks", they are insufficient.

2 A. Yes, I think that there are no
3 guarantees that any internal checks are going to
4 give historical reliability. This has to be done
5 on a case-by-case basis, and I think I emphasized
6 that early in my report.

7 My general approach to this is to look
8 at these on a case-by-case basis, and what that
9 means is you need to keep in mind that we have
10 evidence of oral traditions being demonstrably
11 false. Even if you only had one, even just one
12 cautionary tale, that in and of itself should
13 generate this sober reminder.

14 Q. If the general approach is to look
15 at it on a case-by-case basis --

16 A. Yes.

17 Q. -- then you would agree with me
18 that there are cases where internal checks within
19 an Indigenous community are sufficient to guarantee
20 historical reliability?

21 A. They may be sufficient not to
22 guarantee historical reliability, but to provide
23 confidence that on the balance of probabilities
24 they are historically reliable.

25 MS. GUIRGUIS: Your Honour, it is about

11:34:42 1 11:35 right now. This might be a good time to stop
11:34:46 2 for the morning break.

11:34:47 3 THE COURT: Sir, you have obviously
11:34:56 4 testified before, and you may recall that while you
11:35:00 5 are under cross-examination, you cannot discuss
11:35:02 6 this matter with anyone. All right. I am sure
11:35:05 7 that someone will still direct you to where you can
11:35:09 8 find a cup of coffee or whatever you would like,
11:35:11 9 and we'll take a 20-minute break at this time.

11:35:13 10 -- RECESSED AT 11:35 A.M.

11:56:47 11 -- RESUMED AT 11:55 A.M.

11:56:47 12 THE COURT: I was able to locate my
11:56:48 13 other copy of the report with all my post-its on
11:56:51 14 it, Counsel, so I'm all set.

11:56:54 15 Please go ahead.

11:57:04 16 BY MS. GUIRGUIS:

11:57:05 17 Q. Thank you, Your Honour.

11:57:06 18 So, Dr. von Gernet, I would like to
11:57:09 19 turn to one of the publications you have listed in
11:57:12 20 your CV. It is the article called "What My Elders
11:57:17 21 Taught Me, Oral Traditions As Evidence in
11:57:20 22 Aboriginal Litigation". This is document S-1798,
11:57:25 23 if we can pull that up.

11:57:27 24 Your Honour, I would like to add this
11:57:28 25 article as an exhibit.

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THE COURT: Mr. Registrar.

THE REGISTRAR: Exhibit No. 4316.

EXHIBIT NO. 4316: Article entitled "What My Elders Taught Me, Oral Traditions As Evidence in Aboriginal Litigation".

BY MS. GUIRGUIS:

Q. So this is an article you published in the year 2000; correct?

A. Yes.

Q. And it provides your views about the Supreme Court's decision in Delgamuukw regarding oral history?

A. In part, yes.

Q. Specifically, you deal with and you have a criticism of the Supreme Court's instruction that oral history and traditions must be placed on equal footing with historical documents; correct?

A. I don't think I had a criticism. You would have to refer me to the passage so we can see the context.

Q. Okay. I will. Let me take you to page 115, which is page 18 of the PDF. Thank you.

And if we look towards the bottom of

11:58:28 1 the page, if we can zoom in, so starting right
11:58:36 2 after the word "elder", right there, yes, where the
11:58:42 3 mouse is, about halfway down the paragraph, you
11:58:45 4 write:

11:58:46 5 "The rejection of McEachern's
11:58:46 6 [...] --

11:58:52 7 And you are referring to Justice
11:58:53 8 McEachern, who was the trial judge in Delgamuukw.

11:58:54 9 A. Yes.

11:58:54 10 Q. So:

11:58:54 11 "The rejection of McEachern's
11:58:57 12 critical analysis will almost
11:58:59 13 certainly be regarded by some as not
11:59:01 14 merely an effort to level the field
11:59:04 15 or lower the standard, but as an
11:59:06 16 outright abandonment of the rigorous
11:59:08 17 scrutiny that is essential to any
11:59:09 18 fact-finding process."

11:59:11 19 So here you mean in this passage that
11:59:13 20 it is the Supreme Court of Canada's rejection of
11:59:16 21 Justice McEachern's approach?

11:59:23 22 A. Yes, and I think I have been
11:59:26 23 proven right that it has been regarded by some in
11:59:29 24 that fashion.

11:59:30 25 Q. It is regarded by some, and I take

11:59:32 1 it from my reading of this article, of the rest of
11:59:37 2 this article in this passage that you would include
11:59:39 3 yourself amongst the some?

11:59:43 4 A. I don't think that was my
11:59:44 5 intention then, nor would it be my opinion today,
11:59:49 6 but I do -- of course, at the same time I am well
11:59:53 7 known as an advocate of a rigorous scrutiny and a
12:00:01 8 scientific approach.

12:00:05 9 Q. And your position has been that
12:00:08 10 one should not give independent weight to oral
12:00:11 11 history evidence as set out by the Supreme Court in
12:00:17 12 Delgamuukw?

12:00:18 13 A. I don't think that I have ever
12:00:20 14 been on record as saying that. That is not my
12:00:25 15 position. My position has always been that these
12:00:31 16 matters have to be looked at on a case-by-case
12:00:34 17 basis. And for example, earlier today I mentioned
12:00:40 18 interviewing elders at Buffalo Narrows. I,
12:00:48 19 together with my colleagues, gave the oral
12:00:50 20 histories of those elders independent weight.
12:00:56 21 There was no corroborating evidence, but I have no
12:00:59 22 reason not to give it weight.

12:01:02 23 So as I said, it has to be done on a
12:01:05 24 case-by-case basis. I do not -- I don't think I am
12:01:09 25 anywhere on the record with an outright

12:01:12 1 generalization that oral histories and traditions
12:01:19 2 should never be given independent weight.

12:01:22 3 Q. Well, except for that statement
12:01:24 4 that we were discussing right before the break,
12:01:27 5 which is at page 67 of your July 2019 report. You
12:01:31 6 said that the most elaborate internal checks within
12:01:33 7 an Indigenous community are an insufficient
12:01:36 8 guarantee of historical reliability. Wouldn't you
12:01:38 9 agree with me that that's a different way of saying
12:01:42 10 that it shouldn't be given independent weight,
12:01:44 11 unless it is independently -- unless it is
12:01:47 12 otherwise corroborated with other evidence?

12:01:48 13 A. No, that is a completely different
12:01:50 14 statement. That is not related to this at all.

12:01:54 15 Q. Okay. So I would like to turn to
12:01:59 16 your July 2019 report again at page 26. So here,
12:02:18 17 near the bottom of this paragraph, you are
12:02:19 18 commenting on "anthropologists closely tied to
12:02:26 19 Indigenous communities", who you say whose aim is
12:02:28 20 to "preserve, protect and defend indigenous ways of
12:02:33 21 knowing". You describe them as advocates; correct?

12:02:37 22 A. No, I think it is -- to be clear
12:02:39 23 on the record, I will read what my sentence
12:02:42 24 actually says:

12:02:44 25 "Further, certain

12:02:45 1 anthropologists closely tied to
12:02:47 2 Indigenous communities do not only
12:02:50 3 see advocacy as compatible with
12:02:51 4 their profession, but have elevated
12:02:53 5 it to a quasi-subfield of applied
12:02:58 6 anthropology known as 'advocacy
12:03:01 7 anthropology.'

12:03:03 8 Q. So you are describing them as
12:03:05 9 advocates?

12:03:05 10 A. They themselves describe
12:03:08 11 themselves as advocates and use the term "advocacy
12:03:12 12 anthropology".

12:03:12 13 Q. You sometimes refer or you have
12:03:20 14 referred at page 20 of your report to -- I am not
12:03:25 15 sure if it is this group -- as the Indigenous
12:03:30 16 intelligentsia?

12:03:33 17 A. Yes.

12:03:33 18 Q. And when you use "Indigenous
12:03:39 19 intelligentsia", are you just referring to educated
12:03:42 20 Indigenous people?

12:03:42 21 A. No. I use the term
12:03:48 22 "intelligentsia" in the same way I would use it for
12:03:52 23 non-Indigenous people. In this instance, these are
12:03:57 24 intellectuals with advanced academic degrees who
12:04:05 25 describe themselves as part of the academic

12:04:11 1 community.

12:04:12 2 Q. Okay. So Indigenous
12:04:16 3 intelligentsia are educated or academics that are
12:04:20 4 Indigenous?

12:04:20 5 A. Yes.

12:04:20 6 Q. And some non-Indigenous scholars,
12:04:25 7 at page 28 of your report, you talk about this
12:04:28 8 group being proponents of what you refer to as
12:04:33 9 "fashionable nonsense"?

12:04:35 10 A. I said, if you go back to the
12:04:37 11 sentence that we just read -- it is on a different
12:04:52 12 page. There you go. I say:

12:04:57 13 "I appreciate that some within
12:05:02 14 the Indigenous intelligentsia [...]"

12:05:05 15 So I'm not referring to every
12:05:07 16 Indigenous person with academic credentials.

12:05:10 17 Q. But some of that group are
12:05:13 18 proponents of what you call this fashionable
12:05:19 19 nonsense?

12:05:19 20 A. It is not what I call. It is what
12:05:22 21 Alan Sokal --

12:05:24 22 Q. And what you have adopted here?

12:05:26 23 A. I have borrowed the term, and to
12:05:29 24 be clear, what I am describing is a certain type of
12:05:34 25 nihilism that emerges from the post-modernist.

1 Q. You are adopting the words to
2 refer to the acceptance of Indigenous oral history
3 and tradition as a different way of understanding
4 or recording of past.

5 A. Where do I say that?

6 Q. This is page 28 of your report.

7 A. Let's go to that, please. So
8 which sentence are you referring to?

9 Q. So in the first paragraph, about
10 halfway down, you start off by saying:

11 "Yet many scholars, including
12 some in my own profession who have
13 been persuaded by critical theory or
14 'interpretive' approaches, dismiss
15 the notion that there is a real,
16 knowable world, reject the
17 fundamental principles of rational
18 inquiry, and see all reconstructions
19 of the past as culturally mediated
20 and socially constructed."

21 And then you go on, and where you use
22 the term "fashionable nonsense" is in the next
23 paragraph:

24 "This stance and approach
25 rejects much of the antirationalism,

12:06:57 1 factual, cognitive or epistemic

12:07:02 2 relativism, and other fashionable

12:07:06 3 nonsense."

12:07:06 4 A. Yes, and the term "fashionable

12:07:09 5 nonsense" has a footnote to a book by that name by

12:07:15 6 Alan Sokal.

12:07:18 7 Q. But you adopt that term and use

12:07:21 8 that term in your report?

12:07:23 9 A. I think that there is a great deal

12:07:26 10 of fashionable nonsense out there, absolutely, and

12:07:39 11 I think Alan Sokal demonstrated that quite

12:07:39 12 effectively when he sent an article to a major

12:07:45 13 peer-reviewed journal in which he elaborately

12:07:51 14 argued that gravity is a social construction, and

12:07:58 15 he managed to pass peer review and have it

12:08:01 16 published only because he used the fashionable

12:08:04 17 language of post-modernism. And then he later

12:08:11 18 revealed that this was a hoax, and it became quite

12:08:14 19 a sensation at the time.

12:08:16 20 Q. So the use of these terms

12:08:19 21 "fashionable nonsense", "advocacy anthropology",

12:08:23 22 you juxtapose that against the view of yourself and

12:08:26 23 your work, arguing that you are not an advocate;

12:08:28 24 correct?

12:08:29 25 A. What I have done here is I have

12:08:31 1 laid out my approach -- or I should say my stance
12:08:38 2 within a legitimate academic dispute between those
12:08:46 3 who side with the more empiricist and positivist
12:08:52 4 view of the world and those who stand on the side
12:08:54 5 of a more idealist critical theory type of view of
12:09:00 6 the world or interpretive view of the world which
12:09:03 7 has its roots in French philosophy of
12:09:09 8 post-modernism.

12:09:10 9 Q. So legitimate academic dispute
12:09:15 10 between the two sides, you count yourself amongst
12:09:19 11 the empiricists and positive view, I assume?

12:09:22 12 A. Well, I lean more in that
12:09:24 13 direction. I have had the very good fortune of
12:09:31 14 having been educated in both the sciences and the
12:09:33 15 humanities, and so I have always tried to effect a
12:09:35 16 balance between them. I understand the important
12:09:38 17 lessons of post-modernism; that is, we need to be
12:09:42 18 reflective of our own personal biases and our own
12:09:48 19 culture. I know I'm a product of my -- the
12:09:50 20 privileges I have had in my upbringing and, you
12:09:53 21 know, the fact that I am a male and that I am white
12:09:57 22 and that, you know, I am a certain generation. I
12:10:01 23 know that all these things influence who I am and
12:10:06 24 what I do. That is an important lesson of
12:10:09 25 post-modernism.

1 At the same time, I reject the excesses
2 of that, the extremes that lie at the one end of
3 it, and I tend to position myself in a more
4 realistic other end of the spectrum. I am not at
5 the -- I'm not a strict empiricist, but I certainly
6 am inclined more in that direction in part because
7 of the influence of my mentor, Bruce Trigger.

8 Q. The other side that you have
9 described as idealist critical theory, interpretive
10 view, post-modernism that you don't think is
11 helpful, you have dismissed as fashionable
12 nonsense.

13 A. Well, I think in its more extreme
14 and even in some cases in its more moderate
15 expression, it is, while on the one hand a useful
16 academic and legitimate exercise, it has practical
17 implications, which, in my view, disqualify it as a
18 means to accessing a real past as independent of
19 human belief.

20 Q. I am going to turn to your
21 footnote 29, which is on pages 26 to 27. It starts
22 on 26 and goes on to 27. Maybe we can zoom in a
23 bit because that is very small writing.

24 So this is where we just were with the
25 advocacy anthropology, and you say that you do not

1 count yourself amongst them. And footnote 29 is
2 not a citation to any authority, but I would like
3 to read from a part of it starting with court cases
4 about halfway down.

5 A. Well, just before you move on to
6 that, just to correct you, this is a -- this is --
7 the citation for this is in the previous footnote.
8 That is where the debate about the role of advocacy
9 is found.

10 So what I am doing here is simply
11 elaborating on some of the aspects of that debate,
12 which I cite at footnote 28.

13 Q. So if we go to -- there is the
14 part starting with "Court cases [...]", and I
15 wonder if it starts on the next page. You talk
16 about here what your mentors taught you, and then
17 you go into this statement starting with:

18 "Court cases in which I have
19 been called to testify have obliged
20 me to lay aside the strong
21 sympathies that I have for the
22 political aspirations of Indigenous
23 peoples, so that I may properly
24 rebut expert evidence adduced in
25 support of claims such as the

12:13:20 1 alleged right to discriminate
12:13:21 2 against women, the alleged right to
12:13:22 3 resources that were not of
12:13:24 4 traditional interest, the alleged
12:13:26 5 right to territories not associated
12:13:28 6 with the claimants until relatively
12:13:31 7 recent times, alleged treaty
12:13:35 8 promises that are no more than
12:13:38 9 neo-traditions, or alleged rights by
12:13:40 10 self-described 'Métis' who have no
12:13:44 11 connection to historic Métis
12:13:46 12 communities. The fact is that not
12:13:48 13 all claims and causes are supported
12:13:50 14 by the available evidence. Some
12:13:52 15 merely replicate fictions, while
12:13:55 16 others are wholly justified."

12:13:56 17 So the three cases that we referred to
12:14:01 18 earlier, the three cases that you cite in your
12:14:03 19 report that support for your approach to the
12:14:09 20 inquiry about oral traditions, your opinion was
12:14:12 21 that the Indigenous groups claim and cause in those
12:14:15 22 three cases was not supported by the available
12:14:16 23 evidence; correct?

12:14:17 24 A. Whether a particular claim or
12:14:21 25 cause is supported by the available evidence is, of

12:14:26 1 course, for the Courts to decide. It is not really
12:14:31 2 for me to decide.

12:14:34 3 Q. Well, I wasn't asking about you
12:14:37 4 deciding, about what your opinion was in those
12:14:40 5 three cases, that it wasn't supported by the
12:14:42 6 available evidence.

12:14:43 7 A. Well, there is a difference
12:14:48 8 between what the claims are that are made by
12:14:52 9 counsel, you know, as a matter of law and claims
12:15:00 10 that are made by certain expert witnesses or lay
12:15:02 11 witnesses which I respond to.

12:15:05 12 And I am referring to those types of
12:15:07 13 claims, the latter.

12:15:08 14 Q. What you said in this sentence is
12:15:24 15 that you may properly rebut expert evidence adduced
12:15:27 16 in support of claims.

12:15:28 17 A. Yes.

12:15:29 18 Q. And then you go on at the last
12:15:31 19 sentence to say the fact is that not all claims and
12:15:34 20 causes are supported by the available evidence. So
12:15:36 21 my question is about the three cases that we
12:15:38 22 referred to earlier, is your opinion that the
12:15:41 23 evidence did not support the claim and the cause?

12:15:45 24 A. I am not referring to those three
12:16:00 25 cases in that sentence. For example, the Métis

12:16:04 1 case, I am actually referring to the Vautour case,
12:16:09 2 which is a gentleman who decided to build a shack
12:16:14 3 in a provincial park and self-described himself as
12:16:19 4 Métis. And my evidence in that case is that he had
12:16:24 5 no connection to historic Métis communities.

12:16:29 6 Q. So, sorry, sir, my question was
12:16:34 7 about the three earlier cases that you referred to.

12:16:35 8 A. Yes.

12:16:36 9 Q. Surely you have -- you can say yes
12:16:39 10 or no whether your opinion in that case was whether
12:16:43 11 that Indigenous group's claim and cause was
12:16:45 12 supported by the available evidence.

12:16:47 13 A. Well, in the case of -- well, when
12:16:54 14 we look at the first one, you are referring to the
12:16:58 15 cases -- the Benoit case?

12:17:03 16 Q. Yes, Benoit, Queen v. Drew, and
12:17:11 17 the Buffalo case.

12:17:17 18 A. All right.

12:17:18 19 Q. Chief Victor Buffalo.

12:17:23 20 A. Yes. Well, Chief Victor Buffalo
12:17:25 21 is a very complicated case, and I wouldn't pretend
12:17:28 22 to know everything that was being claimed, but my
12:17:30 23 specific role in Drew, to name one of your cases,
12:17:38 24 was the claim that was being made was that the
12:17:45 25 Mi'kmaq of Conne River, Newfoundland, had been

12:17:51 1 there since prior to European contact, and my
12:17:56 2 research, based on a combination of archaeological
12:18:01 3 evidence, written documents and oral histories and
12:18:03 4 traditions, did not support that claim, and the
12:18:10 5 judge agreed with me.

12:18:13 6 So is that the answer you are seeking?

12:18:16 7 Q. Yes. Thank you.

12:18:17 8 A. So for the case of Benoit, as I
12:18:19 9 recall, I don't recall the specific circumstances
12:18:28 10 of that case, but I believe it was also a Métis
12:18:33 11 case where an individual self-ascribed as Métis --
12:18:42 12 sorry, Benoit, is that the Alberta case?

12:18:47 13 Q. I would have to look up the
12:18:49 14 details.

12:18:49 15 A. Yes, I don't -- Benoit may have
12:18:54 16 been a tax case. I would have to look up my CV and
12:18:57 17 refresh my memory as to which case that was.

12:19:04 18 Q. Well, you said that Chief Victor
12:19:08 19 Buffalo is complicated as well. Well, what about
12:19:10 20 Mitchell, the one that I brought your attention to?
12:19:13 21 In Mitchell, your opinion was that the Indigenous
12:19:15 22 group's claim and the cause was not supported by
12:19:17 23 the available evidence; correct?

12:19:18 24 A. Again, I can't comment on the
12:19:22 25 claim in general. I can comment on what their

12:19:24 1 expert witnesses testified to and what I responded
12:19:29 2 to. The testimony was that the claim -- the
12:19:38 3 testimony was in the nature of a claim that the
12:19:41 4 Mohawk of Akwesasne had been in the area since time
12:19:47 5 immemorial or before European contact and that the
12:19:51 6 Mohawk in general had a territory that extended
12:19:54 7 into what is now Canada prior to contact.

12:19:57 8 My evidence, based primarily on
12:20:02 9 archaeological work, was that the Mohawk homelands
12:20:07 10 were in what is now New York State and did not
12:20:10 11 extend into what is now Canada.

12:20:16 12 Q. Okay.

12:20:16 13 A. So in that sense, it did not
12:20:19 14 corroborate the claim. This was a case about, you
12:20:26 15 know, about crossing the international border, so
12:20:30 16 this is why it was important to establish where the
12:20:34 17 First Nation was at the time of first contact.

12:20:37 18 Q. In the Tsilhqot'in case, your
12:20:40 19 opinion was that the Indigenous group's claim and
12:20:43 20 cause was not supported by their evidence either;
12:20:45 21 correct?

12:20:45 22 A. I don't recall that at all. I
12:20:48 23 think I gave testimony in general as to the
12:20:51 24 evidence of -- as to how to handle oral tradition
12:20:56 25 evidence. I don't recall having very specific

12:21:02 1 opinions about the specific case. It was more
12:21:09 2 general.

12:21:10 3 Q. You gave evidence in Tsilhqot'in
12:21:20 4 that, according to the trial judge, that you
12:21:24 5 commented on the assessment of oral histories and
12:21:29 6 oral traditions as evidence and they ought not to
12:21:31 7 be given any independent weight; is that fair?

12:21:34 8 A. As I said, I didn't -- I don't
12:21:38 9 think that is anywhere on record that I actually
12:21:40 10 make such a generalization. The generalization is
12:21:45 11 one that I do not support.

12:21:49 12 Q. If we were to go through the more
12:21:53 13 than 30 cases where you have provided expert
12:21:55 14 testimony, would I be correct in saying, sir, that
12:22:03 15 there is no instance in which you concluded that
12:22:05 16 oral history evidence is independently credible?

12:22:08 17 A. Well, that is simply not true.
12:22:19 18 There are numerous cases in which I have had no
12:22:23 19 reason whatsoever to question the historical
12:22:30 20 accuracy of certain oral histories. In fact, the
12:22:40 21 vast majority of oral histories in some cases I
12:22:47 22 find no need to question them, and there is no need
12:22:50 23 for skepticism.

12:22:51 24 After all, you know, if an Elder is on
12:22:55 25 a witness stand and says that his grandfather told

12:23:00 1 him that in the old days they used to go hunt in a
12:23:04 2 particular area for a particular resource, I have
12:23:12 3 no grounds to question that unless there is a --
12:23:20 4 you know, given the caveat that, you know, these
12:23:24 5 memories are susceptible to memory loss as in every
12:23:28 6 human.

12:23:29 7 But I have had many occasions where I
12:23:34 8 have accepted oral history evidence without making
12:23:41 9 any comments about the unreliability of it. The
12:23:47 10 Buffalo Narrows example is one where we actually --
12:23:53 11 I actually interviewed these Elders and sat down
12:23:56 12 with them with a video recorder and notes, and I
12:24:02 13 don't think there was a single one of those Elders
12:24:05 14 where I had reason to disregard the evidence as a
12:24:17 15 consequence of some view that I might have of the
12:24:21 16 unreliability of that species of evidence.

12:24:23 17 Q. So, sir, how does this square with
12:24:39 18 the earlier statement that we have gone to now a
12:24:41 19 couple of times about internal checks not being
12:24:45 20 ever good enough to guarantee you are satisfied or
12:24:52 21 for historical reliability?

12:24:54 22 A. I think what I meant should be
12:24:58 23 clear. The cautionary tale encourages us to
12:25:07 24 dispense with an a priori opinion that any time you
12:25:14 25 find oral -- or checks and -- internal checks and

12:25:19 1 balances, it automatically guarantees that these
12:25:24 2 oral traditions are historically reliable. That is
12:25:27 3 what the cautionary tale does.

12:25:29 4 It should never generate a
12:25:31 5 generalization that in all cases and in all places
12:25:35 6 oral traditions are unreliable, irrespective of
12:25:41 7 whether there is evidence of internal checks or
12:25:46 8 not.

12:25:47 9 The fact is is that even without the
12:25:51 10 cautionary tale, it stands to reason that
12:25:56 11 collectivities, just as much as individuals, can
12:26:01 12 maintain falsehoods over the course of generations.
12:26:05 13 So that in and of itself should make us cautious,
12:26:07 14 but it should not result in us abandoning that
12:26:10 15 species of evidence because, as I keep saying, it
12:26:15 16 has to be done on a case-by-case basis.

12:26:17 17 Q. But then let's come back to the
12:26:19 18 question that I just recently asked you about your
12:26:22 19 testimony in courts with respect to oral history
12:26:25 20 evidence. You have not concluded that they should
12:26:27 21 be treated as independently credible, given
12:26:31 22 independent weight outside of corroboration?

12:26:33 23 A. In some cases we have no choice
12:26:37 24 because there is no independent corroboration, so
12:26:38 25 then you have to tell yourself, well, what do we do

12:26:42 1 with this? We know that we can't automatically
12:26:45 2 accept it on its face because we have cases in
12:26:49 3 which these turn out to be demonstrably false, when
12:26:53 4 we do have external checks.

12:26:55 5 So what do we do with it? Well, then
12:27:00 6 it becomes really a matter of a case-by-case basis.
12:27:04 7 It depends on the context of the telling, who is
12:27:08 8 telling it, where it is being told, and you make a
12:27:13 9 judgment. It is not easy.

12:27:16 10 But what you don't do is you don't
12:27:19 11 generalize. You don't say, Look, all oral
12:27:22 12 traditions necessarily contain facts about history;
12:27:28 13 therefore, we should accept everything that is
12:27:30 14 said. You don't do that. Nor do we say, all oral
12:27:37 15 traditions are useless because that would just
12:27:40 16 simply be an a priori bias that keeps us from
12:27:46 17 acknowledging the possibility that there are oral
12:27:49 18 histories and traditions that are demonstrably
12:27:52 19 containers of facts.

12:27:54 20 Q. So this follows to something that
12:27:56 21 I want to ask you about that you have already
12:27:58 22 touched on with my friend about confirmation bias,
12:28:01 23 and you have defined it, and you have admitted that
12:28:04 24 you have it with respect to things like CNN and Fox
12:28:07 25 News, that everybody is susceptible to confirmation

12:28:11 1 bias. And you have just said right now, which is
12:28:18 2 included in your July 2019 report, you note that:

12:28:22 3 "Anyone who deals with oral
12:28:23 4 traditions must be open to the
12:28:25 5 possibility that they are complete
12:28:26 6 fiction rather than containers of
12:28:28 7 historical facts."

12:28:30 8 That is at page 348 of your July 2019
12:28:33 9 report.

12:28:34 10 A. Yes, and that is absolutely the
12:28:37 11 case. You have to be open to that possibility. If
12:28:40 12 you are not, then you are just engaging in a
12:28:43 13 confirmation bias.

12:28:45 14 Q. So you would agree with me that it
12:28:46 15 follows from what you have said that anyone who
12:28:48 16 deals with oral traditions must also be open to the
12:28:52 17 possibility that these oral traditions are
12:28:54 18 containers of historical facts; is that right?

12:28:57 19 A. Absolutely.

12:28:58 20 Q. So you have said that there is --
12:29:04 21 of course, you have the vulnerability to
12:29:06 22 confirmation bias as well as anybody else, and one
12:29:09 23 of the ways that you have dealt with it is that you
12:29:13 24 read widely various sources from all areas of this
12:29:19 25 academic debate; is that correct?

12:29:21 1 A. Well, that is one important
12:29:23 2 strategy, but you should also keep in mind that I
12:29:28 3 was trained as a graduate student to avoid
12:29:33 4 confirmation bias because it was -- I was given to
12:29:37 5 understand that because it is the mother of all
12:29:39 6 cognitive biases, it can seriously affect objective
12:29:45 7 findings and research.

12:29:47 8 Q. Right.

12:29:47 9 A. And so it is a matter of being
12:29:52 10 cognizant of it, trying to avoid it, knowing that
12:29:57 11 complete objectivity is impossible in any kind of
12:30:01 12 endeavour, but that that is no excuse for
12:30:06 13 constantly being vigilant and trying to avoid a
12:30:10 14 partisan or biased or non-objective approach.

12:30:14 15 Q. And the other tactic and the other
12:30:17 16 way that you have said you deal with it is you read
12:30:20 17 widely; you flip back and forth between different
12:30:22 18 sides of the debate, and we have talked about the
12:30:24 19 different sides of the debate. You have where you
12:30:27 20 are aligned and then the other side is what you
12:30:29 21 have referred to as fashionable nonsense in this
12:30:31 22 report.

12:30:31 23 A. Well, again, I don't refer to all
12:30:34 24 of that other side as fashionable nonsense. I
12:30:40 25 include some of the extreme ends as fashionable

1 nonsense, and when I say "fashionable", it is I
2 have noticed in recent days or recent years that
3 that fashion has begun to decline, thankfully.

4 But when I was a graduate student, the
5 courses that I took other than those with Bruce
6 Trigger allowed me the luxury of being a
7 post-modernist. That is what I was. But once I
8 hit the real world outside of academia where real
9 decisions have to be made about the lives of real
10 people, you don't have that luxury anymore. And
11 now you have to find something that balances your
12 post-modernist inclinations with your more
13 empiricist inclination and your positivism, and I
14 have tried to do that throughout the rest of my
15 career.

16 Q. You dismiss that side, setting
17 aside the word "fashionable", when you say
18 "nonsense", that is dismissive.

19 A. Yes, I think -- and I think Alan
20 Sokal was quite right to be dismissive, and again,
21 we are talking about that extreme end. I don't
22 agree with even some of the less extreme versions
23 of interpretive and critical anthropology, nor do
24 many of my colleagues.

25 I mean, let's put it this way.

1 Anthropology has always had this tension between
2 its purely scientific side which includes mainly
3 the archaeologists and the physical
4 anthropologists, and the other side which includes
5 mainly the cultural anthropologists and social
6 anthropologists. And that tension is played out in
7 departments across North America, and in some cases
8 has led to the dissolution of departments and the
9 creation of new departments, like at the University
10 of Calgary where the archaeologists split from the
11 anthropologists and created their own department.

12 So my point is that this is not just a
13 debate within me. It is a debate in the wider
14 world of anthropology, in my field, and I take a
15 stand and a side in that debate, and you could call
16 that a bias, but I think it is a legitimate bias
17 because you can't have it both ways. You can't be
18 a post-modernist and empiricist at the same time,
19 right.

20 Q. Okay. So, sir, you have said you
21 are similarly vulnerable to confirmation bias, but
22 you have training; you have means to try to avoid
23 it when you are doing your work. And you have
24 noted to my friend that you believe that the report
25 that you submitted to this Court here is a good

12:33:53 1 example of overcoming the confirmation bias, but in
12:34:04 2 this report you have noted that internal checks --
12:34:04 3 you have said that your starting point is
12:34:04 4 admittedly that internal checks on Indigenous oral
12:34:06 5 history and tradition are never good enough, and
12:34:11 6 you have characterized the other side of this
12:34:13 7 debate as fashionable nonsense.

12:34:14 8 So, sir --

12:34:15 9 A. Well, first of all, I -- the first
12:34:20 10 part of your characterization was incorrect. The
12:34:25 11 second one I think I did use the term "fashionable
12:34:29 12 nonsense" because I borrowed it from Alan Sokal,
12:34:34 13 and there I was referring -- you are taking it out
12:34:37 14 of context because I was referring to only a
12:34:40 15 portion, the most extreme portion of the
12:34:42 16 post-modernist claims.

12:34:49 17 So I don't have any problem with one of
12:34:55 18 the underlying messages of post-modernism, and that
12:34:58 19 is that we are all products of our gender and our
12:35:03 20 politics and our, you know, income and all of that.
12:35:12 21 I don't have any problem with that.

12:35:13 22 Q. Uhm-hmm.

12:35:14 23 A. I know enough about the history of
12:35:16 24 my own profession to know that they had an impact.
12:35:24 25 Anthropologists in the 19th century were just as

12:35:26 1 racist as the next person. So I understand all of
12:35:31 2 that.

12:35:33 3 But at the same time, my role here is
12:35:36 4 to assist the trier of fact to get at the truth
12:35:40 5 about what happened in the past, and the best means
12:35:42 6 to do that is, in my respectful submission, the
12:35:47 7 type of rigorous approach that I advocate for, and
12:35:54 8 it is not an approach that, for example, deems all
12:35:58 9 stories about the past equally true or equally
12:36:01 10 false. It privileges those stories about the past
12:36:05 11 which are in accord with independent evidence or
12:36:09 12 with some kind of -- are in accord with as much
12:36:15 13 evidence as we have.

12:36:18 14 So it is not --

12:36:19 15 Q. So the ones that don't accord with
12:36:20 16 the other evidence, you would say don't give them
12:36:23 17 any kind of independent weight; correct? That is
12:36:30 18 what you are saying?

12:36:31 19 A. I am not sure which other ones you
12:36:33 20 are talking about.

12:36:34 21 Q. You say that you privilege stories
12:36:35 22 that are in accord with other evidence. For those
12:36:39 23 that aren't, you say don't give them independent
12:36:46 24 weight. They are not -- they don't stand on their
12:36:50 25 own.

12:36:51 1 A. Well, as I said, you have -- if
12:36:53 2 you come to a point where there are stories about
12:36:56 3 the past which are impossible to corroborate by any
12:37:02 4 external means, then you have to make decisions on
12:37:10 5 a case-by-case basis. But as a general rule, it is
12:37:13 6 always better to have as much corroboration as you
12:37:19 7 can muster, and I think that is appreciated by --
12:37:26 8 not only by me, but by all parties in a dispute.
12:37:30 9 That is why, you know, there is a geologist who has
12:37:35 10 testified in these proceedings. That is not --
12:37:39 11 those aren't stories. That is a completely
12:37:42 12 independent form of evidence, and there is a value
12:37:48 13 to that.

12:37:49 14 Q. So if I can take you to page 245
12:37:54 15 in your report, you refer to the Mishomis Book, and
12:38:07 16 you are aware that this is an important book to the
12:38:09 17 people of the Medewin faith; correct?

12:38:12 18 A. I am aware of that, yes.

12:38:13 19 Q. Okay. And this book contains
12:38:15 20 certain stories, oral traditions?

12:38:17 21 A. It contains stories that were
12:38:19 22 written by the author who relied on traditions --
12:38:26 23 in part on traditions that were passed down to him
12:38:28 24 from his grandfather I believe.

12:38:31 25 Q. And on the same page of your

12:38:34 1 report, you refer to this book as a "children's
12:38:39 2 book"?

12:38:40 3 A. Yes.

12:38:40 4 Q. And I assume you are aware, sir,
12:38:43 5 that labelling something as a children's book has
12:38:46 6 certain negative connotations?

12:38:51 7 A. Having had three children, I would
12:38:52 8 not say so, and I should point out that this book
12:38:57 9 has been identified as a children's book in the
12:39:00 10 book itself. It is not -- these are not -- I
12:39:04 11 didn't use these words -- they don't come from me.
12:39:09 12 These are words that are actually used as a
12:39:12 13 description of the book by the book itself on page
12:39:15 14 114.

12:39:18 15 Q. I believe your view is that the
12:39:21 16 stories contained in the Mishomis Book, as you have
12:39:24 17 just described, that they are passed down but they
12:39:26 18 don't contain information about actual events?

12:39:31 19 A. I'm sorry, can you repeat that?

12:39:34 20 Q. You describe them as that they
12:39:35 21 were passed down to the author who wrote them, and
12:39:37 22 I take it that your view is that these stories
12:39:40 23 don't contain information about actual historical
12:39:42 24 events?

12:39:43 25 A. I think for the most part they do

12:39:54 1 not describe actual historical events that occurred
12:40:03 2 in the real world independently of belief. I am
12:40:09 3 aware that the author, Edward Benton-Banai, makes a
12:40:19 4 claim of historicity of these stories, he claims
12:40:23 5 that they are.

12:40:29 6 I am skeptical and point out that these
12:40:30 7 stories actually originate in a much older
12:40:35 8 tradition that goes back to the mid 19th century,
12:40:41 9 and there is a record of these stories in the mid
12:40:44 10 19th century, a record created by an individual of
12:40:50 11 Anishinaabe heritage. And these stories differ in
12:40:57 12 many respects, and that is often an indication that
12:41:01 13 we need to be very cautious about what these
12:41:06 14 stories are and what their purpose was.

12:41:12 15 In general, I would say that there is
12:41:20 16 no evidence to suggest that the Anishinaabe
12:41:28 17 originated in Atlantic Canada and moved west, such
12:41:36 18 as has been described in this book. So in that
12:41:41 19 sense, you know, I mean, I have great respect for
12:41:48 20 the author's beliefs and for the traditions that
12:41:51 21 were passed down to him, but at the same time I
12:41:58 22 spent a considerable amount of one of the chapters
12:42:05 23 in my report examining this in considerable detail,
12:42:08 24 and I have come to the conclusion that, while I
12:42:15 25 respect the belief, it is unlikely to be in accord

12:42:19 1 with what actually happened in the past.

12:42:22 2 Q. So then your conclusion, sir, is
12:42:34 3 that the stories themselves, just taken by
12:42:40 4 themselves, can't contain any relevant information
12:42:45 5 about actual events? I am talking about
12:42:51 6 independent from other historical evidence.

12:42:54 7 A. I am not saying they can't. I am
12:42:56 8 saying, in this instance, they are unlikely to
12:43:06 9 contain evidence of actual past events. There may
12:43:11 10 be exceptions to that. I would have to re-read the
12:43:14 11 book again. But the general story is the story of
12:43:22 12 migration of a people from Atlantic Canada to
12:43:29 13 Madeline Island and Lake Superior.

12:43:30 14 Q. Well, there is several stories. I
12:43:31 15 don't need to get into the contents of them right
12:43:34 16 now. It is just that question that I had for you.
12:43:36 17 But let me move on to something else.

12:43:40 18 At page 349 of your report, you talk
12:43:44 19 about -- you use the phrase "pseudoscience", and
12:43:48 20 you talk about the quotes -- in quotes, "wilder
12:43:51 21 side of geomythology", and you call it
12:43:56 22 "pseudoscience or pseudohistory".

12:43:58 23 A. Yes.

12:43:58 24 Q. So you explain what you mean by
12:44:00 25 this at footnote 850 on the same page?

12:44:04 1 A. Yes.

12:44:04 2 Q. This wilder side of geomythology
12:44:08 3 is using it as a means to reconstruct the past,
12:44:11 4 primarily for political or ideological purposes; is
12:44:15 5 that about right?

12:44:21 6 A. Well, I refer to Michael Shermer's
12:44:24 7 definition of something that is pseudo-historical
12:44:28 8 as being without supporting evidence and
12:44:30 9 plausibility and presented primarily for political
12:44:33 10 or ideological purposes.

12:44:35 11 I would focus primarily on the part
12:44:46 12 "without supporting evidence and plausibility". It
12:44:46 13 may or may not be presented for other purposes,
12:44:50 14 political or ideological or otherwise.

12:44:52 15 Q. Uhm-hmm.

12:44:53 16 A. But the main thing is that this --
12:44:56 17 I think pseudo-historical, in the same sense that
12:45:02 18 you use pseudo-science, I mean, it is similar to
12:45:06 19 sophistry; that is, it is something that is couched
12:45:10 20 in scientific or historical terms, but when you
12:45:13 21 look at it very closely, it is actually a
12:45:17 22 construction that is not supported by -- or an
12:45:23 23 opinion that is not supported by the evidence.

12:45:27 24 Q. So at 851, footnote 851, you cite
12:45:33 25 a 24-year-old publication by Vine Deloria Junior,

1 and you say that Mr. Deloria is an individual of
2 Native American descent, a popular hero, as you
3 say, amongst Indigenous intellectuals -- amongst
4 certain Indigenous intellectuals?

5 A. Yes, he is very much so.

6 Q. He is a proponent of how
7 geomythology can be used to verify traditional
8 knowledge, and according to your words, a "gadfly"?

9 A. Yes, he has often been described
10 as a gadfly. He has been wildly influential. You
11 see him being quoted time and time again in the
12 literature. He is regarded as a hero among many
13 Indigenous people. He railed against anthropology
14 in his first couple of books. In some cases, it
15 was justified, but in many other cases it was
16 entirely off the mark.

17 But he has written extensively. I
18 don't know how many books that he published before
19 he died. But he eventually revealed that he was a
20 creationist and actually wrote a book on the
21 subject and --

22 Q. So you describe him as an
23 influential gadfly who wrote nearly a quarter
24 century ago, and just for my benefit, I would like
25 to pull up the definition of "gadfly", which is

12:47:23 1 SC1027. So it is:

12:47:36 2 "A fly that bites livestock,
12:47:38 3 especially a horse fly, warble fly,
12:47:40 4 or botfly; or an annoying and
12:47:43 5 provocative person."

12:47:45 6 A. Yeah, I think he was -- to many
12:47:48 7 anthropologists, he was quite annoying and
12:47:50 8 provocative. I would agree that is how he was
12:47:57 9 widely regarded in my profession, although not by
12:48:00 10 everyone. He did have some supporters, but --

12:48:03 11 Q. And you share that view of him?

12:48:05 12 A. Well, I think I would say he was
12:48:10 13 definitely provocative in both the positive and
12:48:13 14 negative sense. He was provocative in that he
12:48:19 15 started a line of questioning that all scientific
12:48:22 16 fields should have applied for themselves, but at
12:48:28 17 the same time, he just completely overdid it to the
12:48:35 18 point of annoyance and --

12:48:38 19 Q. I can't imagine, sir, that you
12:48:40 20 mean gadfly in a positive sense, though?

12:48:44 21 A. No, I would -- I mean, I clearly
12:48:51 22 don't think highly of him, so in that sense, yes,
12:48:54 23 but in terms of, you know, the definition of
12:48:56 24 provocative, I think that can be both positive and
12:49:01 25 negative, and I would say that he was positive as a

12:49:04 1 provocateur.

12:49:06 2 Q. So this is the only example of the
12:49:08 3 wilder side of geomythology that you cite in your
12:49:13 4 conclusions in this report?

12:49:14 5 A. Well, let's be clear about what I
12:49:16 6 mean by that "wilder side". I mean, he -- well, if
12:49:23 7 we go back to the page in which I cite him, he:

12:49:34 8 "[...] recognized 'how useful'
12:49:37 9 geomythology is 'to American Indian
12:49:40 10 efforts to get traditional knowledge
12:49:41 11 verified.' Indeed, 'litigation has
12:49:44 12 already been conducted in which
12:49:46 13 geomythological evidence would have
12:49:48 14 been critically important' [...]"
12:49:49 15 So that is what he said.

12:49:55 16 Now, if you continue, what I say about
12:50:01 17 him:

12:50:01 18 "The fact that he was a
12:50:01 19 creationist and" - and I continue on
12:50:04 20 the next page - "believed in the
12:50:08 21 co-existence of humans and dinosaurs
12:50:10 22 did not help his credibility."

12:50:15 23 Q. Yeah, and you go on to say that:

12:50:17 24 "The deep-time oral traditions
12:50:19 25 claim considered here may not be as

12:50:21 1 extreme, but it belongs to the same
12:50:23 2 genre."

12:50:23 3 So you are lumping in the Plaintiffs
12:50:26 4 with this single example; is that right?

12:50:28 5 A. No, I am actually in a way
12:50:32 6 contrasting it in the sense that I am not saying
12:50:34 7 that it is as extreme, but it is similar in the --

12:50:38 8 Q. It is the same genre?

12:50:40 9 A. Well, it is in the same genre in
12:50:42 10 the sense that everything that I wrote prior to
12:50:47 11 this, in my view, should lead a reasonable person
12:50:54 12 to understand that there are alternative
12:51:00 13 explanations for the dataset which are much more
12:51:04 14 probable than the one that is being postulated in
12:51:10 15 the deep-time oral traditions claim, and in that
12:51:15 16 sense it is similar to but not as extreme as
12:51:25 17 basically interpreting Sioux Elder oral traditions
12:51:33 18 as being evidence of dinosaurs and humans
12:51:36 19 co-existing.

12:51:37 20 Q. Because the Plaintiffs are calling
12:51:44 21 evidence from a geologist and from oral traditions
12:51:47 22 in this litigation?

12:51:48 23 A. No, I don't have any problem with
12:51:50 24 that either. What I have a problem with is in the
12:51:54 25 effort to bring that evidence together, using a

12:52:09 1 confirmation bias that points in only one direction
12:52:15 2 and one explanation, when there are so many
12:52:19 3 alternatives that are more plausible.

12:52:21 4 Q. So in your report, sir, you deal a
12:52:30 5 bit with the Plaintiffs' geological evidence, but
12:52:32 6 you are not trained as a geologist; correct?

12:52:34 7 A. I am not -- well, that is somewhat
12:52:39 8 of a tricky question because I actually did take
12:52:42 9 geology as an undergraduate and as a graduate
12:52:45 10 student, but I do not have any degrees in geology.
12:52:50 11 I, like most other professionals, rely on the work
12:52:54 12 of other professionals in other fields, and
12:53:02 13 Dr. McCarthy relies on archaeology, just as I rely
12:53:05 14 on geology, and that is completely within the pale
12:53:11 15 of academic work. We do cite, and we rely on
12:53:14 16 literature outside of our fields because there is a
12:53:17 17 certain interdisciplinarity to some of the subject
12:53:20 18 matter, but to answer your question in short, I do
12:53:24 19 not consider myself a geologist.

12:53:25 20 Q. I just want to make this clear. I
12:53:29 21 just want to be sure that you acknowledge that you
12:53:31 22 are not offering evidence -- though you do deal
12:53:33 23 with the Plaintiff geological evidence, you
12:53:36 24 acknowledge that you are not offering evidence
12:53:37 25 about the structure of the earth, its origin and

12:53:40 1 development?

12:53:41 2 A. No, I am not offering evidence on
12:53:44 3 that at all. I do point to some publications of a
12:53:51 4 geological nature, but I don't offer an opinion in
12:53:56 5 geology.

12:53:56 6 Q. Okay. So instead, you are
12:54:06 7 offering an opinion on approaching oral traditions
12:54:10 8 with caution, as mentioned earlier, in terms of how
12:54:13 9 they might or might not connect with that geology;
12:54:16 10 is that fair to say?

12:54:17 11 A. I am looking at the methods by
12:54:28 12 which one connects oral histories or in this case
12:54:30 13 oral traditions. By definition, these are all oral
12:54:33 14 traditions. I am looking at the evidence that
12:54:35 15 connects those with other kinds of evidence, in
12:54:41 16 this case, geology. I mean, it could just as
12:54:44 17 easily have been archaeology. It doesn't really
12:54:48 18 matter what the evidence is. It is the methods
12:54:49 19 that are used to connect those two lines of
12:54:53 20 evidence.

12:54:54 21 Q. Okay. So at pages 346 and 347 of
12:54:58 22 your report, and you mentioned this in our
12:55:08 23 discussion today, is that you note -- you say to
12:55:11 24 fairly assess a link between geology and myth, we
12:55:14 25 need to explore all extant variants of a myth, such

12:55:20 1 as the stories that you have collected in this
12:55:21 2 report.

12:55:22 3 And then if I can summarize, the task
12:55:23 4 is to look for a probable explanation for the link,
12:55:26 5 if any --

12:55:27 6 A. I'm sorry, I don't follow. Where
12:55:29 7 is it on the screen?

12:55:29 8 Q. Here, I am summarizing just the
12:55:43 9 content of what is probably over the next couple of
12:55:46 10 pages, if you want to take a quick look, but see:

12:55:49 11 "It is not at all difficult for
12:55:51 12 someone (expert or otherwise) to see
12:55:53 13 connections between geology and myth
12:55:54 14 [...]"

12:55:55 15 And so on.

12:55:55 16 A. Yes.

12:55:56 17 Q. And then what you are saying is
12:55:57 18 that the task is to look for the probable
12:55:58 19 explanation for the link, if any, between them?

12:56:00 20 A. Yes. I mean, in all of science
12:56:10 21 and in all of historical reconstruction, it is
12:56:11 22 always easy to come up with possibilities, and it
12:56:13 23 is much more difficult to assess the relative
12:56:15 24 probabilities. That is where the real hard part
12:56:17 25 comes in.

12:56:19 1 Q. And you say here:

12:56:20 2 "It is not at all difficult for
12:56:21 3 someone (expert or otherwise) to see
12:56:23 4 connections between geology and myth
12:56:25 5 and pounce on an euhemeristic
12:56:31 6 explanation for them."

12:56:32 7 I want to flip to page 347 of the
12:56:36 8 report, and here you talk about Occam's Razor. So
12:56:47 9 you say that one can sift through possible
12:56:51 10 explanations for the most probable one by applying
12:56:57 11 this principle, Occam's Razor; correct?

12:56:57 12 A. Yes.

12:56:58 13 Q. And that principle that you
12:57:00 14 summarize in your report:

12:57:04 15 "[...] all things being equal,
12:57:05 16 the simplest explanation of a
12:57:07 17 phenomenon that requires the fewest
12:57:08 18 assumptions is the preferred
12:57:10 19 explanation until it can be
12:57:18 20 disproved."

12:57:18 21 Correct?

12:57:18 22 A. Yes.

12:57:19 23 Q. So, Dr. von Gernet, you would
12:57:20 24 agree with me that experts and non-experts alike
12:57:23 25 can recognize assumptions in an explanation?

12:57:25 1 A. Yes.

12:57:30 2 Q. And you would agree with me that
12:57:34 3 experts and non-experts alike can tell when one
12:57:38 4 explanation relies on more assumptions than the
12:57:41 5 other?

12:57:49 6 A. I am not sure about non-experts.
12:57:51 7 I mean, it depends on how astute they are, but --
12:57:59 8 because once you start getting into the reasons why
12:58:06 9 some possibilities are preferred over others, you
12:58:09 10 get into some complex matters.

12:58:11 11 Q. Would you agree with me that this
12:58:13 12 Court can do so?

12:58:15 13 A. I would hope so, and I would hope
12:58:19 14 that my report gives some assistance to that end.

12:58:33 15 MS. GUIRGUIS: Your Honour, it is about
12:58:35 16 1 o'clock. This is taking a little longer than I
12:58:39 17 had estimated. I probably have about what I think
12:58:43 18 would be about 10 minutes or 15 minutes of
12:58:45 19 questions left.

12:58:51 20 THE COURT: All right. We are going to
12:58:54 21 take the lunch break.

12:58:55 22 Counsel, before you sit down, you don't
12:58:58 23 need to give me any of the information now, but I
12:59:00 24 am assuming that you have communicated to Canada
12:59:05 25 the specific grounds of your objection. Has that

12:59:09 1 happened?

12:59:10 2 MS. GUIRGUIS: Yes, that is correct.

12:59:12 3 THE COURT: So as soon as the evidence
12:59:14 4 is completed, we can move immediately to
12:59:16 5 submissions.

12:59:17 6 MS. GUIRGUIS: I believe so, Your
12:59:18 7 Honour.

12:59:18 8 THE COURT: It won't be one of these
12:59:21 9 surprise situations.

12:59:22 10 MS. GUIRGUIS: No, I believe so, Your
12:59:23 11 Honour, it will be --

12:59:24 12 THE COURT: Mr. Beggs, are you dealing
12:59:26 13 with the submissions as well?

12:59:28 14 MR. BEGGS: Yes, I am, Your Honour.

12:59:29 15 THE COURT: And do you feel like you
12:59:30 16 have an idea of specifically what the grounds are
12:59:33 17 for objection?

12:59:35 18 MR. BEGGS: I think so. I'll check
12:59:36 19 over lunch.

12:59:37 20 THE COURT: Yes. I mean, I just would
12:59:38 21 ask that, as we take the lunch break, unless there
12:59:42 22 is some reason not to, which you can follow without
12:59:49 23 telling me, but I would like to move immediately to
12:59:52 24 the submission stage.

12:59:54 25 I will hear from you if you are taken

1 by surprise, obviously.

2 All right. We'll adjourn to 2:15.

3 -- RECESSED AT 1:00 P.M.

4 -- RESUMED AT 2:17 P.M.

5 THE COURT: Please go ahead.

6 BY MS. GUIRGUIS:

7 Q. Thank you, Your Honour.

8 So, Dr. von Gernet, I just have a few
9 more questions for you, but over the break I took a
10 look at the Mishomis Book again which we had
11 discussed, which is Exhibit 3955, and you had said
12 that the book itself at page 114, which we have
13 brought up, says that it is a children's book.

14 A. This is not page 114.

15 Q. Okay. So if we scroll up, we have
16 page 113.

17 A. Yes.

18 Q. And then the book ends.

19 A. It doesn't end there. Your copy
20 is incomplete.

21 Q. Okay. Well --

22 A. The complete copy is in my
23 supporting documents to my report.

24 Q. Okay. So there is further pages
25 after this?

14:19:36 1 A. That's correct. There is at least
14:19:38 2 one more. I assume the page that you see after 113
14:19:42 3 is the back cover.

14:19:43 4 Q. That's correct.

14:19:44 5 A. So there is two more pages. One
14:19:45 6 is an actual reverse of the one -- of the page 113,
14:19:49 7 and then the last page would be the inside of the
14:19:52 8 back cover.

14:19:52 9 Q. Okay. So that is the page that
14:19:55 10 you say it says that it refers to it as a
14:19:58 11 children's book?

14:19:58 12 A. Absolutely.

14:19:59 13 Q. Okay. We'll have to leave that
14:20:01 14 for a time when I have a more complete copy of the
14:20:04 15 exhibits.

14:20:04 16 So let me turn to your CV. I just have
14:20:14 17 a few questions about what you have listed on your
14:20:19 18 CV, starting at page 6. You have cited about 34
14:20:25 19 times that you have testified as an expert witness,
14:20:28 20 which you discussed with my friend this morning.
14:20:30 21 And from my count, there is about 21 times that you
14:20:33 22 worked for Canada or you were retained for Canada.

14:20:36 23 A. Yes.

14:20:37 24 Q. Seven times for provincial
14:20:39 25 governments?

14:20:40 1 A. Yes.

14:20:41 2 Q. And four times for U.S. state
14:20:44 3 governments?

14:20:44 4 A. Yeah, I haven't counted them, but
14:20:47 5 I am taking your word for it.

14:20:48 6 Q. And so in those cases where you
14:20:53 7 testified as an expert witness, the Indigenous
14:20:56 8 claimants were the opposing parties?

14:20:59 9 A. Well, first of all, it is not that
14:21:03 10 clear-cut at all, because as I testified earlier,
14:21:08 11 in some cases the testimony was actually as part of
14:21:12 12 a joint panel in which the experts from all the
14:21:17 13 parties were retained to write a joint report and
14:21:21 14 to testify jointly.

14:21:24 15 Q. And you mentioned that that was in
14:21:26 16 two instances?

14:21:26 17 A. Well, at least two. There was
14:21:35 18 Alderville, there is Fletcher, and then there is
14:21:39 19 the Buffalo Narrows, which didn't go to Court.

14:21:42 20 Q. Now, in all those cases your
14:21:44 21 involvement in that, though, was as an expert that
14:21:46 22 was initially retained by the government party?

14:21:52 23 A. That's correct.

14:21:52 24 Q. And then the opposing party to the
14:22:03 25 government would be the Indigenous claimants;

14:22:03 1 correct?

14:22:03 2 A. Well, not in all cases, because as
14:22:03 3 I said, it is not that clear-cut. There are cases
14:22:07 4 where the government and a First Nation were on the
14:22:14 5 same side. There are cases where -- for example,
14:22:17 6 the very first case where the intervenors, the
14:22:20 7 Native Women's Council of Canada, actually used my
14:22:26 8 report even though it was originally commissioned
14:22:31 9 by the Crown. So it is not always clear-cut.

14:22:37 10 But as I said earlier, to me who
14:22:39 11 retains me is irrelevant to the content of my
14:22:44 12 testimony or my reports.

14:22:46 13 Q. No, and that is not my question
14:22:48 14 about the content of it. My question is simply
14:22:50 15 that the Indigenous claimants were on the other
14:22:54 16 side from the person who had retained or the party
14:22:57 17 that had retained you?

14:22:58 18 A. Well, in some cases it is
14:23:00 19 questionable whether they even were Indigenous
14:23:02 20 claimants. In the case of the self-ascribed Métis,
14:23:08 21 for example, that is a question. In fact, that was
14:23:13 22 one of the questions before the Court, whether they
14:23:15 23 were in fact Indigenous under section 35 of the
14:23:22 24 Constitution.

14:23:23 25 Q. Is it safe to say that the

14:23:26 1 majority of your expert testimony was about
14:23:29 2 rebutting and responding to the evidence of, let's
14:23:32 3 say, Indigenous claimants and alleged Indigenous
14:23:35 4 claimants then?

14:23:36 5 A. I would say it would be safe to
14:23:40 6 say that in all of the cases that I have gone to
14:23:48 7 trial, my testimony was in response to expert
14:23:52 8 evidence tendered by Indigenous parties or parties
14:24:02 9 that were self-identified as Indigenous.

14:24:10 10 Q. Thank you. In your CV starting at
14:24:13 11 page 8, you list again -- not again list, my
14:24:17 12 apologies, you list 119 publications or reports. I
14:24:21 13 was going to say again by my count, but I think you
14:24:25 14 have actually numbered it.

14:24:26 15 A. Yes.

14:24:26 16 Q. And you would agree with me that
14:24:31 17 the majority of the items on this list are expert
14:24:34 18 reports for the purposes of litigation? By my
14:24:41 19 count, there is about 72 expert reports listed;
14:24:43 20 does that sound about right?

14:24:45 21 A. I have no reason to dispute that.

14:24:48 22 Q. And from my review, it looks to me
14:24:56 23 that in these 72 you were retained by government
14:24:59 24 parties, again, either Canada, provinces or U.S.
14:25:03 25 states, and there is no report listed in your CV

14:25:09 1 that was produced as a result of being retained by
14:25:11 2 a First Nation; correct?

14:25:12 3 A. That is probably correct.

14:25:20 4 Q. Okay. So you spoke to my friend
14:25:28 5 earlier about your work as a Professor, and you
14:25:32 6 used the language that you resisted the temptation
14:25:35 7 to accept a tenured position, and you also said
14:25:39 8 something to the effect that you were fortunate not
14:25:41 9 to require a full-time position to sustain
14:25:47 10 yourself.

14:25:48 11 Looking at the publications here, I
14:25:51 12 see, again by my count, from 2006 to date, you
14:25:54 13 completed three academic publications; is that
14:25:56 14 correct?

14:25:56 15 A. Now, that I cannot confirm without
14:26:05 16 having to go through all of them.

14:26:09 17 Q. Well, if we scroll down to 2006,
14:26:12 18 it might be more apparent. And again, from my
14:26:26 19 review, the last academic publication that I see
14:26:29 20 that you list is from 2007, so it would be three
14:26:32 21 between 2006 and 2007?

14:26:35 22 A. Well, it would be one in 2007. I
14:26:44 23 don't see the rest of them. Yes.

14:27:03 24 Q. In that same time period, 2006,
14:27:07 25 2007, you completed 37 -- is it in the same time

14:27:11 1 period that you completed 37 expert reports and one
14:27:14 2 affidavit; is that right?

14:27:16 3 A. If that is what you counted.

14:27:20 4 Q. And you had mentioned -- you
14:27:26 5 discussed with my friend that you were paid for
14:27:28 6 those, for that work that you had done to provide
14:27:30 7 expert testimony and expert reports?

14:27:33 8 A. Yes. In the early years, I
14:27:42 9 actually was not paid. I did it gratis, but then a
14:27:49 10 judge told me I was crazy, so I started invoicing
14:27:56 11 for them, and so, yes, the reports that you see in
14:28:01 12 the later years are all invoiced, and I was paid
14:28:04 13 for them.

14:28:05 14 Q. So it would be fair to say that
14:28:07 15 the 72 reports that you were paid for over the
14:28:10 16 years supplemented your income such that you didn't
14:28:14 17 require a full-time position?

14:28:15 18 A. No, I am fortunate to be
14:28:18 19 independently wealthy. I didn't have to rely on
14:28:22 20 this and still don't have to rely on it. It is --
14:28:27 21 I have, you know, the good fortune of saying no
14:28:32 22 more often than yes to these. I do a lot of these
14:28:37 23 only because they are fascinating to me, and they
14:28:40 24 pique my intellectual curiosity, and yes, I do get
14:28:44 25 paid for them, but that was not the -- that is not

14:28:50 1 the reason why I taught half-time at U of T.

14:28:56 2 Q. So 72 expert reports and 34 times
14:29:01 3 testifying in Court, you would agree with me that
14:29:03 4 providing expert testimony is a significant part of
14:29:07 5 your career?

14:29:08 6 A. I would say preparing reports with
14:29:16 7 the goal of assisting the Courts in these very
14:29:21 8 complex historical cases has been my role
14:29:28 9 throughout much of my career.

14:29:29 10 Q. And very often the reports that
14:29:34 11 you provide assisting the Courts are about
14:29:39 12 assessing oral histories and traditions in
14:29:43 13 litigation in Indigenous claimants; correct?

14:29:47 14 A. I would say the majority of them
14:29:49 15 have not been specifically about oral histories and
14:29:52 16 oral traditions, but I do concede that many of them
14:29:55 17 are.

14:29:56 18 Q. So you would agree with me that
14:30:00 19 putting forward your methodology, the acceptance of
14:30:03 20 your argument about oral tradition and histories is
14:30:06 21 a significant part of your career?

14:30:08 22 A. No, I think my interest throughout
14:30:21 23 my career has been to try and understand how we can
14:30:30 24 grapple with understanding a very fuzzy and messy
14:30:36 25 past and history, and that interest involves three

14:30:44 1 types of evidence in which I have been trained to
14:30:51 2 deal with; archaeological evidence, written
14:30:54 3 documents and oral histories and traditions.

14:30:57 4 To the extent that a need has arisen in
14:31:02 5 the last few decades for expertise on oral
14:31:05 6 histories and traditions, I have filled that need
14:31:10 7 on the request of various parties, including
14:31:18 8 Indigenous parties.

14:31:37 9 Q. Thank you, sir. Those are my
14:31:38 10 questions for you.

14:31:39 11 THE COURT: Re-examination?

14:31:46 12 RE-EXAMINATION BY MR. BEGGS:

14:31:46 13 Q. Yes, Your Honour, just one point
14:31:47 14 actually. It is to do with the exhibit my friend
14:31:54 15 called up. I believe it was called up Exhibit
14:31:58 16 3955, being the Mishomis Book.

14:32:00 17 The full Mishomis Book is available at
14:32:04 18 S0216. Sorry, this is also an excerpt, but it does
14:32:20 19 have the missing page apparently.

14:32:21 20 So the witness referred to page 114 of
14:32:39 21 the document, which was at the end of the book.

14:32:50 22 Is that -- Professor von Gernet, is
14:32:53 23 that the page you were referring to?

14:32:54 24 A. Yes.

14:32:55 25 Q. I wondered if I could make this an

1 Exhibit, Your Honour.

2 THE COURT: Yes.

3 THE REGISTRAR: Exhibit No. 4317.

4 EXHIBIT NO. 4317: Excerpt from the
5 Mishomis Book, containing page 114 of
6 the book.

7 MR. BEGGS: That is my only matter,
8 Your Honour, and I prepared to begin when you're
9 ready.

10 THE COURT: Have a seat for a moment.

11 Sir, I have one question for you.

12 Along the way this morning you in a -- I am not
13 suggesting in a significant way, but you drew a
14 distinction between oral history and oral
15 traditions. So I wish you just to give me your
16 understanding or how you use those two different
17 words so I know what you mean when you distinguish
18 between them.

19 THE WITNESS: Certainly.

20 The distinction is not always made in
21 either of the academic literature or in the legal
22 literature, which necessitates having precise
23 definitions, and the one that I use, which is also
24 one that has the benefit of being very common in
25 the academic world, is that oral histories are

14:34:11 1 reflections or memories of events that occurred
14:34:16 2 within the lifetime of the individual who is
14:34:20 3 telling the story.

14:34:21 4 It doesn't mean necessarily that the
14:34:24 5 person was an eyewitness, but that he may or she
14:34:28 6 may have heard about an event at the time, and it
14:34:35 7 was communicated to them, and then they recall the
14:34:37 8 incident much later.

14:34:39 9 And so that becomes an oral history.

14:34:41 10 A typical example would be an Elder who
14:34:46 11 testifies as to what he did with his grandfather in
14:34:50 12 the bush, and you know, what kind of meat he took
14:34:54 13 and so forth. These are memories. And this
14:35:01 14 definition, of course, applies equally to
14:35:04 15 Indigenous and non-Indigenous people because, you
14:35:06 16 know, we have oral histories of combatants in a
14:35:12 17 world war or something like that.

14:35:14 18 Now, that is contrasted in my parlance
14:35:19 19 with oral traditions which, by definition, are
14:35:23 20 intergenerationally transmitted; that is, they are
14:35:28 21 not just memories, but they are memories of
14:35:31 22 memories.

14:35:34 23 So the information is passed down over
14:35:37 24 the course of time through human memory, and at
14:35:42 25 some point in the recent past, they are then

14:35:47 1 recorded and thereby frozen in time.

14:35:54 2 THE COURT: Thank you. Ms. Gurguis, do
14:35:56 3 you have any questions arising from my question?

14:35:59 4 MS. GUIRGUIS: No, Your Honour.

14:36:00 5 THE COURT: Mr. Beggs?

14:36:01 6 MR. BEGGS: No, Your Honour.

14:36:02 7 THE COURT: Please go ahead.

14:36:03 8 Mr. Beggs, you seem poised to make submissions. I
14:36:06 9 guess with the last witness where we had a voir
14:36:08 10 dire, the objecting counsel wanted to go second.

14:36:17 11 Sorry, I am trying to think of how it
14:36:23 12 worked. I am not terribly concerned about it, if
14:36:27 13 the two of you have a preferred course I think is
14:36:31 14 what I said the last time, and I think the last
14:36:33 15 time Plaintiffs' counsel chose to wait and hear the
14:36:36 16 objection.

14:36:36 17 Do you have a preferred course, sir?

14:36:39 18 MR. BEGGS: No, I have no preference,
14:36:40 19 Your Honour.

14:36:40 20 THE COURT: Do you, Ms. Gurguis?

14:36:46 21 MS. GUIRGUIS: I think I prefer to make
14:36:47 22 the objection first.

14:36:48 23 THE COURT: All right. Mr. Beggs seems
14:36:50 24 to be fine with that, so please go ahead.

14:36:52 25 MS. GUIRGUIS: Thank you, Your Honour.

14:36:53 1 THE COURT: Now, just in the instance,
14:36:55 2 sir, where you are not immediately after this
14:36:58 3 argument going to be proceeding because you are not
14:37:01 4 scheduled to proceed until next year in any event,
14:37:04 5 I would ask for you to feel free step down. You
14:37:07 6 need not stay there. All right?

14:37:10 7 So you might as well step down from the
14:37:13 8 witness box.

14:37:14 9 THE WITNESS: Thank you, Your Honour.

14:37:16 10 THE COURT: Yes. On the same front,
14:37:23 11 there has been -- up until now in the trial no
14:37:27 12 counsel has suggested that an expert not be present
14:37:29 13 in Court for the argument, and if that is still
14:37:34 14 true, this gentleman can stay, but he is also free
14:37:36 15 to leave I assume since his evidence is not
14:37:41 16 scheduled until next year. Is that correct?

14:37:43 17 All right. So you can stay, sir, if
14:37:45 18 you wish, but you are also free to leave. It is up
14:37:48 19 to you.

14:37:49 20 THE WITNESS: Thank you, Your Honour.

14:37:50 21 THE COURT: Please go ahead,
14:37:51 22 Ms. Gurguis.

14:37:51 23 MS. GUIRGUIS: Thank you, Your Honour.

14:37:52 24 So, Your Honour, today we are
14:37:54 25 challenging Canada's proposed tender of Dr. von

1 Gernet as an expert on the basis that we say he
2 does not meet the requirement being impartial and
3 unbiased --

4 THE COURT: Just before you launch into
5 that, who has control over the screens at this
6 point? Would that person please put on the screen
7 V-2, which is the tender. You can continue, Ms.
8 Gurguis, but it is helpful to me if it is up there.

9 MS. GUIRGUIS: Thank you, Your Honour.

10 THE COURT: Not impartial, you said?

11 MS. GUIRGUIS: Yes, on the requirement
12 of being impartial and unbiased.

13 So based on that, we submit that his
14 expert evidence should not be admitted.

15 In addition, we have some submissions
16 with respect to Dr. von Gernet's opinion evidence
17 in his July 2019 report about whether it meets the
18 necessity requirements of the Mohan test.

19 On bias, my submissions are divided
20 into two parts. First I'll briefly highlight the
21 case law about the test we need to meet, and then
22 second, I'll set out three reasons why we say there
23 is a realistic concern that Dr. von Gernet is
24 incapable of giving impartial evidence.

25 So first, the case law about the test

14:39:11 1 we need to meet is in White Burgess, which we have
14:39:15 2 included for Your Honour at tab 1 of our first Book
14:39:18 3 of Authorities. We've provided you with --

14:39:19 4 THE COURT: I am very familiar with it,
14:39:20 5 and because of that, here is what I would say.

14:39:22 6 Please make the points that you feel are important
14:39:25 7 but please don't feel that it is necessary to go
14:39:27 8 and take me through the entire cases because I have
14:39:30 9 read them all.

14:39:33 10 MS. GUIRGUIS: Excellent. Okay. Thank
14:39:34 11 you.

14:39:34 12 THE COURT: And I actually found one of
14:39:36 13 your cases especially helpful because it has in it,
14:39:38 14 where is it, a recent helpful summary by the
14:39:42 15 Ontario Court of Appeal that folds Mohan and White
14:39:49 16 Burgess and so forth together. And so I made a
14:39:51 17 note that unless counsel disagrees, which they are
14:39:56 18 free to do, but I found that summary, which is in
14:40:03 19 Regina v. Abbey, one of the Regina v. Abbeys, there
14:40:03 20 seems to be a multiplicity of them, 2017 (ONCA)
14:40:09 21 640, paragraph 48, as a helpful summary of how
14:40:17 22 White Burgess reconciles with the Mohan test and
14:40:23 23 everything else.

14:40:24 24 So just so you know.

14:40:27 25 MS. GUIRGUIS: Okay. I'll just flip to

14:40:28 1 that as well.

14:40:29 2 THE COURT: So I'm familiar with all
14:40:30 3 those things, but you shouldn't stop -- it
14:40:34 4 shouldn't stop you from making whatever points you
14:40:36 5 wish to make.

14:40:37 6 MS. GUIRGUIS: Thank you, Your Honour.
14:40:38 7 So I bring up White Burgess because in
14:40:44 8 that case the Supreme Court says realistic concerns
14:40:46 9 about independence and impartiality can go to
14:40:49 10 admissibility.

14:40:50 11 THE COURT: Yes. No question about
14:40:51 12 that, Counsel. You need not persuade me of that.

14:40:54 13 MS. GUIRGUIS: Yes. And we do
14:40:55 14 acknowledge that this requires more than an
14:40:56 15 appearance of bias, but a realistic concern.

14:41:01 16 So let me just move to why we say there
14:41:04 17 are three reasons that we think there is a
14:41:05 18 realistic concern about Dr. von Gernet's ability to
14:41:09 19 provide impartial evidence here in this case.

14:41:11 20 First, we say that Dr. von Gernet
14:41:16 21 assumes the role of advocate. So we have also
14:41:22 22 included, Your Honour, in addition to White
14:41:25 23 Burgess, which you are familiar with, we have
14:41:26 24 included another case, Alfano v. Piersanit, at tab
14:41:33 25 3 of our first Book of Authorities. That is the

1 Ontario Court of Appeal, and in that case, the
2 Ontario Court of Appeal did not interfere with the
3 trial judge's decision to exclude expert evidence
4 on the basis of a realistic concern of bias.

5 We have drawn your attention to
6 paragraphs 107 to 115 where the Court notes that
7 the expert's report should not be a platform from
8 which to argue the client's case. And at paragraph
9 115, the Court notes that in that case, the reports
10 were repetitious and argumentative in tone, and
11 read like the appellate counsel's written argument.

12 And in places the reports go beyond
13 areas in which the expert is qualified to give
14 expert evidence, and address factual issues that
15 properly fall within the purview of the trial
16 judge.

17 We have included this case because we
18 submit that this is similar with what we see with
19 Dr. von Gernet's report summarized in the expert
20 evidence that Canada intends to lead in this case.

21 And to summarize briefly, we would
22 point you directly to starting at page 61 and
23 continuing on to page 67 of Dr. von Gernet's July
24 2019 report. He sets out an argument under the
25 heading of "Application" that his approach to oral

14:42:48 1 history should apply. Starting at page 62, Dr. von
14:42:56 2 Gernet cites selected cases, decisions that endorse
14:42:59 3 his methodology, to persuade the reader of this
14:43:02 4 argument.

14:43:02 5 Page 63, he highlights that in one of
14:43:10 6 those decisions the judge said it is necessary to
14:43:14 7 adopt Dr. von Gernet's approach to oral history and
14:43:19 8 tradition, and he goes on at page 64 to recount his
14:43:22 9 cautionary tale of his involvement in R. v.
14:43:27 10 Marshall, and at the end of that recitation, he
14:43:29 11 muses about what would have happened in Marshall
14:43:31 12 had he not been involved and cautions that his tale
14:43:34 13 should serve as a warning.

14:43:35 14 So in our submission, Dr. von Gernet is
14:43:39 15 citing case law to advocate for the adoption of his
14:43:42 16 approach. And that is not the role of an expert,
14:43:46 17 to argue or even imply why his evidence ought to be
14:43:49 18 accepted by this Court. That is the role of legal
14:43:52 19 counsel.

14:43:53 20 So further on this point, we made note
14:43:58 21 in Dr. von Gernet's cross-examination is that he
14:44:00 22 dismisses different approaches or assessments on
14:44:03 23 the matter of understanding and recording the past
14:44:07 24 as fashionable nonsense, proffered by the
14:44:11 25 Indigenous intelligentsia. Again, it is coming

14:44:14 1 across that he is advocating for the Court to
14:44:16 2 prefer his evidence, the evidence that he is going
14:44:18 3 to provide, and that is not the role for an
14:44:20 4 independent and impartial expert.

14:44:22 5 The second reason we would highlight is
14:44:27 6 that Dr. von Gernet shows the Court an incomplete
14:44:29 7 picture in the expert report that he has provided
14:44:35 8 in that he is selective in his discussion of how
14:44:37 9 his testimony has been received by the Courts.

14:44:40 10 So he cites the three decisions that
14:44:44 11 adopted his approach, and he has omitted any
14:44:47 12 judicial criticism, despite the fact that there has
14:44:50 13 been some, and if he is presenting a balanced and
14:44:54 14 independent report, as part of that report, you
14:44:57 15 would think he would -- you know, the idea is that
14:45:00 16 he would provide a balanced and independent review
14:45:03 17 of his own work as well, if he was providing any.

14:45:06 18 He omitted Justice McEwan's view in
14:45:10 19 Mitchell, and he omitted Justice Vickers' comments
14:45:12 20 in Tsilhqot'in Nation, which amounted to basically
14:45:17 21 that they were left with the impression that Dr.
14:45:19 22 von Gernet would be inclined to give no weight to
14:45:20 23 oral tradition evidence in the absence of some
14:45:23 24 corroboration, which would cause the Court to fall
14:45:26 25 into legal error.

14:45:27 1 So we highlighted those two examples to
14:45:30 2 basically say that there is another half of the
14:45:32 3 picture that Dr. von Gernet has not put in his
14:45:35 4 expert report.

14:45:36 5 He only cites the decisions that are
14:45:46 6 positive because it furthers, it seems, the purpose
14:45:49 7 of trying to persuade the reader or the Court to
14:45:51 8 adopt his evidence. And this is troubling for, as
14:45:54 9 we have mentioned, that it seems that he is acting
14:45:58 10 as an advocate for his own approach, and that is
14:46:00 11 not a role that the impartial expert should play,
14:46:02 12 but also because it raises a realistic concern
14:46:05 13 about whether he can fulfil the expert's duty to
14:46:08 14 provide fair and objective evidence in other
14:46:11 15 regards.

14:46:11 16 THE COURT: I just have a question
14:46:13 17 about that. I mean, there is a lot of law about
14:46:18 18 advocating for a party, which is not the same as
14:46:24 19 advocating for your, I am going to say,
14:46:29 20 archaeological view in an area where archaeologists
14:46:35 21 do not all share that same view.

14:46:43 22 So there is a difference between saying
14:46:45 23 the Plaintiff should win because, which I don't
14:46:52 24 think you have identified any examples of, and
14:46:54 25 saying that in this area where my professional

14:46:57 1 colleagues do not all agree, I think you should be
14:47:00 2 persuaded by me in my professional view for the
14:47:04 3 following reasons.

14:47:05 4 Now, do you say that latter thing is
14:47:07 5 the same kind of advocacy that would disqualify an
14:47:10 6 expert? Because we hear a lot of evidence like
14:47:14 7 that, you know, competing experts saying, Well, I
14:47:19 8 am an expert, and pick another area, a
14:47:23 9 cardiologist, based on my professional experience
14:47:26 10 say that it was in fact a treatable heart problem
14:47:30 11 and here are the reasons why you should accept my
14:47:32 12 opinion.

14:47:34 13 And then the next person gets in the
14:47:36 14 witness box and says, No, no, no, no, it was in
14:47:40 15 fact a -- I don't know enough about cardiology, a
14:47:46 16 tragic, unsolvable defect for which no treatment
14:47:50 17 would be effective, and here is my lineup of the
14:47:53 18 reasons why I say you should accept my opinion.

14:47:55 19 So yes, they are advocating for their
14:47:57 20 view. Is that -- how can that be disqualifying?

14:48:02 21 MS. GUIRGUIS: I think that the
14:48:03 22 difference here is that he is entitled to say this
14:48:06 23 is my approach and this is why it is my approach.
14:48:08 24 It is to cite a select few cases, legal cases, that
14:48:12 25 have adopted his approach without giving the other

14:48:16 1 side of the story.

14:48:16 2 THE COURT: I understood that point.

14:48:17 3 That was a separate point. You had a point about

14:48:19 4 the incomplete picture.

14:48:20 5 MS. GUIRGUIS: Yes.

14:48:21 6 THE COURT: My question is limited to

14:48:22 7 the advocacy point. I am struggling with how

14:48:27 8 advocating for your professional opinion is the

14:48:30 9 kind of advocacy that White Burgess and all the

14:48:33 10 other cases are concerned about, if you can help me

14:48:37 11 with that.

14:48:37 12 MS. GUIRGUIS: It is slightly

14:49:01 13 different. What I am proposing is slightly

14:49:02 14 different than what we have dealt with in the

14:49:04 15 cases, but what we say is that it demonstrates that

14:49:06 16 he is not -- that way of approaching it, to

14:49:10 17 advocate for adopt my methodology, adopt my

14:49:16 18 assessment, is really showing that he is not

14:49:18 19 open-minded to other outlets. But I think the

14:49:21 20 direct answer to what you are asking, Your Honour,

14:49:22 21 is that it is different than what White Burgess is

14:49:27 22 talking about, that arguing from his client's --

14:49:29 23 arguing his client's platform.

14:49:30 24 THE COURT: That is not this situation.

14:49:35 25 MS. GUIRGUIS: Right.

14:49:35 1 THE COURT: Right. Now your other
14:49:37 2 colleague also has a note for you.

14:49:39 3 MS. GUIRGUIS: Thank you.

14:49:43 4 Right, and this is what I was saying
14:49:46 5 about when I brought up the three examples of the
14:49:49 6 case law, is the advocating from case law, which is
14:49:51 7 the role of legal counsel, versus advocating from
14:49:54 8 his discipline, that is what I was getting at when
14:49:57 9 I was saying that using the case law gives a
14:50:02 10 different spin on it, which would be the role of
14:50:05 11 legal counsel.

14:50:06 12 But again, it is slightly different
14:50:08 13 than I think what they are talking about in White
14:50:11 14 Burgess, I think that is correct to say. What they
14:50:13 15 are talking about in White Burgess is that you are
14:50:19 16 actively arguing the client's position.

14:50:19 17 THE COURT: Thank you.

14:50:20 18 MS. GUIRGUIS: Thank you.

14:50:22 19 THE COURT: I interrupted you in the
14:50:26 20 middle of your point number two, which was
14:50:29 21 incomplete picture.

14:50:30 22 MS. GUIRGUIS: I had completed point
14:50:31 23 number two, and that led me to my third point,
14:50:33 24 which is what I was coming up to, is that Dr. von
14:50:36 25 Gernet fails to maintain an open mind with respect

14:50:39 1 to oral history evidence and the treatment of oral
14:50:43 2 history evidence.

14:50:43 3 So we have also included a case in our
14:50:46 4 first Book of Authorities at tab 4 from the Ontario
14:50:49 5 Superior Court called R. v. France. And we drew
14:50:55 6 your attention, Your Honour, to several paragraphs,
14:51:00 7 paragraphs 17, 19 and so on.

14:51:02 8 THE COURT: Yes.

14:51:02 9 MS. GUIRGUIS: That talk about the
14:51:04 10 importance of the expert maintaining an open mind
14:51:06 11 to a broad range of possibilities. And the Court
14:51:09 12 in that case talks about something that we have
14:51:11 13 talked about today, which is confirmation bias.

14:51:14 14 At paragraphs 45 to 48 of this case,
14:51:17 15 the Court notes that this confirmation bias might
14:51:22 16 be unconscious, but it is still a bias that means
14:51:25 17 that a witness is not impartial. The impartial
14:51:27 18 witness owes a duty to the Court to provide an
14:51:30 19 opinion that is not slanted in one direction.

14:51:31 20 We submit that is applicable here. Dr.
14:51:40 21 von Gernet has built a career confirming and
14:51:41 22 affirming the argument that Indigenous oral history
14:51:43 23 and oral traditions is not credible or
14:51:46 24 independently credible. He eventually testifies
14:51:52 25 for one kind of litigant, which are governments

14:51:55 1 that oppose claims of Indigenous people. And in
14:51:57 2 his July 2019 report at page 67, which is something
14:52:01 3 that we went to a couple of times with Dr. von
14:52:03 4 Gernet, he opines that even the most elaborate
14:52:06 5 internal checks within an Indigenous community are
14:52:09 6 an insufficient guarantee of historical
14:52:12 7 reliability.

14:52:12 8 This is an opinion that he has held
14:52:16 9 since the early 1990s. In his article published in
14:52:20 10 2000, "What My Elders Taught Me", we see his
14:52:26 11 commitment to this theory as he questions the
14:52:30 12 direction from the Supreme Court of Canada in
14:52:31 13 Delgamuukw that oral traditions and history must be
14:52:34 14 placed on an equal footing with historical
14:52:37 15 documents, that that's his starting point.

14:52:42 16 This creates a realistic concern that
14:52:45 17 he cannot provide impartial evidence to the Court
14:52:47 18 about the assessment and consideration of oral
14:52:51 19 history and tradition in reconstructing the pasts
14:52:55 20 of Indigenous peoples.

14:52:56 21 He has a confirmation bias.

14:52:59 22 THE COURT: Well, I think what he said,
14:53:01 23 and I think that is -- it is an unsurprising
14:53:05 24 observation, is that at some level everyone has a
14:53:07 25 confirmation bias. This is not the same as

14:53:12 1 something -- a finding that would be an unusual
14:53:18 2 description of, you know, an individual in a
14:53:23 3 population of people.

14:53:25 4 What you would have to show is not that
14:53:30 5 he has a confirmation bias, as we probably all do
14:53:33 6 in some parts of our life everyday, but that he has
14:53:37 7 a confirmation bias that overwhelms his duties and
14:53:44 8 responsibilities.

14:53:44 9 MS. GUIRGUIS: That's right.

14:53:45 10 THE COURT: And why do you say it does?

14:53:48 11 MS. GUIRGUIS: We say that from the
14:53:49 12 report itself, his expert report demonstrates that
14:53:52 13 he doesn't approach the inquiry by considering all
14:53:54 14 or other possibilities. And we have given the
14:53:57 15 example of he provides a one-sided view of things,
14:54:04 16 and he starts with the assumption that oral history
14:54:08 17 and oral tradition is independently unreliable.

14:54:12 18 The parts of his expert report that we
14:54:19 19 went to in the cross-examination really indicate
14:54:25 20 that he is closed to the possibility that oral
14:54:26 21 history and tradition is based on historical
14:54:29 22 events, that it contains information about
14:54:31 23 historical events.

14:54:33 24 See in particular -- well, in his
14:54:39 25 expert evidence, and answers to questions on

14:54:42 1 cross-examination today, and his past publications,
14:54:44 2 they are all slanted towards a strong conviction
14:54:47 3 about the unreliability of oral history and
14:54:49 4 tradition, and in the context of linking oral
14:54:52 5 history to geological events, which is his main
14:54:56 6 subject matter of this report, Dr. von Gernet is of
14:54:59 7 the view that it is never appropriate for
14:55:01 8 Indigenous people to rely on that geomythology. He
14:55:04 9 calls it pseudoscience, pseudohistory.

14:55:11 10 THE COURT: And what do you say about
14:55:12 11 the answers you got in your cross-examination which
14:55:15 12 do not agree with those propositions?

14:55:19 13 MS. GUIRGUIS: The propositions that he
14:55:21 14 set out in his report?

14:55:22 15 THE COURT: In a series of questions
14:55:23 16 today, and I am not going to try and summarize them
14:55:26 17 all, where the witness disagreed, giving reasons at
14:55:34 18 each corner about the suggestion that you are now
14:55:40 19 making, and what is your submission about how I
14:55:46 20 should approach the oral testimony that I heard
14:55:50 21 this morning which in many respects flatly rejected
14:55:55 22 the types of problems that you are now identifying?

14:55:58 23 MS. GUIRGUIS: Well, they are a direct
14:56:04 24 contradiction to direct statements that he has made
14:56:07 25 in the expert report itself, so we have the clear

14:56:11 1 statements in the report and the positions that he
14:56:13 2 has taken in the report that in the oral testimony
14:56:18 3 today he may have contradicted, but as far as we
14:56:21 4 know, those are still the positions that he is
14:56:23 5 going to be putting forward.

14:56:24 6 THE COURT: Well, I am not sure
14:56:26 7 contradict is the right word, but certainly
14:56:28 8 disagreed and explained why.

14:56:30 9 MS. GUIRGUIS: Right.

14:56:31 10 THE COURT: So did not accept the
14:56:32 11 inference that you sought to draw from the
14:56:35 12 statements he made.

14:56:38 13 MS. GUIRGUIS: Well, you know, in
14:56:43 14 preparing for examining him on his evidence, we
14:56:52 15 rely on the statements, and we understand that what
14:56:55 16 will happen is that if he testifies as an expert
14:56:58 17 for Canada, they will seek to add that as an
14:57:01 18 exhibit.

14:57:02 19 THE COURT: Yes, and that is a fair
14:57:03 20 comment, except for one thing, which I don't expect
14:57:07 21 you to have in mind because it was dealt with some
14:57:11 22 months ago, but as I said in July, in my view, it
14:57:19 23 is an open question, and it will not be open for
14:57:23 24 long, because as soon as this voir dire is
14:57:26 25 finished, I am going to -- well, whether I do it

14:57:28 1 today has a lot to do with the fact that I want you
14:57:30 2 all to enjoy your Thanksgiving. But I am going to
14:57:34 3 deal with the question of whether the report will
14:57:35 4 become evidence as a separate matter.

14:57:37 5 But I still understand your position,
14:57:39 6 which is that I should put weight on what he says
14:57:43 7 in his report in considering whether he meets the
14:57:46 8 White Burgess test or not.

14:57:48 9 MS. GUIRGUIS: Right.

14:57:48 10 THE COURT: So I don't need you to be
14:57:53 11 concerned that it will depend on whether the report
14:57:55 12 goes in or not, because I see them as two separate
14:57:59 13 matters because it is still his document.

14:58:03 14 MS. GUIRGUIS: So I think, Your
14:58:05 15 Honour --

14:58:05 16 THE COURT: So don't assume it is going
14:58:07 17 in, but I am not sure it matters is I guess what I
14:58:09 18 am saying to your current issue about whether or
14:58:14 19 not he should be permitted to be qualified as an
14:58:17 20 expert.

14:58:17 21 MS. GUIRGUIS: So I think, Your Honour,
14:58:21 22 is that taking the report that we -- which is
14:58:23 23 providing us kind of a summary or notice of the
14:58:26 24 positions that he will take, and we relied on that,
14:58:29 25 and it is possible that it doesn't become evidence,

14:58:32 1 but if that is a representation of his views here,
14:58:36 2 then what he said on the oral testimony to disagree
14:58:40 3 and explain, still that -- the report with his past
14:58:48 4 publications, with the "What My Elders Taught Me"
14:58:55 5 publication in particular, his past opinions and so
14:58:58 6 on, is what we are relying on to say that he is
14:59:03 7 closed to other possibilities. His approach is
14:59:08 8 closed to other possibilities.

14:59:09 9 So I think that would simply be our
14:59:14 10 submission in that respect.

14:59:15 11 And he himself in his testimony today
14:59:25 12 acknowledges that a strong conviction one way or
14:59:28 13 the other about oral history leads to confirmation
14:59:32 14 bias. His career and his publications, his expert
14:59:35 15 reports and so on, demonstrate a strong conviction
14:59:39 16 I think one way, who he has worked for --

14:59:44 17 THE COURT: Well, what he said was
14:59:45 18 that -- I am going to overgeneralize it, but what
14:59:47 19 he said was, first of all, confirmation bias is
14:59:49 20 important, overarching. He may or may not have
14:59:53 21 said it, but confirmation bias, it would seem to
14:59:56 22 me, is probably something we all have, and he went
14:59:59 23 on to say that he is aware of it, and he has been
15:00:02 24 trained to work against it in his role as an
15:00:06 25 archaeologist.

1 So what is your submission about that?

2 MS. GUIRGUIS: I think my submission,

3 Your Honour, is that it is taking -- again, just

4 taking what he has put in his report, taking what

5 he has put in his past publications, is saying that

6 he is working against it, when you look at how he

7 said that he works against it. He has been trained

8 to work against it. He says that he reads a

9 variety of points of view. He doesn't just stick

10 with one, but reads a wide variety of points of

11 view, but then in his report and in his testimony,

12 he talks about it as being nonsense. So I would

13 suggest that he hasn't overcome it in the same way

14 that he may say that he has.

15 THE COURT: Now, remind me, is that one

16 of the quotes that was a derivative from something

17 else someone else said, or was that his in the

18 first instance?

19 MS. GUIRGUIS: He has footnoted it to

20 someone else, to what somebody else has said, but

21 he has adopted it to describe his kind of

22 anthropology.

23 THE COURT: I am not saying it is not

24 relevant because, you know, I'll definitely

25 consider it, but I was pausing over it because --

15:01:26 1 and this is a coincidence, but our last witness who
15:01:30 2 we just finished, his report also quotes in a
15:01:39 3 negative way other people's comments, and the one
15:01:42 4 that comes to mind is "imbecilic", but there was
15:01:48 5 also other quotes, and they weren't his in the
15:01:50 6 first instance. They were quotes of what other
15:01:52 7 people said about the conduct of government
15:01:54 8 officials, but he also continues to use them
15:02:00 9 himself.

15:02:02 10 And so I would need to understand why
15:02:04 11 this gentleman's use of quotes that he may continue
15:02:10 12 to use is offensive where the prior witness's were
15:02:13 13 not, at least in general terms, because it was part
15:02:17 14 of what he did. I think you know what I am going
15:02:25 15 over. He was asked about it in cross-examination
15:02:29 16 and so forth.

15:02:30 17 MS. GUIRGUIS: Uhm-hmm.

15:02:36 18 THE COURT: That is the one word that
15:02:36 19 sticks in my mind, but I think negligence, perhaps
15:02:40 20 a few others as well. They originated from other
15:02:42 21 people, strong negative descriptions of the conduct
15:02:47 22 of government officials.

15:02:49 23 MS. GUIRGUIS: I think why it is
15:02:51 24 relevant here and why I am saying that it is
15:02:53 25 relevant here, Your Honour, is that because he

1 cited -- he said himself today that the way that he
2 avoids confirmation bias, one of the things that he
3 does is to always take into consideration these
4 different points of view.

5 But in fact, he seems very dismissive
6 of them, so to the extent that he does take that
7 into consideration and does avoid the confirmation
8 bias that is of concern, I would say -- what I
9 would submit is that we take that into
10 consideration, is that when he is dealing with
11 opposing academics, he does dismiss it in his
12 report as being nonsense or annoying and so on.

13 So that is the relevance. That is why
14 I bring it up here.

15 THE COURT: All right.

16 MS. GUIRGUIS: So based on those three
17 points, which is that we say that he has assumed
18 the role of an advocate, he has given the Court an
19 incomplete picture of the judicial reception of his
20 methodology, and he has failed to maintain an open
21 mind with respect to oral history and oral
22 tradition evidence, those three points, we submit
23 that that's why there is a realistic concern that
24 Dr. von Gernet is incapable of giving an impartial
25 opinion.

1 Now, we also have a few submissions on
2 necessity.

3 So if Your Honour should find that
4 Dr. von Gernet is qualified to testify as an expert
5 witness with respect to the impartiality piece, we
6 would say that his opinion is not necessarily
7 needed. So part two of the four-part test in Mohan
8 for the admission of expert evidence says that the
9 evidence must be necessary to assist the trier of
10 fact, and in that case, the Court says that the
11 opinion evidence is necessary when it provides
12 information that is likely outside the experience
13 or knowledge of a judge or jury.

14 And while there is no bright line of
15 when a subject matter falls within that experience
16 of a particular trier of fact, one of the R. v
17 Abbeys, the 1982 Supreme Court case, provides a
18 benchmark that Dickson J. says at page 42:

19 "If on the proven facts a judge
20 or jury can form their own
21 conclusions without help, then the
22 opinion of the expert is
23 unnecessary."

24 So that is sidebarred at tab 4 of our
25 supplementary Book of Authorities.

1 So the other notable points from the
2 case law about necessity we have also included in
3 our supplementary Book of Authorities, R. v. DD at
4 tab 5, paragraph 40, it says:

5 "The evidence that is merely
6 helpful or might reasonably assist
7 the trier of fact does not
8 necessarily satisfy the necessity
9 threshold".

10 THE COURT: Sorry, which one was that?

11 R. v. DD?

12 MS. GUIRGUIS: Yes.

13 THE COURT: Hold on for a second. The
14 difficulty I have, Counsel, with this, and you can
15 help me with this, is at least one and perhaps two
16 of the experts I have already heard from testified,
17 at least one in the context of historical
18 expertise, I believe, and do correct me if I'm
19 wrong, about how oral history should be considered,
20 weighed and factored into an opinion about what
21 happened, you know, 200 years ago or whatever, and
22 I was trying to pin down exactly how often that has
23 come up.

24 And so if I am wrong, please correct
25 me, but I am reasonably sure one expert did, and I

1 think there might have been a second, that talked
2 about the utility of, use of, how it fits in the
3 consideration of the record, historical record.

4 And how is that different from what you
5 are talking about? You are saying I don't need any
6 help with it, but I have already had some from a
7 couple of your experts, I think. Again, I stand to
8 be corrected if I have that wrong.

9 MS. GUIRGUIS: No, I don't think that
10 you have that wrong. I think you are speaking
11 about Professor Brownlie.

12 THE COURT: At least Professor
13 Brownlie. He was the one I was confident about,
14 but there might have been some comments perhaps
15 by -- Dr. Williamson, but I am not sure. I am not
16 sure.

17 MS. GUIRGUIS: So there is a couple of
18 reasons why I would say that is different.

19 With Professor Brownlie, and there may
20 have been others, at least my -- I was in the
21 courtroom for Professor Brownlie, so I'll speak to
22 that example, he was commenting on whether there
23 was two conflicting oral histories and how he
24 weighs that, so his comment on the credibility or
25 the use of sources, let's say, in that way.

1 And I am not trying to say that there
2 is not assistance that the Court can receive or
3 might be helpful about what to do with oral
4 history, but the weighing of different types of
5 evidence is something that the Court does on a
6 regular basis.

7 So the Supreme Court has given the
8 guidance that oral history evidence is to be put on
9 the same equal footing as other kinds of evidence.

10 So that is within the Court's
11 experience to be able to do that, and the ability
12 of the Courts to do it.

13 THE COURT: But wasn't it the case in
14 R. v. RD -- and correct me if I have this wrong,
15 but didn't the Supreme Court of Canada overturn and
16 say that they ought to have permitted the expert
17 evidence on human behaviour in that case?

18 MS. GUIRGUIS: Let me take a look. If
19 I could just have a moment, Your Honour.

20 THE COURT: That is all right. Take
21 your time. I am just trying to check that myself.
22 Which tab did you say it was?

23 MS. GUIRGUIS: It is tab 5 of the
24 supplemental Book of Authorities.

25 THE COURT: Yes.

1 MS. GUIRGUIS: So my understanding of
2 the facts of that case was that the Supreme Court
3 found expert evidence was unnecessary and should
4 not have been admitted at trial.

5 THE COURT: Just a minute. I am just
6 trying to find my reference.

7 It is not assisted by the fact that my
8 note is incorrect.

9 Oh, I think I have the wrong case. It
10 may have been one of Canada's cases in fact. Yes,
11 it was. R v. RD is what I am talking about, and I
12 think you are talking about R. v. DD, which
13 understandably could be confused.

14 So if you look at R v. RD if you have
15 it. It was sent to me as a separate single case.
16 Do you have it?

17 MS. GUIRGUIS: I don't think I do. Do
18 you have that?

19 THE COURT: Back September 6th. Does
20 anyone have a copy they could lend to Ms. Gurguis?
21 Presumably Canada has a copy.

22 MR. BEGGS: Actually no, Your Honour.

23 THE COURT: Seriously. Okay. Well, I
24 am happy to give you mine.

25 MS. GUIRGUIS: Okay.

15:11:52 1 THE COURT: But just so you know what
15:11:55 2 to look at.

15:11:56 3 MS. GUIRGUIS: Uhm-hmm.

15:11:58 4 THE COURT: Paragraph 38 and 39, and
15:12:03 5 this is one of the child abuse cases where the
15:12:08 6 expert was going to testify about the two kinds of
15:12:14 7 memory that children have and was permitted to give
15:12:21 8 some evidence but not permitted to give all of the
15:12:23 9 evidence.

15:12:23 10 Essentially that paragraph simply
15:12:56 11 states what I think is not controversial, but I
15:12:59 12 will hand it to you so you can look at it, which is
15:13:01 13 that expert testimony is admissible even if it does
15:13:06 14 relate directly to the ultimate question.

15:13:09 15 MS. GUIRGUIS: Right.

15:13:09 16 THE COURT: Now, the evidence in
15:13:12 17 question was about human conduct. I am not sure
15:13:15 18 you would agree that that's a precise analogy, but
15:13:17 19 I don't want you to be without the raw material
15:13:20 20 here.

15:13:21 21 Mr. Registrar, can you hand that to
15:13:23 22 Ms. Gurguis.

15:13:24 23 MS. GUIRGUIS: Thank you, Your Honour.

15:13:36 24 THE COURT: But that is not the case
15:13:38 25 you were talking about, so that is the start-off

15:13:42 1 reason for our confusion. We might as well deal
15:13:44 2 with it.

15:13:45 3 MS. GUIRGUIS: Yes. Well, I think my
15:14:21 4 main point on this, Your Honour, is that Dr. von
15:14:25 5 Gernet's evidence, as set out in the July 2019
15:14:28 6 expert report, to the extent that it opines on how
15:14:33 7 oral history evidence in general should be read by
15:14:37 8 the Courts or by this Court, we would say -- one of
15:14:40 9 our submissions is that it is not necessary.

15:14:42 10 The other point though, too, and this
15:14:44 11 is something that we discussed in the
15:14:45 12 cross-examination, is about the extent to which Dr.
15:14:50 13 von Gernet opines on the probable link between
15:14:52 14 geological events and Anishinaabe stories. He
15:14:57 15 suggests using the problem-solving principle of
15:15:01 16 Occam's Razor, a problem-solving principle, which
15:15:08 17 was summarized -- just flipping back. It was
15:15:12 18 basically the simplest explanation that relies on
15:15:15 19 the least amount of assumptions is the one that
15:15:17 20 makes the most sense.

15:15:19 21 And we submit that is something that
15:15:23 22 can be applied by experts and non-experts alike, as
15:15:26 23 well as by the Court.

15:15:28 24 So it is for those reasons -- so it is
15:15:32 25 not necessarily it is because he is going to the

1 heart of the issue or that it is a matter that he
2 is opining on that is at the heart of the issue,
3 but it is because -- the two reasons is that he is
4 opining on how to weigh evidence, which is the
5 Court's role, and because his opinion is based on
6 common sense, the one with the least amount of
7 assumptions and identifying the least amount of
8 assumptions is the one that makes the most sense.

9 So we would submit that it is not
10 entirely necessary --

11 THE COURT: And is that specific to the
12 question of a connection between geological events
13 and mythology?

14 MS. GUIRGUIS: That's right. I think
15 that is the only extent to which he opines on that,
16 the probable link between those geological events,
17 and the stories in his report.

18 So those are my submissions with
19 respect to the necessity and with respect to bias.

20 And I would leave it there in terms of
21 those submissions.

22 THE COURT: Just before you move on
23 from that, the issue having been raised, I should
24 ask you, do your submissions change in any way if
25 the report, the written report, isn't going in but

1 he would still testify? Because that is an option;
2 right?

3 So I want to understand how much of
4 this is based on, you know, entertaining the
5 possibility, which does exist, that the written
6 report would go in, or if it is independent from
7 that.

8 MS. GUIRGUIS: So if his written report
9 doesn't go in, and we are using that as a basis for
10 understanding the basic idea of what he is going to
11 be testifying to?

12 THE COURT: I just want to know if you
13 think it makes any difference. I have already said
14 that I didn't think it did, but I should hear from
15 you about what you think. Obviously I'm going to
16 have to consider all this.

17 MS. GUIRGUIS: Can you give me one
18 moment, Your Honour, to discuss --

19 THE COURT: Of course.

20 MS. GUIRGUIS: Well, Your Honour, I
21 don't think it makes a difference for us either, in
22 our submissions.

23 THE COURT: All right. Go ahead.

24 MS. GUIRGUIS: One thing I did also
25 want to address is there is this agreement about

1 the shorter report, the abridged report.

2 THE COURT: Right.

3 MS. GUIRGUIS: And that agreement
4 that's has been discussed by my colleague with you
5 was that there would be an abridged report, that it
6 is simply a collection of the stories and contains
7 no expert evidence, and as such, we don't think
8 that he needs to be qualified as an expert at all.
9 He can testify as a fact witness and speak to the
10 collection of the stories.

11 But I think Canada also has agreed that
12 there is no opinion in that shorter, abridged
13 report, and in its factum and in the motion
14 materials.

15 However, my understanding is that
16 Canada still wants to qualify him as an expert on
17 the basis of the same tender, and to the extent
18 that they are going to be doing that -- well, our
19 first -- our position is that it is not necessary.
20 But if Your Honour should determine that he has to
21 be qualified as an expert for the abridged report,
22 we would propose something much more limited than
23 what is provided as this tender.

24 So I don't know if you want me to speak
25 to that now, what we would propose, or we leave

15:19:10 1 that to later.

15:19:12 2 But I just wanted to make note of it.

15:19:14 3 THE COURT: Well, I've read the record,
15:19:16 4 and it suggests to me that the understanding was
15:19:18 5 that the abridged report would in fact exclude all
15:19:23 6 opinion evidence, and I am sure that was done, as
15:19:27 7 no one has suggested otherwise. And if it doesn't
15:19:29 8 have any opinion evidence, he does not need to be
15:19:32 9 tendered at all.

15:19:33 10 MS. GUIRGUIS: Okay.

15:19:34 11 THE COURT: So I think you can set
15:19:35 12 aside the need to -- well, I'll make a note that if
15:19:39 13 it came down to that, you would say the tender was
15:19:41 14 too broad?

15:19:41 15 MS. GUIRGUIS: That's right.

15:19:42 16 THE COURT: But you can leave it at
15:19:44 17 that for the moment.

15:19:45 18 MS. GUIRGUIS: Okay. Thank you, Your
15:19:46 19 Honour. And then one last point just with respect
15:19:48 20 to clarifying, with regard to any opinion that this
15:19:53 21 witness has expressed regarding geology in the
15:19:56 22 expert report, we expect Canada is not going to
15:20:00 23 elicit any evidence from him, given that in the
15:20:03 24 report he says he is not an expert in geology and
15:20:06 25 that it is not included in any of the proposed

1 qualifications, but we just wanted to set that out.

2 THE COURT: All right. Anything else?

3 MS. GUIRGUIS: No, thank you.

4 THE COURT: All right. Mr. Beggs?

5 MR. BEGGS: Thank you, Your Honour.

6 To address the question of -- well, of

7 course, technically under the test of White

8 Burgess, bias falls under the category of a

9 properly-qualified witness, and so dealing with

10 that first, I would simply suggest that Dr. von

11 Gernet's evidence is not -- well, we start off with

12 the position that he has acknowledged his duty to

13 the Court. He has recognized what obligations he

14 has, and he has testified that he will follow them.

15 That is the minimum requirement that is

16 referred to in White Burgess at paragraph 47 and

17 48.

18 Having made that assertion, I believe

19 it is evident from the content of Dr. von Gernet's

20 report that he is very much aware of the dangers of

21 potential bias, of confirmation bias or any other

22 professionalism bias which might arise. He

23 addresses it specifically in his report well before

24 this motion became a possibility. But he certainly

25 recognizes that it is a realistic concern.

1 However, I don't believe that Dr. von
2 Gernet's evidence today in oral testimony was in
3 contradiction with his written report or his
4 previous written works, as my friend has suggested.

5 Where Dr. von Gernet has referred to
6 things such as fashionable nonsense or to a person
7 as a gadfly, these are to the extremes of
8 positions. They are not wholesale rejections of
9 oral tradition as a valuable piece of evidence. He
10 has repeatedly stated today and in his report that
11 it is one of the factors, one of the pieces of
12 evidence that will be considered by professionals
13 such as himself in evaluating and trying to
14 reconstruct past societies.

15 He has said that it is to be assessed
16 on a case-by-case basis. He has certainly
17 disavowed any suggestion that he a priori rejects
18 oral tradition evidence as having any utility.

19 So to read it as -- to read him as
20 having this one-sided view, as my friend says,
21 would require the Court to reject both his oral
22 evidence and his written evidence and assume that
23 he in fact is being dishonest about his beliefs
24 about oral history.

25 THE COURT: Well, I think White Burgess

15:24:19 1 says unwilling or unable.

15:24:32 2 MR. BEGGS: Yes.

15:24:32 3 THE COURT: So we don't have to get to
15:24:34 4 dishonesty, do we, to find someone is unwilling or
15:24:37 5 unable.

15:24:38 6 MR. BEGGS: No, no, and perhaps I
15:24:39 7 shouldn't have gone there, but to be unwilling or
15:24:42 8 unable, my point is simply that his evidence is
15:24:47 9 that he is not unwilling and unable, and his report
15:24:51 10 does not contain any references to suggest that he
15:24:54 11 isn't.

15:24:57 12 Where he rejects positions, he does so
15:25:00 13 at the extremes. Where he has said, for example,
15:25:04 14 with respect to the cautionary tale that it is a
15:25:08 15 warning that is not -- and I can't recall the exact
15:25:12 16 words, but there is no absolute guarantee, he is
15:25:18 17 not suggesting that there is a guarantee for any
15:25:20 18 type of evidence. He is simply saying that oral
15:25:23 19 tradition evidence should not be treated as
15:25:30 20 superior to other types of evidence in that the
15:25:32 21 sense it's being -- is not to be questioned.

15:25:34 22 He is open to oral tradition evidence
15:25:38 23 being used and, like all evidence, he believes that
15:25:43 24 it should be tested. That is not unique to oral
15:25:48 25 tradition evidence.

1 My friend has suggested that Dr. von
2 Gernet has adopted the role of an advocate and has
3 made the point that Dr. von Gernet has frequently
4 acted as a representative of -- or acted not as a
5 representative, but has been retained by government
6 agencies.

7 That in itself isn't sufficient to
8 disqualify one as an expert.

9 THE COURT: Ms. Gurguis did not say it
10 was.

11 MR. BEGGS: No, but it was used as one
12 of the points.

13 THE COURT: It was part of the
14 cross-examination, but I did not hear a submission
15 that because, as counted by counsel, the majority
16 of the retainers were for governments, that that
17 should render this in evidence inadmissible.

18 MR. BEGGS: I'm sorry, I believe that
19 was part of her submission.

20 THE COURT: Well, if it was, then you
21 have made your submission about it.

22 MR. BEGGS: Thank you.

23 With respect to the point that Dr. von
24 Gernet didn't include other examples from case law
25 in which his evidence has not been accepted or has

15:27:38 1 been disagreed with or even specifically rejected,
15:27:42 2 as he indicated in his cross-examination, he was
15:27:46 3 not attempting to provide an exhaustive list of his
15:27:50 4 acceptance or not by the Court. He was merely
15:27:52 5 describing the process by which he believed oral
15:27:57 6 tradition evidence should be addressed by the
15:28:00 7 Courts.

15:28:04 8 He differed with the characterization
15:28:07 9 that was given by the trial judges in Tsilhqot'in
15:28:12 10 and Mitchell, I believe, but as he indicated
15:28:17 11 himself, he was not attempting to hide it. Those
15:28:20 12 cases are clearly within his CV and anyone who
15:28:25 13 wanted to could easily look them up and find out.

15:28:30 14 As my friend suggested, it is not for
15:28:32 15 the expert to say, and I am sure we expect that the
15:28:37 16 Court would not feel bound by what other Courts
15:28:42 17 have done with respect to accepting him as a
15:28:44 18 witness on certain grounds.

15:28:47 19 THE COURT: Well, one of the arguments
15:28:48 20 made was that he was essentially adopting the role
15:28:50 21 of counsel because he was making submissions about
15:28:55 22 the law. What do you have to say about that?

15:28:58 23 MR. BEGGS: I would say that I don't
15:29:02 24 believe that was his intent in citing those
15:29:06 25 passages, but to the extent it appears to comment

1 on the law, it is a matter that the Court should
2 ignore as not being the role of any expert to
3 advise the Court on law.

4 I would like to leave the issue of bias
5 and move to the issue of necessity, and I should
6 say that to explain my position on necessity, I'll
7 explain the position on relevance, which is the
8 other part of the test of White Burgess.

9 My friend has -- or sorry, the
10 Plaintiffs have offered evidence of a geologist and
11 offered evidence of oral tradition which they said
12 in their opening that they plan to juxtapose to
13 demonstrate a deep-time presence in the area.

14 The oral tradition evidence itself does
15 not have a temporal component, and so it
16 necessitates being associated with the geological
17 evidence for it to have any significance.

18 Since that evidence has been offered to
19 the Court, I would submit that Dr. von Gernet's
20 evidence is equally relevant to understanding that
21 evidence.

22 THE COURT: Just give me a moment.

23 A lot of what was discussed in the
24 report and in the discussion around the report is
25 this gentleman's professional opinion about the

15:32:15 1 methodology that should be applied in considering
15:32:21 2 the three categories of evidence, the documentary
15:32:25 3 record, the archaeological evidence and the oral
15:32:28 4 history and traditions, that the methodology was
15:32:33 5 the focus.

15:32:33 6 Is that a fair characterization by me?

15:32:38 7 MR. BEGGS: Yes, it is, Your Honour.

15:32:39 8 THE COURT: Okay. So if it is the
15:32:41 9 methodology, I just want to understand how far you
15:32:50 10 submit the witness should be permitted to go with
15:32:56 11 respect to, say, the treatment of Professor
15:33:08 12 McCarthy's evidence. In other words, are you
15:33:10 13 saying that he can describe the methodology from an
15:33:12 14 archaeological standpoint that should be applied,
15:33:14 15 or are you saying that he can then apply his
15:33:16 16 methodology to whatever conclusion that he
15:33:19 17 suggests?

15:33:22 18 MR. BEGGS: Well, I am saying that the
15:33:43 19 methodology --

15:33:44 20 THE COURT: Part of the reason for my
15:33:45 21 question is that I am just trying to understand the
15:33:47 22 difference between the parties in this area,
15:33:48 23 because it was made clear at the outset of this
15:33:51 24 trial that the Plaintiffs themselves intend to --
15:33:56 25 and they, I suppose, can change their mind, but at

1 the outset of the trial, they intended to use the
2 oral history and traditions evidence and the
3 geological evidence to do something along the lines
4 of what one might expect this witness might agree
5 with, which is to use archaeological or, in this
6 case, geological history in considering what weight
7 to give to the oral history and traditions.

8 Now, I am sure I am oversimplifying all
9 of that, but as I understood it from Mr. Townshend
10 in his opening, he intended to do it in argument as
11 opposed to calling an expert witness to draw
12 conclusions from the record.

13 So I need to understand from you why it
14 is you say that the expert evidence is necessary.

15 MR. BEGGS: Certainly.

16 THE COURT: Rather than you all just
17 doing what Mr. Townshend plans on doing, which is
18 standing up at the end of the trial and saying
19 whatever you have to say about all this evidence.

20 MR. BEGGS: Right. Well, that is my
21 understanding of what the Plaintiffs are doing,
22 that they will be making a legal argument -- making
23 in argument the connection between the geological
24 evidence and that of the oral tradition witness,
25 although Ms. Keeshig did make that connection

15:35:26 1 herself in her own evidence.

15:35:28 2 But what I believe Dr. von Gernet's
15:35:33 3 evidence is necessary to do is to provide the data
15:35:41 4 set necessary for the Court to make that
15:35:45 5 conclusion.

15:35:48 6 THE COURT: You don't mean data set
15:35:50 7 really, do you?

15:35:51 8 MR. BEGGS: Well, the raw material, the
15:35:54 9 information, the stories that have been gathered,
15:35:56 10 the various oral tradition evidence, for example,
15:35:59 11 that is evidence which was not presented by the
15:36:04 12 Plaintiffs.

15:36:04 13 THE COURT: You don't have to worry
15:36:05 14 about the short report.

15:36:07 15 MR. BEGGS: Right.

15:36:07 16 THE COURT: It is not disputed that
15:36:10 17 that can be put forward.

15:36:14 18 MR. BEGGS: Right.

15:36:15 19 THE COURT: So in addition to providing
15:36:16 20 some evidence of stories themselves, which is not
15:36:22 21 disputed, I expected that the argument would be
15:36:27 22 about the methodology because that is what I have
15:36:29 23 been hearing about, that there is a professional
15:36:33 24 expertise around what methodology should be used.
15:36:39 25 Am I missing something?

15:36:41 1 MR. BEGGS: No, that is correct.

15:36:42 2 THE COURT: All right. And how far
15:36:44 3 does that go?

15:36:45 4 MR. BEGGS: It does not go so far as to
15:36:47 5 tell the Court what the correct decision is, what
15:36:54 6 the inevitable result, if you will, will be.

15:36:58 7 It is merely to offer his expert
15:37:01 8 opinion as having looked at the various material in
15:37:07 9 the short report, and offering his expert opinion
15:37:11 10 based on the methodology that he has applied that
15:37:16 11 certain probabilities are more likely than others.

15:37:19 12 I could contrast that, for example, to
15:37:22 13 the case of R. v. J-LJ, if I am getting those
15:37:30 14 initials right, which is in my friend's materials,
15:37:33 15 where the doctor, Dr. Beltrami, essentially offered
15:37:37 16 or declared to the Court that his tests
15:37:40 17 demonstrated that the accused could not commit the
15:37:43 18 crime, and Dr. Beltrami also refused to provide the
15:37:49 19 underlying data.

15:37:50 20 Here we have all of the work done as
15:37:53 21 set out step by step by Dr. von Gernet in his
15:37:57 22 materials offering several different scenarios
15:38:01 23 which are possibilities, and then his expressed
15:38:05 24 opinion as to which possibilities are more likely
15:38:07 25 than others.

15:38:08 1 As he indicated today and is apparent
15:38:12 2 from his report, he does not dismiss outright the
15:38:14 3 possibility that the Plaintiffs are correct, that
15:38:17 4 the Plaintiffs can connect the oral tradition
15:38:23 5 evidence with the geological evidence in the manner
15:38:25 6 in which they seem to do.

15:38:27 7 It is his opinion that that is not the
15:38:30 8 most likely scenario given the other possibilities
15:38:34 9 which he has explored in his report, and that is
15:38:39 10 what he has to offer here.

15:38:40 11 Obviously, the Court, as my friend has
15:38:43 12 said, can weigh possibilities, can weigh evidence,
15:38:49 13 can do these things. However, this is a very novel
15:38:52 14 situation of looking at the question of oral
15:38:58 15 tradition evidence and whether it can survive
15:39:01 16 essentially unchanged for 10,000 years. Dr. von
15:39:07 17 Gernet's report says it is possible. He won't
15:39:13 18 dismiss it outright. But he does explore what is
15:39:16 19 the more likely scenarios.

15:39:18 20 And that, of course, is how it falls
15:39:21 21 into Occam's Razor, which my friend referred to.
15:39:26 22 The application of that kind of principle is indeed
15:39:28 23 with the Court. It is not for Dr. von Gernet to
15:39:30 24 say. Well, he can express his opinion as to what
15:39:34 25 is the simplest explanation, but that is ultimately

15:39:36 1 for the Court to decide.

15:39:39 2 THE COURT: Anything else?

15:39:41 3 MR. BEGGS: No, Your Honour, I think
15:39:45 4 that is everything.

15:39:46 5 THE COURT: All right. Ms. Gurguis,
15:39:47 6 reply?

15:39:48 7 MS. GUIRGUIS: No, Your Honour.

15:39:52 8 THE COURT: Well, it had originally
15:39:55 9 been my plan to have you all wait and render a
15:40:00 10 decision, because I really want this issue to be
15:40:02 11 moving forward, but I am not going to do that to
15:40:07 12 you at quarter -- 20 to 4:00 before the long
15:40:10 13 weekend, unless you all agree collectively that you
15:40:13 14 would like me to.

15:40:14 15 I don't see anybody running to that,
15:40:18 16 and that includes my Court staff.

15:40:20 17 So instead of that, we will deal with
15:40:23 18 it on the Monday of our return. That witness is
15:40:26 19 scheduled for half a day, so there should be lots
15:40:30 20 of time, and then this issue can begin to move
15:40:34 21 forward, which I think is what everybody would like
15:40:36 22 to see.

15:40:36 23 So I want to wish all of you a
15:40:39 24 wonderful Thanksgiving. We have lots to give
15:40:41 25 thanks for this in country. Yes, sir?

15:40:44 1 MR. OGDEN: Your Honour, may I note for
15:40:46 2 the record Ontario's position that --

15:40:49 3 THE COURT: I'm sorry, of course. I
15:40:51 4 had been told previously by you or someone that you
15:40:54 5 supported the position of Canada, without making
15:40:58 6 additional submissions. Is that still correct?

15:41:00 7 MR. OGDEN: Yes, Your Honour.

15:41:01 8 THE COURT: Thank you, sir.

15:41:03 9 MR. OGDEN: Thank you.

15:41:03 10 THE COURT: All right. To go back to
15:41:05 11 my happy Thanksgiving message, we'll adjourn until
15:41:07 12 a week from Monday.

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14 -- Adjourned at 3:41 p.m.

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REPORTER'S CERTIFICATE

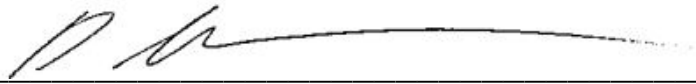
I, DEANA SANTEDICOLA, RPR, CRR,
CSR, Certified Shorthand Reporter, certify:

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

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

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

Dated this 21st day of October, 2019.



NEESONS, A VERITEXT COMPANY

PER: DEANA SANTEDICOLA, RPR, CRR, CSR

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