ROUGH DRAFT - NOT CERTIFIED - NOTE PURPOSES ONLY

Court File No. 94-CQ-50872CM

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

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

Plaintiffs

- and -

THE ATTORNEY GENERAL OF CANADA, HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, THE CORPORATION OF THE COUNTY OF GREY, THE CORPORATION OF THE COUNTY OF BRUCE, THE CORPORATION OF THE MUNICIPALITY OF NORTHERN BRUCE PENINSULA, THE CORPORATION OF THE TOWN OF SOUTH BRUCE PENINSULA, THE CORPORATION OF THE TOWN OF SAUGEEN SHORES, and THE CORPORATION OF THE TOWNSHIP OF GEORGIAN BLUFFS

Defendants

Court File No. 03-CV-261134CM1

A N D B E T W E E N:

CHIPPEWAS OF NAWASH UNCEDED FIRST NATION and SAUGEEN FIRST NATION

Plaintiffs

- and -

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

Defendants

--- This is the ROUGH DRAFT transcript of VOLUME 98 / DAY 98 of the trial proceedings in the above-noted matter, being held via Zoom virtual platform, on the 19th day of October, 2020.

B E F O R E:

The Honourable Justice Wendy M. Matheson

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

H.W. Roger Townshend, Esq.,	for the Plaintiffs,
& Benjamin Brookwell, Esq.,	The Chippewas of
& Renee Pelletier, Esq.,	Saugeen First
& cathy Giurguis, Esq.,	Nation, and the
& Jaclyn McNamara,, Esq.,	Chippewas of Nawash
& Krista Nerland, Esq.,	First Nation.
Michael Beggs, Esq.,	for the Defendant,
& Michael McCulloch, Esq.,	Attorney General
& Barry Ennis, Esq.,	of Canada.
& Alexandra Colizza, Esq.	
David Feliciant, Esq.,	for the Defendant,
& Richard Ogden, Esq.,	Her Majesty the
& Julia McRandall, Esq.,	Queen in Right of
& Jennifer Lepan, Esq,	Ontario.
& Peter Lemmond, Esq.	
Jill Dougherty, Esq.,	for the Corporation
Deborah McKenna, Esq.	of the Township of
	Georgian Bluffs

A P P E A R A N C E S: (continued)

Greg Stewart, Esq. for the Corporation of the Municipality of Northern Bruce Peninsula, the Corporation of the Town of South Bruce Peninsula, and the Corporation of the Town of Saugeen Shores.

Tammy Grove-McClemont, Esq., for the County of Bruce.

ALSO PRESENT:

Mr. Shaule, Ms. Prokos, Kelly Matharu, Keshika Ramlochun, Monica Singh

REPORTED BY: Helen Martineau, CSR.

I N D E X

PAGE

--- Upon commencing at 10:00 a.m.

MS. ROBERTS: Good morning, everyone.

10:00:55 This is a virtual hearing using Zoom.
10:00:57 Today is Monday, October 19th, 2020, resuming
10:01:03 for closing arguments in the trial of two
10:01:05 actions. The first is the Chippewas of Saugeen
10:01:08 First Nations et al. and the Attorney General of
10:01:10 Canada et al. And the second is the Chippewas
10:01:13 of Nawash Unceded First Nation et al. and the
10:01:14 Attorney General of Canada et al., day 98.
10:01:17 The last day of hearing was on
10:01:20 April 29th, 2020, which was also a virtual
10:01:23 hearing. The file numbers of these proceedings
10:01:25 are 03-CV-261134CM1 and 94-CQ-50872CM. Justice
10:01:42 Matheson presiding.
10:01:44 If a technical problem is encountered
10:01:47 during the proceeding and a connection is
10:01:48 disconnected, counsel will receive instructions
10:01:50 by email and the hearing will resume once the
10:01:53 matter is resolved.
10:01:56 The wide streaming of this proceeding
10:01:57 is made available on YouTube for public
10:02:00 access. The links for each day are available
10:02:03 through the court and from Arbitration Place on
10:02:05 its website at arbitrationplace.com/broadcast

links.

I'll now turn it over to Justice Matheson.

THE COURT: Thank you, Ms. Roberts.

Good morning, I am Justice Matheson. I'm going to ask each lead counsel to the parties to indicate who is present in their group, beginning with Mr. Townshend for the plaintiffs.

MR. TOWNSHEND: Morning, Your Honour. With me today who will be speaking are Ms. Pelletier and Ms. Guirguis. And also on the call are Ms. McNamara, Mr. Brookwell, and Ms. Nerland and also our documents staff, Mr. Shaule and Ms. Prokos.

THE COURT: Thank you. Mr. Beggs for Canada?

MR. BEGGS: Morning, Your Honour. Speaking on behalf of Canada will be myself, Michael Beggs, and Michael McCulloch. Also appearing on behalf of Canada is Barry Ennis and Alexandra Colizza. And once Canada's submissions begin, our documents clerks will be joining us, Kelly Matharu and Keshika Ramlochun.

THE COURT: Thank you. Mr. Feliciant

10:03:25 for Ontario.

10:03:28 **MR. FELICIANT:** Thank you, Your Honour. Today present is myself, David Feliciant, Richard Ogden, Peter Lemmond, Julia McRandall and Jennifer Lepan, as well as our law clerk, Monica Singh.

10:03:45 **THE COURT:** Thank you. And I believe we have Ms. Dougherty and Ms. McKenna for the Corporation of the Township of Georgian Bluffs. Is that the case, Ms. Dougherty? I think Ms. Dougherty does not have her microphone on. That's all right.

10:04:08 **MS. DOUGHERTY:** Sorry. Good morning, Your Honour. I'm here on behalf of the Township of Georgian Bluffs, along with my colleague Deborah McKenna. And also with me are counsel for the Corporation of the Municipality of Northern Bruce Peninsula, corporation of the Town of South Bruce Peninsula, and the Corporation of the Town of Saugeen Shores, Mr. Greg Stewart. And Ms. Tammy Grove McClemont is here on behalf of the County of Bruce.

10:04:55 **THE COURT:** Thank you, Ms. Dougherty. No one has been appearing in this trial for the County of Grey which settled with the

10:04:55 plaintiffs.

10:04:55 As has been the case throughout this

10:04:56 trial, all counsel in each group are not

10:04:59 required to attend throughout the hearing

10:05:01 provided that those needed for submissions are

10:05:06 present. This is day 98 of the Court hearing

10:05:09 days in this trial and these remaining days are

10:05:12 being conducted virtually on consent.

10:05:15 The evidence stage of this trial was

10:05:17 completed in April 2020 and closing submissions

10:05:21 were delayed due to the COVID-19 pandemic.

10:05:25 As you have heard, the host of this

10:05:28 Zoom hearing is Ms. Roberts of Arbitration

10:05:30 Place.

10:05:31 She is hosting the hearing under my

10:05:33 direction.

10:05:35 Public access to this virtual hearing

10:05:39 is being enhanced through the use of a YouTube

10:05:42 channel. As Ms. Roberts mentioned, links for

10:05:44 this channel are available from the Court and

10:05:47 are posted on the website for Arbitration Place.

10:05:51 Anyone can watch all or part of the hearing in

10:05:53 that way.

10:05:54 As with any trial, this hearing is

10:05:56 being recorded by the Court. No one else is

permitted to photograph or record or take a screen shot of this hearing without my permission as required under section 136 of the Courts of Justice Act. No permission has been sought and none has been granted.

Today the parties commence their oral closing arguments in that trial. Written crossing submissions have already been submitted to the Court totaling over 2,000 pages of submissions.

The oral closing arguments are not intended to repeat those lengthy materials. If anyone wishes to make a request for a party's written submissions, they may contact counsel for that party directly.

Given the pandemic, consent arrangements have been made to keep track of certain steps in the final stages of this trial. In that regard charts have been prepared and maintained listing any Exhibit-related steps taken since the last in-courthouse day.

As set out in more detail in those charts, there have been additional Exhibits marked on consent, corrections to Exhibits and other steps taken that I have directed be

10:07:11 included in the charts so that they form part of
10:07:14 the trial record.
10:07:17 Exhibits G4 and I4 are charts
10:07:21 previously marked in June and July of this year.
10:07:25 Another chart, which is as of last Friday, shall
10:07:29 be Exhibit M5.
10:07:31 You may notice that I am not always
10:07:34 looking directly at the screen. Like an
10:07:36 in-court trial, I will be taking notes and doing
10:07:39 documents while the trial progresses.
10:07:43 Mr. Townshend, please proceed.
10:07:51 **MR. TOWNSHEND:** Thank you, Your
10:07:52 Honour.
10:07:52 We began this hearing with a
10:07:54 territorial acknowledgment and I'd like to end
10:07:57 it with that way. So I'd want to acknowledge
10:08:00 the Treaties and traditional territory of the
10:08:03 Mississaugas of the Credit First Nation.
10:08:05 I will be speaking first followed by
10:08:09 Ms. Pelletier and Ms. Guirguis. And my
10:08:13 presentation will be a capsule overview of the
10:08:18 case, the entire case.
10:08:23 Then I'll talk about some preliminary
10:08:25 points about evidence. Then I'll talk about
10:08:27 identity and Anishinaabe land custom,

territorial control, and something about Navigable Waters Law and a little bit at the end about Crown immunity.

So the first substantive question I asked of my first witness was to tell the Creation Story. So why did I do that? I started there because that's where my clients start.

There have been times I've asked a question that I thought was about political procedure and the answer started with the Creation Story. And that was actually illustrated in court.

On the third day of trial, I asked Karl Keeshig to talk about the role of the Band in Anishinaabe social organization and he gave a lengthy answer to that that referred to the Creation Story.

And again, when I asked questions about access to land and resources, I got an answer rooted in the Creation Story.

The Creation Story was also referred to in their testimony by Randall Kahgee and by Doran Ritchie.

This case, there are two cases of

10:09:56 course, Aboriginal Title and Treaty 72, both of
10:10:02 those cases, but especially the Aboriginal Title
10:10:04 side is about territory, and SON's relationship
10:10:10 to its territory. The lands and waters
10:10:14 stretching from Goderich to Collingwood.
10:10:17 The fact that they root their
10:10:19 understanding of this in their Creation Story is
10:10:22 a glimmer of how differently their perspective
10:10:26 is from the European intellectual tradition.
10:10:30 And the importance of taking account
10:10:32 of that different perspective has been
10:10:34 recognized by the Court. And that's outlined in
10:10:38 our closing submissions at paragraphs 54 to 57.
10:10:44 I just want to highlight one thing in
10:10:46 there that Justice Smith in the Platinex case
10:10:52 noted the relationship that Aboriginal peoples
10:10:56 have with the land cannot be understated. The
10:10:59 land is the very essence of their being. It is
10:11:04 their very heart and soul. And he went on to
10:11:06 say that this is a perspective that is foreign
10:11:08 to and difficult to understand from a
10:11:11 non-Aboriginal viewpoint.
10:11:15 I will talk in a few moments about
10:11:17 what the courts have said about from an
10:11:21 Indigenous perspective is to be incorporated

10:11:23 into the evidence and the analysis.

10:11:26 The Indigenous perspective is the

10:11:29 starting point but it's not the stopping point.

10:11:31 In addition to traditional knowledge evidence,

10:11:35 we have evidence in this trial spanning 9,000

10:11:38 years, from ethnology, ethnohistory,

10:11:42 linguistics, archeology, history, and geology.

10:11:50 Ms. Pelletier or I will be saying more about the

10:11:51 content of these types of evidence.

10:11:53 The point I am making now is that all

10:11:58 of these disciplines have different lenses for

10:12:01 looking at the world. All should be considered

10:12:04 and weighed together and brought to bear on the

10:12:07 key point we need to prove to show Aboriginal

10:12:10 title. And that is exclusive occupation at the

10:12:13 time of the assertion of British sovereignty,

10:12:17 which in this trial everyone agrees is to be

10:12:20 taken as 1763.

10:12:26 So the Canadian law test for

10:12:28 Aboriginal title is focused on 1763. But

10:12:32 evidence 250 years old doesn't come neatly

10:12:37 packaged so as to isolate a single point in

10:12:39 time.

10:12:40 There is no evidence about this

10:12:42 particular territory that can be dated precisely

10:12:45 to the year 1763. So we have to look earlier
10:12:49 and later and we have to look at traditional
10:12:53 knowledge, oral history, the archeological
10:12:56 record, documents and insights we can get from
10:12:59 all the various expert disciplines that are
10:13:02 before this Court. That is what the Aboriginal
10:13:06 title case is about.

10:13:09 The Treaty case, which Ms. Guirguis
10:13:13 will be dealing with, I just want to start with
10:13:17 a very brief capsule overview. And if we could
10:13:22 start -- have appendix -- the map at appendix D
10:13:26 tab 1 shared on the screen?

10:13:28 The key history in the Treaty case
10:13:35 starts at about -- it's the other map, sorry.
10:13:40 Thank you.

10:13:40 The key history starts in about 1830.
10:13:47 Your Honour has seen this map many times in this
10:13:47 proceeding, and there is one thing that's
10:13:55 different about it now. You can see in the
10:13:57 southeastern part of Georgian Bay there's a
10:14:01 black line. SON is slightly reducing the area
10:14:05 over which we seek a declaration of Aboriginal
10:14:09 title. That's explained in our written argument
10:14:13 at paragraph 409, and I can return to that when
10:14:24 I talk about boundaries. For now I want to talk

about the period in the 1830's and the 1850's.

So in 1836, my clients, we say, were occupying their territory which is the entire light portion of that map.

Settlers were starting to move into the southern part of their territory and in 1836, the Crown came to them and said, settlers are moving into your territory, we can't stop them. We want you to move all up to Manitoulin.

My clients, SON, rejected that idea and they told later their missionary that they had at that point considered going to war as an alternative, even though they realized they would almost certainly be destroyed if they did that, but to them that was preferable to leaving their territory.

So after that, the Crown negotiator, Francis Bond Head, gave an alternative proposal to say, all right, stay north of Owen Sound. So that would be in the white coloured -- the yellow coloured territory on the map.

Stay on the peninsula, we'll protect that peninsula for you and we'll open the rest of your territory to the south for settlers. And to that SON agreed, rather reluctantly and

10:16:00 with tears in their eyes, as one of their
10:16:03 missionaries recalled.
10:16:08 In return for that, they got a promise
10:16:11 from the Crown to protect their territory
10:16:15 forever from the encroachments of the whites.
10:16:18 We say that creates a fiduciary duty.
10:16:25 Well, forever turned out to be 18
10:16:30 years and the Crown again came back in 1854 and
10:16:33 said, settlers are starting to move into your --
10:16:38 now onto the peninsula. We can't stop them. So
10:16:44 what we want you to do is let the peninsula go
10:16:47 and we'll save for you some small Reserves,
10:16:50 which are marked on that map in various colours,
10:16:53 and they agreed to that very reluctantly.
10:17:01 The Crown negotiator said that he
10:17:05 considered his job was to wring from them their
10:17:09 assent however reluctant. So they agreed to
10:17:14 that at one o'clock in the morning on
10:17:16 October 14th.
10:17:20 Later that day, still on October 14,
10:17:24 the Crown negotiator, Lawrence Oliphant, wrote
10:17:31 to the sheriff and said, we now have a surrender
10:17:36 of the peninsula. Keep squatters off.
10:17:39 Now, there's lots of other evidence
10:17:41 about whether or how the Crown could have

protected SON's lands, the peninsula, in the period 1836 to 1854 and onward and Ms. Guirguis will be talking about that. That's a key issue on which the Treaty 72 case turns.

My point now is that what Oliphant did on October 14, 1854, most clearly belies what he had been telling to SON the very previous day. And we say this is a breach of fiduciary duty and we ask for such a declaration.

This case, and this is Phase 1 of an action which may be longer, comes down to very few questions.

On the title side, we have to ask, did SON exclusively occupy their territory at the time of the assertion of British sovereignty and we say the answer should be yes.

Secondly, has anything happened since then to change that? We say no. Nor has that been in dispute, except that I note in their closing argument, Ontario, despite not having pleaded so, now says the International Boundary Water Treaty Act extinguished Aboriginal title.

I can touch on that later.

The third question about title is is there a conceptual barrier in law to there being

10:19:24 Aboriginal title to the beds of navigable waters
10:19:28 and we say no.
10:19:33 On the treaty side, there are four
10:19:35 questions we're asking the Court to answer. Did
10:19:38 the Crown have a fiduciary duty to protect the
10:19:41 peninsula for SON starting in 1836? We say,
10:19:46 yes.
10:19:47 Second, was the Crown capable of
10:19:49 protecting the peninsula in the
10:19:51 mid-19th century? We say, yes.
10:19:55 Third, did what the Crown do in 1854
10:20:00 breach that duty? We say, yes.
10:20:04 Fourthly, has anything happened since
10:20:07 then that bars the Court from so declaring? We
10:20:13 say, no.
10:20:14 And fifthly, did whatever harvesting
10:20:17 rights SON had in 1854 continue after Treaty 72?
10:20:26 We say, yes, they did continue. Although the
10:20:29 exercise of those rights has been affected as
10:20:32 lands become settled, and Ms. Guirguis will talk
10:20:34 more about that.
10:20:35 These are what we say this case is
10:20:41 about. So having given an overview -- we can
10:20:45 take the map down now, thank you.
10:20:47 Having given an overview of what we

10:20:50 say matters in this case, I want to turn to what
10:20:54 we say does not matter and why. And we have a
10:20:58 chapter on that, chapter 1 in our argument.
10:21:03 There are a number of things in that
10:21:08 chapter. I just want to highlight one of them
10:21:12 which is about equity and fiduciary law which
10:21:18 relates to the Treaty case.
10:21:19 It took me a long time to realize how
10:21:22 different equity was from common law. It's
10:21:25 really a different mode of legal reasoning,
10:21:28 quite unlike common law. And that's why we have
10:21:30 a section on that at the beginning of chapter 41
10:21:34 of our submissions.
10:21:37 Now, why is that important? We say
10:21:40 that some of the defendants' arguments are
10:21:43 inconsistent with equitable reasoning, although
10:21:45 they're using these principles, but they're
10:21:48 using them in a way that we say is more the way
10:21:52 one would use a common law doctrine.
10:21:56 And I set out some of the relevant key
10:21:58 differences in argument at page -- at paragraph
10:22:02 48. Some of those focusing on the -- the focus
10:22:09 in this case must be on the actions of the
10:22:10 Crown. What SON did or did not do or might have
10:22:17 done does not affect the analysis of whether

there was a breach of fiduciary duty.

Nor does it matter whether there was harm caused by the breach or even any harm at all, although that could affect compensation when we get to Phase 2. But a breach of fiduciary duty is a breach. And all that this Court needs to look at to determine that is the actions of the Crown.

I want to say a bit about evidence law now. We have that in chapter 2 of our argument and we also have some additional material on that in chapter 3 of our reply argument.

We set out how the courts have directed evidence be treated in Indigenous rights cases. Specifically oral history is to be placed on an equal footing with historical documents.

Now, the defendants are arguing that there a high threshold of whether something is or is not oral history in order to qualify for this kind of consideration. We say that is not the law. Oral history is to be given equal and due treatment compared to other evidence.

Reference for that is the Mitchell and -- many references for that. One is

Mitchell and MNR, paragraph 39 is perhaps the clearest of that, that equal and due does not mean preferential treatment. There is a spectrum on reliability that applies to oral history as well as to documents.

And as Mitchell says, that spectrum ranges from the highly compelling to the highly dubious. That's true of oral history. It's also true of written documents.

That we say is where some of the aspects that the defendants point to about the indicators of reliability in the evidence need to be factored in, just as they would be for any other kind of evidence. Not by putting a threshold at the beginning and saying something is not oral history because it lacks a formal transmission procedure.

If a witness says, my grandfather told me whatever, we say that's oral history. The question -- there's a question left of what weight is to be given? How reliable is it? Those are all good questions and need to be addressed. But in the context of the spectrum of reliability, not as an initial threshold is this or is this not oral history?

10:25:20 I now want to move to identity and
10:25:22 continuity, which is at chapter 4 in our written
10:25:26 argument. SON says they have been in their
10:25:33 territory forever. The defendants say they have
10:25:37 been there from the 19th century. That's a big
10:25:41 gap.
10:25:43 We say that's because the defendants
10:25:46 confuse continuity of a group with continuity of
10:25:51 the names by which a group is known. So, that
10:25:58 places SON's identity in issue and they have to
10:26:06 establish it. Their prime identity, and I think
10:26:08 there's agreement on this, is they are
10:26:10 Anishinaabe people. They have secondary
10:26:12 identities, one of which is their dodem or
10:26:15 inherited clan, which is passed down from father
10:26:18 to child. And then other secondary identity of
10:26:23 what local group they belong to.
10:26:27 The confusion comes in when people
10:26:29 outside the group call the group by different
10:26:32 names. They might refer to them by a dodem
10:26:36 name, they might refer to a location, they might
10:26:40 refer to a physical characteristic, as Champlain
10:26:44 did when he met Anishinaabe warriors at the
10:26:48 mouth of the French River in 1615 and called
10:26:51 them Cheveux Relevées or high hairs. There are

10:26:58 different ways. Especially the early Europeans,
10:27:02 they called all kinds of different -- they used
10:27:05 all kinds of different names to refer to
10:27:07 Indigenous people.
10:27:11 So also the terms Ojibwe, Odawa and
10:27:19 Potawotami, which are all Anishinaabe people,
10:27:21 are 19th century political configurations. And
10:27:24 the evidence from the ethnologists is
10:27:28 ethnologists recall have been that those
10:27:32 configurations have little meaning to the
10:27:35 Anishinaabe people.
10:27:37 Now, I'm not trying to say that in the
10:27:39 19th century Anishinaabe people couldn't
10:27:43 identify who was Potawotami and who wasn't.
10:27:48 There was a linguistic separation. They had
10:27:52 either a very distinct dialect or a
10:27:54 closely-related language from Ojibwe and Odawa,
10:27:59 but they were still considered the same people.
10:28:03 And that -- we have that set out at paragraph
10:28:06 107 of our argument.
10:28:09 Now, the Ojibwe-Odawa distinction is
10:28:15 far more vague. Ontario's witness, Dr. Reimer,
10:28:18 had sharply distinguished them in her report.
10:28:22 But she admitted on cross-examination that there
10:28:25 is confusion and uncertainty among scholars

10:28:29 about how to distinguish these and that some
10:28:33 groups called Odawa in the 17th century may well
10:28:36 be called Ojibwe now. That's at our argument
10:28:42 paragraphs 116 and 117.
10:28:45 So why is the 17th century important?
10:28:49 The test for title is at the mid-18th century.
10:28:54 It's important because of the Haudenosaunee
10:28:57 wars.
10:28:57 The Haudenosaunee had swept, in the
10:29:02 late 17th century from their homelands south of
10:29:05 Lake Ontario in 1648, up into what is now
10:29:12 Ontario and they were pushed back after about 20
10:29:15 years. And they were completely pushed out of
10:29:19 what is now Ontario by the Anishinaabe by 1701
10:29:24 at the latest.
10:29:26 And there's a gap in the written
10:29:28 records. There were Europeans, mostly French
10:29:34 Jesuits, in Georgian Bay in the early 17th
10:29:37 century. They all left during the Haudenosaunee
10:29:42 wars and it was a long while before Europeans
10:29:45 got back into that area.
10:29:48 So to understand where things were in
10:29:50 the 1763, we have to look back. And we say SON
10:29:57 is continuous with an early 17th century Odawa
10:30:03 group, despite now being identified in English

10:30:06 as Ojibwe.

10:30:08 Why do I say that? There are reasons

10:30:11 from archeology, from linguistics, and from

10:30:15 traditional knowledge blended with ethnology.

10:30:21 Firstly, let me talk about archeology.

10:30:28 There's evidence of the same ritual sites being

10:30:31 used for the same rituals over centuries, which

10:30:36 we say shows knowledge of the site passed down

10:30:40 over generations. And this is in our argument

10:30:44 starting at paragraph 448.

10:30:50 Some of those key sites were in

10:30:52 Nochemowaning and the River Mouth Speaks site.

10:30:59 And both of those, when the Court went on a view

10:31:01 of the territory, we stopped at both of those

10:31:04 sites.

10:31:10 So Dr. Williamson noted there was

10:31:12 evidence of ritual use in the exact same spot,

10:31:15 in the exact same manner before and after the

10:31:20 late 17th century conflict with Haudenosaunee.

10:31:22 And Dr. Williamson gave the opinion that it

10:31:25 would be utterly unlikely for it to be a

10:31:31 different group since these kinds of places and

10:31:32 their use is communicated through family lines.

10:31:39 And reference to that evidence is

10:31:40 September 17th-transcript, page 5342.

10:31:49 And we talk about the second reason
10:31:55 that we talk about for continuity and that's
10:31:57 linguistics.
10:31:59 So why did we call this linguistic
10:32:04 evidence? There were three reasons. They were
10:32:07 all about continuity.
10:32:08 Firstly, there's evidence that the
10:32:11 dialect Anishinaabemowin spoken at SON is a mix
10:32:17 of Odawa and eastern Ojibwe. And it's closest,
10:32:23 among dialects in the region, it's closest to
10:32:28 the dialect at Manitoulin, which is a core Odawa
10:32:33 dialect. Core Odawa people there. This is in
10:32:35 our argument at paragraph 199. And we say that
10:32:38 that alone shows continuity with the 17th
10:32:42 century Odawa.
10:32:50 Professor Valentine, our linguist,
10:32:52 went further and he compared the dialects of
10:32:56 surrounding Anishinaabe communities and
10:32:58 identified grammatical and vocabulary
10:33:03 differences.
10:33:03 And he gave evidence of that
10:33:05 linguistics has ways of measuring changes in
10:33:13 dialects, and grammar changes more slowly than
10:33:16 vocabulary and so forth. And he found that
10:33:19 looking at those differences in dialects led him

10:33:23 to conclude that there had been a long-term
10:33:27 geographical stability of those communities over
10:33:30 centuries. And that starts at paragraph 200 of
10:33:35 our argument.
10:33:38 The third point about linguistics is
10:33:41 that there's no trace of Potawotami in the
10:33:45 language. And we know that some Potawotami
10:33:51 joined these communities in the 19th century,
10:33:53 but the linguistic absence of Potawotami dialect
10:33:58 shows, we say, that they had assimilated to the
10:34:03 Ojibwa-Odawa community and become part of it.
10:34:10 Now, the third thing about continuity
10:34:12 across the 17th century is traditional knowledge
10:34:17 and ethnology.
10:34:18 Vernon Roote testified it had been
10:34:28 passed on to him by his grandfather. That the
10:34:32 Huron people had requested help from them when
10:34:35 they were being attacked by the Haudenosaunee,
10:34:37 which happened, of course, in the
10:34:38 mid-17th century. And this is set out at
10:34:43 paragraph 474 of our argument.
10:34:48 So we have here a cultural memory of a
10:34:52 mid-17th century event preserved in oral history
10:34:57 and considered by them to be about their
10:35:00 community. I suggest one can infer from this

10:35:04 that the memory has been passed down from the
10:35:07 17th century in their community.
10:35:14 The second bit about traditional
10:35:18 knowledge is a biography of Vernon Johnson which
10:35:24 had been written by Professor Rosamund
10:35:25 Vanderburgh. And Dr. Reimer had referred to
10:35:31 that book, and I put to her a portion of it that
10:35:36 shows the group at Owen Sound, which Vernon's
10:35:43 Potawotami ancestors joined, was led by
10:35:46 Wahbahdik and it was an Odawa group. And
10:35:52 Wahbahdik, of course, was one of the signatories
10:35:55 in Treaty 72 in 1854. Another source of
10:35:59 continuity.
10:36:04 The third point on continuity of
10:36:06 traditional knowledge are dodem -- are dodem
10:36:09 identifications. And some of the dodems that
10:36:13 were recorded in or near the SON territory in
10:36:23 the early 17th century are still there in these
10:36:25 communities, specifically the Otter and the Bear
10:36:28 Clans. And that's at our argument paragraphs 97
10:36:34 to 98.
10:36:40 And then turn to some of the
10:36:43 ethnological evidence about returning after the
10:36:52 Haudenosaunee conflicts, which did displace, at
10:36:55 least temporarily, or at least partly and

10:37:00 temporarily, the Anishinaabe.

10:37:08 Professor Driben testified they would
10:37:10 return to the same place after the Haudenosaunee
10:37:12 wars, partly because they were familiar with the
10:37:14 resources and they would know how to use them.
10:37:18 And also because if they went somewhere else,
10:37:20 that would create conflict with the people who
10:37:23 were there. That's set out in our argument at
10:37:28 paragraph 485.

10:37:29 And then another aspect of the
10:37:34 ethnology are burial customs. And these are set
10:37:40 out in paragraph 234 and following of our
10:37:45 argument.

10:37:45 Now, this took me a long time to
10:37:51 grasp. All cultures treat graves with respect,
10:37:53 but it seemed to me that the Anishinaabe had a
10:37:58 whole different level of reverence for graves
10:38:00 and I wondered why.

10:38:03 And then it was explained to me and
10:38:05 that's -- and it's now in evidence that
10:38:08 Anishinaabe people believe humans have two
10:38:10 souls, and at death one of them goes on a
10:38:15 westward journey and the others -- the other
10:38:18 stays with the body.

10:38:23 Now, when I see a grave, I see a

10:38:25 grave, I treat it with respect, but really I
10:38:30 just see a grave. When Anishinaabe people see a
10:38:33 grave, they see a soul and they would never
10:38:38 willingly abandon the souls of their ancestors.
10:38:46 So for all of these reasons,
10:38:47 archeology, linguistics, traditional knowledge
10:38:52 and ethnology, we say SON's continuous with an
10:38:59 early 17th century Odawa.
10:39:13 I want to turn now to Anishinaabe land
10:39:15 custom. That is written about in chapter 9 of
10:39:29 our argument.
10:39:31 The first point is it's rooted in
10:39:38 spirituality. I've already noted, as I started
10:39:41 out, that Karl Keeshig drew that link. I asked
10:39:44 him a question about social organization, I got
10:39:47 back a Creation Story.
10:39:49 This Court has also heard evidence
10:39:52 about the deep spiritual connection that SON has
10:39:55 with their territory and the responsibility for
10:39:58 the territory that flow from this. And that's
10:40:04 all discussed in chapter 6 of our argument.
10:40:08 Well, that's reflected in Anishinaabe land
10:40:10 customs.
10:40:13 It's generally accepted that the Band,
10:40:17 as anthropologists call it, is the central

10:40:20 political unit of Anishinaabe society. We set
10:40:26 that out beginning at paragraph 246 of our
10:40:29 argument. And that people coming in to the
10:40:34 territory of a Band needed permission of that
10:40:37 Band. And this starts at paragraph 351 of our
10:40:43 argument.

10:40:46 Other Anishinaabe are almost always
10:40:50 granted permission. Other Indigenous people who
10:40:53 are not Anishinaabe were sometimes given
10:40:58 permission, sometimes not. And Europeans were
10:41:03 sometimes given permission and sometimes not.

10:41:10 An iconic example in this case of
10:41:13 Anishinaabe custom is when Alexander Henry
10:41:18 traveled to Michilimackinac in 1761. He was the
10:41:29 first Englishman to go there just after the
10:41:29 defeat of the French in North America and his
10:41:33 journal is Exhibit 476 in this trial. And from
10:41:38 reading it, it's clear how terrified he is on
10:41:41 his way there. He was so fearful, he disguised
10:41:46 himself so as not to be recognized as English.
10:41:50 And he goes into hiding when he arrives at
10:41:53 Michilimackinac.

10:41:56 Then the Anishinaabe learn he is there
10:41:58 and visited him and Chief Minweweh said to him:

10:42:05 "Englishman, although you have

10:42:07 conquered the French, you have not yet
10:42:09 conquered us. We are not your slaves.
10:42:13 These lakes, these woods and mountains
10:42:16 were left to us by our ancestors.
10:42:17 They are in our inheritance and we
10:42:20 will part with them to none."
10:42:22 That is a dramatic example of
10:42:26 Anishinaabe land custom.
10:42:33 The next key feature of Anishinaabe
10:42:36 social organization are alliances. When faced
10:42:42 with an external threat, Bands formed alliances
10:42:47 to protect their lands. And this is set out
10:42:51 starting at paragraph 250 of our argument.
10:42:56 These alliances were not formal,
10:42:59 permanent, political structures, but they
10:43:02 operated from time-to-time, and we heard
10:43:05 evidence about that. It operated over a larger
10:43:11 region than a territory of a Band because that's
10:43:14 the nature of the geography of the area.
10:43:18 The Anishinaabe, unlike Huron and
10:43:22 Georgian Bay, controlled all the access points
10:43:25 to the lake, and that's how they could defend
10:43:29 their territory from an eternal threat. And we
10:43:35 deal with that at paragraph 379 of our argument,
10:43:38 which quotes a section of Dr. Reimer's report to

10:43:42 that effect, speaking of the 17th century Odawa.

10:43:48 I liken what was happening to a gated

10:43:52 community where members group together to defend

10:43:58 a perimeter, but they all retain ownership and

10:44:01 control of their own property.

10:44:05 Now, this is important because the

10:44:09 defendants are saying that either somehow this

10:44:13 doesn't count or that it makes the title holder

10:44:16 to be the Lake Huron Georgian Bay Anishinaabe

10:44:20 collectively.

10:44:27 We say, no. A counter example of that

10:44:29 might be the way European borders are controlled

10:44:32 now. There are controls around a perimeter.

10:44:35 It's technically called a Schengen Area, and

10:44:42 it's controlled on behalf of all the countries,

10:44:44 by whichever country is at the perimeter.

10:44:49 By agreement of the member countries,

10:44:50 inside the perimeter there's free movement.

10:44:54 It's a loose association. It includes both

10:44:58 members and nonmembers of the European Union.

10:45:01 But I see Mr. Beggs has a question.

10:45:11 **MR. BEGGS:** Your Honour, unless I'm

10:45:12 forgetting something, I'm not aware that any of

10:45:15 this evidence about the European Union or any of

10:45:17 this material about the European Union is in

10:45:23 evidence.

10:45:24 **THE COURT:** I was wondering the same

10:45:25 thing, Mr. Townshend.

10:45:28 **MR. TOWNSHEND:** I'm using it as an

10:45:29 analogy, as a counterfactual, and it's part of

10:45:33 an argument. It's something that can be easily

10:45:36 looked up.

10:45:38 **THE COURT:** Well, the difficulty of

10:45:42 course is that after a very lengthy trial, we

10:45:45 should not be supplementing the evidentiary

10:45:49 record indirectly.

10:45:51 If you wish to use it as an analogy,

10:45:53 I'd ask that you make it plain that it is not in

10:45:57 the evidence so that everybody understands where

10:45:58 it fits, sir.

10:46:01 We now know that for this analogy. If

10:46:03 there are any others like it, please say so at

10:46:06 the outset of the submission in that regard.

10:46:10 Please go ahead.

10:46:18 **MR. TOWNSHEND:** Very well, thank you.

10:46:18 Yes, I am using it as an analogy. The

10:46:20 same as for a gated community, an externally

10:46:28 controlled perimeter doesn't make for shared

10:46:30 title. France doesn't share title with Belgium,

10:46:33 for example, even though they're inside a

10:46:35 controlled perimeter. Neither do the members of
10:46:39 a gated community share title to their
10:46:41 community. They all have their individual
10:46:43 titles to their own parcels of land. They're
10:46:46 just co-operating. They remain independent with
10:46:50 their own property rights.
10:47:00 Now, Canada says this gated community
10:47:02 way of looking at things is contrary to the
10:47:07 approach to taken in the Tsilhqot'in case. Yes,
10:47:14 in that case, the title holder was a whole
10:47:17 Nation, not the local Band. That's a very
10:47:18 different culture in a very different location.
10:47:21 The evidence in that case was that a
10:47:23 Tsilhqot'in hunter could hunt anywhere in
10:47:28 Tsilhqot'in territory. There was no control of
10:47:31 territory by local Bands. And you can find that
10:47:35 reference in the Tsilhqot'in trial decision,
10:47:39 which is in our book of authorities at tab 107,
10:47:43 at paragraph 459.
10:47:48 So in Tsilhqot'in, there was a unified
10:47:52 territory. In our case, the evidence is that
10:47:56 someone from a neighbouring Band still needed
10:47:58 permission to go and -- to a neighbouring
10:48:04 community. True, but it would usually be
10:48:07 granted, but there was still a need to ask. So

that's significantly different from the land holding regime in Tsilhqot'in.

Further, Canada and Ontario argues that if one needs help to defend territory, one does not control it and so cannot have title. Really? As an analogy, does Paris not belong to France because they needed help to expel the Germans in World War II? That's what allies do for each other. It doesn't change who owns the land.

THE COURT: Mr. Townshend, I know that's another analogy not in the evidence. I would ask that you be specific.

MR. TOWNSHEND: I'm not sure I understand what you're asking, Your Honour.

THE COURT: Well, I don't remember any evidence about land ownership in France. That's a very big subject. If I'm wrong, you'll correct me.

MR. TOWNSHEND: What I'm saying is the fact that France needed help to expel the Germans does not mean they share title with the United States army.

THE COURT: All right. Please go ahead.

10:49:47 **MR. TOWNSHEND:** So the test for
10:49:49 Aboriginal title doesn't specify particular
10:49:52 constraints on how title holders would control
10:49:55 their territory.
10:49:57 The question is, could they defend it?
10:50:01 We say they could. We say they could in part by
10:50:03 relying on their allies when needed. The same
10:50:07 as any other countries do.
10:50:17 So I want to point to five key events
10:50:19 that I say shows territorial control. Champlain
10:50:25 at the mouth of the French River in 1615; the
10:50:29 Haudenosaunee wars; the Pondiac war; the War of
10:50:35 1812; and, the fishing leases to non-Aboriginal
10:50:40 fishermen in the 1830s. Five events. One
10:50:54 might do, but we have five.
10:50:56 First example, Champlain at the mouth
10:50:58 of the French River in 1615. This is at our
10:51:08 argument, paragraph 466. He was the first
10:51:11 European to reach Georgian Bay and he was met by
10:51:16 300 Anishinaabe warriors. Some of them we know
10:51:21 come from around what is now Collingwood in the
10:51:25 eastern part of SON territory. And we know that
10:51:28 because Champlain met them there later on the
10:51:31 next year, the same people.
10:51:36 Now, they didn't go all the way up the

French River at the northeast corner of Georgian Bay to pick blueberries. They went there to meet Champlain. That was the opinion expressed by Professor Driben relying on writings by Dr. Leo Waisberg.

Ontario's witness Dr. Reimer agreed this was a plausible explanation and further that they certainly weren't there just to pick blueberries.

The defendants point out that this was outside SON territory. That's true. Indeed, that's how they controlled the territory. They controlled the larger perimeter.

And once Champlain gave a present of an axe, and we have evidence about the importance of presents in establishing relationships, that established friendly relationships and they let him proceed.

So how do we know that these warriors Champlain called Cheveux Relevées were from SON? Because of what I explained a few minutes ago about the evidence from archeology, linguistics and traditional knowledge and ethnology. I say they're the same people. This is the first recorded example of them controlling territory,

10:53:11 1 together with other Anishinaabe from Georgian
10:53:12 2 Bay.
10:53:20 3 The second example of control is the
10:53:21 4 Haudenosaunee war and that's in our argument
10:53:23 5 starting at paragraph 484.
10:53:30 6 There's clear evidence of battles in
10:53:32 7 SON territory and with SON involvement in
10:53:35 8 driving the Haudenosaunee out of their
10:53:37 9 territory, and indeed back south of Lake
10:53:39 10 Ontario. That's a very strong and specific
10:53:43 11 example of control. This time focused right on
10:53:46 12 the territory.
10:53:47 13 The third example I have is the
10:53:55 14 Pondiac war, which we deal with in our argument
10:54:00 15 at paragraph 519 and in our reply argument at
10:54:04 16 paragraphs 367 and following.
10:54:13 17 We have evidence that Pondiac held the
10:54:19 18 British at bay and kept them out of Lake Huron
10:54:21 19 for a good chunk of 1763. In fact, they didn't
10:54:22 20 re-enter Lake Huron until the fall of 1764,
10:54:25 21 which was after the Treaty of Niagara, by which
10:54:30 22 we say the Anishinaabe agreed to let the British
10:54:33 23 back into Lake Huron.
10:54:43 24 And there's an iconic quote about this
10:54:51 25 from William Johnson, who was a British official

10:54:51 who knew the most about Indigenous affairs in
10:54:51 North America at the time. And his quote in
10:54:51 1764, and this is set out in our argument at
10:54:55 paragraph 575:

> "The Indians all know, we cannot be a match for them in the midst of an extensive, woody Country [...]."

10:55:03 That is an acknowledgment by a high
10:55:06 British official of the power of the
10:55:10 Anishinaabe.

10:55:10 Now, we don't have direct evidence
10:55:13 that SON was involved in the Pondiac war, but we
10:55:20 do, we say, have evidence from which this can be
10:55:22 inferred.

10:55:23 Firstly, there's evidence that with
10:55:29 the exception of Wabbicommicot at Credit River,
10:55:32 the Great Lakes and the Anishinaabe united in
10:55:36 purpose to defend their territory and keep the
10:55:38 British out until the British agreed to
10:55:40 acceptable terms. That's at paragraph 573 of
10:55:44 our argument.

10:55:47 Now, it's true that the -- some Odawa
10:55:51 from L'Arbre Croche near Michilimackinac
10:55:54 protected some British traders at
10:55:57 Michilimackinac from some Ojibwe. They were

10:56:00 protecting people in their kin and trade
10:56:04 networks. That's not to be inferred from that
10:56:08 that they were fighting on the side of the
10:56:10 British against other Anishinaabe. Reference to
10:56:17 that is in Professor Hinderaker's report, which
10:56:19 is Exhibit 4017, pages 56 to 57.
10:56:29 We also know that there were warriors
10:56:32 from Georgian Bay who participated in the
10:56:36 Pondiac War and that's set out in our paragraph
10:56:39 564.
10:56:40 And finally, given SON's spiritual
10:56:50 connection to territory and their responsibility
10:56:53 to the territory, can we really imagine them not
10:56:58 being involved in the military defence of
10:57:00 territory so close to them?
10:57:04 They went up to the northeast corner
10:57:06 of Georgian Bay in 1615. That's why I say one
10:57:13 can infer that they were involved in the Pondiac
10:57:17 War and that that is another example of control
10:57:20 of territory.
10:57:26 The fourth thing about control I want
10:57:29 to talk about is the War of 1812. By the War of
10:57:33 1812, the Anishinaabe were now allied with the
10:57:37 British and they assisted in defending the
10:57:41 territory from the Americans, and played a

10:57:44 significant role in the outcome of the war.

10:57:49 We know SON was involved, we even know

10:57:51 the names of some of the warriors. One of them

10:57:55 was James Nawash. That's a shared control with

10:58:00 the British. Certainly they were allies with

10:58:01 the British at that point.

10:58:03 **THE COURT:** Mr. Townshend, I believe

10:58:05 in your written submissions somewhere it says

10:58:08 that the War of 1812 is not especially

10:58:10 significant to this case and at least in part

10:58:13 because of the timing. Because as you said

10:58:16 earlier this morning, the relevant time to

10:58:18 demonstrate the things that you submit ought to

10:58:21 be shown is 1763 not 1812. Can you clarify

10:58:27 that, please?

10:58:28 **MR. TOWNSHEND:** It's evidence of the

10:58:30 Anishinaabe custom, which is still active at

10:58:33 that point. It's evidence that even that long

10:58:39 after 1763, there was still some significant

10:58:43 Anishinaabe military power.

10:58:54 Yes, it's not a key focus, but it is

10:58:58 one of these five examples that I say show

10:59:01 control.

10:59:04 The fifth example is when Europeans

10:59:09 first started moving into the SON territory in

10:59:13 the 1830s, they came there to fish. And the
10:59:19 European fishermen arrived there and they leased
10:59:25 fishing grounds from SON. And after a while,
10:59:27 even though the leases started being issued by
10:59:32 the Crown instead, SON was getting the proceeds
10:59:36 of those leases.
10:59:43 So I say these five examples,
10:59:45 Champlain in 1615, the Haudenosaunee war, the
10:59:53 Pondiac War, the War of 1812 and the 1830
10:59:57 fishing leases are not the acts of people who
10:59:59 are loosely associated with land. They're not
11:00:02 the act of people unable to control territory.
11:00:06 These are the actions of nations. These are the
11:00:09 actions of owners.
11:00:22 One thing I haven't mentioned is
11:00:24 boundaries. I explained that in chapter 11 of
11:00:31 our argument and also in chapter 7 of the reply
11:00:35 argument. I think they're explained in quite a
11:00:39 detailed way, but the defendants are saying that
11:00:43 they're somehow arbitrary.
11:00:45 So I wanted to check if there were any
11:00:48 questions or anything that I could assist the
11:00:50 Court with in that?
11:00:51 **THE COURT:** Yes, a couple of
11:00:52 questions. First of all, the amended version of

11:00:55 the claim area chart that you used this morning,
11:00:58 does that form part of any of the briefs of
11:01:03 documents you've filed thus far?
11:01:07 **MR. TOWNSHEND:** No, it does not.
11:01:08 **THE COURT:** So I want to deal with
11:01:09 that. Before I deal with that, can you please
11:01:12 explain why the change was made?
11:01:15 **MR. TOWNSHEND:** Yes. Maybe we can
11:01:16 have that map up again, please?
11:01:18 We say in the eastern part of the
11:01:29 territory, there's an overlap with the
11:01:33 Beausoleil First Nation and we have a similar
11:01:37 overlap at -- down at the south around Goderich.
11:01:41 And there we have an agreement with the First
11:01:44 Nations down there, that indeed that's a shared
11:01:49 territory.
11:01:49 So we were hoping that we could get
11:01:53 that sort agreement with Beausoleil. We weren't
11:01:58 able to get them to -- really to get their
11:02:06 attention.
11:02:07 So rather than put the Court in a
11:02:09 difficult situation of perhaps prejudicing our
11:02:14 rights, we moved the boundary back.
11:02:17 And the way we came to that line was
11:02:21 that's the line between SON's commercial fishing

agreement, which is to the west of that line, and Beausoleil has commercial fishing licences east of that line.

And there's no evidence that any First Nations, either Beausoleil or we, objected to the other fishing in those areas. So that's why we moved it back to that point.

THE COURT: And when you say "moved it back", you're referring to a vertical line that commences at the shore between Meaford and Collingwood and goes straight north?

MR. TOWNSHEND: Yes, that's correct. And that is in fact the boundary of the commercial fishing agreement, which is in evidence.

THE COURT: All right. There was a submission made by Canada with respect to the claim area. It focused on the difference between your Statement of Claim, which had the -- I'm going to call it the eastern boundary run directly down the middle of Georgian Bay, as is illustrated by a red line on this map. And as Canada noted in its written submissions, there is a reference in your written submissions to a change which describes that line as

11:03:50 80 degrees, 20 minutes west. Is that related to
11:03:53 this new line at all or is that a different
11:03:56 issue?
11:03:59 **MR. TOWNSHEND:** That is the -- that
11:04:01 80 degrees, how ever many minutes, that is the
11:04:06 black line.
11:04:07 **THE COURT:** All right. So those are
11:04:08 the same issue then?
11:04:14 **MR. TOWNSHEND:** Yes.
11:04:14 **THE COURT:** Okay. I am going to mark
11:04:15 this revised version -- what was the lettered
11:04:17 Exhibit that it was previously marked as? Is it
11:04:20 P?
11:04:21 **MR. TOWNSHEND:** Yes.
11:04:21 **THE COURT:** And I'm going to impose on
11:04:23 Mr. Brookwell to look up for me the next
11:04:26 lettered exhibit. Mr. Brookwell is a member of
11:04:41 the plaintiff's team who's been extremely
11:04:41 helpful in such matters and I thank him again
11:04:41 for doing that.
11:04:41 Mr. Brookwell, is the next lettered
11:04:44 exhibit available?
11:04:45 **MR. BROOKWELL:** Yes, Your Honour. It
11:04:46 would be N6.
11:04:49 **THE COURT:** N as in Nancy?

11:04:53 **MR. BROOKWELL:** N as in Nancy, 5.

11:04:54 **THE COURT:** N5, all right. This shall be marked as Exhibit N, as in Nancy, 5.

11:04:58 EXHIBIT NO. N5:

11:05:01 **THE COURT:** Now, before we move on, I'm going to ask counsel to Canada and Ontario and then the Municipalities, so I think actually this only relates to the title claim, so just counsel and the Municipalities to indicate to me whether they have had an opportunity to consider this change and address it, not now, but when they reach their written -- sorry, their oral submissions. And also in the same vein, are there any other questions they would ask through me to facilitate their consideration of this change, starting with Mr. Beggs.

Have you had a chance to consider it, Mr. Beggs?

MR. BEGGS: Yes, Your Honour, I have. I don't have any further concerns about that change.

THE COURT: Thank you. Mr. Feliciant.

MR. FELICIANT: Nothing to add, Your Honour.

THE COURT: So neither of you are now

11:06:02 objecting to this change in the claim area, is
11:06:06 that correct?
11:06:08 **MR. FELICIANT:** That's correct.
11:06:09 **THE COURT:** All right, thank you.
11:06:11 Please go ahead -- let me just check my notes.
11:06:13 You said are there any other questions
11:06:15 about the claim area? And I do have one other
11:06:20 question. The focus of your submissions for the
11:06:22 claim area is on submerged land. And I would
11:06:25 like you to clarify your position on islands in
11:06:28 the claim area, which isn't really focused on in
11:06:32 your written material.
11:06:33 **MR. TOWNSHEND:** That is correct.
11:06:33 **THE COURT:** Maybe you could take the
11:06:33 map down at this point.
11:06:33 **MR. TOWNSHEND:** Actually I would like
11:06:33 it for a moment.
11:06:33 **THE COURT:** Oh, you're going to use
11:06:33 the map? Please go ahead. No problem.
11:06:33 **MR. TOWNSHEND:** The islands were all
11:06:47 subject to additional treaties with a couple of
11:06:51 exceptions. There were a number of treaties,
11:06:56 some of them dealing with individual islands.
11:07:00 Those on the east side of the peninsula, there
11:07:05 were individual treaties for Hay Island, White

Cloud Island, Griffiths Island. This has not been a feature of it because we -- that they're sort of out of the claim because there are -- they're separate treaties.

The islands on the west side were dealt with sort of en masse in a treaty. And so they're out of the title area, except that in the 1970s, a number of the islands were returned to Reserve status. So we don't need to litigate about that because they're already recognized as Reserve. Most of them are very small islands and in fact often submerged.

The only islands that were not subject to additional treaties were Barrier Island also known as Rabbit Island, which is very close to Nawash. And an island called Chantry Island which is very close to Saugeen. That's our position on the islands.

THE COURT: And is it your position that those two islands form part of your claim?

MR. TOWNSHEND: Yes.

THE COURT: And that there are no other islands that form part of your claim?

MR. TOWNSHEND: That's correct.

THE COURT: Thank you for clarifying

that. Please go ahead.

MR. TOWNSHEND: All right. Now I want to turn to the law about navigable waters. We have very detailed arguments --

THE COURT: Just before you do that, I'm just looking at these names. Barrier Island, also known as Rabbit Island, and Chantry Island, are they mentioned in your written submissions by -- specifically?

MR. TOWNSHEND: I don't believe they are.

THE COURT: All right. Well, at some point during your written -- your oral submissions, it doesn't have to be right now, I would like you to say whatever it is you want to say about those two islands. You don't have to do it right now. I'll leave that up to you, all right?

MR. TOWNSHEND: I don't know that I have more to say than I have said.

THE COURT: Just by way of example, I'm trying to recall, and with a record as big as this, I can't recall if either of those two islands came up in the evidence. Can you help with that, Mr. Townshend?

11:09:52 **MR. TOWNSHEND:** Chantry Island did
11:09:55 come up in the evidence. It came up because
11:09:57 there was a document that purported to be a sale
11:10:00 of Chantry Island that took place on the same
11:10:10 day as Treaty 72. And it's something I
11:10:13 cross-examined Dr. Reimer on because she had
11:10:15 mentioned it in her report. And it's suspicious
11:10:26 because of who signed it and what circumstances
11:10:28 and that the Crown didn't seem to know about
11:10:30 that for years later.
11:10:38 They finally did sell the land, but it
11:10:41 is now back in Canada's hands. It was purchased
11:10:47 again.
11:10:50 **THE COURT:** Is there any other
11:10:51 evidence on either of these two islands?
11:11:08 **MR. TOWNSHEND:** It's perhaps some of
11:11:08 the community witnesses mentioned Rabbit Island
11:11:10 in passing as a place where they would go.
11:11:14 **THE COURT:** Perhaps one of your team
11:11:15 could check it out and let me know later in the
11:11:18 week.
11:11:20 **MR. TOWNSHEND:** Thank you.
11:11:21 **THE COURT:** So you don't have to rely
11:11:22 on your recollection.
11:11:23 Thank you, Mr. Townshend, please go

11:11:25 ahead.

11:11:27 **MR. TOWNSHEND:** So I wanted to move to
11:11:29 Navigable Waters Law. We have very detailed
11:11:34 arguments about that in chapter 36.

11:11:36 The Crown's arguments boil down to
11:11:41 saying Aboriginal title is exclusive, there must
11:11:45 be a public right to navigate and that's
11:11:48 inconsistent with Aboriginal title so,
11:11:52 therefore, we can't have Aboriginal title. I
11:11:58 don't agree with that argument.

11:12:00 Look at Fee Simple Title. A Fee
11:12:03 Simple Title also has a right to exclude. If
11:12:08 the Crown's arguments are sound, it would be
11:12:13 impossible to have Fee Simple Title to the beds
11:12:15 of navigable waters. But plainly it is possible
11:12:19 even by adverse possession.

11:12:23 The defendants give no explanation for
11:12:25 treating the concept of exclusivity in a totally
11:12:30 different way for Aboriginal title than Fee
11:12:33 Simple Title.

11:12:34 So I say the Crown's arguments make
11:12:42 Aboriginal title and navigation rights
11:12:46 unnecessarily and inappropriately absolute.

11:12:54 To begin with the Aboriginal title
11:12:59 side of it, my friends frame it as absolute and

11:13:03 argue that it can't be reconciled with public
11:13:06 navigation. Well, it shouldn't be my job to
11:13:09 find ways to qualify and limit Aboriginal title.
11:13:12 I say that's my friends' job, but they haven't
11:13:17 done it. So I'm obliged to point out that there
11:13:20 are ways in which Aboriginal title can be
11:13:24 qualified and limited.

11:13:29 For example, the doctrine of justified
11:13:32 infringement. If public navigation is as
11:13:35 fundamental and important as my friends say, it
11:13:37 should breeze through a justification test. And
11:13:40 I note that the majority of the judges in the
11:13:43 Mitchell v. MNR case said the doctrines of
11:13:47 extinguishment, infringement and justification
11:13:50 had so far been the appropriate framework for
11:13:53 resolving conflicts between Aboriginal rights
11:13:56 and competing claims, even claims based on Crown
11:14:00 sovereignty.

11:14:01 In that case it was about the right to
11:14:06 cross borders. That's at paragraph 1008 of our
11:14:11 argument.

11:14:13 Statute is another means of limiting
11:14:16 title and there already is one. The
11:14:19 International Boundary Waters Treaty Act of
11:14:21 1909. It guaranteed free access to waters for

11:14:26 the purpose of commerce.

11:14:29 I would think that -- suggest that

11:14:32 many courts would have a strong instinct that

11:14:34 this statute would pass a justified infringement

11:14:39 test.

11:14:40 Now, this is also the statute that

11:14:41 Ontario says extinguished Aboriginal title. As

11:14:46 I mentioned, they haven't pleaded that.

11:14:48 The standard for extinguishment is

11:14:53 clear and plain. To say the public has free

11:14:58 access to the waters for the purpose of commerce

11:15:01 is not clear and plain enough to extinguish

11:15:06 title. Extinguish property rights at all. It

11:15:09 simply grants a right of passage. Those are

11:15:12 different things.

11:15:20 Third, the Treaty of Niagara. If the

11:15:22 Crowns step back from their argument that

11:15:25 there's no such thing, they could see benefits

11:15:29 that it provided to the Crown. Access to the

11:15:32 upper lakes for important purposes like trade

11:15:37 and defence.

11:15:40 And fourthly, the doctrine of

11:15:44 dedication. And that is how public navigation

11:15:49 rights came to exist in the first place,

11:15:52 according to the privy council in Caldwell v.

11:16:01 McLaren. And this is in our argument at
11:16:02 paragraph 993. The doctrine of dedication
11:16:07 continues to function and the leading case on
11:16:10 that is Gibbs v. Grand Bend. That's discussed
11:16:15 in our argument at paragraph 997.
11:16:18 Now that case is a complicated,
11:16:23 three-way split. Three judge panel all writing
11:16:29 separate decisions.
11:16:30 Dedication is discussed by Justice
11:16:32 Brook. That's really the only thing he
11:16:36 discusses. And the other two judges do agree
11:16:39 with him on that. But there's also a majority
11:16:45 ruling, Justices Brook and Finlayson that
11:16:50 there's an easement reserved by the Crown grant
11:16:52 over those same lands for the same purposes.
11:16:55 So but they are all agreeing with what
11:17:03 Justice Brooks says about that dedication. And
11:17:07 that is, dedication can be inferred from
11:17:10 unobstructed public views. And as that case
11:17:14 makes clear, it does not affect title, but it
11:17:17 can vest rights in the public.
11:17:20 In that case what was at issue was a
11:17:23 beach. The result of the case was, yeah, the
11:17:27 beach is owned by Malcolm Gibbs, and there's
11:17:31 either an easement over it or a dedication of it

11:17:37 to public use for recreation, but it remains
11:17:43 owned by Malcolm Gibbs. He can use the beach as
11:17:47 long as he doesn't interfere with public
11:17:50 recreation. And he can, for example, prevent
11:17:51 others from using the beach for things other
11:17:54 than public recreation. And some of the things
11:17:56 mentioned in that case are someone wants to put
11:18:01 a merry-go-round there or a concession stand or
11:18:05 extract sand and gravel. These are things that
11:18:07 Malcolm Gibbs can agree to or not agree to or do
11:18:13 himself.

11:18:15 So there's still meaning -- there's
11:18:17 still some meaning to the idea of an exclusive
11:18:20 right, even though he can't keep the public off
11:18:27 if they're using it for recreation.

11:18:29 So dedication is another doctrine that
11:18:32 could reconcile aboriginal title and public
11:18:38 navigation.

11:18:40 It's also a key example of the
11:18:42 co-existence of an exclusive property right and
11:18:45 public access. That co-existence can work for
11:18:48 submerged lands too.

11:18:52 Supposing there's a public right of
11:18:54 navigation, it's still meaningful to talk of the
11:18:57 ownership of the bed of the water bodies

11:19:00 exclusive. With ownership of the bed goes
11:19:03 mineral rights, exclusive rights for anything to
11:19:07 be constructed on the bed, exclusive fishing
11:19:10 rights, rights to prevent pollution. It's still
11:19:15 meaningful.
11:19:16 And the Queen v. Robertson case in
11:19:19 the Supreme Court of Canada in 1882 explains
11:19:23 that the public right of navigation is
11:19:27 consistent with private ownership of the bed and
11:19:30 exclusive fisheries.
11:19:34 Now, the facts to support limits on
11:19:38 Aboriginal title are not before the Court, and
11:19:41 my friends are not even asking for findings
11:19:43 about that. But I'm highlighting these examples
11:19:49 to illustrate that there are ways that
11:19:51 Aboriginal title, as an exclusive right, can be
11:19:55 reconciled with public rights through existing
11:19:57 judicial doctrine in the right factual
11:20:00 situation.
11:20:06 **THE COURT:** Mr. Townshend, while
11:20:07 you're on the subject, if I understand the
11:20:09 material, the argument now being made that the
11:20:12 proper way to approach public right of
11:20:15 navigation is under the justification law was
11:20:18 first raised in the final argument, is that

11:20:20 correct? That may account for the fact that
11:20:26 there's no record to support it?
11:20:31 **MR. TOWNSHEND:** If -- it would be my
11:20:33 friend's onus to --
11:20:35 **THE COURT:** I realize that, but one
11:20:36 needs to know about the issue first. Let me ask
11:20:39 the question this way. Has the plaintiff, in
11:20:43 these proceedings, raised the submission that
11:20:44 that is the proper legal construct before final
11:20:48 argument?
11:20:57 **MR. TOWNSHEND:** That was raised at the
11:20:58 motion to strike the pleadings on this issue
11:20:59 back in 2004 or 5. I argued that that was how
11:21:10 the rights could be reconciled.
11:21:20 **THE COURT:** Is that case in your
11:21:21 material?
11:21:23 **MR. TOWNSHEND:** Yes, that was in the
11:21:23 original brief of materials sent to Your Honour
11:21:26 at the beginning of the trial.
11:21:28 **THE COURT:** All right. I do have that
11:21:29 still, but is it in the materials provided for
11:21:36 final argument?
11:21:44 **MR. TOWNSHEND:** I'm not sure.
11:21:46 **THE COURT:** Perhaps on the break, you
11:21:47 could check that and let me know.

11:21:49 Thank you, please go ahead.

11:21:59 **MR. TOWNSHEND:** So I want to turn to the public navigation side. And the Crown's position, as far as I can understand it, is that navigable waters and the Great Lakes in particular, inhabit some unique juridical space, perhaps a quasi-constitutional nature. I say that's not borne out by the evidence or the authorities.

11:22:25 The underlying common law for navigable waters in Ontario is the English nontitle common law regime.

11:22:36 And in England that's confusingly called non-navigable sometimes. Although there was still a public right of navigation. So non-navigable was sort of a misnomer. When they're talking about non-navigable, they're talking about nontitle. This is at our argument at paragraph 1028.

11:23:01 And some of the features of that regime is a presumption that the owner of the shores owns out the middle of the water body. We're not basing our argument for Aboriginal title on that kind of a presumption, but this is an explanation of the underlying common law.

11:23:23 **THE COURT:** But that presumption's been removed by legislation in Ontario. So how could you -- how could you rely on it? You can't rely on it.

11:23:35 **MR. TOWNSHEND:** We're not relying on it. The point is this is still -- it is still -- the presumption has been removed, but the underlying law is still the nontitle legal regime as modified by statute. It is not title regime.

And as I think that your question suggests, the non -- that presumption was in fact applied to navigable waters in Ontario by the Ontario Court of Appeal in Keewatin Power v. Kenora.

Now, yes the Ontario legislator didn't like that and it reversed the presumption for shore property and it did that by saying that the Crown grant will not lead to that presumption. That's not the source of Aboriginal title. So it didn't impact Aboriginal title nor are we relying on the presumption either, but it just doesn't affect -- it's a different thing.

Now, the other thing about this is the

11:24:43 case of Walker v. Ontario, which went to the
11:24:46 Supreme Court of Canada. It again applied the
11:24:51 English nontitle common law regime to property
11:24:54 on the shore of Lake Erie and rejected a claim
11:24:58 that the title regime applied and therefore the
11:25:02 property would stop at high water mark. It
11:25:05 said, no the property goes to the edge of the
11:25:08 water as per the nontitle common law regime.
11:25:17 **THE COURT:** Just not sure, sir, how --
11:25:20 where you land on this law. In Canada, it's
11:25:25 partially been displaced by legislation in
11:25:28 Ontario. It has been not followed in a number
11:25:32 of jurisdictions, even in Ontario cases that did
11:25:37 not have to deal with the Great Lakes. Our
11:25:39 courts have said that the Great Lakes are simply
11:25:44 different. And at the end of the day, it's only
11:25:46 a presumption, which can be displaced, and
11:25:49 depends on the specific circumstances of the
11:25:51 specific case.
11:25:53 Now, so there are lots of ways through
11:25:56 this law that do not result in an acknowledgment
11:26:00 of any kind of title. And perhaps you could
11:26:04 summarize for me how you say it assists the
11:26:07 plaintiffs, if you do?
11:26:12 **MR. TOWNSHEND:** It assists because the

defendants are arguing the common law could not recognize ownership of the beds of navigable waters.

THE COURT: But the English common law develops to that end. It started off saying for title the presumption was Crown ownership and for nontitle there were certain other presumptions, but in the end it also concluded that for nontitle waters that are navigable that the outcome is going to be different.

So I'm just not clear on how it assists the plaintiff in this case.

MR. TOWNSHEND: It's an example of how the common law did -- yes, it's been modified by statute, but the common law was able to contemplate the idea of private ownership of the bed of a navigable waterway.

THE COURT: All right. That I understand. You're saying that it cannot be said of common law that it was impossible to have water -- submerged land owned because at least in the context of those cases it was described that way.

Now while we are on the subject, I have a question that really relates to your

claim area more than this topic, but I'll ask it now.

Your claim area excludes, and I think the wording is "privately owned land and fee simple", that's the phrase. And I'd like to know whether the plaintiffs submit that there is any such land in the claim area?

MR. TOWNSHEND: Yes, there is. There is. There are various ports and harbours that are water lots. In Owen Sound Harbour, Tobermory Harbour.

THE COURT: And where is the evidence of that?

MR. TOWNSHEND: That's the sort of thing that would be out in Phase 2. I don't think there's evidence of that.

THE COURT: Well, not to put you on the spot and over the course of the next couple of days, if you could just confirm that for me.

MR. TOWNSHEND: Okay.

THE COURT: Thank you, please go ahead.

MR. TOWNSHEND: So I was going to point out that as it seems Your Honour's quite aware that the Crowns point to western Canadian

11:28:50 cases that seem to say otherwise than what I'm
11:28:54 saying about the underlying common law
11:28:56 applicable to navigable waters in Ontario.
11:28:59 **THE COURT:** Isn't it also in KEEWATIN?
11:29:03 I don't have my case in front of me. Didn't the
11:29:06 Chief Justice in KEEWATIN say it's not for us to
11:29:10 decide, but the Great Lakes are probably
11:29:12 different? Something like that?
11:29:14 **MR. TOWNSHEND:** He did not say the
11:29:16 underlying law was different. He said the
11:29:18 presumption could probably be rebutted on the
11:29:21 fact.
11:29:28 **THE COURT:** With respect to the Great
11:29:29 Lakes in particular.
11:29:30 **MR. TOWNSHEND:** Yes.
11:29:31 **THE COURT:** Thank you, please go
11:29:31 ahead.
11:29:32 **MR. TOWNSHEND:** The cases from western
11:29:34 Canada that seem to talk about navigation as
11:29:39 precluding private ownership are not cases that
11:29:42 are about the title of waterways. They're not
11:29:45 about navigation rights either, but they make
11:29:49 passing comments about those things that suggest
11:29:56 otherwise.
11:29:56 And I say one should look at the

11:30:00 Ontario cases that deal squarely with title to
11:30:03 waterways and the underlying common law. You
11:30:06 get a different picture than if you look at some
11:30:10 of these other cases.
11:30:16 **THE COURT:** Just looking at the time,
11:30:17 sir. We don't have to break at this moment. If
11:30:20 you want to finish off your submissions in this
11:30:23 area, but I'm going to ask you to indicate a
11:30:26 convenient time.
11:30:27 Please go ahead.
11:30:27 **MR. TOWNSHEND:** I'd be happy to break
11:30:31 now, thank you.
11:30:31 **THE COURT:** Ms. Roberts, we'll break
11:30:31 for 20 minutes.
11:30:31 **MS. ROBERTS:** Thank you, Your Honour.
11:30:31 Confirming that we will be back in 20 minutes at
11:30:31 10 to noon.
11:30:31 -- RECESSED AT 11:30 A.M. --
11:30:31 -- RESUMED AT 11:51 A.M. --
11:53:00 **THE COURT:** Please go ahead.
11:53:04 **MR. TOWNSHEND:** Thank you, to address
11:53:06 the questions Your Honour asked about justified
11:53:09 infringement and when that was raised, we
11:53:13 mentioned that in the -- we say there were
11:53:16 certain infringements that were not justified,

in our Statement of Claim at paragraph 39 and paragraph 41.

The strike motion that I mentioned is in Ontario's book of authorities, tab 30, and paragraph 10 of that mentions an argument. It says, to be resolved in accordance with Sparrow, which is where the justified infringement test comes from.

So when it speaks of Sparrow, it is speaking of the justified infringement test. Would it help to put that paragraph up.

THE COURT: No, please go ahead.

MR. TOWNSHEND: And in our opening statement we mentioned this point on page 25 of the first volume of the transcript, line 6 to 10.

There is one case that my friends rely on, that I hadn't mentioned in our material, and that's Re Provincial Fisheries for Chief Justice Strong, which suggests that the title Common Law regime applies to navigable waters in Canada. And I want to make some quick points about that.

It was a reference case about a jurisdictional debate between Canada and Ontario it wasn't about title to water beds.

11:55:14 Secondly, it's a -- there are five
11:55:18 separate sets of reasons, and Chief Justice
11:55:21 Strong is writing only for himself.
11:55:27 Thirdly, Justice Taschereau goes out
11:55:30 of his way and says explicitly that this is on
11:55:33 advisory opinion and is binding on no one.
11:55:36 And fourthly, there was an appeal to
11:55:38 the Privy Council which varied the result in the
11:55:41 Supreme Court of Canada, and says that the
11:55:44 question of ownership of lakes and rivers for
11:55:46 rights of the public are not necessary to decide
11:55:50 and therefore makes no comment on this them.
11:56:23 **THE COURT:** Please go ahead.
11:56:25 **MR. TOWNSHEND:** I want to shift to the
11:56:28 evidence for a moment. Let's look at the
11:56:30 evidence about 1763.
11:56:33 The Royal Proclamation forbade the
11:56:36 public to enter Indian land, which included the
11:56:41 Great Lakes. And that is in our argument
11:56:44 paragraphs 568 to 569.
11:56:46 If public navigation of the Great Lake
11:56:50 was as fundamental and vital to nationhood as my
11:56:54 friends say, that's not something that would
11:56:56 with have happened.
11:57:06 So where does that leave us in

relation to navigable waters? My friends are asking this court to do five things which I say should be resisted. Even one of them would probably do but there are five.

Firstly, they are asking this court to not to follow the analysis that the interaction of the Common Law and Indigenous property rights to submerged land by the New Zealand Court Of Appeal in Ngati Apa. We deal with that at paragraph 1037 of our argument.

The corollary to this is they are asking this court, effectively, to do what the New Zealand legislature did in 2004, that is make it impossible to have Indigenous property rights to submerged land as a matter of law. And that result was strongly condemned by UN bodies as being discriminatory. That is an argument at paragraph 1039.

Thirdly, they're asking this court to disregard the decision of the Supreme Court of Michigan that concluded a Chippewa tribe had originally had Aboriginal title to a portion of Lake Superior. That's in our argument.

THE COURT: Which decision are you referring to?

11:58:37 **MR. TOWNSHEND:** That's the LeBlanc decision.

11:58:41 **THE COURT:** LeBlanc?

11:58:43 **MR. TOWNSHEND:** Yes. Our argument at paragraph 1054.

11:58:50 **THE COURT:** Thank you.

11:58:59 **MR. TOWNSHEND:** People v. LeBlanc, that is tab 62 of our book of authorities.

11:59:06 Maybe I'll mention about that case, the way it's cited in our argument are two paragraph numbers in the Northwest Reporter, or page numbers in the Northwest Reporter, and it is an electronic version of the decision that's in the book of authorities. It does have those page numbers in there, embedded in it. They are preceded by two asterisks.

11:59:41 **THE COURT:** All right.

11:59:45 **MR. TOWNSHEND:** The fourth point, my friends are asking this court to disregard the overwhelming weight of academic opinion on the subject of Indigenous property rights to submerged land. And I set out a long list of those at paragraph 1055 of our argument.

12:00:05 And finally, they're asking this court to make effectively meaningless the statements

of the Supreme Court of Canada in Dalgamuukw and in Tsilhqot'in that Aboriginal title could be proven by showing regular use of land for fishing. And that is in our argument paragraph 1031.

THE COURT: The cases don't say that is all you have to show, but it says that is some evidence.

MR. TOWNSHEND: Yes.

THE COURT: In fact the Supreme Court has said that Aboriginal rights appear on a spectrum with some rights, for example, the right to fish perhaps in the middle where Aboriginal title is at the extreme end. I'm trying to think if that was Chief Justice Lamer or maybe ^Vanderbute.

MR. TOWNSHEND: It talks about that but it also says that Aboriginal title can be proven by showing regular use of the land for fishing, which suggests it's possible to have Aboriginal title to submerged land.

THE COURT: Are you saying that Dalgamuukw was focused on submerged land?

MR. TOWNSHEND: No, it wasn't.

THE COURT: Because it was not. We

12:01:30 all agree that there has not been a Canadian
12:01:32 judicial determination of the question of
12:01:35 Aboriginal title to submerged land.
12:01:38 **MR. TOWNSHEND:** That's correct. There
12:01:39 has not been a determination of that.
12:01:42 **THE COURT:** Now, I understand that the
12:01:43 plaintiffs' position here is that the existing
12:01:49 law on dry land, which would include Dalgamuukw,
12:01:51 should apply.
12:01:57 **MR. TOWNSHEND:** And Dalgamuukw and
12:01:59 Tsilhqot'in also talk --
12:02:04 **THE COURT:** But Tsilhqot'in was stated
12:02:08 right in the decision of the Supreme Court of
12:02:09 Canada that any issues of submerged land were
12:02:12 withdrawn and not being dealt with.
12:02:14 **MR. TOWNSHEND:** That's right.
12:02:14 **THE COURT:** So it's difficult to say
12:02:16 that they were commenting on it when they say
12:02:19 expressly they are not going to do it.
12:02:26 **MR. TOWNSHEND:** I was taking it that
12:02:27 they said it was possible. There may be other
12:02:29 factors that come into it. But they do --
12:02:33 **THE COURT:** And in Tsilhqot'in you say
12:02:36 they say it's possible? You better on a break
12:02:41 give me the paragraph for that. Because my

recollection is that they specifically said it was withdrawn and they were not going to deal with it.

MR. TOWNSHEND: You're correct they do not deal expressly with it. I'm referring to the paragraphs in Dagamuukw paragraphs 143 to 149 Tsilhqot'in paragraphs 137 to 144.

THE COURT: It as a bit of a stretch, Mr. Townshend to say that the court expressly said they weren't going to be addressing it and then say they did.

MR. TOWNSHEND: They do comment on it. They did not decide it but they did comment on it.

THE COURT: And what paragraphs in Tsilhqot'in again?

MR. TOWNSHEND: 37 to 44.

THE COURT: All right. Please go ahead.

MR. TOWNSHEND: I was going to turn to Crown immunity I have a very brief section on that.

THE COURT: Just before you do. That let me check, I think I have one other question on the title issue.

12:05:02 There is pleaded in the Statement of
12:05:03 Claim a breach of fiduciary duty, which is a
12:05:07 simple pleading without particulars. But as the
12:05:10 Aboriginal title claim has been presented to the
12:05:13 court, and as I understand it it is a
12:05:16 straightforward claim for title, which is not
12:05:18 dependent on some sort of breach of fiduciary
12:05:21 duty.
12:05:23 Have I got that right, Mr. Townshend?
12:05:29 **MR. TOWNSHEND:** That's correct.
12:05:30 **THE COURT:** So your position would be
12:05:31 that in the title action the subject matter of
12:05:34 fiduciary duty is off the table.
12:05:36 **MR. TOWNSHEND:** That's correct.
12:05:36 **THE COURT:** Thank you for clarifying
12:05:38 that.
12:05:45 Please go ahead.
12:05:48 **MR. TOWNSHEND:** For Crown immunity, we
12:05:50 have an extensive legal argument in our reply,
12:05:56 starting at paragraph 1, to Ontario's argument
12:05:58 that the Crown is immune from liability for
12:06:01 beach of fiduciary duty as the evidence happened
12:06:06 before -- the events happened before 1963.
12:06:12 I just wanted to simply point out
12:06:15 there are -- this would require not following

12:06:20 five recent cases of the Ontario Court.

12:06:25 That to not follow the reason the 2004

12:06:27 decision of the Ontario Court of Appeal in

12:06:31 Cloud. And we list them in part 2 of our reply,

12:06:38 the decision in Cloud. It would have to not

12:06:41 follow the 2010 decisions of Justice Cullity and

12:06:44 Justice Herman in Slark. It would have to not

12:06:44 follow the 2012 decision of Justice Horkins. It

12:06:44 we would have to not follow the 2020 of Justice

12:06:51 Morgan in Barker. And you would have to decide

12:06:51 to not follow the 2020 decision of Justice

12:07:02 Hennessy in Restoule.

12:07:09 Now, for what it's worth those last

12:07:11 two are pending appeals.

12:07:13 However, in our paragraph 25 of our

12:07:17 reply we have a quote from Justice Hennessy that

12:07:22 such decisions should be followed unless there

12:07:24 are compelling reasons otherwise.

12:07:26 So why is it that Ontario is asking

12:07:29 this court not to follow these decisions.

12:07:33 Well, they issued fiats in both of the

12:07:38 actions before you that started "let right be

12:07:40 done". And those fiats are Exhibits 3910 and

12:07:47 3911. And they want this court to apply those

12:07:51 fiats. What that means is that the court may

12:07:56 hear the case, but no matter what the evidence,
12:07:58 no matter what the legal argument, the First
12:08:01 Nations can't win because the Crown is immune to
12:08:04 liability. And that is Ontario's position on
12:08:12 how right is to be done.
12:08:22 Your Honour, I've concluded the part
12:08:23 that I'm intending to deal with and I want to
12:08:26 turn it over to Ms. Pelletier.
12:08:28 **THE COURT:** Thank you. Ms. Pelletier,
12:08:30 please go ahead.
12:08:38 **MS. PELLETIER:** Good morning, or
12:08:39 rather good afternoon, Your Honour.
12:08:41 As Mr. Townshend mentioned I will be
12:08:43 making submissions on the Aboriginal title test
12:08:46 and the evidence we are led that goes to meeting
12:08:48 that test.
12:08:49 Now, the good news is that with
12:08:51 respect to the content of the test itself the
12:08:54 parties are largely in agreement. We do,
12:08:56 however, differ in two fundamental ways. And it
12:09:00 is those differences that I wish to focus my
12:09:02 submissions on today.
12:09:04 The two areas where we diverge is
12:09:07 first to the attention placed on the Indigenous
12:09:10 perspective. And the second is with respect to

Canada's submissions specifically, SON disagrees with how Canada has described the test for Aboriginal title as three distinct branches that must be met, rather than as SON submits, three different lends with which to view title.

I would like to begin my submissions by discussing the importance of the Indigenous perspective.

Now, both Canada and Ontario correctly point out that the law requires that in considering evidence to ground Aboriginal title courts must give equal treatment and due weight to both Common Law and Indigenous perspective. Although they acknowledge this requirement neither Crown defendant appears to attempt to engage with the Indigenous perspective at all.

So what did the Supreme Court of Canada mean when it said that the dual perspectives of the Common Law and the Indigenous group bear equal weight in evaluating a claim for Aboriginal title, and that the evidence must be approach in a cultural sensitive manner?

SON submits that it means more than looking to SON's way of life to determine what

activities might be used as evidence of occupation. Activities such as fishing do serve as evidence to support SON's occupation of their water territory, but if analysis does not end here.

The objective is not to simply use the Indigenous perspective to find evidence to import into a Common Law test. The role of the Indigenous perspective cannot be simply to help in the interpretation of Aboriginal practices in order to assess whether they conform to Common Law concepts of title. The Indigenous perspective shapes the very concept of Aboriginal title.

This notion was adopted by Chief Justice McLachlin in Tsilhqot'in when she wrote about the need to consider the dual perspectives of the Common Law and the Aboriginal group in question. She said that the Common Law test for possession, which requires an intention to occupy or hold land for the purposes of the occupant, must be considered alongside the perspective of the Indigenous group which, depending on its size and manner of living, might conceive of possession of land in a

somewhat different manner than did the Common Law.

Now, this last point is key and in SON's submission really speaks to what it means to take an approach that gives equal weight to the Indigenous perspective.

SON's submits that another way to think of this culturally sensitive approach is to -- is as a shift from an objective approach to the evidence, that being from the perspective of a reasonable European person, to a subjective approach to the evidence, that being from the perspective of the Indigenous group.

The question becomes reframed as, did SON believe, based on its Indigenous perspective, that its activities demonstrated exclusive occupation of its territory?

This subtle reframing in SON's submission can assist the court in broadening its consideration of the evidence presented in this case.

We can move from looking to the various uses to which the territory is put as proof of occupation, uses such as fishing, and ceremony, to also considering what title looked

like to SON.

And what does the evidence tell us about what title looked like to SON? The court heard from community witness and former Chief Randall Kahgee who explained that SON has a responsibility to the land and the water that was bestowed on SON by the Creator. That inherent responsibility is to protect the waters and safeguard them for future generations.

Mr. Kahgee talked about who they are as Anishinaabe is very much linked to that relationship with the territory both land and water. Their relationship to the territory and linked to their language, their culture, their ceremonies and indeed their very identity.

For SON spirituality is embedded in everything. It is the foundation for their relationship with their territory; it is entrenched in all of their stories; it guides their interactions with the land, the water, the spirits, with each other; it is the reason they are such stewards of their territory; and it is the source of their responsibility to their waters.

Even fishing is about much more than

12:14:12 the mere -- than mere resource extraction for
12:14:15 SON. It has an important spiritual component
12:14:18 and the knowledge of how to harvest in
12:14:21 accordance with the spirits is passed on through
12:14:23 the generations.
12:14:29 When the evidence is viewed from the
12:14:30 Indigenous perspective. Performing the task set
12:14:32 out by the Supreme Court of Canada in Marshall
12:14:34 v. Bernard becomes clear. That task of course
12:14:38 is to examine the pre-sovereignty Aboriginal
12:14:42 practice and translate that practice as
12:14:45 faithfully and objectively as we can into a
12:14:48 modern legal right.
12:14:52 And what was the pre-sovereignty
12:14:54 practice for SON? It was a practice that
12:14:56 involved a sacred responsibility to care for and
12:14:59 protect the waters, to pray for the water, to
12:15:03 conduct ceremony for the water, to honour the
12:15:08 water.
12:15:09 It was a practice based on a
12:15:11 connection to the territory that has subsisted
12:15:14 for thousands of years. It was a practice that
12:15:18 involved an obligation to protect the territory
12:15:21 for future generations. And, finally, it was a
12:15:26 practice that involved the right to make

12:15:27 decisions about the water territory.

12:15:30 When looking at what modern legal

12:15:32 right that pre-sovereignty practice most

12:15:35 faithfully translates to, SON submits that is

12:15:39 Aboriginal title.

12:15:48 Canada, and to a lesser degree

12:15:49 Ontario, have described the Aboriginal title

12:15:50 test as three branches that must be met,

12:15:50 exclusivity, continuity and sufficiency.

12:15:50 SON submits that, to the contrary,

12:15:50 this is not a checklist that must be met in

12:16:01 order to prove title. While SON has led

12:16:04 evidence that go to each of these elements, I

12:16:07 remind the court that the Supreme Court of

12:16:09 Canada in Tsilhqot'in was clear, the concepts of

12:16:14 sufficiency, continuity and exclusivity provide

12:16:18 useful lenses through which to view the question

12:16:21 of Aboriginal title, but the concepts are not

12:16:25 ends in themselves, but inquiries that shed

12:16:27 light on whether Aboriginal title is

12:16:30 established.

12:16:30 That being said, I would like to

12:16:35 discuss these lenses and highlight some of the

12:16:37 evidence that SON says speaks to the concepts of

12:16:40 sufficiency, continuity and exclusivity.

12:16:59 **THE COURT:** The Supreme Court said these are the three things to look at in order to ascertain whether Aboriginal title has been demonstrated. So it's not as if that is unusual, that is what it says.

So I'm not sure how much weight you're putting on the difference "branches" and "lenses". But maybe you can clarify for me why you think they are materially different from each other?

MS. PELLETIER: Sure, and I'm not sure that they're materially different from each other. In SON's submission, we've led evidence that would satisfy the three lenses.

The point that I'm making is that Canada, in particular, appears to treat it as a checklist and if you don't complete each one but maybe you've met the other two you don't get title.

Whereas I think the Supreme Court of Canada is clear that you're supposed to look at all of the evidence through these lenses. Perhaps you might have a situation where there is a lot of evidence of continuity and sufficiency but not a ton about exclusivity

12:17:57 given the nature of the group. It does not
12:17:59 necessarily mean that you do not meet the
12:18:01 Aboriginal title test.
12:18:02 **THE COURT:** So is it your submission
12:18:03 that if the claimant cannot prove exclusivity
12:18:09 that they may nonetheless succeed in Aboriginal
12:18:15 title?
12:18:16 **MS. PELLETIER:** I think that is
12:18:17 theoretically possible. I think that that's not
12:18:19 the situation in this case .
12:18:22 **THE COURT:** I think it's a bit of a
12:18:24 stretch from what Justice McLachlin says. She
12:18:27 doesn't say you don't have to demonstrate
12:18:29 exclusivity, she says you do.
12:18:31 It may be nuance. If what you're
12:18:37 saying is that it may be that depending on the
12:18:42 circumstances, the amount of evidence you need
12:18:45 to show exclusivity may differ I can understand
12:18:51 that.
12:18:52 If you're saying you just plain don't
12:18:52 need to show and you may still succeed, that
12:18:54 seems contrary to what Chief Justice McLachlin
12:18:58 and her predecessors have to say about it.
12:19:03 **MS. PELLETIER:** I think that's
12:19:03 correct, Your Honour. And I think that's more

the point I'm trying to make. It may be that you have less evidence of one rather than the other, and it is not a checklist, as Canada has suggested. I just remind the court that these are lenses.

That being said, we have, in SON's submission, led evidence that I think meets all lenses of the test, so maybe this is a bit of an academic debate.

THE COURT: Thank you. Please go ahead.

MS. PELLETIER: I would like to look at some of the evidence that SON says speaks to the concept of sufficiency, continuity and exclusivity.

I do not propose to discuss all of the evidence, nor do I propose to discuss any of the evidence in much detail given much of this is covered in our written submissions.

Should Your Honour have questions, however, about anything that I do not cover I'm of course happy to answer that.

THE COURT: All right.

MS. PELLETIER: On the lens of exclusivity, it is helpful to remember the

12:20:04 question that the court needs to answer is not
12:20:06 whether SON as a single community alone could
12:20:11 have fought off an invasion of the full force of
12:20:13 the British military. If that were the question
12:20:16 there might be no Aboriginal title in Canada.
12:20:20 The Crown defendants, particularly
12:20:22 Ontario, have invited you to do a detailed
12:20:25 weapon-by-weapon, battle-by-battle analysis of
12:20:30 whether in February 1763, if the British had
12:20:35 been in SON's territory, which they were not,
12:20:37 whether SON could have won a war against the
12:20:39 entire British military.
12:20:41 I'm going to suggest that this focus
12:20:44 misses the larger point. In answering the
12:20:47 question, did SON have the means to fend off a
12:20:51 British attack in February of 1763? The answer
12:20:55 is, yes, they had a way to protect their
12:20:58 territory and part of that was calling on others
12:21:02 when needed. SON submits that the evidence it
12:21:05 has led with respect to Pondiac's war
12:21:10 demonstrates this.
12:21:11 But evidence of battles are not the
12:21:12 only type of evidence that demonstrate
12:21:15 exclusivity. The Supreme Court of Canada
12:21:18 considered what to do in a situation not

12:21:21 dissimilar to SON's where evidence of exclusion
12:21:25 at the relevant time the difficult to find. In
12:21:28 its decision in R. v. Marshall, R. v. Bernard
12:21:31 the court considered how to assess a claim for
12:21:35 title in an area that is sparsely populated,
12:21:37 with the result that clashes and the need to
12:21:39 exclude strangers seldom if ever occurred. Or
12:21:44 if the people may have been peaceful and chose
12:21:46 to exercise their control by sharing rather than
12:21:49 exclusion.

12:21:50 The court went on to hold that it is,
12:21:53 therefore, critical to view the evidence of
12:21:56 exclusion from the Indigenous perspective. To
12:22:00 insist on evidence of overt acts of exclusion in
12:22:04 such circumstances may, depending on the
12:22:07 circumstances, be unfair.

12:22:09 The problem is compounded by the
12:22:12 difficulty of producing evidence of what
12:22:13 happened hundreds of years ago where no
12:22:16 tradition of British history exists.

12:22:20 The Supreme Court of Canada in R. V.
12:22:21 Marshall, R. v. Bernard went on to hold that
12:22:25 evidence of acts of exclusion of a First Nation
12:22:28 physically preventing others from using their
12:22:31 territory is not required to establish

12:22:38 Aboriginal title.

12:22:40 What SON has tried to do to
12:22:41 demonstrate its exclusivity of occupation is
12:22:44 draw on pieces of evidence respecting, firstly,
12:22:47 what was happening on the SONUTL in 1763.

12:22:56 Secondly, SON's demonstrated the
12:22:59 ability hold their territory both through force
12:23:01 and negotiations, through treaties and through
12:23:03 the exercise of Anishinaabe law.

12:23:05 And finally, third, through evidence
12:23:07 of the force of the Great Lakes Anishinaabe as a
12:23:10 collective. The alliance SON would have called
12:23:17 on for assistance if necessary.

12:23:18 I do not plan to discuss the evidence
12:23:22 with respect to the Great Lakes Anishinaabe and
12:23:22 Pondiac's war as Mr. Townshend has already
12:23:25 discussed how this evidence fits to support
12:23:28 SON's claim for Aboriginal title.

12:23:30 What I would like to do is quickly
12:23:32 highlight some of the other evidence we have led
12:23:35 that speaks to SON's exclusivity of occupation
12:23:38 in 1763.

12:23:48 To begin with the evidence relating to
12:23:50 what was happening on the SONUTL in 1763. As
12:23:58 Your Honour heard throughout the trial, there is

12:23:59 nothing in the written historical record that
12:24:02 speaks to what was happening in and around the
12:24:04 peninsula and its surrounding waters in 1763,
12:24:07 and that's simply because Europeans were not
12:24:11 there.

12:24:11 And that is an important point to
12:24:13 remember. SON had, in fact, exclusive
12:24:18 occupation of its territory because others were
12:24:20 not present.

12:24:21 It's also worth noting that it would
12:24:24 be decades before there were any significant
12:24:27 European presence on the SONUTL. The firs
12:24:32 survey of Georgian Bay was not completed until
12:24:32 1788. And maps of sufficient quality for
12:24:35 navigation of Lake Huron and Georgian Bay were
12:24:39 not produced until the 1820s. This meant that
12:24:42 the British, even if they had been in the SONUTL
12:24:46 in 1763, would have been entirely reliant on
12:24:55 their Indigenous allies to navigate the
12:24:57 territory and would have posed little threat to
12:24:57 SON's ability to continue to control the SONUTL.

12:25:04 Now, we know that the Europeans were
12:25:06 not there, but how do we know that SON had
12:25:09 exclusive occupation vis a vis other Indigenous
12:25:09 groups? We know this because of the application

of the Anishinaabe customary law governing control of territory. We have heard evidence of the law that allowed each local group to control its territory. Permission from that local group needed to be sought to enter the territory and utilize its resources. This is one of the ways, from the Indigenous perspective, that SON demonstrated the capacity and intent to control its territory.

SON submits that this evidence fits squarely with what was contemplated by the Supreme Court of Canada in Dalgamuukw when it said, where others were allowed access upon request, the very fact that permission was asked for and given would be further evidence of the group he's exclusive control.

The Supreme Court of Canada commented in Dalgamuukw and in Tsilhqot'in, that where that permission is the subject of treaties between Indigenous Nations this too can go to demonstrating the intent and capacity to control territory.

We have precisely this evidence in this trial with the Dish With One Spoon Treaty between the Anishinaabe and the Haudenosaunee in

12:26:20 1 1700, which along with the Great Peace of
12:26:23 2 Montreal, put an end to the Haudenosaunee wars.
12:26:27 3 We also have evidence of the Treaty of
12:26:29 4 Niagara, which SON submitted is the vehicle by
12:26:33 5 which the British received permission from the
12:26:37 6 Great Lakes Anishinaabe, including SON, to
12:26:39 7 utilize its territories. This treaty is also
12:26:42 8 evidence of the British dealing with SON and
12:26:45 9 others as Nations who had ownership and control
12:26:48 10 of their territories.
12:26:51 11 Despite the fact that there is no
12:26:53 12 requirement of evidence of overt acts of
12:26:57 13 exclusion to demonstrate exclusive occupation,
12:26:59 14 SON has still led evidence of having used force
12:27:02 15 to assert control of its territory. The first
12:27:06 16 is the evidence of the first arrival of
12:27:08 17 Champlain in 1615 at the mouth of the French
12:27:11 18 River when 300 warriors, which included SON
12:27:16 19 attended as a show of force.
12:27:19 20 An overt act of aggression was
12:27:20 21 ultimately not needed in the end as Champlain
12:27:23 22 provided the warriors with a gift, thus abiding
12:27:26 23 by their Anishinaabe customary law of seeking
12:27:29 24 permission. And in so doing, from SON's
12:27:32 25 perspective, respecting their occupation of

12:27:37 their territory.

12:27:38 Now, the second instance of exclusion
12:27:40 by force that SON points to is its role in the
12:27:45 Haudenosaunee wars. There is extensive evidence
12:27:48 that although they may have initially been
12:27:51 dispersed from the SONUTL, SON returned to the
12:27:58 SONUTL and forced the Haudenosaunee off of their
12:28:00 territory.

12:28:01 Dr. Williamson and Dr. Reimer both
12:28:04 gave evidence about the Haudenosaunee wars.
12:28:06 There is no dispute that the Anishinaabe were
12:28:08 overwhelmingly successful in the battles at the
12:28:11 end of the war and forced the Haudenosaunee out
12:28:13 of their territories.

12:28:14 Now, key battles took place in and
12:28:17 around the SONUTL, including at the mouth of the
12:28:19 Saugeen River, at Red Bay, and at the Blue
12:28:23 Mountains. Three of SON's community witnesses
12:28:27 Vern Roote, Karl Keeshig, and Rule 36 witness
12:28:32 Frank Shawbeedes gave evidence about SON's role
12:28:37 in these battles. Ultimately, as Frank
12:28:40 Shawbeedes testified, "SON beat the hell out of
12:28:40 them". There is no evidence that any one other
12:28:45 than SON participated in these battles.

12:28:47 The Haudenosaunee were forced out of

12:28:53 1 the SONUTL and out of Anishinaabe territory, and
12:28:58 2 the Great Lakes more generally in the late 1690.
12:29:00 3 Now, the Haudenosaunee wars are of
12:29:02 4 particular significance because this is the only
12:29:04 5 example that we have to show how SON would have
12:29:08 6 responded to a geographically specific threat to
12:29:11 7 its territory. They responded with overwhelming
12:29:15 8 force and successfully expelled the unwelcome
12:29:18 9 party from their territory.
12:29:20 10 If you want to answer the question of
12:29:23 11 what SON's response would have been to a similar
12:29:27 12 threat in 1763? The Haudenosaunee wars provide
12:29:30 13 your answer.
12:29:32 14 Control of their territory was
12:29:33 15 something they fought fiercely for. SON
12:29:40 16 continued to control portions of its territory
12:29:43 17 well beyond the assertion of sovereignty. It
12:29:45 18 exercised this control in the 1830s by
12:29:48 19 granting leases to fisheries in the SONUTL. At
12:29:51 20 the same time SON also took actions to prevent
12:29:55 21 unauthorized exploitation of their fishing
12:29:57 22 resource.
12:29:58 23 In doing so SON both asserted control
12:30:02 24 over the water territory and behaved in a way
12:30:04 25 that communicated to European settlers and to

the Crown that it was their exclusive territory.

European settlers, by seeking leases from SON, also behaved in a manner that acknowledged that the fisheries were within SON's territory, and that SON had authority over them.

SON also submits that this evidence is exactly of the type that was contemplated by the Supreme Court of Canada in Tsilhqot'in when it said that to sufficiently occupy the land for purposes of title the Indigenous group in question must show that it has historically acted in a way that would communicate to third parties that it held the land for its own purposes.

I will go into more detail respecting the lens of sufficiently shortly, but for now I move to the lens of continuity.

As Your Honour knows, proof of continuity is not required to make out a claim of title. It is only where an Indigenous group is relying on present occupation to prove past occupation that this lens is even engaged.

Where continuity is relied on the Indigenous group is not required to provide

12:31:18 evidence of an unbroken chain of continuity
12:31:21 between their current practices, customs and
12:31:24 traditions and those which existed prior to
12:31:26 contact. Rather, continuity is a question of
12:31:30 whether the present occupation is rooted in
12:31:33 pre-sovereignty times.
12:31:35 It is worth noting that Ontario has
12:31:37 acknowledged, at paragraph 104 of their written
12:31:41 closing submissions, that some of SON's
12:31:44 ancestors were present in the claim area,
12:31:46 generally, at the Crown assertion of sovereignty
12:31:51 on February 10, 1763. This demonstrates
12:31:54 continuity of the right holder. Canada
12:31:57 maintains their position that continuity has not
12:32:00 been proven.
12:32:03 As Your Honour has heard over the
12:32:04 course of this trial, the evidence from SON has
12:32:07 been that their identity has been continuous
12:32:09 over thousands of years. This is supported by
12:32:14 evidence from traditional knowledge holders,
12:32:17 SON's traditional stories and their correlation
12:32:19 to ancient geological events; it is supported by
12:32:23 the continued use of ritual sites such as River
12:32:26 Mouth Speaks, and Naotkamegwanning for the same
12:32:31 type of ceremonies over centuries; the

12:32:35 archeological evidence of the Odawa
12:32:37 on the SONUTL arose in situ and then returned
12:32:37 following the dispersal that occurred during the
12:32:42 Haudenosaunee wars.
12:32:43 And it's supported by the evidence of
12:32:45 the connection the community has to fertile
12:32:47 sites, as well as linguistic evidence, dodemic
12:32:50 evidence and oral history that has been
12:32:53 recounted to the court. Put bluntly, the
12:32:57 evidence on SON's continuity on the SONUTL has
12:33:00 been voluminous.
12:33:03 SON has led some evidence that more
12:33:05 obviously demonstrates how they have used their
12:33:08 territory continuously from 1763 until today.
12:33:12 For example, the fishing evidence. The evidence
12:33:15 has been that SON has always relied heavily on
12:33:18 fishing for sustenance and trade. Even when the
12:33:26 Crown tried to impose limitations on their
12:33:26 fishery, and when the fishery was almost
12:33:26 destroyed by overfishing, SON continued to
12:33:29 protest incursions on their fishery and seek to
12:33:33 expand their fishing grounds under the licensing
12:33:36 regime.
12:33:37 Fishing continued to be an important
12:33:39 part of SON's economy, livelihood, and culture

throughout the 20th century as well. Even though severe drops in fish populations and Provincial -- even through severe drops in fish population and Provincial restrictions on licences.

SON's determination to continue fishing in these extreme circumstances shows the strength of their relationship with the SONUTL. And it's important not just for resource extraction purposes but as a core part of SON's identity.

SON notes that its fishing evidence also speaks to spiritual continuity. SON community witnesses Doran Ritchie, Karl Keeshig and Paul Jones all spoke of the spiritual aspect of fishing. Karl Keeshig describing hunting and fishing as a spiritual right. It was a spiritual practice but a necessary one.

Based on this, SON's evidence respecting their current commercial subsistence and spiritual fishing practices can be relied on as representing their practices in 1763.

SON has also led evidence that speaks to the continuity of the Indigenous perspective on title. And that is evidence of the spiritual

12:34:59 relationship SON has with its water territory.
12:35:04 The evidence of this relationship was extensive.
12:35:07 The ways in which SON honours and protects its
12:35:10 water territory are numerous.

12:35:14 Your Honour has heard evidence about
12:35:15 Water Spirits, their presence in streams, lakes
12:35:20 and whirlpools, and prayers to these spirits.
12:35:24 The court heard evidence about the
12:35:26 responsibilities of men and women to water,
12:35:28 Joanne Keeshig, Paul Nadjiwon and Vernon Roote
12:35:33 testified about water ceremonies. Joanne
12:35:36 Keeshig explained that certain ceremonies must
12:35:39 be done in specific locations. For example, the
12:35:42 ceremony at Nochemowaning you have to be
12:35:46 Nochemowaning to do that ceremony. And to pray
12:35:50 for a specific place, such as the water at Bruce
12:35:53 Nuclear you would need to be in that location.

12:35:55 Other types of water ceremonies can be
12:35:57 done with tap water away from the shore.
12:36:00 According to Ms. Keeshig's testimony it depends
12:36:03 on what you're doing and why you're doing it.

12:36:06 This connection to their water
12:36:08 territory and not a new development. Water
12:36:10 features prominently in SON's Creation Story as
12:36:13 one of the four levels the Anishinaabe pass

12:36:16 through to the earth realm.

12:36:18 This connection is also evident from
12:36:22 archeological evidence which demonstrates the
12:36:25 importance of fish to the Odawa. Even more
12:36:28 significantly fish remains are found in
12:36:29 ceremonial burials across the SONUTL, and at
12:36:34 Nochemowaning a 17th century pendant was found
12:36:38 that the depicts the powerful under Water Spirit
12:36:40 Mishipizheu known as the King of Fishes, master
12:36:45 of underwater creatures and snakes.

12:36:48 Some of the evidence presented to the
12:36:49 court is of recent practices such as the water
12:36:53 walks. But what this evidence speaks to is the
12:36:56 core connection to the water which has been
12:36:58 present since time immemorial and is tied to
12:37:03 SON's perspective of what Aboriginal title means
12:37:05 to them.

12:37:07 The defendants have argued that while
12:37:12 SON has a relationship with water this
12:37:15 relationship is not specific to the water of the
12:37:19 SONUTL. In making this argument they point to
12:37:22 evidence that water ceremonies do not need to be
12:37:25 done by the water's edge with water from a
12:37:29 particular place or specifically in the claim
12:37:31 area.

They also point to evidence that water spirits are everywhere and not just on the SONUTL. In making this argument the defendants arbitrarily compartmentalize the evidence of the community witnesses the fact that all water is sacred and water ceremonies can be conducted in other communities, and outside of the SONUTL, does not take away from the fact that SON's community witnesses were emphatic about their connection to their territory.

SON submits that it would be inappropriate for the court to consider these aspects of the community witnesses' evidence in silos. SON's connection to their territory must be understood in conjunction with their beliefs and practices regarding water.

All water is sacred but the waters of the SONUTL are theirs, given to them by the Creator. Their specific responsibilities are to this water. Their spiritual connection with water when understood together with their spiritual connection to the territory is extraordinary.

Now I would like to --

THE COURT: Ms. Pelletier, just on

12:38:48 that point one, of the defendants makes the
12:38:50 observation that water is a substance not like
12:38:55 land. And just with respect to your final
12:38:58 remarks, can you clarify the significance of
12:39:03 that from your standpoint, bearing in mind the
12:39:07 claim area has boundaries that at least
12:39:16 superficially appear inconsistent with the
12:39:18 concept of connection with particular waters?
12:39:22 What is your submission about that?
12:39:26 **MS. PELLETIER:** Are you -- is Your
12:39:27 Honour referencing Ontario's submission that a
12:39:29 different test would be required?
12:39:32 **THE COURT:** Well, I would like to
12:39:33 understand your point more generally. So we
12:39:36 have a claim here for submerged land over when
12:39:42 passes water, which is fluid and there's no
12:39:45 issue between the parties that that water is
12:39:47 contained in any way. And your submission is
12:39:53 that there is a special connection between SON
12:39:56 and its water. And those two things are
12:40:02 somewhat at odds with each other and I wanted to
12:40:04 understand your response to that observation?
12:40:09 **MS. PELLETIER:** Sure, so perhaps the
12:40:11 better way to put it is the water within the
12:40:13 boundaries of its territory.

12:40:16 **THE COURT:** But the water within the
12:40:17 boundaries of its territory can change every
12:40:20 day, or probably does change every day.
12:40:23 So --
12:40:24 **MS. PELLETIER:** So I think --
12:40:27 **THE COURT:** Because things of are of a
12:40:29 different nature. Because it has been raised
12:40:31 and I want to make sure I understand how your
12:40:34 argument translates into that situation.
12:40:40 **MS. PELLETIER:** Sure. So, no, the
12:40:41 idea is not that SON has a responsibility --
12:40:43 that it follows the water once it flows and
12:40:46 leaves its territory. The idea is that its
12:40:48 territory, as defined by Anishinaabe law, has
12:40:51 boundaries. Part of that territory is submerged
12:40:55 lands. And that relationship with the surface
12:41:00 water, as well as with the ground below.
12:41:02 And so the relationship would be with
12:41:06 its -- within the boundaries of its territory.
12:41:10 If I'm not sure if I'm answering the question
12:41:13 properly. But the idea is not the SON -- that
12:41:16 the relationship follows the water once it's
12:41:19 left the territory. All water is sacred. But
12:41:22 their responsibility within the boundary as has
12:41:25 been presented in this court.

12:41:26 **THE COURT:** How does the international
12:41:27 border fit into that? I mean, one of your
12:41:33 boundaries is the international border that
12:41:36 didn't exist in 1763 to it bears explanation as
12:41:39 to how that border is meaningful.
12:41:48 **MS. PELLETIER:** Well, the first thing
12:41:49 I would say about the border, Your Honour is
12:41:51 whether the territory went beyond it or not.
12:41:54 There is no sense claiming it here.
12:41:55 Your Honour could not make a finding
12:42:02 or grant a declaration of Aboriginal title to
12:42:04 land outside of Canada.
12:42:05 **THE COURT:** That's true, but it has
12:42:14 never been suggested that the territory extends
12:42:16 beyond that.
12:42:17 **MS. PELLETIER:** And I'm not saying
12:42:17 that it doesn't, but I'm saying that it also
12:42:20 provides a practical boundary for the purpose of
12:42:25 the declaration that we would be seeking.
12:42:27 Perhaps, Your Honour if you can just
12:42:29 give me one moment?
12:42:31 **THE COURT:** You can look at it on a
12:42:32 break if you'd like, you don't have to do it
12:42:34 right now.
12:42:35 **MS. PELLETIER:** Yes, perhaps if I can

12:42:37 come back to that question?

12:42:38 **THE COURT:** Yes.

12:42:40 **MS. PELLETIER:** Thank you, Your

12:42:40 Honour. That's great.

12:42:41 Sufficiency of occupation is

12:42:54 demonstrated by SON demonstrating that they have

12:42:56 acted in a way that would communicate to third

12:42:59 parties that it held the land for its own

12:43:01 purposes.

12:43:02 They need not show notorious or

12:43:05 visible use. Sufficiency is also highly

12:43:07 dependent on the type of land and the

12:43:10 characteristics of the Indigenous group in

12:43:13 question.

12:43:15 SON submits that much of the evidence

12:43:16 it has led with respect to exclusivity also can

12:43:20 be viewed from the sufficiency lens of

12:43:23 Aboriginal title.

12:43:25 If SON was occupying its territory in

12:43:28 such a way as to be exercising control over it,

12:43:32 then it stands to reason that it has

12:43:34 sufficiently occupied it for the purposes of the

12:43:36 Aboriginal title test.

12:43:38 So I do not propose to recite all of

12:43:40 that evidence again. What I would like to focus

12:43:44 on instead, in my submissions on sufficiency, is
12:43:48 on the occupation from the lens of sufficiency
12:43:52 from Townshend SON's perspective.
12:43:56 The first thing I want to highlight is
12:43:57 what the Supreme Court of Canada has said about
12:44:00 considering the evidence of the uses to which
12:44:02 the land is put. And that is that the intensity
12:44:06 and frequency of the use may vary with the
12:44:10 characteristics of the Aboriginal group
12:44:12 asserting title and the character of the land
12:44:15 over which title is asserted.
12:44:18 The character of the land here, of
12:44:20 course, is water. So not only is the intensity
12:44:24 and frequency of use going to vary here because,
12:44:27 unlike land, there will not be village sites or
12:44:31 settlements in the middle of the lake.
12:44:34 **THE COURT:** Just so we don't create
12:44:35 new issues here, the claim is for submerged
12:44:39 land. You're not seeking title over the actual
12:44:44 water.
12:44:46 **MS. PELLETIER:** No, that's right.
12:44:47 **THE COURT:** We have enough legal
12:44:49 issues already so maybe we can make that clear
12:44:52 before we go forward.
12:44:54 **MS. PELLETIER:** Sure. The point that

12:44:55 I was merely trying to make sheer, Your Honour
12:44:57 is that in terms of the nature and frequency of
12:45:00 use you're not going to find a proper settlement
12:45:03 in the middle of the lake.
12:45:05 **THE COURT:** No, I understand that.
12:45:06 You might be -- this is a nonapplicable example,
12:45:11 but you might say, well, I put four submerged
12:45:17 exploratory mines there at the bottom of the
12:45:26 lake, that did not occur here. That might be a
12:45:28 use you mentioned.
12:45:30 Anyway, please go ahead.
12:45:33 **MS. PELLETIER:** Thank you.
12:45:33 I was saying that we are dealing with
12:45:36 lands under water that the intensity and
12:45:38 frequency of use is going to vary, but also the
12:45:41 evidence that we have led to prove occupation
12:45:43 will necessary also be different.
12:45:47 Now, Ontario suggests that a different
12:45:49 test is needed to prove Aboriginal title to
12:45:52 water.
12:45:53 SON submits that this isn't necessary.
12:45:56 In fact the current test appears to contemplate
12:45:59 title to water when you consider that when it
12:46:02 was first articulated in Dalgamuukw. Now Your
12:46:06 Honour had questions of Mr. Townshend with

12:46:08 respect this, so I'm making the same point here.
12:46:11 That the Supreme Court of Canada said that
12:46:13 physical occupation could be proven by evidence
12:46:15 of fishing.
12:46:17 Now the Supreme Court of Canada --
12:46:19 **THE COURT:** The thing is, counsel, I
12:46:21 heard there from Mr. Townshend and I appreciate
12:46:23 that evidence of fishing would be relevant.
12:46:27 But, I don't think it necessarily translates
12:46:30 into an acknowledgment by the Supreme Court of
12:46:32 Canada that they had in mind submerged land,
12:46:36 because if you fish off the peninsula and I had
12:46:38 a lot of evidence of all of the locations all
12:46:41 the way around the peninsula that were used for
12:46:44 that purpose, that that may be evidence of
12:46:47 Aboriginal title to the peninsula itself.
12:46:55 Obviously I will take into account,
12:46:57 what you and Mr. Townshend have said, but both
12:46:59 of you seem to be trying to say that even though
12:47:04 it is agreed that it has never been addressed
12:47:06 directly, and in Tsilhqot'in noted by the
12:47:11 Supreme Court, that somehow they have address ID
12:47:13 it in general terms.
12:47:14 And it seems that that is contrary to
12:47:16 two things. It is contrary to the test to

12:47:22 establish an Aboriginal title set out in some
12:47:24 detail by the Supreme Court of Canada, which is
12:47:26 very, very clear that the starting point is a
12:47:30 specific right claimed not some general right.
12:47:32 So in this case it would be Aboriginal title to
12:47:35 submerged water, which has never been addressed.
12:47:38 And then even under Tsilhqot'in, as
12:47:41 you say should be applied, it also says, as you
12:47:46 recounted, that the nature of the claimed land
12:47:50 is relevant. And that also hadn't been the
12:47:52 subject of any expose -- not only by the Supreme
12:47:55 Court, but by any court in this country that any
12:47:59 party has been able to put in front of me.
12:48:01 So I'm not sure how much further you
12:48:03 can go with it than that. But if you wish to
12:48:06 I'm certainly happy to let you continue.
12:48:09 **MS. PELLETIER:** No, Your Honour I'm
12:48:10 not trying to suggest that the Supreme Court has
12:48:12 already ruled on this.
12:48:14 **THE COURT:** I know you aren't. But
12:48:16 made comments that would suggest.
12:48:18 **MS. PELLETIER:** And the reason --
12:48:20 **THE COURT:** That is a stretch counsel.
12:48:22 **MS. PELLETIER:** The reason I say that
12:48:23 although Dalgamuukw talked about fishing, and

you mentioned that fishing -- perhaps what Dalgamuukw was thinking -- what the Supreme Court was contemplating in Dalgamuukw was fishing for the purposes of proving title to the land adjacent to the water.

In Tsilhqot'in they specifically talk about fishing in tracts of water.

THE COURT: Well, sure. But I think we've covered it well enough. It is well established by the Supreme Court of Canada that these issues must be dealt with specifically not generally.

And this issue in front of me, Aboriginal title to submerged land has not been.

MS. PELLETIER: 100 percent.

THE COURT: I've heard and will consider what you have had to say about fishing, and the other comment Mr. Townshend made, but it doesn't change that reality.

The issues surrounding this have never been addressed and both Canada and Ontario say -- and for that matter the plaintiffs all say they don't need to be because various burden of proof arguments.

But I think it's difficult to imagine

that we should jump from never been addressed and need to be addressed in a focused and specific way, to taking general remarks and saying this indicate as willingness to do it.

Anyway. Let's move forward then. I don't think you can go any further with that.

MS. PELLETIER: I merely pointed the comments of the Supreme Court in Dalgamuukw and Tsilhqot'in to demonstrate that from the SON's perspective it has been contemplated and we do not think a new test is required.

THE COURT: I understand that.

MS. PELLETIER: So ultimately the test for Aboriginal title, as it currently stands, works for title to -- for a claim to title to water when proper attention is paid to the Indigenous perspective.

Now, as Your Honour knows Aboriginal title arises from the prior possession of land and the prior social organization and distinctive cultures of Indigenous peoples on that land.

The need to reconcile this prior occupation with the Crown's assertion of sovereignty means that we need to consider more

than just the Common Law conceptions of use that would prove possession.

When considering the degree of occupation sufficient to establish title, we must be mindful that as an Aboriginal right title is ultimately premised upon the notion that the specific land or territory at issue was of central significance to the Indigenous group's culture.

As Justice LeBel stated in R. v. Marshall, R. v. Bernard, occupation should therefore, be provided by evidence not of regular and intensive use of the land, but of the traditions and culture of the group that connected with the land.

Aboriginal title is about connection to territory. And how has SON demonstrated its connection to its territory? Through all of the community witnesses that have talked about the interconnectedness of land and water. The interconnectedness between them and their territory. By how their territory features in stories the evidence of the archeological record that places SON in the territory for millennia.

This connection to SON's water

territory does not just extend to particular sites or areas that were extensively fished. It applies to the entirely of the SONUTL.

Now the Supreme Court of Canada warned that an Indigenous' groups occupation cannot be purely subjective or internal. So how then did SON's title, SON's exclusive stewardship over its territory manifest itself? SON submits that they demonstrated their ownership by fulfilling their responsibility bestowed on to them by the Creator.

By performing ceremony, by the fishing and harvesting that SON conducted in accordance with the spirits. And how did SON, to use the words of the Supreme Court of Canada in Tsilhqot'in, act in a way that would communicate to third parties that its territory was under its exclusive stewardship.

The most clear evidence of this is through the exercise of their Anishinaabe customary law requiring permission before outside groups could enter SON's territory. This is one of the ways in which SON expressed its exclusive occupation.

And it is also the way that those

12:53:10 present in the areas surrounding the SONUTL at
12:53:16 the relevant time would have understood that the
12:53:19 territory was under SON's to control. The only
12:53:22 other people in the territory in February of
12:53:24 1736 were other Anishinaabe who also followed
12:53:28 Anishinaabe customary law and would have
12:53:31 respected SON's occupation of its territory.
12:53:40 In conclusion, what I try to do here
12:53:42 today, Your Honour, is invite you to look at the
12:53:44 evidence of what ownership of water territory
12:53:46 would have looked to SON from their perspective.
12:53:49 I've invited you to look beyond the
12:53:51 more obvious traditional activities that would
12:53:53 fall under the category of uses to which
12:53:56 territory was put.
12:53:57 I've invited you to consider the deep,
12:54:01 spiritual underpinnings to SON's relationship
12:54:04 with and responsibility to its territory. In so
12:54:10 doing I'm not suggesting that we forget the
12:54:13 Common Law perspective in trying to meet the
12:54:16 Aboriginal title test, quite the opposite. SON
12:54:18 submits that the evidence of occupation and
12:54:20 control from a Common Law perspective is also
12:54:24 substantial.
12:54:24 Over the course of the trial SON has

led evidence to demonstrate the ways in which they had title in the Common Law sense, by shows of force to protect their territory, through uses such as fishing and entering into treaties respecting their territory.

And SON submits that the manifestation of its spiritual connection to its territory, through its customary laws of control of territory, and its spiritual and sustenance practices on the water, also had the effect of demonstrating to others that it occupied and controlled its territory. This is particularly the case for the only other people who were in the area in 1763, the other Great Lakes Anishinaabe, who had similar practices with their own lands.

SON's submission is that analysis of the evidence in this case, both from the Common Law and Indigenous perspective leads to the faithful translation of SON's pre-sovereignty practice into a finding of Aboriginal title.

A culturally sensitive analysis that gives true meaning to SON's perspective in this case is to recognize SON's deep spiritual connection to its water territory for what it

12:55:39 is, a sacred responsibility to exclusively care
12:55:44 for and protect its water now and for its future
12:55:48 generations. Those are my submissions, Your
12:55:51 Honour.
12:55:52 **THE COURT:** Thank you, Ms. Pelletier,
12:55:53 I have a question that may not strictly speaking
12:55:58 be limited to your submission, but perhaps I'll
12:56:01 ask it and then suggest that you don't need to
12:56:05 answer it right now because it's a legal
12:56:08 technical question that you could consider over
12:56:12 lunch or overnight and get back to me.
12:56:15 As everyone nose there is a decision
12:56:19 Regina v. Jones from some time ago, I think it
12:56:29 was 1993 to do with fishing rights, and it's
12:56:31 referred to not only in the plaintiffs'
12:56:33 submissions frequently but also in some of the
12:56:35 defendant's submissions.
12:56:41 And what is not clear to me and what I
12:56:44 would like -- not just you but Ontario and
12:56:47 Canada I would like to hear from as well, your
12:56:55 position on the legal impact of that decision on
12:57:01 this case and what you say has finally been
12:57:03 decided and how that does or does not affect
12:57:06 this case, including but not only on the law but
12:57:18 the facts in that case as recorded in the

12:57:19 decision itself.

12:57:22 So if you could put that on a list of

12:57:24 things to consider and get back to me at some

12:57:26 point before the plaintiffs' submissions are

12:57:30 done that would be helpful.

12:57:35 **MS. PELLETIER:** Absolutely, Your

12:57:37 Honour.

12:57:39 **THE COURT:** Timing being what it is

12:57:44 we'll take the lunch break and resume at 1:15.

12:57:48 -- RECESSED AT 12:57 P.M. --

12:57:48 -- RESUMED AT 2:16 P.M. --

02:16:50 **THE COURT:** Welcome back,

02:16:51 Ms. Guirguis, I understand that you are

02:16:52 proceeding next. Please go ahead.

02:16:59 **MS. GUIRGUIS:** That's correct, Your

02:17:00 Honour, good afternoon.

02:17:00 So, Your Honour, as indicated by

02:17:00 Mr. Townshend earlier, I'm going to be dealing

02:17:01 with the Saugeen Ojibwe Nations or as we refer

02:17:01 to them SON, their treaty claim. And I'll be

02:17:07 covering the following subjects in my

02:17:09 submissions: Treaty 45 1/2; Treaty 72; the

02:17:13 Crown's fiduciary duty, and how it was breached;

02:17:16 the honour of the Crown; and laches.

02:17:22 So I'm going to cover these subjects

02:17:24 in three broad sections. The first section will
02:17:27 be about the promise to protect and the Crown's
02:17:31 fiduciary duty. The second section I'll be
02:17:38 speaking about the breaches of the Crown's
02:17:46 fiduciary duties. And the third section I'll be
02:17:48 dealing with the Crown's honour and laches.
02:17:56 So before turning to these three
02:17:57 sections, I'd like to just touch on what I'm not
02:17:59 covering, which is with respect to harvesting
02:18:01 rights of Treaty 72. I don't plan to go into
02:18:05 detail about the harvesting rights claim, which
02:18:09 is dealt with in our written, final argument,
02:18:13 our supplementary final submissions, and also
02:18:15 touched on in our reply argument, which provides
02:18:20 some context, the latter, for the way in which
02:18:24 it was pled. So I'm not going to be going into
02:18:30 too much detail about it.
02:18:31 Just the overview of it is that Canada
02:18:32 argues that SON surrendered these rights in
02:18:35 Treaty 72. Ontario argues that SON did not. We
02:18:40 agree with Ontario that SON did not. And we
02:18:42 pointed to evidence regarding the intention for
02:18:44 those rights to continue at the time of the
02:18:48 Treaty. And subsequent to the conclusion of the
02:18:52 Treaty, we've also pointed to the evidence

02:18:54 regarding the continuing exercise of these
02:18:56 rights throughout the peninsula, on public and
02:18:59 private lands where it is possible.
02:19:01 So I don't have much more to add to
02:19:04 what is set out in our written submissions, but
02:19:06 I can answer any questions that Your Honour has.
02:19:09 **THE COURT:** Yes, I have one question
02:19:10 that comes to mind. I'm just going to have to
02:19:14 find it here.
02:19:17 Let me put the question and if you
02:19:18 think I've paraphrased it wrong, just let me
02:19:22 know. As I recall Ontario's position was that
02:19:25 it agreed that the treaty did not include the
02:19:32 termination, if I can use that word, of
02:19:34 harvesting rights up until the land was put to
02:19:37 an incompatible use. Do the plaintiffs agree
02:19:41 with that full concept as purported by Ontario?
02:19:49 **MS. GUIRGUIS:** Yes, Your Honour, to a
02:19:50 degree. I think that what it is in terms of
02:19:51 visible and incompatible use is the test that's
02:19:54 been handed down in terms of whether the rights
02:19:56 could continue from the Supreme Court.
02:19:58 So that is to be determined on a
02:20:01 case-by-case basis. So if someone was
02:20:03 exercising rights and was charged, then they

would have the ability to bring the defence that it was not being put to a visible and incompatible use. So we might differ on a case-by-case basis, but as a general proposition, no, we don't disagree.

THE COURT: Well, I hear what you're saying about case-by-case basis. So if I could recap, you agree with Ontario that the treaty does not preclude harvesting rights up until a parcel of land is deployed for an incompatible use and you would prefer to leave to another day what that means. Is that a fair summary?

MS. GUIRGUIS: Yes, Your Honour.

THE COURT: All right, thank you.

I'm just thinking of some of the trial evidence, counsel, as I'm making a note. For example, and again obviously if you think I'm remembering the trial evidence incorrectly, you'll point that out because we've now been doing this for a long time.

I heard the testimony, for example, from one gentleman who said that if he approached a private property and -- but also saw a sign of some kind indicating no trespassing or a symbol. At the moment, I can't

remember the symbol he mentioned. He would respect that and not proceed onto the property. But if he did not see such a symbol, he would feel free to go onto the property, even though it was private property, and even though it may be fenced.

Are you saying that those -- that sort of evidence does not need to be confronted at this stage of this trial? I should say, in this trial, because I don't think that it's contemplated that it be addressed later. But that I need not be concerned about that specific evidence about what people feel they can and can't do?

Yes, that's correct, Your Honour. And I believe that what you're referring to, I recall that and I think that you're accurately summarizing it, is that that's Mr. Doran Ritchie's evidence. And that if he had seen a sign that he would otherwise not harvest on that land or he would seek -- he would go and knock on a door and come to an agreement about that.

THE COURT: Yes.

MS. GUIRGUIS: But, yes, that's what we are saying essentially, is that you need

not --

THE COURT: Because I feel I also heard from a gentleman who said that he would not feel constrained by not only a fence, but also signage and go ahead and proceed to hunt, or whatever he was doing.

Now, all the witnesses said that they would do so safely. So I don't see that as an issue of contention. If it is, one of the defendants will point that out to me.

But it would help me to know what the plaintiffs' position is on the difference between those two things and whether you say that either or both are permitted under your interpretation of the Treaty?

If you want to mull that over, you don't have to answer it right now.

MS. GUIRGUIS: Yes, Your Honour. If I could have some time, maybe at the next break, because then I'll refamiliarize myself with the evidence.

THE COURT: Even at the next break or we can come back to it later. There's no rush. Please go ahead.

MS. GUIRGUIS: Thank you, Your Honour.

02:24:03 So before getting to those three
02:24:06 sections that I've mentioned, just to provide a
02:24:09 bit of overview or context for what I'm going to
02:24:11 be talking about. Mr. Townshend has already
02:24:14 provided an overview of the Treaty claim when he
02:24:17 started his submissions.
02:24:18 When I made my opening statement to
02:24:20 this Court, I talked about SON's connection with
02:24:22 their territory. I talked about the
02:24:24 significance of SON's relationship with their
02:24:27 territory, with the lands and the waters, and
02:24:29 the responsibility that they have to that
02:24:31 territory.
02:24:33 I talked about the -- about SON's
02:24:37 claims or about the relationship and about
02:24:39 defending that relationship. That includes the
02:24:42 Treaty claim and particularly it's with respect
02:24:45 to the peninsula. SON's particular and specific
02:24:48 interest in the peninsula.
02:24:51 And it's reliance on the Crown's
02:24:55 promise to protect SON's specific and particular
02:24:58 interest in the peninsula.
02:25:02 Put another way, the Treaty claim is
02:25:04 about the Crown's choices in respect of
02:25:07 protecting or not protecting the peninsula.

02:25:11 The Crown's choices in respect of
02:25:14 keeping its promise. The Crown's choices and
02:25:17 not SON's.
02:25:19 In Treaty 45 1/2, the Crown took
02:25:24 discretionary control of SON's interest in the
02:25:25 peninsula. That means its choices determined
02:25:30 how and whether that interest would be protected
02:25:32 and would be maintained.
02:25:39 By the point in history that we're
02:25:40 talking about, 1836 to 1854, SON did not have
02:25:44 the option of self-help. They didn't have the
02:25:47 option to take up arms, for example, and protect
02:25:50 the peninsula itself. That was not a --
02:25:54 **THE COURT:** Is sorry, I didn't hear
02:25:55 that word.
02:25:57 **MS. GUIRGUIS:** They didn't have the
02:25:58 option to take up arms, for example, and protect
02:26:01 the peninsula.
02:26:04 **THE COURT:** Arms.
02:26:06 **MS. GUIRGUIS:** That wasn't a choice
02:26:08 that's available to SON. So instead, the
02:26:10 protection of the peninsula relied on the
02:26:12 Crown's choices, on its action or inaction, on
02:26:16 its enforcement or nonenforcement. And
02:26:20 ultimately this claim is about the Crown making

choices that it was not, as a fiduciary, permitted to make.

So I want to talk about section 1, the Crown's promise to protect the peninsula and fiduciary duty to SON.

In this section there are two key points that I want to discuss. The first, what was promised to SON in Treaty 45 1/2 in respect to the peninsula. And the second, the nature and the content of the fiduciary duty to SON in respect of it.

So first, what was promised to SON in Treaty 45 1/2 in respect of the peninsula. And I'd like to bring up Exhibit 1128, which is the text of Treaty 45 1/2, which we've all seen before a number of times in this trial. This is a text of Treaty 45 1/2 and the text is a record of Bond Head's speech to the Saugeen Ojibwe about the deal that was struck with them.

THE COURT: Now, there's also an original that has some changes reflected on it. I'm not sure those changes are especially relevant here.

MS. GUIRGUIS: Right. For my purposes right now, it's not. The changes -- I believe

that's Exhibit --

THE COURT: It's all right. You don't need to pull it up because I'm familiar with it. I just want to make sure that I hear from you if you think the changes are relevant or not.

MS. GUIRGUIS: Yes, not at this moment. And, in fact, we don't think that the changes are relevant. I'll speak to it a bit -- it will be spoken to in our reply submission.

So the text here says, in the second paragraph, we've looked at this before with several witnesses. It talks about a promise to protect. And it says, "You should repair," in speaking to the Saugeen Indians Bond Head says:

> "You should repair either to this island or to that part of your territory which lies north of Owen Sound, which your Great Father engages forever to protect for you from the encroachment of whites."

What we say is that based on the evidence and based on applying principles of Treaty interpretation, that the promise in Treaty 45 1/2 was a promise, (A), to protect the whole peninsula from the encroachment of whites,

and, (B) to protect the whole peninsula for SON.

The Crown defendants seem to disagree with both.

THE COURT: Just before you get to that, do you agree -- I think having read all the submissions, it appears to me that the plaintiffs, Canada and Ontario, agree about at least this one thing, which is that the reference to "forever" did not exclude the ability of those parties to enter into a new treaty if they felt like it?

In other words, I think your written submissions say that it is not SON's position that "forever" means up until today, but indeed it was open to SON, if it was -- if they were -- wished to do so, to in fact negotiate and surrender more land. Do I have that right, counsel?

MS. GUIRGUIS: That's correct, Your Honour.

THE COURT: All right. Please go ahead.

So I know that's not the gravamen that you're concerned about, but I just want to make sure that the plaintiffs agree that that is the

02:30:42 case.

02:30:42 **MS. GUIRGUIS:** That is the case, Your

02:30:44 Honour.

02:30:44 **THE COURT:** All right.

02:30:49 **MS. GUIRGUIS:** The two points about

02:30:51 protecting the whole peninsula and protecting

02:30:53 the peninsula for SON, the Crown defendants seem

02:30:55 to disagree with both of those points.

02:30:58 Canada does take the position that

02:31:00 Treaty 45 1/2 should not be interpreted

02:31:02 narrowly, but Canada argues that the promise to

02:31:05 protect in Treaty 45 1/2 does not necessarily

02:31:07 extend to the whole of the peninsula.

02:31:09 Rather what Canada argues is that the

02:31:12 court should note that Governor -- Lieutenant

02:31:16 Governor Bond Head's original intention was not

02:31:18 for the promise to apply to the peninsula

02:31:20 itself, and that the text does not explicitly

02:31:24 promise to protect the peninsula. Based on this

02:31:32 reading of the text, Canada's arguing that the

02:31:35 promise was with respect to cultivated lands

02:31:39 only.

02:31:39 And in their submissions at paragraphs

02:31:41 127 and 128, they say to note two things should

02:31:46 be observed from the Treaty text and the

02:31:47 modifications. That the promise to protect was
02:31:51 there before the amendment was added to refer to
02:31:54 the peninsula. So they point out that Bond
02:31:57 Head's original intention was not to apply to
02:32:00 the peninsula itself. And then they also say
02:32:03 that the text doesn't explicitly promise to
02:32:05 protect the peninsula forever. Rather Canada's
02:32:08 formulation of the words of Treaty 45 1/2
02:32:12 rearranges the text as follows.

02:32:15 Taken literally, the words of Treaty
02:32:19 45 1/2 do not promise to protect the peninsula
02:32:21 forever, rather your Great Father engages
02:32:23 forever to protect for you the land upon which
02:32:26 proper houses shall be built for you and proper
02:32:29 assistance given to enable you to become
02:32:32 civilized, to cultivate from the encroachment of
02:32:36 the whites.

02:32:37 They go on further to say that it is
02:32:47 key to the Crown's efforts to protect the lands
02:32:48 against encroachments because that the land
02:32:49 should be cultivated by the Saugeen as stated by
02:32:54 the Treaty itself.

02:32:56 Ontario argues that the meaning of the
02:32:57 promises in Treaty 45 1/2 also can only be
02:33:00 understood by reference to the terms of Treaty

02:33:02 45. And in essence Ontario's argument is this,
02:33:07 the two promises in Treaty 45 1/2 should be
02:33:11 confined to what they call the original text of
02:33:13 Treaty 45 1/2, which is based on Bond Head's
02:33:20 original proposal to remove SON from the
02:33:23 territory and relocate them to Manitoulin.
02:33:27 So like Canada, Ontario is arguing
02:33:30 that Bond Head was promising to protect only
02:33:32 those lands that SON cultivated on Manitoulin
02:33:32 Island, and they say that that's the promise
02:33:36 that applies to the peninsula.
02:33:45 So I'd like to discuss these points
02:33:54 and the interpretation of the duties stemming
02:33:58 from Treaty 45 1/2 in accordance with the
02:34:02 principles of treaty interpretation.
02:34:04 We've laid out in our final argument
02:34:06 the principles governing treaty interpretation
02:34:07 generally, that's at paragraphs 1074 to 1086 of
02:34:14 our final argument.
02:34:17 And very briefly, it's that the honour
02:34:19 of the Crown is always at stake in the process
02:34:21 of treaty making and treaty interpretation. And
02:34:24 so to maintain the honour of the Crown, the
02:34:26 courts are -- will presume that the Crown
02:34:30 behaved in good faith and intends to fulfill its

promises. They will interpret treaties accordingly. They also will not sanction sharp dealing.

So there's four principles, in addition to looking at the treaty text itself, the first being that it's appropriate to rely on extrinsic evidence to the Treaty text, even in the absence of ambiguity of the Treaty text.

The second is that the ambiguities and uncertainties in the meaning of a treaty provision should be resolved in favour of the Indigenous treaty partners.

The third is that treaties ought to be interpreted in a way that reconciles the interest of treaty partners.

And the fourth is that narrow and technical readings of treaty promises, particularly those that serve to deprive Indigenous treaty partners from the benefit of the Crown's promises are to be avoided.

So applying these principles, SON submits that the proper interpretation of Treaty 45 1/2 is that it was a promise to protect A) the whole peninsula, and B) to protect it for SON and no one else.

02:35:38 So in respect of the whole peninsula,
02:35:45 the text itself refers to the territory north of
02:35:47 Owen Sound. So that is the peninsula.
02:35:54 Yes, the text does go on to mention
02:35:55 that on those lands the Crown will build proper
02:35:58 houses and provide SON with assistance to
02:36:01 cultivate lands, but it does not say, as is
02:36:04 suggested by the Crown defendants, that the
02:36:06 promise to protect only applies in respect of
02:36:10 the cultivated tracts. This is confirmed by the
02:36:17 extrinsic evidence as well.
02:36:19 In the historical record, we have the
02:36:23 back and forth that happened between Bond Head
02:36:25 and the Saugeen Ojibwe that reflect the
02:36:29 intentions to protect the whole peninsula. This
02:36:32 is the back and forth that happens between
02:36:37 Treaty 45 and Treaty 45 1/2. And we've noted
02:36:41 these examples at paragraphs 390 and 391 of our
02:36:45 reply argument.
02:36:47 So when Bond Head made his initial
02:36:49 proposal saying to the Saugeen Ojibwe I want you
02:36:55 to remove to the island, they said no. And
02:36:57 that's what we see in the historical record.
02:36:59 And then there was a back and forth between Bond
02:37:02 Head and the Saugeen Ojibwe.

02:37:04 So at Exhibit 1236, for example, which
02:37:06 is a letter from Egerton Ryerson to Lord Glenelg
02:37:11 where he's describing what happened, he says
02:37:13 that the Saugeen Indians were inflexible even in
02:37:18 the face of what he described as Bond Head's
02:37:22 threats to persuade. And that they told him
02:37:25 they could not live on those islands and would
02:37:27 not go there. He emphasizes that SON only
02:37:27 agreed to the surrender of the 1.5 million acres
02:37:30 of land to the south of Owen Sound when Bond
02:37:34 Head agreed to secure the peninsula to them.
02:37:38 Earlier, Mr. Townshend brought up how
02:37:41 the Saugeen Ojibwe were at the point where they
02:37:45 thought they were going to lose their territory,
02:37:47 ready to take up arms. He was referring to an
02:37:51 account by a missionary named Herbert, which is
02:37:56 found at Exhibit 2559.
02:37:58 So the evidence demonstrates that the
02:38:01 plan shifted because of the negotiation, because
02:38:03 of the back and forth. It shifted from what was
02:38:06 initially proposed in Treaty 45 to what was
02:38:09 ultimately then agreed to in Treaty 45 1/2. A
02:38:13 new bargain was struck between Bond Head and the
02:38:17 Saugeen Ojibwe. And it was for the protection
02:38:21 of the whole peninsula, the promise to protect

02:38:23 the land most dear to them that resulted in an
02:38:24 agreement.
02:38:26 So even if the intention by Bond Head
02:38:28 was only to protect cultivated tracts for the
02:38:30 Saugeen Ojibwe, if they moved to Manitoulin,
02:38:33 this deal changed. The subsequent actions of
02:38:42 the Crown and the Saugeen Ojibwe reflect the
02:38:42 understanding that it's the whole peninsula.
02:38:42 This is dealt with at paragraphs 394 to 396 in
02:38:42 SON's reply. And in that we cite the following
02:38:56 exhibits, Exhibit 1427, which is a petition from
02:39:01 the Saugeen Ojibwe on June 10th, 1843, where
02:39:01 they're complaining about timber. So we say
02:39:01 that this evidence suggests that the Crown knew
02:39:01 and agreed that the promise to protect wasn't
02:39:01 limited to cultivated lands, but also to lands
02:39:15 that were not being used for farming.
02:39:33 Next the 1847 declaration. We've
02:39:36 cited various other exhibits in those paragraphs
02:39:36 as well so I won't go into all of them, but
02:39:38 there's the 1847 declaration, which Canada's
02:39:41 expert historian, Professor McHugh, confirmed
02:39:45 indicated that the Crown would continue to
02:39:47 protect the Saugeen possession and enjoyment of
02:39:49 the peninsula from the right encroachment -- as

02:39:54 presumably from the right encroachments referred
02:39:58 to in the Treaty.
02:40:00 In addition, we have expert evidence
02:40:02 on the record which we've cited at paragraph 397
02:40:06 of our reply submissions as well.
02:40:09 Brownlie, McHugh, Reimer and Driben,
02:40:11 all of those experts all gave evidence that
02:40:16 support the understanding of the promise to
02:40:19 protect was not just with respect to cultivated
02:40:21 lands, but as to the whole peninsula.
02:40:24 The second principle of treaty
02:40:32 interpretation about ambiguities and
02:40:34 uncertainties in the meaning of a treaty
02:40:36 provision should be resolved in the favour of
02:40:38 the Indigenous partners.
02:40:40 **THE COURT:** Just before you get to
02:40:41 that, Ms. Guirguis.
02:40:45 **MS. GUIRGUIS:** Yes.
02:40:47 **THE COURT:** Can you remind me what the
02:40:48 notice that was issued the following -- this is
02:40:50 a notice -- it may not be applicable. I'm
02:41:05 thinking of the notice issued after Treaty 72
02:41:07 and whether you say that sheds any light on this
02:41:11 issue. Recognizing that that was marking a
02:41:14 different step. It may not be that it does. I

02:41:16 just wonder if you have a submission about that
02:41:17 or if you wanted to take a look at it on the
02:41:19 afternoon break and tell me what you think.
02:41:24 **MS. GUIRGUIS:** Yes, Your Honour. I
02:41:24 can take a look at it. Are you referring to the
02:41:26 notice issued by Oliphant?
02:41:28 **THE COURT:** Yes, I'm recognizing that
02:41:29 it's at a later step and it may not in fact
02:41:33 assist me. I'm curious to know your submission
02:41:41 about whether or not it sheds any light on this
02:41:44 issue.
02:41:45 There were some other notices as well,
02:41:46 but I think that notice was specific to the
02:41:48 peninsula.
02:41:58 **MS. GUIRGUIS:** I can take a look at
02:41:59 that on the break, Your Honour.
02:42:00 **THE COURT:** All right.
02:42:00 **MS. GUIRGUIS:** So the principle of
02:42:01 resolving any ambiguity or uncertainty, that
02:42:09 also lends itself -- that also tells us that we
02:42:11 should be interpreting this as a promise to
02:42:12 protect the whole peninsula.
02:42:15 It must be preferred since it's the
02:42:18 interpretation that resolves any ambiguity, if
02:42:21 there is one, which we say there is not, in

02:42:24 favour of SON and in favour of preserving SON's
02:42:26 rights.
02:42:30 And in submission at paragraph 597 of
02:42:35 their argument, Ontario seems to be suggesting
02:42:37 that this principle of treaty interpretation
02:42:38 ought not apply here. Even though Ontario
02:42:43 accepts that we have correctly identified the
02:42:45 governing principles of treaty interpretation.
02:42:50 Their argument seems to be that it
02:42:52 shouldn't apply because SON is claiming that
02:42:55 Treaty 45 1/2 gave rise to a fiduciary duty.
02:42:59 However, we suggest that Ontario is
02:43:01 attempting to invert the analysis here. The
02:43:05 first question is what is the proper
02:43:06 interpretation of the Treaty? And this is
02:43:09 assessed according to well established
02:43:11 principles of treaty interpretation.
02:43:16 Once the meaning of the treaty promise
02:43:19 is properly interpreted, then the Court must
02:43:21 turn to the second question. Whether this
02:43:24 treaty promise, properly interpreted, gives rise
02:43:26 to a fiduciary obligation on the part of the
02:43:29 Crown? On either the ad hoc or the sui generis
02:43:33 grantors, which we will discuss later.
02:43:38 The third principle of treaty

02:43:42 interpretation that treaties ought to be
02:43:44 interpreted in a way that reconciles the
02:43:44 interests of the treaty partners. Again we say
02:43:46 that the best way to do this is by understanding
02:43:48 the Treaty promise to apply to the whole
02:43:51 peninsula. Bond Head's interest was to open up
02:43:55 lands for settlement and to action his plan of
02:43:59 removing Indigenous people to isolated areas
02:44:02 away from the whites.

02:44:06 He also believed that teaching Indians
02:44:07 to farm was a failing venture. SON's interest
02:44:16 was not to be removed from their traditional
02:44:22 lands, to retain as much of their lands as
02:44:22 possible. Interpretation of Treaty 45 1/2 as
02:44:26 protecting the whole peninsula is the best way
02:44:28 to reconcile those interests, much more aptly
02:44:31 than an interpretation that narrowly construes
02:44:35 what the Crown is promising to protect.

02:44:49 The final principle of treaty
02:44:49 interpretation calls for the rejection of narrow
02:44:51 technical readings of treaty promises,
02:44:53 particularly those that serve to deprive
02:44:56 Indigenous treaty partners from the benefit of
02:44:59 Crown promises.

02:45:06 Canada's and Ontario's construction of

02:45:08 the texts and of the Treaty promise to narrow
02:45:11 the promise to protect cultivated tracts only is
02:45:16 exactly this.
02:45:17 There's an overly technical reading of
02:45:19 the promise in Treaty 45 1/2 that serves to deny
02:45:23 SON the benefits of the promise in Treaty 45
02:45:28 1/2.
02:45:34 Canada says as much when it says at
02:45:36 paragraph 129 of its submissions in the Treaty
02:45:39 phase, it is not Canada's position that the
02:45:42 promise made in Treaty 45 1/2 should be
02:45:44 interpreted so narrowly. However at the same
02:45:50 time, they do provide this narrow and technical
02:45:54 interpretation which we say should be rejected.
02:46:08 That's the first point of the treaty
02:46:08 interpretation about applying to the whole
02:46:09 peninsula. The second point is protecting the
02:46:11 peninsula for SON.
02:46:15 **THE COURT:** Just before you get to
02:46:15 that, counsel, in your reply written submissions
02:46:18 you pointed out that this nuance on the
02:46:26 government position on the treaty interpretation
02:46:26 had not been raised in the pleadings. Is that
02:46:27 an objection that you're putting forward as
02:46:29 something I should consider as dispositive, or

are you prepared to go ahead and deal with it on the merits, as you've just been doing?

MS. GUIRGUIS: Well, Your Honour, we think it would be dispositive and, yes, we are suggesting that you can deal with it in that way. However, in the case that you don't do so, we are also dealing with it in the merits.

And the reason why, Your Honour, we're not addressing it here is I don't have much more to add to that than what's been set out.

THE COURT: That's fine. I just wanted to know whether or not you're maintaining the objection.

MS. GUIRGUIS: Yes, Your Honour.

So protecting the peninsula for SON. Applying the same treaty interpretation principles. We submit that proper interpretation of promise in Treaty 45 1/2 is to protect the peninsula for SON.

As we went into in length in our written submissions, the peninsula was not ever created as a general Reserve. That is our position.

THE COURT: You mean the whole of the peninsula?

02:47:46 **MS. GUIRGUIS:** The whole of the
02:47:47 peninsula, in Treaty 45 1/2, that was not
02:47:49 created as a general Reserve.
02:47:56 **THE COURT:** Okay, I'm a bit unclear on
02:47:58 that. Your position on fiduciary obligations is
02:48:02 that there are added fiduciary obligations
02:48:06 because the effect of Treaty 45 1/2 was to
02:48:10 create a general Reserve. Is that not the case?
02:48:16 **MS. GUIRGUIS:** No, sorry, let me make
02:48:18 a distinction between the two terms. When I say
02:48:22 "general Reserve" I mean in the way that
02:48:24 Dr. Gwen Reimer, the expert for Ontario, argued
02:48:27 that this was a Reserve for all Anishinaabe,
02:48:30 that Ontario's putting forward.
02:48:32 Versus we're saying that it created a
02:48:34 Reserve for the Saugeen Ojibwe only, so it was
02:48:39 their Reserve.
02:48:53 So the argument that the peninsula was
02:48:56 what's been called a general Reserve by
02:48:58 Dr. Reimer, so a Reserve for all Ojibwe, that's
02:49:05 being advanced by Ontario. And it's largely
02:49:07 based on Dr. Reimer's opinion and interpretation
02:49:10 of the historical record.
02:49:13 We canvassed it in great detail during
02:49:17 Dr. Reimer's cross-examination, and also in our

02:49:19 final argument at paragraphs 674 to 701.

02:49:32 We put to Dr. Reimer several

02:49:34 historical documents indicating that the

02:49:36 peninsula was not formalized as a general

02:49:38 Reserve for all Ojibwe in the same way that

02:49:41 Manitoulin Island was.

02:49:43 She agreed it was not and in our view

02:49:47 that it was nothing more than an idea.

02:49:55 **THE COURT:** Did you say Dr. Reimer

02:49:57 said it was nothing more than an idea?

02:50:00 **MS. GUIRGUIS:** She agreed that it was

02:50:02 nothing more than an idea. Ontario, though,

02:50:08 still relies on this argument that the peninsula

02:50:12 intended it to be the general Reserve and they

02:50:15 also argue that it was actually surrendered in

02:50:19 Treaty 45 1/2 to be set aside as this kind of

02:50:21 general Reserve. Again in the same way that

02:50:25 Manitoulin was in Treaty 45.

02:50:31 We've argued that the historical

02:50:33 record doesn't support this, nor, we submit,

02:50:36 does the proper interpretation of Treaty 45 1/2,

02:50:39 in accordance with governing principles.

02:50:44 So, again, looking at the text of

02:50:46 Treaty 45 1/2, it says in the second paragraph:

02:50:51 "I now propose to you that you

should surrender to your Great Father the Sauking territory you at present occupy and that you should repair either to this island or to the part of your territory which lies on the north of Owen Sound."

And then it goes on to say at the end:

"Which your Great Father engages forever to protect for you from the encroachment of whites."

Contrast that to the text of Treaty 45, which if we scroll up, it's in the same Exhibit. Here it says at the bottom paragraph:

"I consider that from the facilities and form that they're being surrounded by innumerable fishing islands," he's talking about the islands, "They might be a most desirable place of residence for many Indians who wish to be civilized. As well as to be totally separated from the whites. And I now tell you that your Great Father will withdraw his claim to these islands and allow them to be applied that purpose."

02:51:57 On the next page goes on to say:

02:52:03 "... are you therefore the
02:52:03 Ottawas and Chippewas willing to
02:52:03 relinquish your respective claims to
02:52:08 these islands and make them the
02:52:10 property under your Great Father's
02:52:12 control of all Indians whom we shall
02:52:15 allow to reside on them. If so affix
02:52:18 your marks to this my proposal."

02:52:20 The text of Treaty 45 -- of treaty 45
02:52:24 exclusively mentions that it is going to become
02:52:27 the property of your Great Father, of the Crown.
02:52:30 It exclusively mentions allowing others to
02:52:34 reside on the island. And it explicitly says
02:52:36 that the island will be under the government's
02:52:38 control to allow for that purpose.

02:52:41 Treaty 45 1/2 contains no such
02:52:43 language. And while it may refer back to Treaty
02:52:48 45, we can't forget that it was modified, not
02:52:52 just the text, but the deal as a result of
02:52:54 negotiations between the Saugeen Ojibwe and Bond
02:52:57 Head because the Saugeen Ojibwe refused this
02:53:01 first and initial proposal in Treaty 45.

02:53:09 So again, turning to the other four
02:53:11 principles that govern treaty interpretation,

02:53:20 the first being extrinsic evidence. This is
02:53:22 summarized in our final argument at paragraphs
02:53:25 306 to 323, we provided detailed evidence about
02:53:33 how the Crown and SON behaved in the years
02:53:33 leading up to Treaty 45 1/2, during the Treaty
02:53:36 council Treaty 45 1/2, and the years that
02:53:39 followed.
02:53:40 And the evidence demonstrates that
02:53:41 neither side believes that it was a general
02:53:43 Reserve that was created by Treaty 45 1/2, but
02:53:47 rather a Reserve for the Saugeen Ojibwe.
02:53:57 I'm not going to go through that
02:53:58 evidence, as we've gone through it in detail,
02:54:00 but I will draw your attention, Your Honour, to
02:54:03 three key documents. Exhibit 1587, which is a
02:54:07 letter from Anderson to Higgins dated
02:54:10 February 4th, 1846, in which he says that if
02:54:16 they wanted to effect a general Reserve on the
02:54:18 peninsula that the Crown would need to get a
02:54:22 surrender of the peninsula to the Crown in
02:54:25 trust. So that means that this was not already
02:54:27 done. The surrender to the Crown or the
02:54:31 establishment of a general Reserve.
02:54:35 I would draw your attention, Your
02:54:36 Honour, to Exhibit 1874, which is the 1847

declaration. In the historical record and the petitions around it from SON, which is Exhibit 1655, this was treated as a deed for the Saugeen Ojibwe for the peninsula.

And finally, Your Honour, Exhibit 1894, which is the 1851 Crown proclamation extending the 1850 Act to the peninsula and referring it to -- referring to it as the Saugeen Ojibwe's Reserve.

THE COURT: What was that Exhibit number, counsel, for the last document?

MS. GUIRGUIS: Exhibit 1894.

THE COURT: Thank you.

MS. GUIRGUIS: So that's the extrinsic evidence.

In addition, the second principle of the ambiguities and uncertainties in the meaning of a treaty provision being resolved in favour of the Indigenous treaty partners. Again, we don't see that there's any ambiguity in the text or historical record about this point. However, to the extent there is, this principle also instructs that the treaty ought to be interpreted to more fully protect SON's rights and to read limitations on those more narrowly.

02:56:01 A general Reserve akin to the one on
02:56:04 Manitoulin is a limit of SON's rights in the
02:56:08 peninsula, their exclusive rights in the
02:56:12 peninsula. And according to Ontario, it would
02:56:15 mean that the Crown had the right to control who
02:56:17 would -- could come to the peninsula. It would
02:56:20 mean SON was required to share their territory.
02:56:25 So in the face of an ambiguity in the
02:56:28 text, an interpretation that preserves SON's
02:56:33 exclusive rights to the peninsula should be
02:56:36 preferred.
02:56:39 The third principle that treaties
02:56:41 ought to be interpreted in a way that reconciles
02:56:43 the interest. We submit it's the same as what
02:56:46 we've said before in respect to protecting the
02:56:48 whole peninsula. Bond Head's interest -- Bond
02:56:52 Head's interest that the Crown's interest was
02:56:55 about opening up lands for settlement. SON's
02:56:59 interest was about not being removed from their
02:57:00 lands and to retain as much of the lands as
02:57:03 possible.
02:57:03 So the interpretation of Treaty 45 1/2
02:57:07 is protecting the peninsula for SON reconciles
02:57:11 these interests much more aptly than
02:57:13 interpretation that's -- that says that SON gave

02:57:17 up the peninsula as a general Reserve.

02:57:28 Again, the last principle of treaty
02:57:29 interpretation is that a narrow and technical
02:57:31 reading of treaty promises particularly those
02:57:32 that serve to deprive Indigenous partners from
02:57:34 the benefit of the Crown's promises are to be
02:57:39 avoided.

02:57:41 An interpretation of the peninsula
02:57:43 being a general Reserve for all Ojibwe is to
02:57:47 impose a narrow and technical reading of the
02:57:51 Treaty 45 1/2 promise. That would limit SON's
02:57:54 ability to gain benefit from the Treaty 45 1/2
02:57:57 promise. This is largely apparent in examining
02:58:00 why the Crown is making the general Reserve
02:58:04 argument.

02:58:05 Canada says that in order to be able
02:58:07 to keep the promise to protect there was a need
02:58:13 for a larger Indigenous population on the
02:58:15 peninsula. They say this at their treaty
02:58:17 submissions at paragraph 148. They seem to be
02:58:28 suggesting by this argument that the promise was
02:58:30 contingent on others joining SON on the
02:58:33 peninsula.

02:58:34 Ontario makes a similar argument and
02:58:36 suggests that since the peninsula was a general

02:58:39 Reserve, the Crown's fiduciary duty to protect
02:58:43 the peninsula was not to SON, but much more
02:58:47 diluted to a balancing of interests amongst
02:58:50 various partners. Other Indigenous groups and
02:58:54 settlers, for example. They make these
02:58:56 arguments in their submissions at paragraphs 605
02:58:59 to 607.

02:59:01 I will discuss this and respond to it
02:59:03 a bit more in the following point about the
02:59:05 Crown's promises and the nature and content of
02:59:10 the Crown's fiduciary duty. For now, I'll just
02:59:16 say that the arguments that they make, it's
02:59:17 apparent that the interpretation that the Crown
02:59:19 defendants seek to impose are precisely aimed at
02:59:23 narrowing the promise to protect in
02:59:25 Treaty 45 1/2. It's aimed at limiting the
02:59:28 benefits SON was entitled to from the Crown's
02:59:32 promises.

02:59:32 In our submission, Your Honour, is
02:59:35 that base on the evidence, and also based only
02:59:37 the law about treaty interpretation, the Court
02:59:40 should reject the Crown defendants' arguments
02:59:45 that so narrowly construe Treaty 45 1/2.

02:59:56 I'll just ask Ms. Croker, if she can
02:59:58 take down the document now.

03:00:00 And I'd like to move to the second
03:00:05 point in this first section to talk about the
03:00:09 promise to protect in Treaty 45 1/2, about how
03:00:15 the promise relates to and defines the nature
03:00:23 and the content of the Crown's fiduciary duty to
03:00:26 SON in respect of the peninsula.
03:00:35 **THE COURT:** Just pause for a moment,
03:00:36 counsel. I'm trying to remember which of the
03:00:45 cases -- which is the case where Chief Justice
03:00:57 McLachlin was in dissent, but in her reasons she
03:01:01 summarized all the principles of treaty
03:01:03 interpretation that come up from other cases.
03:01:03 Do you know the one I mean?
03:01:03 **MS. GUIRGUIS:** In dissent?
03:01:03 **THE COURT:** She was in dissent but her
03:01:03 remarks about treaty interpretation alluded back
03:01:04 to other -- I can find it. I'm just not finding
03:01:10 it quickly here.
03:01:16 **MS. GUIRGUIS:** I know that they're
03:01:16 elaborated on in Badger and Mitchell, but I
03:01:20 don't think that was McLachlin in dissent. So,
03:01:42 I mean, I can ask one of my team to find that.
03:01:42 **THE COURT:** Just give me a moment.
03:01:42 **MS. GUIRGUIS:** Oh, Marshall, Mr. Beggs
03:01:47 says.

03:01:48 **THE COURT:** Which Marshall?

03:01:48 **MS. GUIRGUIS:** Marshall 2.

03:01:52 **THE COURT:** In the plaintiffs' main submissions on treaty interpretation, the discussion did not simply adopt Chief Justice McLachlin's summary, which obviously would be your decision and perfectly fine, but it did lead me to wonder if by not adopting it, the plaintiffs had some difficulty with her summary of treaty interpretations principles. Many of which you've discussed this afternoon.

If you want to park that issue until you've had a chance to look at that summary, please go ahead.

One of Canada or Ontario simply incorporated that entire summary, which a number of other cases have since that decision came out. It's quite a convenient summary.

So when you have a moment, take a look at it and just let me know whether there's some aspect of it you have some difficulty with.

MS. GUIRGUIS: Will do, Your Honour.

THE COURT: Thank you.

MS. GUIRGUIS: Okay, so going into the fiduciary duty -- the nature and content of the

Crown's fiduciary duty to SON in respect of the peninsula. There are two different branches, which we've discussed in our submissions, for which the Crown can be found to have taken on a fiduciary duty to a First Nation.

There is the ad hoc fiduciary duties, which arise where there's an undertaking by the alleged fiduciary duty -- the alleged fiduciary to act in the best interests of the alleged beneficiary.

There's a defined person or class of persons that are vulnerable to a fiduciary's control. And there's a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.

The second branch is the sui generis fiduciary duties, which arise when the Crown takes discretionary control over a cognizable Indigenous interest.

We say that the two branches are close closely related. The sui generis duty is one category of a per se fiduciary duty. Per se fiduciary duties arise out of a pattern of

judicial recognition of ad hoc cases.

So the relationship, the sui generis duty was often recognized by the courts as meeting the ad hoc test and therefore becomes a category of a per se fiduciary duty.

So therefore the two branches, ad hoc and sui generis, are closely related. They are not wildly different species of duties. They are just different routes to get to very similar end point.

The specific content of the duties turns primarily not on which branch of the test the duty arises, but the context of the case, the relationship between the parties, and the nature of the interest at stake.

Both of them, ad hoc and sui generis, give rise to a fiduciary standard of conduct which enforces obligations of loyalty and honesty.

It also gives rise to a fiduciary standard of care which where there's an exercise of discretion that it's requiring, that exercise of discretion to be exercised with due diligence, judgment and care.

SON submits that on both the ad hoc

and sui generis test, the Crown owed a fiduciary duty to SON to respect and protect their rights over the peninsula.

So why do we go through the trouble then to establish the fiduciary duty under the ad hoc branch as well as the sui generis?

Because in some of the case law, the two branches have been treated differently.

So we have set out how the fiduciary duty arises for the Crown to SON on both branches in respect of the peninsula. Our submission is that we meet both.

And our central point is that regardless of what this Court finds as the most appropriate branch to meet the test, the context and the facts of this case is what is important for determining the scope and content of that duty.

On both branches we say that the promise in Treaty 45 1/2 is important in determining the scope and context of the duty.

On both branches there are duties that have been found to attach to Reserve lands which apply here. Duties of loyalty, preventing exploitation, and ordinary prudence.

03:07:29 On both branches we say the "many hats
03:07:38 principles" that the Crowns raise do not apply.
03:07:47 We and both Crown defendants have discussed the
03:07:50 many hats principle in our written submissions
03:07:52 and we have different takes on it.
03:07:58 So what is the many hats principle?
03:08:00 It's the idea that the Crown, unlike other
03:08:04 fiduciaries, may consider other interests beyond
03:08:08 those of its beneficiary and that's because the
03:08:12 Crown is no ordinary fiduciary. It has
03:08:16 competing public law obligations.
03:08:18 The many hats principle has only come
03:08:22 up under the sui generis branch. It's not come
03:08:24 up in case law with respect to just the ad hoc
03:08:28 branch. And it has only been allowed to justify
03:08:33 the government taking into account its broader
03:08:35 roles in very specific factual circumstances.
03:08:40 The idea arose in Wewaykum, the
03:08:44 Supreme Court of Canada case in 2002, which is
03:08:48 at our book of authorities at tab 113.
03:08:55 **THE COURT:** Did you say 113, counsel?
03:08:58 **MS. GUIRGUIS:** That's correct, 113.
03:09:06 So the facts of that case, we
03:09:07 discussed them in our reply submissions. It was
03:09:10 about two Bands that had a claim to each other's

03:09:13 Reserve lands as a result of an administrative
03:09:16 error by the Crown. Both are part of a
03:09:18 larger -- the same larger Nation.
03:09:28 So as a result of the error, both
03:09:30 Reserves were identified as belonging to the
03:09:32 larger Nation. And the Indian Department in
03:09:38 1900 in their schedule, list both Reserves as
03:09:42 belonging to one of the Nations -- one of the
03:09:47 Bands, sorry. There's some back-and-forth
03:09:57 between them, but at the end of the day is that
03:09:59 there's what they call the ditto mark error.
03:10:01 There's an administrative error that results in
03:10:11 them there being some confusion about the two
03:10:11 Bands and which Reserve they have an entitlement
03:10:11 to. Neither Band has ever occupied the other's
03:10:13 Reserve. Both in the facts of that case
03:10:16 expected the status quo and made use of the
03:10:19 Reserves allocated to them.
03:10:21 Both Reserves were outside of their
03:10:23 traditional territories. However, the claim was
03:10:26 that they say that but for the error, they would
03:10:29 have possessed both Reserves and they sought
03:10:32 compensation from the Crown for breach of
03:10:36 fiduciary duty.
03:10:42 So in the context of this, in

03:10:44 Wewaykum, at paragraph 96, in finding that there
03:10:51 was no breach of fiduciary duty, Justice Binnie
03:10:55 said that:

03:10:55 "At that stage, prior to reserve
03:10:57 creation, the Court cannot ignore the
03:11:00 reality of the conflicting demands
03:11:02 confronting the government, asserted
03:11:05 both by the competing bands themselves
03:11:06 and by non-Indians."

03:11:10 So it's very particular that this is
03:11:13 prior to Reserve creation. The Crown may
03:11:15 consider other interests in relation to the
03:11:17 First Nation lands where there has been no
03:11:19 Reserve as yet created and where the lands at
03:11:23 issue are outside the First Nation's traditional
03:11:29 territory.

03:11:31 So why does it matter whether there's
03:11:34 a Reserve or not? Because as we said is Crown
03:11:38 croup's fiduciary duty varies with A) the nature
03:11:40 and the importance of the interest being
03:11:43 protected and B) the nature of the relationship,
03:11:45 including the vulnerability to the Crown such
03:11:49 that it is like a private law consideration.

03:11:52 When we're dealing with a First
03:11:54 Nation's interest in Reserve land, an interest

of the highest importance, then the duty is elevated. There's more to the duty then. And we say that in that context, the many hats principle does not apply.

This, however, is not the reading of Wewaykum, that fiduciary duty that the Crown defendants have urged. So I just want to go through where we agree or disagree with the arguments that my friends have made.

So where we agree or disagree with Canada. Canada argues that there is no plenary or fiduciary duty at that exists at large covering all aspects of the Crown/First Nation relationship. We agree with that and make no such allegation. Canada accepts that in Treaty 45 1/2 the Crown undertook the sui generis duties in relation to the lands reserved on the peninsula and we agree with that.

But Canada denies that the Crown had on ad hoc duty in relation to the peninsula. They deny that they had an ad hoc duty borne out of the promise to protect the peninsula as set out in Treaty 45 1/2.

And they say this because they were making decisions that were impacting both the

plaintiff First Nations and settlers that the Crown could not be concerned with solely the interests of the Bands. They say this at paragraph 826 of the Treaty submissions. We disagree.

The Crown made a clear and express undertaking to prefer the interests of SON in relation to the peninsula by promising to protect them against white encroachment on those lands. I'll discuss a bit later the examples in the case law where tribunals and courts have confirmed that in such cases where there's a clear and express undertaking to prefer the interests, that the Crown must prefer the interests of the First Nation in respect of a Reserve or traditional lands in particular that of settler interests.

In respect of the content of the duty, Canada argue that the Crown was obviated to act with a view to the plaintiffs' best interests in the Reserve on the peninsula.

In relying on Wewaykum, Canada argues that the Crown was obligated to act with respect to the interests of Aboriginal peoples with loyalty, good faith, full disclosure appropriate

to the subject matter and with ordinary diligence in what it reasonably regards as the best interests of the fiduciary -- of the beneficiaries.

In such circumstances, the Crown's fiduciary duty, they argue, is limited by its obligation to have regard to the interests of all affected parties, and to be even-handed amongst the competing beneficiaries.

Canada says the Crown's duty was to act with reference to SON's best interests in relation to the peninsula while reconciling competing interests fairly. We disagree.

The Crown made a clear and express undertaking to prefer the interests of SON when it made the promise to protect the peninsula for them against white encroachments on those lands.

Having regard to the interests of all affected parties does not exhaust the Crown's fiduciary duty to SON in relation to the peninsula. The Crown fiduciary is not at liberty to treat everyone as if they were in the shoes of a beneficiary.

THE COURT: Counsel, I understand that your submission is that the terms of Treaty 45

03:16:09 1 1/2 created a fiduciary obligation. And also in
03:16:14 2 your written material, you submit that the terms
03:16:18 3 of the Treaty were breached in respect of the
03:16:22 4 same promise, but you neither sued for nor seek
03:16:31 5 relief for breach of the Treaty. Can you help
03:16:34 6 me understand how those two positions go
03:16:37 7 together?
03:16:39 8 **MS. GUIRGUIS:** So the undertaking is
03:16:43 9 found in a treaty promise, but the claim that
03:16:46 10 we're making is not breach of treaty. We're
03:16:49 11 claiming that it was a breach of fiduciary duty
03:16:51 12 not to keep that promise or not to act in
03:16:53 13 accordance with the standard that was required
03:16:55 14 of them as a fiduciary.
03:16:58 15 **THE COURT:** I understand that. What
03:16:59 16 I'm trying to understand is why. You have a
03:17:04 17 treaty. You expressly allege that it was --
03:17:08 18 that you've proved that it was breached, but you
03:17:13 19 make no claim and then seek no remedy for that.
03:17:19 20 Instead you claim fiduciary duty in breach and
03:17:21 21 I'm just trying to understand that.
03:17:24 22 Something else you can mull over if
03:17:32 23 you'd like that.
03:17:33 24 **MS. GUIRGUIS:** Yeah, I can certainly
03:17:33 25 do that. I mean the answer that I have with

respect to that, Your Honour, is that the way that we've -- well, let me discuss over the break with my team.

THE COURT: Yes.

MS. GUIRGUIS: So Ontario, when they're talking about how the duty arises, they also say that there is no ad hoc fiduciary duty. And they argue that because they say such a duty must be in respect of an interest already held by the beneficiary prior to the undertaking that creates the duty, and B) must be to put the beneficiary's interest in the undertaking ahead of all interests.

Ontario also says there's no sui generis duty in this case. And this reasoning seems to turn on the idea that SON did not have an interest in the Reserve on the peninsula prior to 45 1/2.

Ontario also says the sui generis duty arises in the honour of the Crown while the ad hoc duty does not. We disagree with all of this.

As noted already, we submit that both the ad hoc and sui generis branches are met. We also say that when an undertaking that gives

rise to an ad hoc fiduciary is in relation to protecting First Nation's lands, the duty is rooted in the honour of the Crown because these duties involve reconciling First Nation's rights with Crown sovereignty.

While significantly we also say that SON did have an interest in the peninsula prior to Treaty 45 1/2, it was SON's traditional territory which they used and occupied since time immemorial. And that is a sufficient interest to give rise to a fiduciary duty.

In terms of the content of the duty, Ontario says that under the sui generis branch, the Crown must only act with reference to and not in the interests of the beneficiary under the sui generis fiduciary duty.

It asserts that the Crown's obligation is limited to reconciling interests fairly and that the sui generis duty is not a strict duty because it accepts that the Crown can be in a conflict position with respect to other rights. Ontario says that is the case even after a Reserve is created.

And that Wewaykum says that all that is required is a fair reconciliation of

interests. We disagree and submit that that's an incorrect reading of Wewaykum. Ontario conflates the language in Wewaykum about how to treat the interests of competing beneficiaries in a proposed Reserve, that is in that case the two First Nation plaintiffs that were -- had competing interests in the Reserve, with a direction about how to treat all interests in the Reserve.

While some consideration of competing interests is permitted under the sui generis branch because of the unique role of the Crown, this is not a license to prefer all other interests in all circumstances. Rather, it's a tightly circumscribed exception that still preserves a basic principle of loyalty to the First Nation's interest.

However, we submit that the balancing in relation to the peninsula is not appropriate because the peninsula was a Reserve for SON. Wewaykum is explicit that the fiduciary duty expands when a Reserve is created. In that context, the Crown has a duty to preserve and protect the Reserve, including from exploitative bargains. This is not simply fair

reconciliation of competing interests. The Court must do more than act as an honest referee in this context. That's set out in Wewaykum at paragraph 104.

THE COURT: Are you talking about the court? You said the court or are you talking about the Crown?

MS. GUIRGUIS: I'm talking about the Crown.

THE COURT: All right.

MS. GUIRGUIS: My apologies.

THE COURT: No, that's not a problem.

This is the part of your argument that I was confusing with your use of the phrase "general reserve."

MS. GUIRGUIS: Right.

THE COURT: So just so I understand it, your prior submissions about the nature of the Treaty use that term to describe a Reserve for all Anishinaabe, not just SON, so the general was describing the peoples who would be encompassed in that concept.

Whereas here we're talking about the creation of a Reserve, which is a legal -- at least as of today, a legal event.

MS. GUIRGUIS: Yes, that's correct.

THE COURT: And your position there, I understand, which is that if a Reserve was created by Treaty 45 1/2 then there would be -- that would have an impact on the scope of the fiduciary duty that applied.

MS. GUIRGUIS: That's correct, Your Honour.

THE COURT: But there is no agreement that in fact a Reserve was created by Treaty 45 1/2 to begin with, is that not the case?

I know that the plaintiffs submit that one was created, I could be wrong. But I believe that Canada contests that and I won't go on to try and recall Ontario's position.

Perhaps I'll let them deal with that when they get reached.

MS. GUIRGUIS: Yes. So I believe that -- I mean, as far as I can go in terms of paraphrasing is that there's some disagreement in terms of the -- Ontario argues that it was a general Reserve, which is as you correctly state, for the Anishinaabe.

We say that it was -- there was a Reserve created by Treaty 45 1/2 and it was a

Reserve created for the Saugeen Ojibwe Nation.

THE COURT: There were some complications, as I recall, most of the case law that I've been given relates to legislation that did not exist at the time of Treaty 45 1/2 and what the definitions in that legislation mean.

So there's certainly jurisprudence about that. And I can think of at least one case where a judge applied similar principles in determining whether, at an earlier stage, a Reserve was created.

But my recollection is that either Canada or Ontario or both of them don't agree. Maybe I'd better just get some clarity on that right now.

Mr. Beggs, if you could turn your microphone on for a moment.

MR. BEGGS: Yes, Your Honour.

THE COURT: Is my recollection accurate about Canada's position in this area?

MR. BEGGS: No. Canada didn't take an explicit position on whether a Reserve was created or not. If you're asking if that's our view, I would say it is, that our view would be that a Reserve was created by Treaty 45 1/2.

03:25:44 **THE COURT:** That will explain why I didn't pin it down.

03:25:47 And, Mr. Feliciant, what is Ontario's position on whether Treaty 45 1/2 created a Reserve, leaving aside who it was for?

03:26:00 **MR. FELICIANT:** Leaving aside who it was for, ultimately I think, yes, a Reserve was created. Certainly no later than 1847.

03:26:12 It's less clear on the terms of the Treaty itself whether it was created in 1836, but certainly by the royal declaration in 1847 it was.

03:26:30 **THE COURT:** That's helpful, thank you.

03:26:35 Just while I have the -- each of you and then we'll take our afternoon break.

03:26:44 Mr. Feliciant, does Ontario also agree that the fiduciary duties are expanded because of that, because a Reserve was created?

03:27:03 **MR. FELICIANT:** I'm going to have to answer unfortunately -- unequivocally and say not necessarily.

03:27:08 **THE COURT:** That's fine. If the answer is not necessarily, I'll ask you to address that in your submissions.

03:27:14 Mr. Beggs, can you answer that

question as well, please? Do you want me to repeat the question?

MR. BEGGS: Yes, please, if you could repeat it, that'd be great.

THE COURT: Do you also agree with the plaintiffs that because Treaty 45 1/2 created a Reserve, there were expanded fiduciary obligations? Or do you want to wait and talk about that later, which is fine?

MR. BEGGS: I would like to explain it in my submissions.

THE COURT: That's fine.

Just before we break, Ms. Guirguis, just to assist counsel. As it happens, immediately after you and I were talking about what turns out to be Regina v. Marshall, I found it. So the case I'm referring to is the 1999 Marshall, where Chief Justice McLachlin was in dissent on the result, but in her dissent and my note is it's at paragraph 78, she took the time to summarize principles of treaty interpretation drawing on prior decisions of the Supreme Court, about which I think the majority would agree that it's my impression, but I would like to hear from the plaintiffs if you either

wish to say that that summary is in some respect inaccurate or is actually in dissent. Because it has been picked up by cases afterward as a good starting point for treaty interpretation principles. And I haven't seen anything in those cases which say that it should be disregarded or watered down.

So if you could consider that and let me know your position.

MS. GUIRGUIS: Certainly, Your Honour.

THE COURT: All right. We'll take 20 minutes.

-- RECESSED AT 3:29 P.M. --

-- RESUMED AT 3:51 P.M. --

THE COURT: Thank you, please go ahead, Ms. Guirguis.

MS. GUIRGUIS: So first I'll answer the few questions you put to me before I get back to the submission I prepared.

The first question was about the notice that Oliphant had given to Rankin and to Sheriff Schneider after the surrender of the Treaty.

So and I took at a look at that, and it would be our position that it doesn't really

03:51:51 give any more clarity in terms of the scope of
03:51:54 the promise. The notices really just refer to
03:51:58 the surrender of the Reserve, referring to that
03:52:01 it's the surrender of the peninsula but for the
03:52:04 Reserves that were reserved out of that
03:52:09 surrender. So we don't think that that really
03:52:13 adds too much in terms of clarity in terms of
03:52:15 the promise to protect.
03:52:16 The second question you asked me with
03:52:23 respect to Chief Justice McLachlin in the
03:52:26 Marshall 1999 decision, paragraph 78. So I've
03:52:29 taken a look at that, and we don't have an issue
03:52:31 with this list in terms of summarizing the
03:52:34 principles of treaty interpretation, except for
03:52:38 in this list I think it's number 6 and number 8
03:52:44 that talk about how to construe the language in
03:52:46 the Treaty text.
03:52:50 And my view is that this kind of
03:52:52 gives too much importance to the text itself.
03:52:54 And why this is particularly significant is that
03:53:02 she's in dissent in this decision in R. v.
03:53:05 Marshall, which finds that there's a treaty
03:53:10 promise with respect to -- with respect to a
03:53:10 document where the text is very sparse.
03:53:12 So it's significant that the majority

found that there was a treaty promise and Chief Justice McLachlin did not agree with that.

So that's the only thing that I would add as a comment or caveat with respect to the list that she provides of the treaty principles for interpretation. However, it is comprehensive.

And then the third question you asked me was about the breach of fiduciary duty claim that we are bringing versus a breach of treaty, asking me why we are not framing it as a breach of treaty claim.

So there's two answers to this. If it was a breach of treaty claim the possibility or the remedy for that is that it might lead to Treaty 72 being void.

So we've chosen not to argue a breach of treaty claim as voiding Treaty 72 would have impacts on third parties.

The second answer is that, also part of our claim with respect to fiduciary duty looks at the behaviour leading up to Treaty 72. And we only get with the fiduciary duty, the fiduciary duty claim, the breach of fiduciary duty claim that there is a standard of care and

03:54:37 conduct that applies to that behaviour.

03:54:40 So that's also part of the reason that

03:54:42 we chose to frame it as a breach of fiduciary

03:54:46 duty claim we're not pursuing the breach of

03:54:49 treaty.

03:54:50 **THE COURT:** So you say that even

03:54:51 though the validity of Treaty 72 is not

03:54:54 challenged that that result of a breach of

03:54:58 Treaty 45 1/2 would be to void Treaty 72?

03:55:03 That's --

03:55:08 **MS. GUIRGUIS:** Yes, that's part of the

03:55:14 reasoning.

03:55:15 **THE COURT:** That's fine. Your reasons

03:55:17 can be whatever they are. Thank you very much

03:55:19 for all those responses.

03:55:27 **MS. GUIRGUIS:** So if I can turn back

03:55:28 to my submissions, Your Honour. Where I'd left

03:55:31 off was talking about the balancing that -- the

03:55:36 balancing of interests in relation to the

03:55:37 peninsula. And we were saying that our

03:55:41 submissions about why that's not appropriate

03:55:44 when it comes to the peninsula, the first reason

03:55:48 I gave is because the peninsula was a Reserve.

03:55:52 The second reason is because settler

03:55:57 interests in the peninsula were private interest

in owning lands. These are not the kind of public interests that the Crown can balance against any other interest.

For example, in the case of Osoyoos, at tab 59 of our book of authorities, there are public interests recognized in that case, and that's in the context of expropriation which are defined by statute.

The Osoyoos carves out a narrow exception in the more robust duty that applies to Reserve land, where there is a statutory power to act to expropriate a Reserve in the public interest. The duty on the Crown in this context is to protect the Reserve as much as possible in light of that statutory interest, but it doesn't mean that there's a general license to balance competing stakeholders, however the Crown, in the context of that time, thought was fair.

The third reason we say it is not appropriate to allow a balancing of interest in this case is that the Crown made a specific promise to protect if peninsula from white encroachment. So the specific promise was to prefer the interest of SON to settlers in

relation to the peninsula.

So as part of the bargain to allow settler interest to win the day in terms of land surrendered in Treaty 45 1/2, those lands were being opened up to settlers there. They've gotten the promise, the specific promise that their interests are going to be preferred to settlers' interests on the peninsula.

Fiduciary duties are highly content specific. So the scope of the Crown's duty must take into account the promise to protect the peninsula in Treaty 45 1/2. So the Crown's articulation of a highly-limited fiduciary duty fails to account in any way for that promise.

Ontario also makes an argument at paragraphs 505 to 509 of their submissions that fiduciary duties do not apply in the same way where Reserves are large.

THE COURT: Sorry, repeat that please.

MS. GUIRGUIS: That fiduciary duties do not apply where the Reserve is large.

So we disagree with this because there's no support in the case law for the proposition that the well-established suite of fiduciary duties that arise in relation to

Reserve land do not apply if a Reserve reaches a certain size.

Even if it did, Ontario has not pointed to a specific size limit, rather they have only suggested that since the peninsula is larger than the typical Reserves we might see at present times, it can't be protected as a Reserve or subject to the same fiduciary duties. We submit that that should be rejected.

There's no qualitative difference between smaller and larger Reserves in this case. The large Reserve was created the same way, by treaty and for the same reasons as other Reserves to preserve a homeland for the First Nation as they gave up most of their land to be opened up for settlement.

Finally, Ontario also argues that the ad hoc duty but not the sui generis duty may be strict and may require the fiduciary to avoid conflict. So they say that that is only required of ad hoc duty but not the sui generis duty; and that generally fiduciary law in Canada requires only ordinary prudence but all other Crown interest must, on the ad hoc branch, give way to the beneficiary's interest. But we

04:00:38 disagree. Under both branches duties of
04:00:45 loyalty, the strict duties, and the standard of
04:00:50 care apply.
04:00:54 So whether it's under the ad hoc
04:00:57 branch or the sui generis branch you have the
04:00:59 duty of loyalty and the duty -- and the
04:01:02 fiduciary standard of care under both of them.
04:01:06 We've set this out with some clarity,
04:01:09 or we've tried to clarify this in our reply,
04:01:13 paragraphs 410 to 415. And I'd like to discuss
04:01:18 this a bit next.
04:01:28 The standard of conduct relates to
04:01:31 loyalty and honesty, and it is a very strict
04:01:33 standard. A fiduciary, for example, is
04:01:38 prohibited from having a conflict of interest or
04:01:42 from profiting from the fiduciary relationship.
04:01:47 The standard of conduct also encompasses other
04:01:50 matters, owing generally to honest, good faith
04:01:53 and loyalty. So the standard of conduct is
04:01:58 strictly enforced.
04:02:02 In matter where the fiduciary gets to
04:02:05 choose how to pursue the objective of acting in
04:02:07 the beneficiary's best interest, and there's
04:02:11 discretion on how to do that, then the fiduciary
04:02:14 is subject to the standard of care. And the

04:02:19 standard of care is defined usually as acting in
04:02:24 accordance with ordinary prudence.
04:02:30 But what does ordinary prudence
04:02:32 require? One consideration is what the Crown
04:02:38 has actually done or does when it manages its
04:02:40 own assets. The duty on the Crown as a
04:02:51 fiduciary here is that of a man of ordinary
04:02:53 prudence managing his own affairs. That's the
04:03:02 standard that's been defined by courts. that's
04:03:05 set in Fales v. Canada Permanent Trust Co., and
04:03:05 that's set out at tab 21 of our book of
04:03:08 authorities.
04:03:14 This has been elaborated on in
04:03:16 Blueberry Indian Band, Blueberry River v.
04:03:23 Canada, a 1995 Supreme Court of Canada case,
04:03:26 paragraphs 102 to 104. And this is at our book
04:03:30 of authorities at tab 9.
04:03:42 **THE COURT:** Which book of authorities?
04:03:44 **MS. GUIRGUIS:** The original one for
04:03:45 both of them.
04:03:47 **THE COURT:** So tab 21, and the second
04:03:49 tab?
04:03:50 **MS. GUIRGUIS:** The second tab is
04:03:51 tab 9.
04:03:52 **THE COURT:** Thank you.

04:03:58 **MS. GUIRGUIS:** Ordinary prudence is
04:04:03 discussed there in terms of to say that a
04:04:06 reasonable person does not inadvertently give
04:04:09 away a potentially valuable asset.
04:04:11 So in the case in Blueberry River the
04:04:13 court found that the Crown, managing its own
04:04:16 affairs there, reserved out mineral and it
04:04:19 should have done the same for the Blueberry
04:04:20 River Indian Band.
04:04:30 So I want to touch on how this plays
04:04:32 out in application to our case. So we argue, in
04:04:36 our final argument, that there is a duty on the
04:04:37 Crown to protect SON's interest in its Reserves
04:04:41 from exploitation. That's sets out in our final
04:04:45 argument at paragraphs 1186 to 1190. To protect
04:04:55 from exploitation attracts a strict standard of
04:04:57 conduct. It arises when a Reserve has been
04:05:01 created and it requires that the Crown not
04:05:05 accept a surrender made under conditions of
04:05:07 exploitation, such as when the First Nations
04:05:11 autonomy and freedom to choose to make the
04:05:14 surrender is called into question.
04:05:17 There's examples of this in the case
04:05:20 law, one is the Makwa case, tab 44 of our
04:05:26 original book of authorities. And in that case

04:05:31 is the Specific Claims Tribunal that found the
04:05:34 surrender was exploitative and a breach of the
04:05:37 Crown's duty because they found that the Band
04:05:40 didn't really have a choice. Their choices were
04:05:43 refuse to surrender and live with squatters, or
04:05:46 accept the surrender and receive some money.
04:05:51 The specific claim's tribunal also
04:05:54 talked about how that was because the Department
04:05:55 of Indian Affairs would not remove squatters.
04:05:59 Indian Affairs pressed the Band to
04:06:01 vote for the surrender; they misrepresented the
04:06:05 powers of CN, CN Rail, and underplayed the
04:06:10 ability of the Crown to stop CN developments.
04:06:16 The relevant paragraphs for this are 155 to 157,
04:06:20 also 140 to 146.
04:06:25 The Department of Indian Affairs,
04:06:33 according to the Tribunal, gave priority to the
04:06:36 interest of squatters over the interests of the
04:06:38 Band in preserving its land base, and it
04:06:41 condoned squatter and had no intention of
04:06:44 removing them from the Reserve.
04:06:46 What the tribunal found in Makwa is
04:06:58 that they found the actions of Crown officials
04:07:00 breached Crown fiduciary of loyalty,
04:07:00 consultation and adequate consideration of the

interests of the Band in preserving its land base. So this is a strict standard of conduct.

The same arises in Semiahmoo, which is at our book of authorities, the original one, at tab 99. The court there says that the Crown had a duty to avoid an exploitative bargain in a 1951 surrender. The court found this that Band was vulnerable because of, (1) the Crown's ability to expropriate the lands, the Band new that they couldn't really say no; and, (2), at the time of surrender, and even 40 years later, the Crown did not have an actual plan for development of the Custom's facility for which it took the surrendered. The surrender, according to the court was exploitative and the Crown had a duty to refuse it. And in this duty the fiduciary Crown must be held to a strict standard of conduct.

So in application to our case, first we argue that the Crown did not take adequate measures to protect the peninsula. We say that the actions were not consistent with the ordinary prudence needed to protect the Reserve. I'm going to talk more about that in the next section regarding breaches.

04:08:29 What we're saying here is that they're
04:08:34 not acting in accordance with the standard of
04:08:35 care, not acting in accordance with ordinary
04:08:38 prudence. What would that have included? To at
04:08:40 least manage it in the same way that they were
04:08:44 expected to manage their own affairs, or that
04:08:45 they would have managed their own affairs; to
04:08:55 enforce applicable laws, so evicting
04:08:56 trespassers, appointing constables to do so and
04:08:56 so on.
04:08:58 Second, regardless of whether or not
04:09:01 the Crown took adequate measures, or acted in
04:09:05 accordance with ordinary prudence to protect the
04:09:08 peninsula prior to Treaty 72, the duty from
04:09:12 exploitation means that it could not accept a
04:09:14 surrender made under exploitative conditions.
04:09:17 What we say are the exploitative
04:09:22 conditions again are drawn from guidance from
04:09:26 the case law. We say that the Saugeen Ojibwe
04:09:30 really didn't have a choice, in the same way
04:09:34 that the Makwa First Nation did not that was
04:09:39 just discussed. Where the Crown lied or misled
04:09:46 them, including if the Crown failed to make any
04:09:49 inquiry to ascertain whether the information
04:09:52 they were delivering was the truth. We say that

04:09:55 1 created exploitative conditions.
04:10:10 2 An example of that from our case law
04:10:14 3 in Jim Shot Both Sides, I don't have it here
04:10:14 4 where it's located in our book of authorities
04:10:14 5 but I will find out for you. But in that case
04:10:28 6 where the Crown was dealing with protection of
04:10:30 7 Reserve interest that the tribe had -- that the
04:10:33 8 Blood Tribe had in their Reserve, the Crown
04:10:37 9 found that -- here it is tab 35 of our side of
04:10:44 10 authorities. The relevant paragraph is
04:10:46 11 paragraph 378. The court found that the Crown,
04:10:51 12 Canada, breached its duty to the Blood Tribe in
04:10:55 13 1888 when its official told Red Crow and the
04:10:58 14 others that the Reserve as laid out in the 1883
04:11:00 15 survey gave them a larger Reserve than they were
04:11:03 16 entitled to under the terms of Treaty No. 7.
04:11:05 17 First, the statement was wrong based
04:11:07 18 on the population count determined herein,
04:11:10 19 second, there was no evidence that Pocklington,
04:11:13 20 the Crown official who made the statement, had
04:11:18 21 made any inquiry to ascertain its truth or had
04:11:22 22 any direct knowledge that it was accurate.
04:11:24 23 So misleading them, giving them
04:11:27 24 misinformation, not verifying the truth of the
04:11:28 25 information results in exploitative conditions,

and that is a breach of the breach standard of conduct.

So moving on to the next section and my submissions about the breaches of fiduciary duty, and what happened in this case. So our claim is that the Crown owed fiduciary duty to SON in respect of its interest in the peninsula and that the Crown breached those fiduciary duties.

In essence our argument about breaches is this, first, the Crown had the capacity to protect the peninsula; second, the Crown failed to take adequate measures that were within its capacity to protect the peninsula. It's actions were not consistent with the standard of care required to meet its duty; and third, the Crown breached its duties by obtaining a surrender through threats and misinformation.

The results of that breach was the surrender of the peninsula, the result is Treaty 72. So our claim is that this is about the breach of fiduciary duty leading up to Treaty 72. The result is the Treaty but we are not challenging the legal validity of the Treaty based on duress. Duress and validity are

mentioned at paragraph 617 of Canada's submissions on the Treaty.

We're not challenging the validity on any other grounds. Rather we are making a claim in equity about the breach of fiduciary duty. And the evidence, we say, suggests that the breaches of fiduciary duty were significant in prompting the surrender. Because Treaty 72 was the result of a breach of fiduciary duty we are seeking an equitable remedy to put SON in as close a position as possible had the breach not happened. That is, the remedy we will be seeking is a finding that the lands on the peninsula became subject to a constructive trust as of October 14, 1854.

This is of course a matter for Phase 2 but I wanted to set out this context clearly, particularly in response to any confusion or arguments regarding our claim in respect of validity.

THE COURT: Just before you get to that, counsel, I want to make sure that it's clear to all concerned that the constructive trust claim is not to the peninsula. Your constructive trust claim is in respect of lands

currently owned by the defendants, Canada, Ontario and the Municipalities, and does not include privately-owned property.

MS. GUIRGUIS: Doesn't include lands that were bona fide -- yes, subject to a bona fide purchase without value.

But we're saying it was in 1854, but then it was subsequently reduced.

THE COURT: I just want to make it clear on the record, that your claim is very specific, it is not general. And if one was to generalize it it would be that you're claiming a constructive trust over lands held by Canada in the area of -- affected by Treaty 72, and lands held by Ontario in that area, and lands held by the Municipalities in that area. That is the claim you're making for constructive trust, not other lands.

MS. GUIRGUIS: Yes, that's correct, Your Honour, our claim is with respect to compensation for those lands.

THE COURT: Please go ahead.

MS. GUIRGUIS: So in respect of the breaches of fiduciary duty, starting with the first point of this section, the capacity to

protect the peninsula.

Mr. Townshend mentioned this is an important aspect of our case, the question of whether the Crown had the capacity to protect the peninsula.

We've led evidence, as have the Crown defendants, conducted extensive cross-examination, and canvassed the matter throughout the trial. We've also covered this, I hope thoroughly, in our written submissions so I don't propose to go into detail in respect of capacity.

Subject to any questions Your Honour may have I was going to give a few minute overview to set out what we are not arguing, particularly in response to some of the points that the Crown defendants have raised, versus what we are arguing.

THE COURT: Well, why don't you go ahead, counsel, with your overview and I'll let you know if I have questions.

We are not arguing that the settlement of a colony, or that the whole project of colonization was a breach of the Crown's fiduciary duty to SON in respect of its interest

04:17:20 in the peninsula

04:17:22 We are not arguing that the Crown was

04:17:31 required to station the entire British army at

04:17:32 the base of the peninsula to exclude squatters,

04:17:35 or unauthorized farmers and timber thieves. Nor

04:17:42 do we argue that it is evident from anything in

04:17:46 the record that such a force or patrol would

04:17:49 have been necessary to protect the peninsula

04:17:56 from the encroachment of whites.

04:18:00 What we did hear was expert opinion

04:18:01 from, for example Mr. Wentzell that the starting

04:18:04 point with respect to trespassers, squatters,

04:18:05 unauthorized farmers or timber thieves would be

04:18:11 an arrest. What we are arguing is that it was

04:18:14 within the capacity of the Crown to do more than

04:18:19 it did to protect the peninsula, using the laws

04:18:22 that it had in place and using local law

04:18:25 enforcement to do so.

04:18:28 The laws that they had in place

04:18:30 included the 1839 Act and the 1850 Act, which we

04:18:35 discuss in our written submissions at paragraphs

04:18:38 730 to 753, those Acts, we say, provided that

04:18:46 warrants and evictions could be issued against

04:18:48 people unlawfully occupying Crown or Indian

04:18:52 lands.

04:18:56 With respect to local law enforcement,
04:18:59 we put that into our written submissions at
04:19:02 paragraph 748 to 777. And we talk about
04:19:09 Commissioners that were appointed under these
04:19:11 Acts and could have directed local constables to
04:19:13 carry out warrants and evictions. We've pointed
04:19:17 to evidence that there were some local
04:19:19 Constables in the 1850s, and that there could
04:19:21 have been more appointed if they were needed.
04:19:28 But what we are saying is the Crown
04:19:30 had choices in terms of how it could have
04:19:33 protected the peninsula. And what we are
04:19:38 arguing is that the Crown was required to make
04:19:40 choices to employ that capacity in accordance
04:19:44 with ordinary prudence, to fulfill its promise
04:19:47 to protect the Reserve, the peninsula, for SON.
04:19:59 So the second point that I want to
04:20:02 make is that, the Crown failed to take adequate
04:20:08 measures that were within its capacity to
04:20:10 protect the peninsula, and that its actions were
04:20:13 not consistent with the standard of care
04:20:16 required to meet its fiduciary duty.
04:20:18 So what would have been enough?
04:20:24 Contrary to what Ontario asserts, we are not
04:20:28 saying that the Crown had to do every

04:20:30 conceivable thing to protect the peninsula.
04:20:34 What we are saying they had to do was prefer the
04:20:36 interests of SON in the peninsula to the
04:20:39 interest of settlers, and it had to exercise
04:20:42 ordinary prudence to achieve the objective of
04:20:45 protecting the Reserve for SON.
04:20:49 So as noted, the standard of care
04:20:51 requires ordinary prudence, so the duty on the
04:20:55 Crown as fiduciary was that of a man of ordinary
04:20:58 prudence in managing his own affairs. So the
04:21:02 first place we looked to determine what would
04:21:05 have been enough is the examples of how the
04:21:09 Crown dealt with its own lands.
04:21:11 When the Crown was managing Crown
04:21:14 lands, including the peninsula for itself and
04:21:17 for the benefit of settlers after Treaty 72, it
04:21:22 took the following measures: So in respect of
04:21:26 Crown lands after the surrender of lands in
04:21:32 Treaty 45 1/2 we see some prosecution of
04:21:35 squatters. We have one example that we've cited
04:21:40 in mind, the Withers's example, which is at
04:21:44 paragraph 776(b) of our final submissions. This
04:21:53 is an example of someone that was settled on
04:21:55 Treaty 45 1/2 lands after they were surrendered,
04:21:58 so they were Crown lands at the time. And that

04:22:00 person was prosecuted by the Crown.

04:22:05 We see also the notice and the request
04:22:09 to Rankin and to the sheriff, to Sheriff
04:22:12 Schneider to keep squatters off the land right
04:22:17 after the surrender of the peninsula, on
04:22:19 October 14th, 1854. We discussed that in our
04:22:25 final argument at paragraphs 834 and 835. And
04:22:32 copies of those notices appear in several places
04:22:35 in the record, but we've cited it to Exhibit
04:22:38 2175.

04:22:46 There was also the offer of military
04:22:48 support to a survey party that the Crown made in
04:22:51 1855 when the surveyor was having trouble
04:22:56 surveying the peninsula a year after, a little
04:23:00 less than a year after it was surrendered. We
04:23:04 see that evidence, that offer that the Crown
04:23:08 made in an effort to protect its own lands by
04:23:11 that point at Exhibit 2246.

04:23:18 In 1849 we have the example of the
04:23:21 Crown sending 87 soldiers to Mica Bay to put
04:23:26 down a resistance by Indigenous peoples to a
04:23:30 mining project. That was about protecting
04:23:34 settler interest in mining.

04:23:37 In 1863 we have the Manitoulin
04:23:40 incident where Mr. William Gibbard, a fishery

overseer, gathered a force of 22 constables to arrest Indigenous people over -- that were involved in a stand-off where the Crown was trying to take control over fisheries on Manitoulin. More information on that at Exhibit 4301, and we deal with it in our final argument at paragraph 758(a).

There's also an example in 1845 of a police force created on the Williamsburg canals to preserve order amongst labourers on the canals. Creations of local police forces for the protection of Crown infrastructure at that time. Again there is more detail on that in Exhibit 4722, and in our final argument we deal with that at paragraph 758(b).

So all of that we submit are examples of how the Crown managed its own affairs in the interest of settlers, and give us a sense of what would have been, what could have been done, similar actions could have been taken in respect of the peninsula but they were not.

The other place we submit that we can seek guidance from in terms of what would have been enough, in terms of ordinary prudence, is the case law examples. So in Williams Lake v.

04:25:16 Canada, which was a specific tribunals case,
04:25:18 which was affirmed by a majority of the Supreme
04:25:22 Court of Canada in 2018, we have the specific
04:25:28 tribunals case at tab 115 of our original book
04:25:37 of authorities and the Supreme Court case at
04:25:39 tab 116 of our original book of authorities.
04:25:44 The Specific Claims Tribunal there
04:25:46 talks about the steps that Canada had to take
04:25:49 within its power to protect Indian settlements
04:25:52 and challenge unlawful pre-emptions by settlers
04:25:57 of Williams Lake's land. At paragraph 328 of
04:26:04 the Specific Claims Tribunal decision they say:
04:26:07 "In the circumstances, the
04:26:07 exercise of ordinary prudence in
04:26:07 advancing the 'liberal policy' would
04:26:07 include measures to clear away the
04:26:07 impediment to the allotment of a
04:26:07 reserve at the Village Lands. The Land
04:26:07 Act, 1875, made provision for just
04:26:07 that. If ordinary prudence did not
04:26:07 call for these measures, the higher
04:26:07 duty associated with a unilateral
04:26:07 undertaking would. As Canada was to
04:26:07 pursue a policy of reserving
04:26:07 settlement lands it was duty bound to

04:26:07 challenge unlawful pre-emptions where
04:26:07 their existence prevented the
04:26:07 allotment of reserves."
04:26:51 So in Williams we see that ordinary
04:26:53 prudence called for the Crown to use its own
04:26:55 laws to clear away impediments to allotment of
04:26:59 Reserve lands, they were required to challenge
04:27:02 the pre-emptions of settlers these lands. And I
04:27:05 would note that Williams is about pre-Reserve
04:27:09 creation and it's still found that the Crown had
04:27:11 to act accordingly.
04:27:13 In Makwa, which we've talked about
04:27:18 earlier, which is in our original book of
04:27:21 authorities tab 44, the specific claims tribunal
04:27:27 notes that the Department of Indian Affairs knew
04:27:30 about the presence of squatters on the Reserve
04:27:33 and they gave priority to the interest of
04:27:36 squatters over the interest of the Band in
04:27:38 preserving its land base. It condoned squatting
04:27:42 and had no intention of removing them. And
04:27:46 instead of removing the squatters the Department
04:27:49 of Indian Affairs told the Indians that their
04:27:52 land could be taken without permission and
04:27:53 sought a surrender.
04:27:53 So in Makwa ordinary prudence would

have required the Department of Indian Affairs to use its knowledge of the presence of squatters on the Reserve and to remove them from the Reserve.

So, Your Honour, I see that it's almost 4:30 and I'm moving to the third in this section, the third part of this section about breaches. I can break here, if that's okay with you?

THE COURT: Thank you, counsel.

--- Whereupon the proceedings were adjourned at 4:28 p.m.