The Chippewas of Saugeen First Nation, et al v The Attorney General of Canada, et al Defendants (Court File No.: 94-CQ-50872 CM)

Chippewas of Nawash First Nation and Saugeen First Nation v Attorney General of Canada, et al (Court File No.: 03-CV-261134CM1)

APPENDIX E – WITNESS EVIDENCE (RELEVANCE AND WEIGHT)

INDEX

18	Jones, Dale
19	Jones, Fred
20	Jones, Howard
21	Jones, Jay
22	Jones, Paul
23	Kahgee, Randal
24	Keeshig, Don
25	Keeshig, Joanne
26	Keeshig, Karl
27	Keeshig, Lenore
28	Keyes, Jennifer
29	Lauzon, Ryan
30	McCalla, Douglas
31	McCarthy, Francine
32	McHugh, Paul
33	Morden, Margaret
34	Morin, Jean Pierre
35	Morin, Michel
36	Muschett, Mark
37	Nadjiwon, John
38	Nadjiwan, Marshall
39	Nadjiwan, Paul
40	O'Neil, Carolyn
41	Pelletier, Miguel
42	Reimer, Gwen

43	Ritchie, Doran
44	Ritchie, Jim
45	Roote, Vernon
46	Shawbedees, Frank
47	Sikma, Greg
48	Unruh, Troy
49	Valentine, Troy
50	von Gernet, Alexander
51	Wentzell, Tyler
52	Williamson, Ronald
53	Ontario's Maps

RELEVANCE AND WEIGHT OF ALAIN BEAULIEU'S EVIDENCE

1. Prof. Beaulieu was an expert witness called by Canada. He produced three reports entitled "French, British and Aboriginal Peoples in the Great Lakes Area, 1600-1774"[1] (First Report, 2015), "The Congress at Niagara in 1764: the Historical Context and Meaning of the British-Aboriginal Negotiations"[2] (Second Report, 2016), and "Translation Issues Concerning French Documents Relative to the Impact of the Iroquois Wars in the Mid-Seventeenth Century"[3] (Third Report, 2018).

2. Prof. Beaulieu's First Report dealt mainly with French settlement and expansion from 1600-1760, which included what the French viewed their legal rights to be in New France, and British and Indigenous relations from 1760-1774, with a discussion of the Royal Proclamation and Pondiac's War, among other things. Prof. Beaulieu's Second Report focussed on his thesis that a treaty was not entered into with the Western Indigenous Nations at Niagara. The Third Report was more narrow in scope and focussed on a few discrete matters of translation.

3. Prof. Beaulieu was tendered as an expert "historian with special expertise in Native-Newcomer relations in New France and the early years of the British regime in Canada."[4]

---

[1] Prof. Alain Beaulieu, "French, British and Aboriginal Peoples in the Great Lakes Area, 1600-1774" (2015), Exhibit 4380.
[2] Prof. Alain Beaulieu, "The Congress at Niagara in 1764: The Historical Context and Meaning of the British-Aboriginal Negotiations" (2016), Exhibit 4381.
[3] Prof. Alain Beaulieu, "Translation Issues Concerning French Documents Relative to the Impact of the Iroquois Wars in the Mid-Seventeenth Century" (2018), Exhibit 4382.
[4] Ruling of the Court, Transcript vol 60, November 18, 2019, p. 7728, lines 13-23.

EXPERTISE

4. Prof. Beaulieu's primary academic focus is Indigenous-French relations in the 17th century. He has not published with respect to French relations with Great Lakes Indigenous Nations after 1701.[5]

5. Prof. Beaulieu testified about the importance of working for all sides in order to retain his "integrity." However, Prof. Beaulieu has been retained almost exclusively by the Crown for the purposes of appearing as an expert in litigation. The only exceptions are one instance where Prof. Beaulieu had a joint retainer with the federal government and a First Nation and a second instance where Prof. Beaulieu acted for individuals, but not a First Nation specifically.[6]

RELEVANCE

French Legal Views

6. One of the questions Professor Beaulieu's First Report responds to is "Did the French feel themselves legally bound to seek permission from indigenous communities when they used the Great Lakes and built forts and trading posts at certain locations?"

7. Section 1.4 of Professor Beaulieu's First Report is a legal-historical analysis of numerous commissions by the King of France to various merchants and officials, which Professor Beaulieu asserts reveal a "unilateral logic of appropriation" and a "logic of conquest".[7]

8. Professor Beaulieu goes on to admit that the French did not act in accordance with such colonial logic. Rather, alliances with Indigenous peoples "played a crucial role in French

---

[5] Evidence of Prof. Beaulieu, Transcript vol 61, November 19, 2019, p. 7902, line 23 to p. 7903, line 10.
[6] Evidence of Prof. Beaulieu, Transcript vol 61, November 19, 2019, p. 7907, line 3 to p. 7911, line 23.
[7] Prof. Alain Beaulieu, "French, British and Aboriginal Peoples in the Great Lakes Area, 1600-1774" (2015), Exhibit 4380, pp. 30-39, quotes on pp. 31-32.

colonization history up until the end of the French regime." Further, the French could not "impose their decisions or manipulate the Aboriginal peoples as they pleased… The French had to negotiate, argue, convince, or bribe influential Aboriginal persons, and most of all, avoid marked expressions of colonization."[8]

9. The key focus in proving Aboriginal title in this case is showing exclusive occupation of portions of Lake Huron and Georgian Bay at the time of assertion of British sovereignty. It is common ground that this time is 1763 for this area.

10. What the French did in the years leading up to 1763 could be relevant to exclusive occupation in 1763. For example, Professor Beaulieu states that the French indeed tried to conceal any colonial aspirations from Indigenous people, and instead negotiated with their Indigenous allies.

11. The state of French law, however, much less what the French thought or felt about the law, is not relevant to determining exclusive occupation in 1763.

12. Furthermore, the Supreme Court of Canada has established that whether or not a right was recognized under French colonial law is not a factor in the analysis of an Aboriginal right.

> *R. v Côté*, [1996] 3 SCR 139 at paras 51-53, Plaintiffs' Book of Authorities, Tab 72.

13. SON therefore submits that evidence about French legal views should be disregarded as not relevant.

---

[8] Prof. Alain Beaulieu, "French, British and Aboriginal Peoples in the Great Lakes Area, 1600-1774" (2015), Exhibit 4380, pp. 43, 47-48.

Scope of the Report

14. Another of the questions Professor Beaulieu's First Report responds to is "Who used the Great Lakes and for what purposes between 1701 and 1774?"

15. The first two chapters of Professor Beaulieu's Report have a wide scope, with respect to subject, to geography[9], and to which Indigenous Nations are involved. Some of these chapters relate to the motivations and intentions of the French in general. Much of them, however, relate to interactions of the French and the Haudenosaunee,[10] which Professor Beaulieu considers "the most informative example" of the French using force to uphold their freedom of movement.[11] Geographically, the St. Lawrence Valley[12] and the Ohio Valley[13] figure prominently. The Anishinaabe or Lake Huron/Georgian Bay are mentioned relatively infrequently, and often only in passing.[14]

16. As noted above, the focus of proving Aboriginal title in this case is showing exclusive occupation of portions of Lake Huron and Georgian Bay at 1763. SON submits that to be relevant, a fact must have some relation to occupation of the territory claimed, or to the context necessary to understand this. This should be interpreted broadly – for example by relating to

---

[9] Prof. Alain Beaulieu, "French, British and Aboriginal Peoples in the Great Lakes Area, 1600-1774" (2015), Exhibit 4380, see map, p. 60.
[10] Prof. Alain Beaulieu, "French, British and Aboriginal Peoples in the Great Lakes Area, 1600-1774" (2015), Exhibit 4380, pp. 41, 52-54, 61-74.
[11] Prof. Alain Beaulieu, "French, British and Aboriginal Peoples in the Great Lakes Area, 1600-1774" (2015), Exhibit 4380, p. 52.
[12] Prof. Alain Beaulieu, "French, British and Aboriginal Peoples in the Great Lakes Area, 1600-1774" (2015), Exhibit 4380, pp. 13-15, 52-56.
[13] Prof. Alain Beaulieu, "French, British and Aboriginal Peoples in the Great Lakes Area, 1600-1774" (2015), Exhibit 4380, pp. 25, 57, 75-78.
[14] Prof. Alain Beaulieu, "French, British and Aboriginal Peoples in the Great Lakes Area, 1600-1774" (2015), Exhibit 4380, pp. 16, 19, 22, 25, 40-41, 50-51, 53, 56, 68.

Anishinaabe people, by relating to Lake Huron or Georgian Bay, or by relating to the assertion of British sovereignty in North America.

17. Even interpreted broadly, Prof. Beaulieu's report includes material which does not meet these criteria. For example, it includes the following matters:

(a) The Iroquoians at Stadacona (near Québec City) tried to persuade Jacques Cartier from proceeding upstream in 1535.[15]

(b) French trade monopolies in the St. Lawrence River Valley affecting the Innu (focused on the mouth of the Saguenay River).[16]

(c) La Salle taking Louisiana in 1682.[17]

(d) French troops invading Mohawk territory in 1666.[18]

(e) Interactions between the French and the Iroquois concerning building and holding Fort Frontenac (now Kingston).[19]

18. SON submits that events from the French period which do not relate to Anishinaabe people, nor to Lake Huron or Georgian Bay, nor to the assertion of British sovereignty in North America are not probative of any issue connected to Aboriginal title, and can be disregarded.

---

[15] Prof. Alain Beaulieu, "French, British and Aboriginal Peoples in the Great Lakes Area, 1600-1774" (2015), Exhibit 4380, p. 50.
[16] Prof. Alain Beaulieu, "French, British and Aboriginal Peoples in the Great Lakes Area, 1600-1774" (2015), Exhibit 4380, pp. 54-56.
[17] Prof. Alain Beaulieu, "French, British and Aboriginal Peoples in the Great Lakes Area, 1600-1774" (2015), Exhibit 4380, p. 41.
[18] Prof. Alain Beaulieu, "French, British and Aboriginal Peoples in the Great Lakes Area, 1600-1774" (2015), Exhibit 4380, p. 53.
[19] Prof. Alain Beaulieu, "French, British and Aboriginal Peoples in the Great Lakes Area, 1600-1774" (2015), Exhibit 4380, pp. 61-65.

CREDIBILITY

19. Professor Beaulieu opines that a treaty was not entered into at Niagara between Britain and the Western Indigenous Nations. Professor Beaulieu is alone amongst his academic peers in holding this opinion.[20]

20. Professor Beaulieu seemed entrenched in his view that a treaty was not entered into at Niagara and refused to make reasonable concessions on cross examination in this regard. For example:

(a) He insisted that terms such as compensation for British traders for their losses in Pondiac's War and to collect and return prisoners from the war were part of what was contemplated in the Treaty of Detroit, such that they were not new terms at Niagara;[21] and

(b) He refused to acknowledge that for Niagara to have truly been a renewal of the Treaty of Detroit, all the Western Nations at Niagara would have had to have been part of the Treaty of Detroit.[22]

21. Prof Beaulieu repeatedly insisted that the Court needed to look to how Sir William Johnson explained to his superiors what he did in Niagara in 1764 to determine whether a treaty

---

[20] Evidence of Prof. Eric Hinderaker, Transcript vol 19, June 10, 2019, p. 1653, line 25 to p. 1654 line 3.
[21] Evidence of Prof. Alain Beaulieu, Transcript vol 62, November 20, 2019, p. 7968 line 23 to p. 7972 line 5.
[22] Evidence of Prof. Alain Beaulieu, Transcript vol 62, p. 7992, line 21 to 7993, line 24 and p. 8001, lines 8-14.

was formed.[23] When Prof. Beaulieu was presented with two documents that suggested that Johnson understood that a treaty had been formed with the Western Nations at Niagara, specifically when he was presented with letters from Johnson to the Lords of Trade, who were "supervising" the "colonial operation",[24] where Johnson said that he: (1) was going to admit Nations into the Covenant Chain;[25] and (2) had made a Treaty with the Ottawas and Mississaugas, which he considered to be Western Nations, at Niagara,[26] Professor Beaulieu would not acknowledge that it was possible that Johnson believed that two written treaties and one unwritten treaty were concluded at Niagara.[27] SON submits that this undermines his credibility and suggests that he was advancing his own belief that there was no treaty with the Western Nations at Niagara rather than trying to assist the court in understanding the evidence as an impartial witness. Because of this, SON submits, his evidence with respect to the Treaty of Niagara should be given very little weight. Furthermore, the SON submits that this credibility concern should be considered when weighing his other evidence as well.

---

[23] Evidence of Prof. Alain Beaulieu, Transcript vol 62, p. 7975, lines 1-3; p. 7977, lines 6-23; p. 7989, lines 14-17; p. 7992, lines 1-8; p. 7995, line 23 to 7996, line 1; p. 8001, lines 15-20; p. 8024, line 21 to p. 8025, line 5; and p. 8027, lines 2-25.
[24] Evidence of Prof. Alain Beaulieu, Transcript vol 62, November 20, 2019, p. 8044, line 24 to p. 8045, line 1.
[25] Evidence of Prof. Alain Beaulieu, Transcript vol 62, November 20, 2019, p. 8030, line 9 to p. 8039, line 4.
[26] Evidence of Prof. Alain Beaulieu, Transcript vol 62, p. 8040, line 9 to 8047, line 12; Letter from William Johnson to the Lords of Trade, October 30, 1764, Exhibit 652, p. 674.
[27] Evidence of Prof. Alain Beaulieu, Transcript vol 62, p. 8047, line 13 to p. 8049, line 14.

RELEVANCE AND WEIGHT OF CARL BENN'S EVIDENCE

1. Prof. Carl Benn is a historian with an expertise in military history. He prepared a report entitled "Historical Questions Related to Lake Huron and Georgian Bay 1760s-1830s"[1] and testified about:

(a) Pondiac's War, the post-war period, and the Indigenous role in the war of 1812, in response to the portion of Mr. Donald Graves' report, "Comments and Observations on the Expert Reports of Hinderaker and Harring" (Exhibit 4553), that responded to Prof. Eric Hinderaker's evidence;

(b) water routes, navigation trade and colonial records in the SONUTL in the mid to late 18th and early 19th centuries, in response to sections 1.3.2, 3.3 and 7.3 of Dr. Gwen Reimer's report, "Volume 2: Aboriginal Use and Occupation of the Lake Claim Area, ca. 1600-1900";

(c) the capacity of the British, the Anishinaabe, and others including the Americans to travel in, and control access to Lake Huron and Georgian Bay around the War of 1812; and

(d) when and how the British developed the knowledge required for navigating Lake Huron and Georgian Bay.[2]

---

[1] Prof. Carl Benn, "Historical Questions Related to Lake Huron and Georgian Bay 1760s-1830s" (2016), Exhibit 4195.
[2] Prof. Carl Benn, "Historical Questions Related to Lake Huron and Georgian Bay 1760S-1830S", September 2016, Exhibit 4195, p. 3 and generally.

2. Prof. Benn was qualified as a "historian with expertise in military history, and capable of giving opinion evidence on the military history of the Great Lakes area and the St. Lawrence Valley from 1760 to the mid-19th century and the Seven Years' War, with particular expertise in the British naval presence in Eastern Lake Huron and Georgian Bay and the War of 1812."[3]

Qualifications

3. Prof. Benn has extensive experience in the area for which he was qualified. He began his career as an historical interpreter at the Toronto Historical Board in 1972, and obtained a PhD in history from York University in 1995.[4] His dissertation was on the role of the Iroquois in the War of 1812, and was ultimately published as a book.[5]

4. Prof. Benn began teaching courses on Canadian colonial military history and Indigenous history at the University of Toronto in 1991, and has continued to do so at the University of Toronto and Ryerson University since that time.[6] He has published extensively over his career, including three books (soon to be four) on the Indigenous involvement in the War of 1812, and numerous other publications on this topic.[7] He confirmed on cross examination that of the scholars who are alive, he is the leading Canadian expert in the field of Indigenous peoples in the War of 1812 in the Great Lakes.[8]

---

[3] Ruling of the Court, Transcript vol 39, August 16, 2019, p. 4432, lines 7-14; Ruling of the Court, Transcript vol 40, August 19, 2019, p. 4553, line 13 to p. 4554, line 8; Revised Description of Qualifications for Prof. Carl Benn, Exhibit P-1.
[4] Evidence of Prof. Carl Benn, Transcript vol 39, August 16, 2019, p. 4419, lines 3-6 and lines 16-19; CV of Prof. Carl Benn, August 2019, Exhibit 4194, p. 1.
[5] Evidence of Prof. Carl Benn, Transcript vol 39, p. 4425, lines 11-18.
[6] Evidence of Prof. Carl Benn, Transcript vol 39, August 16, 2019, p. 4420, lines 5-11; CV of Prof. Carl Benn, August 2019, Exhibit 4194, pp. 16-17.
[7] Evidence of Prof. Carl Benn, Transcript vol 39, August 16, 2019, p. 4420, lines 1-4; p. 4425, line 11 to p. 4427, line 11; CV of Prof. Carl Benn, August 2019, Exhibit 4194, pp. 3-15.
[8] Evidence of Prof. Carl Benn, Transcript vol 40, August 19, 2019, p. 4645, line 20, to p. 4646, line 5.

5. He also published reviews for texts covering Mackinac from 1616-1860, and Detroit from 1701-1838, which Prof. Benn described as focussing on transportation, the assertion of various kinds of sovereignty, resistance to the sovereignty and characteristics of material culture of the region such as sailing vessels.[9] He has also published reviews of texts on the Seven Years' War and the role of Indigenous forces, and teaches courses about Indigenous people and settlers in the Great Lakes in 1763.[10] He has written on Indigenous peoples in Southern Ontario, Toronto, and the Toronto Passage in the 18th and 19th centuries.[11]

6. Prof. Benn's expertise was acknowledged and sought by Canada and Ontario: both Defendants requested to qualify him as an expert more broadly than the Plaintiffs originally proposed, as they wished to have him testify about events leading up to the Seven Years' War, as well as events in the St. Lawrence Valley.[12]

General Credibility and Reliability

7. Prof. Benn was a polite and respectful witness. He was agreeable on cross examination where appropriate, and acknowledged when he did not know the answer to a question.[13] Prof. Benn was a credible and reliable witness, and his evidence should be given significant weight where it is relevant.

---

[9] Evidence of Prof. Carl Benn, Transcript vol 39, August 16, 2019, p. 4420, line 20, to p. 4421, line 18; Evidence of Prof. Carl Benn, Transcript vol 40, August 19, 2019, p. 4646, lines 6-17; CV of Prof. Carl Benn, August 2019, Exhibit 4194, pp. 9-10, 17.
[10] Evidence of Prof. Carl Benn, Transcript vol 39, August 16, 2019, p. 4421, line 19, to p. 4422, line 10.
[11] Evidence of Prof. Carl Benn, Transcript vol 39, August 16, 2019, p. 4422, line 11 to p. 4425, line 10.
[12] Submissions of Counsel, Transcript vol 39, August 16, 2019, p. 4428, line 13 to p. 4431, line 19.
[13] See, for example: Evidence of Prof. Carl Benn, Transcript vol 39, August 19, 2019, p. 4652, lines 14-24; p. 4662, lines 1-14; and p. 4708, line 24 to p. 4710, line 9.

RELEVANCE AND WEIGHT OF PROF. LAUREL M. BOWMAN'S EVIDENCE

1. Professor Bowman was qualified by this Court as an expert classicist with special expertise in the methodology of inquiry into the historical content of orally-transmitted traditions.[1]

2. SON submits that there are weaknesses in Professor Bowman's training and experience, which calls for less weight to be afforded to some of her opinions.

NO EXPERIENCE WITH INDIGENOUS ORAL TRADITIONS

3. In her evidence, Professor Bowman summarized the academic literature in the field of geomythology. She then set out step-by-step basic principles for the historical interpretation of any oral tradition.[2] In her testimony, she maintained that her methodology was valid regardless of content.[3]

4. Professor Bowman acknowledged, however, that there is no academic consensus to how to do geomythology.[4] She also acknowledged that the methodology she developed is novel and has not been peer reviewed.[5]

---

[1] Evidence of Prof. Laurel Bowman, Transcript vol 85, February 18, 2020, p. 10811, lines 18-21.
[2] Prof. Laurel Bowman, "Geomythology and Oral Tradition: A Guide to Method" (2019), Exhibit 4617, pp. 7-8 – *Broad basic principles for the historical interpretation of any oral tradition*.
[3] Evidence of Prof. Laurel Bowman, Transcript vol 85, February 18, 2020, p. 10907, line 19 to p. 10908, line 20.
[4] Evidence of Prof. Laurel Bowman, Transcript vol 85, February 18, 2020, p. 10890, lines 18-23.
[5] Evidence of Prof. Laurel Bowman, Transcript vol 85, February 18, 2020, p. 10891, lines 8-14.

5. Professor Bowman is trained in classics, which is the study of the Greek and Roman worlds from the Bronze Age to the fall of the Roman Empire.[6] Her speciality is Greek literature.[7] She acknowledged that she has no expertise with Indigenous traditions in Ontario or elsewhere in the world.[8]

6. Further, her experience is with written texts – as Greek myths are no longer passed down orally.[9] She freely acknowledged on cross-examination that she has no experience with extant oral traditions.[10] She has never conducted an interview with an oral history knowledge holder.[11]

7. SON submits that a novel and untested methodology that purports to apply to *any* oral tradition prepared by someone who has no experience with live oral traditions and no experience outside of the classical world should receive little weight from this Court.

INCONSISTENCIES IN ANALYSIS

8. At times, Professor Bowman applied her own analysis inconsistently.

9. In the context of Greek traditions, Professor Bowman stated that one may draw conclusions from an aggregate of individual stories. Those stories can be about different locations and describe different events. To illustrate this concept, Professor Bowman gave the example of an aggregate of stories regarding the adventures of Hercules. She explained that

---

[6] Evidence of Prof. Laurel Bowman, Transcript vol 85, February 18, 2020, p. 10782, lines 5-15.
[7] Evidence of Prof. Laurel Bowman, Transcript vol 85, February 18, 2020, p. 10782, line 21 to p. 10783, line 1.
[8] Evidence of Prof. Laurel Bowman, Transcript vol 85, February 18, 2020, p. 10810, lines 12-16 and p. 10907, lines 4-14.
[9] Evidence of Prof. Laurel Bowman, Transcript vol 85, February 18, 2020, p. 10906, line 20 to p. 10907, lines 3.
[10] Evidence of Prof. Laurel Bowman, Transcript vol 85, February 18, 2020, p. 10907, lines 1-25.
[11] Evidence of Prof. Laurel Bowman, Transcript vol 85, February 18, 2020, p. 10907, lines 4-7.

together they were a way to understand social patterns in the ancient Greek world – in particular, the desire of ancient Greeks to associate their settlements with Hercules.[12]

10. In the context of the Australian flood stories, she remarked that inferences could be drawn from an aggregate of stories. In that case, the stories described a similar event – sea level rise. Professor Bowman testified: "one of the things that I find particularly impressive is that you've got these six separate, widely-separated populations telling the story, which looks like corroboration to me."[13]

11. On cross-examination, the principles of drawing inferences from an aggregate of stories was put to Professor Bowman through a hypothetical situation. The hypothetical situation she was asked to consider was that there was a traditional story about the breach of a dam, there was geological evidence of such a breach, and there was evidence to show that there had been people in the area before the breach and after, up to today. In that scenario, Professor Bowman agreed that it was possible that the story about the breach of a dam could originate from an eye witness from 9,000 years ago.[14]

12. However, when confronted with expanding the hypothetical situation with evidence of other stories of geological events and features she insisted that each story had to be deconstructed and weighed separately with testing of each proposed parallel between Anishinaabe myths and ancient geologic events, and disavowed the validity of combining pieces

---

[12] Evidence of Prof. Laurel Bowman, Transcript vol 85, February 18, 2020, p. 10797, lines 1-9; p. 10800, lines 3-19; and p. 10801, lines 8-16.
[13] Evidence of Prof. Laurel Bowman, Transcript vol 85, February 18, 2020, p. 10869, line 23 to p. 10870, line 5.
[14] Evidence of Prof. Laurel Bowman , Transcript vol 85, February 18, 2020, p. 10900, lines 2-15.

of evidence to make inferences when the individual pieces of evidence are insufficient in isolation.[15]

13. SON submits that such an opinion is of no assistance to this Court, since it would lead the Court into legal error. Pieces of evidence must not be weighed individually, but as a body of evidence as a whole. Various pieces of evidence, insufficient alone to lead to a particular factual inference, may combine together to justify such an inference.[16]

---

[15] Evidence of Prof. Laurel Bowman, Transcript vol. 85, February 18, 2020, p. 10902, lines 12 to 22; p. 10903, lines 14-24; and p. 10904, lines 10-12.

[16] See: *Grant v Australian Knitting Mills*, [1936] AC 85 (PC), [1935] UKPC 62 at 6-7 (BAILII), Plaintiffs' Book of Authorities, Tab 27 and *R v Armbruster*, 2010 SKCA 25 (CanLII) at para 26, Plaintiffs' Book of Authorities, Tab 69.

RELEVANCE AND WEIGHT OF JARVIS BROWNLIE'S EVIDENCE

1. Prof. Jarvis Brownlie is a historian called by the Plaintiffs to testify on 19th century British policy in relation to treaty-making; the history of Treaties 45 ½ and 72; and the historical development of SON's capacity to challenge the Crown on treaty and land issues.[1] Prof. Brownlie was qualified as a:

> Historian with expertise in Crown-Indigenous relations in what is now Canada in the 19th and 20th centuries, and capable of giving opinion evidence on:
>
> 1. Crown policy towards Indigenous peoples and their lands in the 19th and 20th centuries;
> 2. The history of treaty-making;
> 3. The making of treaties 45 ½ and 72;
> 4. Colonial regulation and administration of Indigenous peoples in the 19th and 20th centuries;
> 5. The socio-economic circumstances of Indigenous peoples in the 19th and 20th centuries; and
> 6. The history of Indigenous rights advocacy and Indigenous activism in the 19th and 20th centuries.[2]

---

[1] Prof. Jarvis Brownlie, "The Saugeen Ojibway and Treaty 72" (2013), Exhibit 4118; Prof. Jarvis Brownlie, "The Long Road to the Land Claim: The Historical Development of the Saugeen Ojibway's Capacity to Challenge Governments on Treaty and Land Issues" (a revised 2018), Exhibit 4119.

[2] Evidence of Prof. Jarvis Brownlie, Transcript vol 30, July 22, 2019, p. 2961, line 22 to p. 2963, line 10.

General Qualifications

2. Prof. Brownlie holds a Master of Arts and a PhD in Canadian History from the University of Toronto.[3] His PhD research focused on the history of Crown - Indigenous relations in Canada.[4] Prof. Brownlie has been a tenured Professor of History at the University of Manitoba since 2005. His work as a scholar has been evaluated by his peers as a condition of his obtaining tenure.[5] He regularly publishes in the area of Crown-Indigenous and Crown-settler relations in prestigious, peer-reviewed journals[6] that vet the quality of his scholarship and the accuracy of his historical conclusions.[7] He has received an award from the Ontario Historical Society for his book on Indian Agents in Ontario.[8]

3. His publications and reports cover a wide range of topics that are directly relevant to the matters on which he testified in this litigation:

    a. The relationship between Indian-Agents and the Indigenous peoples with whom they worked in Ontario;[9]

---

[3] Curriculum Vitae of Professor R. Jarvis Brownlie, Exhibit 4117, p. 1.
[4] Evidence of Prof. Jarvis Brownlie, Transcript vol 30, July 22, 2019, p. 2943, line 6 to p. 2944, line 8.
[5] Evidence of Prof. Jarvis Brownlie, Transcript vol 30, July 22, 2019, p. 2944, line 9 to p. 2945, line 18.
[6] Prof. Brownlie has published in the leading journal in Canada for Canadian history, the Canadian Historical Review, as well as several other prestigious journals. See: Evidence of Prof. Jarvis Brownlie, Transcript vol 30, July 22, 2019, p. 2952, line 10 to p. 2953, line 10 and p. 2953, line 14 to p. 2954, line 24.
[7] Evidence of Prof. Jarvis Brownlie, Transcript vol 30, July 22, 2019, p. 2953, lines 3-10.
[8] Evidence of Prof. Jarvis Brownlie, Transcript vol 30, July 22, 2019, p. 2950, line 5 to p. 2952, line 9.
[9] Evidence of Prof. R. Jarvis Brownlie, Transcript vol 30, July 22, 2019, p. 2950, line 10 to p. 2953, line 13; Curriculum Vitae of Prof. R. Jarvis Brownlie, Exhibit 4117, p. 1.

b. The impacts of policy levers under historical versions of the *Indian Act*, such as enfranchisement;[10]

c. The treaty-making process between the Crown and Indigenous peoples;[11]

d. The use of oral history;[12]

e. How Indigenous peoples historically have understood and articulated their rights;[13] and,

f. The socio-economic conditions of Indigenous peoples in Ontario in the 20th century.[14]

4. Prof. Brownlie teaches courses on both Indigenous history and historical methods.[15] In this capacity, he teaches students about the treaty-making process and the process of European settlement of Indigenous lands.[16] He also trains students in historical methods and interpretation, including how to locate records, cross-reference them against other records and determine their reliability.[17]

---

[10] Evidence of Prof. Jarvis Brownlie, Transcript vol 30, July 22, 2019, p. 2953, line 14 to p. 2954, line 24; Curriculum Vitae of Prof. R. Jarvis Brownlie, Exhibit 4117, p. 2.
[11] Evidence of Prof. Jarvis Brownlie, Transcript vol 30, July 22, 2019, p. 2954, line 25 to p. 2957, line 1.
[12] Evidence of Prof. Jarvis Brownlie, Transcript vol 30, July 22, 2019, p. 2956, line 12 to p. 2958, line 2; Curriculum Vitae of Prof. R. Jarvis Brownlie, Exhibit 4117, pp. 2, 3-4.
[13] Evidence of Prof. R. Jarvis Brownlie, Transcript vol 30, July 22, 2019, p. 2958, line 3 to p. 2959, line 22; Curriculum Vitae of Prof. R. Jarvis Brownlie, Exhibit 4117, pp. 2, 3.
[14] Evidence of Prof. Jarvis Brownlie, Transcript vol 30, July 22, 2019, p. 2951, lines 10-23 and p. 2959, lines 3-22.
[15] Curriculum Vitae of Prof. R. Jarvis Brownlie, Exhibit 4117, pp. 6-7.
[16] Evidence of Prof. Jarvis Brownlie, Transcript vol 30, July 22, 2019, p. 2946, line 25 to p. 2948, line 9; Curriculum Vitae of Prof. R. Jarvis Brownlie, Exhibit 4117, pp. 6-7.
[17] Evidence of Prof. Jarvis Brownlie, Transcript vol 30, July 22, 2019, p. 2945, line 22 to p. 2946, line 24.

5. SON submits that Prof. Brownlie's expertise on Crown-Indigenous relations in the 19th century, and on appropriate methods to interpret historical documents is deeper and more extensive than Dr. Reimer's.[18] While Prof. Brownlie is an independent academic and award-winning scholar with tenure in a recognized university, Dr. Reimer is a career expert witness who has worked primarily for the Ontario government over the past 20 years.[19] Dr. Reimer has not published her own academic work on any issues related Crown-Indigenous relations in the 19th or 20th centuries.[20] She has not been required to meet the scholarly standards of tenure.[21] This militates towards giving Prof. Brownlie's opinions greater weight where they diverge from Dr. Reimer's opinions.

Objectivity

6. In cross-examination, counsel for Ontario put a number of Prof. Brownlie's Facebook posts, Twitter posts and public remarks to him for comment. Insofar as Ontario intends to suggest that this information about Prof. Brownlie's personal points of view indicate that his evidence in this case is not objective, SON submits that such a suggestion has no merit.

7. It is not a sign of a lack of objectivity to acknowledge that one has a perspective and a personal set of beliefs that they bring to their work. The American Historical Association Statement on the Standards of Professional Conduct explicitly sets this out:

---

[18] Dr. Reimer is trained as anthropologist, but SON submits that much of the work she undertook in her report, Dr. Gwen Reimer, "Volume 3: Saugeen-Nawash Land Cessions No. 45 ½ (1836), No. 67 (1851), and No. 27 (1854)" (Revised November 2019), Exhibit 4703, was focused on interpreting historical documents, not elucidating the perspectives of SON on historical events.
[19] See, generally, Curriculum Vitae of Dr. Gwen Reimer, Exhibit 4575.
[20] See, generally, Curriculum Vitae of Dr. Gwen Reimer, Exhibit 4575.
[21] See, generally, Curriculum Vitae of Dr. Gwen Reimer, Exhibit 4575.

> Professional integrity in the practice of history requires awareness of one's own biases and a readiness to follow sound method and analysis wherever they may lead. [22]

8. Prof. Brownlie follows this practice in his work. For example, Prof. Brownlie's book, *Fatherly Eye,* identifies his anti-colonial and feminist perspective that informs his research. He explains that this is perfectly consistent with efforts to be accurate and thorough in his account of historical events:

> The reason I included this passage in my book is because to do so is itself a feminist practice, and its role is, its function is to acknowledge the biases that the researcher brings. And the acknowledgement that every researcher does, every person does bring their own views to a subject. And that the feminist insight was in the past academics had always maintained an illusion of objectivity. The ideal of objectivity, which I still hold, but with the understanding that it's never perfectly achievable by anyone. And so the feminist insight was, we're going to acknowledge what our biases are and the recognition that everyone has them, but at least in this instance the reader understands where you're coming from and you're not pretending to be neutral, although we were attempting to be as balanced and fair and thorough and accurate as possible.[23]

9. The crucial question is not whether the historian has personal views and politics, but rather, whether the historian followed a sound method and let the information guide their analysis. Prof. Brownlie affirmed his commitment to these principles: "As an historian, my commitment is to document the history of Canadian colonization and Crown indigenous relations."[24]

---

[22] American Historical Association Statement on the Standards of Professional Conduct (2019), Exhibit 4166, p. 4.
[23] Evidence of Prof. Jarvis Brownlie, Transcript vol 35, August 12, 2019, p. 3713, line 17 to p. 3714, line 11.
[24] Evidence of Prof. Jarvis Brownlie, Transcript vol 34, July 26, 2019, p. 3674, lines 18-22.

10. That Prof. Brownlie expresses political views via Facebook or Twitter has little do whether he undertakes careful research in the context of his professional life. Prof. Brownlie explained that:

> [Facebook], to me, has very little connection to my work as an academic, except that obviously I have interests that are related to my work. And that's part of the reason that I became a historian because I am interested in these issues, and I felt that I could make a contribution myself by becoming a careful, rigorous historical researcher who contributed to people understanding how we got to where we are today. And so it's very important to me, in my work, that everything I produce be rigorous, carefully researched, strictly accurate to the extent I can ensure that it is. Facebook is a playful medium, and no, I don't research everything I put on Facebook. Although, I would stand by the statement that governments frequently attack Indigenous activists and if you'd like I can list some recent ones who have experienced this. And finally I would say that primarily what you're seeing from these Facebook posts that you extracted from the many other posts on my Facebook page is that I am acting as an educator. I want to get issues out into the public. Sometimes I make provocative statements because I want people to think about things.[25]

11. As Justice Zinn wrote in *Jim Shot Both Sides,* discussing the evidence of Dr. Carter, a historian called by the Plaintiffs in that case, "It is not surprising that one who devotes her career to Canadian aboriginal history forms an opinion or point of view about the general treatment of our First Nations by Canada."[26] Justice Zinn noted that Dr. Carter had provided an evidentiary basis for her opinions, and gave her evidence weight.[27]

---

[25] Evidence of Prof. Jarvis Brownlie, Transcript vol 35, August 12, 2019, p. 3722, line 18 to p. 3723, line 21.
[26] *Jim Shot Both Sides v Canada,* 2019 FC 789 at para 103, Plaintiffs' Book of Authorities, Tab 35.
[27] *Jim Shot Both Sides v Canada,* 2019 FC 789 at paras 103, 105, Plaintiffs' Book of Authorities, Tab 35.

12. The notion that injustice and unfairness affects Indigenous people in Canada is not a radical or unorthodox conclusion. In fact, it is the near-universal conclusion of the numerous inquiries and commissions appointed to look into Indigenous issues in Canada. For example:

    a. Ontario highlighted a Facebook post from Prof. Brownlie's account that refers to Canada as "an unjust nation" whose "systems have failed" Indigenous peoples.[28] Prof. Brownlie was directly quoting an article in the Toronto Star about Tina Fontaine, an Indigenous woman from Manitoba who was murdered.[29] Prof. Brownlie explained in testimony that he believes "the situation in which Indigenous people live in Winnipeg and Manitoba and many other places is unjust, yes."[30] The Truth and Reconciliation Commission of Canada agrees with Prof. Brownlie's assessment, noting that, "only a real commitment to reconciliation will reverse the trend and lay the foundation for a truly just and equitable nation."[31] It referred to Canada's policies of "cultural genocide and assimilation," which "have left deep scars on the lives of many Aboriginal people, on Aboriginal communities, as well as on Canadian society, and have deeply damaged the relationship between Aboriginal and non-Aboriginal peoples".[32]

    b. Ontario also pointed to Prof. Brownlie's Facebook posts that linked to resources about Colten Bushie, a young Indigenous man in Saskatchewan who was murdered, and

---

[28] Jarvis Brownlie Facebook Posts, Exhibit 4167, p. 11.
[29] Evidence of Prof. Jarvis Brownlie, Transcript vol 35, August 12, 2019, p. 3724, lines 14-21.
[30] Evidence of Prof. Jarvis Brownlie, Transcript vol 35, August 12, 2019, p. 3726, lines 7-22.
[31] Honouring the Truth, Reconciling for the Future – Summary of the Final Report of the Truth and reconciliation Commission of Canada, 2015, Exhibit 4138, p. 182, Plaintiffs' Book of Authorities, Tab 176.
[32] Honouring the Truth, Reconciling for the Future – Summary of the Final Report of the Truth and reconciliation Commission of Canada, 2015, Exhibit 4138, p. 183, Plaintiffs' Book of Authorities, Tab 176.

whose alleged killer, Gerald Stanley, was acquitted. Prof. Brownlie excerpted a quote from one article: "If you don't know how it is that so many reserves live in poverty, or why the prisons are full of our people, or why there are so many boil water advisories, why there are so many Missing and Murdered Indigenous Women, why any of the dysfunction and failure and tragedy that is the "Indian Problem" in this county exists, look for your answer in the Gerald Stanley verdict. To find Gerald Stanley guilty, would be to find him responsible for his actions – actions which resulted in the death of Colten Bushie, an Indian. But we don't do that in this country. White Canada is not responsible for what happened to Indians." Prof. Brownlie did not add his own comment to this quote.[33] Ontario also raised Prof. Brownlie's re-tweet of a press release from the Indigenous Bar Association speaking about systemic racism within the Justice System. In the accompanying tweet, Prof. Brownlie commented, "Indigenous Bar Association on the desperate need for reforms in our so-called justice system.[34] He explained in his testimony that this comment was made in the context of the acquittal of Gerald Stanley in the murder of Colten Bushie, a verdict "many, many people, especially on the prairies, felt […] was unjust."[35] The Truth and Reconciliation Commission identified the same injustice in the justice system, noting that "The justice system continues to fail Aboriginal victims of crime…. The statistics are startling. Aboriginal people are 58% more like to be victimized by crime".[36] It noted a "pattern

---

[33] Jarvis Brownlie Facebook Posts, Exhibit 4167, p. 12.
[34] Jarvis Brownlie Twitter Posts, Exhibit 4171, p. 2.
[35] Evidence of Prof. Jarvis Brownlie, Transcript vol 35, August 12, 2019, p. 3734, line 18 to p. 3735, line 7.
[36] Honouring the Truth, Reconciling for the Future - Summary of the Final Report of the Truth and Reconciliation Commission of Canada, 2015, Exhibit 4138, p. 179, Plaintiffs' Book of Authorities, Tab 176.

of disproportionate imprisonment and victimization of Aboriginal people continues to this day. The continued failure of the justice system denies Aboriginal people the safety and opportunities that most Canadians take for granted.**"**[37]

c. In remarks at a "Welcome Winnipeg" event, Prof. Brownlie noted that Canada has inflicted and continues to inflict violence on Indigenous peoples.[38] In his testimony, he explained that he was primarily thinking about the experience of residential schools, and of the ongoing effects of Hydro developments on Indigenous communities in Manitoba, developments that have "destroyed their economy, and [had] […] multiple negative impacts, including deaths by driving their boats into floating logs and so on".[39] Both residential schools and the ongoing impacts of hydro development on Indigenous communities have been characterized as having serious negative impacts, up to and including forms of direct and structural violence, by the Truth and Reconciliation Commission and the Royal Commission on Aboriginal Peoples:

    i. The Report of the Truth and Reconciliation Commission noted the "violent nature of the discipline at the [residential] schools [which] came as a shock to students,"[40] that many students spoke of the violence and abuse they experienced at residential schools[41], that the schools inflicted spiritual

---

[37] Honouring the Truth, Reconciling for the Future - Summary of the Final Report of the Truth and Reconciliation Commission of Canada, 2015, Exhibit 4138, p. 164, Plaintiffs' Book of Authorities, Tab 176.
[38] Professor Brownlie's remarks from "Welcome Winnipeg" event, Exhibit 4168.
[39] Evidence of Prof. Jarvis Brownlie, Transcript vol 35, July 22, 2019, p. 3737, line 16 to p. 3739, line 13.
[40] Honouring the Truth, Reconciling for the Future - Summary of the Report of the Truth and Reconciliation Commission, 2015, Exhibit 4138, p. 103, Plaintiffs' Book of Authorities, Tab 176.
[41] Honouring the Truth, Reconciling for the Future - Summary of the Report of the Truth and Reconciliation Commission, 2015, Exhibit 4138, p. 107, Plaintiffs' Book of Authorities, Tab 176.

violence,[42] that residential schools have had a "destructive legacy"[43], and that national public history institutions have a responsibility to "retell the story of Canada's past" so it reflects "the collective violence and historical injustices that [Indigenous peoples] have suffered at the hands of the state.[44] It further noted the "devastating impacts of colonization on Indigenous peoples."[45]

ii. The Royal Commission on Aboriginal Peoples has explored the impacts of expanding hydro-electric activities on Indigenous communities, including the many instances where Indigenous communities were forced to relocate as a result of these activities. The report pointed to a number of ongoing effects of these projects and the relocations they occasioned, including the weakening of Indigenous culture and identity;[46] issues with substance abuse and violence, including self-injury and suicide;[47] loss of economic self sufficiency, including through a dramatic decline in traditional hunting, gathering and fishing activities;[48] an increase in debris in waterways that reduced fishing

---

[42] Honouring the Truth, Reconciling for the Future - Summary of the Report of the Truth and Reconciliation Commission, 2015, Exhibit 4138, p. 225, Plaintiffs' Book of Authorities, Tab 176.
[43] Honouring the Truth, Reconciling for the Future - Summary of the Report of the Truth and Reconciliation Commission, 2015, Exhibit 4138, p. 210, Plaintiffs' Book of Authorities, Tab 176.
[44] Honouring the Truth, Reconciling for the Future - Summary of the Report of the Truth and Reconciliation Commission, 2015, Exhibit 4138, p. 248, Plaintiffs' Book of Authorities, Tab 176.
[45] Honouring the Truth, Reconciling for the Future - Summary of the Report of the Truth and Reconciliation Commission, 2015, Exhibit 4138, p. 210, Plaintiffs' Book of Authorities, Tab 176.
[46] Royal Commission on Aboriginal Peoples, Volume 1: Looking Forward, Looking Back," Chapter 11, p. 469, Plaintiffs' Book of Authorities, Tab 188.
[47] Royal Commission on Aboriginal Peoples, Volume 1: Looking Forward, Looking Back," Chapter 11, p. 470, Plaintiffs' Book of Authorities, Tab 188.
[48] Royal Commission on Aboriginal Peoples, Volume 1: Looking Forward, Looking Back," Chapter 11, pp. 465, 466, 467 471, 473, Plaintiffs' Book of Authorities, Tab 188.

opportunities and that many believed has led to deaths in boating accidents;[49] mercury contamination caused by flooding;[50] and an increase in mortality rates.[51] One official described effects of the relocation of one Manitoba First Nation to accommodate Hydro activities as a "tragedy"; another, a First Nations community member, noted that 'everything is drowned".[52] It is not a stretch to refer to these effects as a form of violence.

13. SON submits that Prof. Brownlie's statements, far from being radical, are within the range of mainstream views expressed by the various inquiries and commissions that have investigated Crown-Indigenous relations over the past thirty years.

14. Counsel for Ontario suggested that Prof. Brownlie had an obligation to use more "nuanced" language to educate people about the issues facing Indigenous people in Canada.[53] However, the Truth and Reconciliation Commission of Canada has called on national public history institutions, such as the Canadian Museum of History, to "retell the story of Canada's past so that it reflects not only diverse cultures, history and experiences of First Nations, Inuit, and Metis peoples, but also the collective violence and historical injustices they have suffered at the hands of the state."[54] As a professor of Canadian history, Prof. Brownlie bears the same

---

[49] Royal Commission on Aboriginal Peoples, Volume 1: Looking Forward, Looking Back," Chapter 11, pp. 466, 473, 475, Plaintiffs' Book of Authorities, Tab 188.
[50] Royal Commission on Aboriginal Peoples, Volume 1: Looking Forward, Looking Back," Chapter 11, p. 473, Plaintiffs' Book of Authorities, Tab 188.
[51] Royal Commission on Aboriginal Peoples, Volume 1: Looking Forward, Looking Back," Chapter 11, p. 475, Plaintiffs' Book of Authorities, Tab 188.
[52] Royal Commission on Aboriginal Peoples, Volume 1: Looking Forward, Looking Back," Chapter 11, pp. 467, 473, Plaintiffs' Book of Authorities, Tab 188.
[53] Evidence of Prof. Jarvis Brownlie, Transcript vol 35, August 12, 2019, p. 3735, line 9 to p. 3736, line 7.
[54] Honouring the Truth, Reconciling for the Future - Summary of the Report of the Truth and Reconciliation Commission, 2015, Exhibit 4138, p. 248, Plaintiffs' Book of Authorities, Tab 176.

responsibility. His evidence should not be discounted as a result of his efforts to fulfill this responsibility.

15. Finally, it is worth noting that Prof. Brownlie's previous experience as being an expert for litigation was being retained by Canada.[55]

16. Prof. Brownlie is a recognized and reputable historian. He was willing to change his views where he was shown evidence that suggested a different conclusion was warranted.[56] Where Prof. Brownlie had not researched or formed an opinion on a matter put to him by counsel on cross-examination, he said so.[57] And the opinions he expressed in his testimony and in his reports were supported by the historical record. These are the key factors that the Court should consider when weighing his evidence, not the content of his Facebook or Twitter posts.

Key Factual Disputes

17. Prof. Brownlie's testimony and report on the historical treaty issues in this case are, by and large, aligned with the evidence of other experts, including particularly with Dr. Reimer's evidence.[58]

---

[55] Evidence of Prof. Jarvis Brownlie, Transcript vol 30, July 22, 2019, p. 2959, line 23 to p. 2960, line 24.
[56] Evidence of Prof. Jarvis Brownlie, Transcript vol 38, August 15, 2019, p. 4265, line 17 to p. 4311, line 3.
[57] Evidence of Prof. Jarvis Brownlie, Transcript vol 36, August 13, 2019, p. 4016, lines 19-22.
[58] *These include, among others: The description of the applicable treaty-making principles that flowed from the Royal Proclamation and Dorchester's Instructions, and the British policy background that governed relations with Indigenous peoples more generally. In particular, both explained that Crown officials were aware they were required to obtain the consent of Indigenous peoples before taking their lands* – Dr. Gwen Reimer, "Volume 3: The Saugeen-Nawash Land Surrenders: No. 45 ½, No 67 and No. 72" (as revised 2019), Exhibit 4703, pp. 13, 17, 74, 108, 116, 143-144, 158-159, 202; Prof. Jarvis Brownlie, "The Saugeen Ojibway and Treaty 72" (2013), Exhibit 4118, pp. 5-21, 26-27.

18. There are, however, a few key areas where Prof. Brownlie's evidence differed from Dr. Reimer's evidence in relation to the issues surrounding the treaty case. Two key issues that warrant attention here: whether Treaty 45 ½ was intended by the parties to create a general reserve on the Peninsula; and Prof. Brownlie's opinion on whether SON had an opportunity to consider Oliphant's proposal prior to October 13, 1854.

    a. **The general reserve:** Prof. Brownlie concluded in his testimony that the creation of a general reserve was not a condition of Treaty 45 ½.[59] This was a change from the view expressed in passing in the executive summary of his report, "The Saugeen Ojibway and Treaty 72".[60] Prof. Brownlie explained this change by saying that he had reviewed the documents since he drafted the report and did not believe that this conclusion was supported by the historical record.[61] The view that a general reserve was created on the Peninsula was held by Dr. Reimer alone.[62] As detailed at length in the section of the Plaintiffs' argument entitled "Treaty 45 ½ set aside the Peninsula *for SON*", Dr. Reimer's view is not supported by the historical record. On this point, SON submits Prof. Brownlie's testimony in Court ought to be given more weight than Dr. Reimer's views because Prof. Brownlie's testimony is more consistent with the historical record.

---

[59] Evidence of Prof. Jarvis Brownlie, Transcript vol 30, July 22, 2019, p. 3065, line 5 to p. 3067, line 19.
[60] Prof. Jarvis Brownlie, "The Saugeen Ojibway and Treaty 72" (2013), Exhibit 4118, pp. 2, 5.
[61] Evidence of Prof. Jarvis Brownlie, Transcript vol 30, July 22, 2019, p. 3065, line 5 to p. 3067, line 19; Evidence of Prof. Jarvis Brownlie, Transcript vol 36, August 13, 2019, p. 3941, line 19 to p. 3946, line 10; See also: Evidence of Prof. Paul McHugh, Transcript vol 68, December 10, 2019, p.8862, lines 7-10. Question: *Do you agree that Bond Head at Treaty 45 1/2 promised to protect the peninsula from white encroachment for the Saugeen? Answer: Yes.*
[62] Dr. Gwen Reimer, "Volume 3: Saugeen - Nawash Land Cessions No. 45 1/2 (1836), No. 67 (1851), and No. 72 (1854)" (as revised 2019), Exhibit 4703, pp. 41-45.

b. **The issue of when the Crown first sought a surrender of the full Peninsula:** Prof. Brownlie was asked in his report to consider whether SON had had the opportunity to consider the Crown's proposal for Treaty 72 prior to October 13, 1854. He originally held the view that that the Crown asked SON for a surrender of the entire Peninsula for the first time on October 13, 1854. He believed previous requests for surrenders, of which there were many, had been for lesser amounts of land.[63] On cross-examination, he was presented with evidence that Anderson had proposed a similarly large surrender in August 1854.[64] Upon reviewing that evidence, Prof. Brownlie amended his opinion.[65] SON submits that this demonstrates open-mindedness and scholarly integrity. It is an indication that Prof. Brownlie prioritized providing accurate information that reflected the best available evidence to the Court over maintaining a longstanding position, or being seen to have been "correct" in the first instance.

Oral Interview Methodology and Reliability

19. Prof. Brownlie conducted interviews with seven SON members with traditional knowledge and/or personal knowledge of SON's struggle to have its rights recognized. Prof. Brownlie's interviewees were Dale Jones, Darlene Johnston, Howard Jones, Eric Johnston, Jim Ritchie, Vernon Roote, and Paul Jones.

20. The interview subjects were identified by SON's counsel as individuals with personal experience of the land claims processes.[66] These interviews were intended to supplement the

---

[63] Prof. Jarvis Brownlie, "The Saugeen Ojibway and Treaty 72" (2013), Exhibit 4118, pp. 38-43.
[64] See: Evidence of Prof. Jarvis Brownlie, Transcript vol 38, August 15, 2019 p. 4265, line 17 to p. 4311, line 3.
[65] Evidence of Prof. Jarvis Brownlie, Transcript vol 38, August 15, 2019 p. 4310, line 24 to p. 4311, line 3.
[66] Evidence of Prof. Jarvis Brownlie, Transcript vol 31, July 23, 2019, p 3199, line 14 to p. 3200, line 5.

documentary record on the steps taken in the land claims process with accounts of what the experience was like on a practical level.[67] Prof. Brownlie explained why he did not interview more individuals from SON:

> My intent in conducting this oral history was not to undertake a large oral history project, but rather to use interviews with a few individuals who had been directly involved in the attempt to defend the Treaty rights and so on, in order to ask them specific questions about, really about their experience in trying to bring the claim.[68]

21. Prof. Brownlie also reviewed the majority of over 200 recorded oral history interviews from SON members, which were taken between 1968 and 2020 and conducted by a number of different researchers.[69] He cross referenced the answers he received from his interviewees with the extensive written record on the history of SON's land claims.[70] Through this, Prof. Brownlie had access to a large body of information against which he could assess the reliability of the information he received through the interviews he conducted.[71]

22. Prof. Brownlie structured the questions he asked the seven interviewees himself. He explained: "I tried to develop questions that were specific to the area I was investigating and at the same time were fairly broadly phrased so that I wasn't guiding the people I was talking to, so that they could choose what were the most important issues to raise".[72]

---

[67] Evidence of Prof. Jarvis Brownlie, Transcript vol 31, July 23, 2019, p. 3217, line 9 to p. 3218, line 7.
[68] Evidence of Prof. Jarvis Brownlie, Transcript vol 31, July 23, 2019, p. 3217, line 13 to p. 3218, line 3.
[69] Evidence of Prof. Jarvis Brownlie, Transcript vol 31, July 23, 2019, p. 3198, line 22 to p. 3199, line 10. See also: Agreed Statement of Fact Regarding Oral History Interviews, Exhibit 3931.
[70] Evidence of Prof. Jarvis Brownlie, Transcript vol 31, July 23, 2019, p. 3203, lines 6-17.
[71] Evidence of Prof. Jarvis Brownlie, Transcript vol 35, August 12, 2019, p. 3812, line 19 to p. 3813, line 19.
[72] Evidence of Prof. Jarvis Brownlie, Transcript vol 31, July 23, 2019, p. 3200, lines 15-20.

23. Ontario pressed a theory on cross-examination that Prof. Brownlie had improperly led his interviewees during the interview process.[73] Many of the instances Ontario highlighted of this so-called leading in its cross-examination were simply Prof. Brownlie trying to summarize or clarify what he had heard, and to prompt the interviewee to continue talking.[74] As Prof. Brownlie explained:

> Conducting an oral history is a challenging practice. It takes a lot of practice, and your role as an interviewer is multi-faceted. The main thing you are trying to do while you're interviewing someone is to encourage them to continue. So a lot of my comments were encouraging them to continue, in the ways that one ordinarily does that in conversation. Which is not limiting yourself to asking a question and silently waiting for their response because that can be quite off putting.[75]

24. In addition, there is little concern that Prof. Brownlie's questions shaped the information he heard. Six of the seven interviewees – all except Eric Johnston – attended at court, adopted their interview transcripts (which were entered into evidence), and were subject to extensive cross-examination by counsel for Ontario and Canada. SON submits that all were credible witnesses. To the extent that there were inconsistencies in the information they provided, or that the information they provided was inconsistent with either the documentary record or approximately 200 recorded oral history evidence that have been disclosed in this litigation, counsel for the Defendants had a full opportunity to explore those inconsistencies.

---

[73] Evidence of Prof. Jarvis Brownlie, Transcript vol 35, August 12, 2019, p. 3829 line 7 to p. 3846, line 9.
[74] Evidence of Prof. Jarvis Brownlie, Transcript vol 35, August 12, 2019, p. 3820, lines 4-14; p. 3835, line 9 to p. 3840, line 22; and p. 3846, line 9.
[75] Evidence of Prof. Jarvis Brownlie, Transcript vol 35, August 12, 2019, p. 3820, lines 4- 14.

Conclusion on Weight

25. SON submits that Prof. Brownlie's evidence should be given significant weight. He is an award-winning scholar and a tenured professor who has published extensively on the issues on which he opined. He demonstrated that he was willing to change his views when he was shown convincing evidence, notwithstanding any personal political views he may have.

RELEVANCE AND WEIGHT OF JEAN-PHILIPPE CHARTRAND'S EVIDENCE

1. Mr. Jean-Philippe Chartrand was qualified by the court as follows:

> an anthropologist and ethnohistorian qualified to provide opinion evidence on British and American relations with Indigenous peoples in the Great Lakes region from the mid-18th century to the mid-19th century, including administrative development and general treaty policies and practices; treaty-making with Native American tribes in the Great Lakes region generally from 1795-1842, and in particular with reference to treaties made in 1807, 1819, 1820, 1831 and 1836, and the intentions and understandings of the United States in making these treaties; and related historical events and context.[1]

2. SON did not object to this qualification statement. However, as set out below, SON submits that there are several aspects of Mr. Chartrand's training and experience that call for the weight of his opinions to be discounted.

LIMITED TRAINING AND EXPERIENCE IN US HISTORY

3. Mr. Chartrand has worked exclusively for Ontario as a research consultant since 2011.[2]

4. Mr. Chartrand holds no degrees in US history,[3] nor has he taught any courses that touch on US history beyond a superficial overview of different Native American tribes.[4] His sole publication related to the United States is a peer review, which he co-authored with Dr. Gwen Reimer, of a manuscript on census-taking among Native American tribes in the late 19th and first decade of the 20th centuries.[5] Mr. Chartrand testified that he gained his familiarity with British and

---

[1] Evidence of Jean-Philippe Chartrand, Transcript vol 77, January 20, 2020, p. 9783, line 19 to p. 9784, line 13.
[2] Evidence of Jean-Philippe Chartrand, Transcript vol. 78, January 21, 2020, p.9949, line 24 to p.9950, line 8.
[3] Evidence of Jean-Philippe Chartrand, Transcript vol 78, January 21, 2020, p. 9944, lines 1-5.
[4] Evidence of Jean-Philippe Chartrand, Transcript vol 78, January 21, 2020, p. 9944, lines 6-25.
[5] Evidence of Jean-Philippe Chartrand, Transcript vol 78, January 21, 2020, p. 9945, line 1 to p. 9946, line 13.

US history in 2009-2010 when he undertook a review of historical and ethnohistorical literature for a report he prepared for another piece of litigation.[6] However, the focus of that research was on annuity provisions and not the geopolitical relations between the United States and Britain.[7]

5. SON submits that Mr. Chartrand's opinions on relations between the United States and Britain should be given little weight given his limited training and experience in US history in general and in US-British geopolitical relations in particular.

LEGAL INTERPRETATION

6. Mr. Chartrand's analysis of the Treaty of Greenville (1795) was based on his reading of the text of the treaty. He did not rely on historical sources to explain how the US understood the articles of the treaty at the time it was entered into.[8]

7. SON submits that interpreting the text of a treaty is a matter of law and outside of Mr. Chartrand's expertise. Therefore, his opinions about the meaning of the Treaty of Greenville should be given no weight.

ERRONEOUS INTERPRETATION OF THE ROYAL PROCLAMATION

8. In his report, Mr. Chartrand stated that the Royal Proclamation (1763) clearly stipulated basic procedures for treaty making aimed at obtaining cessions of Indigenous lands within the "Indian Territory".[9] He based this statement on his summary of three paragraphs of the Royal

---

[6] Evidence of Jean-Philippe Chartrand, Transcript vol 78, January 21, 2020, p. 9946, line 14 to p. 9947, line 15.
[7] Evidence of Jean-Philippe Chartrand, Transcript vol 78, January 21, 2020, p. 9947, line 16 to p. 9948, line 13.
[8] Evidence of Jean-Philippe Chartrand, Transcript vol 78, January 21, 2020, p. 9924, line 1 to p. 9929, line 12.
[9] Jean-Philippe Chartrand, "Historical Research on Provisions of American Treaties Including Surrenders of Lake Bends in the Great Lakes" (2015), Exhibit 4513, p. 13.

Proclamation, excerpted on pages 12-13 of his report, which described a procedure to be followed for treaty making "within those parts of our colonies."[10]

9. On cross-examination, Mr. Chartrand acknowledged that the Royal Proclamation describes Indian territory as *outside* the bounds of colonies.[11] However, when pressed about this clear contradiction in his analysis, Mr. Chartrand dug in to his position that "within those parts of our colonies" included "Indian territory".[12]

10. SON submits that Mr. Chartrand's interpretation of the Royal Proclamation is not credible and should be given no weight.

---

[10] Evidence of Jean-Philippe Chartrand, Transcript vol 78, January 21, 2020, p. 9936, line 20 to p. 9937, line 16.
[11] Evidence of Jean-Philippe Chartrand, Transcript vol 78, January 21, 2020, p.9937, lines 17-20.
[12] Evidence of Jean-Philippe Chartrand, Transcript vol 78, January 21, 2020, p. 9937, line 21 to p. 9940, line 12.

RELEVANCE AND WEIGHT OF MARY ANN CORBIERE'S EVIDENCE

1. Prof. Mary Ann Corbiere was qualified as:

> Professor of the Anishinaabemowin language, with expertise in the field of English-to Anishinaabemowin and Anishinaabemowin-to-English translation, and capable of giving opinion evidence on the likely range in meaning to Anishinaabe people of English words and phrases when translated into Anishinaabemowin in the 19th century, and on the challenges that confront English-Anishinaabemowin translators.[1]

SUPPORTING QUALIFICATIONS

2. Prof. Corbiere is a Professor in the Department of Indigenous Studies at Laurentian University.[2] She has been a Professor since 1989,[3] and was Chair of the Department from 1994-1997.[4]

3. Her first language is Anishinaabemowin, and the principal subject she teaches is Anishinaabemowin.[5]

4. She has presented 48 conference papers at academic conferences and many of them are about the Anishinaabemowin language.[6]

---

[1] Tender as expert: Transcript vol 24, July 9, 2019, p. 2338, line 14 to p. 2339, line 1 and Tender For Qualification of Professor M.A. Corbiere, Lettered exhibit F2; Ruling on tender: Transcript vol 24, July 9, 2019, p. 2371, line 21 to p. 2375, line 7.
[2] Evidence of Prof. Mary Ann Corbiere, Transcript vol 24, July 9, 2019, p. 2323, lines 6-10.
[3] Evidence of Prof. Mary Ann Corbiere, Transcript vol 24, July 9, 2019, p. 2323, lines 11-23.
[4] Evidence of Prof. Mary Ann Corbiere, Transcript vol 24, July 9, 2019, p. 2323, line 24 to p. 2324, line 2. See also Prof. Mary Ann Corbiere CV June 2018, Exhibit 4092.
[5] Evidence of Prof. Mary Ann Corbiere, Transcript vol 24, July 9, 2019, p. 2324, lines 3-7.
[6] Evidence of Prof. Mary Ann Corbiere, Transcript vol 24, July 9, 2019, p. 2325, lines 4-12. See also Prof. Mary Ann Corbiere CV June 2018, Exhibit 4092.

5. One of her projects is an online Anishinaabemowin-English dictionary. She began work on this dictionary because she wanted a comprehensive resource for language learners, and contemporary Anishinaabemowin dictionaries were not comprehensive. For example, while teaching she would know a word existed, but her students were not able to find it in existing dictionaries.[7]

6. Her process for creating dictionary entries involves compiling notes she made about words not then in dictionaries, and consulting with mother tongue speakers of Anishinaabemowin from five different communities about whether they knew the word and what it meant.[8] She also works on this project with Prof. Rand Valentine, on whom she relied to design a database for the dictionary.[9] There are over 12,000 words in the dictionary by now.[10]

7. Prof. Corbiere has given conference presentations about translation, about 19th century Anishinaabemowin, and about 19th century Anishinaabemowin translation.[11]

8. Prof. Corbiere has prepared expert reports for litigation or testified about translation involving 19th century Anishinaabemowin in two cases.[12]

---

[7] Evidence of Prof. Mary Ann Corbiere, Transcript vol 24, July 9, 2019, p. 2326, line 6 to p. 2327 line 11.
[8] Evidence of Prof. Mary Ann Corbiere, Transcript vol 24, July 9, 2019, p. 2327, line 12 to p. 2329 line 7.
[9] Evidence of Prof. Mary Ann Corbiere, Transcript vol 24, July 9, 2019, p. 2329, lines 15-21.
[10] Evidence of Prof. Mary Ann Corbiere, Transcript vol 24, July 9, 2019, p. 2333, lines 1-4.
[11] Evidence of Prof. Mary Ann Corbiere, Transcript vol 24, July 9, 2019, p. 2333, line 5 to p. 2335 line 3.
[12] Evidence of Prof. Mary Ann Corbiere, Transcript vol 24, July 9, 2019, p. 2335, line 4-13, and p. 2335, line 23 to p. 2336 line 7.

9. She has also translated materials for the Law Society of Upper Canada,[13] Laurentian University,[14] the Ontario Ministry of the Attorney General,[15] the Canadian Cancer Society,[16] the YWCA,[17] the Sudbury Art Gallery,[18] the Sudbury and District Health Unit,[19] the Ipperwash Inquiry,[20] and the Ontario Ministry of Natural Resources.[21]

10. She has prepared translations from English into Anishinaabemowin including of a book about Daphne Odjig,[22] of a poster about Jordan's Principle, of a synopsis of a book and film,[23] of patient guides for medical use,[24] of an elementary school curriculum,[25] and of signage for a courthouse.[26]

11. She has facilitated discussions in Anishinaabemowin, and transcribed and translated them into English.[27]

---

[13] Evidence of Prof. Mary Ann Corbiere, Transcript vol 24, July 9, 2019, p. 2335 lines 15-22 and p. 2336 lines 15-20.
[14] Evidence of Prof. Mary Ann Corbiere, Transcript vol 24, July 9, 2019, p. 2336 lines 8-14.
[15] Evidence of Prof. Mary Ann Corbiere, Transcript vol 24, July 9, 2019, p. 2336 line 25 to p. 2337 line 5.
[16] Evidence of Prof. Mary Ann Corbiere, Transcript vol 24, July 9, 2019, p. 2337 line 22 to p. 2338 line 1.
[17] Prof. Mary Ann Corbiere CV June 2018, Exhibit 4092, p. 15.
[18] Prof. Mary Ann Corbiere CV June 2018, Exhibit 4092, p. 15.
[19] Prof. Mary Ann Corbiere CV June 2018, Exhibit 4092, p. 15; Evidence of Prof. Mary Ann Corbiere, Transcript vol 24, July 9, 2019, p. 2338, lines 9-13.
[20] Prof. Mary Ann Corbiere CV June 2018, Exhibit 4092, p. 15.
[21] Prof. Mary Ann Corbiere CV June 2018, Exhibit 4092, p. 15.
[22] Evidence of Prof. Mary Ann Corbiere, Transcript vol 24, July 9, 2019, p. 2324 line 25 to p. 2325 line 3.
[23] Evidence of Prof. Mary Ann Corbiere, Transcript vol 24, July 9, 2019, p. 2336, lines 8-14.
[24] Evidence of Prof. Mary Ann Corbiere, Transcript vol 24, July 9, 2019, p. 2336, lines 21-24.
[25] Evidence of Prof. Mary Ann Corbiere, Transcript vol 24, July 9, 2019, p. 2337, lines 13-18.
[26] Evidence of Prof. Mary Ann Corbiere, Transcript vol 24, July 9, 2019, p. 2337, lines 13-21
[27] Evidence of Prof. Mary Ann Corbiere, Transcript vol 24, July 9, 2019, p. 2337, lines 6-12.

12. She comes from Wikwemikong on Manitoulin Island. She has spoken Anishinaabemowin with speakers from Saugeen and Nawash, and they are able to understand each other. The dialects are close.[28]

13. Prof. Corbiere was cross-examined extensively on her qualifications by counsel for Ontario. It is true that she has no formal certification in translation – no such programs exist for Anishinaabemowin-English translation.[29] Nor are there programs for translation in general, outside of the context of translating between two specific languages.[30] It is also true that she has not taken courses in translating 19th century Anishinaabemowin – no such courses exist. If such a course did exist, Prof. Corbiere said she would definitely take it.[31]

14. However, Prof. Corbiere has familiarized herself with linguistic concepts,[32] and has taken informal workshops on translation.[33] As noted above, she has translated a wide variety of materials for a wide variety of organizations,[34] has opined on 19th century Anishinaabemowin translation in a litigation context,[35] has no difficulty understanding 19th century Anishinaabemowin dictionaries,[36] and is, of course, writing an Anishinaabemowin-English dictionary.[37]

---

[28] Evidence of Prof. Mary Ann Corbiere, Transcript vol 24, July 9, 2019, p. 2324, lines 8-23.
[29] Evidence of Prof. Mary Ann Corbiere, Transcript vol 24, July 9, 2019, p. 2345, line 18 to p. 2346, line 2.
[30] Evidence of Prof. Mary Ann Corbiere, Transcript vol 24, July 9, 2019, p. 2346, line10 to p. 2347, line 3.
[31] Evidence of Prof. Mary Ann Corbiere, Transcript vol 24, July 9, 2019, p. 2348, line 21 to p. 23409, line 2.
[32] Evidence of Prof. Mary Ann Corbiere, Transcript vol 24, July 9, 2019, p. 2341, lines 19-22.
[33] Evidence of Prof. Mary Ann Corbiere, Transcript vol 24, July 9, 2019, p. 2344, lines 5-9.
[34] As noted above.
[35] As noted above.
[36] Evidence of Prof. Mary Ann Corbiere, Transcript vol 24, July 9, 2019, p. 2363, lines 2-5, referring to the 19th century Baraga and Wilson dictionaries, as explained in Prof. Mary Ann Corbiere, "Treaty Translation Issues" (2013), Exhibit 4094, p. 6.
[37] As noted above.

WEIGHT TO BE GIVEN PROF. CORBIERE'S EVIDENCE

15. Prof. Corbiere's reports are about how some of the terms in Treaties 45 ½ and 72 would have been translated into Anishinaabemowin, and what meaning would then have been understood by unilingual Anishinaabemowin speakers.[38] SON submits that Prof. Corbiere is well qualified for this task.

16. SON submits that Prof. Corbiere's opinions should be given considerable weight - especially since no other expert evidence has been adduced on Anishinaabemowin-English translation issues about the treaties in this litigation.

---

[38] Prof. Mary Ann Corbiere, "Treaty Translation Issues" (2013), Exhibit 4094, pp. 1-3 and Prof. Mary Ann Corbiere, "Additional Treaty Translation Issues" (2016), Exhibit 4095, p. 1.

RELEVANCE AND WEIGHT OF PAUL DRIBEN'S EVIDENCE

1. Prof. Paul Driben was qualified as follows:

> Anthropologist, with expertise in the ethnography, ethnology, and ethnohistory of the Anishinaabe, and capable of giving opinion evidence on:
>
> 1. pre and post-contact Anishinaabe subsistence patterns, cultural traditions, ethnohistory, and social and political organization;
>
> 2. Anishinaabe spiritual beliefs, including relationships to land, water, and the dead;
>
> 3. historical Anishinaabe use, occupancy, and customs concerning decision-making about the use of land and water territory;
>
> 4. the perspective of the Anishinaabe during 19th century treaty-making processes, including Treaty 72 and Treaty 45 ½.[1]

ACADEMIC QUALIFICATIONS

2. Prof. Paul Driben has a M.A. and a Ph.D. in anthropology,[2] and taught anthropology at the university level for 39 years.[3] He was Director of the Lakehead University Native Studies Program from 1976 to 1983,[4] and Chair of the Department of Anthropology from 1979 to 1985.[5] He was

---

[1] Ruling of the Court on qualification, Transcript vol 53, October 21, 2019, p. 6753, lines 3-5; Tender for Paul Driben's Qualification, Lettered Exhibit W1.
[2] Evidence of Prof. Paul Driben, Transcript vol 53, October 21, 2019, p. 6722, line 25 to p. 6723, line 2.
[3] Evidence of Prof. Paul Driben, Transcript vol 53, October 21, 2019, p. 6723, lines 3-5. See also Curriculum Vitae - Paul Driben, Exhibit 4323.
[4] Evidence of Prof. Paul Driben, Transcript vol 53, October 21, 2019, p. 6723, lines 11-14.
[5] Evidence of Prof. Paul Driben, Transcript vol 53, October 21, 2019, p. 6723, lines 15-17.

also Chair of the International Committee for the Study of Jesuit Relations Concerning the Lake Superior Ojibwe 1848-1924, from 1999 to 2002.[6]

FOCUS OF CAREER

3. His principal interest has been Anishinaaabe society and culture. He is also interested in applied anthropology.[7] Over the course of his career, he has done ethnography, ethnology and ethnohistory, and has been doing that for over 50 years.[8]

> See main argument, Chapter 3, Expert Disciplines, for an explanation of these terms.

FIELDWORK & RESEARCH

4. He has done fieldwork in 22 Anishinaabe communities, one Cree community, one Inuit community, and one Métis community.[9] This has included fieldwork in communities in all the divisions of Ojibway into which anthropologists categorize Ojibway people: northern Ojibway, plains Ojibway, southwestern Ojibway and southeastern Ojibway.[10] This has also included fieldwork in the Georgian Bay area.[11]

5. In the course of his career, Prof. Driben has interviewed hundreds of Anishinaabe traditional knowledge holders.[12]

---

[6] Evidence of Prof. Paul Driben, Transcript vol 53, October 21, 2019, p. 6723, lines 18-22.
[7] Evidence of Prof. Paul Driben, Transcript vol 53, October 21, 2019, p. 6723, lines 6-10.
[8] Evidence of Prof. Paul Driben, Transcript vol 53, October 21, 2019, p.6727, lines 1-18, and p. 6733, lines 4-6.
[9] Evidence of Prof. Paul Driben, Transcript vol 53, October 21, 2019, p. 6727, lines 19-25.
[10] Evidence of Prof. Paul Driben, Transcript vol 53, October 21, 2019, p. 6730, lines 8-22.
[11] Evidence of Prof. Paul Driben, Transcript vol 53, October 21, 2019, p. 6731, lines 1-5.
[12] Evidence of Prof. Paul Driben, Transcript vol 53, October 21, 2019, p. 6747, line 19 to p. 6748, line 23.

6. Prof. Driben has done work under 83 research grants and contracts, 42 of which involve expert witness work supporting litigation or negotiation.[13]

7. Prof. Driben has done a wide variety of fieldwork and research, including work related to treaty rights to harvest,[14] related to the extent that the ability to live off the land has been affected by injuries,[15] related to the extent that flooding has impacted communities' living off the land,[16] related to the Anishinaabe rules for using the territory of another First Nation,[17] related to the Anishinaabe rules for treaty processes and interpretation,[18] and to the Anishinaabe rules for constructing buildings.[19]

8. His pre-eminent concern is with understanding the rules by which Anishinaabe communities operate: such as rules involving hunting, rules involving theology, and rules that govern political interaction.[20]

9. Prof. Driben has done work for a wide variety of clients: many First Nations, Department of Justice Canada, Government of Ontario, Ontario Hydro, Government of the N.W.T,

---

[13] Evidence of Prof. Paul Driben, Transcript vol 53, October 21, 2019, p. 6737, lines 19-25. See also Curriculum Vitae - Paul Driben, Exhibit 4323.
[14] Evidence of Prof. Paul Driben, Transcript vol 53, October 21, 2019, p. 6738, line 21 to p. 6739, line 5.
[15] Evidence of Prof. Paul Driben, Transcript vol 53, October 21, 2019, p. 6739, line 14 to p. 6740, line 18.
[16] Evidence of Prof. Paul Driben, Transcript vol 53, October 21, 2019, p 6740, line 19 to p. 6742, line 4.
[17] Evidence of Prof. Paul Driben, Transcript vol 53, October 21, 2019, p 6742, line 5 to p. 6743, line 4.
[18] Evidence of Prof. Paul Driben, Transcript vol 53, October 21, 2019, p. 6743, lines 5-21, and p. 6745, lines 11-22.
[19] Evidence of Prof. Paul Driben, Transcript vol 53, October 21, 2019, p. 6743, line 22 to p. 6744, line 14.
[20] Evidence of Prof. Paul Driben, Transcript vol 53, October 21, 2019, p. 6744, lines 15-23.

Government of Manitoba, Government of Wisconsin, Government of Minnesota, Government of Michigan, and a mining company (Platinex).[21]

PRIOR EXPERT TESTIMONY

10. Prof. Driben has testified or been deposed 12 times.[22]

PUBLICATIONS

11. Prof. Driben has presented 20 conference papers, published 18 journal articles or book chapters, and written five books, three of which are about the Anishinaabe.[23]

METHODOLOGY

12. In his work Prof. Driben uses three key types of sources: his own fieldwork experience, the fieldwork experience of other ethnologists, and the written historical record.[24]

13. Prof. Driben explained the way that general Anishinaabe customary rules apply to individual Anishinaabe communities:

> Q. To what extent are general Anishinaabe customary rules applicable to individual Anishinaabe communities?
>
> A. That depends on time and place, of course. But in general -- at one level of generalization, they're going to be the same.
>
> For instance, if you're interested in theology, I find a common theology. If you're interested in economy, there's going to be some variation because of the

---

[21] Evidence of Prof. Paul Driben, Transcript vol 53, October 21, 2019, p. 6734, line 4 to p. 6735, line 4.
[22] Evidence of Prof. Paul Driben, Transcript vol 53, October 21, 2019, p. 6746, lines 20-23; See also Curriculum Vitae - Paul Driben, Exhibit 4323.
[23] Evidence of Prof. Paul Driben, Transcript vol 53, October 21, 2019, p. 6746, line 20 to p. 6747, line 11; See also Curriculum Vitae - Paul Driben, Exhibit 4323
[24] Evidence of Prof. Paul Driben, Transcript vol 53, October 21, 2019, p 6745, line 23 to p. 6746, line 19.

> ecological circumstances in which people find themselves. Political organizations, it's common.
>
> So some things vary, but it's usually things that have to do with subsistence, things like -- those would be economic things. Things that are fundamentally the same would be things like political organization -- I'm talking traditionally now -- political organization, religious organization, kinship, all those would be the same, right throughout the Anishinaabe world.
>
> Whereas the others that you're talking about, these economic or some linguistic differences would be -- they would be present as well.[25]

14. Prof. Driben did not do fieldwork at SON, but, before testifying, did review SON oral histories and the trial testimony of SON community witnesses.[26] He testified that he found them consistent with what he had written in his report for this litigation.[27]

15. Prof. Driben elaborated on his methodology:

> Q. … So can you tell us how you approached answering these questions you were given?
>
> A. Well, as I say in my report, my approach to these was an ethnohistorical approach. And what I was -- so what I -- what I was interested in is first and foremost is the documentary record; what does the documentary record tell me about the questions that you posed.
>
> And then, what I was interested in is not only what the documentary record said but how that documentary record is informed by the customs and traditions of Anishinaabe people.

---

[25] Evidence of Prof. Paul Driben, Transcript vol 53, October 21, 2019, p. 6750, line 10 to p .6751, line 8.
[26] Evidence of Prof. Paul Driben, Transcript vol 53, October 21, 2019, p. 6748, line 24 to p. 6749, line 10.
[27] Evidence of Prof. Paul Driben, Transcript vol 55, October 23, 2019, p. 7092, lines 17-23; p. 7093, line 18 to p. 7094 line 11.

> Q. How do you assess the reliability of the source that you use in general?
>
> A. Well, what I look for is diversification of research bias. Each technique that one uses has limitations. So, if one relied, say, for instance, strictly on the historical record, that would be a limitation, because there's also information about customary practices that you can learn in the field.
>
> And so if you don't have that information and you don't bring that information to bear then it's harder to interpret the material that you really want to interpret which is the documentary record.
>
> So I take -- as I said before, I take what I know in this approach, what other ethnologists, what I know through my own field research, what other conclusions people have come to, let's say about the decision-making process, and see whether that has a -- whether that can inform the documentary record which would consist of letters and diaries and government reports, and sundry others.
>
> Q. How would you deal with any divergences in the content of your sources?
>
> A. Well, if I find something that's an outlier, that makes me suspicious of it. But if I find something that is consistent, something that there's more than one source for, that's what I'm looking for. I'm looking for something with more than -- more than a single substantiation. I want multiple substantiations because then I know I can say something that is correct.
>
> But if I have only one thing, only one -- let's say one item that talks about a particular event or something like that, then I feel far less confident than that. I'm looking for consensus in the data.[28]

16. SON submits that Prof. Driben is highly experienced in studying Anishinaabe society and culture, having studied it for over 50 years. He testified to matters at the core of this expertise. He

---

[28] Evidence of Prof. Paul Driben, Transcript vol 53, October 21, 2019, p. 6757, line 11 to p. 6759, line 10.

also works for governments and industry as well as First Nations. His opinions should be given substantial weight.

RELEVANCE AND WEIGHT OF RON GOULD'S EVIDENCE

1. Mr. Ron Gould is a protected areas specialist at the Ministry of the Environment, Conservation and Parks (MECP) and was called as a witness by Ontario.[1]

2. Mr. Gould testified about some of the parks in southwestern Ontario that he is responsible for by virtue of his position with MECP. In particular, he provided evidence about the classification of operating and non-operating parks on the Peninsula.[2] Non-operating parks, Mr. Gould testified, do not have public use facilities, staff or established operating dates, whereas operating parks do have facilities for public use, established operating dates and usually staff onsite.[3]

3. Mr. Gould confirmed that there only five operating parks throughout SONTL (which includes the Peninsula and the lands south of the Peninsula – the Treaty 45 ½ Lands).[4] Mr. Gould confirmed that the majority of provincial parks on the Peninsula are non-operating. This includes approximately nine non-operating parks.[5] Of the nine non-operating parks, eight are classified as nature reserve parks and one is a natural environment park, meaning they have important ecosystems and natural heritage in need of protection.[6]

---

[1] Evidence of Ron Gould, Transcript vol 81, February 6, 2020, p. 10380, lines 1-22.
[2] Evidence of Ron Gould, Transcript vol 81, February 6, 2020, p. 10391, line 22 to p. 10419, line 12.
[3] Evidence of Ron Gould, Transcript vol 81, February 6, 2020, p. 10387, lines 4-18; p. 10433, line 13 to p. 10436, line 16.
[4] Evidence of Ron Gould, Transcript vol 81, February 6, 2020, p. 10429, line 14 to p. 10433, line 16.
[5] Evidence of Ron Gould, Transcript vol 81, February 6, 2020, p. 10429, lines 7-13; p. 10436, line 17 to p. 10437, line 5.
[6] Evidence of Ron Gould, Transcript vol 81, February 6, 2020. p. 10438, lines 6 to p. 10439, line 11.

4. Mr. Gould confirmed that in these non-operating parks, there are no superintendents, wardens, or staff on-site. There are no limits imposed on how many visitors can attend at the parks.[7] He further confirmed that MECP does not have full time staff on-site to ensure that visitors are complying with prohibitions on activities that can harm the natural environment – for example, motorized boating in Lion's Head provincial park, or scaling a sensitive shoreline in Hope Bay provincial park. MECP primarily relies on signage, education and ultimately trusting people to obey the rules to enforce prohibitions geared at protecting the natural environment.[8]

5. Mr. Gould's evidence suggests that MECP's management of non-operational parks and protection of sensitive areas on the Peninsula relies on voluntary compliance from the public and does not require extensive enforcement staff resources.[9] Mr. Gould was reluctant to agree with the proposition that there were minimal resources and staff put towards managing parks on the Peninsula, but did ultimately acknowledge that fact when he was presented with precise numbers of staff that are responsible for the parks in his zone – for example, there is only one ecologist on staff for the southwest zone, within which there are 53 parks. He agreed that he is limited in terms of how much monitoring and information collection he can do in the parks of the SONTL due to limits on resources and staff allocated to this task.[10]

6. Mr. Gould admitted that based on his knowledge about SON – via its Environment Office, for example – he understands that SON has several staff members that are dedicated to protecting

---

[7] Evidence of Ron Gould, Transcript vol 81, February 6, 2020, p. 10439, line 12 to p. 10440, line 5.
[8] Evidence of Ron Gould, Transcript vol 81, February 6, 2020, p. 10444, line 3 to p. 10449, line 6.
[9] Evidence of Ron Gould, Transcript vol 81, February 6, 2020, p. 10455, line 3 to p. 10456, line 23; Chapter 3 of the 2013 Annual Report from the Office of the Auditor General of Ontario, tabled at the Legislative Assembly on December 10, 2013, Exhibit 4568, pp. 204, 208-210.
[10] Evidence of Ron Gould, Transcript vol 81, February 6, 2020, p. 10460, line 8 to p. 10461, line 12.

the land, animals and waters throughout SONTL. He agreed that SON would be capable of putting up signs to alert users of parks to sensitive areas and ecological risks, just like MECP does, and also testified that SON has participated in other initiatives such as baseline research and education efforts upon, which MECP relies to encourage the public's compliance with various rules– e.g. no motorized boating, no scaling the sensitive shoreline – in order to protect sensitive areas.[11]

7. Finally, Mr. Gould testified that, in his experience:

   (a) SON has never interfered with MECP's access to or management of shorelines, waters and provincial parks in SONTL;

   (b) SON has not opposed the protection of species that Mr. Gould testified MECP acts to protect; and

   (c) SON has assisted in gathering and sharing knowledge with MECP.[12]

8. The evidence provided by Mr. Gould assists this Court in the following matters:

   (a) that the management of the majority of provincial parks and sensitive shorelines on the Peninsula does not rely on significant staffing or resource expenditures by the province, but rather relies on public compliance with prohibitive signage and education; and

---

[11] Evidence of Ron Gould, Transcript vol 81, February 6, 2020, p. 10449, line 7 to p. 10450, line 25; p. 10451, line 17 to p. 10452, line 13; p. 10461, line 16 to p. 10462, line 20; and p. 10464, line 19 to p. 10468, line 10.
[12] Evidence of Ron Gould, Transcript vol 81, February 6, 2020, p. 10468, line 25 to p. 10470, line 5.

(b) that SON has not interfered with MECP access to shorelines, waters or lands throughout the SONTL for the purposes of management or protection of species, wildlife and waters.

RELEVANCE AND WEIGHT OF DONALD E. GRAVES'S EVIDENCE

1. Mr. Donald Graves is a military historian called to testify by Ontario. He was qualified as a

> Historian capable of giving opinion evidence on the military and naval history of the Great Lakes/St Lawrence region in the 18th and 19th centuries, including in relation to the provision of military aid to the civil power for the purposes of law enforcement and maintaining public order for the purposes of law enforcement and maintaining public order in Upper Canada and Canada West."[1]

2. He provided commentary on the expert reports of Prof. Sidney Harring and Prof. Eric Hinderaker, as well as on paragraph 19 of the Statement of Claim in the Aboriginal title case. [2]

3. As set out in more detail below, SON submits that Mr. Graves was argumentative and hostile in cross-examination. He refused to consider evidence that contradicted the opinions he expressed, preferring to answer with glib or sarcastic comments rather than to offer an earnest consideration of the record to assist the court. His report contained a number of errors and misstatements, and he frequently ventured into providing opinions on topics in which he has little to no expertise. SON submits his evidence should be given no weight.

4. This appendix will deal first with Mr. Graves' evidence in relation to the Hinderaker Report; and then in relation to the Harring Report. It will conclude with some more general observations on Mr. Graves expertise, particularly in relation to his opinions on para 19 of the

---

[1] Evidence of Mr. Donald Graves, Transcript vol 80, February 3, 2020, p. 10313, line 3 to p. 10314, line 8; "Qualification statement for the testimony to be provided by Mr. Donald Graves to the court", Exhibit Q-3.

[2] Mr. Donald Graves, "Comments and Observations on the Expert Reports of Professor Eric Hinderaker and Dr. Sidney Harring and the Historical Basis of the Plaintiff's Statement of Claim" (2015), Exhibit 4553.

Plaintiffs' Statement of Claim in the Aboriginal title case, as well as Mr. Graves' demeanor in court.

Mr. Graves evidence in relation to Prof. Hinderaker's Report

5. While Mr. Graves agreed with much of Prof. Hinderaker's evidence, his evidence differed, and should not be accepted, on the following points :

(a) His interpretation of the meaning of the attack on the survey party on St. Clair River in 1763;[3]

(b) His opinion on the outcome of Pondiac's War;[4]

(c) His views on the dominance of British naval power on the Upper Great Lakes from 1764 to the War of 1812;[5]

(d) His unsupported opinion that "it was only through their alliances with Britain that the aboriginal nations of the Upper Great Lakes were able to utilize the waters of the Upper Lakes for their own purposes."[6]

---

[3] Mr. Donald Graves, "Comments and Observation on the Expert Reports of Professor Eric Hinderaker and Doctor Sidney Harring and the Historical Basis of the Plaintiff's Statement of Claim" (2015), Exhibit 4553, pp. 6-7.

[4] Mr. Donald Graves, "Comments and Observation on the Expert Reports of Professor Eric Hinderaker and Doctor Sidney Harring and the Historical Basis of the Plaintiff's Statement of Claim" (2015), Exhibit 4553, pp. 7, 16-17.

[5] Mr. Donald Graves, "Comments and Observation on the Expert Reports of Professor Eric Hinderaker and Doctor Sidney Harring and the Historical Basis of the Plaintiff's Statement of Claim" (2015), Exhibit 4553, pp. 7, 16.

[6] Mr. Donald Graves, "Comments and Observation on the Expert Reports of Professor Eric Hinderaker and Doctor Sidney Harring and the Historical Basis of the Plaintiff's Statement of Claim" (2015), Exhibit 4553, pp. 16-17.

NO EXPERTISE IN PONDIAC'S WAR

6. Mr. Graves has undertaken no research, nor has he edited any texts, on Pondiac's War previous to this litigation[7] and so his expertise on this issue is limited. Conversely, Prof. Hinderaker was at the time of his testimony writing a third book related to the subject matter of his testimony, including Pondiac's War. Prof. Hinderaker has spent much of his academic career working on topics related to Pondiac's War.[8] To the extent that Mr. Graves' evidence differs from Prof. Hinderaker's respecting this subject, Prof. Hinderaker's evidence should be preferred.

> Relevance and Weight of the Evidence of Prof. Eric Hinderaker,
> Appendix E, Tab 13

THE MEANING OF THE ATTACK ON THE SURVEY PARTY REFERENCED BY DR. HINDERAKER

7. One area where Mr. Graves' evidence differed from Prof. Hinderaker's was with respect to the attack on the St. Clair River in 1763, where St. Clair River Ojibwa warriors attacked a British survey party and prevented them from passing through the river to Lake Huron.[9] Dr. Hinderaker gave the opinion that the warriors were aware it was a survey party,[10] while Mr. Graves gave the opinion that the warriors did not know it was a survey party and were simply attacking because it was a British party.[11] On this point, Prof. Hinderaker's evidence should be preferred.

---

[7] Evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020, p.10982, lines 4-10,
[8] Evidence of Prof. Eric Hinderaker, Transcript vol 19, June 10, 2019, p. 1554, line 25 to p. 1556, line 17; Curriculum vitae of Prof. Eric A. Hinderaker, January 2019, Exhibit 4021, pp. 1-5.
[9] John Rutherford's Captivity Narrative (January 1, 1763), Exhibit 514, pp. 222-224.
[10] Evidence of Prof. Eric Hinderaker, Transcript vol 19, June 10, 2019, p. 1625, line 20 to p. 1626, line 4.
[11] Mr. Donald Graves, "Comments and Observation on the Expert Reports of Professor Eric Hinderaker and Doctor Sidney Harring and the Historical Basis of the Plaintiff's Statement of Claim" (2015), Exhibit 4553, p. 6; Evidence of Mr. Donald Graves, Transcript vol 80, February 3, 2020, p. 10328, lines 6-18.

8. John Rutherford was a member of the British survey party that was attacked, and wrote a journal which tells the story of Mr. Rutherford's experience in the attack on the surveyors and in his captivity following that attack.[12] It is a key primary source document respecting this attack, and is cited by Prof. Hinderaker for the very point Mr. Graves was disputing.[13] When the journal was put to Mr. Graves on cross examination, Mr. Graves was unfamiliar with John Rutherford, his relation to the survey party, and his journal.[14]

THE OUTCOME OF PONDIAC'S WAR

9. Mr. Graves gave the opinion that:

> The British military was taken by surprise [by Pondiac's War] but recovered quickly and was about to come back and launch a military operation which would have crushed those Indigenous nations that were involved in that conflict."[15]

10. In coming to this conclusion, the only evidence Mr. Graves appears to have considered is respecting Britain's military strength in the period of peace following the Treaty of Niagara and the end of Pondiac's War on the Upper Great Lakes.[16] He ignored key evidence respecting the British view of their likelihood of success in Pondiac's War. On cross examination, SON counsel put to Mr. Graves a 1764 letter from Sir William Johnson, Superintendent for Northern Indians,[17]

---

[12] Evidence of Prof. Eric Hinderaker, Transcript vol 19, June 10, 2019, p. 1623, line 17 to p. 1624, line 6; John Rutherford's Captivity Narrative (January 1, 1763), Exhibit 514

[13] Prof. Eric Hinderaker, "The Anishinaabeg, the British Crown, and Aboriginal Land Rights in the Era of Pontiac's War" (2013), Exhibit 4017, p. 24, footnote 31, p. 49, footnote 60.

[14] Evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020, p. 10934, line 4, to p. 10935, line 1; John Rutherford's Captivity Narrative (January 1, 1763), Exhibit 514, pp. 222-224.

[15] Evidence of Mr. Donald Graves, Transcript vol 80, February 3, 2020, p. 10327, lines 21-25.

[16] Mr. Donald Graves, "Comments and Observation on the Expert Reports of Professor Eric Hinderaker and Doctor Sidney Harring and the Historical Basis of the Plaintiff's Statement of Claim" (2015), Exhibit 4553, pp. 6-17.

[17] See Cast of Characters, Appendix C.

to the Lords of Trade discussing peace that had been made with the Great Lakes Anishinaabe. Johnson was, at the time, the most knowledgeable British official respecting Indigenous Nations.[18] In that letter, Sir William Johnson states:

> The Indians all know, we cannot be a match for them in the midst of an extensive, woody Country, where, tho' we may at a large expence convey an army, we can not continue it there, but must leave our small Posts at the end of the Campaign, liable to either be blockaded, surprised, or taken by Treachery.[19]

11. Mr. Graves refused to acknowledge that Johnson did not share Mr. Graves' confidence that the British were about to come back and crush the Indigenous forces, pointing to the preceding paragraph as suggesting what they are really talking about is stability and peace on the front. Mr. Graves finished by stating that "[i]f you add the previous paragraphs into all of this, instead of just cherry-picking one, you could see that."[20] This perspective ignores the fact that Johnson's previous paragraph also indicates he is less than certain they would be successful continuing in the war – Johnson states that the peace Britain entered into with the Western Nations is "much cheaper, than any other plan, and more certain of success."[21]

12. This demonstrates that when Mr. Graves was presented with evidence that did not align with his particular view, he became rude and argumentative, and determined to make the

---

[18] Evidence of Prof. Eric Hinderaker, Transcript vol 19, June 10, 2019, p. 1580, line 10 to p. 1581, line 6.
[19] Johnson to Lords of Trade, August 30, 1764, Exhibit 643, pp. 649-650; Evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020, p. 10953, line 5 to p. 10955, line 19.
[20] Evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020, p. 10955, line 11 to p. 10956, line 24.
[21] Johnson to Lords of Trade, August 30, 1764, Exhibit 643, p. 649.

evidence fit with his preconceived view, rather than re-evaluating his position in light of the evidence.

BRITISH NAVAL DOMINANCE FROM 1764 TO 1812

13. Mr. Graves gave evidence that the British controlled the Upper Great Lakes from 1764 to 1813, and that there is no evidence of any Indigenous attempt to oppose that control.[22] For the period up until the start of the War of 1812, the only support Mr. Graves provides for this opinion is a tally of the number of ships the British had on the Great Lakes, and evidence of British disputes with the Americans.[23] There is no attempt to determine the military power of Indigenous nations at the time, nor to compare the British military power to that of Indigenous nations. Further, this supposed control does not take into account any agreement reached at Niagara. On cross examination, Mr. Graves acknowledged that:

(a) Between 1764 and the period right before the War of 1812 was a period of peace on the Upper Great Lakes;[24]

(b) The use of waterways was part of what was negotiated in Niagara in 1764;[25]

(c) There would be no reason for the Anishinaabe communities to challenge British vessels on the Upper Great Lakes between 1764 and 1812;[26]

---

[22] Evidence of Mr. Donald Graves, Transcript vol 80, February 3, 2020, p. 10327, lines 2-5; Evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020, p. 10939, lines 15-20; Mr. Donald Graves, "Comments and Observations on the Expert Reports of Professor Eric Hinderaker and Doctor Sidney Harring and the Historical Basis of the Plaintiff's Statement of Claim" (revised and corrected November 2015, redacted January 2020), Exhibit 4553, p. 16.
[23] Mr. Donald Graves, "Comments and Observations on the Expert Reports of Professor Eric Hinderaker and Doctor Sidney Harring and the Historical Basis of the Plaintiff's Statement of Claim" (revised and corrected November 2015, redacted January 2020), Exhibit 4553, pp. 7-9.
[24] Evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020, p. 10940, lines 1-9.
[25] Evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020, p. 10944, lines 1-5.

(d) There is no evidence of Anishinaabe challenging British presence on the Upper Great Lakes between 1764 and 1812;[27] and

(e) No one tried to challenge Anishinaabe presence on the Upper Great Lakes between 1764 and 1812.[28]

14. Given these admissions, Mr. Graves' characterization of British dominance seems less based in an assessment of evidence and an attempt to be of assistance to the Court and more based in Mr. Graves' attempt to forward his own view that the British were an all powerful military force.

15. Further to this, on cross-examination, it was put to Mr. Graves that the British feared attacks like those in Pondiac's War for many years after the war concluded. The following passage from his report where he acknowledged that the British feared such attacks, specifically following the signing of the 1783 Treaty of Paris, was put to him:

> Aboriginal leaders were furious at what they regarded as a blatant British betrayal of their interests and their anger caused **British leaders to fear that attacks would be made on British posts and settlements similar to those of the Pontiac Conflict of 1763-1764**.[29] [Emphasis added.]

16. Mr. Graves responded by stating that the British were not afraid of attacks like those in Pondiac's War from 1763 to 1783 or from 1784 to 1812, but briefly feared such attacks in 1783

---

[26] Evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020, p. 10944, lines 6-11.
[27] Evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020, p. 10945, lines 2-6.
[28] Evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020, p. 10945, lines 12-20.
[29] Mr. Donald Graves, "Comments and Observations on the Expert Reports of Professor Eric Hinderaker and Doctor Sidney Harring and the Historical Basis of the Plaintiff's Statement of Claim" (revised and corrected November 2015, redacted January 2020), Exhibit 4553, p. 47; Evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020, p. 10958, line 7 to p. 10959, line 9.

and 1784 (the latter, because Indigenous leaders were furious that Britain had betrayed their interests in the 1783 Treaty of Paris with the United States).[30] Mr. Graves' opinion that 1783-1784 was the only period after Pondiac's War when Britain was afraid of being attacked by Indigenous forces is inconsistent with the documentary record: Pondiac's War was ongoing in the Upper Great Lakes in 1763 and the beginning of 1764, and outside the Upper Great Lakes until 1766. It is also inconsistent with his own report, given that, as quoted above, he stated that British feared attacks "similar to those of the Pontiac Conflict of 1763-1764." Presumably, at the very least the British continued to fear attacks like those in Pondiac's War while the war was still ongoing.

> See Chapter 18, The Pondiac War (1763), Outcome of Pondiac's War (*Pondiac and some of his followers continued the war outside of the Great Lakes until 1766, the vast majority of the Great Lakes First Nations made peace with Britain in 1764 at Niagara.)*

ANISHINAABE USE OF THE UPPER GREAT LAKES FROM 1764 TO 1812

17. Mr. Graves claimed in his report that "it was only through their alliances with Britain that the aboriginal nations of the Upper Great Lakes were able to utilize the waters of the Upper Lakes for their own purposes."[31] No evidence was cited for this proposition. Mr. Graves did not undertake any assessment of the military capability of the Indigenous nations he is referring to, which SON submits is necessary to support his claim. However, it is worth noting that, as elaborated above, Mr. Graves agreed on cross examination that no one tried to challenge Anishinaabe presence on the Upper Great Lakes between 1764 and 1812.[32] That suggests that

---

[30] Evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020, p. 10958, line 22 to p. 10960, line 2.
[31] Mr. Donald Graves, "Comments and Observation on the Expert Reports of Professor Eric Hinderaker and Doctor Sidney Harring and the Historical Basis of the Plaintiff's Statement of Claim" (2015), Exhibit 4553, pp. 16-17.
[32] Evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020, p. 10945, lines 12-20.

there is evidence to support the contrary position: that the Indigenous Nations were capable of using the Great Lakes for their own purposes without any assistance.

In relation to Prof. Harring's Report

18. Mr. Graves' evidence in relation to Prof. Harring's report contained a number of errors on key points, and was often based on areas of study on which he had little expertise and had undertaken little research. Specifically:

(a) His opinion on what was required to address squatting was rooted in errors about the nature of squatting in Upper Canada in between 1836 and 1854, a topic on which he has little expertise;

(b) Mr. Graves made a number of errors in his descriptions of the civilian law enforcement resources available in Upper Canada in between 1836 and 1854;

(c) Mr. Graves' opinion about the inadequate strength and organization of the militia is rooted in an idea that the militia would be required to launch a permanent border patrol on the Peninsula; in fact, the militia would have been able to take steps like assisting with difficult arrests of squatters, but was never asked to do so;

(d) Mr. Graves opinion that the British army could not be called to assist if necessary because there were few troops in Upper Canada by 1854 was significantly undermined by the fact that an offer of military support was made to the party surveying the Peninsula just 8 months after Treaty 72; and

(e) Mr. Graves opinion on the reasons that Oliphant sought a surrender of the Peninsula are not rooted in evidence or expertise.

(A) OPINION ON WHAT IS REQUIRED TO ADDRESS SQUATTING SHOULD BE GIVEN NO WEIGHT

19. Mr. Graves' report offers opinions on the factors that led to squatting in and around the Peninsula, including about the extent[33] and causes of squatting on the Peninsula.[34] The opinions Mr. Graves expresses about the extent and nature of squatting are the foundation of his assessment of the military resources required to address squatting. For example, he states that:

> The first thing is to note that we are not talking here about a few farms but a border or boundary some 20 miles (32 kilometers) in length between the Saugeen Reserve on Lake Huron and the Nawash reserve on Georgian Bay. To clear the squatters from an area that size would have taken more than a few dozen men, and to keep it clear would have taken even more as it would have to be constantly patrolled.[35]

20. Mr. Graves does not have the expertise to assess the nature or extent of squatting:

(a) Prior to this litigation, Mr. Graves had done no research on squatting and Crown land policy with respect to the Peninsula and surrounding areas in the 19th century.[36]

(b) Mr. Graves does not engage in his report with many of the leading secondary sources on squatting referred to by other experts like Prof. Harring and Prof. McCalla. For example, when asked whether he reviewed key secondary sources

---

[33] Mr. Donald Graves, "Comments and Observation on the Expert Reports of Professor Eric Hinderaker and Doctor Sidney Harring and the Historical Basis of the Plaintiff's Statement of Claim" (2015), Exhibit 4553, p. 24.
[34] Mr. Donald Graves, "Comments and Observation on the Expert Reports of Professor Eric Hinderaker and Doctor Sidney Harring and the Historical Basis of the Plaintiff's Statement of Claim" (2015), Exhibit 4553, pp. 18-21.
[35] Mr. Donald Graves, "Comments and Observation on the Expert Reports of Professor Eric Hinderaker and Doctor Sidney Harring and the Historical Basis of the Plaintiff's Statement of Claim" (2015), Exhibit 4553, p. 24
[36] Evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020, p. 10989, lines 12-23.

on the topic such as Michelle Vosburgh's Agents of Progress,[37] he responded "that wasn't my remit, was it? And that's not my expertise."[38]

(c) Mr. Graves did not review the record of primary documents in this litigation that discuss squatting on the Peninsula.[39]

(d) Mr. Graves did not undertake a detailed assessment of the relationship between population growth in Upper Canada and squatting[40], though he offered opinions on this topic in his report.[41]

21. SON submits that because there is no basis for Mr. Graves's conclusions about the extent and pattern of squatting, they ought to be given no weight. Mr. Graves' conclusion that a border patrol would be required to address squatting on the Peninsula therefore has no foundation. Witnesses with more expertise on the dynamics surrounding squatting on Indian lands in Upper Canada, including both Prof. Harring and Prof. McCalla, identified that squatting moves in zones

---

[37] Michelle Vosburgh's PhD Thesis deals with the treatment of squatters near and on the Saugeen Peninsula in the mid 19th century, including by local Crown Lands Agent Alexander McNabb. It was cited by both Prof. McCalla and Prof. Harring; See: Prof. Sidney Harring, "Report" (2013), Exhibit 4276, p. 11, footnotes 20, 33, 39, 93, 94; Prof. Douglas McCalla, "Population Grown and the Search for Land in Upper Canada & Related Questions," Exhibit 4367, footnotes 27, 29, 37, 38, 42, 53, 54, 55, 56, 57, 58, 59, 61; Professor McCalla described it as a "richly documented study" which makes it "possible to "examine the process and the problems of land distribution at the height of the land boom in 1854-55."; Prof. Douglas McCalla, "Population Grown and the Search for Land in Upper Canada & Related Questions," Exhibit 4367, p. 18.

[38] See evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020, p. 10991, lines 20-25.

[39] See evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020, p. 10990, lines 14 to 25

[40] See evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020, p. 10992, line 25 to p 10993, line 5.

[41] Mr. Donald Graves, "Comments and Observations on the Expert Reports of Professor Eric Hinderaker and Doctor Sidney Harring and the Historical Basis of the Plaintiff's Statement of Claim" (2015), Exhibit 4553, pp. 19-20.

near existing settlements. The challenge the Crown faced was one of removing farmers settled for many months, or timber thieves whose locations are known, not catching intruders passing in and out of the reserve in the dead of night. As Mr. Wentzell fairly noted in his examination, arresting a person in this context could involve a more targeted operation of a small number of men than a permanent boundary patrol.[42]

22. On cross-examination, Mr. Graves was asked to assume Prof. McCalla's evidence on the patterns of squatting in Upper Canada was correct, and if it was, whether this would change his views on the number of troops required to address squatting on the Peninsula. Mr. Graves was argumentative and essentially refused to engage with the question, before finally answering "I would want as many men as I could. If I'm the hypothetical commander of this hypothetical force. And I want blue uniforms. Hypothetical uniforms."[43] SON submits that this is not the kind of answer the Court should expect from an expert who is acting with a sincere desire to assist the Court in understanding the factual bases and boundaries of the opinions he has expressed. It reveals an expert more interested in scoring points against counsel than sharing accurate, well-supported opinions with the Court.

(B) ERRORS IN ASSESSMENT OF CIVILIAN LAW ENFORCEMENT RESOURCES

23. On cross examination, Mr. Graves demonstrated that he had at best an incomplete understanding of the civilian law enforcement resources available in Upper Canada between 1836 to 1854.

---

[42] Evidence of Mr. Tyler Wentzell, Transcript vol 64, November 22, 2019, p. 8386, line 21 to p. 8387, line 5

[43] Evidence of Mr. Donald Graves, Transcript vol 86, Feb 20, 2020, p. 11003, line 11 to p. 11019, line 12.

i. Commissioners under the Indian Lands Protection Legislation

24. In his report, Mr. Graves claimed that Commissioners were rarely appointed under the 1839 *Act for the protection of the Lands of the Crown in this Province, from Trespass and Injury* and the 1850 *Act for the protection of the Indians in Upper Canada from imposition, and the property occupied or enjoyed by them from trespass and injury*.[44] On cross-examination, he also suggested, without pointing to any supporting evidence, that there was a question whether *any* such commissioners existed.[45] Mr. Graves was shown that two individuals, T.G. Anderson and John McLean, were in fact appointed as Commissioners with the power to address squatting on the Peninsula.[46] After being shown he had been incorrect in his opinion about the appointment of commissioners, Mr. Graves instead suggested that he did not know when Mr. Anderson retired. Counsel pointed out that Anderson was still in his position in August 1854, just two months prior to the treaty. Mr. Graves then suggested, without any supporting evidence, that perhaps Anderson was no longer a Commissioner even though he continued in his post. He directed counsel, "I suggest at the lunch break you go to the Dictionary of Canadian Biography and look up Thomas Gummersal Anderson."[47] In spite of his intransigence, he was ultimately

---

[44] Mr. Donald Graves, "Comments and Observations on the Expert Reports of Professor Eric Hinderaker and Doctor Sidney Harring and the Historical Basis of the Plaintiff's Statement of Claim" (2015), Exhibit 4553, p. 25; *An Act for the protection of the Lands of the Crown in this Province, from Trespass and Injury*, 1839, Exhibit 1301; *An Act for the protection of the Indians in Upper Canada from imposition, and the property occupied or enjoyed by them from trespass and injury***,** 1850, Exhibit 1784.

[45] Evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020, p. 11027, lines 9-16.

[46] Evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020, p. 11020, line 4 to p. 11041, line 20; Letter from Col. Bruce to T.G. Anderson, February 18, 1851, Exhibit 4718; Letter from Col. Bruce to Provincial Secretary, October 20, 1852, Exhibit 4719.

[47] Evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020, p. 11031, line 3 to p. 11034, line 16; Letter from Col. Bruce to T.G. Anderson, February 18, 1851, Exhibit 4718; Letter from T.G. Anderson to John Frost, September 1852, Exhibit 4720.

forced to concede that commissioners had been appointed with the legislative power to address squatting on the Peninsula.[48]

ii. Cherokee Rangers

25. Mr. Graves testified that Prof. Harring was "confused" in his report when Prof. Harring mentioned the Cherokee Rangers as one example of the kind of institution that could be martialed to address squatting on the Peninsula.[49] Mr. Graves alleged the Cherokee Rangers had "no connection with either law enforcement or the military in Canada West in 1854."[50] On cross-examination, Mr. Graves was shown evidence that the example of Cherokee Rangers (an Indigenous law enforcement institution that existed in the United States) were discussed by senior officials in the Indian Department, including in the Bagot Commission Report.[51] Although such measures were never authorized in Upper Canada, it is clear that the option of empowering Indigenous law enforcement to address squatting on Indian lands was under consideration in Upper Canada between 1836 and 1854. Mr. Graves simply was not aware of this discussion, even though it appeared in central Indian Affairs policy documents[52] like the Bagot Commission report.

---

[48] Evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020, p. 11039, line 21 to p. 11041, line 20.
[49] Evidence of Mr. Donald Graves, Transcript vol 80, February 3, 2020, p. 10345, lines 11-14.
[50] Mr. Donald Graves, "Comments and Observations on the Expert Reports of Professor Eric Hinderaker and Doctor Sidney Harring and the Historical Basis of the Plaintiff's Statement of Claim" (2015 as redacted 2020), Exhibit 4553, p. 25.
[51] Evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020 p. 11073, lines 7 to p. 11080 line 8; Bagot Commission Report, Exhibit 1447, PDF image 36; See also: Evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020, p. 11078, line 6 to p. 11080, line 8; Letter from T.G. Anderson, March 14, 1843, Exhibit 4418.
[52] Evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020, p. 11078, lines 1-5

iii. Indian Agents

26. Mr. Graves opined in his report that "Indian Agents" would not have been available to help address squatting on the Peninsula because "the Indian Department was being downsized and was short staffed".[53] His report provides no citation for this proposition.[54] On cross examination, he claimed that the strength or numbers of Indian Agents in this period was "outside his remit" and so he could not answer questions on that topic.[55]

iv. Constables and Special Constables

27. In his report, Mr. Graves opined that constables could not act in relation to squatting because "constables were a municipal appointment in villages and towns and patrolling the boundary was not a municipal function".[56] He clarified on cross-examination that he meant primarily that they would not be used for paramilitary operation like "setting a boundary out" along the Peninsula. [57] He agreed that constables could undertake activities under the 1839 and 1850 Indian Land Protection legislation, such as delivering warrants or arresting and removing squatters.[58] However, when asked if constables could therefore have taken action to enforce against squatters on Indian lands in the mid 19th century, he said:

---

[53] Mr. Donald Graves, "Comments and Observations on the Expert Reports of Professor Eric Hinderaker and Doctor Sidney Harring and the Historical Basis of the Plaintiff's Statement of Claim" (2015), Exhibit 4553, p. 25.
[54] Mr. Donald Graves, "Comments and Observations on the Expert Reports of Professor Eric Hinderaker and Doctor Sidney Harring and the Historical Basis of the Plaintiff's Statement of Claim" (2015), Exhibit 4553, p. 25.
[55] Evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020, p. 11090, line 5 to p. 11092, line 7.
[56] Mr. Donald Graves, "Comments and Observations on the Expert Reports of Professor Eric Hinderaker and Doctor Sidney Harring and the Historical Basis of the Plaintiff's Statement of Claim" (2015), Exhibit 4553, p. 24.
[57] Evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020, p. 11068, lines 11-17.
[58] Evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020, p. 11066, line 18 to p. 11069, line 17.

> Answer: Ma'am, if my grandmother had wheels she could be a bicycle. Hypotheticals. I can't answer that. I don't know. They didn't do it, did they? I deal in facts, eh. I'm a historian, not a lawyer. Facts. Give me some facts. Let's discuss facts. Much more interesting.[59]

28. SON submits that this was another argumentative and evasive answer. The question was geared at elucidating what kinds of activities constables could undertake by virtue of their role in the mid 19th century – a topic on which Mr. Graves had opined in his report.

29. Mr. Graves also opined – without any evidence in support of his position – that no constables were appointed who could act on the Peninsula prior to 1854.[60] After his testimony, evidence was uncovered and entered into evidence on consent, including by way of an Agreed Statement of Fact, that demonstrates that there were in fact constables in Grey and Bruce counties prior to October 1854.[61]

30. When evidence that the appointment of special constables was put to Mr. Graves as another option to address squatting on the Peninsula, Mr. Graves said he couldn't venture an opinion on this topic,[62] even though in his report he purports to offer a survey of the strength and availability of law enforcement institutions in Upper Canada in the mid 19th century. SON

---

[59] Evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020, p. 11069, lines 11-17.
[60] Evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020, p.11042, line 8 to p. 11069, line 17; p. 11068, line 11 to p. 11069, line 17.
[61] Agreed Statement of Fact Regarding Constables in Grey and Bruce Counties, Exhibit 4901; Quarter Sessions for the County of Grey, April 1854 Session, Exhibit 4819; Quarter Sessions for the County of Grey- June/July 1854 Session, Exhibit 4820; List of Persons to Serve as Constables for the year 1852-1853 appointed by the County General Quarter Sessions of the Peace April 1852, Exhibit 4823; List of Persons notified to serve as constables in and for the united counties of Huron and Bruce as Appointed by the County General Quarter Sessions of the Peace April 1853, Exhibit 4824; Schedule of the names of persons appointed to serve as Constables in and for the United Counties of Huron and Bruce for the Year 1854-1855, Exhibit 4825.
[62] Evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020, p. 11066, line 9 to p. 11068, line 10.

submits that this reveals either a lack of knowledge on the topic on which he was opining, or an unwillingness to consider evidence that may challenge his views.

v. Deputized Local Citizens

31. Mr. Graves commented that "Dr. Harring mentions 'deputized local citizens' which begs the question of who would deputize them".[63] On cross-examination, he admitted that the deputization of local citizens was expressly provided in the 1850 *Indian land Protection Act.* He also acknowledged that the appointment of special constables would be a form of the deputization of local citizens.[64]

vi. Police Forces

32. Mr. Graves opined that there were no police forces in the mid 19th century in Upper Canada outside of Toronto.[65] He was shown evidence that, contrary to what he had stated in his report, police forces were created in the relevant period in rural areas like Morrisburg to deal with discrete law enforcement needs.[66] SON submits that this indicates such forces could be and were created where it was a priority to do so.

vii. Speculation about level of organization in Bruce and Grey

33. In an attempt to suggest that civilian law enforcement institutions would not have acted in relation to squatting on the Peninsula even if they were asked, Mr. Graves testified that he was

---

[63] Mr. Donald Graves, "Comments and Observations on the Expert Reports of Professor Eric Hinderaker and Doctor Sidney Harring and the Historical Basis of the Plaintiff's Statement of Claim" (2015), Exhibit 4553, p. 25.
[64] Evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020, p. 11081, lines 1-10.
[65] Mr. Donald Graves, "Comments and Observations on the Expert Reports of Professor Eric Hinderaker and Doctor Sidney Harring and the Historical Basis of the Plaintiff's Statement of Claim" (2015), Exhibit 4553, pp. 25-26.
[66] Evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020, p. 11085, line 24 to p. 11089, line 25; Ruth Bleasdale, "Class Conflict on the Canals of Upper Canada in the 1840s," Exhibit 4722, p.34.

"not sure just how far [Grey and Bruce County] had gone by 1854 in developing their administrative operations. I don't know".[67]

34. However, Mr. Graves was not aware of basic facts about the way the Peninsula was administered leading up to 1854, including most notably the fact that the Peninsula fell partially under the jurisdiction of Grey County.[68] SON submits that Mr. Graves' comments about the level of organization of the Peninsula and where it fit into the administrative scheme of Upper Canada amount to unsubstantiated speculation, rather than expert testimony rooted in the evidentiary record before the court.

Conclusion on Civilian Law Enforcement

35. SON submits that Mr. Graves assessment of the strength of civilian law enforcement and its availability to address squatting on the Peninsula should be given no weight.

(C) MILITIA RESOURCES AVAILABLE IN THE YEARS LEADING UP TO 1854

36. Mr. Graves' essential opinion regarding the availability of the militia was that the militia force was not organized in Grey and Bruce in the years leading up to 1854.[69] However, after refusing to answer a number of counsel's questions, he ultimately agreed:

---

[67] Evidence of Mr. Donald Graves, Transcript vol 80, February 3, 2020, p. 10346, lines 1-5.
[68] He remarked in his report that it was "interesting that Oliphant would contact the sheriff of Grey County to remove squatters after Treaty 72 was concluded, although the Saugeen/Bruce Peninsula was actually under the jurisdiction of Bruce County", Mr. Donald Graves, "Comments and Observations on the Expert Reports of Professor Eric Hinderaker and Doctor Sidney Harring and the Historical Basis of the Plaintiff's Statement of Claim" (2015), Exhibit 4553, p. 34; Evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020, p. 11119, lines 16-24.
[69] Mr. Donald Graves, "Comments and Observations on the Expert Reports of Professor Eric Hinderaker and Doctor Sidney Harring and the Historical Basis of the Plaintiff's Statement of Claim" (2015 as redacted 2020), Exhibit 4553, pp. 27-29.

(a) That there was legislation in place in this period (the *Militia Act,* 1846[70]) that made every adult male up to the age of "55 or 60"[71] liable for militia duty, with a few limited exceptions (such as for religious reasons); [72]

(b) That the legislation in place provided for training the militia;[73]

(c) That a militia force called up under this 1846 Act would be capable of delivering eviction notices to or arresting squatters or timber thieves.[74] In fact, Mr. Graves was shown examples of cases between 1836 and 1854, where militia did assist with difficult arrests.[75]

(d) That there was nothing under the 1846 Act to prevent militia from other counties or districts from assisting across county lines, if they were called out to do so. Mr. Graves seemed to believe the main obstacle was that officials would be disinclined to call them. [76]

---

[70] *The Militia Act,* 1846, 9 Vict Ch 28, Exhibit 1603.
[71] The legislation is clear that all men aged 18 to 60 are part of the militia. See *The Militia Act,* 1846, 9 Vict Ch 28 Exhibit 1603, s 2. Mr. Graves suggested the age range was 16 to 55 or 60. The basic point stands: all adult men were part of the militia by law between 1846 and 1855.
[72] Evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020, p. 11099, line 24 to p. 11103, line 6.
[73] Evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020, p. 11099, line 24 to p. 11103, line 6.
[74] Evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020, p. 11104, lines 13- 22.
[75] Evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020, p. 11114, line 1 to p. 11116, line 6.
[76] Evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020, p. 11110, line 20 to p. 11113, line 25.

37. SON submits that this suggests that there were militia forces that could have assisted with squatting on the Peninsula, if they were asked to do so, and as such, Mr. Graves' opinion that the militia was not available to do so because it did not exist should be disregarded.

(D) THE AVAILABILITY OF THE BRITISH MILITARY

38. Mr. Graves opined in his report it was unlikely the British military could be called upon to assist with squatting "in view of the army's shortage of manpower in 1854".[77] On cross examination, he was shown evidence that, in 1855, Lord Bury, Oliphant's successor as Superintendent General of Indian Affairs,[78] offered military support to put down SON's resistance to the survey of the newly surrendered Peninsula. Mr. Graves confirmed that British troop strength continued to drop in the period following the conclusion of Treaty 72.[79] As a result, this newfound ability to martial the military to aid civil power on the Peninsula could not be explained by an increase in troop levels.

39. In his report, Mr. Graves had wrongly interpreted this as evidence that Lord Bury was offering the military to address unrest among squatters.[80] His report expressed the view was that this demonstrated how violent squatting had become. "Given these circumstances", he concluded

---

[77] Mr. Donald Graves, "Comments and Observations on the Expert Reports of Professor Eric Hinderaker and Doctor Sidney Harring and the Historical Basis of the Plaintiff's Statement of Claim" (2015 as redacted 2020), Exhibit 4553, p. 33.
[78] See Appendix C, Cast of Characters.
[79] Evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020, p. 11121, line 15 to p. 11126, line 1; Letter from Lord Bury to Captain Tulloch, June 16, 1855, Exhibit 2250; Letter from Rankin to Lord Bury, June 25, 1855, Exhibit 2251.
[80] Mr. Donald Graves, "Comments and Observations on the Expert Reports of Professor Eric Hinderaker and Doctor Sidney Harring and the Historical Basis of the Plaintiff's Statement of Claim" (2015), Exhibit 4553, pp. 34-35.

that Oliphant's decision to seek a surrender was justified.[81] Not only is this based on an incorrect reading of the documentary record regarding the purpose of the offer of military support,[82] but it also reveals a serious inconsistency in Mr. Graves' opinion. Clearly, Mr. Graves was aware of evidence that military support could be martialled to the Peninsula by colonial officials if needed just after Treaty 72. This is inconsistent with his conclusion that military resources were not available due to low troop levels.

40. When pressed on whether the major factor in willingness to send troops was therefore not troop levels, but rather political will, Mr. Graves noted that this question was about what transpired after the Treaty and therefore "beyond [his] remit".[83] He made this claim even though he had discussed this very incident after Treaty 72 - although he misunderstood the source documents – in his own report.[84]

41. SON submits that this is another example of Mr. Graves being reluctant to engage with evidence contrary to his views. The evidence that the military was perceived by senior Indian Department officials to be available to assist with the survey of surrendered lands just 8 months after Treaty 72, when troop levels had dropped even further, casts serious doubt on Mr. Graves conclusion that there were insufficient troops in Upper Canada in 1854 to help address squatting

---

[81] Mr. Donald Graves, "Comments and Observations on the Expert Reports of Professor Eric Hinderaker and Doctor Sidney Harring and the Historical Basis of the Plaintiff's Statement of Claim" (2015), Exhibit 4553, pp. 36.
[82] Evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020, p. 11120, line 5 to p. 11122, line 20; Daily Leader, June 6, 1855, Exhibit 2245; Lord Bury to Captain Tulloch in Toronto, June 16, 1855, Exhibit 2250.
[83] Evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020, p. 11121, line 15 to p. 11126, line 1; Letter from Lord Bury to Captain Tulloch, June 16, 1855, Exhibit 2250; Letter from Rankin to Lord Bury, June 20, 1855, Exhibit 2251.
[84] Mr. Donald Graves, "Comments and Observations on the Expert Reports of Professor Eric Hinderaker and Doctor Sidney Harring and the Historical Basis of the Plaintiff's Statement of Claim" (2015), Exhibit 4553, pp. 34-35.

on the Peninsula. His opinion on the availability of military resources should be given no weight.

(E) NO EXPERTISE OR BASIS FOR OPINION ON OLIPHANT'S MOTIVATIONS FOR ENTERING TREATY 72

42. In his report, Mr. Graves suggests that "it was the wish to prevent further bloodshed that led to the negotiations for Treaty 72 and the sale of Aboriginal lands on the Peninsula".[85] Mr. Graves agreed that this conclusion rested primarily on: 1) his assessment of the intensity of demand for lands in the counties neighbouring the Peninsula; and 2) the portion of Oliphant's report of the Treaty Council that discusses an alleged murder by a band of disgruntled squatters (south of the Peninsula).[86]

43. However, Mr. Graves admitted that he did not have expertise on land policy or squatting in Upper Canada in the years leading up to Treaty 72.[87] He also conceded that the history of Crown-Indigenous treaty-making regarding the surrender of land in the 19th century was "not [his] expertise".[88] SON therefore that Mr. Graves does not have the expertise to opine on the intensity of demand for land in Upper Canada, nor on its effects.

---

[85] Mr. Donald Graves, "Comments and Observations on the Expert Reports of Professor Eric Hinderaker and Doctor Sidney Harring and the Historical Basis of the Plaintiff's Statement of Claim" (2015), Exhibit 4553, p. 21.
[86] Evidence of Mr. Donald Graves, Transcript vol 87, February 21 2020, p. 11148, line 20 to p. 11150, line 12. See also Exhibit 2175, Oliphant to Lord Elgin, November 3, 1854, p. 3; Mr. Donald Graves, "Comments and Observations on the Expert Reports of Professor Eric Hinderaker and Doctor Sidney Harring and the Historical Basis of the Plaintiff's Statement of Claim" (2015), Exhibit 4553, pp. 21-22.
[87] Evidence of Mr. Donald Graves, Transcript vol 87, February 21, 2020, p. 11150, line 13 to p. 11152, line 8.
[88] Evidence of Mr. Graves, Transcript vol 86, February 20, 2020, p. 10986, line 22 to p. 10987, line 7.

44. On the risk of violence among squatters, counsel put to Mr. Graves on cross examination that there were laws in place against murder and violence that could have been applied to deal with such incidents, and that enforcing these laws was an alternative to seeking a surrender. Mr. Graves conceded this option was available, though he noted that this was not the solution Oliphant pursued. [89] On cross examination, Mr. Graves also accepted that the decision to seek the surrender was made prior to Oliphant encountering the individuals who spoke of the alleged murder and risk of bloodshed.[90]

45. Mr. Graves further confirmed that he had not undertaken a comprehensive historical review outside of the documents contained in Exhibit 2175 (the collection of documents associated with Treaty 72)[91] to understand the reasons behind the Crown's attempts to obtain a surrender of the Peninsula.[92] Without any review of the specific documentary record *in this case,* including the complex prior history of the Crown's numerous attempts to secure a surrender portions of the Peninsula prior to October 1854, or any general expertise in the area of squatting, land settlement and its impacts, SON submits that Mr. Graves opinions on what motivated the Crown to seek Treaty 72 should be given no weight.

Highly argumentative and evasive witness

46. Mr. Graves was evasive and argumentative throughout his cross-examination, including on basic and relatively non-controversial points. For example:

---

[89] Evidence of Mr. Donald Graves, Transcript vol 87, February 21, 2020, p. 11157, line 10 to p. 11159, line 4.
[90] Evidence of Mr. Donald Graves, Transcript vol 87, February 21, 2020, p. 11159, line 6 to p. 11164, line 17; Oliphant to Anderson, June 28, 1854, Exhibit 2094 [partial transcript at Exhibit 4778]; Sarnia Observer Article, September 25, 1854, Exhibit 4376.
[91] See "Chart: Exhibit 2175 Contents and Corresponding Exhibits," Exhibit H4.
[92] Evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020, p. 10996, lines 6-14.

(a) Counsel asked Mr. Graves several questions about whether the opinions expressed in the section of his report dealing with para. 19 of the Statement of Claim in the title action were opinions about what Anishinaabe people would have understood or meant. The line of questions went to whether these opinions were ethnohistory, and therefore outside Mr. Graves' expertise. She asked him a few questions that began with the phrase "I'm wondering if you'll agree with me that" or "But you'd agree with me that." He interrupted counsel mid-question to instruct her: "Don't start the question, "You would agree with me."[93]

(b) Counsel asked Mr. Graves a series of questions to clarify the parameters of his expertise as a military historian. Mr. Graves again interrupted examining counsel to offer a critique:

> Question: So, sir, going back from where you stand and you answered these questions that you've been asked to answer by my friends from Ontario, when I look at your CV, I don't see any publications, research or experience about the history Crown Indigenous treaty-making about the surrender of lands in the 19th century.
>
> Answer: That's not my area of expertise.
>
> Question: Okay. So—
>
> Answer: You should know that from reading my direct examination.[94]

(c) Counsel cross-examined Mr. Graves on his opinion on the measures Oliphant took to protect the Saugeen Peninsula after Treaty 72 was concluded. Mr.

---

[93] Evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020, p. 10971, line 6 to p. 10972, line 5.
[94] Evidence of Mr. Graves, Transcript vol 86, February 20, 2020, p. 10986, line 22 to p. 10987, line 7.

Graves' report expressed the view that these efforts were designed to prevent unrest among squatters.[95] Counsel demonstrated that Mr. Graves had misread the source material about the "unrest" on the Peninsula; it was actually unrest from SON members against the parties surveying their reserve. In responding to counsel's questions about whether he may have misread the materials, Mr. Graves behaviour did not reflect an eagerness to assist the Court, but rather to score points against counsel:

> Question: You go on to the next page [page 35 of Mr Graves' Report] to talk about "unrest during the surveying of the Indian reserve"; and that goes onto the next page.
>
> Answer: [Witness reviews document]. Yes.
>
> Question: I take it from what you've stated in your report, sir, that you're attributing this unrest to squatters?
>
> Answer: Well, that's a newspaper report.
>
> Question. Right.
>
> Answer: They're attributing it to squatters.
>
> Question: So I'd like to go to the primary source for this, which is Exhibit 2245, and this is an article from the Daily Leader dated June 6, 1855. We have highlighted on the second page of the PDF which starts "The attempt to impede the progress of the survey must, in the end, prove futile […]" and goes on to "whose instigation he transgressed."
>
> Answer: Is this the 6th June, '55?
>
> Question: Yes.

---

[95] Mr. Donald Graves, "Comments and Observations on the Expert Reports of Professor Eric Hinderaker and Doctor Sidney Harring and the Historical Basis of the Plaintiff's Statement of Claim" (2015 as redacted 2020), Exhibit 4553, pp. 33-35.

> Answer: There's some problem here because that's not the same quote I used.
>
> Question: Yes, this is later on in the article.
>
> **Answer: Okay, thank you for not making that clear. Now, what's your question? [96]**

(d) Counsel went on to point him to sources indicating that the Crown offered military assistance to the survey party to defend against SON interference with the survey. The exchange was as follows:

> Question: If we can bring up Exhibit 2250. This is a letter dated June 16th, 1855, from Lord Bury to Captain Tulloch in Toronto.
>
> […]
>
> Question: Is it fair to say Lord Bury is supportive of a request for military assistance to deal with Indian interference with a Mr. Hamilton's property?
>
> Answer: Um-hmmm.
>
> Question: And it also refers to their interference in Rankin's survey work, right?
>
> Answer: Yes.
>
> Question: So I'd like to pull up Exhibit 2251.
>
> Answer: Now, can we have that back again?
>
> Question: Sure.
>
> Answer: It's very interesting here, that he refers to, "as many of the pensioners under your command as you may judge necessary to keep the peace". I'm wondering who the "pensioners" are. Do you know who the – oh, I'm not supposed to ask you questions. Who are these pensioners? That's rhetorical.

---

[96] Evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020, p. 11120, line 5 to p. 11121, line 8.

> Question. Okay. If we can go to Exhibit 2251.
>
> Answer: Will that explain pensioners? [97]

(e) Counsel cross-examined Mr. Graves on his opinion that there were no active duty, full-time militia prior to the 1855 Militia Act. His initial testimony was as follows:

> If we go to the 1855 [Militia] Act, we now have two kinds of militia. Voluntary active militia and sedentary militia. Sedentary militia is the same old gang I talked about ten minutes ago. The volunteer militia is a whole new thing. These are militia who will be paid to turn out and train, who will be equipped, armed and uniformed.[98]

When the example of Colored Corps full-time militia force was put to him as an example of full-time units that existed prior to 1855, he explained "these are not militia." [99]

Later in the cross-examination, counsel showed him a thesis that referred to the coloured corps as a militia unit in existence prior the 1855 *Militia Act*.[100] Counsel asked:

> Question: So, sir, my question to you with respect to this is simple. I understand that the Colored Corps was disbanded around 1850, but doesn't their existence between 1838 and 1850 suggest that it

---

[97] Evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020, p. 11121, line 15 to p. 11122, line 20.
[98] Evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020, p. 11108, lines 4-12.
[99] Evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020, p. 11110, lines 5-6.
[100] Evidence of Mr. Donald Graves, Transcript vol 87, February 21, 2020, p. 11138, line to p. 11139, line 7; Wayne Edward Kelly, "Black Troops to Keep an Intelligent People in Awe: The Coloured Companies of the Upper Canadian Militia in 1837-1850", Exhibit 4723.

> was possible to create a full-time unit prior to the 1855 Act where authorities decided to do so?[101]

Over the course of his response, Mr. Graves directed counsel, who had glanced at the real time transcript, to "**look at me when I'm talking [] It's only polite**".[102] During the discussion, he also commented as follows:

> Answer: my point when I said "militia", they were not sedentary militia. **Do you understand what sedentary militia is?**
>
> Question: So they were called up from the sedentary militia?
>
> Answer: I don't think so. I think they were recruited from the public at large.
>
> Question: Okay. So these –
>
> Answer: Okay? My point was they were not sedentary militia. They were a long service unit. Yes, in a generality, they were members of the militia, but they weren't sedentary militia, which is what we're dealing with at Saugeen Peninsula okay?
>
> Question: So it's keeping with this –
>
> **Answer: Are you aware, Counsellor – sorry, I can't ask questions.**
>
> Question: So keeping with this question that I'm asking about –
>
> **Answer: What was your question?**
>
> Question: The coloured corps? I'll ask it.
>
> **Answer: You haven't gotten to your question. So sorry.**

---

[101] Evidence of Mr. Donald Graves, Transcript vol 87, February 21, 2020, p. 11142, lines 17-23.
[102] Evidence of Mr. Donald Graves, Transcript vol 87, February 21, 2020, p. 11143, line 24 to p. 11144, line 2.

> Question: This thesis seems to suggest that the Colored Corps were in fact corps of the Canadian militia on permanent service until about 1850, correct?
>
> Answer. Very generally correct […][103]

He went on to describe some of the activities of the Colored Corps in this period:

> Answer: The major job was keeping the peace on the Welland Canal, the struggle between he Protestants and Catholics **which culminated in the Battle of Slabtown; I'm sure you're aware of that. Sorry, do you know about the battle of Slabtown? I guess not.**
>
> Question: Okay. Sir. So let me go back to where we left off yesterday.
>
> Answer: Excuse me. I do want to make it clear, I want to add to this sentence. Your Honour, can I add to – can I add something?
>
> The Court: Counsel is not objecting. Please go ahead.
>
> Witness: **Are you objecting counsel?**[104]

47. SON submits that the incidents outlined here were just a few of many times during his cross-examination where Mr. Graves revealed himself to be argumentative and unwilling to even consider or engage with evidence that contradicted the views he expressed.

48. At times, Mr. Graves seemed reluctant to admit the clear limits to his expertise. For example, it was put to him on cross examination that he was not an expert in ethnohistory – defined as approaching the study of history from the perspective of a particular ethnic or cultural group, in this case the Anishinaabe. In response, Mr. Graves attempted to suggest that he had

---

[103] Evidence of Mr. Donald Graves, Transcript vol 87, February 21, 2020, p. 11139, line 9 to p. 11140, line 11.
[104] Evidence of Mr. Donald Graves, Transcript vol 87, February 21, 2020, p. 11145, lines 7-21.

"dabbled" in ethnohistory through is work on military history. [105] Whatever "dabbling" he may have done, it was not sufficient to give Mr. Graves fluency with even the most basic terms for the Anishinaabe. For example, he was asked a question about his experience studying history from the perspective of Anishinaabe nations. He responded:

> So it's not true I haven't studied the ethnology, or the culture, or the politics of Aboriginal nations. Never did the Ansihinaabe though. Did the Chippewa or the Ojibway.[106]

His answer suggests that he was not aware that the Chippewa or Ojibway is a subethnicity of the Anishinaabe.[107]

Conclusion on weight

49. Mr. Graves was argumentative and evasive throughout his testimony. He made no attempt to help the Court understand evidence that conflicted with the views he expressed, refused to engage with assumptions put to him by cross-examining counsel, and opined on areas in which he has little expertise. In addition, a number of foundational errors in his report were demonstrated on cross-examination. SON submits that his testimony should be given no weight.

---

[105] Evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020, p. 10984, line 16 to p. 10985, line 23.
[106] Evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020, p. 10972, line 21 to p. 10974, line 24, particularly p. 10974, lines 18-25.
[107] See, generally, Prof. Paul Driben, "An Anthropological Report on Selected Aspects of the Cultural Lives of the Saugeen Ojibway" (2013), Exhibit 4324, pp. 20-24.

RELEVANCE AND WEIGHT OF BRUCE GREENE'S EVIDENCE

1. Bruce Greene is a U.S. lawyer with experience in U.S. Federal Indian law. He was qualified by the Court to give opinion evidence concerning the doctrine of Aboriginal title in the United States.[1]

EXPERIENCE

2. Mr. Greene is called to the Bar in California and Colorado.[2] He practices law in the United States and has represented Indian tribes throughout the United States for almost 50 years.[3] In his career, he has litigated a number of cases that touch on Aboriginal title and acted as lead counsel in such cases before the United States Federal Court and the Michigan Supreme Court.[4]

RELEVANCE AND WEIGHT

3. Mr. Greene's expert report focused on Indian Aboriginal title in the United States, its origin and characteristics, and the inclusion of navigable waterways within its territory.[5] Where he gave evidence on historical events, those accounts were drawn from the legal decisions that he relied upon to prepare his opinion. [6]

---

[1] Evidence of Bruce Greene, Transcript vol 46, September 30, 2019, p. 5654, line 16 to p. 5655, line 15; Exhibit T-1.
[2] Evidence of Bruce Greene, Transcript vol 46, September 30, 2019, p. 5649, lines 16-25.
[3] Evidence of Bruce Greene, Transcript vol 46, September 30, 2019, p. 5650, lines 1-19.
[4] Evidence of Bruce Greene, Transcript vol 46, September 30, 2019, p. 5650, line 20 to p. 5651, line 12.
[5] Mr. Bruce Greene, "Indian Aboriginal Title in the United States: Its Origin And Characteristics, and the Inclusion of Navigable Waterways Within its Territory" (2016), Exhibit 4264.
[6] Evidence of Bruce Greene, Transcript vol 46, September 30, 2019, p. 5654, line 16 to p. 5655, line 15.

4. Mr. Greene's evidence relates to the capacity of the common law to recognize Aboriginal title to the beds of navigable waters. This issue is mostly legal argument, however, Mr. Greene's testimony, as a factual matter, sets out the extent to which US law recognizes that Indian tribes can and do hold Aboriginal title to the beds of navigable waters.

5. Mr. Greene was the only witness to give evidence on how US law treats Aboriginal title to the beds of navigable waters. He is experienced in his field and was knowledgeable about the subject matter on which he testified. SON submits that his evidence should be given significant weight.

RELEVANCE AND WEIGHT OF SIDNEY HARRING'S EVIDENCE

1. Prof. Sidney Harring is a legal historian who provided evidence on land policy in Upper Canada; squatting in Upper Canada generally and on the Peninsula in particular; and about law enforcement on Indigenous lands in the late 18th and 19th centuries, including on the Peninsula .

2. Prof. Harring was qualified as a sociologist and legal historian with expertise in the history of the interaction of Indigenous peoples and common law legal systems, and capable of giving opinion evidence on:

(a) colonial land policy, land settlement regimes and land settlement practices, and land sales in the late 18th and the 19th century in what is now Ontario; and

(b) actual law enforcement in relation to Indigenous lands in the late 18th and the 19th century in what is now Ontario.[1]

Expertise on Law Enforcement and Squatting on Indian Reserves

3. Prof. Harring's own primary research includes issues related to law enforcement and squatting on Indian reserves in 19th Century Upper Canada, including an in-depth study of squatting and law enforcement on the Six Nations reserve.[2] He is the only witness that testified in this trial who has done such research. SON submits this experience is directly relevant to

---

[1] Evidence of Prof. Sidney Harring, Transcript vol 47, October 1, 2019, p 5890, line 12 to p. 5896, line 15.

[2] Sidney Harring, White Man's Law: Native People in Nineteenth-Century Canadian Jurisprudence, 1998, Exhibit 4271, pp. 35-61; Curriculum Vitae of Sidney Harring, Exhibit 4270, pp. 3-7.

assessing the law enforcement options used on *other* Indian reserves (namely the Peninsula) in Upper Canada in the same period.

Opinion on effect of colonial land policy on prevalence of squatting

4. SON submits that Prof. Harring's opinion on the ways in which British colonial land policy led to and encouraged squatting reflects the mainstream opinion among historians, and is supported by the leading thinkers in the field. Prof. Harring identified the "classic" studies of Crown land policies in the settlement of Upper Canada: Lillian Gates, *Land Policies of Upper Canada*[3] and Gilbert Paterson, *Land Settlement in Upper Canada, 1783-1840*.[4] Prof. Douglas McCalla agreed that, in the topics she addressed in her book, Lillian Gates was a "very authoritative source" who was cited by many other scholars.[5] Prof. Harring points out that there is no serious challenge in the historical literature to the core theses of these texts: that the prevalence of squatters on unoccupied lands in Upper Canada was the direct result of Canada's restrictive land policy, and "negligence" in how the government allocated lands to squatters.[6]

5. The opinions advanced by Gates and Paterson draw on and reflect key primary documents from the 19th century. For example, Charles Buller was charged with writing a report on British North American Land disposal issues for Lord Durham. The final report, released in 1839, notes that, " Throughout all of the North American provinces a very considerable portion of the population consists of squatters."[7] It goes on to tie this phenomenon of widespread

---

[3] Lillian Gates, Land Policies of Upper Canada*,* 1968, Exhibit 4309 (whole book); Exhibit 4280 (excerpt).
[4] Gilbert C. Paterson, Land Settlement in Upper Canada (excerpts pp. 33-69, 206-239), Exhibit 4279.
[5] Evidence of Prof. Douglas McCalla, Transcript vol 58, October 31, 2019, p. 7553, lines 9-18.
[6] Prof. Sidney Harring, "Report" (2013), Exhibit 4276, pp. 3-4.
[7] Lord Durham's Report on the Affairs of North America, Vol III – Appendix B, Report of Charles Buller, Exhibit 1284 [report begins at p. 29], p. 106.

squatting to Crown policies that made it impossible for ordinary people to acquire land legally, while allowing land to collect in the hands of the wealthy and powerful.[8] Buller expressly criticized the "negligence of the Government," the slow process of granting land, and the concentration of lands in the hands of powerful people, which gave sanction to the practice of squatting in Upper Canada.[9]

6. Prof. McCalla takes a different view from the mainstream scholarship on the relationship between Crown policy and squatting in Upper Canada in the 19th Century, one which de-emphasized the role of government policy in fostering squatting. His argument rested primarily on his view that some of the leading thinkers in the field, such as Lillian Gates, did not adequately account for the private land market in their assessment of squatting.[10] Though he identified one scholar who addressed tenant farmers in this period, Prof. McCalla did not identify any other scholars who agreed with his position that the private land market made it less likely that government policy played a significant role in fostering squatting in Upper Canada.[11] His perspective also departs from the view taken in the Buller Report, the contemporaneous study of land issues in Upper Canada. [12] Because Prof. McCalla's opinion is idiosyncratic among scholars in the field, SON submits that Prof. Harring ought to be given more weight on this point.

---

[8] Lord Durham's Report on the Affairs of North America, Vol III – Appendix B, Report of Charles Buller, Exhibit 1284, pp. 106-107.
[9] Lord Durham's Report on the Affairs of North America, Vol III – Appendix B, Report of Charles Buller, Exhibit 1284, pp. 106-107
[10] Evidence of Prof. Douglas McCalla, Transcript Vol 58, October 31, 2019, p. 7459, line 7 to p. 7469, line 3 and p. 7575, line 8 to p 7480, line 24.
[11] Evidence of Prof. Douglas McCalla, Transcript vol 58, October 31, 2019, p. 7475, line 18, to p. 7576, line 19.
[12] Lord Durham's Report on the Affairs of North America, Vol III – Appendix B, Report of Charles Buller, Exhibit 1284, pp. 106-107.

RELEVANCE AND WEIGHT OF GARY HARRON'S EVIDENCE

1. Mr. Gary Harron is a long time resident of South Bruce Peninsula. He operates several farms on the Peninsula, including about 450 acres on which he farms beef and sells hay.[1] One of the farms is located in the Arran-Elderslie township, at Lot 27, Concession A and abuts the reserve of Saugeen First Nation (Mr. Harron pointed out that it is located at E2 of Exhibit Q).[2]

2. Mr. Harron's evidence sheds light on how SON's exercise of its harvesting rights continues alongside and is compatible with other land uses on the Peninsula, such as farming.

3. Mr. Harron testified about the relationship he has had with SON over the years in his capacity as a neighbour and also serving in municipal politics.[3] In particular, Mr. Harron testified about an understanding he has with SON harvesters – such as Doran Ritchie – regarding harvesting wildlife and plants on his farm at Lot 27, Concession A, including hunting deer, trapping beavers and harvesting cedar boughs.[4] Mr. Harron confirmed that harvesting activities on his farm did not interfere with his use of the lands. He specifically noted that these activities did not interfere with buildings or cattle on his lands.[5]

4. Mr. Harron provided evidence about how hunting on the Peninsula can take place without interfering with private land uses, such as farming.[6] He responded to questions about concerns

---

[1] Evidence of Gary Harron, Transcript vol 6, May 14, 2019, p. 609, line 21 to p. 610, line 9.
[2] Evidence of Gary Harron, Transcript vol 6, May 14, 2019, p. 612, lines 1-14.
[3] Evidence of Gary Harron, Transcript vol 6, May 14, 2019, p. 613, line 16 to p. 615, line 1.
[4] Evidence of Gary Harron, Transcript vol 6, May 14, 2019, p. 615, line 17 to p. 617, line 12; Map prepared by Mr. Ritchie showing Lot 27 Concession A, Exhibit 3698.
[5] Evidence of Gary Harron, Transcript vol 6, May 14, 2019, p. 620, lines 17-22.
[6] Evidence of Gary Harron, Transcript vol 6, May 14, 2019, p. 624, line 8, to p. 625, line 16 and p. 628, line 18 to p. 629, line 4.

regarding safety, noting that properties and neighbours are far apart, and that he expects Mr. Doran Ritchie and other SON members hunting on the property would exercise common sense (e.g. shooting towards the deer or knowing the difference between cows and deer). Mr. Harron also confirmed that he is unaware of any safety issues or concerns as a result of SON members hunting on his farm lands.[7]

5. SON submits the Mr. Harron's evidence should be accepted.

[7] Evidence of Gary Harron, Transcript vol 6, May 14, 2019, p. 633, line 17 to p. 635, line 11.

RELEVANCE AND WEIGHT OF ERIC HINDERAKER'S EVIDENCE

1. Prof. Eric Hinderaker prepared three reports entitled: "The Anishinaabeg, the British Crown, and Aboriginal Land Rights in the Era of Pontiac's War"[1]; "Supplement: The Saugeen Ojibway Nation and the Niagara Treaty of 1764, With Background on British-Aboriginal Treaty Making"[2]; and "Supplement Two: A response to Alain Beaulieu, "The Congress at Niagara in 1764: The Historical Context and Meaning of the British-Aboriginal Negotiations."[3]

2. He testified in this trial regarding:

(a) Britain's absence in SONTL and SONUTL in 1763;

(b) Britain's promises to the Great Lakes First Nations respecting their occupation of their territory, from before the Seven Years' War up until the Treaty of Paris in 1763; and

(c) Pontiac's War, specifically:

(i) The motivations for the war;

(ii) Control of the Great Lakes waterways;

(iii) The Great Lakes First Nations' military strategy; and

---

[1] Prof. Eric Hinderaker, "The Ansihinaabeg, the British Crown, and Aboriginal Land Rights in the Era of Pontiac's War" (2013), Exhibit 4017.
[2] Prof. Eric Hinderaker, "Supplement: The Saugeen Ojibway Nation and the Niagara Treaty of 1764, With Background on British-Aboriginal Treaty Making", Exhibit 4019.
[3] Prof. Eric Hinderaker, "Supplement Two: A response to Prof. Alain Beaulieu, 'The Congress at Niagara in 1764: The Historical Context and Meaning of the British-Aboriginal Negotiations", Exhibit 4020.

(iv) The outcome of the war, including its impact on Britain's decision to issue the Royal Proclamation and enter into the Treaty of Niagara.

3. Prof. Hinderaker was qualified as a "historian with expertise in the relations between the British and First Nations in the 18th century, and capable of giving opinion evidence on:

(a) British practice with respect to issues associated with the territorial expansion of the American colonies;

(b) The events leading up to the Seven Years' War in North America and the war itself;

(c) The Detroit Treaty;

(d) Pontiac's War;

(e) The Royal Proclamation; and

(f) The Niagara Congress."[4]

Qualifications

4. Prof. Hinderaker obtained a PhD in history from the University of Harvard in 1991, and has been a professor at the University of Utah, Department of History, since that time.[5] He was named a distinguished professor, a rank reserved for individuals "whose achievements exemplify the highest goals of scholarship, as demonstrated by recognition accorded to them from their peers with national and international stature…" in 2018.[6]

---

[4] Ruling of the Court, Transcript vol 19, June 10, 2019, p. 1556, line 22 to p. 1557 line 9 and p. 1558, lines 11-14; Tender of expertise of Prof. Eric Hinderaker, Exhibit D-2.
[5] Evidence of Prof. Eric Hinderaker, Transcript vol 19, June 10, 2019, p. 1551, lines 10-16.
[6] Evidence of Prof. Eric Hinderaker, Transcript vol 19, June 10, 2019, p. 1551, lines 18-21 and p. 1552, line 6 to p. 1553 line 1.

5. Prof. Hinderaker describes himself as a "scholar of early Anglo-America with particular interest in comparative colonization, European-Indian relations and the nature of early modern empires."[7] His PhD dissertation was titled "The Creation of the American Frontier, Europeans and Indians in the Ohio River Valley 1673 to 1800", and involved him working with materials regarding the British and French empires throughout the course of the 18th century, as they related to relations with Indigenous peoples of the west, including the Ohio valley and the Great Lakes.[8] This included the interplay between policymaking in Britain and the on-the-ground conditions in North America.[9] He ultimately turned his dissertation into a book, entitled "Elusive Empires: Constructing Colonialism in the Ohio Valley, 1673-1800", which was published in 1997.[10]

6. Prof. Hinderaker has written two books (including Elusive Empires) and is currently writing a third related to the subject matter of his report and testimony. His texts address the efforts of Britain to develop policies relating to Indigenous peoples and also deal with the responses that Indigenous people made to those efforts.[11] He has also written a number of articles and book chapters relevant to the subject matter of his evidence in this trial.[12]

---

[7] Evidence of Prof. Eric Hinderaker, Transcript vol 19, June 10, 2019, p. 1553, lines 2-11.
[8] Evidence of Prof. Eric Hinderaker, Transcript vol 19, June 10, 2019, p. 1553, line 12, to p. 1554, line 2.
[9] Evidence of Prof. Eric Hinderaker, Transcript vol 19, June 10, 2019, p. 1557, line 21 to p. 1558 line 10.
[10] Evidence of Prof. Eric Hinderaker, Transcript vol 19, June 10, 2019, p. 1553, line 12 to p. 1554 line 2; Curriculum vitae of Prof. Eric A. Hinderaker, January 2019, Exhibit 4021, p. 2.
[11] Evidence of Prof. Eric Hinderaker, Transcript vol 19, June 10, 2019, p. 1554, line 25 to p. 1555 line 20; Curriculum vitae of Prof. Eric A. Hinderaker, January 2019, Exhibit 4021, pp. 1-2.
[12] Evidence of Prof. Eric Hinderaker, Transcript vol 19, June 10, 2019, p. 1555, line 22, to p. 1556, line 17; Curriculum vitae of Prof. Eric A. Hinderaker, January 2019, Exhibit 4021, pp. 3-5.

7. Prof. Hinderaker's evidence falls squarely within the subject matter he has been studying over the course of his academic career. As counsel for Canada commented, he has a distinguished CV.[13]

General Credibility and Reliability

8. Prof. Hinderaker was a credible and reliable witness. He diligently answered the questions put to him and was agreeable in cross examination where appropriate.[14]

9. Based on all of the above, SON submits all of his evidence should be given significant weight.

---

[13] Evidence of Prof. Eric Hinderaker, Transcript vol 19, June 10, 2019, p. 1663, lines 2-6.
[14] See for example: Evidence of Prof. Eric Hinderaker, Transcript vol 19, June 10, 2019, p. 1675, lines 7-25 and p. 1680, line 3 to 1685 line 16; Evidence of Prof. Eric Hinderaker, Transcript vol 20, June 11, 2019, p. 1748, line 15 to p. 1751 line 3.

RELEVANCE AND WEIGHT OF WENDI HUNTER'S EVIDENCE

1. Ms. Wendi Hunter was called as a witness by the Defendant Township of Georgian Bluffs, on behalf on all of the Municipal Defendants except for County Grey.[1] At the time of her testimony, she was the Clerk and Director of Legislated Services. She has been employed by Georgian Bluffs since May 2017, and has held her current position since November 2019. She has also acted as Chief Administrative Officer since February 2020.[2]

2. The majority of Ms. Hunter's testimony was focussed on roads and what actions Georgian Bluffs undertakes respecting its roads network. She testified about:

(a) Her roles and responsibilities with Georgian Bluffs, focusing on portions of her work relevant to roads;

(b) The road network in Georgian Bluffs, including:

(i) ownership and jurisdiction;

(ii) a broad overview of which roads are opened, once opened but no longer maintained, and unopened; and

(iii) Georgian Bluffs' responsibilities with respect to the road network;

(c) The difference between a road allowance and an improved road;

(d) The process of "opening" and "closing" a road, and the circumstances in which Georgian Bluffs might do so;

---

[1] Submissions of Counsel for Bruce County, Transcript vol 95, March 12, 2020, p. 12279, lines 1-11.

[2] Evidence of Ms. Wendi Hunter, Transcript vol 95, March 12, 2020, p. 12287, lines 2-9.

(e) Roads “in lieu of”; and

(f) How unimproved roads are used and the rights of access.

3. Ms. Hunter also testified about her role with Georgian Bluffs, and when Georgian Bluffs first received notice of any claim by SON with respect to the roads.

4. Ms. Hunter’s evidence is irrelevant to this stage of the proceedings. There are no claims respecting liability being made against the Municipal Defendants. Ultimately, this evidence speaks to the issue of whether or not SON is entitled to the return of the lands subject to its claim that are owned by Georgian Bluffs. This issue is not being argued in Phase 1 of this trial, and therefore the complete evidence necessary to assess this issue is not before the Court at this time.

5. The evidence provided by Ms. Hunter was a broad overview of the roads system, and did not get into specific detail with respect to the roads because, as counsel for County of Bruce stated on behalf of all the Municipal Defendants save County of Grey, this evidence would not be called until Phase 2 of this trial.[3] In any event, calling such evidence in Phase 1 would have created significant issues since none of the Municipal Defendants have completed the discovery process.

6. Ms. Hunter’s evidence is therefore incomplete: all the Court has been provided with are broad statements, without the necessary detail to determine, on a case by case basis, whether the broad statements are correct.

7. For these reasons, Ms. Hunter’s evidence should not be relied upon in Phase 1 of this trial.

---

[3] Submissions from Counsel for Bruce County, Transcript vol 95, March 12, 2020, p. 12279, line 12 to p. 12280, line 5.

RELEVANCE AND WEIGHT OF DARLENE JOHNSTON'S EVIDENCE

1. Prof. Darlene Johnston is a professor of law, currently employed with the University of British Columbia.[1] However, she did not testify as an expert witness, but rather as a fact witness.[2] Prof. Johnston is a member of Chippewas of Nawash Unceded First Nation, and was employed as a land claims researcher for Saugeen and Nawash First Nations from 1992 to 2001.[3]

2. As the land claims researcher for SON, Prof. Johnston acted as a liaison between legal counsel and the Band Councils of the two First Nations (when the councils of the two First Nations meet together, this is referred to as the Joint Council).[4] She also acted as an archival researcher and worked with contract researchers, supervised research staff and collected historical documents.[5] She testified in court about her interview with Prof. Jarvis Brownlie (conducted on June 14, 2016).[6] Prof. Johnston also testified about the nature and context of some of the documents she had collected as part of her work as the SON land claims researcher, and her own experience with SON's attempts to assert their legal rights.

3. Prof. Johnston identified several motions and band council resolutions starting in the 1960s, passed either jointly or by each individual First Nation, that dealt with SON seeking the return of unsold surrendered lands (which she explained are lands within the Treaty 72 yellow area

---

[1] Evidence of Darlene Johnston, Transcript vol 23, July 8, 2019, p. 2210, lines 2-6.
[2] Evidence of Darlene Johnston, Transcript vol 23, July 8, 2019, p. 2208, lines 4-9.
[3] Evidence of Darlene Johnston, Transcript vol 23, July 8, 2019, p. 2208, lines 19-22 and p. 2210, lines, 7-15.
[4] Evidence of Darlene Johnston, Transcript vol 23, July 8, 2019, p. 2216, lines 11-23 and p. 2217 lines, 1-20.
[5] Evidence of Darlene Johnston, Transcript vol 23, July 8, 2019, p. 2210, lines 16-24.
[6] Evidence of Darlene Johnston, Transcript vol 23, July 8, 2019, p. 2221, line 1 to p. 2222, line 11; Exhibit 3924.

on Exhibit P – that is, the Peninsula),[7] and also with SON's fishing rights, fishing islands and water territory. Prof. Johnston's testimony provided insight into the following matters:

(a) documentation of SON's efforts to assert their rights and legal claims throughout the 1960s, 70s and 80s, including the obstacles that they encountered;

(b) her own knowledge and experience of SON's efforts to assert their rights and legal claims in the 1980s and 90s, including attempts to obtain information relevant to SON's land claims from the federal and provincial governments, efforts to negotiate these claims with the federal and provincial government, and some of the obstacles SON encountered during this process; and

(c) her own knowledge and experience of the end of the multi-year negotiations with Ontario and Canada, and how that affected the timing of SON launching the present legal claims.[8]

4. Prof. Johnston answered questions both in chief and in cross examination based on her recollection and experience of events from up to 40 years ago, as well as based on what she had learned from SON elders. For example, Prof. Johnston testified about what she had been told about the Indian Agent burning documents in the 1960s, something she had discussed with Prof. Brownlie in her June 14, 2016 interview. She explained that she had heard this from several elders.[9] The oral history of the Indian Agent burning documents in the community was discussed by several

---

[7] Evidence of Darlene Johnston, Transcript vol 23, July 8, 2019, p. 2220, lines 9- 24.
[8] Evidence of Darlene Johnston, Transcript vol 23, July 8, 2019, p. 2226, line 23 to p. 2228, line 17; p. 2231, line 21 to p. 2246, line 5; p. 2246, line 6 to p. 2248, line 2; and p. 2249, line 3 to p. 2263, line 11.
[9] Evidence of Darlene Johnston, Transcript vol 23, July 8, 2019, p. 2263, line 24 to p. 2264, line 21; Darlene Johnston Interview with Prof. Jarvis Brownlie, Exhibit 3924, p.6

fact witnesses in this trial.[10] Prof. Johnston also testified about her observation of the documents – letter books and ledger books – that she understood as being the books and documents that were saved from the Indian Agent's burning. These documents were stored in the Nawash band office's safe, and later in the land claims office. [11] In response to several questions from both Canada and Ontario about this evidence and about the documents, Prof. Johnston provided direct answers based on her direct knowledge of the documents.[12]

5. Based on the above, SON submits that Prof. Johnston's evidence should be accepted.

PROF. JOHNSTON'S ROLE IN SON'S LEGAL CLAIMS

6. On several occasions, counsel for Ontario challenged the validity of the knowledge of fact witnesses from Saugeen and Nawash that had served as councillors. Counsel suggested their knowledge of SON's history arose out of discussions with Prof. Johnston. This is dealt with in appendices regarding the evidence of Randall Kahgee, Dale Jones and Howard Jones. As noted in more detail in those appendices, SON submits that their evidence should not be given less weight simply because they had discussions with researchers and employees – such as Prof. Johnston – about SON's history in their capacity as elected decision makers.

7. Prof. Johnston was direct in describing her role as a liaison between legal counsel and the Joint Council.[13] She also talked about how there is no minimum education or other requirements

---

[10] See Evidence of Marshall Nadjiwan, Transcript vol 22, June 28, 2019, p. 2090, line 9 to p. 2095 line 25; Evidence of James (Jim) Ritchie, Transcript vol 7, May 15, 2019, p. 667, line 19 to p. 668, line 6.
[11] Evidence of Darlene Johnston, Transcript vol 23, July 8, 2019, p. 2264, line 22 to p. 2266, line 2; Agreed Statement of Facts Regarding Original Indian Agency Documents held by Chippewas of Nawash, Exhibit 4193.
[12] Evidence of Darlene Johnston, Transcript vol 23, July 8, 2019, p. 2284, line 1 to p. 2287, line 11; p. 2291, line 11 to p. 2292, line 6 and p. 2305, line 15 to p. 2307, line 10.
[13] Evidence of Darlene Johnston, Transcript vol 23, July 8, 2019, p. 2210, lines 16-24.

for councillors to be elected to the band council even though councillors often had to make decisions about legal matters.[14] Prof. Johnston described role as researcher and liaison to make sure the two First Nations' elected decision makers had enough information and sufficient understanding to proceed to make important decisions. Prof. Johnston would review legal advice that was presented to both her and to SON Joint Council, and discuss that advice with Joint Council in advance of meetings with legal counsel. She would endeavour to explain it in plain language, and to make the materials accessible to Joint Council.[15] SON submits that this is a vital role in any government. There is nothing to suggest, however, that it interferes with the ability of former elected officials to recall the events associated with the land claims process that they personally experienced, nor to separate traditional knowledge from bureaucratic advice.

8. If Ontario suggests that there was something wrong with Prof. Johnston fulfilling this role, SON submits that this has no basis. There is no evidence that Prof. Johnston's interaction with elected councillors somehow tainted their evidence or interfered with their ability to accurately reflect their own experiences and traditional knowledge in their testimony. Prof. Johnston's evidence instead reveals that she provided an important service in her role as land claims researcher that enabled decision makers to understand complex information and make informed decisions.

---

[14] Evidence of Darlene Johnston, Transcript vol 23, July 8, 2019, p. 2217, line 18 to p. 2218, line 1

[15] Evidence of Darlene Johnston, Transcript vol 23, July 8, 2019, p. 2218, line 2 to p. 2220, line 2.

RELEVANCE AND WEIGHT OF ROSS JOHNSTON'S EVIDENCE

1. Ross Johnston was a witness whose evidence was entered under Rule 36 of the *Rules of Civil Procedure*. His examination-in-chief was conducted on September 12, 2002, and his cross examination was conducted on November 4, 2002.

2. Mr. Johnston was born on March 21, 1927 at Cape Croker.[1] He identified as Ojibway.[2] His parents were also from Cape Croker.[3] His grandparents on his father's side were Pottawatomi.[4] Mr. Johnston went to school in Cape Croker, enlisted in the military during the Second World War when he was 17, and spent some time in the air force, and doing various other work. He returned to Wiarton and Cape Croker in 1992 where he was still living at the time of his testimony.[5] Mr. Johnston spoke English at home as a child.[6]

3. Mr. Johnston testified on the following topics:

(a) The integration of the Pottawatomi into SON;[7]

---

[1] Rule 36 Evidence of Ross Johnston, September 12, 2002, Examination-in-chief, Exhibit 3953, p. 3, lines 23-27.
[2] Rule 36 Evidence of Ross Johnston, September 12, 2002, Examination-in-chief, Exhibit 3953, p. 3, line 24 to p. 4, line 5.
[3] Rule 36 Evidence of Ross Johnston, September 12, 2002, Examination-in-chief, Exhibit 3953, p. 4, lines 17-23.
[4] Rule 36 Evidence of Ross Johnston, November 4, 2002, Cross-examination, Exhibit 3954, p. 4, line 25 to p. 5, line 14.
[5] Rule 36 Evidence of Ross Johnston, September 12, 2002, Examination-in-chief, Exhibit 3953, p. 6, line 22 to p. 8, line 9.
[6] Rule 36 Evidence of Ross Johnston, September 12, 2002, Examination-in-chief, Exhibit 3953, p. 8, lines 10-17.
[7] Rule 36 Evidence of Ross Johnston, September 12, 2002, Examination-in-chief, Exhibit 3953, p. 8, line 18 to p. 10 line 21; Rule 36 Evidence of Ross Johnston, November 4, 2002, Cross-examination, Exhibit 3954, p. 6, line 19 to p. 8, line 22.

(b) His knowledge and understanding of treaties respecting SONTL, including marine shore allowances;[8]

(c) Hunting and fishing historically;[9]

4. This evidence is relevant to the identity of SON, harvesting rights, and limitations and laches.

5. John Nadjiwon testified that Mr. Johnston was "knowledgeable" regarding information about the past of the band, and agreed with his evidence respecting marine shore allowances.[10] Mr. Johnston testified about learning from elders, in informal settings such as hunting and around the fire which he explained was part of the tradition.[11] Mr. Johnson was frank in his evidence, both in chief and on cross examination, about believing that he was a poor candidate to testify because of his time away from his community, and readily admitted when he did not know the answer to a question he was asked.[12] SON submits that he was a credible witness, and his evidence should be given weight.

---

[8] Rule 36 Evidence of Ross Johnston, September 12, 2002, Examination-in-chief, Exhibit 3953, p. 10 line 22 to p. 13 line 7; Rule 36 Evidence of Ross Johnston, November 4, 2002, Cross-examination, Exhibit 3954, p. 33, line 23 to p. 35, line 12 and p. 38, line 4 to p. 42, line 28.
[9] Rule 36 Evidence of Ross Johnston, September 12, 2002, Examination-in-chief, Exhibit 3953, p. 13, lines 7 to p. 15, line 29.
[10] Rule 36 Evidence of John Nadjiwon, November 5, 2002, Cross Examination, Exhibit 3952, p. 55, line 1 to p. 56 line 19.
[11] Rule 36 Evidence of Ross Johnston, November 4, 2002, Cross-examination, Exhibit 3954, p. 22, line 22 to p. 24, line 26.
[12] Rule 36 Evidence of Ross Johnston, September 12, 2002, Examination-in-chief, Exhibit 3953, p. 16, lines 8-24 and p. 12, line 27 to p. 13, line 6; Rule 36 Evidence of Ross Johnston, November 4, 2002, Cross-examination, Exhibit 3954, p. 25, lines 7-16.

RELEVANCE AND WEIGHT OF EDWARD (TED) JOHNSTON'S EVIDENCE

1. Edward ("Ted") Johnston was a member of the Chippewas of Nawash Unceded First Nation.[1]

2. His testimony covered the subjects of tribal identity and the relationship between the Pottawatomi and other Anishinaabe at Nawash. He also testified briefly about traditional harvesting, Treaty 72 and Indian Agents.

3. Mr. Johnston's maternal grandfather was Charles Kegedonce Jones,[2] who was the son of Peter Jones[3], a signatory to Treaty 72.[4] When he was young, Mr. Johnston spent considerable time with Charles Kegedonce Jones.[5]

4. As a result, the chain of transmission of oral history from the 19th century is relatively short in the case of Mr. Johnston, which is one factor to consider.

5. Mr. Johnston's father identified as Pottawatomi, and his mother's family did not.[6] Thus, Mr. Johnston had direct knowledge of the relationships between Pottawatomi and other Anishinaabe at Nawash.

6. Thus SON submits that Mr. Johnston's evidence can be considered reliable.

---

[1] Evidence of Edward Johnston, Transcript vol 4, May 1, 2019, p. 386, lines 20-22.
[2] Evidence of Edward Johnston, Transcript vol 4, May 1, 2019, p. 388, lines 9-13.
[3] Evidence of Edward Johnston, Transcript vol 4, May 1, 2019, p. 388, lines 14-16.
[4] Treaty 72, Exhibit 2147.
[5] Evidence of Edward Johnston, Transcript vol 4, May 1, 2019, p. 388, line 25 to p. 390, line 16.
[6] Evidence of Edward Johnston, Transcript vol 4, May 1, 2019, p. 391, lines 11-15.

RELEVANCE AND WEIGHT OF MR. DALE JONES'S EVIDENCE

1. Mr. Dale Jones is a member of Chippewas of Nawash Unceded First Nation, and resides at Neyaashiinigming (the Nawash reserve at Cape Croker).[1] Mr. Jones testified about his interview with Prof. Jarvis Brownlie on June 4, 2016.[2] He also gave evidence about traditional knowledge and teachings he learned from his father and his aunt.[3] He further testified about his experience as an elected councillor on Nawash Council from 1997 to 2003, including his role in advancing land claims as a councillor.[4]

2. Mr. Jones provided testimony to this Court about what he learned from his father and other relatives about how and when SON asserted their rights historically, including by exercising their rights throughout SONTL, as well as his own experiences as a child and as an adult doing so.[5]

3. Mr. Jones was cross examined by Ontario counsel about his involvement in SON land claims as an elected councillor. Some of these questions focused on whether Mr. Jones reviewed research from Prof. Darlene Johnston, who was employed by SON as a land claims researcher and who also testified in this case. Ontario counsel suggested that Mr. Jones learned some of SON's history through discussions with Prof. Darlene Johnston and with his wife, Linda Jones, who was employed as a historical researcher by SON for some time. Mr. Jones provided direct answers to these questions about the sources of his knowledge.

---

[1] Evidence of Dale Jones, Transcript vol 8, May 16, 2019, p. 825, lines 8-24.
[2] Evidence of Dale Jones, Transcript vol 8, May 16, 2019, p. 828, line 5 to p. 828, line 23.
[3] Evidence of Dale Jones, Transcript vol 8, May 16, 2019, p. 831, line 22 to p. 836, line 14.
[4] Evidence of Dale Jones, Transcript vol 8, May 16, 2019, p. 836, line 15 to p. 838, line 19.
[5] Evidence of Dale Jones, Transcript vol 8, May 16, 2019, p. 839, line 16 to p. 844, line 1.

(a) When asked about whether some of his knowledge of SON's history came from Prof. Darlene Johnston, Mr. Jones responded that Prof. Johnston had shared some historical documents, and then he discussed how he then connected this information back to what he had heard from his father.[6]

(b) When asked about whether he learned some of his knowledge of his community's history from his wife Linda Jones, Mr. Jones responded "somewhat", relaying a memory of when his wife asked him about the clan system and he told her he was Otter clan.[7]

(c) He explained that as a councillor he had heard presentations from and had discussions with SON researchers.[8]

4. As noted in the appendix about Prof. Darlene Johnston's evidence, SON submits there is no basis for finding that the fact that SON's elected government employed researchers to provide them with bureaucratic advice undermines the knowledge of community witnesses who serve in elected office. In particular, SON submits that this should not reduce the weight that this Court gives to Mr. Jones' evidence. Mr. Jones identified his evidence as based on his own experience and observations; based on teachings he received from elders; based on documents; or based on a combination of these different sources. For example, Mr. Jones testified that:

(a) Evidence he gave about SON's assertion of hunting and fishing rights throughout SONTL, and encountering conservation officers came from his own experience as

---

[6] Evidence of Dale Jones, Transcript vol 8, May 16, 2019, p. 857, lines 10-23.
[7] Evidence of Dale Jones, Transcript vol 8, May 16, 2019, p.861, line 19 to p. 862, line 22.
[8] Evidence of Dale Jones, Transcript vol 8, May 16, 2019, p. 856, line 5 to p. 864, line 23.

well as learning from his father, former Chief Vernon Jones, who was charged for trespassing when hunting on Griffith Island;[9]

(b) Evidence that he gave about SON's history and traditional teachings came from his father (Vernon Jones) and his aunt (Gladys Kid);[10]

(c) Evidence that he gave about advancing land claim negotiations came from his own experience as an elected councillor, and history that he heard from his father about the treaties, including that they were not "upheld".[11]

---

[9] Evidence of Dale Jones, Transcript vol 8, May 16, 2019, p. 832, line 2 to p. 834, line 14 and p. 839, line 16 to p. 844, line 1.
[10] Evidence of Dale Jones, Transcript vol 8, May 16, 2019, p. 834, line 16 to p. 836, line 14 and p. 844, line 6 to p. 846, line 21.
[11] Evidence of Dale Jones, Transcript vol 8, May 16, 2019, p. 836, line 15 to p. 838, line 24 and p. 854, line 6 to p. 855, line 8.

RELEVANCE AND WEIGHT OF FRED JONES'S EVIDENCE

1. Frederick (Fred) Jones was a witness whose evidence was entered under Rule 36 of the *Rules of Civil Procedure*. His examination-in-chief was conducted on November 5, 2002, and his cross examination was conducted on December 5, 2002.

2. Mr. Jones was born in Cape Croker on November 1, 1914.[1] He belonged to the Chippewas of Nawash, the Ojibway tribe, and the Otter Clan.[2] He went to school up to grade 8 in Cape Croker.[3] His father was Chief Charles Kegedonce Jones of the Band at Cape Croker (Nawash), and his mother was of English descent.[4] His paternal grandfather was Peter Jones, a signatory to Treaty 72.[5] He spoke English at home as a child, but he learned some Ojibway from other children in school.[6] Mr. Jones lived at Cape Croker most of his life, although he went overseas during the Second World War from 1939 to 1945, and lived in Ottawa, Manitoba, British Columbia, Parry

---

[1] Rule 36 Evidence of Fred Jones, November 5, 2002, Examination-in-chief, Exhibit 3949, p. 3, lines 17-20.
[2] Rule 36 Evidence of Fred Jones, November 5, 2002, Examination-in-chief, Exhibit 3949, p. 3, line 26 to p. 4, line 12.
[3] Rule 36 Evidence of Fred Jones, November 5, 2002, Examination-in-chief, Exhibit 3949, p. 5, lines 17-22.
[4] Rule 36 Evidence of Fred Jones, November 5, 2002, Examination-in-chief, Exhibit 3949, p. 4, line 13 to p. 5, line 9.
[5] Rule 36 Evidence of Fred Jones, November 5, 2002, Examination-in-chief, Exhibit 3949, p. 4, lines 22-24; Evidence of Edward Johnston, Transcript vol 4, May 1, 2019, p. 388, lines 9-16; Treaty 72, Exhibit 2147.
[6] Rule 36 Evidence of Fred Jones, November 5, 2002, Examination-in-chief, Exhibit 3949, p. 5, lines 25-28.

Sound and Labrador for roughly 16-17 years for work.[7] He was on Band Council at Cape Croker in roughly the late 1950s, early 1960s when Indian agents were still there.[8]

3. Mr. Jones gave evidence respecting the following topics:

(a) The early history of his people, and how they lived before the treaties;[9]

(b) Relations between Ojibway and Pottawatomi;[10]

(c) Accounts of the treaties he knew of, including what he had heard respecting the lakes and shores and marine allowances;[11]

(d) Fishing locations away from Cape Croker;[12] and

(e) Relations between the Indian agent and the Band Council.[13]

4. This evidence is relevant to the identity of SON, harvesting rights, and limitations and laches.

---

[7] Rule 36 Evidence of Fred Jones, November 5, 2002, Examination-in-chief, Exhibit 3949, p. 6, line 4 to p. 7, line 4.
[8] Rule 36 Evidence of Fred Jones, November 5, 2002, Examination-in-chief, Exhibit 3949, p. 7, lines 5 to 14.
[9] Rule 36 Evidence of Fred Jones, November 5, 2002, Examination-in-chief, Exhibit 3949, p. 7, line 15 to p. 8, line 18.
[10] Rule 36 Evidence of Fred Jones, November 5, 2002, Examination-in-chief, Exhibit 3949, p. 8, line 18 to p. 9, line 6; Rule 36 Evidence of Fred Jones, December 5, 2002, Cross examination, Exhibit 3950, p. 18, line 9 to p. 25, line 14.
[11] Rule 36 Evidence of Fred Jones, November 5, 2002, Examination-in-chief, Exhibit 3949, p. 9, line 7 to p. 11, line 7; Rule 36 Evidence of Fred Jones, December 5, 2002, Cross examination, Exhibit 3950, p. 26, line 11 to p. 32, line 28.
[12] Rule 36 Evidence of Fred Jones, November 5, 2002, Examination-in-chief, Exhibit 3949, p. 11, line 8 to p. 12, line 5.
[13] Rule 36 Evidence of Fred Jones, November 5, 2002, Examination-in-chief, Exhibit 3949, p. 12, line 6 to p. 13, line 19; p. 33, line 1 to p. 34, line 10.

5. Mr. Jones was identified by Mr. Donald Keeshig, another Rule 36 witness, as being knowledgeable about the treaties.[14] Mr. Jones is the sole witness who is only two generations removed from a treaty signatory. He spoke about what his father told him about treaties,[15] who was only one generation removed. This should be considered when weighing Mr. Jones evidence respecting the treaties.

6. SON submits that Mr. Jones' evidence should be accepted as credible and given weight.

---

[14] Rule 36 Evidence of Donald Keeshig, December 5, 2002, Cross examination, Exhibit 3946, p. 100, line 27 to p. 101, line 5.

[15] Rule 36 Evidence of Fred Jones, November 5, 2002, Examination-in-chief, Exhibit 3949, p. 9, line 7 to p. 11, line 7; Rule 36 Evidence of Fred Jones, December 5, 2002, Cross examination, Exhibit 3950, p. 26, line 11 to p. 30, line 9.

RELEVANCE AND WEIGHT OF HOWARD JONES'S EVIDENCE

1. Howard Jones is a member of Chippewas of Nawash Unceded First Nation and resides at Neyaashiinigming (the Nawash reserve at Cape Croker).[1] Mr. Jones testified about an interview with Prof. Jarvis Brownlie on June 7, 2016.[2] The content of that interview included Mr. Jones' knowledge of the history of the Chippewas of Nawash Unceded First Nation and SON, which he learned from the oral teachings of his grandfather and from his mother who served on Nawash Council,[3] as well as his direct experience as an elected leader in Nawash for several years, and his experiences and perspectives as a member of Chippewas of Nawash Unceded First. [4]

2. Mr. Jones' evidence can assist this Court with several matters. Specifically,:

   (a) his perceptions and experiences growing up in Neyaashiinigming, including his perceptions of the Indian Agent;[5] and

   (b) his experiences and struggles to assert and exercise harvesting rights in SONTL, including his role in the actions that led to the *R v. Jones and Nadjiwon* decision confirming SON's commercial fishing rights and how that enabled SON to more effectively assert their claims and rights in a legal forum.[6]

---

[1] Evidence of Howard Jones, Transcript vol 7, May 16, 2019, p. 740, lines 6-25.
[2] Evidence of Howard Jones, Transcript vol 7, May 16, 2019, p. 742, line 14 to p. 743, line 21.
[3] Evidence of Howard Jones, Transcript vol 7, May 16, 2019, p. 744, line 10 to p. 746, line 23.
[4] Evidence of Howard Jones, Transcript vol 7, May 16, 2019, p. 741, line 7 at p. 742, line 12.
[5] Evidence of Howard Jones, Transcript vol 7, May 16, 2019, p. 746, line 24 to p. 752, line 5.
[6] Evidence of Howard Jones, Transcript vol 7, May 16, 2019, p. 766, line 18 to p. 784, line 12.

3. Mr. Jones elaborated on his experiences encountering conservation officers when trying to exercise hunting and fishing rights throughout SONTL. This included evidence about being charged with hunting and fishing offences, and his knowledge of others being charged for fishing over quota. [7]

4. Mr. Jones was cross examined by counsel for Canada about different fishing techniques and how they were adapted to different areas of SONTL. Mr. Jones provided answers to all of these questions, including information about different types of fishing, boats and locations.[8]

5. Mr. Jones also responded to questions from Ontario counsel about details of Mr. Jones' interview by Prof. Jarvis Brownlie, which took place 3 years prior to Mr. Jones' testifying for this Court. He answered questions about why he may have been selected and the interview process.[9] When Ontario counsel put to Mr. Jones that his knowledge of SON treaties was based on research rather than on oral teachings from his relatives and from SON elders, Mr. Jones responded directly that his knowledge and evidence is based on what he learned from his grandfather, even though he has also completed research about his peoples' history.[10]

6. SON submits that the fact that Mr. Jones may have done research and learning about the history of SON via books and scholarly works does not taint the evidence that he gave based on his own experiences and knowledge, and on the teachings that he has received from his elders. It is not a reasonable or fair position to say that an elder or traditional knowledge holder cannot also

---

[7] Evidence of Howard Jones, Transcript vol 7, May 15, 2019, p. 766, line 18 to p. 784, line 12.
[8] Evidence of Howard Jones, Transcript vol 7, May 15, 2019, p. 791, line 8 to p. 794, line 22.
[9] Evidence of Howard Jones, Transcript vol 7, May 15, 2019, p. 798, line 6 to p. 805, line 1.
[10] Evidence of Howard Jones, Transcript vol 7, May 15, 2019, p. 809, line 17 to p. 810, line 11.

read documents that deal with the history of their people. The effect of such a conclusion would be to impose a false or stereotypical view of Indigenous elders.

7. Mr. Jones was careful to identify the sources of the evidence he provided – some from his own direct experiences, some from what he learned from his elders, some from documents or a combination of all of these. For instance, Mr. Jones testified that his knowledge about the history and meaning of the treaties, he received through teachings from his grandfather (Jack Jones) and his father (Vernon Jones), and also acknowledged that he has read and looked at historical documents.[11]

8. SON submits that Mr. Jones' testimony should be accepted.

---

[11] Evidence of Howard Jones, Transcript vol 7, May 15, 2019, p. 744, line 21 to p. 746, line 4 and p. 809, line 17 to p. 810, line 11.

RELEVANCE AND WEIGHT OF JAY "TATTOO" JONES'S EVIDENCE

1. Jay "Tattoo" Jones is a member of Chippewas of Nawash Unceded First Nation. He has been a commercial fisherman for the past 37 years.[1] In his testimony, he identified the places along the coast of SONTL where he accesses SON's fishing territory as well as where he fishes commercially. He also testified about how far out into Georgian Bay and Lake Huron he has travelled. Specifically, in his evidence he:

(a) Described the different types of boats he uses to fish commercially;[2]

(b) Described the boundary line of SON's commercial fishing agreement;[3]

(c) Identified on a map of SONTL all of the points on land where he accesses the fishery.[4] For each access point, Mr. Jones described how far out into the lake he would go to fish. In total, Mr. Jones identified 34 access points spanning the entire length of the shores along SONTL;[5]

(d) Testified about all of the areas along SONTL where he rod fishes;[6] and

(e) Testified that about how often he has travelled across Georgian Bay and to the southern boundary of SONUTL in Lake Huron.[7]

---

[1] Evidence of Jay Jones, Transcript vol 14, May 29, 2019, p. 1224, line 14 to p. 1225, line 9.
[2] Evidence of Jay Jones, Transcript vol 14, May 29, 2019, p. 1226, lines 2-24.
[3] Evidence of Jay Jones, Transcript vol 14, May 29, 2019, p. 1226, line 2 to p. 1228, line 25.
[4] Exhibit 3999
[5] Evidence of Jay Jones, Transcript vol 14, May 29, 2019, p. 1227, line 1 to p. 1249, line 10.
[6] Evidence of Jay Jones, Transcript vol 14, May 29, 2019, p. 1251, line 6 to p. 1253, line 11.
[7] Evidence of Jay Jones, Transcript vol 14, May 29, 2019, p. 1255, line 3 to p. 1257, line 1.

2. Mr. Jones' evidence provides insight in respect of the following matters for this Court:

(a) Use of SONUTL for commercial fishing by SON, which is relevant to the continuity arm of the Aboriginal title test;

(b) The extent to which SONUTL is utilized for fishing; and

(c) The locations where one can access the water from SONTL. Mr. Jones' evidence demonstrates that the access points are all along the shore of the entire SONTL.

3. Mr. Jones demonstrated a deep knowledge the commercial fishery and the various fishing locations around SONTL. He was able to quickly and accurately point out locations on the map and gave detailed answers about various fishing equipment such as the types of boats used by SON commercial fishers. His evidence should be accepted.

RELEVANCE AND WEIGHT OF PAUL JONES' EVIDENCE

1. Paul Jones is a commercial fishermen and member of Chippewas of Nawash Unceded First Nation.[1] He also served as a councillor for Chippewas of Nawash Unceded First Nation from 1991 to 2017.[2] He resides in Neyaashiingmiing (Cape Croker).[3]

2. Mr. Jones gave evidence about locations where he fishes in SONUTL. This is Exhibit 4103, with names of the various fishing locations identified on a map.[4] He also spoke about his experience hunting, which he described as something very crucial to the Indigenous people and one of those things that shows your connection to the land, your respect.[5]

3. Mr. Jones testified about his involvement in four successive fishing agreements entered into between SON and the Ontario government to protect and preserve the fishery around the Peninsula.[6] He also gave evidence about the boundaries of that agreement and his understanding of the water boundaries of SON.[7]

4. Finally, he provided evidence about his attendance in a meeting between SON and Parks Canada regarding hunting in the park on the Peninsula.[8]

---

[1] Evidence of Paul Jones, Transcript vol 27, July 15, 2019, p. 2596, lines 14-19 and p. 2604, line 9 to p. 2605, line 11.
[2] Evidence of Paul Jones, Transcript vol 27, July 15, 2019, p. 2597, line 25 to p. 2598, line 1.
[3] Evidence of Paul Jones, Transcript vol 27, July 15, 2019, p. 2596, lines 15-21.
[4] Paul Jones, Annotated Grey County Map, Exhibit 4103; Paul Jones, Chart indicating the names of numbered references on Exhibit 4103, Exhibit 4104.
[5] Evidence of Paul Jones, Transcript vol 27, July 15, 2019, p. 2651, lines 1-25.
[6] Evidence of Paul Jones, Transcript vol 27, July 15, 2019, p. 2626, line 17 to p. 2641, line 6.
[7] Evidence of Paul Jones, Transcript vol 27, July 15, 2019, p. 2643, line 18 to p. 2648, line 25.
[8] Evidence of Paul Jones, Transcript vol 27, July 15, 2019, p. 2652, line 1 to p. 2653, line 19.

5. Mr. Jones' evidence speaks to the scope of present-day fishing and harvesting in SONTL and the water of SONUTL. His evidence also shows how SON understands their water boundaries and their ongoing effort to protect their hunting rights.

6. Mr. Jones provided his account based on his own experience as well as knowledge learned from his parents and others. SON submits that Mr. Jones' evidence should be accepted.

RELEVANCE AND WEIGHT OF RANDALL KAHGEE'S EVIDENCE

1. Randall Kahgee is a community member and former Chief of Saugeen First Nation. Mr. Kahgee served as Chief for four consecutive terms from 2006 to 2014. Mr. Kahgee is a lawyer, although he is not, nor has he ever been, legal counsel in the matters currently before this Court.[1]

2. Mr. Kahgee's testimony centered mainly around the Maawn-Ji-Giig-Do-Yaang Declaration. The Maawn-Ji-Giig-Do-Yaang Declaration is an agreement that SON entered into with Walpole Island First Nation, Kettle and Stony Point First Nation, and Aamjiwnaang First Nation to deal with a 22 mile wide strip of water territory near the southern boundary of the SONUTL that has historically been shared by all five First Nations.[2]

3. Mr. Kahgee explained that the Maawn-Ji-Giig-Do-Yaang Declaration (which means "Gathering to Speak as One") was signed in February 2011 and later ratified through a traditional ceremony.[3] He explained that the Declaration fits into SON's governance traditions by being consistent with Anishinaabe core values, principles and laws.[4]

4. Mr. Kahgee testified that territorial overlap is often seen as a divisive issue but that in the case of the overlap between SON, Walpole Island First Nation, Kettle and Stony Point First Nation and Aamjiwnaang First Nation the overlap represented a strength as it provided an opportunity for

---

[1] Evidence of Randall Kahgee, Transcript vol 9, May 22, 2019, p. 881, lines 1-23.
[2] Maawn-Ji-Giig-Do-Yaang Declaration, February 18, 2011, Exhibit 3983.
[3] Evidence of Randall Kahgee, Transcript vol 9, May 22, 2019, p. 900, line 24 to p. 901, line 7.
[4] Evidence of Randall Kahgee, Transcript vol 9, May 22, 2019, p. 911, lines 14-20.

those communities to come together and demonstrate their collective understanding as Anishinaabe people of how territorial overlap should be addressed.[5]

5. Mr. Kahgee testified that he believes he has a very good understanding of SON's history and traditions. He explained that he learned the traditional knowledge that he shared in court from his grandparents, his parents, and from elders in the community.[6]

6. Mr. Kahgee also testified about how SON ensures that the accuracy of oral tradition is maintained. He explained that stories told by elders in the community will go through what he called a verification process whereby the knowledge of each elder is verified against the knowledge of the others.[7]

7. Mr. Kahgee's evidence provides insight in respect of the following matters for this Court:

(a) The 22 mile strip in the southern portion of SON's territory to which SON shares title with other First Nations;

(b) SON's territorial governance protocols (e.g. laws) and how they are still practiced to this day; and

(c) How the accuracy of SON's traditional knowledge is safeguarded.

8. Mr. Kahgee was a knowledgeable witness and very forthcoming with answers both on examination in chief and on cross examination, sharing with the Court the history and customs of

---

[5] Evidence of Randall Kahgee, Transcript vol 9, May 22, 2019, p. 914, lines 15-25.
[6] Evidence of Randall Kahgee, Transcript vol 9, May 22, 2019, p. 903, lines 12-23.
[7] Evidence of Randall Kahgee, Transcript vol 9, May 22, 2019, p. 905, line 7 to p. 909, line 15.

SON that he has learned from elders in the community. His evidence should be accepted and given full weight.

RELEVANCE AND WEIGHT OF DON KEESHIG'S EVIDENCE

1. Donald (Don) Keeshig was a witness whose evidence was entered under Rule 36 of the *Rules of Civil Procedure*.

2. Mr. Keeshig was born in Cape Croker in 1930.[1] He identified as Ojibway, and his Dodem was the wolf.[2] His parents and grandparents were all from Cape Croker.[3] The great-grandparents that he was aware of were from Cape Croker/Nawash, and one he identified as French.[4]

3. Mr. Keeshig went to school in Cape Croker, moved away briefly but returned in 1959 and was there at the time of his testimony in 2002.[5] Growing up he spoke "Indian", and learned English in school.[6]

4. Mr. Keeshig gave evidence on the following:

   (a) The early history of SON, including a story about a tunnel from Tobermory to Manitoulin Island;[7]

---

[1] Rule 36 evidence of Donald Keeshig, September 13, 2002, Examination in chief, Exhibit 3945, p. 3, lines 23-27.
[2] Rule 36 evidence of Donald Keeshig, September 13, 2002, Examination in chief, Exhibit 3945, p. 4, lines 3-7.
[3] Rule 36 evidence of Donald Keeshig, September 13, 2002, Examination in chief, Exhibit 3945, p. 4, lines 10-30.
[4] Rule 36 evidence of Donald Keeshig, September 13, 2002, Examination in chief, Exhibit 3945, p. 5, line 1 to p. 6, line 18.
[5] Rule 36 evidence of Donald Keeshig, September 13, 2002, Examination in chief, Exhibit 3945, p. 6, line 19 to p. 8 line 25.
[6] Rule 36 evidence of Donald Keeshig, September 13, 2002, Examination in chief, Exhibit 3945, p. 8, line 26 to p. 9, line 1.
[7] Rule 36 evidence of Donald Keeshig, September 13, 2002, Examination in chief, Exhibit 3945, p. 9, line 4 to p. 11, line 14; Rule 36 Evidence of Donald Keeshig, December 5, 2002, Cross

(b) The integration of Pottawatomi into SON;[8]

(c) His knowledge respecting treaties, including their application to lakes and rivers;[9]

(d) Fishing and hunting, including locations where people used to fish;[10]

5. This evidence is relevant to the identity of SON and SON's connection to SONTL, as well as harvesting rights, and limitations and laches.

6. Mr. Keeshig demonstrated in cross-examination the accuracy of his memory. He was cross-examined on the basis of a transcript of an interview he had given four years before, in 1998. It was put to Mr. Keeshig that in this interview, according to the transcript, he had stated "*I guess they must have got discouraged somehow. I heard people say they came with nothing. They were like bums. They come in, they had nothing. They were almost like an outcast*", referring to Pottawatomi.[11] Mr. Keeshig was cross examined extensively on this statement, and he would not

---

examination, Exhibit 3946, p. 41, line 15 to p. 44, line 13; p. 57, line 8 to p. 63, line 9 and p. 97, line 10 to p. 99, line 23.

[8] Rule 36 evidence of Donald Keeshig, September 13, 2002, Examination in chief, Exhibit 3945, p. 11, line 15 to p.13, line 30; Rule 36 Evidence of Donald Keeshig, December 5, 2002, Cross examination, Exhibit 3946, p. 46, lines 8-30 and p. 48, line 22 to p. 53, line 30.

[9] Rule 36 evidence of Donald Keeshig, September 13, 2002, Examination in chief, Exhibit 3945, p. 14, line 1 to p. 23, line 7; Rule 36 Evidence of Donald Keeshig, December 5, 2002, Cross examination, Exhibit 3946, p. 67, line 14 to p. 71, line 6.

[10] Rule 36 evidence of Donald Keeshig, September 13, 2002, Examination in chief, Exhibit 3945, p. 23, line 8 to p. 28, line 9.

[11] Rule 36 Evidence of Donald Keeshig, December 5, 2002, Cross examination, Exhibit 3946, p. 45, lines 16-26.

agree to it.[12] He insisted that the statement was "just a story he had heard", [13] and that he "had said it because [he] heard it at one time".[14]

7. The audio recording of the 1998 interview demonstrated that the transcript was incorrect, and Mr. Keeshig had actually stated "*I guess they must have got discouraged somehow. I heard people say they came with nothing. They were like bums. They come in, they had nothing… one man I heard say… they were almost like an outcast*."[15]

8. SON submits that Mr. Keeshig's evidence should be accepted as credible and given weight.

---

[12] Rule 36 Evidence of Donald Keeshig, December 5, 2002, Cross examination, Exhibit 3946, p.45, line 16 to p. 46, line 1 and p. 48, line 22 to p. 53, line 25.
[13] Rule 36 Evidence of Donald Keeshig, December 5, 2002, Cross examination, Exhibit 3946, p. 49, lines 8-9.
[14] Rule 36 Evidence of Donald Keeshig, December 5, 2002, Cross examination, Exhibit 3946, p. 49, lines 26-27.
[15] Agreed Statement of Fact Regarding Rule 36 Cross-Examination of Donald Keeshig, Exhibit 3932.

RELEVANCE AND WEIGHT OF JOANNE KEESHIG'S EVIDENCE

1. Helena Joanne Keeshig, who goes by Joanne Keeshig, is member of Nawash Unceded First Nation. She is Wolf Clan and her Anishinaabe name is Bzauniibiikwe, which means Peaceful Water Woman. Ms. Keeshig is a member of the Three Fires Midewin Lodge and is a third degree Midewin woman. She has been a member of the Three Fires Midewin Lodge since 1991.[1]

2. Ms. Keeshig shared traditional knowledge about the importance of water to Anishinaabe people. She testified that she learned the knowledge she shared in court through her family, in her time in the Three Fires Midewin Lodge and through other community members.[2]

3. Ms. Keeshig began her testimony by talking about the relationship between woman and water. She shared how this relationship is featured in the Anishinaabe creation story.[3] She testified about Anishinaabe women's responsibility for water and how it is their role to conduct ceremony for water and to petition the spirits.[4] Ms. Keeshig explained that it is the Creator that has bestowed upon her the responsibility for water and that responsibility is contained in her Anishinaabe name.[5]

4. Ms. Keeshig testified that water ceremonies can be held anywhere in the territory but that mostly they are performed at Lake Huron or Georgian Bay.[6] She also spoke about the specific

---

[1] Evidence of Joanne Keeshig, Transcript vol 28, July 16, 2019, p. 2711, line 19 to p. 2713, line 2.
[2] Evidence of Joanne Keeshig, Transcript vol 28, July 16, 2019, p. 2712, line 18 to p. 2712, line. 24, p. 2732 line 9-15.
[3] Evidence of Joanne Keeshig, Transcript vol 28, July 16, 2019, p. 2712, line 3 to p. 2715, line 11.
[4] Evidence of Joanne Keeshig, Transcript vol 28, July 16, 2019, p. 2715, line 12 to p. 2718, line 2.
[5] Evidence of Joanne Keeshig, Transcript vol 28, July 16, 2019, p. 2718, line 3 to p. 2719, line 6.
[6] Evidence of Joanne Keeshig, Transcript vol 28, July 16, 2019, p. 2726, lines 2-9.

water ceremony that takes place Nochemowenaing and about full moon ceremonies.[7] Finally, Ms. Keeshig shared her experience participating in Water Walks, which are walks around Lake Huron done by Anishinaabe women and men to bring awareness to the importance of water.[8]

5. Ms. Keeshig's evidence provides insight in respect of the following matters for this Court:

(a) SON's perspective on the importance of water, its spiritual significance, and the responsibility SON has to protect its waters;

(b) The roles and responsibilities of Anishinaabe women specifically in protecting and caring for SON's waters; and

(c) The "uses" to which water is put for the purposes of satisfying the Aboriginal title test.

6. Ms. Keeshig was very generous in sharing her traditional knowledge with the Court. She shared details of sacred stories and described the steps involved, and the meaning behind, sacred ceremonies. Her evidence should be accepted.

---

[7] Evidence of Joanne Keeshig, Transcript vol 28, July 16, 2019, p. 2726, line 10 to p. 2735, line 4.
[8] Evidence of Joanne Keeshig, Transcript vol 28, July 16, 2019, p. 2735, line 5 to p. 2747, line 10.

RELEVANCE AND WEIGHT OF KARL KEESHIG'S EVIDENCE

1. Karl Keeshig is a traditional knowledge holder from Nawash. His spirit name, given to him by the Creator, is Wabanogiizis, which means Morning Sun. He is of the Wolf clan.[1]

2. He follows the Midewin faith, and is a member of the Three Fires Midewin Lodge (the "Midewin Lodge"). In his testimony, he explained that the Midewin Lodge is roughly analogous to a church for followers of the Midewin faith.[2]

3. Karl Keeshig explained that the Midewin Lodge recognizes eight different levels of knowledge and wisdom, and the transition between them involves responding to the Creator. Karl Keeshig is at the third level, and in the process of attaining the fourth level.[3]

4. There are over 3,000 members in the Three Fires Midewin Lodge, and about 20 have reached the third level or higher.[4]

5. He has a particular responsibility in the Midewin Lodge of being a "Lodge Director", which involves facilitating the performance of ceremonies.[5]

6. Karl Keeshig named a number of respected spiritual teachers in the lodge from whom he learned over the years, including Eddie Benton-Banai (Grand Chief of the Midewin Lodge), Jim Dumont (Chief of the Eastern Door of the Midewin Lodge), Wasayabanokwe (Gladys Kidd, from

---

[1] Evidence of Karl Keeshig, Transcript vol 2, April 29, 2019, p. 143, line 20 to p. 144, line 5.
[2] Evidence of Karl Keeshig, Transcript vol 2, April 29, 2019, p. 146, lines 8 to p. 147, line 2.
[3] Evidence of Karl Keeshig, Transcript vol 2, April 29, 2019, p. 151, lines 4-7 and p. 145, line 23 to p.146, line 7.
[4] Evidence of Karl Keeshig, Transcript vol 2, April 29, 2019, p. 154, lines 4-17.
[5] Evidence of Karl Keeshig, Transcript vol 2, April 29, 2019, p. 148, line 24 to p. 149, line 17.

Nawash), Edna Manitowabi, Robin Greene, Porky White, Wes Whetung, Leona Stevens, Mary Deleary, and Nick Deleary.[6]

7. Karl Keeshig is also a certified civil engineering technologist who works for the federal government.[7]

8. Karl Keeshig testified about the Midewin Creation Story, Flood Story and Migration Story; traditional knowledge about early encounters between the Anishinaabe and Europeans; Anishinaabe spiritual beliefs about the water; spiritual beliefs about burial practices; and the way Anishinaabe people were organized into different groups like confederacies, nations, tribes and clans, and how these related to each other. He also explained how decisions about access to lands, waters and resources were traditionally made. He talked about practices and beliefs about hunting and fishing, and about what memory of the treaties has been passed down.

9. Some of his evidence related to matters of which he had direct personal experience (such as traditional harvesting), but much of his evidence relates to knowledge he gained over years in the Three Fires Midewin Lodge. Having attained a certain level of knowledge and wisdom, and having responsibilities for conducting ceremonies in the Midewin Lodge, he is well positioned to give such evidence.

10. The traditional sacred stories told by Karl Keeshig at the very outset of the evidence in this trial (such as the Creation Story and the Flood Story) are foundational to understanding the Anishinaabe perspective as it pertains to this case. They are the starting point for how SON

---

[6] Evidence of Karl Keeshig, Transcript vol 2, April 29, 2019, p. 152, line 4 to p. 153, line 18.
[7] Evidence of Karl Keeshig, Transcript vol 2, April 29, 2019, p. 154, lines 18-23.

explains who they are and what they believe about how to maintain proper relationships of respect with other people, with the creation, and with the Creator.[8]

[8] *Creation Story*-Evidence of Karl Keeshig, Transcript vol 2, April 29, 2019, pp. 156-180; *Flood and Diving Muskrat Story*-Evidence of Karl Keeshig, Transcript vol 2, April 29, 2019, pp. 181-189. *Why it was important to start with the creation story*-Evidence of Karl Keeshig, Transcript vol 3, April 30, 2019, pp. 265-269.

RELEVANCE AND WEIGHT OF LENORE KEESHIG'S EVIDENCE

1. Ms. Lenore Keeshig has lived most of her life in Neyaashiinigmiing (Cape Croker). She identifies as Anishinaabe, a member of the wolf clan, and a citizen of the Saugeen Ojibway Nation.[1]

2. Ms. Keeshig obtained an undergraduate degree in fine arts from York University and completed her course work for a Masters Degree in geology at the University of Toronto.[2] She has worked for Ontario Indian Magazine, Sweet Grass Magazine, as an advocate for Indigenous artists and artists of colour, and taught Indigenous studies at George Brown College before taking a job at Parks Canada in Tobermory as an interpreter.[3]

3. Ms. Keeshig is also a storyteller. Her education as a storyteller has come through reading and talking with people, listening to stories, fasting, and dreaming.[4] She learned traditional stories from a number of elders in her community and from her father.[5] She heard her first stories about Nanabush (the Anishinaabe trickster teacher) when she was a child around the dinner table.[6]

4. As an adult, she made the decision to become a storyteller. She approached her elder, Gladys Kidd, and asked for her help. Ms. Keeshig then embarked on a two day fast. Over the

---

[1] Evidence of Lenore Keeshig, Transcript vol 28, July 16, 2019, p. 2770, line 20 to p. 13.
[2] Evidence of Lenore Keeshig, Transcript vol 28, July 16, 2019, p. 2772, lines 1-9.
[3] Evidence of Lenore Keeshig, Transcript vol 28, July 16, 2019, p. 2774, line 2 to p. 2775, line 9.
[4] Evidence of Lenore Keeshig, Transcript vol 28, July 16, 2019, p. 2772, lines 10-17.
[5] Evidence of Lenore Keeshig, Transcript vol 28, July 16, 2019, p. 2772, line 18 to p. 2773, line 8.
[6] Evidence of Lenore Keeshig, Transcript vol 28, July 16, 2019, p. 2775, line 13 to p. 2776, line 10.

course of those two days, Ms. Keeshig had vivid dreams and Ms. Kidd helped interpret them. Through this experience, Ms. Keeshig transitioned into the role of a storyteller.[7]

5. Ms. Keeshig explained that storytellers have responsibilities to the stories they tell. She noted that a storyteller has a responsibility to act with dignity and respect and goodness of heart.[8] In her words:

> As a story teller I am a story keeper, a story holder; and I keep those stories in my heart and in my mind, I keep those stories in my body. And when I tell a story what I try to do for the story is to create an atmosphere with my voice, with my being, my spirit, and with my body create an atmosphere to make it safe for the story and for the story teller. And it's as if I hold the story in my hand and I become the vessel and the story just seems to come alive and it starts to move. It's as if I don't have any control over it except to hold it. And then the story is over it comes back into my hand and it comes back into me. That's how I see holding stories.[9]

6. Ms. Keeshig also explained that there can be variation in stories when they are told by different tellers:

> Let's say that we are all sitting around a fire and there are a number of rows of us sitting around the fire, and the fire is in the centre and the fire is burning. Now, say that I am in the first row. And when I look at the fire I see one facet of that fire, that camp fire; someone on the other side sees another facet of it; someone in a different position sees another facet of it. Sometimes too there are people who are in front or - sometimes that their views are - something - are obscured by someone sitting in front of it, or some object, or something there. So while there may be one story only those people who are closest to it actually get to see a clearer image of the story and have a clearer understanding of the story, whereas people who are further back and may be obscured, or whose vision is obscured, they see a different part of that story and thus a different understanding or a different interpretation of that story.[10]

---

[7] Evidence of Lenore Keeshig, Transcript vol 28, July 16, 2019, p. 2778, line 9 to p.2784, line 19.
[8] Evidence of Lenore Keeshig, Transcript vol 28, July 16, 2019, p.2784, lines 23-25.
[9] Evidence of Lenore Keeshig, Transcript vol 28, July 16, 2019, p. 2793, lines 2-19.
[10] Evidence of Lenore Keeshig, Transcript vol 28, July 16, 2019, p. 2792, lines 2-24.

7. Ms. Keeshig was knowledgeable about the stories she told. SON submits that her evidence should be accepted.

RELEVANCE AND WEIGHT OF JENNIFER KEYES' EVIDENCE

1. Jennifer Keyes is employed by the Ontario Ministry of Natural Resources and Forestry as the director of the natural resources policy conservation branch. She provides strategic direction to staff who review legislation and regulations that help manage aggregate, petroleum, water, and natural heritage resources around the Great Lakes.[1]

2. Ms. Keyes' gave evidence on the general roles and responsibilities of the province of Ontario in Great Lakes management through international and inter-jurisdictional treaties, provincial legislation, and other agreements.

3. Ms. Keyes was unfamiliar with the claim area at issue in this litigation.[2] She was also unfamiliar with specific water management projects within SONTL.[3]

4. SON has no objection to Ms. Keyes' evidence about the general roles and responsibilities of the province of Ontario in Great Lakes management and inter-jurisdictional treaties, provincial legislation, and other agreements being accepted.

---

[1] Evidence of Jennifer Keyes, Transcript vol 79, January 22, 2020, p. 10065, line 17 to p. 10066, line 19.
[2] Evidence of Jennifer Keyes, Transcript vol 79, January 22, 2020, p. 10127, line 21 to p. 10128 line 5.
[3] Evidence of Jennifer Keyes, Transcript vol 79, January 22, 2020, p.10126, line 24 to p. 10127 line 5.

RELEVANCE AND WEIGHT OF RYAN LAUZON'S EVIDENCE

1. Mr. Ryan Lauzon is the Fisheries Assessment Biologist for the Chippewas of Nawash Unceded First Nation. He has been in this role since 2008. His work is focussed mainly on running the Fisheries Assessment Program. This program was started in 1995 to collect information about SON's commercial fishery. Mr. Lauzon is also involved in advising SON on its involvement in the governance committee under its fishing agreement with Ontario, discussed below, and coordinating of work around the fishery with universities, government departments and bi-national organizations. His duties include tracking the number of fish harvested by the Saugeen Ojibway Nation commercial fishery, and collecting biological data about individual fish harvested.[1]

SON'S COMMERCIAL FISHING

2. Mr. Lauzon and his team collect data about how many fish are harvested by SON commercial fishers, what kinds of fish are harvested, and where they are harvested. They do not track subsistence or ceremonial fishing.[2]

3. Mr. Lauzon testified that a harvest effort occurs every time a commercial fishermen goes out, sets a net and goes back out to retrieve the net.[3] Mr. Lauzon provided detailed testimony about the information collected about each harvest effort, and how that information is collected.[4] Mr. Lauzon then explained that this data is entered into the Fisheries Assessment Program database.

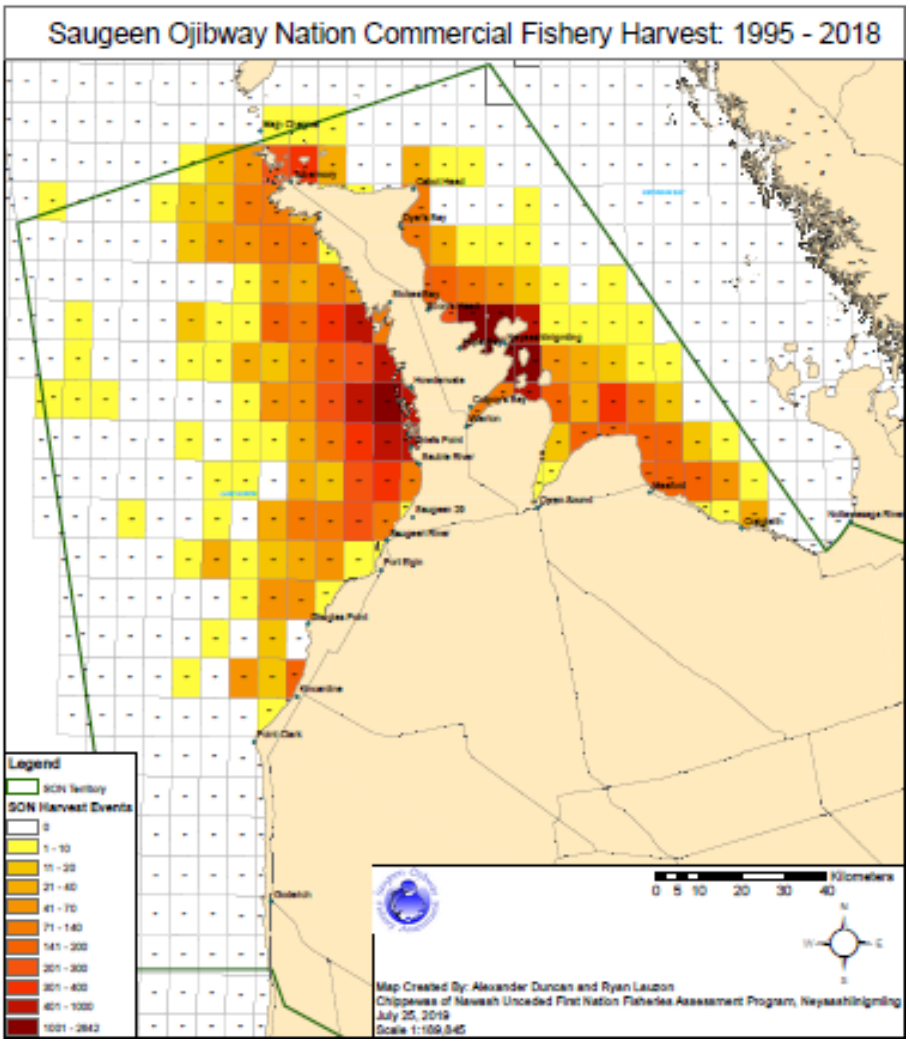
---

[1] Evidence of Ryan Lauzon, Transcript vol 53, October 21, 2019, p. 6609, line 6 to p. 6611, line 5.
[2] Evidence of Ryan Lauzon, Transcript vol 53, October 21, 2019, p. 6618, line 18 to p. 6619, line 17.
[3] Evidence of Ryan Lauzon, Transcript vol 53, October 21, 2019, p. 6621, lines 6-12.
[4] Evidence of Ryan Lauzon, Transcript vol 53, October 21, 2019, p. 6621, line 6 to p. 6632, line 18.

The information in the database is shared with Ontario's Ministry of Natural Resources and Forestry, or MNRF. Mr. Lauzon provided a chart of the data collected about harvest efforts between 1995 and 2018.[5]

Exhibit 4320: Illustration of SON's Commercial Harvest Efforts

4. A graphic illustration of this data was also added as Exhibit 4320:



[5] Evidence of Ryan Lauzon, Transcript vol 53, October 21, 2019, p. 6633, line 7 to p. 6634, line 4; Database Harvest Effort Information, Exhibit 4319.

5. Mr. Lauzon described how the illustration was created, how it represents a range of harvest efforts plotted in each square, and how this range is described in the legend.[6]

6. Canada and Ontario questioned Mr. Lauzon about how the data about harvest efforts was grouped and illustrated in Exhibit 4320. Mr. Lauzon responded that the data is grouped using an algorithm that divides the data into groups according natural breaks in the data itself. However, he acknowledged that data could be grouped differently, and the colour of the squares would change based on the chosen groupings.[7] SON submits that Mr. Lauzon was clear in his responses about Exhibit 4320, and what it does and does not illustrate. SON submits that Mr. Lauzon's evidence on this point should be accepted.

7. Ontario provided their own illustrations of SON's commercial harvest data between 1995 to 2018, which they entered into evidence through Mr. Mark Muschett, an employee of the MNRF. This is discussed in more detail in the appendix about Mr. Muschett's evidence.[8] However, it is worth noting that Mr. Muschett acknowledged and agreed that the illustrations created by the MNRF (Exhibits 4525 and 4526) depict the same information set out in Exhibit 4320. The only difference is that the MNRF has used different groupings for the data and a different colour scheme. That is, the MNRF maps have fewer distinct data groupings represented, and instead of the orange to yellow to white variations that are used in Exhibit 4320, MNRF illustrated their maps using different shades of grey and white.

---

[6] Evidence of Ryan Lauzon, Transcript vol 53, October 21, 2019, p. 6634, lines 5-2 and p.6643, line 19 to p. 6647, line 5; 5-Minute Grid Map produced by Alexander Duncan and Ryan Lauzon
[7] Evidence of Ryan Lauzon, Transcript vol 53, October 21, 2019, p. 6651, line 21 to p. 6653, line 9 and p. 6673, line 4 to p. 6675, line 16.
[8] Relevance and Weight of Evidence of Mr. Mark Muschett, Appendix E, Tab 36.

8. SON submits that the map provided by Mr. Lauzon in Exhibit 4320 provides much more detailed information than Exhibits 4525 and 4526. Exhibit 4320 illustrates with far more precision approximately how many harvest efforts have taken place in each square on the map. As is further discussed in the appendix regarding Mr. Muschett's evidence, Exhibit 4525 and 4526 obfuscate this information by lumping together larger groupings of data – for example, as Mr. Muschett agreed on cross-examination, it is impossible to tell from Exhibit 4526 whether there have been 500 harvest events in a particular square of the map, or none.[9] Combined with the colour scheme employed in Exhibits 4525 and 4526, the result is an illustration where the user cannot differentiate between one white square that is meant to illustrate several hundred harvest efforts, and another white square that is meant to illustrate zero harvest efforts.

9. SON submits that Exhibit 4320 should be preferred to Exhibits 4525 and 4526.

SON's Participation in Cooperative Management of the Fishery

A. THE SUBSTANTIVE COMMERCIAL FISHING AGREEMENT BETWEEN SON AND ONTARIO

10. Mr. Lauzon also provided evidence about the Substantive Commercial Fishing Agreement between Ontario and SON. He described this agreement as a co-management agreement addressing the management of the commercial fishery in the parts of Lake Huron and Georgian Bay that are solely fished by SON.[10] Co-management is implemented through a governance committee made up of the Assistant Deputy Minister from MNRF, several other MNRF

[9] Evidence of Mark Muschett, Transcript vol 78, January 21, 2020, p. 10041, line 10 to p. 10044, line 16.
[10] Evidence of Ryan Lauzon, Transcript vol 53, October 21, 2019, p. 6647, line 6 to p. 6649, line 16; Marked up version of document marked as Exhibit 4320, Exhibit 4321.

representatives, the SON Chiefs, and two councillors from each of Saugeen First Nation and the Chippewas of Nawash Unceded First Nation.[11]

B. SON'S COOPERATION WITH OTHER DEPARTMENTS AND ORGANIZATIONS

11. Mr. Lauzon gave evidence about how his team works with other parties on issues related to the fishery, including with universities, and government departments such as the federal Department of Fisheries and Oceans and Ontario's MNRF. Mr. Lauzon also discussed SON's participation in the Great Lakes Fisheries Commission – a bi-national organization between Canada and the U.S. with whom SON has worked closely.[12]

C. CONCLUSION ON SON'S COOPERATIVE MANAGEMENT OF THE FISHERY

12. SON submits that Mr. Lauzon's evidence about SON's cooperative management of its fisheries is unchallenged in this trial. It is useful because it sheds light on how SON's Aboriginal title to the lakebeds would interact with the management of such lakebeds and fisheries by other parties.

Other Aspects of Mr. Lauzon's Evidence

13. Mr. Lauzon was direct in answering Canada's cross examination questions about his employment relationship with Chippewas of Nawash Unceded First Nation – that is, that they pay his salary and could fire him. SON submits that such questions are irrelevant to the weight that should be given to Mr. Lauzon's evidence.[13] This is particularly so given that a substantial number

---

[11] Evidence of Ryan Lauzon, Transcript vol 53, October 21, 2019, p. 6615, lines 7-15.
[12] SON's work with the commission has focused on a project on the Saugeen River. This project resulted in SON winning an award from the Commission. Evidence of Ryan Lauzon, Transcript vol 53, October 21, 2019, p. 6610, line 20 to p. 6612, line 25.
[13] Evidence of Ryan Lauzon, Transcript vol 53, October 21, 2019, p. 6651, lines 6-16.

of witnesses, both for the Plaintiffs and the Defendants in this case, were employees, civil servants or experts retained and paid by the parties calling them.

14. Canada also asked Mr. Lauzon questions about an article that he had published about SON's reliance on fishing, putting to him excerpts from the article about SON's decreased reliance on fishing.[14] In his testimony, Mr. Lauzon provided some additional context for this research, explaining that it illuminated some of the ways that colonialism had disrupted Indigenous reliance on fish and traditional foods.[15]

15. SON submits that Mr. Lauzon's evidence should be accepted as credible and given full weight.

---

[14] Evidence of Ryan Lauzon, Transcript vol 53, October 21, 2019, p. 6656, line 5 to p. 6662, line 2.

[15] Evidence of Ryan Lauzon, Transcript vol 53, October 21, 2019, p. 6676, lines 6-16; Ryan Lauzon et al., On food security and access to fish in the Saugeen Ojibway Nation, Lake Huron, Canada, Exhibit 4322, p. 175.

RELEVANCE AND WEIGHT OF DOUGLAS MCCALLA'S EVIDENCE

1. Prof. Douglas McCalla is a historian called to testify by Canada. He was qualified to testify as an "economic historian with special expertise in the social and economic history of 19th century Upper Canada/Canada West, which extends to social and economic interactions of civilians and the military."[1]

2. He testified about two reports: "Population Growth and the Search for Land in Upper Canada & Related Questions" (Exhibit 4367) and "*The Indian Chief,* by Conrad Van Dusen" (Exhibit 4368). The first addressed population growth, the availability of land, migration, and available military resources in Upper Canada/Canada West in the mid 19th century.[2] It also provided an opinion on how to assess the reliability of the two accounts of Treaty 72 provided by Lawrence Oliphant in his official report[3] and memoir.[4] The second report analyzed Van Dusen's book, *The Indian Chief,* and whether his comment that the Crown had promised SON that they would "Ride in carriages, roll in wealth and fare sumptuously" every day was likely to be an accurate reflection of the events of the Treaty.[5]

---

[1] Evidence of Prof. Douglas McCalla, Transcript vol 57, October 30, 2019, p. 7376, line 24 to p. 7378, line 13 and p. 7338, lines 3-8; Professor McCalla, Tender on Qualifications; Exhibit Y-2.
[2] Prof. Douglas McCalla, "Population Growth and the Search for Land in Upper Canada & Related Questions" (March 31, 2015), Exhibit 4367.
[3] Copies of Extracts of recent Correspondence respecting Alterations in the Indian Department in Canada, Exhibit 2175.
[4] L. Oliphant, Chapter 4 – Politics and Indian Affairs in Canada in Episodes in a Life of Adventure or Moss from a Rolling Stone, Exhibit 2966; Prof. Douglas McCalla, "Population Growth and the Search for Land in Upper Canada & Related Questions" (March 31, 2015), Exhibit 4367.
[5] Prof. Douglas McCalla, "The Indian Chief by Conrad Van Dusen(August 2018), Exhibit 4368.

Lack of Expertise on Military Strategy and Enforcement

3. Professor McCalla's expertise in military and law enforcement issues in 19th century Upper Canada is limited. His research focuses primarily on the economy of Upper Canada in the 19th century – for example, he has studied the purchasing patterns among ordinary Upper Canadian consumers in the 19th century.[6] He has studied how the money spent by British Army garrisons affected the Upper Canadian economy,[7] and the social relationships between military personnel and the communities in which they served.[8] He may even have the general knowledge of any 19th century historian of the big events of the 19th century – e.g. the War of 1812, and the Upper Canadian Rebellions.[9]

4. However, there is no evidence to suggest he has ever researched what kinds of operations the military could undertake in the 19th century, how it would undertake those operations, or what kinds of personnel and support different kinds of operations would require. He has done primary research on how the military makes its decisions, the capacity of constables to act, or the size and nature of a force required in any given situation.[10] He is not a military historian, or an expert in what the military could or could not do from an operational perspective.[11]

5. At pages 25 to 26 of his report, "Population Growth and the Search for Land in Upper Canada & Related Questions" (Exhibit 4367), Prof. McCalla expressed a series of opinions on

---

[6] Evidence of Prof. Douglas McCalla, Transcript vol 57, October 30, 2019, p. 7354, line 23 to p. 7355, line 20 and p. 7359, line 17 to p. 7360, line 2;
[7] Evidence of Prof. Douglas McCalla, Transcript vol 57, October 30, 2019, p. 7355, line 21 to p. 7357, line 13; p. 7363, line 7-20; and p. 7366, line 19 to p. 7367, line 3.
[8] Evidence of Prof. Douglas McCalla, Transcript vol 57, October 30, 2019, p. 7357, line 8 to p. 7359, line 4.
[9] Evidence of Prof. Douglas McCalla, Transcript vol 57, October 30, 2019, p. 7365, line 20 to p. 7366, line 18.
[10] Evidence of Prof. Douglas McCalla, Transcript vol 57, October 30, 2019, p. 7368, line 19 to p. 7370, line 8.
[11] Evidence of Prof. Douglas McCalla, Transcript vol 57, October 30, 2019, p. 7370, lines 6-8.

what the military and constables were capable of doing to address squatting.[12] SON submits that, in light of his limited expertise in these areas, his opinions found here should be given little to no weight.

Idiosyncratic opinion on effect of colonial land policy on prevalence of squatting

6. The mainstream view of scholars is that government policy played a dominant role in encouraging squatting in Upper Canada in the 19th century.[13] Prof. McCalla takes a different view from the mainstream scholarship, a view which de-emphasizes the role of government policy in fostering squatting. His argument rests primarily on his view that some of the leading thinkers in the field, such as Lilian Gates and the scholars that follow her, did not adequately account for the private land market in their assessment of squatting.[14] Though he identified one scholar who addressed tenant farmers in this period, Prof. McCalla did not identify any evidence for or any other scholars who agreed with his position that the private land market made it less likely that government policy played a significant role in fostering squatting in Upper Canada.[15] His perspective also departs from the view taken in the Buller Report, the contemporaneous study of

---

[12] Prof. Douglas McCalla, "Population Growth and the Search for Land in Upper Canada & Related Questions" (March 31, 2015), Exhibit 4367, pp. 25-26.
[13] Lilian Gates, Land Policies of Upper Canada, 1968, Exhibit 4309 (whole book), 4280 (excerpt); Gilbert C. Paterson, Land Settlement in Upper Canada (excerpts pp. 33-69, 206-239), Exhibit 4279; Prof. Sidney Harring, "Report" (2013), Exhibit 4276, pp. 3-4; Evidence of Prof. McCalla, Transcript vol 58, October 31, 2019, p. 7553, lines 9-18.
[14] Evidence of Douglas McCalla, Transcript vol 58, October 31, 2019, p. 7459, line 7 to p. 7469, line 3 and p. 7575, line 8 to p. 7480, line 24.
[15] Evidence of Prof. Douglas McCalla, Transcript vol 58, October 31, 2019, p. 7475, line 18, to p. 7576, line 19.

land issues in Upper Canada.[16] Because Prof. McCalla's opinion is idiosyncratic among scholars in the field, SON submits his opinion on this point should be given limited weight.

[16] Lord Durham's Report on the Affairs of North America, Vol III – Appendix B, Report of Charles Buller, (1839), Exhibit 1284, pp. 29, 106-107

RELEVANCE AND WEIGHT OF FRANCINE MCCARTHY'S EVIDENCE

1. Prof. Francine McCarthy was qualified by this Court as a geologist with expertise in the geologic history of the Great Lakes basin from the last ice age to the present, and capable of giving opinion evidence about what can be reconstructed from the geologic and fossil record concerning historical lake levels, lake depths, water flows, landforms and changes to them, climate, and plants and animals found in the Great Lakes region.[1]

EXPERIENCE

2. Prof. McCarthy holds a PhD in earth sciences and she has taught as a professor in the Earth Sciences Department at Brock University for 29 years.[2] She chaired the Department of Earth Sciences from 2011 to 2015 and became the director of the graduate program in 2017.[3] She has published over 40 articles, many of which are on the Great Lakes.[4] She also serves on the board of the International Association for Great Lakes Research.[5]

RELEVANCE AND WEIGHT

3. Prof. McCarthy outlined in her evidence the geologic history of the Lake Huron basin since the end of the last ice age. She also addressed specific geological events in that period of time.

---

[1] Exhibit A-2; Evidence of Prof. Francine McCarthy, Transcript vol 9, May 22, 2019, p. 963, line 5 to p. 964, line 10.
[2] Evidence of Prof. Francine McCarthy, Transcript vol 9, May 22, 2019, p. 960, lines 7-14.
[3] Evidence of Prof. Francine McCarthy, Transcript vol 9, May 22, 2019, p. 960, lines 15-25; Curriculum Vitae – Prof. Francine McCarthy (2019), Exhibit 3985.
[4] Evidence of Prof. Francine McCarthy, Transcript vol 9, May 22, 2019, p. 961, lines 1-7.
[5] Evidence of Prof. Francine McCarthy, Transcript vol 9, May 22, 2019, p. 961, lines 8-20.

4. SON submits that the physical environment described by their traditional stories closely resembles events that took place over 8,000 years ago. Prof. McCarthy's evidence is relevant to understanding what the physical environment in the Lake Huron basin looked like at that time.

5. Prof. McCarthy was the only expert to give evidence on the geologic history of the Lake Huron basin. She is experienced in her field and was knowledgeable about the subject matter on which she testified. Prof. McCarthy answered questions put to her by counsel and the Court in an open and straightforward manner.

6. SON submits that Prof. McCarthy's evidence should be given significant weight.

RELEVANCE AND WEIGHT OF PAUL MCHUGH'S EVIDENCE

1. Prof. Paul McHugh was qualified as a

> Legal historian with special expertise in the evolution of the legal principles and policies that affected the conduct of the Crown relations with Indigenous peoples starting in the 18th century and following, with particular reference to Canada and New Zealand.[1]

LIMITED RELEVANCE OF LEGAL HISTORY

2. At numerous points in this trial, evidence has touched on legal history. SON submits that this properly can be used to help explain the actions of persons in the past. It can also assist in situations of using the law of other jurisdictions as persuasive authority, to understand how the law in such other jurisdictions developed, in order to shed light on similarities and differences with the law of Canada.

3. At times, however, it seemed that Prof. McHugh was suggesting that the state of the law in the mid 19th century was something to guide the Court in interpreting the law today, especially when giving opinion about the legal enforceability of obligations. For example, he summed up his report by saying:

> The exercise of governmental authority was not untrammelled but exercised on a disciplined basis that officials sought constantly in particular cases to apply in a principled manner consistent with their understanding at that time of the nature and responsibilities of public authority. Whilst we may judge these officials as falling short of our standards

---

[1] Ruling on Qualification, Transcript vol 67, December 9, 2019, p. 8676, line 18 to p. 8677, line 2.

> today, the historical question of this report is whether they fell short of their own.[2]

4. Read narrowly enough, that may be unobjectionable – that is, if it is read purely as a historical statement of fact. However, it is then not clear how such a fact bears on the matters at issue in this case.

5. The key issue of the Treaty 72 case is whether the Crown breached its duties to SON. That issue is to be decided on the basis of the standards of the law today, not the standards of the 19th century.

6. For example, the Supreme Court of Canada in 1985 rejected the ruling of an earlier Court on the matter of the competence of Indigenous parties to conclude a binding treaty, making clear that the legal conceptions of an earlier time were to be left behind.

> It should be noted that the language used by Patterson J., illustrated in this passage, reflects the biases and prejudices of another era in our history. Such language is no longer acceptable in Canadian law and indeed is inconsistent with a growing sensitivity to native rights in Canada. With regard to the substance of Patterson J.'s words, leaving aside for the moment the question of whether treaties are international-type documents, his conclusions on capacity are not convincing.
>
> *Simon v The Queen*, [1985] 2 SCR 387 at page 399, Plaintiffs Book of Authorities, Tab 100.

7. The Yukon Court of Appeal re-affirmed the same principle more recently, noting that whether courts would have enforced an obligation in the past was of limited importance in deciding whether such an obligation should be enforced by modern courts.

---

[2] Paul McHugh, "Treaty 45 1/2 (1836), the Crown's 'unremitting solicitude' and the 'forever' promise to the Saugeen Ojibway Nation: a report on British imperial policy and practice in Upper Canada during the 1830s" (2015), Exhibit 4441, pp. 101-102.

> *Ross River Dena Council v Canada (AG)*, 2012 YKCA 10 at para 6, Plaintiffs' Book of Authorities, Tab 96.

8. Prof. McHugh did seem to acknowledge the same principle in his report:

> At this initial stage I emphasize that an historical contextualization of Treaty 45½ should not be confused with a contemporary legal interpretation … The meaning that a court might today ascribe Treaty 45½ will not necessarily be the same as that given and argued about during the nineteenth century.
>
> … The historian is concerned with those processes of past meaning. A lawyer applying section 35(1) is concerned with present meaning. Historical and contemporary legal meaning should not be conflated.[3]

9. SON therefore submits that Prof. McHugh's opinions about the enforceability of obligations in the 19th century are of little or no assistance to the Court in considering whether the Crown breached its duties to SON.

10. On the other hand, whether or not Crown obligations were enforceable in the past may well be relevant to limitations and laches issues (which, if raised by the Defendants, will be dealt with by SON in a Reply Argument).

PARTIALITY

11. SON submits that Prof. McHugh did not testify with an impartial attitude. He was argumentative, would not make reasonable concessions, and wanted to know where counsel was going before committing to an answer. Some examples follow.

---

[3] Prof. Paul McHugh, "Treaty 45 ½ (1836), the Crown's 'unremitting solicitude' and the 'forever' promise to the Saugeen Ojibway Nation: a report on British imperial policy and practice in Upper Canada during the 1830s" (2015), Exhibit 4441, p. 7.

12. The following exchange is on the record.

> Q….Let's go to your report at paragraph 5.46. So I am asking first a general question about the 5.46, 5.47 and 5.48.· You are describing an explosive emigration from Britain, leading to unquenchable demand for land and intense pressures on Governors to make land available; is that a fair summary?
>
> A. I have inverted "explosively" because I am associating it with the work of an important Imperial historian called James Belich, and that is the term he uses, "explosive colonization", so hence the inverted commas. So that's right, yes.
>
> Q. Was my summary a fair statement?
>
> A. Could you say that again, please?
>
> Q. That explosive emigration from Britain leading to unquenchable demand for land and intense pressures on Governors to make land available; that is what you are talking about?
>
> A. Well, that is your summary.
>
> Q. Yes.
>
> A. "Unquenchable", that is not a word I am using.
>
> Q. Does that capture the essence of what you are saying?
>
> A. Well, they are your words, not mine. My words are set out in those paragraphs.
>
> Q. Is there any substantive difference other than the words?
>
> A. I am using different words to you, and I have put my position using my words in the report.
>
> Q. At the second line of paragraph 5.47, you say: "Spreading white Anglo settlement of the North American continent, southern Africa and Australia (Australia and New Zealand) gave rise to an almost unquenchable demand for land [...]"

A. Well, there is the word then. Thank you.[4]

13. In his report, Prof. McHugh, speaking of Treaty 45 and 45½ , said:

> Although he [Bond Head] failed to complete these cessions by the usual forms or with provision for an annuity, he stressed his careful compliance with underlying principle of **informed consent** and sought Colonial Office endorsement by despatch 20 August 1836. [emphasis added][5]

14. However, on the stand, Prof. McHugh disavowed at length that the consent of an Indigenous group was required for a surrender of land. He rather insisted that their agreement was required, and that that was different from their consent.[6] SON submits that in the three pages of transcript this discussion takes up, Prof. McHugh failed to make a coherent distinction between consenting to a land surrender and agreeing to it. Not only that, despite the above quote from his report referring to "informed consent" of the Saugeen [SON] to Treaty 45½, he denied that the Saugeen [SON] had "consented" to Treaty 45½, but instead had only "agreed" to it.[7]

15. Prof. McHugh described his report as "an historical account of how imperial and colonial figures perceived the Treaty at the time of its conclusion, and their perception of how the Saugeen First Nation viewed it."[8] He used exclusively documentary sources for this, to glean the

---

[4] Evidence of Prof. Paul McHugh, Transcript vol 69, December 11, 2019, p. 9004, line 13 to p. 9006, line 4.
[5] Prof. Paul McHugh, "Treaty 45 1/2 (1836), the Crown's 'unremitting solicitude' and the 'forever' promise to the Saugeen Ojibway Nation: a report on British imperial policy and practice in Upper Canada during the 1830s" (2015), Exhibit 4441, p. 28, para 3.26.
[6] Evidence of Prof. Paul McHugh, Transcript, vol 69, December 11, 2019, p. 8939, line 7 to p. 8942, line 7.
[7] Evidence of Prof. Paul McHugh, Transcript vol 69, December 11, 2019, p. 8940, line 19 to p. 8941, line 17.
[8] Prof. Paul McHugh, "Treaty 45 1/2 (1836), the Crown's 'unremitting solicitude' and the 'forever' promise to the Saugeen Ojibway Nation: a report on British imperial policy and practice in Upper Canada during the 1830s" (2015), Exhibit 4441, p. 6, para. 2.3.

attitude of Crown officials from what they wrote. Concerning the 1847 Proclamation about Saugeen lands (Exhibits 1673 and 1674), Prof. McHugh insisted that it was not a "deed of title". When confronted on the stand with correspondence from the Civil Secretary which referred to that Proclamation as "the deed securing the Saugeen Reserve for the tribe forever", Prof. McHugh gave that correspondence no weight at all[9], and said that the Civil Secretary "probably wasn't even thinking at all when he wrote that".[10]

16. Prof. McHugh was cross-examined extensively on his view that the Royal Proclamation of 1763 did not create any legal constraint on the Crown.[11] Over the course of 12 pages of transcript, he was taken to various documents and scholarly writings on the matter. He refused to acknowledge other historians as reliable or reputable, and made a point of acknowledging them only as "historians".[12] He referred to the writings of other historians as "bad history".[13] In the end he stated:

> So when we are talking about rigid requirements and how they become, we need to be talking about things like that, and **that is not occurring in any of the historiography of the Proclamation except mine**. [emphasis added][14]

---

[9] Evidence of Prof. Paul McHugh, Transcript vol 69, December 11, 2019, p. 8933, line 3 to p. 8936, line 21.
[10] Evidence of Prof. Paul McHugh, Transcript vol 69, December 11, 2019, p. 8936, lines 18-21.
[11] Evidence of Prof. Paul McHugh, Transcript vol 69, December 11, 2019, p. 8955, line 1 to p. 8967, line 12.
[12] Evidence of Prof. Paul McHugh, Transcript vol 69, December 11, 2019, p. 8959, lines 10-16 and p. 8965, lines 12-15.
[13] Evidence of Prof. Paul McHugh, Transcript vol 69, December 11, 2019, p. 8961, lines 4-5.
[14] Evidence of Prof. Paul McHugh, Transcript vol 69, December 11, 2019, p. 8967, lines 8-12.

17. While Prof. McHugh no doubt intended all this to support his opinions, SON submits that what it has done is establish that Prof. McHugh is an outlier among historians, who does not respect the scholarship of other historians, and whose views are not shared by others.

18. When being cross-examined about findings of fact about the Royal Proclamation made in the *Chippewas of Sarnia* case, rather than saying whether he agreed with those facts or not, Prof. McHugh said that the analysis was "jejune"[15], and that the full historical material was not before the Court.[16] He said this even though he himself had given evidence about the Royal Proclamation in that case.[17]

19. When asked whether he agreed that the Saugeen [SON] had, in the course of Treaty 45½, had expressed the importance of their territory to Bond Head, Prof. McHugh only accepted the proposition with the caveat that he needed "to know where this is going" before committing to an answer.[18] SON submits that this reveals that Prof. McHugh was trying to understand or predict the use to which his evidence would be put, rather than simply answering questions at face value. This is not the attitude of someone trying to assist the Court in an impartial manner. It took further cross-examination, taking up another 11 pages of transcript, before Prof. McHugh was able to admit that the Saugeen [SON] had expressed the importance of their land to Bond Head,

---

[15] "Jejune" has several meanings, including insignificant, uninteresting, juvenile or lacking nutritive value. Prof. McHugh did not specify which he meant.
[16] Evidence of Prof. Paul McHugh, Transcript vol 69, December 11, 2019, p. 8990, line 4 to p. 8991, line 7.
[17] Evidence of Prof. Paul McHugh, Transcript, vol 69, December 11, 2019, p. 8983, lines 7-9. See also *Chippewas of Sarnia Band v Canada (Attorney General)* (2000), 51 OR (3d) 641 at para 200, Plaintiffs' Book of Authorities, Tab 14.
[18] Evidence of Prof. Paul McHugh, Transcript vol 68, December 10, 2019, p. 8911, lines 20-24.

and that Bond Head had understood that the promise to protect their lands was important to the Saugeen [SON].[19]

20. Prof. McHugh was taken to an excerpt from a book he had written that said:

> The Indian Act of 1876 was a consolidating measure and had national application, its provisions remaining the most important governing code for Indian peoples and polities in Canada for nearly a century (until re-consolidated in 1951). The 1876 statute built upon and fortified the earlier laws denying traditional structures of political authority any inherent legal status. The Act repeated the formula through which native peoples living on reserves could obtain individual property rights so as to assume the responsibilities of civic life. First and as noted earlier, their traditional form of group organization was legally obliterated. The traditional hereditary system of band government remained supplanted by a statutory elective one, a measure that set the scene for decades of internecine on-reservation conflict over the two modes of governance. The band was given limited powers of self-management under the Act but these fell far short of self-government. Those curtailed powers were anyway subject to the supervision of the Crowns officials—its agents who lived on the reserve and practically controlled most if not all of Indian life on behalf of the Minister. The Indian Agents managed the land and monies for the Indians (the band council having limited powers of consent). Under the Indian Act, these czars also had vital roles as the Ministers representative in the surrender process (alienation of reserve land), administration of Indian estates, and prohibition of the consumption of liquor.[20]

---

[19] Evidence of Prof. Paul McHugh, Transcript vol 69, December 11, 2019, p. 8921, line 13 to p. 8932, line 11.

[20] Aboriginal Societies and the Common Law: A History of Sovereignty, Status and Self-Determination, Exhibit 4442, p. 184.

21. Discussing the above excerpt, Prof. McHugh engaged in the following exchange with SON's counsel:

> Q. My question was, was it a fair statement that the dominance of the Indian Agents was an obstacle to Aboriginal peoples vindicating their rights, and in this particular excerpt you are talking about the latter part of the 19th century and into the 20th century?
>
> A. The statements I am making about the Indian Agent, who was a creature of statute and who is a representative of forms of control, had been introduced by statute, by local legislatures. The format of the legislation was to continue the pattern of executive discretion, but this time you get an array of statutory discretions that are in that sense directed, but the sum of the whole is still a world of official discretion.
>
> The existence of these discretions – I am not saying anything here about those powers of agents acting as some curb or prevention of First Nations going to courts. That is an inference that you have taken from my description of the range of their powers.
>
> My response would be that if that was occurring in particular cases, that would need to be on the basis of a particular First Nations community and their set of circumstances.
>
> What I am saying there is about the powers they hold at large and that is an inference you wish me to draw from the material that I don't think the material that I am saying there can support. I am talking about their powers. I'm not talking about them preventing something from happening. I'm talking about the powers they have.[21]

22. SON submits that this is an attempt to resile from the tone and content of the excerpt from Prof. McHugh's book. While the book referred to Indian Agents who "practically

---

[21] Evidence of Prof. Paul McHugh, Transcript vol 68, December 10, 2019, p. 8831, line 6 to p. 8832, line 12.

controlled most if not all of Indian life on behalf of the Minister", on the stand, Prof. McHugh tried to argue that this was only meant to refer to the power they held, not about how it was exercised. SON submits this is an unconvincing interpretation of what Prof. McHugh wrote in his book, which robs it of meaning.

23. Prof. McHugh was asked whether at Treaty 45½, when Bond Head promised the Peninsula would be protected for the Saugeen [SON] forever, whether Bond Head would have thought the Peninsula would be protected for the Saugeen [SON] for the long term. Prof. McHugh seemed unable to accept that "forever" meant a long time. The following exchange ensued:

> Q. …So I am suggesting, considering that and considering Bond Head's belief that the Indians would be hunting and fishing and trapping for a long time, that he would have considered, that Bond Head would have thought that the peninsula would be protected for them in the long term, shall we say?
>
> A. He might have thought that. We don't know what he might have thought, but what we do know is that he thought that at the time they were well settled and that they were better off by that arrangement. His thoughts as to the duration of the relationship remain speculative.
>
> Q. Well, he said "forever"?
>
> A. Well, at the time no one was thinking about, no one was arguing about, no one was contesting what "forever" meant. It wasn't regarded as an issue or as problematic, certainly within official circles, because if it was, there would have been discussion about that.
>
> And so he is happy with the arrangement as it stands, and we see from other material that "forever" means as long as or until they wished to sell. The same principle applies to European ownership of property.

So they would think that. So I can't speculate on how long he would have thought it was going to last because there is no evidence to base an assessment of attention on, but there is statements about how well it fits the present situation. You can certainly see that he says that.

Q. Well, let's go to paragraph 3.74 of your report, and down near the bottom of that page, you speak of: "[...] the facility with which Bond Head attuned his speech 'to the Idiom of the Indian language', capturing 'their Attention and Confidence' in a way that would 'doubtless be remembered and frequently repeated in the Depths of the Wilderness.'"

A. Right.

Q. So he was trying to speak to them in a way they would understand, and that would be in order to get them to agree to the Treaty; fair?

A. What I am describing there is the impression that he made upon the missionaries that were there and these are the accounts of how Bond Head presented it.

Now, the impact of that one can imagine, but we have a record of the impact that it made upon his colleagues, and so that is what I am recording. I am not saying that he actually performed that way. These are accounts. They might not be accurate in terms of the effectiveness of his statement, but he was reported, he is reported as having done that.

So I would say that there is a report of what he did. I am reporting. I am not saying he spoke well. I wasn't there.

Q. I am suggesting to you that when he said "My Children, I will protect your lands for you forever," he would have meant, he would have expected that to mean the long term? Now, I am not trying to get into a question of whether the Saugeen could decide otherwise later. That is not the point of my question.

A. But that is speculation about what he would have believed, and anyone can make that speculation. You don't need to be an expert to do that. But it is not historical evidence because you read something

someone says and anyone can speculate on what intentions are harboured within a statement like that.

Q. Well, I would suggest to you if he didn't mean the long term and he said "forever," that would have been deceitful?

A. They weren't thinking about the term, that's the point. We don't have any evidence to show what they were thinking of the duration of the promise. They certainly weren't going and saying it would be next week or next month, but they had no concept. It was until they wanted to sell, is the indication that we do get from the documentary record that we can say -- from which we can construct some idea of the official conception of the span.

But reading statements into "my children" and from "my children" extrapolating "forever" means a long, long time, I am not prepared to do that because that is reading into statements more than their ultimate weight can bear. There is nothing in the statement "my children" that suggests it would be a very long time. There has to be something more and something he says for that to be a conclusion based upon evidence.

Q. He said "forever."

A. Yes, but what did "forever" mean, and we have the surrounding --

Q. Well, I am trying --

A. "Forever" means until you are willing to sell.

Q. That is not the point I am trying to make.· We can get to that in a minute. I am talking about Bond Head's intention at the time. When he said "forever" --

A. Someone has to --

THE COURT:· Sir, you have to wait until he finishes the question.

BY MR. TOWNSHEND:

Q. When he said "forever" in the context of trying to get them to agree to a Treaty, either he meant that was a long time or he was deceiving them, and you are saying you don't know which that is?

A. You are putting it in terms of an either/or, which is not how I am seeing it and how I am describing in my report, so that is a reductive approach.

When he said it will be yours forever, there was no discussion or conceptualization of how long forever would be. It was not problematized at the time. Now, you could say it would have been expected that would have been a long time, and I think generally people might have agreed, well, it is not going to be this year, next year, but they are not thinking in terms of how far ahead or what the future is going to bring many years hence because "forever" is taken as meaning until you wanted to sell.

And that becomes clear in the Macaulay Report and in the documentation that we saw this morning, and that was the understanding that the official records, the archives, disclose, so much as we can extract one.

Q. I am trying to tease apart Bond Head's intentions and --

A. Well, there is limited evidence.

Q. I am trying to tease apart Bond Head's intentions and the intentions of colonial officials more generally. Now, I am not sure if you make that distinction in your report or not. Do you see those things as the same or different?

A. Well, Bond Head was appointed to be the instrument of Imperial policy. As it was, he went off on his own course because he wanted -- he decided that the policy needed redirecting and, of course, he advocated the policy of removal.

If he is thinking about anything, that is what he is thinking about. He is not thinking about how long forever is because that is a concession he has made and he is still pursuing what for him is the main

> aim, the bigger prize, which is the settlement on Great Manitoulin Island and the removal policy.
>
> Now, even with this, one can see that it is beginning to come undone, but that is Bond Head's overriding concern.
>
> Now, the context in which Bond Head is considering this policy is coming in a decade in which policy for First Nations has been, so to speak, on the table. It has been on the table in the Select Committee in Westminster. It has been on the table in the report of the Lower Canada Executive Report that Glenelg relies upon and comes very soon after the Treaty 45 and soon after Macaulay will be writing.
>
> So it is a period when options are being discussed, and so he seems -- he obviously felt that this was an initiative that is consistent with that type of activity, except Governors can't do that. Governors don't introduce policy like that, and that soon becomes discovered.
>
> The response that Glenelg takes is initially accepting, cautious, and that changes. Bond Head realizes he needs to mount a defence. His August dispatch is pretty perfunctory, not rich on detail, and then in November he sends along a dispatch, a report that is essentially a justification for what he has done and for the policy. It makes no reference to questions of textual meaning, what does "forever" mean, or to process. Process and textual meaning are not being contested at that time.
>
> The historical issue is the policy, the question of removal.

24. SON submits that Prof. McHugh’s opinion evidence should be discounted as not having the degree of impartiality expected for expert witnesses.

RELEVANCE AND WEIGHT OF MARGARET MORDEN'S EVIDENCE

1. Margaret Morden is an archaeologist who prepared a report for Canada and testified specifically in response to Dr. Ron Williamson's 2017 report, "Non-Destructive Analysis of the Glass Bead Assemblage from the *Ne'bwaakaah giizwed ziibi* (The River Mouth Speaks) site (BdHi-2), Town of Saugeen Shores, Bruce County Museum" (Exhibit 4240), which has been referred in this trial as the Bead Report.[1] She was qualified as an "archaeologist with familiarity in the practice of archaeology and of archaeological methodology in general."[2] Her report and testimony focussed primarily on the use of the dating of beads found at *Ne'bwaakaah giizwed ziibi* (The River Mouth Speaks) using scientific testing and the bead database.

General Qualifications

2. Ms. Morden has limited relevant experience in archaeology as compared to Dr. Williamson, and her evidence should receive less weight as a result.

> Relevance and Weight of the Evidence of Dr. Ronald Williamson,
> Appendix E, Tab 52

3. Specifically:

(a) Ms. Morden's employment history includes predominantly teaching adult education courses on archaeology, organizing tours focussed on archaeology in Europe, and acting as the 'registrar of finds' for excavations in Israel.[3] Ms. Morden

---

[1] Ms. Margaret Morden, "Response to the Dr. Ronald F. Williamson 2017 Report", August 31, 2018, Exhibit 4452, p. 6.
[2] Ruling of Justice Matheson, Transcript vol 70, December 16, 2019, p. 9067, lines 22-24.
[3] Margaret E. Morden Resume, updated December 10, 2019, Exhibit 4451, p. 1.

confirmed that the adult education course respecting archaeology in Ontario she co-taught had no admissions criteria and did not count towards a degree, and was only run once;[4] and

(b) Ms. Morden's publications are limited and are dated: most were published or presented in the 1990s, and none were published or presented in the last 10 years. Although they are all contained in the 'Publications' section of her resume, it appears only six of her works have been published, the rest were only presented and were not subject to peer review.[5]

4. Further, the experience that Ms. Morden does have lies outside of Ontario:

(a) Ms. Morden's expertise lies in classical, Mediterranean archaeology;[6]

(b) Ms. Morden has limited experience with archaeology in Ontario: Ms. Morden did not do her Masters or PhD work on Ontario archaeology, nor do any of her publications relate to Ontario; [7]

(c) Ms. Morden has only worked on two sites in Ontario, one for five to six days a week for about two months and one for two weekends, in 1982 and 1977

---

[4] Evidence of Margaret Morden, Transcript vol 70, December 16, 2019, p. 9025, lines 19-25; p. 9042, lines 3-21 and p. 9044, lines 3-11.
[5] Margaret E Morden Resume, updated December 10, 2019, Exhibit 4451, p. 2.
[6] Evidence of Margaret Morden, Transcript vol 70, December 16, 2019, p. 9036, line 21 to p. 9037, line 13.
[7] Evidence of Margaret Morden, Transcript vol 70, December 16, 2019, p. 9037, lines 22-25; p. 9038, lines 8-12-*Masters degrees and PhD work are not related to Ontario*; p. 9038, line 25 to p. 9039, line 3-*no publications related to archaeology in Ontario* and p. 9039, line 4 to p. 9040, line 15-*only one presentation done respecting Ontario completed between Masters and co-written, otherwise no presentations in Canada*.

respectively, neither in a supervisory capacity. Outside of this, Ms. Morden has done no field work relating to archaeology in Canada. [8]

5. This is significant because of the difference between the soil conditions in Ontario and the Mediterranean, where Ms. Morden's experience predominantly lies: in the Mediterranean, soil conditions allow for stratigraphy to be commonly used in dating sites. In Ontario, this method is not typically used because many sites do not have stratigraphy.[9] Ms. Morden does not have experience working with alternative methods of dating sites that are used in Ontario, such as the bead database.[10]

6. Ms. Morden, in her testimony, also acknowledged Dr. Williamson's expertise in archaeology, calling him a "giant in his field" and stating how much she respects him "in all aspects of archaeology".[11] To the extent that Ms. Morden's evidence differs from Dr. Williamson's, Dr. Williamson's evidence should be preferred.

No experience with archaeology as it relates to Indigenous peoples

7. Ms. Morden was not qualified as an expert in archaeology as it relates to Indigenous peoples, nor did she claim to have expertise in this area.[12] Ms. Morden acknowledged that her

---

[8] Evidence of Margaret Morden, Transcript vol 70, December 16, 2019, p. 9040, line 16 to p. 9041, line 23; Margaret E Morden Resume, updated December 10, 2019, Exhibit 4451, p. 1.
[9] Evidence of Margaret Morden, Transcript vol 70, December 16, 2019, p. 9159, line 16 to p. 9160, line 18.
[10] Evidence of Margaret Morden, Transcript vol 70, December 16, 2019, p. 9161, line 17 to p. 9162 line 19-*Ms. Morden questions how sites can be reliably dated without stratigraphy or a documentary record*; Evidence of Dr. Ronald Williamson, Transcript vol 44, September 17, 2019, p. 5357, line 24 to p. 5359, line 7-*Dr. Williamson's explanation for why lack of stratigraphy doesn't impact his conclusions*.
[11] Evidence of Margaret Morden, Transcript vol 70, December 16, 2019, p. 9117, line 12.
[12] Evidence of Margaret Morden, Transcript vol 70, December 16, 2019, p. 9026, line 24, to p. 9027, line 3.

masters degrees and PhD work are in no way related to archaeology of Indigenous communities, nor has she ever worked on a site or published an article relating to Indigenous communities.[13]

8. The Plaintiffs challenged Ms. Morden's qualification on this basis, and the Court ruled that to the extent that Ms. Morden gave evidence relating to archaeology relating to Indigenous peoples, and that evidence does not have a proper evidentiary foundation from Dr. Williamson, Ms. Morden's evidence should be disregarded.[14]

9. Specifically, Ms. Morden gave evidence on the following topics subjects respecting archaeology as it relates to Indigenous peoples:

(a) The nature of the archaeological record left by Indigenous sites;[15]

(b) Whether a single bead could be viewed as a complete object;[16] and

(c) Whether animal bundles related to ceremonial feasting and celebrations was relatively new in the long history of Anishinaabe people.[17]

10. This evidence does not have an evidentiary basis in Dr. Williamson's evidence, and thus should be given no weight.

---

[13] Evidence of Margaret Morden, Transcript vol 70, December 16, 2019, p. 9038, lines 1-4, 13-15 and p. 9041, line 20, to p. 9042, line 2.
[14] Ruling of Justice Matheson, Transcript vol 70, December 16, 2019, p. 9069, lines 14-25.
[15] Ms. Margaret Morden, "Response to the Dr. Ronald F. Williamson 2017 Report", August 31, 2018, Exhibit 4452, p. 8.
[16] Ms. Margaret Morden, "Response to the Dr. Ronald F. Williamson 2017 Report", August 31, 2018, Exhibit 4452, p. 14; Evidence of Margaret Morden, Transcript vol 70, December 16, 2019, p. 9105, line 10, to p. 9106, line 12.
[17] Ms. Margaret Morden, "Response to the Dr. Ronald F. Williamson 2017 Report", August 31, 2018, Exhibit 4452, pp. 18, 20.

Failure to understand the Glass Bead Database

11. Ms. Morden acknowledged that she had never used the glass bead database on which her report was based.[18] On cross examination, she also conceded that was unfamiliar with the sites in the database, and unaware of how the sites in the database were dated.[19] Ms. Morden at one point believed that the sites were being dated using the date of manufacture,[20] but later acknowledged that the dates obtained using the bead database are not based on the date of manufacture.[21]

12. Further, Ms. Morden based her analysis on assumptions that she did not identify clearly for the Court, nor did she verify their validity. For example:

(a) Ms. Morden gave evidence in her report about how the comparator sites in the database were identified, claiming they were "identified by surface collections of artefacts after they are dragged to the surface by ploughing and other intrusive activities".[22] She gave this evidence despite not being familiar with the sites in the database. She did so based on the assumption that it was the same as another database, without verifying the validity of this assumption, and ultimately acknowledged that the sites in the two databases were not the same;[23] and

---

[18] Evidence of Ms. Margaret Morden, Transcript vol 70, December 16, 2019, p. 9049, lines 5-12.
[19] Evidence of Ms. Margaret Morden, Transcript vol 70, December 16, 2019, p. 9121, lines 17-21; p. 9138, lines 3-9; and p. 9153, lines 10-13.
[20] Evidence of Ms. Margaret Morden, Transcript vol 70, December 16, 2019, p. 9121 lines 13-16- *Ms. Morden calls for an acknowledgement that date of manufacture does not necessarily mean date of deposit*.
[21] Evidence of Ms. Margaret Morden, Transcript vol 70, December 16, 2019, p. 9140 line 21 to p. 9142 line 6 and p. 9144, lines 5-10.
[22] Ms. Margaret Morden, "Response to the Dr. Ronald F. Williamson 2017 Report", August 31, 2018, Exhibit 4452, p. 16.
[23]Evidence of Ms. Margaret Morden, Transcript vol 70, December 16, 2019, p. 9152, line 25, to p. 9153, line 25.

(b) Ms. Morden assumed that the *Ne'bwaakaah giizwed ziibi* (The River Mouth Speaks) beads had been entered into the bead database, and used this as an example of sites with uncorroborated dates being in the database. When challenged on this assumption, she acknowledged that in fact she did not know whether these beads had been included in the database.[24]

13. Ms. Morden also initially misunderstood the analysis in the Bead Report, and how it was determined which sites would be compared to the *Ne'bwaakaah giizwed ziibi* (The River Mouth Speaks) sites: she incorrectly believed Dr. Williamson specifically chose certain sites in order to minimize discrepancies rather than comparing the beads to all 4,000 beads in the database.[25] After testifying about this in chief, she acknowledged on cross examination that Dr. Williamson did in fact compare the beads to all the beads in the database, after being shown the relevant portion of the Bead Report.[26] This once again demonstrates Ms. Morden's failure to understand how the database works, and how the beads were dated using the database.

14. Despite clearly not understanding how the bead database works, Ms. Morden levied a number of criticisms against the database and the ability to accurately date the beads found at *Ne'bwaakaah giizwed ziibi* (The River Mouth Speaks) using the database.[27]

---

[24] Evidence of Ms. Margaret Morden, Transcript vol 70, December 16, 2019, p. 9161, line 17 to p. 9162, line 19.
[25] Evidence of Ms. Margaret Morden, Transcript vol 70, December 16, 2019, p. 9088, line 10, to p. 9089, line 14; Ms. Margaret Morden, "Response to the Dr. Ronald F. Williamson 2017 Report", August 31, 2018, Exhibit 4452, p. 12.
[26] Evidence of Margaret Morden, Transcript vol 70, p. 9134, line 19 to p. 9135, line 3.
[27] Evidence of Ms. Margaret Morden, Transcript vol 70, December 16, 2019, p. 9096, line 3 to p. 9098, line 8 and p. 9120, line 9 to p. 9121, line 24.

The Plaintiffs submit that Ms. Morden's evidence should be given very little weight. Her shortcomings in knowledge, training, and experience in the areas of archaeology at issue in this case are significant. Further, her lack of understanding of the Glass Bead Database renders her critique of that database of no value to the court.

RELEVANCE AND WEIGHT OF JEAN-PIERRE MORIN'S EVIDENCE

1. Mr. Jean-Pierre Morin is employed by Crown-Indigenous Relations and Northern Affairs Canada.[1] He is the departmental historian where he is responsible for the administration of the history of the Department (sometimes referred to historically as the "Indian Department"), its policies, and the historical relationship with Indigenous peoples from the 1700s to present day.[2]

2. He testified about:

   (a) The name, general organization and administration of the Department from its origins in 1755 to the present;[3]

   (b) The Department organization of the agencies or superintendencies assigned to SON in the late 19th century to their closure in 1958 (Nawash) and 1998 (Saugeen);[4] and

   (c) The existence of a separate Indian land agency located in Wiarton after its establishment in the late 19th century until 1921.[5]

3. Mr. Morin gave his evidence in a straight forward manner in his answers to questions from counsel. SON has no objection to Mr. Morin's evidence being accepted.

---

[1] Evidence of Jean-Pierre Morin, Transcript vol 66, November 26, 2019, p. 8515, lines 1-6.
[2] Evidence of Jean-Pierre Morin, Transcript vol 66, November 26, 2019, p. 8515, lines 7-18.
[3] Evidence of Jean-Pierre Morin, Transcript vol 66, November 26, 2019, p. 8516, line 20 to 8545, line 18 and p.8568, line 9 to p. 8569, line 14.
[4] Evidence of Jean-Pierre Morin, Transcript vol 66, November 26, 2019, p. 8545, line 19 to p. 8566, line 12 and p.8573, line 18 to p.8574, line 10.
[5] Evidence of Jean-Pierre Morin, Transcript vol 66, November 26, 2019, p. 8547, line 15 to p. 8548, line 2.

RELEVANCE AND WEIGHT OF MICHEL MORIN'S EVIDENCE

1. Prof. Michel Morin is a legal historian who prepared a report entitled "Alliances, Peace Treaties and Aboriginal Territories in the Great Lakes Area During the French Regime (1603-1760)"[1] and testified about the perspectives taken by international law writers and French colonial officials concerning territorial rights of Indigenous peoples in New France during the French period from 1534-1760.[2] His evidence was called in reply, in response to the portion of Professor Alain Beaulieu's report, "French, British and Aboriginal Peoples in the Great Lakes Area 1600-1774"[3] which pertained to the period before 1760.[4]

2. Prof. Morin was qualified as "a legal historian with expertise in the legal relationship between France and First Nations from the 16th to the 18th century, and capable of giving evidence on:

(a) The Law of Nations and its application to and impact on French practice with respect to First Nations and territory in North America;

(b) Official grants of authority by the French Crown to colonial administrators from 1541 to 1760;

---

[1] Prof. Michel Morin, "Alliances, Peace Treaties and Aboriginal Territories in the Great Lakes Area During the French Regime (1603-1760)", (2017), Exhibit 4929.
[2] Professor Michel Morin, "Alliances, Peace Treaties and Aboriginal Territories in the Great Lakes Area During the French Regime (1603-1760) at p. 5.
[3] Exhibit 4380
[4] Professor Michel Morin, "Alliances, Peace Treaties and Aboriginal Territories in the Great Lakes Area During the French Regime (1603-1760) at p. 5.

(c) French views on the significance of discovery and symbolic acts of possession;

(d) Diplomatic negotiations between France and England from 1687 to 1755 regarding respective territorial holdings in North America; and

(e) Official acts with respect to the boundaries of First Nations' territories."[5]

Relevance

3. SON submits that aspects of Prof. Beaulieu's evidence respecting the state of French law, and what the French thought and felt about the law, are not relevant to determining exclusive occupation in 1763. Similarly, evidence that Prof. Beaulieu gave relating to the interactions of the French and the Haudenosaunee, outside of the geographic area of Lake Huron and Georgian Bay, is also not relevant to determining whether SON had exclusive occupation of SONUTL in 1763.

> Relevance and Weight of the Evidence of Prof. Alain Beaulieu, Appendix E, Tab 1

4. If the Court accepts these arguments, then Prof. Morin's responding evidence respecting these same topics would also not be relevant. The balance of Prof. Morin's evidence remains relevant to providing the Court with the necessary context of European-Anishinaabe relations leading up to Britain's assertion of sovereignty in 1763.

Qualifications

5. Prof. Morin has been teaching legal history since 1987, including "the duality of common law and civil law; and also the interactions with Indigenous peoples".[6] He has published extensively on topics related to his testimony, including legal recognition and sovereignty of

---

[5] Ruling of Justice Matheson, Transcript vol 96, April 28, 2020, p. 12425, line 16 to p. 12426, line 23.
[6] Evidence of Prof. Michel Morin, Transcript vol 96, April 28, 2020, p. 12405, lines 2-24.

Indigenous people in North America in the 16th, 17th and 18th century, and the Law of Nations.[7] In 1997, Prof. Morin wrote a prize-winning book reviewing the status of Indigenous peoples prior to the 19th century, and the evolution of this status into the 19th and 20th centuries, the title of which translates to "The Usurpation of Aboriginal Sovereignty".[8] It was clear from Prof Morin's testimony about his publications that he is very knowledgeable about the status of Indigenous people during the French period in North America, and has considered these issues for a long time.

6. It was also clear from his testimony that he is accustomed to working with and interpreting historical documents.[9] Prof Morin described the work of a legal historian as trying to understand historical events, with a focus on the law, and explained that a good legal historian will look at what was considered the law, and "even if it's not acknowledged can be established in fact the way the law was applied, modified, the official norm and the resulting practice may have been different, sometimes very different, than the official norms that were established."[10] He also explained that "sometimes for historians it's difficult to understand that laws may impose constraints even though they're not always respected and there may be violations of them."[11] He pointed to the understanding of historical literature, events, and motivations, and empowerment or lack of empowerment of various groups as areas of overlap between historians and legal historians.[12]

---

[7] Evidence of Prof. Michel Morin, Transcript vol 96, April 28, 2020, p. 12406, line 4 to p. 12415, line 4; Michel Morin Curriculum vitae, March 3, 2020, Exhibit 4931, pp. 2-9.
[8] Evidence of Prof. Michel Morin, Transcript vol 96, April 28, 2020, p. 12406, line 24 to p. 12408, line 15.
[9] See, for example, Evidence of Prof. Michel Morin, Transcript vol 96, April 28, 2020, p. 12411, line 18 to p. 12412, line 2.
[10] Evidence of Prof. Michel Morin, Transcript vol 96, April 28, 2020, p. 12416, lines 1-24; Also see the discussion of this topic on cross examination, Evidence of Prof. Michel Morin, Transcript vol 96, April 28, 2020, p. 12523, line 10 to p.12524, line 10.
[11] Evidence of Prof. Michel Morin, Transcript vol 96, April 28, 2020, p. 12416, line 25 to p. 12417, line 3.
[12] Evidence of Prof. Michel Morin, Transcript vol 96, April 28, 2020, p. 12417, lines 4-13.

7. Prof Morin's testimony falls squarely within the subject matter he has been studying for most of his academic career. It was clear in his testimony that the issues under discussion were ones he had given much consideration.[13] He is best placed to provide evidence respecting the legal relationship between France and First Nations from the 16th to the 18th century.

General Credibility and Reliability

8. It was apparent during Prof. Morin's testimony that he was trying to provide helpful information to the court.[14] He was also polite throughout his testimony, and followed directions from the Court and counsel when they were given.[15]

9. Prof Morin conceded and was agreeable on cross examination where appropriate,[16] and advised when questions began to fall outside of his knowledge or area of expertise.[17]

10. Prof. Morin was a credible and reliable witness, and his evidence should be given substantial weight where it is relevant.

---

[13] See, for example, Evidence of Prof. Michel Morin, Transcript vol 96, April 28, 2020, p. 12545, line 7 to p. 12546, line 13; p. 12550, line 1 to p. 12552, line 9; and p. 12555, line 24 to p. 12558, line 3.

[14] See, for example: Evidence of Prof. Michel Morin, Transcript vol 96, April 28, 2020, p. 12459, line 10 to p. 12460, line 7 and p. 12562, line 20 to p. 12563, line 3; Evidence of Prof. Michel Morin, Transcript vol 97, April 29, 2020, p. 12618, line 20 to p. 12619, line 3 and p. 12623, line 24 to p. 12624, line 3.

[15] See, for example: Evidence of Prof. Michel Morin, Transcript vol 96, April 28, 2020, p. 12520, line 22, to p. 12521, line 9-*Prof. Morin telling M. McCulloch his translation is very good*; Evidence of Prof. Michel Morin, Transcript vol 96, April 28, 2020, p. 12630, lines 2-13; Evidence of Prof. Michel Morin, Transcript vol 97, April 29, 2020, p. 12715, line 1 to p. 12716, line 7.

[16] See for example: Evidence of Prof. Michel Morin, Transcript vol 96, April 28, 2020, p.12507, line 13 to p. 12517, line 2 - *cross examination establishing historical dates*; p. 12524, line 11 to p. 12525, line 3; Evidence of Prof. Michel Morin, Transcript vol 97, April 29, 2020, p. 12609, line 25 to p. 12611, line 8.

[17] See for example: Evidence of Prof. Michel Morin, Transcript vol 96, April 28, 2020, p. 12505, line 20 to p.12506, line 5; p. 12511, lines 10-17 and p. 12513, line 21 to p.12514 line 1-*historical facts that he did not know by heart*.

RELEVANCE AND WEIGHT OF MARK MUSCHETT'S EVIDENCE

1. Mr. Mark Muschett is an employee of the Ministry of Natural Resources and Forestry (MNRF), called as a witness by Ontario. He testified about his role at the Ministry as a fisheries regulation officer and Indigenous liaison in the Upper Great Lakes management unit. The Upper Great Lakes management unit is responsible for Lake Huron (including SONUTL).[1]

2. Mr. Muschett testified about his responsibilities regarding commercial fishing licenses, recreational fisheries, and management planning. He described the use of Lake Huron fishery by First Nations, Metis and the general public.[2] Mr. Muschett also testified about the Great Lakes Fisheries Commission. He explained that it was created to coordinate across jurisdictions for Great Lakes research and management.[3]

3. Mr. Muschett testified about the allocation of Lake Huron fishery resources and the priority of allocation: after conservation, Mr. Muschett said MNRF's first priority is Aboriginal and treaty rights. After those rights have been satisfied, the next priority is general commercial and recreational fishing.[4] Mr. Muschett testified about the estimated values of the commercial and

---

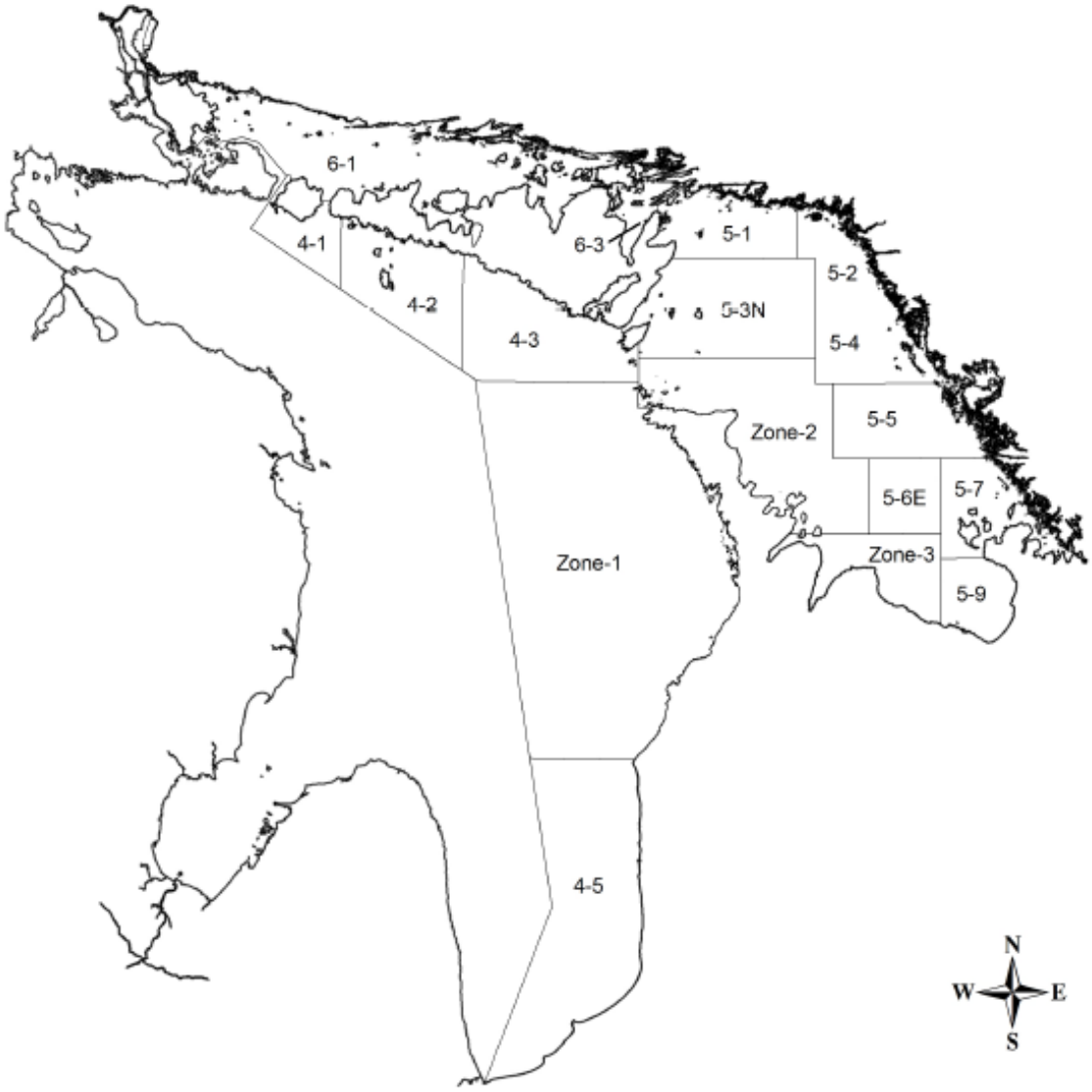
[1] Evidence of Mark Muschett, Transcript vol 78, January 21, 2020, p. 9955, lines 1-19 and p. 9956, line 22 to p. 9957, line 12.
[2] Evidence of Mark Muschett, Transcript vol 78, January 21, 2020. p. 9960, line 23 to p. 9961, line 12.
[3] Evidence of Mark Muschett, Transcript vol 78, January 21, 2020, p. 9961, line 13 to p. 9962, line 6 and p. 9967, line 11 to p. 9970, line 6; A Joint Strategic Plan for Management of Great Lakes Fisheries, Exhibit 4522
[4] Evidence of Mark Muschett, Transcript vol 78, January 21, 2020, p. 9962, line 23 to p. 9964, line 3.

recreational fisheries in Lake Huron, and confirmed that neither revenues nor licensing fees charged by the province are shared with SON.[5]

4. Mr. Muschett also provided evidence about the fishing agreement that was reached between SON and Ontario. The first iteration of the agreement was entered into in 2000. The areas covered by the fishing agreement are depicted in Exhibit 4527– see Zones 1, 2 and 3 marked on the map excerpted below. In 2000, Ontario bought the commercial licences from non-Indigenous fishers in those areas, and allocated the quotas associated with those licenses to SON commercial fishers.[6] Mr. Muschett agreed that waters located in zone 5-9 and 4-5 are within the area referred to as SONUTL, but those zones are not yet covered by the fishing agreement between SON and Ontario.[7]

[5] Evidence of Mark Muschett, Transcript vol 78, January 21, 2020, p. 9964, lines 7-25; p. 10044, line 17 to p. 10045, line 19.
[6] Evidence of Mark Muschett, Transcript vol 78, January 21, 2020, p. 10000, line 22 to p. 10003, line 10; 2017 Map of the Quota Management Areas – Canadian Side of Lake Huron, Exhibit 4527.
[7] Evidence of Mark Muschett, Transcript vol 78, January 21, 2020, p. 10010, line 22 to p. 10012, line 15.

EXCERPT FROM EXHIBIT 4527



5. On cross examination, Mr. Muschett confirmed that SON participates in setting the total allowable catch (that is, the maximum allowable catch for whitefish) in the zones covered by the fishing agreement, and that no other First Nations participate in doing so for this area.[8] He also confirmed that where there are differences of opinions between SON and MNRF regarding the total allowable catch, the parties have been able to work together towards a solution through the

[8] Evidence of Mark Muschett, Transcript vol 78, January 21, 2020, p. 10003, line 11 to p. 10004, line 12.

governance mechanisms provided by the fishing agreement.[9] For example, Mr. Muschett confirmed that the total allowable catch of whitefish was reduced in 2011 at SON's urging due to their concerns about the declines of whitefish in Lake Huron.[10]

6. Mr. Muschett further confirmed that SON has worked with Ontario regarding restrictions to SON's commercial fishing in Owen Sound's Bay and Colpoy's Bay, in order to balance between SON's commercial fishery, and the enjoyment of other users of the lake. SON has consented to this, even though it affects their court-recognized constitutional rights.[11] Again, this compromise was reached through the governance mechanisms provided under the fishing agreement. However, Mr. Muschett also confirmed that not all issues have been resolved through the fishing agreement, such as SON's concerns about to fish stocking and the impacts of the Bruce Nuclear generating station on the fishery.[12]

7. SON submits that Mr. Muschett's testimony confirms that SON's participation in decision-making and stewardship of Lake Huron through the fishing agreement has not compromised the province's abilities to carry out its duties and obligations. Mr. Muschett's testimony also confirms that the fishing agreement is not a complete answer to the recognition and accommodation of SON's rights and asserted ownership to SONUTL.

---

[9] Evidence of Mark Muschett, Transcript vol 78, January 21, 2020, p. 10008, line 12 to p. 10009, line 14.
[10] Evidence of Mark Muschett, Transcript vol 78, January 21, 2020, p. 10018, line 4 to p. 10021, line 24; A Feasability Assessment of Proposals from Nawash and Saugeen First Nations Communities to Improve the Lake Huron Lake Whitefish Fishery, Exhibit 4529, PDF p. 8.
[11] Evidence of Mark Muschett, Transcript vol 78, January 21, 2020, p. 10023, line 24 to p. 10024, line 17.
[12] Evidence of Mark Muschett, Transcript vol 78, January 21, 2020, p. 10031, line 4 to p. 10038, line 16.

ILLUSTRATIONS OF SON'S COMMERCIAL HARVESTING DATA

8. Ontario introduced through Mr. Muschett two maps illustrating harvest information in the areas covered by fishing agreement between SON and Ontario – Exhibits 4525 and 4526.[13] These maps were very similar to Exhibit 4320, a map that was added via SON's witness, Mr. Ryan Lauzon illustrating harvest efforts by SON fishers between 1995 to 2018.[14] A harvest effort occurs every time a SON commercial fisher sets their net, and then retrieves it.[15]

9. On cross examination, Mr. Muschett agreed that the only differences between SON's illustration at Exhibit 4320 and Ontario's illustrations at Exhibits 4525 and 4526 were: (1) the colour scheme used, and (2) the "baskets" into which the data were grouped. He agreed that Ontario's maps used different shades of white and light grey, while SON's map used colours. He also agreed that the way Ontario had grouped the data on its map provided a less precise view of use of the commercial fishery – for example, on Exhibit 4526, there is no differentiation between squares[16] where there is no fishing at all and squares where there are over 500 harvest efforts.[17] Exhibit 4320, produced by Mr. Lauzon and his team, on the other hand, provides users of the map with several gradations in that range so that users can more precisely determine the amount of commercial fishing that has taken place in each grid square marked on the map.[18] SON submits

---

[13] Saugeen Ojibway Nation Commercial Fishing Events: 1995-2018, Exhibits 4525, 4526.
[14] Saugeen Ojibway Nation Commercial Fishery Harvest: 1995-2018, Exhibit 4320.
[15] Evidence of Ryan Lauzon, Transcript vol 53, October 21, 2019, p. 6621, lines 6-12
[16] Five minute by five minute squares refers to the grid lines marked on the two maps, Exhibit 4320 (SON's commercial fishing map) and Exhibits 4525 and 4526 (Ontario's commercial fishing map). Each line marks 1/12 of a degree of longitude or latitude. See Evidence of Mr. Ryan Lauzon, Transcript vol 53, October 21, 2019, p. 6627, line 21 to p. 6628, line 10
[17] Evidence of Mark Muschett, Transcript vol 78, January 21, 2020, p. 10041, line 10 to p. 10044, line 16. Saugeen Ojibway Nation Commercial Fishing Events: 1995-2018, Exhibit 4526.
[18] Saugeen Ojibway Nation Commercial Fishery Harvest: 1995-2018, Exhibit 4320

that Ex 4526, in particular, is designed to make invisible SON's use of their territory for commercial fishing.

EXHIBIT 4525:

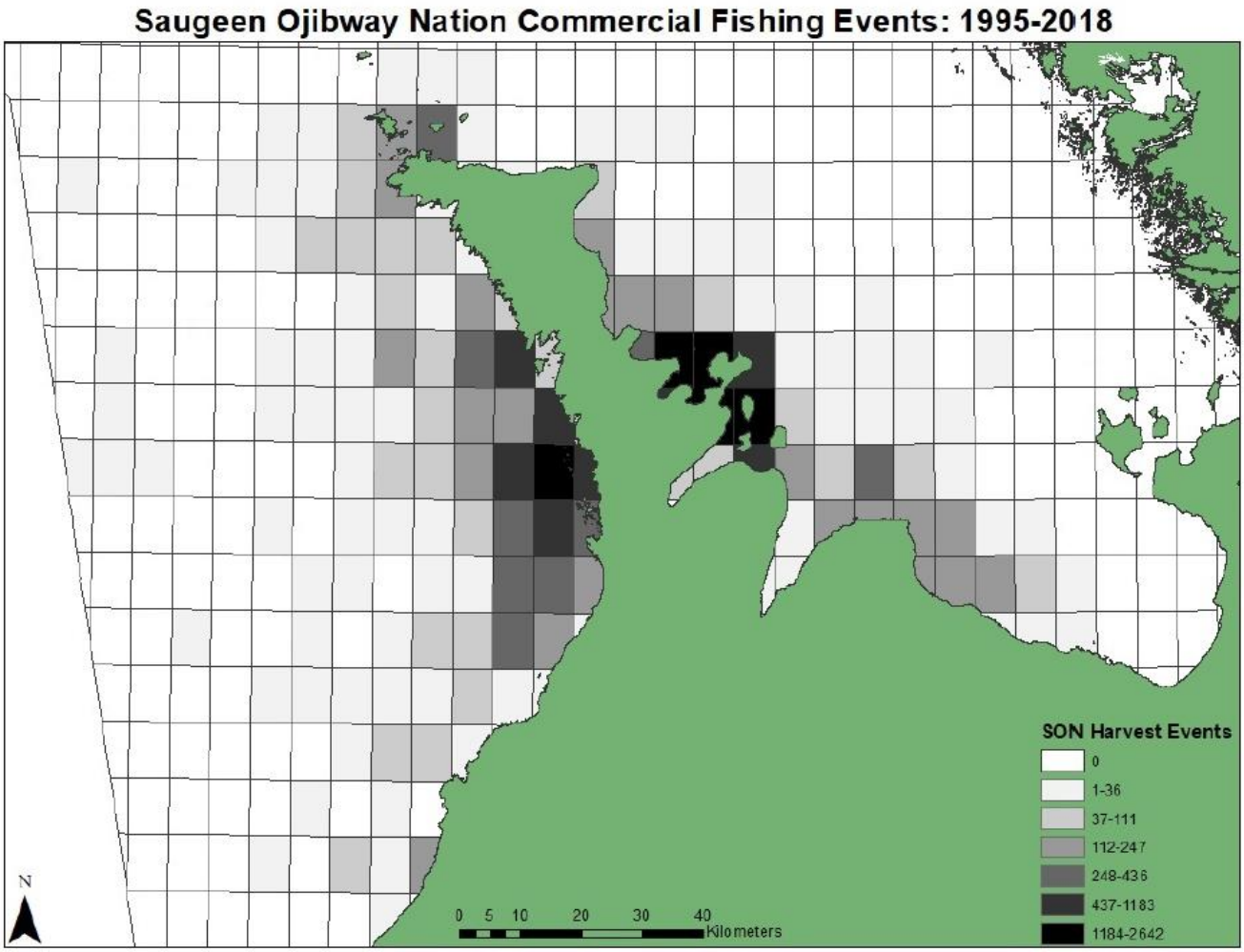
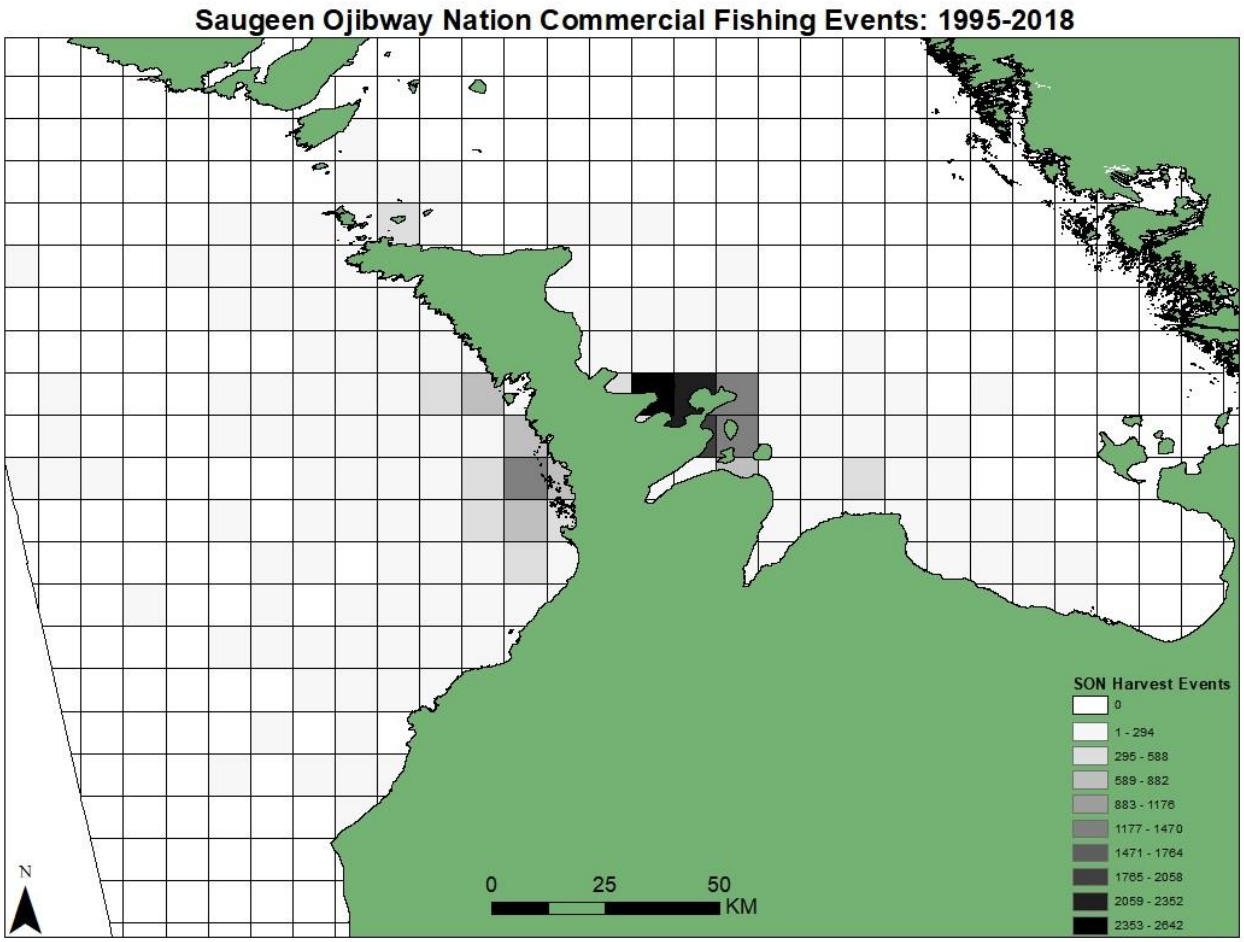


EXHIBIT 4526:



10. SON submits that Mr. Muschett's testimony and Ontario's illustrations do not undermine the credibility of the evidence offered by Mr. Lauzon, nor do they challenge the accuracy of Exhibit 4320.

RELEVANCE AND WEIGHT OF JOHN NADJIWON'S EVIDENCE

1. John Nadjiwon's evidence was entered under Rule 36 of the *Rules of Civil Procedure*. His examination-in-chief was conducted on September 12, 2002, and his cross examination was conducted on November 5, 2002.

2. Mr. Nadjiwon identified as Ojibway, was born in 1932[1] in Cape Croker, and belonged to the Otter Clan. His family also has Pottawatomi affiliations.[2] He was a councillor for his band in the 1950s.[3] Growing up, the language spoken in his home was Ojibway.[4]

3. Mr. Nadjiwon testified on the following subjects:

   (a) The integration of Pottawatomi into SON and relationship between the Pottawatomi, Odawa and Ojibway;[5]

---

[1] Rule 36 Evidence of John Nadjiwon, September 12, 2002, Examination in Chief, Exhibit 3951, p. 5, line 11.
[2] Rule 36 Evidence of John Nadjiwon, September 12, 2002, Examination in Chief, Exhibit 3951, p. 5, lines 10-20; Rule 36 Evidence of John Nadjiwon, November 5, 2002, Cross Examination, Exhibit 3952, p. 8, line 4 to p. 9, line 11.
[3] Rule 36 Evidence of John Nadjiwon, September 12, 2002, Examination in Chief, Exhibit 3951, p. 21, lines 16-18;
[4] Rule 36 Evidence of John Nadjiwon, September 12, 2002, Examination in Chief, Exhibit 3951, p. 8, line 28 to p. 9, line 1.
[5] Rule 36 Evidence of John Nadjiwon, September 12, 2002, Examination in Chief, Exhibit 3951, p. 9, line 6 to p. 10, line 12; Rule 36 Evidence of John Nadjiwon, November 5, 2002, Cross Examination, Exhibit 3952, p. 4, line 10 to p. 7, line 25; p. 9, line 17 to p. 14, line 11; and p. 64, line 23 to p. 65, line 24.

(b) Accounts of treaties that have been passed down, including disputes over ownership of the shores and water territory, and the implementation of these treaties;[6]

(c) Fishing in the early 1900s, including fishing locations and camps used when fishing;[7]

(d) Relations between Band Council and Indian agents;[8] and

(e) The clan system, dodems, and how they are passed through generations.[9]

4. This evidence is relevant to the identity of SON, harvesting rights, and limitations and laches.

5. Mr. Nadjiwon gave detailed answers to the questions posed both in examination in chief and in cross examination. For example, when he was asked in cross examination whether at any point in the past there was conflict between people of Pottawatomi and Ojibway origins at Cape Croker, he responded:

> There was – I wouldn't say – Well I would – the way I would put it, I guess, there was some maybe strong

---

[6] Rule 36 Evidence of John Nadjiwon, September 12, 2002, Examination in Chief, Exhibit 3951, p. 10, line 13 to p. 17, line 20 and p. 26, line 8 to p. 29, line 27; Rule 36 Evidence of John Nadjiwon, November 5, 2002, Cross Examination, Exhibit 3952, p. 14, line 12 to p. 23, line 21; p. 27, line 13 to p. 36, line 9; p. 40, line 10 to p. 53, line 7; p. 57, line 1 to p. 58, line 14; p. 66, line 22 to p. 70, line 1, p. 71, line 18 to p. 72, line 1; p. 73, line 7 to p. 74, line 16; p. 77, line 21 to p. 93, line 11; p. 109, line 3 to p. 111, line 6; and p. 112, line 29 to p. 114, line 24.

[7] Rule 36 Evidence of John Nadjiwon, September 12, 2002, Examination in Chief, Exhibit 3951, p. 17, line 21, to p. 19, line 17; Rule 36 Evidence of John Nadjiwon, November 5, 2002, Cross Examination, Exhibit 3952, p. 98, line 8 to p. 101, line 18.

[8] Rule 36 Evidence of John Nadjiwon, September 12, 2002, Examination in Chief, Exhibit 3951, p. 19, line 18 to p. 25, line 30; Rule 36 Evidence of John Nadjiwon, November 5, 2002, Cross Examination, Exhibit 3952, p. 22, line 25 to p. 27, line 12; p. 36, line 10 to p. 40, line 9; and p. 101 line 23 to p. 109, line 2.

[9] Rule 36 Evidence of John Nadjiwon, November 5, 2002, Re-Examination, Exhibit 3952, p. 111, line 22 to p. 112, line 28.

> identical feelings but never aggressive. Like they would, you know, sort of maybe, you know, discuss things back and forth and sometimes it would indicate that there was a – somewhat a – a very minor disagreement on – like on the Pottawatomi and the Ojibway. Some – They were very strong. Like, it was a very aggressive discussion. But I don't think there was actually any hatred between them; it was just the fact that they were indicating as to where you came from and what brought you here in the first place is – is what their more arguments were about.[10]

6. He was clear about the source of the information he gave: in some cases he witnessed events himself, and in others he identified the source of the information. For example, Mr. Nadjiwon testified that one of the ways he gained information was through learning from elders in social settings, akin to round table discussions.[11] Mr. Nadjiwon was identified by Mr. Donald Keeshig, another Rule 36 witness, as being knowledgeable about the treaties.[12] SON submits that Mr. Nadjiwon's evidence should be accepted as credible and given weight.

---

[10] Rule 36 Evidence of John Nadjiwon, November 5, 2002, Cross Examination, Exhibit 3952, p. 9, line 17 to p. 10, line 2.
[11] Rule 36 Evidence of John Nadjiwon, November 5, 2002, Cross Examination, Exhibit 3952, p. 75, lines 4 to p. 77, line 20 and p. 95, line 24 to p. 97, line 13.
[12] Rule 36 Evidence of Donald Keeshig, December 5, 2002, Cross examination, Exhibit 3946, p. 100, line 27 to p. 101, line 5.

RELEVANCE AND WEIGHT OF MARSHALL NADJIWON'S EVIDENCE

1. Marshall Nadjiwan is a member of Chippewas of Nawash Unceded First Nation. Mr. Nadjiwan accompanied the Court on the view it took around the Peninsula portion of SONTL on June 24, 2019. Mr. Nadjiwan began his testimony by explaining to the Court the significance of some of the locations the Court visited. Specifically, Mr. Nadjiwan noted the following:

(a) A location at Oliphant, where there is a view of the fishing islands used by SON;[1]

(b) Red Bay area, where SON battled against the Haudenosaunee in the Haudenosaunee Wars;[2] and

(c) Howdenvale dock, a significant fishing spot and access point for SON.[3]

2. Mr. Nadjiwan also testified about his role as a pipe carrier and the special responsibilities he has to protect and safeguard SON's waters.[4] Mr. Nadjiwan talked about water spirits and the ways in which he has fulfilled his responsibility to protect and safeguard SON's water, through

---

[1] Evidence of Marshall Nadjiwan, Transcript vol 22, June 28, 2019, p. 2080, line 6 to p. 2084, line 2.
[2] Evidence of Marshall Nadjiwan, Transcript vol 22, June 28, 2019, p. 2084, lines 4-25.
[3] Evidence of Marshall Nadjiwan, Transcript vol 22, June 28, 2019, p. 2085, line 1 to p. 2090, line 7.
[4] Evidence of Marhsall Nadjiwan, Transcript vol 22, June 28, 2019, p. 2096, line 2 to p. 2121, line 20.

advocacy work to help address pollution and through traditional ceremonies.[5] He also spoke about the Anishinaabe laws of the water.[6]

3. Mr. Nadjiwan testified about his experience as a young teenager witnessing the burning of a number of documents by an Indian agent.[7] On cross examination both counsel for Canada and Ontario presented a number of different accounts to Mr. Nadjiwan about different people who had claimed to witness the book burning and at different times than that alleged by Mr. Nadijwan.[8] When considering this evidence, SON submits it is important to consider the testimony of Prof. Brownlie. When asked specifically about the inconsistent evidence of this account as told by various community members, he noted:

> This particular story is told in somewhat different ways by different people. The details vary somewhat. For instance, people place it at different points in time and speak of different actors being involved in the process, so different people are named as the ones who witnessed the burning of these books.
>
> At the same time, there are certain aspects of the story that remain constant in every telling. It is always the Indian Agent. It is always burning of books and I think in every case they specify that they are books that record land transactions.
>
> And what that tells you is that a community story has circulated that gives you insight into the community understandings of their relations with Indian Agents in which the Indian Agent was seen as not necessarily trustworthy, as someone who withheld information about land from them, and the fact that they always mention land books, ledgers related to land sales, shows how important those records were to the community.

---

[5] Evidence of Marshall Nadjiwan, Transcript vol 22, June 28, 2019, p. 2121, line 21 to p. 2126, line 15.
[6] Evidence of Marshall Nadjiwan, Transcript vol 22, June 28, 2019, p. 2126, line 16 to p. 2127, line 6.
[7] Evidence of Marshall Nadjiwan, Transcript vol 22, June 28, 2019, at p. 2090, line 9 to p. 2096, line 25.
[8] Evidence of Marshall Nadjiwan, Transcript vol 22, June 28, 2019, at p. 2145, line 20 to p.2154, line 21 and p. 2162, line 13 to p. 2192, line 3.

> One of the problems with this kind of story is that sometimes people discount stories like this because of the inconsistencies on some details, such as when it happened and who witnessed it, and that would be a great mistake.[9]

4. SON submits that any inconsistencies in Mr. Nadjiwan's evidence on the burning of documents by the Indian Agent should be viewed through the perspective provided by Prof. Brownlie, and should not effect his credibility or the fact that there is a cultural memory at SON of such an event taking place.

5. Mr. Nadjiwan's evidence provides insight in respect of the following matters for this Court:

(a) SON's perspective on the importance of water, its spiritual significance, and the responsibility SON has to protect its waters;

(b) The responsibilities of pipe carriers specifically, including the responsibility to address pollution in SON's waters;

(c) The "uses" to which water is put for the purposes of satisfying the Aboriginal title test; and

(d) Limitations and laches and the factors that made it difficult for SON to bring forth its claim.

6. Mr. Nadjiwan was forthcoming with his answers both on direct and cross examination. He provided detailed answers and shared very personal experiences with the Court. His evidence

---

[9] Evidence of Prof. Jarvis Brownlie, Transcript vol 31, July 23,2019, at p. 3206, line 18 to p. 3207, line 19.

demonstrated his deep connection to SON's territory and is of assistance to the Court in understanding the Indigenous perspective.

RELEVANCE AND WEIGHT OF PAUL NADJIWAN'S EVIDENCE

1. Robert Paul Nadjiwan is a member of the Chippewas of Nawash Unceded First Nation.[1] He lives at Nawash (Cape Croker).[2] As a child his great uncle gave him his Anishinaabe name: Giitaamagad, which means the jetstream.[3] He is a member of the crane clan where he holds the position of headman.[4] As a headman in his clan, he is responsible for knowing his language, culture, traditions, sacred sites, clan systems, oral traditions and sacred law.[5]

2. Mr. Nadjiwan learned Anishinaabemowin as a child from his older relatives. It was always spoken in his home when his older relatives would come to visit.[6]

3. Mr. Nadjiwan obtained his undergraduate degree from the University of Ottawa and a Masters degree from Lakehead University.[7] After university, Mr. Nadjiwan worked with Indigenous peoples at healing centres and as executive director of the Ojibwe Cultural Foundation. He was also the elected Chief of the Chippewas of Nawash Unceded First Nation from 2005-2007.[8] Currently, he acts as a consultant to SON providing support services related to cultural protocols, ceremonial protocols, and with school and healing facilities.[9]

---

[1] Evidence of Robert Paul Nadjiwan, Transcript vol 17, June 3, 2019, p. 1425, lines 21-23.
[2] Evidence of Robert Paul Nadjiwan, Transcript vol 17, June 3, 2019, p. 1425, lines 24-25.
[3] Evidence of Robert Paul Nadjiwan, Transcript vol 17, June 3, 2019, p. 1426, lines 3-13.
[4] Evidence of Robert Paul Nadjiwan, Transcript vol 17, June 3, 2019, p. 1429, lines 6-12.
[5] Evidence of Robert Paul Nadjiwan, Transcript vol 17, June 3, 2019, p. 1429, lines 13-19.
[6] Evidence of Robert Paul Nadjiwan, Transcript vol 17, June 3, 2019, p. 1432, lines 2-14.
[7] Evidence of Robert Paul Nadjiwan, Transcript vol 17, June 3, 2019, p. 1430, lines 16-21.
[8] Evidence of Robert Paul Nadjiwan, Transcript vol 17, June 3, 2019, p. 1431, lines 1-11.
[9] Evidence of Robert Paul Nadjiwan, Transcript vol 17, June 3, 2019, p. 1431, lines 12-18.

ANISHINAABEMOWIN PLACE NAMES

4. Mr. Nadjiwan testified about Anishinaabemowin place names in SONTL and translations of those names, which he gathered from elders.[10]

5. SON submits that Mr. Nadjiwan is knowledgeable in the Anishinaabemowin language and that he clearly set out how he gathered the place names for his evidence. SON submits that Mr. Nadjiwan's evidence on place names is relevant because it shows SON's connection to their territory and should be given due weight.

HUNTING

6. Mr. Nadjiwan testified that he hunts throughout SONTL.[11] He explained that he hunted with his father and his grandfather in areas like Beaver Valley, Greenock Swamp, and other valleys.[12] He gave evidence on the responsibilities that hunters have to share with the broader community and the respect that hunters are afforded for their generosity.[13] Finally, he explained that he could not conceive of no longer being allowed to hunt.[14]

7. Mr. Nadjiwan is an experienced hunter and openly shared his knowledge and understanding of hunting in SONTL. SON submits that Mr. Nadjiwan's evidence on hunting is relevant because it shows SON's ongoing use of SONTL and should be given due weight.

---

[10] Evidence of Robert Paul Nadjiwan, Transcript vol 17, June 3, 2019, p. 1437, line 2 to p. 1438, line 8.
[11] See Aide-Memoire Paul Nadjiwan, Exhibit 4013 and Grey County annotated Map, annotated by Paul Nadjiwan to indicate hunting locations with green dots.
[12] Evidence of Robert Paul Nadjiwan, Transcript vol 17, June 3, 2019, p. 1483, lines 7-17.
[13] Evidence of Robert Paul Nadjiwan, Transcript vol 17, June 3, 2019, p. 1474, lines 7-9.
[14] Evidence of Robert Paul Nadjiwan, Transcript vol 17, June 3, 2019, p. 1474, lines 2-6 and lines 10-24.

RELEVANCE AND WEIGHT OF CAROLYN O'NEILL'S EVIDENCE

1. Carolyn O'Neill is the manager of the Great Lakes Office within the Great Lakes and Inland Waters Branch at the Ministry of the Environment, Conservation and Parks – Ontario Ministry of Environment, Conservation and Parks.[1] Ms. O'Neill's evidence was largely about international agreements, sub-national agreements, and Ontario programs in the Great Lakes area. She also gave evidence on the involvement of Indigenous peoples in those collaborative agreements.

2. Ms. O'Neill was somewhat familiar with SON. She was aware of their work on fisheries, and learned from them in one of their traditional ecological knowledge workshops.[2] She was also familiar with the claim area in this litigation.[3]

3. Ms. O'Neill agreed that with respect to the Ontario international agreements, sub-national agreements and provincial programs:

(a) Ontario strives to cooperate and consult with First Nations in those efforts;[4]

(b) She was not aware of any instances where Indigenous involvement and consultation has prevented Ontario from assisting Canada in implementing the agreements;[5]

---

[1] Evidence of Carolyn O'Neill, Transcript vol 79, January 22, 2020, p. 10136, lines 2-8.
[2] Evidence of Carolyn O'Neill, Transcript vol 79, January 22, 2020, p. 10177, lines 2-4.
[3] Evidence of Carolyn O'Neill, Transcript vol 79, January 22, 2020, p. 10177, lines 19-23.
[4] Evidence of Carolyn O'Neill, Transcript vol 79, January 22, 2020, p. 10185, lines 5-10.
[5] Evidence of Carolyn O'Neill, Transcript vol 79, January 22, 2020, p. 10185, lines 12-17.

(c) She was not aware of any instances where such cooperation and consultation has prevented Ontario from implementing their subnational agreements;[6]

(d) She had no knowledge of complaints against Canada or Ontario regarding their obligations in the agreements based on Indigenous participation;[7]

(e) She had no knowledge of Ontario scientific testing teams ever being denied access to waters of SONUTL described in Exhibit P.[8]

4. SON has no objection to Ms. O'Neill's evidence being accepted.

---

[6] Evidence of Carolyn O'Neill, Transcript vol 79, January 22, 2020, p. 10185, lines 18-23.
[7] Evidence of Carolyn O'Neill, Transcript vol 79, January 22, 2020, p. 10185, line 24 to p. 10186, line 4.
[8] Evidence of Carolyn O'Neill, Transcript vol 79, January 22, 2020, p. 10178, line 11 to p. 10179, line 7.

RELEVANCE AND WEIGHT OF MIGUEL PELLETIER'S EVIDENCE

1. Mr. Miguel Pelletier was called as a witness by the Defendant the Corporation of the County of Bruce on behalf on all of the Municipal Defendants except for County Grey.[1] He has been the Director of Transportation and Environmental Services for Bruce County since May 2018.[2]

2. Mr. Pelletier testified about his role and responsibilities with Bruce County, the difference between an upper-tier Municipality and a lower-tier Municipality and differences in road responsibilities between them, and the County's road maintenance obligations.

3. For the reasons explained in Appendix E, Tab 14 respecting the relevance and weight of Ms. Wendi Hunter's evidence, Mr. Pelletier's evidence is irrelevant to this stage of the proceedings. Mr. Pelletier gave a broad overview of Bruce County's road network and maintenance obligations, without demonstrating the extent of those obligation on a road by road, or even road classification by road classification, basis. Without this information, Mr. Pelletier's evidence is essentially incomplete, and cannot be relied upon. Mr. Pelletier's evidence belongs in Phase Two of this trial, when discoveries with Bruce County have been completed and the Court has a complete picture of the County's true road holdings in the claim area, and its obligations respecting those holdings.

> Relevance and Weight of Evidence of Ms. Wendi Hunter, Appendix E, Tab 14

---

[1] Submissions of Counsel for Bruce County, Transcript vol 95, March 12, 2020, p. 12279, lines 1-11.
[2] Evidence of Mr. Miguel Pelletier, Transcript vol 95, March 12, 2020, p. 12355, lines 1-8.

4. For these reasons, Mr. Pelletier's evidence should not be relied upon in Phase 1 of this trial.

RELEVANCE AND WEIGHT OF DR. GWEN REIMER'S EVIDENCE

1. Dr. Gwen Reimer was qualified as follows:

> Dr. Gwen Reimer is an anthropologist and qualified to give opinion evidence in relation to cultural anthropology and ethnohistory, and in general, on the pre-history, proto-history, and history of the Saugeen and Chippewas of Nawash First Nations and their ancestors, including their traditional social and economic practices, and the history of Crown and Indigenous relations including the history of treaty-making in Ontario. She is also qualified to give opinion evidence on the history of the surrenders and treaties between the Crown and the ancestors of the Saugeen and Chippewas of Nawash First Nations, the historical background leading up to the making of Treaties 45 ½, 67, and 72 and the making, signing and implementation of those Treaties.[1]

2. SON did not object to this qualification statement, which is extremely broad. However, as set out below, SON submits that there are weaknesses to Dr Reimer's training and limits to expertise; areas where her opinions reflected errors rooted in inadequate research, overstatement or misinterpretation of the record; areas where she ventured into providing legal opinion; and areas in which her evidence was rooted in speculation. Her evidence in these areas ought to be given reduced weight. In addition, SON submits that Dr. Reimer's explanation for her change in opinion regarding Oliphant's conduct at the Treaty 72 council was unconvincing and the changed opinion ought to be given little weight.

---

[1] Ruling on qualification, Transcript vol 83, February 12, 2020, p. 10547, line 10 to p. 10550, line 6.

OPINIONS BASED ON LIMITED OR INADEQUATE EXPERTISE

1. Archaeology

3. Dr. Reimer acknowledged fully that she was not an archaeologist.[2] However, she had taken some courses in archaeology and explained that she believed this enabled her to:

> …search for and locate, review archaeological monographs, reports, publications to discern majority opinions and conclusions about certain matters, to synthesize those and apply those then to the subject matter I was currently concerned with in a report.[3]

4. She also acknowledged that she had given a "very general overview" of archaeological scholarship, which should not be considered an "exhaustive account".[4]

5. Interestingly, Ontario's counsel objected to a cross-examination question on the basis that Dr. Reimer did not have the capacity to make archaeological conclusions, stating that her expertise was limited to "synthesiz[ing]" archaeological reports.[5] SON submits that it is difficult to imagine that one could be expert in synthesizing archaeological reports, but not have the capacity to make archaeological conclusions.

6. Dr. Reimer deferred to Dr. Williamson's opinion about distinctive Odawa ceremonial animal burial practices, noting that "Dr. Williamson is an archaeologist".[6]

---

[2] Evidence of Dr. Gwen Reimer, Transcript vol 89, March 4, 2020, p. 11392, lines 21-22.
[3] Evidence of Dr. Gwen Reimer, Transcript vol 83, February 12, 2020, p.10543, lines 16-21.
[4] Evidence of Dr. Gwen Reimer, Transcript vol 89, March 4, 2020, p. 11393, lines 5-8.
[5] Evidence of Dr. Gwen Reimer, Transcript vol 89, March 4, 2020, p. 11389, line 19 to p. 11390, line 7.
[6] Evidence of Dr. Gwen Reimer, Transcript vol 89, March 4, 2020, p. 11372, line 13 to p.11373, line 8; referring to Dr. Williamson's evidence at Transcript vol 43, September 16, 2019, p. 5288 line 21 to p. 5289 line 23; See also Evidence of Dr. Gwen Reimer, Transcript vol 89, March 4, 2020, p. 11373, line 9 to p. 11375, line 18.

7. Dr. Reimer was unaware of a number of archaeological matters: 1) she did not know the dates of the period archaeologists refer to as the "Archaic period";[7] 2) she had not researched about the distinctiveness of Odawa ceremonial animal burial practices;[8] 3) she had not researched archaeological scholarship about the connection or lack thereof between ceramic styles and ethnicity.[9]

8. Dr. Reimer was not aware of a thesis by Lisa Rankin about the Nodwell site,[10] although she agreed that Rankin's analysis would question an opinion expressed in her report about a supposed Iroquoian migration into Saugeen territory in the 14th century.[11] Dr. Reimer admitted that the analysis of this issue had advanced since the studies that she had relied on had been written, and that this new evidence needs to be taken into consideration.[12]

9. Dr. Reimer also admitted that "it is apparent to me that additional research has started to question some of the prior majority opinions" on which she had based her archaeological overview,[13] and that this new information is something she would have reviewed had she been aware of it.[14]

---

[7] Evidence of Dr. Gwen Reimer, Transcript vol 89, March 4, 2020, p. 11364, lines 1-7.
[8] Evidence of Dr. Gwen Reimer, Transcript vol 89, March 4, 2020, p. 11374, line 13 to p. 11375, line 8.
[9] Evidence of Dr. Gwen Reimer, Transcript vol 89, March 4, 2020, p. 11378, lines 3-9.
[10] Evidence of Dr. Gwen Reimer, Transcript vol 89, March 4, 2020, p. 11380, lines 18-25.
[11] Evidence of Dr. Gwen Reimer, Transcript vol 89, March 4, 2020, p. 11381, lines 14-24.
[12] Evidence of Dr. Gwen Reimer, Transcript vol 89, March 4, 2020, p. 11381, line 25 to p. 11382, line 9.
[13] Evidence of Dr. Gwen Reimer, Transcript vol 89, March 4, 2020, p. 11393, lines 10-13.
[14] Evidence of Dr. Gwen Reimer, Transcript vol 89, March 4, 2020, p. 11393, lines 2-4.

10. In the end, Dr. Reimer admitted in cross-examination that she had not reconsidered the archaeological evidence since she first drafted that section of her report in the 1990s.[15]

11. Therefore, SON submits that a "very general overview" of archaeological scholarship, done by someone who is not an archaeologist, and which was written in the 1990s and has not been updated since, despite more recent developments in archaeology, should receive no weight from this Court.

2. Ethnology

12. Dr. Reimer has done very little participant observation (i.e. ethnographic fieldwork) in Anishinaabe communities.[16] She expressed the view that it is important to locate and review ethnographies about the group studied or groups close to them, but not so important to have done the fieldwork oneself.[17]

13. SON does not challenge that it is possible to do ethnohistorical study by consulting only ethnographies done by others, but submits that one factor to be considered in weighing ethnohistorical opinion evidence is whether it is informed by first-hand information (i.e. ethnographic fieldwork) or by second-hand information (i.e. by reading ethnographies done by others).

14. Somewhat related to this point, Dr. Reimer admitted that there was evidence from community witnesses that she would have considered regarding the ethnohistory of SON had that information been available to her. For example:

---

[15] Evidence of Dr. Gwen Reimer, Transcript vol 89, March 4, 2020, p. 11393, line 15 to p.11394, line 8.
[16] Evidence of Dr. Gwen Reimer, Transcript vol 83, February 12, 2020, p. 10537, line 20 to p. 10538, line 4.
[17] Evidence of Dr. Gwen Reimer, Transcript vol 83, February 12, 2020, p. 10538, lines 5-20.

(a) She agreed that the kind of evidence given by Vernon Roote in this litigation about the Haudenosaunee Wars is the kind of evidence she would want to consider, if it were available to her, in addressing the question of whether the Anishinaabe who were in SONTL before the Iroquois Wars, were the same or different than the ones who came back after the Iroquois Wars.[18]

(b) She agreed that the kind of evidence given by Fred Jones in his Rule 36 examination about the Pottawatomi is the kind of evidence one would consider, if it was available, in understanding the relations between the Pottawatomi who moved to SONTL and those other Anishinaabek already there.[19]

15. Dr. Reimer also agreed that evidence from Prof. Valentine about linguistic data (which she had not considered) is evidence one would want to consider if one was to answer a questions about the length of occupation of territory by SON,[20] or about whether the Pottawatomi joined and were incorporated into an existing community.[21]

16. SON therefore submits that the evidence Dr. Reimer did not look at, but admitted would be appropriate to consider, is a factor in assessing the weight to be given to her ethnohistorical conclusions about the continuity of SON.

---

[18] Evidence of Dr. Gwen Reimer, Transcript vol 89, March 4, 2020, p. 11405, line 15 to p. 11407, line 5 - *referring to the evidence of Vernon Roote*; Transcript vol 5, May 13, 2019, p. 445, line 10 to p. 446, line 2 and p. 487, line 18 to p. 490, line 6.
[19] Evidence of Dr. Gwen Reimer, Transcript vol 89, March 4, 2020, p. 11416, lines 6-12 and p. 11418, lines 12-23 - *referring to Exhibit 3949 p. 8.*
[20] Evidence of Dr. Gwen Reimer, Transcript vol 89, March 4, 2020, p. 11408, line 18 to p.11410, line 12.
[21] Evidence of Dr. Gwen Reimer, Transcript vol 89, March 4, 2020, p. 11415, lines 3-24.

3. Law Enforcement

17. Dr. Reimer opined in her report that the enforcement of the various laws against squatting on the Peninsula "suffered from the absence of a police force"[22] and from the absence of constables and other law enforcement officials in Bruce and Grey counties.[23] Dr. Reimer relied solely on an 1851/1852 census in support of this conclusion.[24] However, Dr. Reimer declined to answer – and Ontario objected to[25] – questions about contrary evidence that were put to her, stating that law enforcement between 1836 and 1854 were outside her expertise.[26] As a result, SON submits that any evidence provided by Dr. Reimer regarding the strength of civilian law enforcement in between 1836-1854 should be given no weight.

ERRORS ROOTED IN INADEQUATE RESEARCH, OVERSTATEMENT AND MISTAKEN INTERPRETATION OF DOCUMENTS

1. Genealogy

18. Dr. Reimer stated at several places in her report that Nawash was a leader in the War of 1812, who later led a large group of Pottawatomi to Owen Sound and founded the Indian settlement there.[27]

19. Dr. Reimer explained that for this matter she was relying on work done by Gwen Patterson,[28] whose conclusions she had adopted.[29]

---

[22] Dr. Gwen Reimer, "Volume 3: Saugeen - Nawash Land Cessions No. 45 1/2 (1836), No. 67 (1851), and No. 72 (1854)" (as revised 2019), Exhibit 4703, p. 98.
[23] Dr. Gwen Reimer, "Volume 3: Saugeen - Nawash Land Cessions No. 45 1/2 (1836), No. 67 (1851), and No. 72 (1854)" (as revised 2019), Exhibit 4703, p. 98, footnote 384.
[24] Evidence of Dr. Gwen Reimer, Transcript vol 92, March 9, 2020, p. 11795, lines 15 to 17.
[25] Evidence of Dr. Gwen Reimer, Transcript vol 92, March 9, 2020, p. 11796, line 19 to p. 11805, line 18.
[26] Evidence of Dr. Gwen Reimer, Transcript vol 83, Feb 12, 2020, p. 10658, line 23 to p 10660, line 9; Transcript vol 92, March 9, 2020, p. 11795, line 8 to p. 11796, line 11.
[27] Evidence of Dr. Gwen Reimer, Transcript vol 89, March 4, 2020, p. 11419, lines 3-8. See also Dr. Gwen Reimer, "Volume 1: Aboriginal Use and Occupation of Bruce Peninsula and Environs, CA 500 BC-1860 AD" (as revised 2019), Exhibit 4576, pp. 282, 161-162, 166, 188.

20. After lengthy cross-examination referring to the sources Dr. Reimer relied on for the above proposition about Nawash, the following exchange ensued:

> Q. So just summing up the primary sources, just dealing with them for a moment, that you cite for the proposition that Nawash was the leader of the War of 1812 and later led a large group of Potawatomi to Owen Sound and founded the Indian settlement. The primary sources are actually about two different people which appear to have been treated as one in your analysis; is that fair?
>
> A. I certainly accept that I need to re-examine the primary documentation. Because I agree that there's certainly an indication that they're talking about more than one individual. But to sort that out, I would need some time to look at this and then -- yeah, to re-analyze that data.[30]

21. Since no re-analysis of the data was proffered, SON submits that the above proposition advanced by Dr. Reimer about Nawash (the person), is one that was based on incomplete research, has not been established, and should be disregarded.

2. SON motivations for entering Treaty 72

22. In her report, Dr. Reimer expressed the view that one of SON's major motivations for entering Treaty 72 was to settle their debts.[31] Dr. Reimer's report included lengthy footnotes, citing 20 primary documents, that purported to support her view that SON's debts motivated

---

[28] Evidence of Dr. Gwen Reimer, Transcript vol 89, March 4, 2020, p. 11420, lines 4-16.
[29] Evidence of Dr. Gwen Reimer, Transcript vol 89, March 4, 2020, p. 11420, line 24 to p. 11421, line 8.
[30] Evidence of Dr. Gwen Reimer, Transcript vol 89, March 4, 2020, p. 11445, lines 1-16. See also Evidence of Dr. Gwen Reimer, Transcript vol 89, March 4, 2020, p. 11441, line 13 to p. 11442, line 2.
[31] Dr. Gwen Reimer, "Volume 3: Saugeen - Nawash Land Cessions No. 45 1/2 (1836), No. 67 (1851), and No. 72 (1854)" (as revised 2019), Exhibit 4703, pp. 146-152.

them to surrender these lands. [32] On cross examination, counsel began to go to each document to review their actual content, revealing that they dealt with just a few debts, some of which were paid years before the treaty, and others which were unenforceable against the First Nations.[33] As a result, Dr. Reimer retreated from her opinion on this in her testimony. In particular, Dr. Reimer agreed that:

(a) Taking on debt was a regular part of life for First Nations, including SON, because the Crown held their money for them. They would often pay for supplies by going into debt and then later asking the Crown to pay the debts out of band funds.[34]

(b) The seemingly numerous examples of debts Dr. Reimer cited in her report at footnote 589 are in fact in relation to just a few debts. Some of these were settled prior to Treaty 72. The footnote does not support the conclusion that there were a variety of outstanding debts at the time of Treaty 72.[35]

---

[32] Dr. Gwen Reimer, "Volume 3: Saugeen - Nawash Land Cessions No. 45 1/2 (1836), No. 67 (1851), and No. 72 (1854)" (as revised 2019), Exhibit 4703, p. 150, footnote 589.
[33] Evidence of Dr. Gwen Reimer, Transcript vol 92, March 9, 2020, p. 11863, line 3 to p. 11869, line 7.
[34] Evidence of Dr. Gwen Reimer, Transcript vol 92, March 9, 2020, p. 11862, line 6 to p. 11863, line 2.
[35] Evidence of Dr. Gwen Reimer, Transcript vol 92, March 9, 2020 p. 11863, line 3 to p. 11870, line 3.

(c) Several of the debts she identified in her report would have been considered to be dishonest or illegal, and therefore not valid or enforceable, by the Indian Department.[36]

(d) SON had 1500 pounds in its annuity account in 1855 to 1856. This was before any sales from the surrender began. They received an annuity of 1250 pounds each year by which they could replenish their accounts. They could use that money to pay for any debts that needed to be paid.[37]

(e) There is no evidence to suggest that either Oliphant or SON mentioned settling SON's debt as a reason to enter Treaty 72.[38]

23. In light of this, SON submits that Dr. Reimer's opinion that settling debt played a role in SON's decision to enter Treaty 72 ought to be disregarded.

3. Admitted overstatements regarding the Pottawatomi

24. In her report, Dr. Reimer identified those whom Champlain referred to as the "Fire Nation" as Pottawatomi.[39] On cross examination, she agreed that "there is certainly a debate and dispute about the association between the people of the fire, or the fire nation, and the

---

[36] Evidence of Dr. Gwen Reimer, Transcript vol 92, March 9, 2020, p. 11871, line 8 to p. 11874, line 1 and p. 11874, line 3 to p. 11879, line 2.
[37] Evidence of Dr. Gwen Reimer, Transcript vol 92, March 9, 2020, p. 11884, line 23 to p. 11885, lines 22.
[38] Evidence of Dr. Gwen Reimer, Transcript vol 92, March 9, 2020 p. 11885, line 23 to p. 11886, line 4.
[39] Evidence of Dr. Gwen Reimer, Transcript vol 88, March 3, 2020, p. 11255, lines 13-22.

Potawatomi and that this was perhaps an issue I could have analyzed more carefully in my report."[40]

25. In her report, Dr. Reimer also opined that the Pottawatomi were distinct from the Ojibway in that the Pottawatomi subsisted primarily on agriculture.[41] After being taken to a chapter by James Clifton, whom Dr. Reimer recognized as an authority on the Pottawatomi,[42] she agreed that her statement about Pottawatomi subsistence patterns may have been overstated, and that she "could have provided a more balanced view of the diversity of their economy".[43]

LEGAL INTERPRETATION

26. Dr. Reimer was alone among the experts in this litigation in expressing the view that Treaty 45 ½ had the effect of creating a general reserve on the Peninsula. Her opinion on this topic is set out at page 43 of her Volume 3 Report:

> According to the terms of the surrender text, the Saugeen Chiefs and Principal Men agreed to the following terms:
>
> - To surrender all of their territory except that tract vaguely deveined as "north of Owen's Sound" which under the terms of the surrender would hereafter be considered a 'Reserve' to which the Saugeen-Nawash First Nations held treaty title.
>
> - **By repetition of the phrase "the property (under your Great Father's control) of all Indians whom he shall allow to reside on them" in relation to Manitoulin Island, there is implied agreement that his provision**

---

[40] Evidence of Dr. Gwen Reimer, Transcript vol 88, March 3, 2020, p. 11259, lines 10-14.
[41] Evidence of Dr. Gwen Reimer, Transcript vol 88, March 3, 2020, p. 11244, line 18 to p. 11245, line 5.
[42] Evidence of Dr. Gwen Reimer, Transcript vol 88, March 3, 2020, p. 11246, lines 2-11.
[43] Evidence of Dr. Gwen Reimer, Transcript vol 88, March 3, 2020, p. 11248, lines 14-19.

> **also applied to that area north of Owen's Sound."[44]**
> [emphasis added]

27. SON submits her evidence on this point ought to be given little weight because Dr. Reimer is engaging in a grammatical construction of a provision of the treaty text, and imputing legal meaning to that provision. It amounts to a legal, rather than a factual conclusion, and therefore is outside of the scope of expert evidence. In addition, this interpretation is not supported by the documentary record. This is explained in detail in the section of the Plaintiffs' main argument entitled "Treaty 45 ½ set aside a reserve *for SON*."

SPECULATION

28. SON submits that several of Dr. Reimer's opinions were unsupported by any evidence and amounted to speculation. These opinions should be given little weight. At the same time, as will be discussed in more detail below, Dr. Reimer sometimes refused to engage with the implications of evidence contrary to her views, dismissing the inferences put to her as "speculation". There is no ready explanation for why Dr. Reimer would speculate freely in some cases, but refuse to draw inferences rooted in the documentary record in others.

1. The Half Mile Strip Surrender (Treaty No. 67)

29. Dr. Reimer explained in her report that SON had resisted the Crown's efforts to secure a reserve of a strip at the south end of the Peninsula several times prior to the half mile strip surrender in 1851 (Treaty No. 67). The last time, on June 24, 1851, the Chief stated: "We are not willing on any conditions to surrender the strip of land in question".[45] Two days later, SON agreed to a surrender of a half-mile strip. Dr. Reimer expressed the view that SON changed their

---

[44] Dr. Gwen Reimer, "Volume 3: Saugeen - Nawash Land Cessions No. 45 1/2 (1836), No. 67 (1851), and No. 72 (1854)" (as revised 2019), Exhibit 4703, p. 43.
[45] Dr. Gwen Reimer, "Volume 3: Saugeen - Nawash Land Cessions No. 45 1/2 (1836), No. 67 (1851), and No. 72 (1854)" (as revised 2019), Exhibit 4703, pp. 121-122.

minds as part of a "compromise" where they would surrender a strip of a reduced depth of half a mile.[46] She further suggested that SON had "counter-proposed" this surrender to the Crown.[47]

30. On cross-examination, Dr. Reimer agreed that there were no documents in support of her conclusion that SON had "counter-proposed" this surrender. She merely thought it was "plausible."[48] SON submits that this explanation amounts to speculation, and should not be given weight.

31. On the other hand, as noted in detail in the Plaintiffs' final argument in the section entitled "The Half Mile Strip", there are documents that were put to Dr. Reimer on cross examination to suggest an alternative explanation for SON's "change of heart" in relation to the half-mile strip surrender – that there was pressure put on Chiefs who opposed the Treaty. This included a meeting chaired by T.G. Anderson to consider the removal of SON Chiefs from office who opposed the surrender.[49] Dr. Reimer conceded it was "possible" but "simplistic" that this pressure was what caused SON to agree to the treaty after steadfastly refusing two days earlier.[50] SON submits that there is no credible reason why Dr. Reimer should find this explanation less plausible than her theory of "compromise," which has no support in the documentary record.

2. SON's Response to Threats

32. In her report, Dr. Reimer characterized Anderson's conduct in August 1854, including his threats to take SON's lands without their consent if they would not agree to surrender the

---

[46] Dr. Gwen Reimer, "Volume 3: Saugeen - Nawash Land Cessions No. 45 1/2 (1836), No. 67 (1851), and No. 72 (1854)" (as revised 2019), Exhibit 4703, pp. 121-122.
[47] Evidence of Dr. Gwen Reimer, Transcript vol 92, March 9, 2020, p. 11831, lines 11-18.
[48] Evidence of Dr. Gwen Reimer, Transcript vol 92, March 9, 2020, p. 11831, lines 18-24.
[49] Memo of Council Meeting, Saugeen and Owen Sound Chiefs, September 3, 1851 Exhibit 1881, p.111652 [Transcript at Exhibit 4792, p. 2].
[50] Evidence of Dr. Gwen Reimer, Transcript vol 92, March 9, 2020, p. 11856, lines 5 to p. 11857, line 13.

Peninsula, at "both coercive and dishonourable".[51] In her testimony, however, Dr. Reimer noted that, "Just because Anderson said it does not mean the Chiefs necessarily believed it"[52] and that it was "possible" that SON did not believe Anderson when he threatened to take the Peninsula without their consent.[53]

33. Dr. Reimer offered a few potential explanations for this view. First, she noted that SON had experience dealing with the Crown from the 1851 half-mile strip surrender.[54] She also argued that SON's relationship with Anderson had begun to deteriorate."[55] Third, she suggested that SON's counterproposal indicated that "their understanding that they need not acquiesce to everything that Anderson said to them."[56]

34. It is not clear that SON's experience in the half-mile strip surrender would have convinced them the Crown was a benevolent actor. As noted above, T.G. Anderson had chaired a meeting to consider the removal from office of Chief Kegedonce Jones in part because he opposed the surrender.[57]

---

[51] Dr. Gwen Reimer, "Volume 3: Saugeen - Nawash Land Cessions No. 45 1/2 (1836), No. 67 (1851), and No. 72 (1854)" (as revised 2019), Exhibit 4703, p. 158.
[52] Evidence of Dr. Gwen Reimer, Transcript vol 92, March 9, 2020, p. 11906, line 3 to p. 11907, line 1.
[53] Evidence of Dr. Gwen Reimer, Transcript vol 93, March 10, 2020, p. 11945, lines 10-20.
[54] Evidence of Dr. Gwen Reimer, Transcript vol 92, March 9, 2020, p. 11906, line 17 to p. 11907 line 1.
[55] Evidence of Dr. Gwen Reimer, Transcript vol 92, March 9, 2020, p. 11907, lines 2-8.
[56] Evidence of Dr. Gwen Reimer, Transcript vol 92, March 9, 2020, p. 11907, lines 8-14.
[57] Memo of Council Meeting, Saugeen and Owen Sound Chiefs, September 3, 1851 Exhibit 1881, p. 111652 [transcript at Exhibit 4792, p. 2].

35. In addition, there is no documentary record to support Dr. Reimer's assertion that the deterioration of the relationship with Anderson somehow led SON to disbelieve his threats.[58] There is no evidence that anyone communicated to SON that Anderson's threat to take their lands without consent would not be acted upon.[59] SON submits that Dr. Reimer's opinion that SON may not have believed Anderson is based on pure speculation, and should be given no weight.

36. Finally, SON's offer of the inland wedge was a sharp change from their repeated refusal to surrender *any* land on the Peninsula prior to Anderson's threats.[60] SON submits that this suggests they took Anderson's threats very seriously indeed.

37. Dr. Reimer was shown evidence that the Rama First Nation expressed concerns about the Crown breaking faith and taking reserve lands that they had promised to protect.[61] Dr. Reimer agreed that Rama attended general councils with Saugeen, and that the First Nations present at these councils discussed issues of common concern.[62] However, she refused to comment on

---

[58] Evidence of Dr. Gwen Reimer, Transcript vol 92, March 9, 2020, p. 11908, line 13 to p. 11911, line 20.
[59] Evidence of Dr. Gwen Reimer, Transcript vol 92, March 9, 2020, p. 11911, line 25 to p. 11912, line 6.
[60] These repeated refusals are discussed at length in the section of the Plaintiffs Final Argument entitled *Pressure for the Peninsula Pre-October 1854.*
[61] Evidence of Dr. Gwen Reimer, Transcript vol 93, March 10, 2020, p. 11940, line 12 to p. 11944, line 22; Rama Indians to T. G Anderson, Superintendent Indian Affairs, Exhibit 2106 [transcript at Exhibit 4782] - *Answers from the Rama Indians*.
[62] Evidence of Dr. Gwen Reimer, Transcript vol 93, March 10, 2020, p. 11948, line 22 to p. 11949, line 24.

whether it was therefore likely that Rama would have shared its perspective on its interactions with the Crown with other First Nations present, including SON.[63]

38. Dr. Reimer was comfortable, in other words, speculating in the absence of documentary evidence that SON believed Anderson's threats, but was not comfortable drawing an inference that First Nations may have also shared amongst themselves their negative experiences with the Crown.

3. Lack of Notice of the Treaty Council

39. One of the issues in this litigation is whether Oliphant gave notice to the SON Chiefs in advance of the October 13, 1854 treaty council. There is no documentary record to indicate that any such notice was given.

40. Dr Reimer suggested that notice may have been given and simply not been recorded in any record or document. Because the trip was "relatively arduous" and Oliphant's mission was "important", Dr. Reimer stated that she believed Oliphant would not have arrived unannounced at Saugeen. She noted as well, that McNabb and Rankin, two Crown officials, knew to be present in Saugeen for the treaty council.[64]

41. SON submits that Dr. Reimer's opinion on this point amounts to speculation, and is contradicted by the documentary record.

---

[63] Evidence of Dr. Gwen Reimer, Transcript vol 93, March 10, 2020, p. 11949, line 25 to p. 11950, line 14.
[64] Evidence of Dr. Gwen Reimer, Transcript vol 83, February 12, 2020, p. 10682, line 23 to p. 10684, line 6.

42. There is an Agreed Statement of Fact that establishes that Oliphant passed through Owen Sound on his way to negotiate Treaty 72, and that the SON Chiefs were not present when Oliphant arrived at Saugeen to negotiate on October 12, 1854. [65]

43. In cross-examination, Dr. Reimer agreed that:

(a) There is no indication in Oliphant's report of the treaty council that he stopped to invite the Nawash Chiefs to the treaty council when he passed nearby Owen Sound.[66]

(b) Oliphant's accounts of the treaty do not make any reference to him sending advance notice of the treaty council to the SON Chiefs.[67]

(c) Anishinaabe Chiefs would generally arrange to be at a council if they had notice of such a council, though there are exceptions to this pattern;[68]

(d) Oliphant admitted that he sought to avoid allowing the SON Chiefs opportunities to consult amongst themselves prior to the treaty council.[69]

---

[65] Agreed Statement of Fact regarding events in 1854 concerning the negotiation of Treaty 72, Exhibit 3927, p. 2.
[66] Evidence of Dr. Reimer, Transcript vol 93, March 10, 2020, p. 11998, lines 3-7; Oliphant to Lord Elgin, November 3, 1854, Exhibit 2175, pp. 3-11.
[67] Evidence of Dr. Reimer, Transcript vol 93, March 10, 2020, p. 11991, lines 5-21 and p. 12001, lines 6-19. See also Oliphant to Lord Elgin, November 3, 1854, Exhibit 2175, pp. 3-11.
[68] Evidence of Dr. Reimer, Transcript vol 93, March 10, 2020, p. 11999, lines 5-22.
[69] Evidence of Dr. Reimer, Transcript vol 93, March 10, 2020, p. 12003, lines 12 to p. 12004, line 9; See also Oliphant to Lord Elgin, November 3, 1854, Exhibit 2175, p. 4 – "*Shortly after, the chiefs of the other bands arrived, and anxious not to allow them an opportunity of consulting either among themselves or with Europeans, I called a grand council at 7p.m. in the church at the Indian Village…"*

(e) There is no documentary evidence that Oliphant sent advance notice of the October 1854 treaty council to Charles Rankin or Alexander McNabb.[70]

(f) Alexander McNabb lived in Southampton near the Saugeen village. Charles Rankin lived at Owen Sound. Oliphant could have sent them a message to attend the council when he arrived at Saugeen on October 12, 1854.[71]

44. SON submits that the evidence suggests that Oliphant did not give any advance notice of the treaty council was given to the SON Chiefs, and that this was part of his effort to avoid the Chiefs from consulting amongst themselves prior to the Treaty. Dr. Reimer's contrary view is purely speculation.

4. Errors and Speculation in Maps Report

45. Dr. Reimer also produced a supplementary report in relation to a series of maps generated by Ontario for the purposes of the cross examination of Prof. Brownlie. Dr. Reimer was asked to review the historical documents Ontario counsel had identified as supporting the maps, and to explain the inferences that could be drawn from those documents.[72]

46. As explained in more detailed in Appendix E, Tab 53 – Ontario's Maps, a number of Dr. Reimer's opinions set out in that report were based on a) errors in the interpretation of historical documents; b) a failure to refer to relevant documents that could shed light on SON's intentions at the relevant period; and c) faulty or unwarranted assumptions and speculation. Where this is

---

[70] Evidence of Dr. Reimer, Transcript vol 93, March 10, 2020, p. 11991, lines 22-25.
[71] Evidence of Dr. Reimer, Transcript vol 93, March 10, 2020, p. 11995, line 5 to p. 11996, line 18.
[72] Evidence of Dr. Gwen Reimer, Transcript vol 93, March 10, 2020, p. 12048, line 10 to p. 12049, line 1; Maps Report Exhibit 4710, p. 1.

the case, SON submits that her opinions, and the maps they support, should be given little to no weight.

CHANGE OF OPINION REGARDING OLIPHANT'S CONDUCT

47. About a week prior to commencing her testimony[73], Dr. Reimer changed the opinion stated in her report about the conduct of Oliphant at the treaty council in 1854. Her original opinion was that Oliphant's behaviour was "unbefitting a representative of the Crown", that the tone set by Oliphant was "manipulative", and that he employed "questionable" tactics which were "not beyond reproach". She deleted all of these words from her report and substituted more neutral words.[74] Her key explanation for this was that she had failed to distinguish between Oliphant's conduct before the treaty council began from his conduct during the formal council.[75] However, she did admit that Oliphant's prior conduct would not have been forgotten once the council started.[76] Nonetheless, she maintained that making this distinction between pre-council conduct and conduct during the council somehow transformed her opinion of Oliphant's behaviour from "conduct unbefitting" to "acceptable behaviour".[77] She maintained this even though she admitted that had Oliphant conducted himself during the council the way he had just prior to the council, it would have been conduct unbefitting.[78]

---

[73] Evidence of Dr. Gwen Reimer, Transcript vol 94, March 11, 2020, p. 12155, line 25 to p. 12156, line 4.
[74] Changes to Dr. Gwen Reimer Opinion Volume 3, Exhibit 4706.
[75] Evidence of Dr. Gwen Reimer, Transcript vol 84, February 13, 2020, p. 10706, line 10 to p. 10713, line 11.
[76] Evidence of Dr. Gwen Reimer, Transcript vol 94, March 11, 2020, p. 12173, line 19 to p. 12174, line 22.
[77] Evidence of Dr. Gwen Reimer, Transcript vol 94, March 11, 2020, p. 12176, line 17 to p. 12177, line 11.
[78] Evidence of Dr. Gwen Reimer, Transcript vol 94, March 11, 2020, p. 12177, line 23 to p. 12178, line 2.

48. SON submits that Dr. Reimer's explanation for this change of opinion is unconvincing. Conveniently, it brought her testimony into closer alignment with the positions taken by Ontario in this litigation. SON submits that this changed opinion ought to be disregarded.

RELEVANCE AND WEIGHT OF DORAN RITCHIE'S EVIDENCE

1. Doran Ritchie is a member of Saugeen First Nation, and his clan is the bear clan.[1] Mr. Ritchie is an employee of SON's Environment Office, which is a group of technical advisors to the SON Joint Council who provide information and advice on resource management through SONTL.[2]

2. Mr. Ritchie testified about his previous experience in wildlife management and park regulations, which included both academic study and positions with the provincial and federal governments.[3] Mr. Ritchie testified that his reasons for leaving positions with the federal government and the provincial government included targeted enforcement efforts at SON harvesters, which he testified that he believed were unfair and based on profiling.[4]

3. Mr. Ritchie testified about his knowledge of the resources – fish, water, wood, and wildlife – throughout SONTL, which he learned about from a very young age from his parents and grandparents. He shared this knowledge in court by illustrating a map of the SONTL with historic harvesting locations.[5] Mr. Ritchie also described how he learned about SONTL and its resources

---

[1] Evidence of Doran Ritchie, Transcript vol 16, May 31, 2019, p. 1292, lines 9-23.
[2] Evidence of Doran Ritchie, Transcript vol 16, May 31, 2019, p. 1302, line 17 to p. 1303, line 4.
[3] Evidence of Doran Ritchie, Transcript vol 16, May 31, 2019, p. 1297, line 9 to p. 1298, line 15.
[4] Evidence of Doran Ritchie, Transcript vol 16, May 31, 2019, p. 1295, line 13 to p. 1296, line 13.
[5] Evidence of Doran Ritchie, Transcript vol 16, May 31, 2019, p. 1305, line 3 to p. 1306, line 20; p. 1308, line 17 to p. 1317, line 25; Annotated Version of the Map previously marked as Exhibit Q, Exhibit 4000.

from the elders in Saugeen and Nawash. He referred to specific teachers such as Vernon Roote and Paul Nadjiwon who had shared their knowledge with him.[6]

4. Mr. Ritchie also provided detailed evidence about contemporary traditional harvesting practices and locations throughout SONTL, again illustrating traditional land use throughout SONTL with the assistance of maps.[7] He provided evidence about informal agreements and understandings that he and other SON members have with private landowners throughout SONTL to guarantee access for traditional harvesting.[8]

5. Mr. Ritchie's evidence provides insight in respect of the following matters:

(a) SON's historical harvesting and land use throughout SONTL, as is passed down through traditional knowledge and oral history teachings;

(b) Contemporary harvesting and land use throughout SONTL by SON members, including Mr. Ritchie's own experiences harvesting and using the land, what he has learned from elders and other SON harvesters, and how he teaches other SON members about exercising their rights throughout SONTL; and,

---

[6] Evidence of Doran Ritchie, Transcript vol 16, May 31, 2019, p. 1312, line 14 to p. 1313, line 6 and p. 1322, lines 17-21.

[7] Map of the Northern Peninsula Harvesting Areas, Exhibits 4001; Annotated map of the Northern Peninsula Harvesting Areas, Exhibit 4002; Map of the Central Peninsula Harvesting Area, Exhibit 4003; Annotated map of the Central Peninsula Harvesting Area, Exhibit 4004; Map of South Peninsula Harvesting Area, Exhibit 4005; Annotated map of South Peninsula Harvesting Area, Exhibit 4006; Map of Eastern Territory Harvesting Area, Exhibit 4007; Annotated map of Eastern Territory Harvesting Area, Exhibit 4008; Map of Western Territory Harvesting Area, Exhibit 4009; Annotated map of Western Territory Harvesting Areas, Exhibit 4010.

[8] Evidence of Doran Ritchie, Transcript vol 16, May 31, 2019 p. 1340, line 17 to p. 1341, line 3; p. 1363, lines 8-23; and p. 1375, line 9 to p. 1376, line 8.

(c) SON members' regular practice of harvesting on, and assertion of the right to, access all lands throughout SONTL that are suitable for harvesting. This is the case regardless of whether they are public or private lands. Mr. Ritchie testified about securing access to private lands by way of informal agreements or understandings reached with private landowners such as Mr. Gary Harron.

6. Mr. Ritchie described the sources of his knowledge about resources in SONTL, what he has learned from his relatives and elders, his own experiences, and what he has also learned from his professional training and work experience in natural and wildlife resources.[9]

7. In response to questions from counsel for Canada, Mr. Ritchie provided clear and direct answers about how and what he harvests, what firearms he uses, and whether SON members harvest more regularly on reserve lands than other lands on the Peninsula. In response to the latter question, Mr. Ritchie explained that while he agrees that SON members may more frequently harvest on reserve lands, this is not because of any difference between SON's view of reserve lands and other lands in SONTL, but is rather a matter of proximity.[10]

8. Mr. Ritchie was similarly clear in responding to questions from Ontario counsel about how SON Joint Council makes decisions and the functions of the SON Environment Office.[11] He identified when he did not have sufficient knowledge to respond to Ontario counsel's questions.[12] Ontario counsel asked specific questions about whether the SON Environment Office had considered restricting public access to parks if the litigation was successful. Mr. Ritchie clarified

---

[9] Evidence of Doran Ritchie, Transcript vol 16, May 31, 2019, p. 1320, line 12 to p. 1324, line 19.
[10] Evidence of Doran Ritchie, Transcript vol 16, May 31, 2019, p. 1391, line 21 to p. 1392, line 3.
[11] Evidence of Doran Ritchie, Transcript vol 16, May 31, 2019, p. 1397, line 5 to p. 1400, line 19.
[12] Evidence of Doran Ritchie, Transcript vol 16, May 31, 2019, p. 1401, line 13 to p. 1402, line 14.

that he views his role as being about protecting and preserving ecological values and cultural heritage, and that he has not discussed restricting access to any parcels of land, provincial or national park lands.[13]

9. Mr. Ritchie was direct in sharing his own experiences and knowledge and Anishinaabe teachings about SONTL and traditional harvesting. He was detailed in his responses to all questions put him in both chief and cross examination. SON submits that Mr. Ritchie's evidence should be accepted.

[13] Evidence of Doran Ritchie, Transcript vol 16, May 31, 2019, p. 1404, lines 3-12.

RELEVANCE AND WEIGHT OF JIM RITCHIE'S EVIDENCE

1. James (Jim) Robert Ritchie is a member of Saugeen First Nation, and resides in Saugeen.[1] Mr. Ritchie testified about an interview he gave to Prof. Jarvis Brownlie on June 2, 2016.[2] The content of that interview included Mr. Ritchie's knowledge about the oral history of Saugeen First Nation and SON that he learned from his grandfather,[3] as well as his own experiences and knowledge as a member of Saugeen First Nation, his experiences growing up in Saugeen exercising his harvesting rights (including fishing and hunting),[4] and his experiences as an elected councillor of Saugeen First Nation's Chief and Council.[5]

2. Mr. Ritchie's evidence provides this Court with insight about several matters:

   (a) the history of SON's assertion of rights, which Mr. Ritchie learned from his grandfather and other relatives;[6]

   (b) his own recollections and perceptions of the Indian Agent as a child in Saugeen, and experiences hunting and fishing when he was a child in SONTL;[7] and,

---

[1] Evidence of James Ritchie, Transcript vol 7, May 16, 2019, p. 659, line 18 to p. 660, line 18.
[2] Evidence of James Ritchie, Transcript vol 7, May 16, 2019, p. 649, line 20 to p. 650, line 1.
[3] Evidence of James Ritchie, Transcript vol 7, May 16, 2019, p. 651, line 17 to p. 654, line 9.
[4] Evidence of James Ritchie, Transcript vol 7, May 16, 2019, p. 656, line 14 to p. 658, line 15.
[5] Evidence of James Ritchie, Transcript vol 7, May 16, 2019, p. 658, lines 16-24.
[6] Evidence of James Ritchie, Transcript vol 7, May 16, 2019, p. 651, line 20 to p.652, line 5.
[7] Evidence of James Ritchie, Transcript vol 7, May 16, 2019, p. 661, line 4 to p. 662, line 9 and p. 656, line 4 to p.658, line 15.

(c) his experiences as a Saugeen elected councillor, and the role he played in asserting SON's legal rights via protests, political statements and directing legal actions.[8]

3. Mr. Ritchie provided an account of his own experiences as well as his knowledge of Saugeen history learned from his grandfather and other relatives and elders. He responded to questions put to him by both Canada and Ontario to clarify his understanding of SON's legal rights and SON's ability to assert those rights.[9] He responded to questions by Ontario about his knowledge of when SON was able to start its own research into its legal claims and to hire legal representation to bring such claims forward.[10] Mr. Ritchie also responded to questions about his knowledge of the process followed for the interview Prof. Jarvis Brownlie conducted 3 years prior to his testimony for this Court.[11]

4. Ontario counsel put to Mr. Ritchie questions about whether he or his late brother, Chester Ritchie, did their own research into the legal claims.[12] While it is not entirely clear why Ontario counsel was pressing Mr. Ritchie on whether he or other members of SON did research about their own history or were engaged in land claim matters and legal claims, to the extent that it may be to suggest that Mr. Ritchie's evidence should not be given weight or that his recollections or understanding of his history from traditional knowledge or oral teachings by elders are somehow tainted, SON submits there is no basis for such a conclusion.

---

[8] Evidence of James Ritchie, Transcript vol 7, May 16, 2019, p. 658, line 19 to p.659, line 10; p.671, line 25 to p. 672, line 10 and p. 672, line 22 to p. 675, line 12.
[9] Evidence of James Ritchie, Transcript vol 7, May 16, 2019, p. 699, line 15 to p. 701, line 7 and p. 706, line 2 to p. 707, line 4.
[10] Evidence of James Ritchie, Transcript vol 7, May 16, 2019, p. 719, line 4 to p. 724, line 3.
[11] Evidence of James Ritchie, Transcript vol 7, May 16, 2019, p. 714, line 12 to p. 717, line 6.
[12] Evidence of James Ritchie, Transcript vol 7, May 16, 2019, p. 715, line 9 to p.717, line 6 and p. 732, line 5 to p.733, line 19.

5. Mr. Ritchie stated what he could recall and what he could not. He also testified about the basis and sources of knowledge on which his evidence relied – whether they be personal experiences, recollections or teachings from his grandfather or other elders. For instance, Mr. Ritchie testified about:

(a) The history of SON he learned from his grandfather, Oliver Nashkwa, who was born in 1906, and who served on Saugeen Council in the 1950s and 60s. Mr. Nashkwa told him stories of SON's history, taught him Anishinaabemowin, and also taught him that they could "hunt anywhere he said"; [13]

(b) His recollection and personal experience of fearing the Indian Agent in Saugeen when he was a child because the Indian Agent was perceived as playing a role in sending kids away;[14] and,

(c) His knowledge and personal experience hunting and fishing throughout SONTL, and his role in asserting SON's fishing rights in the late 1980s/early 1990s as an elected councillor. Mr. Ritchie testified about his own experience facing fishing charges as well.[15]

6. SON submits there is no reason discount Mr. Ritchie's testimony about his personal experiences and observations, and knowledge he received from his grandfather, because he was involved in elected office in his community, or otherwise read the available written sources that discuss SON's history. Mr. Ritchie explained that all elected councillors would work on the land

---

[13] Evidence of James Ritchie, Transcript vol 7, May 16, 2019, p. 651, line 20 to p. 657, line 16.
[14] Evidence of James Ritchie, Transcript vol 7, May 16, 2019, p. 661, line 4 to p. 664, line 7.
[15] Evidence of James Ritchie, Transcript vol 7, May 16, 2019, p. 658, line 16 to p. 659, line 10; and p. 672, line 2 to p. 677, line 4.

claims, and stated his own interest in reading books and materials that have been written about SON.[16] There is no basis for finding that Mr. Ritchie was unable to separate the traditional knowledge shared with him by elders such as his grandfather from information he had read in books.

7. SON submits that Mr. Ritchie's evidence should be accepted.

[16] Evidence of James Ritchie, Transcript vol 7, May 16, 2019, p. 733, lines 11-19 and p. 735, line 3 to p. 737, line 5.

RELEVANCE AND WEIGHT OF VERNON ROOTE'S EVIDENCE

1. Vernon Roote is a traditional knowledge holder from Saugeen. His Anishinaabemowin name is M'Kdaa Moos-Cuss, which means black blue heron.[1] He is of the bear clan.[2] His first language is Anishinaabemowin.[3]

2. He has both an Anishinaabe traditional education and a European education.[4] He has held many administrative and leadership positions in his community and in wider Anishinaabe organizations, including Band Administrator, Councillor, and Chief at the Saugeen First Nation, and Grand Chief of the Union of Ontario Indians. He is now retired.[5]

3. His Anishinaabe education began with his grandfather, who taught him language, styles of life, medicines, and spiritual outlook.[6] His education continued with ceremonies such as the rain dance at various Indigenous communities.[7]

4. He is a pipe carrier, which was bestowed on him when the traditional people involved with the rain dance decided it was appropriate for him.[8] The pipe is a sacred item used for prayer.[9] Mr.

---

[1] Evidence of Vernon Roote, Transcript vol 5, May 13, 2019, p. 426, lines 2-4.
[2] Evidence of Vernon Roote, Transcript vol 5, May 13, 2019, p. 426, lines 11-15.
[3] Evidence of Vernon Roote, Transcript vol 5, May 13, 2019, p. 429, lines 6-11.
[4] Evidence of Vernon Roote, Transcript vol 5, May 13, 2019, p. 429, line 12 to p. 430, line 7.
[5] Evidence of Vernon Roote, Transcript vol 5, May 13, 2019, p. 427, line 19 to p. 429, line 5.
[6] Evidence of Vernon Roote, Transcript vol 5, May 13, 2019, p. 429, lines 14-20.
[7] Evidence of Vernon Roote, Transcript vol 5, May 13, 2019, p. 430, line 8 to p. 431, line 9.
[8] Evidence of Vernon Roote, Transcript vol 5, May 13, 2019, p. 431, lines 10-15.
[9] Evidence of Vernon Roote, Transcript vol 5, May 13, 2019, p. 431, lines 16-19.

Roote explained that the responsibilities of a pipe carrier are to "try and abide by the Seven Grandfather Teachings and try to be the best human being that they can be for everyone".[10]

5. Mr. Roote has written a book called K'an Das Win. He explained his purpose in writing it as follows:

> The book that I put together was meant to help students, and perhaps those people who were asking of my past and my involvement and working with the community and people.
>
> The book is broken down into seven teachings. And in those seven teachings I try and make a biography of myself, and also the events that I was involved with so that people can understand that if you're going to obtain trust and respect from people throughout the land, and throughout the community, then you must act in a certain way and try and be that person that they expect you to be in a good way.
>
> So I tried to put all that together in the book so that students who are asking me to come and speak about myself at local high schools perhaps, whatever event took place, and I was able to use that as my guiding – my guiding speech or guiding teaching to them.[11]

6. Mr. Roote testified about a wide range of matters, including: the social and political structures of the Anishinaabe, Anishinaabe customs, Anishinaabe perspectives on the land and the water, Anishinaabe spirituality, SON's sense of territory, traditional knowledge about wars with the Haudenosaunee, traditional knowledge about treaties, hunting, fishing and gathering, and some relatively recent events at which he was present.

7. Throughout his testimony, Mr. Roote was careful to specify which knowledge was passed down to him from traditional knowledge holders, which came to him from reading documents,

---

[10] Evidence of Vernon Roote, Transcript vol 5, May 13, 2019, p. 431, line 25 to p. 432, line 5.
[11] Evidence of Vernon Roote, Transcript vol 5, May 13, 2019, p. 432, line 12 to p. 433, line 5.

which was from his personal experience, and which was from more than one of these sources. For instance, Mr. Roote testified that:

(a) The evidence he gave about the Three Fires Confederacy and other Indigenous nations in the Great Lakes area came from people he had talked to, but also from reading documents. For the traditional side of the knowledge he named as his sources Livingston Nawash, Alex Roote, James Mason, Roy Wesley, Robert Nashkewa, Wilmer Nadjiwon, and Frank Solomon.[12]

(b) His evidence about customs of control of the territory came from these same people, whom he considered knowledgeable in oral history which had been passed down to them, which they were passing on to him.[13]

(c) At a young age his parents had taken him all around Lake Huron and Georgian Bay. That knowledge he blended with oral history to contribute to his understanding of where the indigenous communities around Lake Huron/Georgian Bay were and how they lived.[14]

(d) His knowledge of the extent of SON territory came from both historical documents and oral history.[15]

(e) His knowledge of teachings about grave sites came from the Seven Grandfather Teachings, which had been imparted to him from a young age.[16]

---

[12] Evidence of Vernon Roote, Transcript vol 5, May 13, 2019, p. 436, line 2 to p. 437, line 23.
[13] Evidence of Vernon Roote, Transcript vol 5, May 13, 2019, p. 446, lines 3-9.
[14] Evidence of Vernon Roote, Transcript vol 5, May 13, 2019, p. 450, lines 4-22.
[15] Evidence of Vernon Roote, Transcript vol 5, May 13, 2019, p. 462, line 17 to p. 463, line 3.
[16] Evidence of Vernon Roote, Transcript vol 5, May 13, 2019, p. 475, line 17 to p. 478, line 3.

(f) His knowledge about Treaty 72 included comments he had heard from his grandmother, Isabel Roote, Chief James Mason, and other members of Council.[17]

(g) His knowledge about the Huron asking for SON's help when under attack from the Haudenosaunee came from his grandfather.[18] Knowledge about the battle that resulted in Skull Mound is well-known with the Saugeen community.[19]

8. SON submits that these examples show both that Mr. Roote has a precise memory about what knowledge has been passed down to him and from whom, and that he is forthright in explaining other sources of his knowledge. Therefore his knowledge can be considered reliable.

---

[17] Evidence of Vernon Roote, Transcript vol 5, May 13, 2019, p. 484, line 16 to p. 485, line 7.
[18] Evidence of Vernon Roote, Transcript vol 5, May 13, 2019, p. 488, line 15 to p. 489, line 4.
[19] Evidence of Vernon Roote, Transcript vol 5, May 13, 2019, p. 490, lines 1-6.

RELEVANCE AND WEIGHT OF FRANK SHAWBEDEES'S EVIDENCE

1. Franklin (Frank) Shawbedees was a witness whose evidence was entered under Rule 36 of the *Rules of Civil Procedure*. His examination-in-chief was conducted on September 13, 2002, and his cross examination was conducted on December 4, 2002.

2. Mr. Shawbedees was born on April 2, 1939,[1] in Saugeen, went to school there, and lived in Saugeen most of his life.[2] His aboriginal name was Squdahpinnehshee,[3] He primarily spoke Ojibway, or a combination of Pottawatomi, Ojibway and Odawa, growing up.[4] He was a member of Saugeen First Nation, and he identified as Pottawatomi and Ojibway. He was part of the loon clan.[5] He also belonged to the Three Fires Confederacy.[6] Mr. Shawbedees' mother, step-father, and the grandparents he knew were all from Saugeen as well.[7] He was elected as a councillor in 1969 and served as a councillor for many years.[8]

---

[1] Rule 36 Evidence of Frank Shawbedees, September 13, 2002, Examination-in-chief, Exhibit 3947, p. 5, line 4.
[2] Rule 36 Evidence of Frank Shawbedees, September 13, 2002, Examination-in-chief, Exhibit 3947, p. 7, line 22 to p. 8, line 6.
[3] Rule 36 Evidence of Frank Shawbedees, September 13, 2002, Examination-in-chief, Exhibit 3947, p. 4, lines 17-26.
[4] Rule 36 Evidence of Frank Shawbedees, September 13, 2002, Examination-in-chief, Exhibit 3947, p. 6, lines 26-28; Rule 36 Evidence of Frank Shawbedees, December 4, 2002, Exhibit 3948, p. 8, line 10 to p. 10, line 8.
[5] Rule 36 Evidence of Frank Shawbedees, September 13, 2002, Examination-in-chief, Exhibit 3947, p. 5, line 14.
[6] Rule 36 Evidence of Frank Shawbedees, September 13, 2002, Examination-in-chief, Exhibit 3947, p. 5, lines 7-12.
[7] Rule 36 evidence of Frank Shawbedees, September 13, 2002, Examination-in-chief, Exhibit 3947, p. 5, line 15 to p. 6, line 17.
[8] Rule 36 Evidence of Frank Shawbedees, September 13, 2002, Examination-in-chief, Exhibit 3947, p. 17, line 21; Rule 36 Evidence of Frank Shawbedees, December 4, 2002, Cross examination, Exhibit 3948, p. 35, line 28 to p. 36, line 6.

3. Mr. Shawbedees testified on the following subjects:

(a) The integration of Pottawatomi into SON;[9]

(b) His knowledge respecting treaties, including the circumstances of the treaties, and the exclusion of water territory and shorelines from the surrender; [10]

(c) Fishing and hunting, including where it was done, and where smoke houses were located;[11]

(d) The relationship between the Indian agent and Chief and Council and the band;[12] and

(e) The Iroquois (or Haudenosaunee) Wars.[13]

4. This evidence is relevant to the identity of SON, harvesting rights, limitations and laches, and SON's control over SONTL.

---

[9] Rule 36 Evidence of Frank Shawbedees, September 13, 2002, Examination-in-chief, Exhibit 3947, p.8, line 7 to p. 9, line 10; Rule 36 Evidence of Frank Shawbedees, December 4, 2002, Cross examination, Exhibit 3948, p. 5, line 23 to p. 15, line 19.
[10] Rule 36 Evidence of Frank Shawbedees, September 13, 2002, Examination-in-chief, Exhibit 3947, p. 9, line 11 to p. 12, line 22; Rule 36 Evidence of Frank Shawbedees, December 4, 2002, Cross examination, Exhibit 3948, p. 20, line 25 to p. 30, line 27 and p. 60, line 8 to p. 80, line 25.
[11] Rule 36 Evidence of Frank Shawbedees, September 13, 2002, Examination-in-chief, Exhibit 3947, p.12, line 23 to p. 13, line 27.
[12] Rule 36 Evidence of Frank Shawbedees, September 13, 2002, Examination-in-chief, Exhibit 3947, p. 13, line 27 to p. 19, line 25; Rule 36 Evidence of Frank Shawbedees, December 4, 2002, Cross examination, Exhibit 3948, p. 30, line 28.
[13] Rule 36 Evidence of Frank Shawbedees, December 4, 2002, Cross examination, Exhibit 3948, p. 19, line 24 to p. 20, line 24.

5. Mr. Shawbedees was clear about where and how he learned the information he shared.[14] SON submits that he was a credible witness, and his evidence should be given weight.

[14] See, for example, Rule 36 Evidence of Frank Shawbedees, December 4, 2002, Cross examination, Exhibit 3948, p. 51, line 6 to p. 60, line 7.

RELEVANCE AND WEIGHT OF GREG SIKMA'S EVIDENCE

1. Greg Sikma is an employee of the Ministry of Natural Resources and Forestry.[1] Mr. Sikma was called by Ontario to explain the creation of maps tendered by Ontario as exhibits purporting to be illustrations of parts of the Peninsula that are described in certain historical documents that are exhibits in this trial.[2] Mr. Sikma testified to the process he employed in creating the maps.

2. SON does not dispute Mr. Sikma's evidence about the diligence he employed in creating the maps. Mr. Sikma's evidence also confirmed the following in respect of Ontario's maps:

(a) the instructions about what should be illustrated on the maps Mr. Sikma created came form Ontario's legal counsel,[3] rather than from Mr. Sikma's own interpretation of all the historical documents (he only looked at two historical documents[4]) or any interpretation or opinion from a historian about the historical documents the maps purport to illustrate;

---

[1] Evidence of Greg Sikma, Transcript vol 80, February 3, 2020, p. 10196, line 24 to p. 10197, line 1.

[2] Illustration of Tracts Intended for the Nawash at Owen Sound, John Jones Band at Colpoy's Bay, Caughnawaga Mohawks and the Credit Mississaugas based in part on Exhibit 1873, 2175, Exhibit 4866; Illustration of Tracts Intended for the Nawash at Owen Sound, John Jones Band at Colpoy's Bay, Caughnawaga Mohawks and the Credit Mississaugas based in part on Exhibit 1873, 2401, 2449, 2175, Exhibit 4867; Illustration of approximate area described in Exhibit 2095 (Keating's proposal to the Chiefs and Principal Men, 5 July 1854), Exhibit 4868; Illustration of Bruce Peninsula with approximate acreage of North and South Regions, Exhibit 4869; Illustration of Approximate Areas Described in Ex 2104, Ex 2105, Exhibit 4870; Illustration of Approximate Areas Described in Ex 2120, Exhibit 4871; and Treaty 72 Reserves and Caughnawaga Tract at the Start of 1856, Exhibit 4872.

[3] Evidence of Greg Sikma, Transcript vol 80, February 3, 2020, p. 10277, line 9 to p. 10278, line 1.

[4] Map of the Saugeen Indian Peninsula Shewing the Township of Ablemarle, Keppel and Amabel, Exhibit 2401; Copies of Extracts of recent Correspondence respecting Alterations in the Indian

(b) Mr. Sikma did not have any contact or interaction with Dr. Gwen Reimer;[5] and

(c) the instructions from Ontario counsel included Google maps that were images of what the maps should look like, and Mr. Sikma agreed that he created the maps (Exhibits 4866-4972) based on these Google maps.[6]

3. In Mr. Sikma's in chief examination, Ontario counsel asked him – in respect of each map – whether there was any different way Mr. Sikma could have illustrated these maps. On cross examination, Mr. Sikma clarified that in answering those questions, he assumed he had to obey the instructions and parameters he was given by Ontario legal counsel.[7]

4. SON submits that Mr. Sikma provided a fair summary of how he was instructed to and how he created the maps. Based on his testimony, SON submits that Ontario's maps at Exhibit 4866, Exhibit 4867, Exhibit 4868, Exhibit 4869, Exhibit 4870, Exhibit 4871, and Exhibit 4872 should be given little to no weight because it is clear that they are simply illustrations of Ontario's legal counsel's instructions and thus interpretations of historical documents, rather than a reflection of independent historical interpretation of these documents by an expert witness. This is explained in further detail in the appendix regarding Ontario's maps at Exhibits 4866-4872 (Appendix E Tab 53).

Department in Canada - Despatches from the Governor-General of Canada, Exhibit 2175; Evidence of Greg Sikma, Transcript vol 80, February 3, 2020, p. 10284, lines 8-25.

[5] Evidence of Greg Sikma, Transcript vol 80, February 3, 2020, p. 10278, lines 2-6.

[6] Evidence of Greg Sikma, Transcript vol 80, February 3, 2020, p. 10288, line 23 to p. 10291, line 22.

[7] Evidence of Greg Sikma, Transcript vol 80, February 3, 2020, p. 10291, line 23 to p. 10293 line 14.

RELEVANCE AND WEIGHT OF TROY UNRUH'S EVIDENCE

1. Mr. Troy Unruh was called as a witness by the Defendant Township of Georgian Bluffs on behalf on all of the Municipal Defendants except for County Grey.[1] Mr. Unruh has worked for Georgian Bluffs since June 19, 2006.[2] He is currently the utility co-ordinator for the Municipality, a role he started in 2015. He has previously worked for Georgian Bluffs as a plow operator, a grade operator, and acting road supervisor.[3]

2. Mr. Unruh's testimony was focussed on what Georgian Bluffs does respecting construction and maintenance of roads, the minimum maintenance standards Georgian Bluffs must meet, and his own roles and responsibilities in that area.

3. For the reasons explained in Appendix E, Tab 14 respecting the relevance and weight of the evidence given by Ms. Wendi Hunter, Mr. Unruh's evidence is irrelevant to this stage of the proceedings, and belongs in Phase 2 of this trial when discoveries with the Municipalities have been completed. As with Ms. Hunter's evidence, Mr. Unruh provided a broad overview of his knowledge respecting the Georgian Bluffs road network, and specifically its construction and maintenance. He did not get into detail with respect to the roads on a road by road basis, making his evidence similarly incomplete. Again, all the Court has been provided with are broad statements, without the necessary detail to determine to which roads the broad statements apply, and to which they do not. For example, it was clear from Mr. Unruh's testimony that there are

---

[1] Submissions of Counsel for Bruce County, Transcript vol 95, March 12, 2020, p. 12279, line 1 to 11.
[2] Evidence of Mr. Troy Unruh, Transcript vol 95, March 12, 2020, p. 12332, lines 1-4.
[3] Evidence of Mr. Troy Unruh, Transcript vol 95, March 12, 2020, p. 12332, lines 5-23.

varying maintenance requirements and levels of use associated with different types of roads.[4] But no information has been provided about which of the roads in Georgian Bluffs require which level of maintenance.

Relevance and Weight of the Evidence of Ms. Wendi Hunter, Appendix E, Tab 14

4. For these reasons, Mr. Unruh's evidence should not be relied upon in Phase 1 of this trial.

[4] See, for example, Evidence of Mr. Troy Unruh, Transcript vol 95, March 12, 2020, p. 12340, line 15 to p. 12344, line 23 - *there are different minimum maintenance standards for different classifications of opened roads*; p. 12347, line 19 to p. 12348 line 14 - *some unopened roads are still driven on*; and p. 12352, line 19 to p. 12353, line 3 - *not all unopened roads would be passable*.

RELEVANCE AND WEIGHT OF J. RANDOLPH VALENTINE'S EVIDENCE

1. Prof. Valentine was qualified as:

> Linguist, qualified with expertise in the Anishinaabemowin language and its various dialects spoken in Quebec, Ontario, Manitoba, Saskatchewan, Alberta, Michigan, Wisconsin, Minnesota and Montana; and capable of giving opinion evidence about the Anishinaabemowin dialects spoken at Saugeen First Nation and the Chippewas of Nawash First Nation, their relationships to the dialects of surrounding communities, and what conclusions can be drawn from these dialectical variants.[1]

SUPPORTING QUALIFICATIONS

2. Prof. Valentine has a B.A., M.A. and Ph.D. in linguistics, and is a Professor of linguistics at the University of Wisconsin.[2]

3. He has 28 scholarly publications.[3] He has created an online Anishinaabemowin dictionary, which he has continuously updated for more than 25 years, together with Prof. Mary Ann Corbiere. The dictionary now contains about 13,500 entries.[4]

4. He has also published an Anishinaabemowin reference grammar, which he described as:

> It is a reference grammar, again focusing on the very same dialects. It's 1100 pages, so a massive tome. I'm

---

[1] Court ruling on qualification, Transcript vol 10, May 23, 2019, p. 1100, line 23 to p. 1101, line 11. See also lettered exhibit C1.
[2] Evidence of Prof. J. Randolph Valentine, Transcript vol 10, May 23, 2019, p. 1097, lines 12-19.
[3] Evidence of Prof. J. Randolph Valentine, Transcript vol 10, May 23, 2019, p. 1098, lines 8-11; J. Randolph Valentine Curriculum Vitae, Exhibit 3992.
[4] Evidence of Prof. J. Randolph Valentine, Transcript vol 10, May 23, 2019, p. 1098, line 12 to p. 1099, line 2.

> trying to, exhaustively as I possibly could, document the language of these specific dialects.

5. He frequently teaches courses on the Anishinaabemowin language.[5]

6. Prof. Valentine has been called upon in four pieces of treaty litigation, concerning how the Anishinaabemowin language relates to treaty interpretation.[6]

7. For three years he was editor of the papers of the Algonquian conference, which is an inter-disciplinary conference bringing together scholars of every field related to Algonquian people (which includes Anishinaabe and others).[7]

METHODOLOGY

8. Prof. Valentine's Ph.D. thesis (1994) was an analysis of variations of dialects of Anishinaabemowin. It received an award given to the dissertation that "represents the most significant research on an Indigenous language in the Americas, North, Central and South America."[8] Research for his thesis involved going to Anishinaabe communities from Québec to Alberta and working with Anishinaabemowin speakers in each community.[9] Prof. Valentine then mapped out patterns showing the linguistic relationships between different communities.[10] In

---

[5] Evidence of Prof. J. Randolph Valentine, Transcript vol 10, May 23, 2019, p. 1100, lines 3-10; J. Randolph Valentine Curriculum Vitae, Exhibit 3992.
[6] Evidence of Prof. J. Randolph Valentine, Transcript vol 10, May 23, 2019, p. 1100, lines 11-20.
[7] Evidence of Prof. J. Randolph Valentine, Transcript vol 10, May 23, 2019, p. 1099, line 15 to p. 1100, line 2.
[8] Evidence of Prof. J. Randolph Valentine, Transcript vol 10, May 23, 2019, p. 1097, line 20 to p. 1098, line 7.
[9] Evidence of Prof. J. Randolph Valentine, Transcript vol 10, May 23, 2019, p. 1113, lines 4-14.
[10] Evidence of Prof. J. Randolph Valentine, Transcript vol 10, May 23, 2019, p.1116, line 8 to p. 1117, line 3.

preparing his expert report, he relied very much on this thesis, the conclusions of which he stills stands behind,[11] after much continued research on Anishinaabemowin dialects.[12]

9. Prof. Valentine's expert report follows a similar methodological approach as his PhD thesis. Specifically, he undertook an analysis of variations in Anishinaabemowin dialects at Saugeen and Nawash and the Anishinaabe communities closest to them geographically.[13]

10. At one point in his report, Prof. Valentine mentioned, in passing, an article by ethnologist Ed Rogers. Prof. Valentine explained in his testimony that he did not rely on that work for his conclusions, which are founded in linguistic analysis. Instead, he referred to the article by Rogers only as some background comparison.[14]

11. SON submits that Prof. Valentine is highly qualified in Anishinaabemowin linguistics, especially the analysis of variations of dialect, and that the subject matter of his report is at the very core of his expertise. Therefore his opinions should be given substantial weight.

---

[11] Evidence of Prof. J. Randolph Valentine, Transcript vol 10, May 23, 2019, p. 1117, line 21 to p. 1118, line 2.
[12] Evidence of Prof. J. Randolph Valentine, Transcript vol 10, May 23, 2019, p. 1117, lines 6-20.
[13] J. Randolph Valentine, "Linguistic Analysis of the Speech of Chippewas of Nawash and Saugeen First Nations" (2013), Exhibit 3993, p. 2
[14] Evidence of Prof. J. Randolph Valentine, Transcript vol 10, May 23, 2019, p. 1118, line 16 to p. 1119, line 6, referring to J. Randolph Valentine, "Linguistic Analysis of the Speech of Chippewas of Nawash and Saugeen First Nations" (2013), Exhibit 3993, p. 8, bottom para; See also Evidence of Prof. J. Randolph Valentine, Transcript vol 10, May 23, 2019, p. 1177, line 22 to p. 1178, line 7.

RELEVANCE AND WEIGHT OF ALEXANDER VON GERNET'S EVIDENCE

1. Dr. Alexander von Gernet is an anthropologist who testified as a witness for Canada. His testimony was focussed on oral histories and how they should be interpreted.

2. Dr. von Gernet was qualified as an "anthropologist and ethnohistorian with special expertise in the use of archaeological evidence, written documentation, and oral histories and traditions to reconstruct past cultures of Indigenous peoples and their history of contact with European newcomers throughout Canada and parts of the United States."[1]

General Credibility

3. Dr. von Gernet was an extremely difficult witness. He refused to make reasonable concessions in cross examination, suggesting he is so firmly entrenched in his position he cannot provide useful evidence to the Court. For example:

(a) After much cross examination on the point, he would not move from his assertion that the geological evidence in this case does not corroborate oral histories, choosing instead to confusingly state that "it is a piece of external evidence leading to a possible interpretation of the story as leading to historicity":

> Q. …What I'm saying is you have a story. There's no assumptions in the story, it's simply a story. It's a story and perhaps the people who tell the story believe it to be true but there's no evidence to support it. It's just a story that's always been told. And it's

[1] Decision of the Court, Transcript vol 53, October 21, 2019, p. 6698 lines 4-11 and p. 6715 lines 24-25.

> about how many, many, many years ago – they don't know how long ago, but a long time ago we used to have giant beavers. And then later it's discovered that there's proof of that that giant beavers are a real thing and they existed and they existed 10,000 years ago. Would that not be – putting aside whether you think it's probable or possible, is that fact not – the geological fact not a corroboration for the premise that that original story could have preserved a memory of a time when the Anishinaabe lived with giant beaver?
>
> A. It's not a corroboration. **What it is is a piece of external evidence leading to a possible interpretation of the story as having historicity.** [Emphasis added.][2]

(b) Dr. von Gernet initially refused to acknowledge on cross examination that the breaking of the Nadoway Barrier would have been a dramatic event, despite having given such evidence already in chief.

> Q. Now, finally, the breaking of the Nadoway Barrier. I believe you acknowledged in your testimony in-chief that this would have been a dramatic event, would you agree?
>
> A. Well, I would agree that the geological assessment by scientists suggests that it was "abrupt", that's the term that was used in the scientific publication that was relied on by Dr. McCarthy.[3]

When his previous testimony, where he called the breaking of the Nadoway Barrier a "dramatic event",[4] was put to him, Dr. von Gernet argued about wording:

---

[2] Evidence of Dr. von Gernet, Transcript vol 73, January 14, 2020, p. 9543, line 5 to p. 9544, line 2.
[3] Evidence of Dr. von Gernet, Transcript vol 74, January 15, 2020, p. 9654, lines 7-15.
[4] Evidence of Dr. von Gernet, Transcript vol 73, January 14, 2020, p. 9465, lines 7-13; Evidence of Dr. von Gernet, Transcript vol 74, January 15, 2020, p. 9654, line 16 to p. 9655, line 20.

> So I'm putting to you, Dr. von Gernet, that yesterday your testimony was that in fact the Nadoway Barrier, that was your one example of something that would in fact have been, in your view, significant?
>
> A. I didn't say it would in my view be significant. I could understand how a dramatic event like that could stimulate interest and give rise to stories.[5]

He then walked back his earlier testimony, questioning how long it actually took for the barrier to break, and the meaning of the word abruptly in the geological context, despite having no qualification to provide an opinion respecting geology.[6]

(c) When the Court asked whether it would be "reasonable to consider that the Anishinaabe, relying on oral orality… to convey their history might take more care in doing so",[7] Dr. von Gernet stated that "[t]here's no evidence that at any point in time they put more effort into preserving their oral literature as a consequence of its orality…".[8] When it was then put to him that the fact that communities have internal checks is in fact evidence of them taking more care to preserve their oral literatures, Dr. von Gernet would not move off of his initial position, but rather suggested that internal checks might be a new development, implying that they are thus not evidence of extra care being taken with oral histories:

> And more to the point is, even if there was evidence in the 21st century among Elders today I don't know how we can possibly know whether those same

---

[5] Evidence of Dr. von Gernet, Transcript vol 74, January 15, 2020, p. 9655, line 21, to p. 9656, line 4.
[6] Evidence of Dr. von Gernet, Transcript vol 74, January 15, 2020, p. 9656, lines 5-11.
[7] Evidence of Dr. von Gernet, Transcript vol 74, January 15, 2020, p. 9671, lines 3-7.
[8] Evidence of Dr. von Gernet, Transcript vol 74, January 15, 2020, p. 9671, lines 11-14.

> checks existed in each and every generation in the past. So it becomes sort of an insoluble problem.[9]

4. This final point is also an example of Dr. von Gernet's shifting perspective from his voir dire to his testimony. At his voir dire, before it was clear he would be allowed to give expert evidence at trial, Dr. von Gernet agreed that internal checks within an Indigenous community "may be sufficient not to guarantee historical reliability, but to provide confidence that on the balance of probabilities they are historically reliable."[10] Later, when giving evidence at trial, Dr. von Gernet's perspective seemed to change:

> But my overall point is that the existence of those kinds of internal mechanisms, while it may lead to a circumstantial probability of reliability is not necessarily the case.[11]

5. Dr. von Gernet ultimately suggested in the passage from his evidence quoted above in paragraph 3(c) that internal checks could be a new development, and may not have existed in past generations.[12] This represents a significant shift in his view between his voir dire and his trial evidence.

6. Dr. von Gernet's credibility is further damaged by his suggestion on cross examination that his evidence might change somehow if he had "the advantage of knowing precisely how this claim is going to be characterized in argument by lawyers at the end of these proceedings", a statement he made when being pressed on the assumptions he claimed were necessary to believe the oral

---

[9] Evidence of Dr. von Gernet, Transcript vol 74, January 15, 2020, p. 9672, line 24 to p. 9673, line 13.
[10] Evidence of Dr. von Gernet, Transcript vol 52, October 11, 2019, p. 6501, lines 21-24.
[11] Evidence of Dr. von Gernet, Transcript vol 74, January 15, 2020, p. 9667, lines 10-14.
[12] Evidence of Dr. von Gernet, Transcript vol 74, January 15, 2020, p. 9672, line 24 to p. 9673, line 13.

histories were based on eyewitness accounts.[13] This comment suggests that Dr. von Gernet was testifying more as an advocate for his way of viewing oral histories than an impartial witness. When it was pointed out to him that he should not be concerned with how the claim would be characterized in legal argument, he ultimately acknowledged that "it should have no impact on my testimony."[14]

7. This brings up the concerns SON raised during Dr. von Gernet's voir dire, that Dr. von Gernet has assumed the role of advocate in providing evidence.[15] This was based on that fact that he:

(a) included references to cases where courts had treated his evidence favourably, and omitted cases where courts did not accept his evidence from his (ultimately excluded) long report, providing a misleading representation of how his work has been received by courts;[16]

(b) used, in his excluded long report, a cautionary tale aimed at casting doubt on the reliability of oral history that had nothing to do with the facts of this case;[17]

---

[13] Evidence of Dr. von Gernet, Transcript vol 74, January 15, 2020, p. 9645, lines 14-17.
[14] Evidence of Dr. von Gernet, Transcript vol 74, January 15, 2020, p. 9646, line 3.
[15] Ruling of the Court, Transcript vol 53, October 21, 2019, p. 6698, lines 15-17.
[16] Evidence of Dr. von Gernet, Transcript vol 52, October 11, 2019, p. 6491, line 19 to p. 6496, line 17.
[17] Evidence of Dr. von Gernet, Transcript vol 52, October 11, 2019, p. 6499, lines 1-6.

(c) has previously published opinions criticizing the Supreme Court of Canada's instruction that oral history and traditions be placed on equal footing with historical documents;[18]

(d) overwhelmingly has provided evidence on behalf of governments and against Indigenous parties: he has testified 34 times as an expert witness, 21 of which he was retained by Canada, 7 by provincial governments, and 4 times by U.S. State governments, and in all cases Dr. von Gernet's evidence was "in response to expert evidence tendered by Indigenous parties or parties that were self-identified as Indigenous". Similarly, he has written 72 expert reports, all for government parties;[19] and

(e) applied an unreasonably high standard of scrutiny to oral history evidence, as discussed in detail below.

8. Although his long report containing the evidence described at para 7(a) and (b) above was excluded, the evidence he ultimately did give in this Court echoed the one-sided nature that was evident in his long report. This should be considered when the Court assesses his credibility.

9. Given how entrenched he is in his position, and the evidence that he has taken on the role of an advocate for the Crown, Dr. von Gernet's evidence should be given very little weight.

---

[18] Evidence of Dr. von Gernet, Transcript vol 52, October 11, 2019, p. 6503, line 8, to p. 6504, line 23; Alexander von Gernet, "What my Elders taught me, oral traditions as evidence in Aboriginal Litigation" (2000), Exhibit 4316.

[19] Evidence of Dr. von Gernet, Transcript vol 52, October 11, 2019, p. 6545, line 16 to p. 6549, line 3; Curriculum vitae of Dr. von Gernet, Exhibit 4313, pp. 8-19.

Oral histories held to an inappropriately high standard

10. Although he denied it during his voir dire, the application of Dr. von Gernet's approach would essentially mean that oral histories could not be given independent weight, and must be corroborated by numerous pieces of evidence to be believed.

11. During his voir dire, Dr. von Gernet denied that he had an "a priori view that all oral histories and traditions are historically unreliable".[20] He also claimed that his position was not that one could not give independent weight to oral history evidence, stating that "I don't think that is anywhere on record that I actually make such a generalization. The generalization is one that I do not support."[21] Rather, he contends, both in voir dire and in his trial evidence, that his position "has always been that these matters have to be looked at on a case-by-case basis"[22], citing one example of a case where he interviewed elders at Buffalo Narrows and gave the oral histories of those elders independent weight and stating: "there was no corroborating evidence, but I have no reason not to give it weight."[23]

12. Later in his evidence, however, once he had been qualified to testify as an expert, he walked this position back, essentially restricting instances where oral histories can be given independent weight to stories that are only passed on for a generation or two:

> Q. But would you not agree, and you spoke in your voir dire about the – you clarified that your position is not that oral traditional stories should never be given independent weight, that to give a story independent weight you would simply need to accept

---

[20] Evidence of Dr. von Gernet, Transcript vol 52, October 11, 2019, p. 6500, lines 8-11.
[21] Evidence of Dr. von Gernet, Transcript vol 52, October 11, 2019, p. 6519, lines 8-11.
[22] Evidence of Dr. von Gernet, Transcript vol 52, October 11, 2019, p. 6505, lines 15-17; Evidence of Dr. von Gernet, Transcript vol 72, January 13, 2020, p. 9324, line 17, to p. 9325, line 4.
[23] Evidence of Dr. von Gernet, Transcript vol 52, October 11, 2019, p. 6505, lines 21-22.

> it without pointing to anything in support of it. That's truly giving a story independent weight.
>
> A. There are times when we really have no choice at all, and there are times when it is moreover apparent that the probability of a story being correct is quite high and that it is in fact a reasonable reconstruction of what happened. But these tend to be relatively short-term traditions often of a generation or two. The reason why we can have some confidence in these stories is because of the context in which they're told and their content.[24]

13. Dr. von Gernet also does not accept that mnemonic devices could assist in preserving oral histories. When asked about birch bark scrolls, he stated that they

> unfortunately did not result in the preservation of traditions in the long term, much like wampum belts. Because you always had to have that link between the symbol and the oral tradition that goes with it, and as soon as you lose that link it's no longer – the tradition is lost. So – and the mnemonic device no longer functions the way it was originally intended.[25]

14. The consequence of this approach is that as time continues to pass, it becomes harder and harder for Indigenous communities to provide any evidence of anything that happened pre-contact, or in early interactions with Europeans. Even now, this falls well outside of Dr. von Gernet's "one or two generation" limit. If Dr. von Gernet's approach is followed, oral history evidence older than one or two generations could effectively only be accepted if corroborated. This is completely contrary to the Supreme Court of Canada's direction that oral history should be placed on equal footing with other types of evidence: documentary evidence does not have an expiration date after which it needs independent corroboration.

---

[24] Evidence of Dr. von Gernet, Transcript vol 73, January 14, 2020, p. 9546, lines 1-20.
[25] Evidence of Dr. von Gernet, Transcript vol 74, January 15, 2020, p. 9668, lines 12-20.

Mitchell v M.N.R, [2001] SCR 911 at para 39, Plaintiffs' Book of Authorities, Tab 48 and *Delgamuukw v British Columbia,* [1997] 3 SCR 1010 at para 84, Plaintiffs' Book of Authorities, Tab 18.

15. Other courts have found that Dr. von Gernet's approach is inconsistent with Canadian law. In the recent Federal Court decision *Watson v. Canada*, Justice Phelan found this aspect of Dr. von Gernet's evidence to be "not workable or consistent with the law", stating

> However, I am concerned about Dr. von Gernet's idea that the archival record provides a baseline from which to assess oral history. The idea of an archival record providing a historical "baseline" is problematic because the Court is to place oral history and documentary evidence on equal footing (*Delgamuukw* at para 87). If the Court accepted the premise that one type of evidence can provide a baseline for another, it would assume without proof in the particular instance, that the baseline evidence is inherently better or more reliable. **His near insistence on corroborating documentary evidence is not workable or consistent with the law.**
>
> **Such a premise, particularly in aboriginal litigation, would tend to undermine the history of a people who relied on oral rather than documentary communications.** The task of the Court is to take the multiple sources of evidence and reach conclusions from the whole of the evidence. [Emphasis added.]

Watson v Canada, 2020 FC 129 at paras 64 and 65, Plaintiffs' Book of Authorities, Tab 111.

16. The judgment in *Watson v Canada* is not an outlier: other courts have also found similarly.

> See also *Mohawk Council of Akwesasne v. Canada (Minister of National Revenue - M.N.R.)*, [1997] FCJ No. 882 at para. 93 aff'd *Mitchell v. Canada (Minister of National Revenue - M.N.R.)*, [1998] FCJ No. 1513 (FCA); rev'd on other grounds 2001 SCC 33, Plaintiffs' Book of Authorities, Tab 49.
>
> *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700 at para 154, Plaintiffs' Book of Authorities, Tab 1070.

Unhelpful methodology

17. Dr. von Gernet's "scientific" methodology is not at all clear, despite being asked questions about it in examination in chief, cross examination, and additional questions by the Court. In essence, though, his method seems to be to examine stories and evidence critically. This is unhelpful since this is already the task the Court is undertaking.

18. When discussing his methodology, Dr. von Gernet explained that one should not have an a priori stance on whether an oral history has historicity, and that it needs to be assessed on a case-by-case basis.[26] He also stated that in this case the historicity of the stories must be "seriously considered".[27] When asked to explain his "skeptical approach" to oral tradition, he explained that

> It's not that you adopt a skeptical position. I don't adopt skepticism as a position; that would be quite unscientific because that already sort of leads to a confirmation bias. Rather I follow Michael Shermer's definition in that skepticism in science is a methodology, it's not a position. In fact it's one of the most important methodologies of science. You do not take anything on its face but you examine it critically.[28]

19. When pressed to explain on cross examination, he stated that he did not use the scientific method of testing hypotheses, which he referred to as the "hypothetico-deductive method", but rather used "science writ large":

> What I'm referring to is science writ large. Science writ large is not exclusively the hypothetico-deductive method, rather it is an approach to understanding the real world, which is rigorous,

---

[26] Evidence of Dr. von Gernet, Transcript vol 72, January 13, 2020, p. 9324, line 17 to p. 9325, line 4.
[27] Evidence of Dr. von Gernet, Transcript vol 72, January 13 2020, p. 9327, lines 7-8.
[28] Evidence of Dr. von Gernet, Transcript vol 72, January 13, 2020, p. 9329, lines 2-13.

> skeptical, evidence-driven; and while it recognizes the presence of subjectivities it also postulates that objectivity is a – something one should strive for.[29]

20. Further elaborating when addressing questions from the Court, he stated:

> So when I refer to "science" in my report and testimony I'm not referring to the hypothetico-deductive method I'm referring to science writ-large, that is the wider understanding of science as a rigorous process that has a skeptical stance and that strives for objectivity.[30]

21. Essentially, Dr. von Gernet's method is to examine the oral histories critically. This is not useful to the Court, as this is already what the Court is required to do.

22. This is in line with recent caselaw assessing Dr. von Gernet's evidence. In *Watson v. Canada*, the trial judge summarized Dr. von Gernet's approach, stating that he "described his skeptical case by case approach to oral history evidence, which focussed on assessing the "historicity" of an oral history, or the ability of an oral history to reflect the actual past." The trial judge then went on to state that he "found Dr. von Gernet's evidence generally unhelpful. Dr. von Gernet did little to describe what went into a skeptical case by case approach, **which is already the Court's approach to oral history** (see *Delgamuukw v British Columbia*, 1997 CanLII 302 (SCC), [1997] 3 SCR 1010 at para 87, 153 DLR (4th) 193 [*Delgamuukw*])" (emphasis added), Plaintiffs' Book of Authorities, Tab 18.

> *Watson v Canada,* 2020 FC 129 at paras 63 and 64, Plaintiffs' Book of Authorities, Tab 111.

---

[29] Evidence of Dr. von Gernet, Transcript vol 73, January 14, 2020, p. 9498, lines 7-24.
[30] Evidence of Dr. von Gernet, Transcript vol 74, January 15, 2020, p. 9665, lines 14-20.

Evidence respecting Archaeology

23. Dr. von Gernet acknowledged on cross examination that he did not look at the history of the presence of the Odawa on the Peninsula in his research.[31] As such, his speculation about whether or not the Odawa migrated there or developed *in situ* should be given no weight.[32]

Conclusion

24. Dr. von Gernet was an extremely difficult witness throughout his cross examination, and refused to make reasonable concessions. His evidence also shifted from his voir dire to his testimony following his qualification as an expert. Dr. von Gernet took a much narrower approach to the reliability of oral history evidence in his testimony following his qualification. Dr. von Gernet appeared to be advocating for his way of viewing oral histories, to the benefit of the Crown and detriment of Indigenous communities, rather than acting as an impartial witness. For these reasons, Dr. von Gernet's evidence should be given very little weight. Further, the standard he holds oral history evidence to is inconsistent with Canadian law, and the approach he advocates for in assessing oral history evidence is already the one taken by Courts. His evidence is thus of no assistance to the Court.

---

[31] Evidence of Dr. von Gernet, Transcript vol 73, January 14, 2020, p. 9562, lines 12-16.

[32] See, for example, his claim that *"you should never, ever, ever assume that any modern Indigenous group has been at that location since time immemorial, or for thousands of years, never, because we have so many examples of the movement of Indigenous peoples all over the continent."* - Evidence of Dr. von Gernet, Transcript vol 72, January 13, 2020, p. 9436, lines 5-10; *and his claim that there is no evidence of an in situ resident population* - Evidence of Dr. von Gernet, Transcript vol 73, January 14, 2020, p. 9459, lines 4-17.

RELEVANCE AND WEIGHT OF TESTIMONY OF TYLER WENTZELL'S EVIDENCE

1. Mr. Tyler Wentzell is a military tactician and historian who was called to testify by Canada. He was qualified as a military historian with particular expertise in Canadian military history, and in the practicalities of military-police cooperation in the 19th and 20th centuries.[1]

2. He testified on the basis of two reports:

   (a) "A British Officer's Understanding of the Military Aid to Civil Power", which evaluates what a British Officer would have known regarding aid to the civil power operations, the "cultural considerations" that would have affected such an officer in the 19th century; and the various law enforcement institutions available to aid the civil power between 1836 and 1854.[2]

   (b) "Considerations Affecting a Military Expedition to Secure the Bruce Peninsula Against Squatters Between 1836 and 1854," which describes the various British military priorities between 1836 and 1854; the strength of British garrisons in the Canadas; and the various practical considerations affecting a mission to launch a "cordon sanitaire" on the Peninsula.[3]

---

[1] Evidence of Mr. Tyler Wentzell, Transcript vol 64, November 22, 2019, p. 8337, line 7 to p. 8338, line 3.
[2] Evidence of Mr. Tyler Wentzell, Transcript vol 64, November 22, 2019, p. 8338, lines 5-21; Mr. Tyler Wentzell, "A British Officer's Understanding of the Military Aid to Civil Power" (As redacted November 22, 2019), Exhibit 4414.
[3] Mr. Tyler Wentzell, "Considerations Affecting a Military Expedition to Secure the Bruce Peninsula against Encroachment by Squatters between 1836 and 1854", Exhibit 4405.

3. Mr. Wentzell sought to assist the Court to the best of his ability. SON submits that his cross examination revealed some of the key conclusions expressed in his report were based on faulty assumptions stipulated to Mr. Wentzell by counsel for Canada, had little to no evidentiary support, or were largely irrelevant to the issues in this proceeding. His cross-examination clarified the opinions set out in his reports, and established that a) civilian law enforcement institutions did have adequate capacity to issue warrants to or to arrest squatters; b) the militia would be available and would be capable to assist with difficult arrests, where needed; and c) if further support was required from the British military, all that was required would have been a request from a magistrate or justice of the peace. This is discussed in more detail below.

Capacity of various civilian law enforcement institutions

4. In Part II of his report, "A British Officer's Understanding of Military Aid to the Civil Power in 1854", Mr. Wentzell provides an assessment of the instruments of civil power available in 1854.[4] His report cites no primary or secondary source documents in support of the opinions he offers about the strength of the police[5] and the militia.[6] SON submits that, as a result, the opinions expressed in the report on these points ought to be given little weight.

5. On cross-examination, Mr. Wentzell clarified that:

(a) The role of constables in Upper Canada between 1836 and 1854 included delivering warrants, making arrests, and generally to assist magistrates in

---

[4] Mr. Tyler Wentzell, "A British Officer's Understanding of Military Aid to the Civil Power in 1854," Exhibit 4414, paras 25-34.
[5] Mr. Tyler Wentzell, "A British Officer's Understanding of Military Aid to the Civil Power in 1854," Exhibit 4414, paras 25-28.
[6] Evidence of Mr. Tyler Wentzell, Transcript vol 64, November 22, 2019, p. 8406, line 10 to p.8408. line 5; Mr. Tyler Wentzell, "A British Officer's Understanding of Military Aid to the Civil Power in 1854," Exhibit 4414, paras 31-34.

enforcing the law.[7] A constable or the sheriff would have been the first institution called upon to arrest a squatter on the Peninsula.[8]

(b) Constables operating in Upper Canada between 1836 and 1854 could be expected to make arrests or deliver warrants with reasonable effectiveness.[9] Constables who did not obey orders to act from a Justice of the Peace would be subject to discipline, and they therefore had an incentive to follow orders.[10]

(c) Special constables could be called in to fill gaps in the ordinary law enforcement apparatus.[11] Mr. Wentzell confirmed he had seen nothing to indicate "instances of disobedience" to orders given to such constables.[12]

(d) The militia or military would only be called in if there was some dispute that was beyond the capacity of constables to address.[13] They would not be called upon for an arrest unless, for some reason, the civilian law enforcement lacked the capacity to handle the matter on their own.[14] Mr. Wentzell clarified that he did not intend

---

[7] Evidence of Mr. Tyler Wentzell, Transcript vol 64, November 22, 2019, p. 8389, line 17 to p. 8391, line 24; Janet Nickerson, "Crime and Punishment in Upper Canada: A Researcher's Guide, Chapter 6", Exhibit 4407, p. 146.
[8] Evidence of Mr. Tyler Wentzel, Transcript vol 64, November 22, 2019, p. 8430, line 23 to p. 8431, line 4.
[9] Evidence of Mr. Tyler Wentzel, Transcript vol 65, November 25, 2019, p. 8474, lines 1-5.
[10] Evidence of Mr. Tyler Wentzell, Transcript vol 65, November 25, 2019, p. 8471, line 20 to p. 8472, line 16.
[11] Evidence of Mr. Tyler Wetnzell, Transcript vol 65, November 25, 2019, p. 8469, lines 10-14.
[12] Evidence of Mr. Tyler Wentzell, Transcript vol 65, November 25, 2019, p. 8572, lines 5-16.
[13] Evidence of Mr. Tyler Wentzell, Transcript vol 64, November 22, 2019, p. 8403, line 21 to p. 8404, line 9.
[14] Evidence of Mr. Tyler Wentzell, Transcript vol 64, November 22, 2019, p. 8404, lines 16-22; Transcript vol 65, November 22, 2019, p. 8462, lines 4-11.

to suggest that this was the situation on the Peninsula between 1836 and 1854, and had not come across any documents in his research to suggest that it was.[15]

(e) Between 1836 and 1854, the militia was made up of all adult-aged men in Upper Canada. Although there were limitations to its organization at various points, when the militia was called upon by the colony's leadership, it was able to deal with threats to public peace. [16] Mr. Wentzell clarified that "the militia did play an important role" in providing assistance with various internal disturbances, including difficult arrests.[17]

(f) The British military would ordinarily be called in to support the civil power only if events had escalated to an emergency, such as widespread violence.[18] As noted in more detail in paragraphs 8 to 9 below, Mr. Wentzell confirmed that if the British military had been asked to assist with an operation to address squatting on the Peninsula, they would have done so.

---

[15] Evidence of Mr. Tyler Wentzell, Transcript vol 65, November 25, 2019, p. 8499, line 9 to p. 8500, line 24 and p. 8501, lines 8-15.
[16] Evidence of Mr. Tyler Wentzell, Transcript vol 64, November 22, 2019 p. 8412, line 10 to p. 8413, line 7.
[17] Evidence of Mr. Tyler Wenzell, Transcript vol 64, November 22, 2019, p. 8440, line 5 to p. 8443, line 7 and p. 8438, lines 11-20; William Wylie, "Poverty, Distress and Disease: Labour and the Construction of the Rideau Canal, 1826-1832", Exhibit 4413, p. 27.
[18] Evidence of Mr. Tyler Wenzell, Transcript vol 64, November 22, 2019, p. 8443, line 14 to p. 8444, line 6.

(g) Finally, Mr. Wentzell also acknowledged that he had not considered the creation of an Indigenous militia in making his assessments of militia strength,[19] nor did he "have any real knowledge of sheriff's authority". [20]

Faulty assumption that cordon sanitaire required to address squatting

6. Mr. Wentzell's report "Considerations Affecting a Military Expedition" takes as its starting assumption that a cordon sanitaire would be required to address squatting on the Peninsula. A cordon sanitaire is a deployment of troops or other personnel to prevent travel from one area to another.[21] Its purpose is to stop movement from one area to another.[22] Mr. Wentzell's opinion about the challenges of a military operation on the Peninsula was confined to the challenges facing a sustained cordon sanitaire with a garrison nearby. [23] He explained in his testimony that he was directed to make this assumption by counsel for Canada.[24]

7. On cross-examination, Mr. Wentzell gave evidence that suggests this foundational assumption is flawed and that there were many law enforcement options that could have been used to respond to encroachments on the Peninsula besides a cordon sanitaire. Specifically, he testified that:

---

[19] Evidence of Mr. Tyler Wentzell, Transcript vol 65, November 25, 2019, p. 8480, line 17 to p. 8481, line 15
[20] Evidence of Mr. Tyler Wentzell, Transcript vol 65, November 25, 2019, p. 8477, line 21 to p. 8478, line 2.
[21] Evidence of Mr. Tyler Wentzell, Transcript vol 64, November 22, 2019, p. 8375, lines 7-11.
[22] Evidence of Mr. Tyler Wentzell, Transcript vol 64, November 22, 2019, p. 8376, lines 1-3 and p. 8377, lines 2-5.
[23] Evidence of Mr. Tyler Wentzell, Transcript vol 65, November 25, 2019, p. 8500, line 25 to p. 8501, line 7.
[24] Evidence of Mr. Tyler Wentzell, Transcript vol 64, November 22, 2019, p. 8377, lines 2-10.

(a) A cordon sanitaire would not be required to assist with arrests, even difficult arrests.[25] In the circumstance of a difficult arrest, what would be required is a much smaller operation to encircle or zero in on the person who is the target of the arrest.[26]

(b) He was not asked to consider, nor did he have an opinion on whether there was a threat to public peace and order on the Peninsula between 1836 and 1854 that was serious enough to bring the matter beyond the capacity of the ordinary constabulary force.[27]

(c) Mr. Wentzell agreed that if SON was aware of the locations of squatters on the Peninsula, Crown officials simply could have asked them the locations of those squatters and run a more targeted operation to remove them.[28]

Relevance of cultural norms in British Military

8. Mr. Wentzell's second report, "A British Officer's Understanding of Military Aid to the Civil Power in 1854" addresses what an officer in the British Army would have thought were the legal limits on what his men could be called upon to do to assist the civil power.[29] The report focused extensively on the cultural norms that informed the behaviour of British officers, and

---

[25] Evidence of Mr. Tyler Wetnzell, Transcript vol 64, November 22, 2019, p. 8384, lines 9-15.
[26] Evidence of Mr. Tyler Wentzell, Transcript vol 64, November 22, 2019, p. 8385, line 22 to p. 8386, line 2.
[27] Evidence of Mr. Tyler Wentzell, Transcript vol 65, November 25, 2019, p. 8499, lines 9-22.
[28] Evidence of Mr. Tyler Wentzell, Transcript vol 64, November 22 2019, p. 8386, line 12 to p. 8387, line 5
[29] Mr. Tyler Wentzell, "A British Officer's Understanding of Military Aid to the Civil Power in 1854" (as redacted 2019), Exhibit 4414, para 7 and parts III and IV generally.

how British officers might have felt about being asked to do different tasks in aid of the civil power in the period between 1836 and 1854.[30]

9. SON submits that the cultural norms, beliefs and feelings of British Officers are not relevant. If a British Officer was asked by a magistrate to assist with an aid to the civil power operation, Mr. Wentzell agreed that British Officer would have assisted.[31] There were consequences for those Officers who did not respond to an order to assist.[32] He also agreed that the Crown could send troops to aid the civil power where it was consistent with their priorities to do so.[33] Mr. Wentzell accordingly agreed with the proposition that the most significant factor determining whether military aid was ever sent to the Peninsula to assist with squatting prior to October 1854 was whether a magistrate ever asked for such support.[34] The inference that can be drawn from this testimony is that troops would have been available and would have attended at the Peninsula if the appropriate civilian authority had decided that protecting the Peninsula from squatting was sufficiently important to call for their assistance.

Conclusion

10. Mr. Wentzell's cross-examination clarified and modified much of the testimony set out in his reports, and corrected some of the faulty assumptions that underpinned his reports. Upon cross-examination, it became clear that the institutions of civilian law enforcement had the capacity to issue warrants to and to remove squatters; the militia was capable of assisting with

---

[30] Mr. Tyler Wentzell, "A British Officer's Understanding of Military Aid to the Civil Power in 1854" (as redacted 2019), Exhibit 4414, para 8, and parts III and IV generally.
[31] Evidence of Mr. Tyler Wentzell, Transcript vol 64, November 22, 2019, p. 8444, line 24 to p. 8446 line 1; See also p. 8446, lines 1-18.
[32] Evidence of Mr. Tyler Wentzell, Transcript vol 64, November 22, 2019, p. 8446, lines 1-14.
[33] Evidence of Mr. Tyler Wentzell, Transcript vol 65, November 25, 2019, p. 8490, line 16 to p. 8491, line 14.
[34] Evidence of Mr. Tyler Wentzell, Transcript vol 64, November 22, 2019, p. 8446, line 22 to p. 8447, line 2.

difficult arrests; and, if matters escalated further, the military would have assisted – if only they had been asked to do so by the appropriate civilian official.

RELEVANCE AND WEIGHT OF RON WILLIAMSON'S EVIDENCE

1. Dr. Ronald Williamson is an archaeologist who prepared three reports for this litigation entitled "The Archaeology and History of the Saugeen Ojibway Nation Traditional Land & Region (to 1763)"[1], "Supplemental Report: Cultural Continuity in the Occupation of the Saugeen Ojibway Nation Traditional Land & Region as Reflected in the Archaeological Record",[2] and "Non-Destructive Analysis of the Glass Bead Assemblage from the *Ne'bwaakaah giizwed ziibi* (The River Mouth Speaks) site (BdHi-2) Town of Saugeen Shores, Bruce County Ontario."[3]

2. Dr. Williamson was qualified as an anthropological archaeologist with expertise in the presence of First Nations in the Great Lakes area from the Paleo-Indian Period to the mid-18th century and capable of giving opinion evidence on:

(a) The identities of the Indigenous communities present in the Great Lakes area in the 17th and 18th centuries;

(b) The archaeological record of Manitoulin Island, Bruce and Grey Counties and surrounding areas, with particular emphasis on:

(i) Whether Algonquian groups developed *in situ* in SONTL and surrounding areas

---

[1] Dr. Ronald Williamson, "The Archaeology and History of the Saugeen Ojibway Nation Traditional Land & Region (to 1763)" (2013), Exhibit 4239.
[2] Dr. Ronald Williamson, "Cultural Continuity in the Occupation of the Saugeen Ojibway Nation Traditional Land & Region as Reflected in the Archaeological Record" (2017), Exhibit 4241.
[3] Dr. Ronald Williamson, "Non-Destructive Analysis of the Glass Bead Assemblage from the *Ne'bwaakaah giizwed ziibi* (River Mouth Speaks) site (BdHi-2) Town of Saugeen Shores, Bruce County Ontario" (2017) Exhibit 4240

(ii) Whether there was continuity in Indigenous groups' presence in SONTL, and

(iii) Dating glass beads and other artifacts from archaeological sites in SONTL; and

(c) Archaeological evidence regarding peoples in the Great Lakes area and SONTL from 1615 to 1763, with particular emphasis on:

(i) Land use and settlement; and

(ii) Interactions between Indigenous groups and between Indigenous groups and Europeans.[4]

3. Dr. Williamson testified on a wide range of subjects, including:

(a) Who the Saugeen Odawa are, including archaeological markers for them and their *in situ* development;

(b) What the archaeological and documentary records show about the use of SONTL up to 1650;

(c) The Iroquois (Haudenosaunee) Wars, including the dispersal period and the post-dispersal period and the Odawa return to SONTL; and

(d) What the glass bead analysis done on beads found at *Ne'bwaakaah giizwed ziibi* (The River Mouth Speaks) tells us about the occupation of SONTL.

Qualifications

4. Dr. Williamson has a PhD in anthropology, with a focus on archaeology.[5]

---

[4] Ruling of the Court, Transcript vol 43, September 16, 2019, p. 5236, lines 2-22; Proposed Qualification for Dr. Ron Williamson, Exhibit Q-1.
[5] Ronald F. Williamson Curriculum Vitae, April 2019, Exhibit 4236, p. 1; Evidence of Dr. Ronald Williamson, Transcript vol 43, September 16, 2019, p. 5153, lines 4-9.

PROFESSIONAL EXPERIENCE

5. His professional experience is vast.

(a) Dr. Williamson founded a cultural resource management firm called Archaeological Services Incorporated (ASI) in 1980.[6] ASI has directed over 1,000 archaeological surveys, excavations, and comprehensive heritage resource assessments on lands throughout Ontario, and in New York and Michigan. The work done by ASI has spanned all major cultural and temporal periods. Dr. Williamson both manages a full time staff of over 50 individuals, plus seasonal staff, and continues to do archaeological fieldwork and practice as a senior associate at ASI.[7]

(b) Dr. Williamson works for a variety of clients, including private land development firms, municipalities, and First Nations, and has himself directed hundreds of excavations, and been intimately involved in the excavation of well over 100 sites.[8]

(c) Dr. Williamson is an adjunct professor at the department of anthropology at the University of Toronto and at Western University, and has been since 1995 and 2013 respectively.[9]

---

[6] Evidence of Dr. Ronald Williamson, Transcript vol 43, September 16, 2019, p. 5153, lines 10-13.
[7] Evidence of Dr. Ronald Williamson, Transcript vol 43, September 16, 2019, p. 5154, line 13 to p. 5155, line 6.
[8] Evidence of Dr. Ronald Williamson, Transcript vol 43, September 16, 2019, p. 5155, line 7 to 25 and p. 5196, line 20 to p. 5200, line 9; Ronald F. Williamson Curriculum Vitae, April 2019, Exhibit 4236, p. 2.
[9] Evidence of Dr. Ronald Williamson, Transcript vol 43, September 16, 2019, p. 5156, line 11 to 23.

(d) He is a chairman of the board of directors of the Museum of Ontario Archaeology/Sustainable Archaeology at Western University, and has served as the vice chair of the Shared Path Consultation Initiative since 2017. The Shared Path Consultation Initiative is an organization dedicated to improving the communication between municipalities and Indigenous communities.[10]

EXPERTISE IN INTERPRETING HISTORICAL DOCUMENTS

6. Dr. Williamson explained that as an archaeologist, he relies on the documentary record to a significant degree for both Indigenous and post-contact excavations, as well as biological data and linguistic evidence.[11] He regularly uses historical documentary sources in his work:[12]

> Q. To what extent can you understand Indigenous archeological [*sic*] sites without understanding culture and history?
>
> A. I don't believe you can. That is why we employ the documentary record to the state we do.[13]

7. Dr. Williamson clarified on cross examination that his "specialty in archaeology has to do with the Iroquoian and Algonquian history and the documents about that."[14]

8. The integration of the documentary record into archaeological work is also clear from the Ministry of Culture Standards and Guidelines for Consultant Archeologists, which Dr. Williamson

---

[10] Evidence of Dr. Ronald Williamson, Transcript vol 43, September 16, 2019, p. 5158, lines 1-22.
[11] Evidence of Dr. Ronald Williamson, Transcript vol 43, September 16, 2019, p. 5160, line 17 to p. 5161, line 2.
[12] Evidence of Dr. Ronald Williamson, Transcript vol 43, September 16, 2019, p. 5194, lines 4-22.
[13] Evidence of Dr. Ronald Williamson, Transcript vol 43, September 16, 2019, p. 5161, lines 3-8.
[14] Evidence of Dr. Ronald Williamson, Transcript vol 43, September 16, 2019, p. 5210, line 22 to p. 5211, line 2.

had a part in creating. These Standards and Guidelines guide the field methods and report production for various stages of assessment.[15]

9. Dr. Williamson explained that the first of four stages of archaeological fieldwork in the Standards and Guidelines, background research, involves a complete examination of the documentary record as it pertains to a particular parcel of land, including primary historical documents, secondary historical documents, oral information and Indigenous engagement. It also includes an examination of archaeological sites on or within one kilometre of the property, and drawing out the environmental parameters of the property and region in which it is located so that one can determine the archaeological potential on that property.[16]

10. Dr. Williamson also discussed the following work he has done, which demonstrate his knowledge of working with and interpreting the historical record:

(a) Dr. Williamson has worked on 36 "heritage feature master/management plans", which he described as very detailed two-year studies carried out for municipalities to determine how to manage the archaeological resources within that municipality.[17] He explained that he consulted primary or secondary historical documents in every single one of these studies.[18] Some of these studies, such as the

---

[15] Evidence of Dr. Ronald Williamson, Transcript vol 43, September 16, 2019, p. 5162, line 7 to p. 5164, line 6.
[16] Evidence of Dr. Ronald Williamson, Transcript vol 43, September 16, 2019, p. 5164, lines 7-22 and p. 5167, line 19 to p.5169, line 3.
[17] Ronald F. Williamson Curriculum Vitae, April 2019, Exhibit 4236, p. 5; Evidence of Dr. Ronald Williamson, Transcript vol 43, September 16, 2019, p. 5178, line 3 to p. 5180, line 10.
[18] Evidence of Dr. Ronald Williamson, Transcript vol 43, September 16, 2019, p. 5180, line 11 to p. 5181 line 2.

one that Dr. Williamson completed for Toronto, are extremely complex and have extensive histories of occupation.[19]

(b) Dr. Williamson has published extensively,[20] with many of his publications involving research using primary and secondary historical documents.[21]

(c) Dr. Williamson has worked particularly closely with the documentary record on the Iroquois Wars in his work for the Wendat.[22]

(d) Dr. Williamson described on cross examination his method of working with historical documents, including cross referencing those documents, taking into account the motivations of the authors of the documents, and interpreting the documents against his experience reading documents from that period.[23]

11. Canada's witness testifying about the archaeological evidence in this trial and specifically about the Glass Bead Database, Ms. Margaret Morden, described the documentary or historic record as being "invaluable for aid in interpreting archaeological materials" [24] and explained that "of course, the use of historical materials demands all of the theoretical underpinnings of that

---

[19] Evidence of Dr. Ronald Williamson, Transcript vol 43, September 16, 2019, p. 5181, line 3 to p. 5182, line 5.
[20] Evidence of Dr. Ronald Williamson, Transcript vol 43, September 16, 2019, p. 5200, line 10 to 22.
[21] Evidence of Dr. Ronald Williamson, Transcript vol 43, September 16, 2019, p. 5183, line 12 to p. 5191, line 4.
[22] Evidence of Dr. Ronald Williamson, Transcript vol 43, September 16, 2019, p. 5192, line 18 to p. 5194, line 3.
[23] Evidence of Dr. Ronald Williamson, Transcript vol 43, September 16, 2019, p. 5211, line 22 to p. 5213, line 2.
[24] Evidence of Ms. Margaret Morden, Transcript vol 70, December 16, 2019, p. 9100, line 21 to 25.

discipline."[25] As noted below, she also expressed her high regard of Dr. Williamson in all aspects of archaeology, presumably including use of the historical record.

EXPERIENCE WITH INDIGENOUS COMMUNITIES

12. Dr. Williamson describes himself as an anthropological archeologist: he employs anthropology to understand the archaeological record.[26] As a result, he has extensive experience with engaging with Indigenous communities, and collecting and using oral histories.[27] When giving evidence on assessing the ethnicity of those who deposited material on a site, he said that "archaeologists work on a literally daily basis in trying to identify the ethnicity of the material that we find": it is a major component of his work.[28]

13. This is reflected in his professional experience: ASI was selected by Ontario as the only firm to do work on Indigenous sites because of their special experience and practice in engaging with Aboriginal communities.[29] Dr. Williamson also frequently works with Indigenous trade routes, and described being confronted on an "almost-weekly basis" with collections that have historic trade goods in them.[30]

PEER RECOGNITION

14. Dr. Williamson has been recognized by his peers for his work. In addition to being the recipient of many notable awards, including an award given by the Canadian Archaeological

---

[25] Evidence of Ms. Margaret Morden, Transcript vol 70, December 16, 2019, p. 9101, lines 13-15.
[26] Evidence of Dr. Ronald Williamson, Transcript vol 43, September 16, 2019, p. 5159, line 3 to p. 5160, line 5.
[27] Evidence of Dr. Ronald Williamson, Transcript vol 43, September 16, 2019, p. 5175, line 23 to p. 5178, line 2 and p. 5191, line 5 to p. 5192, line 17.
[28] Evidence of Dr. Ronald Williamson, Transcript vol 43, September 16, 2019, p. 5194, line 23 to p. 5195 line 22.
[29] Evidence of Dr. Ronald Williamson, Transcript vol 43, September 16, 2019, p. 5182, line 6 to p. 5183, line 11.
[30] Evidence of Dr. Ronald Williamson, Transcript vol 43, p. 5195, line 23 to p. 5196, line 19.

Association to an archeologists with a distinguished career,[31] the other experts qualified to give evidence respecting archaeology spoke highly of Dr. Williamson, and in some cases deferred to his evidence. For example:

(a) Ms. Morden, Canada's witness, acknowledged Dr. Williamson's expertise in archaeology, calling him a "giant in his field" and stating how much she respects him "in all aspects of archaeology".[32] She went on to say that "he is someone I truly respect and know his work quite well."[33]

(b) Dr. Gwen Reimer, Ontario's witness speaking to archaeological evidence in this trial, deferred to Dr. Williamson's opinion on whether dog burials are characteristic of Odawa culture, stating "Dr. Williamson is an archaeologist and I would defer to his opinion".[34]

General Credibility and Reliability

15. Dr. Williamson answered the questions put to him in Court thoroughly and respectfully, and diligently answered questions in writing as requested by counsel for Ontario.[35] He was clearly knowledgeable about the subject matter on which he testified.

16. Dr. Williamson's qualifications and professional experience are directly relevant to the evidence he provided at trial. He is highly respected and widely regarded as a leading expert in his

---

[31] Evidence of Dr. Ronald Williamson, Transcript vol 43, September 16, 2019, p. 5200, line 23 to p. 520,3 line 16; Ronald F. Williamson Curriculum Vitae, April 2019, Exhibit 4236, p. 27.
[32] Evidence of Margaret Morden, Transcript vol 70, December 16, 2019, p. 9117, lines 12-14
[33] Evidence of Margaret Morden, Transcript vol 70, December 16, 2019, p. 9118, lines 7-8.
[34] Evidence of Dr. Gwen Reimer, Transcript vol 89, March 4, 2020, p. 11373, lines 5-14.
[35] Evidence of Dr. Ronald Williamson, Transcript vol 45, September 18, 2019, p. 5488, lines 5-9.

field. All of his evidence should be given significant weight, and, to the extent that Ms. Morden and Dr. Reimer contradicted Dr. Williamson's evidence, his evidence should be favoured.

> See also: Relevance and Weight of the Evidence of Ms. Margaret Morden, Appendix E, Tab 33
>
> See also: Relevance and Weight of the Evidence of Dr. Gwen Reimer, Appendix E, Tab 42

THE RELIABILITY AND WEIGHT OF MAPS PRODUCED BY ONTARIO (EXHIBITS 4866-4872)

1. Counsel for Ontario directed the production of a series of maps to be used in the cross examination of Prof. Jarvis Brownlie. These are Exhibits 4866 to 4872 in this litigation. In order to have these maps made exhibits, Ontario elicited testimony from Mr. Greg Sikma, the cartographer who produced the maps. Ontario also commissioned a supplementary report from Dr. Gwen Reimer, who was asked to review the historical documents Ontario counsel had identified as supporting the maps, and to explain the inferences that could be drawn from those documents. Dr. Reimer supplemented this by adding several documents that, in her view, were necessary to understand her interpretation of what these maps were attempting to illustrate.[1]

2. The maps were not added as exhibits until after Dr. Reimer's testimony. Prior to that, they were identified on the Record as lettered exhibits. Throughout the testimony of Mr. Sikma and Dr. Reimer, they were referred to by their lettered exhibits. For the sake of clarity, we reference the lettered exhibit in brackets after the exhibit number in this appendix.

3. There is an overarching issue with how these maps were made. Mr. Sikma explained in his testimony that he did not communicate with Dr. Reimer or any other historian during the creation of these maps, nor did he refer to any reports prepared by Dr. Reimer or any other historian.[2] In preparing his maps, Mr. Sikma looked at just three historical documents: Exhibit 2401, which is a map of the surveyed Peninsula dated 1856; Exhibit 2449, which is a map of the

---

[1] Evidence of Dr. Gwen Reimer, Transcript vol 93, March 10, 2020, p. 12048, line 10 to p. 12049, line 1; Maps Report Exhibit 4710, p 1.
[2] Evidence of Mr. Greg Sikma, Transcript vol 80, February 3 2020, p. 10277, line 17 to p. 10278, line 24; Evidence of Dr. Gwen Reimer, Transcript vol 93, March 10, 2020, p. 12049, lines 2-4.

surveyed Peninsula, dated 1857; and the map in Exhibit 2175, which is a map of the reserves set aside at Treaty 72, as attached to the text of the Treaty.[3]

4. Ontario provided Mr. Sikma with instructions as to what the maps should look like.[4] Some, but not all, of these instructions are captured in the redacted copy of Mr. Sikma's working notes at Exhibit 4550.[5] Included in Mr. Sikma's instructions were a series of google maps provided to him by counsel for Ontario to guide him in producing the maps.[6] Mr. Sikma testified that he had used the google maps "as a refence to, along with the descriptions I was provided and the historical maps, to help position these features on the landscape [map]".[7] Ontario also provided feedback on the drafts, and sought changes in the drafts from Mr. Sikma.[8]

5. As noted in the appendix dealing with the weight and relevance of Mr. Sikma's evidence, SON does not take issue with Mr. Sikma's technical skills, nor his testimony that he created these maps carefully, and to the best of his ability. The issue is that the maps were created to look as Ontario wanted them to look, not to reflect expert evidence about what the historical documents suggest. This expert interpretation of historical evidence was provided after the fact by Dr. Reimer in order to corroborate the maps Ontario had already created.[9] Dr. Reimer's role, in other words, was not to generate an independent set of directions about what the historic record shows about

---

[3] Evidence of Mr. Greg Sikma, Transcript vol 80, February 3, 2020, p. 10284, line 8 to p. 10286, line 24
[4] Evidence of Mr. Greg Sikma, Transcript vol 80, February 3, 2020, p. 10278, line 25 to p. 10279, line 8.
[5] Evidence of Mr. Greg Sikma, Transcript vol 80, February 3, 2020, p. 10286, line 25 to p. 10288, line 6. Redacted copy of Mr. Sikma's Working Notes, Exhibit 4550, p. 36.
[6] Evidence of Mr. Greg Sikma, Transcript vol 80, February 3, 2020, p. 10288, line 23 to p. 10293, line 14. Redacted copy of Mr. Sikma's Working Notes, Exhibit 4550, pp. 11-31.
[7] Evidence of Mr. Greg Sikma, Transcript vol 80, February 3, 2020, p. 10293, lines 19-25.
[8] Evidence of Mr. Greg Sikma, Transcript vol 80, February 3 2020, p. 10288, lines 12-22.
[9] Evidence of Dr. Gwen Reimer, Transcript vol 93, March 10, 2020, p. 12048, lines 10-15.

the various parcels of land represented, but to provide expert backstopping to a tool of advocacy created by counsel for the purposes of cross examination. SON submits that this created tension with Dr. Reimer's duty to the court to provide independent and impartial opinion evidence.

6. SON takes no issue with some of the maps produced, but others are based on unwarranted assumptions and errors in interpreting the documentary record:

(a) Exhibits 4866 (K2) and 4967 (L1), which purport to show lands that SON intended to share with other Indigenous groups in 1851,[10] do not fairly reflect the documentary record, and accordingly should be given no independent weight as evidence in this trial.

(b) Exhibit 4868 (L2), which purports to show the proposal made by Keating to SON for a surrender of a mill site on the Sauble River in July 1854[11], is a fair representation of what Keating proposed. However, that proposal was rejected by SON, who wished to keep the land for themselves. As such, this map does not offer any insight into SON's intentions in July 1854.

(c) Exhibit 4869 (M2), which purports to show the division in the Peninsula between North and South regions,[12] is a reasonable reflection of the documents on which it purports to rely.

---

[10] Evidence of Dr. Gwen Reimer, Transcript vol 93, March 10, 2020, p. 12049, lines 11-16; Dr. Gwen Reimer, Analysis of Documentation Relevant to Ontario's Illustration Maps Marked as Exhibits K2, L1, L2, M2, N1, N2, O1, Supplementary Report, Exhibit 4710, pp. 4, 10.
[11] Dr. Gwen Reimer, Analysis of Documentation Relevant to Ontario's Illustration Maps Marked as Exhibits K2, L1, L2, M2, N1, N2, O1, Supplementary Report, Exhibit 4710, p. 16.
[12] Dr. Gwen Reimer, Analysis of Documentation Relevant to Ontario's Illustration Maps Marked as Exhibits K2, L1, L2, M2, N1, N2, O1, Supplementary Report, Exhibit 4710, p. 19.

(d) Exhibit 4870 (N1) purports to show the counterproposal that SON made in August 1854 after Anderson threatened the Crown would take their lands without their consent if they continued to resist a surrender.[13] It is largely unsupported by documentary evidence, and has no value as evidence of the size, location, or boundaries of the land SON intended to keep in their August 1854 proposal.

(e) Exhibit 4871 (N2) purports to show the surrender that Anderson proposed to the Saugeen Ojibway at the Treaty Council on August 2, 1854, and the reserves that they would retain if they accepted that surrender.[14] Instead, it shows the reserves that were created by Treaty 72. There is no basis in the documentary record for the conclusion that these were the same or similar.

(f) Exhibit 4872 (O1) purports to show the Indian Reserves on the Peninsula as they existed in 1856-1857.[15] There is better evidence available to make this point – namely, two contemporaneous maps from 1856 and 1857 that show where the tracts described in Exhibit 4872 were understood to be at the time.

Exhibits 4866 (K2) and 4867 (L1)

7. These two maps both purport to represent the land that SON intended to share or set aside for other Indigenous groups as of 1851.[16] However, the documents on which they purport to rely do not support the placement, size, or, indeed, existence of several of the tracts marked on the map.

---

[13] Dr. Gwen Reimer, Analysis of Documentation Relevant to Ontario's Illustration Maps Marked as Exhibits K2, L1, L2, M2, N1, N2, O1, Supplementary Report, Exhibit 4710, p. 22.
[14] Dr. Gwen Reimer, Analysis of Documentation Relevant to Ontario's Illustration Maps Marked as Exhibits K2, L1, L2, M2, N1, N2, O1, Supplementary Report, Exhibit 4710, p. 26.
[15] Dr. Gwen Reimer, Analysis of Documentation Relevant to Ontario's Illustration Maps Marked as Exhibits K2, L1, L2, M2, N1, N2, O1, Supplementary Report, Exhibit 4710, p. 29.
[16] Evidence of Dr. Gwen Reimer, Transcript vol 93, March 10, 2020, p. 12049, lines 11-16

TRACT A: THE COLPOY'S BAY RESERVE

8. There was no Colpoy's Bay reserve in 1851. The only reserve that existed at this point was SON's reserve, which encompassed the entire Peninsula. [17] The area marked as "A" on the map represents the Colpoy's Bay reserve that was created three years later, by way of Treaty 72.[18] Dr. Reimer confirmed that she had not cited any documentary support for the notion that there was a defined Colpoy's Bay tract of 6,000 acres in 1851.[19] Though the Colpoy's Bay Band lived on the Peninsula in 1851, there is no documentary evidence to support the notion that SON had an intention to cede a defined parcel to them at that point, or that the tract they were using in 1851 was sized or shaped as represented on either of Exhibit 4866 (K2) or Exhibit 4867 (L1).

TRACT B: THE OWEN SOUND RESERVE

9. In 1851, the entire Peninsula was set aside for SON *as a whole.* There was no Owen Sound reserve. On cross examination, Dr. Reimer confirmed that there is no basis for separating the Owen Sound "tract" or "reserve", as marked on the map, from the rest of the Peninsula. There is also no indication in any of the documents cited by Dr. Reimer that SON intended to give up the rest of the Peninsula at this point, or to retain only parcel B.[20]

10. The best evidence we have about SON's intention for its reserve prior to Treaty 72 is their repeated response to the Crown's requests for a surrender in the early 1850s: that they did not want to surrender any land on the Peninsula.[21] SON submits that a fair representation of the situation in

---

[17] Evidence of Dr. Gwen Reimer, Transcript vol 93, March 10, 2020, p. 12058, lines 11-21.
[18] Evidence of Dr. Gwen Reimer, Transcript vol 93, March 10, 2020, p. 12062, lines 9-15.
[19] Evidence of Dr. Gwen Reimer, Transcript vol 93, March 10, 2020, p. 12062, lines 15-24.
[20] Evidence of Dr. Gwen Reimer, Transcript vol 93, March 10, 2020, p. 12051, lines 14-25 and p. 12056, line 6 to p. 12058, line 10,
[21] See, for instance: Minutes of General Council at Owen Sound, August 18, 1852, Exhibit 1943 [Transcript at Exhibit 4775]; See also evidence of Prof. Jarvis Brownlie, Transcript vol 30, July 22, 2019, p. 3071, line 16 to p. 3075, line 12; and p. 3077, line 1 to p. 3078, line 17; T.G. Anderson,

1851 would mark the entire Peninsula as SON's reserve, and would not mark an Owen's Sound reserve.

TRACT C: THE CAUGHNAWAGA "TRACT"

11. Tract C on each of these two maps is labelled as the "Caughnawaga Tract". There was an agreement concluded in 1851 between the Nawash Band and the Caughnawaga First Nation that Nawash would permit Caughnawaga people to reside on the Peninsula.[22] It is clear that at least some Caughnawaga families temporarily resided on the Peninsula in the 1850s.[23] However, there are several problems with how this tract is represented on the two maps.

12. First, as Dr. Reimer accepted in cross examination, the Saugeen band was not consulted about the 1851 agreement between Nawash and Caughnawaga,[24] and in fact, the evidence shows that the Saugeen band objected to it.[25] Therefore, the 1851 agreement cannot be said to reflect the intentions of SON as a whole. In addition, SON later confirmed that they did not wish to give up control over any parcels of their reserve to the Caughnawaga, even if they allowed some

---

"Report of my visit to the various Tribes under my Superintendence between the 19th July and 25th August 1853", July 19 and August 25, 1853, Exhibit 2004; See also evidence of Prof. Jarvis Brownlie, Transcript vol 30, July 22, 2019, p. 3081, line 16 to p. 3084, line 16. Letter from T.G. Anderson to Laurence Oliphant, June 22, 1854, Exhibit 2091; See also evidence of Prof. Jarvis Brownlie, Transcript vol 30, July 22, 2019, p. 3094, line 13 to p. 3096, line 21.

[22] Articles of Agreement made at Sydenham the twentieth day of August in the Year of our Lord One Thousand Eight hundred and fifty one, August 20, 1851, Exhibit 1872. See also Exhibit 1873.

[23] See, for instance, Evidence of Dr. Gwen Reimer, March 10, 2020, p. 12076, line 7 to p. 12077, line 22; Survey of Charles Rankin, August 5, 1856, Exhibit 4845.

[24] Articles of Agreement made at Sydenham the twentieth day of August in the Year of our Lord One Thousand Eight hundred and fifty one, August 20, 1851, Exhibit 1872. [A second version of the same document exists at Exhibit 1873].

[25] Anderson, Minutes of Meeting with Saugeen and Owen Sound Band, June 26, 1852, Exhibit 1933 [Transcript at Ex 4759], pp. 1 -2; Evidence of Dr. Gwen Reimer, Transcript vol 93, March 10, 2020, p. 12065, line 20 to p. 12066, line 13.

Caughnawaga to join them there.[26] As Dr. Reimer confirmed in cross-examination, after 1851, SON understood that the land still belonged to them, and they retained the sole right to surrender it.[27] SON therefore submits that there is no basis for suggesting that SON as a whole agreed to a "cession" of portions of their land to the Caughnawaga, or to mark the lands the Caughnawaga would use as a defined or separate tract from the reserve as a whole. The evidence shows that there was at most a willingness for some Caughnawaga to reside on SON's reserve.

13. Second, there are significant issues with the size of the tract represented on the maps, which is marked out as 26,000 acres on Exhibit 4866 (K2), and 38,000 acres on Exhibit 4867 (L1). The documents that Dr. Reimer identifies in her report as supporting the illustration of this tract do not support such a large tract:

(a) The 1851 Agreement between Nawash and Caughnawaga does not propose a size of land on which the Caughnawaga would be entitled to settle. [28]

(b) Dr. Reimer states that the basis of the size of tract represented is that each family would be entitled to 100 acres, and the entire Caughnwaga tribe would move to the Peninsula.[29] However, this number of 100 acres per family is drawn not from the

---

[26] Anderson, Minutes of Meeting with Saugeen and Owen Sound Band, June 26, 1852, Exhibit 1933 [transcript at Exhibit 4759], pp. 1-2; See also: Petition from Saugeen and Owen Sound Chiefs to Governor General, September 3, 1856, Exhibit 4844 - *reflecting the intention of the Owen Sound and Saugeen Indians that the Caughnawaga did not have any rights to sell land on the Peninsula;* Evidence of Dr. Gwen Reimer, Transcript vol 93, March 10, 2020, p. 12066, line 14 to p. 12072, line 2.

[27] Evidence of Dr. Gwen Reimer, Transcript vol 93, March 10, 2020, p. 12071, line 23 to p. 12072, line 2.

[28] Articles of Agreement made at Sydenham the twentieth day of August in the Year of our Lord One Thousand Eight hundred and fifty one, August 20, 1851, Exhibit 1872 [a second version of the same document exists at Exhibit 1873].

[29] Dr. Gwen Reimer, Analysis of Documentation Relevant to Ontario's Illustration Maps Marked as Exhibits K2, L1, L2, M2, N1, N2, O1, Supplementary Report, Exhibit 4710, pp. 5-6, 11-12.

agreement with Nawash but rather from a cap set by the Governor General on the amount of land on the Peninsula that could be made available to the Caughnawaga.[30] It therefore cannot be said to reflect the intention of SON, or even the Nawash band alone, in 1851.

(c) Exhibit 2048 is a Petition signed by both the Saugeen and Owen Sound bands, dated January 3, 1854. This petition suggests that SON was willing, in January 1854, to share a tract of 3600 acres with the Caughnwaga – 100 acres per family, to each of 36 families. [31] SON submits that this petition, since it is signed by both Saugeen and Nawash, better reflects SON's intentions for their lands than the 1851 Agreement relied upon by Dr. Reimer. However, this petition does not speak the intention of anyone in 1851.

(d) There is evidence that by 1856 approximately 17 Caughnawaga families resided on the Peninsula, each on a plot of land of 100 acres.[32] Though this does not show what the parties intended in 1851, it is some reflection of what SON ultimately accepted – a tract for the Caughnawaga on the Peninsula of just 1700 acres, rather than the 26,000 acres marked on Exhibit 4866 (K2) or the 38,000 acres on Exhibit 4867 (L1).

---

[30] Dr. Gwen Reimer, Analysis of Documentation Relevant to Ontario's Illustration Maps Marked as Exhibits K2, L1, L2, M2, N1, N2, O1, Supplementary Report, Exhibit 4710, pp. 6, 11-12.
[31] Petition to His Excellency William Rowan, by the Ojibwe Tribe of Indians, January 3, 1854, Exhibit 2048; Evidence of Dr. Gwen Reimer, Transcript vol 93, March 10, 2020, p. 12072, lines 3 to p. 12074, line 16.
[32] Evidence of Dr. Gwen Reimer, Transcript vol 93, March 10, 2020, p. 12076, line 7 to p. 12077, line 22; Survey of Charles Rankin, August 5, 1856 Exhibit 4845.

14. SON submits that it is simply not clear from the documentary record that SON, as whole, or even Nawash alone, had formed an intention in 1851 to share a defined tract of any particular size with the Caughnawaga. What is clear is that SON intended to retain control of any land that was shared with members of the Caughnawaga who came to the Peninsula.

TRACT D: THE CREDIT MISSISSAUGA "TRACT"

15. Tract D on both maps is identified as belonging to the Credit Mississauga. It is set out as 6000 acres in size. The difference between the two maps is the shape of the tract marked. Exhibit 4866 (K2) marks the Credit tract as a square, while Exhibit 4867 (L1) marks it as a wedge shape.

16. Dr. Reimer confirmed that the size of this tract as marked on both of the maps relied on documents showing that 61 Credit families were planning to remove to the Peninsula, and that each family would be accorded 100 acres. The basis for the idea that 61 families would move to the Peninsula was Exhibit 1659, a set of minutes of a council head at the Credit in March and April 1847.[33] On cross examination, Dr. Reimer confirmed that she had misread this document. Just one Credit family indicated they would relocate to the Peninsula. The rest were planning to go to either Munceytown or Brantford.[34]

17. SON submits that there is no remaining basis identified in Dr. Reimer's report for the Credit tract as marked on Exhibits 4866 (K2) and 4867 (L1).

CONCLUSION ON EXHIBITS 4866 (K2) AND 4867 (L1)

18. Accordingly, SON submits that Exhibit 4866 (K2) and Exhibit 4867 (L1) should be given no weight. To the extent that Ontario will rely on Exhibits 4866 and Exhibit 4867 to advance an

---

[33] Minutes of a Council held at the Credit village, March 30, 1847, Exhibit 1659; Evidence of Dr. Gwen Reimer, Transcript vol 93, March 10, 2020, p. 12078, line 20 to p. 12080, line 11.
[34] Evidence of Dr. Gwen Reimer, Transcript vol 93 March 10, 2020, p. 12078, line 19 to p. 12087, line 25; See also, Letter from Anderson to Vardon, March 30, 1847, Exhibit 4846.

argument about what portion of the Peninsula SON was willing to share with other Indigenous groups in 1851, they are of no value because: 1) they do not fairly reflect what SON intended to be shared with other Indigenous groups in 1851; and 2) they do not accurately or fairly reflect the underlying documents they purport to represent.

Exhibit 4868 (L2): "Illustration of Approximate Area described in Exhibit 2095 (Keating's 'proposal to the Chiefs & Principal Men, 5 July 1854)

19. SON accepts that this map is a reasonable illustration of the proposal Keating made to SON for a mill site surrender at the Sauble River in July 1854.[35] However, it is important to note that SON rejected this proposal.[36] Therefore, the map shows nothing about what SON intended for its territory in July 1854. In fact, the best evidence is that at this point, was SON's refusal to surrender any portion of the Peninsula, which suggests they intended to keep the entire reserve.[37]

Exhibits 4869 (M2): "Illustration of Bruce Peninsula with approximate acreage of north and south regions"

20. Although it is impossible to draw the line precisely because the source documents provide only a "rough estimate", SON accepts that this map likely approximates the division of the Peninsula into north and south regions as described by surveyor Charles Rankin in his August 2, 1854 letter to T.G. Anderson.[38]

---

[35] Mr. Keating's proposal to Chiefs and Principal Men residing at Saugeen, Owen's Sound and Colpoy's Bay, July 5, 1854, Exhibit 2095.
[36] W. Keating to T.G. Anderson, July 11, 1854, Exhibit 2097.
[37] W. Keating to T.G. Anderson, July 11, 1854, Exhibit 2097.
[38] C. Rankin to T.G. Anderson, August 2, 1854, Exhibit 2104.

Exhibit 4870 (N1): "Illustration of approximate areas described in Ex 2104 (Letter from Rankin to Anderson […]); Exhibit 2105 (Response to survey, containing SON counterproposal)"

21. This map purports to represent SON's counterproposal for a partial surrender, made after T.G. Anderson threatened to take their lands without their consent at the August 1854 Treaty council.[39] Although there was once a map of this counterproposal, it has not been located in the archival records.[40] Dr. Reimer's report on these maps suggests that SON was willing to surrender the "inland wedge" marked as B on the map, but wished to keep the tracts marked as A, C and D as reserve land.[41]

22. There is nothing in any of the documents cited by Dr. Reimer in her report on this map to identify the precise locations of the borders of tracts A, B, C, and D as marked on the map.[42]

23. Dr. Reimer states in her report that she has assumed that the reserve encompassing Cape Croker identified in SON's counterproposal was approximately the same size and location as the reserve set aside at Cape Croker in Treaty 72.[43] SON submits that this assumption is without foundation in the documentary record. In fact, Anderson balked at SON's counterproposal, and it

---

[39] See, T.G. Anderson, Address to the Saugeen Ojibway, August 2, 1854, Exhibit 2175, pp. 12-13; T.G. Anderson report to Oliphant, August 16, 1854, Exhibit 2175, pp. 11-12; C. Rankin to Anderson, August 2, 1854, Exhibit 2175 pp. 13-14 (the same document is also set out as Exhibit 2104); David Sawyer to Laurence Oliphant, August 2, 1854, Exhibit 2105 [transcript at Exhibit 4796] – *setting out SON's counterproposal.*

[40] Dr. Gwen Reimer, Analysis of Documentation Relevant to Ontario's Illustration Maps Marked as Exhibits K2, L1, L2, M2, N1, N2, O1, Supplementary Report, Exhibit 4710, p. 22. Evidence of Dr. Gwen Reimer, Transcript vol 93, March 10, 2020, p. 12102, lines 10-24.

[41] Dr. Gwen Reimer, Analysis of Documentation Relevant to Ontario's Illustration Maps Marked as Exhibits K2, L1, L2, M2, N1, N2, O1, Supplementary Report, Exhibit 4710, pp. 21-24.

[42] Dr. Gwen Reimer, Analysis of Documentation Relevant to Ontario's Illustration Maps Marked as Exhibits K2, L1, L2, M2, N1, N2, O1, Supplementary Report, Exhibit 4710, p. 22.

[43] Dr. Gwen Reimer, Analysis of Documentation Relevant to Ontario's Illustration Maps Marked as Exhibits K2, L1, L2, M2, N1, N2, O1, Supplementary Report, Exhibit 4710, p. 23.

was not accepted by the government.[44] SON submits that this suggests that the reserves they proposed in August 1854 did not line up with what was offered by the government in Treaty 72. Certainly, there is no support in the documentary record for the notion that the boundary of parcel D marked on Exhibit 4870 should be positioned as it is, at the boundary of the current reserve, nor to support the conclusion that the acreage of SON's proposed reserve at Cape Croker would be comparable to what was reserved in Treaty 72.

24. On cross examination, Dr Reimer confirmed that:

(a) SON's counterproposal (set out at Exhibit 2105) is clear that SON wished to retain three reserves. Collectively, these reserves embrace the Fishing Islands and Cape Croker. One reserve embraces a tract from the head of Owen Sound to the head of Colpoy's Bay.[45] However, it is not clear from this document that the reserve that embraces the Fishing Islands is to be distinct from the reserve that embraces Cape Croker.[46]

(b) There is no document that says the three reserves marked on Exhibit 4870 (N1) as A, C and D would have been reserved separately for each of the Colpoy's Bay, Saugeen and Nawash bands.[47]

---

[44] See T.G. Anderson to L. Oliphant, August 16, 1854, Exhibit 2175, p. 12- *"I told them I did not believe their great father would permit them to make an arrangement of this kind, by which they would prevent the sale of the most valuable part of their reserve."*
[45] Evidence of Dr. Gwen Reimer, Transcript vol 93, March 10, 2020, p. 12102, line 25 to p. 12103, line 9; David Sawyer to L. Oliphant, August 2, 1854, Exhibit 2105.
[46] Evidence of Dr. Gwen Reimer, Transcript vol 93, March 10, 2020, p. 12102, line 25 to p. 12103, line 22.
[47] Evidence of Dr. Gwen Reimer, Transcript vol 94, March 11, 2020, p. 12117, lines 1-21.

(c) The documentary record suggests that SON were only intending to surrender a 60,000 acre inland wedge.[48] It is "very possible" that SON intended to keep their village sites or "tracts" for each individual band, and share the rest of the remaining reserve jointly, as they had up to that point.[49]

25. SON submits that this map and reliable only insofar as it gives some visual representation of the size of the 60,000 acre inland wedge that SON agreed to surrender in response to Anderson's threats in August 1854. The map should not be given any weight as a representation of the precise boundaries of the reserves SON was proposing.

Exhibit 4871 (N2): "Illustration of approximate areas described in Exhibit 2120 (Report to Superintendent General of Indian Affairs from Anderson, 16 August 1854")

26. This map purports to show the surrender Anderson proposed to the Saugeen Ojibway on August 2, 1854.[50] Aside from the manual labour school reserve, which has at least *some* basis in the documentary record[51], neither the shapes, nor the locations of the "reserves" or "tracts" identified on this map were described in Anderson's account of his proposal to SON.[52]

---

[48] Evidence of Dr. Gwen Reimer Transcript vol 94, March 11, 2020, p. 12117, line 22 to p. 12118, line 2 and p. 12225, line 12 to p. 12228, line 15 - *Note that the question referenced Exhibit 2105, which is David Sawyer's description of the counterproposal, dated August 2, 1854. However, it is in fact C. Rankin to Anderson, August 2, 1854, Exhibit 2175 pp. 13-14 (the same document is also set out as Exhibit 2104 that describes this inland wedge). This was clarified on re-examination.*

[49] Evidence of Dr. Gwen Reimer, Transcript vol 94, March 11, 2020, p. 12118, lines 3-8.

[50] Evidence of Dr. Gwen Reimer, Transcript vol 94, March 11, 2020, p. 12118, lines 9-19.

[51] Dr. Gwen Reimer, Analysis of Documentation Relevant to Ontario's Illustration Maps Marked as Exhibits K2, L1, L2, M2, N1, N2, O1, Supplementary Report, Exhibit 4710, p. 26

[52] Evidence of Dr. Gwen Reimer, Transcript vol 94, March 11, 2020, p. 12119, lines 13-16; Dr. Gwen Reimer, Analysis of Documentation Relevant to Ontario's Illustration Maps Marked as Exhibits K2, L1, L2, M2, N1, N2, O1, Supplementary Report, Exhibit 4710, p. 27.

27. The map – and in turn, Dr. Reimer – simply "assumed" that the locations and sizes of the reserves proposed by Anderson in August 1854 are the same reserves provided for in Treaty 72. There is no evidence in the documentary record that supports this assumption.[53] Anderson's proposed reserves in August 1854 may have been quite different from the reserves ultimately agreed to in October 1854.

28. SON submits that Exhibit 4871 (N2) should be given no weight as a representation of the size, shape or locations of the reserves proposed by Anderson in August 1854.

Exhibit 4872 (O1): "Treaty 72 Reserves and Caughnawaga Tract at the Start of 1856"

29. This map approximates the reserves for Saugeen, Nawash and Colpoy's Bay set out in Treaty 72, and the land being used by the Caughnawaga in 1856. It is important to note, however, that whatever lands that the Caughnawaga were using at this point were not created as a reserve.[54] SON did not believe the Caughnawaga had any rights to lands on the Peninsula,[55] though there is evidence to show that approximately 17 Caughnawaga families were using tracts on the west side of Owen Sound in 1856/7.[56]

30. SON submits that Exhibit 4872 (O1) is not necessary or particularly helpful because there are two contemporaneous maps exist on the record already: Exhibit 2401, which was dated 1856,

---

[53] Evidence of Dr. Gwen Reimer, Transcript vol 94, March 11, 2020, p. 12119, line 13 to p. 12120, line 7; Dr. Gwen Reimer, Analysis of Documentation Relevant to Ontario's Illustration Maps Marked as Exhibits K2, L1, L2, M2, N1, N2, O1, Supplementary Report, Exhibit 4710, p. 27.
[54] See Treaty 72, Exhibit 2175, pp. 13-14, Map at PDF image 14.
[55] Anderson, Minutes of Meeting with Saugeen and Owen Sound Band, June 26, 1852, Exhibit 1933 [transcript at Exhibit 4759], pp. 1-2. See also: Petition from Saugeen and Owen Sound Chiefs to Governor General, September 3, 1856, Exhibit 4844 - *reflecting the intention of the Owen Sound and Saugeen Indians that the Caughnawaga did not have any rights to sell land on the Peninsula.* Evidence of Dr. Gwen Reimer, Transcript vol 93, March 10, 2020, p. 12066, line 14 to p. 12072, line 2.
[56] Evidence of Dr. Gwen Reimer, Transcript vol 93, March 10, 2020, p. 12076, lines 7 -17

and Exhibit 2449, which was dated 1857. Both show the tracts of land occupied by the Saugeen, Owen Sound, Colpoy's Bay, and Caughnawaga Indians at the time they were drafted. Dr. Reimer identifies these maps as supporting documents for Exhibit 4872.[57] To the extent that there is any need to refer to the locations of the reserves or the Caughnawaga tract as they were understood in 1856 or 1857, SON submits it would be more accurate to simply refer to the original source documents rather than a map generated to the specifications of Ontario's counsel.

[57] Dr. Gwen Reimer, Analysis of Documentation Relevant to Ontario's Illustration Maps Marked as Exhibits K2, L1, L2, M2, N1, N2, O1, Supplementary Report, Exhibit 4710, pp. 28-29.