Federal Court  Cour fédérale

Date: 20150728

Docket: T-195-92

Citation: 2015 FC 920

Ottawa, Ontario, July 28, 2015

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

ALDERVILLE INDIAN BAND NOW KNOWN AS MISSISSAUGAS OF ALDERVILLE FIRST NATION, AND GIMAA JIM BOB MARSDEN, SUING ON HIS OWN BEHALF AND ON BEHALF OF THE MEMBERS OF THE MISSISSAUGAS OF ALDERVILLE FIRST NATION

BEAUSOLEIL INDIAN BAND NOW KNOWN AS BEAUSOLEIL FIRST NATION, AND GIMAA RODNEY MONAGUE, SUING ON HIS OWN BEHALF AND ON BEHALF OF THE MEMBERS OF THE BEAUSOLEIL FIRST NATION

CHIPPEWAS OF GEORGINA ISLAND INDIAN BAND NOW KNOWN AS CHIPPEWAS OF GEORGINA ISLAND FIRST NATION, AND GIMAANINIIKWE DONNA BIG CANOE, SUING ON HER OWN BEHALF AND ON BEHALF OF THE MEMBERS OF THE CHIPPEWAS OF GEORGINA ISLAND FIRST NATION

CHIPPEWAS OF RAMA INDIAN BAND NOW KNOWN AS MNJIKANING FIRST NATION, AND GIMAANINIIKWE SHARON STINSON-HENRY, SUING ON HER OWN BEHALF AND ON BEHALF OF THE MEMBERS OF THE MNJIKANING FIRST NATION

CURVE LAKE INDIAN BAND NOW KNOWN AS CURVE LAKE FIRST NATION, AND GIMAA KEITH KNOTT, SUING ON HIS OWN BEHALF AND ON BEHALF OF THE MEMBERS OF THE CURVE LAKE FIRST NATION

HIAWATHA INDIAN BAND NOW KNOWN AS HIAWATHA FIRST NATION, AND GIMAANINIIKWE LAURIE CARR, SUING ON HER OWN BEHALF AND ON BEHALF OF THE MEMBERS OF THE HIAWATHA FIRST NATION

MISSISSAUGAS OF SCUGOG INDIAN BAND NOW KNOWN AS MISSISSAUGAS OF SCUGOG ISLAND FIRST NATION, AND GIMAANINIIKWE TRACY GAUTHIER, SUING ON HER OWN BEHALF AND ON BEHALF OF THE MEMBERS OF THE MISSISSAUGAS OF SCUGOG ISLAND FIRST NATION

Plaintiffs

and

HER MAJESTY THE QUEEN

Defendant

and

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Third Party

ORDER AND REASONS

I. Introduction

[1] The Plaintiff First Nations apply for leave to file the expert report of Dr. Darrel Manitowabi and call him as an expert witness. Dr. Manitowabi's report is titled "*An Anishinaabeg Oral Narrative of the Williams Treaties Based on 174 Interviews with Members of the Williams Treaties First Nations collected by the late Dr. Krystyna Sieciechowicz in the Years 2001-2002, and Related Materials*" [Manitowabi Report]. The Plaintiffs submit this evidence provides the Aboriginal perspective on events surrounding the making of the 1923 Williams Treaties, and impact of those Treaties on the Plaintiff First Nations.

[2] The Defendant Canada filed a cross-motion for an order denying the Plaintiffs' request for leave to file the Manitowabi Report or, in the alternative, granting an adjournment to mitigate prejudice arising from the late filing of the Manitowabi Report, as well as other measures.

[3] The Third Party Ontario also filed a cross-motion. They seek an order dismissing the Plaintiffs' motion and, in the alternative, an order for mitigative measures.

[4] Having regard for the importance of considering the Aboriginal perspective in this trial, the circumstances which gave rise to the late introduction of the Manitowabi Report, and the mitigative measures available to alleviate any prejudice caused, I have decided the Plaintiffs may file the Manitowabi Report and call Dr. Manitowabi as an expert witness.

[5] I have also decided that further orders and directions are necessary to satisfy the adequacy of the trial record, mitigate prejudice arising from the late filing, and ensure fairness for all Parties in this proceeding.

[6] My reasons are set out in the following discussion and analysis.

II. **Background**

[7] In 1992, the Plaintiff First Nations [Plaintiffs or First Nations] filed their claim that the Crown breached its fiduciary duty in the making of the 1923 Williams Treaties. Negotiation between the First Nations and Canada and Ontario ended in July 2000, when Canada informed the First Nations that it would not negotiate hunting, fishing and trapping rights as treaty rights. Canada suspended negotiations and Ontario followed suit.

[8] In 2000, the Plaintiffs asked an anthropologist, Dr. Krystyna Sieciechowicz, to interview First Nations members to assist in identifying potential witnesses. From 2001 to 2002, Dr. Sieciechowicz interviewed 174 members of the First Nations. In 2005, Plaintiffs' legal counsel requested Dr. Sieciechowicz prepare an expert report on the First Nations' oral history of the Williams Treaties based on the interviews she had conducted. Dr. Sieciechowicz began drafting the report in 2006 but was not able to complete her report prior to the close of pleadings in 2007. On March 26, 2007, the Plaintiffs advised the Defendant and Third Party that they would not make use of an expert report from Dr. Sieciechowicz.

[9] The Plaintiffs explored taking *de bene esse* evidence prior to trial. This proposal was not realized but, according to Plaintiffs' counsel, evolved into community testimony by First Nations members in Phase 1 of this trial.

[10] The trial was scheduled to commence May 9, 2009 but was adjourned to allow for further negotiations, which were also unsuccessful.

[11] Dr. Sieciechowicz had produced an incomplete draft report profiling her methodology and summary conclusions and had left voluminous materials including semi-structured questionnaires, 174 completed interviews, notes and other materials [Draft Report]. Dr. Sieciechowicz died on March 22, 2012.

[12] The trial subsequently commenced May 2012, beginning with testimony by community members from each of the seven First Nations.

[13] On March 27, 2013, the Plaintiffs' expert witness, Dr. Janet Armstrong, examined the original engrossed Williams Treaties at Library and Archives Canada, and detected possible anomalies in the text of the original documents. The subsequent forensic reports of the engrossed Williams Treaties confirmed the anomalies which raised questions about the events and documentation during the final negotiation and signing of the Williams Treaties in 1923. In her testimony on January 28, 2015 concerning the significance of the anomalies, Dr. Armstrong suggested that one should have regard for the First Nations' oral history of the events.

[14] Chief Greg Cowie of the Hiawatha First Nation deposed that Plaintiffs' legal counsel informed him Professor Sieciechowicz had kept the interview and research materials in her possession until she passed away. Her estate then transferred the materials to the University of Toronto archives; however, the estate trustee retained control over these documents and was initially unwilling to grant access to the First Nations.

[15] In 2013, Plaintiffs' legal counsel retained Dr. Darrel Manitowabi to prepare an expert report based on Dr. Sieciechowicz's Draft Report. Dr. Manitowabi, an anthropologist and a professor at Laurentian University, has studied the south-central Anishinaabeg and is familiar with Dr. Sieciechowicz's work as she was his Ph.D. supervisor in the Department of Anthropology at the University of Toronto in 2001 – 2007.

[16] Dr. Manitowabi was able to gain approval from the estate trustee and examined Dr. Sieciechowicz's research in July 2013 and September 2014. He arranged the scanning of the Draft Report in the fall of 2014.

[17] Dr. Manitowabi completed his expert report based on Dr. Sieciechowicz's Draft Report on March 1, 2015. In his report, Dr. Manitowabi states that sociocultural anthropology is qualitative and many studies follows a "grounded theory" approach. He explains that this research method is increasingly popular in a variety of disciplines including social science and health research:

> In grounded theory oral narrative research, the objective is look for patterns of meaning and consistent themes in oral narratives. While an anthropologist is collecting oral narratives, a pattern emerges and saturation is reached when the themes and oral narratives of in

> [sic] interviews becomes repetitive. The focus of grounded theory is the main themes found in consistent responses. There are certainly instances where an interview may contradict another, but these are typically only taken into consideration if there is a pattern of contradictions, and the contradictions become part of the thematic analysis. ... If a patterned contradiction exists, it becomes a meaningful point of analysis. Once patterns are observed consistently, saturation is reached, and the anthropologist arrives at an understanding of a people's oral narrative of the issue at hand.
>
> Manitowabi Report, p. 12

[18] Dr. Manitowabi says that grounded theory served as the basis for Dr. Sieciechowicz's theoretical framework and concludes that his report encompasses a unique aspect being the integration of two expert opinions on a data set which examines the impact of the Williams Treaties on the First Nations.

[19] Dr. Manitowabi identified three main themes that arose from the collective oral narratives on the Williams Treaties, which Dr. Manitowabi termed the First Nations' "grand narrative of the Williams Treaties". These three main themes are:

i. the way of life at the time of the Treaties,

ii. the Treaties signings, and

iii. the impact of the Treaties.

[20] In response to the cross-motions, the Plaintiffs filed the affidavit of Dr. Edward J. Hedican, a professor of anthropology at the University of Guelph. Dr. Hedican is familiar with the grounded theory research approach in anthropological and Aboriginal studies. He says Dr. Manitowabi's approach is soundly based on the generally accepted guidelines for research

employing the grounded theory paradigm. Dr. Hedican also observed that the themes in the report seem to reasonably focus on the First Nations' understanding of the Williams Treaties.

[21] On January 23, 2015, the Chiefs of the Plaintiff First Nations approved submitting the Manitowabi Report to the Court. On March 27, 2015, the Plaintiffs filed a motion seeking to vary Prothonotary Milczynski's July 7, 2009 Order which limited the Plaintiffs to eight expert witnesses. In this motion, they seek leave to call an additional expert witness, Dr. Manitowabi, and to file his expert report.

III. **Legislation**

[22] The *Federal Court Rules*, SOR/98-106, as amended [the *Rules*] provide:

52.4 (1) A party intending to call more than five expert witnesses in a proceeding shall seek leave of the Court in accordance with section 7 of the Canada Evidence Act.	52.4 (1) La partie qui compte produire plus de cinq témoins experts dans une instance en demande l'autorisation à la Cour conformément à l'article 7 de la Loi sur la preuve au Canada.
…	…
53. (1) In making an order under these Rules, the Court may impose such conditions and give such directions as it considers just.	53. (1) La Cour peut assortir toute ordonnance qu'elle rend en vertu des présentes règles des conditions et des directives qu'elle juge équitables.
…	…
58. (1) A party may by motion challenge any step taken by another party for non-compliance with these Rules.	58. (1) Une partie peut, par requête, contester toute mesure prise par une autre partie en invoquant l'inobservation d'une disposition des présentes règles.
…	…
59. Subject to rule 57, where, on a motion brought under rule 58, the Court finds that a party	

has not complied with these Rules, the Court may, by order,

(a) dismiss the motion, where the motion was not brought within a sufficient time after the moving party became aware of the irregularity to avoid prejudice to the respondent in the motion;

(b) grant any amendments required to address the irregularity; or

(c) set aside the proceeding, in whole or in part.

…

227. On motion, where the Court is satisfied that an affidavit of documents is inaccurate or deficient, the Court may inspect any document that may be relevant and may order that

(a) the deponent of the affidavit be cross-examined;

(b) an accurate or complete affidavit be served and filed;

(c) all or part of the pleadings of the party on behalf of whom the affidavit was made be struck out; or

(d) that the party on behalf of whom the affidavit was made pay costs.

…

279. Unless the Court orders otherwise, no expert witness's evidence is admissible at the trial of an action in respect of any issue unless

(a) the issue has been defined

59. Sous réserve de la règle 57, si la Cour, sur requête présentée en vertu de la règle 58, conclut à l'inobservation des présentes règles par une partie, elle peut, par ordonnance :

a) rejeter la requête dans le cas où le requérant ne l'a pas présentée dans un délai suffisant — après avoir pris connaissance de l'irrégularité — pour éviter tout préjudice à l'intimé;

b) autoriser les modifications nécessaires pour corriger l'irrégularité;

c) annuler l'instance en tout ou en partie.

…

227. La Cour peut, sur requête, si elle est convaincue qu'un affidavit de documents est inexact ou insuffisant, examiner tout document susceptible d'être pertinent et ordonner :

a) que l'auteur de l'affidavit soit contre-interrogé;

b) qu'un affidavit exact ou complet soit signifié et déposé;

c) que les actes de procédure de la partie pour le compte de laquelle l'affidavit a été établi soient radiés en totalité ou en partie;

d) que la partie pour le compte de laquelle l'affidavit a été établi paie les dépens.

…

279. Sauf ordonnance contraire de la Cour, le témoignage d'un

by the pleadings or in an order made under rule 265;

(b) an affidavit or statement of the expert witness prepared in accordance with rule 52.2 has been served in accordance with subsection 258(1), rule 262 or an order made under rule 265; and

(c) the expert witness is available at the trial for cross-examination.

…

399. (2) On motion, the Court may set aside or vary an order

(a) by reason of a matter that arose or was discovered subsequent to the making of the order; or

(b) where the order was obtained by fraud.

(3) Unless the Court orders otherwise, the setting aside or variance of an order under subsection (1) or (2) does not affect the validity or character of anything done or not done before the order was set aside or varied.

témoin expert n'est admissible en preuve, à l'instruction d'une action, à l'égard d'une question en litige que si les conditions suivantes sont réunies :

a) cette question a été définie dans les actes de procédure ou dans une ordonnance rendue en vertu de la règle 265;

b) un affidavit ou une déclaration du témoin expert a été établi conformément à la règle 52.2 et signifié conformément au paragraphe 258(1) ou à la règle 262 ou à une ordonnance rendue en application de la règle 265;

c) le témoin expert est disponible à l'instruction pour être contre-interrogé.

…

399. (2) La Cour peut, sur requête, annuler ou modifier une ordonnance dans l'un ou l'autre des cas suivants :

a) des faits nouveaux sont survenus ou ont été découverts après que l'ordonnance a été rendue;

b) l'ordonnance a été obtenue par fraude.

(3) Sauf ordonnance contraire de la Cour, l'annulation ou la modification d'une ordonnance en vertu des paragraphes (1) ou (2) ne porte pas atteinte à la validité ou à la nature des actes ou omissions antérieurs à cette annulation ou modification

IV. **Previous Orders and Directions**

[23] The motion and cross-motions address questions about variation of prior orders and directions, which are:

i. the July 10, 2009 Prothonotary Milczynski Order that the Plaintiffs may examine eight expert witnesses and may examine up to a further three additional expert witnesses in order to respond to Canada's and/or Ontario's experts' evidence;

ii. the July 17, 2013 Order where I ruled that the video recording of the community viewings fell short of being evidence at trial and ordered the video recordings be marked as exhibits for identification; and

iii. the February 20, 2015 Direction where I directed that the trial be organized into three phases, a liability phase, a remedies phase and a third party action.

V. **Parties' Submissions**

A. *Plaintiff First Nations*

[24] The Plaintiffs submit that their collective narrative on the Williams Treaties is set out in the Manitowabi Report. They say the Manitowabi Report would provide the Court with the Aboriginal perspective on the Williams Treaties.

[25] The Plaintiffs acknowledge the interview statements to be hearsay as there are no living witnesses to the making of the Williams Treaties. Further, the Chiefs of the First Nations do not want their elders subjected to the trial witness process, which can be very difficult and tiring.

[26] The Plaintiffs submit that Dr. Manitowabi's report would allow them to relate their collective oral history about community conditions in 1923, the making of the Williams Treaties, and the impact of the Williams Treaties had in the years following. The Plaintiffs emphasize the difficulties in obtaining an expert report on the collective oral history prior to the close of pleadings, explaining that Dr. Sieciechowicz's work had not been completed when pleadings closed in 2007 and that they had focused on negotiations between 2007 and 2011.

[27] The Plaintiffs say that Dr. Armstrong's discovery of anomalies in the engrossed Williams Treaties raises serious questions about what occurred in 1923, specifically what were the First Nations expectations regarding the Treaties and what was the state of the documents at the time the Treaties were signed. Since learning of these issues, the Plaintiffs say they have moved as quickly as possible to obtain and submit the Manitowabi Report.

[28] The Plaintiffs submit that circumstances surrounding the Manitowabi Report satisfies the requirement under Rule 399(2)(a) for variation given the discovery subsequent to the making of the Prothonotary Milczynski's July 27, 2009 Order. The Plaintiffs ask the Court to vary the Order and allow them to call Dr. Manitowabi as an additional expert witness.

[29] The Plaintiffs further submit appropriate mitigative measures are available to cure any prejudice incurred by Canada and Ontario through trial management measures, such as conferencing and panelling and their offer to schedule Dr. Manitowabi's evidence later in the trial to allow Canada and Ontario sufficient time to respond to the Manitowabi Report.

B. *Defendant Canada*

[30] Canada submits that presenting Dr. Manitowabi's report along with Dr. Sieciechowicz's Draft Report this late in the trial essentially amounts to "trial by ambush". The Defendant Canada notes that the Plaintiffs have almost completed calling all their liability evidence. Canada states its defence to date had been constructed on the basis of the existing record, which did not contain the Manitowabi Report or the oral history interviews it relies on.

[31] Canada submits it is prejudiced by the late introduction of the Manitowabi Report and that the prejudice is compounded by the Plaintiffs' failure to previously disclose Dr. Sieciechowicz's Draft Report under the Court's rules governing production and discovery.

[32] Canada says that the Plaintiffs' motion calls into question issues of fundamental fairness, the integrity of the trial process and the administration of justice, and that the Court should not sanction the failure to disclose material documents. However, if the Court allows the report, the Court must fully and completely address the prejudice.

[33] Canada says irremediable prejudice is caused by the lost opportunity to question the Plaintiffs' ethnohistorians about the contents of Dr. Manitowabi's report during cross-examination and that prejudice outweighs the probative value of the Manitowabi Report. Although Canada requests the opportunity to recall these three witnesses in its cross-motion, Canada submits that the inability to retrofit new issues into already completed cross-examinations means some of the prejudice cannot be cured.

[34] Canada notes that the Plaintiffs have had access to Dr. Sieciechowicz's Draft Report since 2013 and Dr. Manitowabi himself has had more than a year to review and consider the materials to develop his opinion. Canada accepts that Dr. Manitowabi is a trained anthropologist who is qualified to testify on the opinions expressed in his report. In making this concession however, Canada does not waive its right to challenge Dr. Manitowabi's qualifications, and cross-examine Dr. Manitowabi should he be called as an expert witness in trial.

[35] For purposes of the Plaintiffs' motion and Canada's cross-motion, Canada also accepts that the subject matter of Dr. Manitowabi's report is relevant. However, Canada does not waive any right to challenge at trial the admissibility of evidence on matters extraneous to the making of the Williams Treaties or outside the scope of the pleadings in the action.

[36] Canada accepts Dr. Sieciechowicz's statements, as to her own observations, are admissible for purposes of the leave and cross-motions only, but does not waive its right to challenge the admissibility of such statements should leave be granted and Dr. Manitowabi called to testify. Canada acknowledges that Dr. Sieciechowicz is no longer living and that her statements regarding her own observations may meet the hearsay test of necessity. It also reserves the right to challenge the admissibility of the interviewees' statements should leave be granted and Dr. Manitowabi testify.

[37] Canada says it requires an expert critical analysis of Dr. Manitowabi and Dr. Sieciechowicz's methodologies in order to assess the reliability of the statements underlying their respective reports.

[38] Although Canada initially opposed granting leave to file Dr. Manitowabi's report, Canada ultimately takes the position that the Court may grant leave for filing Dr. Manitowabi's report but with mitigative orders and directions:

a. affording the Defendant a 15 month adjournment to obtain an expert anthropological and ethnohistorical report responding to the Manitowabi Report;

b. confirming the Defendant has preserved the right to challenge the qualifications of Dr. Manitowabi and its without prejudice concessions made for the purposes of the Plaintiff's motion and Defendant 's cross-motion;

c. providing for future adjournments to accommodate any reasonably required additional Defendant reports including such future adjournment necessary for receipt of the anticipated Plaintiffs' reply report;

d. granting leave for the Defendant to renew its cross-examination of the Plaintiffs' ethnohistorical experts who already testified as the Defendant may elect;

e. granting leave for the Defendant to cross-examine such First Nations interviewees identified in the Sieciechowicz/Manitowabi materials as the Defendant may elect;

f. providing directions through trial management necessary adjustments to the scope and length of the trial;

g. providing directions concerning use by experts of past recordings of oral accounts by members of the First Nations concerning the 1923 Williams Treaties;

h. providing directions for use at trial of oral history accounts or other historical records that form part of the evidentiary record in *R v Howard*; and

i. directing the Plaintiffs to amend their affidavit of documents to include the additional documents as required by the Federal Court Rules governing production in civil proceedings.

[39] In its cross-motion, Canada also submits that there are other audio recordings, some of which appear to be duplicative copies, made by First Nations members which are at issue in this cross-motion:

i. four oral history audio recordings that were located Indian Commission of Ontario (ICO) storage in 2009 (three of which are also in the Christian Island recording listed below);

ii. other oral history audio recordings, including:

1. Christian Island audio recording;

2. John Loucks' audio recording

3. Curve Lake audio recording

4. other oral history audio recordings of the elders of Scugog and Christian Island recorded by Ian Johnson

[40] Canada submits these additional oral history recordings reference the making and impacts of the 1923 Williams Treaties and are therefore relevant. Canada submits there is no claim of privilege in respect of those recordings.

[41] Also in its cross-motion, Canada also requests the Ralph Loucks' testimony in the *R v Howard* trial (Reasons for Judgement, January 10, 1986) be admitted as an exhibit. Canada

acknowledges this Court has already ruled the evidence in *Howard* is subject to restricted use but specifically requests that the transcript of Mr. Loucks' testimony be included since it is part of an archive of statements made by First Nations members about the Williams Treaties. Canada submits there is no basis to treat it differently from other archival sources.

[42] Finally, Canada submits costs of the Plaintiffs' motion for leave and its cross-motion should be granted to the Defendant on a substantial indemnity basis.

C. *Ontario Submissions*

[43] Ontario submits admitting the Manitowabi Report would constitute a palatable error for many of the same reasons as Canada emphasizing that:

a) the Manitowabi Report and information it is based upon are inadmissible hearsay;

b) the Plaintiffs advised they would not file a report by Dr. Sieciechowicz and are now filing her Draft Report when she is unavailable for cross-examination;

c) the material on which the Manitowabi Report is based existed since 2000-2002 but was not produced until March 2, 2015 notwithstanding disclosure requirements for affidavits of documents, negative answers to written interrogatories in the discovery process, and assurances by Plaintiffs' legal counsel that any relevant material that existed would be disclosed.

[44] Ontario asserts it suffered significant prejudice by the late disclosure of the Manitowabi Report and the interviews. It says it was deprived of the opportunity to use the information to

cross-examine the Plaintiffs' community witnesses who testified in Phase 1 of the trial, and the Plaintiff's experts who testified in Phase 2 of the trial. In addition Ontario was deprived of the opportunity to engage expert assistance on Aboriginal oral history evidence when preparing its case prior to trial which impacted its litigation strategy.

[45] Ontario also submits that portions of the Manitowabi Report address issues that are not defined by the pleadings.

[46] Ontario also submits introducing the Manitowabi Report will delay the trial, require significant expenditures by the parties, necessitate recalling witnesses, and could result in the Plaintiffs splitting their case.

[47] Ontario further submits that calling Dr. Manitowabi would violate Prothonotary Milczynski's July 10, 2009 Order which limits the Plaintiffs to calling eight expert witnesses.

[48] Ontario seeks an order dismissing the Plaintiff's motion. Ontario submits that, although there should be a flexible approach to the introduction of evidence in Aboriginal trials, the requirement of a fair trial and the rules of evidence continue to apply.

[49] If the Manitowabi Report is introduced into evidence, Ontario submits that mitigative steps should be taken to lessen the prejudice. Ontario proposes the following:

a) Dr. Sieciechowicz draft report should be redacted from Dr. Manitowabi's report because it is outside the scope of the trial, unsigned, incomplete, fails to meet Rule 279 and does not comply with the Code of Conduct for expert witnesses;

b) adjourn the trial for at least one year to give Ontario time to locate and retain an appropriate expert to review the Manitowabi Report and prepare a response;

c) Dr. Manitowabi should not be permitted to testify after Ontario's experts as this would allow the Plaintiffs to split their case and would be contrary to fair hearing rights;

d) Ontario should have the opportunity to recall the Plaintiffs' community witnesses and ethnohistorians who have given evidence on the Aboriginal perspective;

e) the ICO and other oral history recordings should also be admitted into evidence, so all material that is relevant to either understanding or challenging the Manitowabi Report and its underlying materials must be available to the parties;

f) Ralph Loucks' evidence before the Ontario Provincial Court (Criminal Division) on October 1, 1985 in the *Howard* trial should be admitted;

g) the Ian Johnson's reports which Dr. Sieciechowicz reviewed during the course of her research should also be produced;

h) the Plaintiffs should file an accurate and complete supplementary affidavit of documents listing all relevant documents including all recordings or transcriptions of statements made by the members of the Plaintiff First Nations in relation to the making of the Williams Treaties.

[50] Finally, Ontario seeks an award of costs for additional trial preparation and attendance as a result of the filing of the Manitowabi Report.

[51] During the course of the motion and cross-motions, I asked the parties to provide submissions on whether the video recordings of the First Nations community witnesses' statements during the viewings ought to be considered as part of completing the First Nations oral history record given the witnesses not only spoke about their communities but also of their oral history. The First Nations were in agreement while Canada was opposed but, in the alternative, submitted only the statements made by the community witnesses be entered as evidence. Ontario did not oppose inclusion.

VI. **Analysis**

[52] I am satisfied that the Manitowabi Report should be admitted notwithstanding the prejudice that arises from its late filing in this trial involving the First Nations' claim of breach of fiduciary duty and failure to uphold the honour of the Crown in the making of the Williams Treaties.

[53] The First Nations say that the Manitowabi Report will provide the First Nations' collective Aboriginal perspective on the making of the Williams Treaties and that it is essential for the Court to hear the voice of the First Nations. The First Nations say the Manitowabi Report would provide the Court with oral history evidence on the conditions in the communities at the time of the Treaties, the making of the Treaties, and the impact of the Treaties in the years after.

[54] The Manitowabi Report is a new way of introducing oral history evidence in Court. It applies a grounded theory research approach to discern themes that emerge from interviews. This means that evidence will be presented in Court by an expert witness, an anthropologist, rather than by either an individual Aboriginal witness or by a number of Aboriginal witnesses.

[55] A review of previous court cases involving of oral history evidence reveals a number of ways in which Courts receive oral history evidence:

a. in *Delgamuukw*, above, a total of 61 lay witnesses gave evidence, many using translators of the Gitksan and Wet'su wet'en languages, while another 15 gave evidence on commission;

b. in *Badger*, above, an elder, Dan Maclean, testified about the Indians' understanding of Treaty No. 8; his capacity to do so was not challenged and his testimony was corroborated by a text documenting oral history recounted by other Treaty No. 8 elders;

c. in *Mitchell*, above, Grand Chief Michael Mitchell testified about the Mohawks' oral history as it related to trade. His capacity to do so was because of his training form an early age in the history of his community.

[56] In his report, Dr. Manitowabi describes two types of Anishinaabeg oral stories: ‘aadsookan’, mythic stories of the past and ‘dbaajmowin’, stories of past events. The oral narratives of Dr. Sieciechowicz’s interviewees are ‘dbaajmowin’, historic stories told to the interviewees mixed with some personal stories from the interviewees themselves.

[57] Since I consider the First Nations oral narratives recorded by Dr. Sieciechowicz and subsequently analyzed by Dr. Manitowabi to be handed down stories of past events, they constitute both oral history evidence and hearsay evidence on the Williams Treaties.

[58] In *R v Khan* [1990] 2 S.C.R. 531, the Supreme Court of Canada set out a principled approach for admitting hearsay evidence. The first question is whether the hearsay statement is “reasonably necessary”. The second question is whether the evidence is reliable. The Supreme Court reviewed and clarified the law of hearsay in *R v Khelawon*, [2006] 2 S.C.R. 787. It acknowledged that hearsay evidence is presumptively inadmissible because it is an out of court statement adduced to prove the truth of its contents without affording an opportunity to cross-examine the declarant to test the reliability of the statement, but provided that hearsay evidence is presumptively admissible if it meets the indicia of necessity and reliability required by the principled approach: see also *R v Mapara*, 2005 SCC 23 at para. 15.

[59] Dr. Manitowabi is an anthropologist who can be expected to provide expert evidence in his field of expertise. He is being called to provide the Court with expert evidence on grounded theory methodology and thematic assessment as applied to the oral history of the First Nations about the Williams Treaties. The data upon which his expert report is based is the 174

interviews of First Nations members conducted by Dr. Siechiechowicz on their collective oral history about the Williams Treaties. The interviews may be hearsay but the Manitowabi Report is not. To the extent it is like a survey, it is no different from expert reports that include survey groups as part of the data set considered.

[60] The Manitowabi Report is relevant in that it focusses on the First Nations oral history of the Williams Treaties which is central to the issues in this trial. It is necessary in that it deals with grounded theory methodology and analysis outside of the ordinary experience of the Court. It is being presents by Dr. Manitowabi who is an anthropologist and, for the purposes of these motions, is qualified to give evidence on the subject matter of his Report. *R v Spence* 2005 SCC 71, at para 68.

[61] The substantive issues are the hearsay nature of the oral history interviews and Dr. Sieciechowicz's Draft Report. The admission of the oral history evidence in this case involves threshold questions of usefulness and reliability.

[62] The Supreme Court of Canada has considered the question of hearing the Aboriginal perspective. In *R v Sparrow*, [1990] 1 S.C.R. 1075. Chief Justice Dickson and Justice La Forest wrote: "it is possible, and, indeed, crucial, to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake."

[63] In *Delgamuukw v British Columbia*, [1997] 3 S.C.R. 1010 at paras. 81-82, Chief Justice Lamer explained that an understanding of the Aboriginal perspective assists in achieving

reconciliation, and that "aboriginal rights are truly *sui generis*, and demand a unique approach to the treatment of evidence which accords due weight to the perspective of aboriginal peoples."

[64] In *Mitchell v Minister of National Revenue* 2001 SCC 33 at paras. 31-33, Chief Justice McLachlin explained that the rules of evidence must be applied flexibly in a manner commensurate with the inherent difficulty posed by such claims and the promise of reconciliation embodied in s. 35(1) of the *Constitution Act* 1982. In particular, Chief Justice McLachlin discussed the admissibility of Aboriginal oral histories stating:

> In *Delgamuukw*, mindful of these principles, the majority of this Court held that the rules of evidence must be adapted to accommodate oral histories, but did not mandate the blanket admissibility of such evidence or the weight it should be accorded by the trier of fact; rather, it emphasized that admissibility must be determined on a case-by-case basis (para. 87). Oral histories are admissible as evidence where they are both useful and reasonably reliable, subject always to the exclusionary discretion of the trial judge.
>
> Aboriginal oral histories may meet the test of usefulness on two grounds. First, they may offer evidence of ancestral practices and their significance that would not otherwise be available. No other means of obtaining the same evidence may exist, even in the absence of contemporaneous records. Second, oral histories may provide the aboriginal perspective on the right claimed. Without such evidence, it might be impossible to gain a true picture of the aboriginal practice relied on or its significance to the society in question....
>
> The second factor that must be considered in determining the admissibility of evidence in aboriginal cases is reliability: does the witness represent the reasonably reliable source of a particular people's history? The trial judge need not go so far as to find a special guarantee of reliability. However, inquiries as the witness's ability to know and testify to orally transmitted aboriginal traditions and history may be appropriate both on the question of admissibility and the weight to be assigned the evidence if it meant it.
>
> [Emphasis added]

[65] Although the Supreme Court was considering Aboriginal oral histories in respect of Aboriginal rights and titles claims in *Sparrow*, *Delgamuukw* and *Mitchell*, the same principles apply in matters involving Indian treaties. In *R v Badger*, [1996] 1 S.C.R. 771 at para. 54, Justice Cory wrote:

> An interpretation of the Treaty properly founded upon the Indians' understanding of its terms leads to the conclusion that the geographical limitation on the existing hunting right should be based upon a concept of visible, incompatible land use. This approach is consistent with the oral promises made to the Indians at the time the Treaty was signed, and with the oral history of Treaty No. 8 Indians, with earlier case law and with the provisions of the Alberta wildlife act itself.

Justice Cory went on to consider the oral history evidence led in that case stating at para. 57:

> The oral history of the Treaty No. 8 Indians reveals a similar understanding of the treaty promises. Dan McLean, an elder from the Sturgeon Lake Indian Reserve, gave evidence in this trial. He indicated that the understanding of the treaty promise was that the Indians were allowed to hunt any time for food to feed their families. They could hunt on unoccupied Crown land and on abandoned land. If there was no fence on the land they could hunt, but if there was a fence, they could not hunt there. This testimony is consistent with the oral histories presented by other Treaty No. 8 elders whose stories have been recorded by historians. The Indians understood that land would be taken up for homesteads, farming, prospecting and mining and that they would not be able to hunt in these areas or shoot at the settlers' farm animals or buildings. No doubt the Indians believed that most of the Treaty No. 8 land would remain unoccupied and so would be available to them for hunting, fishing and trapping. *Citation omitted*
>
> [Emphasis added]

[66] In *Tsilhqot'in Nation v British Columbia*, 2004 BCSC 148, Justice Vickers had to decide whether to admit the oral histories of the Tsilhqot'in and Xeni Gwet'in in evidence. He had before him the affidavit evidence of John Dewhirst, an anthropologist and archaeologist who was

to be later called as a witness as well as the oral evidence of Chief Roger Williams and two elders. Justice Vickers noted Dewhirst said the oral history of the Tsilhqot'in is maintained by repetition and the Tsilhqot'in are generally reluctant to give oral history unless they are confident they are able to accurately recount an event. Justice Vickers reached a similar conclusion but cautioned such a preliminary observation was not to be seen as a finding of fact that would be made at the conclusion of the trial. Justice Vickers then set out a process for ascertaining personal information about the witnesses' ability to recount oral history and their sources of knowledge.

[67] Given the foregoing, oral histories about the making of an Indian treaty are admissible subject to the guidance provided by the Supreme Court of Canada, namely that such oral histories must be considered on a case-by-case basis to determine if the oral histories satisfy the threshold requirements of being useful and reasonably reliable. Further, preliminary findings about admissibility are not findings of fact, which are not only made when the evidence is complete at the end of a trial.

[68] Ontario submits that the Manitowabi Report addresses issues that are not defined in the pleadings. However, Aboriginal oral histories have their own structure, one that is not necessarily in conformity with pleadings in an action. Chief Justice Lamer addressed this difference in *Delgamuukw*, above, at para. 85 when he drew from the *Report of the Royal Commission on Aboriginal Peoples* (1996) vol. 1 (Looking Forward, Looking Back), at p. 133:

> The aboriginal tradition in the recording of history is neither linear nor steeped in the same notions of social progress and evolution [as in the non-aboriginal tradition]. ...

> In the Aboriginal traditions the purpose of repeating oral accounts from the past is broader than the role of written history in Western societies. It may be to educate the listener, to communicate aspects of the culture, to socialize people into a cultural tradition, or to validate the claims of a particular family to authority and prestige. ...
>
> Oral accounts of the past included good deal of subjective experience. They are not simply in a detached recounting of factual events but, rather, are "facts enmeshed in the stories of a lifetime". …

[69] Although the First Nations' interviewee oral histories upon which Dr. Manitowabi's report is based do not come in a tidy package in accordance with legal sensibilities or the *Rules*, they are about the making of the Williams Treaties, a subject central to these proceedings. Dr. Manitowabi describes, and, indeed, titles his report as an oral narrative of the Williams Treaties.

[70] While the oral histories also contain subject matter not directly related to the issues set out in the pleadings, some being contextual and some clearly unrelated, they are, nevertheless, useful for understanding the Aboriginal perspective on the making of the Williams Treaties in a more holistic way.

[71] Ontario also submits that the report is not reliable because it is based on Dr. Sieciechowicz's Draft Report. Since she is not available for cross-examination, and the Plaintiffs had not proposed to put forward the interviewees as witnesses in this trial, Ontario says the recorded interviews have no circumstantial guarantee of reliability or trustworthiness.

[72] Given that Dr. Sieciechowicz is no longer living, her statements regarding her observations meet the hearsay test of necessity. Courts have admitted reports by deceased experts when the admission of the report was necessary, the expert did not have a motive to fabricate the findings, and another expert witness with the same qualifications could testify to the reports reliability. *Tulshi v Ioannou*, [1994] O.J. No. 1472 (Gen. Div.) at paras. 16-18.; *Colley v Travellers Insurance Co.*, [1998] N.S.J. No. 405 (N.S.S.C.) at paras. 15-17; *Scime v Guardian Insurance Company of Canada*, [1988] O.J. No. 2878, *Augustine v Inco Limited*, 2006 CanLII 21783 (Ont. S.C.) at para. 21.

[73] Dr. Manitowabi would be available for cross-examination. He reports Dr. Sieciechowicz followed the grounded theory research approach, which he himself also used and which is accepted among the academic community, as further confirmed by Dr. Hedican. Since Dr. Sieciechowicz engaged in research using an academically accepted approach and Dr. Manitowabi is available for cross-examination, I am satisfied that the reliability and trustworthiness of Dr. Sieciechowicz's work may be assessed through Dr. Manitowabi's expert testimony.

[74] Ontario's other concern, that the First Nations interviewees would not be available for cross-examination, has been dealt with as the Plaintiffs have modified their position and now say that some of the First Nation interviewees would be available to testify and be cross-examined.

[75] The advantage of receiving expert testimony on Aboriginal oral history is that it obviates the need to hear a very large number of witnesses. It also has the advantage of discerning themes

that emerge from the oral histories recounted by a large number of First Nation members across-seven different First Nations. In this way, it is, both a survey and a socio-anthropological thematic analysis of the collective First Nations' oral history. The disadvantage is that it is one step removed, and in this case two steps removed, from hearing the Aboriginal voice, which could lead to evidence of the Aboriginal perspective being overtaken by experts.

[76] Having said that, in this case, the Plaintiffs have indicated that there are First Nation witnesses who gave interviews available to testify. In addition, Canada and Ontario have identified archival oral history recordings that are also available for comparison. These two different avenues are thus available to cross-check the reliability and trustworthiness of the interviews upon which Dr. Sieciechowicz's and Dr. Manitowabi's report are based.

[77] With the foregoing methods available to assess the reliability of the oral history interviews, I am satisfied that, Dr. Manitowabi's report, meets the requirements for admissibility. Questions regarding relevance of extraneous parts of the report, or the weight to be afforded the oral history evidence will be determined at trial.

[78] Finally, there remains the question of prejudicial impact of the late filing of the Manitowabi Report and the accompanying oral history interviews. Both Canada and Ontario emphasize the very late provision of the Manitowabi Report but also propose a number of mitigative measures.

[79] Both Canada and Ontario say they require an adjournment of at least one year, if not more, in order to engage experts, who can both advise and prepare reports on Dr. Manitowabi's Report and Aboriginal oral history, prior to any cross-examination of Dr. Manitowabi. Canada also takes the position that if Dr. Manitowabi's report is admitted and its own expert produces a responding report, it must see the Plaintiffs' reply report to that response before Dr. Manitowabi testifies. Canada does not offer any substantial reason why this should be so. I need not address this further since Canada would have the opportunity to have its expert provide a further response to any reply report provided by the Plaintiffs and it remains to be seen whether events unfold in this manner.

[80] The Plaintiffs say the parties had agreed that documents attached to expert reports need not be included in the affidavits of documents. This process was observed with respect to the filed expert reports by all parties. The Plaintiffs' clear intention was that the First Nations interviews were to be part of an expert report by Dr. Sieciechowicz. While Canada and Ontario say they requested disclosure of the First Nations oral history recordings, they do not respond to the Plaintiffs' submission that these interviews were part of an expert report which was much delayed by the circumstances.

[81] In my view it was reasonable for the parties to await the closing of pleadings prior to initiating settlement discussions. I also think it was reasonable for the Plaintiffs to focus on negotiations during that time. The Plaintiffs' had advised they would not be putting forth Dr. Sieciechowicz's expert report in 2007. Pleadings closed that year and the parties attempted to negotiate a settlement but were unsuccessful. When the trial was about to commence in in 2009,

the parties again sought an adjournment to attempt negotiating a settlement. That effort was similarly unsuccessful and the trial commenced in 2012.

[82] While I accept the Plaintiffs' explanation for not advancing their efforts to obtain an expert report on the oral history of the Williams Treaties between 2007 and 2012, the situation for the Plaintiffs changed once the trial began in 2012. Although the Plaintiffs struggled to gain access to Dr. Sieciechowicz's Draft Report, it was open for them to seek the assistance of the Court in that endeavour. At the very least, they should have put Canada and Ontario on notice that they were making this effort. The Plaintiffs say they did not determine the need for the oral history evidence until they learned of the irregularities in the engrossed Williams Treaties. I find the Plaintiffs' explanation to be insufficient.

[83] Ontario has submitted that Dr. Sieciechowicz's report ought to be redacted from Dr. Manitowabi's report. I disagree. Dr. Sieciechowicz's methodology was considered by Dr. Manitowabi and is a necessary element of Dr. Manitowabi's analysis. Dr. Manitowabi describes his report as a being a unique blend of the two expert research reports.

[84] I am also satisfied that a more complete collection of the First Nations oral history on the 1923 Williams treaties would assist the Court in addressing the question of reliability of the oral history narratives upon which Dr. Manitowabi's report is based.

[85] While the Plaintiffs did not provide the Manitowabi Report until this late stage in the proceedings, it seems to me that Canada and Ontario were not entirely unaware of oral history

accounts of the First Nations' perspectives about the Williams Treaties. I note the ICO oral history recordings were made with the involvement of all three parties: the First Nations (through the agency of the Union of Ontario Indians), Canada, and Ontario. Additionally, the audio recordings of elders made at Christian Island were done with a representative of Canada present. As matters stand, the Plaintiffs do not disagree that the recordings should become part of the trial record. I am satisfied the First Nations Aboriginal perspective should be heard and that includes the other oral history recordings which are a further expression of the First Nations oral history.

[86] This Court has resisted re-examining the evidence in the *Howard* trial since it is impermissible for a trial court to adopt the fact finding of another trial court. *Howard* dealt with the question of treaty fishing rights. Canada, which earlier denied any such right existed in its Second Amended Statement of Defence, now submits that the Supreme Court of Canada did not fully address this issue in *Howard*. In result, the testimony of Ralph Loucks in *Howard* should be a relevant part of the larger narrative of the First Nations' Aboriginal perspective on the 1923 Williams Treaties.

[87] There have been instances where courts have accepted testimony in a prior proceeding in a subsequent proceeding, the most common example being witness testimony in a preliminary inquiry where that witness is not available to testify at trial. I also note section 23 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, provides that evidence of any preceding or record in a court in the province may be given in an action by exemplification or a certified copy of the preceding.

[88] If one is to look at a complete record of the oral history of the First Nations about the Williams Treaties, it seems to me necessary to consider the testimony of Ralph Loucks in the *Howard* trial. That does not include all the evidence in the *Howard* trial, but rather only the Ralph Loucks' testimony. While the trial judge preferred Ralph Loucks' testimony in *Howard* that does not govern how this Court is to treat that testimony. Rather, this Court must decide the significance of Ralph Loucks' testimony in the context of all other evidence presented in this trial including the oral narratives provided by other First Nations members, through expert testimony, recorded interviews, audio recordings or live testimony. In this way, Ralph Loucks' voice is added to the First Nations' collective Aboriginal perspective on the Williams Treaties.

[89] The First Nations were in favour of including the community witnesses' statements during the viewing as part of the oral history record, on the condition that the video recording take precedence over any transcript of the testimony. If the viewing were included in the court record, Ontario proposed that the viewing videos be entered as exhibits.

[90] Given that six of the seven community witnesses who testified at the start of this trial in 2012 were interviewed by Dr. Sieciechowicz and also provided sworn statements during the course of the viewing, I am satisfied that the seven statements taken during the viewings ought to be included in order to complete the First Nations oral history record of the Williams Treaties.

[91] Ontario also seeks to have reports by Ian Johnson produced since Dr. Sieciechowicz said she reviewed Ian Johnson's reports. Without more I do not see any basis for requiring Ian Johnson's report to be produced given Dr. Sieciechowicz does not specify which reports she

reviewed nor cites from any specific Ian Johnson report in her Draft Report. However, the Plaintiffs no longer raise an objection to the Ian Johnson reports and I leave that question to the parties.

[92] Finally, I find there are mitigative measures which can be taken would adequately address much of the prejudice arising from the late filing of the Manitowabi Report. The mitigative measures include:

a. the Direction made February 10, 2015 organizing the trial order into three phases being liability, remedies and the third-party action, is set aside; the trial organization will revert to usual order: the Plaintiff will put their entire case on both liability and remedies; followed by the Defendant's case and then the Third Party's case; all of which is followed by the third-party action between the Defendant and Third Party;

b. the Order made July 10, 2009 permitting the Plaintiffs to examine eight expert witnesses is varied to permit the Plaintiffs to examine nine expert witnesses; and the Plaintiffs may call their Aboriginal perspective evidence through the testimony of Dr. Manitowabi and file his expert report;

c. those First Nations members who were interviewed by Dr. Sieciechowicz, as selected by the Plaintiffs, are to testify and be available for cross-examination; Canada and Ontario may apply to the Court to have called other First Nations witnesses who participated in the oral history interviews but were not selected by the Plaintiffs to testify;

d. the video recordings made of the statements made by the community witnesses during the viewings are to be entered as exhibits; Canada and Ontario may also recall the First Nations' community witnesses for cross-examination with respect to their statements during the viewings;

e. all of the Aboriginal perspective witnesses and the community witnesses will testify in the First Nations' communities of Rama and Curve Lake; they will be available for cross-examination by Canada and Ontario in accordance with a protocol similar that that previously adopted as may be modified through consultation among the parties having regard to the Federal Court Aboriginal Litigation Practice Guidelines and the approval of this Court;

f. Dr. Manitowabi's testimony is to be called later in the Plaintiffs' case; in addition, he should have an opportunity to review the additional oral history recordings and transcripts prior to testifying;

g. Canada and Ontario may defer cross-examination of Dr. Manitowabi until after they have retained their own expert and obtained an expert report responding to Dr. Manitowabi's report; however, they must be prepared to proceed with their evidence within the time constraints for this trial;

h. the oral history audio recordings identified by the parties including:

   i. the ICO audio recordings, and

   ii. the Christian Island, John Loucks', Scugog and Curve Lake recordings

shall be entered into the record as exhibits by the parties in possession of those recordings;

i. the transcript of Ralph Loucks' testimony in *R v Howard* is to be introduced into evidence by Canada;

j. for greater certainty the Plaintiffs are not required to provide an amended affidavit of documents for the interviews and documents that are included as appendices to Dr. Manitowabi's expert report.

[93] Additional mitigative matters to those set out in this order can be addressed in the course of trial management.

[94] There will be no adjournment of the trial. The Plaintiff will proceed with calling evidence on both liability and remedies after which the Defendant will call its evidence and then the Third Party.

[95] Costs are awarded against the Plaintiff First Nation in any event.

ORDER

THIS COURT ORDERS that:

1. the Direction made February 10, 2015 organizing the trial order into three phases being liability, remedies and the third-party action, is set aside; the trial organization will revert to usual order: the Plaintiff will put their entire case on both liability and remedies; followed by the Defendant's case and then the Third Party's case; all of which is followed by the third-party action between the Defendant and Third Party;
2. the Order made July 10, 2009 permitting the Plaintiffs to examine eight expert witnesses is varied to permit the Plaintiffs to examine nine expert witnesses; and the Plaintiffs may call their Aboriginal perspective evidence through the testimony of Dr. Manitowabi and file his expert report;
3. those First Nations members who were interviewed by Dr. Sieciechowicz, as selected by the Plaintiffs, are to testify and be available for cross-examination; Canada and Ontario may apply to the Court to have called other First Nations witnesses who participated in the oral history interviews but were not selected by the Plaintiffs to testify;
4. the video recordings made of the statements made by the community witnesses during the viewings are to be entered as exhibits; Canada and Ontario may also recall the First Nations' community witnesses for cross-examination with respect to their statements during the viewings;

5. all of the Aboriginal perspective witnesses and the community witnesses will testify in the First Nations' communities of Rama and Curve Lake; they will be available for cross-examination by Canada and Ontario in accordance with a protocol similar that that previously adopted as may be modified through consultation among the parties having regard to the Federal Court Aboriginal Litigation Practice Guidelines and the approval of this Court;

6. Dr. Manitowabi's testimony is to be called later in the Plaintiffs' case; in addition, he should have an opportunity to review the additional oral history recordings and transcripts prior to testifying;

7. Canada and Ontario may defer cross-examination of Dr. Manitowabi until after they have retained their own expert and obtained an expert report responding to Dr. Manitowabi's report; however, they must be prepared to proceed with their evidence within the time constraints for this trial;

8. the oral history audio recordings identified by the parties including:

   i. the ICO audio recordings, and

   ii. the Christian Island, John Loucks', Scugog and Curve Lake recordings

   shall be entered into the record as exhibits by the parties in possession of those recordings;

9. the transcript of Ralph Loucks' testimony in *R v Howard* is to be introduced into evidence by Canada;

10. for greater certainty the Plaintiffs are not required to provide an amended affidavit of documents for the interviews and documents that are included as appendices to Dr. Manitowabi's expert report.

11. Additional mitigative matters to those set out in this order can be addressed in the course of trial management.

12. There will be no adjournment of the trial. The Plaintiff will proceed with calling evidence on both liability and remedies after which the Defendant will call its evidence and then the Third Party.

13. Costs are awarded against the Plaintiff First Nation in any event.

"Leonard S. Mandamin"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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