CITATION: Restoule v. Canada (Attorney General), 2019 ONSC 5329
COURT FILE NO.: C-3512-14 & C3512-14A1 and **COURT FILE NO.:** 2001-0673
DATE: 2019-10-03

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN: Court File No.: C-3512-14 & C3512-14A	
Mike Restoule, Patsy Corbiere, Duke Peltier, Peter Recollet, Dean Sayers and Roger Daybutch, on their own behalf and on behalf of all members of the Ojibewa (Anishinabe) Nation who are beneficiaries of the Robinson Huron Treaty of 1850 Plaintiffs	Joseph J. Arvay Q.C., Catherine Boies Parker Q.C., David C. Nahwegahbow, Dianne G. Corbiere, Chris E.J. Albinati, for the Plaintiffs
– and –	
The Attorney General of Canada, the Attorney General of Ontario and Her Majesty the Queen in Right of Ontario Defendants	Owen Young and Scott Warwick, for the Defendant the Attorney General of Canada; Michael R. Stephenson, Lisa La Horey, Sarah Valair, Christine Perruzza and Aaron Dewitt for the Defendant the Attorney General of Ontario
The Red Rock First Nation and the Whitesand First Nation Third Parties	Harley Schachter and Kaitlyn Lewis, for the Third Parties
-AND-	
Court File No.: 2001-0673	
The Chief and Council of the Red Rock First Nation, on behalf of The Red Rock First Nation Band of Indians, the Chief and Council of the Whitesand First Nation on behalf of the Whitesand First Nation Band of Indians Plaintiffs	Harley Schachter and Kaitlyn Lewis, for the Plaintiffs
– and –	
The Attorney General of Canada, and Her Majesty the Queen in Right of Ontario and the Attorney General of Ontario as representing Her Majesty the Queen in Right of Ontario Defendants	Owen Young and Scott Warwick, for the Defendant the Attorney General of Canada; Michael R. Stephenson, Lisa La Horey, Sarah Valair, Christine Perruzza and Aaron Dewitt for the Defendant the Attorney General of Ontario
	HEARD: In Writing

DECISION ON MOTION TO ADMIT FRESH EVIDENCE AND RE-OPEN STAGE ONE OF THE TRIAL

HENNESSY, J.

[1] Ontario brings this motion to reopen Stage One of the trial in which the court found that there was no cap on the collective annuity entitlement owed by the Crown to the First Nations pursuant to the terms of the Robinson Huron and Robinson Superior Treaties. Canada did not participate in this motion.

[2] Almost one year after the close of evidence and more than five months after the release of the decision and reasons, Ontario advised that they had discovered a significant new piece of evidence. Ontario submits that had the newly discovered evidence, the Fort William Jesuit Mission Diary (the "Diary") and particularly the September 30, 1850 entry (the "Entry"), been before the court during Stage One, it would likely have changed the result of the trial.

[3] Ontario asks the court to reopen the trial, admit the fresh evidence as well as expert opinion on the evidence.

INTRODUCTION

[4] The Stage One decision was released on December 21, 2018, following a trial that took place over 78 days from September 2017 to June 2018. During the trial, expert witnesses filed affidavits as their evidence in chief, gave *viva voce* evidence, and were cross-examined. The affidavits of the witnesses identified over 2500 documents with over 52,000 pages on which they relied as forming part of their research. Counsel for all parties collaborated on a Joint Book of Documents made up of the documents relied upon by the witnesses.

[5] The Jesuit Diary of the Fort William Mission, which is the subject of this Fresh Evidence motion, was originally handwritten in French. In 2009, Dr. Alain Nabarra published a transcription of the Diary. An English translation of the Nabarra book was published in 2010 by William Lonc, s.j.. Both the Nabarra and Lonc publications contain material in addition to the diary entries of 120-130 pages.

The Proffered Evidence

[6] The primary focus of this motion is the request to admit the Diary Entry of September 30, 1850.

[7] The Entry (as per the Lonc translation) reads as follows:

> *30. {Mon} Mr. McKenzie [sic] distributes the money, which had come on the* Whitefish*, to the natives, as well as to the natives who had gone to Sault Ste. Marie. This year they receive $6 per head; in subsequent years they will receive only $1.50, unless lucrative mines are found. In that case, they could receive up to $4, but not more. They would also have clothing, as it was done below [sic]; this however is not stipulated in the Treaty because, says Joseph la Peaux de Chat, the Ottawas have been taken care of and should no*

> *longer receive money. The reserve, which is 6 by 5 miles, has not yet been accurately surveyed.*

ANALYSIS

[8] For the reasons set out below, I conclude as follows:

a. The trial shall not be reopened;

b. The circumstances of this case do not trigger a "relaxed" test for the admission of fresh evidence;

c. The Fort William Jesuit Mission Diary will not be admitted as fresh evidence;

d. The Entry of September 30, 1850 will not be admitted as fresh evidence; and

e. The opinion evidence of Mr. Jean-Philippe Chartrand, included at paragraphs 22-29 in his Affidavit of June 26, 2019, is inadmissible on this motion.

[9] I will address each of these issues and comment on the allegations made in respect of the plaintiffs' witnesses' awareness of the evidence.

[10] Ontario's full request to admit fresh evidence includes the following:

a. The entirety of the Jesuit diary in French handwriting 1848-1954 (approximately 92 pages);

b. The entirety of the 2009 Nabarra publication (170 pages), which contains a transcription of the diary;

c. The entirety of the 2010 Lonc translation (188 pages) of the Nabarra publication;

d. A supplementary expert report to address the above; and

e. Further submissions on the impact and significance of the whole of the diary.

Chronology and Involvement of Experts

[11] The following is a brief chronology of the relevant events:

a. March 15, 2018 - Evidence at the Stage One trial ended;

b. June 22, 2018 - Submissions concluded;

c. December 21, 2018 – Reasons from Stage One released;

d. February 22, 2019 - Ontario discovered the Entry evidence while conducting document review for Stage Two and counsel for Ontario alerted their expert, Mr. Chartrand, who conducted additional investigation;

e. June 3, 2019 - Ontario advised the other parties of their discovery and sought consent to have the evidence admitted;

f. June 17, 2019 - Summary judgments were released;

g. June 19, 2019 - Ontario requested that the judgments not be entered until after the motion on fresh evidence;

h. July 3, 2019 - Ontario withdraws the objection to the Entry of the judgment; and

i. August 9, 2019 - Judgment for Stage One trial was entered.

[12] Four of the expert witnesses called at trial have filed affidavits on this motion:

1. *Jean-Phillipe Chartrand*: Ethnohistorian, expert witness for Ontario, filed reports responding to the reports of Dr. Driben, Mr. Corbiere and Mr. Morrison among others at the Stage One trial. The latter two witnesses cited the Nabarra and/or Lonc publications in their reports. Mr. Chartrand did not cite either the Diary or the Entry. His affidavit on this motion included opinion evidence.

2. *Dr. Paul Driben*: Ethnohistorian, expert for the Red Rock plaintiffs, did not cite the Nabarra or Lonc publications in his report for the Stage One trial but was mentioned in the preface/forward to them.

3. *James Morrison:* Historian, expert witness for the Red Rock plaintiffs, cited excerpts from the Diary (Nabarra and Lonc publications) but not the specific Entry in their report for the State One trial.

4. *Alan Corbiere*: Expert witness for the Restoule plaintiffs, cited excerpts from the Diary (Lonc publication) but not the specific Entry in his report for the Stage One trial.

[13] None of these four witnesses, nor any other witness, cited the Entry in their evidence at trial, oral or written. All four of these witnesses assert that they were not aware of this Entry prior to or at the time that they gave evidence in the proceeding.

[14] The Entry documents the distribution of the first payment under the Robinson Superior Treaty to individuals at Fort William by Fort William Hudson's Bay Company ("HBC") Factor John MacKenzie. The Entry refers to the per capita value of this payment and of subsequent annuities, as well as the condition under which annuities might increase in future years.

[15] The issue on this motion is whether the Stage One trial ought to be reopened, and whether the evidence of the Diary and the Entry should be admitted, along with an expert opinion and additional argument.

[16] As part of their arguments in response, the plaintiffs distinguish between the Entry and the Diary, and object to the admissibility of the expert's opinion evidence on this motion.

[17] The Red Rock plaintiffs have also responded to what they call unwarranted and reckless allegations against Dr. Driben.

[18] I will address each of these issues separately.

The Test to Admit Fresh Evidence

[19] Rule 59.06(2)(a) of the *Rules of Civil Procedure*, R.R.O 1990, Reg. 194, provides:

> A party who seeks to, (a) have an order set aside or varied on the ground of fraud or of facts arising or discovered after it was made ... may make a motion in the proceeding for the relief claimed.

[20] The onus is on the moving party to show that all of the circumstances are such as to justify making an exception to the fundamental rule that final judgments are, in fact, final (*Tsaoussis (Litigation Guardian of) v. Baetz*, [1998] 41 O.R. (3d) 257 at 274).

[21] The test to admit fresh evidence has been recently reviewed by the Ontario Court of Appeal in *Holterman v. Fish*, 2017 ONCA 769, and *Mehedi v. 2057161 Ontario Inc.*, 2015 ONCA 670. In both cases, the court relies on the two-pronged test articulated by the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, along with additional considerations.

[22] The two-pronged test, which also guides the application of r. 59.06(2)(a), is:

1. Whether the new evidence, if presented at trial, would probably have changed the result; and

2. Whether the new evidence could have been obtained by the exercise of reasonable diligence at the time of the proceedings.

[23] The additional factors to be considered include:

a. finality;

b. the apparent cogency of the evidence;

c. delay;

d. fairness; and

e. prejudice.

Holterman at paras. 17-18; *Mehedi* at para. 20; *Baetz* at 274

[24] Trial judges are presumed to be "in the best position to decide whether, at the expense of finality, fairness dictates that the trial be reopened" (*Sagaz* at para. 60; *Holterman* at para. 18). The motion judge's decision under rule 59.06(2)(a) is discretionary (*Mehedi* at para. 12). The Supreme Court in *Sagaz* cautioned that the discretion to reopen a trial should be exercised "sparingly and with the greatest care" (at para. 61).

DIARY ANALYSIS

[25] Before embarking on an analysis of the Diary, I distinguish between the Entry and the entire Nabarra and Lonc publications which include over 100 pages of the transcribed and translated Diary.

For the reasons that follows, I am not persuaded that the Diary should be admitted as fresh evidence on either the first or second branch of the test.

First Branch

Would the Diary, if presented at trial, have probably changed the result?

[26] With respect to the first branch of the test, Ontario's evidence and submissions are directed solely at the Entry. The Diary was not the focus of Ontario's argument. They did not argue that the Diary in its entirety was necessary to understand the Entry nor that the Diary, other than the Entry, contained anything relevant to the interpretation of the Treaty. The expert's (Mr. Chartrand) opinion evidence is directed solely at the Entry.

[27] While Ontario's expert recalls reviewing the Diary for the purposes of research on another case, he does not specifically indicate that he reviewed any excerpt other than the Entry after it was brought to his attention in February 2019. His affidavit is directed solely at the single Entry.

[28] Ontario's affiants do not assert that the Diary contains any other relevant entries other than the September 30, 1850 Entry and do not maintain that the admission of the Diary would likely change the result of the trial.

[29] I note that Ontario does in fact reference a short passage in the Forward to the Lonc publication as part of its evidence and argument. This passage is meant to support a criticism aimed at Dr. Driben and is not identified as potentially relevant to any material issue or the finding at trial. I address this passage in another section of these reasons.

[30] A submission that does not explicitly address how the Diary would likely change the result obviously cannot persuade me that the Diary meets the first branch of the test.

Second Branch

Could the Diary have been discovered with reasonable diligence?

[31] In any event, with respect to the Diary, Ontario clearly fails on the second branch of the test: reasonable diligence. Two witnesses for the plaintiffs cited the Diary (the Lonc and Nabarra

publications) in their reports which were filed prior to the start of trial and prior to the Reply report filed by Ontario's expert. The actual exhibits contained the cover page of the books. In other words, the Diary was plainly identified for Ontario before their own expert completed his preparation for the trial.

[32] The Red Rock plaintiffs submit that the only logical reason why Ontario or its expert would not have followed up on the Diary, which had been cited by the plaintiffs, is that they had no reason to believe that the Diary might contain other relevant entries. I would add, in the alternative, that Ontario made the decision that it was satisfied with their own investigation and research parameters and chose not to follow up on other primary sources subsequently identified for them and upon which the plaintiffs relied.

[33] There can be no doubt that the Diary was available to Ontario through the exercise of reasonable diligence.

[34] Both branches of the test must be met before the court should reopen a trial to admit fresh evidence (*Sagaz* at para. 65). However, there are other considerations, including cogency, delay, fairness, prejudice, and finality, to take into account when determining whether to reopen a trial to admit fresh evidence.

Other Considerations Besides the Two Branches of the Test – Analysis of Diary

[35] Although evidence need not be cogent in order to be relevant, cogency is "central to the assessment of the probity of the evidence and the weighing of that probity against the prejudicial impact of the evidence" (*R. v. Pan*, 2014 ONSC 4056 at para. 67). Without any explanation as to why the entire Diary is material to the interpretation of the Treaty, it is difficult to assess what, if any, probative value its admission would have. Moreover, any probative value the Diary might provide—though none has been argued—is significantly outweighed by the prejudice of "the likelihood that the evidence offered, and the counter proof will consume an undue amount of time" (*R. v. Seaboyer*, [1991] 2 S.C.R. 577 at para. 45).

[36] Ontario submits that it would be prejudiced if the Diary was not admitted. However, Ontario does not make reference to how they would be prejudiced if the entire Diary was not admitted. On the other hand, there would be considerable prejudice to the plaintiffs and the entire process of these proceedings if the Diary were admitted. While the context of the single Entry may seem apparent on its face, especially to participants in the first stage of the trial, the admission of the entire Jesuit Diary from Fort William could trigger an extensive investigation and a need for responding experts and cross-examination following a long delay for various experts to do archival research and prepare supplementary reports. All of this creates unnecessary complication and protraction of the already lengthy proceedings.

Conclusion on Admission of the Diary Evidence

[37] On this motion, Ontario has neither demonstrated that the Diary would probably have changed the result of the judgment, nor that it could not have been discovered with reasonable diligence.

[38] In addition, none of the other factors weigh in favour of the admission of the Diary. There would be overwhelming prejudice of admitting the Diary which is fatal to this part of their request.

[39] The motion fails with respect to the request to admit the Diary.

[40] I turn now to the issues relating to the September 30, 1850 Entry.

ENTRY ANALYSIS

First Branch

Would the Entry have probably changed the result with or without the Opinion Evidence?

[41] Ontario states that the Entry is contemporaneous evidence of how the parties, in particular Chief Peau de Chat, understood the annuity promise. They submit that had this Entry been in evidence before the court, it would have been the subject of expert testimony and argument. They further submit that had the Entry been in evidence "the trial judge might well have interpreted the Robinson Treaties differently".

[42] Ontario also asks the court to admit expert evidence on this motion to explain and contextualize the Entry to assist the court in determining admissibility.

[43] The plaintiffs submit that the expert evidence on this motion is inadmissible; it is not necessary, reliable nor sufficiently probative to overcome the prejudice that it would create. The plaintiffs go further and state that the motion fails to meet the test of "would probably have changed the result" with or without the expert opinion evidence.

[44] However, the plaintiffs chose not to move to strike the opinion evidence as a preliminary matter and asked the court to consider the evidence and also to consider their objection to it. I will consider therefore the opinion evidence as part of Ontario's argument and also whether it should be admitted at all.

Analysis of the "Would Probably Change the Result" Test with the Contested Opinion Evidence

[45] The contested evidence includes an opinion that the Entry contains significant historical and ethnohistorical information about Euro-Canadian and Fort William Anishinaabeg understanding of the value of initial and subsequent annuity payments and the potential increase in annuity values.

[46] Ontario asks the court to consider this opinion to assess whether the Entry would likely have changed the result at trial. Ontario also asks the court to consider the Entry on its face without the opinion evidence.

[47] Ontario's expert's conclusion on Chief Peau de Chat's understanding of the limits of the annuity promise rests on an argument comprising a number of premises, outlined in paragraph 27 of his affidavit, the truth of which remains unsupported by any evidence. In the absence of any

provable evidence that the premises are in fact true, or at least more probable than not, the argument as a whole is weak and the conclusion uncertain and unreliable.

[48] We can assume that the author of the Entry was one of the Jesuits at the Fort William Mission who has already appeared in this case as an author of other documents. However, the Entry is based on hearsay from an unidentified source. We do not know the first language of the source of the information. We do know that the Jesuits in Fort William were French speaking and that the HBC representatives were generally English speaking. We know that the Anishinaabe from Fort William were generally speakers of Anishinaabemowin. We do not know if there was an interpreter or, if there was, the language ability of the interpreter. We do not know who among the group had a shared language, what their biases were and what details were not shared with the Jesuit author of the Entry. On these language issues Ontario's expert either expresses no opinion or he admits he does not know.

[49] Language abilities and cross-cultural understandings of the main actors were canvassed fully at trial in respect of the significant events and documents whenever a party sought to attribute an understanding or intention to a party. The pedigree and experience of translators was important evidence to be considered for many of the communications, especially those pointing to an interpretation of the Treaty promise. With respect to this Entry, there is no evidence at all on the language abilities of the author or his source.

[50] We also cannot tell from the Entry where MacKenzie received his information about the Treaty or how it was conveyed to him and for what purpose.

[51] Without answers to any of the above concerns, I note that Ontario's expert makes a number of assumptions some of which are pure speculation. For example, in paragraph 27 (c), Mr. Chartrand states that:

> It is very likely that MacKenzie would have made a public statement to the assembled Anishinaabe when the funds were distributed, both as a matter of protocol for such a significant event, and to ensure that the Anishinaabe were aware that future annuities were to be smaller than the initial payment —thereby seeking to avoid misunderstanding and future complaints.

[52] From the face of the Entry, we know that the expert cannot be relying on any evidence of past practice with respect to Treaty payments by HBC representatives because this was the first payment under the first Treaty between the parties. This statement contains a number of assumptions, some of which are qualified with phrases such as "It is very likely that". Those assumptions and inferences include:

a. MacKenzie made a public speech about the payment;

b. MacKenzie sought to "avoid misunderstanding and future complaints";

c. MacKenzie's comments were in substance the same as what was in the Entry;

d. Chief Peau de Chat would have been present for the distribution; and

e. Chief Peau de Chat understood the terms of the Treaty as described in the Entry because there is no mention in the Entry that he disputed MacKenzie's characterization of the augmentation promise.

f. The Fort William Anishinaabeg understood the value of money.

[53] There are many reasons why these assumptions and inferences are problematic. Firstly, all trial participants would be aware of the considerable evidence during the trial underscoring our collective inability 160 years later to presume that we know what an English-speaking person might have said to non-English speakers or how the Treaty obligation might have been explained. It is difficult to interpret legal terms to lay people and this is compounded when there is a large cultural gap. Even at trial, in a room full of English speakers who were all educated in the Common Law, it was impossible to agree on how to interpret the Treaties (*Restoule v. Canada (Attorney General)*, 2018 ONSC 7701 at paras. 442-43).

[54] There is simply no basis to assume or speculate that MacKenzie shared Robinson's understanding of the promise or how MacKenzie communicated what he understood, even if he shared an understanding with Robinson.

[55] The expert also assumes that either Chief Peau de Chat or some other Anishinaabeg would have "objected to this description of the annuity promise" if they actually disputed what they were told at the distribution (at para. 27 (h)). But there is no evidence to support the assumption that the author of the Entry or the informant heard or understood what the Anishinaabe may have responded to what MacKenzie presumably said.

[56] The expert does not point to any evidence at trial as to MacKenzie's past conduct with the Fort William Anishinaabeg or as a representative of the government.

[57] The expert then concludes that the absence of a record of an objection from Chief Peau de Chat to the presumed description of the augmentation terms and Chief Peau de Chat's presumed understanding of what was said, means that whatever MacKenzie might have conveyed, corresponded with Chief Peau de Chat's understanding of the Treaty promise.

[58] The expert also concludes that Chief Peau de Chat would likely have addressed the issue of a "communal annuity payment" if he believed they were entitled to one over and above the payments to individuals. He further suggests that these comments would have been recorded.

[59] The expert concludes at paragraph 27(j) of the affidavit:

> Had Chief Peau de Chat understood that communal annuity payments were to be made in addition to payments to individuals, or that the Crown was otherwise obliged to increase the annuities above $4 per person, it is very likely that he would have addressed

> this significant omission in MacKenzie's summary of the promise, and that his comments would have been recorded.

[60] I do not see logic leading to this conclusion. This opinion is constructed on the basis of premises too weak to make his conclusion necessary or reliable.

[61] This Entry was not meant to be a record of an Anishinaabe complaint. We know that the Anishinaabeg were able to articulate their complaints as they did in a Petition in 1852 among others (see *Restoule* at para. 294(3)). We cannot assume that the Entry is a full or complete record of all that was said, just as we cannot assume exactly what MacKenzie said or whether at the time Chief Peau de Chat had reason to dispute what he said.

[62] Where I agree with the expert is that in order to find meaning in this Entry for the purposes of interpreting of the Treaty one must make a long list of assumptions and draw inferences based on those qualified premises. The Entry is brief and has all of the other weaknesses of hearsay evidence which I have outlined above. It is completely lacking in the type of detail needed for it to be useful in the interpretation task. The expert's explanation and contextual evidence and opinion do not add to the cogency or probative value of the Entry. His evidence does not help Ontario to meet the test that the Entry would probably have changed the result at trial.

[63] The plaintiffs have referred to the expert's opinion as "wholly speculative," "a daisy chain of speculations" and "built on a house of cards of unwarranted and unsupportable assumptions about what may have taken place". Unfortunately, I cannot disagree. The opinion is based on the fact that the Jesuit diarist who heard from some unidentified person about the distribution of funds did not include in his brief Diary Entry any mention of an objection by Chief Peau de Chat. The absence of any evidence recording Chief Peau de Chat's objection to the assumed contents of an assumed public speech by Mackenzie cannot form the basis of cogent and probative evidence on which to assess whether the evidence would likely have changed the result at trial. The expert opinion does not provide any context or explanation to strengthen the probity of the new evidence. The opinion is based on mere speculation and therefore does not strengthen the impact of the fresh evidence.

Second Branch

Could the Entry have been discovered with reasonable diligence?

[64] Ontario submits that they exercised reasonable diligence in finding the Entry. In support of this assertion, their expert witness submitted an affidavit setting out when and how he became aware of the Entry.

[65] Ontario initially retained their expert to respond to the reports of seven witnesses for the plaintiffs. Two of these witnesses, Mr. Morrison and Mr. Corbiere, cited the Lonc and/or Nabarra publications amongst their hundreds of citations, but not the Entry.

[66] Ontario's expert stated that because he began his research prior to the Nabarra and Lonc publications of the Jesuit diaries, he was not aware of them or the Entry as he prepared his reports.

[67] However, a simple statement that the expert witness was not aware of the Entry (as distinct from the Diary) does not meet the burden of reasonable diligence. A better test for reasonable diligence is set out by the expert in his description of his own methodological approach where he stated, in one of his reports for trial, that he undertook a detailed review of the reports of the plaintiff experts against actual document contents. He then says he identified gaps in the historical narratives presented in their reports, noting instances in which documents potentially relevant to the issues they addressed were not cited or were cited incompletely.[1]

[68] The expert also states that he acquired the Lonc publication in June 2018 (before the end of the Stage One trial) and reviewed it for another case, but that he does not recall seeing the Entry before being contacted by Ontario's counsel in February 2019.

[69] That is the essence of Ontario's argument on reasonable diligence. Ontario does not give any explanation whatsoever why their expert witness did not further examine or consider the Diary once he saw the citations that were unfamiliar to him in two of the plaintiff expert reports. He would have recognized that he had not consulted or read the Diary. The fact that he was unfamiliar with these publications would reasonably have triggered further investigation.

[70] The plaintiff expert reports citing the Diary were delivered to Ontario in September 2016 and June 2017. The plaintiffs point out that the Joint Book of Documents included four actual excerpts from the Diary plus the cover page of the Lonc publication. As I found in the analysis of the Diary, the two publications were available to researchers well before Ontario's expert prepared his reply reports dated July 20, 2017 or March 30, 2017: The Diary transcription and translations were published in 2009 and 2010.

[71] The trial commenced September 2017. I agree with the plaintiffs that at least one interpretation of reasonable diligence would have included a review of the Diary in preparation for the cross examination of Mr. Morrison and Mr. Corbiere, the plaintiff expert witnesses who cited the Diary.

[72] From this review of the timing of the identification of the very publications which contain the transcribed and translated versions of the Entry, which Ontario now calls "new evidence," it is obvious to me that the Entry was easily available to Ontario counsel and/or their expert and research personnel well before the evidence in the Stage One trial was completed. It was not new evidence at all.

[73] There is no explanation for why Ontario's expert did not follow up on the Diary when it came to his attention before the trial. As the Restoule plaintiffs point out, the expert also missed a similar reference to how the Fort William money was distributed in other documents which he himself produced in support of his reports.

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[1] Chartrand. *Historical and Ethnohistorical Research and Reply Report: Red Rock First Nation and Whitesand First Nation Treaty Annuities Claim*, dated April 25, 2017, at para. 1.3.

[74] The evidence on this motion does not demonstrate the exercise of reasonable diligence in respect to discovery of the Entry. Regrettably, notwithstanding other instances of what appeared to be thorough investigation of primary sources, Ontario missed an obvious source of information they now consider relevant. I am not persuaded that the evidence could not have been obtained before trial by the exercise of reasonable diligence.

Conclusion on Admission of Entry with Opinion Evidence

[75] I find that the September 30, 1850 Diary Entry as explained by opinion evidence of Ontario's expert would not likely have changed the result of the trial had it been admitted into evidence during the trial on the interpretation of the Treaty. The Entry fails both branches of the test even with consideration of the contested opinion evidence.

Analysis on the Entry under the First Branch to the Test Without Opinion Evidence

[76] I cannot find within the Ontario submissions an explanation of how or why this Entry would likely or probably have changed the result of the trial. The reasons for the decision on the meaning of the Treaty promise took into account the considerable pre- and post-Treaty records and the full historical context according to the Superior Court of Canada's direction to consider the "possible range of interpretations" and to choose "from among the various possible interpretations of the common intention the one which best reconciles the parties' interests" (*R. v. Marshall*, [1999] 3 S.C.R. 465 at para. 83 (citations omitted)).

[77] This Entry simply provides some confirmation of the distribution of treaty monies to individuals in Fort William at a certain time by an HBC official. It also purports to state the actual future amount to be distributed to individuals. But it does not speak to other significant parts of the Treaty promise including: any collective entitlement; the graciousness clause ("or such further sum as Her Majesty is graciously pleased to order"[2]); or the condition of future profits from the Territory. On these items we do not know whether MacKenzie or the informant to the Jesuit author had knowledge of or communicated a full interpretation of the Treaty promise nor whether any Anishinaabeg leader heard him, understood him, accepted or disputed what he said. There is absolutely no mention of these things in the Entry. We cannot fill in all these blanks with assumptions. We cannot build a logical link where none exists.

[78] The nub of Ontario's position is that this Entry is evidence of the Superior Anishnaabeg's understanding or intention with respect to the augmentation promise. But there is no logical link between this Entry and what Chief Peau de Chat may or may not have understood or intended as the entitlement and obligation contained in the Treaty annuity augmentation clause. Nothing in the Entry allows us to attribute to Chief Peau de Chat any understanding or intention with regards to the augmentation term.

[79] As I explained in the Stage One decision, the post-Treaty record contained ambiguities and inconsistencies regarding the understanding and intention of the parties. This Entry may or may not suggest one more of those inconsistent descriptions of the Treaty promise on the part of

[2] The Robinson Superior Treaty, dated 7 September 1850.

MacKenzie. But there is too little here to allow one to draw conclusions on a possible understanding or intention by one party or the other. And where there is content within the Entry regarding the Treaty promise, *e.g.* that the annuity is capped "unless lucrative mines are found," it is not faithful to the Treaty language. The Treaty language indicates that the increase in the cap is triggered by profits from the Territory, not simply lucrative mines.

[80] To disturb the Stage One findings of fact, as Ontario requests, would take much more than a brief and ambiguous Diary Entry of unknown source that does not even attempt to attribute an understanding or intention to a Fort William Anishinaabeg leader.

[81] The Entry, with or without the benefit of the expert's opinion, does not meet the first branch of the test. Had it been part of the trial evidence, the court would not likely have changed the result.

Analysis of Entry - Other Considerations

[82] The other considerations listed in *Mehedi* and *Holterman* call for a balancing exercise where the court must resolve the tensions between the need for finality and the consequences of either admitting or not admitting the evidence. The other considerations must be viewed through the lens of fairness and proportionality to the parties.

[83] Because I do not find that the fresh evidence is so important that it would probably affect the outcome of the trial, I do not accept that Ontario will be prejudiced or that a miscarriage of justice will result if the evidence is not admitted.

[84] At Stage One, Ontario made a thorough argument based on what they called the overwhelming evidence of the post-Treaty historical record. This Entry would fit easily amongst the many examples they cited in support of their position that the common intention of the parties was for a cap on the collective annuity.[3] That argument was not accepted. This brief and incomplete hearsay evidence would not tip the evidentiary scales in their favour.

[85] The proffered fresh evidence would have been considered in the same fashion as the evidence at trial. At best, it is an ambiguous example of the Euro-Canadian understanding of the Treaty from one Euro-Canadian who was not at the Treaty Council.

[86] The Entry does not demonstrate a clear understanding or intention of either the colonial or Anishinaabe actors as to the Treaty promise.

[87] On the other hand, there would be severe prejudice to the plaintiffs if the evidence were admitted. There would be a long delay as the plaintiffs retained experts to dig into the material to respond to Ontario's interpretation of the Entry. We have already experienced the extensive time that experts require to take on this work, conduct their research, write their reports and then make themselves available to testify. The experts, in our experience, are not necessarily immediately available. The process would impose a serious delay of several months or more. There would be

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[3] See Ontario's Summary of Evidence Supporting Position on $4 Cap (Euro-Canadian Understanding of a $4 Cap), Exhibit NN from Stage One.

associated fees and costs and the additional burden on the court and judicial scheduling. This is not a trifling matter.

[88] The Entry does not have the potential to change the outcome of the Treaty interpretation issue from Stage One.

Admissibility of Expert Opinion on Motion to Introduce Fresh Evidence

[89] I turn now to the plaintiffs' objection to the admissibility of the expert's opinion evidence as found in paragraphs 21-30 of his affidavit.

[90] Ontario submits that expert opinion evidence is necessary and therefore admissible on this motion "in keeping with the practice established at trial … where the significance and context of a document cannot be determined by a simple reading" (Ontario Factum at para. 61). They say that the opinion evidence is necessary to enable the court to determine whether the document would or could have affected the result at trial.

[91] The plaintiffs strongly object to the admissibility of paragraphs 21-29 in the expert's affidavit and the last two sentences of paragraph 30. They argue that the opinion evidence is not necessary or reliable, and in any event does not survive the balancing exercise where the potential benefits justify the risk – goes to essence. They also submit that the expert's conclusion goes to the very essence of the court's task of interpretation.

[92] Opinion evidence is presumptively inadmissible and though expert opinion is the exception to that general rule, its admission still must be scrutinized this and every time it is proposed, notwithstanding that many experts, including this expert have already given opinion evidence in this matter. *R. v. Khelawon*, [2006] 2 SCR 787, 2006 SCC 57 at para. 9; *Pfizer Canada Inc. v. Teva Canada Limited*, 2016 FCA 161 at para. 83. In my view, Ontario has not met the burden to overcome the presumption of inadmissibility of the proposed opinion evidence. The evidence for admissibility was refined in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 from the approach set out in *R. v. Abbey*, 2009 ONCA 624:

> Step One: The onus is on the proponent of the evidence to establish the threshold requirements: relevance, necessity, absence of exclusionary rule and a properly qualified expert.
>
> Step Two: The court exercises a discretionary gatekeeping function, balancing the potential risks and benefits of admitting the evidence, measuring the Step One factors against the counterweights of consumption of time, prejudice and confusion.

[93] Although the opinion evidence may *prima facie* meet the last three criteria, it does not clearly meet the necessity threshold. When it comes to necessity, the question is whether the expert will provide information which is likely to be outside the ordinary experience and knowledge of the trier of fact. "Necessity" means that the evidence must more than merely "helpful" but rather, it requires that the evidence be necessary to allow the trier of fact to either appreciate the facts due to their technical nature, or to form a correct judgement where ordinary persons are unlikely to do

so without the help of special knowledge (*R. v. D. (D.)*, 2000 SCC 43; *Mohan*; *R. v. Lavallee*, [1990] 1 S.C.R. 852.

[94] As may be expected, my analysis of the usefulness and necessity of the opinion is informed by my familiarity with the massive amounts of historical and ethnohistorical contextual evidence received during the trial. Along with members of the counsel teams, I have worked with this material over a long period of time. Although the ordinary person might be unlikely to appreciate the Entry without expert knowledge, the historical context of this Entry is hardly "outside the knowledge" of this trier of fact.

[95] This court has already received contextual evidence with respect to the relationship between the parties, the Treaty Council participants, locations, travel of Treaty Council participants and the plan for the HBC to be involved in Treaty money distribution. There has been contextual evidence with respect to the relationship between both the HBC and Jesuit Mission at Fort William and the Anishinaabeg who lived in that territory. At trial, we also heard and received expert opinion evidence with respect to the difficulties in drawing conclusions of Anishinaabe intentions, understandings and communications from documents written in English or French by colonial actors. As well, the court already has specific context in which to assess this Entry. For example, we know from Stage One evidence that:

a. MacKenzie was an HBC Factor;

b. HBC was charged with distributing the Treaty money to the Superior territory Anishinaabeg;

c. treaty money was to be distributed soon after the conclusion of the Treaty Council;

d. Sault Ste. Marie was the site of the Treaty Council;

e. there was a distribution of money following the Treaty Council and there would be in the future years; and

f. the matter of clothing was in issue and was not explicitly addressed in the Treaty.

[96] This contextual evidence is important. However, Ontario expert's assumptions, which were not based upon evidence, do not assist the court in any way to assess how this new Entry might meet the fresh evidence test—that is, to be so probative as to probably change the outcome of the trial.

[97] I am fully able to assess the cogency, materiality and probity of this evidence without further contextual evidence than that which I have already considered. This opinion evidence is not necessary or helpful to assist me. The evidence at trial, with which I am still familiar, is sufficient to allow me to assess the fresh evidence without the assistance of an expert.

[98] As I noted earlier, the weak or non-existent logical links between the Entry and the expert's conclusion would be obvious to any reader.

[99] The expert's opinion evidence on this motion does not meet the test of necessity.

Balancing the Potential Risks and Benefits of Admitting the Opinion Evidence

[100] The court's role as gatekeeper is especially important in this case with its considerable complexities, high stakes, delays and enormous outlays of time and resources from all participants. The burden is on the moving party to establish on a balance of probabilities that the opinion evidence is relevant, reliable and necessary, and is sufficiently beneficial to the process to warrant its admission despite the potential harm to the process that may flow from its admission. (*White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 at paras. 22-24).

[101] Assessment of reliability touches on more than merely the subject matter of the evidence, but also requires a consideration of the expert's methodology and validity of his results. Although the expert's general research methods may be sound, as discussed above, his conclusion was drawn from weak premises and is far from reliable. The opinion evidence does not support the conclusion that both the expert and Ontario wish to draw from the Entry.

[102] The opinion goes to the very essence of the Treaty interpretation exercise, that Chief Peau de Chat had a specific understanding of a limit on future annuity payment, based on the "lucrative mines." It could not be admitted without rigorous cross examination and/or another expert to respond on behalf of the plaintiffs. This would create unduly protracted proceedings and significant costs in terms of time and money. These risks are not outweighed by any benefit the admission would have.

[103] The risk of admitting the opinion evidence on this motion is apparent on its face. Whatever slight benefit may flow to Ontario or any other litigant from admitting this opinion evidence, it is grossly overwhelmed by the prejudice that it would cause.

[104] In all of these circumstances, I do not find that the opinion evidence outweighs the prejudice arising from delay, cost and confusion that would flow from its admission. The opinion evidence is not admissible on this motion.

Ontario Asks for a Relaxed Standard on the Test

[105] Ontario argues that even if the court is unable to conclude that the proffered evidence would likely have changed the result, in the unique circumstances of this case, the interests of justice require that the fresh evidence be admitted. They submit that certain characteristics of this case demand that the standard ought to be relaxed, that the principle of finality is diminished because there are two further stages of this case to be argued and decided and that these two stages will continue before me as the trial judge.

[106] It is a fundamental principle of our legal system that a final judgement, unless appealed, is final. Although there are exceptions to that general rule and finality is not a determinative factor on such a motion, this principle "is so highly valued that it can be given priority over the justice

of an individual case" (*Baetz* at 265). For that reason, any attempts to reopen matters that were the subject of a final judgement must be carefully scrutinized. The two-prong test from *Sagaz* is necessarily a high bar.

Principle of finality

[107] This case is an historic and complex action. During extensive case management conferences, it was agreed that the actions could be split into three stages. Stage One was a summary judgment motion and a complete hearing on all issues of liability. Stage Two, which is scheduled to begin in mid-October of this year will consider the discrete questions of Crown liability/paymaster and what have been referred to as the 'technical defences': Crown immunity and limitation period. Stage Three will include all remaining pleaded issues, including damages for violation of the Treaty obligation.

[108] In this case, there is no diminished interest in the finality of the liability question from Stage One. In fact, the need for finality, is in my view, increased. The parties and the court have and continue to expend enormous resources on these actions. The parties specifically asked and agreed that the stages proceed on a timetable which would allow them to know with certainty the finding on the interpretation of the Crown obligations before they had to prepare their defense on Crown responsibility, limitations and respective Crown immunity. The Red Rock plaintiffs began their action almost two decades ago and the Restoule plaintiffs over 4 years ago. These First Nations have a reasonable expectation that the long and expensive road to a trial determination on Treaty interpretation has come to an end. Their expectation deserves at least as much respect as parties in other less complex litigation.

[109] To say that the interest in finality on the question of liability is diminished is simply wrong.

Is there any reason to relax the standard in this case?

[110] Ontario submits that the application of the reasonable diligence consideration should be relaxed in this case for two reasons: Firstly, they argue that the onerous obligation of document production calls for a relaxed standard. Secondly, they argue that the diligence test is less significant when the evidence is in the hands of the party against whom it is tendered and there was an obligation on the party to disclose it, which they failed to do. On this point, Ontario specifically references Dr. Driben.

[111] It is useful to recall that treaty interpretation cases rely heavily on the historical record and that the research into the historical record is a demanding undertaking. All parties recognized the scope of this task and retained expert historians and ethnohistorians to conduct the work. Ontario is a sophisticated litigant with extensive experience in Treaty cases. Ontario retained an expert with academic credentials and experience. Ontario's expert is the lead researcher in a private social science research and consulting firm, which specializes in conducting research pertaining to Indigenous issues in Canada and historic treaties, particularly the Robinson Treaties. However, in saying this, I do not point the finger at Ontario's expert witness. As indicated, Ontario is a sophisticated and experienced litigant. As a Crown defendant, Ontario made its own decisions about how to allocate its resources and direct their experts.

[112] In addition, Ontario retained and had the significant assistance of Public History Inc. to act as archivist, searching out and identifying the best version of documents, whether original, transcribed or translated.

[113] Although Ontario appears to argue that a compressed time frame may be the reason the proffered evidence was not discovered by them, their own witness does not cite time as a factor. He gives no explanation at all.

[114] Ontario further submits that fairness must prevail over finality and that it is in the interests of justice to reopen Stage One. They state that the overriding principle in reopening a trial is to avoid a miscarriage of justice.

[115] Ontario submits that there are unique and other relevant features of this case that must be taken into account, including that:

a) the trial is not yet complete, thus calling for a more relaxed standard;

b) the same judge will be considering further stages of the trial, so therefore the principle of finality is diminished;

c) the case involves Treaty interpretation and is dependent on a complete historical record;

d) not all the parties to the treaties are represented;

e) portions of the Mission Diary are already in evidence; and

f) Ontario would be prejudiced by not being able to introduce the whole of the Mission Diary into evidence.

[116] In support of their arguments, Ontario relies on *Griffin v. Corcoran*, 2001 NSCA 73, *Clatney v. Quinn Thiele Mineault Grodzki LLP*, 2016 ONCA 377, and *Dean v. Mister Transmission*, 2010 ONCA 443, as counterpoints to the parameters for admitting fresh evidence as set out in the decisions in *Sagaz, Holterman*, and *Mehedi*.

[117] With respect to the application of the test, Ontario submits that the *Griffin* decision calls for flexibility when assessing diligence where there is the risk of substantial injustice and that the decision in *Clatney* stands for the proposition that the interests of justice will prevail over the goal of finality.

[118] On the fundamental question of how to apply the test for fresh evidence, I do not find that there are irreconcilable differences amongst the decisions in *Sagaz, Holterman, Mehedi, Griffin, Dean* and *Clatney*. Each of these decisions stands for the proposition that procedural interests and the question of reasonable diligence cannot be the sole focus in the analysis on the admissibility of fresh evidence. Where the latter three cases emphasize flexibility, avoiding the miscarriage of justice and seeking a complete record, the common thread is an emphasis on the importance of the

evidence to the outcome of the case. In my view, this is simply another way to articulate the first branch of the test, would the evidence probably have resulted in a different outcome. In each of these decisions cited by the plaintiffs the court considered both diligence and how important the new evidence would be to the result in the case. The final balancing exercise is left to the discretion of the motions judge (*Mehedi* at para. 12; *Holterman* at para. 18).

[119] In *Griffin* the court stated that lack of diligence will give way to the interests of substantial justice where the new evidence is "credible and *so important that a substantial injustice will occur if the matter is not reopened*" (at para. 71, emphasis added). The court emphasized the high threshold of importance that the evidence must meet. The more important the evidence would be to the outcome of the case, the stronger the argument in favour of its reception (*Griffin* at paras. 68-71). In that case, the court asserted that the reopening of a trial is an "extraordinary and rare step that must be undertaken with great caution" (at para. 64).

[120] In *Dean*, the court found that "the fresh evidence calls for an explanation" and without that explanation the court would not have a full and fair record sufficient to pronounce judgment (at para. 18). Although this test is framed in the negative, *i.e.* the consequences of not admitting the fresh evidence, there is no doubt that the court was emphasizing the very significant role the fresh evidence would play, so significant that a fair determination of the dispute would not be possible without it.

[121] In *Clatney,* where the moving party asked the court to set aside a consent order on solicitor fees, the court considered the importance of finality and expressed that there should be a willingness to depart from finality and set aside court orders where it is necessary in the interests of justice to do so (at para. 60). In that case the interests of justice arose from the court's supervisory role over the appropriate compensation for legal services and the importance of public confidence in the administration of justice.

[122] The court found in *Clatney* that at the time of the consent order the appellant was: vulnerable, permanently impaired by a brain injury, under intense financial pressure, had been misled by the solicitor, was without independent legal advice and was subject to pressure to settle.

[123] The reasoning in this case was based on fairness and the interests of justice. It is consistent with the application of the test as articulated in *Sagaz, Mehedi* and *Holterman*.

[124] The unique characteristics of this case do not support either a modified or different test for the admission of the fresh evidence. These unique characteristics can all be considered in the application of the two-pronged test and assessment of the other factors. The demand for a complete record that does justice to the important task of Treaty interpretation has been met in my opinion. Whether portions of the Diary are already in evidence is irrelevant to the consideration of the consequences of admitting this evidence. The fact that the trial is ongoing before the same judge underscores the time and resources that have already been devoted and will be devoted to this case. That demand supports the exclusion of evidence that does not have the potential to change the outcome of the decision on liability.

Allegations against the plaintiffs' witnesses

[125] In support of their argument for a relaxed standard on the diligence test, Ontario cites the decision in *Dean*, where the court found that the due diligence test should be "less significant when the evidence is in the hands of a party against whom it is tendered and there was an obligation on the party to disclose or to produce it" (at para. 17).

[126] The facts here do not support the proposition that the evidence was in the hands of the plaintiffs.

[127] The thrust of these arguments is that three plaintiff witnesses appeared to have known about the Entry and did not fulfil their duties as independent expert witnesses to disclose the Entry to court. The allegations against Dr. Driben are very specific and rely upon what turns out to be a faulty translation within the Lonc preface.

[128] Ontario cited two sentences in the Preface to the Lonc publication, (a translation of the Nabarra preface) to suggest that Dr. Driben knew the contents of the Diary and appreciated its actual importance. However, counsel for the Red Rock plaintiffs correctly identified the Lonc publication's mistranslations of the original French preface, which substantially undermined Ontario's conclusion.

[129] The only facts which are now before the court is that in 1999 Dr. Driben became aware of the existence of the French Diary manuscript, which he realized could be important to the history of the Jesuit Mission at Fort William. Not fluent in French, Dr. Driben initiated a project to translate and transcribe the Diary. His involvement ended in 2002. Dr. Driben left the project group before the Diary was transcribed, translated and published. He did not read the Diary at that time nor did he see either publication until after June 3, 2019. He had no further involvement with the group or Dr. Nabarra after 2002 and did not know the status of the project when he prepared his own report.

[130] A proper reading of the preface from the Nabarra text is a simple expression of thanks to Dr. Driben for his early involvement in the project which ultimately resulted in the publication of the Diary. The English translation of that preface suggested that Dr. Driben might have had a greater involvement in the project than in fact he had. For some reason, Ontario made allegations against Dr. Driben based on their own interpretation of the English text, without checking the translation against the original French version. The original French version was available to counsel for Ontario either through the services of interpreters or through their own francophone and bilingual witness. The original version does not provide a sufficient basis for Ontario to have concluded that Dr. Driben had any knowledge whatsoever of the September 30, 1850 Entry at the time he did his report for this case.

[131] In any event, Dr. Driben has fully explained his very limited and early connection to the publication project and asserts that he was not involved with nor had any knowledge of the project or the contents of the Diary after he left the project team in 2002.

[132] Ontario's allegation against Dr. Driben has no merit.

[133] The general allegation against other plaintiff witnesses, Mr. Morrison and Mr. Corbiere, is similarly without foundation. While both cited discrete portions of the Diary, neither of them was aware of the Entry at the time they wrote their reports or gave their evidence.

[134] I do not accept Ontario's assertion that the plaintiffs' failure to disclose the Entry is either a failure of diligence or a failure of the witness' duty to the court, nor was it unintentionally misleading.

[135] I am satisfied that these witnesses in the Stage One hearing fulfilled their obligations to the court as required by the *Rules*.

[136] Therefore, contrary to Ontario's submission, the proffered evidence was not in the hands of the plaintiffs as it was in the *Dean* case. Ontario's diligence should be measured in all the circumstances. Well before Ontario cross examined the plaintiffs' experts, they had explicit notice of the existence of the transcribed and translated Diary, published in English and French. They did not require any assistance from the plaintiffs to access these publications. Their witness did not explain why he did not do any further research into the Diary. Had he done so, he would and could have easily discovered the Entry within those publications well before he testified. There is no explanation why Ontario or their witness did not investigate the Diary and find the Entry.

[137] For a different purpose, Ontario's expert did in fact review the Diary including the Entry, in June 2018, after the close of evidence, but long before the Reasons were released. He did not disclose this to counsel for Ontario.

[138] Therefore, the request for a relaxed standard on the diligence test fails.

[139] By way of advice, counsel should be slow to make allegations against an expert witness' failure to fulfil one's duty to the court and should not do so without considerably more effort to ensure the correctness of their facts. And where the allegations are based on inferences, the logic should be unassailable. This was not the case here.

Delay in bringing this motion

[140] Ontario discovered the Entry in February 2019. They did not disclose it to the other parties for three and a half months. They did not bring their motion for over five months after their discovery.

[141] During that time, the parties with the court's assistance, tried to settle the judgment, unaware of this issue and of Ontario's intentions. This approach does not demonstrate the diligence that this matter deserves. It does not recognize the consequences of disclosing the evidence after such delay. Fresh evidence issues should always be raised in the most expeditious time frame. This holds especially true where counsel have the benefit of case management.

CONCLUSION

[142] To reopen the trial for a marginally significant piece of evidence would be a great injustice to the plaintiffs and an unwarranted demand on judicial resources.

[143] When considered in the context of this entire case and the body of evidence which was put before the court in the Stage One trial, this Entry does not meet the threshold two-pronged test. It does not alter, contradict or shed new light on what was already before the court. It would not probably have changed the result. Its exclusion would not be a prejudice to Ontario nor a miscarriage of justice. It could have been discovered with reasonable diligence. It would not be in the "interests of justice" to admit this evidence.

[144] I also note that this Entry does not purport to have any impact on the Huron Anishinaabeg who were not present in Fort William during Mackenzie's visit in the Superior Territory. This fresh evidence could not stand for or support any understanding on their part.

[145] Motion dismissed.

[146] Costs to the plaintiffs.

[147] I will receive brief submissions on costs as follows:

a. From the plaintiffs within 7 days of the release of this decision. In addition to submissions, they are to deliver a Bill of Costs;

b. From Ontario within 7 days of delivery of the plaintiffs' submissions;

c. Any reply from the plaintiffs within 5 days of the delivery of the Ontario's submissions; and

d. If Ontario challenges the rate or time of the plaintiffs on costs, they are to submit their own Bill of Costs.

P. C. Hennessy J

The Honourable Madam Justice Patricia C. Hennessy

Released: October 3, 2019

CITATION: Restoule v. Canada (Attorney General), 2019 ONSC 5329
COURT FILE NO.: C-3512-14 & C3512-14A1 and **COURT FILE NO.:** 2001-0673
DATE: 2019-10-03

Court File No.: C-3512-14 & C3512-14A

Mike Restoule, Patsy Corbiere, Duke Peltier, Peter Recollet, Dean Sayers and Roger Daybutch, on their own behalf and on behalf of all members of the Ojibewa (Anishinaabe) Nation who are beneficiaries of the Robinson Huron Treaty Of 1850

Plaintiffs

– and –

The Attorney General of Canada, the Attorney General of Ontario and Her Majesty the Queen in Right of Ontario

Defendants

- and -

The Red Rock First Nation and the Whitesand First Nation

Third Parties

-AND-

Court File No.: 2001-0673

The Chief and Council of Red Rock First Nation, on behalf of the Red Rock First Nation Band of Indians, the Chief and Council of the Whitesand First Nation on behalf of the Whitesand First Nation Band of Indians

Plaintiffs

– and –

The Attorney General of Canada, and Her Majesty the Queen in Right of Ontario and the Attorney General of Ontario as representing Her Majesty the Queen in Right of Ontario

Defendants

DECISION ON MOTION TO ADMIT FRESH EVIDENCE AND RE-OPEN STAGE ONE OF THE TRIAL

Hennessy, J.

Released: October 3, 2019