

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

DAY 96 VOL 96
April 28, 2020



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Court File No. 94-CQ-50872CM

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

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

Plaintiffs

- and -

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

Defendants

Court File No. 03-CV-261134CM1

A N D B E T W E E N:

CHIPPEWAS OF NAWASH UNCEDED FIRST NATION and
SAUGEEN FIRST NATION

Plaintiffs

- and -

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

Defendants

--- This is VOLUME 96 / DAY 96 of the trial
proceedings in the above-noted matter, being
held via Zoom virtual video and audio platform,
on the 28th day of April 2020.

B E F O R E:

The Honourable Justice Wendy M. Matheson

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

2

3 Renée Pelletier, Esq., for the Plaintiffs,
4 & Jaclyn McNamara, Esq., the Chippewas of
5 Saugeen First
6 Nation, and the
7 Chippewas of Nawash
8 First Nation.

9

10 Michael Beggs, Esq., for the Defendant,
11 & Michael McCulloch, Esq., Attorney General
12 of Canada.

13

14 David Feliciant, Esq., for the Defendant,
15 & Jennifer Lepad, Esq. Her Majesty the
16 Queen in Right of
17 Ontario.

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I N D E X

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1 --- Upon commencing at 10:05 a.m.

10:05:03 2 MS. ROBERTS: Good morning, everyone
10:05:04 3 today is Tuesday, April 28th, 2020 and we're
10:05:07 4 here in the matter of the SON trial, day 96.

10:05:11 5 There are two files numbers associated
10:05:12 6 with this file. The first is 03-CV-261134CM1
10:05:22 7 and the second is 94-CQ-50872CM

10:05:35 8 In the event that anyone is
10:05:37 9 disconnected from the hearing please use the
10:05:38 10 same credentials to log back in.

10:05:42 11 I may not be able to reconnect you
10:05:42 12 immediately but please wait in the virtual
10:05:43 13 waiting room until you are reconnected.

10:05:46 14 In the event of a security breach the
10:05:47 15 call will be terminated immediately and we will
10:05:50 16 communicate regarding the resumption of the
10:05:51 17 call.

10:05:52 18 Because we are in a virtual connection
10:05:53 19 everyone is going to have to be more conscious
10:05:56 20 than ever of not speaking over one another. If
10:05:58 21 I cannot hear the end of a question or the
10:06:02 22 beginning of an answer it will make for a poor
10:06:06 23 roared. If there is an objection Justice
10:06:07 24 Matheson, the Court Reporter and I must be able
10:06:08 25 to hear it and know who is objecting.

1 When stating an objection please state
2 your name and if you are off camera please turn
3 your camera on for the duration of the time
4 you're speaking.

5 If I have to interrupt please be
6 patient and understand that my goal is to
7 provide you with a perfect record of the
8 proceeding.

9 Please move any papers and/or legal
10 pads away from the microphone so there is no
11 ambient noise.

12 From time-to-time the audio can be
13 affected, and if so we may need to stop the
14 proceeding and wait for a moment for the audio
15 to improve either by reconnecting or asking that
16 everyone use the conference call number if you
17 are using computer audio.

18 Our court reporter today is Ms. Helen
19 Martineau and the court clerk is Ms. Natasha
20 Novak, who will be keeping a record of exhibits
21 along with Ms. Martineau.

22 This meeting is also being recorded by
23 me, Liz Roberts of The arbitration Place,
24 however, only the main hearing room is recorded.
25 When participants are in their individual

1 breakout rooms these rooms are completely
2 confidential and there is no recording being
3 made.

4 I will now take a roll call of counsel
5 before turning the matter over to Justice
6 Matheson.

7 Renée Pelletier, counsel for the
8 plaintiff. Renée, could you please state
9 your -- confirm that.

10 MR. PELLETIER: Yes, I'm here. Thank
11 you.

12 MS. ROBERTS: Thank you. Jaclyn
13 McNamara, counsel for the plaintiff.

14 MS. McNAMARA: Yes, I'm here. Thank
15 you.

16 MS. ROBERTS: Michael McCulloch,
17 counsel for the Attorney General of Canada.

18 THE COURT: I'm seeing Mr. McCulloch
19 present, Ms. Roberts.

20 MS. ROBERTS: Okay.

21 Michael, can you hear us?

22 MR. McCULLOCH: Yes.

23 MS. ROBERTS: And Mr. Michael Beggs,
24 counsel for the Attorney General of Canada?

25 MR. BEGGS: Yes, thank you.

10:08:06 1 MS. ROBERTS: Jennifer Lepan, counsel
10:08:06 2 for Her Majesty the Queen in Right of Ontario.

10:08:08 3 MS. LEPAN: Yes, thank you.

10:08:10 4 MS. ROBERTS: And David Feliciant,
10:08:12 5 counsel for Her Majesty the Queen in Right of
10:08:12 6 Ontario?

10:08:15 7 MR. FELICIAN: Yes, I am present.

10:08:17 8 MS. ROBERTS: Thank you.

10:08:17 9 I'll now turn the matter over to
10:08:19 10 Justice Matheson.

10:08:22 11 THE COURT: Thank you, Ms. Roberts.

10:08:24 12 At my direction I am assisted by
10:08:26 13 Ms. Roberts in the conduct of this electronic
10:08:29 14 hearing to facilitate a fair and orderly
10:08:32 15 electronic hearing, and I have given her
10:08:35 16 permission to fulfill the roles that she will be
10:08:40 17 fulfilling commencing today.

10:08:44 18 I note that all participating counsel
10:08:47 19 and the witness have had training on this Zoom
10:08:51 20 platform before today, again to facilitate a
10:08:54 21 fair and orderly hearing.

10:08:57 22 We also have present some members of
10:08:59 23 the public who are able to come and go as they
10:09:04 24 please. As I indicated to counsel some weeks
10:09:08 25 ago, the process regarding public access is

1 posted on our courts' website and I also have
2 discussed that with counsel.

3 As with a normal trial day this
4 electronic hearing will be recorded and a
5 transcript will be prepared in accordance with
6 the Courts of Justice Act. No one else is
7 permitted to record this meeting without my
8 permission and no permissions have been sought.

9 I have made arrangements, with the
10 consent of the parties, to proceed with this
11 electronic hearing without the need for a
12 Registrar. Ms. Roberts, who is qualified, will
13 be taking the affirmation of the witness.

14 And the parties and my law clerk are
15 co-operatively keeping track of the trial
16 exhibits which are all electronic.

17 A chart has been prepared by counsel,
18 at my request, which sets out all documents that
19 have been added to the trial record since our
20 last sitting day on March 12th. That document
21 is entitled "Trial Exhibits, Consent Changes and
22 Exhibits Marked After March 12th", Mr. Brookwell
23 of plaintiffs' counsel has helpfully agreed to
24 maintain this chart, and at my request has sent
25 me the current chart as of the commencement of

1 court this morning.

2 That chart will be added to the
3 lettered exhibits in this trial both in its
4 current form as of this morning and in its final
5 form after any additional exhibits have been
6 added in the course of the conclusion of the
7 evidence.

8 I am marking the current form of the
9 chart, with one note I'll put on the record in a
10 minute, as lettered Exhibit F-4, which is the
11 next lettered exhibit.

12 EXHIBIT NO. F4: Chart entitled "Trial
13 Exhibits, Consent Changes and Exhibits
14 Marked After March 12th", setting out
15 all documents added as exhibits since
16 March 12th, 2020, to date.

17 THE COURT: I just note on the record
18 that the version of the chart that was
19 circulated this morning is missing one exhibit
20 number. Counsel will see a blank on the first
21 page, I'm advised by Mr. Brookwell that is
22 Exhibit 4910.

23 And before the document is marked --
24 well, it's been marked, before the electronic
25 document is put in the database that change will

10:11:51 1 be made.

10:11:56 2 Now, as for where we are in the trial,
10:11:58 3 our prior court day on March 12th marked the
10:12:02 4 conclusion and closing of all of the defendants'
10:12:06 5 evidence, and as of that time those defendants
10:12:12 6 have closed their cases.

10:12:13 7 However, I have permitted the
10:12:15 8 plaintiffs to call a reply witness who is being
10:12:19 9 called commencing today.

10:12:24 10 Ms. Roberts, I didn't hear in your
10:12:28 11 roll call, I assume the witness is in the
10:12:30 12 virtual courtroom, is that correct?

10:12:33 13 MS. ROBERTS: Yes, that's correct.

10:12:41 14 THE COURT: That's fine. Professor
10:12:42 15 Morin of the University of Montreal is the reply
10:12:43 16 witness. He had been scheduled to testify about
10:12:47 17 ten days after our last court day, but as I'm
10:12:50 18 sure you all know in the meantime the COVID-19
10:13:02 19 pandemic made that in-person hearing not
10:13:05 20 proceed.

10:13:05 21 I wish to thank all involved for the
10:13:06 22 arrangements made to proceed with this
10:13:08 23 electronic hearing today, bearing in mind all of
10:13:11 24 the circumstances that everyone has been
10:13:13 25 experiencing in the intervening weeks.

1 Two other points. With respect to
2 this electronic hearing Ms. Roberts has already
3 emphasized this point but I repeat it, I remind
4 all people with speaking roles, counsel and our
5 witness, that it is especially important to
6 pause before either asking your next question,
7 or answering the next question, or making a
8 submission so that there are no people talking
9 at the same time.

10 Now, even in a regular courtroom we
11 experience that difficulty and if it does arise
12 we will be able to deal with it. But I'm sure
13 everyone will make an extra effort today.

14 As for those people without a speaking
15 role it is important that you always have your
16 microphone muted so that the background noise in
17 your location does not interfere with everyone's
18 ability to hear.

19 Lastly, I note that on consent the
20 expert report of Professor Morin has already
21 been marked as a trial exhibit and forms a
22 substantial part of his examination in-chief.
23 This has been the consent practice in this trial
24 for almost all of the expert witnesses.

25 As set out in the chart that I just

1 marked as Exhibit F-4, Professor Morin's expert
2 report has already been marked, as approved by
3 me, as Exhibit 4929.

4 EXHIBIT NO. 4929: Expert report of
5 Professor Michel Morin.

6 THE COURT: The errata to that report
7 is Exhibit 4930.

8 EXHIBIT NO. 4930: Errata to the
9 expert report of Professor Michel
10 Morin.

11 THE COURT: The curriculum vitae of
12 the witness is Exhibit 4931.

13 EXHIBIT NO. 4931: Curriculum vitae of
14 Professor Michel Morin.

15 THE COURT: And those documents have
16 all already been marked.

17 That concludes my introductory
18 remarks. Henceforth, we will try our best to
19 conduct this hearing as we ordinarily would with
20 the importance assistance of Ms. Roberts.

21 As a result I am going to call upon
22 Ms. Pelletier, who I understand is calling this
23 witness, to proceed with bringing the witness
24 forward electronically in order that his oath or
25 affirmation can be taken by Ms. Roberts.

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Please go ahead, Ms. Pelletier.

MR. PELLETIER: Thank you, Your Honour. The plaintiffs' call Professor Michel Morin.

THE COURT: I see Mr. Morin on the screen.

MICHEL MORIN: AFFIRMED.

EXAMINATION IN-CHIEF BY MS. PELLETIER.
ON QUALIFICATIONS:

THE COURT: Please to ahead Ms. Pelletier.

MR. PELLETIER: Thank you, Your Honour.

BY MR. PELLETIER:
Q. Good morning, Professor Morin. I'm going to begin by pulling up Exhibit 4931.

THE COURT: That is the curriculum vitae, counsel?

MR. PELLETIER: That's correct, Your Honour.

THE COURT: Thank you.

BY MR. PELLETIER:
Q. Professor Morin, who prepared this document?
A. I did. Can you hear me?

10:17:22 1 Q. We can, thank you.

10:17:29 2 A. Just give me one second. I seem
10:17:31 3 to be having trouble with my Internet connection
10:17:35 4 and I think if I open the door in front of me it
10:17:38 5 could improve the situation. I've been missing
10:17:40 6 a few sentences so just one second. I apologize
10:17:43 7 for this.

10:17:46 8 THE COURT: That's no problem.

10:18:08 9 THE WITNESS: Ready now.

10:18:10 10 THE COURT: Professor Morin if there
10:18:12 11 is anything that you don't hear for any reason
10:18:14 12 you need only say, Could you please repeat that?
10:18:18 13 All right.

10:18:18 14 Please go ahead, Ms. Pelletier.

10:18:21 15 MR. PELLETIER: Thank you, Your
10:18:22 16 Honour.

10:18:22 17 BY MR. PELLETIER:

10:18:22 18 Q. So, Professor Morin, we have here
10:18:23 19 your curriculum vitae and I'd like to begin with
10:18:26 20 your education. Could you tell us how your
10:18:31 21 education related to the subject matter of your
10:18:34 22 report?

10:18:46 23 MS. ROBERTS: I'm not seeing Professor
10:18:49 24 Morin on the screen.

10:18:50 25 THE COURT: I have Professor Morin

1 frozen on the screen.

2 MR. PELLETIER: I do as well.

3 MS. LEPAN: I do as well.

4 THE COURT: Just give him a minute.

5 THE WITNESS: Sorry, the problem I was
6 mentioning with my Internet connection. I think
7 I lost the connection for a few seconds.

8 THE COURT: Did you hear the question,
9 sir? Yes, we seem to have a weak connection
10 with the witness.

11 BY MR. PELLETIER:

12 Q. Professor Morin, I was asking if
13 you could tell us a little about your education
14 and how your education related to the subject
15 matter of your report?

16 A. Yes, certainly. And the short
17 answer is that during my LLB studies in law and
18 my studies in economics at the University of
19 Montreal I did not really acquire any special
20 expertise in Indigenous people's law, that came
21 later.

22 I think that is not that unusual for
23 academics to study in one field. I never really
24 returned to economics and moved on to legal
25 history and eventually doing Indigenous people's

10:20:55 1 rights.

10:20:58 2 Q. And when did you start teaching
10:20:59 3 courses at university?

10:21:01 4 A. Well, at the University of Ottawa
10:21:05 5 the civil law section, which as you may know
10:21:09 6 trains students to become lawyers in Quebec, as
10:21:13 7 opposed to the Common Law section. So I was
10:21:16 8 there from 1986 to 2003 and the second year I
10:21:20 9 started to teach legal history.

10:21:23 10 And then I moved to the Université de
10:21:24 11 Montréal doing essentially the same kind of work
10:21:29 12 as a law professor.

10:21:42 13 Q. Can you tell us about the
10:21:43 14 subjects you teach?

10:21:44 15 A. Well, Foundations of Law 1, or
10:21:45 16 the origination of law at the previous
10:21:49 17 university I was teaching is a broad overview of
10:21:52 18 the evolution of legal systems and legal
10:21:54 19 traditions from the Roman era through the Middle
10:21:58 20 Ages to codification in France, the common law
10:22:02 21 in England, and how all this unraveled in
10:22:05 22 Canada, in Quebec and in the other provinces;
10:22:08 23 the duality of common law and civil law; and
10:22:13 24 also the interactions with Indigenous peoples.

10:22:22 25 Q. I'd like to move now to the

1 section of your curriculum vitae titled
2 "Publications", which begins at page 7.

3 We've lost the document. Here we go.

4 Moving to page 7 of your curriculum
5 vitae we have here your publications. I'm
6 wondering, Professor Morin, whether you could
7 take us through your publications, those that
8 are -- particularly those that are relevant to
9 the topics you covered in your report?

10 A. We can scroll down the page to
11 1995. Yes, so here. Just here before, "Note:
12 only titles published since 1997", so this is my
13 first document. I have already been working on
14 the book that was published in 1997, but I did
15 find the reasons for judgment of a decision of
16 the Supreme Court of Canada which had never been
17 published in 1918, I published them immediately.

18 And this is just to explain that by
19 that time I had acquired certain familiarity
20 with going to the archives and using microfilms,
21 and copies, and things like that, which I didn't
22 have when I started to teach and do some
23 research.

24 But the next publication that's really
25 more substantial is my 1997 book, slightly

10:24:38 1 above, "The Usurpation of Aboriginal
10:24:38 2 Sovereignty". Yes, stop. Yeah.

10:24:46 3 And this initially was about to be a
10:24:53 4 chapter of a wider book on Quebec legal history.
10:24:56 5 And it's a book that almost was never written.
10:24:59 6 I like to tell the anecdote because I had been
10:25:03 7 reviewing the literature and had become
10:25:08 8 convinced that there was no kind of legal
10:25:10 9 recognition of Indigenous people in the 16th,
10:25:15 10 17th, 18th century.

10:25:16 11 So I almost abandoned that not
10:25:21 12 reviewing the literature from basic sources that
10:25:24 13 were quoted, until I started to look more
10:25:26 14 carefully at the index of a book by a famous
10:25:31 15 author called Gorotius, and I realized that he
10:25:35 16 was mentioning Indigenous peoples in North
10:25:37 17 America in a way that implied that they had
10:25:38 18 rights over their territory.

10:25:40 19 So at that time I said, okay, I have
10:25:42 20 to really start looking closely at what these
10:25:46 21 authors have said.

10:25:48 22 And then starting from there I
10:25:49 23 discovered that the initial assumption was
10:25:51 24 completely wrong. It was much more complex
10:25:54 25 situation in the Law of Nations. And when I

1 looked at the colonial documents of the French
2 Crown, and even the British Crown, I can see
3 that prior to the 19th century Indigenous
4 peoples were considered independent peoples
5 within treaties and could be entered into at the
6 international level. And then I reviewed the
7 transformation from the 19th century to the
8 20th century.

9 So this book won a prize, it's
10 mentioned at the beginning of my CV, which is a
11 social sciences prize, the Jean-Charles
12 Falardeau, and so I was quite happy with that of
13 course. Not only it was a prestigious prize but
14 it was also a multidisciplinary committee that
15 awarded me this prize.

16 So do I -- so are there other
17 publications you would like me to discuss? If
18 so we can move to 2004.

19 Q. Yes, those related to the topics
20 of your report please, Professor Morin.

21 A. Yes. Okay, just here, "Manger
22 avec la même micoine dans". Yes, there we are.
23 A paper that looks closely at the in-between
24 concepts of The Law of Nations, French colonial
25 documents and Indigenous legal traditions,

10:27:44 1 mostly deals with the Haudenasaunee looking for
10:27:49 2 symbolic expressions that could express legal
10:27:53 3 concepts, such as being brothers when Indigenous
10:27:57 4 Nations hunted and encountered each other; and
10:28:00 5 reviewing treaties that were entered into by the
10:28:03 6 French with various Indigenous peoples.

10:28:12 7 Now, another paper that is important I
10:28:14 8 think is slightly above on Samuel de Champlain.
10:28:23 9 Yes, here. So "The Legal Dimensions of the
10:28:28 10 Relation Between Samuel de Champlain, the
10:28:31 11 Aboriginal Peoples of New France". And here I
10:28:33 12 look much more closely at the writings of Samuel
10:28:37 13 de Champlain and Lescarbot.

10:28:41 14 And also I did a more thorough
10:28:43 15 analysis of the documents of the French Crown
10:28:46 16 creating the framework for colonization. And I
10:28:49 17 came to the conclusion that I couldn't find any
10:28:53 18 idea that Indigenous peoples were already
10:28:56 19 subject to French authority and French law.
10:28:57 20 There needed to be a change in status.

10:29:01 21 And although Champlain was very keen
10:29:04 22 on imposing the French law he never did it, for
10:29:09 23 various reasons, and he always tried to get the
10:29:11 24 acceptance of his allies.

10:29:16 25 The next important paper would be in

10:29:19 1 2010. So this is here, "Free Nations Without a
10:29:42 2 Territory, Aboriginal Peoples and the
10:29:42 3 Colonization of French America from the
10:29:42 4 17th to the 18th Century". So this was
10:29:53 5 published in a prestigious journal, the "Journal
10:29:57 6 of the History of International Law", edited in
10:30:00 7 Europe so it would be reviewed by experts from
10:30:05 8 other countries.

10:30:06 9 And I tried to look for all the
10:30:10 10 information available on the legal position of
10:30:12 11 the French regarding the status or rights of
10:30:16 12 Indigenous peoples, and going through authors
10:30:21 13 such as Jean Bodin, who is well-known for his
10:30:25 14 definition of sovereignty in the 16th century,
10:30:25 15 and there's all -- sorry, there is an argument
10:30:36 16 that often in sovereignty that he does recognize
10:30:37 17 that families living together could be
10:30:41 18 independent and hold their rights and community,
10:30:43 19 would live from God and from the sword, meaning
10:30:47 20 they would be truly independent from other
10:30:49 21 Nations. And any dealing with them would be on
10:30:51 22 the war and peace basis, meaning
10:30:55 23 nation-to-nation sense.

10:30:58 24 And then I look at the various process
10:31:01 25 through which territories, both in new France

10:31:04 1 but also Louisiana, and to a certain extent in
10:31:06 2 the Indies were colonized, and also at the
10:31:11 3 memorandums that were exchanged during
10:31:14 4 diplomatic conferences, I tried to review them
10:31:17 5 all when there was a discussion of the
10:31:20 6 territories of Indigenous peoples. So that's
10:31:24 7 why it's a very long article, 70 pages. And
10:31:28 8 then initially it was 120 pages. So this would
10:31:36 9 be the 2010 paper.

10:31:38 10 The next one would be in 2013. Yes,
10:31:55 11 here. "Fraternity, Sovereignty and Autonomy for
10:31:55 12 Aboriginal Peoples in New France". So here I
10:32:05 13 tried to use different sources to validate or,
10:32:07 14 if need be, modify my functions about the fact
10:32:13 15 that Indigenous peoples were independent,
10:32:14 16 considered allied with their own law and rights
10:32:19 17 to self-government.

10:32:22 18 And I reviewed mostly the Jesuits'
10:32:26 19 relations and narratives from explorers, such as
10:32:31 20 Champlain and others, to validate this initial
10:32:36 21 assumption. But I think I went through focusing
10:32:41 22 on the people who live in current-day Quebec. I
10:32:46 23 went through the whole of the Jesuits'
10:32:51 24 relations, although many parts were not
10:32:53 25 interesting to me so I just flipped the pages,

10:32:56 1 but I think I did very important work in the
10:33:00 2 documents that were available.

10:33:03 3 And then the other paper, 2013,
10:33:07 4 "Properties and Territories in new France",
10:33:09 5 while initially this was one gigantic paper they
10:33:14 6 had to be subdivide into two parts. The first
10:33:16 7 part was about sovereignty and the second part
10:33:19 8 was published in "Recherches amérindiennes au
10:33:20 9 Québec", subdivided in two parts. So here I
10:33:25 10 focus on territories and property.

10:33:29 11 And I will mention that "Recherches
10:33:30 12 amérindiennes au Québec" is a very well
10:33:34 13 respected periodical by social scientists, such
10:33:41 14 as historians, anthropologists. So I was very
10:33:44 15 pleased that it would accept this paper because
10:33:47 16 I was addressing a controversy between
10:33:52 17 anthropologists, for one thing.

10:33:55 18 But the first part was mostly to
10:33:57 19 establish the fact that French really clearly
10:34:00 20 acknowledged that Indigenous Nations living in
10:34:02 21 the territory that they generally claimed by
10:34:07 22 other European powers controlled their
10:34:09 23 territory, occupied it and were acknowledged as
10:34:14 24 the owners, in an indirect way, in the sense
10:34:19 25 that they would say, this is the country of such

1 a people. The lands where they live. Their
2 lands, such expressions, but they come on so
3 often that for me it was very so significant,
4 and coherent with the legal framework
5 established in the French legal system.

6 And the second part was more on the
7 internal, within the territory of first how
8 hunting districts were not created, or did not
9 develop because of the fur trade, but rather I
10 think I was able to demonstrate or confirm,
11 because there was a conference that hunting
12 districts had pre-existed the arrival of
13 Europeans and there were very specific rules,
14 clearly understood, within Indigenous Nations
15 about these districts.

16 And there is another short paper I
17 want to mention in 2014, sorry. There were many
18 papers that that came out that were in a
19 different time. Here.

20 "Ownership and Indigenous Territories
21 in New France (1603-1760)". This is a summary
22 of the papers I just mentioned in 2013, 2014, in
23 English and I think it will be in evidence so I
24 thought I would just mention that.

25 I did not quote it in my report

1 because it was essentially summarizing my other
2 papers without giving the relevant sources, or
3 the review sources, because this was the result
4 of a conference so it had to be much shorter.
5 But I thought to mention it because it is in
6 English.

7 And then finally there is another
8 paper in 2018. It's below. Yes, here. Page 3.
9 "Indigenous Peoples, Political Economists and
10 the Tragedy of the Commons". This was a special
11 edition on the 50th anniversary of the famous
12 paper called the "Tragedy of the Commons", which
13 was very influential in social sciences and in
14 law.

15 And I did two things I want to mention
16 in this paper, and this is also in a widely
17 respected law review. So I emphasize, I'm
18 sorry, that the author, Garrett Hardin, was
19 really assuming that lands of Indigenous peoples
20 were not owned in any way, there were no
21 territorial rights over these lands.

22 And then I also used example of the
23 Innus in northwestern Quebec, on the north shore
24 of the St. Lawrence, to show that they had rules
25 to manage the commons and to avoid exhaustion of

1 the resources, but these rules mostly
2 disappeared in some areas because of epidemics
3 and the bad practices of the traders, the French
4 traders who gave alcohol to Indigenous peoples.

5 Q. Thank you, Professor Morin.

6 Now I would like to move past your
7 publications and go back up to the first page of
8 your curriculum vitae to your work experience.
9 You've said a little bit about the courses you
10 teach. I'm wondering if you'd like to say a bit
11 more about how your work experience relates to
12 the report you have written?

13 A. Well, I think apart from my
14 publication in teaching where when you look at
15 legal history in the middle ages, or in the
16 Roman era, sometimes you are confronted with
17 customs, with various legal sources and legal
18 information, so that's good preparation to deal
19 with Indigenous people's rights. But in general
20 my experience as a law professor and as an
21 academic.

22 So I'm not sure what else I can add on
23 the various functions that I've held at the
24 university in which I worked.

25 Q. That's fine. Thank you.

1 Now, could you explain to us the
2 distinction in your view between a historian and
3 a legal historian?

4 A. Initially, or the starting point
5 answer is that they are all trying to do the
6 same thing, to understand historical events.

7 But legal historians will focus, of
8 course, on the law whereas historians will focus
9 on society and will look at the law only to
10 understand how it impacts specific events or
11 empowers some people, how it empowers others.

12 Whereas the lawyers may focus on norms
13 that are not always complied with but are
14 understood by lawyers and judges to exist, and
15 of course a serious legal historian has always
16 to do both; to look at what was considered the
17 law, according to the sources that are
18 available, whether they are enactments, or
19 judgments, or doctrine, or writing. And even if
20 it's not acknowledged can be established in fact
21 the way the law was applied, modified, the
22 official norm and the resulting practice may
23 have been different, sometimes very different,
24 than the official norms that were established.

25 And sometimes for historians it's

10:40:58 1 difficult to understand that laws may impose
10:41:02 2 constraints even though they're not always
10:41:04 3 respected and there may be violations of them.

10:41:09 4 Q. And could you tell us a little
10:41:10 5 where there is overlap between a legal historian
10:41:14 6 and a historian?

10:41:16 7 A. Well, certainly the legal
10:41:23 8 historian will want to understand well the
10:41:25 9 historical literature, the events, what we know
10:41:28 10 about the modification -- the motivations and,
10:41:33 11 I'm sorry, the empowerments or lack of
10:41:36 12 empowerment of the various persons interacting
10:41:41 13 with each other or groups.

10:41:48 14 But the legal historian may perform
10:41:50 15 the inner logic of law whereas the historians
10:41:53 16 may see the law only as a tool to achieve
10:41:55 17 broader ends.

10:41:56 18 And I think this is where the
10:41:59 19 interaction looking at the same documents may
10:42:02 20 lead to different results.

10:42:05 21 And Professor Beaulieu, whom I respect
10:42:11 22 enormously and had some kind words for my
10:42:15 23 academic research, and I wish to repay the
10:42:17 24 compliment by saying he is a very rigorous
10:42:21 25 scholar, but in the end I think that he, as he

10:42:23 1 says, he sees the colonial enterprise as the
10:42:25 2 overarching principle that must explain the
10:42:28 3 documents he's looking at.

10:42:29 4 Whereas I think that the law may
10:42:31 5 impose constraints or provide different choices
10:42:33 6 that are exercised differently, leaving some
10:42:37 7 situations unchanged but legally effective, even
10:42:40 8 though in the long run the objective might be to
10:42:43 9 achieve that change. But that doesn't mean
10:42:50 10 initially that it is -- the change is effective
10:42:53 11 immediately.

10:42:56 12 Q. Now I'd like to move to the
10:43:00 13 section of your curriculum vitae entitled
10:43:05 14 "expert Reports". And could you tell us,
10:43:12 15 Professor Morin, in what capacity you have acted
10:43:14 16 as an expert previously?

10:43:17 17 A. Well, the first time I was
10:43:21 18 examined in court was when I wrote a report for
10:43:27 19 the Attorney General on the evolution of the
10:43:31 20 voting system in the colonies. So that was a
10:43:34 21 case where the plaintiffs wanted the court to
10:43:38 22 declare that section 3 of the Charter mandated
10:43:42 23 some form of proportional representation, and
10:43:45 24 the Attorney General wanted a historical
10:43:49 25 background. But it was understood that this

1 would not necessarily be decided on the
2 interpretation of section 3 but it would
3 establish at least a starting point when the
4 Constitution Act of 1867 was adopted.

5 So that was one report that I produced
6 in court. I was examined and cross-examined and
7 it was eventually published, as you can see
8 here.

9 Now, the other reports are still
10 confidential because they have been produced
11 more recently, one in 2018 and two different
12 reports on two different files in 2019. And one
13 of these reports was requested by Justice Canada
14 as to Indigenous peoples' rights.

15 Q. Thank you.

16 Professor Morin, can you explain to us
17 your methodology in preparing your report and
18 how you approached your instructions?

19 A. Well, this was really using a
20 methodology from my previous publications, and
21 it is somewhat unusual that you all have a
22 debate in court which raised so squarely the
23 issue I've been working on for so long.

24 So the methodology is to, as I said,
25 establish what would be considered the law, and

1 a starting point for that would be the legal
2 literature of the era of the Law of Nations, but
3 then looking at colonial documents that created
4 the framework for colonization.

5 These colonial documents I looked for
6 the wording to see if it contradicted or
7 confirmed what could be found in the Law of
8 Nations, and especially the idea initially that
9 was very new in 1997, that these people were on
10 a nation dealing with -- dealing with other
11 powers on a nation-to-nation basis.

12 So looking at the legal literature,
13 looking at the colonial documents, and looking
14 the practice, mostly through the archives,
15 starting from the historical literature that
16 analyzed the dealings between Europeans and
17 Indigenous peoples. And many lawyers have also
18 written on these issues doing research that is
19 historically very sound, in my opinion. And I
20 mention at the beginning of the report many of
21 these authors that are important so I did not do
22 this all alone by myself, there were other
23 authors doing the same kind of work that was
24 very helpful.

25 But initially it was -- sorry,

10:46:42 1 essentially it was to create a framework and to
10:46:46 2 see if the framework is validated or
10:46:49 3 contradicted by legal documents, and by the
10:46:51 4 examples that were specifically used by
10:46:55 5 Professor Beaulieu, here I'm referring to the
10:46:57 6 establishment of forts.

10:47:01 7 This specific issue I had not been
10:47:03 8 studying before. I'm working for several years
10:47:06 9 on specific focus on forts before.

10:47:20 10 MS. LEPAN: Professor Morin has cut
10:47:21 11 out for me. I'm not sure if that's happening for
10:47:22 12 others as well?

10:47:25 13 MR. FELICIAN: He's also cut out for
10:47:26 14 me.

10:47:27 15 THE COURT: That's fine. Professor
10:47:30 16 Morin, I'm going to wait until you can
10:47:32 17 acknowledge that you can hear me. Can you hear
10:47:34 18 me?

10:47:37 19 THE WITNESS: Yes.

10:47:38 20 THE COURT: Up until just now I was
10:47:39 21 able to clearly hear everything you said, even
10:47:42 22 though it was interrupted, if you will, in its
10:47:45 23 transmission.

10:47:47 24 But since we are now in a position
10:47:49 25 where at least some people can't hear,

1 Ms. Roberts, is there any additional tips you
2 can give Professor Morin to improve his computer
3 performance?

4 MS. ROBERTS: Yes.

5 Professor Morin, are you able to close
6 any applications that are not in use on the,
7 computer except for the Zoom application?

8 THE COURT: Perhaps you can give him
9 an example?

10 MS. ROBERTS: For example, Microsoft
11 Word, Microsoft outlook, Adobe Acrobat.

12 THE WITNESS: I will do that.

13 THE COURT: Take a minute to do that,
14 sir, and let us know when you've done that.

15 THE WITNESS: Okay, everything is
16 closed now.

17 THE COURT: Everything is closed? All
18 right. We're fortunate to have a transcript for
19 whatever the last couple of words were but
20 perhaps, Ms. Pelletier, you could just repeat
21 where we left off and ask a continuing or
22 another question to give some continuity?
23 Please go ahead.

24 MR. PELLETIER: Will do. Thank you,
25 Your Honour.

10:49:45 1 BY MR. PELLETIER:

10:49:47 2 Q. Professor Morin, we left off with
10:49:48 3 you talking about your methodology and you were,
10:49:50 4 I believe, saying that you had not specifically
10:49:51 5 looked at forts before but you understood that
10:49:54 6 neither had Professor Beaulieu? So perhaps you
10:49:59 7 can pick up from there?

10:50:01 8 A. Yes. I was really surprised to
10:50:06 9 discover that when I --

10:50:24 10 THE COURT: Sir, you're cutting out
10:50:25 11 again. Ms. Roberts, can I get you to intervene?

10:50:37 12 MS. ROBERTS: Can you try repeating
10:50:39 13 your answer please?

10:50:40 14 THE WITNESS: Yes. So -- I lost
10:50:43 15 track.

10:50:44 16 Okay. Working on forts.

10:50:47 17 For me I was surprised to discover
10:50:49 18 that my assumption about the distinction between
10:50:53 19 claims against European powers and the ongoing
10:50:57 20 rights of Indigenous peoples on their
10:51:00 21 territories was considered compatible by the
10:51:05 22 Imperial or the French colonial authorities in
10:51:10 23 the documents that I've reviewed that did not
10:51:14 24 see this as a contradiction.

10:51:16 25 And they would also explain this to

10:51:18 1 Indigenous peoples in the conferences, for which
10:51:23 2 we have archival documents. They would say very
10:51:27 3 clearly to the Haudenosaunee, These are your own
10:51:30 4 lands as long as you don't allow the French to
10:51:33 5 settle there.

10:51:34 6 And previous to that had been seen an
10:51:37 7 assumption in the literature that there would be
10:51:39 8 a kind of dissimulation of the French colonial
10:51:44 9 power of their claims against European rivals.

10:51:48 10 But in these documents we see clearly
10:51:50 11 that they are actually maintaining this position
10:51:55 12 both in Europe and in their dealings with
10:51:58 13 Indigenous people, so that's interesting.

10:52:00 14 But I guess I'm straying away from
10:52:03 15 methodology here. Methodology would be to
10:52:05 16 review the archival documents, the
10:52:07 17 correspondence between French authorities and
10:52:13 18 governors, intendants and how they depicted the
10:52:21 19 legal situation in documents which are focusing
10:52:23 20 a lot on the chronology of events before you can
10:52:26 21 find out specific legal concepts like those I
10:52:29 22 was mentioning, discovery, territories, maybe
10:52:32 23 not exactly that word, but you have countries,
10:52:35 24 you have land, et cetera, that are considered to
10:52:39 25 be those of Indigenous peoples.

10:52:40 1 BY MR. PELLETIER:

10:52:44 2 Q. Thank you, Professor Morin.

10:52:45 3 So I'd like to bring up the proposed
10:52:48 4 tender for Professor Morin. So, Your Honour, we
10:52:56 5 had previously provided you with a copy of the
10:52:59 6 proposed tender. And we realized this morning
10:52:59 7 that we neglected to include the first sentence,
10:53:02 8 the introductory sentence. So we had the
10:53:06 9 version that we had sent to you, Your Honour,
10:53:08 10 and that we had entered, lettered Exhibit E-4,
10:53:11 11 had only the bullets.

10:53:14 12 So what I'm putting up now is document
10:53:16 13 SC2148. Counsel had previously agreed on the
10:53:20 14 wording of that first sentence. I'm not sure
10:53:23 15 how you'd like us to handle this, Your Honour?

10:53:27 16 THE COURT: I would like you to read
10:53:28 17 the tender for the record, counsel, in its
10:53:31 18 entirety.

10:53:43 19 MR. PELLETIER: We have:

10:53:43 20 "A legal historian with expertise
10:53:45 21 in the legal relationships between
10:53:47 22 France and First Nations from the
10:53:49 23 16th to the 18th century, and capable
10:53:53 24 of giving evidence on:

10:53:55 25 1. The Law of Nations and its

1 application to and impact on French
2 practice with respect to First Nations
3 and territory in North America;

4 2. Official grants of authority
5 by the French Crown to colonial
6 administrators from 1541 to 1760;

7 3. French views on the
8 significance of discovery and symbolic
9 acts of possession;

10 4. Diplomatic negotiations
11 between France and England from 1687
12 to 1755 regarding respective
13 territorial holdings in North America,
14 and;

15 5. Official acts with respect to
16 the boundaries of First Nations'
17 territories."

18 -- RULING --

19 THE COURT: Thank you, I have reviewed
20 the consent tender and the related exhibits and
21 am satisfied that this gentleman has the
22 necessary background and expertise to be
23 accepted by me as an expert in those areas.

24 Ms. Pelletier, can I assume that the
25 complete tender will be what is put in to our

1 exhibit database as the lettered Exhibit E-4,
2 with the otherwise missing preamble.

3 MR. PELLETIER: Yes, Your Honour,
4 we'll make that switch.

5 THE COURT: All right. Please go
6 ahead, Ms. Pelletier.

7 MR. PELLETIER: Thank you, Your
8 Honour.

9 EXAMINATION IN-CHIEF BY MR. PELLETIER:

10 Q. So next I would like to pull up
11 Professor Morin's report, which is at Exhibit
12 4929.

13 Professor Morin is this is the report
14 you prepared for this proceeding?

15 A. Absolutely.

16 THE COURT: Ms. Pelletier, I meant to
17 mention this earlier. Professor Morin, as other
18 experts have done if you have a paper copy of
19 your report with you you are free to use that as
20 well. I would ask that you not pull up a
21 separate copy on your computer, but I wanted you
22 to know that you are free to use a paper copy if
23 you wish to do so.

24 THE WITNESS: Thank you.

25 THE COURT: Please go ahead,

1 Ms. Pelletier.

2 MR. PELLETIER: Thank you, Your
3 Honour.

4 BY MR. PELLETIER:

5 Q. Now, Professor Morin, in your
6 report you have a number of passages that you
7 have translated from a French original document,
8 or you have a number of passages that have been
9 translated from a French original document, can
10 you tell us who translated these documents?

11 A. Well, as far as possible I use
12 translations that were already in existence and
13 when I could not find a translation in English
14 then I self-translated the excerpts that seemed
15 to be the most relevant, or in the case of the
16 New York documents, the colonial documents on
17 the history of the New York State, something
18 like that -- sorry, I'm not putting it in the
19 right order, but I discovered a few instances
20 where the English document produced in the
21 19th century was not complete.

22 So when I reviewed the French
23 documents originally, the archives, when I saw
24 some missing sentences or parts I added the
25 translation for these parts in brackets and then

1 I put a footnote in the text of the original
2 sentence that I translated. And any other
3 document that I translated myself I always put
4 the original version in French in the footnote.

5 Q. Thank you.

6 Now, the first section of your report
7 discusses the Law of Nations. I wondered if you
8 could briefly explain to us what the Law of
9 Nations is and tell us why you have included a
10 discussion of this in your report?

11 A. Well, certainly. So the Law of
12 Nations -- what do we mean by "Nations" would be
13 the starting point. And Nations are, of course,
14 states and governments but they would include in
15 these days entities that have the status at the
16 international level, like cities that are
17 considered city republics, or duchies that are
18 in the Holy Roman Empire, and all sorts of
19 communities living outside of Europe, including
20 Indigenous peoples.

21 And a better translation of the Law of
22 Nations would be the law of peoples, in French
23 "droit des gens", "gens" comes from "genus" in
24 Latin that would mean "people". Which -- that
25 they will have a formal government, or what kind

1 of government they will have. So that's the
2 first point.

3 And the Law of Nations is about the
4 relations between Nations essentially who are in
5 peace, and the legal concepts and rules that we
6 need to use to regulate, or at least to
7 understand the situations of war and the
8 situations of peace.

9 And the best way to have a general
10 understanding of the Law of Nations is the
11 literature produced by the authors, which may
12 appear at first blush to be very normative
13 because it is assumed to be based on human
14 nature, the law of nature, which would be
15 universal, and the same rules that would apply
16 prior to the creation of society and of the law.
17 For instance, that you must keep your promises,
18 you have the right to self-defence.

19 These universal rules are also the
20 basis of the Law of Nations in dealings between
21 Nations.

22 Now, the other part of you question
23 would be, why am I using this literature to
24 understand what was going on in new France in
25 the relations between the colonial power and

1 Indigenous peoples? And for me, as I explained
2 earlier, it is because the initial assumption
3 that these were only people to be conquered and
4 subjected that had no kind of legal status was
5 wrong. They were initially independent and,
6 yes, you could wage war on them and try to
7 subject them, and there was a certain amount of
8 discretion, but you can also decide to have
9 peaceful relations with them. And if you did
10 that and entered into an alliance treaty then
11 certain consequences flowed from that.

12 So I think having found this in Law of
13 Nations, ever since I did that in 1997, when I
14 look at the historical documents I try to see if
15 there is coherence, or at times there may be
16 differences, divergences between what you see in
17 the archival documents or the official State
18 documents of France and some rules of the Law of
19 Nations, or there may be controversies. But I
20 still think that we need to relate the two.

21 Q. Thank you, Professor Morin.

22 I will pull up your report again and
23 go to page 14. Here in the paragraph beginning,
24 "In some", we have the third sentence of that
25 paragraph reads:

1 "A majority of authors considered
2 that nomadic peoples possessed the
3 territories over which they hunted and
4 fished, although some denied this."

5 Why do you think that this is the
6 case?

7 A. Well, sorry, but I think that
8 I've always recognized and acknowledged that
9 there is no consensus about this among the
10 authors.

11 Now, this is essentially an unspoken
12 reference to chapter 2 of my 1997 book. So I
13 could have provided more details here.

14 But essentially I see that for Vitoria
15 -- starting from Vitoria Indigenous peoples had
16 dominion. He has hesitation about whether they
17 can be temporarily restrained to be educated and
18 to abandon their way of life and to become good
19 Christians. That is the final part of his work.

20 But from then on the idea that there
21 was a possibility of enslaving Indigenous
22 peoples would continue to be debated among the
23 Spanish scholacists, but it was always an issue
24 about whether they could be enslaved.

25 And if you rejected the assumption

11:03:13 1 that some held, then even if they were to be
11:03:16 2 forced to step into some places for Vitoria and
11:03:18 3 for the others, it should never be to deprive
11:03:22 4 them of their dominion of their rights over
11:03:24 5 their territory.

11:03:26 6 And Grotius repeated this argument
11:03:30 7 with a specific reference to hunting territories
11:03:31 8 in his first book in 1609.

11:03:35 9 And in 1625 I argue in my chapter, to
11:03:35 10 the book of 1997, that he really had the same
11:03:35 11 position, although it's not as explicit in 1625,
11:03:35 12 whereas in 1609 there's a long passage where he
11:03:35 13 quotes the Spanish author saying hunting --
11:03:35 14 Indigenous people had the right over their
11:03:35 15 territory.

11:03:35 16 And then Pufendorf took the same
11:03:39 17 position. And in the 18th century we have the
11:03:44 18 debate between Wolff, who supports the rights
11:03:48 19 of Indigenous people and their territories, and
11:03:52 20 Vattel who -- having read many summaries and in
11:03:54 21 some cases the relevant excerpts of authors, and
11:03:57 22 the most important authors on the Law of
11:03:59 23 Nations, I came to the conclusion that it was a
11:04:02 24 majority of authors.

11:04:32 25 Q. Thank you, Professor Morin. I

11:04:34 1 will turn next to page 15 of your report. And

11:04:41 2 here we have the paragraph beginning with

11:04:42 3 "Using". The first sentence reads:

11:04:45 4 "Using the documents analyzed by
11:04:47 5 Professor Beaulieu, I will show that
11:04:49 6 because representatives of the King
11:04:51 7 were generally instructed to respect
11:04:53 8 treaties or alliances to which
11:04:55 9 Aboriginal peoples and the French were
11:04:57 10 parties, they needed to concern
11:05:00 11 themselves with Aboriginal
11:05:02 12 sovereignty."

11:05:05 13 So can you explain how you draw the
11:05:06 14 link between treaties and alliance and concern
11:05:09 15 with Aboriginal sovereignty?

11:05:13 16 A. Well, I think that I've been
11:05:19 17 mentioning this already. If Indigenous peoples
11:05:23 18 were Nations it means Treaties were entered into
11:05:26 19 with them because they have the right of
11:05:26 20 self-government and achieved external
11:05:32 21 sovereignty, meaning they made their decisions
11:05:36 22 independently of any other power or Nation, and
11:05:39 23 they had control over their territory, with the
11:05:43 24 qualification I already mentioned that for
11:05:46 25 hunting grounds, this was very debated, but

11:05:49 1 general assumption that Nations, including
11:05:53 2 Indigenous Nations, have control over their
11:05:55 3 territory as part of their external sovereignty,
11:05:58 4 seems to be well established.

11:06:04 5 Q. Thank you.

11:06:04 6 I'd like to go back up to the table of
11:06:06 7 contents of your report. The first portion of
11:06:17 8 your report is entitled "Aboriginal Independence
11:06:18 9 in French Diplomatic or Imperial Documents",
11:06:19 10 and, your discussion of the Law of Nations is
11:06:25 11 part of this section, which we've just covered.

11:06:29 12 I'm going to be focusing my questions
11:06:30 13 today mainly on part 2 of your report, but
11:06:33 14 before we move on to part 2 could you give us a
11:06:36 15 very high-level summary of the important
11:06:38 16 take-aways from the rest of part 1, starting
11:06:41 17 with "B", "Official Grants by the Crown of
11:06:45 18 France"?

11:06:50 19 A. Here again looking at these
11:06:51 20 documents and reviewing them, and focusing on
11:06:55 21 the specific wording, it's very clear that the
11:07:02 22 French authorities in France have the power to
11:07:04 23 enter into treaties of alliances.

11:07:06 24 And over time, although in the
11:07:09 25 16th century various documents that have a very

11:07:14 1 short life span may take various positions on
11:07:16 2 this, but from 1603 I see a continuity in the
11:07:20 3 French position, where once a treaty is made and
11:07:26 4 an alliance has been entered into the French
11:07:29 5 must respect that and should cannot attack
11:07:33 6 Indigenous people, unless they are attacked or
11:07:37 7 they are unable to carry on their trading
11:07:39 8 activities and settle in the territory
11:07:40 9 peacefully.

11:07:41 10 And for me this is specifically
11:07:44 11 obvious in the company of the West India edict
11:07:50 12 which mentioned a special article that's quoted
11:07:53 13 in the report, treaties that are entered into
11:07:57 14 with Princes of these countries, which can only
11:08:02 15 be Princes of the Americas, because with
11:08:03 16 Charters territory goes out from Brazil in the
11:08:08 17 West Indies, et cetera, unless the French are
11:08:14 18 attacked they should respect these treaties.

11:08:18 19 And there's also a very interesting
11:08:21 20 part of this edict where they say the French
11:08:25 21 case can expand onward and develop the territory
11:08:36 22 but they must respect the rights of their
11:08:37 23 allies, and this is the crucial point here.

11:08:41 24 I argue that when you look at the two
11:08:43 25 together Indigenous peoples are Nations with

11:08:45 1 which you can have treaties, including
11:08:49 2 alliances. And you have in the preamble the
11:08:53 3 grants of the territory with no westward limits,
11:08:57 4 in which you read that the French can rule
11:09:02 5 inside the territories but they must respect the
11:09:06 6 rights of the allies of France. Well, I think
11:09:11 7 this includes Indigenous peoples.

11:09:13 8 And there are other examples of that
11:09:15 9 in the previous documents that I analyzed in my
11:09:18 10 reports.

11:09:22 11 Q. Now, the section of your report,
11:09:23 12 the first section, also touches on discovery,
11:09:27 13 symbolic acts of possession and official
11:09:31 14 territorial limits. Can you also give us the
11:09:35 15 important take-aways on this topic please?

11:09:38 16 A. Well, I just mentioned that for
11:09:42 17 almost all these documents that granted the
11:09:47 18 powers to create settlements and to expand in a
11:09:54 19 westward direction, in most cases there was no
11:10:00 20 westward limits, this is one thing I say by the
11:10:04 21 Indigenous nature of these territories or the
11:10:09 22 European claims, they're very ill-defined.

11:10:12 23 And for discoveries and simply
11:10:15 24 possession all the European countries use these
11:10:20 25 documents, including the French, so they were

1 always willing to say, We were the first to go
2 there. But they would never acknowledge that
3 because another country had been in some area
4 where, for instance, the French wanted to go a
5 hundred years ago, they would never acknowledge
6 that the discovery was valid.

7 Or because in the case of Hudson's
8 Bay, for instance, the British were first to go
9 on the shore, they would say, Well, we were
10 almost near the shore before the British so that
11 was enough to give us the right to the whole
12 Hudson's Bay.

13 So every country was using this
14 argument about symbolic acts of possession and
15 discovery, being the first there, or being the
16 first to put up the standard or write a document
17 that actually laid -- they actually walked on
18 the ground.

19 But there was very little value
20 afforded to these documents by themselves other
21 than settlements begin, or some forts were
22 established in an area. But then how far could
23 you go from a specific settlement of the
24 colonial power to define a territory? There was
25 absolutely no consensus on this.

1 Q. Thank you, Professor Morin.

2 I'd like to bring up your report again
3 and we'll go to page 49, which is where part 2
4 begins. Now, in this section you reference the
5 "King's domain", could you tell us briefly what
6 is the King's domain?

7 A. Well, it was an area that was
8 reserved for the lessees of the King to carry on
9 trading activities, essentially to gather furs,
10 and this was to produce income for the King.

11 And for this system to be effective,
12 for the lessees to make money out of this in the
13 various posts that existed, you needed for them
14 to have a monopoly. So it was strictly
15 forbidden to any other person, whether a French
16 subject or other Nations, indigenous Nations
17 living in New France, it was strictly forbidden
18 for them to go and carry on trade in the King's
19 domain.

20 So roughly I think it's mentioned
21 here, it starts on the St. Lawrence, maybe
22 roughly 100 kilometers from Quebec until
23 Sept-Iles, and there's a wide territory going
24 towards James Bay that is the King's domain
25 where only the lessees of the King are allowed

1 to carry on trade and no one else can go there
2 for trade purposes.

3 So for me I explained in my report
4 that 1733 there is an ordinance that clarified
5 the limits of the King's domain, but also
6 mentioned that on the southwest direction there
7 are two rivers that are the hunting countries of
8 Indigenous peoples, this is obvious from the
9 context, so they are hunting countries of Three
10 Rivers.

11 And then lower down we have the
12 hunting lands in the depths of the Batiscan,
13 which was used by the Wendat and the Hurons. So
14 the King's domain on the northeast direction,
15 after the height of land, there's to the --
16 after the Normandin, Mr. Normandin, I'm sorry,
17 went to establish the limits where the height of
18 lands is between the various rivers that were
19 hunting countries for other Indigenous Nations.

20 And for these official documents,
21 although the main purpose is to establish the
22 limits to the King's domain and reaffirm that
23 nobody else can go there except the lessees and
24 the original inhabitants, the Indigenous peoples
25 there, it also mentioned incidentally other

11:15:03 1 hunting countries or lands.

11:15:11 2 Q. Thank you.

11:15:11 3 Now I'll move on to page 52 of your
11:15:14 4 report. Here we have in the first paragraph, a
11:15:17 5 few sentences in, a sentence that reads:

11:15:21 6 "Presents needed to be offered by
11:15:23 7 travelers who wanted to cross a
11:15:25 8 territory, otherwise their canoes
11:15:29 9 would be pillaged."

11:15:31 10 Can you explain what made you conclude
11:15:34 11 that this requirement for presents existed?

11:15:40 12 A. This is evidenced from various
11:15:43 13 documents that mentioned this and some contrary
11:15:52 14 examples, according to some scholars, are, in my
11:15:56 15 view, totally unconvincing.

11:15:59 16 So this is what we see here. We see
11:15:59 17 rather the opposite evidence first and then
11:16:02 18 further down we have more explicit evidence,
11:16:07 19 where there's a recognition of the fact that to
11:16:09 20 cross a territory for trading purposes, a
11:16:11 21 territory that belonged to a Nation, presents
11:16:13 22 had to be offered. This is mentioned very often
11:16:18 23 in the source as a rule between Indigenous
11:16:22 24 people and Nations.

11:16:28 25 So maybe I can provide more details on

11:16:30 1 the -- unfortunately I footnoted only my prior
11:16:36 2 publications in French.

11:16:42 3 So Perrot is the one that gives the
11:16:46 4 impression that there was a great achievement, a
11:16:47 5 right to travel without -- for the French, I'm
11:16:51 6 sorry, without making presents when they were
11:16:54 7 crossing a territory.

11:16:55 8 And many of these incidents concerned
11:16:59 9 the Algonquins living on an island called the
11:17:03 10 Allumette Island, I'll call them the Algonquins.

11:17:06 11 So according to Perrot in 1750 or '51
11:17:13 12 there was a Father Jesuit Jerome l'Allemand, he
11:17:15 13 was travelling back with some Huron-Wendat, they
11:17:20 14 were fleeing the Haudenosaunee and they needed
11:17:23 15 to pass around the island. And passing around
11:17:28 16 the island meant making presents to the chief of
11:17:34 17 this Allumette Island, the Algonquin.

11:17:41 18 MR. McCULLOCH: Your Honour, I have an
11:17:42 19 objection.

11:17:44 20 THE COURT: Just pausing before I hear
11:17:45 21 from -- was that Mr. McCulloch?

11:17:48 22 MR. McCULLOCH: Yes, Your Honour.

11:18:04 23 THE COURT: Just before I hear from
11:18:05 24 Ms. McCulloch about his objection, Ms. Roberts
11:18:08 25 is suggesting something which I think is a good

11:18:11 1 idea. Professor Morin, in your present location
11:18:12 2 do you have a regular telephone?

11:18:18 3 THE WITNESS: Yes.

11:18:19 4 THE COURT: And is it proximate to
11:18:20 5 your computer? Nearby?

11:18:27 6 THE WITNESS: Not really.

11:18:31 7 THE COURT: Is it able to be?

11:18:36 8 THE WITNESS: My problem is that in
11:18:36 9 the office the Internet connection is usually
11:18:39 10 very bad and I'm not sure why we are having a
11:18:42 11 problem this morning when last Thursday we did
11:18:44 12 not having a problem.

11:18:49 13 THE COURT: You don't have a cordless
11:18:51 14 phone?

11:18:51 15 THE WITNESS: I have only my iPhone
11:18:53 16 but I'm not sure it's going to -- but, no, I
11:18:55 17 don't have a cordless phone.

11:18:57 18 THE COURT: The iPhone would
11:19:00 19 probably be terrific.

11:19:01 20 Ms. Roberts is suggesting, and this is
11:19:03 21 I think a good suggestion, that these hearings
11:19:07 22 can be conducted with you on your computer but
11:19:12 23 you're talking in to your telephone so that we
11:19:14 24 have a higher quality of audio.

11:19:17 25 And Ms. Roberts could you explain to

1 Professor Morin what would be involved in him
2 making that switch?

3 MS. ROBERTS: Yes. Thank you, Your
4 Honour.

5 Professor Morin in the invitation that
6 was provided to you by your counsel there are
7 several calling numbers from Ontario or Quebec.

8 If you could call in, and I can assist
9 you with that, using your telephone and mute the
10 audio on your computer so that we would not be
11 picking up feedback from your computer and audio
12 would only be coming from your phone.

13 THE COURT: Ms. Roberts, would it be
14 practical for you to do that in a breakout room
15 with Professor Morin while I hear from counsel
16 about the objection?

17 MS. ROBERTS: Yes, that would be best.

18 THE COURT: And, Ms. Pelletier, are
19 you content with that?

20 MR. PELLETIER: Yes, Your Honour.

21 THE COURT: All right. So I'm going
22 to ask Ms. Roberts just to go off-line for a
23 moment with Professor Morin and assist him in
24 switching over his audio to his iPhone, and
25 they will return to us as soon as they have

1 finished that process.

2 And in the meantime I will call on
3 counsel with respect to the objection.

4 So please go ahead, Ms. Roberts, and I
5 will ask Mr. McCulloch now to give me his
6 submission on his objection. Please go ahead.

7 MR. McCULLOCH: Your Honour, our
8 objection is based on the fact that it is an
9 extension in his answer to Ms. Pelletier's
10 question Professor Morin is going well beyond
11 the four corners of his report. And,
12 furthermore, by going into ethnographic material
13 about Indigenous cultures he is going beyond the
14 terms of his tender.

15 THE COURT: Ms. Pelletier, what is
16 your response to that?

17 MR. PELLETIER: It would probably be
18 helpful, Your Honour, to pull up Professor
19 Morin's report at page 52.

20 THE COURT: Yes, I have that.

21 MR. PELLETIER: And it's the second
22 green box, Your Honour. All that Professor
23 Morin has launched into is an explanation of his
24 comment:

25 "Nicolas Perrot, in the 1710s,

1 and father Albanel, in 1672, tried to
2 convince their readers that the French
3 had been granted to right to travel
4 through North America, but there is no
5 evidence that Aboriginal Peoples
6 agreed to this."

7 So I disagree that this is going
8 beyond his report. He's merely explaining this
9 sentence.

10 THE COURT: I think he said something
11 to the effect that he hadn't gone into it, and
12 these are my words, much depth and he was about
13 to elaborate.

14 Ms. McCulloch, is that the aspect of
15 the answer that you're concerned about?

16 MR. McCULLOCH: Yes, Your Honour. And
17 elaborate on the basis of sources not cited.

18 THE COURT: What source was he
19 referring to that wasn't cited? I thought he
20 was referring to his own publication?

21 MR. McCULLOCH: I was under the
22 impression that he said he was going to be
23 talking about things in English, but I may have
24 misheard. The reception wasn't very good at
25 that point.

11:22:39 1 THE COURT: Anything further you wish
11:22:40 2 to add, Mr. McCulloch?

11:22:42 3 MR. McCULLOCH: No, Your Honour.

11:22:46 4 THE COURT: Ms. Pelletier, I think
11:22:48 5 what I'm going to do is ask for you, rather than
11:22:52 6 just saying, "Please continue", when the
11:22:57 7 Professor is rejoining our hearing, to ask
11:23:02 8 another or the same question. I don't think the
11:23:08 9 question was objectionable, it was where the
11:23:11 10 witness went when he began part way through his
11:23:14 11 answer to delve into other areas. I ask that
11:23:19 12 you bear Mr. McCulloch's objection in mind.

11:23:22 13 And if, Mr. McCulloch, there continues
11:23:27 14 to be a problem that you think creates an
11:23:31 15 unfairness, recognizing that no one is going to
11:23:37 16 stick precisely to everything in their report,
11:23:40 17 and often witnesses do talk about their
11:23:43 18 supporting references, but if after considering
11:23:52 19 those factors you still feel there is a problem
11:23:54 20 I invite you to make another objection. All
11:23:57 21 right?

11:23:58 22 MR. McCULLOCH: Thank you, Your
11:23:59 23 Honour.

11:24:02 24 THE COURT: Now, I have asked my
11:24:03 25 moderator to step off our hearing in order to

11:24:06 1 help. I was able to hear -- I should say I was
11:24:10 2 able to hear Professor Morin, and indeed it was
11:24:13 3 improved somewhat after he followed the
11:24:16 4 moderator's suggestions, but I do think that
11:24:20 5 using the telephone audio is probably going to,
11:24:23 6 in turn, be much clearer.

11:24:26 7 MS. ROBERTS: Your Honour, it's Liz
11:24:27 8 Roberts here. I've returned and I believe that
11:24:30 9 Professor Morin has joined by phone.

11:24:33 10 THE COURT: Okay. I don't see him yet
11:24:35 11 on the screen but perhaps -- he's not on my
11:24:42 12 screen, in any event. Could someone please
11:24:46 13 temporarily close the expert report?

11:24:53 14 MS. ROBERTS: Professor Morin, can you
11:24:54 15 hear me?

11:24:56 16 THE WITNESS: Yes.

11:24:57 17 THE COURT: I can see him, we've lost
11:24:58 18 the video.

11:25:01 19 MS. ROBERTS: And Professor Morin,
11:25:03 20 could you please rejoin the meeting using your
11:25:06 21 computer video?

11:25:07 22 THE WITNESS: Yes.

11:25:47 23 THE COURT: I'm seeing Professor Morin
11:25:48 24 on his telephone. Welcome back.

11:25:51 25 THE WITNESS: Thank you. Ms. Roberts,

11:25:51 1 if I use the loudspeaker will it be as good or
11:25:54 2 should I keep the phone like this.

11:26:05 3 MS. ROBERTS: You can try.

11:26:06 4 THE COURT: We're getting an echo. I
11:26:09 5 that Professor Morin has to leave his speaker
11:26:12 6 off.

11:26:18 7 THE WITNESS: Yes.

11:26:24 8 MS. ROBERTS: So the computer speaker
11:26:26 9 will need to remain off but the phone will
11:26:28 10 remain on.

11:26:29 11 THE WITNESS: Yes.

11:26:30 12 THE COURT: Professor Morin, can you
11:26:32 13 hear me clearly?

11:26:33 14 THE WITNESS: Yes.

11:26:35 15 THE COURT: Can you say, hello from
11:26:36 16 the City of Montreal in the province of Quebec
11:26:39 17 so I can see how well I hear you?

11:26:41 18 THE WITNESS: Hello from the City of
11:26:43 19 Montreal in the Province of Quebec.

11:26:46 20 THE COURT: Fabulous. That is a
11:26:47 21 significant improvement. And I realize that it
11:26:51 22 does mean that you have to hold your phone.

11:26:56 23 THE WITNESS: That's okay.

11:26:58 24 THE COURT: But I know we are planning
11:26:59 25 our regular breaks. I think, Ms. Pelletier, if

1 you don't mind we'll do a little bit more before
2 the break. But, Professor Morin, if you do get
3 tired of holding your phone you need only say so
4 and we'll take another break, all right?

5 THE WITNESS: Okay.

6 THE COURT: That is much better from
7 an audio standpoint. I'm going to ask that
8 Ms. Pelletier pick it up now with another
9 question.

10 If you could please go ahead,
11 Ms. Pelletier?

12 MR. PELLETIER: Thank you, Your
13 Honour.

14 BY MR. PELLETIER:

15 Q. So I'd like to pull up Professor
16 Morin's report again and we'll go to page 52.

17 Professor Morin, I'd like to take you
18 to the middle of the first paragraph, the
19 sentence beginning with, "Nicolas Perrot". So
20 I'll read that out.

21 A. Yes.

22 Q. "Nicolas Perrot, in the 1710s,
23 and Father Albanel, in 1672, tried to
24 convince their readers that the French
25 had been granted the right to travel

11:27:56 1 throughout North America, but there is
11:27:56 2 no evidence that Aboriginal Peoples
11:27:56 3 agreed to this. Certainly Albanel
11:27:56 4 expected to be asked to provide
11:27:56 5 presents. He had to fall back on the
11:27:56 6 special position of missionaries, who,
11:27:56 7 officially, were neither traders nor
11:27:56 8 military officers threatening the
11:27:56 9 interests of their hosts."

11:28:23 10 I'd like to begin with Father Albanel.

11:28:26 11 What do you mean that he had to "fall back on
11:28:27 12 the special position of missionaries"?

11:28:29 13 A. Well, when he made his way
11:28:33 14 towards James Bay in 1672 and he encounters an
11:28:44 15 important chief with something like 14 canoes, I
11:28:46 16 think a delegation that comes to meet him, and
11:28:48 17 he is clearly, as he explains in his narrative,
11:28:53 18 aware of the fact that presents will be
11:28:55 19 expected.

11:28:56 20 And in fact he offers two presents,
11:28:59 21 when you read the sources. The first present
11:29:06 22 is -- and I'm sorry that my memory fails me a
11:29:11 23 little bit here. Okay. I have -- I will need
11:29:16 24 to go -- is it okay if I go to the document
11:29:20 25 where I have the narrative in here?

11:29:24 1 Q. We will pull up -- why don't we
11:29:26 2 pull up the document for you, Professor Morin,
11:29:29 3 that is Exhibit 4922. You can confirm for us if
11:29:38 4 this is the document that you're referring to?
11:29:54 5 Is this the document, Professor Morin?

11:29:56 6 A. Absolutely. And we would have to
11:29:59 7 go to page 173. So we see the 18 canoes that
11:30:18 8 appear here to meet him because they want to
11:30:20 9 travel further across the territory to go to
11:30:28 10 James Bay.

11:30:28 11 And Father Albanel, who is speaking to
11:30:32 12 this important chief offers, two rich gifts, as
11:30:36 13 he says. We see here in the second square at
11:30:40 14 the end of the first paragraph.

11:30:44 15 "[...] I might present to them
11:30:45 16 two rich gifts accompanied by the
11:30:48 17 following address: Sesibahoura, it is
11:30:55 18 not to purchase the passage of the
11:30:56 19 river and of the Lake that I am
11:30:58 20 pleased to regale thee with two
11:30:58 21 presents."

11:30:58 22 So he offers presents but he says, not
11:31:00 23 to pay for the passage, as we usually do. And
11:31:03 24 he says:

11:31:03 25 "The Frenchman, having delivered

11:31:06 1 his whole country from the incursions
11:31:07 2 of the Iroquois, your foes, well
11:31:10 3 deserves to be accorded the right to
11:31:13 4 go and come with entire freedom
11:31:15 5 through the region, which he has
11:31:17 6 subdued with his arms."

11:31:18 7 But the important word is "well
11:31:21 8 deserves", it's not something that is taken for
11:31:24 9 granted yet something he hopes to convince this
11:31:26 10 interlocutor that will happen.

11:31:29 11 And if we go to the next part of this
11:31:32 12 document? Yes. Then he has a second argument.
11:31:47 13 He says:

11:31:49 14 "[...] God whom you yourselves
11:31:49 15 acknowledge to be the master of the
11:31:52 16 universe [...] sends me to make him
11:31:54 17 known throughout all these regions."

11:31:56 18 And he says, God gives me the passage
11:32:03 19 of free passage. And he adds, no other
11:32:07 20 Indigenous peoples, including the Haudenosaunee,
11:32:09 21 ask us for presents. We are only travelling as
11:32:15 22 priests to Christianize.

11:32:20 23 So the real reason, even in his mind,
11:32:22 24 is that he is a missionary, he's not there for
11:32:25 25 trading purposes. And he says, you should give

1 us this grant because our King has pacified the
2 area and made peace with the Iroquois but, in
3 any case, I am a missionary and not here to
4 trade so there is no reason why I should offer
5 you presents. And, furthermore, he does offer
6 presents.

7 And then the answer of Sesibahoorra
8 will be, Well, we are very happy that you come
9 to baptize us and we are very happy to enter
10 into an alliance with the French.

11 So for me nothing is established there
12 except that these new allies want to be
13 baptized.

14 Q. Thank you, Professor Morin.

15 Now going back to Nicolas Perrot why
16 do you say that he tried to convince readers
17 that the French had been granted the right to
18 travel through North America?

19 A. So he narrates -- and he is
20 writing --

21 MR. McCULLOCH: Objection, Your
22 Honour. I'm sorry, I was muted.

23 THE COURT: All right. Please pause,
24 Professor Morin, but stay on the line.

25 Mr. McCulloch, what is your objection.

11:33:44 1 MR. McCULLOCH: My objection is that
11:33:44 2 in interpreting the chief's response Professor
11:33:48 3 Morin is expressing a view on the Aboriginal
11:33:52 4 perspective, which is outside the very
11:33:56 5 specifically European tender expertise tender
11:34:02 6 which has been accepted. We feel that it is not
11:34:05 7 within his tender to interpret the Aboriginal
11:34:10 8 perspective.

11:34:11 9 THE COURT: Ms. Pelletier?

11:34:13 10 MR. PELLETIER: I believe that
11:34:15 11 Professor Morin was about to give his
11:34:17 12 interpretation of a historical document, and
11:34:19 13 this is no different than what other historians
11:34:22 14 or legal historians have done.

11:34:25 15 Perhaps it would be helpful to bring
11:34:26 16 up that exhibit and have Professor Morin take us
11:34:29 17 through it and give his opinion, but I don't
11:34:32 18 believe that his evidence is about to fall into
11:34:35 19 the realm of ethnohistory by any stretch.

11:34:39 20 THE COURT: Well, let's do this one
11:34:41 21 step at a time. Certainly the plaintiffs have
11:34:43 22 objected more than once over the course of this
11:34:48 23 trial to defence experts giving the kind of
11:34:51 24 evidence that Mr. McCulloch has also just
11:34:57 25 objected to.

1 If that was not what you were trying
2 to accomplish, Ms. Pelletier, then I will ask
3 that you move on to some more focused questions
4 and we'll see if the issue comes up again.

5 So, Professor Morin, if you could
6 please wait until you get the next question?

7 MR. PELLETIER: Thank you, Your
8 Honour.

9 BY MR. PELLETIER:

10 Q. I'd like to bring up the exhibit
11 that Professor Morin was just beginning to talk
12 about, which is Exhibit 259.

13 So, again, Professor Morin, this is
14 going back to the line in your report where you
15 said that Nicolas Perrot was trying to convince
16 readers that the French had been granted the
17 right to travel through North America.

18 I'm wondering in looking at this
19 exhibit, first can you confirm that "began to
20 tell an account", is this the document which
21 contains that account?

22 A. Absolutely.

23 Q. Now, could you explain to us,
24 Professor Morin, what is in this document and
25 how it relates to your statement that Nicolas

1 Perrot tried to convince readers that the French
2 had been granted the right to travel through
3 North America?

4 A. So he specifically narrates --
5 would you want me to go to the relevant passages
6 or just to summarize?

7 Q. You can take us to the relevant
8 passages, Professor Morin, thank you.

9 A. Okay. So that would be page 177.
10 So this is the Chief of the Algonquin village on
11 the Allumettes Island here, he was -- he
12 gathered a toll from the travelers who went down
13 to the French colonies.

14 And later on we see that Father
15 l'Allemand, who was travelling with the
16 Huron-Wendat, and that may be further up in the
17 document here but -- so we have to go a bit
18 upwards

19 Father L'Allemand here was traveling
20 with Huron-Wendat and he tried to avoid paying
21 or offering presents. And the Chief would not
22 accept that, according to Perrot.

23 So, here, I won't read all the
24 relevant excerpts, I think I'm better at
25 summarizing it but this is where you found this

11:38:29 1 information.

11:38:30 2 So we see that they were really keen,
11:38:39 3 or this Chief was really keen on teaching a
11:38:41 4 lesson to the French. So he actually hung up
11:38:46 5 Father l'Allemand up in the air and insulted him
11:38:51 6 and tried to teach him a lesson again that
11:38:55 7 presents were to be demanded. And finally the
11:38:58 8 Huron were able to negotiate --

11:39:01 9 MR. McCULLOCH: Your Honour,
11:39:01 10 objection.

11:39:02 11 THE COURT: All right.

11:39:04 12 MR. McCULLOCH: Once, again, this is
11:39:05 13 being presented as the motivations and
11:39:07 14 intentions of the Indigenous peoples, which is
11:39:11 15 outside of Professor Morin's tender.

11:39:15 16 THE COURT: Well, I understand your
11:39:17 17 concern, Mr. McCulloch, but I will say now on
11:39:21 18 the record that I am proceeding on the basis
11:39:27 19 that it's this gentleman's interpretation of
11:39:30 20 this document, and it is accepted that he is not
11:39:34 21 in the position to opine on the Indigenous
11:39:39 22 perspective.

11:39:42 23 I do not wish to stop you from making
11:39:45 24 further objections, but for this document I am
11:39:50 25 going to permit the witness to answer the

11:39:53 1 question.

11:39:55 2 MR. McCULLOCH: Thank you, Your
11:39:55 3 Honour.

11:39:56 4 THE COURT: Professor Morin, if you
11:39:58 5 could bear your expertise in mind, as I'm sure
11:40:08 6 you're trying to do, did you have anything
11:40:10 7 further to answer the counsel's question or
11:40:12 8 would you prefer she ask you a question to see
11:40:15 9 where she's going?

11:40:16 10 THE WITNESS: Well, if I may explain
11:40:18 11 my thinking? To understand the French position
11:40:21 12 you have to understand what the French thought
11:40:23 13 were the events occurring.

11:40:25 14 So if a certain Chief acted in a
11:40:27 15 certain way and the French say it was because he
11:40:32 16 was demanding payments, maybe it was not the
11:40:34 17 case, maybe that's not the Indigenous
11:40:35 18 perspective. But it would be very hard for me
11:40:40 19 as an expert to establish the French position
11:40:44 20 without at least relying on the facts that were
11:40:47 21 taken for granted or accepted by the French.
11:40:50 22 Without me saying that they actually are what
11:40:52 23 the Indigenous peoples would agree with or
11:40:55 24 think.

11:40:56 25 THE COURT: From the French

1 perspective?

2 THE WITNESS: Yes.

3 THE COURT: All right. Thank you for
4 that clarification, Professor Morin, that you
5 are giving what you regard as the French
6 perspective on what the Indigenous people were
7 endeavouring to do or say.

8 Ms. Pelletier, please continue.

9 MR. PELLETIER: Thank you, Your
10 Honour.

11 BY MR. PELLETIER:

12 Q. Professor Morin, was there
13 anything else in this document that you wanted
14 to highlight in answer to the question of the
15 comment in your report that Nicolas Perrot was
16 trying to convince readers that the French had
17 been granted the right to travel through North
18 America?

19 A. Yes. Okay. Well, I think
20 following line-by-line is a little hard for me
21 because I don't know the document by heart. So
22 I'll give the gist of it and then if there's a
23 problem with what the document actually say then
24 we can deal with it later.

25 But essentially Father l'Allemand was

1 assaulted in a way, he was suspended from a tree
2 by the armpits and then finally he was allowed
3 to go free. And according to Perrot the
4 following year the Chief of the Algonquin island
5 was jailed by the French for behaving in such an
6 outrageous manner. So that is the perspective
7 of Perrot.

8 But I will go in the next page to see
9 his conclusion. Just below actually -- so this
10 is the episode. But if we go further down --
11 just after the square, rectangle, we see:

12 "See what the French accomplished
13 in the first establishment of the
14 colony, although it was of very little
15 importance to the world."

16 And so he's saying these were the good
17 old days, in a way.

18 And then if we go six lines from the
19 bottom of the document:

20 "On the other hand in this
21 present time of ours [...]"

22 Because he's writing around 1716.

23 "On the other hand in this
24 present time of ours they desire to
25 dominate us and be our superiors; they

11:43:21 1 even regard us as people who are in
11:43:24 2 some manner dependent on them. I will
11:43:27 3 explain what has given rise to this
11:43:28 4 presumption."

11:43:30 5 So he says, well, in 1651 we were able
11:43:35 6 to punish or chastise a very arrogant Algonquin
11:43:40 7 Chief who pretended to delay us and ask presents
11:43:44 8 from us when we were travelling on the rivers
11:43:46 9 with Father l'Allemand. So that's Perrot's
11:43:50 10 version that is written much, much later.

11:43:55 11 Now, there is another version of what
11:43:56 12 appears to be the very same incident that is
11:43:59 13 more contemporaneous and more reliable in the
11:44:02 14 Jesuit's relations, and it's very different.

11:44:13 15 Q. Why don't we bring up that
11:44:15 16 document then, Professor Morin. I believe
11:44:16 17 that's found at Exhibit 4924. Can you confirm
11:44:22 18 for us that this is the document that has the
11:44:25 19 same is the account?

11:44:27 20 A. Yes. Absolutely.

11:44:34 21 So I will say the relevant page or
11:44:38 22 pages 267, 269, and the incident is similar.
11:44:48 23 It's 1638, so it's earlier. L'Allemand is
11:44:53 24 travelling with the Huron-Wendat but he's going
11:44:54 25 downriver instead of upriver, and there's an

11:44:56 1 incident on the island we were just mentioning.

11:45:00 2 But here the Chief assaults l'Allemand again,
11:45:11 3 but because a few days before another Frenchman
11:45:12 4 has caused the death of an Algonquin of the
11:45:12 5 island and the Chief is blaming the whole French
11:45:17 6 people for this.

11:45:23 7 So l'Allemand is assaulted, is bound
11:45:25 8 and ill treated by the Indian. The Huron-Wendat
11:45:31 9 are able to calm down the Algonquin Chief. They
11:45:35 10 offer presents and they actually are able to
11:45:36 11 continue down to Montreal.

11:45:39 12 So in this incident the issue is not
11:45:41 13 at all about whether the French should offer
11:45:45 14 gifts when they're travelling, it's because a
11:45:48 15 few days before an Algonquin has died because a
11:45:53 16 Frenchman had tried to cure him by bleeding him
11:45:57 17 so caused his death.

11:45:59 18 And eventually the Wendats are able to
11:46:01 19 negotiate a settlement, offer gifts and they go
11:46:09 20 to Montreal.

11:46:10 21 And we have what happens the following
11:46:12 22 year, like in the Perrot incident, that would be
11:46:13 23 -- because the following year a different Jesuit
11:46:19 24 relation.

11:46:26 25 And should we bring it up in exhibit?

11:46:34 1 THE COURT: I'm going to ask you to
11:46:35 2 wait for Ms. Pelletier.

11:46:38 3 And, Ms. Pelletier, around now and it
11:46:40 4 doesn't have to be right now, I would like to
11:46:42 5 take the morning break. So you should tell me
11:46:44 6 what you request vis-a-vis the continuity of
11:46:50 7 your examination?

11:46:53 8 MR. PELLETIER: My apologies, Your
11:46:54 9 Honour, I completely lost track of time.

11:46:57 10 THE COURT: It's not a problem.

11:46:58 11 MR. PELLETIER: This would be a fine
11:46:59 12 time to break if that works for you, Your
11:47:02 13 Honour.

11:47:02 14 THE COURT: Now, for all concerned
11:47:04 15 we're going to take a 20 minute break but that
11:47:06 16 does not mean you are going to log off. You are
11:47:09 17 welcome to if you want to leave the hearing,
11:47:11 18 that's your decision.

11:47:16 19 Professor Morin, I suspect that
11:47:18 20 Ms. Roberts might want to talk to you off line a
11:47:21 21 bit. So you might want to stay on line for a
11:47:24 22 minute and work that out with her. We will
11:47:26 23 resume in 20 minutes.

11:47:30 24 MS. ROBERTS: Thank you, Your Honour.
11:47:30 25 I am going to open up the break rooms. The

11:47:33 1 members of the public have a public room they
11:47:36 2 will be invited to.

11:47:42 3 Professor Morin, you will be invited
11:47:44 4 to a break room as well and I will join you
11:47:48 5 there, along with the court reporter.

11:47:50 6 THE WITNESS: Thank you.

11:47:50 7 -- RECESSED AT 11:47 A.M. --

11:52:43 8 -- RESUMED AT 12:10 P.M. --

12:10:50 9 THE COURT: Welcome back. I see all
12:10:52 10 concerned. Ms. Pelletier, please go ahead.

12:11:01 11 MR. PELLETTIER: Thank you, Your
12:11:01 12 Honour.

12:11:03 13 BY MR. PELLETTIER:

12:11:04 14 Q. Professor Morin, before the break
12:11:05 15 you were discussing the account of Father
12:11:08 16 l'Allemand and you ended by saying that
12:11:15 17 eventually the Wendat were able to negotiate a
12:11:18 18 settlement and offer gifts and they go to
12:11:23 19 Montreal. And then you were about to talk about
12:11:25 20 what happened in the following year.

12:11:27 21 And I noted that this is in a
12:11:29 22 different book of the Jesuit relations so I'm
12:11:31 23 going to pull that up for you, that is Exhibit
12:11:34 24 4923. And I'll ask you just to continue with
12:11:45 25 your interpretation of this document?

1 A. So we need to go to page 211. So

2 I won't go, again, in to a detailed narrative,
3 line-by-line. What this paragraph is saying is
4 that the following year again the Captain or
5 Chief from the Algonquin on the Allumette Island
6 went to Montreal and the French wanted to
7 chastise him in some way.

8 But there was also an important
9 Algonquin in Montreal at the same time who had
10 recently been injured by a third Algonquin, who
11 had forgiven this third Algonquin as a good
12 Christian. And he said to the French who were
13 intent on chastising the person who assaulted
14 Father l'Allemand, he said, You should all
15 forgive. Aren't we all good Christians?
16 Shouldn't we all forgive each other? And this
17 is what happened.

18 So there was no sending this person to
19 jail, which is what Nicolas Perrot was saying in
20 his account.

21 So the two versions are very, very
22 different, and certainly the most
23 contemporaneous and the most credible one, in my
24 view, is that of the editor of the Jesuits
25 relations, not this one but -- anyway.

1 It seems to me that this information
2 is more credible because it is much more
3 contemporaneous. Perrot did not live to see
4 these events.

5 Q. Thank you, Professor Morin.

6 Now, are you aware of any other
7 instances where the French were impeded in their
8 ability to travel over land?

9 A. Yes, and this is one incident
10 that I quote in the paper of 2013, that is
11 mentioned as a general supporting reference for
12 this page 52, footnote 141. So I just wanted to
13 mention that it was implicitly referred to but
14 not explicitly.

15 So it is an episode where the French
16 had to agree, again, because of the Algonquin of
17 the islands, that there could not be travelling,
18 the "rivers were closed", was the expression
19 used during the negotiations.

20 So there was a conflict, a very tense
21 situation between the Algonquins that were
22 present in Quebec City. One of their members
23 was being detained and accused of having
24 committed murder.

25 Champlain wanted to try this person

12:14:30 1 but he knew if he actually executed the culprit
12:14:33 2 after trying him that it would provoke reprisals
12:14:36 3 or retaliation. So he was trying to get the
12:14:42 4 treatment of the Indigenous Nations but he
12:14:45 5 failed, he was not able.

12:14:47 6 And the Algonquins of the island let
12:14:50 7 it be known clearly that if the Huron-Wendat
12:14:54 8 travelled with the French people the French
12:14:56 9 people would be attacked. So the Huron-Wendat
12:14:59 10 said, Well, we cannot take the Jesuits with us
12:15:04 11 it will be dangerous for them, it will be
12:15:08 12 dangerous for us, it will degenerate into
12:15:11 13 outright war.

12:15:12 14 So all this happened in Quebec City.
12:15:14 15 The Jesuits are ready to leave with the
12:15:18 16 Huron-Wendat but the Algonquin says, We will
12:15:22 17 attack you and the French. So the Hurons said,
12:15:25 18 Well, the rivers are closed. We cannot go there
12:15:29 19 because the Algonquins said no one is allowed to
12:15:32 20 pass through with these French who are detaining
12:15:35 21 one of ours.

12:15:36 22 And eventually that's what happens,
12:15:38 23 the Jesuits say, We will not go to the
12:15:41 24 Huron-Wendat's country this year, we will wait
12:15:46 25 another year. We do not want to cause this

12:15:48 1 violence, or to run the risk of hostilities
12:15:53 2 happening.

12:15:54 3 So what is interesting in 1633, this
12:15:57 4 is after the edict of the company of the One
12:15:59 5 Hundred Associates where French -- sorry, France
12:16:04 6 has clearly laid a claim to the territories from
12:16:07 7 the Atlantic to Lake Huron and from Newfoundland
12:16:11 8 to Florida I think.

12:16:13 9 So there's an official statement that
12:16:15 10 these are French territories. They're wanting
12:16:19 11 to travel through it but Champlain and the
12:16:25 12 Jesuits who are negotiating are really
12:16:27 13 discussing this closely into -- sorry,
12:16:30 14 collaborating with each other and, you know,
12:16:34 15 discussing in advance what they will be saying
12:16:36 16 during the conferences with the allies of the
12:16:38 17 French. And Champlain never says, Well, you
12:16:43 18 should let us travel through your territories,
12:16:45 19 this is our territory.

12:16:48 20 He and the Jesuits accept that the
12:16:50 21 rivers are closed because the Algonquins of the
12:16:52 22 island have said, You cannot travel through our
12:16:55 23 territory.

12:16:57 24 And although Champlain would very much
12:16:59 25 want to try the Algonquin according to French

12:17:03 1 laws he wants to get the agreement of the
12:17:06 2 Nations to avoid violent reprisals.

12:17:14 3 So, again, this is very clear evidence
12:17:15 4 in my mind, my view, of the fact that they were
12:17:18 5 well aware and they understood that the
12:17:19 6 territories that they claim against other
12:17:22 7 Nations were territories controlled by First
12:17:27 8 Nations.

12:17:30 9 Q. And I'll pull up Exhibit 4925.
12:17:39 10 And the account that you've just shared with us,
12:17:42 11 Professor Morin, is it found in this document?

12:17:46 12 A. Yes.

12:17:51 13 Q. Okay, thank you.

12:17:58 14 Now, we'll go back to your report at
12:18:01 15 page 54, again at the beginning of the first
12:18:26 16 paragraph you state:

12:18:27 17 "It is tempting to speculate
12:18:28 18 that, following the Peace Treaties of
12:18:32 19 1665 and 1701, after new posts were
12:18:35 20 established in the Great Lakes area
12:18:37 21 and presents were offered regularly,
12:18:39 22 many allies allowed the French to
12:18:42 23 travel through their territory without
12:18:44 24 requiring gifts from them."

12:18:45 25 So can you explain the opinion that

12:18:49 1 you give here please?

12:18:54 2 A. Well, the starting point is that
12:18:55 3 these Peace Treaties allowed freedom of
12:19:00 4 circulation between Indigenous Nations, for
12:19:05 5 hunting purposes at least, and that the French
12:19:08 6 were expanding westward where in general they
12:19:12 7 were meeting with Nations who were interested in
12:19:14 8 trading with them.

12:19:17 9 So I think we see a new reality
12:19:19 10 occurring between allies. The French who were
12:19:23 11 providing goods that they will offer gifts, or
12:19:26 12 that they have for trading purposes, will not be
12:19:29 13 required to pay presents when they travel
12:19:34 14 through the various territories.

12:19:37 15 So my assumption is, because I have
12:19:38 16 not found information that confirmed this or
12:19:41 17 influenced this, but my information is that we
12:19:44 18 have a freedom of circulation that has been
12:19:47 19 established between allies and giving gifts; we
12:19:51 20 know that at some time in the 1740s when the
12:19:55 21 French weren't able to procure gifts this
12:19:58 22 created violent incidents between some of the
12:20:01 23 allies and the traders.

12:20:06 24 So my -- the alliance with the gifts
12:20:09 25 that were given created a new environment where

12:20:12 1 there was freedom of circulating. Gifts were
12:20:16 2 offered regularly at the post, not with a
12:20:18 3 specific mention that this would be for
12:20:20 4 travelling through territories but as part of a
12:20:24 5 general alliance where they were mutually
12:20:27 6 advantageous exchanges.

12:20:34 7 Q. Thank you, Professor Morin.

12:20:36 8 Now moving to the section of your
12:20:37 9 report entitled "The explanation of the French
12:20:41 10 position to the Haudenosaunee, 1739-1748".

12:20:48 11 THE COURT: What page, counsel?

12:20:50 12 MR. PELLETIER: Beginning at page 54,
12:20:51 13 Your Honour.

12:20:54 14 BY MR. PELLETIER:

12:20:55 15 Q. You've discussed in this section,
12:20:56 16 Professor Morin, Fort Saint Frédéric. I'm
12:21:00 17 wondering if you can tell us how this fort fits
12:21:04 18 into your analysis respecting whether or not
12:21:07 19 consent of Aboriginal peoples was required to
12:21:13 20 build forts?

12:21:14 21 A. Well, it's not specifically Fort
12:21:15 22 Frédéric but a neighbouring area where the
12:21:19 23 French had started to plan granting lands
12:21:31 24 although, they did not actually do it, and there
12:21:32 25 was immediately a complaint from the Mohawks.

1 And when the Governor finally responds
2 he says, Oh, no, no, we have no intention to do
3 that, for whatever reason, because of the
4 complaint of the Mohawks, or in the meantime
5 they changed their plants. I'm not sure. But
6 they said there will be no settlement. We are
7 not planning on doing this in this area where
8 you hunt.

9 And the governor said -- let me look
10 at page 55 at the exact. "I will gladly leave
11 that land for your hunts." For the governor,
12 happy to leave the land for the hunt of the
13 Haudenosaunee, or the Mohawks, more precisely.
14 But he says, I will not allow the British to
15 settle there. I am not settling there myself.

16 So even though he presented it as a
17 gift coming from the governor or a grant, or
18 recognition, these are lands where the Mohawks
19 were hunting.

20 It also includes the rights of the
21 allies of the French, the domiciled,
22 Christianized Indians living near Montreal and
23 the Three Rivers to go and hunt in these areas,
24 but that's already part of the Great Peace of
25 1701.

1 So he is reaffirming something that
2 already exist for the domiciled, Christianized
3 Indians of the colonies. But essentially he is
4 saying, there will no settlement there. I leave
5 you these hunting lands, implying that it's kind
6 of a gift, but in reality it was clear to
7 everyone that these were the hunting lands of
8 the Mohawk.

9 And the main point is that they are
10 taking a step back and saying, Okay, we're not
11 going to settle them. We don't want the British
12 to settle there. And they tell very clear
13 that's their position. These are our lands, if
14 anyone is going to settle them it must be the
15 French. We will not allow the British to settle
16 them but in the meantime these are hunting lands
17 for you.

18 Q. Just pulling up your report
19 again, Professor Morin, and we'll go to page 57.
20 I believe you've just explained this for us but
21 I'll put the question just in case there's
22 anything you'd like to add. At the end of the
23 block quote you say:

24 "Here in the Haudenosaunee
25 heartland there is no hint of Onontio

12:24:11 1 [...]"

12:24:12 2 And perhaps you can tell us who that
12:24:16 3 is?

12:24:16 4 "[...] assuming the power to
12:24:16 5 authorize settlements."

12:24:16 6 I'm wondering if there's anything else
12:24:17 7 you'd like to say about that, and if you can
12:24:20 8 explain for us who Onontio is please?

12:24:25 9 A. Yeah. Onontio was the French
12:24:27 10 governor. So the various French governors were
12:24:30 11 called "Onontio".

12:24:32 12 And here it's a different episode
12:24:34 13 where the British asked the permission to settle
12:24:39 14 a fort, which is -- sorry, yeah, Fort des
12:24:48 15 Sables.

12:24:49 16 So fort des Sables was, in the view of
12:24:53 17 the British, an ideal place to set up a fort.
12:24:56 18 And they asked permission from the Haudenosaunee
12:24:59 19 but they denied it. And then the governor, who
12:25:02 20 knows what's going on and he meets the
12:25:05 21 Haudenosaunee, he congratulates them for having
12:25:08 22 refused permission to settle in their country.

12:25:15 23 And it's very clear on the way it's
12:25:16 24 worded here that he has no pretense, contrary to
12:25:19 25 the area around Fort Frédéric, he doesn't say,

12:25:22 1 this is an area where I have control of the
12:25:26 2 settlement. He acknowledges that it is the
12:25:29 3 decision of the Haudenosaunee to allow the
12:25:30 4 British to settle Fort des Sables or not, and he
12:25:39 5 just congratulates them as part of the peaceful
12:25:42 6 relationship that they're striving to maintain
12:25:44 7 that they have not allowed the British to go in
12:25:47 8 their territory.

12:25:53 9 Q. Thank you, Professor Morin.

12:25:55 10 Now moving on in your report to the
12:25:56 11 section discussing forts, and specifically Fort
12:26:00 12 Frontenac. You stated your view in your report
12:26:02 13 that the Haudenosaunee gave consent to this
12:26:06 14 fort. I'm wondering if you can walk us through
12:26:08 15 how you came to that conclusion?

12:26:14 16 A. Well, I think it's important to
12:26:19 17 realize there was a previous expedition by
12:26:24 18 Governor Courcelles but it doesn't seem from the
12:26:29 19 written source we have that he discussed the
12:26:33 20 fort.

12:26:33 21 And then the next year the new
12:26:34 22 Governor, Frontenac, decided that he would go
12:26:37 23 back to the Fort Frontenac area, near
12:26:42 24 present-day Kingston, and that he would build a
12:26:44 25 fort.

12:26:44 1 So for several years I think implies
12:26:45 2 that this was trying to take the Haudenosaunee
12:26:49 3 by surprise. But far in advance Frontenac sent
12:26:58 4 a message to the Haudenosaunee telling them that
12:26:59 5 he wanted to meet them initially in a different
12:27:01 6 place, but eventually it was -- the meeting,
12:27:02 7 sorry, was reconvened around Fort Frontenac.

12:27:06 8 So if I may go back to the relevant
12:27:17 9 part? There's a large delegation of chiefs that
12:27:18 10 are there while the fort is being given.
12:27:21 11 Initially there is one side and then two sides,
12:27:23 12 but the fort is not at all completed. And even
12:27:25 13 though the French have an impressive force there
12:27:28 14 to me nothing is really decided.

12:27:32 15 And if the Haudenosaunee wanted to get
12:27:35 16 reinforcement quickly we don't know -- it would
12:27:38 17 be speculation to say could they have stopped
12:27:41 18 the enterprise or not?

12:27:42 19 But the upshot is that when there's
12:27:46 20 these large delegations of various Chiefs of the
12:27:48 21 Haudenosaunee Confederation they are told by
12:27:52 22 Frontenac, there will be a fort here to provide
12:27:54 23 you goods, trading goods at better prices. And
12:27:58 24 they don't mention that they're opposed or
12:28:01 25 outraged, perhaps they are inwardly but they

12:28:13 1 don't say this because they want to preserve
12:28:15 2 peace. For them it's important at this stage to
12:28:18 3 preserve peace. And their answer is that, you
12:28:20 4 forgot to mention what will be the prices.

12:28:23 5 So for me it's very clear that he says
12:28:26 6 there will be a fort, and the answer of the
12:28:29 7 Chiefs, after discussion among themselves is,
12:28:32 8 Yes, they are filled with joy, which may be a
12:28:36 9 diplomatic exaggeration that the fort will be
12:28:38 10 built. But he adds, And we want to know the
12:28:38 11 prices. And Frontenac will say, I will make
12:28:45 12 sure that we provide you the trading goods at
12:28:47 13 the best possible prices, and much better
12:28:49 14 prices. Because the French are really keen on
12:28:51 15 stopping the trade that goes through the
12:28:56 16 Haudenosaunee territories to Albany, or the
12:28:59 17 other trading towns there.

12:29:04 18 So for me this exchange, we will build
12:29:08 19 a fort, we will bring you trading goods, yes, we
12:29:12 20 are overjoyed as long as we have good prices.
12:29:15 21 And Frontenac answering, I will do everything in
12:29:19 22 my power to provide you goods at these
12:29:22 23 reasonable prices. For me it's an offer, an
12:29:26 24 agreement kind of thing perhaps without using
12:29:28 25 exactly the word "consent".

1 And we see further down other
2 documents where the French say, or the
3 Haudenosaunee say, This was founded with the
4 consent of the Five Nations. Maybe a reluctant,
5 or someone of course consents but still, as I
6 said, it's not clear for me at all that they
7 were so powerless in front of this huge French
8 delegation.

9 Q. I'll bring up your report,
10 Professor Morin at page 64, and perhaps you can
11 confirm for us that this is what you've just
12 been discussing?

13 A. Yes, this is the answer from the
14 Haudenosaunee.

15 Q. And you mentioned that there were
16 other documents that spoke to this, are there
17 any that you had wanted to refer to now?

18 A. Yes, absolutely. When I was
19 reviewing Perrot to explain more clearly the
20 episode of the rights of the French to travel
21 through territories, which is a short document,
22 so I was going through the pages and I found a
23 specific reference that I had not found when I
24 was writing my report on the foundation of Fort
25 Frontenac.

1 How does Nicolas Perrot explain the
2 foundation of Fort Frontenac. And it's a few
3 sentences but it's very clear. He says
4 essentially that they consented.

5 He puts it -- the previous year when
6 Courcelles went there, but he was actually in
7 Montreal in 1671, so here he is a very credible
8 witness I think, if I may use that courtroom
9 expression, reliable source would be more
10 academic I should say.

11 So he says, yeah, it was under the
12 Governor de Courcelles in 1671. The first trip
13 he asked them to consent to the establishment of
14 Fort Frontenac and they did. Whereas the
15 sources that are written that have would rather
16 tend to indicate that it was the next year when
17 Frontenac arrived the discussions took place.

18 But since Perrot was in Montreal in
19 August of 1671 it's quite possible that he knew
20 something that he recalled perfectly that it was
21 not mentioned by Governor de Courcelles or in
22 the account of Governor de Courcelles'
23 expedition.

24 Q. The last of the exhibits we'll
25 pull up is 259. Is this the document, Professor

12:32:25 1 Morin?

12:32:26 2 A. Absolutely.

12:32:26 3 Q. Is there a passage that you'd
12:32:28 4 like to take us to?

12:32:31 5 A. I will -- yes, certainly. I just
12:32:36 6 need to find the page number. It would be 226,
12:32:38 7 at the bottom.

12:32:51 8 So this tells us that de Courcelles
12:32:52 9 made this expedition to impress the Iroquois,
12:33:03 10 and at Catarauqui, which is the name by which
12:33:07 11 Fort Frontenac -- okay, I had a strange sound on
12:33:07 12 my iPhone.

12:33:07 13 So then we have to go to the following
12:33:12 14 page. So as Fort Frontenac is now called, it
12:33:34 15 used to be called "Catarauqui". So according to
12:33:35 16 Perrot de Courcelles summoned the Iroquois and
12:33:40 17 he might lay before them his intention to build
12:33:42 18 a fort. They consented to this and some
12:33:45 19 presents were given to them for which they gave
12:33:47 20 others in return. And the following year the
12:33:49 21 fort was built.

12:33:51 22 So according to Perrot there was an
12:33:54 23 agreement even before the fort was built. But
12:33:57 24 maybe he is confusing the two, but in any way
12:34:00 25 there was some kind of consent given.

12:34:05 1 Q. Thank you, Professor Morin.

12:34:07 2 Now I would like to move on to your
12:34:08 3 analysis regarding Fort Detroit. This section
12:34:12 4 starts at page 66 of your report but I'm going
12:34:16 5 take you closer to the end of that section at
12:34:19 6 page 68, and I'll pull that up now. Here at
12:34:31 7 page 68 there is a paragraph beginning:

12:34:36 8 "It is clear that the
12:34:37 9 Haudenosaunee realized that the
12:34:38 10 construction of a fort at Detroit was
12:34:41 11 a non-negotiable condition of the
12:34:43 12 peace."

12:34:46 13 I'm wondering if you could tell us
12:34:47 14 what makes you say that?

12:34:50 15 A. Well, one thing we should keep in
12:34:53 16 mind is that for the French the Detroit area was
12:35:01 17 not Haudenosaunee territory. From -- at least
12:35:02 18 the sources tell us that there were statements
12:35:04 19 by the Haudenosaunee, whether that was a true
12:35:07 20 perspective or not I am not qualified to opine
12:35:10 21 on that.

12:35:11 22 But the research tells us that there
12:35:13 23 were statements by the Haudenosaunee that these
12:35:15 24 were their hunting grounds, their territories
12:35:18 25 because they have conquered the previous

12:35:21 1 Indigenous peoples there.

12:35:24 2 So the French are not accepting,
12:35:25 3 that's my point, that this is Haudenosaunee
12:35:27 4 territory, when they are told, according to the
12:35:33 5 sources that we have, that there is a claim that
12:35:36 6 effect.

12:35:42 7 And when word is heard by the
12:35:44 8 Haudenosaunee that the French are going sell
12:35:46 9 Detroit, to convince the French to avoid doing
12:35:50 10 this, this is clearly explained by Professor
12:35:53 11 Beaulieu in the months from April maybe 1701 to
12:35:58 12 August 1701. But finally when the Haudenosaunee
12:36:00 13 arrive in Montreal to ratify the very important
12:36:06 14 Great Peace with all the French allies in 1601,
12:36:09 15 when they are met by the Governor Callières they
12:36:16 16 are told, We will build Detroit. We welcome you
12:36:19 17 to ratify the solemn peace with all the allies
12:36:22 18 of the French of the Great Lakes area, but he
12:36:27 19 also specifically mentioned, "We will build
12:36:29 20 Detroit." So for me this is the rejection of
12:36:32 21 their opposition to the building Fort Detroit.
12:36:36 22 And they are told there this a few days before
12:36:39 23 the official ceremony to ratify the peace
12:36:42 24 begins.

12:36:43 25 So for me the peace, like most peace

12:36:45 1 treaties, I would think, is there to settle all
12:36:48 2 the grievances. If you're allowed to keep your
12:36:52 3 grievances alive that were, you know, part of
12:36:55 4 the conflicts that were violent and led to the
12:36:59 5 war, or even the conflicts that developed during
12:37:05 6 the war or in the final days before the
12:37:08 7 ratification of the peace no treaty of peace
12:37:10 8 will stand. And I think that is not a new
12:37:13 9 perspective, that was the same perspective at
12:37:17 10 the time.

12:37:17 11 And so this peace was supposed to put
12:37:19 12 to rest all the grievances and complaints
12:37:22 13 between allies or between the Haudenosaunee and
12:37:24 14 the French.

12:37:31 15 Q. And then further on in the page
12:37:32 16 the paragraph beginning with, "As Professor
12:37:35 17 Beaulieu notes", you state, "In my view, the
12:37:38 18 allies [...]" the here it's the French,
12:37:40 19 including the Odawahs:

12:37:43 20 "[...] generally desired this
12:37:44 21 establishment. For this reason, there
12:37:46 22 was no need to solicit their consent
12:37:48 23 formally."

12:37:49 24 I'm wondering if you can tell us how
12:37:51 25 you came to that conclusion, Professor Morin?

12:37:57 1 A. Yes. This was really referring
12:38:01 2 to the secondary literature, and these clearly
12:38:05 3 imply that some people made some requests for,
12:38:09 4 well, forts to be reopened and to settle the
12:38:13 5 Detroit area, and I footnote those references.

12:38:19 6 And when Detroit was established
12:38:23 7 different Indigenous peoples and Indigenous
12:38:26 8 Nations, or groups, or members of Indigenous
12:38:29 9 Nations did move to Detroit. So that indicates
12:38:32 10 to me, and I think that's a well-known fact,
12:38:35 11 that although they may have been prompted in
12:38:37 12 some case by the French, in general this was not
12:38:40 13 something that was resisted, but because it's
12:38:43 14 hard to have a very general and clear statement
12:38:46 15 because there were so many different groups
12:38:49 16 involved in the area of Detroit, but some of
12:38:52 17 them willingly moved to Detroit and were happy
12:39:01 18 that the fort was built there, at least that's
12:39:02 19 my understanding of the historical literature
12:39:03 20 that is footnoted here.

12:39:13 21 Q. I would like to move now to Fort
12:39:14 22 Niagara, and this section starts at page 69.
12:39:17 23 And I'm wondering again, Professor Morin, if you
12:39:20 24 can give us an overview of the conclusions that
12:39:22 25 you've come to in this section?

1 A. Well, fort Niagara is much closer
2 to the homeland of the Haudenosaunee, south of
3 Lake Ontario and going towards Lake Erie
4 obviously.

5 So the French here, and this reminds
6 of other episodes where for this area they were
7 well aware that this is undoubtedly
8 Haudenosaunee territory and I think they were
9 not contesting this.

10 So they want the agreement, the
11 permission to build the Fort. And they get it
12 from one Nation that is a member of the
13 confederation. Then a few years later, or one
14 year later I think, the Confederation itself, at
15 the point has Six Nations, overrules the Nation
16 that gave this authorization, so we read in the
17 source, and wants to send notice to the French
18 that they will not consent to the building of
19 Fort Niagara.

20 But eventually they don't send this
21 message to the French. They make the decision
22 and the French know about it, the British know
23 about it because -- well, we see this in the
24 sources, they are well informed about what's
25 going on the Haudenosaunee councils but, again,

12:40:41 1 the note is not sent to the French.

12:40:44 2 They prefer to request the British to
12:40:46 3 intervene. And the British do make a complaint
12:40:49 4 about the building of Fort Niagara, that is
12:40:51 5 discussed in some of the memorandums exchanged
12:40:55 6 at diplomatic conferences that I quote in the
12:40:58 7 earlier part of my report.

12:41:00 8 So the Haudenosaunee make the decision
12:41:06 9 to use the British to try to stop the
12:41:07 10 construction of Fort Niagara, but that doesn't
12:41:10 11 work. And after this fails I provide two
12:41:19 12 examples of conferences where there's a clear
12:41:22 13 indication by the Haudenosaunee, according to
12:41:23 14 the written record that we have, that they
12:41:25 15 consented to the foundation of this fort. And
12:41:29 16 the Governors that are present say, yes, I
12:41:31 17 remember that you agreed to this.

12:41:34 18 Now, it's not always the word
12:41:38 19 "consent", sometimes they say, You promised that
12:41:41 20 this will be only be a peaceful house, and the
12:41:43 21 Governor says, Yes, we have promised this and we
12:41:46 22 have kept our promises. So it means the initial
12:41:50 23 understanding has been respected. So for me
12:41:53 24 this is a reference to "consent" even though the
12:41:57 25 word itself is not used.

1 Q. Thank you, Professor Morin. On
2 that same note I'll take you to page 77 of your
3 report. Now this is in the section on the Fort
4 at the Ohio Valley. And here you point out in
5 the paragraph beginning with:

6 "Hence La Jonquiere repeated that
7 fort Frontenac and Niagara had been
8 established with the 'consent' of the
9 Haudenosaunee."

10 What is your view -- what in your view
11 is the significance of this?

12 A. Well, here La Jonquiere is
13 repudiating or revoking, if I may say, some
14 statements or promises that were made the
15 previous year by the Governor that was then
16 acting in New France, La Galissonière, about the
17 Ohio Valley area. La Galissonière had said, we
18 will respect -- he had said specifically to the
19 Haudenosaunee, We will respect your right to
20 hunt there. We will never settle there. And
21 these are hunting grounds reserved for you.

22 And the French Crown said, this is
23 totally -- we lost the document, but I think I
24 can continue, if that's okay?

25 So the French Crown said, There's no

1 way we're going to accept that the Ohio Valley
2 is reserved for the Haudenosaunee as a hunting
3 grounds or anybody else. And the reason for
4 this, according to the French Crown, is that
5 this initially was not Haudenosaunee territory.
6 They were French Europeans to go there that
7 discovered it, and there was another Indigenous
8 Nation that eventually was vanquished by the
9 Haudenosaunee.

10 So they say, We were the first to go
11 there and we do not accept that this is
12 Haudenosaunee territory. I'm not even sure that
13 the first Indigenous Nation was vanquished by
14 the Haudenosaunee.

15 Anyway, this was a matter of dispute,
16 but let us say between the French officials and
17 the Haudenosaunee, they were absolutely adamant
18 that the Ohio Valley was not part of
19 Haudenosaunee territory.

20 So they said, whatever was said about
21 hunting grounds being reserved in the Ohio
22 Valley we revoke and we consider -- or we put
23 you on notice that this is absolutely not the
24 position of the French Nations.

25 But in the passage that we just saw a

12:44:46 1 few seconds or minutes ago they say, We
12:44:49 2 recognize that fort -- let me go back to the two
12:44:52 3 forts, Fort Frontenac and Fort Niagara were
12:45:00 4 established with your consent. And, again, for
12:45:02 5 me because these forts were established in the
12:45:05 6 homeland or the core territory of the
12:45:07 7 Haudenosaunee and not into contested areas.

12:45:15 8 Q. Thank you, Professor Morin.

12:45:16 9 Now, before leaving Fort Niagara can
12:45:17 10 you say a little bit more about how the
12:45:23 11 circumstances surrounding the forts tie in with
12:45:27 12 the Law of Nations?

12:45:29 13 A. Well, there's a discussion, as I
12:45:31 14 mentioned, in memorandums and the arguments are
12:45:35 15 made based on the Treaty of Utrecht, and also
12:45:44 16 about the question of whether Indigenous Nations
12:45:46 17 can occupy and possess hunting grounds, hunting
12:45:49 18 territories.

12:45:50 19 And the French have long memoirs, as
12:45:52 20 summarized in the first part of my report, where
12:45:56 21 they have all sorts of arguments saying that the
12:45:58 22 Haudenosaunee consented to Fort Frontenac and
12:46:01 23 these are our countries. And all of a sudden
12:46:04 24 there's a paragraph saying, but in any case
12:46:08 25 hunters have no territories, they're just going

12:46:11 1 many different directions and this is of no
12:46:13 2 concerns to us as French people. We can go
12:46:16 3 there and settle.

12:46:18 4 And for me this is totally
12:46:20 5 contradictory, it's also contradicted by what
12:46:21 6 they say about Abenaki's territories. So it's a
12:46:26 7 very self-serving document, which is not at all
12:46:29 8 unusual for memorandums in diplomatic
12:46:32 9 conferences.

12:46:33 10 We see that in the British. They put
12:46:35 11 forward a position and then they stuck with that
12:46:38 12 position when they are dealing with another
12:46:40 13 issue in a different area.

12:46:42 14 So for the British the hunting grounds
12:46:45 15 always belong to the Iroquois or the
12:46:50 16 Haudenosaunee, and according to the Treaty of
12:46:53 17 Utrecht the territories of the Iroquois and the
12:46:58 18 Haudenosaunee, the British position is that that
12:47:00 19 was reserved for them by the Treaty of Utrecht
12:47:03 20 and the French could not go in there.

12:47:05 21 And the French denied that for reasons
12:47:07 22 that are maybe not that convincing, but the
12:47:10 23 whole point is that they did lay a lot of
12:47:12 24 emphasis on the consent while at the same time
12:47:16 25 saying that the consent was unnecessary which is

12:47:18 1 to me is completely contradictory.

12:47:28 2 Q. I will pull up your report again
12:47:29 3 and we'll go to page 78, this is still on the
12:47:30 4 section on forts and moving now to the forts of
12:47:31 5 the Ohio Valley.

12:47:34 6 And I'll paraphrase here but at
12:47:36 7 page 78 you concluded that the French didn't
12:47:39 8 believe that the Haudenosaunee had a right to
12:47:41 9 the lands in question because the French had
12:47:43 10 discovered them first. And you conclude that:

12:47:48 11 "Obviously the situation would be
12:47:50 12 different in the Haudenosaunee
12:47:50 13 homeland."

12:47:51 14 I'm wondering if you can elaborate on
12:47:54 15 this and tell us how you came to this
12:47:56 16 conclusion, please?

12:47:58 17 A. Well, this is the distinction
12:47:59 18 between how they behave in the Ohio Valley where
12:48:05 19 they make absolutely no attempt to discuss or --
12:48:10 20 yeah, discuss the issue with the Haudenosaunee,
12:48:13 21 and what they did for Fort Niagara, and even for
12:48:18 22 Fort Frontenac, although perhaps not in advance
12:48:20 23 but on the spot this evolved as a bargaining
12:48:24 24 about whether Fort Frontenac would be -- not
12:48:29 25 whether it would be constructed but under what

12:48:32 1 conditions that if it was constructed, the
12:48:35 2 condition that was requested by Haudenosaunee
12:48:37 3 for Fort Frontenac being that trading goods be
12:48:42 4 provided at a reasonable price.

12:48:44 5 So, again, it's the position that in
12:48:51 6 the homeland of the Haudenosaunee and Fort
12:48:53 7 Frontenac initially was very clearly in that
12:48:56 8 situation because there were settlements on the
12:48:58 9 north shore of Lake Ontario that disappeared
12:49:00 10 later, and that fort Niagara was really in the
12:49:05 11 same category.

12:49:10 12 Forts that were very, very close to
12:49:11 13 the settlements, the villages of the
12:49:13 14 Haudenosaunee, and there the French did not
12:49:15 15 pretend even that they should exclude the
12:49:19 16 British, as I mentioned for Fort de Sables.
12:49:20 17 They just congratulated the Haudenosaunee for
12:49:25 18 refusing permission to the British without ever
12:49:27 19 saying that this is an area discovered by France
12:49:30 20 and under the control France, whereas in the
12:49:33 21 Ohio Valley they have a totally different
12:49:36 22 position.

12:49:42 23 Q. Thank you, Professor Morin.

12:49:43 24 Now finally I'd like to discuss one of
12:49:44 25 the conclusions we haven't touched on and that

1 is at the bottom of page 83 and beginning of
2 page 84 of your report. So I'll pull that up
3 now.

4 THE COURT: Why don't we take our
5 lunch break. We'll adjourn until 2:15.

6 -- RECESSED AT 12:52 P.M. --

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

8 THE COURT: Thank you, good afternoon.
9 There's one matter I wanted just to raise with
10 counsel before we resume, Ms. Pelletier.

11 As counsel will know, ordinarily on
12 breaks and at lunch Madam Court Reporter takes
13 the opportunity to talk to the witness about
14 spellings for purposes of the transcript.

15 In this electronic hearing Madam Court
16 Reporter has made a practical alternative
17 suggestion, which I'm fine with provided that
18 counsel are also fine with it, which is that she
19 email the witness at the end of the day with any
20 spelling questions she has and he give her those
21 responses by return email.

22 Starting with you, Ms. Pelletier, do
23 you have any objection to that?

24 MR. PELLETIER: No objection, Your
25 Honour.

02:18:56 1 THE COURT: Mr. McCulloch, for Canada?

02:18:56 2 MR. McCULLOCH: No objection.

02:18:56 3 THE COURT: Ms. Lepan, for Ontario?

02:18:56 4 MS. LEPAN: No objection.

02:18:56 5 THE COURT: Thank you very much.

02:19:00 6 Madam reporter, you may therefore proceed in

02:19:00 7 that manner. I assume you have an email for

02:19:02 8 Professor? You do. All right. Thank you for

02:19:07 9 making that suggestion.

02:19:10 10 Ms. Pelletier, please go ahead.

02:19:13 11 MR. PELLETIER: Thank you, Your

02:19:13 12 Honour.

02:19:15 13 BY MR. PELLETIER:

02:19:15 14 Q. So, Professor Morin, just before

02:19:17 15 the break I was about to take you to page 83 or

02:19:18 16 your report so I'll pull that up again now. And

02:19:38 17 here at the bottom of page 83 you begin -- you

02:19:43 18 have a conclusion that begins:

02:19:45 19 "If the French were willing to

02:19:46 20 concede (over time) that the

02:19:48 21 establishment of forts in their

02:19:51 22 territory required their (meaning the

02:19:56 23 Haudenosaunee) consent, even if it was

02:20:00 24 obtained after the fact, it seems

02:20:03 25 obvious that they would adopt the same

02:20:05 1 position with Aboriginal Peoples with
02:20:06 2 whom they traded and who were more
02:20:09 3 reliable allies if time of war."

02:20:11 4 And I'm wondering, Professor Morin,
02:20:13 5 whether you can explain your thinking here
02:20:15 6 please?

02:20:15 7 A. Well, the relationship with the
02:20:18 8 Haudenosaunee was tense and there was always a
02:20:24 9 possibility that war would resume between them,
02:20:27 10 as it often resumed between other Nations or
02:20:29 11 countries. So the French were willing to pay
02:20:34 12 attention to their concerns, if I may put it
02:20:37 13 that way, but still they were dealing with
02:20:40 14 potential enemies, or former enemies would be a
02:20:45 15 more exact way of putting it. So you would
02:20:53 16 expect they would be less willing to go out of
02:20:55 17 their way, if I may put it that way, to assuage
02:20:58 18 their concerns, as opposed to allies which were
02:21:01 19 reliable warriors and trading partners.

02:21:07 20 So for me to comment on the assumption
02:21:09 21 that you cannot treat in a less advantageous
02:21:12 22 way, or more disadvantageous (sic) way, sorry
02:21:20 23 about the pronunciation, treat in such a
02:21:24 24 negative manner your own allies on whom you
02:21:28 25 depend much more than the Haudenosaunee.

02:21:33 1 Q. Thank you, Professor Morin, and
02:21:35 2 Your Honour those are my questions.

02:21:37 3 THE COURT: Thank you.

02:21:39 4 I believe the next examining counsel
02:21:41 5 is Mr. McCulloch for Canada, is that correct?

02:21:46 6 MR. McCULLOCH: Yes, Your Honour.

02:21:47 7 THE COURT: Are you all set to
02:21:48 8 proceed, Mr. McCulloch?

02:21:50 9 MR. McCULLOCH: Yes, Your Honour.

02:21:51 10 There is one point I would like to make clear at
02:21:54 11 the beginning. Counsel from the parties have
02:21:58 12 discussed the issue of French material being put
02:22:02 13 to the witness, and with your consent, Your
02:22:07 14 Honour, what we propose is that only those bits
02:22:12 15 of French that are translated for the record, to
02:22:17 16 the agreement of the parties, will form part of
02:22:20 17 the record such that the parties will be relying
02:22:22 18 upon them in their closings.

02:22:24 19 We thought that was perhaps the most
02:22:26 20 practical solution. We hope it meets with your
02:22:29 21 approval.

02:22:31 22 THE COURT: Let me ask a couple of
02:22:33 23 questions. So when we had Professor Beaulieu,
02:22:36 24 who similarly had done significant writing in
02:22:40 25 the French language and was being questioned

02:22:44 1 about some of his publications, counsel adopted
02:22:50 2 the practice of, first of all, confirming with
02:22:54 3 the witness by stating the gist of the -- of the
02:23:01 4 point in English, that counsel properly
02:23:05 5 understood what the point was, and by doing so
02:23:10 6 the record reflected the English and the
02:23:16 7 witness' either agreement or disagreement or
02:23:19 8 clarification with that.

02:23:22 9 Is that what you're proposing, or are
02:23:24 10 you proposing something different?

02:23:26 11 MR. McCULLOCH: Well, your Honour, at
02:23:28 12 least in so far as Canada is concerned the
02:23:30 13 French portion -- texts that we intend to put to
02:23:36 14 Professor Morin are so short that whether it's
02:23:40 15 the gist or a translation doesn't make a
02:23:42 16 difference.

02:23:43 17 THE COURT: All right. My point being
02:23:44 18 that you plan to first of all ask Professor
02:23:50 19 Morin to agree, disagree, clarify or correct
02:23:55 20 your English translation before asking a
02:23:59 21 question about the matter, is that what you're
02:24:02 22 planning on doing?

02:24:04 23 MR. McCULLOCH: Yes, Your Honour.

02:24:05 24 THE COURT: I think that's fine. As
02:24:06 25 long as the record indicates in English what the

02:24:09 1 point, and Professor Morin has an opportunity to
02:24:14 2 accept, reject or correct the English I think
02:24:19 3 that's a workable solution.

02:24:21 4 I do note that to the extent you are
02:24:24 5 asking questions about publications that
02:24:27 6 Professor Morin went to some trouble, I believe,
02:24:30 7 in his CV to include both French and English
02:24:35 8 names, for those publications, and in that that
02:24:40 9 is already part of the record it would be of
02:24:41 10 assistance to me if you could use the English
02:24:46 11 names for the publications rather than the
02:24:51 12 French names, as has been identified by the
02:24:53 13 witness already. Is that satisfactory?

02:24:57 14 MR. McCULLOCH: Certainly, Your
02:24:58 15 Honour.

02:24:58 16 THE COURT: And I see -- Ms. Pelletier
02:25:02 17 and examining counsel from Ontario, are you
02:25:04 18 content with that?

02:25:05 19 MR. PELLETIER: Yes, Your Honour,
02:25:06 20 thank you.

02:25:08 21 THE COURT: Ms. Lapan?

02:25:11 22 MS. LEPAN: Yes, Your Honour.

02:25:11 23 THE COURT: I'm most concerned not
02:25:12 24 only about me because, as you know, this is an
02:25:15 25 English trial, but also that there be a robust

02:25:18 1 understandable record, and of course, that Madam
02:25:21 2 Reporter is also able to correctly prepare the
02:25:25 3 transcript, which we talked about it a moment
02:25:28 4 ago.

02:25:29 5 All right. Thank you for drawing that
02:25:30 6 to my attention, Mr. McCulloch, please go ahead.

02:25:35 7 CROSS-EXAMINATION BY MR. McCULLOCH:

02:25:36 8 Q. Professor Morin, I am Michael
02:25:39 9 McCulloch, on behalf of the Attorney General of
02:25:40 10 Canada I am going to be asking you a few
02:25:43 11 questions.

02:25:45 12 In order to give you some sense of
02:25:48 13 where we're going I'm going to give you a very
02:25:53 14 high-level overview of the topics that I would
02:25:59 15 like to discuss with you.

02:26:05 16 The first thing I would like to do is
02:26:07 17 put to you some historical facts that we
02:26:11 18 consider noncontroversial. We did attempt to
02:26:16 19 arrive at an Agreed Statement of Fact and I
02:26:18 20 believe you were involved in that discussion,
02:26:20 21 but the plaintiffs have declined to join in the
02:26:25 22 Agreed Statement of Fact and have declined to
02:26:30 23 consent to making the underlying citations for
02:26:33 24 standard references into exhibits.

02:26:37 25 I'm hoping we won't actually have to

02:26:40 1 go to those documents because, again, the
02:26:44 2 references are things that are as standard as
02:26:47 3 the "Dictionary of Canadian Biography", but I'm
02:26:51 4 just making it clear that at the moment we do
02:26:53 5 not have exhibit numbers for the various
02:26:57 6 biographies that we want to refer to, or at
02:27:02 7 least the biographies of the people to whom we
02:27:05 8 want to refer.

02:27:07 9 So if I may turn to -- oh, I believe
02:27:11 10 you were shown a preliminary draft of the agreed
02:27:14 11 statements of fact, is that correct?

02:27:16 12 A. That is correct.

02:27:22 13 Q. And again, I hope these aren't
02:27:26 14 controversial. I think you'd agree that John
02:27:31 15 Cabot was sent by Henry VII to explore North
02:27:35 16 America in 1497?

02:27:38 17 A. I agree.

02:27:43 18 Q. And I think you'd agree that
02:27:46 19 Francisco de Vitoria, who was born in Spain,
02:27:50 20 lived from 1486 to 1546?

02:27:56 21 A. Yes, I don't know this by heart
02:27:59 22 but when I reviewed the documents, the
02:28:01 23 biographies you sent, that was fine.

02:28:04 24 Q. And he was professor of sociology
02:28:06 25 at the University of Salamanca?

02:28:10 1 A. That's correct.

02:28:11 2 Q. And that around about -- because
02:28:14 3 the publication dates for incunabula are a
02:28:19 4 little tricky, he published "De Indis" in 1532?

02:28:24 5 A. Well, this is where I had a small
02:28:27 6 disagreement in the statements of facts. So I
02:28:31 7 don't think much turns upon it but I want the
02:28:35 8 historical record to be correct.

02:28:37 9 So Francisco de Vitoria actually these
02:28:41 10 were lectures that he gave. And it used to be
02:28:44 11 believed that it was in 1532 but later documents
02:28:48 12 show that it was actually in 1539 that these
02:28:53 13 lectures were delivered. And I do footnote this
02:28:55 14 as early as 1997, I did reference this. And I
02:29:05 15 saw, because every year we have two or three
02:29:06 16 papers on Francisco de Vitoria in international
02:29:11 17 law, a recent paper also confirming these
02:29:13 18 footnotes that the exact dates were 1539. So
02:29:21 19 these were lectures that were given and then
02:29:22 20 they were published only in 1557 in Léon,
02:29:24 21 France.

02:29:26 22 So unless you meant "published" in the
02:29:28 23 old sense of broadcast orally I had a few
02:29:39 24 difficulties with the exact chronology.

02:29:42 25 Q. Thank you very much for that

02:29:42 1 correction, it adds very useful light on to the
02:29:45 2 nature of early scholarship.

02:29:49 3 And I don't think, I hope, that it's
02:29:52 4 controversial that Jacques Cartier lived between
02:29:56 5 1491 and 1557?

02:30:02 6 A. That's correct.

02:30:06 7 Q. And without getting into the
02:30:08 8 specifics of his voyages, he voyaged what was
02:30:11 9 going to become new France between 1534 and
02:30:15 10 1541?

02:30:16 11 A. Actually the date is 1542. He
02:30:20 12 came here in 1541 but he returned in 1542, so he
02:30:29 13 spent the winter here.

02:30:30 14 Q. I see. Thank you again for the
02:30:32 15 correction.

02:30:35 16 And, again, I hope this isn't
02:30:37 17 controversial and I hope we got this one right,
02:30:40 18 Jean-Francois de la Rocque de Roberval, 1500 to
02:30:48 19 1560 approximately?

02:30:50 20 A. Yes.

02:30:51 21 Q. And -- just a moment. And he
02:31:06 22 went to new France in 1542 approximately?

02:31:10 23 A. Yes, and wintered over. So 1542
02:31:14 24 and went back in 1543.

02:31:24 25 Q. And another person who comes up

02:31:26

1

in your report often, Samuel de Champlain?

02:31:29

2

A. Uhm-hmm.

02:31:30

3

Q. You'd agree that he lived between

02:31:33

4

1574 and 1635.

02:31:42

5

A. Yes. 1635.

02:31:47

6

Q. Yes, 1635.

02:31:47

7

A. Otherwise he was born before he

02:31:49

8

died.

02:31:50

9

Q. And did he voyage into what was

02:31:53

10

becoming new France between -- whoops, sorry.

02:31:55

11

I'm handling two different computers at the same

02:31:58

12

time and that occasionally get as little

02:32:04

13

tricky -- between 1603 and 1635?

02:32:12

14

A. Yes, that's correct.

02:32:12

15

Q. And his -- he was commander of

02:32:15

16

New France, if you will accept that translation,

02:32:18

17

between 1629 and 1635?

02:32:22

18

A. Yes, he had various titles before

02:32:25

19

that, but yes.

02:32:33

20

Q. And would you agree that Marc

02:32:34

21

Lescarbot was born in 1570 and died in 1642, or

02:32:41

22

thereabouts?

02:32:43

23

A. Yes, I will agree.

02:32:46

24

Q. And I hope I get this one right,

02:32:47

25

he published his "Histoire de la Nouvelle Franc"

1 in 1609?

2 A. Yes. There were other editions,
3 but yes.

4 Q. Okay. That pre-existed Hugo
5 Grotius, again someone who gets mentioned a fair
6 bit. He was born in the Netherlands, is that
7 correct?

8 A. That is correct.

9 Q. And lived between 1583 and 1645?

10 A. Correct.

11 Q. And he published "On the Law of
12 War and Peace" in 1625?

13 A. Correct.

14 Q. And he was in fact a practicing
15 lawyer, correct?

16 A. In the Netherlands, yes.

17 Q. And in fact one of his clients
18 was the Dutch East Indian Company?

19 A. Correct.

20 Q. And he achieved a fair amount of
21 prominence in the context of the Thirty Years'
22 War?

23 A. I would say, I'm not necessarily
24 agreeing that because of his book, he was so
25 innovated in his treatment of "The Law of

02:34:13 1 Nations" that he achieved a fair degree of
02:34:17 2 prominence during that period.

02:34:18 3 I don't feel qualified to go further
02:34:20 4 than that but I don't think it contradicts what
02:34:22 5 you're saying.

02:34:23 6 Q. So I guess we don't need to go
02:34:24 7 into his being an advisor to the King of Sweden
02:34:30 8 and the ambassador of Sweden to France?

02:34:34 9 A. I agree. That's correct. That's
02:34:36 10 a historical fact, I was less sure about his
02:34:42 11 influence.

02:34:46 12 Q. And I hope this one isn't
02:34:48 13 controversial. King Louis XIV of France was
02:34:52 14 born in 1638 and died in 1715?

02:34:55 15 A. That's noncontroversial.

02:34:58 16 Q. And I hope equally
02:35:00 17 noncontroversial is that he reigned from 1643 to
02:35:05 18 1715?

02:35:07 19 A. Yes.

02:35:08 20 Q. And just to anchor him correctly
02:35:16 21 in popular culture, he is responsible for the
02:35:18 22 present shape of Versailles?

02:35:25 23 A. Yes. The initial building -- the
02:35:30 24 building of the castle began with Louis XIV.

02:35:33 25 Q. Before that I understand it was a

02:35:35 1 hunting lodge?

02:35:35 2 A. Yes, yes.

02:35:36 3 Q. And -- one of his sobriquet was
02:35:44 4 the Sun King?

02:35:46 5 A. Yes, that was widely used. There
02:35:49 6 are a lot of references to that.

02:35:50 7 Q. And just moving right along, Jean
02:35:53 8 Talon, you'd agree he lived between 1626 and
02:35:59 9 1694?

02:36:00 10 A. Yes.

02:36:09 11 Q. And that he was the intendant of
02:36:09 12 New France 1665, 1668 and 1670 to 1672?

02:36:16 13 A. Yes.

02:36:16 14 Q. And --

02:36:27 15 A. I will say this, this is the only
02:36:29 16 bio you sent that I did not have time to finish
02:36:31 17 reading. Many of them arrived late yesterday.
02:36:33 18 The years seem to be correct and I don't think
02:36:36 19 if we're off by one year anything will turn on
02:36:38 20 that.

02:36:39 21 Q. I'm pretty sure nothing will turn
02:36:42 22 on it.

02:36:44 23 And Samuel von Pufendorf, born in
02:36:52 24 what's now Germany 1632 died in 1694?

02:36:58 25 A. Yes.

02:36:58 1 Q. And he published his "Of the Law
02:37:00 2 of Nature and Nations" in 1672?

02:37:05 3 A. 1672?

02:37:08 4 Q. That's what my notes say.

02:37:15 5 A. Yeah, maybe I misunderstood.

02:37:17 6 Q. Oh, I'm sorry. And he was in
02:37:18 7 fact the Chair of Natural Law at the University
02:37:21 8 of Lund in Sweden where -- for 20 years?

02:37:28 9 A. Yes.

02:37:30 10 Q. In short he was a law professor?

02:37:33 11 A. Yes. And, again, another name
02:37:41 12 that I hope is not controversial but you can
02:37:43 13 understand, given that we're covering 250 years
02:37:46 14 of history, a nice tidy chronological summary
02:37:51 15 may be useful to the court.

02:37:58 16 Louis Du Buade, Comte de Frontenac
02:37:59 17 born 1622 died 1698.

02:38:03 18 A. Correct.

02:38:03 19 Q. And he was the Governor of New
02:38:05 20 France from 1672 to 1682, and then from 1689 to
02:38:15 21 1698?

02:38:17 22 A. Correct.

02:38:18 23 Q. And particularly during that
02:38:21 24 latter period he was engaged in the North
02:38:29 25 American dimension of what's sometimes known as

02:38:31 1 King William's War, also as the Nine Years' War,
02:38:35 2 which concluded with the Treaty of Ryswick on
02:38:40 3 September the 20th, 1697?

02:38:42 4 A. Yes. Correct.

02:38:43 5 Q. John Locke, I'm not going to
02:38:52 6 bother with his birthdates, but you'd agree that
02:38:54 7 he published two treatises of government in
02:38:58 8 December of 1689?

02:39:01 9 A. Yes.

02:39:07 10 Q. Next, Philippe de Rigaud, Marquis
02:39:11 11 de Vaudreuil. I hope you will excuse my accent,
02:39:17 12 I read and speak French fairly well but I have
02:39:20 13 preserved an extreme Ontario secondary school
02:39:24 14 system's accent.

02:39:28 15 A. It seems good to me.

02:39:29 16 Q. Thank you. Philippe de Rigaud,
02:39:31 17 Marquis de Vaudreuil, 1658-1725?

02:39:39 18 A. Correct.

02:39:39 19 Q. And he was Governor of Montreal
02:39:42 20 from 1698 to 1703?

02:39:45 21 A. Correct.

02:39:46 22 Q. And then Governor General of New
02:39:48 23 France from 1703 to 1735?

02:39:55 24 A. 1725.

02:39:57 25 Q. Oh, I'm sorry, 1725. And that

1 covers the period -- we'll get to it in a
2 moment, of the War of the Spanish Succession?

3 A. Yes, in the beginning of the
4 18th century.

5 Q. In fact from 1701 to 1714?

6 A. '13, '14, yeah.

7 Q. Concluded by the Treaty of
8 Utrecht --

9 A. 1713.

10 Q. Yeah. A couple of details from
11 the DCB, I hope you had a chance to look at just
12 to put him in his time and place, since he was
13 there for a long time and was quite important.

14 You'd agree that he started off his
15 career as a Musketeer, which the DCB entry
16 described as an "elite core of the French army"?

17 A. Yes. Well, I agree that in the
18 DCB and I have no reason to doubt this
19 information.

20 Q. And that he then went on to be a
21 naval Captain?

22 A. Yes.

23 Q. And the reason he became a naval
24 Captain, or at least the connection, is that
25 under the French regime the colonies were under

02:41:18 1 the administration of the Ministère de la
02:41:23 2 marine, the department of the Navy I guess you'd
02:41:26 3 say?

02:41:28 4 A. I'm not sure if it's true for the
02:41:30 5 whole period, but I think in many cases it has
02:41:35 6 been the fact that Ministry of Marines. So I'm
02:41:40 7 saying there may be periods where different
02:41:43 8 regimes were put in place but I think as a
02:41:45 9 general rule that is correct.

02:41:47 10 Q. And the DCB said that he was
02:41:51 11 described as a military man who studied little
02:41:56 12 and who was ignorant of all subsets except
02:41:59 13 military ones?

02:42:04 14 A. This I cannot comment on, except
02:42:06 15 that generally the DCB is reliable information,
02:42:09 16 but that is clearly an opinion from the author
02:42:12 17 and not a fact, according to my understanding.

02:42:18 18 Q. Well, the author is quoting
02:42:20 19 contemporaries, the hard fact is that there were
02:42:23 20 only five books in his estate when he died, but
02:42:26 21 we don't need to go into that.

02:42:39 22 And what is sometimes referred to as
02:42:42 23 the Great Peace of Montreal, August 4th, 1701,
02:42:45 24 or thereabouts?

02:42:47 25 A. Yes, that's correct.

02:42:51 1 Q. We now come to one that gives me
02:42:53 2 trouble, the War of the Austrian Succession.
02:42:58 3 There are some people I understand who date that
02:43:02 4 from 1744 to 1748, but at least from the North
02:43:07 5 American perspective it's usually dated from
02:43:11 6 1739 to 1748?

02:43:17 7 A. Well, I will leave it at that
02:43:24 8 because I've used 1742 to 1748, so it may depend
02:43:29 9 on whether you look at official declarations by
02:43:32 10 the Metropolis against other European powers,
02:43:34 11 and on the ground hostilities that may begin
02:43:39 12 before the war is officially declared, that's
02:43:41 13 what the case for the Seven Years' War, it
02:43:44 14 started in 1755, but the official declaration --
02:43:46 15 or maybe even 1754 in North America, but the
02:43:51 16 official declaration came in 1756, so it may be
02:43:55 17 something like that that is at play here.

02:43:58 18 Q. And in fact I was going to
02:43:59 19 mention the Seven Years' War because we've had
02:44:02 20 testimony about the different dates, the one
02:44:06 21 we've been working with as part of another
02:44:08 22 Agreed Statement of Fact is 1754 to 1763, you're
02:44:15 23 comfortable with that?

02:44:16 24 A. Absolutely.

02:44:17 25 Q. Just to jump back, the War of the

02:44:20 1 Austrian Succession, whenever it started, was
02:44:25 2 concluded by the Treaty of Aix-la-Chapelle?

02:44:30 3 A. Correct, in 1748. This sounds
02:44:42 4 like a quiz.

02:44:53 5 Q. I'm sorry, Professor --

02:44:53 6 A. No, no. It's okay.

02:44:53 7 Q. I just want to get the timeline
02:44:53 8 clear because we're going to be jumping around a
02:44:53 9 fair bit.

02:44:53 10 Baron Christian von Wolff, he was born
02:44:56 11 in what is now Poland and lived from 1679 to
02:44:57 12 1754?

02:45:00 13 A. Yes.

02:45:01 14 Q. And he published "The Law of
02:45:01 15 Nations According to the Scientific Method" in
02:45:01 16 1749?

02:45:07 17 A. Correct.

02:45:13 18 Q. And he was in fact a Professor of
02:45:16 19 mathematics at the University of Halle?

02:45:21 20 A. Yes.

02:45:22 21 Q. And after some problems that we
02:45:25 22 won't go into, ended up as Chancellor there?

02:45:30 23 A. Well, that's in the biographical
02:45:34 24 notice that was sent to me and I have no reason
02:45:36 25 to doubt that information. I just don't know

02:45:39 1 this by heart.

02:45:42 2 Q. Again, that's probably not all
02:45:45 3 that important but, again, it's placing these
02:45:51 4 people in their context that I'm trying to do.

02:45:59 5 I'm simply going to refer to him as
02:46:00 6 Jacques-Pierre, Marquis de la Jonquière because
02:46:00 7 I'm not sure how to pronounce "de Taffanel".

02:46:08 8 A. Very good.

02:46:08 9 Q. He lived from 1685 to 1752?

02:46:13 10 A. Yes.

02:46:14 11 Q. And he was Governor General of
02:46:16 12 New France 1749 to 1752?

02:46:21 13 A. Absolutely.

02:46:23 14 Q. And again from the DCB entry, he
02:46:28 15 started active duty as a midshipman at the age
02:46:31 16 of 12?

02:46:32 17 A. Yes. I'll just go back. The DCB
02:46:36 18 notice I think he was appointed earlier Governor
02:46:39 19 General but he was not able to be in New France
02:46:41 20 before 1749 but, yeah. So he was -- he was in
02:46:48 21 effect the Governor only from 1749.

02:46:52 22 Q. And he started with the Navy and
02:46:55 23 active service at the age of 12?

02:46:58 24 A. Yes.

02:47:06 25 Q. Ange Marquis Duquesne de

02:47:06 1 Menneville, and again I hope I'm getting that
02:47:06 2 right, he was born in 1700 and died in 1778?

02:47:15 3 A. Yes.

02:47:16 4 Q. And he was Governor General of
02:47:18 5 New France 1752 to 1755?

02:47:24 6 A. Correct.

02:47:26 7 Q. And he started off as a
02:47:28 8 midshipman at 13?

02:47:32 9 A. Yes, meaning it's in the notice.

02:47:38 10 Q. Yeah. And now let me just get
02:47:47 11 this back into play.

02:47:48 12 Pierre de Rigaud de Vaudreuil, the
02:47:48 13 last Governor of New France, he was born in 1698
02:48:03 14 and died in 1778?

02:48:06 15 A. Yes.

02:48:08 16 Q. And he was Governor General of
02:48:12 17 New France 1755 to 1760?

02:48:20 18 A. Correct.

02:48:21 19 Q. And he was in fact the son of
02:48:22 20 Pierre?

02:48:28 21 A. Yes, Governor from 1703 we said,
02:48:33 22 1703 to 1725. He was the son of the governor
02:48:38 23 who was apparently famous in New France.

02:48:40 24 Q. Well, he was there for quite a
02:48:42 25 long stretch.

02:48:43
02:48:46
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02:50:00
02:50:03

1 A. Yes.

2 Q. Emer de Vattel, born in 1714 died
3 in 1767?

4 A. Yes.

5 Q. And he published "The Law of
6 Nations" or "Principles of Law of Nature Applied
7 to the Conduct and Affairs of Nations and
8 Sovereigns" in 1758?

9 A. Correct.

10 Q. And the last few, I don't think
11 they're going to be controversial. Fall of
12 Quebec City, September 18, 1759?

13 A. Correct.

14 Q. And the capitulation of Montreal,
15 September 18, 1760?

16 A. Correct.

17 Q. And finally Treaty of Paris,
18 February 10th, 1763?

19 A. Correct. All pretty exact day of
20 the month but, you know, this seems really
21 correct.

22 Q. I have noticed in trying to work
23 this stuff out that you tend to have whole
24 bundles of agreements with slightly different
25 dates so I'm just asking if that's approximately

02:50:06 1 right?

02:50:07 2 A. Yes.

02:50:12 3 Q. Well, I think that gives us a
02:50:13 4 kind of chronological background. I'd like to
02:50:17 5 move into the second area and these are going to
02:50:22 6 be the substantive ones.

02:50:25 7 I'm going to ask you some more
02:50:27 8 questions about methodology. I don't think that
02:50:32 9 anyone here doubts that the issue of methodology
02:50:35 10 is a very important one in both your report and
02:50:39 11 in Professor Morin's examination in-chief, but
02:50:44 12 I'd like to work a bit more into the methodology
02:50:47 13 issue.

02:50:50 14 Then I'm going ask you about
02:50:53 15 terminology, and again to give you proper
02:50:57 16 notice, two terms, of course, in terms of how
02:51:04 17 they were understood in the 16th, 17th and
02:51:06 18 18th century, again purely in that legal
02:51:12 19 historical context. I'm going to ask you some
02:51:15 20 more questions about this "ius gentium" this Law
02:51:26 21 of Nations.

02:51:27 22 A. Yes.

02:51:27 23 Q. And then after that I'm going to
02:51:28 24 ask you some questions, again in the context of
02:51:31 25 the period under consideration, about what

02:51:33 1 people meant by the word "sovereignty" at the
02:51:38 2 time. I hope we have an interesting discussion
02:51:48 3 that will also assist the court.

02:51:51 4 Well, let's start off with
02:51:53 5 methodology, and I'm afraid I'm going have to
02:51:57 6 get a reference book for the exhibit numbers.
02:52:15 7 I'd like to take you to an article, in this case
02:52:24 8 the title in the chart is in French, "Les
02:52:26 9 insuffisances d'une analyse purement historique
02:52:26 10 des droits des peuples autochtones", which I
02:52:33 11 think you'll allow me to translate as "The
02:52:37 12 inadequacies of a purely historical analysis of
02:52:40 13 the rights of the Indigenous peoples", is that
02:52:43 14 acceptable as a translation".

02:52:45 15 A. Yes.

02:52:58 16 Q. And I would like to go to
02:52:59 17 page 250 of the publication, PDF number 15. I'm
02:53:11 18 sorry, I should -- you are the author of this
02:53:18 19 document?

02:53:19 20 A. Correct.

02:53:20 21 Q. And it was published in 2003?

02:53:22 22 A. Correct.

02:53:29 23 Q. If we move the screen down a
02:53:30 24 little bit more, I would like to take your
02:53:46 25 attention the first sentence under, "La

02:53:49 1 Maximisation Des Éléments Historiques"?

02:54:00 2 A. Yes.

02:54:01 3 Q. And I'll try translating the
02:54:02 4 first two sentences and you can tell me if I've
02:54:07 5 got it more or less right, and then I'll ask you
02:54:11 6 a couple of questions about it.

02:54:15 7 A. All right.

02:54:16 8 Q. The interpretation of old
02:54:18 9 documents very often requires putting them in a
02:54:23 10 context that only historians can furnish, but
02:54:30 11 this contribution can sometimes have an
02:54:35 12 excessive influence on the judgment of judges
02:54:39 13 who blend together sometimes the impact of a
02:54:43 14 normative text and the practical preoccupations
02:54:48 15 of its authors. Is that roughly right?

02:54:54 16 A. I'll just say the influence on
02:54:57 17 the mind of the judges because, you said on the
02:54:59 18 judgment of the judges.

02:55:02 19 Q. Well "l'esprit", I will take that
02:55:07 20 as judgment. I will take that as a correction.

02:55:16 21 I have one question, it's also a
02:55:18 22 question of translation, the term "texte
02:55:20 23 normatif", or normative text. "Normative" is a
02:55:26 24 tricky word, at least in English, it may be more
02:55:30 25 clear-cut in French. But by a normative text

02:55:35 1 are you talking about a text that sets out what
02:55:38 2 should be as opposed to what is?

02:55:42 3 A. No. What I meant, but I will
02:55:45 4 concede it is not perfectly clear here, is a
02:55:52 5 legally normative text, or just let me say that
02:55:57 6 the reason why I do this is because we have
02:56:00 7 enactments, we have declarations of King, or
02:56:03 8 proclamations and edicts and ordinances, all
02:56:07 9 sorts of words. And just using the word
02:56:10 10 "legislation" seems anachronical so I tend to
02:56:14 11 use "normative" text to say that they have a
02:56:18 12 juridically-mandatory norm contained in it, but
02:56:23 13 it's not very clear from this sentence, I will
02:56:26 14 admit.

02:56:30 15 So I mean by this, what I'm referring
02:56:32 16 to, at least in my mind, is a legally-binding
02:56:35 17 text, and not normative text in the sense that
02:56:41 18 it is morally aspirational text.

02:56:47 19 Q. So in this case you mean legally
02:56:50 20 binding?

02:56:51 21 A. Yes.

02:56:51 22 Q. And then on PDF page 16, if we go
02:57:03 23 there, it's the first sentence under "La
02:57:17 24 perception de l'époque et la Proclamation
02:57:17 25 royale". And I'm going to attempt to translate

02:57:29 1 the first three sentences and then ask you a
02:57:32 2 couple of questions.

02:57:36 3 Beyond the reconstruction of those
02:57:39 4 events considered pertinent, the historical
02:57:43 5 method gives priority to the analysis of social
02:57:47 6 relations and the motivations and values that
02:57:52 7 guided or inspired the actors in the period
02:57:59 8 under study. In this respect --

02:58:03 9 A. Very good.

02:58:04 10 Q. Oh thank you.

02:58:08 11 From this perspective it's possible to
02:58:11 12 ask ones self, what was the conception of
02:58:17 13 colonial administrators and autonomous people.
02:58:20 14 But in the "domaine juridique", and I'm going to
02:58:25 15 ask you about that, the juridical domain there's
02:58:30 16 always a risk to give too much weight, or too
02:58:34 17 absolute a weight to the perceptions of these
02:58:38 18 individuals. Is that also roughly correct?

02:58:44 19 A. Yes.

02:58:47 20 Q. One of the things that I wanted
02:58:48 21 to ask about, and again it's a question of
02:58:52 22 problems with my French, you've talked about "le
02:58:55 23 domaine juridique" and elsewhere you've talked
02:59:01 24 about "jurist". We need I think to know, for
02:59:04 25 example, whether "jurist" is only judges? Is it

02:59:08 1 only judge and active lawyers? Does it include
02:59:11 2 law professors? Is it the judicial domain and
02:59:16 3 jurists? How far do they extend?

02:59:20 4 A. Okay. Well, here I'm discussing
02:59:22 5 the interpretation in the 20th century, in 21st
02:59:26 6 century of the Royal Proclamation. So the
02:59:31 7 juridical domain, or the legal field for me
02:59:35 8 would include all these actors, the legal
02:59:39 9 literature, the arguments of lawyers will
02:59:42 10 influence what the judge decide, and eventually
02:59:47 11 I compare to interpretation by judges of the
02:59:51 12 Royal Proclamation saying that some, in my view,
02:59:53 13 put too much emphasis on what the colonizers
02:59:57 14 hoped to achieve in the long run as opposed to
03:00:00 15 the text and the interpretation of the text
03:00:02 16 itself.

03:00:04 17 Q. The interpretation of the text in
03:00:06 18 the present?

03:00:07 19 A. Yes.

03:00:08 20 Q. Yeah. And one last quotation
03:00:15 21 from this article and then I'll try to wrap it
03:00:17 22 up with a couple of general questions. This is
03:00:20 23 page 252 of the publication, PDF 17, and it's
03:00:34 24 the first two sentences under "L'influence des
03:00:38 25 positions contemporaines".

03:00:49 1 The temptation of projecting our
03:00:51 2 values and our concerns into the past is
03:00:54 3 inherent in historical research even more than
03:00:59 4 historians, jurists are past masters of the art
03:01:05 5 of pulling out an extract from its context in
03:01:08 6 order to appropriate it and to give it a new
03:01:12 7 meaning.

03:01:14 8 Did I get that roughly right?

03:01:16 9 A. Yes.

03:01:18 10 Q. So to put these all together, I
03:01:20 11 think you would agree then that when you're
03:01:24 12 dealing with matters of history before the court
03:01:28 13 there's always a tension between, as you were
03:01:33 14 explaining to my friend, the interest of the
03:01:35 15 historians who want to know about who was doing
03:01:39 16 what when and, above all, why in the context of
03:01:42 17 the time, and the jurists who want to look at
03:01:47 18 the past as a way of addressing present-day
03:01:50 19 problems. Is that a fair summary?

03:01:58 20 A. Yes, that's a fair summary. But
03:01:59 21 I would want to add a caveat to that that good
03:02:03 22 legal historians should overcome as much as
03:02:07 23 possible these problems understanding what the
03:02:09 24 historians can provide, the information about
03:02:11 25 the context and the motivations and how it can

03:02:13 1 explain our understanding of something that may
03:02:15 2 not be clear, and making sure that you try to
03:02:22 3 understand the meaning of the text for the
03:02:24 4 contemporaries themselves.

03:02:27 5 Then you have another point which is,
03:02:29 6 is this interpretation sustainable today? If
03:02:36 7 you are looking at the Royal Proclamation you
03:02:39 8 may look at how it was understood at the time
03:02:41 9 and what it should mean today, and that's for
03:02:43 10 the courts to do.

03:02:45 11 Q. One of the reasons I've been
03:02:46 12 trying to get this clear is we, as you know,
03:02:49 13 have had other legal historians as witnesses in
03:02:52 14 this case who have written about this tension,
03:02:56 15 and I just wanted to make it clear for the
03:02:58 16 record that you identify the same tension in
03:03:02 17 more or less the same terms. I wanted to get it
03:03:05 18 in your own words rather than putting somebody
03:03:07 19 else to you.

03:03:08 20 This way I hope that Your Honour will
03:03:11 21 be able to compare apples with apples so I'm
03:03:20 22 just explaining why I ask those questions.

03:03:22 23 A. Yes. Well, I was unaware -- I
03:03:24 24 haven't seen the list of the expert witnesses --
03:03:30 25 expert witness, sorry, so I cannot comment on

03:03:33 1 what they said and what their position is, but I
03:03:37 2 think what you said about my paper and my
03:03:39 3 position is correct.

03:03:42 4 Q. Thank you. I'd like to -- still
03:03:44 5 within the context of methodology I'd like to
03:03:48 6 look at again some issues from your report, one
03:04:00 7 of which my friend has already touched on but I
03:04:03 8 think I would like to get clarified because I'm
03:04:06 9 sure that -- so that I can understand it and
03:04:10 10 there's no ambiguity.

03:04:12 11 There is a number of places in your
03:04:15 12 report, and I will take you to some of them,
03:04:20 13 where you use terms like "majority", "most",
03:04:28 14 "most important". So I'm going to take you
03:04:32 15 through some of those examples. Hello, did I
03:04:37 16 just --

03:04:38 17 A. No, probably someone was
03:04:39 18 preparing to put up a document.

03:04:40 19 Q. Okay. I'd like to first of all
03:04:43 20 go to your report, which is Exhibit 4929, and I
03:05:04 21 would like to go to page 9, PDF 9 of 86. And if
03:05:27 22 we could go down a little bit further? This is
03:05:56 23 PDF page 9 of the report. If we can go there
03:06:34 24 first?

03:06:34 25 A. Is that what you were looking

03:06:35 1 for?

03:06:35 2 Q. Yes. "Majority" is an
03:06:39 3 interesting word, and you explained to my friend
03:06:43 4 how you arrived at that. "Majority" to my mind
03:06:50 5 is a straightforward, objective, quantitative
03:06:53 6 fact, 50 percent plus 1.

03:06:56 7 I'm trying to work out, on the basis
03:07:05 8 of your report, how it is you said the majority
03:07:06 9 of the authors. Did you compile a list of all
03:07:09 10 the authors from the period that's relevant to a
03:07:15 11 particular French action and decide that
03:07:17 12 50 percent plus 1 of them had this particular
03:07:22 13 view?

03:07:27 14 A. No, that would be very difficult.
03:07:28 15 Because if we're talking about the authors on
03:07:31 16 the Law of Nations, or if you're talking about
03:07:35 17 official documents that empower governors, or
03:07:37 18 representatives of the King to go and settle in
03:07:46 19 New France it's hard to arrive at a rough number
03:07:49 20 and -- or a precise number, sorry.

03:07:51 21 If you want to have a precise
03:07:54 22 percentage you need to have a precise database,
03:07:56 23 if I may put it that way, or a list of authors
03:07:58 24 that you review.

03:08:00 25 Now, for the Law of Nations in my book

03:08:02 1 of 1997 there are many other authors that I do
03:08:05 2 not quote that don't really discuss the issue
03:08:10 3 and seem to agree in general with Grotius and
03:08:13 4 Pufendorf, but without providing information on
03:08:19 5 their view about Indigenous peoples rights. So
03:08:23 6 we end up with a smaller number as opposed to
03:08:25 7 the scholacists, who are very numerous writing
03:08:27 8 in 16th century in Spain. So it's hard to have
03:08:31 9 a total number of authors; and then some will
03:08:35 10 have brief comments, some will have much more
03:08:37 11 elaborate discussions. So in the end it becomes
03:08:39 12 a qualitative assessment.

03:08:42 13 As I said for territory rights, I've
03:08:46 14 never denied that there were strong
03:08:49 15 disagreements among authors. For the official
03:08:52 16 documents of the French expansion I think it's
03:08:55 17 only in the 16th century that you see a
03:08:58 18 reversion to a Spanish style of legal documents
03:09:02 19 authorizing outright conquest or subjugation.
03:09:06 20 And from the 16th century the policy is pretty
03:09:12 21 steady and remains the same, although sometimes
03:09:14 22 it's specifically spelled out, sometimes it's
03:09:17 23 more implicit in the documents or not really
03:09:20 24 addressed in the documents.

03:09:25 25 Q. So you'd agree that when you use

03:09:26 1 terms like "majority" and "more" it's
03:09:28 2 qualitative rather than arithmetically
03:09:32 3 quantitative?

03:09:33 4 A. Yes, I would agree.

03:09:34 5 Q. I just wanted to get that clear.

03:09:37 6 And I hope I have this right, if we
03:09:39 7 could have page 12, PDF 12? And here the first
03:09:51 8 sentence of that paragraph here:

03:09:55 9 "As for the second issue, the
03:09:58 10 most important authors (the Spanish
03:10:02 11 Scholastics, Grotius, Pufendorf,
03:10:11 12 Wolff, and Vattel) all agreed that
03:10:15 13 primitiveness was not a ground for
03:10:18 14 involuntary subjection."

03:10:22 15 Again I just wanted to ask,
03:10:24 16 methodologically speaking, what were your
03:10:27 17 criteria for deciding that these were the most
03:10:29 18 important authors?

03:10:31 19 A. Well, if you take any book that
03:10:34 20 studies the history of the Law of Nation through
03:10:36 21 its authors the ones that will be considered the
03:10:40 22 more influential, the most-often quoted, would
03:10:45 23 be Vitoria and some of his followers, and
03:10:48 24 Grotius and Pufendorf and Vattel, and there are
03:10:56 25 other ones that may be important but does not

03:10:59 1 really discuss the issue.

03:11:00 2 And the one that would oppose this
03:11:04 3 view and the ones that were famous and whose
03:11:08 4 names come often enough in the literature, so my
03:11:12 5 criteria is this kind of scholarly consensus of
03:11:17 6 who were the most influential authors in these
03:11:20 7 days. And among those who discuss primitiveness
03:11:24 8 I find that there is a very large group, and for
03:11:27 9 more me the most important one, who discuss --
03:11:32 10 who agree that primitiveness was not a ground
03:11:34 11 for involuntary subjection.

03:11:38 12 Q. And when you talk about the
03:11:39 13 "scholarly consensus" you're talk talking about
03:11:42 14 the modern scholarly consensus?

03:11:44 15 A. Yes, yes.

03:11:45 16 Q. Wanted to get that clear.

03:11:46 17 A. Yes.

03:12:04 18 Q. And I would like to go now to
03:12:06 19 page 13, PDF 13. Starting at the -- in the
03:12:24 20 paragraph "In other words", and the sentence I'm
03:12:27 21 interested in begins:

03:12:30 22 "It should be pointed out that
03:12:32 23 Lescarbot's [...]"

03:12:37 24 And I'm going to shrink it because I
03:12:40 25 can't make out the text.

03:12:43 1 "[...] Lescarbot's outright
03:12:46 2 rejection of the Law of Nations was
03:12:48 3 based on the supposed priority given
03:12:50 4 to the 'Children of God'. This view
03:12:54 5 was rejected by the vast majority of
03:12:58 6 Spanish theologians or lawyers who
03:13:02 7 discussed this issue".

03:13:09 8 There are two questions I'd like to
03:13:11 9 ask about that comment. Again when you talk
03:13:12 10 about the vast majority of Spanish theologians
03:13:16 11 or lawyers here the majority is a qualitative
03:13:20 12 rather than a quantitative modifier?

03:13:24 13 A. Yes.

03:13:25 14 Q. Now, I'm quite interested in
03:13:27 15 Lescarbot's having rejected the Law of Nations.
03:13:31 16 I in fact would like to ask you -- ask
03:13:34 17 Ms. Ramlochun to take us to Lescarbot's "History
03:13:43 18 of New France", which should be Exhibit 4945,
03:13:48 19 and I would like to go to PDF page 5?

03:14:00 20 THE COURT: Just for the record,
03:14:00 21 Mr. McCulloch is referring to his document
03:14:04 22 Clerk, whose name is otherwise not on the record
03:14:09 23 I don't believe, when he asks for her to post
03:14:12 24 the document. Please go ahead.

03:14:16 25 MR. McCULLOCH: I'm sorry, it's

03:14:17 1 Ms. Ramlochun.

03:15:09 2 BY MR. MCCULLOCH:

03:15:09 3 Q. And if you could move down?

03:15:11 4 Okay, there we are. This is the title page of
03:15:19 5 at least the 1613 edition of Lescarbot's
03:15:24 6 "History of New France"?

03:15:29 7 A. Yes, that seems correct.

03:15:33 8 Q. And you'll note just above the
03:15:34 9 highly decorative motif at the bottom there's
03:15:38 10 the Phrase "Avec Privilege Du Roy"?

03:15:46 11 A. Yes, that's correct.

03:15:47 12 Q. And I would -- again because of
03:15:48 13 the technicalities I might get quite wrong, but
03:15:51 14 "Licensed by the King"?

03:15:55 15 A. Yes.

03:15:57 16 Q. Not approved by the King but
03:15:59 17 licensed by the King, right?

03:16:01 18 A. Yes.

03:16:02 19 Q. And that would indicate that
03:16:06 20 someone somewhere in the court of, I think we're
03:16:11 21 just from Henry IV to Louis XIV, someone
03:16:18 22 somewhere in the court at least pretended to
03:16:22 23 have read this book?

03:16:24 24 A. Yes, that would be the
03:16:26 25 assumption.

03:16:30 1 Q. And I don't believe that in your
03:16:32 2 report that you give evidence of court
03:16:38 3 circulation for any of the other jurists,
03:16:46 4 authors, that you mention, certainly not for
03:16:50 5 Grotius, not for Pufendorf, not even for
03:16:55 6 Vitoria, not for Wolff, not for Vattel, is that
03:17:00 7 correct?

03:17:01 8 A. Yeah, that is correct.

03:17:06 9 Q. So this is the one that we can
03:17:08 10 say somebody in the Royal circle, at the period
03:17:11 11 where the French are really becoming active in
03:17:15 12 New France, we're talking about the early days
03:17:18 13 of Champlain and Roberval, that we mentioned
03:17:23 14 earlier, this is what they had in front of them,
03:17:26 15 or at least that you can claim was part of the
03:17:29 16 intellectual environment? Just to try to pin
03:17:32 17 that down.

03:17:34 18 Could we go to the same document,
03:17:37 19 pages 8 to 9, PDF? Keep going to the bottom of
03:17:54 20 that page. Okay. Hold on a second. Stop.

03:17:59 21 THE COURT: Mr. McCulloch, could your
03:18:01 22 assistant please remove the purple box which is
03:18:04 23 generate by the computer and not part of the
03:18:06 24 document? Thank you.

25

1 BY MR. MCCULLOCH:

2 Q. At the very last sentence at
3 page 8 and on to the beginning of 9, again
4 starting at, "Et au moyen de ce pourroit prendre
5 [...]", I'm going to again try a translation and
6 you can tell me if I'm close.

7 And by this means could establish a
8 religion -- the Christian religion over there.
9 Since certainly it's very far advanced and the
10 matter has been done. In the consideration
11 of --

12 A. Um, can we do it sentence by
13 sentence?

14 Q. Okay, sorry.

15 A. Okay. I would suggest, not
16 having done this in advance, but I would suggest
17 by this means the Christian religion could take
18 root overseas or abroad, as certainly it would
19 have been much advanced if such a thing had been
20 done.

21 Q. And the next sentence, and the
22 consideration of religion and the establishment
23 of a country from which France can take a profit
24 and glory, deserves well that those who inhabit
25 it enjoy fully and entirely the fruits that come

03:19:57 1 from that land since they contribute nothing
03:20:02 2 to -- with this design for the comforting of
03:20:11 3 businessmen which, at the risk of their lives
03:20:15 4 and their -- their financial means, have
03:20:21 5 discovered by all of this so much golden shores
03:20:25 6 that -- and deep earth where never
03:20:30 7 Christianity -- a Christian has been. Did I get
03:20:34 8 that closer?

03:20:35 9 A. No, I think there are some things
03:20:44 10 I would word differently. I will start again
03:20:45 11 with the sentence because otherwise I think it
03:20:48 12 will be too cumbersome.

03:20:50 13 So my version would be, and the
03:20:52 14 considering of religion and the establishment of
03:20:54 15 a country from which France may draw profit and
03:20:59 16 glory deserves much better than that those who
03:21:05 17 inhabit it enjoy -- the wording in French is
03:21:14 18 strange so I have to stop here. So it deserves
03:21:18 19 much better than those that inhabit it will
03:21:25 20 enjoy fully entirely the fruits that are drawn
03:21:30 21 from this country, because no one has
03:21:34 22 contributed to this endeavour, and to relieve
03:21:42 23 the business people, those who at the risk of
03:21:49 24 their lives and of their means have discovered
03:21:59 25 overseas the Maritime overtures and the

03:22:04 1 inland -- hmm -- I have a problem here.

03:22:15 2 Q. Yeah.

03:22:15 3 A. So they have been in the
03:22:17 4 Maritimes overseas and deeply inside the land
03:22:22 5 where no other Christian ever has been.

03:22:30 6 Q. I think we -- we'll skip over the
03:22:33 7 next sentence because it's also, convoluted and
03:22:36 8 start at "C'a esté une plainte faite de tout
03:22:42 9 temps [...]".

03:22:47 10 This is a complaint that's been made
03:22:50 11 all the time, that individual considerations
03:22:51 12 have ruined the general public interest and thus
03:22:55 13 it is to be feared that something -- that
03:23:00 14 nothing will arise from the affairs on these new
03:23:03 15 lands if we neglect it and if we do not support
03:23:08 16 those who, with an unshakeable resolution,
03:23:12 17 expose themselves for the good, the honour and
03:23:17 18 the glory of France, and for the exultation of
03:23:22 19 the name of God and his church.

03:23:26 20 Is that what you meant by the -- I'm
03:23:29 21 sorry to have taken you through such a
03:23:32 22 convoluted sentence, but is the last what you
03:23:35 23 meant by the "priority of the children of God"
03:23:39 24 in the sense that the purpose of this project is
03:23:45 25 the glory and profit of France and of God -- in

03:23:50 1 the name of God and his church?

03:24:01 2 A. Let me go back to that sentence.
03:24:19 3 You are trying to establish a relationship
03:24:21 4 between this vision of the glory and -- I will
03:24:24 5 agree to this extent, Lescarbot is always the
03:24:30 6 propounder and defender of the development of
03:24:32 7 New France for the glory of France and the
03:24:37 8 exultation of God and of his church.

03:24:40 9 Now, as for the Law of Nations and the
03:24:43 10 children of God, I think that religion
03:24:48 11 authorizes the French to settle territory if
03:24:51 12 they want to improve the land. So he has the
03:24:55 13 vision that any land that is settled, improved
03:24:59 14 and cultivated is land that could be part of
03:25:04 15 their territory under the Law of Nations.

03:25:06 16 And, as I said, I think this is the
03:25:08 17 old controversy where reverting -- while we are
03:25:13 18 at this if you look, for instance, at Vitoria or
03:25:21 19 Grotius --

03:25:22 20 Q. Actually we're going to be
03:25:23 21 getting to Vitoria and Grotius in a little bit,
03:25:29 22 because Lescarbot, I think you will agree, was
03:25:35 23 actually involved in New France?

03:25:36 24 A. Yes, absolutely.

03:25:37 25 Q. And he was also a lawyer,

03:25:38 1 correct?

03:25:39 2 A. Correct.

03:25:44 3 THE COURT: Mr. McCulloch, it need not
03:25:48 4 be right now but sometime in the next short
03:25:50 5 while can you tell me a logical time for our
03:25:53 6 afternoon break?

03:26:10 7 MR. McCULLOCH: Since I have decided
03:26:11 8 that because of Mr. Morin's examination in-chief
03:26:13 9 was so lucid I'm going to cut out some questions
03:26:17 10 and make now a good time.

03:26:19 11 THE COURT: All right. Well, that's
03:26:21 12 up to you, sir. If now is not interrupting your
03:26:24 13 cross-examination we'll take the afternoon
03:26:26 14 break.

03:26:26 15 I'm inclined, as I often do in court,
03:26:29 16 to say 15 minutes, but do counsel need longer
03:26:32 17 than that? Because if you do that's fine.
03:26:35 18 Ms. Pelletier is shaking her head, Ms. Lapan
03:26:38 19 shaking her head. Professor Morin, are you
03:26:43 20 content with a 15 minute break?

03:26:45 21 THE WITNESS: Absolutely.

03:26:45 22 THE COURT: Madam Reporter?

03:26:45 23 THE COURT REPORTER: Yes, Your Honour.

03:26:49 24 THE COURT: We will break at this time
03:26:51 25 for 15 minutes.

03:26:51 1 -- RECESSED AT 3:26 P.M. --

03:26:51 2 -- RESUMED AT 3:44 P.M. --

03:44:57 3 THE COURT: Thank you. Mr. McCulloch,
03:44:59 4 before you begin again, at the outset of your
03:45:05 5 cross-examination you went through a relatively
03:45:07 6 lengthy list of names of historical people with
03:45:13 7 Professor Morin, and I appreciate that those
03:45:17 8 names came out of a document the content of
03:45:20 9 which was not agreed.

03:45:23 10 Ms. LEPAN has got her hand up.

03:45:26 11 MS. LEPAN: Your Honour, I would ask
03:45:27 12 that we perhaps wait for a few minutes. I
03:45:29 13 understand that Mr. Feliciant is not hearing or
03:45:32 14 seeing anything. I think he's having some
03:45:35 15 technical difficulties.

03:45:37 16 THE COURT: Okay. I see his name on
03:45:40 17 my screen but there is no --

03:45:44 18 MS. LEPAN: He's advised me that he
03:45:46 19 has to rejoin the meeting, so perhaps if there's
03:45:49 20 just administrative matters you could deal with
03:45:53 21 those with Professor Morin?

03:45:53 22 THE COURT: Well, that is what this is
03:45:54 23 as it happens, Ms. LEPAN. So we'll deal with it
03:45:57 24 and hopefully Mr. Feliciant will be back.

03:46:06 25 The administrative matter is this,

03:46:06 1 Mr. McCulloch, being that you have a typed list
03:46:09 2 of all of those individual people that I think
03:46:11 3 would be of great assistance to Madam Reporter,
03:46:15 4 I wonder if other counsel would agree,
03:46:17 5 Ms. Pelletier and Ms. Lapan, that Mr. McCulloch
03:46:21 6 could provide an edited version of that piece of
03:46:24 7 paper, removing all of the other content and
03:46:27 8 leaving only the list of names and he could
03:46:29 9 provide that directly to Madam Report?

03:46:32 10 Ms. Pelletier, is that acceptable to
03:46:32 11 you?

03:46:38 12 MR. PELLETIER: That's acceptable.
03:46:38 13 Thank you, Your Honour.

03:46:39 14 THE COURT: And obviously
03:46:40 15 Mr. McCulloch can cc Ms. Pelletier and
03:46:44 16 Ms. Lapan.

03:46:45 17 Ms. Lapan, is that acceptable to you?

03:46:45 18 MS. LEPAN: Yes, it is, Your Honour..

03:46:50 19 THE COURT: All right. How are we
03:46:51 20 doing with getting Ms. Feliciant back?
03:46:53 21 Ms. Roberts can you help us with that?

03:46:58 22 MS. ROBERTS: He has logged out and
03:46:59 23 has not returned yet, but I take it that should
03:47:00 24 be momentarily.

03:47:01 25 THE COURT: Let's just pause for a

03:47:02 1 moment. Hopefully he will be able to rejoin.

03:47:50 2 MS. ROBERTS: Would he be able to dial
03:47:53 3 in by phone?

03:47:55 4 MS. LEPAN: Yes, he would.

03:47:56 5 THE COURT: Ms. Lepan, can you ask him
03:47:58 6 to dial in by phone?

03:48:00 7 MS. LEPAN: Yes, I've done so, Your
03:48:02 8 Honour.

03:48:03 9 THE COURT: We'll just wait for
03:48:04 10 another moment as I'm sure he'll be with us
03:48:05 11 soon.

03:48:05 12 MS. LEPAN: Thank you. I believe he
03:48:05 13 will be with us momentarily. His screen
03:48:05 14 currently says that the meeting should be
03:48:05 15 starting in a few minutes.

03:50:22 16 I understand that it's not working.
03:50:22 17 We're content to move forward and have Liz work
03:50:22 18 out the technical issues, if that's acceptable.

03:50:25 19 THE COURT: Thank you, Ms. Lepan,
03:50:25 20 that's very helpful. I'm sure that
03:50:25 21 Ms. Roberts will be able to assist him. And in
03:50:25 22 the meantime appreciate that we can proceed.
03:50:25 23 Please go ahead, Mr. McCulloch.

03:50:33 24 BY MR. MCCULLOCH:

03:50:33 25 Q. Thank you, Your Honour.

03:50:34 1 As I said at the beginning, my next
03:50:36 2 topic is the question of terminology. And I'm
03:50:41 3 going to be starting with some questions about
03:50:43 4 the "ius gentium" the Law of Nations, not so
03:50:48 5 much as you've defined it already but the -- a
03:50:52 6 sense of now it actually worked.

03:50:58 7 So I'd like to ask by asking
03:51:00 8 Mr. Ramlochun to bring up Exhibit 4946, which
03:51:06 9 used to be SC2121. It's -- well, the overall
03:51:12 10 text is "Property Rights, Land and Territory in
03:51:13 11 the European Overseas Empires", but I believe it
03:51:20 12 has been entered as "Ownership and Indigenous
03:51:23 13 Territories in New France, 1603-1760".

03:51:30 14 THE COURT: What was the Exhibit
03:51:31 15 number, Mr. McCulloch?

03:51:33 16 MR. MCCULLOCH: The Exhibit number is
03:51:35 17 4946.

03:51:37 18 THE COURT: I see it, thank you.
03:51:38 19 Please go ahead.

03:51:40 20 BY MR. MCCULLOCH:

03:51:41 21 Q. The "Ownership of Indigenous
03:51:42 22 Territories" is the title of the chapter which
03:51:46 23 Professor Morin contributed to the overall
03:51:51 24 collection.

03:51:55 25 So if we could go to -- I'm just

03:51:59 1 scrolling down PDF 713, page 23 of the text.

03:52:15 2 And I am going have to move the gallery. If we
03:52:24 3 could go to the paragraph that starts, "To
03:52:30 4 return to the Law of Nations [...]".

03:52:44 5 A. Yes.

03:52:44 6 Q. And, Professor Morin, you
03:52:45 7 recognize this as your own work, correct?

03:52:47 8 A. Correct.

03:52:48 9 Q. And it was published in 2014 I
03:52:49 10 believe?

03:52:50 11 A. Yes.

03:52:57 12 Q. I would like to go to the second
03:52:59 13 sentence in that paragraph. Well, actually we
03:53:04 14 want to go -- if you can take a look at the
03:53:06 15 whole paragraph I'd like to ask you about the
03:53:10 16 first two sentences. I don't think I need to
03:53:13 17 read them out.

03:53:15 18 A. No.

03:53:21 19 Q. So the concept of "terra
03:53:22 20 nullius", that is the idea that Indigenous
03:53:29 21 people didn't count when it came to the
03:53:35 22 occupation of law, wasn't a legal term until the
03:53:39 23 19th century?

03:53:40 24 A. Yes, that is correct.

03:53:43 25 Q. But you go on to say that all the

03:53:45 1 colonial powers act as if it were true, they
03:53:50 2 just handed out lands without containing (sic)
03:53:52 3 any kind of consent. That was their practice,
03:53:58 4 that's right?

03:54:01 5 A. Yes. I've always said that
03:54:03 6 they -- in my report I will say that this is not
03:54:09 7 terra nullius, it may the claim result in the
03:54:14 8 sense that there is no prior consultation or
03:54:15 9 negotiations that, in my view, the power to act
03:54:19 10 unilaterally could co-exist with Indigenous
03:54:22 11 legal orders as independent Nations which needed
03:54:25 12 to live somewhere, hence they had a territory.

03:54:28 13 So it may be the power to put an end
03:54:32 14 to these rights but these rights exist from the
03:54:35 15 beginning, so this is the distinction I make.

03:54:38 16 Q. And you go on to explain that
03:54:41 17 even if they did this legally that was far from
03:54:45 18 the case. What you're saying is they had the
03:54:49 19 power and legally, I assume here you mean
03:54:53 20 legally, according to the Law of Nations they
03:54:56 21 shouldn't have done it?

03:54:59 22 A. Well, I said however this was far
03:55:01 23 from indicate because they recognized that there
03:55:04 24 was a controversy, but there was no widely
03:55:09 25 accepted consent denying the legal right of

1 Indigenous people and their rights to hold land.

2 But in my report I always mention that if the
3 right to hold land, especially hunting grounds,
4 is very controversial.

5 If I may go on, "terra nullius" is
6 that they don't count, they don't exist legally,
7 they are only like the animal there.

8 In my view they are Nations,
9 independent and having territories where they
10 live, and the process of colonization may result
11 in these lands disappearing either through
12 violence or through negotiation as part of the
13 alliance and the French conception.

14 Q. But in short what this paragraph
15 says is the colonial powers acted as if there
16 were no Law of Nations?

17 A. No, that's not what I meant. Let
18 me re-read what you -- yeah, let me clarify it
19 then.

20 The Law of Nations did empower
21 colonization. All the authors that we discussed
22 said that the Europeans could go there to
23 Christianize or to commerce, and even -- we can
24 settle there and cultivate the lands. We have a
25 God given right to do this but we should not

03:56:43 1 harm the Natives, we should live peacefully with
03:56:46 2 them.

03:56:47 3 So for me saying that they have the
03:56:48 4 power to colonize is not the same thing as
03:56:51 5 saying that there are no rights or no rules that
03:56:54 6 apply.

03:56:55 7 Q. When you say "rules", and I think
03:56:59 8 you were getting to the very crux of the issue,
03:57:01 9 because sometimes you talk about rules,
03:57:06 10 sometimes you talk about obligations, sometimes
03:57:09 11 you talk about imperative policies. Without
03:57:11 12 taking you to your book on The Usurpation of
03:57:14 13 Indigenous Autonomy -- of Indigenous
03:57:19 14 Sovereignty, which I will be doing later, there
03:57:23 15 was no means by which the Law of Nations, as
03:57:28 16 understood between the 16th and the middle of
03:57:32 17 18th century, could be enforced?

03:57:37 18 A. That's not my understanding. My
03:57:39 19 understanding is that the remedies, if
03:57:43 20 negotiation failed, was war, and the authors are
03:57:46 21 very clear about that. And war was the only --

03:57:50 22 Q. Well, perhaps we will go --

03:57:52 23 A. But, I mean, the way it is
03:57:56 24 enforced is through war, and those who have a
03:58:00 25 just cause hopefully will win. And I found the

03:58:03 1 French authors say sometimes God will punish
03:58:06 2 somebody who stays within his rights and that
03:58:10 3 state will be punished by God for other reasons
03:58:12 4 so that it will lose to war.

03:58:15 5 So the ultimate arbiter in the Law of
03:58:18 6 Nations conflicts, if you can't settle the issue
03:58:21 7 through treaties, or arbitration, or whatever,
03:58:24 8 is war. And all the authors agree on this.
03:58:26 9 This is the ultimate sanction is the right to
03:58:30 10 self-remedy, because they live as if they were
03:58:33 11 under the law of nature. They have no
03:58:35 12 sovereign, there is no jurisdiction, so
03:58:37 13 enforcement is the last remedy, the last resort.

03:58:42 14 Q. Well, perhaps we will go to the
03:58:45 15 "Usurpation of Indigenous Sovereignty", it's
03:58:49 16 Exhibit 4947. Ms. Ramlochun, can you get that?
03:58:55 17 I believe it's SC2122.

03:59:03 18 And if you could go to pages 17 to 18
03:59:06 19 of the text, PDF 12 to 13. And the last
03:59:20 20 paragraph on PDF 12, page 17, it starts "L'es
03:59:24 21 juristes"?

03:59:29 22 A. Yes.

03:59:29 23 Q. Okay. And I'd like to go to the
03:59:35 24 second sentence.

03:59:38 25 A. Yes.

03:59:38 1 Q. Most of the time they, that being
03:59:40 2 the jurists, appeal to the conscience of the
03:59:48 3 Prince in order act as a counterweight to the
03:59:51 4 liberty of perception of which -- of
03:59:54 5 appropriation which the King -- the Prince
03:59:58 6 controlled.

04:00:07 7 A. No. Can we do it sentence by
04:00:07 8 sentence, otherwise I forget. But it would be
04:00:08 9 the margin of maneuver, "liberté d'affecter la
04:00:10 10 situation" is the liberty of affecting the
04:00:20 11 situation.

04:00:20 12 The jurists appeal to the conscience
04:00:21 13 of the Prince to provide a counterweight to the
04:00:25 14 liberty, to decide on what is best that the
04:00:32 15 Prince enjoys.

04:00:37 16 Q. And the next sentence, they seem
04:00:42 17 therefore on the moral sphere?

04:00:45 18 A. Yeah.

04:00:45 19 Q. Uhm-hmm.

04:00:48 20 So essentially the role of these
04:00:51 21 jurists is to appeal to the conscience of the
04:00:55 22 King?

04:00:56 23 A. Well, it refers to establish the
04:00:59 24 powers that they enjoy, which I was just
04:01:01 25 mentioning a few seconds ago. Like, if there's

04:01:04 1 injury and it has to be according to -- although
04:01:11 2 they can debate about just cause, but if someone
04:01:14 3 has been injured and the territory has been
04:01:16 4 affected, and citizens have been injured, the
04:01:20 5 injured party should address the assaulter and
04:01:26 6 try to find a remedy, but if it doesn't work the
04:01:29 7 ultimate issue is self-help in violence.

04:01:33 8 So that's the general framework, the
04:01:36 9 legal framework, which gives enormous power to
04:01:40 10 the sovereign or to the Prince to assess if
04:01:42 11 there's been a violation of their rights, and if
04:01:47 12 no satisfactory compensation has been offered
04:01:51 13 and then they may resort to war.

04:01:53 14 And during the conduct of war they
04:01:55 15 could enslave people, maybe not in Europe. So
04:01:58 16 it is very important to try and temper the
04:02:04 17 excessive powers they have under the Law of
04:02:06 18 Nations, but this comes second in these two
04:02:10 19 paragraphs.

04:02:11 20 Q. Let's focus in a little bit. Was
04:02:14 21 there an organized, co-ordinated international
04:02:18 22 body of jurists in the 16th century?

04:02:29 23 A. They were responding to each
04:02:30 24 other after they were published, and when we
04:02:32 25 speak of the Spanish scholacists somewhere in

04:02:35 1 Spain and Portugal, and others would be in the
04:02:38 2 Netherlands or Belgium in Spanish territory and
04:02:43 3 they were writing in Latin. So all over Europe
04:02:46 4 there was kind of a community of scholars but
04:02:49 5 they were not a community of international law
04:02:52 6 scholars. They were writing on all sorts of
04:02:55 7 issues.

04:02:56 8 Q. And you have already indicated
04:02:58 9 that you have no sense of how many scholars were
04:03:03 10 actively engaged in the Law of Nations in the
04:03:09 11 16th century or the 17th century or the
04:03:11 12 18th century?

04:03:12 13 A. No, I've never counted them. But
04:03:20 14 many of the books have been published in the
04:03:23 15 classics of international law in the early
04:03:25 16 20th century, and others have been translated
04:03:28 17 later for production, I would say it was more
04:03:31 18 abundant in the 16th century and is not as
04:03:35 19 important in the 17th and 18th century.

04:03:38 20 But we're speaking maybe of 30
04:03:41 21 well-known authors, maybe less. I have tried to
04:03:47 22 count them.

04:03:49 23 Q. Thirty authors over 250 years?

04:03:51 24 A. Yes, but that is just a rough
04:03:54 25 estimation.

04:03:55 1 Q. Okay. I want to explore this
04:04:06 2 whole question about appealing to the conscience
04:04:08 3 of the Prince.

04:04:10 4 If you were the King of France, let's
04:04:13 5 take Louis XIV, since he's around for a long
04:04:21 6 time at the crucial period, are you more likely
04:04:24 7 to listen to a Dutch lawyer or your own
04:04:28 8 confessor when it comes to matters of
04:04:30 9 conscience?

04:04:31 10 A. Well, that's interesting because
04:04:36 11 I cannot say what would be the influence of the
04:04:39 12 confessor on matters of conscience, but we get
04:04:43 13 all -- what's maybe not exemplary in his private
04:04:48 14 life, I shall say, and was maybe a ruler that
04:04:50 15 was very harsh towards those who opposed him.
04:04:54 16 So I'm not sure if confessor had such a strong
04:04:59 17 influence on him. But this being said, and I
04:05:07 18 forgot the other point.

04:05:09 19 The other point is -- there is an
04:05:11 20 excellent example of the influence of Grotius,
04:05:20 21 because I discuss this in my 2010 paper. There
04:05:21 22 was a religious man who was in charge of
04:05:24 23 teaching the dauphin, the dauphin was like the
04:05:27 24 Prince of Wales, he was the heir to the throne
04:05:31 25 of France, and this is Hbdé Fleury. And he

04:05:34 1 wrote detailed notes on legal issues really on
04:05:37 2 the governance of the kingdom, but there were
04:05:39 3 many legal issues. And he spent about 50 pages
04:05:43 4 on the law of war and peace quoting extensively
04:05:48 5 Grotius.

04:05:48 6 I should add, of course, these notes
04:05:50 7 were not published when he was living because
04:05:52 8 this would have been confidential, but they were
04:05:56 9 published I think sometime in the 1760s when
04:05:59 10 it didn't seem to be problematic to publish
04:06:03 11 these notes of the teacher of the future King of
04:06:06 12 France, who referred abundantly to Grotius and
04:06:09 13 mentioned specifically Indigenous peoples and
04:06:12 14 the right to make war and peace with Indigenous
04:06:15 15 peoples.

04:06:16 16 Q. So you're saying that Grotius'
04:06:17 17 notes on war and peace discussed explicitly the
04:06:22 18 idea of Indigenous sovereignty?

04:06:28 19 A. Yes. Grotius' book did discuss
04:06:30 20 the issues that I explained in my book.

04:06:33 21 And the teacher of the dauphin, the
04:06:36 22 future King of France, when expounding the
04:06:39 23 powers of the King and the rules of war and
04:06:41 24 peace referred extensively to Grotius and agreed
04:06:45 25 most of the time with him, and did discuss the

04:06:48 1 situation of Indigenous peoples from the
04:06:51 2 perspective of the right to make war on them and
04:06:55 3 how to behave.

04:06:56 4 It was a kind of harsher testament
04:07:03 5 that especially those who were fierce warriors
04:07:05 6 needed to be exterminated, so it was not
04:07:07 7 something positive for Indigenous peoples but
04:07:09 8 they were mentioned as being within the
04:07:10 9 framework of war and peace.

04:07:13 10 Q. And one final question arising
04:07:15 11 from this extract. And as you've pointed out
04:07:17 12 elsewhere both in your report and your
04:07:20 13 testimony, not all of these jurists over these
04:07:26 14 250 years agreed, there were conflicts and that
04:07:32 15 in fact they were highly controversial on some
04:07:40 16 topics?

04:07:40 17 A. Yes.

04:07:41 18 Q. So, in short, the Prince could
04:07:43 19 choose to listen to one side or the other,
04:07:46 20 right?

04:07:46 21 A. Well, not always but in many
04:07:51 22 tense situations, yeah, that could have been the
04:07:54 23 case.

04:07:57 24 But the Law of Nations could also be
04:07:58 25 applied by courts in some circumstances by the

04:08:01 1 law of prices. If a ship was captured was it
04:08:06 2 during the war or during the peace? Was it a
04:08:07 3 neutral ship or neutral cargo? All these issues
04:08:10 4 would depend on whether the war had been
04:08:14 5 declared, had come to an end, whether a Nation
04:08:17 6 was allied or not.

04:08:19 7 So in these situations, although the
04:08:22 8 application of these rules may be very
04:08:25 9 controversial we see a legal framework under the
04:08:29 10 Law of Nations having very practical
04:08:31 11 consequences before the courts.

04:08:32 12 Now, that would be one of the few
04:08:34 13 examples where it's actually the courts deciding
04:08:37 14 this but, as I said, the basic framework would
04:08:40 15 be the Prince who decides whether self-remedy is
04:08:46 16 the only available option.

04:08:51 17 Q. So the subjects for which the
04:08:52 18 courts had jurisdiction were things like
04:08:55 19 privateers or naval law -- or admiralty law?

04:09:01 20 A. Yes.

04:09:08 21 Q. Nice practical areas of
04:09:09 22 international law.

04:09:10 23 I want to take you to another extract
04:09:13 24 from your report. I'd like Mr. Ramlochun to put
04:09:21 25 up Exhibit 4929, and it's page 12, PDF 12. And

04:09:43 1 if we could go to -- just a moment.

04:09:53 2 It's the last sentence in that
04:09:54 3 paragraph, the sentence that starts:

04:09:56 4 "As well treaties between
04:09:57 5 Christian and nonChristian peoples
04:10:00 6 were perfectly valid. In this regard
04:10:07 7 unequal treaties would save a
04:10:09 8 significant degree of authority and
04:10:11 9 military affairs and foreign relations
04:10:14 10 to a stronger power did not deprive
04:10:18 11 the weaker one of its international
04:10:21 12 sovereignty."

04:10:22 13 This is going to be my transit point
04:10:26 14 over to the second topic, that of sovereignty.

04:10:29 15 And just in terms of clarification, by
04:10:37 16 "international sovereignty" you do not mean a
04:10:39 17 sovereignty recognized by various Kings and
04:10:42 18 Princes in Europe, do you?

04:10:44 19 A. Well, here I'm talking about
04:10:47 20 nonChristian people, so their sovereignty could
04:10:51 21 be recognized without difficulty.

04:10:55 22 And I've been submitting in my report
04:10:58 23 that the status of allied Nations or enemies was
04:11:04 24 the status which carried with it, at least
04:11:06 25 external because I didn't specify in my report,

04:11:09 1 external sovereignty or independence, for me in
04:11:13 2 this context is synonymous as taking orders from
04:11:17 3 no one as a collective entity, as a nation and
04:11:23 4 having a defined territory.

04:11:28 5 Q. It looks like in fact we will be
04:11:29 6 getting into that topic in my next set of
04:11:32 7 questions, but I'm afraid I'm still a little
04:11:35 8 unclear about what you meant by "international
04:11:38 9 sovereignty".

04:11:40 10 I'm going to ask you some specific
04:11:42 11 questions that might perhaps clarify things.
04:11:47 12 Were Indigenous peoples parties to the Treaty of
04:11:55 13 Ryswick?

04:11:57 14 A. No.

04:11:57 15 Q. Were they parties to the Treaty
04:11:59 16 of Utrecht?

04:12:02 17 A. No.

04:12:02 18 Q. Were they parties to the Treaty
04:12:04 19 of Aix-la-Chapelle?

04:12:07 20 A. No.

04:12:08 21 Q. Were they parties to the Treaty
04:12:09 22 of Paris?

04:12:10 23 A. No.

04:12:12 24 Q. So as far as we can see in the
04:12:15 25 international sphere, and I may be -- in the

04:12:19 1 international sphere the Princes of Europe did
04:12:24 2 not consider them to be equal international
04:12:27 3 sovereigns?

04:12:30 4 A. Well, I see it as two planes.
04:12:34 5 And for me there are other examples, but the
04:12:38 6 Treaty of Utrecht is one where in these
04:12:41 7 international treaties between European powers
04:12:47 8 the rights of Indigenous people are clearly
04:12:51 9 recognized, and I discussed this at length in my
04:12:54 10 report, the article of the Treaty at Utrecht.

04:12:58 11 So there were --

04:12:59 12 Q. I agree about the Treaty --

04:13:06 13 A. -- in the Treaty of Utrecht,
04:13:07 14 1686, and even the Treaty of -- I'm sorry, the
04:13:13 15 1648 famous treaty that is said to have
04:13:16 16 recognized the separation of religion with --
04:13:22 17 Westphalia, the Treaty of Westphalia has some
04:13:26 18 references also to Indigenous people.

04:13:28 19 So in that sense for me they exist as
04:13:31 20 international actors, but there may be
04:13:35 21 agreements between European powers that may be
04:13:38 22 done differently than treaties with Indigenous
04:13:43 23 peoples, but there's nothing that says that one
04:13:45 24 is more international than the other at the
04:13:48 25 time.

04:13:48 1 Q. Yes, I'm just trying to struggle
04:13:51 2 with the distinction. You quite correctly
04:13:54 3 mention that the Treaty of Utrecht talked about
04:13:58 4 the freedom of certain Indigenous peoples to
04:14:00 5 move in certain ways, but -- and perhaps this
04:14:06 6 will best be developed in the next set of
04:14:09 7 questions. Acknowledgments of rights -- well,
04:14:11 8 "rights" is a bit of an anachronisms, of
04:14:15 9 practices is not -- is that, you are saying, the
04:14:18 10 same thing as international sovereignty?

04:14:22 11 A. Well, I say acknowledgment of
04:14:25 12 status. And, yes, in the Treaty of Utrecht I
04:14:29 13 would say rights. They have the right to travel
04:14:31 14 from territories to territories, which is
04:14:33 15 something that was strictly -- from colonies to
04:14:36 16 colonies, I'm sorry.

04:14:37 17 So this right to travel from one
04:14:39 18 colony to the other is granted to Indigenous
04:14:42 19 Nations and is absolutely denied to the
04:14:45 20 colonists themselves, it was strictly forbidden,
04:14:53 21 although it was enforced more in the breach than
04:14:56 22 anything else. But it was strictly forbidden to
04:15:00 23 trade between French and British colonies, or
04:15:01 24 British colonies and Spanish colonies.

04:15:03 25 So here the international status and

04:15:06 1 the rights of Indigenous Nations clearly appears
04:15:08 2 as being recognized although they're not party
04:15:11 3 to the treaty itself.

04:15:13 4 Q. Well, let's actually come to
04:15:17 5 grips with the second of the terms that I've
04:15:19 6 indicated I would like to get clarified, and
04:15:24 7 that's this whole question of how was
04:15:30 8 sovereignty understood at the time?

04:15:33 9 I'd like to start off with the
04:15:35 10 fundamentals which are, I may say, very well set
04:15:40 11 out in your book about "The Usurpation of
04:15:48 12 Indigenous Sovereignty".

04:15:49 13 I'd ask Ms. Ramlochun to bring up
04:15:53 14 Exhibit 4947 again, page 48 of the text, SC2122,
04:16:31 15 which is PDF page 43. And the very first
04:16:58 16 sentence under "L' Independance Autochtone"?

04:17:07 17 A. Yes.

04:17:07 18 Q. And rather than trying to
04:17:08 19 translate because it is a fairly complex
04:17:11 20 sentence, I'm going to ask you, does this say
04:17:18 21 that, at least in Grotius, the theory of the
04:17:22 22 state makes a distinction between two aspects of
04:17:27 23 the State? One is "imperium" or authority, and
04:17:36 24 the other is "dominium" which I think here might
04:17:40 25 be translated as possession?

04:17:45 1 A. Or dominion used to be the old
04:17:47 2 translation. It was a mixture of property or --
04:17:51 3 and control, it's hard for me to find the exact
04:17:54 4 equivalent but, anyway, professional. So
04:17:59 5 captures the idea.

04:18:02 6 Now, for the first part when Grotius
04:18:06 7 is writing at least in his book you don't find a
04:18:09 8 theory of the State as we find one today. And
04:18:15 9 the issues and the concepts that he really uses,
04:18:17 10 and the authors of the time, is "imperium",
04:18:20 11 authority over persons, and "dominion", over
04:18:24 12 property.

04:18:31 13 Q. That's exactly the distinction I
04:18:32 14 was struggling with. You've got rule over
04:18:35 15 people and dominion over property. Is that --

04:18:39 16 A. Yes.

04:18:40 17 Q. I think it's useful to understand
04:18:43 18 that. But you'd agree that that's the
04:18:47 19 17th century, even 18th century concept of the
04:18:51 20 State, or of authority rather? I'm asking
04:18:57 21 during what period was that distinction
04:19:00 22 considered a useful one?

04:19:04 23 A. Well, certainly in the 17th
04:19:08 24 century and the 18th century still, but you will
04:19:13 25 start to see the idea of the State as a moral

04:19:15 1 person with Wolff, and Vattel, although
04:19:20 2 physically on the consequences of what this
04:19:22 3 means. So the putting together of two concepts
04:19:30 4 starts with Wolff and Vattel.

04:19:33 5 Q. Actually I won't take you to the
04:19:34 6 page in your book, but you will agree that you
04:19:38 7 talked about the transition from the theologians
04:19:45 8 like Vitoria to the humanists like Gentilli and
04:19:50 9 Grotius?

04:19:51 10 A. Yes.

04:19:51 11 Q. So that there's a shift in the
04:19:53 12 philosophical underpinnings of thoughts about
04:19:57 13 sovereignty. You'd agree with that?

04:20:00 14 A. Hmm, I'm not sure about the last
04:20:03 15 one. There's a shift but underpinning of
04:20:06 16 sovereignty with Grotius? I'd have to see what
04:20:08 17 you're referring to or -- because there's a lot
04:20:14 18 of continuity between the two, so this is why I
04:20:20 19 hesitate with how you word the questioning.

04:20:23 20 Q. Then perhaps some of the elements
04:20:26 21 of thinking about the Law of Nations does change
04:20:30 22 between the era of say Vitoria and of Vattel?

04:20:37 23 A. Yes.

04:20:37 24 Q. So I'd now like to go to the
04:20:49 25 question of what limits would have been

04:20:51 1 understood under the principles of ius gentium
04:20:56 2 on sovereignty. I don't think I need to take
04:21:00 3 you to the portion of your report, although it's
04:21:03 4 page 14 where you talk about Vattel thought the
04:21:09 5 settlement and actual use --

04:21:13 6 THE COURT: Mr. McCulloch, do you
04:21:14 7 still need this document.

04:21:25 8 MR. McCULLOCH: No, Your Honour.

04:21:25 9 THE COURT: Then it would be helpful
04:21:25 10 to remove it.

04:21:25 11 MR. McCULLOCH: Thank you, Your
04:21:25 12 Honour.

04:21:25 13 BY MR. MCCULLOCH:

04:21:25 14 Q. I don't think, Professor Morin, I
04:21:25 15 need to take you to the part of your report
04:21:28 16 where you summarize Vattel's insistence that
04:21:34 17 settlement and actual use were required for
04:21:37 18 possession? I think you've made that fairly
04:21:40 19 clear.

04:21:43 20 Do you have anything to add to what
04:21:45 21 you've said about Vattel's argument that
04:21:47 22 settlement and land -- and actual use could
04:21:55 23 establish possession over the properties of
04:21:56 24 errant Nations?

04:21:58 25 A. No.

04:22:00 1 Q. In which case then I'd like to
04:22:02 2 move on to a passage actually from Vattel's "Law
04:22:09 3 of Nations" or "Principles of the Law by
04:22:12 4 Nature", it's SC2123, Exhibit 4951.
04:22:18 5 Ms. Ramlochun, if you could bring up PDF 40,
04:22:33 6 which is also page 40?

04:23:09 7 THE COURT: Mr. Feliciant, the
04:23:10 8 document I'm looking at has only 8 pages, which
04:23:16 9 makes PDF 40 seem unlikely. Oh, here we go.

04:23:22 10 BY MR. MCCULLOCH:

04:23:22 11 Q. It is a very big document.

04:23:24 12 THE COURT: I see that now, it's now
04:23:26 13 saying 600 pages. Please go ahead.

04:23:40 14 BY MR. MCCULLOCH:

04:23:40 15 Q. And chapter 11 of "A State that
04:23:42 16 has Passed Under the Dominion of Another"?

04:23:46 17 A. Yes.

04:23:51 18 Q. If we go up a little bit higher I
04:23:53 19 want to see the whole paragraph.

04:23:55 20 THE COURT: Just before you do that,
04:23:56 21 Mr. McCulloch, what is the date of publication
04:23:58 22 of this document?

04:24:00 23 MR. McCULLOCH: I have to -- that was
04:24:02 24 in our chronological list. I'll get it to you
04:24:06 25 in a moment.

04:24:06 1 THE WITNESS: I can answer, this is
04:24:07 2 1758, and this was in the agreed fact that we
04:24:20 3 discussed earlier.

04:24:25 4 THE COURT: So we're obviously looking
04:24:26 5 at a transcription of that document, just for
04:24:28 6 the record.

04:24:29 7 Please go ahead Mr. McCulloch.

04:24:35 8 BY MR. MCCULLOCH:

04:24:35 9 Q. Professor Morin, you do recognize
04:24:36 10 this as an extract from the "Law of Nations"
04:24:39 11 from --

04:24:39 12 A. Yes.

04:24:40 13 Q. -- Emerich de Vattel?

04:24:42 14 A. Yes. I had a chance to preview
04:24:45 15 an extract in advance and it seemed an accurate
04:24:46 16 part that I looked at, and now we have the full
04:24:50 17 book, which I requested.

04:24:52 18 THE COURT: Now, Mr. McCulloch, you
04:24:54 19 may go on, it's early still, but do keep in mind
04:24:58 20 that sometime in the next five or ten minutes
04:25:01 21 we'll be breaking. I don't suggest we should
04:25:04 22 break now, just to be clear, so go ahead.

04:25:08 23 BY MR. MCCULLOCH:

04:25:08 24 Q. I think I can fit in one last
04:25:14 25 question before I shift topics, still within the

04:25:16 1 context of sovereignty.

04:25:18 2 If we can see the entirety of chapter
04:25:20 3 11? Actually if you could expand it out so that
04:25:35 4 we can see the entire paragraph?

04:25:53 5 And, Professor Morin, you say you have
04:25:55 6 had a chance to review this?

04:25:57 7 A. Yes.

04:25:57 8 Q. So you would agree that it refers
04:25:59 9 back to the Roman empire?

04:26:01 10 A. Yes.

04:26:02 11 Q. Where peoples, Nations and
04:26:04 12 kingdoms became subject to the -- to an empire?

04:26:08 13 A. Yes.

04:26:10 14 Q. So one of the things that even
04:26:13 15 someone who hadn't studies Grotius or Pufendorf
04:26:17 16 or Vattel might be aware of that you could have
04:26:22 17 subordinate Nations and kingdoms within an
04:26:26 18 empire?

04:26:28 19 A. Yes, I would agree with that.

04:26:35 20 Q. And I think, Your Honour, since
04:26:36 21 the next topic on sovereignty is quite a
04:26:39 22 different one it might be perhaps appropriate to
04:26:44 23 finish here.

04:26:45 24 A. May I qualify my answer a little
04:26:47 25 bit?

04:26:49

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Q. Certainly, Professor Morin.

04:26:52

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A. So I agree with this but this is

04:26:54

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not something that is automatic. And Grotius

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and Bodin recognized that alliances that start

04:27:02

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as kind of relations between independent Nations

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that form a confederation or coalition can

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evolve over time to a situation where what I was

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referring to as external sovereignty is lost,

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although internal sovereignty like what is

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called here the situation where they were

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governed by their own laws and magistrates while

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being subject to Rome.

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So this scenario is possible, but the

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other scenario, when you read closely Vattel, is

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also possible that this point has not been

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reached.

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Q. The difference between the two

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possibilities would come down to a matter of

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fact?

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A. I agree with that.

04:27:54

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Q. Thank you very much for that

04:27:54

22

clarification.

04:27:56

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A. And I have a hard time applying

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the concept as it is here where they have lost

04:28:02

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their independence or external sovereignty to

04:28:03 1 the allies of the French people here in the
04:28:06 2 French regime, as I think is clear from my
04:28:09 3 report.

04:28:11 4 Q. Yes, but as I said, we have
04:28:13 5 historian who've also reported and that's
04:28:17 6 another matter. That's an issue of fact that it
04:28:20 7 will be up to Justice Matheson to decide.

04:28:26 8 THE COURT: Thank you, Mr. McCulloch.
04:28:27 9 Before we adjourn until tomorrow morning I
04:28:29 10 wanted just to cover off a couple of things.

04:28:33 11 I understand, Professor Morin, that
04:28:35 12 you have testified before?

04:28:37 13 THE WITNESS: Only once.

04:28:38 14 THE COURT: And you may know this
04:28:39 15 already but it's my practice to remind witnesses
04:28:42 16 that when they're under cross-examination, as
04:28:46 17 you are, you should not be communicating about
04:28:52 18 any matter relevant to this to any person, or
04:28:57 19 engage in your own sort of unilateral activities
04:29:01 20 with respect to the subject matter. Basically
04:29:04 21 you need to put the whole thing to one side
04:29:07 22 overnight and begin again tomorrow morning at 10
04:29:15 23 o'clock. I'm sure you're accustomed to that
04:29:17 24 sir?

04:29:18 25 THE WITNESS: Yes.

04:29:19 1 THE COURT: And on a related point, I
04:29:20 2 don't think this will be a problem, but I have
04:29:22 3 asked Ms. Roberts to before 10 o'clock tomorrow
04:29:25 4 to do a little work with Professor Morin to see
04:29:33 5 that his sound is working well. She obviously
04:29:36 6 will not be discussing his evidence in my way.

04:29:38 7 Ms. Pelletier are you content with
04:29:40 8 that?

04:29:41 9 MR. PELLETIER: Yes, of course, Your
04:29:41 10 Honour.

04:29:43 11 THE COURT: Mr. McCulloch?

04:29:45 12 MR. McCULLOCH: Certainly.

04:29:46 13 THE COURT: Ms. Lapan?

04:29:48 14 MS. LEPAN: Yes.

04:29:49 15 THE COURT: All right. I'll ask,
04:29:50 16 Professor Morin, Ms. Roberts will work that out
04:29:53 17 with you directly. But we're just talking
04:29:55 18 about, you know, in that half hour before 10
04:29:58 19 o'clock just getting you as well set up as
04:30:01 20 possible before 10 o'clock.

04:30:10 21 THE WITNESS: Yes.

04:30:10 22 THE COURT: So she will be in touch
04:30:11 23 with you directly.

04:30:14 24 So we will adjourn and Mr. McCulloch
04:30:16 25 will continue his cross-examination tomorrow.

04:30:20

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MR. McCULLOCH: Thank you, Your

04:30:20

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Honour.

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--- Whereupon the examination was

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adjourned at 4:30 p.m.

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REPORTER'S CERTIFICATE

I, HELEN MARTINEAU, CSR, Certified
Shorthand Reporter, certify;

That the foregoing proceedings were
taken before me at the time and date therein set
forth;

That the testimony of the witness and
all objections made at the time of the
examination were recorded stenographically by me
[Note: Not all quotes have been verified
against source document, but transcribed as
read into the record];

That the foregoing is a true and
accurate transcript of my shorthand notes so
taken. Dated this 10th day of May, 2020.



PER: HELEN MARTINEAU
CERTIFIED SHORTHAND REPORTER

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