

In the Matter Of:

The Chippewas of Saugeen First Nation, et al v. Attorney General of Canada,

DAY 97 VOL 97

April 29, 2020



77 King Street West, Suite 2020

Toronto, ON M5K 1A2

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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 97/ DAY 97 of the trial
proceedings in the above-noted matter, being
held via ZOOM virtual video and audio platform,
on the 29th day of April, 2020.

B E F O R E:

The Honourable Justice Wendy M. Matheson

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

Renée Pelletier, Esq., for the Plaintiffs,
& Jaclyn McNamara, Esq., the Chippewas of
Saugeen First
Nation, and the
Chippewas of Nawash
First Nation.

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

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

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I N D E X

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1 --- Upon commencing at 10:09 a.m.

10:09:54 2 MS. ROBERTS: Good morning everyone.

10:09:56 3 Today is Wednesday, April 29th, 2020, and we're

10:09:59 4 here in the matter of the SON trial. There are

10:10:02 5 two file numbers associated with this file, the

10:10:04 6 first is 03-CV-261134CM1, and the second is

10:10:14 7 94-CQ-50872CM.

10:10:21 8 In the event anyone is disconnected

10:10:24 9 from the hearing please use the same credentials

10:10:27 10 to log back in. I may not be able to reconnect

10:10:31 11 you immediately but please wait in the virtual

10:10:33 12 waiting room until you are reconnected.

10:10:35 13 In the event there is a security

10:10:37 14 breach the call will be terminated immediately

10:10:39 15 and we will communicate regarding the resumption

10:10:43 16 of the call.

10:10:43 17 Because we are using a virtual

10:10:44 18 connection everyone is going to have to be

10:10:46 19 mindful of not speaking over one another. If

10:10:49 20 there is an objection Justice Matheson, the

10:10:51 21 court reporter and I must be able to hear it and

10:10:54 22 know who is objecting. When stating an

10:10:56 23 objection please state your name and if you are

10:10:58 24 off camera please turn your camera on for the

10:11:01 25 duration of the time you are speaking.

1 If I have to interrupt please be
2 patient and understand my goal is to provide you
3 with a perfect record of these proceedings.
4 Please move any papers and or legal pads away
5 from the microphone so there is no ambient
6 noise.

7 From time to time the audio may be
8 affected and if so we may need to stop the
9 proceedings and wait a moment for the audio to
10 improve, either by reconnecting or asking that
11 everyone use the conference call number if you
12 are using computer audio.

13 Our court reporter today is Ms. Helen
14 Martineau and the court Clerk is Ms. Natasha
15 Novack, who will be keeping a record of the
16 exhibits along with Ms. Martineau.

17 This meeting is also being recorded by
18 me, Liz Roberts, of Arbitration Place, however
19 only the main hearing room is being recorded.
20 When participants are in their individual
21 break-out rooms these rooms are completely
22 confidential and are not being recorded.

23 I will now take a roll call of counsel
24 before turning the matter over to Justice
25 Matheson.

10:12:01 1 René Pelletier, counsel for the
10:12:03 2 plaintiff.
10:12:04 3 MR. PELLETIER: Yes, good morning.
10:12:06 4 MS. ROBERTS: Morning.
10:12:08 5 Jaclyn McNamara, counsel for the
10:12:11 6 plaintiffs.
10:12:12 7 MS. McNAMARA: Yes, good morning.
10:12:16 8 MS. ROBERTS: Thank you.
10:12:17 9 Michael McCulloch, counsel for the
10:12:19 10 Attorney General of Canada.
10:12:22 11 MR. McCULLOCH: Good morning.
10:12:24 12 MS. ROBERTS: Good morning.
10:12:25 13 Michael Beggs, counsel for the
10:12:26 14 Attorney General of Canada.
10:12:27 15 MR. BEGGS: Yes, good morning.
10:12:29 16 MS. ROBERTS: Thank you.
10:12:29 17 Jennifer Lepan, counsel for Her
10:12:31 18 Majesty the Queen in Right of Ontario.
10:12:31 19 MS. LEPAN: Yes, good morning.
10:12:33 20 MS. ROBERTS: Good morning.
10:12:33 21 And David Feliciant, counsel for Her
10:12:34 22 Majesty the Queen in Right of Ontario.
10:12:35 23 MR. FELICIAN: Yes, good morning.
10:12:38 24 MS. ROBERTS: Good morning.
10:12:38 25 And the witness, Professor Michel

10:12:43 1 Morin.

10:12:46 2 THE WITNESS: Yes, good morning.

10:12:49 3 MS. ROBERTS: Thank you everyone.

10:12:49 4 I will now turn the matter over to
10:12:51 5 Justice Matheson.

10:12:52 6 THE COURT: Thank you, Ms. Roberts.

10:12:54 7 I am Justice Matheson. At my
10:12:56 8 direction I am assisted by Ms. Robertson in the
10:12:59 9 conduct of this electronic hearing to facilitate
10:13:02 10 a fair and orderly process, and she proceeds
10:13:05 11 with my full authority.

10:13:07 12 As with any normal trial this
10:13:08 13 proceeding is being recorded by and for the
10:13:11 14 court record. No one else is permitted to
10:13:15 15 photograph or record this proceeding without
10:13:18 16 permission of the court, and no permission has
10:13:21 17 either been sought or granted.

10:13:24 18 This morning we resume with the
10:13:26 19 cross-examination of Professor Morin, an expert
10:13:30 20 witness, called by the plaintiffs in reply.

10:13:34 21 That cross-examination, already under
10:13:37 22 way, is being conducted by Mr. McCulloch for
10:13:41 23 Canada.

10:13:42 24 Mr. McCulloch, please go ahead.

10:13:44 25 MICHEL MORIN: PREVIOUSLY AFFIRMED.

10:13:44 1 CROSS-EXAMINATION BY MR. MCCULLOCH:

10:13:44 2 (continued)

10:13:53 3 Q. Good morning, Professor Morin, I
10:13:55 4 hope you slept well?

10:13:56 5 A. Absolutely.

10:13:57 6 Q. I'm just going to remind you of
10:13:59 7 my roadmap and where we are in it in case we're
10:14:02 8 getting lost.

10:14:03 9 I've already asked you some questions
10:14:05 10 about your methodology and right now we're
10:14:09 11 discussing terminology. We've discussed some
10:14:13 12 aspects at large of natural law, right now we're
10:14:18 13 trying to come to grips with what was understood
10:14:22 14 by "sovereignty" in the 16th, 17th and
10:14:27 15 18th century. So that's where we are in that
10:14:31 16 roadmap.

10:14:32 17 But before I resume the question of
10:14:35 18 sovereignty I have a chronological question for
10:14:39 19 you. You know I like chronology. You mentioned
10:14:45 20 yesterday, I believe it was page 158 of the
10:14:48 21 transcript, about how the education of a dauphin
10:14:54 22 included some references Grotius. Do you happen
10:15:01 23 to know which dauphin?

10:15:03 24 A. I forget his exact name. He died
10:15:06 25 before Louis XIV so eventually it was the great

1 grandson of this dauphin -- of Louis XIV that
2 succeeded to the throne, so he was the Duke
3 then. I don't remember the specifics.

4 Q. No, that allows me to place the
5 chronology. It was either the son or the
6 grandson of Louis XIV who never took the throne.

7 A. Yes, it was in the 1670s or
8 1680s.

9 Q. That's all I needed.

10 Let's get back to sovereignty then.
11 Now, the whole idea of sovereignty as having its
12 limits and qualifications is something I'd like
13 to explore by turning to your text, your book,
14 the "Usurpation of Indigenous Sovereignty". And
15 that is Exhibit 4947, and page 39 of the text,
16 which should be page -- PDF page 29.

17 And what I'm looking for is this
18 quotation, it's a quotation Vitoria, correct?

19 A. Correct.

20 Q. And I'd like to go to the very
21 last sentence of the quotation.

22 A. Yes.

23 Q. And for the same reason, for the
24 good of religion, he -- that's to say the Pope?

25 A. Yes.

1 Q. Could equally create Princes
2 where previously there weren't any Christian
3 Princes?

4 A. Yes.

5 Q. So even within the world of
6 Vitoria the sovereignty of Indigenous peoples
7 can be interrupted by the Pope on the grounds
8 that they're not Christian?

9 A. That would be correct, although
10 if you look at the whole work I think his main
11 emphasis is in trying to convert the Princes
12 first, and if that becomes really a problem, if
13 a non-Christian, Indigenous Prince would
14 persecute the Christians in such extreme
15 circumstances then there would be some
16 justification for --

17 Q. Well, that kind of --

18 A. -- that kind of a measure.

19 Q. That actually takes me to the
20 next document I want to show you, which is
21 actually an extract from Vitoria.

22 If I could ask Ms. Ramlochun to bring
23 up "De Indis Et De Ivre Belli Relectiones",
24 which is -- sorry, I have to keep on jumping
25 back again, Exhibit 4948. And if we could go to

1 the -- sorry, page 81. And if we could go a
2 little bit further down? Paragraph 14.

3 Professor Morin, if you'd like to look
4 at this paragraph you can tell me if this is the
5 opinion of Vitoria that you were starting to
6 comment on?

7 A. (Witness reading the document.)

8 Can I read the paragraph to the very
9 end?

10 Q. Sorry, if I could ask
11 Ms. Ramlochun to go over to the next page?

12 A. (Witness reading the document.)

13 Further down. All right.

14 If you give me one moment I will just
15 go to the table of contents of Vitoria to double
16 check something.

17 Q. Certainly.

18 A. Okay. I'm not too sure because
19 the version I received did not have page numbers
20 so -- oh, this is the fourth legal title. Okay,
21 so my question -- because I did not print the
22 full document of Vitoria and there are three
23 sections in this edition, this translation.

24 And I'm not clear yet whether this
25 section is in the first section where Vitoria is

1 discussing titles that are not valid, or in the
2 second section where he is propounding titles
3 that might be valid.

4 Q. Perhaps then we could simply turn
5 to the content of this extract? You do
6 recognize it as an extract from Vitoria though?

7 A. Yes. And it ends -- so we
8 justify it -- or, sorry, I read it too quickly.

9 So this is probably in the second
10 section, which was my recollection but I wanted
11 to make sure. And -- yes, so the first
12 paragraph --

13 Q. If you go back up to the previous
14 page?

15 A. Yes.

16 Q. The very first sentence, and I'll
17 paraphrase so you can tell me whether my
18 paraphrase is correct.

19 It doesn't matter how Indigenous
20 peoples are converted to Christianity, whether
21 by persuasion or threats or anything improper,
22 if they become Christian the Pope of his own
23 will can depose unbelieving rulers?

24 A. Yes, this is what it says.

25 Q. So you would agree then that

10:24:33 1 Vitoria's image of Indigenous self-rule is
10:24:36 2 subordinate ultimately to the good of the church
10:24:42 3 and the authority of the Pope?

10:24:46 4 A. Ultimately yes, but as I
10:24:47 5 emphasize he goes to great lengths to say that
10:24:51 6 Christianity must be first announced peacefully,
10:24:54 7 and every reasonable means must be employed to
10:24:57 8 allow non-Christian, Indigenous Princes to
10:25:01 9 convert; and then there must with be a
10:25:06 10 reasonable cause, which could be the persecution
10:25:09 11 of Christians. So it's a little bit like
10:25:14 12 humanitarian intervention nowadays but on the
10:25:18 13 basis of faith.

10:25:21 14 Q. I don't want to get into modern
10:25:23 15 analyses because, as you know, presentism is
10:25:25 16 very much a problem in this field. But you will
10:25:32 17 agree we've got here a limitation on Indigenous
10:25:36 18 sovereignty or at least...

10:25:38 19 What I'd like now to move to is the
10:25:41 20 "De Jure Naturae Et Gentium Libri Octo" of
10:25:48 21 Pufendorf, this would be Exhibit 4949. And I'd
10:26:00 22 like to go to PDF 432 to 433, and that should be
10:26:17 23 pages 353 to 354 of the document.

10:26:40 24 And if we want to go a little further
10:26:43 25 down on the page, on to the next page. Yes,

10:27:11 1 where the "5" is, "Among these duties, reckoned
10:27:16 2 by Grotius [...]".

10:27:17 3 A. Yes.

10:27:22 4 Q. Professor Morin, what is the
10:27:23 5 standard scholarly pronunciation, is it
10:27:26 6 "Grotius" or "Groshius" [ph]?

10:27:28 7 A. I always say "Groshius" [ph] in
10:27:32 8 English, but maybe it's a mistake. My
10:27:35 9 apologies.

10:27:36 10 Q. I'd like you to look at paragraph
10:27:38 11 number 5.

10:27:46 12 A. Yes.

10:27:46 13 Q. And again I'm going to paraphrase
10:27:49 14 so you can tell me if this is Pufendorf
10:27:51 15 interpreting Grotius, right?

10:27:52 16 A. Uhm-hmm.

10:27:53 17 Q. And what he's saying, from way
10:27:56 18 back, from time immemorial, possession of
10:28:00 19 property is subject to the innocent passage
10:28:05 20 over, it doesn't matter, lands, rivers, parts of
10:28:10 21 sea, anything that is subject to ownership if
10:28:12 22 there's a legitimate reason, such as carrying on
10:28:16 23 commerce with a distant people?

10:28:19 24 A. Yes, that's correct.

10:28:20 25 Q. And this is not specifically

10:28:23 1 about Indigenous peoples this is a general
10:28:26 2 proposition of ius gentium?

10:28:38 3 A. Absolutely.

10:28:38 4 Q. So that from the French
10:28:38 5 perspective if they were thinking about the
10:28:42 6 historic Law of Nations they would think they
10:28:44 7 had a right of innocent passage over rivers or
10:28:48 8 lands no matter who owned them?

10:28:50 9 A. That would be correct. But I
10:28:51 10 would want to qualify this somewhat by saying
10:28:55 11 that Grotius, and I think Pufendorf, are very
10:29:00 12 clear that you may have in some areas of the
10:29:02 13 world different customs that are developed, as
10:29:06 14 long as they are not what we would call "ius
10:29:08 15 cogens", they're not fundamental rules of the
10:29:12 16 law of nature, and they don't put it exactly
10:29:15 17 quite in these words but that's what they mean.

10:29:19 18 Q. And the right of --

10:29:21 19 A. From my perspective the French
10:29:22 20 could agree to offer presents if these were the
10:29:28 21 customs between Indigenous people. They were
10:29:30 22 not obligated to do. They had the choice to use
10:29:32 23 force, if need be, to carry on and they would
10:29:34 24 not be in violation of the Law of Nations, but
10:29:36 25 by the same token they would not be in violation

1 of the Law of Nations if they complied with the
2 customs.

3 And, in any case, this would mean that
4 this is the territory of Indigenous Nations. If
5 they could cross through it without paying the
6 presents it's still not French territory, if we
7 adopt the framework of the paragraph or the
8 scenario that is discussed in this paragraph.

9 Q. Yes. We're considering if in
10 fact a French officer or a fur trader was
11 thinking about the Law of Nations, which of
12 course has never been established, in your
13 report at least, he would think that any
14 blockading of his innocent passage for purposes
15 of trade meant that the Indigenous peoples
16 blocking him were in violation of the Law of
17 Nations?

18 A. Well, as I said, and in here I
19 think it's clear from this paragraph which I
20 read when I received it this weekend, it must be
21 requested first the right of passage and only if
22 it is refused could they use force.

23 And there would be a choice between
24 paying presents and using force. And nothing --
25 it would not be in violation of the Law of

1 Nations to pay presents.

2 Q. No, no.

3 A. So it could be complying with the
4 regional custom of international law that is not
5 universal. This reference would certainly be
6 compatible -- even not insisting it's renouncing
7 a right that you have. So I don't deny this,
8 according to Pufendorf and the hypothesis we're
9 discussing.

10 Q. I'd like to move along then and
11 I'd like to call up Exhibit 4950.

12 THE COURT: Mr. McCulloch, can you
13 please tilt your screen? There is a bright
14 light overhead. The video yesterday was better
15 for you.

16 MR. McCULLOCH: Is that an
17 improvement?

18 THE COURT: Yes, it is.

19 MR. McCULLOCH: Would you like me to
20 adjust any further?

21 THE COURT: No, that's very helpful.
22 Thank you.

23 BY MR. MCCULLOCH:

24 Q. Now, Professor Morin, I think you
25 recognize this document?

10:32:28 1 A. Absolutely.

10:32:29 2 Q. And I'd just like to go to the
10:32:32 3 last paragraph. You recognize that it's a
10:32:38 4 document that you wrote?

10:32:38 5 A. Yes, absolutely.

10:32:49 6 Q. And I'm going to have to move the
10:32:56 7 gallery view so I can actually read it.

10:32:59 8 A. Are you on the last paragraph?

10:33:01 9 Q. Yes. You'd agree that this was
10:33:03 10 written in the context of debate about whether
10:33:05 11 or not the Treaty of Paris, 1763, was legal by
10:33:13 12 the principles of French law and international
10:33:18 13 public law?

10:33:19 14 A. Yes, that's the debate.

10:33:21 15 Q. And just going to the very last
10:33:26 16 sentence, you state that the Treaty of Paris, at
10:33:30 17 least according to the international law as it
10:33:32 18 was understood in 1763 was legitimate, that's
10:33:40 19 your conclusion?

10:33:41 20 A. Yes. It's in agreement with the
10:33:44 21 rules of the international public law of the
10:33:47 22 time, yes.

10:33:49 23 Q. And this is the Treaty by which
10:33:51 24 the French transfer Canada to the English,
10:33:55 25 correct?

10:33:55 1 A. Yes.

10:33:57 2 Q. And, again, we confirmed

10:33:59 3 yesterday the Indigenous peoples of Canada were
10:34:03 4 not parties to this treaty?

10:34:07 5 A. Yes.

10:34:09 6 Q. I just want to get that

10:34:11 7 straightened out.

10:34:16 8 And I think now it's time to move on
10:34:19 9 to the fourth topic, that is to say specific
10:34:25 10 events and specific documents that I'd like to
10:34:28 11 discuss with you. Some but not all of these are
10:34:33 12 the ones identified by Professor Beaulieu in his
10:34:38 13 examination in-chief. I'm not going to go
10:34:43 14 through all of his examination in-chief because
10:34:47 15 the court has that transcript.

10:34:50 16 I'm primarily interested in those
10:34:53 17 documents that capture the differences in
10:34:57 18 methodologies that you and me have agreed upon
10:35:02 19 explains many of your differences of opinion.

10:35:08 20 Does that make sense to far?

10:35:11 21 I'd like to start by going to your
10:35:16 22 report. Oh, two other minor points before we
10:35:20 23 get into the specific documents, just to frame
10:35:23 24 them.

10:35:24 25 Yesterday you talked about your

1 methodology in approaching documents. That is
2 to say that you looked at the law, the legal
3 literature first and then you looked at the
4 document. Have I got that basically right?

5 A. Well, I would add something also,
6 I read the literature to understand the context,
7 the issues that the documents attempted to solve
8 or the end purpose that was envisioned by the
9 actors themselves.

10 I said that sometimes legal historians
11 put too much weight into the long-term goals,
12 but still I need to understand these goals and
13 they may be very important in understanding the
14 document.

15 My expertise comes more from knowing
16 the legal terminology context and the legal
17 framework.

18 Q. Because you have no training in
19 the actual historical context? You're
20 self-taught. I'm not saying that you're not
21 qualified it's just that you're self-taught?

22 A. Yes.

23 Q. And there's one other point that
24 I wanted to get clear before we go into the
25 specific documents. If I could ask

1 Ms. Ramlochun to bring up the usurpation text
2 again, that's Exhibit 4947. And I would like to
3 go to page 17 of the text, which I believe is
4 PDF page 12. I have to go a little bit further
5 down. Sorry for this. I had page 17. There we
6 are. Stop there. Okay.

7 You would agree as a general
8 principle, in fact it's a legal maxim that as
9 you say the -- during war the laws are silent?

10 A. Well, there was a distinction,
11 and I'm going to -- I'm not sure the terminology
12 was used exactly at the time. Certainly in
13 Grotius it's well recognized.

14 But a distinction between I think "ius
15 ad dillum" and "ius in bello", so there are
16 still some rules, although very harsh rules,
17 like you may put to death any prisoner of war or
18 enslave at least at least non-Christians.

19 And Grotius tried to infuse more
20 morality into this and thus created a tension
21 with his attempt to establish juridical norms
22 and trying -- and I don't remember the specific
23 details of his reasoning but I know it has been
24 interpreted as creating a tension between some
25 of the other principles he expounded at the

10:39:39 1 beginning of his book.

10:39:41 2 That there was no law, maybe it was
10:39:43 3 very rudimentary and limited but there was some
10:39:47 4 rules about what could be done during a war.

10:39:52 5 Q. But you would agree from our
10:39:53 6 chronology yesterday that for most of the period
10:39:57 7 that we're discussing war was more or less the
10:40:01 8 normal part of the historical context?

10:40:08 9 A. Well, it was quite frequent, I
10:40:10 10 wouldn't go as far as what you're saying.

10:40:13 11 Q. Well, some would say it was a
10:40:15 12 very frequent part of the historical context.

10:40:20 13 A. My impression is that there were
10:40:21 14 more -- quantitatively the years that kingdoms
10:40:26 15 were in peace with each other in Europe rather
10:40:27 16 than the colonies were still more numerous, more
10:40:33 17 important than the years during which there were
10:40:37 18 wars, but in any case.

10:40:37 19 Q. Well, I'd like to now turn to
10:40:41 20 your report, and that's Exhibit 4929.

10:40:59 21 A. Yes.

10:41:00 22 Q. And I'd like to go to pages 77 to
10:41:02 23 78, which I believe is page 14 of 86. I'm not
10:41:17 24 sure that's right. Actually try going to
10:41:36 25 page 77, 78 of the document. Here, this is what

1 we want. Could you go down to the bottom of
2 this page?

3 The paragraph starting, "The following
4 year", and we're going to be looking at this
5 paragraph and then the next page. I'd like to
6 get your characterization of the -- what the
7 documents say are clear. You refer to Marquis
8 de La Jonquière having a:

9 "[...] chimerical project of
10 convincing Aboriginal Nations to leave
11 the Ohio Valley [...]".

12 That's your description of what the
13 document says?

14 A. I say "unsettled".

15 Q. I'm sorry. And now I'm going to
16 take a look at the first sentence of the
17 paragraph -- of the actual document, going on
18 over to the next page.

19 This is the comment from the Ministère
20 de la Marine, the equivalent of the colonial
21 secretary to La Jonquière successor, the Marquis
22 Duquesne. If we can go to the bottom of the
23 previous page?

24 The Minister is describing de la
25 Jonquière's project as:

10:43:37 1 "[...] to drive from the River
10:43:39 2 Ohio the Indians who are looked upon
10:43:42 3 as rebels or suspected [...]".

10:43:44 4 That's not quite convincing them to
10:43:49 5 leave, is it?

10:43:52 6 A. No, maybe I was referring to an
10:43:54 7 attempt to convince -- yeah, okay. Could I
10:44:20 8 re-read the paragraph? I'll just use the paper
10:44:24 9 copy. I need to re-read the full paragraph
10:44:31 10 before I answer your question.

10:44:33 11 Q. Sure.

10:45:00 12 A. (Witness reading the document.)

10:45:00 13 So I guess when I was mentioning the
10:45:02 14 project of convincing the Aboriginal Nations to
10:45:08 15 leave the Ohio Valley I was referring to the
10:45:10 16 previous documents that I quote, but maybe there
10:45:14 17 is a small distinction that this case needs,
10:45:17 18 because in any case this nerve happened. It was
10:45:20 19 a project discussed by Indigenous Nations. But
10:45:22 20 I would have to re-read this carefully in order
10:45:26 21 to make sure.

10:45:35 22 But one possibility would be that it's
10:45:37 23 my understanding what the previous documents are
10:45:39 24 saying what La Jonquière had discussed with
10:45:41 25 Indigenous people, and what the Ministry says is

10:45:46 1 somewhat different. That's one possibility.

10:45:48 2 And maybe there's some nuance here
10:45:50 3 that I did not capture.

10:45:52 4 Q. Well, if we could go further on
10:45:53 5 to the Minister's direction to Duquesne on the
10:46:06 6 next page?

10:46:10 7 A. Yes.

10:46:11 8 Q. Now, you've got two things that
10:46:13 9 are the principal points, this is right at the
10:46:16 10 very top of the page. First, "[...] to drive
10:46:23 11 the English from our territory [...]". So as
10:46:27 12 far as the Minister is concerned the English are
10:46:32 13 on our territory, is that correct?

10:46:35 14 A. Yes, I said that yesterday and it
10:46:38 15 is in my report. That it was discovered by the
10:46:41 16 French at the time when it was occupied by a
10:46:46 17 different Indigenous Nation, the Haudenosaunee
10:46:48 18 came there later, according to the French, and
10:46:51 19 did not really acquire possession of the
10:46:54 20 territory but the French did.

10:47:00 21 Q. His second point is that, while
10:47:04 22 he's not going to drive out -- he's not to drive
10:47:07 23 out the Indigenous peoples, he's to tell them
10:47:10 24 that when they're on our territory they can't
10:47:15 25 deal with the English.

10:47:17 1 So Duquesne is to tell the Indigenous
10:47:22 2 peoples how to behave when they are on our
10:47:26 3 territory, correct?

10:47:27 4 A. Yes, but we have to remember that
10:47:29 5 there were many Indigenous Nations in that very
10:47:33 6 territory so this is harder to say if it's the
10:47:37 7 territory of one specific Nation.

10:47:41 8 Q. Sorry, our territory.

10:47:43 9 A. Yes.

10:47:43 10 Q. The French territory.

10:47:45 11 A. We see that even -- we see that
10:47:49 12 often, and I gave other examples where this is
10:47:53 13 French territory but it still can be the
10:47:55 14 countries of the Indians at the same time, or
10:47:58 15 the hunting territories of the Indians. I see
10:48:02 16 no contradiction.

10:48:03 17 One is the territory of the European
10:48:05 18 power, the other is the continued existence of
10:48:08 19 the territory.

10:48:09 20 But here in the Ohio Valley we don't
10:48:13 21 have one specific Nation that clearly could be
10:48:15 22 identified, according to the French at least,
10:48:17 23 the Haudenosaunee would disagree as being in
10:48:20 24 possession of that territory.

10:48:22 25 Q. Well, that actually brings me to

10:48:30 1 the second point. If we go a little further
10:48:33 2 down on that page, and you have in fact
10:48:47 3 discussed this whole question of early
10:48:49 4 possession, prior possession.

10:48:52 5 So what you're saying is that -- and
10:48:54 6 again correct me if I'm misstating it, is that
10:48:58 7 from the French perspective only the original
10:49:02 8 inhabitants could claim any interest, and if
10:49:06 9 there were different people that moved in they
10:49:08 10 had no claim?

10:49:16 11 A. That's not exactly what I said.
10:49:17 12 It's that the situation was confused, because
10:49:19 13 many people moved in, as to who the occupants of
10:49:24 14 these hunting grounds would be. And so they
10:49:29 15 would not accept that because of conquest or
10:49:32 16 whatever event, the Haudenosaunee had some kind
10:49:34 17 of title over these territories, even though
10:49:38 18 they were hunting there but with other Nations.

10:49:40 19 So the factual situation were that
10:49:42 20 there was not, according to the French, one
10:49:44 21 interlocutor who was entitled to be considered
10:49:50 22 as the occupants of that -- these hunting
10:49:55 23 grounds.

10:49:56 24 Q. So just to conclude this point,
10:49:57 25 what you're saying is where the history of

10:50:01 1 occupation is confused and overlapping the
10:50:06 2 French felt, according to review, entirely at
10:50:12 3 home in certain possession?

10:50:14 4 A. Well, they do say that they have
10:50:16 5 no intention, as they said in a different
10:50:18 6 context and I explain in my report, of
10:50:22 7 preventing the Indians from being there and
10:50:26 8 hunting as long as there is no British
10:50:29 9 settlement.

10:50:30 10 So it is their territory for
10:50:31 11 settlement, future settlement purposes and we'll
10:50:33 12 have to see how we go about settling if we
10:50:36 13 eventually go there.

10:50:38 14 But for the time being they don't even
10:50:40 15 mention this possibility. They just say, as
10:50:42 16 long as the British don't settle there these
10:50:44 17 will be hunting lands for all of the
10:50:47 18 Haudenosaunee.

10:50:48 19 So we don't try to be the only
10:50:52 20 occupants, but we don't want to prevent you from
10:50:55 21 being there as you are used to doing.

10:50:58 22 Q. But that's not what the Minister
10:50:59 23 said. The Minister isn't talking about
10:51:02 24 settlement, he's talking about trade with the
10:51:06 25 English. He's not saying, we are going to

10:51:09 1 settle this. It's about control of trade, isn't
10:51:12 2 it? And it's telling the Indians within the
10:51:20 3 Ohio Valley, you don't trade with the British
10:51:23 4 because it's ours. That's quite independent of
10:51:25 5 any policy of settlement, it has to do with the
10:51:29 6 policy of trade, correct?

10:51:33 7 A. Yes, very correct.

10:51:35 8 So for me it's a similar issue, but I
10:51:43 9 did jump from settlement because it is
10:51:45 10 preventing the British from going to the
10:51:46 11 territory, either for settlement purposes or for
10:51:50 12 trade purposes, so that is correct.

10:51:53 13 Q. Well, that actually leads nicely
10:51:55 14 in to the second specific topic that I wanted to
10:52:01 15 ask you about, and that's the question of the
10:52:04 16 "domaine du Roy" the main territory of the King.

10:52:12 17 This --

10:52:13 18 A. The King's domain was a widely
10:52:15 19 used expression after conquest.

10:52:18 20 Q. I was actually taking "domaine"
10:52:20 21 and putting it into the contemporary English
10:52:26 22 legal term of "domaine lands". Are you familiar
10:52:30 23 with that term?

10:52:30 24 A. Not really not having studied the
10:52:34 25 common law that well.

1 Q. Okay, we'll stick to "domain".

2 And I note that you discussed this at
3 page 51 of the transcript. I don't know if we
4 need to go to the transcript, I'll try to
5 paraphrase what my notes say that you discussed,
6 rather than going through the whole long stream
7 of documents.

8 A. Okay.

9 Q. Okay.

10 A. This is what I said yesterday you
11 are referring to?

12 Q. Yes. Essentially you said that
13 what is created, what is meant by the "domain of
14 the kingdom" is the vast territories, I think
15 it's now called the Kingdom of the Saguenay, in
16 which only people directly licensed by the King
17 could trade. That's the initial, basic legal
18 definition?

19 A. Yes.

20 Q. Of "the domain"?

21 A. Yes.

22 Q. And in the documents defining the
23 boundaries of the domain there are references to
24 areas where different Indigenous groups hunt,
25 correct?

10:53:47 1 A. Outside the domain, because
10:53:48 2 they're establishing the boundary between the
10:53:50 3 domain itself and other hunting grounds or
10:53:55 4 hunting countries.

10:53:56 5 Q. So what we have here, as I
10:53:58 6 understand it, is the King is asserting not
10:54:03 7 occupation but authority to manage whatever is
10:54:08 8 happening within his domain, is that correct?

10:54:12 9 A. That would be correct. Well,
10:54:16 10 whatever is happening -- no, let me take that
10:54:18 11 back.

10:54:19 12 There is historical evidence when
10:54:21 13 there was some trial between traders who were
10:54:26 14 using domiciled Indians to go indirectly into
10:54:30 15 the domain using first the rivers where they
10:54:33 16 used traditionally to hunt, but crossing over
10:54:36 17 the height of land to go to the domain.

10:54:39 18 And I mentioned this in both my 2010
10:54:43 19 paper and my 2013 paper in "Recherches
10:54:47 20 amérindiennes au Québec". We have one of the
10:54:51 21 complainants who is a member of the Sovereign
10:54:54 22 Council, which is the Court of Appeal, and he
10:54:57 23 says, In this domain by the Law of Nations they
10:55:02 24 have their own territories with well-defined
10:55:05 25 limits and they stick to these territories.

10:55:07 1 And, therefore, the Indian, because he is one of
10:55:13 2 the lessees, or connected with one of the
10:55:15 3 lessees, so he says, Therefore those Indians
10:55:18 4 from outside domain who are coming to trade
10:55:22 5 there are violating the Law of Nations and this
10:55:25 6 could lead to war between the Indian Nations.

10:55:27 7 So the kind of control that the King
10:55:30 8 is exercising there can be seen also and
10:55:35 9 understood at the time as arbitrating between
10:55:40 10 Indigenous Nations, according to the Law of
10:55:42 11 Nations.

10:55:44 12 And I repeat, the Law of Nations
10:55:46 13 specifically mentioned as the basis of war that
10:55:48 14 would develop if the limits of hunting
10:55:53 15 territories between Indigenous Nations, allied
10:55:56 16 with the French or even subjects of the French
10:55:58 17 if you think of the domiciled Indians who are
10:56:01 18 Christianized and live near Quebec City, this
10:56:05 19 would still be regulated by the Law of Nations.

10:56:07 20 So I have provided the references in
10:56:09 21 English but my papers are in evidence. And if
10:56:14 22 you want we can go to the pages where jus
10:56:16 23 gentium and maybe here some new answers. I
10:56:18 24 don't recall perfectly.

10:56:20 25 Q. Actually that argument, as you've

1 explained, is made in the King's court. That
2 brings me to actually the next specific document
3 I'd like to talk to you about.

4 The discussion is, again, still in
5 your report. And let's go to PDF 14, we're
6 going to be looking at a fairly long chunk,
7 right down to PDF 18, but I'd like to start on
8 PDF 14.

9 THE COURT: Mr. McCulloch, what page
10 is it?

11 MR. McCULLOCH: It's page 16 -- 16 to
12 18.

13 BY MR. MCCULLOCH:

14 Q. And I would like to go to a
15 paragraph on page 14. I'm looking for a
16 paragraph that starts, "Vitoria and his Spanish
17 colleagues". Maybe it's the next page.

18 A. It's at the top of page 14.

19 Q. Thank you very much. That's my
20 fault.

21 A. Now we're at page 12. We must go
22 downwards. There we go.

23 Q. Yes, it's the second sentence in
24 the first paragraph.

25 A. Yes.

1 Q. And again I'm going to try and
2 summarize, you can tell me if I've got it right.

3 In 1493 the Pope divided the new world
4 between the Spanish and the Portuguese.

5 A. Yes.

6 Q. But other European countries did
7 not particularly respect that division and
8 continued to make assertions based on discovery,
9 or making symbolic acts of their possession of
10 territories in North America, is that correct?

11 A. That is correct.

12 I would add, because you're raising
13 the issue, that one way in the 17th century also
14 to acquire title would be maybe alliances. And
15 then you'd say, well, alliances would give the
16 exclusive right to trade to one Nation and not
17 the others, according to Grotius, although that
18 was not widely accepted.

19 So there were many different arguments
20 to justify settlement. And by the 17th century
21 even the Spanish had rejected the -- at least
22 most of their authors had rejected the Papal as
23 the direct source of their authority there, with
24 the exception mentioned here that they had the
25 right to exclude other European countries.

11:00:44 1 Q. Right now however I want to
11:00:46 2 concentrate on the early years, the
11:00:54 3 16th century, the era of the first commissions
11:00:57 4 and Roberval and Cartier.

11:00:59 5 A. Yes.

11:01:00 6 Q. But more or less from the outset
11:01:03 7 there are other European Princes contending for
11:01:08 8 control over at least parts of what they
11:01:11 9 considered the new world?

11:01:20 10 A. Yes.

11:01:20 11 Q. Now, if we could go on to
11:01:22 12 page 15? The paragraph starting, "In 1541".
11:01:29 13 It's the first paragraph below "16th century
11:01:38 14 documents".

11:01:40 15 A. Yes.

11:01:40 16 Q. And we're finally getting to
11:01:46 17 Francis I's commissions, letters, patents,
11:01:50 18 whatever we want to call them, to Francois de
11:01:53 19 Roberval?

11:01:56 20 A. Yes.

11:01:57 21 Q. And you note that Roberval's 1541
11:02:09 22 patent contained a rejection of the theory of
11:02:13 23 natural servitude?

11:02:15 24 A. Yes.

11:02:26 25 Q. But that theory had many

1 supporters at the time, including a theologian
2 at least in Paris.

3 A. Yes.

4 Q. So, again, I just want to make it
5 clear that in the context of de Roberval's
6 initial commissions we're not in a situation
7 where the law about -- even the theological
8 thinking, because it's not law it's theological
9 thinking, had been settled down, right?

10 A. Yes, but if I look at the
11 document here it's -- what is --

12 Q. Well, we're actually going to be
13 going through the text of the document in some
14 detail.

15 A. Yeah. But when they say, Well,
16 this position and understanding, it's meaning
17 there's nothing that will prevent them
18 intellectually of being Christianized and
19 they're sensible enough not to need to be
20 reduced to servitude. That's my understanding.
21 Implicitly they say, We will not do like the
22 Spanish.

23 Q. Yes. And of course you've
24 mentioned in your book, that's in the reports so
25 I hope I don't have to take you to it, under the

1 first administration in New France, if you
2 became a Christian, that is to say a Catholic,
3 you became a subject of the King of France,
4 correct?

5 A. Yeah. Initially in 1664 it was
6 the first descendants but, yeah, that was the
7 basis for becoming a subject.

8 Q. Whereas right now we're looking
9 at the first century?

10 A. Yes.

11 Q. And I'd like to go on to the next
12 page and look at your characterization of
13 Francis' priorities, his purposes.

14 You say:

15 "Hence the King's purpose was
16 'discoursing' with Aboriginal Peoples
17 and achieving a 'communication' of the
18 Catholic faith."

19 That's your characterization of
20 Francis' purpose?

21 A. Yes, summarizing the previous
22 excerpt.

23 Q. Let's go back and actually read
24 the excerpt.

25 A. Okay.

1 Q. If we could go back up to the
2 bottom of the previous page?

3 Now, the King has decided to send:

4 "[...] into the said countries
5 [...] not possessed nor granted by any
6 Christian princes [...]".

7 Again very specifically Christian
8 Princes.

9 Can we go on to the next page?

10 "[...] and to dwell in the said
11 lands and countries, there to
12 construct and build towns and forts,
13 temples and churches for the
14 communication of our Holy Catholic
15 Church, and Christian doctrine, to
16 constitute and establish laws in our
17 name, together with officers of
18 justice to make them", the Indigenous
19 inhabitants, "live according to equity
20 and order, and in the fear and love of
21 God [...]".

22 Francis here is saying, go and set up
23 my law and set up the mechanism to enforce it,
24 isn't he?

25 A. I'm saying he is saying, if it

11:06:03 1 can be done. So that's what you should attempt
11:06:06 2 to do and the goal you want to achieve in the
11:06:10 3 long term, but then further down there are other
11:06:14 4 possibilities that are offered.

11:06:17 5 I'm not denying the possibility is
11:06:19 6 there but I'm not saying that it's the only way
11:06:22 7 to settle the country.

11:06:24 8 And when he says in the previous page:

11:06:27 9 "[...] for the purposes of
11:06:28 10 discoursing with said strange peoples,
11:06:31 11 if it can be done, and to dwell in the
11:06:33 12 said lands and countries [...]".

11:06:35 13 And the French would be allowed to
11:06:37 14 build their forts and towns and temples, of
11:06:41 15 course, but eventually this can be done
11:06:44 16 peacefully, or if it can be done peacefully this
11:06:48 17 is the preferred option. And if peaceful
11:06:50 18 co-existence is possible and conversion is
11:06:53 19 progressing somewhat, there's no need to try and
11:06:55 20 impose the authority of the King but it's
11:06:59 21 possible.

11:07:00 22 Q. Let's proceed to the next
11:07:02 23 excerpt.

11:07:03 24 A. Yes.

11:07:12 25 Q. "[...] to go and come into the

11:07:13 1 said countries, to land and enter them
11:07:16 2 and put them in our hands, as much by
11:07:20 3 way of amity of friendly relations
11:07:22 4 (sic) [...] as by force of arms,
11:07:24 5 strong hands, and all hostile means
11:07:28 6 [...]".

11:07:30 7 I see that the King is seeing these --
11:07:32 8 I think this document says, as much by way of
11:07:36 9 friendly agreement as by war. It's no -- I
11:07:41 10 don't see where you're getting from this
11:07:43 11 document that, oh, war is the very last resort?

11:07:51 12 A. I agree that the choices given to
11:07:53 13 the officer of the King, but I think the
11:07:55 14 Christian thinking and the necessity to
11:07:57 15 differentiate themselves with the -- from the
11:08:06 16 Spanish approach would mean that they would
11:08:08 17 attempt -- anyway, that was the teaching of the
11:08:09 18 church too. So for me it makes sense to say,
11:08:12 19 and even practically if you're not thinking in
11:08:14 20 religious terms you're much better to try to
11:08:17 21 achieve it peacefully than to try to wage war.

11:08:20 22 But the option is given and I will
11:08:22 23 agree with you that it's not in the text a clear
11:08:25 24 indication.

11:08:29 25 While the order -- it says:

1 "[...] as much by way of amity or
2 friendly agreements, if that may be
3 done, as by force of arms [...]".

4 So "if that may be done" to me implies
5 that you should attempt to do it. So that's why
6 I see a priority, it's an order. Try to do it
7 peacefully and then if it doesn't work you're
8 free to use force.

9 Q. In short at the most what this
10 says is, avoid unnecessary wars?

11 A. Yeah.

12 Q. Okay. Which is, I guess, a
13 principle of government rather than the Law of
14 Nations?

15 A. Well, it's here in a legal
16 document.

17 Q. Are you saying that this is --
18 well, we'll actually get to the question of
19 whether or not this is a reference to the Law of
20 Nations in due course. I just want to continue
21 on.

22 Now, you say, furthermore, in your
23 commentary on this paragraph:

24 "Here, 'amity or friendly
25 agreements' [...] This expression

1 clearly refers to a treaty of an
2 international nature."

3 A. Yes.

4 Q. I don't see any reference to
5 "treaty" in there, certainly no language that
6 would make you think of the Peace of Augsburg.
7 Clearly -- nowhere in here, in this document,
8 does Francis I say, In accordance with the
9 principles of the Law of Nations as articulated
10 by Francisco Vitoria, does he?

11 A. And I would agree that it's very
12 unlikely that Vitoria's lecture would have been
13 known in France. But for me amity or friendly
14 agreements, "agreements" can be a legal concept.
15 And here I will admit that this is an ambiguous
16 term so you need a little more than just the
17 word "agreement".

18 But amity or friendship were legal
19 concepts that were discussed in the Law of
20 Nations, and they were, you know -- when they
21 were friends you know you were more than just at
22 peace with former enemies, you had peaceful
23 relationships.

24 So there was amity and even fraternity
25 is occasionally discussed by the authors as one

1 of the basis of the Law of Nations for having
2 relations between Nations.

3 Q. But you're talking specifically
4 about these being clearly -- they're referring
5 to treaties of an international nature?

6 A. Yes. Because for me Princes that
7 are mentioned here can be, of course, European
8 Princes but Indigenous Princes. That's very
9 clear for me.

10 Q. Well, except just above we saw
11 the reference was to Christian Princes?

12 A. Yes, but when we get to --

13 Q. I'm just dealing with one
14 document at a time --

15 A. Well, the same document.

16 Q. Yes.

17 A. Well, one excerpt at a time you
18 mean, but it starts with Christian Princes and
19 then it mentions two Christian Princes, among --
20 any Princes or potentates or allies and
21 confederates.

22 And to me, and I know there is a
23 disagreement here with Professor Beaulieu
24 because I read his examination in-chief, to me
25 Princes or potentates or allies and confederates

1 includes certainly Indigenous peoples' Princes.

2 Q. And it's on that interpretation,
3 which you agree can be disputed, that you are
4 saying that the expression clearly refers to a
5 treaty of an international nature?

6 A. Yeah, I was willing to say an
7 agreement. If you want me to stick more closely
8 to the words of the letters patent for me that
9 does not make a difference.

10 Considering the literature at the time
11 "agreements" and "treaties" or "covenants" were
12 used simultaneously. Such a specific definition
13 of "treaty" in the 16th century that we would
14 have like -- so for me Princes, Indigenous
15 Princes can enter into those friendly agreements
16 and they can become allies and confederates.

17 Now, on that note, and I think this is
18 important, there's one excerpt of the letters
19 patent that I did not quote in the report, so
20 there's a further excerpt that provides
21 additional information on this, and this further
22 excerpt is in the same document. And I had
23 discussed this excerpt in a paper in 2004 so I
24 just thought that my reasoning was convincing,
25 apparently it is not.

11:13:49 1 So if it would be possible to go to
11:13:52 2 the document which is called here --

11:13:59 3 Q. Has this document been made an
11:14:02 4 exhibit?

11:14:02 5 A. I think it has. Now the editor
11:14:04 6 is Baxter and I'm trying to find the -- yeah,
11:14:08 7 James Phinney Baxter, and this is the document
11:14:12 8 that is quoted in the footnotes. So James
11:14:15 9 Phinney Baxter, "A Memoir of Jacques Cartier,
11:14:15 10 sieur de Limoilou".

11:14:20 11 Q. Yes.

11:14:20 12 A. So it's the very same document.
11:14:23 13 And if we have the full document, and when this
11:14:33 14 was discussed with counsel for plaintiffs they
11:14:37 15 made sure that the document would be ready here
11:14:39 16 prior to all this examination beginning, of
11:14:42 17 course, and because the issue had been raised by
11:14:45 18 Professor Beaulieu. And I think this was
11:14:51 19 communicated in advance to counsel.

11:14:53 20 Q. Yes, we consented to the memoir
11:14:56 21 on Cartier being turned into an exhibit, we
11:14:59 22 don't know if that has happened. I'm afraid I
11:15:02 23 don't have for Ms. Ramolchun's reference either
11:15:10 24 an SC number or an exhibit number?

11:15:14 25 MR. PELLETIER: If I may, Your Honour,

1 I have that information. It's document SC2142,
2 and if it would be of assistance Ms. McNamara
3 can pull that up.

4 THE COURT: Ms. Pelletier, is that
5 among the documents that are already on Exhibit
6 F-4?

7 MR. PELLETIER: Not yet, Your Honour.

8 THE COURT: Not yet.

9 MR. PELLETIER: We would like to enter
10 it as an exhibit but it has not yet been
11 entered.

12 THE COURT: Well, you can't do it
13 right now, Ms. Pelletier.

14 MR. PELLETIER: I appreciate that.

15 THE COURT: It's up to Mr. McCulloch
16 what they want to do. Mr. McCulloch, the image
17 is available to you if that is something you are
18 going to pursue?

19 MR. McCULLOCH: I would like actually
20 to finish off this section and come back to new
21 documents, particularly as I'd to have a look at
22 the document over the break.

23 THE COURT: All right. Please go
24 ahead.

25

1 BY MR. MCCULLOCH:

2 Q. Now --

3 A. I would like to clarify. Can I
4 summarize what is in this document even though
5 it's not fully in evidence, or should I wait?

6 Q. Why don't you summarize it in
7 that way. I can look at the document and be
8 able to ask more direct questions after the
9 break.

10 A. So the excerpts would be on
11 page 321 of the Baxter edition, and this is
12 where the King says that he will ratify anything
13 that will be done by his lieutenant, meaning
14 Roberval, there. And it says here, anything
15 that was achieved and composed as well by arms,
16 friendship and confederation as otherwise.

17 So anything that will be done in
18 Canada, as it was understood at the time, either
19 by way of force, by arms, or friendship and
20 confederation.

21 And "allies" and "confederates" were
22 the terms that was used earlier here. Allies
23 and confederates. And we see any confederation
24 and any relations here, this is where allies
25 appear here. Let me double check it. No, but

11:17:32 1 it speaks of friendship and confederation.

11:17:35 2 So for me, as I said, agreement,
11:17:37 3 amity, confederation, all these are synonymous.
11:17:39 4 So anything that will be done by way of
11:17:44 5 confederation and amity in Canada will be
11:17:46 6 ratified by the King. So the only way to have
11:17:49 7 confederation for me is in dealings with
11:17:52 8 Princes.

11:17:53 9 Q. Do you mean you can't wage war on
11:17:56 10 people that you don't recognize as having
11:18:00 11 Princes?

11:18:02 12 A. Well, I mean that confederates
11:18:07 13 and confederation are the same thing. So if we
11:18:10 14 read "confederates" here and then we see
11:18:12 15 "anything done by way of confederation on the
11:18:15 16 ground" there, who are you to confederate with
11:18:18 17 if this is a reference only to European Princes?
11:18:23 18 I doubt there are many European Princes in
11:18:25 19 Canada at the time. So --

11:18:27 20 Q. Well, perhaps we can discuss this
11:18:29 21 further now that we've got the page reference
11:18:32 22 and the point you are making?

11:18:35 23 A. I thought it would be helpful for
11:18:43 24 me to close this part of the discussion and you
11:18:45 25 can come back to me and we can discuss it

1 further.

2 Q. And we will. It's going to be
3 a -- an interesting discussion.

4 Again, I would like to emphasize and
5 actually ask if you would agree that what we
6 have here in the disagreement between Professor
7 Beaulieu is a difference in methodology, in that
8 Professor Beaulieu is interpreting documents in
9 the context of what he sees as France's grand
10 empire building project; whereas you are
11 interpreting the document in light of the
12 vocabulary employed by scholars writing about
13 the Law of Nations, is that fair?

14 A. I agree with what you say about
15 Professor Beaulieu. On my part, and this is
16 referenced in my 2013 paper, I'm not relying
17 only on the authors of the Law of Nations, I'm
18 also relying on the voyages of Jacques Cartier,
19 where you see the expression, "kingdom" and
20 "King" being used to describe what will later be
21 called in the 17th century rather "Captains" or
22 "Chiefs".

23 So in the 16th century, so the voyages
24 of Jacques Cartier there were reports that were
25 given to the King, and there are quite a few

1 instances, they're all in Baxter and I have the
2 list if you want them, where the word "King" and
3 "kingdom" to describe Donnacona or his successor
4 of the Kingdom of Saguenay, or the Kingdom of
5 the People at Stadacona is used.

6 So for me this is evidence that in the
7 thinking of the time by whoever wrote the report
8 about the second Jacques Cartier expedition, and
9 the third just prior to the granting of the
10 letters patent, let me know the third that would
11 not work so it would be the second report it
12 would have been on.

13 Q. And in your report you proffer no
14 evidence that Cartier, Roberval or the people --
15 or the person or persons who wrote the memoirs
16 and accounts had any actual exposure to
17 scholarly writing about the Law of Nations? You
18 would agree?

19 A. I would agree. But --

20 Q. Thank you.

21 A. -- I would qualify that the Law
22 of Nations nonetheless developed out of practice
23 between Nations, not the European Nations. So
24 the literature, for the most part, appears
25 later, although it was there in the Middle Ages

1 focusing on Europe too.

2 So the idea of independent sovereign
3 having the relations of war and peace was not
4 something new and could have been known at a
5 general level without knowing necessarily what
6 Thomas Aquinas had written on the natural law
7 being the basis of relations between the Princes
8 of Europe and the infidels, and things like
9 that.

10 So that scholarly thinking, though
11 maybe not in print because publication was just
12 in its beginning, was based on general concepts.
13 And although Cartier and Roberval certainly had
14 no specific training in this, like you -- not
15 you and me, but people not trained in law
16 nowadays have a general lay understanding of
17 what an independent country is and a territory,
18 would have been able to express it very clearly.

19 So they understood the general meaning
20 of this concept as a lay person can understand
21 them at the time.

22 Q. In short what you're saying is
23 they would have had some knowledge of history
24 and the practical lessons learned from history,
25 but no technical knowledge of law?

11:22:36 1 A. Yeah. Well, as I said --

11:22:38 2 Q. And --

11:22:39 3 A. -- some technical concepts of law
11:22:41 4 are understood at a general level by the
11:22:44 5 population as being something legal.

11:22:46 6 When you're talking about Kings you
11:22:48 7 know you're talking about someone who has
11:22:50 8 authority, who may wage war and make peace. And
11:22:56 9 that concept is refined and developed by legal
11:23:00 10 scholars but may be understood by people who
11:23:02 11 have never read anything about the law.

11:23:04 12 Q. Who would at the time, for
11:23:05 13 example, have understood "King" as being by
11:23:08 14 grace of God?

11:23:12 15 A. Well, they would have understood
11:23:13 16 if they say "King", and of course Thomas Aquinas
11:23:17 17 and others say, and in Vitoria there's
11:23:19 18 "infidels", are not deprived -- and here again
11:23:23 19 there was some controversy, are not deprived,
11:23:27 20 are prevented from being Kings of Prince if
11:23:29 21 they're not heretics.

11:23:30 22 If they have never heard of the faith
11:23:32 23 they cannot be blamed for this. So
11:23:34 24 non-Christians have their own Princes. That
11:23:37 25 started in Europe talking of relations with

11:23:40 1 other non-Christian countries and it was applied
11:23:42 2 to America.

11:23:44 3 Q. Your Honour, this discussion has
11:23:46 4 taken up so much time that I'm -- although very
11:23:49 5 useful that I don't think I have time to fit in
11:23:52 6 a separate topic before 11:30. I was wondering
11:23:58 7 if we could take the break now so that I could
11:24:01 8 have a look at the document cited by Professor
11:24:06 9 Morin?

11:24:07 10 THE COURT: Yes, that's perfectly
11:24:08 11 satisfactory.

11:24:09 12 Professor Morin, you will recall my
11:24:18 13 comments to you yesterday about the important
11:24:19 14 limitations on what you can do on a break during
11:24:21 15 cross-examination so I won't repeat them now.
11:24:25 16 So we'll take a 20-minute break.

11:24:27 17 THE WITNESS: Yes. I have two points
11:24:27 18 I want to raise.

11:24:27 19 First, because of the examination
11:24:27 20 in-chief of Professor Beaulieu I was made aware
11:24:33 21 of the debate and prepared for this way before
11:24:35 22 the beginning of the examination and never
11:24:39 23 during the break.

11:24:39 24 And, second, if it is useful to
11:24:42 25 Mr. McCulloch I can give him the page numbers so

11:24:45 1 he can look at them in advance where "Kings" and
11:24:47 2 "kingdoms" are mentioned, but that is up to
11:24:51 3 Mr. McCulloch.

11:24:52 4 THE COURT: Thank you, Professor,
11:24:54 5 Morin, I note that my caution is a standard one
11:24:56 6 and not arising out of any concern on my part.
11:24:59 7 Mr. McCulloch, would you like the page numbers?

11:25:03 8 MR. McCULLOCH: It would be very much
11:25:04 9 appreciated.

11:25:05 10 THE COURT: Can you do that now, sir?

11:25:06 11 THE WITNESS: Yes.

11:25:08 12 THE COURT: Please go ahead.

11:25:10 13 THE WITNESS: Let me find my notes
11:25:12 14 here. In the second voyage we have page 135,
11:25:16 15 140, the Kingdom of Saguenay; 167, the King and
11:25:21 16 Lord of the country; page 210, the following is
11:25:26 17 the language of the countries and kingdoms of
11:25:29 18 Hochlaga and Canada.

11:25:31 19 And in the third voyage, but that
11:25:33 20 would come after the letters patents I'm afraid
11:25:36 21 so I will not mention those of the third voyage.

11:25:41 22 MR. McCULLOCH: Thank you very much.

11:25:43 23 THE COURT: All right. We'll adjourn
11:25:45 24 for 20 minutes.

11:25:47 25 MS. ROBERTS: The court will now take

1 a 20-minute break.

2 -- RECESSED AT 11:25 A.M. --

3 -- RESUMED AT 11:56 A.M. --

4 MS. ROBERTS: Thank you and welcome
5 back. I'd just like to take the opportunity to
6 remind counsel and the witness to please pause
7 before stating your answer to avoid talking over
8 each other and for the sake of the transcript.
9 Thank you.

10 THE COURT: Please go ahead,
11 Mr. McCulloch.

12 BY MR. MCCULLOCH:

13 Q. Professor Morin, I have had a
14 chance to take a quick look at the pages you
15 cited and I would be happy for you to put them
16 up.

17 I may ask you to allow me to read them
18 a little bit more carefully once you have
19 indicated the passage on the pages that you
20 think is going to illuminate our discussion
21 about Princes, Christian or otherwise?

22 THE COURT: Now, of course the witness
23 is not able to put the document up on the
24 computer, Mr. McCulloch. Have you noted the
25 production number that Ms. Pelletier mentioned

11:58:37 1 before the break so that your assistant can put
11:58:41 2 that document up?

11:58:43 3 MR. McCULLOCH: I have not. I
11:58:44 4 wonder --

11:58:48 5 THE COURT: Perhaps your assistant did
11:58:49 6 note it. Thank you. Please go ahead.

11:58:59 7 BY MR. MCCULLOCH:

11:58:59 8 Q. And I asked you before the break,
11:59:01 9 Professor Morin, why you thought that the people
11:59:05 10 who contributed to both Roberval's commission
11:59:10 11 and narrative of Cartier's voyages had concepts
11:59:14 12 of the Law of Nations in their heads? You said
11:59:20 13 that they would have, at some high level
11:59:25 14 abstraction.

11:59:26 15 We had some discussion on that point
11:59:28 16 and then you said that there were certain pages
11:59:32 17 from this document that you thought would be
11:59:35 18 useful to elucidate what you meant by a "popular
11:59:41 19 understanding", is that correct?

11:59:44 20 A. No, at this point I'm focusing
11:59:46 21 more on the drafters of the commission and what
11:59:51 22 they would know.

11:59:52 23 Q. Okay. Then if you'd like to take
11:59:55 24 us to the pages that you think will tell us --
12:00:00 25 illustrate Roberval's commission and the purpose

1 of its drafters?

2 A. Yes. So we could go to the other
3 excerpt that I did not quote in my report but I
4 summarized briefly, which would be at page 321
5 of the book itself, probably the PDF too.

6 I have to remove the window here.

7 THE COURT: Well, I would like,
8 Mr. McCulloch, your document clerk to enlarge
9 the text, assuming that's what Professor Morin
10 is referring to?

11 THE WITNESS: Yes.

12 THE COURT: And he can indicate -- I
13 still find it too small, Mr. McCulloch.

14 MR. McCULLOCH: As do I, Your Honour.
15 Ms. Ramlochun, can you please expand it further
16 and see if you can position it such that the
17 text is in the centre?

18 THE WITNESS: From experience that may
19 be difficult to do.

20 THE COURT: I think that may not be
21 able to work, but this is much better more me.
22 Professor Morin, perhaps you can indicate where
23 on the page you would like to refer to?

24 THE WITNESS: The second half or the
25 second third at the bottom of the page.

12:01:38 1 THE COURT: Okay. I have no
12:01:38 2 difficulty reading that as long as Mr. McCulloch
12:01:46 3 is able to proceed.

12:01:48 4 MR. McCULLOCH: I'm comfortable with
12:01:49 5 that, Your Honour.

12:01:50 6 THE COURT: Please go ahead.

12:01:51 7 THE WITNESS: So now we're looking for
12:01:53 8 the phrase "there in person". Yes, it's six
12:01:59 9 lines from the top. Then this is the King
12:02:08 10 speaking of course:

12:02:11 11 "[...] all this by our said
12:02:13 12 lieutenant shall be done, declared,
12:02:15 13 constituted, ordered, established,
12:02:17 14 contracted, achieved, and composed, as
12:02:17 15 well by arms, friendship and
12:02:19 16 confederation as otherwise, in any
12:02:21 17 sort and manner as may be or can be by
12:02:24 18 reason of the said enterprise and
12:02:26 19 despatch (sic) of it, as well by sea
12:02:29 20 as by land, we have approved, agreed
12:02:31 21 and ratified, we do approve, agree,
12:02:33 22 and ratify by these present, and we
12:02:35 23 hold and will it to be held good and
12:02:37 24 available as by us done."

12:02:40 25 So this is the King confirming the

1 very extensive powers that he granted to
2 Roberval and his lieutenant, which is his
3 representative and the power holder locally.

4 And he said that this lieutenant may
5 of course resort to arms, but anything that will
6 be done by way of friendship and confederation
7 locally in Canada will be ratified by the King
8 as if it had been done by him.

9 And --

10 BY MR. MCCULLOCH:

11 Q. Yes. Professor Morin, you're
12 familiar with old fashioned legal drafting by
13 the 16th, 17th and 18th centuries?

14 A. Yeah, I see what you mean by
15 that.

16 Q. And have we not here the classic,
17 old fashioned drafting of listing every
18 conceivable possibility?

19 A. Yes, I would say.

20 Q. So that this enumeration is
21 simply for the purpose of completeness, wouldn't
22 you agree? Rather than assigning any kind of
23 priority to any of the individual items?

24 A. Well, for me --

25 Q. This is comprehensiveness, isn't

12:03:55 1 it?

12:03:56 2 THE COURT: Mr. McCulloch, I need you
12:03:58 3 to work harder to either make it clear that
12:04:02 4 you're not finished your question or pause when
12:04:05 5 you are finished because we are having that same
12:04:08 6 problem as we had this morning with you and
12:04:11 7 Professor Morin talking at the same time.

12:04:14 8 MR. McCULLOCH: I'm sorry, Your
12:04:15 9 Honour, and I will do better.

12:04:17 10 THE COURT: Thank you.

12:04:19 11 THE WITNESS: And I'll take some of
12:04:20 12 the share of the blame because I'm eager to jump
12:04:23 13 into the debate so please forgive me for that.

12:04:29 14 THE COURT: It's no problem, sir.
12:04:30 15 Please go ahead.

12:04:32 16 BY MR. MCCULLOCH:

12:04:33 17 Q. After you, Professor Morin.

12:04:33 18 A. Okay, thank you. So what I'm
12:04:39 19 saying, I can see that of course they want to
12:04:43 20 consider every conceivable possibility, but the
12:04:45 21 mention of something done by arms potentially,
12:04:48 22 theoretically maybe there will be European
12:04:51 23 mowers there, but friendship and confederation
12:04:54 24 on the ground, and resorting to arms -- it
12:04:59 25 doesn't make sense to say that this could not

12:05:00 1 apply to Indigenous people. These are the most
12:05:04 2 likely persons in Canada, as described in the
12:05:09 3 letters patent, with whom you would have either
12:05:14 4 violent relations in the form of war or use of
12:05:17 5 arms, or confederation.

12:05:19 6 So when I see earlier in the document
12:05:21 7 "confederates" and associated to "Princes" for
12:05:27 8 me these notions are all connected. And
12:05:30 9 "Princes" and "confederation" is not restricted
12:05:33 10 to European Princes it includes Indigenous
12:05:40 11 Princes.

12:05:40 12 Q. And is it your assumption, and I
12:05:42 13 think we can move on after this because I think
12:05:45 14 this territory is familiar, is your assumption
12:05:49 15 that in the historical recollection of the
12:05:52 16 drafters of this document you could not have an
12:05:56 17 alliance, agreement or a confederation with your
12:06:00 18 inferiors?

12:06:03 19 A. I don't see anything like that
12:06:05 20 being understood at the time when I read the
12:06:08 21 commission, when I read the voyages of Jacques
12:06:13 22 Cartier, as I explained earlier, mentioning
12:06:18 23 "kingdom" and "Kings". I don't see that, yes,
12:06:20 24 they may be considered inferiors but they still
12:06:23 25 have Kings. And when you deal with Kings or

1 Princes you are on a nation-to-nation basis, or
2 acting on a nation-to-nation basis.

3 Q. You may remember, I can take you
4 to it if necessary, we had that discussion on
5 how the Law of Nations scholars you cited drew
6 upon the Roman empire to discuss how federated
7 Kingdoms could become in fact subordinate and
8 lose their external sovereignty? So it would
9 have been on the basis -- anyone who knew about
10 Roman history would have known that you could
11 have federations with your inferiors, they were
12 not your equals in the way, for example, that
13 the Holy Roman emperor and the King of France
14 were on the same footing. You would agree with
15 that, wouldn't you?

16 A. No.

17 Q. Okay.

18 A. What I agree to is that over time
19 the confederation may evolve into what you
20 describe, but when you start a confederation,
21 even though the relationship may be unequal
22 these are still independent powers, even though
23 there would be one power in a position of
24 preeminence and superiority, and these are
25 concepts came from Europe and the Roman era, but

12:07:46 1 still when it begins it is on a nation-to-nation
12:07:49 2 basis and it may evolve over time to become what
12:07:53 3 you've described, but it takes some time.

12:07:55 4 So initially you assume that maybe
12:07:57 5 this confederation or agreement of amity, to use
12:08:03 6 the exact word here, on a nation-to-nation basis
12:08:09 7 mentioning the use of arms is something where
12:08:12 8 you recognize you're, again, acting on a
12:08:16 9 nation-to-nation basis.

12:08:19 10 Q. I'd like to just go back to
12:08:20 11 something that you said in your examination
12:08:24 12 in-chief yesterday, that when you're using the
12:08:27 13 term "ius gentium", Law of Nations, in the
12:08:32 14 16th century context you're not talking about
12:08:34 15 modern international law you're talking, for
12:08:40 16 modern Nation states, you're talking about
12:08:42 17 peoples?

12:08:42 18 So when you say "nation-to-nation"
12:08:45 19 here you don't mean nation state to nation state
12:08:47 20 you mean people to people, correct?

12:08:54 21 A. Correct or nation state to
12:08:55 22 people.

12:08:55 23 Q. I think that's all we need from
12:08:56 24 this particular page. Is there anything else
12:09:01 25 that you wanted to go to?

12:09:05 1 A. No. As I mentioned, and maybe we
12:09:06 2 don't need to review them or we can come back to
12:09:09 3 them later if you need more time, but we have
12:09:11 4 this voyage by Cartier where the expression
12:09:14 5 "King" and "kingdoms" is used, which is, in my
12:09:17 6 opinion, perfectly compatible and, more than
12:09:20 7 that, confirms the fact that it was perfectly
12:09:24 8 conceivable to speak of Princes in Canada that
12:09:27 9 were not Christian Princes and non-European
12:09:31 10 Princes.

12:09:32 11 Q. Well, perhaps we better look at
12:09:34 12 those documents because it's my recollection
12:09:36 13 that what you have is the French interpreting
12:09:40 14 what the Iroquoian speaking peoples were saying
12:09:46 15 rather than adopting the terminology, that in
12:09:52 16 fact there's no endorsement that Stadacona was a
12:09:56 17 King it's that they considered him their King.
12:09:59 18 So I'm -- would you agree with that summary or
12:10:02 19 do we need to look at the document?

12:10:04 20 A. I think we need to look at the
12:10:06 21 document because when, for instance, Cartier
12:10:16 22 maneuvers to have one potential King or Chief,
12:10:21 23 are his words, because Donnacona will be coming
12:10:22 24 to him with France, actually was forced to come
12:10:23 25 to him with France, he maneuvers, I read

12:10:29 1 elsewhere was the interpretation of his, that
12:10:33 2 voyage and the recital here -- anyway.

12:10:36 3 So there is a replacement of one King
12:10:38 4 by the other. So he says, Donnacona is coming
12:10:44 5 to France and he was replaced by this King. And
12:10:46 6 for me whether Cartier was instrumental in this
12:10:50 7 or not he really appreciates that the word
12:10:55 8 "King" captures the status of these persons. So
12:10:59 9 maybe I'm saying the same thing to you but to me
12:11:02 10 he's using a legal concept to describe the
12:11:06 11 society that he's observing.

12:11:07 12 Q. I think we've gone through that
12:11:09 13 issue sufficiently that perhaps we can move on
12:11:13 14 to the next issue?

12:11:17 15 A. Yes.

12:11:18 16 Q. It will just take me a moment to
12:11:22 17 call things back up.

12:11:53 18 There are a couple of minor points
12:11:55 19 that arose during your examination in-chief that
12:11:58 20 I'd simply like to get some clarification on. I
12:12:09 21 believe Ms. Ramlochun has uploaded into the
12:12:14 22 database the dictionary of Canadian biography
12:12:19 23 entry for Perron --

12:12:22 24 A. Perrot.

12:12:23 25 Q. Perrot, sorry. I'm not going to

1 take you to that unless it's necessary, but we
2 do have it available if you feel it necessary to
3 verify any particular details?

4 A. I have a question mark whether I
5 received it but, in any case, let's see what you
6 want to have.

7 Q. It's very straightforward and
8 shouldn't require a reference to the DCB entry.
9 I have it as page 90, 91. You talk about
10 Perrot's being a credible witness --

11 A. Yes.

12 Q. -- to the founding of I believe
13 it was Fort Frontenac in 1671?

14 A. Yes.

15 Q. I'd just like to confirm with you
16 that nowhere in the account that Perrot produced
17 does he state that he was directly involved or
18 an eyewitness of the discussions at Fort
19 Frontenac.

20 A. That's correct.

21 Q. And you would agree that the
22 account that you're relying on was written
23 nearly 40 years after the event?

24 A. That is correct.

25 Q. And you're aware that historians

12:13:52 1 whom you've read have reservations about relying
12:13:57 2 too closely on narratives long after the fact?

12:14:04 3 A. I would agree with that as a
12:14:05 4 general principle.

12:14:07 5 Q. That's all I wanted to clarify
12:14:10 6 about that point.

12:14:14 7 A. If I may? My opinion, and I
12:14:17 8 expect you to disagree with that, is
12:14:19 9 recollection that's corroborated by the
12:14:21 10 contemporary evidence in the account by -- of
12:14:26 11 Frontenac's foundation of the fort. So there
12:14:32 12 were the two elements. Just Perrot would be
12:14:35 13 weaker evidence, I would agree with that, but
12:14:38 14 there was an additional element strengthening
12:14:41 15 his credibility in this case.

12:14:43 16 Q. As I said, I just want to make
12:14:45 17 sure that we're looking at the historical
12:14:48 18 problem through your self-taught historical
12:14:52 19 methodology. I'm glad to see that it matches up
12:14:55 20 with what we've heard from other historians.

12:15:01 21 THE COURT: Mr. McCulloch, just while
12:15:02 22 you move on, I wish to remind you, and this has
12:15:05 23 not come up with Professor Morin, that when
12:15:08 24 you're referring to the transcript from
12:15:10 25 yesterday you should describe it as it is, a

1 rough transcript. We have excellent court
2 reporters but it is nonetheless a rough
3 transcript, sir, and no more than that. Please
4 go ahead.

5 MR. McCULLOCH: Thank you, Your
6 Honour. I will be careful to be explicit in any
7 future references. So I don't think I will be
8 making any more references but I will make sure
9 to be precise.

10 BY MR. MCCULLOCH:

11 Q. Professor Morin, I'd like to ask
12 you a few questions, and here, it turns out I
13 was wrong. I may go to the rough transcript but
14 I hope I do not have to.

15 I want to talk about Detroit. You've
16 mentioned Detroit in both your testimony and
17 your -- in your report. I would like to, again,
18 summarize what I think you have said and then
19 ask you some further questions.

20 What you have said is, is that many
21 Indigenous peoples came to Detroit upon the
22 French invitation?

23 A. That's my understanding. That's
24 correct.

25 Q. And that there's no actual record

1 of anyone seeking consent in any active sense in
2 1701?

3 A. That is correct.

4 Q. I would like to, again keeping
5 the chronology clear, move forward a good 30 to
6 40 years from 1701?

7 A. If I may, this reminds me of our
8 previous discussion of the Ohio Valley where you
9 have many Indigenous Nations in the same area
10 and not one clearly identified interlocutor.

11 Q. It's the same situation, the
12 French felt quite comfortable treating it as our
13 territory?

14 A. Our territory. Yes, anyway.

15 Q. That's 1701. I remind you, and
16 we've talked about this a couple of times so I
17 don't think I have to take you to either your
18 report or to the rough transcript, writers such
19 as Locke, and more specifically Emer de Vattel,
20 had advanced the proposition that you could
21 acquire legitimate possession of part of the
22 territory of an errant hunter-gatherer people by
23 settling down and farming. Have I restated that
24 correctly?

25 A. Yes, with one minor reservation.

12:18:21 1 They said not in the villages or where they
12:18:24 2 actually cultivate the lands themselves, but
12:18:28 3 this is just to take that where he's speaking of
12:18:32 4 hunting grounds.

12:18:38 5 Q. And you would agree, again based
12:18:40 6 on your knowledge about the relations between
12:18:43 7 the French and the British, diplomatic and
12:18:52 8 otherwise during this period, by the time we get
12:18:54 9 into the 1740s there is a substantial French
12:18:58 10 settlement at Detroit?

12:19:00 11 A. Yes.

12:19:02 12 Q. You would -- do you know that the
12:19:04 13 settlement had a population of approximately
12:19:08 14 2,000 people?

12:19:09 15 A. That makes sense but it's not in
12:19:13 16 my area of expertise, this is not something I
12:19:15 17 know by heart. What I know is from the
12:19:18 18 literature in any case so that makes sense.

12:19:26 19 Q. I believe that my friends from
12:19:27 20 Ontario may ask further questions along this
12:19:29 21 topic, I just wanted to establish that we have
12:19:31 22 an agreement on the basic facts?

12:19:36 23 A. Yes, but I would not want to be
12:19:37 24 the source of the exact number. As a rough
12:19:41 25 estimate it makes sense but I don't know the

12:19:43 1 numbers by heart. Is it 1,000, 5,000, 500, I
12:19:51 2 couldn't tell that, but it seems from my reading
12:19:54 3 something that would be quite possible.

12:20:01 4 Q. I've noticed that in your report,
12:20:03 5 as far as I can recollect, or in your testimony,
12:20:06 6 you haven't talked about Michilimackinac?

12:20:15 7 A. No.

12:20:15 8 Q. And on the basis your general
12:20:17 9 expertise in this period are you aware that
12:20:19 10 there was a French fort at Michilimackinac?

12:20:23 11 A. Well, I do mention
12:20:25 12 Michilimackinac in one paragraph but I did not
12:20:27 13 research the issue and considered -- well, I
12:20:31 14 thought it would be better for me to concentrate
12:20:33 15 on the examples chosen by Professor Beaulieu.
12:20:37 16 There was enough work for me doing that, I did
12:20:40 17 not want to add additional examples so that was
12:20:43 18 my approach, but I did mention I think
12:20:46 19 Michilimackinac, or maybe I'm confusing with
12:20:49 20 Detroit.

12:20:49 21 So you're saying it's not in my
12:20:51 22 report?

12:20:52 23 Q. I don't remember the description
12:20:53 24 of there being a fort, and my next question, a
12:20:57 25 French settlement there.

1 A. Yes, that is true, a French
2 settlement around the fort.

3 Q. At Michilimackinac?

4 A. Yes.

5 Q. I want to make sure we have the
6 same fact.

7 A. If I may, this is an example of
8 when the fort was closed. Here this comes from
9 my reading of the secondary literature, but it
10 was very clear that the Ottawas Indigenous
11 Nations at Michilimackinac were very unhappy
12 that the trading post was closed and that they
13 were actually requesting the reopening of the
14 trading post. And so that is very clear from
15 the secondary literature that I looked at.

16 Q. Thank you, that leads very nicely
17 into my next question. At Detroit and along the
18 south shore of Lake Ontario up to the
19 St. Lawrence, the Indigenous groups there,
20 particularly the Haudenosaunee were in close
21 proximity to English trading posts, isn't that
22 correct?

23 A. At Detroit? Later in the
24 southern shore of Lake Ontario, yes, there were
25 Oswego there, but close proximity to the British

12:22:20 1 post at Detroit? I'm not sure what you're
12:22:23 2 referring to.

12:22:24 3 Q. I was thinking of things like
12:22:26 4 Albany and -- they're actually further east than
12:22:31 5 Detroit.

12:22:31 6 A. Yes, it seems to me not close
12:22:33 7 proximity.

12:22:36 8 Q. I will agree. Shall we say that
12:22:39 9 there were English trading post in what is
12:22:41 10 nowadays upstate New York?

12:22:44 11 A. Yes.

12:22:48 12 Q. And I think you would certainly
12:22:49 13 agree with me that in that context, or that
12:22:53 14 period of clashes between the British and the
12:22:56 15 French empires the Indigenous peoples who had
12:23:02 16 access to both French and English trading posts
12:23:06 17 could play one against the other?

12:23:09 18 A. Yes.

12:23:10 19 Q. And, hence, you would agree it's
12:23:13 20 in that context that the discussion that you had
12:23:17 21 about the better prices could be understood?

12:23:23 22 A. Yes.

12:23:24 23 Q. Are you committing to being
12:23:26 24 competitive? Is what the Indigenous peoples
12:23:28 25 were saying to Frontenac?

12:23:37 1 A. Well, yes, but I think they're
12:23:38 2 saying also we're paying too high a price even
12:23:43 3 when they go to Montreal and this leads us to go
12:23:45 4 to Albany. So if you're going to come for a
12:23:48 5 fortification which we say officially we're
12:23:51 6 filled with joy, but perhaps internally not.
12:23:53 7 But at least it has to be advantageous for us
12:23:56 8 and then we'll live with it because we don't
12:23:59 9 want to use you more.

12:24:01 10 Q. And when we speak of the
12:24:03 11 Indigenous groups in the -- what is now upstate
12:24:12 12 New York and then along to Lake Champlain we are
12:24:15 13 talking about the Haudenosaunee, is that
12:24:15 14 correct?

12:24:16 15 A. Yes, west of Lake Champlain and
12:24:20 16 upstate New York, yes.

12:24:26 17 Q. So that in fact the Haudenosaunee
12:24:27 18 were in a particularly well-advantaged position
12:24:30 19 to play the French off against the English?

12:24:35 20 A. Absolutely.

12:24:37 21 Q. I think in fact you'd agree
12:24:38 22 that's the story of their diplomacy,
12:24:40 23 particularly in 1701?

12:24:44 24 A. Indeed.

12:24:45 25 Q. You don't mention it by name but

1 I gather by implication in your report you refer
2 to the agreement that the then Five Nations, but
3 I'll just call them the Six Nations, did a deal
4 with the English at Albany in 1701?

5 A. Yes, if you mean the deed of
6 surrender which I do discuss in my report?

7 Q. Yes, yes. You don't call it the
8 Treaty of Albany or the Nanfan Treaty?

9 A. No.

10 Q. Just again for the record, the
11 usual term, to avoid confusion, at least here in
12 Canada is the Nanfan Treaty, just for future
13 reference later in this discussion.

14 And it's only a few months later that
15 they participate in the Great Peace at Montreal
16 in 1701?

17 A. Yes. I'll just back-track a
18 little bit and I will say, although I should
19 have been aware of this, I did not double check
20 this but -- so this is reading the literature
21 long time ago.

22 So I'll leave it open for maybe
23 counsel if something is not correct, but my
24 impression is that the term you're using and the
25 date certainly corresponds with the deed. So I

1 would be inclined to say, yes, but I just want
2 to raise a flag here saying maybe I'm missing
3 something.

4 Q. We can always verify the exact
5 dates. They were at one point I think in a
6 table of chronological events but perhaps they
7 no longer are. And we can verify that a little
8 later on.

9 So again we have, you would agree
10 then, that the Five Nations, later the Six
11 Nations, not only occupied a highly strategic
12 geographic area, but also demonstrated a
13 coherence and joint operation amongst themselves
14 in terms of the pursuit of a strategy of dealing
15 with the French and the English?

16 A. Yes.

17 Q. In fact, talking of
18 confederacies, a common name for the
19 Haudenosaunee was the Confederacy of the
20 Iroquois?

21 A. Yes.

22 Q. Now, to the best of your
23 knowledge there were -- we've already
24 established that to the best of your knowledge
25 there were no English trading posts in even the

1 remote proximity of the Anishinaabe in the Upper
2 Great Lakes?

3 A. Yes, that's correct. Let me
4 qualify this, the Upper Great Lakes but then you
5 have the trading post on Hudson's Bay so it
6 depends on which Anishinaabe you're talking to.

7 Some may have been within relatively
8 reasonable travelling distance from British
9 trading posts up north.

10 Q. But that would have been on the
11 other side of the height of land, which would
12 have made --

13 A. I presume so.

14 Q. Yes. So that -- but the
15 Anishinaabe along the shores of -- and
16 perhaps -- because I understand there's some
17 dispute over the terminology? When I use the
18 term "Upper Great Lakes" did you include Lake
19 Erie?

20 A. Yeah, for me there are five Great
21 Lakes. I'm not excluding any Great Lake.

22 Q. I'd just like to clarify for the
23 purposes of this because just different
24 terminology depending on whether you go by
25 geography or general history, that for the

1 purposes here the Upper Great Lakes are Lakes
2 Huron and Lake Superior.

3 A. Alright.

4 Q. So you would agree that for the
5 Anishinaabe living on the shores of the Upper
6 Great Lakes there was not an immediate
7 competitor to the French fur traders who were
8 expanding north and westward from
9 Michilimackinac?

10 A. For those living on the shores it
11 would be very time consuming and almost
12 unreasonable maybe to travel to the shores of
13 James Bay.

14 Q. I'm sorry, my computer keeps on
15 turning off.

16 A. And if I may when you're ready I
17 just want to add something.

18 Q. That should be in just a moment.
19 Yes, one of the problems with government
20 computers is they won't allow you to turn off
21 the "don't turn off" sign, so despite my best
22 efforts every once in a while it shuts down and
23 I have to reload it. It's the result of being a
24 civil servant.

25 A. Apparently the VPN from my

12:30:13 1 university was creating some problems yesterday.

12:30:28 2 Q. Now, this is again something from
12:30:29 3 both your report and the rough transcript.

12:30:34 4 A. If I may, I just wanted to go
12:30:36 5 back to the previous answer.

12:30:37 6 Q. I'm sorry.

12:30:38 7 A. Just to say that it would have
12:30:40 8 been probably not as advantageous but people on
12:30:44 9 the shores of the Upper Great Lakes could have
12:30:46 10 traded with other Indigenous Nations if the
12:30:51 11 prices of the French became so bad, or so
12:30:54 12 terrible, or if there was a shortage of goods.
12:30:57 13 They could have used intermediaries instead of
12:31:01 14 going up to Hudson's Bay, so that's one
12:31:04 15 possibility I wanted to mention.

12:31:05 16 Q. Yes. The whole middlemen and the
12:31:11 17 fur trade is, I think you would agree, a fairly
12:31:14 18 well-documented phenomenon?

12:31:16 19 A. Yes.

12:31:16 20 Q. And that certain Indigenous
12:31:18 21 groups in fact made a business about being
12:31:21 22 intermediaries?

12:31:22 23 A. Yes.

12:31:23 24 Q. While we're on this sort of
12:31:25 25 economic context, part of the things that I

12:31:29 1 gather you picked up from secondary literature,
12:31:34 2 I think you would agree that the primary
12:31:38 3 economic motor for the expansion of trade was
12:31:44 4 the French appetite for beaver pelts?

12:31:48 5 A. Absolutely.

12:31:51 6 Q. And I've asked this question of
12:31:54 7 other experts and received answers, why were the
12:31:59 8 French and the English, in fact Europeans
12:32:05 9 generally, so interested in beaver pelts?

12:32:07 10 A. Well, because there was a strong
12:32:10 11 demand for it in Europe, would be my answer.

12:32:13 12 Q. Well, do you know for what the
12:32:15 13 beaver pelts were used?

12:32:17 14 A. For hats, for making hats.

12:32:20 15 Q. What kind of hats?

12:32:21 16 A. Hat that would be resistant, more
12:32:23 17 resistant to the rain; I'm not sure what shape
12:32:26 18 they had or anything like that. Here I'm basing
12:32:30 19 myself entirely on secondary literature but
12:32:33 20 that's what I've read.

12:32:35 21 Q. In fact by and large they were
12:32:38 22 the hats worn by the gentlemen and aristocrats?

12:32:46 23 A. I couldn't say. I know it was a
12:32:49 24 large market so maybe it was not only gentlemen
12:32:52 25 and aristocrats. I cannot answer that question.

12:32:55 1 Q. I'm going to move along then --

12:33:01 2 A. Because I don't know.

12:33:04 3 Q. Yes, yes --

12:33:05 4 THE COURT: Mr. McCulloch, I'm glad to
12:33:06 5 hear you're moving along because I'm beginning
12:33:08 6 to wonder how some of these last questions fall
12:33:12 7 within the tender for this gentleman?

12:33:16 8 MR. McCULLOCH: Your Honour, I was
12:33:17 9 increasingly aware that I was operating on the
12:33:19 10 very edge of the fourth provision, which is the
12:33:22 11 diplomacy that is between the French and
12:33:26 12 English. But, yes, I was skating on
12:33:28 13 ever-thinning ice, which is why I would like to
12:33:35 14 move on to what I expect will be my final
12:33:39 15 question.

12:33:45 16 BY MR. MCCULLOCH:

12:33:46 17 Q. In both your report and the
12:33:46 18 transcript, just a moment, I'm going to pull it
12:33:48 19 up.

12:33:49 20 A. You mean the rough transcript?

12:33:51 21 Q. I'm sorry, the rough transcript.
12:34:03 22 You make an assertion, and I think you will
12:34:05 23 remember it, that it only makes sense that since
12:34:11 24 the French occasionally or tentatively sought
12:34:16 25 agreements with the Haudenosaunee about places

12:34:19 1 like Fort Frédéric and Detroit that surely they
12:34:25 2 would have done the same for their Anishinaabe
12:34:30 3 allies?

12:34:33 4 A. I say for any ally. You said
12:34:35 5 Fort Detroit but you meant Fort Niagara.

12:34:38 6 Q. Sorry, yes, yes.

12:34:40 7 A. But that's -- well, tentative
12:34:43 8 agreement is qualifying I think what I meant but
12:34:49 9 otherwise, yes, that's what I said.

12:34:52 10 Q. And the basis for the principle
12:34:54 11 is simply it makes sense, right?

12:34:57 12 A. Yes. It's what I would call an
12:35:01 13 educated guess based on my reading of the
12:35:05 14 secondary literature and some of the conferences
12:35:07 15 that are dealing with allies in my previous
12:35:10 16 research that were not the Haudenosaunee, and
12:35:12 17 things like that.

12:35:13 18 But I present it clearly as something
12:35:15 19 I think is very likely but I cannot offer a firm
12:35:19 20 opinion on this. An educated guess is I think
12:35:23 21 the best expression I can use.

12:35:25 22 Q. So you would agree that in coming
12:35:32 23 to that educated guess you didn't make a
12:35:34 24 particular historical study of the mentality of
12:35:38 25 absolute monarchs in the 18th century, of

12:35:44 1 military strategies, of economic priorities? So
12:35:47 2 you didn't look at the context of the people who
12:35:51 3 were setting the policy, did you?

12:35:55 4 A. Well, in my previous research I
12:35:56 5 did look at that to the extent that it would
12:35:59 6 inform the treaties, or other documents, or the
12:36:03 7 conference that I was reading. As I mentioned,
12:36:05 8 my previous research was not focusing
12:36:08 9 exclusively on the Haudenosaunee.

12:36:10 10 So to that extent I have thought about
12:36:13 11 these issues reading on the secondary
12:36:15 12 literature, but I did not do any research for
12:36:20 13 this report to kind of increase my knowledge in
12:36:24 14 these fields or on these issues.

12:36:27 15 Q. Of the historical context of the
12:36:29 16 decision-makers and why they would have adopted
12:36:32 17 one strategy over the other?

12:36:33 18 A. Yeah. But these strategies I
12:36:39 19 take from my previous research and my other
12:36:43 20 understanding of these strategies. As I said,
12:36:45 21 military strategy and economics in as long as it
12:36:48 22 helps us understand generally the context of the
12:36:51 23 documents I was focusing on and not developing
12:36:54 24 an expertise in this field.

12:36:56 25 Q. And just to bring back to where

12:36:59 1 we started, when I was examining you on your
12:37:02 2 methodology you talked about how the context and
12:37:07 3 motivations and priorities of the individual
12:37:10 4 actors was particularly the domain of
12:37:16 5 historians?

12:37:18 6 A. Yes, but I don't think it
12:37:19 7 prevents other people in different disciplines,
12:37:21 8 and ethnohistory is a good example where
12:37:25 9 anthropologist and historians have developed
12:37:27 10 eventually a subdiscipline.

12:37:30 11 Q. Again, like Professor Beaulieu I
12:37:32 12 have a great deal of respect for your
12:37:34 13 scholarship, I'm simply trying to make sure that
12:37:37 14 the different types of scholarship that Her
12:37:40 15 Honour will be weighing are clearly
12:37:43 16 distinguished.

12:37:43 17 A. Yes.

12:37:45 18 Q. And if I may check for a moment
12:37:48 19 with my colleagues? I guess the only way I can
12:37:53 20 do that is if we can be very briefly put in a --

12:37:58 21 THE COURT: Yes, we can do that.

12:38:00 22 Ms. Roberts, can you put us into our
12:38:02 23 breakout rooms? Is five minutes enough,
12:38:05 24 Mr. McCulloch, or you talking a little longer
12:38:08 25 period?

12:38:11 1 MR. McCULLOCH: I would be surprised
12:38:12 2 if it took five minutes.

12:38:15 3 THE COURT: Perhaps Ms. Roberts can
12:38:16 4 join that room? Is that acceptable,
12:38:17 5 Mr. McCulloch?

12:38:20 6 MR. McCULLOCH: Yes, Your Honour.

12:38:22 7 THE COURT: And then she'll just bring
12:38:23 8 us all back just as soon as Mr. McCulloch has
12:38:27 9 had an opportunity to consult with his
12:38:30 10 colleagues.

12:38:31 11 MS. ROBERTS: We will now break for
12:38:32 12 five minutes.

12:38:33 13 -- RECESSED AT 12:38 P.M. --

12:38:33 14 -- RESUMED AT 12:43 P.M. --

12:43:50 15 MR. McCULLOCH: Your Honour, those are
12:43:51 16 my questions.

12:43:53 17 THE COURT: Thank you, Mr. McCulloch.

12:43:56 18 Counsel, I have a judicial meeting
12:44:03 19 over the lunch break today. For that reason I
12:44:06 20 am not in the position to resume any earlier
12:44:10 21 than 2:15, which I would orderly do if we broke
12:44:15 22 early.

12:44:16 23 My sense, Ms. Lapan, is that we're
12:44:21 24 significantly ahead of schedule and there are,
12:44:23 25 therefore, no timing issues. Is that your sense

1 as the next examining counsel as well?

2 MS. LEPAN: Yes, that's my sense as
3 well. And I actually expect that we'll be able
4 to finish today.

5 THE COURT: All right. Well, thank
6 you for that estimate. Is that going to be
7 true, Ms. Lepan, if we stop 10 minute early for
8 lunch and still resume at 2:15 rather than
9 sooner than that? Or if you want to get started
10 that's fine with me.

11 MS. LEPAN: I'm content to break now
12 and my estimate won't change if we break a bit
13 early.

14 THE COURT: All right. All counsel,
15 is that satisfactory? I'm looking at
16 Ms. Pelletier in particular.

17 MR. PELLETIER: Yes, Your Honour.
18 Thank you.

19 THE COURT: All right. We'll adjourn
20 early for lunch but we will resume at the usual
21 time of 2:15. Thank you, counsel.

22 -- RECESSED AT 12:45 P.M. --

23 -- RESUMED AT 2:19 P.M. --

24 CROSS-EXAMINATION BY MS. LEPAN:

25 Q. Good afternoon, Professor Morin.

02:20:36 1 A. Good afternoon.

02:20:37 2 Q. My name is Jennifer Lapan, I'm
02:20:39 3 counsel for Ontario and I'm going to be asking
02:20:42 4 you a few questions today beginning with
02:20:44 5 questions about the Law of Nations briefly, just
02:20:47 6 to confirm a few things, and then moving on to
02:20:50 7 questions about Fort Detroit and some of the
02:20:52 8 other forts.

02:20:53 9 A. Yes.

02:20:56 10 Q. Your report discusses three
02:20:57 11 issues that were addressed by the Law of
02:20:59 12 Nations. The first, what were the legitimate
02:21:04 13 grounds to wage war against Indigenous people;
02:21:06 14 the second, could Indigenous people be forced to
02:21:11 15 live and work for a colonial power; and, the
02:21:13 16 third, could Aboriginal hunting and fishing
02:21:16 17 territories be occupied unilaterally by
02:21:20 18 settlers.

02:21:20 19 So when you mention the principles of
02:21:20 20 the Law of Nations in the rest of your report is
02:21:22 21 my understanding correct that you're referring
02:21:24 22 to principles that address those three issues?

02:21:28 23 A. Yes, I would think so.

02:21:31 24 Q. And on the first issue, the
02:21:33 25 legitimate reasons to wage war, you'd agree that

02:21:37 1 there was no scholarly consensus on what the
02:21:39 2 principles of the Law of Nations dictated?

02:21:47 3 A. Well, I guess there was some very
02:21:52 4 broad issues about which there was consensus, in
02:21:55 5 self-defence, for instance, otherwise there were
02:21:58 6 other more controversial grounds for just cause
02:22:00 7 of war.

02:22:02 8 Q. So there wasn't consensus on all
02:22:04 9 of the reasons for just cause of war?

02:22:09 10 A. Exactly.

02:22:11 11 Q. And on the third issue, can
02:22:13 12 Aboriginal hunting and fishing territories be
02:22:16 13 occupied unilaterally, there was also no
02:22:19 14 consensus on what the principles of the Law of
02:22:21 15 Nations dictated?

02:22:22 16 A. Yes.

02:22:24 17 Q. And do you agree that the
02:22:25 18 scholarly debate regarding the Law of Nations
02:22:28 19 developed between the 16th to the
02:22:29 20 18th centuries?

02:22:32 21 A. Yes.

02:22:34 22 Q. And between the 16th to the
02:22:36 23 18th centuries the Law of Nations weren't
02:22:39 24 codified in any formal document that was written
02:22:42 25 down and signed by abiding Nations?

02:22:46 1 A. Absolutely.

02:22:48 2 Q. And between the 16th and the
02:22:51 3 18th century there was no international body
02:22:53 4 that existed to enforce the Law of Nations?

02:22:56 5 A. Correct.

02:22:58 6 Q. So is it fair to say that between
02:23:00 7 the 16th to the 18th centuries the principles of
02:23:03 8 the Law of Nations weren't a set of
02:23:07 9 internationally-prescribed and accepted legal
02:23:09 10 rules, but more principles that were developed
02:23:13 11 by academics and jurists which Nation could or
02:23:17 12 could not follow, albeit at their own risk?

02:23:21 13 A. Well, as I explained yesterday,
02:23:24 14 the thinking at the time was that although the
02:23:29 15 causes of war that might be involved were
02:23:34 16 somewhat debatable, but the basic principle was
02:23:38 17 you had to be injured and you had to seek
02:23:40 18 redress before resorting to violence.

02:23:43 19 And these principles were understood,
02:23:44 20 and European powers would try to justify their
02:23:51 21 resort to force according to these principles.
02:23:53 22 And you could see contradiction both in the
02:23:57 23 scholarly literature and in the way the powers
02:24:01 24 would try to justify their actions.

02:24:04 25 And I also mentioned yesterday there

02:24:06 1 was a basic framework about relations between
02:24:10 2 nations that have some specific concrete
02:24:15 3 consequences, like you have different
02:24:16 4 territory's rulers, you're subjects of one King
02:24:19 5 or Republic or whatever, and there are
02:24:23 6 foreigners, and you have ships that can be
02:24:26 7 captured during wars and whether it was a time
02:24:30 8 of war, a time of peace, whether it was a
02:24:32 9 neutral state or not. All of these would be
02:24:36 10 interpreted according to the Law of Nations and
02:24:38 11 acted upon, in my last example, in court.

02:24:42 12 So I think it's going much too far to
02:24:44 13 say that there are no rules, no consensus.
02:24:46 14 Maybe there are far less consensus on what
02:24:50 15 international law allows you to do and not to do
02:24:53 16 in these times than today, but there was a
02:24:56 17 conscious effort to develop rules. And the
02:25:00 18 authors I was mentioning were also very eager --
02:25:05 19 no, "eager" would not be correct. Were anxious
02:25:09 20 to try to reflect state practice. So the
02:25:12 21 controversies were both in the debate in the
02:25:16 22 literature and in the way the nations acted.

02:25:22 23 Q. So to confirm, in the course of
02:25:28 24 your research you haven't found any documents
02:25:33 25 which provided instructions to officials in New

02:25:36 1 France that explicitly stated the requirements
02:25:39 2 of the Law of Nations? Would you like me to
02:25:46 3 repeat that?

02:25:47 4 A. No, I was thinking.

02:25:49 5 Q. Of course.

02:25:50 6 A. My reports argues that when you
02:25:52 7 have references to Princes, to treaties, to
02:25:55 8 making war with local Princes in the Americas,
02:25:59 9 that is and would be understood at the time as a
02:26:03 10 reference to a status that comes from the Law of
02:26:06 11 Nations and not from French law. These are
02:26:08 12 people who will not be subject to the authority
02:26:10 13 of the King.

02:26:12 14 So I think this terminology is a legal
02:26:14 15 terminology and would have been understood as
02:26:17 16 such at the time.

02:26:22 17 Q. And you haven't found any
02:26:23 18 letters, or memoirs, or other documents that
02:26:26 19 were written by officials in New France that
02:26:29 20 explicitly stated that they understood that the
02:26:32 21 Law of Nations was governing their actions?

02:26:40 22 A. What I have found and I have a
02:26:42 23 question mark if -- yeah, I have one example I
02:26:45 24 can think of.

02:26:46 25 So in my 2013 paper on fraternity, in

02:26:51 1 footnote 15, I give specific examples in the
02:26:54 2 literature I've reviewed, most of which is not
02:26:57 3 clearly official documents, but written by the
02:27:01 4 Jesuits with in some cases relatively good legal
02:27:08 5 culture, I would say general legal culture, or
02:27:11 6 explorers, and relating the action of governors
02:27:14 7 and referring specifically to the Law of Nations
02:27:17 8 or the laws of wars, or some expressions like
02:27:20 9 that.

02:27:20 10 So I find a few examples of the
02:27:24 11 relations between France and Indigenous people
02:27:29 12 where the expression was quoted, one of which is
02:27:32 13 in Baron Lahontan and he reproduces a
02:27:45 14 declaration of war by Governor de La Barre.

02:28:02 15 So Governor de La Barre is actually,
02:28:06 16 according to Lahontan, declaring war formally
02:28:10 17 against the Haudenosaunee around 17 -- and he
02:28:13 18 reproduces the text. And other examples or more
02:28:15 19 comments of ongoing circumstances where the
02:28:21 20 French say, We have the right to retaliate, to
02:28:23 21 execute prisoners, things like that. But
02:28:26 22 mentioning specifically the Law of Nations or
02:28:29 23 very close words, sorry, some words that are
02:28:32 24 very close that I identify as being applicable.
02:28:36 25 And then many more examples describing the Law

02:28:39 1 of Nations as applying between Indigenous
02:28:42 2 Nations in footnotes 16 of that paper.

02:28:46 3 Q. And of those examples that you
02:28:48 4 were just discussing you said the majority of
02:28:51 5 them is not official documents or official
02:28:55 6 French actors, it's Jesuits or --

02:29:00 7 A. But I believe they are also in
02:29:01 8 the correspondence from Louis XIV, some
02:29:05 9 reference to the Law of Nations also, but here
02:29:10 10 my memory fails me.

02:29:12 11 Q. You didn't cite that in your
02:29:14 12 report?

02:29:14 13 A. No. I think some examples are
02:29:16 14 quoted in my previous publications but I would
02:29:19 15 have to double check that.

02:29:20 16 Q. Thank you. I'd like to show you
02:29:32 17 Exhibit 4380, an excerpt from Professor
02:29:36 18 Beaulieu's report. And here he states:

02:29:57 19 "Several factors contributed to
02:29:58 20 the expansion and settlement of the
02:29:59 21 French in the interior of the
02:30:01 22 continent, but the fur trade and the
02:30:03 23 strategic imperatives arising from the
02:30:05 24 desire to exclude the British from
02:30:07 25 these regions were the most important

1 and they largely determined French
2 decisions."

3 Do you agree with this statement?

4 A. Yes, with the qualification that
5 that does not detract, in my opinion, not in
6 Professor Beaulieu's of course, on the rights
7 and status of Indigenous people. We cannot
8 conclude from what is there anything about that.

9 Q. And I'm showing you a document
10 which is SC2104.

11 A. Yes.

12 Q. And according to your CV the
13 English title for this document is "French and
14 British Civilization in North America during the
15 17th and 18th century and the status of
16 Aboriginal People", and this document is chapter
17 2 in the book "Le juge et l'Outre-mer", and it's
18 dated 2005. And you're nodding your head so I
19 assume you will agree that you wrote this
20 chapter?

21 A. Absolutely. I thought it was
22 2006 but that's not a big deal.

23 Q. 2005 or '06.

24 A. Okay.

25 Q. So this chapter examines French

02:31:25 1 and British approaches to colonization in North
02:31:28 2 America in the 17th and 18th century and the
02:31:31 3 status of Aboriginal peoples during that time?

02:31:34 4 A. Yes.

02:31:34 5 Q. So it covers similar topics to
02:31:36 6 those you discuss in your report?

02:31:38 7 A. Yes.

02:31:38 8 Q. I'm going to ask you to look at
02:31:53 9 five sentences in the introduction section,
02:31:54 10 which is on page 145 of this document, or 5 of
02:31:54 11 the PDF, and they begin with, "La colonisation
02:31:57 12 de l'Amérique" and end with, "les rapports de
02:32:10 13 force." I'll give you a second to look it over.

02:32:28 14 A. (Witness reading the document.)

02:32:29 15 Yes.

02:32:30 16 Q. I'm going to go through and say
02:32:32 17 what I think those sentences mean in English and
02:32:34 18 after each sentence I'm going to pause and I'll
02:32:37 19 give you an opportunity to correct me if you
02:32:41 20 want to rephrase anything, or correct me, okay?

02:32:44 21 A. Perfect.

02:32:47 22 Q. The colonization of North America
02:32:49 23 seems to have proceeded in fundamentally
02:32:52 24 different ways in New France and in the British
02:32:54 25 colonies.

02:32:56 1 A. Very good.

02:32:57 2 Q. At first glance the low number of
02:33:00 3 conflicts seems to point to the fact that the
02:33:03 4 French approach was more flexible?

02:33:07 5 A. Very good.

02:33:08 6 Q. We must, nonetheless, be wary of
02:33:11 7 hasty generalization because the low density of
02:33:14 8 populations brought about similar results in the
02:33:17 9 northern regions where the British settled, in
02:33:19 10 brackets, the Hudson's Bay company, for example?

02:33:27 11 A. That's correct.

02:33:28 12 Q. Further, in southern zones the
02:33:29 13 Antilles, Louisiana and Guyana conflicts between
02:33:34 14 the French and the Aboriginal peoples seem to
02:33:37 15 have been more frequent?

02:33:38 16 A. I think Antilles is better
02:33:40 17 rendered by "Indies" in general.

02:33:43 18 Q. Thank you.

02:33:44 19 In both cases the choice between a
02:33:46 20 peaceful or war-like approach was directed by
02:33:49 21 relationships of power?

02:33:51 22 A. That's correct.

02:33:53 23 Q. So the gist of what you're saying
02:33:54 24 here is that the approach the British or the
02:33:57 25 French took to colonization in New France, and

02:34:00 1 their choice between either using a peaceful
02:34:04 2 approach or war, was determined based on the
02:34:07 3 relationship of power between Britain or France
02:34:11 4 and the local Aboriginal people?

02:34:14 5 A. I agree with that.

02:34:19 6 Q. And now I'm going to ask you to
02:34:20 7 look at two more sentences from the document and
02:34:23 8 this is the last time that I'll refer to a
02:34:25 9 French document in my examination.

02:34:27 10 So if we turn to page 152 of this
02:34:30 11 document I'd like you to look under the heading
02:34:34 12 "Les domiciliés", and I'd like you to look at
02:34:40 13 the last paragraph that's highlighted. The two
02:34:43 14 sentences that begins with, "Dans l'ensemble, la
02:34:46 15 politique", and ends on the next page with, "ne
02:34:47 16 sont pas en guerre." I'll give you a second to
02:34:49 17 review it and then we'll go through the same
02:34:52 18 exercise.

02:34:53 19 A. (Witness reading the document.)

02:35:17 20 I think I have a paper copy to read
02:35:20 21 because I was provided this in advance and it
02:35:24 22 will be easier for me to read the sentence from
02:35:27 23 here.

02:35:29 24 Q. Great.

02:35:56 25 A. Okay.

02:35:57 1 Q. So in English those sentences
02:35:58 2 mean roughly, overall French policy is dictated
02:36:06 3 by the vastness of the territory where new lands
02:36:08 4 are easily available, as well as by the economic
02:36:11 5 importance of the fur trade which requires that
02:36:13 6 Aboriginal peoples be kept in their countries in
02:36:16 7 order to ensure a constant supply.

02:36:21 8 A. I agree with that.

02:36:22 9 Q. In the military arena alliances
02:36:24 10 allow for the support of Aboriginal enemies of
02:36:28 11 Great Britain without necessarily joining them
02:36:32 12 in the attack they embark on against the British
02:36:37 13 colonies when the two kingdoms are not at war?

02:36:40 14 A. I agree with that also, the
02:36:42 15 support of the French.

02:36:44 16 Q. So here when you say "French
02:36:49 17 policy" you mean French policy with respect to
02:36:51 18 Aboriginal peoples in New France?

02:36:53 19 A. Yes.

02:36:56 20 Q. And in this chapter you don't
02:36:58 21 discuss the principles of the Law of Nations
02:37:00 22 guiding French policy in the 16th, 17th or
02:37:03 23 18th century?

02:37:06 24 A. Well, this was supposed to be a
02:37:10 25 general overview of the legal status of

02:37:16 1 indigenou s peop les in New France, in Quebec in
02:37:19 2 general.

02:37:20 3 I would be surprised if I did not in
02:37:23 4 some way do this but if I did not, at least in
02:37:29 5 the footnotes, yeah...

02:37:42 6 Q. Perhaps we can leave this for now
02:37:44 7 and at the afternoon break you can review the
02:37:46 8 article and if you find any parts of it that
02:37:48 9 you'd like to draw my attention to you can after
02:37:51 10 we come back. Does that make sense to you?

02:37:55 11 A. Yes, it does, but I'll just go to
02:37:57 12 page 149.

02:38:00 13 Q. Yes.

02:38:02 14 A. And if you look at the second
02:38:10 15 paragraph starting from the top, here I review
02:38:15 16 what I've discussed in my report about the fact
02:38:18 17 that we are speaking of allies of the King and
02:38:21 18 the status is recognized by the company of the
02:38:26 19 West Indies in 1664, I've discussed this at
02:38:29 20 length.

02:38:30 21 But you can wage war, and I repeat
02:38:32 22 this, you can have an alliance and that you
02:38:37 23 should not use the countries of Nations who are
02:38:43 24 not in the alliance of the King.

02:38:46 25 So even though I maybe did not flag

02:38:49 1 this as a Law of Nations issue, for someone who
02:38:52 2 is interested in the legal history of
02:38:53 3 colonization, seeing that these Nations are not
02:38:57 4 subjects and that they have alliances with them
02:39:00 5 and you could wage war against them in the
02:39:03 6 official documents of the time, would flag out
02:39:06 7 that this is an issue of nation-to-nation
02:39:08 8 relationship.

02:39:10 9 So even though I did not spell it out
02:39:13 10 perhaps, and I would have to review this, I
02:39:16 11 don't think I was contradicting myself in any
02:39:18 12 way. Because I wanted to produce a shorter text
02:39:23 13 focusing more on the specific situation of New
02:39:26 14 France and the legal documents specific to New
02:39:30 15 France and not going to the Law of Nations
02:39:36 16 debate.

02:39:37 17 Q. Your Honour, we ask that this
02:39:39 18 chapter be marked as the next exhibit, with the
02:39:42 19 title being "French and British civilization in
02:39:44 20 North America during the 17th and 18th century
02:39:47 21 and the Status of Aboriginal People", dated
02:39:48 22 2005.

02:39:51 23 THE COURT: Is there any objection?

02:39:56 24 MR. PELLETIER: No, Your Honour.

02:39:56 25 Thank you.

02:39:57 1 THE COURT: All right. That will be
02:39:59 2 Exhibit 4952, Ms. Lapan.

02:39:59 3 MS. LEPAN: Thank you.

02:40:01 4 EXHIBIT NO. 4952: Chapter entitled,
02:40:02 5 "French and British Civilization in
02:40:02 6 North America during the 17th and
02:40:02 7 18th Century and the Status of
02:40:02 8 Aboriginal People", dated 2005.

02:40:19 9 BY MS. LEPAN:

02:40:19 10 Q. You would agree it was costly for
02:40:20 11 the French to fund military operations against
02:40:20 12 aboriginal people in New France?

02:40:22 13 A. Absolutely.

02:40:23 14 Q. So it benefited France, from an
02:40:24 15 economic perspective, to attempt to minimize
02:40:27 16 conflicts with Aboriginal peoples?

02:40:30 17 A. That is correct.

02:40:31 18 Q. And forming alliances with
02:40:33 19 Aboriginal peoples allowed France to form trade
02:40:35 20 partnerships that also benefited it
02:40:38 21 economically?

02:40:38 22 A. I agree.

02:40:40 23 Q. So it benefited France from a
02:40:42 24 trade perspective to acquire lands in New France
02:40:45 25 for peaceful means instead of by force?

02:40:48 1 A. Yes.

02:40:49 2 Q. And forming alliances with
02:40:51 3 Aboriginal peoples benefited France in their
02:40:54 4 struggle with Great Britain to dominate the
02:40:58 5 continental interior?

02:41:00 6 A. I agree also.

02:41:04 7 Q. So from a military perspective it
02:41:06 8 benefited France to acquire lands in New France
02:41:08 9 through peaceful means instead of by force?

02:41:12 10 A. Yes.

02:41:12 11 Q. I'm going to pull up your report
02:41:17 12 and turn to page 7 of that document. And here
02:41:33 13 you state:

02:41:35 14 "On the contrary, from 1541 to
02:41:38 15 1760, the French crown almost
02:41:40 16 invariably expressed its preference
02:41:42 17 for relationship based on treaties of
02:41:45 18 friendship or alliance, as opposed to
02:41:47 19 a conquest or military confrontations.
02:41:50 20 With few exceptions, French officials
02:41:53 21 were ordered to maintain peaceful
02:41:54 22 relations and to use force only as a
02:41:56 23 defensive measure (including
02:41:59 24 retaliation of course). This was
02:42:03 25 clearly a reference to the principles

02:42:05 1 of Law of Nations and it imposed
02:42:08 2 limits on the powers of the French
02:42:10 3 officials."

02:42:10 4 You would agree, however, that it's
02:42:11 5 possible that the approach of using peace
02:42:13 6 instead of force was taken by the French Crown
02:42:16 7 for strategic, economic or military reasons
02:42:19 8 rather than because of the Law of Nations?

02:42:22 9 A. Well, I don't see any
02:42:24 10 contradiction between the two points you're
02:42:27 11 making. That the motivations may be essentially
02:42:33 12 imperial, if I might put it that way, expanding
02:42:36 13 the territory as against other European Nations
02:42:39 14 and developing trade.

02:42:41 15 And the Law of Nations never denied
02:42:42 16 the possibility of colonizing but it did provide
02:42:46 17 a framework where you are dealing with people
02:42:50 18 who are initially independent who could become
02:42:52 19 allies.

02:42:53 20 And for all sorts of reasons we've
02:42:56 21 discussed yesterday and today, if you are about
02:42:59 22 to promote Christianity and you start by waging
02:43:04 23 war it's a bad start, let's put it in a way. So
02:43:08 24 that was clearly understood by everyone and
02:43:10 25 there was a strong mandate that you should

02:43:12 1 approach gently and peacefully these people.

02:43:17 2 So all of this is coherent with the
02:43:19 3 approach that I see, especially in the 1603
02:43:22 4 letters patent, and the edict creating the
02:43:24 5 company of the West Indies in 1664 where there
02:43:28 6 is clearly a requirement not to assault
02:43:30 7 Indigenous peoples first.

02:43:31 8 So the Law of Nations framework
02:43:35 9 preserved the discretion, you could almost
02:43:38 10 always find a valid reason to wage war against
02:43:40 11 Indigenous peoples, but it was much more
02:43:44 12 profitable and quite possible to interact with
02:43:47 13 them as allies, as I've explained.

02:43:51 14 So I don't see any contradiction
02:43:53 15 between the wider objectives and using the legal
02:43:57 16 framework of the Law of Nations to explain what
02:44:01 17 powers were given on the ground to make use of
02:44:05 18 the discretion that came both from the Law of
02:44:07 19 Nations, judging if you have a just cause of war
02:44:12 20 as the Governor you reported to Versailles or
02:44:16 21 Paris, or whatever, before acting.

02:44:22 22 And I've been lost in my thoughts
02:44:25 23 here, sorry.

02:44:26 24 So I don't see any tension between
02:44:29 25 this description of power or acting peacefully

02:44:33 1 and using the common-sense approach that it's
02:44:35 2 much better not to start with a war, for all the
02:44:39 3 good reasons you've indicated. But these two
02:44:42 4 things go hand-in-hand together, or there's no
02:44:46 5 contradiction between them.

02:44:48 6 Q. So I'm going to move on now from
02:44:51 7 the Law of Nations and talk to you a bit about
02:44:55 8 forts. And I won't take you there unless you'd
02:45:01 9 like to go, but at page 54 to 57 of your report
02:45:04 10 you discuss Queen's Fort and a French survey
02:45:10 11 that was near Lake George and Chicot River, do
02:45:13 12 you remember that example?

02:45:14 13 A. Yes.

02:45:14 14 Q. So apart from that example you
02:45:16 15 don't provide any other examples in your report
02:45:19 16 of where an Aboriginal group refused their
02:45:22 17 consent to the construction of a French fort and
02:45:26 18 French officials respected that refusal.

02:45:32 19 A. No. And to be perfectly honest,
02:45:34 20 that was not an example about building a fort,
02:45:39 21 that was an example about settling lands near
02:45:41 22 the fort that was already built.

02:45:42 23 So I've always said that the French
02:45:45 24 didn't seek consent for Fort Niagara but it was
02:45:48 25 given, in debatable circumstances, but over time

02:45:51 1 the interpretation by both parties was that
02:45:54 2 there had been consent.

02:45:56 3 So I did not find an example, and I
02:45:58 4 said there was an obligation to seek consent in
02:46:01 5 advance. That being said, I did not review, and
02:46:04 6 I don't think Professor Beaulieu either reviewed
02:46:09 7 all the forts.

02:46:10 8 It's quite possible. In here I say
02:46:12 9 this only as a hypothesis that seems to be quite
02:46:16 10 plausible and probable, that the people who were
02:46:20 11 in charge of building the forts would try to
02:46:22 12 make sure that they would not be met with
02:46:25 13 violations that they would throw up their arms
02:46:28 14 and become violent, or someone with whom they
02:46:30 15 had a good relationship that they would be able
02:46:33 16 to convince in advance, or on the spot, that
02:46:35 17 they would not oppose doing this. But it was
02:46:37 18 not asking consent in advance formally, although
02:46:41 19 it could have been done in practice for
02:46:42 20 common-sense purposes.

02:46:47 21 Q. So if we turn back now to that
02:46:49 22 example where you say the French contemplated
02:46:52 23 setting up a settlement near Lake George and
02:46:54 24 Chicot River, you would agree that if the French
02:47:00 25 had built either a fort, or a settlement, or an

02:47:02 1 establishment at that point it would have been
02:47:05 2 close to the British colonial settlement of
02:47:08 3 Albany?

02:47:09 4 A. Yes.

02:47:10 5 Q. And Albany was a primary European
02:47:13 6 settlement in the colony of New York?

02:47:16 7 A. Yes.

02:47:17 8 Q. And it was a central trading hub
02:47:20 9 and military supply centre for the British?

02:47:25 10 A. Yes. Well, I'm not too clear if
02:47:27 11 it's Albany or a town close to Albany, but in
02:47:30 12 any case what you're describing was very close
02:47:33 13 to Albany or in Albany.

02:47:36 14 Q. So if the French had intended to
02:47:38 15 build a fort near Lake George, or set up an
02:47:42 16 establishment or settlement, you'd agree that
02:47:44 17 there was a significant risk that that would
02:47:46 18 have sparked a larger conflict with Great
02:47:52 19 Britain?

02:47:53 20 A. Well, that risk had already been
02:47:56 21 run because in 1727 I think when Fort Frédéric
02:48:02 22 was built, or whatever the date, yeah. I have
02:48:08 23 to go back to -- which page were you referring
02:48:17 24 me to?

02:48:17 25 Q. You begin the discussion of this

02:48:19 1 on page 54 of your report.

02:48:21 2 A. Thank you. Yes. So it had been
02:48:23 3 erected in 1727, and this part of my report does
02:48:27 4 not at all discuss under what circumstances Fort
02:48:31 5 Frédéric was established but it was still there
02:48:35 6 and the French did not withdraw from Fort
02:48:37 7 Frédéric.

02:48:41 8 The debate was about the plans to
02:48:44 9 create a settlement with the laying out of some
02:48:48 10 pickets or something by surveyors and then the
02:48:51 11 cancellation of that decision.

02:48:53 12 But Fort Frédéric was there for -- I
02:48:56 13 didn't check out for how long but, in any case,
02:48:59 14 the French had already taken the risk of setting
02:49:03 15 up a fort very close to where old fort of the
02:49:07 16 British used to be, Fort Queen Ann, or whatever
02:49:12 17 it was.

02:49:13 18 So they did not withdraw from the
02:49:17 19 territory -- sorry, from the fort. The fort,
02:49:21 20 from what I understand, was still there. That
02:49:24 21 is the issue that was debated.

02:49:27 22 Q. Would you agree that Fort
02:49:28 23 Frédéric is further north on Lake Champlain than
02:49:33 24 the area that we're talking about?

02:49:36 25 A. I'm sorry? Further north from

02:49:39 1 Lake Champlain -- yeah. From Lake George?

02:49:43 2 Q. Yes, sorry.

02:49:44 3 A. Yes, okay.

02:49:52 4 Q. In relation to Albany?

02:49:54 5 A. Yes.

02:49:54 6 Q. In relation to Albany Fort

02:49:56 7 Frédéric is much further north than the area

02:49:58 8 we're talking about?

02:50:00 9 A. Well my understanding, again, is

02:50:02 10 that Fort Frédéric is the southeastern part of

02:50:06 11 Lake Champlain, northeast of Lake George, and

02:50:09 12 not too far away there's the Chicot River, or

02:50:13 13 maybe it's the very southern part of Lake

02:50:15 14 Champlain.

02:50:18 15 And the distance, the exact distance

02:50:20 16 from Albany I'm not too clear, and then what is

02:50:24 17 now a small distance, like a hundred or

02:50:26 18 two-hundred kilometres might have been a

02:50:28 19 considerable distance at the time.

02:50:29 20 Q. Would you agree that adding

02:50:31 21 another settlement or establishment could have

02:50:34 22 exacerbated the risk of conflict?

02:50:39 23 A. It could have.

02:50:45 24 Q. So now I want to turn to discuss

02:50:46 25 Fort Detroit with you. In the last two decades

02:50:50 1 of the 17th century there was frequent warfare
02:50:55 2 between the Haudenosaunee Confederacy on the one
02:50:57 3 side and the French and their western First
02:51:01 4 Nation allies on the other side?

02:51:07 5 A. That is correct.

02:51:07 6 Q. And I'm showing you Exhibit 4941.
02:51:16 7 This is an excerpt from the archive series
02:51:20 8 "Documents Relative to the Colonial History of
02:51:22 9 the State of New York", and on page 590 of this
02:51:27 10 document, or 2 in the PDF, you'll see a letter
02:51:30 11 from Louis XIV to Count de Frontenac and
02:51:34 12 Champigny dated June 14, 1695?

02:51:39 13 A. Yes.

02:51:41 14 Q. And just before we go on,
02:51:43 15 Frontenac was the Governor of New France?

02:51:46 16 A. Yes.

02:51:47 17 Q. And Champigny was the intendant?

02:51:53 18 A. Yes.

02:51:53 19 Q. So I'd like you to take a moment
02:51:55 20 to review two highlighted passages. The first
02:51:58 21 begins with the words, "By their despatch
02:52:00 22 (sic)", and ends with the words --

02:52:04 23 A. They are on the screen because we
02:52:06 24 have the rectangle so I can get that just by
02:52:10 25 looking at it, thank you.

02:52:11 1 Q. Yes, thank you. I'm still going
02:52:12 2 to repeat it just so it's clear on the record.

02:52:15 3 THE COURT: Yes, professor Morin, I've
02:52:18 4 asked counsel to do that.

02:52:20 5 THE WITNESS: I'm sorry.

02:52:21 6 THE COURT: That's okay, there would
02:52:22 7 be no way of you knowing that. Please go
02:52:25 8 ahead, Ms. Lapan. I'm interested in having a
02:52:25 9 clear record.

02:52:27 10 BY MS. LEPAN:

02:52:28 11 Q. So the first passage ends with,
02:52:29 12 "involved them in this war", and the second
02:52:39 13 starts with, "Wherefore his Majesty is
02:52:42 14 persuaded", and ends with, "they shall have
02:52:49 15 entirely submitted." Let me know when you are
02:52:52 16 con reviewing?

02:52:53 17 A. Thank you.

02:52:54 18 (Witness reading the document.)

02:53:16 19 Yes. So what is the question?

02:53:23 20 Q. So here the King of France is
02:53:25 21 directing Governor Frontenac and Champigny to
02:53:26 22 stop negotiating with the Iroquois Confederacy
02:53:27 23 for peace and wage war on them until they
02:53:29 24 entirely submitted, is that correct?

02:53:34 25 A. Yes.

02:53:35 1 Q. And I want to show you another
02:53:36 2 document, which is Exhibit 4934?

02:53:40 3 A. Can I stop? Can we go back to
02:53:42 4 that excerpt?

02:53:43 5 Q. Of course. If we could go back
02:53:45 6 to Exhibit 4941?

02:53:57 7 A. You were asking for examples
02:53:58 8 where the King of France refers to the Law of
02:54:01 9 Nations. Here we don't see the expression "Law
02:54:04 10 of Nations" but we see "waging war" and "suing
02:54:07 11 for peace", which are not terms that you would
02:54:09 12 use within the kingdom or when discussing
02:54:12 13 relations with subjects of the colonies, those
02:54:13 14 are subjects to the authority of the colony. So
02:54:19 15 for me this is a reference to the Law of
02:54:20 16 Nations.

02:54:20 17 And, as I said, only one example like
02:54:28 18 this would not be sufficient, but over and over
02:54:30 19 we see people acting in a way that denotes the
02:54:32 20 nation-to-nation relationship. If you're waging
02:54:35 21 war it is not with your subjects, and I have
02:54:38 22 argued that there's lot's of evidence that
02:54:41 23 you're waging war with people who have an
02:54:44 24 independent status under the Law of Nations.

02:54:48 25 Q. Thank you.

02:54:55 1 So if we turn to Exhibit 4934 this is
02:54:58 2 the journal of Governor Fletcher's visit to
02:55:02 3 Albany dated October 1, 1696. If we can turn to
02:55:14 4 page 237 of the document. And governor Fletcher
02:55:18 5 was the Governor of New York?

02:55:29 6 A. Yes, he was.

02:55:31 7 Q. And in this document a Mohawk man
02:55:33 8 is telling Fletcher about the condition of the
02:55:40 9 Haudenosaunee people. And I'd like you to take
02:55:42 10 a moment to look at the passages, which are
02:55:44 11 highlighted on 237 and 238, and the first
02:55:48 12 passage begins with, "We come to desire" and
02:55:51 13 ends with "out of Canada." And when you're done
02:55:59 14 with this we can scroll to the next.

02:56:03 15 A. (Witness reading the document.)

02:56:03 16 I'm done.

02:56:36 17 Q. If we scroll to page 238, still
02:56:40 18 on 237. This passage begins with "We desire you
02:56:46 19 to acquaint the great King" and ends with "or
02:56:51 20 for some time."

02:57:09 21 A. (Witness reading the document.)

02:57:09 22 Yes, I'm done.

02:57:13 23 Q. In this passage the Mohawk man is
02:57:16 24 describing the loss of Haudenosaunee villages
02:57:18 25 due to French attacks?

02:57:21
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A. Due to French?

Q. Attacks.

A. Attacks, correct.

Q. And from this document the Haudenosaunee, you'd agree, seem to be in a pretty desolate condition?

A. That seems to be what is written there.

Q. And the headman says that if the Haudenosaunee don't get assistance from the British they will have to make peace with the French because they are not in a position to destroy the French themselves.

A. That is correct.

Q. I'm now going to show you Exhibit 4938. And this is the report of Robert Livingston, the British secretary of Indian Affairs, in his voyage to Onondaga. And he's sending it to the Earl of Belmont, who is the colonial Governor of New York, right?

A. Right.

Q. And the document is dated April 1700. So I'd like you to review the first highlighted passage, which is on page 648, and begins with the words, "That the Maqua's"

1 and ends with "instruct them."

2 A. (Witness reading the document.)

3 I am done reading.

4 Q. And if with scroll down in the
5 document to page 625, I'd like you to review the
6 highlighted passage that begins with the words,
7 "Something must be done", and ends with the
8 words, "felt the smart of their blows often."

9 A. Maybe we should say it begins
10 with, "But of two evils the least is to be
11 chose".

12 Q. I'm happy with that.

13 A. Okay.

14 (Witness reading the document.)

15 I am done reading.

16 Q. Before I ask you my questions I
17 just want to correct for the record what page
18 this passage is on, I had said it was on
19 page 625 but it's actually on page 652.

20 So in this document Livingston is
21 describing that the French are threatening to
22 attack the Five Nations on an almost daily
23 basis, and that if they don't come to New France
24 and make peace with the French they will
25 continue those attacks?

03:01:09 1 A. Yes, I agree with that.

03:01:10 2 Q. And he also advises that two
03:01:12 3 thirds of the Mohawk population have emigrated
03:01:14 4 to New France as a result?

03:01:17 5 A. Well, they have emigrated also to
03:01:20 6 find priests. So these would be the Mohawk that
03:01:23 7 are called "Maqua's" I think in this document,
03:01:26 8 or the previous one. In any case, the Mohawks
03:01:30 9 that have converted to the Catholic faith
03:01:32 10 because there were missionaries present in these
03:01:37 11 Mohawk lands.

03:01:44 12 Q. So that was another factor that
03:01:46 13 led them to emigrate to New France?

03:01:48 14 A. Yes.

03:01:48 15 Q. And I did mean to clarify that,
03:01:48 16 when this document says "Maqua" is it correct
03:01:52 17 that -- is my understanding correct that they
03:01:52 18 are referring to the Mohawk Nation?

03:01:54 19 A. It is correct.

03:01:55 20 Q. And he also describes the
03:01:58 21 Haudenosaunee as being in a staggering
03:02:00 22 condition?

03:02:02 23 A. Yes, I would agree with that.

03:02:06 24 Q. If we could take down this
03:02:09 25 document now, and we can get out of document

03:02:15 1 view.

03:02:17 2 You'd agree that there was an
03:02:18 3 important trade route across Lake Erie, through
03:02:21 4 the Detroit River up to Lake St. Clair and into
03:02:26 5 Lake Huron?

03:02:27 6 A. It makes sense. It's not
03:02:30 7 something I specifically studied but I think
03:02:32 8 that is the case.

03:02:39 9 Q. And you would agree that the
03:02:41 10 ability of the Haudenosaunee to influence trade
03:02:42 11 in that area, in part through that trade route,
03:02:45 12 that was important to them?

03:02:47 13 A. Yes, it was, at the time we are
03:02:53 14 considering around the 1700s.

03:02:56 15 Q. Thank you. And the Haudenosaunee
03:02:58 16 around this time period they were reluctant for
03:03:00 17 the French to built a fort at Detroit because it
03:03:03 18 could impact their influence over trade in that
03:03:07 19 area?

03:03:14 20 A. That would be one of the reasons,
03:03:16 21 yes, maybe a very important reason, so yes.
03:03:18 22 There may be others.

03:03:20 23 Q. But that would be a main reason?

03:03:25 24 A. Well, this is the Haudenosaunee
03:03:30 25 perspective so I'll be cautious about this what

03:03:34 1 exactly were their motives, sorry.

03:03:36 2 Q. So now I'm going to show you an
03:03:38 3 Exhibit which is 4942. this is a book by Gilles
03:03:56 4 Havard and it's titled "The Great Peace of
03:04:02 5 Montreal of 1701", and it's an updated and
03:04:08 6 translated version of his earlier book that was
03:04:10 7 in French on the subject?

03:04:11 8 A. Yes.

03:04:12 9 Q. And this updated and translated
03:04:13 10 version was published in 2001. And you cite
03:04:17 11 Gilles Havard in your report so I take it you
03:04:23 12 agree that he's a respected historian?

03:04:25 13 A. I do agree. I did not
03:04:26 14 specifically look at the English translation
03:04:28 15 because it would have been reading again the
03:04:31 16 book, so if there are some nuances that were not
03:04:34 17 in the French version I may not be aware of
03:04:37 18 them.

03:04:37 19 Q. That's all right. I'll take you
03:04:39 20 to the passages that I want to ask you some
03:04:41 21 questions about. You'd agree that Gilles Havard
03:04:46 22 is authoritative on the subject of the Great
03:04:48 23 Peace of 1701?

03:04:51 24 A. Definitely.

03:04:52 25 Q. And if we turn to page 164 of his

03:04:56 1 text I'd like you to take a moment to read the
03:05:11 2 first paragraph under the heading "Were the
03:05:13 3 Iroquois the Winners or the Losers?" And the
03:05:17 4 passage begins with, "Scholars have always
03:05:20 5 agreed", and ends with, "but especially the
03:05:25 6 latter."

03:05:44 7 A. (Witness reading the document.)

03:05:44 8 Yes, I'm done reading.

03:05:46 9 Q. So here Havard is describing two
03:05:49 10 competing schools of thought about the position
03:05:51 11 of the Iroquois in 1701 when they sign the Peace
03:05:54 12 Treaty of 1701, right?

03:05:56 13 A. Right.

03:05:57 14 Q. And one school of thought
03:06:00 15 advances the theory that the Iroquois were so
03:06:04 16 weak at the end of the 18th century they were
03:06:05 17 forced to capitulate in the peace of 1701?

03:06:10 18 A. Yes.

03:06:11 19 Q. And the other school of thought,
03:06:13 20 as represented by the view of Brandão and
03:06:15 21 Starna, advanced the theory that the peace of
03:06:18 22 1701 should be characterized as a diplomatic
03:06:22 23 victory instead of a military loss?

03:06:24 24 A. Yes.

03:06:25 25 Q. So now I want to go to Brandão

03:06:27 1 and Starna article that Havard references, which
03:06:32 2 is Exhibit 4574. And this article is entitled
03:06:40 3 "The Treaties of 1701: A Triumph of Iroquois
03:06:44 4 Diplomacy", published in 1996. Are you familiar
03:06:49 5 with this article?

03:06:50 6 A. Yes, although I was not provided
03:06:51 7 in advance with a copy but I have read it and
03:06:53 8 quoted it before, so I'll just review the
03:06:56 9 paragraph that starts with "Powerful and feared"
03:07:00 10 and ends with, I suppose, "military might."

03:07:05 11 Q. Thank you.

03:07:06 12 THE COURT: Thank you, professor
03:07:08 13 Morin, you're getting very expert in court
03:07:10 14 proceedings very quickly.

03:07:11 15 Ms. Lepan, can you please expand this
03:07:13 16 so I can read it better?

03:07:16 17 BY MS. LEPAN:

03:07:16 18 Q. Of course.

03:08:14 19 A. (Witness reading the document.)

03:08:14 20 Yes, I am done reading.

03:08:16 21 Q. I am going to ask you to review
03:08:18 22 one last passage in this document, which is on
03:08:20 23 page 215 and begins with the words, "The French
03:08:26 24 argued otherwise", and ends with the words,
03:08:29 25 "arms alone."

03:08:48 1 A. (Witness reading the document.)

03:09:10 2 I'm done reading.

03:09:12 3 Q. And the last passage, I have one
03:09:14 4 more to show you, which is on page 216 and
03:09:16 5 begins with the words, "There is also no
03:09:19 6 question", and ends with the words, "security
03:09:23 7 and land."

03:09:42 8 A. (Witness reading the document.)

03:09:43 9 I am done reading.

03:09:44 10 Q. So based on what we've gone
03:09:46 11 through you'd agree that there's a scholarly
03:09:52 12 consensus that in 1701 the Iroquois were in a
03:09:56 13 very weak position militarily?

03:09:59 14 A. This is an opinion or an
03:10:02 15 assessment, certainly a weak position. Very
03:10:05 16 weak may depend on the perspective and who
03:10:09 17 you're reading, but I will agree that the
03:10:11 18 documents you've shown me indicates this.

03:10:15 19 Q. And you would agree that the
03:10:19 20 Iroquois in 1701 had little if any ability to
03:10:24 21 sustain warfare against the French. Or sorry,
03:10:28 22 you'd agree that this is what the scholarly
03:10:32 23 consensus is saying?

03:10:33 24 A. Well, some of these documents
03:10:34 25 were saying that they could not expel the French

03:10:36 1 or conquer the French, but if they decided to
03:10:40 2 continue war and if they were able to get some
03:10:44 3 relief on the western front then they may be
03:10:47 4 able to continue attacks against the French or
03:10:50 5 the traders.

03:10:52 6 So they were still an important
03:10:55 7 military force. And what really weakened them,
03:10:59 8 as I said, was the attacks of the allies on the
03:11:02 9 western front.

03:11:03 10 And maybe, because I'm not sure, but
03:11:05 11 epidemics too may have weakened them. So this
03:11:10 12 is a combination of things but here I am be
03:11:13 13 wrong about this.

03:11:16 14 So all I'm saying is that if war was
03:11:18 15 to continue, and if somehow they had victories
03:11:22 16 on the western front and made peace with their
03:11:24 17 aggressors there they might concentrate their
03:11:28 18 energies on New France.

03:11:29 19 And they had been terribly effective
03:11:31 20 on the 1660s before the peace of 1665. And
03:11:36 21 even in 1689 when they mounted a surprise attack
03:11:41 22 against Montreal and they killed many settlers
03:11:48 23 during the first years of the war.

03:11:50 24 So, yes, they were weakened and that's
03:11:52 25 why they desired peace very much, but they could

03:11:56 1 have continued and perhaps do much harm. So it
03:11:59 2 was also in the interest of New France to make
03:12:01 3 peace, and also for the sake of their allies who
03:12:06 4 would bring them fur.

03:12:07 5 So to put it differently, as often
03:12:11 6 happened in a war both parties became somewhat
03:12:15 7 exhausted and were willing to make peace, and
03:12:19 8 still the negotiations were somewhat difficult,
03:12:22 9 lasted many months and years but they were able
03:12:24 10 to finally reach an agreement and make peace.

03:12:32 11 So that's my understanding of the
03:12:34 12 whole context of the peace of 1701.

03:12:38 13 Q. I'd like to show you another
03:12:40 14 document, which is Exhibit 4940. This document
03:12:51 15 is titled "Instructions of the King to
03:12:55 16 Denonville", and it is dated March 10, 1685.

03:13:01 17 A. Yes.

03:13:01 18 Q. I'd like you to look over two
03:13:03 19 sections of that document. The first is on
03:13:05 20 page 68 and starts with, "He is likewise", and
03:13:11 21 ends with, "the fear of arms." You can just
03:13:17 22 instruct us when to scroll -- oh but no need.

03:13:20 23 A. Okay.

03:13:21 24 (Witness reading the document.)

03:13:21 25 Yes, I am done reading.

03:13:51 1 Q. And the second section is on
03:13:54 2 page 69 and begins with, "His Majesty has", and
03:14:00 3 ends with, "may wish to impose on them." When
03:14:05 4 you are ready just let us know and we can
03:14:08 5 scroll.

03:14:12 6 A. (Witness reading the document.)

03:14:13 7 I'm ready for the second part.

03:14:30 8 Q. You'll note that the sections
03:14:31 9 that I'm referring to they are separated in the
03:14:35 10 document because the document is originally in
03:14:37 11 French and the translation is provided
03:14:39 12 underneath it?

03:14:40 13 A. Yes.

03:14:41 14 Q. So it jumps.

03:14:43 15 A. Yes. So I will ask you to go
03:14:45 16 back because since the sentence is interrupted I
03:14:48 17 have to concentrate more.

03:14:51 18 Q. Of course.

03:15:08 19 A. (Witness reading the document.)

03:15:08 20 I am done read.

03:15:10 21 Q. So here the King of France is
03:15:11 22 instructing Denonville, who is the Governor of
03:15:15 23 New France, and he's instructing him to use
03:15:18 24 warfare against the Iroquois to weaken them
03:15:20 25 until the French can impose peace on them,

03:15:23 1 right?

03:15:23 2 A. Yes.

03:15:30 3 Q. And the last document I'm going
03:15:30 4 to show you --

03:15:30 5 A. If I may pause? I reviewed this
03:15:32 6 document in advance unfortunately I did not
03:15:34 7 print it, but I was struck with what we find at
03:15:38 8 the beginning of the document when they discuss
03:15:41 9 the possibility that Haudenosaunee territories
03:15:44 10 may become British territory through alliance or
03:15:48 11 subjection, and whether they would make war with
03:15:53 12 the Haudenosaunee and attack British if they
03:15:56 13 were actively supporting the Haudenosaunee's
03:16:00 14 attacks against France, although at the time
03:16:04 15 they were at peace, France and Great Britain
03:16:08 16 were at peace.

03:16:08 17 So these instructions seems to me to
03:16:12 18 reflect very much the legal framework that I'm
03:16:15 19 describing in my report. And if need be during
03:16:21 20 the next break I will print this document and
03:16:24 21 indicate more specifically the passages which,
03:16:27 22 in my opinion, corroborate the legal framework
03:16:29 23 I've been trying to describe as being accepted
03:16:35 24 at the time.

03:16:37 25 Q. Thank you, I don't think that

03:16:38 1 will be necessary for my purposes but your
03:16:41 2 counsel may wish to review this with you.

03:16:44 3 A. I understand.

03:16:45 4 Q. So the last document that I'll
03:16:48 5 show you on the subject of Fort Detroit is
03:16:51 6 Exhibit 386, and this document is titled "Answer
03:16:58 7 of the Memoire of his Britannic Majesty" and
03:17:05 8 it's dated 1727. And this document you
03:17:08 9 reference in your report at footnote 109.

03:17:11 10 So if we turn to page 983 of this
03:17:14 11 document I would like you to look at the
03:17:19 12 paragraph which begins with "5th", and this
03:17:29 13 passage begins with the words "The five Iroquois
03:17:33 14 Nations", and ends with "subjects by right of
03:17:38 15 conquest."

03:18:01 16 A. (Witness reading the document.)

03:18:02 17 Now, you mentioned this was a British
03:18:03 18 memorial or did I --

03:18:07 19 Q. This is -- no, it's in response I
03:18:10 20 believe to an --

03:18:15 21 A. British memorial but it comes
03:18:16 22 from the French.

03:18:17 23 Q. Exactly. If you like we can
03:18:19 24 scroll to the top of the document?

03:18:20 25 A. No, no, I just got confused with

03:18:23 1 the initial introduction.

03:18:26 2 So yes, I am finished reading.

03:18:30 3 Q. So here France's position is that
03:18:32 4 they did in fact impose peace on the Iroquois?

03:18:37 5 A. Yes.

03:18:39 6 Q. And would you agree that France's
03:18:41 7 objective, at least in the last decade of the
03:18:44 8 17th century, was to impose peace on the
03:18:47 9 Iroquois, or the Haudenosaunee, by waging war on
03:18:50 10 them such that they had to agree to French
03:18:53 11 terms?

03:18:55 12 A. Well, yes, I would agree, but I
03:18:57 13 see nothing unusual in a war and peace context
03:19:01 14 either in Europe or in America. The objective
03:19:07 15 is to weaken your adversary to make him, or to
03:19:12 16 make the people come to terms that are
03:19:15 17 favourable to you, that is the whole point of
03:19:17 18 waging war.

03:19:18 19 And whether this specific position of
03:19:22 20 what occurred under Denonville made them
03:19:29 21 subjects this is one of those unilateral
03:19:31 22 assertions. And the French may have -- let me
03:19:34 23 go back and read again.

03:19:45 24 (Witness reading the document.)

03:19:47 25 I think in other documents, and I must

03:19:50 1 mention this in my report or at least in my
03:19:53 2 publication, the French are entitled since that
03:19:55 3 time to regard them as subjects by right of
03:19:58 4 conquest. Now this is 1727, is that correct?

03:20:03 5 Q. The date of the document is 1727,
03:20:06 6 yes.

03:20:06 7 A. So this is after the Peace of
03:20:10 8 Utrecht where the French have agreed to a clause
03:20:17 9 that says that the Five Nations are under the
03:20:21 10 domination or subjection of Great Britain. So
03:20:25 11 they're trying to get away from what they have
03:20:29 12 agreed to in a specific treaty and the
03:20:32 13 British -- it's very easy for the British to
03:20:41 14 point out to the French, Well, whatever the
03:20:43 15 actual reality on the ground is and whatever
03:20:46 16 you've done before the Treaty now the Treaty
03:20:48 17 controls it and you are estopped, we would say
03:20:51 18 in the common law I believe, from arguing
03:20:54 19 anything about the status of the Five Nations.

03:20:57 20 So what you've summarized of the
03:21:01 21 position of the French is true, but it's not
03:21:04 22 very credible legally or historically or
03:21:06 23 factually. Actually it's -- sorry, and even
03:21:11 24 more it's completely incredibly incredible.

03:21:21 25 Q. I'm going to move on now but

03:21:23 1 still talking about the forts. In your report
03:21:27 2 you refer to tacit consent or acquiescence, and
03:21:30 3 you also say that:

03:21:31 4 "[...] consent could take many
03:21:33 5 forms and did not require a formal
03:21:35 6 deed."

03:21:37 7 I want to explore that a bit.

03:21:39 8 In the example of Fort Detroit consent
03:21:43 9 was not given prior to when construction of that
03:21:46 10 fort began, correct?

03:21:49 11 A. Yes.

03:21:54 12 Q. So in that example the consent
03:21:55 13 given by the Haudenosaunee was not given in
03:21:58 14 advance of the relevant transaction?

03:22:01 15 A. Well, actually I would agree that
03:22:05 16 no consent was given. I said that as part of
03:22:08 17 the Great Peace they dropped the grievance or
03:22:12 18 opposition to Detroit to have peace, for the
03:22:17 19 reasons you indicated in large part they were
03:22:19 20 very much interested in making peace.

03:22:23 21 Q. And in the example of Fort
03:22:26 22 Niagara you state in your report that:

03:22:28 23 "Though the initial consent given
03:22:31 24 in 1725 may have been partial and was
03:22:35 25 disavowed internally by the

03:22:37 1 Confederation, this decision was never
03:22:39 2 communicated officially to the
03:22:41 3 French."

03:22:47 4 A. Yes, that is what I read in
03:22:49 5 documents that I quoted.

03:22:50 6 Q. But you also acknowledge that
03:22:51 7 while Governor Longueuil obtained the consent of
03:22:55 8 the Onondaga Nation to build the fort in 1725 he
03:22:59 9 was aware that some Haudenosaunee Nations had
03:23:02 10 sent a message asking that the French abandon
03:23:05 11 Fort Niagara?

03:23:13 12 A. Well, my understanding is that
03:23:15 13 the message had been prepared but not formally
03:23:18 14 communicated. Everyone knew there was the
03:23:19 15 opposition but there was not an official
03:23:20 16 position from the Haudenosaunee sending a
03:23:22 17 delegation to the Governor saying, We want you
03:23:25 18 to stop.

03:23:33 19 As I said yesterday, they decided to
03:23:34 20 try to use the British and make the British
03:23:37 21 intervene and stop the construction of Fort
03:23:39 22 Niagara.

03:23:46 23 Q. And so there was no official
03:23:48 24 communication but when you say everybody was
03:23:49 25 aware that would include the French?

03:23:51 1 A. Yeah. And if I may, I also
03:23:56 2 explained that later on in the dealings between
03:23:58 3 the French and the Haudenosaunee the French
03:24:01 4 repeatedly agreed with the Haudenosaunee that
03:24:06 5 there had been consent, or a form of agreement,
03:24:09 6 even though maybe the initial circumstances were
03:24:13 7 controversial. And over time the image that was
03:24:18 8 given and the standard that was established is
03:24:22 9 that an agreement had been given.

03:24:29 10 Q. You'd agree then that while the
03:24:31 11 French were in the process of building Fort
03:24:32 12 Niagara they were aware that at least some of
03:24:35 13 the Nations in the Haudenosaunee confederacy
03:24:39 14 were opposed to it?

03:24:41 15 A. Yes, I think that's correct.

03:24:45 16 Q. And at a certain point the
03:24:50 17 Haudenosaunee did communicate to the French that
03:24:55 18 they were in opposition to the fort, more
03:25:00 19 formally?

03:25:00 20 A. Well, my understanding is that
03:25:02 21 because there were many -- there were French
03:25:07 22 officers there during the council that assisted
03:25:10 23 and sometimes some either British people or
03:25:13 24 Haudenosaunee close to the British people.

03:25:16 25 So everyone knew what the official

03:25:18 1 position was but that does not mean, you know,
03:25:23 2 knowing a decision had been made by someone who
03:25:26 3 is your former enemy does not mean you have to
03:25:29 4 react to it if it's not formally notified to you
03:25:32 5 in the nation-to-nation relationship.

03:25:36 6 I would not go as far as to say they
03:25:39 7 were spying but it was keeping abreast of future
03:25:42 8 developments, knowing what was going on within
03:25:45 9 the Haudenosaunee Confederation. But they were
03:25:49 10 notifying each other of grievances they had.

03:25:52 11 And, as I said, the Haudenosaunee
03:25:54 12 decided to try to use the British. And the
03:25:56 13 British did try to convince the French to
03:26:03 14 withdraw from the area, so I have quoted the
03:26:08 15 memorials notice.

03:26:09 16 Q. And you have that in your report.

03:26:15 17 And eventually the French, in response
03:26:17 18 to the opposition from the Haudenosaunee with
03:26:19 19 respect to Fort Niagara, advise that they're
03:26:22 20 going to continue moving forward with the
03:26:23 21 project of building Fort Niagara because the
03:26:26 22 Haudenosaunee had previously given their
03:26:27 23 consent?

03:26:28 24 A. Yes.

03:26:30 25 Q. So the consent that was given was

03:26:32 1 nonrevocable?

03:26:35 2 A. Well, they don't say that. They
03:26:36 3 pretend not to be aware, I guess, of the
03:26:39 4 decision of the council, again, that was not
03:26:42 5 formally notified to them. And the long
03:26:46 6 tradition of sending delegations to inform the
03:26:49 7 French and the Haudenosaunee of each other's
03:26:53 8 position, like you have in your Europe in
03:26:57 9 relations between Nations.

03:27:01 10 Q. And I'm showing you now Exhibit
03:27:04 11 385. This is a documents titled "Conference
03:27:18 12 Between Governor Burnet and the Indians", it's
03:27:23 13 dated September 7th, 1726.

03:27:25 14 A. Yes.

03:27:25 15 Q. So this is the report of a
03:27:27 16 conference between the British and the
03:27:30 17 Haudenosaunee in which they're discussing the
03:27:31 18 recent French fort -- or the French building of
03:27:36 19 Fort Niagara.

03:27:37 20 And in the course of that discussion I
03:27:39 21 want to show you a passage. If we turn to
03:27:44 22 page 787, I would like to you to look at the
03:27:47 23 first answer on that page which begins with the
03:27:49 24 word, "When Mons Longueuil", and ends with the
03:28:00 25 words, "three hundred years."

03:28:45 1 A. (Witness reading the document.)

03:28:46 2 Q. So here the reference to Fort
03:28:47 3 Cadaracqui is a reference to Fort Frontenac?

03:28:53 4 A. That is correct.

03:28:53 5 Q. So in this instance the
03:28:54 6 Haudenosaunee have expressed the position to the
03:28:56 7 French that the French deceived or manipulated
03:28:58 8 them with respect to the building of Fort
03:29:00 9 Frontenac?

03:29:02 10 A. I would qualify this because they
03:29:04 11 are speaking to Governor Burnett I think you
03:29:07 12 said?

03:29:08 13 Q. Yes.

03:29:08 14 A. So they're saying that they were
03:29:12 15 deceived by the French when they build Fort
03:29:16 16 Cadaracqui to the British. And I've provided
03:29:20 17 other examples where in dealings with the French
03:29:22 18 there are assertions on both sides that Fort
03:29:27 19 Frontenac and Fort Niagara had been built with
03:29:31 20 the consent of the Confederation.

03:29:34 21 So, as I said, there may have been
03:29:36 22 inner opposition and frustration about the
03:29:38 23 building of Fort Frontenac, but here I rather
03:29:42 24 see a different interpretation of the events but
03:29:46 25 nothing that contradicts.

03:29:49 1 They say that they were deceived, so
03:29:51 2 being deceived means that you agreed initially
03:29:55 3 to me, or could be interpreted in that way.
03:29:57 4 Sorry, I don't see a contradiction between this
03:30:00 5 passage relating their frustration to the
03:30:04 6 British and what I've explained in my report.

03:30:11 7 Q. And in the case of Fort Detroit,
03:30:13 8 I won't take you there but if you need to we can
03:30:18 9 go to your report. You state at page 68:

03:30:21 10 "It is clear that the
03:30:22 11 Haudenosaunee realize that
03:30:22 12 construction of a fort at Detroit was
03:30:22 13 a non-negotiable condition of the
03:30:25 14 peace. They were aware of this
03:30:27 15 project and could have attacked the
03:30:28 16 French if they wanted to break the
03:30:30 17 peace talks."

03:30:32 18 A. Yes.

03:30:35 19 Q. So in the case of Fort Detroit
03:30:40 20 the Haudenosaunee, you're saying, could either
03:30:43 21 give the consent to the project, give their
03:30:45 22 consent to the project or if not the likely
03:30:48 23 outcome would have been warfare?

03:30:50 24 A. Yes.

03:30:52 25 Q. And you've agreed, I believe,

03:30:54 1 that the Haudenosaunee were in a weak military
03:30:57 2 position at that point?

03:30:58 3 A. Yes.

03:31:01 4 Q. Your Honour, I note that it's
03:31:02 5 3:30, perhaps now would be a good time for the
03:31:06 6 afternoon break. I don't expect that I'll have
03:31:09 7 any further questions for Professor Morin,
03:31:12 8 however I would like the opportunity confer with
03:31:16 9 my colleagues.

03:31:31 10 THE COURT: Thank you, Ms. Lepan. We
03:31:38 11 will take the afternoon break now for 15
03:31:40 12 minutes.

03:31:40 13 -- RECESSED AT 3:31 P.M. --

03:31:40 14 -- RESUMED AT 3:47 P.M. --

03:47:34 15 THE COURT: Ms. Lepan, do you have any
03:47:35 16 further questions?

03:47:37 17 MS. LEPAN: No, I don't. Thank you,
03:47:38 18 Your Honour. Thank you, Professor Morin.

03:47:40 19 THE COURT: Thank you.

03:47:41 20 Ms. Pelletier, do you have any
03:47:42 21 re-examination of this witness?

03:47:45 22 MR. PELLETIER: I do. Thank you, Your
03:47:46 23 Honour.

03:47:48 24 RE-EXAMINATION BY MS. PELLETIER:

03:47:52 25 Q. Professor Morin, earlier this

03:47:54 1 morning counsel for Canada asked you about the
03:47:55 2 Treaty of Paris and you confirmed that this was
03:47:59 3 the Treaty by which the French transferred
03:48:02 4 Canada to the English.

03:48:04 5 How does this square with your
03:48:06 6 opinions expressed in your report respecting
03:48:09 7 Aboriginal territorial rights?

03:48:27 8 A. So this is a controversial legal
03:48:29 9 issue and it goes back to the debate we're
03:48:33 10 having now, whether having a territory as
03:48:36 11 against other Europeans would have consequences
03:48:41 12 leading to the denial of any territorial rights
03:48:44 13 for Indigenous peoples.

03:48:47 14 My own view, which I've expressed in
03:48:49 15 my book in 1997, was that the word
03:48:54 16 "dependencies" in the Treaty was a way to
03:48:59 17 include, although it could include many things
03:49:02 18 geographically, it was a way to include
03:49:11 19 Indigenous Nations and where they lived.

03:49:15 20 MR. BEGGS: I would like to object for
03:49:16 21 a moment, Your Honour.

03:49:18 22 THE COURT: Just a moment, Mr. Beggs.
03:49:19 23 Professor Morin, could you just pause for a
03:49:22 24 moment.

03:49:22 25 THE WITNESS: Yes.

03:49:23 1 THE COURT: Mr. Beggs, what is your
03:49:25 2 objection?

03:49:27 3 MR. BEGGS: My objection is that the
03:49:33 4 question and the answer appear to be heading
03:49:35 5 toward an expression of a legal opinion as
03:49:39 6 opposed to a historical account of what the
03:49:43 7 legal views held back in -- I guess we're
03:49:48 8 talking about the Treaty of Paris so the
03:49:50 9 17th century.

03:49:53 10 If I'm wrong then that's -- then I
03:49:57 11 have no objection, but if it's asking for a
03:50:00 12 legal opinion of the rights that are actually
03:50:06 13 held, or as opposed to being viewed to be held,
03:50:10 14 that's a different question.

03:50:12 15 THE COURT: Ms. Pelletier, what is
03:50:13 16 your reply to that?

03:50:17 17 MR. PELLETIER: Yes, I believe
03:50:17 18 Professor Morin was speaking about a legal issue
03:50:20 19 in the past, which I think falls well within his
03:50:22 20 and expertise as a legal historian and was not
03:50:26 21 expressing a legal opinion.

03:50:29 22 THE COURT: Right. Professor Morin,
03:50:30 23 we have to be careful to distinguish between
03:50:34 24 historical events and regimes, and legal
03:50:37 25 structures and the present day, where we do not

03:50:43 1 permit experts, even if, as you are, well
03:50:48 2 qualified law professors to talk about the
03:50:50 3 present-day law because that's a matter or
03:50:54 4 courts to determine.

03:50:55 5 So I'm going to ask Ms. Pelletier to
03:50:59 6 repeat her question and when you're answering it
03:51:02 7 I want you to be careful to limit your answer to
03:51:05 8 the historical-legal structures that you may be
03:51:08 9 alluding to in clarifying the matters that were
03:51:13 10 raised just now.

03:51:14 11 I'm not suggesting, Professor Morin,
03:51:17 12 you have to start at the beginning of your
03:51:19 13 answer but I think fairly you should hear the
03:51:21 14 question again so I've asked Ms. Pelletier to
03:51:23 15 restate it.

03:51:26 16 BY MR. PELLETIER:

03:51:26 17 Q. Thank you, Your Honour.

03:51:28 18 So, Professor Morin, just to restate
03:51:30 19 the question, earlier today when you were
03:51:34 20 cross-examined by counsel for Canada and you
03:51:35 21 were speaking about the Treaty of Paris, you
03:51:38 22 confirmed that this was the Treaty by which the
03:51:41 23 French transferred Canada to the English. And
03:51:43 24 I'm wondering if you can tell us how this
03:51:46 25 squares with the opinions expressed in your

1 report respecting Aboriginal territorial rights?

2 A. Yes. So focusing on what
3 happened at the time, and my apologies for
4 mentioning current legal issues, I should not
5 have done that.

6 So we find the word "dependencies" as
7 part of Canada, and we have the notion of
8 dependent Nations in the Edict for Louisiana.
9 And for me this is a way to reconcile this
10 concept that I've been describing over and over
11 again in my report and in my examination and
12 cross-examination of a territory as against
13 other European Nations in which we have allies
14 that continue to occupy their lands. Yeah,
15 that's the position I'm seeing.

16 So and that's one source -- yeah,
17 historical documents for that.

18 And the other piece of evidence I am
19 aware of as an expert is Governor Carleton, who
20 was the Governor of the province of Quebec when
21 Quebec Act was adopted in 1774, he went before a
22 parliamentary committee and he says he's the
23 Governor of Quebec. I understood, I always
24 understood, or words to that effect of course,
25 I'm quoting from memory, I always understood

03:53:10 1 these nations to be free and independent and not
03:53:13 2 subject to Great Britain, which confirms there
03:53:16 3 was no doubt that for Europeans this was the
03:53:18 4 territory of Great Britain. But inside this
03:53:23 5 territory they were independent nations,
03:53:25 6 according to Governor -- well, he says they
03:53:28 7 consider themselves to be independent nations.
03:53:31 8 Which for me is a perfect illustration of the
03:53:36 9 framework I've been describing.

03:53:45 10 Q. And also during your
03:53:46 11 cross-examination by Mr. McCulloch you asked to
03:53:48 12 be taken to a document, a memoir of Jacques
03:53:51 13 Cartier by James Phinney Baxter. Perhaps we can
03:53:57 14 pull up that document? It's document number
03:53:57 15 SC2142.

03:54:02 16 Now, Your Honour, counsel for Canada
03:54:04 17 indicated this morning that he had consented to
03:54:06 18 adding this document as an exhibit and I'm
03:54:09 19 wondering if we can do that now please?

03:54:12 20 THE COURT: Is there any other
03:54:14 21 objection? No?

03:54:16 22 Yes, that shall be Exhibit 4953.

03:54:20 23 EXHIBIT NO. 4953: A memoir of Jacques
03:54:20 24 Cartier by James Phinney Baxter
03:54:20 25 entitled, "A memoir of Jacques

03:54:20 1 Cartier, sieur de Limoilou"; document
03:54:20 2 number SC2142.

03:54:26 3 BY MR. PELLETIER:

03:54:27 4 Q. Now, Professor Morin, you
03:54:27 5 mentioned a number of page references during
03:54:29 6 your cross-examination by Mr. McCulloch but I
03:54:31 7 believe Mr. McCulloch only took you to one. Was
03:54:34 8 there any other passages that you wanted to draw
03:54:36 9 to the court's attention?

03:54:40 10 A. Yes, although I mentioned the
03:54:42 11 substance of these passages, but that will be --
03:54:49 12 yes, page 135, the sixth line of page 135, where
03:55:06 13 you see clearly the expression "the Kingdom of
03:55:12 14 Saguenay" here.

03:55:27 15 So I'm just saying that in the second
03:55:28 16 voyage of Jacques Cartier when he came back in
03:55:32 17 1536, if I'm not mistaken, he uses these words.
03:55:36 18 that's the only point I'm making.

03:55:39 19 And the next page would be 140. Again
03:55:59 20 the second paragraph beginning, "We got under",
03:56:04 21 and then we go -- at the end of the sixth line
03:56:13 22 we have, "the kingdom and land of the Saguenay".
03:56:29 23 And the following example would be on page 167,
03:56:31 24 it would be toward the bottom of the page.

03:56:50 25 So it's the sentence that begins with:

03:56:54 1 "[...] after which things were
03:56:58 2 thus done there was brought by nine or
03:56:59 3 ten men the King and Lord of the
03:57:01 4 country, whom they called in their
03:57:03 5 language, Agohanna, who was seated
03:57:06 6 above a great skin of a stag."

03:57:08 7 So this is the passage I was
03:57:21 8 referencing. And that's it for the second
03:57:22 9 voyage.

03:57:31 10 Q. Thank you, Professor Morin.

03:57:32 11 And finally, counsel for Ontario
03:57:32 12 brought you to Exhibit 4940, which was a
03:57:35 13 document entitled "Instructions to the King of
03:57:36 14 Denonville" dated March 10, 1685.

03:57:36 15 And you said in cross-examination that
03:57:40 16 there was a passage at the beginning of the
03:57:42 17 document that reflected the legal framework you
03:57:45 18 described in your report, did you want to take a
03:57:48 19 look at that passage now?

03:57:55 20 A. Yes. And if I may I was asked a
03:57:57 21 question about my publication whether it
03:57:59 22 contained a reference to the Law of Nations, and
03:58:01 23 I would also want to complete my answer in that
03:58:04 24 regard.

03:58:05 25 Q. Why don't we begin by pulling up

03:58:07 1 Exhibit 4940?

03:58:10 2 MS. LEPAN: Your Honour.

03:58:11 3 THE COURT: Yes, Ms. LEPAN.

03:58:14 4 MS. LEPAN: Despite the fact that I
03:58:15 5 invited counsel to take Professor Morin to this
03:58:17 6 document I would just like to say that my
03:58:21 7 question in respect to this document was whether
03:58:24 8 or not the King was instructing Denonville -- or
03:58:29 9 what he was instructing Denonville in this
03:58:31 10 document.

03:58:32 11 So to the extent that Professor Morin
03:58:34 12 is now going to be speaking about other things
03:58:37 13 in this document that generally are in
03:58:38 14 accordance with other sections of his report,
03:58:40 15 and that are not responsive to my question, I
03:58:42 16 would be objecting to that.

03:58:45 17 THE COURT: Ms. Pelletier.

03:58:46 18 MR. PELLETIER: I'd like to see what
03:58:48 19 the witness has to say, Your Honour. I
03:58:50 20 understood from his earlier answer to
03:58:51 21 Ms. LEPAN's question that he thought that there
03:58:53 22 was a passage at the beginning of this document
03:58:56 23 that would qualify the answer that he gave. So
03:59:00 24 I'd like to give him an opportunity to point
03:59:03 25 that out to us.

03:59:04 1 THE COURT: Well, I will ask you to
03:59:05 2 put your question, Ms. Pelletier, in proper form
03:59:07 3 for re-examination, which is, as you know,
03:59:11 4 fairly limited.

03:59:20 5 So we have the document now and I ask
03:59:21 6 the witness to listen carefully to the question
03:59:23 7 and focus his answers on that. And Ms. Lapan
03:59:28 8 can raise another objection if necessary.
03:59:28 9 Please go ahead.

03:59:28 10 MR. PELLETIER: Thank you, Your
03:59:28 11 Honour.

03:59:28 12 BY MR. PELLETIER:

03:59:29 13 Q. So, Professor Morin is there
03:59:31 14 another passage in this document that you'd like
03:59:33 15 to draw the court's attention to in response to
03:59:36 16 Ms. Lapan's question with respect to this?

03:59:41 17 A. Well, I don't remember the exact
03:59:43 18 words of the question but if they were, were
03:59:45 19 these instructions to wage war between the
03:59:50 20 Iroquois on the best possible terms for the
03:59:54 21 French, then the passages that she showed me
03:59:58 22 confirmed this. I think there were other
04:00:01 23 passages that are in agreement to my report.

04:00:05 24 But having heard the objection I'm not
04:00:08 25 sure these are instructions to Denonville on how

04:00:12 1 he should behave with the British who are in
04:00:16 2 Haudenosaunee territory, so that's the subject.

04:00:18 3 So perhaps the relationship with the
04:00:22 4 initial question is tenuous, unless I'm directed
04:00:29 5 otherwise then I will say that I'm not able to
04:00:33 6 relate it more directly to the question of
04:00:37 7 Ms. Lapan.

04:00:38 8 Q. Thank you.

04:00:38 9 Finally, you just mentioned that you
04:00:41 10 wanted to complete your answer to the question
04:00:43 11 that Ms. Lapan asked you with respect to your
04:00:46 12 publications and references to the Law of
04:00:48 13 Nations?

04:00:53 14 A. Yes. So I think that was Exhibit
04:00:54 15 SC2104, I'm not sure because it's in French if
04:01:02 16 it's necessary to have it before us. I can just
04:01:04 17 summarize.

04:01:07 18 So on page 148, the last paragraph, I
04:01:11 19 discuss claims of European countries based on
04:01:15 20 discovery and taking possession. So even though
04:01:19 21 I do not use the words "Law of Nations" or
04:01:22 22 "international law" I think there would be no
04:01:27 23 doubt in the minds of the reader that this is
04:01:29 24 what I'm referring to.

04:01:32 25 Q. Professor Morin, I'm just going

04:01:34 1 to suggest that we pull that up so that you can
04:01:36 2 point the court to the passages that you're
04:01:38 3 referring to. So if you just give us a moment
04:01:40 4 I'll ask Ms. McNamara -- here we go, she's ahead
04:01:46 5 of me. What was the page number again?

04:01:49 6 A. Page 150, the third -- no, I'm
04:01:52 7 sorry, I moved already. Page 148, which is
04:02:03 8 probably page 2 of the PDF. The last paragraph
04:02:16 9 here says, we have to inquire to look at the
04:02:19 10 issue of claims from other European countries
04:02:21 11 and we should discard those that are based on
04:02:25 12 simple discovery of the territory by an explorer
04:02:27 13 or a taking of possession by leaving symbols of
04:02:34 14 Royal authority. And I give various examples
04:02:37 15 here.

04:02:38 16 So I think everyone would understand
04:02:41 17 that this is a reference to international law as
04:02:46 18 it was understood at the time.

04:02:48 19 And then the second example would be
04:02:50 20 page 151, the first paragraph at the top. And
04:03:03 21 here I'm discussing treaties of peace and
04:03:07 22 alliances, but you find here that these are
04:03:10 23 relations in the international order. So
04:03:17 24 "relations in the international order" for me is
04:03:20 25 clearly a reference to the international law of

04:03:23 1 the time, especially when you're talking about
04:03:25 2 treaties of peace and alliance.

04:03:40 3 Q. Did you want to add anything?

04:03:42 4 A. No.

04:03:42 5 Q. Thank you, Professor Morin.

04:03:44 6 Those are my questions for
04:03:45 7 re-examination, Your Honour.

04:03:47 8 THE COURT: Thank you, Ms. Pelletier.

04:03:49 9 Mr. Morin, that concludes your
04:03:51 10 testimony in this case. I would like to thank
04:03:54 11 you for participating in this virtual format and
04:04:00 12 for the extra steps you took to become familiar
04:04:03 13 with this platform and to get your technology
04:04:07 14 working as well as you did.

04:04:10 15 At this time you're free to leave the
04:04:11 16 hearing all together, or you can remain as a
04:04:15 17 member of the public. If you do wish to remain
04:04:18 18 you should mute your sound and also turn off the
04:04:23 19 video.

04:04:30 20 THE WITNESS: Thank you very much and
04:04:30 21 thank you for the reminder last night of not
04:04:33 22 doing any additional research, because I have
04:04:35 23 been warned by counsel but I was on the verge of
04:04:38 24 taking the book at that time to consult for an
04:04:40 25 issue that eventually was not raised.

04:04:43 1 I am not a litigator, it is the second
04:04:45 2 time I am presenting a report in court so that
04:04:48 3 was a very useful reminder, and if I implied
04:04:53 4 that I was criticizing you this morning that is
04:04:56 5 not the case.

04:04:57 6 THE COURT: Not at all, sir, thank you
04:04:58 7 very much.

04:04:59 8 THE WITNESS: You're quite welcome.

04:05:01 9 THE COURT: Now if you could please
04:05:02 10 either turn your video off or leave the meeting,
04:05:05 11 sir, you have choices.

04:05:07 12 And other counsel present if you wish
04:05:08 13 to turn your videos on you're welcome to do
04:05:11 14 that.

04:05:11 15 I am now going to move to the next
04:05:13 16 step in this trial. As counsel obviously know
04:05:18 17 the next step in this trial -- actually I
04:05:20 18 should -- as a matter of putting it on the
04:05:22 19 record I understand, Ms. Pelletier, from prior
04:05:26 20 communications that the plaintiffs are not
04:05:29 21 calling any additional reply evidence, is that
04:05:31 22 correct?

04:05:32 23 MR. PELLETIER: That's correct, Your
04:05:33 24 Honour.

04:05:33 25 THE COURT: And so the plaintiffs'

04:05:34 1 case is, again, closed?

04:05:36 2 MR. PELLETIER: Yes, that's right.

04:05:38 3 THE COURT: Thank you. So the next
04:05:40 4 step in this trial is closing submissions. And
04:05:43 5 I have some comments to make about that which
04:05:45 6 I'll do now, which we seem to have enough time
04:05:49 7 for.

04:05:49 8
04:05:49 9 -- RULING ON SCHEDULING FOR CLOSING
04:05:49 10 SUBMISSIONS.

04:05:49 11
04:19:15 12 The closing submissions were
04:05:53 13 previously scheduled to take place in July. In
04:05:56 14 my view that was a generous schedule because
04:05:59 15 there's been considerable time over the course
04:06:02 16 of this long trial for all concerned to be
04:06:05 17 working on their closing submissions, and I
04:06:08 18 understand from counsel that they have at least
04:06:12 19 to some extent been doing that.

04:06:15 20 There's also been scheduled
04:06:17 21 out-of-court time in this trial, and unscheduled
04:06:21 22 out-of-court time due to the estimates of
04:06:24 23 counsel being high in relation to the time
04:06:27 24 required to call their witnesses.

04:06:33 25 In this case counsel have requested

04:06:35 1 time to provide written submissions in advance
04:06:37 2 of closing. That is the main reason why we had
04:06:43 3 a schedule that extended as far as July. I have
04:06:46 4 not ordered written submissions but I have
04:06:49 5 permitted extra time to allow counsel to do
04:06:53 6 written submissions, as they expressed a wish to
04:06:56 7 do so from the very beginning of this trial.

04:07:02 8 As well, the July schedule
04:07:04 9 incorporated an extra month to facilitate the
04:07:07 10 main defendants, being Canada and Ontario, extra
04:07:11 11 time to get instructions.

04:07:15 12 Professor Morin was scheduled to
04:07:17 13 testify in March. Shortly before his scheduled
04:07:22 14 testimony the COVID-19 pandemic came down upon
04:07:26 15 all of us. At that time I suspended the
04:07:33 16 schedule for the last witness and told counsel
04:07:35 17 that from my standpoint their top priority
04:07:38 18 should be doing whatever was needed for their
04:07:40 19 health and for their families.

04:07:43 20 I also told them at that time that I
04:07:48 21 would extend the schedule for closing
04:07:50 22 submissions as a result of COVID-19.

04:07:52 23 We regrouped about a month later and
04:07:55 24 among other things we began a discussion about
04:07:57 25 the schedule.

04:07:58 1 I have had submissions from counsel at
04:08:00 2 two trial management conferences and I've had a
04:08:04 3 follow-up email from counsel on the subject of
04:08:06 4 the schedule for written submissions in
04:08:08 5 particular.

04:08:11 6 At the second trial management
04:08:13 7 conference I set a schedule for written
04:08:16 8 submissions ending in mid-September and leaving
04:08:19 9 the door open for counsel to raise issues that
04:08:22 10 may arise.

04:08:26 11 Since then I did receive a written
04:08:29 12 communication from counsel asking that I
04:08:31 13 reconsider that schedule in favour of giving two
04:08:34 14 more months and having written submissions
04:08:38 15 extended to November.

04:08:43 16 My primary concerns throughout this
04:08:45 17 dialogue have been two. First, the health and
04:08:49 18 safety of all concerned given COVID-19 and its
04:08:53 19 resulting impact on all of our personal and work
04:08:56 20 lives; and, two, the fair and just disposition
04:09:01 21 of this case on the merits.

04:09:02 22 On the first concern I have heard and
04:09:05 23 considered all the submissions made by counsel
04:09:07 24 regarding the impact of COVID-19 and I have
04:09:10 25 taken them fully into account. With respect to

04:09:15 1 written submissions in particular, I wish to
04:09:22 2 note that I have not and do not require written
04:09:27 3 submissions of the parties. That said, they are
04:09:31 4 free to do them if they wish to but the focus
04:09:35 5 should be on closing argument at the end of this
04:09:38 6 trial.

04:09:40 7 I have also observed to counsel that
04:09:43 8 any written submissions they wish to submit need
04:09:46 9 not be elaborate. I have made this observation
04:09:50 10 because, from what I have heard over the course
04:09:52 11 of all of the dialogues about written
04:09:55 12 submissions, it appears that counsel have
04:10:00 13 incorporated the idea of extra features, which
04:10:04 14 are not needed and can be set aside in favour of
04:10:07 15 focusing on the substance of the closings.

04:10:12 16 I have required a few things of
04:10:14 17 counsel, specifically the following: First,
04:10:19 18 I've asked all parties to provide a
04:10:22 19 noncomprehensive, short chronology of dates that
04:10:25 20 that party thinks are important that does not
04:10:28 21 have to be agreed upon with any other party.

04:10:32 22 Second, I have asked each party to
04:10:34 23 provide a noncomprehensive, short cast of
04:10:37 24 characters regarding people they think are
04:10:39 25 important, again, which does not have to be

04:10:43 1 agreed upon with any other party.

04:10:46 2 And, third, I have asked for a joint
04:10:49 3 brief of certain focused types of exhibits from
04:10:51 4 the trial evidence. In that case I had asked
04:10:56 5 that it be agreed upon, but I had said that it
04:11:00 6 did not need to be comprehensive.

04:11:04 7 I communicated these three requests to
04:11:06 8 counsel some months ago before the events of
04:11:09 9 COVID-19 arose. I had not set a schedule for
04:11:17 10 these three requests but today I'll indicate
04:11:19 11 that I do not need them until about ten days
04:11:22 12 before oral submissions, and of course counsel
04:11:26 13 are free to provide them earlier if they wish.

04:11:29 14 As well, in all the circumstance I am
04:11:32 15 going to amend my prior request for a joint book
04:11:35 16 of this focused group of exhibits and permit
04:11:38 17 each party to submit their own list, if they
04:11:41 18 wish to do so, setting out the exhibits that
04:11:43 19 they say fall into those narrow categories. As
04:11:48 20 far as providing anything other than a list, in
04:11:50 21 the form of a paper brief and so on, I'm setting
04:11:54 22 any such submissions to one side because it will
04:11:56 23 depend on the course of COVID-19. For now
04:12:00 24 counsel should assume that all that is necessary
04:12:02 25 is a PDF.

04:12:06 1 This is the extent of the material
04:12:07 2 I've required counsel prepare. It is very
04:12:10 3 modest and certainly would not justify many
04:12:15 4 months of delay until closing. I think everyone
04:12:19 5 recognizes that that time is only being
04:12:22 6 requested for the other reasons I have already
04:12:25 7 mentioned.

04:12:27 8 Lastly, I note that the delay in
04:12:29 9 hearing from our last witness should not create
04:12:32 10 any significant additional delay with respect to
04:12:35 11 closings because his evidence was on a narrow
04:12:38 12 topic about which all counsel have had his
04:12:41 13 report for about three years.

04:12:46 14 I move to my second concern regarding
04:12:48 15 the fair and just determination of this case on
04:12:50 16 its merits. In this regard it is not helpful to
04:12:56 17 unnecessarily expand the delay between the
04:12:59 18 hearing of the witnesses and the closings. In
04:13:06 19 this long trial I have heard from, I believe,
04:13:08 20 about 50 witnesses, a large group of which are
04:13:14 21 expert witnesses. There is already a challenge
04:13:18 22 regarding delays from the hearing of that
04:13:20 23 evidence over the last year. It is very
04:13:24 24 beneficial to have the evidence as fresh in my
04:13:27 25 mind as can fairly be achieved. This is an

04:13:30 1 important case which deserves better than
04:13:32 2 unreasonable delay between the evidence and
04:13:34 3 closing submissions.

04:13:39 4 Counsels' most recent submission to me
04:13:42 5 says that all parties wish for the speedy
04:13:44 6 conclusion of this trial. I am very pleased to
04:13:46 7 hear that. That has not been a theme reflected
04:13:49 8 in what have often been joint submissions of
04:13:53 9 counsel on the schedule over the last year or
04:13:55 10 so.

04:14:00 11 I return to the schedule. The recent
04:14:03 12 difficulties in setting the schedule for an
04:14:06 13 extension of time for written submissions, and
04:14:09 14 especially the submissions in the most recent
04:14:12 15 written submissions by counsel, have shown to me
04:14:15 16 that the focus of activity has been distracted
04:14:18 17 away from what it should be.

04:14:21 18 The focus should be on preparation for
04:14:23 19 the closings. The focus needs to be shifted
04:14:28 20 back to that important schedule. In order to do
04:14:34 21 so I will set the schedule now for the closings.
04:14:38 22 If the parties wish to submit additional written
04:14:41 23 material before the closings they are free to do
04:14:43 24 so but it is not required by the court.

04:14:46 25 As for the schedule of any written

04:14:48 1 submissions you may wish to submit these,
04:14:51 2 parties are normally very able to work that
04:14:54 3 schedule out amongst themselves, but if they are
04:14:57 4 unable to do so I am available to resolve any
04:15:01 5 disputes.

04:15:05 6 As I mentioned previously, the closing
04:15:07 7 arguments were scheduled for July. In extending
04:15:12 8 that schedule I am bearing in mind the concerns
04:15:15 9 I have mentioned. I bear in mind both concerns,
04:15:19 10 but I particularly have focused on the impact of
04:15:22 11 COVID-19 on all involved.

04:15:27 12 Bearing all of this in mind I will
04:15:29 13 extend the closings to take place in October
04:15:33 14 rather than July. I'm inclined to commence on
04:15:38 15 October 14th, which would have the effect of
04:15:41 16 giving the parties an additional month for any
04:15:45 17 written material they wish to prepare.

04:15:46 18 However, it is my custom to first of
04:15:50 19 all ask counsel about any unmoveable commitments
04:15:54 20 that they may have in their schedule. As a
04:15:58 21 result, before I fix the date for closings I ask
04:16:02 22 all counsel to email to me by the end of this
04:16:05 23 week the dates of any unmoveable commitments
04:16:10 24 that they have. If you're unsure about those,
04:16:12 25 you may simply say so in your email.

04:16:19 1 After I hear from counsel about their
04:16:21 2 obligations and dates in October, and please
04:16:25 3 send them for the entire month of October, I
04:16:27 4 will then fix the starting date for closing
04:16:33 5 submissions.

04:16:34 6 As I did for July, there shall be a
04:16:36 7 reporter and daily transcripts for the closing
04:16:41 8 submissions in case all counsel cannot be there
04:16:45 9 every single day and are not needed for
04:16:47 10 submissions on a particular day. All the main
04:16:52 11 parties, by which I mean the Plaintiffs, Canada
04:16:55 12 and Ontario, have large counsel teams and that
04:16:57 13 choice should not unreasonably impact scheduling
04:17:01 14 of closing arguments. In my experience in this
04:17:04 15 trial counsel have been very helpful in that
04:17:06 16 regard.

04:17:08 17 Therefore, rather than stating today
04:17:11 18 the date that we will resume, as would be
04:17:13 19 ordinarily the case, I state today that the
04:17:17 20 trial will resume at a date to be fixed in
04:17:20 21 October after I hear from counsel about their
04:17:23 22 schedules.

04:17:24 23 I expect that in the intervening time
04:17:28 24 there will be the need for trial management
04:17:30 25 conferences every now and then, and as I have

04:17:33 1 done before I invite counsel to communicate with
04:17:36 2 me directly if they wish a trial management
04:17:38 3 conference for any reason. In accordance with
04:17:41 4 my past practice I only ask that counsel give
04:17:45 5 the other counsel a heads up before they
04:17:48 6 communicate directly with me.

04:17:51 7 Further, until further notice I
04:17:54 8 continue to permit all counsel to communicate
04:17:56 9 with me directly by email rather than going
04:18:00 10 through my office.

04:18:02 11 If counsel do arrive at a schedule for
04:18:04 12 preclosing written submissions it should be
04:18:06 13 provided to me.

04:18:09 14 That concludes my remarks on schedule.
04:18:11 15 I look forward to hearing from counsel about
04:18:15 16 their dates in October.

04:18:20 17 I also want to take the opportunity to
04:18:22 18 thank all of you, and especially Ms. Roberts,
04:18:24 19 who is not on the screen right now, for the
04:18:28 20 efforts that I know you made to make this
04:18:30 21 virtual hearing possible.

04:18:32 22 I appreciate that you all participated
04:18:35 23 in training, at least those who needed to be
04:18:37 24 involved in this hearing participated in
04:18:40 25 training, and also co-operated with respect to

04:18:43 1 things like the trial exhibits and so forth. It
04:18:46 2 is very impressive and I know that effort was
04:18:52 3 put toward that outcome.

04:18:56 4 I think I've thanked everyone who is
04:18:58 5 currently on this Zoom call and all the people
04:19:01 6 who are not on the call but that have been very
04:19:05 7 involved in this process.

04:19:06 8 I do look forward to hearing from
04:19:08 9 counsel about scheduling and we will adjourn
04:19:10 10 until closing submissions at a date to be fixed.
04:19:13 11 Thank you very much.

12 --- Whereupon the proceedings were
13 adjourned at 4:19 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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