In the Matter Of:

The Chippewas of Saugeen First Nation et al v.

Attorney General of Canada et al.

DAY 67 VOL 67

December 09, 2019

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Court File No. 94-CQ-50872CM
ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

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

Plaintiffs

- and -

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

Defendants

Court File No. 03-CV-261134CM1

A N D B E T W E E N:

CHIPPEWAS OF NAWASH UNCEDED FIRST NATION and SAUGEEN FIRST NATION

Plaintiffs

- and -

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

Defendants

--- This is VOLUME 67/DAY 67 of the transcript of the trial proceedings in the above-noted matter, being held at the Superior Court of Justice, Courtroom 5-1, 330 University Avenue, Toronto, Ontario, on the 9th day of December, 2019.

B E F O R E: The Honourable Justice Wendy M. Matheson

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

H.W. Roger Townshend, Esq., & Krista Nerland, Esq., & Benjamin Brookwell, Esq., & Cathy Guirguis, Esq., — for the Plaintiffs, the Chippewas of Saugeen First Nation, and the Chippewas of Nawash First Nation.

Michael Beggs, Esq., & Michael McCulloch, Esq., & Barry Ennis, Esq., & Alexandra Colizza, Esq., — for the Defendant, The Attorney General of Canada.

David Feliciant, Esq., & Julia McRandall, Esq., & Peter Lemmond, Esq., & Jennifer Lepan, Esq., & Richard Ogden, Esq., — for the Defendant, Her Majesty the Queen in Right of Ontario.

REPORTED BY: Deana Santedicola, RPR, CSR, CRR

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09:15:22 -- Upon commencing at 10:03 a.m.

09:41:17

10:03:55 THE COURT: Good morning.

10:04:02 Counsel, please go ahead.

10:04:04 MR. McCULLOCH: I would like to call the next witness, Professor Paul McHugh.

10:04:10 THE COURT: Professor McHugh, please come forward.

10:04:12 PROFESSOR PAUL GERARD MCHUGH; SWORN.

10:04:57 THE COURT: Professor McHugh, this is a big room, and everyone, including the two gentlemen in the back row, must be able to hear you.

10:05:03 So please use your best teaching voice.

10:05:06 THE WITNESS: Thank you, Your Honour.

10:05:07 THE COURT: That microphone is of some assistance, but it will not do the job all by itself. Please go ahead.

10:05:15 MR. McCULLOCH: Your Honour, as a preliminary matter, I would like to ask that the tender of qualifications, that is SC1455, be made a lettered exhibit.

10:05:31 THE COURT: Is that what I have on the screen here?

10:05:32 MR. McCULLOCH: Yes, Your Honour.

10:05:33 THE COURT: Can you just scroll down so

10:05:35 I can see what it says?
10:05:39 All right. And, Mr. Registrar, what is
10:05:49 the next lettered exhibit?
10:05:51 THE REGISTRAR: Lettered Exhibit C3.
10:05:53 THE COURT: C3?
10:05:56 THE REGISTRAR: Yes, Your Honour.
10:05:59 EXHIBIT NO. C3: Tender of
10:06:07 Qualifications for Professor McHugh.
10:06:07 THE COURT: Now, I did receive -- and
10:06:09 thank you, Counsel, you or one of your team sent me
10:06:13 the updated curriculum vitae of Professor McHugh
10:06:16 and indeed the other experts for Canada.
10:06:19 So I have it right here.
10:06:22 MR. McCULLOCH: And indeed, Your
10:06:23 Honour, I would like to make the updated curriculum
10:06:27 vitae of Professor Paul McHugh, SC1456, a numbered
10:06:36 exhibit.
10:06:37 THE COURT: All right. Mr. Registrar?
10:06:43 THE REGISTRAR: The next numbered
10:06:46 exhibit is 4439.
10:06:49 EXHIBIT NO. 4439: Updated Curriculum
10:07:06 Vitae of Professor McHugh.
10:07:06 THE COURT: Mr. McCulloch?
10:07:07 MR. McCULLOCH: And while we are at
10:07:08 this, I would like to make the report of Professor

10:07:12 Paul McHugh, which is currently a lettered exhibit,
10:07:17 W2, into a numbered report.
10:07:20 THE COURT: Mr. Townshend?
10:07:21 MR. TOWNSHEND: Yes, Your Honour, we do
10:07:22 have some objections to small parts of that report,
10:07:27 as we say it falls outside the expertise of
10:07:30 Professor McHugh. I was planning to bring that up
10:07:34 after he was qualified so we know what we are
10:07:36 dealing with in the qualification scope.
10:07:37 THE COURT: All right. Well, we'll
10:07:39 leave the marking of the report until after the
10:07:41 tender process is completed, and I will hear from
10:07:44 you about it at that time.
10:07:45 Please go ahead, sir.
10:07:47 MR. McCULLOCH: Yes, I would like to
10:07:55 present to the Court with our tender of
10:07:56 qualification --
10:07:58 THE COURT: Yes, I have read it. You
10:08:00 should read it for the record, though, if you would
10:08:02 please.
10:08:04 MR. McCULLOCH: "Legal historian with
10:08:06 special expertise in the evolution of
10:08:07 the legal principles and policies that
10:08:09 affected the conduct of Crown relations
10:08:11 with Indigenous peoples in the British

10:08:16 Empire in the 18th and 19th centuries."
10:08:23 And it is my understanding that my
10:08:24 friend wishes to broaden this qualification to make
10:08:27 it from the 18th century to the present. I am
10:08:33 afraid that I don't sufficiently understand the
10:08:37 thinking, so I would ask my friend to explain his
10:08:44 proposed amendment to the tender.
10:08:46 THE COURT: This is Mr. Townshend you
10:08:48 are referring to?
10:08:49 MR. McCULLOCH: Yes.
10:08:50 THE COURT: The last time someone tried
10:08:51 to broaden a tender, I recall Plaintiffs' counsel
10:08:55 saying that it could not be done. Now, that issue
10:08:57 was never decided because counsel came to an
10:08:59 agreement about it over the weekend.
10:09:02 MR. TOWNSHEND: That is correct, Your
10:09:04 Honour.
10:09:04 THE COURT: But is that what you are
10:09:06 requesting, sir?
10:09:07 MR. TOWNSHEND: Yes, it is, and I was
10:09:09 hoping to -- I was planning to ask the witness
10:09:12 questions about his expertise in order to support
10:09:15 the broadening I'm suggesting.
10:09:17 So I was expecting my friend to do the
10:09:21 examination-in-chief on the qualifications first.

10:09:23 THE COURT: Well, let me ask
10:09:25 Mr. McCulloch. Do you plan to make some overview
10:09:27 of this gentleman's qualifications as part of your
10:09:30 oral chief, sir?
10:09:32 MR. McCULLOCH: Yes, Your Honour, but
10:09:36 exactly how far that goes will depend on what
10:09:39 tender I'm attempting to justify.
10:09:42 THE COURT: Well, you only need to
10:09:43 justify your own, sir. I do think it would be more
10:09:48 practical if you could ask your -- whichever
10:09:54 credentials you wish to highlight because, of
10:09:57 course, you don't need to repeat them all, as a
10:10:05 first step, and then Mr. Townshend will ask his
10:10:12 questions, as he is entitled to in
10:10:14 cross-examination, and you will have some
10:10:15 theoretical right of reply, sir. Is there any
10:10:18 reason why that wouldn't work out?
10:10:20 MR. McCULLOCH: I would simply like to
10:10:22 make the observation that on our very preliminary
10:10:24 understanding, my friend's suggestion, he is not
10:10:27 seeking to broaden the expertise proposed here but
10:10:30 to add a new category of expertise.
10:10:35 THE COURT: How is that different from
10:10:36 broadening the expertise?
10:10:40 MR. McCULLOCH: It is a distinction

10:10:41 whose significance, I guess, we can determine once
10:10:43 I have completed my qualification.
10:10:44 THE COURT: All right. Well, as
10:10:45 occurred the last time, I said to you all that I
10:10:49 would want legal submissions as well on the then
10:10:54 disputed proposition that an expert witness's
10:11:01 tender could be expanded by the opposing party, and
10:11:11 the exception would be if it were on consent.
10:11:13 And that is how it was resolved the
10:11:15 last time, but I am sure that in the meantime you
10:11:18 all looked it up. So we'll get to that once you
10:11:21 have finished the questioning step.
10:11:23 Please go ahead.
10:11:26 EXAMINATION-IN-CHIEF BY MR. McCULLOCH
10:11:26 (On Qualifications):
10:11:27 Q. Your Honour, I would like to ask
10:11:30 Professor McHugh if he has a copy of his curriculum
10:11:33 vitae before him.
10:11:34 A. No, I don't.
10:11:35 Q. Perhaps if we could put it on the
10:11:44 screen. Do you see it before you?
10:11:51 THE COURT: So this is Exhibit 4439
10:11:54 that you are referring to?
10:11:55 BY MR. McCULLOCH:
10:11:56 Q. Yes, Your Honour. And do you

10:11:57 recognize this document?
10:11:58 A. It is my curriculum vitae, yes.
10:12:01 THE COURT: Speak up, sir.
10:12:02 THE WITNESS: It is my curriculum
10:12:04 vitae, yes.
10:12:05 BY MR. McCULLOCH:
10:12:05 Q. And who prepared it?
10:12:08 A. I did.
10:12:09 Q. I would like to take you, in fact
10:12:14 as part of the qualification exercise, to --
10:12:21 unfortunately, the first item I want to take
10:12:23 Professor McHugh to is one of the impugned elements
10:12:28 of his report, so I will have to park the question
10:12:33 that I hoped to lead things off with, or --
10:12:41 THE COURT: Why don't you ask your
10:12:42 question, sir, and I'm sure Mr. Townshend will
10:12:44 stand up if he has a problem.
10:12:45 BY MR. McCULLOCH:
10:12:46 Q. In which case I would like to turn
10:12:47 to Professor McHugh's report. That is Exhibit W2.
10:13:01 And I would like to go to paragraph 1.2, which I
10:13:06 believe is on the second page of the PDF.
10:13:14 THE COURT: This is the expertise
10:13:15 summary?
10:13:16 MR. McCULLOCH: Yes, Your Honour.

10:13:17 THE COURT: All right.

10:13:18 BY MR. McCULLOCH:

10:13:18 Q. Now, in paragraph 1.2 of your report, Professor McHugh, you mention your father Ashley George McHugh. Why do you -- if I may finish my question.

10:13:30 THE COURT: Yes, you may finish your question. Please suspend your answer, sir, until I hear from Mr. Townshend.

10:13:36 BY MR. McCULLOCH:

10:13:37 Q. Why do you do this?

10:13:38 THE COURT: Okay. Mr. Townshend, what is your problem with that?

10:13:42 MR. TOWNSHEND: Your Honour, yes, that is one of the paragraphs we had a problem with, and not the entire paragraph but just the reference to Professor McHugh's father, which I did not think his father's qualifications were relevant to this.

10:13:59 And later in the paragraph, he talks about his own qualifications, and that is fine and most of the paragraph leads up to that. It was just the reference to his father, and I had a -- when we were going to bring this exhibit, this report being an exhibit, I had a black-lined copy of a number of paragraphs where I suggested there

10:14:22 were things that did not belong. That is one --
10:14:24 THE COURT: So your submission is that
10:14:26 it is not relevant?
10:14:32 MR. TOWNSHEND: That's correct.
10:14:33 THE COURT: All right. Mr. McCulloch?
10:14:35 MR. McCULLOCH: Your Honour, I would
10:14:36 like Professor McHugh to explain why he considered
10:14:38 it relevant when he included it in his report.
10:14:40 THE COURT: Well, it seems like a fair
10:14:42 request. Do you have any objection to that,
10:14:44 Mr. Townshend?
10:14:46 MR. TOWNSHEND: No, Your Honour.
10:14:47 THE COURT: Could you please explain
10:14:48 why you included the discussion in here about your
10:14:52 father, sir?
10:14:53 THE WITNESS: Thank you, Your Honour.
10:14:54 My father's mortal remains spent their last night
10:14:58 on earth in a Maori meeting house. It is Maori
10:15:02 custom to acknowledge your ancestors if they have
10:15:06 made a contribution to the cause being heard. So
10:15:09 the reference to my father is something that would
10:15:11 be expected in the home of my upbringing in New
10:15:16 Zealand, and it would be regarded as unusual were
10:15:18 this reference not made. It is part of the
10:15:21 association with the cause through my family, so

10:15:24 that is a reflection of Maori protocols, of
10:15:30 knowledge, and of representation in a legal
10:15:33 setting.
10:15:34 THE COURT: All right. Having heard
10:15:35 the explanation, Mr. Townshend, and taking into
10:15:41 account my comment now that the references will be
10:15:51 limited to this witness's explanation, are you now
10:16:00 content, or do you wish some other remedy?
10:16:03 MR. TOWNSHEND: I am content that that
10:16:05 be continued.
10:16:07 THE COURT: Thank you, sir. Please go
10:16:09 ahead.
10:16:10 BY MR. McCULLOCH:
10:16:10 Q. Professor McHugh, I would like now
10:16:11 to turn back to your curriculum vitae, which you
10:16:17 have on the screen before you.
10:16:21 A. Yes.
10:16:22 Q. I would like to take you to your
10:16:26 present responsibilities. You indicate that you
10:16:31 are a Professor of Law and Legal History. Could
10:16:36 you explain what that means? Is there a
10:16:41 difference? Why are you a Professor of Law and
10:16:45 Legal History?
10:16:45 A. Well, when you are promoted to a
10:16:47 Professorship at Cambridge, which counts as a sort

10:16:51 of recognition of having achieved a certain
10:16:54 standing, I guess, you are entitled to choose the
10:17:00 name of the Chair you wish to hold, and I
10:17:04 purposefully chose law and legal history because
10:17:07 they reflect essentially the two caps that I wear
10:17:11 academically.
10:17:11 I have been closely involved in the
10:17:14 development of contemporary law and commentary on
10:17:18 it, and I have also been heavily involved in legal
10:17:23 history, historical inquiries, writing, research,
10:17:29 and the two can often be distinct.
10:17:34 And so that is why I chose a title that
10:17:36 reflected the two hats that I wear.
10:17:39 Q. And speaking of hats, I don't
10:17:42 think I need to take it to you. It is in your
10:17:44 report at paragraph 2.3, page 6. You say you are
10:17:50 not an ethnohistorian.
10:17:55 A. Correct.
10:17:55 Q. Could you explain your
10:17:56 understand -- what your understanding of
10:18:01 ethnohistory is, and how it is distinct from the
10:18:05 legal history that you practice?
10:18:07 A. Ethnohistory I view as a technique
10:18:12 used by or available to certain historians. It is
10:18:15 not a vocation, and it is not self-designation.

10:18:20 Ethnohistory to me is the use of customary
10:18:25 knowledge -- customary knowledge applied explicitly
10:18:28 in the analysis of historical events.
10:18:31 So the practitioner of ethnohistory
10:18:34 will have access to the customary knowledge and
10:18:37 will be able to locate the customary knowledge
10:18:40 within a particular setting.
10:18:43 Now, I don't have the linguistic, the
10:18:45 anthropological background or expertise to be an
10:18:47 ethnohistorian, but, of course, one can recognize
10:18:51 ethnohistory when it is being practiced, and it is
10:18:54 by explicit reference to cultural knowledge.
10:18:56 Now, one has to separate ethnohistory
10:19:00 from primitivism. Primitivism is simply a
10:19:05 reference to a pre-contact culture and the belief
10:19:09 system that that Indigenous community would have
10:19:12 had.
10:19:13 Ethnohistory deals with a post-contact
10:19:18 setting, and in a post-contact setting, there will
10:19:20 be a syncretic vision of the Indigenous with the
10:19:27 received and with the arriviste, if you like,
10:19:31 systems of thought.
10:19:32 Q. Excuse me, if you could clarify
10:19:36 "arriviste"?
10:19:36 A. The newly arrived, the settler in

10:19:39 the case of North America. So ethnohistory
10:19:41 involves looking at syncretic processes within an
10:19:46 Indigenous community, making explicit the use of
10:19:48 customary knowledge, its state of development at a
10:19:51 particular historical moment, and over time if that
10:19:55 is available.
10:19:55 Q. Again, Professor McHugh, if you
10:19:57 could explain syncretic?
10:20:00 A. Syncretic means two systems of
10:20:03 thought coming together, and the product of that
10:20:05 interaction. So an ethnohistorian will be drawing
10:20:14 upon and explicitly referring to customary
10:20:16 knowledge from within an Indigenous community.
10:20:18 Q. Thank you. I would like to move
10:20:21 on to the next item in your curriculum vitae, your
10:20:26 current research. Now, I would ask you to outline
10:20:31 your current research insofar as it is relevant to
10:20:37 a matter in your report, and perhaps you could
10:20:38 explain, as you go along, why the current research
10:20:44 you are discussing is relevant to the material in
10:20:48 your report.
10:20:48 A. Well, I have been working on a
10:20:51 project. It is a working title for a book called
10:20:55 "Albion's Sceptre: Office and Prerogative in the
10:20:59 Constitutional Culture of the British Empire."

10:21:02 It straddles the 17th, 18th and most of the 19th century, and at the moment, it looks like it is going to be several volumes. The first volume concerns land and land policy in the British Empire, particularly in the North American and the Atlantic colonies during the 18th and early 19th century.

Overall, I am asking, particularly my legal colleagues, for a more careful history of the role of law in the experience of empire from the -- basically from the discovery of the New World. In particular, the book is implicitly an argument for a clearer sense of the epistemic features of law and as those features change over time.

Q. Could you explain epistemic features?

A. Epistemic is a system or a way of knowing and articulating one's realization of the world. So I am looking at law probably in two senses: as a mode of social order and as a mode of thought.

And when I say we have to historicize these modes, if one thinks of a timeline and just thinks of how these enterprises change over time, the way in which law operates to generate social

10:22:37 order, and the way in which it changes as a system
10:22:41 of thought.
10:22:48 Now, law is a human enterprise. It is
10:22:50 a human enterprise that lives in time, so it is an
10:22:53 enterprise of human beings over time. It is
10:22:54 inherently prone to change. And that is why I draw
10:22:57 this timeline analogy.
10:23:01 If you look at the law as a pursuit of
10:23:04 social order, we see that the settings in which
10:23:08 this pursuit occur change over time, and changing
10:23:11 over time can also include the span in which law
10:23:15 seeks social order, the location, so we can go from
10:23:19 empire to periphery, and there will also be, of
10:23:25 course, changes within the social order of a
10:23:27 non-legal kind but which have an impact upon the
10:23:30 development of law as cultural, technological, for
10:23:33 example.
10:23:33 Q. Could you give some illustrations
10:23:35 of these changes you have mentioned?
10:23:38 A. Well, the obvious change is the
10:23:42 Imperial enterprise at the beginning of the 17th
10:23:45 century that starts off as the discovery of the New
10:23:47 World, the establishment of marginal colonies on
10:23:52 the seaboard of the Atlantic.
10:23:56 And then if we go through to the period

10:23:59 of the Seven Years' War, we have two -- three major
10:24:03 Imperial powers contesting for their interest
10:24:08 within the continent, the colonies established
10:24:12 along the seaboard and spreading inwards, with a
10:24:15 fur trade in the interior.
10:24:17 And then if we come into the 19th
10:24:22 century, we have the United States now a major
10:24:25 power, and we have British North America, the two
10:24:32 Canadas, and the international competition has now
10:24:36 resolved itself into the relations between Canada
10:24:43 in the north, between Canada and the United States,
10:24:46 and the economic changes, of course, that are
10:24:48 coming then, profound economic and technological
10:24:52 change occurring in the first half of the 19th
10:24:54 century with things like telegraph, print,
10:24:58 transport, really major -- really major change that
10:25:04 has quite an impact.
10:25:05 So we have to put law within that
10:25:07 social order, but we also have to think of law
10:25:10 secondly as a system of thought and how that system
10:25:14 of thought locates and identifies itself, and we
10:25:19 have in the early modern period -- by which I mean
10:25:22 the 16th, 17th and first half of the 18th century.
10:25:30 In that period, law is not only a profession in the
10:25:34 sense that it is the language or the way of thought

10:25:38 used by a specialist clerisy, group of people, and
10:25:45 it begins in court with pleadings and ways and
10:25:48 manners of dealing with proceedings, different
10:25:52 jurisdiction, different courts. That is all in one
10:25:55 sense.
10:25:55 But in the early modern period, most
10:25:57 Englishmen were educated in the nature of law
10:26:00 because they would be taking roles as justices of
10:26:03 the peace in the localities, or else they would be
10:26:06 dealing with corporations.
10:26:07 And so law was a much more pervasive
10:26:11 way of thought that attracted Englishmen of a
10:26:17 certain class. They were talking of rights and
10:26:20 liberties, and they would understand this. There
10:26:21 was a very strong language of law running through,
10:26:25 for example, the contestation, pamphleteering of
10:26:28 the American Revolution.
10:26:29 Q. Sorry --
10:26:30 A. So we have a society that is
10:26:31 immersed and an idea of law that is not technical
10:26:36 but which is very well-founded and has been part of
10:26:38 their upbringing and their education.
10:26:39 Q. If you move back a second, you
10:26:42 said the contestation, and I'm afraid I missed a
10:26:45 word or two.

10:26:46 A. Well, when there is great times of social upheaval like the American Revolution, there will not only be, as eventually there was, the recourse to arms, there will be debate, pamphlets, discussions, books, tracts, representative spokesmen presenting themselves and arguing the cause. The American Revolution was a period very ripe in its production of such material, and with contributors, as for example Thomas Paine, Thomas Jefferson, that are some of the obvious, and so we have a great flourishing of literature in which the different causes advocate themselves. And the historian of political thought will look at this, and when the historian of political thought looks at the literature of the American Revolution, it is very clear there is a strong legal and constitutional element to this.

Some authors, like John Phillip Reid, have written volumes on the nature of law that is in circulation and being argued at the time of the American Revolution.

Now, this is not law in the sense that we today will be thinking about it, as providing specific propositions and rules. This is law that is being used in an irresolvable context, but it

10:28:11 provides a language and a mode of thought in order
10:28:13 to justify a particular political course of action.
10:28:17 Q. Could you tell us what you mean by
10:28:20 irresolvable context?
10:28:22 A. Well, what we have with the law
10:28:24 during the 19th century is a transition, and the
10:28:26 transition accompanies the rise of the Victorian
10:28:30 administrative state and the arrival of law as a
10:28:34 service industry. And it is also connected with
10:28:38 the reforms that are being made to the profession
10:28:40 and in the organization of the courts. Some people
10:28:43 refer to this as the positivization of law. Law
10:28:48 becomes disengaged from the person that is
10:28:56 iterating it. It loses a sense or a location, an
10:28:59 office, and instead becomes an abstract set of
10:29:01 rules that are applied with a forensis that is
10:29:09 distinctly law that is the practice of a qualified
10:29:11 and disciplined profession.
10:29:12 And that is how law is understood today
10:29:15 in terms of rules derived from legal sources. The
10:29:19 legal sources will be statute or case law, and they
10:29:22 will sustain a proposition which may or may not be
10:29:25 upheld by a court, so that is doctrine becomes the
10:29:32 foremost expression of the nature of legal thought.
10:29:37 And this is a system of legal thought

10:29:39 that is not available to the community at large,
10:29:42 unlike earlier notions of law. It is an idea of
10:29:45 law that is kept and contained within a
10:29:49 professionalized compass and, of course, the legal
10:29:53 profession becomes organized in the 19th century.
10:29:56 Legal education becomes the preserve of the
10:29:59 university, and the judges develop and articulate
10:30:02 rules of stare decisis and precedent --
10:30:02 THE COURT REPORTER: I'm sorry. Your
10:30:02 Honour, through you, I'm having some trouble, as
10:30:02 the witness speeds up, understanding what he is
10:30:14 saying.
10:30:14 THE COURT: All right. So I'm going to
10:30:15 ask you just to speak a little bit more slowly for
10:30:19 Madam Reporter.
10:30:20 THE WITNESS: Thank you. I'm sorry.
10:30:23 THE COURT: Please go ahead.
10:30:26 BY MR. McCULLOCH:
10:30:26 Q. Just before you start, if I could
10:30:28 ask if you could give us an approximate time when
10:30:30 this transition from the early modern to the modern
10:30:32 state of law --
10:30:33 A. The transition is occurring late
10:30:34 in the 19th century, and you can find it in the
10:30:37 work of -- in the Canadian setting of it, in the

10:30:40 work of such legal historians as Richard Risk, for
10:30:43 example.
10:30:44 I could give you an example of the
10:30:46 difference. When I was -- when I began looking
10:30:52 into the field of Aboriginal rights in the
10:30:54 historical dimension in the early 1980s, I looked
10:31:01 at the arguments that were constructed for common
10:31:03 law Aboriginal title. And implicitly, there is a
10:31:06 kind of problem from the perspective of the modern
10:31:09 way of thought, and that is that there is not much
10:31:12 legal authority for Aboriginal title in the 17th
10:31:16 and 18th century.
10:31:17 There is a couple of cases. There is
10:31:19 the Mohegan dispute before the Privy Council which
10:31:24 remains irresolute, and then there are the Marshall
10:31:26 cases, and the case called Symonds, and so --
10:31:29 Q. Just if you could remind us when
10:31:32 you say the Marshall cases.
10:31:34 A. The Marshall cases are a trilogy
10:31:36 of cases decided by the United States Supreme Court
10:31:39 under John Marshall as Chief Justice. They are
10:31:45 regarded as a foremost articulation of the rights
10:31:52 of Indigenous peoples. The Marshall cases have
10:31:56 been used in all kinds of settings to make all
10:32:01 kinds of arguments. The Marshall cases can mean

10:32:08 whatever the user wants them to mean. That is
10:32:12 how -- like the Magna Carta, they become so
10:32:18 lionized and so revered that the historical context
10:32:21 often gets lost, but they are cases that are used.
10:32:24 And a New Zealand case in which several
10:32:27 sound bites support the contemporary common law
10:32:32 doctrine, a judgment by Justice Chapman, and they
10:32:37 are used.
10:32:37 Now, I'm certainly not speaking to
10:32:41 disown the contemporary doctrine of Aboriginal
10:32:43 title but simply to say that it applies the only
10:32:48 rules of its method and looks back into the past
10:32:50 for cases, and it doesn't raise, as it raised with
10:32:54 me, the question, Well, there is not much law going
10:32:56 on there, is there? And the law that is not going
10:32:58 on is law that we know, law in that sense of
10:33:01 statutes and case law.
10:33:03 And that realization makes one think,
10:33:06 Well, maybe they have got a different idea of law,
10:33:09 or maybe there is no law at all. Now, you can't
10:33:12 say there is no law at all because we are not
10:33:14 dealing with people in a state of lawlessness. We
10:33:17 are dealing with people who do have a sense of law
10:33:20 in the social order. It is just that it is not our
10:33:26 modern professionalized view, doctrinal view of

10:33:31 law, and that did lead me along the path that I
10:33:34 have subsequently taken.
10:33:35 I certainly do not wish to be
10:33:37 understood as being negative about the common law
10:33:39 doctrine of Aboriginal title because I have been,
10:33:41 in the New Zealand context and internationally,
10:33:43 probably one of the foremost advocates and
10:33:48 academics dealing with Aboriginal title.
10:33:50 But Aboriginal title is a legal
10:33:54 argument that was constructed in the 1970s from a
10:33:58 mish-mash of sources, very important, very crucial,
10:34:02 but it is not a body of doctrine that applied or
10:34:07 was being applied by historical actors in former
10:34:10 times.
10:34:10 Q. Well, in your CV, you mention that
10:34:14 this proposed book that you are working on
10:34:18 discusses the Indian provisions of the Royal
10:34:22 Proclamation. Could you explain the way in which
10:34:25 the Royal Proclamation in 1763 fits into this
10:34:30 divide that you have been describing?
10:34:32 A. Well, I can explain the Royal
10:34:36 Proclamation by reference to what it was not. It
10:34:38 was not considered a statute at the time. It is
10:34:44 part of a so-called common law interpretation of
10:34:46 the Royal Proclamation that is regarded as having

10:34:50 the effect of a statute and as always having been a
10:34:54 statute.
10:34:55 From that is built a narrative of Crown
10:35:01 liability based upon compliance or otherwise with
10:35:03 the Royal Proclamation. When one looks more
10:35:08 closely at the material, I had considerable
10:35:11 difficulty with that and I continue to have strong
10:35:16 difficulty with that. None of the advocates of the
10:35:19 common law view of the Proclamation have
10:35:23 familiarity with the detail of the political
10:35:26 context or look at the political contexts in which
10:35:31 that singular, enduring interpretation would apply
10:35:38 because if they did, they would historicize the
10:35:42 interpretation of the Royal Proclamation and see
10:35:44 that there is not one unitary interpretation.
10:35:48 THE COURT: Mr. Townshend?
10:35:49 MR. TOWNSHEND: Your Honour, we are
10:35:50 still at the stage of qualifying this witness, and
10:35:53 I think what he is testifying to now are things
10:35:57 that he needs to be qualified before he can give
10:36:00 these opinions.
10:36:07 MR. McCULLOCH: Your Honour, we are, as
10:36:08 part of the qualification, demonstrating that
10:36:11 Professor McHugh is an ongoing active scholar
10:36:16 continuing to be engaged by the issues. This has

10:36:19 been part of the qualifications that we did for
10:36:24 Mr. Wentzell and also for Professor Beaulieu, to
10:36:32 demonstrate the scholarship that they brought to
10:36:34 bear is an area in which they are currently
10:36:36 engaged.
10:36:37 However, since we will be returning to
10:36:39 these issues in the discussion of the report, I
10:36:42 would like to wrap up this portion by asking just
10:36:47 one more question.
10:36:49 THE COURT: Yes. Mr. Townshend, I
10:36:52 understand why you stood up, but it may just be a
10:36:59 nuance that doesn't fall within an objected section
10:37:04 of this gentleman's report anyway.
10:37:06 So as long as Mr. McCulloch is going to
10:37:09 wrap it up, I think we are all right. All right?
10:37:13 Go ahead, sir.
10:37:14 BY MR. McCULLOCH:
10:37:14 Q. And, Professor McHugh, could you
10:37:16 tell me what this overarching understanding of the
10:37:22 changes in law that you have just described has to
10:37:25 do with what Sir Francis Bond Head was doing in
10:37:31 1836.
10:37:31 A. The point is that we are in a
10:37:34 different world. We are in a world that doesn't
10:37:36 think of law the way we do, that has an idea of

public authority based upon office and an acceptance of the scope and realm of the prerogative that we do not have.

So to understand how law circulates and is present within the events of the 1830s in Upper Canada, we have to historicize; that is to say, give historical understanding to the way in which law and public authority were being thought about and operationalized at that time. The book that I am writing is overall an exercise -- it is going to be a very multivolume exercise in reconstruction of a world in which office and prerogative and, in the report, sovereign comportment describe how law is present.

It is not the imperative, positivized doctrinal law that we know today, but a different way of thinking about law.

And so we are in a different world, and that is the historical world that I tried to -- I refer to in my report.

Q. Thank you.

A. Thank you.

Q. I would like to move on now to your occupational background. We have established that you are a Professor of Law and Legal History.

10:39:05 Could you tell me about your previous university
10:39:08 positions.
10:39:09 A. In Cambridge?
10:39:13 Q. Yes.
10:39:13 A. Well, I went to Cambridge to
10:39:19 complete a Ph.D., which I did, and that was -- I
10:39:26 was quite lucky in that my career has coincided
10:39:33 with the rising of -- within an intellectual
10:39:38 movement, I guess, in which law has been important.
10:39:42 And we have gone from anthropology being the lead
10:39:45 discipline and discussion of Indigenous peoples to
10:39:47 law, and I was there at a very early moment.
10:39:53 And I did my masters in Saskatoon where
10:39:58 Brian Slattery was leading the Native Law Centre
10:40:03 and other academics with their talent at the same
10:40:07 time, Kent McNeil, who was about to go over to
10:40:11 Oxford to commence his Ph.D., and Brian threw the
10:40:16 New Zealand cases at me -- well, he didn't throw
10:40:16 them at me. He said, I can't make sense of these.
10:40:18 Why don't you go and have a look? So off I went,
10:40:19 and that was the beginning of my Ph.D.
10:40:22 dissertation, which led to certain important events
10:40:26 in New Zealand over succeeding decades.
10:40:29 And then on the strength of that, I was
10:40:34 elected to a research fellowship, and then a

10:40:39 teaching position in my college and then at the
10:40:41 university. So I stayed in Cambridge for the
10:40:47 duration.
10:40:48 My initial scholarship was very
10:40:50 doctrinal. It was on realm and scope and
10:40:55 applicability of the common law doctrine of
10:40:58 Aboriginal title. At this stage, I was very
10:41:00 absorbed in it and very involved in its applied
10:41:04 setting in New Zealand.
10:41:08 But being in Cambridge, I also was
10:41:11 mixing with historians of political thought. One
10:41:15 cannot help be in the humanities in that town and
10:41:18 not experience the influence of John Pocock and
10:41:23 Quentin Skinner. So my academic interest and
10:41:29 research took a more historical direction and a
10:41:32 more historicized direction as a result of that,
10:41:38 and that led to the second cap, the legal history
10:41:40 cap, which I'm wearing and interested in these
10:41:45 proceedings.
10:41:46 Q. Could I actually ask you a
10:41:47 question about your doctoral thesis. Did it
10:41:51 receive any prizes?
10:41:54 A. I was lucky enough to be awarded
10:41:57 the Yorke Prize. I suppose in a way they had to
10:42:02 give it to me, because by the time it was awarded,

10:42:04 the New Zealand Supreme Court, in a case called
10:42:07 Te Weehi, had recognized the common law doctrine of
10:42:10 Aboriginal title as it applied to customary Maori
10:42:14 interests, of fishing interests on the coastline.
10:42:15 And that was as important a case as
10:42:19 Calder in Canada, and Mabo, No. 2, in Australia.
10:42:26 And in the judgment, Justice Williamson refers
10:42:31 extensively to my work.
10:42:32 And so given the results that were
10:42:35 occurring, the Yorke Fund decided -- the
10:42:41 administrators of the Yorke Fund awarded me the
10:42:44 prize.
10:42:44 The prize had also been won many years
10:42:47 before by the judge who was then the President of
10:42:50 the New Zealand Court of Appeal, Sir Robin Cooke.
10:42:55 He was later Lord Cooke. He was later to become
10:42:59 the first Commonwealth Judge to sit in the House of
10:43:02 Lords, and Robin was a good friend, and he had a
10:43:07 personal copy of my Ph.D., and he was very pleased
10:43:11 when it won a Yorke Prize because that was the
10:43:15 first New Zealander since him.
10:43:16 Q. And going back to your employment
10:43:18 history, I noticed that you were a Visiting
10:43:22 Professor of law at Victoria University of
10:43:24 Wellington as the Ashley McHugh - Ngai Tahu

10:43:35 Professor of Law. Can you tell us about that?
10:43:37 A. This is an occasional position
10:43:39 established by the Ngai Tahu Maori Trust. Now, the
10:43:41 Ngai Tahu, the iwi or Maori tribe covering most of
10:43:46 the south island of New Zealand, I refer to their
10:43:49 claim in my report in the opening paragraphs, and
10:43:53 my father's involvement.
10:43:55 After my father passed away, soon after
10:44:00 the Ngai Tahu Trust Board established a fund in
10:44:05 memory of him, and I was the first visiting
10:44:07 Professor.
10:44:08 Q. Thank you. I would like to move
10:44:12 on now to your publications. Obviously, they are
10:44:16 very extensive, and I am not going to go through
10:44:18 them all. I am in a bit of a dilemma in that I
10:44:26 have identified those that are relevant only to
10:44:29 legal history and not to modern law, so that this
10:44:32 qualification only applies to the tender as we have
10:44:36 proposed it.
10:44:36 A. I understand.
10:44:37 Q. Okay. I would like to go under
10:44:43 "Publications", number 12, which is page 4 of the
10:44:48 CV. And at item number 12, there is an entry in
10:44:58 The New Oxford Companion to Law. Could you tell us
10:45:02 about that?

10:45:03 A. That is simply a condensed description of the arrival of the common law doctrine in the relevant jurisdictions, Canada, Australia and New Zealand, and as an identification of the organic common law in an Imperial setting.

10:45:27 Q. Okay. And now on the next page, page 5, under "Major articles in refereed academic legal periodicals", I would like to ask you about number 6, "Maori Fishing Rights and the North American Indian".

10:45:48 A. That article was the final in a trilogy, four, five and six, that Justice Williamson relied upon in the Te Weehi case. Those were the first -- really the first advocacy of the applicability of common law Aboriginal title in New Zealand and, as I said, related to the recognition of a term used as non-territorial fishing rights and which then led to Maori making a claim to commercial sea fishery rights, which had resulted in a major settlement and as a result of which the regulatory framework for fishing rights around the coast was adapted in a way that took vastly more account of the Maori customary interests than had formerly been the case.

10:46:52 Q. And now I would like to ask you on

10:46:56 this same page -- or rather, page 6, about number
10:47:00 11, "The common law status of colonies and
10:47:04 Aboriginal 'rights': how lawyers and historians
10:47:09 treat the past".
10:47:11 A. Well, this -- and if you look
10:47:13 immediately above it, you'll see "Constitutional
10:47:17 Voices" and "Law, History and the Treaty of
10:47:21 Waitangi", and the 1998 one.
10:47:23 By then, I had become much more clear
10:47:25 of the methodological distinctions being made
10:47:28 between the legal historian and the doctrinal --
10:47:33 contemporary doctrinal lawyer, and those three
10:47:37 articles, in particular number 11, reflect this
10:47:40 consciousness and my writing about it.
10:47:42 The 9 and 10 are more related towards
10:47:46 the New Zealand setting, whereas 11 deals with
10:47:52 Imperial constitutional history at large.
10:47:55 Now, this is a time, the late 1990s,
10:47:59 when Imperial constitutional history is becoming an
10:48:03 emerging field within history at large, so I'm
10:48:07 there writing this, explaining how the status that
10:48:15 were given colonies, as conquered or ceded or
10:48:19 settled, was a categorization made administratively
10:48:23 at the time to decide the position of settler
10:48:30 communities. It was not a distinction applied for

10:48:34 or against the status of Indigenous peoples and
10:48:38 their rights, whatever they might be.
10:48:41 So the contemporary use of that
10:48:45 distinction by some scholars of Aboriginal rights
10:48:48 was one being made divorced from historical
10:48:51 context. So I was making the distinction between
10:48:54 an historical inquiry, which looks at the concerns
10:48:59 of actors at that time, and how the legal
10:49:04 understandings by which they are operating as
10:49:08 contrasted with the questions that a contemporary,
10:49:15 doctrinal lawyer would have at the same time.
10:49:18 Q. Has that article acquired any
10:49:20 recognition?
10:49:21 A. Well, yes, you can see that it has
10:49:23 there in the CV. It has been reprinted in the
10:49:28 legal theory and legal history series, edited by
10:49:35 Maksymilian Del Mar and Michael Lobban, and among
10:49:41 other, there appears some quite illustrious
10:49:45 company, including Sir John Baker, who is probably
10:49:48 far and away the most eminent Anglo Commonwealth
10:49:51 legal historian today, and he is also at Cambridge,
10:49:55 so that was touching. So it is a collection that
10:50:04 assembles current thinking on the way in which
10:50:08 legal history is done.
10:50:09 Q. And I would like to turn the page

10:50:13 to item 19. You can tell me whether this is
10:50:19 relevant to the legal historical project you are
10:50:24 currently engaged on. Could you tell me what
10:50:27 "'Treaty Principles': Constitutional relations
10:50:29 inside a conservative jurisprudence" is about?
10:50:33 A. Well, this is primarily a New
10:50:36 Zealand article written in a memorial edition to
10:50:40 Robin Cooke who had passed away, and thinking about
10:50:46 his heritage, his legacy, and the way in which law
10:50:51 had been operating in a New Zealand setting where
10:50:55 historical claims have profound importance.
10:51:02 In New Zealand, Maori claims are based
10:51:06 upon a treaty, but it is not like a Canadian treaty
10:51:10 which tends to be treaties of cession, of land
10:51:15 cession. The New Zealand Treaty is the Treaty of
10:51:18 Waitangi by which the Maori Chiefs of New Zealand
10:51:21 ceded the sovereignty of the country to the Crown.
10:51:24 Now, there is a difference between the
10:51:26 Maori texts and the English texts, but the
10:51:30 reference to the treaty principles is a reference
10:51:32 to a practice that began in New Zealand during the
10:51:40 1990s of incorporating certain treaty principles
10:51:43 into the interpretation and application of law.
10:51:49 Now, treaty principles meant that New
10:51:53 Zealand courts developed a living tree idea of the

10:51:56 treaty of cession, of the Treaty of Waitangi, and
10:52:00 gave it current meaning.
10:52:02 Now, what is quite clear is that treaty
10:52:04 principles, as developed in contemporary doctrine,
10:52:07 is not the same as the treaty principles as people
10:52:10 were thinking about them in 1840, and so the treaty
10:52:15 principles that I am talking about there are
10:52:19 located in a doctrinal world.
10:52:22 Now, in that article, I also explain
10:52:25 that the doctrinal world of treaty principles has
10:52:29 been a world that revalidates customary forms of
10:52:34 tribal authority, the iwi, and because of this, the
10:52:40 status and standing of Maori within the legal
10:52:42 system was dependent upon how they stood in
10:52:45 relation to claims being made under this treaty and
10:52:51 that gave the nature of the development of law and
10:52:59 Maori an inherently conservative cast.
10:53:07 Q. Okay. I would like to move on to
10:53:08 page 9, number 26, "The Politics of Historiography
10:53:15 and the Taxonomies of the Colonial Past: Law,
10:53:18 History and the Tribes". Could you tell us about
10:53:22 that and in particular explain what you mean by
10:53:28 histography and taxonomies.
10:53:29 A. By the politics of historiography,
10:53:33 I mean the politics of the presentation of history,

10:53:35 the way in which it gets written, because the
10:53:37 writing of history is as much, if one could call
10:53:40 it, a political act because it occurs within a
10:53:43 particular context in a contemporary setting, and
10:53:46 so I looked at the histories that were being
10:53:51 written in the 1980s, the 1990s, and how they
10:53:57 reflected the political circumstances of that time,
10:54:04 and I looked in particular at the standing status
10:54:07 of the Royal Proclamation as -- and the development
10:54:12 of the argument that it has always had the status
10:54:16 of a statute.
10:54:18 And I put it out that, well,
10:54:21 historically, the interpretation of the Royal
10:54:25 Proclamation is not consistent with having always
10:54:27 been like that. Whilst doctrine today can take
10:54:31 that position, previous actors in a different past
10:54:35 were not navigating according to the statutory
10:54:37 model of the Royal Proclamation.
10:54:38 So we have to try and understand what
10:54:40 their idea of law was in that past, and so that is
10:54:43 what I'm talking about there. I'm putting an
10:54:47 argument I sometimes made in a New Zealand setting,
10:54:52 and I am giving it a Canadian aspect.
10:54:53 Q. And number 28 on the same page,
10:54:57 which I believe you co-authored with Lisa Ford,

10:55:01 "Settler Sovereignty and the Shape-shifting Crown".

10:55:05 A. Well, I often mention Lisa. She is one of a group of exciting young scholars in this field of Imperial constitutional history that I spoke about as emerging during the 1990s. By the time we get into the 2000s, there is lots of young scholars, a little bit older, who are producing some very important work. Lisa is one of them. David Armitage is another, and Mark Hickford.

10:55:31 So this paper that we wrote together "Settler Sovereignty and the Shape-shifting Crown", it talks about the Maori in New Zealand have always had a position that the Crown is the unreliable treaty partner, and it's unreliable -- part of its unreliability occurs because it shifts its shape. It goes through internal constitutional changes that are not brought to the attention of Indigenous people.

10:56:06 For example, the shift to responsible government is a good example. It goes from being an Imperial Crown, a Crown whose decision-making is located in London, to one whose ministers advising the Crown are selected from a local assembly which has, in turn, an accountability to a settler electorate.

10:56:29 And so these changes are occurring -- constitutional changes are occurring. The Crown is shifting shape, and Indigenous people are there sitting on the sidelines blinking and wondering what is going on.

Now, the term the "shape-shifting Crown" was later used by a research project in New Zealand funded by the Marsden Fund with over half a million dollars New Zealand put into it to produce the book, and they took the same name "The Shape-Shifting Crown". It came out of Cambridge University Press in the last 13 months. So that is a term that is around as well.

Q. And the last item on that page, "A comporting sovereign, tribes and the ordering of imperial authority in colonial Upper Canada of the 1830s", and Mr. Koskenniemi -- I certainly have that wrong -- and Walter Rech and Manuel Fonseca.

A. Thank you. I could, first of all, say a word about Marty, Professor Koskenniemi, who was probably the foremost historian of international legal thought. He has written a very important book called "The Gentle Civilizer of Nations", which looks at the emergence of international law as a distinct disciplinary field

during the 19th century and into the early 20th century. And that has been a very influential book.

Marty has run a series and continues to run a series of seminars organized by his research students, the always very good research students, at the University of Helsinki, and several volumes have been produced as a result of this European research council funded ongoing exercise.

I have been to three of them. A couple of them have been published. So that is the setting that is occurring. It is occurring within a broader European-based academic project.

This particular paper arises out of research postulated for this hearing, and it is trying to capture the idea of public law as understood at the time, not being law in an imperative sense, as externally imposed, monitored and enforced against public authorities by courts, which is the modern notion. It is a different idea of law, and it is the idea of law that the sovereign comports with the behaviour expected of the sovereign, so it is drawn from the premise of office. Office -- and I will be stressing this throughout my evidence -- is the way in which

authority was conceived in the pre-Victorian period.

Q. So just to confirm then, so it was published in the book cited below by Oxford University Press?

A. That's correct.

Q. And this is going to sound like an odd question. Is that a reputable press, University Press?

A. I think so.

Q. Now, I would like to turn the page and item 33, the last in this heading, "Imperial Law - the Legal Historian and the Trials and Tribulations of an Imperial Past."

A. Okay. This is a collection of essays on designated topics edited by Chris Tomlins and Marcus Drubber. Marcus Drubber is at the University of Toronto, and Chris Tomlins is a very leading historian of -- legal historian, works in America, but his coverage has been the former British Empire.

The Oxford Handbook of Legal History, there is really -- it is like a who's who of legal history today, and I was asked to write about Imperial law. And in this, I talk about the

11:01:01 previous ways of writing the history of Imperial
11:01:04 law; that is to say, an effort by the Imperial
11:01:09 authority, London, to govern the peripheries.
11:01:16 I discuss previous attempts, doctrinal
11:01:22 approaches to the history, and then I talk about
11:01:26 more modern approaches, and I explain an approach
11:01:29 based upon sovereign comportment and office in
11:01:33 that.
11:01:33 Q. Thank you. I would like to move
11:01:35 on now to the section entitled "Books" on page 10,
11:01:45 and as briefly as you can, could you tell us what
11:01:49 the essential hypothesis in "Aboriginal Societies
11:01:55 and the Common Law: A History of Sovereignty,
11:01:58 Status and Self-Determination" is?
11:02:01 A. Well, it starts from the position
11:02:03 that I described earlier, from precarious
11:02:11 beach-side communities established at the beginning
11:02:15 of the 17th century when the continent was called
11:02:19 the New World, through to the modern day where law
11:02:26 has the -- the notion of law has changed, and the
11:02:30 experience of Indigenous people in the intervening
11:02:33 period has certainly been one of a profound change
11:02:38 and of the reduction of these circumstances in
11:02:41 their own territories. That much is obvious and,
11:02:46 of course, it is an historical tale that is not

11:02:49 particularly -- that is not particularly -- it is
11:03:10 not a dignified history. The white settlers and
11:03:14 their authorities do not come out overall of the
11:03:19 tale in a good light.
11:03:22 But --
11:03:22 Q. Would you --
11:03:23 A. But it is also a history in which
11:03:27 the -- I look at the mindset of the settlers. It
11:03:31 is not an account of how Indigenous peoples thought
11:03:33 about or experienced, but, of course, the outcome
11:03:39 of their experience often speaks for itself. It is
11:03:42 the history of the way in which law encounters and
11:03:45 constructs Aboriginal communities and how that law
11:03:50 and constructing them in a particular way at a
11:03:52 particular time is dealing with or giving them a
11:03:56 particular status or position within its own legal
11:04:00 order.
11:04:00 So it is a history of how a legal order
11:04:03 that establishes itself precariously then change --
11:04:07 as the nature of the legal order itself changes
11:04:09 over time, how Aboriginal peoples stand within that
11:04:15 system, and I take it through to the modern day,
11:04:19 but I look at the modern day not as a doctrinal
11:04:22 lawyer but as an historian.
11:04:25 So seeing the changes, for example,

11:04:28 that Calder brings in terms of Calder being an
11:04:34 absolutely profound and important case because it
11:04:36 displaced the idea of the political trust that
11:04:40 previously had been the basis for public laws view
11:04:46 of the status, and I look at how having received
11:04:50 their claims, the questions that become pressing
11:04:54 historically now are not questions of rights so
11:04:58 much as post-rights questions of how you deal with
11:05:02 having rights, entities to manage, the
11:05:06 accountability of those entities, representation,
11:05:08 mandate, membership.
11:05:11 And seeing those issues that are
11:05:14 perplexing and are exciting Aboriginal communities
11:05:19 today, how those are in a historical light of
11:05:26 intensifying legalism.
11:05:28 And I also express a certain skepticism
11:05:34 about the legalism and whether or not it is
11:05:37 actually leading to an improvement of their lot,
11:05:40 and I repeat that in the next book, which is the
11:05:45 book on Aboriginal title.
11:05:47 Q. You have been talking more or less
11:05:50 non-stop for an hour. Would you like to pause and
11:05:53 have a drink of water?
11:05:54 A. Thank you.
11:05:55 Q. Well, obviously I think that is an

11:06:02 excellent segue to your next book. I gather,
11:06:06 however, just to tie that knot off, "Aboriginal
11:06:12 Societies and the Common Law" has been generally
11:06:15 well-received in the academic community?
11:06:17 A. It has.
11:06:17 Q. Can you tell us about your next
11:06:24 book "Aboriginal Title". It is item 4 on page 11.
11:06:32 A. Well, "Aboriginal Title" was a
11:06:36 book looking back at the changes, most of which
11:06:42 were -- had occurred alongside my own academic
11:06:47 career. I became involved with the common law
11:06:53 Aboriginal title early in the 1980s when I was
11:06:56 writing my dissertation and with Brian in
11:06:59 Saskatoon, and since then, there has been a
11:07:04 profound rise in the legalism surrounding and in
11:07:09 some cases engulfing Aboriginal peoples, not just
11:07:12 in Canada but in Australia and in New Zealand.
11:07:15 Now, in this book, I seek to describe
11:07:18 that as an historical phenomenon; that is to say,
11:07:22 from a period in which the relations were governed
11:07:26 by -- sometimes known as the political trust. The
11:07:29 political trust is the idea that relations between
11:07:36 Aboriginal peoples and the Crown is not something
11:07:38 that is amenable to adjudicative process through
11:07:44 the principles of justiciability and

11:07:47 commensurability.

11:07:49 So justiciability would mean that
11:07:58 Indigenous peoples could not go to court to enforce
11:08:01 dimensions of their relationship with the Crown
11:08:03 through the court process. It was a political
11:08:07 trust, a trust of the higher order, as it was
11:08:09 called in Tito v. Waddell No. 2 that courts would
11:08:15 not -- would not adjudicate.

11:08:21 Now, the idea of justiciability was
11:08:25 also matched by the principle of commensurability.
11:08:28 Commensurability is the idea that the courts lack
11:08:32 the institutional competence to adjudicate upon
11:08:38 Aboriginal people's rights, particularly their
11:08:40 property rights, because it involves questions of,
11:08:43 for example, overlapping claims, questions of
11:08:48 leadership, mandate, that the common law -- and
11:08:52 sometimes it involves giving effect to the
11:08:55 consequences of a conquest or customary laws that
11:08:57 the common law of the time in the 19th century
11:08:59 would regard it as -- I use this word in inverted
11:09:03 commas -- "barbaric".

11:09:05 This the courts felt, implicitly felt,
11:09:08 was a matter for the executive branch. It involved
11:09:13 them making decisions about Aboriginal peoples and
11:09:17 their position and their positions between

11:09:19 themselves so much as with the Crown that the
11:09:22 executive was the appropriate body to decide upon,
11:09:26 because the Crown would have the overall view put
11:09:29 to it, and as I will be stressing later on, the
11:09:32 interest of the Crown lay not only in fairness to
11:09:35 the particular community but fairness within the
11:09:37 community at large. The Crown wanted to be seen to
11:09:40 be even-handed and consistent.
11:09:43 And that was something the courts felt
11:09:45 that the executive would and could do because the
11:09:48 common law did not have the machinery or the
11:09:50 apparatus to intervene in this relationship, to
11:09:54 make those decisions about leadership boundaries
11:09:58 and what have you, and customary laws.
11:10:00 The common law couldn't do it, and so
11:10:05 that was why the political trust governed those
11:10:09 relations for so long, until things started
11:10:14 changing in the 1970s.
11:10:18 Now, things started changing in the
11:10:20 1970s, not just in relation to Aboriginal peoples
11:10:22 but to the development of public -- Anglo
11:10:27 Commonwealth public law at large. For example, the
11:10:31 common law developed principles of judicial review,
11:10:35 and the idea that there was an unbounded executive
11:10:37 discretion was something the common law could no

11:10:41 longer take, but also the international covenants
11:10:44 on civil and political rights were developing norms
11:10:48 against discrimination.
11:10:50 So it was felt that if the common law
11:10:52 was going to recognize settlers' property rights,
11:10:55 it should be recognizing Indigenous peoples because
11:10:58 it was discriminatory that it didn't.
11:11:00 And likewise, there was a rise of
11:11:01 public interest litigation during that period, and
11:11:07 that also suggested that the courts could be more
11:11:11 present in the relation between Crown and
11:11:15 Indigenous peoples.
11:11:16 So we have the confluence of a number
11:11:20 of developments within ideas of public law as they
11:11:24 are developing during the 1970s and 1980s that
11:11:28 gives rise to common law Aboriginal title. And it
11:11:31 uses the most conservative of common law notions,
11:11:35 possession and property, in order to habilitate
11:11:40 them within its legal system.
11:11:42 Now, that -- this book when it gets at
11:11:45 the use of a conservative doctrine leads to
11:11:49 problems because it transforms a relationship that
11:11:53 is political, that couldn't be subject to courts,
11:11:55 into the most detailed eventually and the most
11:11:59 conservative of legal frameworks, property.

11:12:01 But the development of Aboriginal title
11:12:05 at that time historically speaking was to nudge
11:12:10 governments into political settlement because --
11:12:15 and to generate a political world to settle, and it
11:12:20 was expected that that would happen.
11:12:21 So after Calder, you don't have many
11:12:24 cases, and you have the hiatus between the Canada
11:12:29 Act in 1982 and the cases in the Supreme Court in
11:12:32 the 1990s, Van der Peet, Delgamuukw, on when you
11:12:36 have the realm of constitutional conferences and an
11:12:39 expectation that this political process of
11:12:41 settlement-making will arise, and it doesn't, and
11:12:45 so again Canadian law historically develops into
11:12:50 the doctrinal shape that it is today with the Van
11:12:59 der Peet test and Delgamuukw.
11:13:00 So I look at the development of
11:13:02 Aboriginal title not doctrinally as a corpus of
11:13:08 rules but as an example rather like a judicial
11:13:11 review that emerges and intensifies and acquires a
11:13:16 doctrinal life of its own, and as that doctrinal
11:13:19 life becomes more and more accentuated and more
11:13:22 furious, it disengages from its own community.
11:13:24 And the example I give is in Australia
11:13:27 where Mabo No. 2 established the fiction of terra
11:13:36 nullius no longer applied in Australia, and there

11:13:39 was a recognition of native title or Aboriginal
11:13:43 title.
11:13:43 Now, the --
11:13:46 THE COURT: I am going to interrupt
11:13:47 you, sir, because that was a very long answer, and
11:13:52 I want to make sure we are not getting off track.
11:13:55 MR. McCULLOCH: Your Honour, my friends
11:13:57 have indicated over the past week that they would
11:14:00 like to ask a number of questions about this
11:14:04 particular book and, therefore, in anticipation
11:14:09 perhaps of a resolution of the qualification issue,
11:14:13 I have been encouraging Professor McHugh to explain
11:14:17 the work.
11:14:19 THE COURT: That is fine. He has done
11:14:20 that at some length at this point. So I hardly
11:14:23 interrupt a witness, only because after that
11:14:27 lengthy answer, I'm interested to know if you have
11:14:30 other questions. If you don't think you have
11:14:34 explored this enough, then you can ask another
11:14:36 question.
11:14:37 BY MR. McCULLOCH:
11:14:37 Q. I think I would like to move on to
11:14:41 some of Professor McHugh's other contributions to
11:14:45 modern legal activity. In particular, I would like
11:14:49 to go to the section that he has labelled "Other",

which includes a number of reports he has prepared to resolve either particular disputes or for purposes of litigation.

And this would be starting on page 13 of the curriculum vitae. Now, in item number 1 - I know I'm going to get most of this wrong - you were a witness on the behalf of the Ngati Pikiao.

A. Pikiao.

Q. Pikiao. Could you explain your role there, and the nature of the proceeding.

A. A lawyer from the central north island town of New Zealand, Ken Hingston, commissioned me to appear before the Waitangi Tribunal, which is the statutory body addressing historical claims in New Zealand, to deal with the proposed installation of a pipeline that was to discharge waste into certain waters. That was the first time that Aboriginal title had been -- common law Aboriginal title had been put before a New Zealand tribunal.

And that moment was the beginning of -- well, that is when it first acquired importance. Ken Hingston is an important character. He appears again in the Marlborough Sounds case as the Judge at first instance. Ken Hingston recognized Maori

11:16:51 customary rights in the Marlborough Sounds in
11:16:56 relation to the planned oyster beds. That was the
11:16:57 last thing Ken did before he retired. And at the
11:17:00 time, he had said to me, in the Kaituna case, that
11:17:06 he would use "Aboriginal Title" again, and he did.
11:17:09 The last, he came over -- he came over to Cambridge
11:17:12 for a week or so after he had retired, and we
11:17:15 discussed this a lot.
11:17:15 Q. I have one last question. It is
11:17:20 going to be a big one, so I think it may take us
11:17:23 right to the break. And number 15 on page 14, in a
11:17:30 very summary fashion, you describe the work you
11:17:34 have done for the Attorney General of Canada in
11:17:37 litigation. I would like to ask about this,
11:17:43 starting with what your contribution was to the
11:17:45 Chippewas of Sarnia.
11:17:47 A. The Chippewas of Sarnia case was
11:17:50 where -- my first encounter with the Royal
11:17:57 Proclamation and its legal status was made in a
11:17:59 public forum. There, the case concerned the
11:18:03 so-called Cameron transactions which were
11:18:09 inconsistent with the procedural elements in the --
11:18:12 of the Indian provisions of the Royal Proclamation.
11:18:15 So the Canadian legal system now has a
11:18:23 challenge to the idea of the Proclamation as always

11:18:28 having had the status of a statute. The Ross River
11:18:41 is the one that follows.
11:18:42 Q. And if you could tell us about the
11:18:43 issue that you were involved in the Ross River
11:18:46 action.
11:18:48 A. The Ross River, the historical
11:18:50 dimension I was involved with, concerned how the
11:18:54 Order in Council of 1870 admitting Rupert's Land to
11:19:02 the Dominion of Canada and the background,
11:19:05 including the just and equitable claims reference
11:19:08 and the joint address by the Canadian Parliament,
11:19:13 would have been understood at the time.
11:19:16 So it was an inquiry into contemporary
11:19:19 legal understanding in the 1860s and 1870s
11:19:24 immediately post-Confederation.
11:19:29 The Victoria Island claims concerned
11:19:31 the Douglas Treaties and the way in which -- the
11:19:43 legal understanding at the time of the Douglas
11:19:46 Treaties. Now, the Douglas Treaties are at least
11:19:49 14 treaties between 1850 and 1854. Thereafter,
11:19:54 there are no treaties, neither in Vancouver Island
11:20:00 - it is a misprint here - or on mainland British
11:20:03 Columbia.
11:20:03 And so I have been involved in ongoing
11:20:10 inquiries as to why there were no treaties in

British Columbia.

Now, obviously I won't go into that here, but on Vancouver island, the treaty-making coincided with the five-year probationary period that the Hudson's Bay Company had as proprietary under the arrangement made with the Crown in 1849.

Q. Sorry, what was that date again?

A. Sorry, 1849. The last treaty is the Nanaimo Treaty and negotiations for that began within the five-year probationary period but which -- it was actually concluded outside. Douglas had said to Blanshard -- this is Governor James Douglas, who was the second Governor of Vancouver Island at the same time as he was Chief Factor for the Hudson Bay Company, had said to the first Governor, Richard Blanshard, whilst he was still in office, that Douglas did not expect the Hudson Bay Company company to get past its probationary period.

So in that five-year period, he was concerned to display the Hudson Bay Company would be a good citizen in terms of the requirements being set by the Colonial Office, even though personally Douglas thought the treaty-making caused political great excitements amongst Indigenous

11:21:39 communities and was not necessarily a useful policy
11:21:42 and practice to be following. That was implicit in
11:21:44 what he said.
11:21:45 So the Douglas Treaties coincided with
11:21:47 the five-year probationary period. Now, that is
11:21:50 not the traditional account that is given of
11:21:54 Douglas treaty-making because the -- well, as I say
11:21:58 traditional, the more recent accounts because they
11:22:00 try to fit it into a world in which the Royal
11:22:03 Proclamation is a legal statute, and that explains
11:22:05 why these people can't give answers to what is
11:22:08 really a straightforward question about the Douglas
11:22:12 Treaties because of the intellectual imperative of
11:22:14 having the Proclamation as a statute.
11:22:15 Q. It is not actually listed in this
11:22:18 entry, but I understand that you did some work for
11:22:21 the Attorney General in the Alderville litigation?
11:22:25 A. Uhm-hmm.
11:22:25 Q. Are you free to talk about that?
11:22:27 A. Well, I think so, generally. This
11:22:31 was about the historical development of the honour
11:22:34 of the Crown, and in particular, it looked at the
11:22:39 cessions of the Toronto purchase, Crawford, in the
11:22:45 1780s in the immediate aftermath of the American
11:22:50 Revolution when Loyalists, Indigenous Loyalists so

much as white settler Loyalists were pouring north and land had to be found in order to accommodate the rush.

And so we have cessions being obtained by Sir Douglas -- Sir William Johnson's son and former retainers of Sir William Johnson in a rush, and they are by anyone's standards done on the back of an envelope, and later on, Simcoe has to go back to correct those.

Now, I give that as an example of a practice that could not have been based upon the Royal Proclamation having the status of a statute because it is actors who were closely involved in the 1760s who knew Sir William Johnson, who accompanied him, for example, to the Treaty of Fort Stanwix in 1764 where there is an elaborate record of minutes and the proceedings.

So the honour of the Crown, and the way and manner of proceeding in the early settlement years after the American Revolution, I look at that in that report as part of the honour of the Crown because those transactions had become important in terms of the Williams Treaties in 1923.

MR. McCULLOCH: Thank you. Those are my questions on qualification. I would ask that

11:24:35 the Crown's tender of qualification, if you could
11:24:40 put that up, be accepted.
11:24:46 THE COURT: And I take it,
11:24:49 Mr. Townshend, you wish to cross-examine?
11:24:51 MR. TOWNSHEND: I do.
11:24:52 THE COURT: All right.
11:24:54 MR. TOWNSHEND: Do you wish to take a
11:24:55 break?
11:24:55 THE COURT: If you wish, we can start
11:24:57 after the break, if that is convenient for you.
11:24:59 MR. TOWNSHEND: It would.
11:25:00 THE COURT: Sir, as you may know -- I
11:25:02 don't know if you have testified in Court before,
11:25:03 but on the breaks sometimes our court reporter will
11:25:07 have some questions for you about spelling, so
11:25:11 factor that in, please, sir. We'll take a
11:25:15 20-minute break.
11:25:15 -- RECESSED AT 11:26 A.M.
11:49:35 -- RESUMED AT 11:48 A.M.
11:51:03 THE COURT: Yes, Mr. Townshend. Please
11:51:05 go ahead.
11:51:07 CROSS-EXAMINATION BY MR. TOWNSHEND
11:51:07 (On Qualifications):
11:51:07 Q. Good morning, Professor McHugh.
11:51:11 My name is Roger Townshend. This morning you

11:51:14 mentioned the Calder case, which is a 1973 Supreme
11:51:19 Court of Canada decision; is that correct?
11:51:21 A. Correct.
11:51:21 Q. You also mentioned international
11:51:26 covenants?
11:51:27 A. Correct.
11:51:27 Q. You mentioned the 1990 Supreme
11:51:30 Court of Canada cases, including Van der Peet and
11:51:36 Delgamuukw, I think?
11:51:37 A. Correct.
11:51:38 Q. And you have written extensively
11:51:41 about these in your book "Aboriginal Title"?
11:51:45 A. Correct.
11:51:46 Q. In doing so, is this legal
11:51:48 history?
11:51:48 A. Are you asking about them
11:51:50 historically? I situate those cases in my book --
11:51:53 I'm quite clear that I am doing this. I'm
11:51:55 situating them as historical moments in the
11:51:58 development of doctrine that ensues along a
11:52:00 timeline. So my discussion of those cases in the
11:52:02 book is quite self-consciously historical.
11:52:07 Q. Yes. So it is -- if one is
11:52:11 talking about what a court did as opposed to the
11:52:17 doctrinal reasons behind it, am I understanding

11:52:20 that --

11:52:21 A. One could take a body of cases and
11:52:22 do what lawyers do.

11:52:23 Q. Sorry, could you speak a bit
11:52:25 slower. I'm having trouble.

11:52:27 A. I beg your pardon?

11:52:27 Q. Could you speak a bit slower.

11:52:30 A. One could take a body of cases, a
11:52:32 corpus of cases, and extract from those cases
11:52:37 rules, doctrine, or else one can look at the
11:52:41 historical development of doctrine and even
11:52:45 genealogize the development of doctrine, so that
11:52:48 law is at a particular state of development at a
11:52:52 particular time.

11:52:56 So the decision in Guerin, of course,
11:52:58 is made without any awareness of what would happen
11:53:01 in Van der Peet or Delgamuukw, so one cannot
11:53:07 historically discuss the state, the legal state in
11:53:08 1984 in terms of cases that are still down the
11:53:11 road.

11:53:11 So in "Aboriginal Title", I look at the
11:53:15 impact of court decisions in that way, as coming at
11:53:17 a particular historical time, their own time, and
11:53:21 as speaking within that locus. And that is quite
11:53:24 an important question of method.

11:53:28 And "Aboriginal Title" is a book that was also based upon my involvement for over 30 years in the development of this, and I remember when the patriation debate was going on. I was in Saskatoon. I remember when section 35 came from nowhere, so -- and then, as I see in the case law, and there I am years later, having seen the path of legal development through that time.

So in a way, the book is as much a record of my professional progress through these changing legal times as a record of that, and that is what I am trying to capture. We go from the time in the book where there are hardly any lawyers in this field, where there were certainly no university courses to speak of, to the current time where the legalism is intense and churning and poses questions for Indigenous communities about capacity under which many of them find themselves experiencing considerable strain.

So the discussion of those cases in that book is historical. It is in terms of the development through the final decades of the 20th century as the doctrine developed. It is not about rules that apply now. If the consequence of what I am talking about is that there are rules being

applied now, there is not in that sense that I am speaking in the book.

Q. I think I understand what you are saying as being legal history as a way of looking at things, not a temporal line between past and present, that one can look at even quite recent developments as a historian; is that correct?

A. That is correct. You know, strangely enough, Crown representatives in 1880 had no idea what the Supreme Court of Canada was going to say in 1984. You can't give an account of the past that is premised upon a present that the relevant actors had no idea was going to happen. We don't know the future. We're sitting here, and 50 years from now, some legal academic may look and say, Well, of course, they were locked into the development of trends and paths, and this was going to happen. But we have no idea how 50 years from now we are going to be seen. We don't know the future. But people often write from the perspective where they do.

And when you are giving an historical account, it is a very fundamental starting point for a historian, the actors do not know the future.

Q. In your report, one of the things

11:56:11 you mentioned was the legal technology not existing
11:56:16 in the 19th century to pursue Aboriginal title, for
11:56:23 example. That continued well into the 20th
11:56:25 century, didn't it?
11:56:25 A. That is right. Believe me, if
11:56:29 Aboriginal people could have sued, they would have
11:56:32 sued. If the cause of action was there, there
11:56:37 would be court proceedings against the Crown,
11:56:39 and courts would have been thought about --
11:56:41 recourse to courts was being thought about in a
11:56:43 modern public law way of courts taking a particular
11:56:47 constitutional role as watchdogs of rights. If
11:56:50 that were the state of the public art at that time,
11:56:54 then there would be a pattern reflecting that
11:56:56 consciousness. But there isn't. And that tells us
11:56:59 they had a different conception of public law.
11:57:02 We live in a world that is thoroughly
11:57:04 accustomed to the Crown being impleaded, to the
11:57:10 virtual assimilation of the Crown to the position
11:57:13 of an ordinary litigant in terms of discovery and
11:57:17 other processes. That is the contemporary state of
11:57:20 art.
11:57:21 But we are in a time that is wholly
11:57:22 different, and that is the time that I look at in
11:57:24 my report. And I'm just referring to the current

state to offset and to make the point of difference, and the difference is when we go into the 19th century pre-Confederation Canada.

Q. And the changes to which you refer happened in the late 20th century, didn't they?

A. What changes?

Q. The -- well, for example, the legal technology not being available --

A. What we have is a series of trends occurring in the nature of constitutional thought within Canada, international thought about human rights, and these have a kind of confluence. It is a very broad intellectual meeting, and when you look at the last half of the 20th century, those are the features of it. The development of human rights and international law, the appearance of courts and constitutional adjudication, and the position of First Nations is part of a trend that is occurring within law as a practice internationally and constitutionally within Canada at large.

As I say in one of the articles I wrote, the more perplexing question would have been what if Canadian courts had maintained the political trust. What if they had not intervened,

because it would have been very hard to justify taking a position with regards to a particular class within a community, Aboriginal people, Indigenous people, and maintaining the old legal ways of conceiving and articulating their status within the constitutional system.

And that was the recognition that comes with section 35, but it is part more generally of changes and developments in legal consciousness that makes Calder possible and what comes after possible.

Q. Professor, you are welcome to answer the questions as you wish. The point of my question is understanding how you -- understanding the distinction between law and legal history and that you write about legal history into the 20th and indeed the 21st century. Is that a fair --

A. Well, law is present from -- law is not just modern law. You have to describe what law is in the context, and a legal historian is dealing with law, but he is dealing with law in a particular past and at a particular historical moment.

So the law that you have referred to in that question, you mean modern law. Because of

12:00:02 course, there was certainly law in the 19th century.

12:00:05 Q. Okay. That wasn't quite what I was intending to ask. What I am saying is, when you write in your book about the 1990 Supreme Court of Canada cases, you are writing about them as a historian? I think you have said that.

12:00:21 A. That's right, that's right. Correct.

12:00:22 Q. Now, in New Zealand, you also write about -- I think you are saying you are also writing about New Zealand legal history. Even when you are writing about the Ngati Apa case, and the legislation that followed that, I think you are writing about that as a historian; is that right?

12:00:42 A. Not necessarily. In the New Zealand setting, I am -- I'm probably combining both roles. I have the two caps, and sometimes you wear both. In the New Zealand setting, there is a historical awareness informed with a critique of doctrinal development.

12:01:01 So that distinction is not being made by me quite so clearly, and in a way, that is deliberate because in Canada there is -- the distinction is not being drawn, and it needs to be

much more sharply because of the questions surrounding the status of the Royal Proclamation, the Douglas Treaties. In New Zealand, when you are talking about the foreshore and seabed, you are talking about a condensed period of ten years, so you can't speak historically because these issues are still active.

Q. I'm sorry, I couldn't catch the last bit.

A. In the New Zealand context, you are talking about developments within a relatively short time frame, and so wearing one cap or the other is not such a pressing requirement because these are changes that are happening compared to what was there before.

So the caps in the foreshore and seabed material in particular are both historical and as a doctrinal lawyer.

Q. All right. In your report, you have mentioned a number of places where you were personally involved in the unfolding of New Zealand. I think I'm talking about New Zealand legal history. You talked about the court relying on you in the Te Weehi case. You have talked about the court relying on your work in the Ngati Apa

12:02:38 case. This is a matter of legal history, I take
12:02:40 it?
12:02:40 A. Well, it certainly is, and I do
12:02:43 talk about it historically because there were quite
12:02:45 major changes in positions.
12:02:49 Q. And you said you were personally
12:02:50 involved in advising the New Zealand government
12:02:54 concerning the legislation that followed the Ngati
12:02:59 Apa case?
12:02:59 A. That's right. There are two
12:03:00 governments, and there are two pieces of
12:03:02 legislation. I was involved in both.
12:03:04 Q. And beyond Canada and New Zealand,
12:03:07 you have written about Crown/Indigenous legal
12:03:12 history in a number of other Commonwealth
12:03:14 jurisdictions and even beyond the Commonwealth; is
12:03:16 that right?
12:03:16 A. In my book.
12:03:17 Q. Yes.
12:03:17 A. Yes, I talk about Asia, for
12:03:20 example.
12:03:20 Q. Yes.
12:03:21 A. I talk about those historically in
12:03:24 terms of the spread of ideas of Aboriginal title as
12:03:29 a more global phenomenon, and that follows upon its

12:03:34 impact in Canada, Australia, and New Zealand. So I
12:03:39 talk about the developments and the Draft
12:03:44 Declaration of the rights of the Indigenous people
12:03:47 in the United Nations during the 1990s.
12:03:49 But that is all history that is not
12:03:51 important to these particular proceedings. That is
12:03:55 more modern history, and I'm not talking about
12:03:57 those -- that modern history in my report.
12:04:14 MR. TOWNSHEND: All right. If I could
12:04:15 have the proposed tender on the screen, please.
12:04:24 The changes I wish to suggest, instead of saying
12:04:31 "in the 18th and 19th century", would be to say
12:04:35 "from the 18th century to the present and after
12:04:38 British Empire/British Commonwealth".
12:04:44 That is my proposal for the
12:04:51 qualification.
12:04:52 THE COURT: So you want to add after
12:04:53 the words "British Empire", "British Commonwealth"?
12:04:58 MR. TOWNSHEND: Yes.
12:05:01 THE COURT: And you want to say "18th
12:05:04 century to the present"?
12:05:06 MR. TOWNSHEND: Yes.
12:05:10 THE COURT: And how is it, sir, that
12:05:12 you say that what happens today is something that
12:05:14 is historical?

12:05:16 MR. TOWNSHEND: Well, that is what I was asking this witness, but he is -- as I understand it, he explained legal histories in the mode of approach to looking at law and that you can talk about the historical development of law even quite recently. I mean, we were talking about New Zealand in, I think, the second piece of legislation. I think we were talking about his 2010, I think, or maybe --

12:05:52 THE WITNESS: '11.

12:05:54 MR. TOWNSHEND: '11?

12:05:55 THE COURT: Sir, this is submissions. You can just listen.

12:05:57 MR. TOWNSHEND: Thank you for that correction. I wasn't sure.

12:06:00 THE COURT: My difficulty, sir, is not -- I understand why the subject is coming up, and I understand the witness's -- I think I understand the witness's answers.

12:06:11 I should pause to make sure Mr. McCulloch doesn't have any re-examination before I go any further on credentials.

12:06:18 MR. McCULLOCH: I just have one question, Your Honour.

12:06:20 THE COURT: Well, you should really do

12:06:21 that first, and then I'll have you back,
12:06:24 Mr. Townshend.
12:06:25 RE-EXAMINATION BY MR. McCULLOCH
12:06:25 (On Qualifications):
12:06:29 Q. Professor McHugh, in your book
12:06:32 "Aboriginal Title", do you talk about Aboriginal
12:06:35 title in countries that are not part of the
12:06:43 Commonwealth, such as the United States and South
12:06:45 Africa?
12:06:45 A. That's correct.
12:06:46 THE COURT: All right. Thank you,
12:06:47 Mr. McCulloch.
12:06:48 Anyway, Mr. Townshend.
12:06:54 MR. TOWNSHEND: Yes.
12:06:54 THE COURT: If you wish to, we can ask
12:06:57 this gentleman to wait outside, but what I need you
12:06:59 to explain to me is the general cross-examination
12:07:04 that you are hoping to conduct so that I can
12:07:07 consider your request to expand the tender, and I
12:07:13 also need you to address the legal question that
12:07:15 was raised a few months ago when counsel on your
12:07:19 side of the fence said that it is improper for
12:07:25 opposite party to seek to expand the tender.
12:07:28 Would you like the gentleman to wait
12:07:31 outside? It is up to you.

12:07:32 MR. TOWNSHEND: Yes, please.
12:07:33 THE COURT: Professor, just so that
12:07:36 counsel doesn't feel restrained by your presence,
12:07:38 would you mind waiting outside. Don't go too far.
12:07:38 [Reporter's Note: Witness exits the
12:07:53 courtroom.]
12:07:53 MR. TOWNSHEND: My suggestion at this
12:07:54 point was that I was trying to determine his
12:07:57 expertise for the point of having a qualification
12:08:01 statement.
12:08:02 THE COURT: That is all we are doing
12:08:03 right now, yes.
12:08:04 MR. TOWNSHEND: Now, when we get into a
12:08:06 specific question, there may be other things that
12:08:08 may arise. There may be questions of relevance.
12:08:10 There may be questions of fairness. And I would
12:08:12 like to address those when we come to them.
12:08:16 THE COURT: Of course.
12:08:17 MR. TOWNSHEND: Rather than -- it is
12:08:19 hard to address in the abstract.
12:08:21 THE COURT: Well, let me then give you
12:08:23 some guidance. I have heard this gentleman's
12:08:28 answers, and he has explained that in his work, he
12:08:33 looks at events, including events in the recent
12:08:37 past, to contextualize the development of legal

12:08:44 principles and so forth, and this tender says
12:08:48 "evolution of the legal principles", so I'll use
12:08:51 that word.
12:08:51 And so I understand that you may wish
12:08:57 to raise some issue. However, it would only come
12:09:01 up, would it not, if you wished to cross-examine
12:09:04 this gentleman on, you know, the legal principles
12:09:08 that arrived in the late 1990s with some Supreme
12:09:15 Court of Canada cases. Are you planning on doing
12:09:16 that?
12:09:16 MR. TOWNSHEND: Yes.
12:09:17 THE COURT: And why do you say I should
12:09:19 hear that, bearing in mind that evidence about
12:09:21 domestic law is inadmissible?
12:09:25 MR. TOWNSHEND: Because I was going to
12:09:27 ask him a legal historical question, not a --
12:09:29 THE COURT: So can you give me an
12:09:30 example? This is one of the reasons why I invited
12:09:33 him to leave.
12:09:34 MR. TOWNSHEND: Yes.
12:09:35 THE COURT: What would be a legal
12:09:36 historical question that would not offend the rule
12:09:38 that I just mentioned?
12:09:41 MR. TOWNSHEND: He has said that the
12:09:44 legal technology for advancing Aboriginal claims

12:09:49 did not exist in the 19th century.

12:09:52 THE COURT: Right.

12:09:53 MR. TOWNSHEND: And I would like to establish at what point that changed.

12:10:00 THE COURT: Okay. Well, I will consider that. It doesn't seem to have -- you think that has something to do with -- beyond what he just said about section 35 of the Constitution?

12:10:14 MR. TOWNSHEND: I am not sure I understand that question.

12:10:16 THE COURT: All right. Well, I heard an answer that seemed relevant to what you just said.

12:10:26 I mean, I don't need to force Canada onto its feet, but that question that you just mentioned doesn't seem to me necessarily to bring in, you know, the recent Supreme Court of Canada decisions. I could be wrong.

12:10:43 Now, Mr. McCulloch, would you object to that question on your current tender if this was asked?

12:10:49 MR. McCULLOCH: No, Your Honour, because it would be coming to the conclusion of principles that were placed in the 19th century. So discussions about the 1951 amendments to the

12:11:00 Indian Act allowing the employment of Indians would
12:11:03 be an appropriate terminus for a 19th century set
12:11:07 of principles.
12:11:08 THE COURT: And that is because it is a
12:11:09 change from what transpired in the 19th century; is
12:11:12 that right?
12:11:12 MR. McCULLOCH: Yes, Your Honour.
12:11:13 THE COURT: Okay. Mr. Townshend is
12:11:16 frowning.
12:11:20 Mr. Townshend, I don't want to --
12:11:24 obviously, your cross-examination may take ebbs and
12:11:27 flows, and it may become more apparent as you go
12:11:36 along what you are trying to accomplish. Let me
12:11:43 ask another question.
12:11:43 Is this intended to be a large -- this
12:11:47 cross-examination on more recent events a large
12:11:50 portion of the cross-examination you have planned
12:11:53 for this gentleman, or are you going to be
12:11:57 focussed, as his report focuses, on what transpired
12:11:59 in the 18th and 19th century?
12:12:03 MR. TOWNSHEND: I have a section on the
12:12:06 issue of when the legal technology changed that he
12:12:11 talked about. I have a section about that in
12:12:15 Canada. I have a section about that in New
12:12:17 Zealand.

12:12:18 THE COURT: I didn't hear that.

12:12:19 MR. TOWNSHEND: I had a section about that in New Zealand. Much of my cross-examination is going to be on what is written in his report. Other things are not addressed in the report in any explicit way, but they have jumping-off places from the report.

12:12:41 When he talks about --

12:12:42 THE COURT: I am going to interrupt you. I'm not concerned that it might not be expressly stated in the report. All right? That is not a barrier to proper cross-examination, you know, subject to whatever the other issues are.

12:12:55 And the other thing is that you don't regard New Zealand as part of the British Empire? Is that why you want the Commonwealth included?

12:13:14 MR. TOWNSHEND: It is not now part of the British Empire.

12:13:16 THE COURT: But is New Zealand the reason why you want the Commonwealth included?

12:13:20 MR. TOWNSHEND: Well, also Canada on legal historical points which, as we were talking about, go into the 20th century.

12:13:34 THE COURT: Well, I don't think there is any debate that he can talk about Canadian

history. Do you not regard that as part of the British Empire at that juncture?

MR. TOWNSHEND: No, Canada is not part of the British Empire now.

THE COURT: No, no, no --

MR. TOWNSHEND: Canada is not part of -- sorry.

THE COURT: This says "the British Empire in the 18th and 19th centuries".

MR. TOWNSHEND: Yes.

THE COURT: So it would include what we now call Canada? Yes? Otherwise, why is this gentleman being called in the first place?

MR. TOWNSHEND: That is true, but I was asking for the time period to be extended.

THE COURT: Yes, and I have gone back to your other point, sir. So is it strictly nomenclature, that if he is going to talk about the 20th century, you want Canada to be included?

MR. TOWNSHEND: Yes.

THE COURT: All right. Not that you want to talk about New Zealand?

MR. TOWNSHEND: Both.

THE COURT: Both. All right.

MR. TOWNSHEND: Would some case law

help?

THE COURT: I would like your position on the case law, since you have -- not you personally, but your side has evidently changed your position.

MR. TOWNSHEND: That is right.

THE COURT: All right.

MR. TOWNSHEND: And indeed, when we adjourned after that last time, we thought that through and decided we should not sustain that position.

THE COURT: All right. And what is your submission about that?

MR. TOWNSHEND: I am handing up a case called Caputo v. Imperial Tobacco, which is a decision of Master MacLeod as he then was in 2002.

THE COURT: All right.

MR. TOWNSHEND: That case was about compelling answers to questions refused on cross-examination of an expert's affidavit, but along the way to deciding that -- and about a number of other things. Along the way to deciding that question, the Court had to consider the party cross-examining an expert at trial could go outside the scope of the qualifications proposed by the

party calling the expert.

And the Court made two observations at paragraphs 24 and 25 of that case. At paragraph 24, he said an expert, having firsthand knowledge of a relevant issue, may be cross-examined on that regardless of whether the expert's affidavit mentioned it.

And at paragraph 25, it includes:

> "If the expert is qualified to answer additional opinion questions, they may be admissible. At trial questions could be asked in cross examination to widen the scope of the expert's expertise and then to elicit a relevant opinion on a point other than that provided in chief."

And my submission on the application of that is we are not attempting to qualify Professor McHugh in a new field. We are saying that his expertise in legal history does not stop at the turn of the 20th century. It continues.

And he in fact has personal experience of some recent events of New Zealand legal history.

THE COURT: Are you intending to ask him about what transpired at some meeting he

12:17:04 attended when some legal step was taken in
12:17:08 New Zealand?
12:17:09 MR. TOWNSHEND: No, Your Honour.
12:17:10 THE COURT: That is what that is
12:17:12 talking about. That is not expert evidence. That
12:17:13 is firsthand witness evidence. Now, if he had some
12:17:16 relevant firsthand witness evidence, you wouldn't
12:17:20 be talking about opinion evidence to begin with.
12:17:23 MR. TOWNSHEND: Right.
12:17:24 THE COURT: So I see that as a bit of a
12:17:26 different matter than the tender, which relates to
12:17:29 on what subjects he would be entitled to give
12:17:32 opinion evidence, and I see that this case deals
12:17:36 with that subject as well.
12:17:37 MR. TOWNSHEND: Yes.
12:17:38 THE COURT: But I don't think that is
12:17:40 what you are trying to accomplish, the firsthand
12:17:43 knowledge part.
12:17:44 MR. TOWNSHEND: That was more to show
12:17:46 his familiarity with it. I have no intention of
12:17:49 asking him about discussions he had with the
12:17:52 New Zealand government, nor am I intending to ask
12:17:55 him about legal doctrinal questions in Canada or
12:18:02 New Zealand.
12:18:03 I am intending to ask him about the

12:18:05 historical development of legal doctrine, which was
12:18:08 the distinction he drew between law and legal
12:18:10 history.
12:18:16 And I recognize that in doing that,
12:18:18 that may raise issues of relevance. It may raise
12:18:22 issues of fairness. My friends can object at that
12:18:24 point, and I can -- with a question, a specific
12:18:29 question. I can address that more fully in
12:18:31 submissions and additional case law.
12:18:36 THE COURT: I'm just looking at
12:18:37 paragraph 25 of this decision, which is the one
12:18:40 that speaks to the question of questioning an
12:18:43 expert on matters of opinion outside of their
12:18:48 recognized expertise. It seems that what this case
12:18:54 contemplates is that in the course of your
12:18:56 cross-examination, you could lay a foundation for
12:19:00 proper questioning outside of the tender, as
12:19:03 opposed to let's qualify him for a whole bunch of
12:19:08 other things that he wasn't brought here to speak
12:19:10 about.
12:19:10 It may be a distinction without a big
12:19:12 difference because, either way, you would say I
12:19:17 still get to ask the questions.
12:19:20 MR. TOWNSHEND: That's correct, Your
12:19:20 Honour, and --

12:19:21 THE COURT: But it is a procedural
12:19:22 difference that speaks to your comment that it may
12:19:25 be that at least some of your questions are better
12:19:28 responded to specifically rather than in general
12:19:31 terms.
12:19:33 MR. TOWNSHEND: Yes. I raise it at
12:19:35 this point. I recognize the Caputo case didn't. I
12:19:38 thought it would be fairer to raise it at the
12:19:41 qualification stage than to wait later.
12:19:43 THE COURT: I appreciate that, sir,
12:19:45 that you are doing -- you know, you are trying to
12:19:47 give advance notice, if you will, of what you are
12:19:50 planning on doing to make sure you don't get a
12:19:53 different kind of objection later on. I appreciate
12:19:55 that.
12:19:56 Do you have any other submissions?
12:20:00 MR. TOWNSHEND: No, Your Honour.
12:20:05 THE COURT: Thank you. Mr. McCulloch?
12:20:08 MR. McCULLOCH: Your Honour, as we have
12:20:14 always taken the position that there is no
12:20:16 objection to an appropriate broadening of a tender,
12:20:23 and I do understand that a lot of our concerns can
12:20:27 be addressed by objecting to questions that stray
12:20:32 too far into comments on domestic law.
12:20:35 However, I do have some concerns that

12:20:39 the proposed wording of the tender, the amended
12:20:44 tender, may in fact obfuscate where those
12:20:49 objections are necessary.
12:20:51 I now have a fuller understanding of my
12:20:55 friend's intention, which is somewhat different
12:20:58 from what I originally understood, and I wonder if
12:21:02 he would be amenable to the idea of rephrasing it
12:21:08 as "expertise in the evolution of the legal
12:21:12 principles and policies that affected the conduct
12:21:17 of Crown relations with Indigenous peoples starting
12:21:23 in the 18th century and developing through the 19th
12:21:26 and into the 20th century, with particular
12:21:30 reference to Canada and New Zealand."
12:21:33 I find the British Empire/Commonwealth
12:21:37 just hopelessly confusing and potentially
12:21:41 anachronistic, so I suggest that as a way of
12:21:44 perhaps clarifying it so we know exactly what we
12:21:46 are dealing with, should an objection be necessary.
12:21:51 THE COURT: Thank you. Mr. Townshend,
12:21:53 perhaps you could take a re-read of that on your
12:21:55 screen, if you need to, but if you don't, fine, and
12:21:59 tell me what you think of that suggestion.
12:22:03 MR. TOWNSHEND: My comment on that is
12:22:06 that the New Zealand legal history we were talking
12:22:10 about a few minutes ago goes into the 21st century.

12:22:16 THE COURT: And why is it relevant, sir, what New Zealand did in the 21st century? I mean, I can understand why you would want to explore, especially with the testimony I have heard about the rather significant difference between the situation in New Zealand and the one that I am confronted with, that something that happened in the 21st century is relevant to this trial?

12:22:38 MR. TOWNSHEND: One of the issues in this trial is whether the common law can comprehend Aboriginal title to the beds of Navajo waters, and New Zealand does, and I could argue that just as a matter of law in final argument using New Zealand cases.

12:23:03 THE COURT: Well, pausing there, why do you say you can do that, without calling evidence?

12:23:09 MR. TOWNSHEND: As persuasive authority about the reasoning of common law --

12:23:12 THE COURT: Well, you can correct me if I'm wrong, sir -- well, you can use New Zealand cases as persuasive authority, yes. But now you are talking about calling this gentleman as an expert in New Zealand law, not as a historian.

12:23:27 Now, how is it you think you are going to improve your situation from, as you say, putting

12:23:36 forward New Zealand cases as persuasive authority,
12:23:39 which you are free to do, with this gentleman?
12:23:41 MR. TOWNSHEND: I thought he would be
12:23:44 able to give context that might assist in
12:23:50 understanding those cases. I can use the cases
12:23:52 myself.
12:23:54 THE COURT: Well, now you are talking
12:23:56 about a kind of context.
12:24:01 MR. TOWNSHEND: What kind of --
12:24:03 THE COURT: What kind of context?
12:24:05 MR. TOWNSHEND: The interplay between
12:24:08 the courts and the legislature.
12:24:19 THE COURT: The interplay between the
12:24:20 courts and the legislature?
12:24:21 MR. TOWNSHEND: Yes.
12:24:22 THE COURT: I don't know what you mean
12:24:23 by that.
12:24:23 MR. TOWNSHEND: After the Ngati Apa
12:24:28 case, the New Zealand legislature reversed that,
12:24:34 that result, and after various events happening,
12:24:42 they undid that reversal.
12:24:45 Now, if that is law rather than legal
12:24:55 history, then I would suggest what my friend has
12:24:59 suggested, with the addition of "and also New
12:25:06 Zealand law".

12:25:07 THE COURT: We are starting to stray
12:25:08 into another legal principle. I mean, I don't know
12:25:11 yet because it may turn out not to be an issue, but
12:25:16 it is beginning to sound collateral, is it not? I
12:25:23 mean, that is not necessarily a -- it's not
12:25:26 prohibition to any cross-examination, so maybe I'll
12:25:28 leave that for later.
12:25:29 But I would have thought a
12:25:30 comprehensive examination of events recently in
12:25:34 New Zealand by which its government decided to make
12:25:37 certain changes sounds well afield of what we are
12:25:45 doing here, with a different Aboriginal community
12:25:49 and a different Aboriginal history and a different
12:25:52 treaty practice, among other things.
12:25:55 MR. TOWNSHEND: Yes, it is on the
12:25:56 point, but what the common law can accommodate and
12:26:01 what it can't, and that is the challenge --
12:26:02 THE COURT: What the common law can
12:26:04 accommodate today is domestic law, is it not, in
12:26:13 Canada?
12:26:13 MR. TOWNSHEND: I thought when
12:26:14 New Zealand decided to make that change would be
12:26:16 legal history, but if that is indeed New Zealand
12:26:18 law, I would ask to add on "New Zealand law" as an
12:26:26 addition to that and --

12:26:27 THE COURT: And when did that change occur, in what year?
12:26:29 MR. TOWNSHEND: Pardon me?
12:26:30 THE COURT: In what year did that change occur that you are hoping to ask about?
12:26:31 MR. TOWNSHEND: The case was in 2003, and then there was a --
12:26:34 THE COURT: The second piece of legislation.
12:26:38 MR. TOWNSHEND: 2011.
12:26:39 THE COURT: All right.
12:26:40 MR. TOWNSHEND: We were talking about that on the break, and my friends were suggesting the possibility of him being qualified as, I think, an expert in foreign Aboriginal law or something like that, which would encompass that as well.
12:26:41 I thought it was a matter of legal history, but if it is not a matter of legal history, then --
12:26:42 THE COURT: Well, I haven't heard qualifications that would cause me to qualify this gentleman as an expert in modern domestic New Zealand law, which he himself has testified has long since been transformed into a profession, and I am not saying he doesn't have some
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12:27:34 qualifications. I just haven't heard anything
12:27:36 about them.
12:27:37 We do seem a great deal off the
12:27:43 ordinary field, and instead of getting closer, we
12:27:51 seem to be getting further away, if what you are
12:27:55 really trying to do is introduce some factual
12:27:59 evidence from this gentleman about events that
12:28:01 transpired in New Zealand in modern times, as
12:28:03 opposed to, you know, interpreting things in their
12:28:09 historical setting and considering the development
12:28:11 of those matters, evolution of legal principles.
12:28:17 MR. TOWNSHEND: In my submission, his
12:28:19 having advised the New Zealand government on
12:28:21 legislation would qualify him as an expert in New
12:28:24 Zealand law.
12:28:24 THE COURT: I don't know that to be the
12:28:25 case. I mean, in Canada, those are the rules I
12:28:36 apply. You have to be a licensed member of a Law
12:28:39 Society before you are going to be allowed to utter
12:28:41 an opinion about -- it would have to be some other
12:28:47 province's law but not this province's law.
12:28:49 Now, there may be exceptions to that.
12:28:54 I go back to -- I don't want to get too far afield
12:28:58 of your plan either, sir. Is this, again I ask, a
12:29:03 relatively small and focussed component of your

12:29:06 cross-examination?

12:29:08 MR. TOWNSHEND: I would say yes.

12:29:09 THE COURT: You would say yes. All
12:29:11 right. One last chance, Mr. McCulloch, since I
12:29:14 just heard a few new things, do you have anything
12:29:16 further to say about this?

12:29:18 MR. McCULLOCH: Well, Your Honour, as I
12:29:19 indicated at the beginning, I was focussing --

12:29:23 THE COURT: You should be at the
12:29:24 podium, sir.

12:29:25 MR. McCULLOCH: Focussing on the
12:29:26 qualification in the context of legal history. It
12:29:30 might very well be that Professor McHugh is
12:29:34 qualified to be an expert on the interpretation of
12:29:37 modern New Zealand statutes and how they
12:29:42 interrelate with modern New Zealand cases, but that
12:29:46 has not been a matter that we have addressed in
12:29:48 terms of a qualification.

12:29:51 And if Mr. Townshend wants to add that,
12:29:54 we would need to start the qualification over
12:29:58 again. I don't think that would be effective. I
12:30:01 agree that I don't think that the very different
12:30:05 legal world of New Zealand Aboriginal law is
12:30:09 relevant to the interpretation of a treaty in 1836,
12:30:14 which is the subject --

12:30:16 THE COURT: Well, Mr. Townshend has located his argument in the other case, the non-treaty case.

12:30:24 MR. McCULLOCH: Uhm-hmm.

12:30:24 THE COURT: So I think what he is saying is he has a small and focussed section of planned cross-examination in service of the lake bed claim, during which it seems that he wishes to put on the record some events, I am going to call them events, that have occurred. They are legal events in New Zealand, one; a case that has been decided, two; and three, statutes that have been passed.

12:30:56 I am not sure what else he wants to do. I am a bit concerned that we'll get into the tall grass, but those narrow and focussed things, leaving aside the legal principles that I am concerned about, seem relatively uncontroversial in the sense that a statute may have been passed in another country. It strikes me like something that you could look up pretty easily.

12:31:23 Anything further?

12:31:27 MR. McCULLOCH: No, Your Honour. If the matter is focussed and specific, we will be able to deal with the matter during ordinary

12:31:36 objections.

12:31:37 THE COURT: All right.

12:31:38 MR. McCULLOCH: Thank you, Your Honour.

12:31:39 THE COURT: So what I am going to do is
12:31:40 I am going to take the lunch recess early, take it
12:31:44 now, and I'll prepare a ruling, and we'll come back
12:31:48 early from lunch, and we'll proceed with the
12:31:54 tender, which I will determine, and the
12:31:56 examination-in-chief of this gentleman.

12:32:00 And just factoring in the time I need
12:32:02 to prepare my ruling, I am going to say 2 o'clock.
12:32:11 All right?

12:32:12 -- RECESSED AT 12:31 P.M.

13:55:41 -- RESUMED AT 2:04 P.M.

14:04:12 THE COURT: Whoever has control of the
14:04:31 screen, could they put up the original tender
14:04:33 document, please? I think it is C3.

14:04:39 Thank you.

14:04:39 All right. Madam Reporter, my ruling
14:05:02 is as follows.

14:05:03 Professor McHugh is tendered as an
14:05:08 expert witness. There is no issue regarding his
14:05:11 expertise.

14:05:14 In that regard, I am satisfied that he
14:05:17 has the expertise needed to testify on the matters

covered by Canada's original form of tender marked as Exhibit C3 as follows:

"Legal historian with special expertise in the evolution of the legal principles and policies that affected the conduct of Crown relations with Indigenous peoples in the British Empire in the 18th and 19th centuries."

Now, I am going to just pause here.

Mr. Townshend, part of my ruling refers to your cross-examination, and we have the gentleman in the room. Does that concern you at all?

MR. TOWNSHEND: It might. I would ask that he --

THE COURT: I'm sorry, sir, it will only take a minute. But we don't want to trip on the finish line, if you will.

[Reporter's Note: Witness exits the courtroom.]

THE COURT: My reasons continue as follows.

The Plaintiffs do not say otherwise. However, they submit that this witness's expertise

14:06:35 1 extends to other matters that they wish to explore
14:06:37 2 in cross-examination. They therefore propose an
14:06:43 3 expanded tender extending the time period covered
14:06:46 4 through to the present day and extending the
14:06:49 5 geographic description to include the Commonwealth.
14:06:52 6 The latter change is intended to ensure
14:06:57 7 that there can be questioning about Canada and New
14:07:00 8 Zealand to the present time, regardless of what the
14:07:03 9 political structure was, and specifically
14:07:06 10 recognizing that at the present time one would not
14:07:08 11 say that they were part of the British Empire.
14:07:12 12 In support of expanding the tender, the
14:07:17 13 Plaintiffs put forward the decision of Master
14:07:23 14 MacLeod in Caputo v. Imperial Tobacco Ltd. [2002]
14:07:29 15 O.J. No. 3767. That case deals with the
14:07:34 16 cross-examination of an expert witness in a
14:07:36 17 different context; however, it does discuss some
14:07:39 18 relevant issues.
14:07:40 19 At paragraph 25 of the case, Master
14:07:49 20 MacLeod provides as follows:
15:34:51 21 "Experts are only entitled to
15:34:54 22 give opinion evidence in areas
15:34:57 23 within their accepted expertise and
15:34:59 24 wandering from that expertise will
15:35:02 25 render the extraneous opinion

inadmissible. There seems no reason this principle should not operate in reverse. If the expert is qualified to answer additional opinion questions, they may be admissible. At trial, questions could be asked in cross examination to widen the scope of the expert's expertise and then to elicit a relevant opinion on a point other than that provided in chief. If this is appropriate on a motion then the expert may be asked questions about experience in other related areas and then could be asked an opinion. That opinion would be admissible only if the judge accepts it after finding this new area of expertise meets the criteria in R. v. Mohan, supra."

I note that this case suggests that the process of cross-examining an expert witness in other areas would come up within the cross-examination itself. It would not change the tender proposed by the party calling the expert witness. At that stage, that is during the

14:08:20 cross-examination, the additional area of expertise
14:08:24 would have to be established.
14:08:25 However, before the commencement of
14:08:30 this trial, I required that the parties exchange
14:08:33 proposed tenders and flag with each other any
14:08:36 potential issues. In accordance with that process,
14:08:41 Mr. Townshend has raised this issue with Canada
14:08:43 before today. Further, he is raising the issue
14:08:47 now, rather than waiting for his cross-examination,
14:08:49 drawing it to my attention.
14:08:51 This witness has testified that events
14:08:56 after the time period at issue in this trial may
14:09:00 nonetheless inform a historian's view of the
14:09:06 historical events that are at issue. He has
14:09:08 testified generally about how the development of
14:09:10 legal principles can and has resulted in changes
14:09:12 over time.
14:09:18 In short, his view of things in the
14:09:21 past as a matter of legal history has been or could
14:09:23 be informed by more recent events. Even very
14:09:28 recent events looked upon by him as legal history
14:09:31 may inform his views regarding earlier time
14:09:35 periods.
14:09:35 The difficulty arises in large part
14:09:39 because a number of the more recent events that

14:09:42 this witness may allude to are domestic law that
14:09:49 will form part of the expected legal argument at
14:09:50 the conclusion of this trial. Evidence on domestic
14:10:00 law is inadmissible.
14:10:03 As for New Zealand, this witness may
14:10:05 well be knowledgeable about aspects of New
14:10:08 Zealand's current law, whether it be case law or
14:10:13 legislation, but he is not tendered as an expert in
14:10:17 current New Zealand law.
14:10:20 Outside the presence of the witness,
14:10:24 Mr. Townshend has indicated that he has a
14:10:26 relatively small, focused set of questions that he
14:10:29 wishes to ask this witness in the area of the
14:10:32 requested more expansive time frame in the tender.
14:10:39 Some seem relatively uncontroversial. For example,
14:10:43 he wishes to ask about when certain statutes in New
14:10:48 Zealand were passed after a decision in a specific
14:10:52 court case was rendered in that country.
14:10:53 By way of another example, Mr.
14:10:57 Townshend wishes to ask when certain parts of the
14:11:00 18th century law changed, even though that change
14:11:04 may have occurred, for example, in the 20th
14:11:08 century.
14:11:11 And as I have already said, at least as
14:11:13 of now, these subjects do not appear to be a large

14:11:16 1 focus of the cross-examination.
14:11:18 2 Mr. Townshend also notes that when it
14:11:20 3 comes to his more specific questions, he may have
14:11:24 4 additional submissions that would be more usefully
14:11:27 5 made at the time of the question rather than now.
14:11:30 6 Having considered all of the issues,
14:11:35 7 I have made a change to one of the later versions
14:11:37 8 of the tender put forward by Mr. McCulloch
14:11:43 9 during the argument roughly at around 12:26 this
14:11:50 10 morning. And I am going to read the change to
14:11:55 11 tender now and you will hear that I have changed
14:12:02 12 the time period to say "the 18th century and
14:12:08 13 following".
14:12:11 14 This leaves open the question of to
14:12:14 15 what extent the very recent past could properly be
14:12:16 16 dealt with in a cross-examination. Those questions
14:12:23 17 will be dealt with on a question-by-question basis.
14:12:27 18 I therefore accept the tender as
14:12:34 19 follows, that this gentleman is a:
14:12:42 20 "Legal historian with special
14:12:43 21 expertise in the evolution of the
14:12:46 22 legal principles and policies that
14:12:47 23 affected the conduct of the Crown
14:12:51 24 relations with Indigenous peoples
14:12:56 25 starting in the 18th century and

following, with particular reference to Canada and New Zealand."

That is the end of the accepted expertise.

I do note the following, however. I am concerned that this does not turn into a cross-examination on either domestic law and is limited to historical events that are properly tied to the legal history in the relevant time period.

By leaving the end time period open, I am not giving an invitation to cross that line. However, this process will permit a full, proper cross-examination and permit Plaintiffs' counsel to make additional submissions that are specific to their questions if and when needed.

Similarly, I am not inviting a wide-ranging investigation of current events in New Zealand. There must be a clear tie to the issues in this case, amongst other potential problems. Based on the evidence thus far, there may be relevant evidence arising from the Maori history in New Zealand, but it is also apparent that there are some very significant differences with the history in that country and what is at issue in this trial. I am concerned that there not be a venture into

irrelevant areas.

I make one last observation. The Plaintiffs' counsel indicated that he wished to introduce two pieces of New Zealand legislation that followed upon a judicial decision from that country. That judicial decision, it seems, will be put forward as a persuasive authority in the final argument of this trial.

Thus far, I have heard no reason why these two pieces of legislation would need to be proved formally in this case. They will presumably speak for themselves with regard to what they provide for. No one has suggested otherwise.

I therefore ask that counsel discuss before the resumption of Court tomorrow morning whether those two pieces of legislation can be marked on consent, without prejudice to any arguments that anyone may wish to make about the weight, if any, that should be given to them should they come up at a later stage in this trial.

That concludes my ruling and reasons for decision, Madam Reporter.

Can we have the witness back, please.

[Reporter's Note: Witness resumes the witness stand.]

14:16:15 EXAMINATION-IN-CHIEF BY MR. McCULLOCH:
14:16:25 Q. Just letting you get settled.
14:16:29 A. Thank you.
14:16:31 MR. McCULLOCH: Your Honour, in light of the certification, I would ask that the report of Professor McHugh, lettered Exhibit W2, become a numbered exhibit.
14:16:44 THE COURT: Any objection?
14:16:46 MR. TOWNSHEND: Yes, Your Honour. As I had mentioned earlier, there are a few portions that I submit where the report goes beyond the qualifications of Professor McHugh, and I have outlined those in black-line on a few paragraphs, and I have given that to my friends and can hand that up to be discussed.
14:17:07 THE COURT: Sure. Please go ahead.
14:17:09 MR. TOWNSHEND: There were two grounds of objections.
14:17:25 One is where we say he is getting into ethnohistory, and there are four paragraphs where we submit that is the case.
14:17:38 And there was one we say the Professor is not qualified in resources required for policing and military operations, and there is one paragraph that we have identified of that nature.

14:17:53 And I put these in writing, as I didn't
14:18:10 want to have to read through all this.
14:18:13 THE COURT: Mr. McCulloch, is there any
14:18:14 overlap between these small portions of the report
14:18:17 and what you plan to do this afternoon?
14:18:19 MR. McCULLOCH: No, Your Honour.
14:18:31 THE COURT: All right. Well, what I am
14:18:33 going to do -- well, I should ask, sir, if you have
14:18:35 any submissions about this?
14:18:37 MR. McCULLOCH: Your Honour, I feel
14:18:39 that this flows from the multiple different
14:18:43 definitions of ethnohistory that we have heard and
14:18:47 will hear, and so I think it is a matter that
14:18:51 should be something that can be resolved fairly
14:18:53 easily, ideally by discussion amongst counsel
14:18:58 before tomorrow.
14:18:59 THE COURT: Well, I would have hoped
14:19:04 that had happened already, but since you can
14:19:06 proceed and avoid these areas, what I am going to
14:19:11 do is ask you to do so, and we'll delay the marking
14:19:14 of the report until I have a proper opportunity to
14:19:16 read this, and it would be certainly my hope that
14:19:20 you could consider a further discussion.
14:19:31 And while you are doing that, it would
14:19:38 certainly surprise me if quoting from historical

14:19:42 documents could be challenged on the basis of not
14:19:47 being an ethnohistorian, but that may be just the
14:19:52 beginning of this document, and I haven't read the
14:19:54 whole thing.
14:19:55 All right. So on that basis, we'll go
14:19:57 ahead, and I will hear from you at 10 o'clock
14:20:00 tomorrow morning on whether you have made any
14:20:02 headway, and if you have not made headway, I'll
14:20:05 make a ruling.
14:20:06 All right. Please go ahead.
14:20:07 BY MR. McCULLOCH:
14:20:07 Q. Thank you, Your Honour.
14:20:08 Professor McHugh, I would like now to
14:20:18 turn to your report, lettered Exhibit W2, and I
14:20:25 would like to start by asking what was the mandate
14:20:30 of this report? What questions were you asked to
14:20:33 answer?
14:20:33 A. I was asked to report upon the
14:20:36 historical circumstances surrounding the conclusion
14:20:40 of what has become known as Treaty 45 1/2, with
14:20:43 particular reference to the Crown's promise to
14:20:45 ensure the Saugeen Bruce Peninsula would remain
14:20:50 forever with the Saugeen Ojibway Nation, and that
14:20:52 is set out in paragraph 2.1 of my report.
14:20:55 Q. Thank you. And I would like to

14:21:05 take you now to paragraph 2.16 of your report.
14:21:08 That is page 11 of the report and in fact page 11
14:21:20 of the PDF. You have a section, a 3, called
14:21:29 "Recurrent Themes of this Report", and you have, I
14:21:34 believe, nine different -- sorry, 12 different
14:21:42 categories of recurrent themes.
14:21:45 I am not going to take you through each
14:21:47 of those. What I would like to do is to clarify
14:21:53 some of the terminology in ways that makes the
14:21:58 relevance of the terminology to the main body of
14:22:02 the report immediately clear because I understand
14:22:06 from your earlier testimony that the meaning of
14:22:11 words, particularly of legal terms, can change, so
14:22:15 we want to make sure that we have got the right
14:22:18 words in front of us.
14:22:19 And the first word I would like to ask
14:22:25 you about, in terms both of its 18th and 19th
14:22:28 century denotation or meaning, but also the
14:22:33 connotations, is the word "protection", and I
14:22:37 notice you mention this in the context about the
14:22:42 Aborigine Protection Society. Could you tell us
14:22:44 what the word "protection" meant and implied in the
14:22:49 first decades of the 19th century and what that
14:22:54 word "protection" tells us about the Aborigine
14:22:58 Protection Society?

14:22:58 A. Well, to understand "protection", I hope you don't mind if we go back into the 18th century.

14:23:04 Q. Certainly.

14:23:04 A. A little bit earlier than that --

14:23:06 THE COURT: I am just going to interrupt you, sir. I know how hard this process is. So here is the artificial part. You have to talk slowly, and there is at least one lawyer in the room who has a similar accent to you, and I have the same thing with him, sitting back there in the back row. Something about the accent, I don't know. But it helps by talking slowly because we need other people other than just him sitting there with a smile on his face to know what you are talking about.

So if you could start again with your answer to that question, that would be helpful.

THE WITNESS: Thank you.

To understand the provenance and meaning of the word, in fact the concept of "protection", one has to go back into the 18th century, and the change in the nature of the British Empire that is occurring historically in the mid-18th century, as it is engaged in war with

14:24:05 France and territory, is becoming more the object
14:24:10 of this empire.
14:24:12 The British Empire, during the 17th and
14:24:16 the early part of the 18th century, was trading
14:24:20 maritime, Protestant and free. There is a
14:24:26 colloquialization that I draw from David Armitage.
14:24:29 He uses those words.
14:24:30 BY MR. McCULLOCH:
14:24:31 Q. Could you clarify what you meant
14:24:32 by "free"?
14:24:33 A. It was without slavery. After the
14:24:40 conclusion of the Seven Years' War, which is marked
14:24:45 by an important military victory, particularly in
14:24:49 Quebec, there was also at the same time in the East
14:24:53 Indies, Clive fought the battle of Plassey and won,
14:24:56 and Britain suddenly had acquired a huge amount of
14:24:59 territory, spanning numerous different cultures,
14:25:03 religions, and the problem of governing that came
14:25:07 with this massive expansion of territory.
14:25:09 Now, the British approach towards
14:25:14 problems or issues in governing the empire was
14:25:18 reactive for the most part and improvisational. So
14:25:27 the concept of protection was developed as a
14:25:31 technique of Imperial governance over non-Christian
14:25:39 populations and communities.

14:25:40 The idea of protection itself
14:25:44 intensified and strengthened in the last decades of
14:25:47 the 18th century. Particular issues that brought
14:25:51 it to the fore included the allegations against
14:25:54 Warren Hastings, as Director of the East India
14:25:58 Company, and the alleged depredations that were
14:26:01 occurring in the East India Company.
14:26:05 Q. Perhaps you could explain what the
14:26:07 East India Company was.
14:26:08 A. Oh, the East India Company was a
14:26:12 trading company which developed significant
14:26:14 interests in the subcontinent, India today, and
14:26:19 which developed an army, won battles and became a
14:26:25 kind of corporate sovereign. The status of the
14:26:29 East India Company in the last two decades of the
14:26:31 18th century in India was regarded as problematic,
14:26:37 and one of the great dramas of British
14:26:39 constitutional history, not just Imperial history,
14:26:43 constitutional history was the trial of Warren
14:26:45 Hastings by Parliament and in which Edmund Burke
14:26:48 famously led the case against.
14:26:51 So that is symptomatic of issues that
14:26:56 Imperial authorities had to deal with about the
14:26:59 treatment of Indigenous communities in India. You
14:27:05 had issues of religious pluralism as well. You had

14:27:13 the status of slave communities, status of free
14:27:16 communities, as well as the status of Indigenous
14:27:17 communities, and in Quebec, of course, the defeated
14:27:21 French population.
14:27:22 So these are issues that the empire had
14:27:25 not dealt with before, and it dealt with them, as
14:27:30 it always did, incrementally, issue by issue, and
14:27:33 it was through this that the policy of protection
14:27:38 came and emerged.
14:27:41 Protection describes the relation
14:27:45 between the Crown and the subject population. As
14:27:52 we go into the first decades of the 19th century,
14:27:56 which is where you set your question, the notion of
14:27:59 protection is becoming more textured. Its
14:28:06 fundamental premise is that the class of persons
14:28:10 within the protected community are subjects of the
14:28:13 Crown. They are regarded as a vulnerable class,
14:28:16 and they are subject to protection by and through
14:28:20 the Crown.
14:28:20 Now, when the Victorians or people just
14:28:24 before the Victorians identified classes of people,
14:28:27 it was not to confer them with rights but to
14:28:31 explain or to justify some form of civic
14:28:35 disability. And that is, indeed, as we see from
14:28:37 the material that I give in my report, the position

14:28:40 of Indigenous communities. They were regarded as a
14:28:44 group. They were not regarded as owning property
14:28:46 in an individual sense, which would have
14:28:48 enfranchised and given them the vote. Jury
14:28:55 service, they were unable to; the question of them
14:28:56 giving evidence because they were non-Christian,
14:28:58 they couldn't take the oath on the Bible. All of
14:29:00 those became issues surrounding their protected
14:29:03 status.

14:29:03 So protection was also something that
14:29:05 was particular to communities as, for example, the
14:29:07 communities after the abolition of slavery or to a
14:29:12 particular type of Indigenous person. And
14:29:14 protection is a concept that has differing degrees
14:29:19 of intensity from the group, but one can see it
14:29:22 also in England with regards to groups that the
14:29:25 early Victorian social legislation set aside.
14:29:27 Women, of course, were probably the most notable
14:29:30 category because they didn't have the vote, but
14:29:34 they were also the indigent, children, the mentally
14:29:41 disabled. These were groups that the Victorian
14:29:46 role identified as under some form of protection.

14:29:49 Protection is a wide-spanning term,
14:29:51 generic, depends upon context, but it is basically
14:29:54 the term that describes not the enjoyment of full

14:30:03 civic competence and status.

14:30:04 Q. Was there a legal doctrine in the
14:30:06 18th and 19th century that acted as a basis for the
14:30:09 idea that the state -- or rather the King, the
14:30:13 Crown, should be playing a protective role?

14:30:15 A. Well, this, of course, came from
14:30:20 the long-established principles and debates over
14:30:24 King-ship. Being a King was to hold an office, and
14:30:28 it came with responsibilities.

14:30:31 The responsibilities -- and the King
14:30:38 would be judged by his people according to the way
14:30:40 in which he had comported with the expectations of
14:30:45 a sovereign.

14:30:47 And so in the Imperial setting, the
14:30:51 other important word we needed to have onboard is
14:30:55 "prerogative" because this was a prerogative
14:30:57 governed by and through -- this was, sorry, an
14:30:59 empire governed by and through prerogative from the
14:31:02 outset until the end or the eclipse of Imperial
14:31:07 management in the 19th century with the rise of
14:31:10 colonial self --

14:31:11 Q. You have in fact anticipated my
14:31:14 next question --

14:31:15 THE COURT: Okay. I am going to
14:31:16 interrupt you. I don't usually do this, sir, but

14:31:18 it may be awhile before I get to ask a question,
14:31:21 and I would like to know now what period of time
14:31:24 you are describing as Victorian.
14:31:25 THE WITNESS: Victorian --
14:31:27 THE COURT: You said it three times.
14:31:28 THE WITNESS: Technically that would be
14:31:30 1837, but we are dealing with the Treaty in 1836,
14:31:33 so I'm taking that in an approximate sense
14:31:37 commencing in the 1830s.
14:31:39 THE COURT: 1830s?
14:31:40 THE WITNESS: Yes.
14:31:41 THE COURT: Thank you.
14:31:42 THE WITNESS: Thank you. I should be
14:31:44 more decade-specific.
14:31:46 THE COURT: Well, no, it is one of
14:31:47 those things that perhaps all the lawyers in the
14:31:49 room already knew that. At least one is being kind
14:31:51 to me and shaking her head. Please go ahead,
14:31:53 Mr. McCulloch.
14:31:54 BY MR. McCULLOCH:
14:31:54 Q. Actually if we could just jump
14:31:55 back one question. I asked you about the Aborigine
14:32:01 Protection Society and its understanding of the
14:32:06 word "protection".
14:32:07 A. Well, during the late 18th

14:32:08 century, see there arose the rights of man, the
14:32:14 romantic movement, a great belief that individuals
14:32:17 had inherent rights. And this became influential,
14:32:22 and it was also a revival of the evangelical
14:32:25 thinking, stronger Christian feeling. There was a
14:32:28 surge of Christianity, and that resulted -- that
14:32:31 produced one movement. One movement it produced is
14:32:33 the movement for the abolition of slaveries.
14:32:35 This was led by a man called William
14:32:38 Wilberforce, who had a conversion, as though he had
14:32:42 been thrown from his horse, and had converted to
14:32:45 the recognition of the evils of slavery. It was a
14:32:48 movement. It was very influential, long-lasting,
14:32:52 the abolition of the slave trade heard in the 19th
14:32:58 century, followed by the abolition of slavery
14:33:00 itself in 1834.
14:33:01 From that movement -- or from that
14:33:04 movement, some call a humanitarian movement, but
14:33:08 technically it should be called a philanthropical
14:33:10 movement. From that movement came the protection
14:33:13 of aborigines movement. Now, this was not only
14:33:16 associated with a society formed in the immediate
14:33:21 aftermath of the foundation of a parliamentary
14:33:24 Select Committee in 1836. It also came from
14:33:29 missionary societies who were concerned with the

14:33:34 souls of Aboriginal peoples across the British
14:33:44 Empire.
14:33:45 There were numerous societies. Church
14:33:48 missionary society, London Missionary Society are
14:33:51 examples.
14:33:52 So we have this great humanitarian
14:33:55 movement, pressure groups, an early form of
14:33:58 pressure groups arising during the 1830s.
14:34:01 Now, it is important to note that it is
14:34:06 the Aborigines protection society. It is not the
14:34:09 Aborigines rights societies because we are not in a
14:34:12 rights-based era yet. It has become fashionable
14:34:15 for people to see this period as the beginning of
14:34:17 the modern notion of human rights, but in fact the
14:34:22 rights that are there are the rights of the Crown
14:34:25 in relation to -- or rather, the duties of the
14:34:28 Crown in relation to protection.
14:34:30 So the pressure that is being applied
14:34:32 is not to recognize rights but to look on the Crown
14:34:35 to exercise its protective powers in an
14:34:40 ameliorative and improving, bettering way.
14:34:46 Q. There is one word that I wanted to
14:34:48 ask you about. It may be that the Court is
14:34:50 sufficiently familiar with it, but it is a very
14:34:53 important word in what you have just been saying.

14:34:58 How was the word "evangelical" understood in the
14:35:03 first few decades of the 19th century?
14:35:05 A. Well, evangelical could apply to a
14:35:11 range or a spectrum of Protestant beliefs, but the
14:35:16 evangelical movement, so there were Quakers,
14:35:20 Methodists, and there were Anglicans. They all had
14:35:23 their different branches of evangelical, but they
14:35:28 were united in a conception of the man born from a
14:35:34 common ancestor, so every human being was part of
14:35:39 the same family of man. We are in a period before
14:35:42 the development of Darwinian theories which
14:35:47 suggested that that was not the case, that there
14:35:49 were in fact many ancestors, but we are in a period
14:35:52 of monogenesis, and that has a strong impact in
14:35:56 this particular case upon the conceptualization of
14:35:59 a policy, orientation to management of First
14:36:04 Nations.
14:36:04 Q. And could you explain that impact?
14:36:06 A. The impact came in relation to an
14:36:15 advocated policy of removal. Removal was a policy
14:36:22 approach that American states, supported by
14:36:31 president Andrew Jackson, had begun taking during
14:36:34 the 1820s, and it involved the permanent removal of
14:36:39 Indigenous populations to places far away so that
14:36:45 the lands that they had used as hunting grounds

could be used for more intense sedentary agriculture.

And this, of course, is what happened to the Cherokee. This is very famous, and it is a very tragic tale.

So removal was regarded in some quarters as a policy option.

When Bond Head becomes the Lieutenant Governor, he becomes convinced by this policy, and he attempts to initiate this policy direction towards removal in Treaty 45 1/2.

Now, the policy had been raised and explored before he became a Lieutenant Governor. Anderson and Elliot had made a kind of --

Q. Just a moment. If you could remind us who T.G. Anderson is -- or was, rather?

A. Thomas Gummarsall Anderson, an important figure in the Indian Affairs Department, he would later become Superintendent, and Elliot, an Anglican missionary who was also present at Treaty 45 1/2 and its conclusions.

So they go on a reconnaissance trip and decide that Manitoulin Island might be a good place for all of the Western Indians to be permanently located.

14:38:14 And Sir John Colborne recommends this
14:38:18 policy, as he is finishing up, and as --
14:38:21 Q. I'm sorry to keep interrupting --
14:38:25 A. Sir John Colborne was Lieutenant
14:38:28 Governor before Sir Francis Bond Head. So Sir
14:38:31 Francis Bond Head takes the relay baton, and he
14:38:33 decides that he is going to run with this idea.
14:38:36 And that essentially is what we see in Treaty 45
14:38:41 and Treaty 45 1/2.
14:38:42 We see the initiation of a policy
14:38:46 direction that was not to take root, and the reason
14:38:53 for that was because of the strong objection and
14:38:58 pressure exerted on the Colonial Office and the
14:39:02 Secretary of State, Lord Glenelg, against this
14:39:06 policy of removal. It was regarded as an American
14:39:11 policy that was inhumane, but the objection more
14:39:16 was the theological one that supposed that First
14:39:23 Nations were not part of the same family of man and
14:39:25 that they were inherently incapable of redemption.
14:39:30 Basically the thinking was -- and it
14:39:34 shows how solipsistic Christian thought was then --
14:39:38 that, well, if I was an Indian, I would want to be
14:39:41 converted too, and that was the thinking as it was
14:39:44 then.
14:39:44 Q. Well, was there any connection

14:39:47 between these evangelicals in the first decades,
14:39:52 indeed the first half of the 19th century, and the
14:39:56 Colonial Office?
14:39:57 A. Well, the Colonial Office was
14:40:01 established in the late 1820s as part of the
14:40:08 bureaucratic organization of the British state that
14:40:13 is occurring.
14:40:15 The legal counsel, James Stephen, comes
14:40:20 under Secretary of State. James Stephen, a very
14:40:24 famous colonial administrator, he is associated
14:40:27 with what is known as the Clapham Sect, the
14:40:32 evangelicals. The Clapham sect refers to a group
14:40:38 of families in south London who lived what we would
14:40:40 today call a hippie lifestyle, sharing houses and
14:40:43 ways of life and in each other's pockets and all
14:40:46 subscribing to the same Christian belief.
14:40:48 So James Stephen had strong connections
14:40:50 with the evangelical movement, though historian
14:40:55 after historian has looked into his management of
14:40:57 the Colonial Office, and he comes out of it pretty
14:41:01 clean. He is not regarded as an advocate for the
14:41:05 missionaries at all, and in many respects, it is
14:41:08 clear that he was embarrassed by some of them.
14:41:11 So we have James Stephen. Lord Glenelg
14:41:16 himself was on the Board of the London Missionary

14:41:20 Society, but he also was not regarded as an
14:41:24 advocate for humanitarian groups, though that is
14:41:30 not to say he wasn't accused or criticized in that
14:41:33 regard, and the same with James Stephen.
14:41:35 The Colonial Office became
14:41:38 controversial, at least in some quarters during the
14:41:41 1830s, because of the so-called colonial reform
14:41:44 movement that sought much easier access to colonial
14:41:48 land than the ministry was prepared to allow.
14:41:53 Q. If we could now return to
14:41:56 something you started to answer, but I think we can
14:41:59 now put in its context. Prerogative, what was that
14:42:06 in the first decades of the 19th century, or indeed
14:42:10 the last decades of the 18th century on to the
14:42:12 first decades of the 19th century?
14:42:14 A. Thank you. Well, it is important
14:42:16 to understand that we are in a different legal
14:42:20 world. We are in a world where prerogative has
14:42:23 much, much more prominence and importance and
14:42:26 acceptance than prerogative today.
14:42:31 The prerogative enabled British
14:42:39 Imperialism. British Imperialism, if there was a
14:42:42 source of the legal power that was being exercised
14:42:45 for most of the time, it was the prerogative. Only
14:42:49 occasionally did the Westminster Parliament

14:42:53 intervene or legislate on Imperial matters. There
14:42:58 was the trade and navigations acts, but they were
14:43:02 considered as legitimate because they covered trade
14:43:06 within the empire.
14:43:07 The Imperial parliament did not
14:43:13 legislate for the colonies -- you see, there was a
14:43:15 period in 1765 which sparked the American
14:43:19 Revolution. And after the American Revolution, it
14:43:22 was most cautious not to intervene. The Imperial
14:43:24 parliament recognized that the governing of the
14:43:27 empire was a matter for, to use the modern term,
14:43:30 the executive, and when it intervened, it was to
14:43:34 pump up or to enlarge an executive power or else,
14:43:39 in the case of the Quebec Act, to put in something
14:43:42 that was substantially similar to prerogative-based
14:43:45 regimes, the Crown colony model.
14:43:49 Now, prerogative is power that was used
14:43:55 to govern empire. Prerogative from the early 17th
14:43:58 century right through until the 1850s and the
14:44:03 1860s, which is the dawn of the period of colonial
14:44:07 responsible government. And that is when
14:44:09 legislators start setting out rules for Crown or
14:44:15 government relations with Indigenous peoples.
14:44:16 The age of legislation begins 1860 in
14:44:21 Canada. Before then, we are in a prerogative era.

14:44:26 Now, when we are going into a
14:44:28 prerogative era, we are not going into a lawless
14:44:32 society. We are going into a zone, the exercise of
14:44:38 lawful government that is predicated upon different
14:44:42 notions than what we have, or at least they are
14:44:45 stronger versions of that which reads more faintly
14:44:52 today.
14:44:52 Prerogative --
14:44:54 Q. If I could, this is an important
14:44:56 question because prerogative, for modern day
14:45:00 lawyers, has a very distinct meaning.
14:45:02 A. Well, you see, the view of
14:45:05 prerogative today is that prerogative comprises a
14:45:09 bundle of particular powers that the Crown has
14:45:12 because the Courts have recognized these as
14:45:15 prerogative powers.
14:45:16 That is a modern view of public
14:45:19 authority as an aggregate of specifically conferred
14:45:22 powers. That is a modern view of authority.
14:45:25 The historical view or the view in the
14:45:31 18th and 19th century is not the same. Prerogative
14:45:37 describes the powers of the Crown, but that is not
14:45:40 to say that they were open-ended and arbitrary.
14:45:45 The powers of the Crown, the prerogatives were
14:45:48 delegated by commission. They were controlled and

14:45:52 monitored by instruction from London. We have a --

14:45:56 Q. Again, I'm sorry to keep on

14:45:57 interrupting. When you say "delegated by a

14:46:00 commission", a commission from whom to whom?

14:46:03 A. I'm sorry, from the Crown to

14:46:06 Governors. When we talk about Imperial governance,

14:46:08 the important figure is the Governor. The Governor

14:46:12 described an office that represented the Crown

14:46:15 within the colonies. So in the Crown's name, the

14:46:18 Governor would constitute courts, appoint officers

14:46:22 and exercise all the powers of government that the

14:46:27 Crown held and had conferred by commission.

14:46:30 The --

14:46:32 Q. And the term "instructions", does

14:46:35 that have a -- what meaning did that have at the

14:46:37 time?

14:46:37 A. "Instructions" is a term of art.

14:46:40 It refers to two types.

14:46:43 First of all, there are the informal

14:46:45 instructions that were issued under the signed

14:46:49 manual to Governors. These documents were secret,

14:46:52 and they were standardized. Over the years, they

14:46:57 became a form of obsolete provisions and rather

14:47:04 top-heavy. But they described how Governors were

14:47:09 to -- what kind of legislation they could

14:47:11 countenance, not countenance, to send legislation
14:47:14 to the Privy Council for allowance or disallowance,
14:47:17 features like that.
14:47:18 The informal instructions were in
14:47:22 dispatches that were sent in the 19th century from
14:47:29 the Colonial Office and earlier from Secretary of
14:47:32 State, often through the Board of Trade, to
14:47:37 colonial Governors, and these were instructions as
14:47:40 well contained in dispatches from London.
14:47:42 The technical status of instructions
14:47:45 were that a Governor was not acting unlawfully if
14:47:48 he acted in breach of his instructions. Governors,
14:47:53 if they crossed a line, could be recalled, but
14:47:58 generally speaking, Governors had a wide ambit of
14:48:02 discretion within the compass of their commission
14:48:07 and according to the tenor of their instructions.
14:48:08 So Governors were the important
14:48:13 characters or figures in the governing of the
14:48:17 empire. And we have in Bond Head a representative
14:48:22 of the Imperial era, and we have some of the
14:48:27 features anomalously captured in Treaty 45 1/2.
14:48:31 So the prerogative was disciplined. It
14:48:38 was exercised according to a hierarchy, a rank of
14:48:44 officers from whom instructions from superior would
14:48:50 run down and ever refining, ramifying, into more

14:48:54 specific instructions, and up the other way. So
14:48:56 these were the neurons running through the spine of
14:48:59 the British Empire. And that body of office was
14:49:01 always changing and reorganizing as new officers
14:49:04 were constituted or as circumstances changed or as
14:49:07 new parts of the world became part of British
14:49:11 territory.
14:49:11 Q. You have referred to this
14:49:14 prerogative as disciplined. Could you explain what
14:49:19 the mechanism of discipline was? How would they
14:49:26 discipline itself?
14:49:27 A. When I spoke of features that we
14:49:29 would recognize, I'm going to use a modern term
14:49:31 because I think it is better to explain it. The
14:49:33 difference between administrative practices and
14:49:36 legally-required practices for public
14:49:38 decision-makers.
14:49:41 In the 18th century, we see in the
14:49:44 Royal Proclamation a very good example of the
14:49:48 organization, the disciplining of the exercise of
14:49:50 discretion, and to simply say that there was a full
14:49:56 executive discretion is not to say it wasn't
14:49:59 unbounded. It was internally monitored, internally
14:50:02 controlled through the mechanisms of reporting to
14:50:04 the superior, London, overhauling, disagreeing or

14:50:09 of Governors being recalled.

14:50:11 So there was a disciplined procedure,
14:50:14 and most Governors would follow the routine. But
14:50:18 that didn't mean that they were legally obliged to.
14:50:20 One should not confuse administrative procedures to
14:50:23 organize the exercise of a sovereign discretion so
14:50:27 that the discretion is exercised consistently,
14:50:30 evenly within the class on the one hand from
14:50:34 externally-imposed obligations.

14:50:36 That is what parliament does, and that
14:50:40 didn't happen in an Imperial context. Parliament
14:50:43 was respectful of Imperial matters as the rightful
14:50:47 province of the executive.

14:50:48 Q. I have one more question to ask
14:50:50 about prerogative before moving on to another one
14:50:54 of your recurring themes. What was the role of
14:50:59 sovereign comportment in prerogative?

14:51:01 A. Well, sovereign comportment is a
14:51:06 concept that I have been developing and will be
14:51:08 looking at more thoroughly in the book I'm working
14:51:11 on that concerns the office of sovereign because
14:51:20 there was a lot written about this and a lot of
14:51:23 discussion of it.

14:51:23 A monarch, a sovereign, was expected to
14:51:30 comport themselves with the dignity and the

14:51:32 requirements of the office. We might put this into
14:51:38 the honour of the Crown, but the honour of the
14:51:40 Crown lay in the proper performance of office.
14:51:44 So when the Royal Proclamation was
14:51:49 issued -- the sovereign comportment is to ensure
14:51:52 that there is evenness and consistency between
14:51:54 groups because there would be different members of
14:51:58 a large class, and sovereign comportment is the way
14:52:03 in which we see the Crown taking measures and
14:52:06 instructing its officers in the field to behave in
14:52:08 a way that does not give preferential treatment or
14:52:12 discriminatory treatment.
14:52:13 It is an internalized way of ordering a
14:52:17 discretion, and the Royal Proclamation is utterly a
14:52:20 reflection of that.
14:52:20 Q. Now, earlier you said that the
14:52:24 conclusion of the Seven Years' War had left Britain
14:52:28 facing the issue of what, I guess, we would call
14:52:32 the multicultural empire around the world. Were
14:52:36 these developments in Upper Canada or British North
14:52:42 America unique? Were these problems being
14:52:45 addressed in other parts of the empire?
14:52:48 A. Well, the problems certainly were
14:52:50 occurring in other parts of the empire. Indigenous
14:52:56 peoples in Australia and New Zealand is the obvious

14:52:59 example and southern Africa. Of course, the way in
14:53:02 which responses played out depended upon time,
14:53:04 place, cultural specificity, the offices involved.
14:53:07 But there were themes of Imperial
14:53:12 governance, how and by what means do you establish
14:53:15 the status and the way in which you govern the
14:53:17 relations, and the prerogative and protection were
14:53:22 at the very heart of it and the status of subjects.
14:53:24 The reason why subjects became so
14:53:27 important was because subjecthood was associated
14:53:33 with the emancipation movement, with slavery, the
14:53:36 abolition of slavery because the British would not
14:53:39 countenance slavery over a British subject. And
14:53:43 that fed into the protection as it took an aspect
14:53:47 for Aboriginal communities.
14:53:49 The Marshall Supreme Court in the
14:53:57 United States in a trilogy of judgments described
14:54:00 the native American communities as domestic,
14:54:05 dependent nations. Now, that was a classification
14:54:10 that meant they weren't citizens; that meant in the
14:54:14 eyes of the Colonial Office, James Stephen, that
14:54:18 legitimated the Federal Governments going to war
14:54:22 with Native Americans. It was precisely because
14:54:25 they were not American citizens and not given the
14:54:27 protection of American law that the government was

able to proceed in that way.

So the Marshall cases and the American position on the status of native American communities was regarded very negatively in the Colonial Office because it was a denial of citizenship and a denial of protection from the law that the British saw themselves as giving.

So British policy was quite markedly within the official mind distinguished from the American.

Q. The next question is a big one, and it may end up coming in a number of parts. So if you would like to have a drink of water now, it might be a good idea.

A. Thank you.

THE COURT: Although you don't need to wait for Mr. McCulloch's permission.

BY MR. McCULLOCH:

Q. One needs to encourage him to pay some attention to his own well-being. Fathers are like that, they tend to forget to eat or drink.

One last issue in terms of recurrent themes, and as I said, it is perhaps the most difficult. In the minds of the British office-holders, particularly but not exclusively in

14:55:57 Upper Canada in the first couple of decades,
14:56:00 particularly the first three or four decades of the
14:56:03 19th century, what did "civilization" mean?
14:56:08 A. It was often said that there were
14:56:13 two policies, protection, plus civilization, and
14:56:18 that the policy was both.
14:56:20 In practice, protection took up all the
14:56:24 time because it involved dealing with
14:56:29 encroachments, problems of disorder on the
14:56:33 boundaries of Native communities, separate
14:56:38 communities, squabbles, dealing with those, dealing
14:56:41 with the here and now. That was what protection
14:56:43 did, and that was what the Crown and the officers
14:56:47 who were designated protectors or Superintendents
14:56:49 spent most of their time doing.
14:56:50 Civilization, however, was the
14:56:53 desiderata. It was the --
14:56:54 Q. It was the?
14:56:56 A. The desiderata. It was the
14:56:59 desired policy outcome. Now, the pursuit of
14:57:03 civilization was never something that the Imperial
14:57:07 authorities took a programatic approach to. Pilot
14:57:15 schemes here and there as, for example, I talk
14:57:18 about in the report, but there was no concerted
14:57:21 push towards civilization. On the whole, they did

14:57:24 their long-established practice of British public
14:57:27 administration, and that was they contracted out.
14:57:30 Well, they didn't actually contract out, but they
14:57:32 got the missionaries to do it. They were happy
14:57:34 that the missionary societies would take care of
14:57:36 the civilization aspect.
14:57:38 Q. And to place the missionary
14:57:40 societies in the right context, what that you have
14:57:45 already discussed would you link the missionary
14:57:47 societies with?
14:57:48 A. Well, the missionary societies
14:57:49 were active in most British colonies, New Zealand,
14:57:53 Australia and Canada, and they were the Imperial
14:58:00 figures most active in spreading the word of God
14:58:06 and actively encouraging Indigenous people to adopt
14:58:12 a sedentary, Christian, agriculturalist lifestyle.
14:58:16 And we find them in Canada, and we find
14:58:20 them in New Zealand and Australia. We find
14:58:23 different houses, low and high church, and we find
14:58:27 them squabbling, having turf wars, and battling in
14:58:30 a free market competition for the souls of
14:58:33 Indigenous peoples, but the missionary societies
14:58:35 are in -- or in the colonies doing that kind of
14:58:40 thing.
14:58:40 So that is also an important feature.

14:58:43 So when we talk of protection and civilization, civilization tends to be more active in the encouragement of missionaries than the Crown actually adopting measures that would facilitate civilization.

Now, that distinction becomes important in the 1840s and 1850s. It becomes important because the Imperial Government in London retained control of native affairs in Canada and in New Zealand until 1860 and 1862 respectively. This was because it was thought that colonial politicians and legislatures were too self-interested to be able to govern First Nations in a disinterested and equal kind of a way.

So part of the -- "protection" isn't the right word. During the 1840s and 1850s, there is a growing organization and disposition of provincial resources in the management of Indigenous affairs that becomes more institutional, bureaucratic one might say, and that establishes what the Imperial authorities read as signs of a commitment to the advancement of civilization.

The Gradual Enfranchisement Act 1857 --

Q. Just a moment. Could you repeat the name of the Act?

15:00:34 A. The Gradual Enfranchisement Act, provincial legislation of 1857, is read in London by both the Colonial Office and the Aborigine Protection Society as an indication that the colonies were committed to advancing the program of civilization, which meant individualizing the sense of responsibility of membership of the community, detribalization, and --

Q. Just perhaps you could clarify or expand upon the term "detribalization"?

A. "Assimilation" is a word that is sometimes used. This is the policy goal of having each male member of the Aboriginal community owning property and exercising the vote, doing jury service and becoming an upstanding member of a community that valorized individual standing and responsibility.

So that, of course, is a distinctly western view and not that of First Nations.

The groups that advocated for Aboriginal communities, like the Aborigine Protection Society, were committed to a policy of assimilation. So the Gradual Enfranchisement Act was read as an indication that the province was going to take seriously through enfranchisement the

15:02:10 business of turning First Nation -- male First
15:02:17 Nation individuals into Christian farmers.
15:02:19 Q. Okay. Thank you. I am now going
15:02:23 to move on to a different issue although, of
15:02:27 course, it is related to all those recurring themes
15:02:31 that we have just been discussing, and I would like
15:02:34 to go to some documents to address the question
15:02:39 about whether Sir Francis Bond Head in 1836 thought
15:02:46 he was or should have thought he was subject to any
15:02:53 procedural requirements in the formulation of what
15:02:58 we have come to call Treaties 45 and 45 1/2.
15:03:04 And I would like to ask you to turn to
15:03:12 page 87 of your report, paragraph 5.32. Now, we
15:03:25 have talked about the 18th century genesis of the
15:03:30 Royal Proclamation of 1763, but in the context of
15:03:36 the years following 1763, was it seen as having any
15:03:43 prescriptive legal force over procedures?
15:03:48 A. So how did the official mind read
15:03:58 or respond to the Royal Proclamation. I think it
15:04:06 is best to understand the response to it, again as
15:04:13 I mentioned this morning, by starting from the
15:04:16 negative, what it was not.
15:04:18 The Royal Proclamation was not a
15:04:21 statute. It is very fundamental it is not a
15:04:24 statute. It is not enacted by Westminister

15:04:29 parliament. It is a Proclamation.

15:04:34 Given that it is not a statute, there
15:04:40 is a consistent pattern of behaviour that is
15:04:44 consistent with it not being a statute, and that is
15:04:46 completely inconsistent with regarding it as a
15:04:49 statute.

15:04:49 So if we take the counter-argument that
15:04:53 is being made in contemporary -- by my contemporary
15:04:57 colleagues that the Royal Proclamation was a
15:04:59 statute, let's look at the behaviour clustering or
15:05:07 surrounding the management of Indian relations at
15:05:10 the time of the Proclamation and into the 19th
15:05:13 century, as you ask.

15:05:15 So there are about eight general heads
15:05:20 of conduct that I could describe in relation to
15:05:24 this. I could start with the two most glaring
15:05:30 ones.

15:05:30 First of all, the Royal Proclamation
15:05:31 was not a penal measure. If it was a statute or if
15:05:41 King George III had the power, accredited to a case
15:05:45 called Campbell v. Hall, to issue prerogative
15:05:49 legislation for Quebec, if it was the Indian
15:05:54 provisions represented prerogative legislation,
15:05:57 then they could have had a penal effect.

15:05:59 But officials did not regard the

15:06:02 official -- the Royal Proclamation as having any
15:06:05 penal effect because Governors were instructed that
15:06:08 they had to solicit legislation from colonial
15:06:13 assemblies to create penal offences. There was a
15:06:17 civil offence of trespassing on Crown land, but to
15:06:21 create a penal offence by crossing the boundary
15:06:24 line, for example, legislation had to be passed by
15:06:27 the colonial legislatures.
15:06:28 Now, in 1763 and afterwards, most of
15:06:31 them weren't going to do that. It happened in
15:06:33 Canada in 1839. 1839 is the legislation --
15:06:39 anti-trespassing legislation that the Royal
15:06:41 Proclamation in 1763 had contemplated.
15:06:43 Proclamation is an announcement of
15:06:47 Crown pleasure. It is like a press statement. It
15:06:49 is not an inherently legislating instrument unless
15:06:52 you are exercising it in relation to the power
15:06:56 recognized in Campbell v. Hall. I'll come to
15:07:02 Campbell v. Hall and the fuller problem with that
15:07:05 in a moment.
15:07:06 So Governors were instructed to obtain
15:07:08 legislation. If they couldn't get the legislation,
15:07:09 and they wanted to take action, criminal action
15:07:12 against settlers in Indian country, they used the
15:07:15 old common law proceedings of disturbance of the

15:07:18 peace. We find Carleton saying that --

15:07:21 Q. Carleton?

15:07:22 A. Governor Carleton.

15:07:24 Q. And he was Governor General roughly when?

15:07:27 A. After Murray in the mid-1760s in Quebec. He issued a Proclamation in 1766 indicating that trespassers on Indian country, he would take proceedings as disturbers of the peace, so he was exercising a common law power because the legislation had not been passed that the Royal Proclamation contemplated.

15:07:50 So the Royal Proclamation cannot be prohibiting in the sense of creating a penalty for trespassing or squatting in Indian country.

15:08:01 That is the first example.

15:08:03 The second example is that after the Proclamation issued, there was a flood of petitioning from individuals at all levels seeking exemption from the policies set out in the Royal Proclamation.

15:08:22 Q. Could I just -- petitioning, could you clarify the role of petitioning in the context of the 18th and early 19th century?

15:08:33 A. Petitions, there were two types of

15:08:35 petitions to the Crown; petitions of right, which
15:08:40 to bring an action in court required the fiat, or
15:08:43 petitions of grace.
15:08:44 A petition of grace is a subject
15:08:46 falling upon the sovereign to exercise a
15:08:51 prerogative power in a beneficent, positive way
15:08:58 that the petitioner seeks. It is a claim upon
15:09:01 royal grace. "Grace" means the discretion of the
15:09:04 sovereign.
15:09:05 So there were numerous petitions from
15:09:08 all levels seeking exemption from the Indian
15:09:11 provisions of the Royal Proclamation. Sir William
15:09:15 Johnson himself made an application seeking
15:09:17 recognition of a gift the Mohawk had made of lands
15:09:22 along the Hudson River.
15:09:26 George Wharton was involved in a
15:09:28 well-known -- and Benjamin Franklin were involved
15:09:31 in a well-known project to create a new colony in
15:09:35 the interior to be known as Vandalia, and they got
15:09:41 the approval of the ministry, but the revolution
15:09:45 broke out and that didn't happen.
15:09:47 So there was a stream of applications
15:09:51 and petitioning for exemption or relaxation of the
15:09:55 requirements of the Royal Proclamation.
15:09:56 Now, if the Royal Proclamation had been

15:10:01 a statute, these would have been people throwing
15:10:04 themselves upon a dispensing power that had been
15:10:06 outlawed in the Bill of Rights in 1689. The Bill
15:10:14 of Rights 1689 declares as an unlawful Stuart
15:10:17 pretense, the suspending and dispensing of laws.
15:10:20 In all of this, applications and
15:10:24 petitioning and lobbying in London, there is no
15:10:26 suggestion that it is misconceived or
15:10:29 constitutionally irregular. There is no calling
15:10:32 upon the exercise of a dispensing power. That
15:10:35 argument is not happening. So there is an
15:10:37 acceptance that the Crown has some discretion to
15:10:41 relax or not to apply the policies set out in the
15:10:44 Royal Proclamation.
15:10:45 The Proclamation doesn't say that.
15:10:48 That is presumed that that discretion inheres. So
15:10:51 that tells me that we are not dealing with a
15:10:54 statute or a rigid procedural power.
15:10:58 And if you look in my report on -- and
15:11:02 Bond Head knew that -- page 88, at the very end of
15:11:07 paragraph 5.32, we have the instructions from Lord
15:11:22 Glenelg to Durham.
15:11:22 Q. Just to remind us, who is Lord
15:11:25 Durham?
15:11:25 A. Lord Durham is the Governor

15:11:27 General of Canada and, of course, he was
15:11:29 responsible for the writing of the Durham Report.
15:11:34 And he is about to go upon his mission to Canada
15:11:41 and sweeps through the country and ends up with the
15:11:44 famous Durham Report. And one of the distinctive
15:11:48 features of the Durham Report and the Durham
15:11:50 mission is that Durham was given instructions --
15:11:53 and these are them -- on principles, relevant
15:11:58 principles for the management of relations with
15:12:01 First Nations.
15:12:02 Q. Professor McHugh, would it be
15:12:04 useful if we put the 1838 Glenelg dispatch on the
15:12:12 screen, since you seem to be referring to it fairly
15:12:15 often in your report?
15:12:16 A. It could be -- if you put the
15:12:18 entire document up, I will be referring to matters
15:12:21 that come further in my evidence, and I can make
15:12:23 the point now, if that would suit.
15:12:25 Q. Well, perhaps if you could simply
15:12:27 flag them for us now, and we can develop them in
15:12:30 detail.
15:12:30 A. Thank you. That would be great,
15:12:31 thank you.
15:12:32 Q. In the appropriate place.
15:12:33 So if I could have Exhibit 1264, a

15:12:42 letter of Earl Durham from Lord Glenelg, dated
15:12:48 August 22nd, 1838. Now, I believe the part that
15:12:52 you were just now talking about is page 5 of the
15:12:56 PDF, page 9 of the document?
15:12:57 A. Correct. Let me just find my copy
15:13:03 here. So we have the letter to -- from the
15:13:33 Secretary of State to Durham. If we look at what
15:13:38 it says at the end, I conclude with three general
15:13:46 observations, and these are observations about the
15:13:48 conduct of the management of First Nations
15:13:50 relations at a time when that is a power under the
15:13:56 prerogative, and the prerogative provides the
15:13:59 basis.
15:14:00 It begins:
15:14:01 "I conclude with Three general
15:14:05 Observations:"
15:14:06 So the first one is:
15:14:08 "It should be regarded as a
15:14:09 fixed Principle in any Arrangements
15:14:10 that may be made regarding the
15:14:12 Indians, that their Concerns must be
15:14:14 continued under the exclusive Care
15:14:16 and Superintendence of the Crown."
15:14:21 Now, the Aborigine Select Committee
15:14:26 recently has issued a recommendation exactly to

15:14:31 that effect, and the "Crown" there means the
15:14:35 Imperial Crown and that it remains a matter for the
15:14:39 exercise of the executive discretion of government.
15:14:42 And you see why, as you read down, that
15:14:49 it is not regarded as something which colonial
15:14:53 assemblies could be given control of.
15:14:58 Now that, as I have said a moment or
15:15:01 two ago, is about to disappear because the Gradual
15:15:07 Enfranchisement Act demonstrates the commitment of
15:15:08 the provincial legislature --
15:15:11 Q. Professor McHugh, I think your
15:15:13 voice is getting --
15:15:14 A. -- to civilization. I'm sorry.
15:15:15 Thank you.
15:15:16 But the 1830s, the governing principle
15:15:24 is one of the Imperial Crown having the exclusive
15:15:28 care and superintendence of relations.
15:15:32 There was then, at point 2, a statement
15:15:34 made about the Colonial Assembly granting money for
15:15:41 the purposes of advancing the civilization program
15:15:44 and how they missed that opportunity with Upper
15:15:47 Canada but that they hoped that Upper Canada will
15:15:49 be able to assume financial responsibility. If you
15:15:53 could scroll down, please, you'll see that at the
15:15:55 top of the next page.

15:15:59 So we see that:

15:16:00 "[...] in the Proposals made to
15:16:03 the Assembly of the different
15:16:05 Provinces respecting the Cession of
15:16:06 the Crown Revenues in return for a
15:16:08 fixed Civil List some Stipulation
15:16:13 was not introduced securing a
15:16:16 Portion of the annual Revenues for
15:16:16 the social and religious Improvement
15:16:18 of the Indians."

15:16:19 So the argument over presents and the
15:16:24 funding of cessions became an argument over who was
15:16:30 going to bear the cost.

15:16:31 And we can see that that is going on
15:16:35 there, and it continues to go on into the 1840s.

15:16:38 But if we could scroll down more
15:16:42 pertinently to what I have been saying, point 3.
15:16:49 Having just expressed hope that an appeal to the
15:16:53 justice and liberality of the local legislature
15:16:56 will result in steps being taken, he refers here to
15:17:00 the same spirit:

15:17:03 "[...] with the Question of
15:17:04 Lands for the Indians."

15:17:05 But the spirit here applies to the
15:17:08 Crown's representative to the Governor. And here

is a very clear statement:

> "However rigidly the Rules respecting the Disposal of Lands may be observed in general, and it is necessary to observe them with the utmost Strictness, yet if in any Case it be for the clear Advantage of the Indians to depart from those Rules the Departure ought without Hesitation to be sanctioned."

So in other words, there are in place for people like Bond Head, the Governors, there are protocols, procedures, ways of doing things already in place. Keep to them, but you can do otherwise. So there is no rigid legal framework. There is no checklist. There is nothing about having to do certain things, but we have done it a certain way, keep doing it.

So -- and that is the history that you have. But there is a history that has an anomaly in Treaty 45 and Treaty 45 1/2.

Q. And as you said, we'll be returning to this document at sometime in the future to discuss points very specifically relevant to the Manitoulin --

15:18:23 A. That's right. There is a question
15:18:24 in there also about the nature of legal security
15:18:26 and Crown grants, to which we will come later.
15:18:29 Q. We'll come back then. While we
15:18:31 are, though, on this topic of regulations and
15:18:36 binding legal procedural matters, again in
15:18:41 paragraph 5.3, you make a reference to the
15:18:45 Dorchester Regulations of 1794.
15:18:50 If it helps, we can call that up onto
15:18:53 the screen. It is Exhibit 741, and this is
15:19:09 instructions from Lord Dorchester. Again, that is
15:19:13 the Governor General, Sir Guy Carleton, under
15:19:16 another name.
15:19:18 A. Okay. When it comes to the
15:19:23 exercise, we have a particular prerogative --
15:19:25 Q. Oh, just a second. It also says
15:19:29 to -- and the person to whom the letter is being
15:19:31 addressed is Sir John Johnson. Could you remind us
15:19:34 who Sir John Johnson was?
15:19:36 A. He was Superintendent General of
15:19:39 Indian Affairs and, of course, he came from the
15:19:41 Johnson dynasty. Sir William Johnson, Sir Guy
15:19:47 Johnson, and the Claus family were all of the same
15:19:50 lineage, mostly involved in Indian Affairs from
15:19:54 before the revolution right through until the early

15:19:57 Victorian period, 1830s.

15:20:00 So these are instructions coming from
15:20:04 Dorchester to a member of the Johnson family. Now,
15:20:08 the significance of this I'll explain as we look at
15:20:14 these Dorchester Instructions.

15:20:16 Now, these are instructions issuing
15:20:19 inside the military establishment. During the
15:20:25 1780s, there had occurred some rushed cessions
15:20:30 obtained with large numbers of settlers and
15:20:37 Loyalists pouring in north. It was what in one day
15:20:43 we would call a refugee crisis, and they needed to
15:20:47 find land too because the Royal Proclamation, for
15:20:50 example, had promised officers certain acreages of
15:20:53 land, and they weren't going to be getting that.
15:20:56 Many had been engaged in support of the Crown in
15:21:02 the expectation that there would be some benefit
15:21:04 for them, and there wasn't. The Six Nations in
15:21:12 particular had to leave, and so the Grand River is
15:21:14 an example of land being made available for
15:21:17 Loyalists.

15:21:18 The cessions had been rather rushed.
15:21:20 The Crawford purchase, the Toronto purchase.

15:21:25 Q. Sorry, the last one that you said,
15:21:27 what was that?

15:21:27 A. The cessions that were obtained in

15:21:30 the mid-1780s had been created in circumstances
15:21:32 where the records weren't complete or where the
15:21:39 forms hadn't been filled out properly, and the
15:21:41 questions of consent were less clear than they
15:21:44 might have been, to the extent that Simcoe, the
15:21:49 Lieutenant Governor --

Q. I just wanted to clarify where the Crawford purchase was.

A. In modern day Ontario.

Q. Okay.

A. Upper Canada. So Simcoe required corrective measures to be taken, and as another outcome, these instructions were issued to prevent a recurrence of that kind of botched cession.

Now, as you read down, you will see the different provisions. For example, provision 3d:

> "All Purchases are to be made in public Council with great Solemnity and Ceremony according to the Antient Usages and Customs of the Indians, the Principal Chiefs and leading Men of the Nation or Nations to whom the lands belong being first assembled."

That is identical to a provision more

15:22:46 or less in the Royal Proclamation. Now, if the
15:22:49 Royal Proclamation had of been a statute, then that
15:22:52 kind of provision is needless. There is no
15:22:55 conception that, Oh, we are doing something that
15:22:58 the Royal Proclamation already requires. The
15:23:02 Dorchester Instructions do not contemplate a space
15:23:09 in which the Royal Proclamation still governs,
15:23:11 still rules, or has the effect of a statute, of an
15:23:15 unrepealed statute.
15:23:17 Likewise, for example, if you look at
15:23:20 the 1847 Proclamation, in this case, there is a
15:23:28 reference at the very end of the Proclamation to
15:23:30 future alienations being by Council. If the Royal
15:23:35 Proclamation had the statutory effect that my
15:23:36 colleagues have argued it has in the 19th century,
15:23:39 then, again, that provision would not be necessary.
15:23:41 You see a pattern of references to
15:23:46 requirements, such as this Council, of procedural
15:23:50 requirements that would not be necessary if the
15:23:54 Royal Proclamation were a statute or at least one
15:23:56 would expect to see some acknowledgment that the
15:24:01 Royal Proclamation had this effect. Instead we
15:24:03 find Bond Head asking for the only copy of the
15:24:05 Proclamation in Upper Canada to be sent to him and
15:24:09 being told, get it back, it is the only one we have

15:24:11 got.

15:24:11 Now, that suggests to me that we are
15:24:15 not dealing in a world where these officers, people
15:24:18 connected with Sir William Johnson, who certainly
15:24:22 knew of the Royal Proclamation, is we are not in a
15:24:26 world where important figures are considering
15:24:29 themselves bound by it. They are in a world that
15:24:31 understands there are these practices and
15:24:33 procedures that discipline the way in which the
15:24:36 Crown conducts relations and that consistency and
15:24:41 good government has meant that over the years were
15:24:44 followed.

15:24:45 But this is good government that
15:24:51 follows and meets the expectations and aims to be
15:24:55 fair and even-handed and which organizes its
15:25:01 discretion internally, that disciplines it, has
15:25:03 administrative practices.

15:25:04 Q. What would be the ongoing formal
15:25:09 effect of these additional instructions from the
15:25:14 Governor General?

15:25:14 A. How do you mean? These are issued
15:25:19 by -- as part of the military, to the military
15:25:23 establishment, which is also another aspect one has
15:25:27 to factor into talking about authority in relation
15:25:34 to particular zones or portions of North America

15:25:39 and who has it and how it can be exercised, because
15:25:45 the Royal Proclamation establishes a military
15:25:47 jurisdiction, not a civil jurisdiction, and that
15:25:48 also limits the capacity of Governors to take
15:25:51 measures against trespassers into Indian country.
15:25:55 Q. One more question, and this again
15:25:58 relates to page 87 of your report where you quote
15:26:06 the Bagot Report, to the effect that the Indigenous
15:26:10 peoples considered the Royal Proclamation very
15:26:13 important.
15:26:16 A. That's right. And we have there
15:26:19 the official response to that importance. I refer
15:26:27 to it at paragraph 5.31. Could I first situate the
15:26:32 Bagot Report because it will also help me explain
15:26:35 features of the Treaty 45 when we come in more
15:26:42 detail to it.
15:26:42 The Royal Proclamation, as I said,
15:26:45 establishes military jurisdiction in Indian
15:26:50 country, and the Superintendencies are established
15:26:55 under a military establishment, and so Indian
15:26:59 Affairs in the early 1820s is part of the military
15:27:06 establishment. So in 1828, we have the Darling
15:27:09 Report, which says that Indian policy hitherto has
15:27:12 been based upon cessions of land, presents,
15:27:15 maintaining that, but now we need to think about we

15:27:19 are in a peaceful time, wars with America are over.
15:27:22 We now need to think about the policy direction.
15:27:25 And the policy direction is towards
15:27:28 assimilation, towards establishing farms and
15:27:30 turning them into the proverbial Christian farmer.
15:27:33 And in 1830, Indian Affairs goes into
15:27:37 the civil establishment. And that, of course, is
15:27:44 the beginning of the decade in which we have
15:27:46 profound changes and events occurring within the
15:27:50 empire, as much of an ideological or intellectual
15:27:55 sort as anything, emancipation, and the rise -- the
15:28:00 importance of the aborigine protection groups.
15:28:06 So we have -- the key document there is
15:28:08 the report of the Aborigine Protection Society, and
15:28:14 that document is in the mid-1830s and sets out the
15:28:17 principle of Crown Superintendence. In Canada,
15:28:21 also in the 1830s, quite beside the Bond Head
15:28:32 Treaties, we have the recent disturbances as they
15:28:34 became known, the rebellion. And Bond Head, his
15:28:37 conduct was at the heart of certainly the Imperial
15:28:40 response to it because he gets recalled, and
15:28:44 Glenelg eventually loses his Secretary of State, is
15:28:47 forced to resign on the Canada question.
15:28:50 The movement for responsible
15:28:53 government, of which the rebellion is an

15:28:55 expression, is essentially successful in that the
15:29:05 institutions of a responsible government start to
15:29:08 form in Canada.
15:29:10 The Bagot Report -- we have, first of
15:29:12 all, the Macaulay Report. The Macaulay Report,
15:29:18 lengthy, descriptive, goes through the Aboriginal
15:29:25 groups in Canada describing their situation, and it
15:29:29 is the document that lays the basis for their
15:29:35 encompassment within a bureaucratic and
15:29:38 institutional setting so that the beginnings of
15:29:42 even treatment, a consistent government,
15:29:44 management, have their basis in an official record.
15:29:47 That is what the Macaulay Report does.
15:29:50 The Bagot Report in 1844 and the Indian
15:29:55 Affairs is concerned with record-keeping,
15:30:00 accounting, and the intensifying of the
15:30:01 bureaucratic structure of an emergent colonial
15:30:06 state, a state where ministers are responsible to a
15:30:10 locally-elected legislature.
15:30:12 After that, we have the Robinson
15:30:16 Treaties. The Robinson Treaties are a remarkable
15:30:22 difference with the 45 and 45 1/2. The Bond Head
15:30:28 Treaties are really the last expression of
15:30:31 complete, unadorned Imperial management, whereas
15:30:34 the Robinson Treaties are conducted, one might

15:30:39 almost say, laboriously, through a highly collegial
15:30:45 manner, through official reports and inquiries, the
15:30:49 Vidal Anderson report preceding the eventual
15:30:51 Treaties in 1850 --
15:30:52 Q. By "collegial", you mean collegial
15:30:55 amongst --
15:30:55 A. With different officers talking
15:30:58 and discussing and being a deliberative manner of
15:31:04 proceeding. And this is at a stage when
15:31:09 technically the authority is in the Governor
15:31:12 General in Lord Elgin. Lord Elgin is consulted and
15:31:15 gives views, but essentially he is leaving the
15:31:19 conduct of this to provincial agents, to provincial
15:31:24 officers, even though technically this remains an
15:31:28 Imperial power exercisable from London, the
15:31:31 management of Indian Affairs.
15:31:33 So the Robinson Treaties are the signal
15:31:41 of the movement that is coming. We have the
15:31:43 Pennefather Report -- we have the abolition of
15:31:46 presents, the Pennefather Report, and then the
15:31:48 transfer of jurisdiction of authority in Indian
15:31:54 Affairs, and particularly after that, we have the
15:31:56 1860 surrender legislation, which is indicative of
15:32:00 the arrival of the age of legislation.
15:32:03 Q. Thank you for that, that overview

15:32:06 of the reports.

15:32:07 Perhaps we could return to the comment
15:32:12 in the Bagot Report about the Royal Proclamation
15:32:16 after the afternoon break.

15:32:18 THE COURT: Yes, 20 minutes.

15:32:21 -- RECESSED AT 3:32 P.M.

15:52:29 -- RESUMED AT 3:55 P.M.

15:56:27 THE COURT: Please go ahead.

15:57:51 MR. McCULLOCH: Your Honour, I have
15:57:52 talked with my friend, and we have agreed that the
15:57:56 New Zealand statutes discussed earlier can be
15:58:00 admitted upon consent.

15:58:02 That consent, however, is without
15:58:04 prejudice to Canada's rights to object to any
15:58:07 particular questions about those two statutes.

15:58:10 THE COURT: And this is also -- as I
15:58:15 said in my ruling, it could be without prejudice to
15:58:20 any parties' position about the relevance, if any,
15:58:23 of those statutes?

15:58:24 MR. McCULLOCH: Yes, Your Honour.

15:58:25 THE COURT: All right. That is fine.
15:58:26 Thank you.

15:58:27 I assume that you will bring those in
15:58:30 electronic form at some point, Mr. Townshend.

15:58:34 MR. TOWNSHEND: Yes, Your Honour.

15:58:34 THE COURT: Yes. Thank you.

15:58:36 Please go ahead.

15:58:37 BY MR. McCULLOCH:

15:58:38 Q. Professor McHugh, if we could go back to the extract from the Bagot Report quoted on page 87 of your report, and in particular, I would like to refer you to the often-quoted line:

> "This document", that is to say the Royal Proclamation of 1763, "the Indians look upon as their Charter."

15:59:06 Do you have any comments about that line or indeed about this --

15:59:10 A. Well, the reference there, of course, as "the Charter" is a reference to the great charter, the Magna Carta, so that has always been presumed what the allusion is to there.

15:59:23 If we could look on, how I would explain it requires that we go back to the first sentence in the extract:

> "The subsequent proclamation of His Majesty George III issued in 1763 furnished them with a fresh guarantee for the possession of their hunting grounds and the protection of the Crown."

So we have a fresh guarantee, not the first guarantee, a fresh guarantee, so that would seem to indicate that it was an assurance of protection that was already occurring, a fresh guarantee.

And if we read on, it says:

> "Since 1763 the Government, adhering to the Royal Proclamation of that year, have not considered themselves entitled to dispossess the Indians of their lands without entering into an agreement with them, and rendering them some compensation."

So the words "have not considered themselves entitled to dispossess" does not suggest an externally-imposed statute prevented that from happening. It indicates self-restraint, self-discipline, but not that there is an actual enforceable restraint upon that.

So the statement "the Indians look upon as their Charter" is surrounded by statements that I would read as guarded or at least as symptomatic that the government took a view that was not the same as the way the Indians looked, and the view

16:01:16 that you get there, the insider view, the official
16:01:18 view, is that it was a fresh guarantee and, since
16:01:23 then, there has been self-restraint, or there have
16:01:29 been a disciplining of governmental action,
16:01:34 procedures, so as not to behave that way, but not
16:01:38 that there is a legal limit or constraint.
16:01:40 Q. To close out this particular
16:01:43 issue, I would like to call upon Ms. Kirk for
16:01:48 Exhibit G1, the ethnohistorical research report,
16:02:01 Volume 3, "Saugeen-Nawash Land Cessions by G.
16:02:09 Reimer", and I would like to ask Ms. Kirk to go to
16:02:13 page 16 of the PDF, which should be page 6.
16:02:24 THE COURT: What volume is it, sir?
16:02:26 MR. McCULLOCH: Volume 3.
16:02:27 THE COURT: 3.
16:02:28 BY MR. McCULLOCH:
16:02:30 Q. Saugeen-Nawash land cessions
16:02:33 number 45 1/2, number 67 and number 72.
16:02:37 And we are in section 2.1. Professor
16:02:45 McHugh, are you familiar with this section of the
16:02:48 Reimer report?
16:02:49 A. Yes, I am.
16:02:49 Q. And if I could ask Ms. Kirk to
16:02:58 scroll down to the table, which I believe is a
16:03:00 couple of pages down. Here we are. This is Table

16:03:15 2.1, PDF 24, which would be page number 14. And I
16:03:34 would like to ask you to comment not simply on the
16:03:39 chart but on the statement at the bottom of the
16:03:43 chart:
16:03:45 "These instructions and
16:03:46 standards continued to guide the
16:03:47 actions of The Indian Department up
16:03:52 to and well beyond the Saugeen
16:03:54 surrenders of 1836 to 1854."
16:04:01 A. Well, my first comment is that
16:04:03 Dr. Reimer has constructed a checklist of treaty
16:04:09 requirements, but this checklist has no historical
16:04:12 foundation in that there is no record of Indian
16:04:16 Affairs officials or officials involved in cessions
16:04:18 going through the checklist one by one.
16:04:20 So this concept of a checklist has been
16:04:23 compiled from a variety of sources.
16:04:26 Now, the difficulty I have with the
16:04:28 Reimer report is that it does not differentiate
16:04:29 between the different instruments which together
16:04:32 make up this checklist that is not in the minds of
16:04:35 officials at the time.
16:04:36 She refers to the Royal Proclamation.
16:04:40 I have made my position -- the beginnings of my
16:04:43 position clear on the Royal Proclamation. There

16:04:45 are other aspects to it.

16:04:46 Q. Professor McHugh, you have talked
16:04:47 about why you didn't think the Royal Proclamation
16:04:51 had binding legal force, and you have gotten as far
16:04:56 as, I believe, the Proclamation, the Carleton
16:05:03 Proclamation. You haven't, I believe, gotten into
16:05:06 the latter part of the 18th century, and you have
16:05:11 only made passing comment to why you don't think it
16:05:14 was considered binding in the 19th century.

16:05:17 Is there anything you would like to add
16:05:19 before we leave the Royal Proclamation?

16:05:20 A. Well, can I just say that the
16:05:22 instrumentation Dr. Reimer uses here is the
16:05:25 Proclamation. There is a plan of '64, which is the
16:05:29 equivalent of a White Paper, an unpublished White
16:05:33 Paper because it was only internal. There are the
16:05:36 Dorchester Instructions, which are instructions
16:05:38 within the military establishment, each of which
16:05:41 are, by their nature, quite different.

16:05:43 So she uses juridically equivalent
16:05:48 documents, legal documents, that in terms of their
16:05:51 legal status and impact are quite different. So
16:05:54 you need to differentiate the types of instruments
16:05:57 by which these treaty requirements, this checklist,
16:06:01 is being built.

16:06:02 And, for example, she calls -- at the
16:06:03 bottom, she refers to "these instructions and
16:06:06 standards". Now, throughout the report, what --
16:06:09 Dr. Reimer refers to this treaty checklist as
16:06:12 "instructions", yet familiarity with the way in
16:06:17 which the empire was governed requires -- or not
16:06:22 requires, knows that "instructions" are a term of
16:06:25 art that refer to documents emanating from
16:06:31 Whitehall, from Secretaries of State, informing and
16:06:35 telling Governors what to do.
16:06:37 "Instructions" are a term of art, and
16:06:39 none of the legal instruments by which this treaty
16:06:42 checklist was built are what would be called
16:06:44 instructions in the historical sense that would
16:06:47 have been understood in the 18th century. They are
16:06:50 not instructions. We might call them guidelines,
16:06:53 protocols, but if they are protocols, then there is
16:06:56 no overriding sense that these are what we have to
16:06:59 do.
16:07:00 So this idea of a treaty checklist I
16:07:05 have great difficulty with. Certainly there are
16:07:08 things that we have done before. We have ways of
16:07:12 doing this, and we continue to do them, but these
16:07:16 are organic ways that develop.
16:07:17 For example, the development of

16:07:20 annuities in 1818, and the recognition of the
16:07:24 reserves policy that arises in the 1830s,
16:07:28 precipitated in part by the crisis of the Bond Head
16:07:31 policy.
16:07:33 Treaty-making thus develops in a way
16:07:39 that is not a layering of requirements but in ways
16:07:47 that there is processes that are continued, that
16:07:54 First Nations expectations have built, and so the
16:07:59 good government, consistent government, sovereign
16:08:03 comportment is maintained, and so we have treaties
16:08:07 as a feature of Upper Canada and then the Prairies.
16:08:12 It is not a Canadian history. It is a mid-Canada
16:08:15 history of treaty-making.
16:08:18 Q. And to deal with the Royal
16:08:21 Proclamation, I would like to call my colleague,
16:08:25 Ms. Kirk, to put on the screen the Quebec Act,
16:08:33 SC0666, which I would like to make a numbered
16:08:38 exhibit. This is -- you have referred to it as the
16:08:43 Quebec Act of 1774.
16:08:47 THE COURT: Is this not already an
16:08:48 exhibit?
16:08:49 MR. McCULLOCH: Oh, I'm sorry, it is
16:08:50 Exhibit -- according to my notes, it is not. I
16:08:59 could be wrong.
16:09:00 THE COURT: Just going back to the very

16:09:04 early stages of the Plaintiffs' case, this was
16:09:07 discussed by one of the Plaintiffs' experts. I
16:09:09 mean, I don't have a problem marking it if it
16:09:12 hasn't been, but it certainly has come up several
16:09:14 times.
16:09:15 MR. McCULLOCH: We will check and find
16:09:16 the exhibit number.
16:09:18 THE COURT: All right. Well, if there
16:09:20 is none, then tomorrow morning we'll mark it. All
16:09:23 right?
16:09:23 MR. McCULLOCH: Certainly. Thank you,
16:09:25 Your Honour.
16:09:25 THE COURT: All right.
16:09:26 BY MR. McCULLOCH:
16:09:26 Q. And in particular, I would like to
16:09:28 go to page 8 of the document, page 4 of the PDF,
16:09:36 and it is Article IV, and I would like to go --
16:10:00 I'll actually go to the annotation at the corner
16:10:03 because the prose is a little stiff:
16:10:10 "Former provisions made for the
16:10:11 province to be null and void after
16:10:14 May 1, 1775."
16:10:16 What is the term "former provisions" a
16:10:19 reference to?
16:10:20 A. The Proclamation.

16:10:21 Q. A little louder, please?

16:10:25 A. The Proclamation. I'm sorry.

16:10:26 Q. Of 1763. Is there anything in this part that an 18th or 19th century office-holder would have taken to mean that any portion of the Royal Proclamation, subject, of course, to the property concern in Article V, had somehow been severed and preserved?

16:10:54 A. We need to distinguish a contemporary debate about the meaning of the Quebec Act from the historical meaning that was given to it.

16:11:01 The historical meaning that was ascribed to the Quebec Act was that it was a repeal of the operative provisions of the Royal Proclamation. There arose, during the post-Confederation period, an argument for the first time that the Indian provisions of the Royal Proclamation were severable -- were severed from the rest of the Royal Proclamation and that, therefore, they continued.

16:11:35 And in the modern age, in the common law argument, the common law interpretation of the Royal Proclamation, the argument is that they should be shown, demonstrated, that given that the

16:11:51 Indian provisions were not repealed by the Quebec
16:11:55 Act, there is an obligation on those arguing for
16:12:00 extinguishment to show the measures by which
16:12:05 extinguishment occurred.
16:12:07 Now, my response to that is that that
16:12:12 is a curious inversion of --
16:12:16 THE COURT: Mr. Townshend? Excuse me,
16:12:17 sir.
16:12:18 MR. TOWNSHEND: Your Honour, this seems
16:12:20 to be getting into a matter of current law,
16:12:25 interpretation of how it is now being understood.
16:12:30 THE COURT: Well, it could be. I am
16:12:33 not quite sure, but let me just go back to the
16:12:36 question. All right?
16:12:38 THE WITNESS: There is no historical
16:12:41 documentary evidence --
16:12:42 THE COURT: Sorry, sir, just pause,
16:12:44 please.
16:12:46 THE WITNESS: Documentary evidence --
16:12:51 THE COURT: Sir, just wait.
16:13:00 Professor McHugh, we have a bit of a
16:13:12 challenge with some of this evidence to try and
16:13:17 remain in the historical context and distinguish
16:13:19 that from today's situation, and that challenge
16:13:24 will be best served if we can take it one step at a

time.

I am noting that Mr. McCulloch's question was somewhat limited, and the one thing, sir, I promise you, is that if Mr. McCulloch wants you to deal with some topic that you have not covered, he will ask you another question.

So I think that the prudent course, Mr. McCulloch, will be to see what your next question is because I'm not entirely sure you were looking for a modern discussion from your question anyway.

And, Professor, if you could do your best to walk through the questions and, as you get to the end of the answer to the question, stop, and be comfortable that if some further useful piece of information is coming up, that Mr. McCulloch will ask you about it.

Please go ahead, Mr. McCulloch.

BY MR. McCULLOCH:

Q. To consolidate the question I asked with the question I was about to ask --

THE COURT: Well, I think the question you asked was very narrow.

MR. McCULLOCH: Uhm-hmm.

THE COURT: You simply asked if there

16:14:44 was anything in this part -- that is, of the
16:14:46 document -- that an 18th or 19th century
16:14:52 office-holder would have taken to mean a certain
16:14:53 thing. So that was a question restricted to what
16:14:55 was in this document.
16:14:57 Now, if you want to ask more questions
16:14:59 about that, by all means, but --
16:15:02 MR. McCULLOCH: No, Your Honour.
16:15:03 Actually I was going to make it, in order to avoid
16:15:06 falling into error, to -- in the 18th or first half
16:15:12 of the 19th century rather than the full 19th --
16:15:16 THE COURT: Well, perhaps you could
16:15:17 just state your question, and I'm sure if there is
16:15:20 an issue with it, we'll be able to deal with it.
16:15:23 BY MR. McCULLOCH:
16:15:23 Q. Is there anything in this
16:15:24 provision that an office-holder in the latter part
16:15:32 of the 18th century, let's say after 1774, or the
16:15:35 first half of the 19th century, that is to say,
16:15:39 prior to 1854, would have taken as severing out and
16:15:45 preserving the Indian clauses of the Royal
16:15:49 Proclamation?
16:15:49 A. No, there isn't, and that would
16:15:53 also be for the reasons that I have given about the
16:15:56 status of the Proclamation generally as not being

16:15:59 an enacted measure.

16:16:00 Q. Okay. Thank you. And I would
16:16:04 like to move on now to another source for the
16:16:09 Reimer checklist, and this is Exhibit 615, "Plan
16:16:18 for Future Management of the Indian Affairs". You
16:16:22 described this briefly, but we would like to get,
16:16:27 if we could, some more detail about where it came
16:16:30 from, what it meant, and whether or not it had any
16:16:32 kind of normative force in the latter quarter and
16:16:36 the first half of the 18th and 19th century.

16:16:41 A. One of the reasons why the Royal
16:16:43 Proclamation was issued was because the government
16:16:46 of the day felt that it needed to say what was
16:16:50 happening. It felt itself under some pressure. So
16:16:55 the Royal Proclamation is in a sense like a holding
16:16:58 statement, that this is what we plan to do.

16:17:00 For Indian Affairs at the time, it was
16:17:04 expected that there would be -- might well be a
16:17:07 major piece of legislation by the Imperial
16:17:10 parliament along those lines. There was a talk of
16:17:13 it, circulated, but in the end, it came to nothing.

16:17:17 So this "Plan for the Future Management
16:17:19 of Indian Affairs" is that. It is like an internal
16:17:22 White Paper circulating, suggesting, getting
16:17:27 feedback but from which nothing eventuated. So it

16:17:30 has no legal standing whatsoever. It is a policy
16:17:32 document discussed about or about which there is
16:17:35 discussion, and eventually nothing happens.
16:17:37 Q. And I believe we have already
16:17:39 discussed Lord Dorchester's Instructions.
16:17:45 A. Correct.
16:17:45 Q. As something in the military
16:17:49 context.
16:17:50 A. Correct.
16:17:51 Q. Uhm-hmm. Is this, in your
16:17:55 opinion, a complete collection of every document
16:18:01 that has been discussed in this case that is
16:18:03 relevant to what the Crown considered to be
16:18:09 appropriate for making a surrender in the latter
16:18:14 quarter and first half of the 18th century and
16:18:17 first half of the 19th century?
16:18:19 A. Well, yes, but there are also
16:18:26 the -- the way in which the Reimer report regards
16:18:29 these instruments from a modern perspective of law
16:18:32 as imperative, without the legal background
16:18:36 attributing what is the statutory effect to each of
16:18:40 them, so there is no differentiation.
16:18:41 Less understood is the role of office
16:18:45 and the role of instructions, instructions not in
16:18:50 the sense that Reimer uses but instructions in the

16:18:52 sense of dispatches from London and the reporting
16:18:55 system, the system of hierarchy, and the
16:19:00 internalized disciplining of procedures within the
16:19:03 Crown by which relations of particular First
16:19:07 Nations were monitored and -- reported and
16:19:12 monitored.
16:19:12 So the answer that you give to Crown
16:19:16 protection, that's not through a treaty checklist
16:19:21 but through the particularities of the Crown's
16:19:24 relations with particular First Nations.
16:19:26 Q. And I am going to just ask one
16:19:30 more question, and then we'll move on to the last
16:19:33 topic for the day, which --
16:19:36 THE COURT: Well, I have something I
16:19:38 wish to raise, so if you have one more question,
16:19:40 then perhaps the last topic for the day could be
16:19:42 the first topic for tomorrow morning.
16:19:44 BY MR. McCULLOCH:
16:19:44 Q. And of the documents we have
16:19:46 discussed, what document from a Governor General
16:19:50 setting out procedure does Dr. Reimer not include?
16:19:55 A. Well, it is, of course, the
16:19:57 document that we have already looked at, and that
16:20:00 is the dispatch from Lord Glenelg to the Earl of
16:20:04 Durham of August 1838, which carries, in the very

16:20:13 last -- the third general observation, the
16:20:15 statement that I referred to in paragraph 8 -- in
16:20:20 part 8. I am going to be wrong. Page 88,
16:20:26 paragraph 5.32.
16:20:30 MR. McCULLOCH: And, Your Honour, you
16:20:32 indicated that you would prefer to address
16:20:34 something?
16:20:34 THE COURT: Well, subject to any
16:20:38 objections by counsel, I would like to just talk to
16:20:40 counsel briefly at the end of the day about some
16:20:43 small scheduling matters just for this week and
16:20:46 next week, no big picture matters, and I was
16:20:48 thinking we could do it right at the end of court.
16:20:52 For that reason, I don't really want to
16:20:54 embark on a new topic because it will mean you'll
16:20:58 have to stay for a few minutes and people may have
16:21:01 difficulties, in which case they should say so now.
16:21:06 But I just wanted to have a brief
16:21:08 scheduling meeting after court here.
16:21:11 MR. McCULLOCH: The next topic is a
16:21:13 biggie.
16:21:14 THE COURT: Oh, well, that makes it
16:21:16 easy then, doesn't it?
16:21:17 Okay. So what we are going to do is
16:21:18 we'll adjourn now, and if counsel can just remain

16:21:21 for a couple of minutes, we'll have a brief
16:21:24 scheduling meeting offline, and we'll resume with
16:21:28 the Professor at 10 o'clock tomorrow morning.
16:21:32 All right?
16:21:33 Okay.
16:21:34

-- Adjourned at 4:22 p.m.

REPORTER'S CERTIFICATE

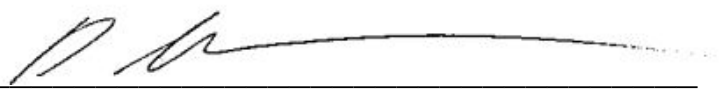
I, DEANA SANTEDICOLA, RPR, CRR, CSR, Certified Shorthand Reporter, certify:

That the foregoing proceedings were taken before me at the time and place therein set forth, at which time the witness was put under oath by me;

That the testimony of the witness and all objections made at the time of the examination were recorded stenographically by me and were thereafter transcribed;

That the foregoing is a true and correct transcript of my shorthand notes so taken.

Dated this 16th day of December, 2019.



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