THE CONTINUITY OF ABORIGINAL CUSTOMS AND GOVERNMENT UNDER BRITISH IMPERIAL CONSTITUTIONAL LAW AS APPLIED IN COLONIAL CANADA, 1760-1860

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This thesis examines the British legal status of aboriginal customary laws and governments in colonial Canada between 1760 and 1860, with a view to contributing to the debate about their modern legal status under the Canadian constitution. By "colonial Canada" is meant the British colonies of Quebec (1763-1791), Upper and Lower Canada (1791-1841) and Canada (1841-1867).

The central argument of the thesis is that there existed in colonial Canada two distinct systems of municipal law—one system for settlers and one system (or set of systems) for natives—both deriving legitimacy from an over-arching British imperial constitution. The settler system was established by imperial statute, while native systems were recognized by non-statutory principles of imperial law, or "imperial common law". It is argued that the *common-law principle of continuity*—according to which British courts presumed that the laws of peoples subjected to British sovereignty remained in force at common law until abrogated by prerogative or Parliamentary legislation—formed the doctrinal foundation of aboriginal rights to customary law and government in colonial Canada.

The objective of Part One of the thesis is to construct a theory of imperial law applicable to the unique constitutional history of colonial Canada. To this end, the principle of continuity is analysed both as it was developed in relation to England's early imperial experiences and as it was manifested in statutes and judicial opinions relating to native nations in British North American colonies of the seventeenth and eighteenth centuries.

Part Two of the thesis applies the general principles of imperial law developed in Part One to Canadian constitutional history. The various municipal legal regimes established under imperial statute for settlers are examined in light of the fact that the imperial ministry, which retained direct control over Indian policy in Canada until 1860, recognized the continuity of native customary law and government in both unceded and reserved Indian lands. It will be argued that this imperial recognition confirmed the common-law continuity of native law and government.

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Abbreviations

AP	C.R. Sanderson, *The Arthur Papers, Being the Canadian Papers, Mainly Confidential, Private, And Semi-Official of Sir George Arthur, K.C.H. Last Lieutenant Governor of Upper Canada*, 3 Volumes (Toronto: University of Toronto Press, 1957-59)
APC	Great Britain, Public Record Office, *Acts of the Privy Council of England, Colonial Series, 1613-1783*, W.L. Grant and J. Munro eds. (London: H.M. Stationers Office, 1909-12)
Bl. Comm.	William Blackstone, *Commentaries on the Laws of England*, 4 Volumes (Oxford: The Clarendon Press, 1765-69)
Chalm.	George Chalmers, *Opinions of Eminent Lawyers, on Various Points of English Jurisprudence, Chiefly Concerning the Colonies, Fisheries, and Commerce of Great Britain*, 2 volumes (London: Reed & Hunter, 1814)
Chitty Prerog.	Joseph Chitty, *A Treatise on the Law of the Prerogatives of the Crown and the Relative Duties and Rights of the Subject* (London: Joseph Butterworth & Son, 1820)
CO	Colonial Office Records, Public Record Office (Kew), London
Co. Inst.	Sir Edward Coke, *The Second Part of the Institutes of the Laws of England* and *The Fourth Part of the Institutes of the Laws of England* (London: E. & R. Brooke, 1797)
CSP	Great Britain, Public Record Office, *Calendar of State Papers, Colonial Series, Americas and West Indies*, Cecil Headlam, ed. (London: H.M. Stationers Office, 1880-1969)
Dekan. Code	*Code of Dekanahwideh* in Arthur C. Parker, *The Constitution of the Five Nations, or The Iroquois Book of the Great Law* (Albany: University of the State of New York, 1916)
DICC	William Houston, ed., *Documents Illustrative of the Canadian Constitution* (Toronto: Carswell & Co., 1891)
DRCHC	A. Shortt and A.G. Doughty, eds., *Documents Relating to the Constitutional History of Canada, 1759-1791*, 2 volumes (Ottawa: The Public Archives of Canada, The King's Printer, 1918)
DRCHC, 1819-28	A.G. Doughty and N. Story, eds., *Documents Relating to the Constitutional History of Canada, 1819-1828* (Ottawa: The Public Archives of Canada, The King's Printer, 1935)
DRCHSNY	E.B. O'Callaghan, ed., *Documents Relative to the Colonial*

History of the State of New York, 11 volumes (Albany: Weed, Parsons & Co., 1856-1861)

Forsy.	William Forsyth, *Cases and Opinions on Constitutional Law and Various Points of English Jurisprudence* (London: Stevens & Haynes, 1869)
GBL	*The Great Binding Law, Gayanashagowa* in Arthur C. Parker, *The Constitution of the Five Nations, or The Iroquois Book of the Great Law* (Albany: University of the State of New York, 1916)
GC	Clarence E. Carter, ed., *Correspondence of General Thomas Gage with Secretaries of State, 1763-1775*, 2 volumes (New Haven: Yale University Press, 1931-33)
Hale Comm. Law	Sir Matthew Hale, *The History of the Common Law*, 4th ed. (London: W. Strahan & M. Woodfall, 1779)
Hale Prerog.	D.E.C. Yale, ed., *Sir Matthew Hale's The Prerogatives of the King* (London: Publications of the Seldon Society, volume 92, 1976)
ISt.	H.F. Berry, ed., *Statutes and Ordinances, and Acts of the Parliament of Ireland. King John to Henry V.* (Dublin: A. Thom & Co., 1907)
ISt.L	[Ireland], *The Statutes at Large, passed in the Parliaments held in Ireland, 1310-1786* (Dublin: George Grierson, 1786)
ITS	Canada, *Indian Treaties and Surrenders*, 2 volumes (Ottawa: Queen's Printer, 1891); 3rd volume (Ottawa: King's Printer, 1912)
JP	J. Sullivan, ed., *The Papers of Sir William Johnson*, 14 volumes (Albany: State University of New York, 1921-65)
JR	Reuben G. Thwaites, ed., *The Jesuit Relations and Allied Documents*, 75 volumes (Cleveland: The Burrows Bros. Co., 1896-1901)
Kent Comm.	James Kent, *Commentaries on American Law*, 4 volumes, 6th ed. (New York: William Kent, 1848)
LBC	("*Labrador Boundary Case*") [Great Britain, Judicial Committee of the Privy Council], *In the Matter of the Boundary between the Dominion of Canada and the Colony of Newfoundland in the Labrador Peninsula; Report of the Lords of the Judicial Committee of the Privy Council*, 12 volumes (London: 1927)

MAR — [Massachusetts], *The Acts and Resolves, Public and Private of the Province of the Massachusetts Bay*, 4 volumes (Boston: Wright & Potter, 1869)

MG20 HBC — Manuscript Group 20, Hudson's Bay Company Archives, microfilm copy, Public Archives of Canada, Ottawa

MG21 — Manuscript Group 21, Public Archives of Canada, Ottawa

MPG — Map Collection, Public Record Office (Kew), London

NR — E.A. Cruikshank, ed., *Records of Niagara: A Collection of Documents Relating to the First Settlement* (Niagara-on-the-Lake: Niagara Historical Society, 1927-30)

PC — Privy Council Records, Public Record Office (Chancery Lane), London

PP — Great Britain, Parliament, House of Commons, *Parliamentary Papers*

PSt. — [Pennsylvania], *The Statutes at Large of Pennsylvania from 1682 to 1801* (Harrisburg: Pennsylvania State Printer and New York: Vantage Press, 1896-1976)

RECJUC — Alexander Fraser, ed., *Records of the Early Courts of Justice of Upper Canada*, 14th Report of the Bureau of Archives for Ontario (Toronto: The King's Printer, 1918)

Rep. Ind. Affrs., 1844
[Province of Canada], Commission on Indian Affairs in Canada (Rawson W. Rawson, John Davidson and William Hepburn, commrs.), *Report on the Affairs of the Indians in Canada* (1844), *CO* 42/515

Rep. Ind. Affrs., 1858
[Province of Canada], *Report of the Special Commissioners Appointed on the 8th of September 1856, To Investigate Indian Affairs in Canada*, Journal of the Legislative Assembly of the Province of Canada, 1858, volume 16, appendix 21

Rep. Ind. Dept., 1840
[Province of Upper Canada], Robert Jameson, J.B. Macaulay, William Hepburn, "Report of Committee No. 4, On Indian Department", *Report on the Public Departments of the Province of Upper Canada in 1839*, January, 1840, *CO* 42/472

Rep. Sel. Comm. Aborigines, 1837
Great Britain, House of Commons,. "Report From the Select

	Committee on Aborigines (British Settlements)", *Parliamentary Papers* 1837, volume VII, number 425
RG10	Record Group 10, Public Archives of Canada, Ottawa
RG19	Record Group 19, Public Archives of Canada, Ottawa
ROBA	Ontario, Bureau of Archives, *Reports of the Ontario Bureau of Archives* (Toronto: The King's Printer, 1909-1918)
RP	E.A. Cruikshank, ed., *The Correspondence of the Honourable Peter Russell with Allied Documents Relating to his Administration of the Government of Upper Canada During the Official Term of Lieutenant Governor J.G. Simcoe while on Leave of Absence*, 3 volumes (Toronto: Ontario Historical Society, 1932-36)
RPA	A.G. Doughty, ed., *Report of the Public Archives for the Year 1933* (Ottawa: F.A. Acland, 1932)
SP	E.A. Cruikshank, ed., *The Correspondence of Lieutenant Governor John Graves Simcoe, with Allied Documents relating to his Administration of the Government of Upper Canada*, 5 volumes (Toronto: Ontario Historical Society, 1923)
Story Const.	Joseph Story, *Commentaries on the Constitution of the United States*, 2 volumes, 4th ed. (Boston: Little, Brown & Co., 1873)
TP	C.W. Alvord and C.E. Carter, eds., *Trade and Politics, 1767-1769* (Springfield: Illinois State Historical Library, British Series, volume III, 1921)
TS	Treasury Solicitor Records, Public Record Office (Chancery Lane), London
VSt.	[Virginia], *The Statutes at Large Being A Collection of all the Laws of Virginia*, W.W. Hening, ed. (New York: W. & G. Bartow, 1821-23)
WP	Massachusetts Historical Society, *The Winthrop Papers*, Collections of the Massachusetts Historical Society, 6th series, III (Boston: University Press, 1888)
WSt.	Ivor Bowen, ed., *The Statutes of Wales* (London: T. Fisher Unwin, 1908)

Table of Statutes and Proclamations

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Statutum Walliae (1284) (in *WSt.*, 2-3)
30 Hen. III (1246) (in *ISt.*, 35)
Royal Proclamation of 1763 (in *DRCHC*, 165)

B. Statutes

An Act for Laws and Justice to be ministered in Wales in like Form as it is in this Realm, 27 Hen. VIII, c. 26 (1535)
An Act to amend and render more effectual, in his Majesty's Dominions in America, an Act passed in this present Session of Parliament, intituled, An Act for punishing Muntiny and Desertion, and for better Payment of the Army and their Quarters, 5 Geo. III, c. 33 (1765) ("*Mutiny Act*")
An Act for the better securing the dependency of his Majesty's dominions in "America" upon the crown and Parliament of "Great Britain", 6 Geo. III, c. 12 (1766) ("*Declaratory Act*")
An Act to amend and render more effectual an Act made in the Twenty-first Year of the Reign of King James the First, intituled, An Act for the general Quiet of the Subject against all Pretences of concealment whatsoever, 9 Geo. III, c. 16 (1769)
An Act for making more effectual provision for the government of the province of Quebec, in North America, 14 Geo. III, c. 83 (1774) ("*Quebec Act 1774*")
An Act to repeal certain parts of an act, passed in the fourteenth year of his Majesty's reign, entitled, An act for making more effectual provision for the government of the province of Quebec, in North America; and to make further provision for the government of the said province, 31 Geo. III, c. 31 (1791) ("*Constitution Act 1791*")
An Act for extending the jurisdiction of justice in the provinces of Lower and Upper Canada to the trial and punishment of persons guilty of crimes and offences within certain parts of North America adjoining to the said provinces, 43 Geo. III, c. 138 (1803) ("*Canada Jurisdiction Act*")
An Act to re-unite the Provinces of Upper and Lower Canada, and for the Government of Canada, 3 & 4 Vic., c. 35 (1840) ("*Union Act 1840*")
An Act to make further Provision for the Regulation of the Trade with the Indians, and for the Administration of Justice in the North-Western Territories of America, 22 & 23 Vic., c. 26 (1859)
An Act for the Union of Canada, Nova Scotia, and New Brunswick, and the Government thereof; and for Purposes connected therewith, 30 Vic., c. 3 (1867) ("*British North America Act 1867*")
Constitution Act, 1982, Schedule B to *Canada Act, 1982* (U.K.) 1982, c. 11

II. Ireland

Statutes of Kilkenny (1366) (in *ISt.*, 431-37)
An Act for taking away captainships (1569), 11 Eliz. I, c. 7 (in *ISt.L*, I)

An Act that five Persons of the best and eldest of every Nation amongst the Irisherie shall bring in all the idle Persons of their Surname, to be justified by Law (1569), 11 Eliz. I, c. 4 (in *ISt.L*, I).

III. Colonial Canada

A. Province of Quebec

An Ordinance for establishing courts of civil judicature in the Province of Quebec, 17 Geo. III, c. 1 (1777)
An Ordinance to prevent the selling of strong liquors to the Indians in the province of Quebec, as also to deter persons from buying their arms or cloathing, and for other purposes relative to the trade and intercourse with the said Indians, 17 Geo. III, c. 7 (1777)
An Ordinance for granting a limited civil power and jurisdiction to his majesty's justices of the peace in the remote parts of this province, 25 Geo. III, c. 5 (1785)
An Act or ordinance for promoting the inland navigation, 28 Geo. III, c. 3 (1788)
An Act to explain and amend the Act intitled, "An Act or Ordinance for promoting the Inland Navigation," and to promote the Trade to the Western Country, 31 Geo. III, c. 1 (1791)

B. Province of Lower Canada

An Act for regulating persons who hire or engage to perform voyages to the Indian Country or to Winter there, 36 Geo. III, c. 10 (1796)
An Act to extend to the Inhabitants of the Indian Reservation of Saint Regis and Dundee, the rights, privileges, and advantages enjoyed by the other inhabitants of this Province, 1 Wm. IV, c. 39 (1831)
An Act to appropriate certain sums of Money to the encouragement of Education in this province, 3 Wm. IV, c. 20 (1833)
An Ordinance to repeal certain parts of an Ordinance therein-mentioned, and to amend certain other parts of the said Ordinance, and to provide for the the further protection of the Indians in this Province, 4 Vic., c. 44 (1840)

C. Province of Upper Canada

An Act to repeal certain parts of an act passed in the fourteenth year of his Majesty's reign, entitled, "An act making more effectual provision for the government of the province of Quebec in North America" and to introduce the English law as the rule of decision in all matters of controversy, relative to property and civil rights, 32 Geo. III, c. 1 (1792)
An Act for building a gaol and court houses in every district within this province, and for altering the names of the said districts, 32 Geo. III, c. 8 (1792)
An Act to provide for the nomination and appointment of parish and town officers within this province, 33 Geo. III, c. 2 (1793)
An Act to establish a superior court of civil and criminal jursidiction, and to regulate the court of appeal, 34 Geo. III, c. 2 (1794)
An Act for the better division of this province, 38 Geo. III, c. 5 (1798)
An Act to prevent the sale of spirituous liquors and strong waters in the tract occupied

by the Moravian Indians on the river Thames, in the Western district, 41 Geo. III, c. 8 (1801)

An Act to authorize the inhabitants of the county of Haldimand to hold annual meetings, for the purpose of electing town and parish officers, 50 Geo. III, c. 12 (1810)

An Act to authorize the inquiry and trial of crimes and offences committed within this province, without the limits of any described township or county, to be had in any district thereof, 49 Geo. III, c. 10 (1818)

An Act for the preservation of deer within this province, 2 Geo. IV, c. 17 (1821)

An Act to repeal the laws now in force relative to the preservation of salmon, and to make further provisions respecting the fisheries in certain parts of this province, and also to prevent accidents by fire, from persons fishing by torch or fire light, 2 Geo. IV, c. 10 (1821)

An Act the better to protect the Mississaga tribes living on the Indian reserve of the river Credit, in their exclusive right of fishing and hunting therein, 10 Geo. IV, c. 3 (1829)

An Act to establish a Court of Chancery in this Province, 2 Wm. IV, c. 2 (1837)

An Act to provide for the disposal of the Public Lands in this Province, 7 Wm. IV, c. 118 (1837)

An Act for the protection of the lands of the crown in this province from trespass and injury, 2 Vic., c. 15 (1839)

D. Province of Canada

An Act to provide for the better internal Government, 4 & 5 Vic., c. 10 (1841)

An Act to prevent the Profanation of the Lord's Day, 8 Vic., c. 45 (1845)

An Act to prevent certain Wild Fowl and Snipes from being destroyed, 8 Vic., c. 46 (1845)

An Act to establish a Court of Common Pleas and a Court of Errors and Appeals for this Province, 12 Vic., c. 63 (1849)

An Act to establish Municipal Corporations, 12 Vic., c. 78 (1849)

An Act for the better protection of the Lands and Property of the Indians in Lower Canada, 13 & 14 Vic., c. 42 (1850)

An Act for the protection of the Indians in Upper Canada from imposition, and the property occupied or enjoyed by them from trespass and injury, 13 & 14 Vic., c. 74 (1850)

An Act to authorize the setting apart of Lands for the use of certain Indian Tribes in Lower Canada, 14 & 15 Vic., c. 106 (1851)

An Act for the Management of Public Lands, 16 Vic., c. 159 (1853)

An Act to make better provision for the Administration of Justice in the unorganized tracts of Country in Upper Canada, 16 Vic., c. 176 (1853)

An Act to encourage the gradual Civilization of the Indian Tribes in this Province, and to amend the Laws respecting Indians, 20 Vic., c. 26 (1857)

An Act respecting Game Laws of Upper Canada, 22 Vic., c. 61 (1859)

An Act to prevent trespasses to Public and Indian Lands, 22 Vic., c. 81 (1859)

An Act respecting Indians and Indian Lands, 23 Vic., c. 2 (1860)

An Act respecting the Management of the Indian Lands and Property, 23 Vic., c. 151 (1860).

An Act to change the tenure of the Indian lands in the Township of Dundee, in the County of Huntingdon, 27 & 28 Vic., c. 68 (1864)

An Act to enable to Huron Indians of La Jeune Lorette, to regulate the cutting of wood in their Reserve, 27 & 28 Vic., c. 69 (1864)

E. Native

Wyandot Constitution, 15 May 1843 (*RG10* Vol. 457, 81036-37)
Wyandot Constitution, 11 August 1846 (*RG10* Vol. 441, 899-903)
"By Laws and Regulations for the Indian Village at the Credit", 23 April 1830 (*RG10* Vol. 46, 23976-23983)
Mud Lake Mississaga Constitution, 1845 (*RG10* Vol. 154, 89582)
"A Plan adopted by the Wyandotts", c. 1852 (*RG10* Vol. Vol. 441, 871)
Regulations enacted at a Council between Chiefs of Grape Island, Rice Lake, River Credit, Balsam Lake, Sahgenge, Coldwater and Narrows, 28 January 1836 (*CO* 42/516: 534-536)

IV. Dominion of Canada

An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria, Chapter 42, 32 & 33 Vic., c. 6 (1869)
An Act respecting Indians, R.S.C. 1985, c. I-6 ("*Indian Act*")
An Act to amend and consolidate the laws respecting Indians, 39 Vic., c. 18 (1876) ("*Indian Act*")
Constitution Act, 1982 (see Imperial Statutes)
North-West Territories Act, 49 Vic., c. 25 (1886)

V. Other Colonies

A. Virginia

Virignia Act, 21 Car. I, c. 1 (1646) (in *VSt.*, I, 323)
Virginia Act, 7 Comm., c. 1 (1656) (in *VSt.*, I, 415)
An Act concerning Indians, 14 Car. II, c. 138 (1661-2) (in *VSt.*, II, 138)
An Act prohibiting the entertainment of Indians without badges, 15 Car. II, c. 9 (1663) (in *VSt.*, II, 185)
An Act concerning the Northerne Indians, 15 Car. II, c. 17 (1663) (in *VSt.*, II, 193)
An Act concerning Indians, 17 Car. II, c. 8 (1665) (in *VSt.*, II, 218-9)
An Act ffor destroying Wolves, 21 Car. II, c. 9 (1669) (in *VSt.*, II, 245)
An Act lycensing trading with Indians, 29 Car. II, c. 3 (1677) (in *VSt.*, II, 410)
An Act for prevention of misunderstandings between the tributary Indians, and other her majesty's subjects of this colony and dominion; and for a free and open trade with all Indians whatsoever, 4 Anne, c. 52 (1705) (in *VSt.* III, 464)
An Act for preventing and repelling the hostile incursions of the Indians, at enmity with the inhabitants of this colony, 29 Geo. II, c. 4 (1755) (in *VSt.*, VI, 550)

B. Pennsylvania

The Duke of York's Laws (1664) (in *PSt.*, I, 94)
Pennsylvania Act, 1683, c. 73 (in *PSt.*, I, 146)
Pennsylvania Act, 1684, c. 161 (in *PSt.*, I, 166)
An Act Against Buying Land of the Natives (1700) (in *PSt.* II, 18)
An Act Against Selling Rum and other Strong Liquors to the Indians (1701) (in *PSt.*, II, 168)
An Act for the Better Improving a Good Correspondence with the Indians (1705-6) (in *PSt.*, II, 229)
An Act for Preventing Abuses in the Indian Trade, for Supplying the Indians, Friends and Allies of Great Britain, with Goods at More Easy Rates, And for securing And Strengthening the Peace and Friendship Lately Concluded with the Indians Inhabiting the Northern and Western Frontiers of this Province (1757-8) (in *PSt.*, V, 320)
An Act to Prevent the Hunting of Deer and other Wild Beasts beyond the Limits of the Lands Purchased of the Indians by the Proprietors of this Province (1759-60) (in *PSt.*, VI, 46)

C. Massachusetts

The Book of the General Lawes and Libertyes Concerning the Inhabitants of the Massachusets (1648)
"Indians", in *The Book of the General Lawes and Libertyes Concerning the Inhabitants of the Massachusets, Collected out of the Records of the General Court, May 1649* (1660) (in *Colonial Laws of Massachusetts* (1889), 40-43)
An Act for the Better Rule and Government of the Indians in their Several Places and Plantations (1693/4) (in *MAR*, I, 150)
An Act for giving necessary supplies to the Eastern Indians, and for regulating of Trade with them (1699) (in *Charters...of Massachusetts Bay* (1814), 384)
An Act to Prevent and Make Void Clandestine and Illegal Purchases of Lands from the Indians (1701-2) (in *Charters...Massachusetts Bay* (1814), 471)
An Act for Regulating the Trade with the Eastern Indians (1713-14) (in *MAR*, I, 725)
An Act for Incorporating the Indians and Molattoes, Inhabitants of Mashpee, with their Lands there, into a District, with Certain Privileges; and for their Better Regulation (1763) (in *MAR*, IV, 639)

D. Connecticut

"*Code of 1650*" (in Jenkins, ed., *Records of the States*)
The Book of the General Laws For the People within the Jurisdiction of Conecticut (1673)
An Act for the Well-ordering of the Indians, in their several Places and Plantations (in *Acts ...of Connecticut* (1715), 55-56)
An Act for the more Effectual Well-ordering of the Indians, and for the bringing of them to the Knowledge of the Gospel (1717) (in *Acts...of Connecticut* (1730), 229)
An Act concerning Purchasers of Native Rights to Land (1717) (in *Acts...of Connecticut* (1730), 221)

An Act for well Ordering, and Governing the Indians in this Colony; and Securing their Interests, and Lands therein (1750) (in *Acts and Laws of...Connecticut* (1750), 95)

E. Maryland

An Act Concerning Purchasing Land from the Indians (1640) (in "Laws of Maryland...1640 to 1692", 5)
An Act for Confirmation of the Articles of Peace made with the Indians (1666) (in "Laws of Maryland...1640-1692", 30)
An Act for the Continuance of peace with and protection of our Neighbours and Confederate Indians in Choptanke River (1669) (in "Laws of Maryland...1640 to 1692", 34)
An Act Prohibiting trade with Indians, 4 W. & M., c. 81 (1692) (in "Laws of Maryland...1640 to 1692", 144)
An Act for ascertaining the bounds of a certain Tract of Land to the use of the Nanticoke Indians (1698) (in *A Complete Body of the Laws of Maryland* (1700), 47)

F. North Carolina

An Act for restraining Indians from Molesting or Injuring the Inhabitants of this Government, and for Securing to the Indians the Right and property of their own Lands (1715) (in "Collection of fifty-seven laws, 1715", 179)
An Act for ascertaining the Bounds of a certain Tract of Land formerly laid out by Treaty to the Use of the Tuskerora Indians, 22 Geo. II, c. 3 (1748) (in *Collection of All the Public Acts...of North Carolina* (1751), 273)
An Act for appointing a Militia, 5 Geo. III, c. 1 (1764) (in *Collection of all the Acts of...North Carolina* (1765), II, 309)

G. New Jersey

"The Concessions and Agreements of the Proprietors Freeholders and Inhabitants of the Province of West New-Jersey, in America" (1676), c. 26
New Jersey Act (1668) (in *Grants...Constitutions of...New Jersey* (1758), 88)
An Act for Regulating the Purchasing of Land from the Indians (1703) (in *Laws...of New-Jersey* (1709), 1)
An Act for regulating Indian Affairs, and to prevent the Setting of Deer Traps within the Colony of New Jersey, 30 Geo. II, c. 128 (1757) (in *Acts...of New-Jersey* (1761), 125)
An Act to impower certain Persons to purchase the Claims of the Indians to Land in this Colony, 32 Geo. II, c. 136 (1758) (in *Acts...of New-Jersey*, 212)

H. New York

An Act against Jesuites and Popish Priests (1700) (in *Laws...of New-York* (1719), 37)
An Act for the Encouragement of the Indian Trade, and rendering it more Beneficial to the Inhabitants of this Province, and for Prohibiting the Selling of Indian Goods to the French (1721) (in *Acts of...New York* (1719), 198)

I. Georgia

An Act to prevent private persons from purchasing lands from the Indians, and for preventing persons trading with them without license (1758) (in *Digest...of Georgia* (1802), 257)

J. Rhode Island

Rhode Island Act (1677) (in "Body of Laws...(1663-1705)", 52-53)
An Act for the Preventing of Illegal and Clandestine Purchases of the Native Indians in this Colony (1663) (in *Acts...of Rhode-Island* (1719), 3)

K. New Hampshire

An Act to prevent and make void clandestine and Illegal Purchases of Lands from the Indians (1719) (in *Acts...of New-Hampshire* (1761), 129)

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Chapter One

Introduction:

Aboriginal Self-Government, Constitutional Reform and Legal History

> [L]ong before our Great Mother the Queen took possession of the Country of our red brethren, it has been their custom to elect from among themselves chiefs to preside over the affairs of the different tribes....[I]nstead of suppressing this custom, our Mother the Queen has continued to cherish and foster the same, and its policy has resulted beneficially as respects the[ir] internal affairs....
>
> Mohawk Chief Tekahonwasen, St. Regis, Province of Canada, 1845[1]

> [D]iversitie of lawes and customes makes no breach of that unite of obedience, faith, and allegiance which all liege subjects owe to their liege king and soveraigne lord.
>
> Ellesmere, L.C., *Calvin's Case* (1608)[2]

I. Empires and Legal Pluralism

Nations which built empires were not always interested in exporting their municipal laws to other nations. The objective of empire-building was the augmentation of the imperial state's military and commercial power by the subjection of foreign nations to its control, and this objective was often assisted by the appropriation of local law and government for imperial purposes. Indeed, the political hegemony of an empire often depended upon an imperial constitution which embraced legal pluralism. Of course, where imperialism was implemented through policies of colonialism—that is, through the transplanting of the state's polity in foreign lands—then the success of the imperial project required a degree of accommodation between colonists and local inhabitants, an

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[1]Petition to Lord Metcalfe, Gov. Gen. Can., 26 April 1845, *RG10* Vol. 147, 85119.

[2]*Calvin's Case* (1608), 2 St. Tr. 559, at 684.

accommodation which in turn required that the imperial constitution balance the case for introducing the imperial state's municipal law against the case for respecting the continuity of local law.

The subject of this study is the continuity of aboriginal customary law and government under the British imperial constitution in colonial Canada between 1760 and 1860. It will be argued that there were two parallel legal systems in Canada during this period: the colonial municipal system established under imperial legislation and a less well-known and documented aboriginal customary system which, although originating in a pre-imperial order, continued in force as an element of the imperial common law. Inquiry will be limited to "colonial Canada", which for the purposes of this study is taken to mean that area around the Great Lakes and St. Lawrence Valley which, at the time of confederation in 1867, fell within the Province of Canada.

The proposition that the common law acknowledged the continuity of native[3] customary law and government in Canada has been asserted with increasing frequency by commentators, particularly in relation to the question of aboriginal title to land.[4] However, little effort has been made to analyse in detail the imperial legal status of native customary laws and government in colonial Canada. It has become clear, however, that this element of Canadian constitutional history forms an important part of the normative

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[3]This study uses the terms "native" and "aboriginal" to describe the indigenous peoples, or "First Nations", of North America. The term "Indian" will also be employed; its use is becoming less common in political and legal discourse, although it remains part of Canadian law (s. 35(2) of the *Constitution Act 1982* defines "aboriginal peoples of Canada" as including "the Indian, Inuit and Métis peoples of Canada").

[4]For example, Slattery, *Land Rights of Indigenous Canadian Peoples* (1979), 10-60; Slattery, *Ancestral Lands, Alien Laws* (1983), 10-15; Lester, *Territorial Rights of the Inuit* (1981); Lester, *Inuit Territorial Rights* (1984), 13-21; Elliot, "Aboriginal Title" (1985), 59-60; McNeil, *Common Law Aboriginal Title* (1987), 180-83; Sanders, "Aboriginal Peoples and the Constitution" (1981), 412; Canada, Royal Commission on Aboriginal Peoples, *Partners in Confederation* (1993), 5-21.

context for current debates about constitutional reform and interpretation.

Recent legal and political discourse in Canada has reflected three general theories of aboriginal self-government. At one extreme, courts have ruled that aboriginal government on reserves is a "creature of statute"[5] exercising powers delegated by the federal Parliament under the *Indian Act*.[6] At the other extreme, certain aboriginal leaders maintain that reserves are sovereign enclaves independent from the Canadian state.[7] Most aboriginal leaders, however, take a position between these extremes, arguing that native communities have certain inherent rights of self-government which, although not derived from the Canadian constitutional order, nevertheless form the foundation of a level of government which is a constituent component of that order.[8]

This intermediate position has shifted from the margins to the centre of political discourse. As of the late 1960s it was federal policy to end "separate legal status" for aboriginal peoples.[9] This policy was not pursued, and by the early 1980s "existing aboriginal and treaty rights" had been constitutionally entrenched by s. 35(1) of the *Constitution Act 1982*,[10] a House of Commons committee had suggested that this phrase

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[5]*Heron Seismic Services Ltd. v. Muscowpetung Indian Band*, [1991] 2 C.N.L.R. 52 (Sask. Q.B.), at 55.

[6]R.S.C. 1985, c. I-6.

[7]On Mohawk/Six Nations claims: "Appeal of the 'Six Nations' to the League," *League of Nations Official Journal* (1924), VI, 829; *Logan v. Styres* (1959), 20 D.L.R. (2d) 416 (Ont. H.C.); *Re Stacey and Montour* (1981), 63 C.C.C. (2d) 61 (Que. C.A.); Canada, House of Commons, Standing Committee on Aboriginal Affairs, *Summer of 1990* (1991), 5-6.

[8]For example, Testimony of Georges Erasmus, Canada, House of Commons, Special Committee on Indian Self-Government, *Proceedings* (1983), No. 28: 41-49.

[9]Canada, *Statement of the Government of Canada on Indian Policy* (1969), 5.

[10]*Constitution Act 1982*, enacted as Schedule B to *Canada Act 1982* (U.K.) 1982, c. 11.

might include a "right of self-government" independent of statutory band council powers under the *Indian Act*,[11] and conferences were being held to negotiate further constitutional amendments to acknowledge that right explicitly.[12] Indeed, by 1990 it was generally accepted that constitutional amendments addressing the status of the province of Quebec and the structure of the federal Senate could not be achieved independently of the entrenchment of a right of aboriginal self-government.[13] The package of proposed constitutional amendments known as the Charlottetown Accord of 1992 therefore included the proposition that the constitution recognize that the "Aboriginal peoples of Canada have the inherent right of self-government within Canada", and that federal, provincial and aboriginal governments constituted the "three orders of government" within the federation.[14] With respect to aboriginal law, the Accord provided that, "[e]xcept as otherwise provided by the Constitution of Canada", existing federal and provincial laws continued to apply to natives subject to subsequent displacement "by laws enacted by legislative bodies of the Aboriginal peoples...."[15] This provision has been interpreted as meaning that no aboriginal "traditional laws or customs" could displace federal or provincial law unless "specifically enacted" by aboriginal governments.[16]

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[11]Canada, House of Commons, *Report of the Special Committee on Indian Self-Government in Canada* (1983), 43.

[12]Canada, *Aboriginal Peoples, Self-Government and Constitutional Reform* (1991), 13.

[13]Quebec, National Assembly, Commission on the Political and Constitutional Future of Quebec, *Report* (1991), 67; Canada, Citizen's Forum on Canada's Future, *Report to the People* (1991), 126-7; Canada, *Shaping Canada's Future* (1991), 7; Canada, Parliament, Special Joint Committee of Senate and House of Commons, *Report: A Renewed Canada* (1992), 28; Ontario, Legislative Assembly, *Final Report of the Select Committee on Ontario in Confederation* (1992), 30.

[14]Canada, Draft Legal Text, Charlottetown Accord, 9 October 1992.

[15]*Ibid.*

[16]Saskatchewan, *The Charlottetown Agreement* (1992), 10.

With the rejection of the Charlottetown Accord (which included other fundamental changes to the constitution unrelated to aboriginal rights) by national referendum the legal status of native law and government in Canada remains contingent upon judicial interpretation of the "existing aboriginal and treaty rights" secured by s. 35(1) of the *Constitution Act 1982*. The Royal Commission on Aboriginal Peoples has suggested that the Charlottetown Accord recognized that aboriginal peoples already have an inherent right to self-government cognizable in Canadian law, and that notwithstanding the failure of the effort to entrench the principle explicitly the principle is legally sound and is implicitly protected as an existing aboriginal right under s. 35(1).[17] This argument may be extended to the question of customary law as well. Although the Accord provided that native law would not displace other laws unless specifically enacted by natives, it may be argued that by qualifying that provision with the clause "[e]xcept as otherwise provided by the Constitution of Canada" it implicitly recognized that there was already a body of aboriginal customary law protected from conflicting federal and provincial laws by s. 35(1).

The determination of the legal status of aboriginal law and government under s. 35(1) therefore involves inquiry into the historical status of that law and government under the Canadian constitution. The Canadian constitution is a direct descendant of British colonial constitutions in Canada, and therefore reference must ultimately be made to the status of native law and government in British colonial and imperial law. It is to assist the modern interpretation of aboriginal rights, then, that this study undertakes an historical analysis of the status of native law and government in British law as applied to colonial Canada.

In addressing this issue, this study follows the general approach taken by other

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[17]*Partners in Confederation, op. cit.*

commentators, such as Brian Slattery and Paul McHugh, who identify as the legal foundation of aboriginal rights the *common law principle of continuity*.[18] This principle provides that the existing laws of nations over which Britain asserted sovereignty were presumed to continue in force at common law until either confirmed, altered or abrogated by prerogative or Parliamentary legislation. It will be argued that the principle of continuity forms a common doctrinal basis for several competing theories of aboriginal rights. One such theory is reflected in the work of Geoffrey Lester and Kent McNeil and recent judicial opinions in *Mabo v. Queensland* and *Delgamuukw v. The Queen*.[19] It concludes that certain aboriginal customs in former British "settlements" were incorporated and protected by the local colonial legal systems introduced for settlers. While that theory may be applicable to such former British colonies as Australia and British Columbia, the central argument of this study is that it fails to explain adequately the continuity of native law and government in colonial Canada, and that an alternative explanation of aboriginal rights must be developed which accounts for the continuity of native laws and governments in colonial Canada as distinct municipal systems sanctioned by imperial law but separate from the local municipal law introduced for settlers. The premise of Bruce Clark's work, that native law and government was protected by imperial instead of local colonial law, represents a step in the right direction in this respect.[20] However, because Clark focuses on the importance of imperial legislation (namely the *Royal Proclamation of 1763*) his conclusions on the common-law status of native law and

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[18]Slattery, *op. cit.*; McHugh, *Aboriginal Rights of the New Zealand Maori* (1987), chs. 4, 5; McHugh, "Aboriginal Title in New Zealand Courts" (1984), 235; McHugh, *Maori Magna Carta* (1991), ch. 4.

[19]Lester, *op. cit.*; McNeil, *op. cit.*; McNeil, "A Question of Title" (1990); *Mabo v. Queensland* (1992), 107 A.L.R. 1 (H.C.A.); *Delgamuukw v. The Queen* (1993), 104 D.L.R. (4th) 470 (B.C.C.A.).

[20]Clark, *Native Liberty, Crown Sovereignty* (1990).

government are incomplete. This study places comparatively less emphasis on imperial legislation and focuses instead upon the status of aboriginal rights according to non-statutory principles of imperial constitutional law, or "imperial common law".

To this end, Part One of this study develops a theoretical model of British imperial law applicable to the constitutional history of colonial Canada. Chapter Two analyses the origins and general implications of the principle of continuity; Chapters Three and Four consider how this interpretation was reflected in the statutes and judicial opinions relating to British North American colonies of the seventeenth and eighteenth centuries; and Chapter Five compares this interpretation to other competing interpretations of imperial law developed in the nineteenth and twentieth centuries. Part Two of this study applies the model of imperial law developed in Part One to the constitutional history of colonial Canada. Chapters Six and Seven consider the status of native customary law and government under the *Royal Proclamation of 1763* and the *Quebec Act 1774* respectively; and Chapters Eight, Nine and Ten consider the status of native law and government under the regimes established by the *Constitution Act 1791* and the *Union Act 1840*, with Chapter Eight focusing upon the situation in unceded Indian lands, and Chapters Nine and Ten examining the situation on Indian reserves from the perspective of imperial and local municipal law respectively.

II. Interpretative Perspective

All examinations of aboriginal rights must confront difficult questions about interpretative perspective. These questions are raised by the effects both of the passage of time and of cultural difference on legal interpretation. As Dickson C.J. has observed, the "biases and prejudices" of the past are "no longer acceptable in Canadian law" and are "inconsistent with a growing sensitivity to native rights in Canada".[21] Indeed, in recent years courts have offered "redemptive" interpretations of law in this area, re-working its express manifestations to meet conceptions of justice and fairness perceived to be inherent to the idea of law.[22] The judicial interpretative perspective reflected by these decisions is no different from that taken by judges in the on-going process of re-articulating common law and constitutional principles generally—a process which, given the ambiguity between empirical and normative statements of law, represents neither strict adherence to precedent nor judicial legislation but something in between.

While the judicial interpretative perspective embraces the ambiguity between the empirical and the normative, the historical interpretative perspective does not. If, as a matter of *fact*, the law was biased and prejudiced, then the legal historian is committed to presenting that fact (or at least to presenting the empirical facts to which one can apply acceptable normative standards so as to determine that the law was indeed biased and prejudiced). The difficulty in answering the question of what as a matter of *historical fact* was the legal status of native law and government in colonial Canada, is that the traditional sources of law offer only partial answers, forcing the historian to inquire into a subsidiary question: what as a matter of *law* would the judgment of courts of the relevant period have been in relation to the matter? Given the passage of time, the intervening changes to political morality, the cultural background of the historian, and the inherent susceptibility of legal interpretation to the influence of all these factors, it is

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[21]*Simon v. The Queen*, [1985] 2 S.C.R. 387, at 399. *Cf.* Williams, *American Indian in Western Legal Thought* (1990), 6-7 (law was mere "instrument" for "genocidal conquest" of natives in North America).

[22]On "redemptive constitutionalism", see Cover, "Nomos and Narrative" (1983), 33-34. For example, *Mabo v. Queensland* (1992), 107 A.L.R. 1, *per* Brennan J. at 24-5 (common law can be "modified to bring it into conformity with contemporary notions of justice and human rights" if to do so does not "fracture the skeleton of principle which gives the body of our law its shape and internal consistency").

difficult to see how an answer to this question could be definitive.

This study therefore adopts an interpretative perspective intermediate between the redemptive and historical perspectives. It concedes that its conclusion—native law and government *was* recognized by British imperial law in colonial Canada—may be, at least in part, the indirect product of modern conceptions of the constitutional status of aboriginal nations in Canada as understood by a non-aboriginal observer; however, it seeks to support this answer with legal arguments which would have been acceptable during the relevant historical period. This modified historical perspective differs from the redemptive perspective because it is constrained by principles of law which a modern court might discard as contrary to modern standards of political morality.

In short, the purpose of this study is not to determine whether there is an "existing" aboriginal right to customary law and government under s. 35(1) of the *Constitution Act 1982*, but to determine the historical status, *from the perspective of British law*, of that right between 1760 and 1860. The conclusions it reaches therefore include propositions which are doubtless "no longer acceptable in Canadian law".[23] However, the articulation of these conclusions is meant not to preclude but to facilitate redemptive interpretations which might purge these conclusions from current manifestations of law.

III. Identifying the Relevant Systems of Law

The subject of this study is the weaving together of otherwise foreign legal systems, and it is therefore necessary to begin by defining the respective systems. A distinction will be made between five basic systems of law. The *law of nations*, or *jus gentium*, will be referred to primarily in its classical sense, as rules and principles derived

[23] *Supra* note 21.

from ancient and medieval imperial practices and from philosophical applications of the *jus naturae* to the conduct of nations. *British imperial law* will mean that body of common law and legislation governing the extension of British sovereignty over foreign lands and peoples, and determining the constitutions of and governing relations between the various components of the British empire. *British municipal law* will mean the bodies of common law and legislation governing the internal affairs of these components respectively. A distinction will be drawn between three systems of municipal law: *English municipal law*, or the common and statutory laws relative to England's internal affairs, *colonial municipal law*, or the common and statutory laws relative to the internal affairs of particular British colonies, and *native municipal law*, or the customary and written laws of native nations within the territories of British colonies.

The borders between these systems of law are potentially obscured in two ways. First, distinctions between different bodies of substantive law were not always manifested institutionally. Although each municipal system had its own institutions, those of the English municipal system served to a certain extent as British imperial institutions as well. Second, borders between each system are obscured by the tendency of each system to incorporate elements of law from other systems. Of course, each of the three British municipal systems were, in a sense, incorporated into British imperial law insofar as they derived legitimacy from the imperial constitution; indeed, the continuity of native municipal law as an element of imperial law is the subject of this inquiry. However, other types of inter-system incorporation were possible. Colonial municipal law often consisted of relevant parts of English municipal law and, potentially, elements of native customary law; conversely, native municipal law occasionally incorporated rules derived from either English or colonial municipal law. Finally, the principal source of imperial common law, other than judicial interpretation of crown usage and practice, was the *jus* *gentium*.

Of course, these different examples of incorporation are not strictly analogous and do not share the same constitutional foundation. At this point, however, it important to emphasize that the arguments of this study are premised upon the idea that, although semi-permeable, identifiable borders—not necessarily territorial—separated the various systems of law. Indeed, the task of determining the legal status of native law and government in colonial Canada is ultimately a matter of constructing—from an historical record which was rarely explicit about such things—a theory about the location of those borders.

IV. Native Law and Government

It is beyond the scope of this study to analyse fully the content of aboriginal customary law. It is important, however, to identify the salient characteristics of that law in relation to the native nations of colonial Canada. The constitutions of the Huron, Six Nations and Ojibwa nations provide illustrative examples.

A. Political and Kindred Units

Aboriginal society in the Great Lakes Region was a village society. A culturally distinct people, or nation, consisted of one or more villages, and several nations with common cultural traditions often united to form a confederacy. The *Wendat*, or Huron, confederacy consisted of four nations, and the *Haudenosaunee* confederacy, called Iroquois by the French and Five (later Six) Nations by the British, consisted of the Mohawk, Seneca, Onondaga, Oneida, Cayuga and (as of the 1720s) Tuscorara nations. The Ojibwa (called Chippewa or Mississaga[24] by the British) were a series of loosely associated bands sharing a common language and cultural tradition but no permanent political institutions.

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[24]Various spellings of "Mississaga" were used; this study uses that in *An act the better to protect the Mississaga tribes* (1829), 10 Geo. IV, c. 3 (U.C.).

Under the Huron and Iroquois constitutions there were village, national and confederal councils; however, the structure and jurisdiction of each council was ultimately determined by a fourth unit, the clan, which disregarded village and national lines. Aboriginal conceptions of law and government were informed by a social order in which ties of kinship, both actual and spiritual, provided the normative force. The clans (sometimes called bands or tribes) created by these ties divided nuclear families and linked individuals from different villages and nations together as "brothers" and "sisters" on the basis of their assumed descent from common animal ancestors.[25] As siblings, members of the same clan could not intermarry, and upon marriage men and women kept their original clan membership.[26] Under Huron and Iroquois law clan membership was matrilineal, under Ojibwa law it was patrilineal.[27] The population of a village or nation therefore consisted of members of a variety of clans, these same clans having members in the villages of other nations in the confederacy; in other words, villages and nations were aggregations of what Trigger calls "clan segments".[28] Within the Five Nations, the Mohawk consisted of members of the Wolf, Bear and Turtle clans, while the Seneca consisted of members of the Wolf, Bear, Turtle, Beaver, Deer, Snipe, Heron, and Hawk

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[25]Clans were "totemic" as opposed to "agnatic" or "cognatic": Vinogradoff, *Outlines of Historical Jurisprudence* (1920), I, 204-5.

[26]Huron: Brébeuf, "Relation of the Hurons" (1636), *JR*, X, 213; Powell, *Wyandot Government* (1881), 63. Iroquois: *GBL*, §43; Morgan, *League of the Ho-De-No-Sau-Nee* (1851), 82; Clark, *Onondaga* (1849), I, 49. Ojibwa: Warren, *History of the Ojibways* (1853), 35.

[27]Huron: Powell, *ibid.*, 59-60; Trigger, *Huron: Farmers of the North* (1969), 55. Iroquois: *GBL*, §44. Ojibwa: Warren, *ibid.*; Morgan, *Houses and House-Life of the American Aborigines* (1881), 8; Densmore, *Chippewa Customs* (1929), 10; Landes, *Ojibwa Sociology* (1937), 31.

[28]Trigger, *ibid.*, 55.

clans.[29]

The web of spiritual kinship reflected by the clan system not only tended to secure political unity between nations but contributed significantly to defining the legal composition and jurisdiction of their various councils. The basic unit of government was the chief (as advised by councils of male and female elders) of each clan segment in each village.[30] Meetings of clan-segment chiefs constituted village, national and confederal councils.[31] The Iroquois constitution deviated from this general rule somewhat by limiting the right to sit on national and confederal councils to fifty sachems who held ceremonial titles.[32] These titles were owned by particular lineages within particular clans, and were not distributed equally among the various nations or among clans of particular nations.[33] Meetings of Ojibwa band chiefs in "General Council" may be considered *ad hoc* confederal councils.[34]

B. Constitutional Customs Relating to Chiefs and Councils

In his 1724 account of aboriginal customs in North America, Lafitau asserted:

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[29]Morgan, *Houses, op. cit.*, 7-8.

[30]Lafitau, *Moeurs des Sauvages Ameriquains* (1724), 464; *GBL*, §§94-95; Sagard, *Le Grand Voyage Du Pays des Hurons* (1632), 148; Powell, *op. cit.*, 61.

[31]Champlain, *Voyages et Descouuertres Faites en la Nouuelle France* (1619), 157-59; Sagard, *ibid.*, 148-9; Brébeuf, *loc. cit.*, 212-13, 230-33, 250-51; Lafitau, *ibid.*, 463-64; Colden, *History of the Five Nations* (1747), 2; Jones, *History of the Ojebway Indians* (1861), 107-110; Tooker, *Ethnohistory of the Huron* (1964), 42; Trigger, *op. cit.*, 55, 74-76; Powell, *ibid.*, 61; *GBL*, §97.

[32]Hale, *Hiawatha and the Iroquois Confederation* (1881) and *Iroquois Book of Rites* (1883).

[33]Distribution of hereditary sachemships: Mohawk-9, Oneida-9, Onondaga-14, Cayuga-10, Seneca-8: Morgan, *League, op. cit.*, 64-5.

[34]Jones, *op. cit.*, 105; Schmalz, *Ojibwa of Southern Ontario* (1991), 11-12.

"Chaque Nation a sa forme de Gouvernement".[35] He proceeded to describe Huron and Iroquois constitutional customary law regarding the selection of chiefs as follows:

> "La dignité de Chef est perpétuelle & hereditaire dans sa Cabane [lineage], passant toujours aux enfans de ses tantes, de ses soeurs, ou de ses nieces du côté maternel...La Matrone, qui a la principale autorité, après en avoir conferé avec ceux de sa Cabane, en confere de nouveau avec ceux de la Tribu [clan] à qui elle a choisi pour succèder, ce qui lui est assez libre.[36]

This statement identifies the three salient features of aboriginal customary law in this respect. First, the succession of chieftainship was determined by a combination of hereditary right and election. In essence, the clan and lineage of a deceased chief had the right to elect his successor from amongst their male members.[37] Second, to the extent that the chieftainship was hereditary, its descent was matrilineal. While this was true of the Huron and Iroquois,[38] in Ojibwa law descent of chieftainships was patrilineal.[39] Third, to the extent that the chieftainship was elective, the electors were limited to certain members of the lineage within the clan in which the office inhered. In Huron and Iroquois law selection was by clan mothers in consultation with male elders; in Ojibwa law, selection was by "principal men".[40] Chiefs chosen by this method were civil chiefs. In general, civil and military responsibilities were strictly distinguished, and civil chiefs

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[35]Lafitau, *op. cit.*, 456.

[36]*Ibid.*, 471-2.

[37]Huron: Brébeuf, *loc. cit.*, 233. Iroquois: *Dekan. Code*, 97. Ojibwa: Copway, *Traditional History and Characteristic Sketches of the Ojibway Nation* (1850), 140; Jones, *op. cit.*, 107.

[38]Lafitau, *op. cit.*, 471-72; Powell, *op. cit.*, 61; Tooker, *op. cit.*, 46-47; Morgan, *League, op. cit.*, 84-87; Hale, *Book of Rites, op. cit.*, 29-30.

[39]Jones, *op. cit.*, 107; Copway, *op. cit.*, 140; Warren, *op. cit.*, 335.

[40]Huron: Powell, *op. cit.*, 61; Tooker, *op. cit.*, 45-6. Iroquois: *GBL*, §54; *Dekan. Code*, 97; Hale, *Book of Rites, op. cit.*, 29 and *Hiawatha, op. cit.*, 14; Parker, *Constitution of the Five Nations* (1916), 11. Ojibwa: Jones, *ibid.*, 107.

were unable to intrude upon the exclusive right of war chiefs to lead war parties.[41]

There were no separate legislative, executive and judicial aboriginal institutions; instead, the various constituent components of native society met in council to negotiate a consensus on each matter of common concern. A council resolution was binding upon clan segments only insofar as their chiefs had agreed to be bound,[42] and even after consensus was reached there were no coercive means by which individuals could be made to comply.[43] Aboriginal customary law developed strict procedures to ensure the attainment of consensus between chiefs-in-council,[44] and between councils and the people,[45] and not coercive sanctions to force compliance.

C. Territorial versus Personal Jurisdiction

The transition from tribal to political society, argued Maine, occurred when a nation settled in a definite territory and that territory replaced kinship as the determinative factor in the exercise of jurisdiction; at that point, the nation asserted "territorial sovereignty" instead of "tribal sovereignty".[46] Insofar as each nation in the Huron and Iroquois confederacies and each local Ojibwa band held and defended its own clearly

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[41]Powell, *ibid.*, 61; Tooker, *ibid.*, 42-43; Trigger, *op. cit.*, 69, 71; Morgan, *League, op. cit.*, 72-73; Warren, *op. cit.*, 319; *GBL*, §§36-41.

[42]*GBL*, §8.

[43]Colden, *op. cit.*, 2; Champlain, *op. cit.*, 157-58; Sagard, *op. cit.*, 148-49.

[44]*GBL*, §§5-11; Guy Johnson, Ind. Dept. Supt., to A. Lee, 28 March 1772, *JP*, XII, 950-953.

[45]Iroquois clan mothers could "correct and admonish" chiefs and "repossess" the title if they disregarded the welfare of the people or the laws of the confederacy: *GBL*, §§18-20, 25, 52; *Dekan. Code*, 106.

[46]Maine, *Early History of Institutions* (1875), 72-73.

defined territory it must be concluded that they exercised territorial sovereignty.[47] Supporting this conclusion is the recognition that, within national territories, rights of property were recognized in clans,[48] and land use was regulated by clan, village and national councils.[49]

However, the application of customary law and jurisdiction in matters unconnected with land use was clearly contingent upon kinship, not territory.[50] As Lafitau observed: "L'autorité des Chefs s'étend proprement sur ceux de leur Tribu [clan], qu'ils considerent comme leurs enfans...."[51] This conclusion is reflected by native methods of dispute resolution. In general, allegations of crime gave rise to certain collective responsibilities: members of the victim's household, clan, village or nation were under a duty to seek satisfaction from members of the accused's household, clan, village or nation. To avoid cycles of violence, chiefs from the opposing units met in council to perform "ceremonies of condolence" which were designed to achieve reconciliation by the payment of presents. Although no independent trier of fact presided, these councils did exercise jurisdiction

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[47]Huron: Powell, *op. cit.*, 65; Trigger, *op. cit.*, 74-75. Iroquois: *GBL*, §73; Morgan, *Houses, op. cit.*, 79. Ojibwa: Jones, *op. cit.*, 107, 113-14; Copway, *op. cit.*, 140.

[48]*GBL*, §42 (clans "sole owners" of land), §44 (clan mothers hold clan land for members); Sir W. Johnson, Ind. Dept. Supt., to Board of Trade, 30 Oct. 1764, *DRCHSNY*, VII, 670-2 ("Each Nation is perfectly well acquainted with their exact original bounds, the same is again divided into due proportions for each Tribe [clan], and afterwards subdivided into shares to each family").

[49]Huron: Powell, *op. cit.*, 65 (Wyandot land held in common; divided among clans by national council and among households by clan mothers). Iroquois: *GBL*, §§42, 44; Morgan, *League, op. cit.*, 314, 326, and *Houses, op. cit.*, 79 (land held by clan mothers and divided by clan councils among households). Ojibwa: Hickerson, *Land Tenure of the Rainy River Chippewa* (1967), 41-42.

[50]*GBL*, §§66-70, 75 (aliens could only benefit from rights of nation upon establishing ties of "blood" by adoption into a clan).

[51]Lafitau, *op. cit.*, 472-73.

over the dispute governed by established customary rules of procedure.[52] The point to emphasize, however, is that this jurisdiction was determined by the *personal* status of the victim and the accused, not *territorial* considerations: disputes were subject to the lowest level of council which encompassed the clan councils of both criminal and victim.[53]

D. Summary

The central principles underlying the Huron, Iroquois and Ojibwa constitutions therefore included: the importance of kindred units, selection of clan chiefs by hereditary succession and election, councils with personal as opposed to territorial jurisdiction, aversion to curtailment of individual liberties by coercive laws and institutions, and collective clan rights and responsibilities in land and criminal law. These customs have been described as "native law and government" notwithstanding the on-going jurisprudential debate about whether "tribal" customs amount to "law". Some eighteenth-century British officials asserted that natives had "no law",[54] while others insisted that that proposition had to be "understood in a Limited Sense" for they had "Customs & usages that am[oun]t thereto...."[55] Although this debate continues,[56] it is not one which will be

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[52]Powell, *op. cit.*, 66; Brébeuf, *loc. cit.*, 215-17; Lafitau, *op. cit.*, 491; Tooker, *op. cit.*, 52-3; Trigger, *op. cit.*, 78-82.

[53]Lafitau, *ibid.*, 486, 490; Trigger, *ibid.*, 73-77; Powell, *ibid.*, 66; Morgan, *League, op. cit.*, 332 and *Houses, op. cit.*, 10-12.

[54]W. Bull, Lt. Gov. S. Carolina, to Board of Trade, 24 Dec 1764, *CO* 323/20: 67-68 (natives "have no Law but their will"); Gov. Hunter, N.Y., to Earl Dartmouth, 14 March 1713, *CSP* (1712-14), #295 (natives in "state of nature", "free from all rules"); G. Johnstone, Gov. W. Florida, to Board of Trade, 3 Jan. 1765, *CO* 323/20: 84-5 ("Constitution of the Indian Governments...founded on the admiration of Heroick fame" not "Coercive Laws"); generally, Pownall, *Administration of the Colonies* (1765), 157-8.

[55]Johnson to Lee, *supra* note 44.

[56]Austin, *Lectures on Jurisprudence* (1869), 104, 204 and 237-38; Malinowski, *Crime and Custom in Savage Society* (1926); Gluckman, *Politics, Law and Ritual in Tribal Society* (1967), 169-215; Diamond, *Primitive Law Past and Present* (1971); Pospisil, *Anthropology of Law* (1971).

addressed in this study. The question to be addressed is not whether native customs and chiefs constituted law and government, but whether they gained some status in British imperial law. The expression "native law and government" will be used because of the belief that the concept of law and government is broad enough to include customary legal systems, but the conclusions of this study are not contingent upon that attitude and are not altered under a jurisprudential approach which denies it.

PART ONE

The Development of General Legal Principles Relating to the Continuity of Native Law and Government in British North America

The common-law theory of aboriginal rights has long been plagued by debates about the implications of the categorization of British colonies as "conquered" or "settled". The basic assumption of British imperial law was that, as Blackstone stated, upon settlement of uninhabited territory "all the English laws then in being, which are the birthright of every subject, are immediately there in force" but in conquered or ceded countries "the ancient laws of the country remain" subject to the crown's right to legislate under the royal prerogative.[1] It has been often asserted that British colonies in North America, Australia and New Zealand were "settlements" in which English municipal law ran automatically and to which the common-law principle of continuity, which might have recognized native customary law, could not apply.[2] The origins and accuracy of this interpretation of imperial law have been the focus of considerable academic scrutiny. Many commentators argue that seventeenth-century American colonies were initially considered to have been acquired by conquest or cession from native nations and (therefore) governed by crown prerogative alone; their status as settlements was the result of a re-interpretation of constitutional history designed to ensure the inherent right of settlers to English law and its protections against the prerogative. The purpose of categorizing colonies as settlements therefore was to define legal relations among settlers and between settlers and the crown, and not to define legal relations among natives or

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[1]*Bl. Comm.*, I, 107.

[2]For a summary of this argument see, for example, Australia, Law Reform Commission, *Recognition of Aboriginal Customary Law* (1986), I, Pt. I, §§64-66.

between natives and the crown.[3]

The purpose of Part One of this study is not to challenge or to re-argue these conclusions but to develop a theoretical framework of imperial law within which the analysis of Canadian constitutional history in Part Two may be made. To construct this theoretical framework, it is necessary to review the general principles of imperial law and their application to North America. In this respect, the conclusions of Part One are consistent with the above-noted argument. However, Part One also provides analysis of certain principles of law and judicial opinions which have not been accorded sufficient attention in the past and which are important to the determination of the common-law status of native customs in former British colonies. Although the settled/conquered colony debate may have been resolved in one sense, it continues to dominate the subject of aboriginal rights in another sense: even if it is accepted that native customs continued in force at common law in so-called settled colonies, the question remains whether they continued in force as part of the colonial municipal legal system introduced for settlers or as part of distinct native municipal systems. The analysis of this question requires a re-interpretation of British imperial law which emphasizes the distinctions between imperial, colonial and native systems of law and the rules governing their interaction. The purpose of Part One of this study is to provide such a re-interpretation.

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[3]Goebel, *Struggle for the Falkland Islands* (1927),105-7; Goebel and Naughton, *Law Enforcement in Colonial New York* (1944), 2-6, 12-13; Brown, "British Statutes in the Emergent Nations of North America" (1963), 96, 105-6; Swindler, "Rights of Englishmen since 1776" (1976), 1083-97; Slattery, *Land Rights of Indigenous Canadian Peoples* (1979), 13-44; Lester, *Territorial Rights of the Inuit* (1981), 430-33, 590, 595, 614-15; Lester, *Inuit Territorial Rights* (1984), 9-10, 17; McHugh, *Aboriginal Rights of the New Zealand Maori* (1987), 113-36; McHugh, *Maori Magna Carta* (1991), 41-42.

Chapter Two

General Principles of British Imperial Constitutional Law

I. Sources of Imperial Law

Jurists of the seventeenth and eighteenth centuries distinguished between *lex non scripta*—unwritten law derived from ancient usage and practice—and *lex scripta*—written law enacted by some entity with legislative powers, like Parliament.[4] The *lex non scripta* included the common law of England, which, narrowly defined, was a body of "general custom" applied by crown courts throughout England.[5] However, the *lex non scripta* also included both "particular customs", followed in particular localities, which deviated from the common law,[6] as well as legal principles from external sources (like Roman law) which had been "admitted and received" by English law through "immemorial usage and custom".[7] These latter two parts of the *lex non scripta* were recognized by common-law courts, and therefore may be considered as part of the common law, broadly defined.

From at least the early seventeenth century, English courts recognized a distinct body of legal principles governing imperial as opposed to municipal matters. The concept of "municipal law" was expressly acknowledged, as was the idea that England and its imperial possessions might be governed internally by "several and distinct municipal laws".[8] Principles governing the relationship between these components were also articulated by courts. However, the label "imperial law" was not initially used to

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[4]*Bl. Comm.*, I, 63-4; *Calvin's Case* (1608), 2 St. Tr. 559, at 671.

[5]*Ibid.* Also, *Case of Ship-Money* (1637), 3 St. Tr. 826, at 1227.

[6]*Rowles v. Mason* (1612), 2 Brownl. & G. 192; *Bl. Comm.*, I, 76-78.

[7]*Bl. Comm.*, I, 79.

[8]*Calvin's Case* (1608), 7 Co. Rep. 1a, at 19b. Also, *Bl. Comm.*, I, 63, 109.

describe these principles, perhaps because this term was traditionally associated with "papal" and "civil" law.[9] Instead, reference was made to the "law in dominions"[10] or the "Law of Plantations".[11]

Courts recognized two principal sources of imperial law: the *jus gentium* and crown usage and practice. Judicial reference to both sources is illustrated by *Calvin's Case* (1608) which addressed the constitutional relationship between England and Scotland. In response to the argument that the "jus gentium" be applied to the question, there being "no precedent for it in the law",[12] Ellesmere L.C. stated that because the issue at bar did not transcend crown sovereignty the "common-lawe can and ought to rule"; nevertheless, he continued, the common law "extends itselfe to...the universall lawe of nations...."[13] In contrast, Coke C.J. relied upon the law of nature, as incorporated by the law of England, and as evidenced by crown usage and practice developed in relation to England's medieval empire.[14]

In fact, crown usage and practice and the *jus gentium* were not wholly distinct sources of imperial legal principle--the *jus gentium* only acquired binding force in English law because of crown usage and practice. In determining the rights of the crown over English subjects trading with "infidel" nations abroad, Jefferies C.J. observed that "the

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[9]*Bl. Comm.*, I, 79 ("papal or imperial laws"); *East-India Co. v. Sandys* (1683-85), 10 St. Tr. 371, at 523 ("imperial or civil law").

[10]*Process into Wales* (1668-74), Vaugh. 395, at 418.

[11]Opinion of Holt, Pollexfen and others (c. 1675), *DRCHSNY*, XIII, 486.

[12]*Calvin's Case* (1608), 2 St. Tr. 559, at 563.

[13]*Ibid.*, 669.

[14]*Calvin's Case* (1608), 7 Co. Rep. 1a, at 12b, 18b-23b.

common and statute laws of this realm are too strait and narrow" to govern, and, in such cases, courts had to "take notice of the law of nations", which, having been "received and used in England time out of mind, may be properly said to be laws of England".[15] Thus, courts identified imperial legal principles as they did constitutional principles generally, with reference to usage and custom.[16]

Imperial legal principles derived by courts from crown usage and practice or the *jus gentium* were non-statutory, and although they were not part of the (municipal) common law of England, they were, like all other parts of the law which derived binding force from ancient usage and practice (including the municipal common law of England), part of England's *lex non scripta*. As such they may be regarded as forming a distinct part of the *lex non scripta*—a *lex imperialis non scripta*. Because this *lex imperialis non scripta* consisted of non-statutory legal principles articulated by common-law courts they may be viewed as forming part of the common law, broadly defined. For the purposes of this study this body of principle is therefore called the "imperial common law" and is distinguished from the common law narrowly defined, or "municipal common law".

As the *lex non scripta* contained elements of imperial law, so did the *lex scripta*. The positive sources of imperial law included statutes of the English (later British) Parliament,[17] as well as instruments of the crown issued pursuant to the royal prerogative

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[15]*East-India Co. v. Sandys* (1683-85), 10 St. Tr. 371, at 529, 523.

[16]*Hale Prerog.*, 7 (public law derives from "the common custom and usage of the kingdom"); *Case of Ship-Money* (1637), 3 St. Tr. 826, *per* Finch, C.J. at 1227 ("The common law is but the common usage of the land" and examples of crown practice are "good authority to prove the laws" on the prerogative).

[17]*Declaratory Act* (1766), 6 Geo. III, c. 12 (Imp.); *Bl. Comm.*, I, 109.

and passed under the great seal.[18] In certain cases, royal instructions to colonial officials under royal sign manual and signet also had legislative force.[19]

II. The Imperial Common Law and Imperial Expansion

The general principles of British imperial common law relating to the assertion of sovereignty over foreign lands and peoples may be summarized as follows: (a) upon the assertion of British sovereignty over a foreign territory by conquest or consent the territory's inhabitants generally became subjects of the British crown; (b) the crown had the right to govern the territory under the royal prerogative, subject to any treaties in force; (c) although subjects, the inhabitants of the territory were presumed to be governed by their own laws, to the extent that those laws were not (i) contrary to British sovereignty, (ii) contrary to British conceptions of justice and humanity, or (iii) expressly altered or abrogated by the crown; (d) British sovereignty over uninhabited or abandoned territories was established by discovery and occupation (or settlement); and (e) British settlers in newly-acquired territories retained their rights and liberties as subjects, and where their settlements were established in uninhabited or abandoned territories, or amongst peoples whose laws were unsuitable for their purposes, they were governed by those elements of existing English statute and common law appropriate to local circumstances.

In this chapter, these principles are examined with reference to commentaries and judicial opinions of the seventeenth and eighteenth centuries rendered in relation to Britain's territorial acquisitions other than North America.

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[18]*Campbell v. Hall* (1774), Lofft 655, at 741-42; *Bl. Comm.*, I, 108; *Chitty Prerog.*, 34.

[19]*Bl. Comm.*, *ibid.*; *Chitty Prerog.*, *ibid.* Royal instructions constituting legislative and judicial institutions had legal force, those directing courses of policy did not: Roberts-Wray, *Commonwealth and Colonial Law* (1966), 146-47; Swinfen, "Legal Status of Royal Instructions" (1968), 38-39.

III. Crown's Rights over Conquered/Ceded Territories

During the course of establishing sovereignty over a territory by conquest or cession, the crown's policies toward local inhabitants—its "acts of state"—were beyond judicial review.[20] This state of affairs lasted after the actual conquest and/or cession until the crown extended to local inhabitants the rights of British subjects. Even then, British imperial law recognized the crown's right to legislate without Parliament for these new subjects.[21] In exercising this right the crown was not limited by the existing constitution or law of the acquired territory,[22] although it was bound by the terms of articles of capitulation or treaties of cession. These treaties were "inviolable",[23] but in the absence of legislative enactment were not justiciable in municipal courts.[24] The crown's right to legislate under the prerogative was subject to Parliament's right to intervene and ceased upon the introduction of a local legislature for the territory.[25]

IV. Continuity of Local Law in Conquered/Ceded Territories

A. The *Jus Gentium* and the Common Law

Although the law of nations acknowledged the conqueror's right to rule the conquered at will, it also recognized that obligations of "humaneness" and considerations

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[20]Generally, O'Connell, *State Succession* (1967), I, 250-56.

[21]*Calvin's Case* (1608), 7 Co. Rep. 1a, at 17b; *Witrong v. Blany* (1674), 3 Keb. 401, at 402; *Anon.* (1722), 2 P. Wms. 75, at 75-76; *Campbell v. Hall* (1774), Lofft 655, at 741-42.

[22]The crown was bound by the local constitution if the conquest was *victoria in regem*, where only the preceding sovereign was displaced, as opposed to *victoria in populum,* where the crown purported to conquer the sovereign and people: *Case of Ship-Money* (1637), 3 St. Tr. 826, at 1214-5; Grotius, *De Jure Belli* (1626), Bk. III, Ch. VIII, Pt. I, §3; *Hale Prerog.*, 4; *Hale Comm. Law*, 75.

[23]*Campbell v. Hall* (1774), Lofft 655, at 741.

[24]*Nabob of Carnatic v. East-India Co.* (1793), 2 Ves. Jun. 56.

[25]*Campbell v. Hall* (1774), Lofft 655, at 741-2.

of "prudence" combined to temper the manner in which that right was typically exercised.[26] Consequently, it was an established principle of the *jus gentium* that the forced or consensual inclusion of a people within an imperial regime did not necessarily serve to destroy their legal system; their government and laws might continue as before, not as an independent system, but as an element of the imperial order under which it had been subsumed. Recognizing local law was "prudent" because a subjected people content with their old laws would be less likely to rebel and, by recognizing the continued authority of local rulers, the imperial power might acquire useful "instruments of subjection".[27]

The idea that a people's local laws and government might remain in force after their inclusion within a larger imperial order was expressed in British imperial law as a common-law presumption: although the crown could rule the territory at will, unless an instrument of the royal prerogative could be shown to alter or abrogate local law, British courts held that it continued in force.[28] In determining how this presumption applied under various constitutional conditions it is important to identify its doctrinal foundations. On the one hand, arguments of counsel and opinions of crown law officers suggest that courts adopted the principle directly from the *jus gentium*.[29] On the other hand,

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[26]Grotius, *op. cit.*, Bk. III, Ch. VIII, Pt. I, §1; Ch. XIII, Pt. IV; *Hale Comm. Law*, 76.

[27]Grotius, *ibid.*, Bk. III, Ch. XV, Pts. IX and X; *Hale Comm. Law, ibid.*

[28]*Calvin's Case* (1608), 7 Co. Rep. 1a, at 17b; *Case of Tanistry* (1608), Davis 28, *per* plaintiff at 30; *Craw v. Ramsey* (1669), 2 Vent. 1, at 4; *Witrong v. Blany* (1674), 3 Keb. 401, at 402; *Dawes v. Painter* (1674), 1 Freem. 175, at 176; *Dutton v. Howell* (1693), Show. 24, *per* plaintiff at 31; *Blankard v. Galdy* (1693), 4 Mod. 215, at 225-226, Holt K.B. 341, at 342; *Anon.* (1722), 2 P. Wms. 75; *Campbell v. Hall* (1774), Lofft 655, at 741.

[29]Maseres, Att. Gen. Que., *Supplement to the Tract written in the year 1766* (c. 1767), 91 ("It is a well known and undisputed maxim of the law of nations, adopted and confirmed by the law of England, that the laws of a conquered people continue in force

commentators of the seventeenth and eighteenth centuries emphasized English sources for the principle. The indigenous roots of the common law were emphasized and the authority of the crown under the royal prerogative was de-emphasized by that theory of the constitution which was premised upon the supposed continuity of Saxon law after the Norman Conquest.[30] In this respect the principle of continuity came to be regarded not so much as a guide for imperial expansion abroad as a foundational principle of English municipal law at home—and, in this sense, the assertion of the principle was less a conclusion of law than an argument of political theory.[31]

While considerations of prudence, humanity and political theory all formed part of the normative context in which judicial decisions were made, they were nevertheless policy considerations which, on their own, fail to support satisfactorily a *common-law* principle of continuity. Without discounting the importance of these other factors, then, the doctrinal foundation for the principle of continuity may be viewed as the necessity of maintaining social order combined with respect for the division of judicial and legislative

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till they are expressly changed by the will of the conquering nation"). Also, Marriott, Adv. Gen., *Plan of A Code of Laws for The Province of Quebec* (1774), 12; Opinion of E. Thurlow, Att. Gen., 22 Jan. 1773, *DRCHC*, 440, 443; *Case of Tanistry* (1608), Davis 28, *per* plaintiff at 30 (principle derived from "la ley del nations"); *Campbell v. Hall* (1774), 20 St. Tr. 239, *per* defendant at 278-79 (citing Grotius); *The King v. Picton* (1804-1812), 30 St. Tr. 225, *per* crown at 906.

[30]Plowden, *Jura Anglorum* (1792), 79; Price, *General View of the Laws...of England* (1799), 20. Commentators and courts argued that either the Norman Conquest was *victoria in regem*, and therefore had no effect on existing law (*Hale Prerog.*, 10; *Hale Comm. Law*, 77; *Case of Ship-Money* (1637), 3 St. Tr. 826, at 1214-5) or, if *victoria in populum*, the Conqueror had confirmed the continuity of existing law (*Hale Comm. Law*, 95). The former argument was regarded as weak (De Lolme, *Constitution of England* (1775), 9-10, fn. a; Reeves, *History of the English Law* (1787), I, 28-30); however, it was accepted that large parts of existing law and local custom were recognized by the Normans (Reeves, 30; *Case of Ship-Money*, *per* Banks, Att. Gen. at 1021; *Bl. Comm.*, I, 66-7).

[31]Yale, "Hobbes and Hale on Law, Legislation and the Sovereign" (1972), 127-28, 133.

functions. Courts were often required to determine the state of the law in newly-acquired territories before the crown had made a decision as to the permanent nature of the territory's constitution. By "necessity" they were driven to recognize the continuity of local law: aside from prudential concerns about discouraging rebellion, the maintenance of basic social order precluded recognition by the common law of either a legal vacuum or the *ipso facto* applicability of English law. Indeed, unless judges were to assume the role of legislators and pre-empt the decisions of the crown in this respect, they could not declare the introduction of English or any other law; their only option was to presume the continuity of the legal *status quo* existing upon the assertion of British sovereignty.[32] It is for this very practical reason, then, that courts presumed that local laws remained in force.

B. Limitations Inherent in the Principle of Continuity

The effect of the principle of continuity was to transform foreign laws into British laws. As a result, certain limitations were built into the principle. First, those parts of the local legal system the continuity of which was inconsistent with the system's inclusion within British sovereignty and imperial government were considered *ipso facto* abrogated. Thus, local laws continued in force "excepting in point of soveraignty".[33] The acquisition

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[32]*Blankard v. Galdy* (1693), 4 Mod. 215, at 225-226 ("though a conqueror may make new laws, yet there is a *necessity* that the former should be in force till new are obtained" [emphasis added]); Maseres, Att. Gen. Que., *Considerations...for the Settlement of the Province of Quebec* (1766), 261 (continuity derived from "the *necessity* of the case, since otherwise the conquered provinces would be governed by no laws at all" [emphasis added]); *The King v. Picton* (1804-1812), 30 St. Tr. 225, *per* Lord Ellenborough at 946 ("the old laws continue till the new are introduced, or they must be positively in a lawless state").

[33]*Process into Wales* (1668-74), Vaugh. 395, at 400.

by the local legal system of a new sovereign root, or "rule of recognition",[34] did not, however, result in the *ipso facto* abrogation of all elements of local constitutional or public law, or all local judicial and governmental institutions.[35] Of particular relevance to this study is the assertion by seventeenth-century courts that the organization of Irish kindred units, or *septs*, and constitutional customs relating to the selection and powers of Irish *sept* chiefs (which, in certain respects at least, resembled tribal customs in North America), remained in force after the English conquest of Ireland.[36]

In acquiring a new rule of recognition, local law became subject to the moral parameters inherent to that rule. Thus, the second limitation built into the principle of continuity was that those elements of local law contrary to British conceptions of justice and humanity were considered *ipso facto* abrogated. The development of this rule by courts was gradual. Initially, morality and religion were regarded as synonymous, and it was concluded that all laws of Christian nations continued in force and all laws of infidel nations were *ipso facto* abrogated.[37] Eventually it was recognized that some laws of infidel nations might qualify for common-law continuity and some laws of Christian

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[34]Hart, *Concept of Law* (1961), 114-116.

[35]*Campbell v. Hall* (1774), Lofft 655, at 742 (crown "may change part or all of the political form of Government"), at 744 (sometimes the "old constitution continues").

[36]*Le Irish Custome de Gavelkind* (1606) Davis 49 (every "Irish sept ou lineage" had "un chiefe" who under the Irish custom of gavelkind re-apportioned all sept land amongst members upon the death of a possessor); *Case of Tanistry* (1608), Davis 28, at 34-35 (chief was "officer per vie tantum" who, "per le custome de tanistry", was the most dignified elder of a lineage according to "le opinion de multitude" as determined "per election"); *Blankard v. Galdy* (1693), 2 Salk. 411, 4 Mod. 215, at 225 (after English conquest but before introduction of English law, Irish customs, including "custom of *tanistry*", remained in force).

[37]*Calvin's Case* (1608), 7 Co. Rep. 1a, at 17b; *Witrong v. Blany* (1674), 3 Keb. 401, at 402; *East-India Co. v. Sandys* (1683-85), 10 St. Tr. 371, *per* counsel at 374-5.

nations might not.[38] The test therefore came to be expressed in general terms: any law which was "*malum in se*" ceased automatically upon the assertion of British sovereignty.[39]

C. Transition from "Presumption" to "Right": Crown Recognition of Local Law

Under the continuity principle courts recognized local law without legislative directions to do so. Given the extraordinary scope of the royal prerogative in conquered or ceded territory, it must be concluded that the common-law presumption that local law continued to govern local inhabitants did not amount a legal *right* to local law justiciable against the crown. Before courts could recognize such a right they had to determine whether the crown had confirmed the introduction of the rule of law (thus precluding further acts of state) and whether that rule of law included local law; once a right to local law had been confirmed, the crown could only alter or abrogate it with valid prerogative legislation, or (if a local legislature had been introduced or recognized) by local or imperial statute.

The initial confirmation, alteration or abrogation of local law by the crown was usually by express legislative instrument.[40] Thus, after the conquest of Wales, Edward I reviewed Welsh customs and in the *Statutum Walliae* (1284) declared: "We have...abolished certain of them, some thereof We have allowed, and some We have corrected; and We have likewise commanded certain others to be ordained and added thereto...."[41] Under certain conditions, however, a legal right to the continuity of local

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[38]*Blankard v. Galdy* (1693), 2 Salk. 411; *The King v. Picton* (1804-1812), 30 St. Tr. 225, *per* crown at 906; *Fabrigas v. Mostyn* (1773), 20 St. Tr. 82, at 181.

[39]*Anon.* (1722), 2 P. Wms. 75, at 76.

[40]The form of instrument was not important as long as it was public: *Cameron v. Kyte* (1835), 3 Knapp. 332, at 346-47.

[41]*Statutum Walliae* (1284), *WSt.*, 2-3. Also, *Buckley v. Rice Thomas* (1554), 1 Plow. 118, at 126; *Co. Inst.*, II, 195.

law was confirmed in the absence of express legislative recognition. Said Hale: "if...by a long prescription, usage and custom, the laws and rights of the conquered people were in a manner settled, and the long permission of the conquerors amounted to a tacit concession or capitulation, for the enjoyment of their laws and liberties", then the continuity of local laws ceased to be a mere "indulgence" on the part of the conqueror and the privilege of continuity ceased to be "resumable" at the will of the conqueror.[42]

Of course, if the transition of continuity from presumption justiciable among individuals to right justiciable against the crown could be achieved by crown usage and practice, the point in time at which it occurred was potentially blurred. At what point did crown usage or practice amount to tacit confirmation that local inhabitants of conquered territories had legal rights to their own laws as English subjects? What sort of evidence would a court consider in determining crown usage or practice? Generally speaking, principles of constitutional law could be derived, said Hale, from any official state documents which represented "the best evidence both *facti* and *juris* of the nature and extent of government...."[43] The judicial practice of relying upon official state documents (which otherwise lacked legislative authority) in the imperial legal context was discussed in *Craw v. Ramsey* (1669). In that case it was stated that where municipal courts were unsure about which peoples were subjects of the crown reference was to be made to those "leagues or treaties" which determined the extent and terms of imperial expansion; and if such treaties were not public, courts were to "address themselves to the King" who "doubtless" had a "roll" indicating "what parts...were in his liegeance, what not...."[44] Later courts would identify in more detail the sorts of evidence of crown usage and

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[42]*Hale Comm. Law*, 76-77.

[43]*Hale Prerog.*, 7.

[44]*Craw v. Ramsey* (1669), Vaugh. 274, at 288.

practice relevant to the judicial determination of the constitution of newly-acquired territories.[45]

D. Crown Sovereignty and Local Jurisdictions

The crown was regarded by the common law as the source and fountain of justice, and the lawful exercise of all judicial or governmental jurisdictions was regarded as dependant upon franchise or delegation from the crown.[46] The exercise of a jurisdiction unsupported by crown grant represented "a great usurpation upon the prerogative of the King" which royal courts could prevent by writ of *quo warranto*.[47] However, the crown's position as fountain of justice was not inconsistent with the common law's recognition of local jurisdictions established by custom and usage. With respect to England's municipal constitution, for example, the counties palatine of Durham, Chester and Lancaster enjoyed rights of *jura regalia*, or "local sovereignty",[48] which included the right to criminal and civil jurisdiction, the right to "exemption from the ordinary power and process of the common law" and the right to "exemption from obligation by an ordinary act of parliament".[49] It was stated that Durham and Chester derived palatinate rights by "prescription", "usage" or "immemorial custom"[50] which was (according to

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[45]*Infra* ch. 5, II, A.

[46]*Hale Prerog.*, 179.

[47]*Dominus Rex v. Staverton* (1606), 1 Bulst. 54, *per* Croke J.; *The King v. Valentine Boyles* (1729), 2 Stra. 836.

[48]Holdsworth, *History of English Law*, I (1903), 50, n. 1.

[49]*Hale Prerog.*, 212. Also, *Bishop of Durham's Case* (1570), 3 Dyer 288b; *Co. Inst.*, IV, 212-15; *Bl. Comm.*, I, 116-19.

[50]*Le Case de Countie Palatine de Wexford* (1612) Davis 58, at 62; *Co. Inst.*, IV, 211, 216; *Hale Prerog.*, 217-18; *Bl. Comm.*, I, 116-117.

Blackstone) "at least as old as the Norman conquest".[51] However, it was also asserted that by "prescription" was not meant "mere prescription", for the exercise, without crown grant, of rights of *jura regalia* would have compromised the crown's position as fountain of justice.[52] The common law therefore "*presumed*"[53] that there were "ancient grants of Kings"[54] which supplemented the force of custom or prescription in securing rights of jurisdiction. In the case of lesser governmental and judicial jurisdictions established by customary or immemorial usage (like local city, village and parish governmental authority) resort to such presumed grants was apparently not necessary.[55] In short, in municipal law courts were accustomed to recognizing local jurisdictions in absence of express crown grant, and there seems no reason why the same principle could not be applied in a modified way in the imperial context.

E. Continuity and Feudalism

Prior to the emergence of a clear distinction between concepts of property and sovereignty, the incorporation of a foreign people within English sovereignty was typically articulated as the incorporation of its rulers within the English system of feudal land tenure. Thus, although English sovereignty over Ireland was considered to have

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[51]*Bl. Comm.*, I, 116.

[52]*Cotton v. Johnson* (1689), 3 Salk 110.

[53]*Hale Prerog.*, 201.

[54]*Cotton v. Johnson* (1689), 3 Salk 110.

[55]*Mayor and Commonalty of London v. Gatford* (1674), 2 Mod. 39, 1 Freem. 203; *Vaughan v. Wood* (1674), 2 Mod. 56; *The King v. Valentine Boyles* (1729), 2 Ld. Raym. 1559, 2 Stra. 836; *Hale Prerog.*, 175-76; *Bl. Comm.*, I, 74; S. and B. Webb, *English Local Government* (1906), I, 4-6.

been established by conquest during the reign of Henry II or shortly thereafter,[56] this conquest did not lead to English government of the Irish; instead, it was argued that sovereignty was manifested feudally through the submission of Irish chiefs and kings in "homage and fealtie" such that their kingdoms were held from the English crown.[57] Likewise, Wales was regarded as originally a nation distinct from England having its own laws and princes, but at some stage the Welsh princes began to hold the nation as feudal tenants "in Chiefe, and in Fee" from the English crown.[58]

The establishment of a proprietary link between England and other nations did not have the effect of abrogating local laws; the Welsh, for example, were not subjected to English law, courts or government, but remained under "their owne municipall and homebred Lawes, and the Customes of their Country".[59] The continuity of indigenous laws and jurisdictions after the establishment of English sovereignty was therefore easily explained by feudal law: foreign rulers, laws and jurisdictions became tenants *in capite*, seignorial customs and seignorial jurisdictions respectively. However, the seignorial customs and jurisdictions of feudal principalities were less like typical manorial rights and

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[56]*Calvin's Case* (1608), 7 Co. Rep. 1a, at 22b; *Craw v. Ramsey* (1669), 2 Vent. 1, at 4; *Hale Prerog.*, 33.

[57]Davis, *Discoverie of the State of Ireland* (1613), 48. Also, Spenser, *View of the State of Ireland* (1613), 14; *Hale Prerog.*, 32-33.

[58]Dodridge, *History of the Ancient and moderne Estate of the Principality of Wales* (1630), 3. Also, *Buckley v. Rice Thomas* (1554), 1 Plow. 118, at 129; *Witrong v. Blany* (1674), 3 Keb. 401, at 404; *Co. Inst.*, II, 195; *Hale Prerog.*, 21-22.

[59]Dodridge, *ibid.*, 33. Also, *Buckley v. Rice Thomas* (1554), 1 Plow. 118, at 129; *Calvin's Case* (1608), 2 St. Tr. 559, at 684; *Process into Wales* (1668-74), Vaugh. 395, at 398; *Craw v. Ramsey* (1669), Carter 184, at 188; *Witrong v. Blany* (1674), 3 Keb. 401, at 402, 404.

more like the special rights associated with counties palatine.[60]

F. Continuity of Local Law after Express Introduction of English Municipal Law

The continuity of local law at imperial common law was subject to abrogation by the crown in council or in Parliament. In general, the express legislative introduction of English *municipal* law into the territory constituted an implicit abrogation of the *imperial* common-law continuity of local law. This general rule was, however, subject to two qualifications.

1. The shire-ground argument

In both Wales and Ireland, the introduction of English municipal law was contingent upon the organization of territory into "shire ground". A sixteenth-century statute introduced English law into Wales and thereby abrogated those aspects of Welsh custom which had been recognized by the *Statutum Walliae*.[61] This statute also constituted remaining unorganized land into counties or shires, the importance of which was explained by Dodridge J.:

> [S]ome other Territories in *Wales* were then no shire grounds, by reason whereof the lawes of *England* could have no currant passage therein. For all the ordinary Ministers and executioners of the processe of the Lawes of *England*, or which have Vicountiell jurisdiction, are the Officers of particular Shires, as the Sheriffs, the Coroners, the Escheators, and such like. Therefore by the said Act of Parliament, there are erected in *Wales*, foure other new ordayned Shires of the Lands not formerly so divided....[62]

The absence of crown "Officers" in unorganized lands did not mean that the crown lacked sovereignty, or that it could not by special commission create *ad hoc* tribunals or

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[60] *Rex v. Cowle* (1759), 2 Burr. 834, at 851.

[61] 27 Hen. VIII, c. 26 (1535); *Buckley v. Rice Thomas* (1554), 1 Plow. 118; *Co. Inst.*, IV, 240; *Craw v. Ramsey* (1669), Carter 184, at 188; *Bl. Comm.*, I., 94-5.

[62] Dodridge, *op cit.*, 40-1.

designate the courts of neighbouring jurisdictions to enforce English law therein,[63] but as long as the territory was outside shire ground, the failure to take such extraordinary steps to enforce English law would have left a legal vacuum unless local laws and jurisdictions were regarded as continuing in force. This point is illustrated by the Irish example.

English courts of the seventeenth century concluded that after the establishment of English sovereignty over Ireland by conquest during the reign of Henry II Irish law continued in force. As a matter of historical fact the conquerors may have initially ignored Irish law.[64] Nevertheless, from the judicial perspective of the seventeenth century, Anglo-Irish constitutional history was one of the first manifestations of the common-law principle of continuity: Irish law retained a *de jure* status after the conquest until the crown exercised its right to introduce alternative laws.[65] This right was exercised by King John. Enclaves of English (Norman) colonists were soon established, and John, "by his letters patent, in right of the dominion of conquest", introduced English municipal law to the island in 1211.[66] Apparently these letters patent did not expressly limit English law to either English colonists or the English "pale";[67] however, it was accepted that English law applied only in the pale, and that Irish law continued

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[63]*Witrong v. Blany* (1674), 3 Keb. 401, at 404.

[64]Hand, *English Law in Ireland* (1967), 172-186.

[65]*Calvin's Case* (1608), 7 Co. Rep. 1a, at 17b-18a, 22b, 2 St. Tr. 559, at 684; *Craw v. Ramsey* (1669), 2 Vent. 1, at 4; *Dawes v. Painter* (1674), 1 Freem. 175, at 176; *Blankard v. Galdy* (1693), 2 Salk. 411, 4 Mod. 215, at 225.

[66]*Bl. Comm.*, I., 100. Also, *Co. Inst.*, IV, 358; *Hale Comm. Law*, 189; *Craw v. Ramsey* (1669), 2 Vent. 1, at 4; *Dawes v. Painter* (1674), 1 Freem. 175, at 176.

[67]See confirmatory charter: 30 Hen. III (1246) (in *ISt.*, 35).

elsewhere.[68] Thus, although royal charters introducing English law were "generall", English law was not put into "execution" until territory was reduced and divided into "counties" and possessed by "English colonies"; outside the limits of "shire-ground" there were no "ministers de le ley" and therefore the King's writ could not run.[69] As Holt C.J. concluded in 1693, even after the legislative introduction of English law into a conquered territory like Ireland the "ancient laws" remained in force "because, for a time, there must want officers, without which our laws can have no force...."[70]

Indeed, until the sixteenth century it was English policy to leave the Irish to be governed "by their own barbarous *Lords* and *Lawes*".[71] The authority of local chiefs was only abolished in 1569 when it was enacted that none of the "lords and chiefteins" residing "within any the shire ground of this realm" be permitted to claim "the authoritie or name of captain or ruler of any countrey, cantrede, or territorie, being now shire ground, or hereafter to be made shire ground", unless granted such authority by letters patent.[72] However, in the unorganized territories, indigenous constitutions were left intact: in the same year it was enacted that the elders of every "stripe or nation of the Irishrie" (which by this time included descendants of both the native Gaelic and earlier

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[68]Bacon, "Argument...In the Case of the Post-Nati" (1608), 660. The *Statutes of Kilkenny* (1366), 40 Edw. III, §IV (in *ISt.*, 431-37), prohibited use of Irish law in English colonies and the *Case of Tanistry* (1608), Davis 28, at 39, interpreted these statutes as confirming that the Irish, among themselves, were governed "per lour barbarous customes, come devant". *Contra*: *Co. Inst.*, IV, 358-59 (after John's charter, Ireland was "governed by one law"; only with "scandall" could law of "English pale, and the wilde Irish" be distinguished).

[69]*Case of Tanistry* (1608), Davis 28, at 37. Generally, Curtis, *History of Ireland* (1970), 115.

[70]*Blankard v. Galdy* (1693), 2 Salk. 411.

[71]Davis, *op. cit.*, 256-57. Also, Spenser, *op. cit.*, 54-5.

[72]*An Act for taking away captainships* (1569), 11 Eliz. I, c. 7 (in *ISt.L*, I). Also, Davis, *ibid.*, 250-1.

English/Norman invaders who had adopted local customs[73]) in "countries that bee not as yet shire grounds, and till they bee shire ground" convey all "idle Persons" of their clans to crown officers "to be justified by Law".[74] In other respects, Irish chiefs were recognized as being responsible for governing their communities.[75] Read together, these two statutes suggest that the general introduction of English municipal law by charter did not have the effect of abrogating existing laws and institutions, that the full introduction of English law was contingent upon the organization of territory into shire ground, and that, until then, existing institutions, and presumably the constitutional customs by which they were defined, continued in force. However, the statutes also suggest that it was not the organization of territory *per se* which triggered the application of English law, but rather the presence of some mechanism capable of conveying offenders to an English court, and, paradoxically, in unorganized territories existing native institutions could be appropriated by statute to fulfil that task.

The shire-ground principle, then, is the application of the principle of continuity by courts after the legislative introduction of English municipal law into a newly-acquired territory but before the introduction of crown officers (typically commissioned by shire or county) capable of enforcing that new law. The traditional judicial deference to legislative authority was, under these transient conditions, outweighed by the judicial aversion to social disorder associated with recognizing a legal vacuum: until steps were taken to enforce English law in a *de facto* way, local laws retained the *de jure* status which, by the imperial common law, they had before the legislative introduction of the

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[73]Curtis, *op. cit.*, 114.

[74]*An Act that...every Nation amongst the Irisherie shall bring in all the idle Persons* (1569), 11 Eliz. I, c. 4 (in *ISt.L*, I).

[75]Curtis, *op. cit.*, 110-11, 179-80.

alternative legal system.

2. The hybrid continuity/particular custom rule

The continuity of Saxon law after the Norman Conquest provided the earliest English precedent for the principle of continuity.[76] Thus, the principle may be argued to explain the survival in common law of certain "remnants and patches" of pre-Norman law, like the customs of gavelkind and borough-english.[77] However, gavelkind and borough-english are more often cited as examples of "particular" customs which derived legitimacy at common law not as remnants of another legal regime but because they were reasonable, certain and consistent customs to which the inhabitants of particular localities had acquiesced as if compulsory since time immemorial.[78] Thus, although the continuity and particular custom principles may have descended from a common source, they were apparently distinct principles by the seventeenth century, the former being part of the imperial *lex non scripta* the latter being part of the municipal *lex non scripta.*

Notwithstanding the distinction between the two principles, they nevertheless operated in tandem under certain constitutional conditions. Under the principle of continuity local law continued in force as an element of British *imperial* law, in part because English *municipal* law had not been introduced into the territory. Once English municipal law was introduced, and the territory was organized into shire ground, then local law was presumably abrogated. However, if local law continued to be followed in

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[76]*Warren's Case* (n.d.) (pre-Conquest rights enforced against Conqueror's grantee), discussed in *Case of Tanistry* (1608), Davis 28, at 41 and *Witrong v. Blany* (1674), 3 Keb. 401, at 402. Generally, *Earl of Derby v. Duke of Atholl* (1751), 2 Ves. Sen. 337, *per* counsel.

[77]*Calvin's Case* (1608), 2 St. Tr. 559, at 670. Also, *Case of Tanistry* (1608), Davis 28, at 40; *Clements v. Scudamore* (1701), 2 Ld. Raym. 1024; *Blackborough v. Davis* (1701), 1 P. Wms. 41; *Fisher v. Nicholls* (1701), 3 Salk. 127; *Bl. Comm.*, I, 74-5; De Lolme, *op. cit.*, 122.

[78]*Bl. Comm.*, I, 76-78.

particular places, it was held that it might be recognized by the newly-introduced English common law as a particular custom.[79] It is important to observe, however, that both the particular custom and the continuity principles are needed to explain the common law's recognition of local customs under these conditions. On the one hand, the particular-custom principle cannot, on it own, explain the common-law recognition of customs in territories newly acquired by Britain—after all, its purpose is to explain the legal status of customs which have been exercised, *notwithstanding the general applicability of the English common law*, since time immemorial.[80] On the other hand, the principle of continuity only served to create a presumption of continuity of existing law until its abrogation by the introduction of an alternative legal system, and it would have ceased to be relevant after the introduction of English municipal law as the common law of the territory. However, by weaving the two rules together the continuity of local customs after the introduction of English municipal law and the organization of territories into shire ground can be explained: to the criteria of the municipal particular-custom rule other than the immemoriality criterion can be added the criteria of the imperial-continuity

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[79]*Anon.* (1579), 3 Dyer 363b (continuity of local Welsh custom not abrogated by 27 H. VIII, c. 26 (1535), which introduced English law into Wales, because it was "agrecable to some customs in England" and because English law was "to be ministered in like form as in this realm"), discussed at *Case of Tanistry* (1608), Davis 28, at 40; *Blankard v. Galdy* (1693), 4 Mod. 215 (K.B.), at 225 (local laws continued until English law was introduced, but "even then some of their old customs may remain").

[80]*Chamberlain v. Harvey* (1696), 1 Ly. Raym. 146, 5 Mod. 182, illustrates problems inherent to applying principle of immemorial rights to newly-acquired territories: defendant argued (5 Mod. 182) that slave could not have been villein attached to plantation in Barbados "for then the plaintiff and his ancestors must be seised of this *negro* and his ancestors time out of memory of man, which could not be, because Barbardoes was acquired to the English within the memory of man...." *Cf.* Sir E. Northey, Att. Gen., 1713, *Forsy.*, 161-62 (New York acquired "within time of memory" therefore "no prescription can be there against the Crown").

principle to make a hybrid rule.[81] In essence, the continuity of law from a preceding legal system displaced the need for immemorial usage, the original reason for which was the need to ensure that customs did not derive from illegitimate sources.

By making the continuity of an indigenous custom under English municipal law contingent upon its meeting the criteria of the particular-custom rule (other than immemoriality), the threshold of recognition was raised considerably from that of the *malum in se* test of imperial common law. First, the custom would have to have been particular to a certain locality even prior to the introduction of English municipal law, for if it had been general to the territory it would have been abrogated by the introduction of a competing general legal system; second, at least in relation to customs governing property rights, the custom would have to have met the municipal common law's unique standards of certainty and reasonableness, as well as the requirements arising from the concept of seisin.[82]

G. The Theory of "Exclusive Continuity"

It has thus far been argued that the principle of continuity served to *include* previously foreign laws within British imperial law. It is important to contrast this theory of continuity with that which considered the *de facto* continuity of local laws in territories over which Britain asserted sovereignty as the continuity of a foreign legal system which

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[81]*Cf. Case of Tanistry* (1608), Davis 28, *per* plaintiff at 30: principle of continuity in *Calvin's Case* cited for proposition that custom of tanistry survived English conquest of Ireland, and Kentish custom of gavelkind cited for proposition that custom survived introduction of English municipal law.

[82]*Case of Tanistry* (1608), Davis 28, at 37, holding custom on selection of *sept* chieftainship invalid as rule of property descent; *Le Irish Custom de Gavelkind* (1606), Davis 49, holding Irish custom of gavelkind, by which *sept* chief periodically redistributed *sept* common land, invalid at common law. Implicit to both cases was the idea that, had the system of *sept* landholding and the powers of *sept* chiefs been more similar to manorial tenure and jurisdictions in England, their continuity as particular customs at municipal common law might have been possible.

remained *excluded* from British imperial law. The two theories may be labelled respectively the "inclusive" and "exclusive" theories of continuity.

The essence of the exclusive-continuity theory is reflected in the early seventeenth-century interpretation of Anglo-Irish constitutional history presented by the Attorney General for Ireland, Sir John Davis. Davis argued in relation to Ireland that, although the crown "doth beare the Title of *Soveraigne* Lord of an entire country", it could not be "justly" asserted that that country was "wholly conquered".[83] In his opinion, the submission of Irish chiefs as feudal tributaries did not yield to the crown "true Soveraignetie", a conclusion he supported by reference to the fact that the Irish retained their government, laws and ability to make peace and war among each other.[84] The *Case of Tanistry* (1608)—or at least Davis' report of it—adopted this approach. The defendant argued and the court accepted that, notwithstanding the claim of English sovereignty from the time of Henry II, the Irish were only gradually reduced to the subjection of the English crown over subsequent centuries.[85] Until the late sixteenth century, the "meere Irish" outside territories possessed by "English colonies" remained outside the rule of law.[86] Under this approach Irish law may have continued in force, but only as a foreign legal system and not as part of the English imperial constitutional regime.

V. English Sovereignty over Uninhabited Territories

In addition to conquest and cession, the *jus gentium* and the common law recognized the acquisition by a nation of territorial sovereignty over uninhabited places

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[83]Davis, *op. cit.*, 6-7.

[84]*Ibid.*, 14-15, 48-49.

[85]*Case of Tanistry* (1608), Davis 28, at 37.

[86]*Ibid.*

which it first discovered and occupied.[87] The historical root of the discovery and occupation—or settlement—rule was the Roman private-law concept of *occupatio*, which explained the acquisition of property by individuals in things which had no previous owner.[88] However, this rule could not be extended to the public international context without an important amendment: the first nation to occupy a territory belonging to no one acquired not only rights of *property* in but rights of *sovereignty* over the territory.[89]

A territory's constitutional status could shift from conquest to settlement if, upon conquest, the local inhabitants abandoned the territory in such numbers that the condition of the place resembled an uninhabited territory.[90]

VI. Rights of English Settlers

A. In Settled Territories

Although Hale recognized that English settlers carried with them "liberties incident to their persons" when they went to a territory acquired by discovery and occupation, he insisted that English law did not govern until it was introduced by

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[87]Vitoria, *De Indis* (1557), Sec. II, §3; Grotius, *op. cit.*, Bk. II, Ch. II, Pts. II, IV, XVII, Ch. III, Pts. IV, and XIX; Pufendorf, *De Jure Naturae et Gentium* (1688), Bk. IV, Ch. VI, §14; Vattel, *Law of Nations*, Bk. I, Ch. XVIII, §§203-5; Wolff, *Jus Gentium* (1764), Ch. I, §85, Ch. III, §291; *Hale Prerog.*, 43, n. 1; *Daws v. Sir Paul Pindar* (1674), 2 Mod. 45, *per* counsel at 47; *Anon.* (1722), 2 P. Wms. 75; *Bl. Comm.*, I, 106-7. For influence of *jus gentium* on English courts: *East-India Co. v. Sandys* (1683-85), 10 St. Tr. 371, at 526 (analysis paralleled Grotius); *Geary v. Barecroft* (1667), 1 Sid. 346, at 347 (law of occupancy derived from "le ley de nature"); *Dutton v. Howell* (1693), Show. 24, *per* counsel at 32 (by "the Law of Nations" Barbados acquired by "Occupancy").

[88]Lindley, *Acquisition and Government of Backward Territory* (1926), 10-14; Goebel, *Struggle for the Falkland Islands* (1927), 65-95; Lester, *Territorial Rights of the Inuit* (1981), 197.

[89]Grotius, *op. cit.*, Bk. II, Ch. III, Pt. IV, §1; Vattel, *op. cit.*, Bk. I, Ch. XVIII, §205; Wolff, *op. cit.*, Ch. I, §85.

[90]*R. v. Vaughan* (1769), 4 Burr. 2494, at 2500; *Campbell v. Hall* (1774), Lofft 655, at 745-46.

legislative instrument, and that until then the crown had the "sole power of making laws".[91] By the end of the seventeenth century, however, it was decided that imperial common law recognized the *ipso facto* introduction of relevant parts of English municipal law, including existing statutes, into territories acquired by discovery and occupation (or settlement); settlers carried English municipal law with them as their "birthright".[92] Until the establishment of local institutions settlers were able to resort to courts at Westminster to enforce rights under English law without violating common-law principles regarding locality.[93]

B. In Conquered or Ceded Territories

Although the crown could rule conquered or ceded territories under the prerogative, this right was qualified in those cases where "English colonies and plantation[s] of Englishmen" settled within the conquered territory; settlers established in these circumstances "carried with them their rights and liberties of Englishmen, though into a country acquired...by the conquering king".[94] Consequently the crown lacked the constitutional authority to treat English settlers in a conquered territory as it might treat local inhabitants. The question remains, however, whether "rights and liberties of Englishmen" included the right to English law, or whether English settlers were governed by the local law which continued in force for the local inhabitants. The answer to this question apparently depended upon the character of the local legal system. Although

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[91]*Hale Prerog.*, 43, n. 1. Also, *Dawes v. Painter* (1674), 1 Freem. 175, at 175-76.

[92]*Blankard v. Galdy* (1693), 2 Salk. 411; *Dutton v. Howell* (1693), Show. 24, *per* councel at 31; Sir E. Northey, Att. Gen., 27 July 1706, *CSP* (1706-08) #444; R. West, Att. Gen., 20 June 1720, *Chalm.*, II, 202; *Anon.* (1722), 2 P. Wms. 75; *Roberdeau v. Rous* (1738), 1 Atk. 543; *Bl. Comm.*, I, 106-7.

[93]*Admiral Palliser's Case*, discussed in *Mostyn v. Fabrigas* (1774), 1 Cowp. 161, at 181.

[94]*Hale Prerog.*, 34.

Lord Mansfield suggested that English settlers were always subject to local laws,[95] this conclusion seems to have applied in European conquests/cessions only; as courts began to recognize the continuity of "infidel" legal systems, it was argued that English settlers were exempt from those systems and, instead, had the right to English law as their "birthright".[96] Thus, according to crown law officers, in territories "acquired by treaty" in India, English subjects settling as distinct "colonies" therein "carr[ied] with them" English municipal law for their internal governance.[97] Under these conditions of legal pluralism, one (or both) of the two sets of laws operating in the newly-acquired territory might have been "personal"—that is, applying to persons according to their membership in a nation—as opposed to "territorial"—or, applying to persons according to their presence within the territory.[98]

VII. Status of Infidels in Imperial Law

Coke C.J. concluded in *Calvin's Case* that infidels were "in law *perpetui inimici*".[99] Given the political and commercial relations which then existed with infidel nations, the legal implications of this status were confusing. Elsewhere Coke recognized that certain sorts of treaties were possible with infidels,[100] and this led to the accusation that his views were "inconsistent" and that his assertion that infidels were perpetual

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[95] *Campbell v. Hall* (1774), Lofft 655, at 741.

[96] *Blankard v. Galdy* (1693), 4 Mod. 215, *per* counsel at 224.

[97] C. Pratt, Att. Gen., and C. Yorke, Sol. Gen. (c. 1726-29), *Chalm.*, I, 195.

[98] Generally, Pollock and Maitland, *History of English Law* (1923), I, 13-14, 90-91; McHugh, *Aboriginal Rights of the New Zealand Maori* (1987), 12-13, 156; Hand, *op. cit.*, 186-87.

[99] *Calvin's Case* (1608), 7 Co. Rep. 1a, at 17a. *Contra, Anon.* (c. 1640), 1 Salk. 46.

[100] *Michelborne v. Michelborne* (1609), 2 Brownl. 296; *Co. Inst.*, IV, 155. *Cf.* Gentili, *De Jure Belli* (1612), ch. XIX.

enemies was wrong.[101]

For seventeenth-century courts, however, there was no inherent contradiction in the notion of carrying on political and commercial relations with *perpetui inimici*.[102] In *Calvin's Case* itself Coke C.J. stated that the king could bring infidels "under his subjection", and, although their laws were abrogated *ipso facto*, he could "judge them and their causes according to natural equity".[103] In short, the status of nations as *perpetui inimici* did not preclude their incorporation, in some degree, within the imperial constitutional order. It did, however, mean that once within English dominions their ability to exercise legal rights was limited; unlike Christian enemies who were naturalized by conquest, or Christian alien friends visiting English dominions, infidels remained outside the rule of law and subject to the discretion of the crown under the royal prerogative.[104] Indeed, children born to infidel parents legitimately within English dominions were not natural-born subjects, but "aliens under safe-conduct only".[105] Apparently, these legal restrictions derived not from ethnicity but from religion: conversion to Christianity constituted "immediate enfranchisement" such that the converted infidel became "intitled to the laws of England".[106] The extraordinary

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[101] *Omichund v. Barker* (1744), Willes 538, at 545. Also, *East-India Co. v. Sandys* (1683-85), 10 St. Tr. 371, *per* counsel at 390-392.

[102] *East-India Co. v. Sandys* (1683-85), 10 St. Tr. 371, at 537-8, 545.

[103] *Calvin's Case* (1608), 7 Co. Rep. 1a, at 17b.

[104] For example, status of Jews in middle ages: *East-India Co. v. Sandys* (1683-85), 10 St. Tr. 371, *per* counsel at 408, 485-6.

[105] *Ibid.*, 486.

[106] *Chamberlain v. Harvey* (1696), 5 Mod. 182, *per* counsel. Also, *Butts v. Penny* (1677), 3 Keb. 785 (infidels may be sold as slaves in America "untill they become Christians; and thereby they are infranchised"). *Contra: Smith v. Brown* (1705/6), 2 Salk. 666; *Smith v. Gould* (1706), 2 Ld. Ray,. 1275; *Sommersett's Case* (1772), 20 St. Tr. 1, at 82: infidel slaves free upon entering England.

prerogative powers of the crown over infidels derived from the crown's duty to protect English subjects from the perceived danger of falling into infidelism.[107]

Coke's conclusion that infidel law ceased *ipso facto* upon the inclusion of an infidel nation within English sovereignty was overturned by Holt C.J. in *Blankard v. Galdy* (1693),[108] and his conclusion that infidels were perpetual enemies was also rejected by the end of the seventeenth century.[109] However, the rejection of the concept of *perpetui inimici* did not mean that non-European peoples over which Britain asserted sovereignty thereafter enjoyed the same legal rights as Europeans. As will be seen, many of the legal implications of the rule were later resurrected under the "doctrine of aboriginal wardship".

VIII. Conclusions

The legal rules and principles surrounding British imperialism reflected—and supported—the political objective of consolidating British power over foreign lands and peoples; imperial law had very little to do with whether that objective was just, or justly pursued. Nevertheless, judges confronting problems arising out of British expansion abroad were often forced to articulate and apply non-statutory principles of law, and in so doing they sought solutions which were most consistent with (a) the right of the legislative and executive branches of state to dictate imperial policy, and (b) the maintenance of social order in what were otherwise disruptive conditions. Courts therefore presumed that the rights of local inhabitants were to be respected in the absence of directions to do otherwise. The result was a certain paradox: peoples forcibly

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[107]*Michelborne v. Michelborne* (1609), 2 Brownl. 296; *East-India Co. v. Sandys* (1683-85), 10 St. Tr. 371, *per* counsel at 374-5.

[108]*Blankard v. Galdy* (1693), 2 Salk. 411.

[109]*Wells v. Williams* (1697), 1 Ly. Raym. 282; *Omichund v. Barker* (1744), Willes 538.

subjected to British sovereignty might seek at least some protection for their traditional rights and laws from the very legal system which denied to them that status which they had enjoyed prior to subjection.

Chapter Three

The Application of British Imperial Law to North America in the Seventeenth and Eighteenth Centuries

English colonists establishing settlements in the seventeenth century arrived in North America with royal letters patent by which the crown purported to grant rights of property and government over expansive territories without having first obtained the territories from the natives by conquest or cession.[1] The assertion of these rights gave rise to what Vattel called the "celebrated question" of whether European nations could acquire sovereignty over North America by mere discovery and occupation, or whether conquest or cession was necessary.[2] Both the *jus gentium* and the British imperial law of the seventeenth and eighteenth centuries provided only ambiguous answers not only to this question but also to the question of the legal status of native peoples and their laws and governments upon the assertion of sovereignty by one method or the other. In this chapter, the ambiguities of the *jus gentium* and the imperial law in this respect will be briefly reviewed. Reference will then be made to local statutes of British North American colonies in order to derive a basis for an interpretation of imperial law in which these ambiguities are resolved.

I. The *Jus Gentium* and British Imperial Law

Commentators of the seventeenth and eighteenth centuries concluded that

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[1]For examples of colonial charters, Thorpe, *Federal and State Constitutions, Colonial Charters* (1909). For discussion of the effect of charters on aboriginal rights see, Slattery, *Land Rights of Indigenous Canadian Peoples* (1979), 100-10; Lester, *Territorial Rights of the Inuit* (1981), 370-74, 402-404, 616-19; McHugh, *Aboriginal Rights of the New Zealand Maori* (1987), 30-33.

[2]Vattel, *Law of Nations*, Bk. I, Ch. XVIII, §209.

aboriginal people in North America did not have property in their lands.[3] By the Lockean formula, property derived from the mixture of land with human labour in the form of cultivation,[4] and it was (mistakenly) believed that natives did not cultivate land. North American land therefore remained in the state of nature and could be acquired by the first European occupant.[5] The argument that aboriginal nations held their uncultivated lands collectively as property was rejected by Vattel on the grounds that, as non-political societies, they were incapable of asserting such territorial rights.[6] While Locke argued that native nations had at least some attributes of political society (indeed, he cited their consent to be ruled by the *paterfamilias* as typical of the compact by which political societies were formed), he concluded that "the *Kings* of the *Indians* in *America*" had "but a very moderate Sovereignty" at any time other than war.[7]

If property in American land could be acquired by discovery and occupation, were native residents therein *ipso facto* subject to that sovereignty which vested as an incident to the rights of property acquired by occupancy? Consistent with prevailing social contract theories, Vattel concluded that they did not.[8] In his view, "colonies" were

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[3]Grotius, *De Juri Belli* (1626), Bk. II, Ch. II, Pt. II, §1; Locke, *Two Treatises of Government* (1698), II, §§26, 30, 32; Vattel, *ibid.*, Bk. I, Ch. XVIII, §209.

[4]Locke, *ibid.*, §§26, 32; Vattel, *ibid.*, Bk. I, Ch. VII, §81; Bk. I, Ch. XVIII, §209, Bk. II, Ch. VII, §97.

[5]Locke, *ibid.*, §§36, 45; Vattel, *ibid.*

[6]Vattel, *ibid.*, Bk. II, Ch. VII, §97. Wolff, *Jus Gentium* (1764), Ch. II, §§309-12, concluded that the "[u]nknown lands" of a "civil" nation could not be occupied by other nations, but those of a people having no "civil sovereignty" could. However, unlike Locke and Vattel, he concluded that the hunting grounds of non-sovereign nations of hunters were held as common property and could not be occupied by civil nations.

[7]Locke, *op. cit.*, §§105-08.

[8]Vattel, *op. cit.*, Bk. II, Ch. VII, §97. Also, Wolff, *op. cit.*, Ch. II, §§168-69, 309-313.

"lawful" if kept within "just bounds";[9] sovereignty did not vest over native "families",[10] rather natives were justly confined to "narrower limits"[11] with the expectation that they would, in order to survive, cultivate that land. The extension of sovereignty over these enclaves was contingent upon native consent or, presumably, conquest in a just war.[12]

It was asserted in the seventeenth century that the (imperial) common law was consistent with the *jus gentium* in matters relating to imperial expansion into North America. Thus, an opinion by Holt and other jurists in 1675 stated: "by ye Law of Nations if any people make Discovery of any Country of Barbarians" they acquired "ye Right of ye Soyle & Govermt", and "[i]n this the Common Law of England and ye Civill Law doth agree...."[13] However, the opinion was unclear on the question of whether the "Barbarians" were automatically subject to the "Govermt" of the discoverer. It concluded that settlers derived no title to land by deeds obtained directly from native inhabitants without the intervention of the crown (or proprietors of the colony). It then continued:

> if any Planter be Refractory & will insist on his Indian Purchase...ye Proprirs...may deny them ye benefit of Ye Law & Prohibitt Comerce with them as Opposers & Enemys to Ye Public peace....therefore tho some Planters have purchased from Ye Indians yett having done soe without Ye

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[9]Vattel, *ibid.*, Bk. I, Ch. VII, §81.

[10]*Ibid.*, Bk. II, Ch. VII, §97.

[11]*Ibid.*, Bk. I, Ch. XVIII, §209.

[12]*Ibid.*, Bk. II, Ch. I, §§6-7 (although civilized nations had duty to help barbarian nations civilize, Grotius was wrong to conclude that infidelism and barbarism were grounds for just war; consequently, "Europeans who attacked the American nations, and subjected them to their greedy dominion" to civilize and Christianize them acted illegally). For more detailed reviews of *jus gentium* see Lindley, *Acquisition...of Backward Territory* (1926); Pagden, *The Fall of Natural Man* (1982); Williams, *American Indian in Western Legal Thought* (1990), 13-194.

[13]"Councells Opinions..." (c. 1675), *DRCHSNY*, XIII, 486, quoted in *Regina v. St. Catharines Milling Co.* (1885), 10 O.R. 196 (Ch.), at 206-208.

> Consent of Ye Proprietrs for Ye time being Ye title is good against the Indians but not against the Proprietrs....[14]

This statement implies that natives had a system of rights internal to their communities, and that settlers might derive rights from that system. However it also implies that to assert rights derived from that system against the colonial proprietors would be tantamount to renouncing allegiance to the crown—perhaps because native *title* initially represented a source of title independent of crown sovereignty. If so, the opinion is at least consistent with the conclusion that native *peoples* were initially outside the crown's sovereignty as well.

The opinions of subsequent courts and commentators were as equivocal. While Hale concluded that sovereignty over American territories which the crown might "newly find out" vested upon the raising of the royal standard, Blackstone concluded that such territories were obtained "by right of conquest and driving out the natives...or by treaties".[15] And while Holt C.J. concluded (in apparent contradiction to his 1675 opinion as counsel) that American territories had been "conquered", Hardwicke L.C. concluded that, as land "uncultivated and possessed by barbarians", sovereignty was acquired by the "*European* country" which "first set up marks of possession".[16] The Board of Trade (like Holt) appeared to hold both views.[17] Colonial courts, as well as elected branches of colonial legislatures, declared that colonies were settlements not conquests, and therefore

[14]*Ibid.*

[15]*Hale Prerog.*, 43, n. 1; *Bl. Comm.*, I, 107-108.

[16]*Smith v. Brown* (1705/6), 2 Salk. 666; *Penn v. Baltimore* (1750), 1 Ves. Sen. 444, at 451.

[17]It concluded in 1685 that certain land grants were valid where land was "uncultivated, and inhabited by savages" (*Chalm.*, I, 55), but also concluded that treaties with native nations would, in "future disputes with any European Nation, greatly strengthen our title in those parts" (Board of Trade to Duke of Newcastle, 20 Aug. 1730, *CSP* (1730), #404).

English law applied as the birthright of settlers.[18] This position conflicted with that of Holt C.J. and Blackstone, that as conquests/cessions American colonies were governed by English municipal law only if it was introduced by the crown.[19] Finally, Reeves, while Chief Justice of Newfoundland, concluded that natives on the island, whose territory had been neither conquered nor ceded, were "the King's Subjects" merely because they "inhabit a Country, the Sovereignty of which is claimed and exercised by His Majesty"; however, he appeared to doubt whether this was the case for "the wandering tribes upon the Continent".[20]

British courts never developed a legal theory of acquisition which might have reconciled the various opinions. One theory the courts could have employed was that of *pre-emption*. Under this theory the acquisition of territory in North America was accomplished in two steps: the first European nation to discover and occupy territory obtained the exclusive "right of preemption" to acquire the territory by conquest or cession from its native inhabitants.[21] Among British officials of the eighteenth century, Sir William Johnson, first superintendent of the imperial Indian Department in America, was perhaps the most vociferous advocate of the pre-emption theory. Said Johnson, although British "Adventurers" had claimed sovereignty "by Setting up Crosses etc.", because "no Conquest ha[d] been made...nor any Indian Transactions tending to more

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[18]*Boehm v. Engle* (1767), 1 Dall. 15 (Penn. S.C.) (counsel, referring to *Anon.* (1722) 2 P.Wms. 75, successfully argued that English statutes extended to the colony); *Morris's Lessee v. Vanderen* (1782), 1 Dall. 64 (Penn. S.C.) (citing colonial statutes declaring English law as settlers' birthright). For resolutions and views of general assemblies and colonists on birthright principle: Pownall, *Administration of the Colonies* (1765), 72-73; Knox, *Controversy Between Great Britain and her Colonies* (1769), 4-20; Stokes, *Constitution of the British Colonies* (1783), 3.

[19]*Smith v. Brown* (1705/6), 2 Salk. 666; *Bl. Comm.*, I, 107-108.

[20]Reeves, "Paper of Remarks" (1793), 162.

[21]Smith, *History...of Nova-Caesaria* (1765), 7-8.

than that of putting their Lands under the protection of the Crown", British sovereignty had not been established over unceded Indian lands.[22] Although "in a political Sense" Britain claimed sovereignty over much of the continent, these claims were of the sort "kept up by European powers to prevent the Encroachments or pretensions of each other" and it would have been contrary to "the Justice of our Constitution" to recognize their validity in relation to native nations; "[s]trictly speaking" British rights extended only as far as those lands "actually purchased by Consent of the Natives".[23] In short, discovery gave an exclusive right to acquire rights of property and sovereignty, but actual conquest or cession was required before property and sovereignty vested over native lands and peoples.

II. Colonial Statutes of the Seventeenth and Eighteenth Centuries

If it is difficult to derive a general theory of aboriginal legal status from commentaries and judicial opinions of the seventeenth and eighteenth centuries, the same cannot be said of the statutes of colonial America of that time. Prior to 1755, relations with aboriginal nations were managed by the crown pursuant to the royal prerogative exercised by colonial governors. However, where the conduct of Indian affairs affected the rights of settlers, required the expenditure of local revenues, or necessitated additions or amendments to colonial municipal law, it was acknowledged that local legislatures had authority to enact appropriate legislation. As a result, most colonial statutes addressed particular details of the settler-native relationship without expressly addressing larger questions of aboriginal legal status. They are therefore important not so much for the provisions they enacted but for the legal assumptions upon which these provisions were premised. Although the provisions enacted became part of colonial municipal law, in

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[22]Johnson to J.T. Kempe, Att. Gen. N.Y., 7 Sept. 1765, *JP*, XI, 923-27.

[23]*Ibid.*

many cases the assumptions they reflect are more appropriately regarded as assumptions of imperial common law.

A. Acquisition of Sovereignty over Native Peoples

Colonial statutes characterized the constitutional status of native peoples in a variety of ways. Two general categories can be identified: aboriginal nations with which there was a degree of peaceful contact, and nations with which there was either no contact or hostile contact. Those nations in the first category included Indian nations described as being at "peace" or in "amity" with,[24] "tributary" to,[25] "allied" to,[26] under the "protection" of,[27] or "subjected" to,[28] particular colonial governments. Native peoples in this first general category were either subjects[29] or alien friends.[30]

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[24]*An act lycensing trading with Indians* (1677), *VSt.*, II, 410 (settlers allowed to trade with Indians "in amity and ffriendship with us"); *An act for the better improving a good correspondence with the Indians* (1705), *PSt.*, II, 229 (settlers not to harm Indians "being at peace with us"); *An act for preventing...incursions of the Indians* (1755), *VSt.*, VI, 550 (unlawful to kill "any Indian in alliance, peace and friendship with his majesty").

[25]*An act for prevention of misunderstanding between the tributary Indians, and other her majesty's subjects of this colony* (1705), *VSt.*, III, 464.

[26]*An act for Preventing Abuses in the Indian Trade* (1757-58), *PSt.*, V, 320 (regulations designed to "induce...distant nations to seek our alliance, withdraw themselves from the French").

[27]Virginia Act (1656), *VSt.*, I, 415 ("no Indians that are in our protection be killed").

[28]*An act for regulating the trade with the Eastern Indians* (1713/14), *MAR*, I, 725 (Indians who "lately submitted themselves, anew recognized their subjection and obedience to the crown").

[29]Rhode Island Act (1677), in [Rhode Island], "Body of Laws...(1663-1705)", 52-53 ("barbarians amongst whom we are Cast" are "ye king's Subjects"); *An Act for the more Effectual Well-ordering of the Indians* (1717), in [Conn.], *Acts...of Connecticut* (1730), 230 (Indians subject to laws as "other His Majesties Subjects"); *An act for prevention of misunderstanding between the tributary Indians, and other her majesty's subjects of this colony* (1705), *VSt.*, III, 464.

[30]The term "alien friend" was not used, but was implicit to those statutes which distinguished between subjects and natives: *An Act for the Better Improving a Good Correspondence with the Indians* (1705-6), *PSt.*, II, 229 ("friendship" between crown's

Those in the second category were described as "strange," "foreign" or "remote",[31] or as "enemies".[32] In some cases, native peoples hostile to particular colonies were described not as alien enemies, but as "rebel" subjects.[33] There is no direct support in the colonial statutes of the seventeenth century for the view that native peoples, as infidels, were *perpetui inimici.* Statutes reflected the belief that natives could be converted to Christianity and civilization,[34] but a nation's categorization as ally/subject did not appear contingent upon conversion.

Colonial statutes do not suggest that the constitutional status of a nation was determined merely by the nation's location either within or outside territories over which Britain asserted rights of sovereignty or which had been granted to a colony by royal

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"subjects and the native Indians"); *An act to prevent private persons from purchasing lands from the Indians* (1758), in [Georgia], *Digest...of Georgia* (1802), 257 ("good correspondence between his majesty's subjects and the several nations of Indians in amity with the said province").

[31]*An act prohibiting the entertainment of Indians* (1663), *VSt.*, II, 185 (contact prohibited with "remote nations"); *An act concerning the Northerne Indians* (1663), *VSt.*, II, 193 ("tributary" Indians to treat "strange Indians" as "enemies"); *An Act Prohibiting trade with Indians* (1692), in [Maryland], "Laws of Maryland...1640 to 1692," 144 (prohibited trade with "forreign and unknown Indians").

[32]*An act for the Continuance of peace* (1669), in "Laws of Maryland," *ibid.*, 34 (the "ancient Inhabitants of this Province" to be protected from "their Neighbour Nations our Enemys"); *An act for appointing a Militia* (1764), in [North Carolina], *Collection of...Acts of...North Carolina* (1765), II, 309 (killing "any Enemy Indian of what Nation soever" declared lawful).

[33]*An act against Jesuites and Popish Priests* (1700), in [New York], *Laws...of New-York* (1719), 37 (Jesuits incited Indians "to Sedition, Rebellion...against his Majesty's Government").

[34][Mass.], *Book of the General Lawes...Massachusets* (1648), 29 ("*one end in planting these parts was to propagate the true Religion to the Indians*"); *An Act for well Ordering and Governing the Indians in this Colony* (1750), in [Conn.], *Acts and Laws of...Connecticut* (1750), 95 (objective was "*the bringing the Indians in this Land to the Knowledge, and obedience of the Only True God*"); *An Act Against Selling Rum...to the Indians* (1701), *PSt.*, II, 168 ("to induce the Indian nations to live of the Christian religion").

charter. Moreover, statutes were not worded as grants of protection or subject-status; rather, they appear to recognize existing conditions. Certain statutes, indeed, explicitly recognized what others seem to imply: that the establishment of peace or friendship, the creation of a tributary relationship, or the submission to British sovereignty, were objectives achieved through the consent of native nations (sometimes after hostilities) by *treaty*.[35]

In short, colonial statutes were premised upon the assumption that whatever rights Britain acquired by discovery and occupation and asserted under royal charter, they did not include rights of sovereignty over native peoples. This interpretation of colonial statutory law is consistent with general royal instructions issued in 1670 which directed colonial governors to maintain "peace" with native nations, receiving any which desired "to put themselves under the Protection of our Government...."[36] It also derives support from the Court of Common Pleas in *Craw v. Ramsey* (1669), which, after concluding that courts might need to refer to the appropriate "treaty" to determine if a people were subjects, observed: "The like may now happen of Virginia, Surenam, or other places, part of which are in the Kings liegeance, part not".[37]

Treaty clauses in which native peoples acknowledged their allegiance as subjects

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[35]*An act for confirmation of the Articles of Peace made with the Indians* (1666), in "Laws of Maryland", *loc. cit.*, 30 ("Articles of Peace" with nations to "be Invyolably kept and preserved"); *An Act for the Better Improving a Good Correspondence with the Indians* (1705-6), *PSt.*, II, 229 (governor to negotiate "treaties" for "peace and welfare"); Virginia Act (1646), *VSt.*, I, 323 (enacted treaty in which King Necotowance acknowledged "to hold his kingdome from the King's Ma'tie of England"); *An act for giving necessary supplies to the Eastern Indians* (1699), in [Mass.], *Charters...of Massachusetts Bay* (1814), 384 (Indians "submitted themselves, and recognized their subjection and obedience to the crown").

[36]"Instructions for the Councell appointed for fforeigne Plantations" (1670), North MSS, ff. 1-5, Bodleian Library (Rhodes House), Oxford.

[37]*Craw v. Ramsey* (1669), Vaugh. 274, at 288.

to the British crown would later be regarded by courts in the United States as having little legal significance. Indian Department Superintendent Sir William Johnson was also sceptical about these treaties, his interpretation of the Five Nations-British covenant chain being illustrative of his views. The Five Nations occupied a strategic location between French Canada and New York. Each year "their Cheife Sachems and Captains" visited Albany to renew "the Antient peace and Covenant Chaine".[38] From the Five (Six) Nations perspective, the relationship established was an alliance between two sovereign nations, a relationship symbolized by the *Gus-Wen-Tah*, or "Two Row Wampum" belt, depicting the courses of the respective nations along the "River of Life" as parallel but separate.[39] However, the English interpreted the covenant chain as submission by the Five Nations as English subjects, an interpretation reflected in records of treaty councils,[40] representations to New France,[41] colonial statutes,[42] Board of Trade reports,[43] international treaty,[44] royal instructions to governors,[45] and royal commissions to Indian

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[38]Memorial to the Earl of Bellomont, 6 July 1698, *MG21* Lansdowne MSS 849, f. 77, at 66-67.

[39]"Statement of the Haudenosaunee...", Canada, House of Commons, Special Committee on Indian Self-Government, *Proceedings* (1983), vol. 31A: 6.

[40]Wraxall, *Abridgment of the Indian Affairs* (1754), 12-14, 18, 32.

[41]Report of negotiations in Canada, 2 July 1698, *DRCHSNY*, IV, 349; Earl Bellomont to Count de Frontenac, 13 Aug. 1698, *DRCHSNY*, IV, 367.

[42]*An act for the Encouragement of the Indian Trade* (1721), in [New York], *Acts of...New York* (1719), 198 (Five Nations owe "Faith and Allegiance to his Majest[y]").

[43]Board of Trade to the King, 2 June 1709, *DRCHSNY*, V, 75.

[44]*Treaty of Utrecht*, §15, *DICC*, 3-5 (Five Nations "subject to the Dominion of Great Britain").

[45]Instructions to New York governors, 1690-1770 (Five Nations to renew "their submission to our government" and be protected "as our subjects"): Labaree, ed., *Royal Instructions to British Colonial Governors* (1935), II, §§666-67.

Department superintendents.[46]

In Johnson's view, however, the origin of this characterization of the covenant chain was the desire to buttress British claims against France to the Great Lakes region, and it was "a very gross Mistake" to conclude that the Five Nations had actually submitted to British sovereignty.[47] He observed that there was no aboriginal word capturing the British conception of subjection, and although they acknowledged the King to be their "Father" it was wrong to "insert a Word [like sovereign] verry different in signification and never intended by the Indians" when translating this expression.[48]

To summarize, certain colonial statutes were consistent with the idea that British sovereignty over native nations derived from treaties of submission, not discovery and occupation; however, questions were raised about the validity of these submissions.

B. Acquisition of Property and Territorial Sovereignty

Colonial statutes did not expressly assert that Britain acquired rights of either property or territorial sovereignty by discovery and occupation; however, they did imply that the crown had rights of territorial sovereignty over and at least radical or ultimate title, and perhaps proprietary title, in territories which by royal charter were included within colonial boundaries, notwithstanding the presence of native nations in those territories. The nature of crown rights to land is reflected in statutes prohibiting the purchase by individual settlers of land from natives. Most colonies had statutory

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[46]Commission to Sir W. Johnson, 11 March 1761, *CO* 324/17: 29-30 (Six Nations, "our faithful Subjects and Allies").

[47]Johnson to Gen. T. Gage, Comm. in Chief, 7 Oct. 1772, *JP*, XII, 994-5. Also, Pownall, *Administration of the Colonies* (1765), at 169-76. Indeed, the Five Nations asserted their neutrality between France and England: Jennings, *Ambiguous Iroquois Empire* (1984), 402; Havard, *La Grande Paix De Montréal De 1701* (1992).

[48]Johnson to Gage, 31 Oct. 1764, *JP*, XI, 394-96.

prohibitions of this sort.[49] The rule was typically expressed in this manner:

> [A]ll the Lands in this Government are Holden of the KING of *Great Britian*, as the Lord of the Fee; and that no Title to any Lands in this Colony can Accrue by any Purchase made of *Indians* on pretence of their being Native Proprietors thereof, without the Allowance or Approbation of this Assembly.[50]

This statement suggests that the crown occupied the same constitutional position in relation to land in the colonies as, by the municipal common-law doctrine of tenures, it occupied in England—that is, it had radical or ultimate title in all lands, with ungranted lands being part of the royal demesne and granted lands being subject to a seignorial estate in the crown and a fee-simple or some lesser common-law estate in the grantee. The vesting of these crown rights was apparently not precluded by the prior existence of native peoples on colonial lands, although the statute suggests that natives had some interest in land which might be purchased with governmental permission. Whatever the legal character of that native title,[51] the implication of the statute is that it was not held

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[49]*An Act to Prevent...Purchases of Lands from the Indians* (1701-2), in *Charters...Massachusetts Bay, op. cit.*, 471; *Duke of York's Laws* (1664), *PSt.*, I, 94; *An act against buying land of the Natives* (1700), *PSt.*, II, 18; *Act Concerning Indians* (1661-2), *VSt.* II, 138; *An Act Concerning Purchasing Land from the Indians* (1640), in "Laws of Maryland", *loc. cit.*, 5; *An Act for Regulating the Purchasing of Land from the Indians* (1703), in [New Jersey], *Laws...of New-Jersey* (1709), 1; *An Act for the Preventing...Purchasing of the Native Indians in this Colony* (1663), in [Rhode Island], *Acts...of Rhode-Island* (1719), 3; *An act to prevent...illegal purchases of lands from the Indians* (1719), in [New Hamp.], *Acts...of New-Hampshire* (1761), 129; *An act to prevent private persons from purchasing lands from the Indians* (1758), in [Georgia], *Digest...of Georgia* (1802), 257.

[50]*An Act concerning Purchasers of Native Rights to Land* (1717), in [Conn.], *Acts...of Connecticut* (1730), 221.

[51]Other statutes were equally vague in their description of native title: [New Jersey], "Concessions and Agreements..." (1676), c. 26 ("when any land is to be taken up for Settlement" the "consent" "of the natives concern'd" was to be obtained); *An act for regulating Indian Affairs* (1757), in [New Jersey], *Acts of...New-Jersey* (1761), 128 ("an amicable and equitable Settlement" to be made with Indians for land not yet "sold by them, or their Ancestors"); *An Act to impower certain Persons to purchase the Claims of the Indians* (1758), *ibid.*, 212 (money alloted "to purchase the Right and Claims...of the *Indian* Natives of this Colony"); *An Act to Prevent the Hunting of Deer* (1759-60),

of the crown. Had native title been converted upon the establishment of the colony to a right held of the crown, the private purchase of that title (while perhaps undesirable for other reasons) would not have compromised the crown's constitutional and proprietary position as lord of the fee. The crown's constitutional and proprietary rights would only have been injured by such a purchase if native nations had been treated by the purchaser and others as a source of title independent of the crown. Thus, as a New Jersey statute provided, private persons "presum[ing] to enter into Treaties with the Indians" to purchase land did not acquire a title which was derived from "the Crown of England, or any person or persons claiming by, from or under the same", and consequently such purchases did "subvert her Majesties Dominion in this Country".[52] Underlying the statutory prohibition on the private purchase of native title, then, was the conclusion of (imperial) common law reached by the 1675 opinion examined above: Indian deeds gave rights against the Indians but not against the crown or its grantees, and the insistence upon these deeds was tantamount to treason.[53] Implicit to this conclusion was the idea that within colonies the native customary system of landholding initially represented a foreign system which was not connected to, but rather competed with, the colonial system established by the crown for settlers.

PSt., VI, 46 (settlers prohibited from hunting "on the lands not yet purchased of the Indians").

[52]*An Act for Regulating the Purchasing of Land from the Indians* (1703), in [New Jersey], *Laws...of New-Jersey* (1709), 1.

[53]*Cf.* Report of New York Executive Council, 6 March 1765, *CO* 5/66: 165 (non-natives arguing crown grants invalid if native title not extinguished charged with "high Misdemeanor" because they "set up the Title of the Natives as paramount to the Rights of the Crown" and thereby questioned "His Majesty's undoubted Right to all the Lands in His Dominions as supreme Lord").

C. The Statutory Status of Native Customary Laws and Government

If native peoples and customs were foreign to the English imperial constitution prior to conquest or treaty, what became of them after conquest or treaty? Did their customs remain in force pursuant to the common-law principle of continuity, or were they considered, under the rule in *Calvin's Case*, *ipso facto* abrogated as infidel laws?[54] There is no indication in colonial statutes of the seventeenth and eighteenth centuries that Coke's approach to infidel laws was accepted; instead, statutes are consistent with the conclusion that aboriginal customs were considered to continue in force in certain circumstances.

According to Vitoria, native monarchies persisted in Spanish America just as in Europe "inferior princes ha[d] a king and as some kings ha[d] the Emperor over them"—in this way, "many persons ha[d] dominion over the same thing...."[55] This observation can also be applied to the native nations tributary to Virginia. Following the model of a feudal principality, that colony entered into a 1677 treaty with certain "Indian Kings & Queens" who acknowledged their "Dependency on" and "Subjection to" the English crown and agreed to hold their kingdoms from the crown under royal patents for which they would pay an annual "Quit-Rent" or "tribute"; thereafter "each Indian King & Queene" retained "Power to Govern their own People".[56]

The 1677 treaty text was not enacted by statute; however, statutory law was premised upon the tributary status which it created. By imposing obligations upon "Indian kings and queens tributary" to the colony without identifying them or the details

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[54]*Calvin's Case* (1608), 7 Co. Rep. 1a, was applied to this effect in *State v. Foreman*, 16 Tenn. R. 171 (S.C., 1835), at 190, but this approach was not generally followed by American courts: *infra* ch. 5, II, B.

[55]Vitoria, *De Indis* (1557), 130.

[56]Articles of Peace, 29 May 1677, *APC*, I, 733-7. Generally, Oldmixon, *British Empire In America* (1741), I, 389, 418-19.

of their constitutional relationship to the colony,[57] statutes not only made reference to the treaties necessary, but implicitly confirmed the continuity of aboriginal customs governing matters like the identity of native chiefs upon which the treaties were silent.[58]

Other aspects of aboriginal custom were similarly confirmed. Statutes reflected the state of legal pluralism contemplated by treaty by providing that settlers committing offences against tributary Indians were subject to English law,[59] but that Indians offending against settlers were subject to different rules which implicitly acknowledged the general aboriginal custom that a nation was collectively responsible for the offences of its members. In 1656 it was enacted that if a settler could establish by the testimony of two other settlers that a native committed a "tresspasse or harme" then "satisfaction" was due from the "King or great man" of the offender's nation.[60] It is not clear whether the questions of liability and quantum of damages were to have been determined by a regular colonial court. In at least one case a special commission was created to determine such matters,[61] and subsequent statutes suggest that settlers could "addresse themselves"

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[57]*An act concerning the Northerne Indians* (1663), *VSt.*, II, 193 ("king of Potomack" to assist in apprehension of criminals and was prohibited from holding council "with any strange nation"); *An act for prevention of misunderstandings between the tributary Indians* (1705), *VSt.*, III, 464 (tributary kings to inform officials about approaching "strange Indians" and prohibited from alienating lands to anyone outside "their own nation"); *An act ffor destroying wolves* (1669), *VSt.*, II, 245 (tributary nations to kill certain number of wolves annually).

[58]Where this was not the case, statutes expressly provided an alternative: Virginia Act (1646), *VSt.*, I, 323 (successors to King Necotowance "appointed or confirmed by the King's Governours"); *An act concerning Indians* (1665), *VSt.*, II, 218-9 (certain nation did "not have power within themselves to elect or constitute their owne *Werowance* or chiefe commander").

[59]*An act concerning Indians* (1661-2), *VSt.*, II, 138.

[60]Virginia Act (1656), *VSt.*, I, 415.

[61]Order of Assembly, Oct. 1660, *VSt.*, II, 15 ("commissioners" to determine "damages" and "give notice to the cheife man or men" of the nation).

directly to the "King" of the nation to which the offender belonged for a "remedy" for "any injuryes" sustained.[62]

Where Indians were charged with more serious offences against settlers, like murder, different procedures may have applied. Tributary kings were under a statutory obligation to "bring in" to colonial authorities any natives alleged to have murdered neighbouring settlers, or else their nation would be "answerable" for the offence.[63] Again, it is not clear whether regular colonial courts exercised jurisdiction over the native accused; in one case a native was tried before a special committee of the colonial assembly.[64] It is important to observe that statutes were conspicuously silent about offences committed between natives *inter se*.

The invocation of the concept of tributary nation by colonial legislatures may be regarded as an attempt to fit Indian nationhood into the model of British imperial constitutional law which best accommodated the presence of internally-sovereign nations within the feudal structure of English land law: by emulating the seventeenth-century conception of the Welsh feudal principality[65] colonial legislatures were able to explain legally the continuity of native jurisdictions and customary laws within territories over which the crown claimed to be "lord of the fee". Of course, by ascribing to aboriginal chiefs a position analogous to that of European monarchs capable of holding kingdoms as tenants *in capite*, colonial statutes may have attributed to them a legal position in relation to their people and lands which under native custom they did not have.

Although the statutes of Maryland also recognized tributary arrangements whereby

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[62]*Act concerning Indians* (1661-2), *VSt.*, II, 138.

[63]*An act concerning the Indians* (1665), *VSt.*, II, 218-19.

[64]Order of Assembly, 23 March 1661/2, *VSt.*, II, 149.

[65]*Supra* ch. 2, IV, E.

native "government[s]" held land from the crown upon the payment of annual rents,[66] the statutes of other colonies are more ambiguous in their treatment of aboriginal governments. For the most part, colonies did not enact statutes expressly declaring native people to be subject to the general laws of the colony, and where statutes of that kind were enacted they seem to have been made in relation to natives living within the organized portions of the colony.[67] Instead, most of the relevant statutes suggest that aboriginal peoples were national units generally exempt from colonial municipal law and subject only to specific elements of colonial law, or other special rules, agreed to by treaty. Thus, a 1684 Pennsylvania statute authorized the governor and council to "treat with some of the Chief[s] of the Indians" on the issue of excessive liquor consumption in the hope that they would "Submitt to have the Laws of this government executed upon them when they shall any wise transgress them, equally with other inhabitants...."[68]

While most colonies expressly included native people within the protection of

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[66]*An act for the continuance of peace with...Indians in Choptanke River* (1669), in "Laws of Maryland", *loc. cit.*, 34 (land granted to "Ababes Hatsawago and Toquassimo and the people under their government or charge and their heirs for ever", to be held for annual rent of six beaver skins). Also, *An act for ascertaining the bounds...of the Nanticoke Indians* (1698), in [Maryland], *Complete Body of the Laws of Maryland* (1700), 47.

[67]In Massachusets, natives resident in "Indian Plantations" were subjected to colonial law: *Indians* (1649), s. 9, in [Mass.], *Colonial Laws of Massachusetts* (1889), 43; *An Act for the Better Rule and government of the Indians* (1693-4), *MAR*, I, 150. Also, *An Act for the more Effectual Well-ordering of the Indians* (1717), in [Conn.], *Acts...of Connecticut* (1730), 229 (natives resident in "each Town" subjected to colonial laws).

[68]Penn. Act (1684), *PSt.*, I, 166. *Cf. An Act Against Selling Rum...to the Indians* (1701), *PSt.*, I, 168 ("kings of the Indian nations" requested restrictions on liquor in native "towns"); *An act for regulating Indian Affairs* (1757), in [New Jersey], *Acts of...New-Jersey* (1761), 125 (provisions enacted concerning sale of liquor, debts, and sale of land which had been agreed to "at a Treaty" between "this Government, and the *Indians* inhabiting within the same"); New Jersey Act (1668), in [New Jersey], *Grants...of New-Jersey* (1758), 88 (officials "to treat with the Indians" on issue of "all differences or trespassess past or to come").

colonial law when criminal acts were committed by settlers against their persons or property,[69] when natives were accused of offending against settlers many colonies recognized a continuity of native jurisdiction over the offender at least concurrent with colonial jurisdiction. As in Virginia, these statutes attributed collective responsibility to the nation for offences committed by its individual members, imposing upon the chiefs the obligation of providing compensation to settlers.[70] By implication, the nation's jurisdiction (whether exclusive or not is unclear) over the actual offender was recognized. This implication was made explicit by a 1676 West New Jersey statute which provided that the "Sachem" of the nation to which an Indian offender belonged was to pay "Satisfaction" to the victim, and that colonial officials were "to parswade the natives" to use a particular "way of Tryall" (a jury of six natives and six settlers) when they prosecuted the suspected offender.[71] North Carolina provided that native defendants in

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[69]*Duke of York's Laws* (1664), *PSt.*, I, 94 (injuries "done to The Indians" to be remedied by courts "as if the Cause had been betwixt Christian & Christian"); *An Act for Better Improving a Good Correspondence with the Indians* (1705-6), *PSt.*, II, 229 (those killing or assaulting "Indians inhabiting in this province" are "subject to the same penalties and punishments as he should or ought to be if the same had been done to a natural-born subject of England"); *An act for restraining Indians* (1715), in [North Carolina], "Collection of fifty-seven laws", 179 (settlers assaulting Indians to pay same compensation "as he should or ought to have done had the offence been committed to an Englishman"); *An Act for ascertaining the Bounds of...the Tuskerora Indians* (1748), in [North Carolina], *Collection of...Acts...of North Carolina* (1751), 273 (re: damage to Indian crops by settlers' livestock, "*Indians* shall and may enjoy the Benefit of the Laws in that Case made and provided, in the same Manner as the White People do or can"); *An Act for the Well-ordering of the Indians* (1715), in [Conn.], *Acts ...of Connecticut* (1715), 55-56 (settlers damaging Indian livestock subject to colonial judicial jurisdiction).

[70][Conn.], "Code of 1650", 28, re-enacted, *An Act for the Well-ordering of the Indians* (1715), *ibid.* (every "Company of Indians...near any English Plantations" to "Declare who is theire Sachem or Cheife" who was responsible for trespasses committed by members of his nation).

[71][New-Jersey], "Concessions and Agreements", c. 26. *Cf.* Pennsylvania Act (1683), *PSt.*, I, 146 (after native committed "trespass or damage" against settler, notice given "to the King of the Indians hee relates to" so that he could be tried by jury of six settlers and six Indians).

cases of trespass or debt were to be tried before the colonial Commissioner for Indian Affairs sitting with "the Ruler or Headman of the Town to which such Indian Delinquent may belong".[72]

Most statutes were silent on the issue of crimes committed by natives *inter se*. An exception was a Connecticut statute which stated that "the Natives about us, notwithstanding all counsel and Advice (to the contrary) given them by the Authority here" continued to commit violence upon each other "and take no course that such justice be executed upon such Malefactors...."[73] To remedy this situation, the Act provided that whenever one native person should murder another "within this Colony, and upon the English land" the offender was to suffer death, and "if the Indians do not Execution upon such Murtherers or Murtherer", the accused would be susceptible to the jurisdiction of colonial courts.

In none of the statutes examined did legislators purport to create the office of Indian chief or sachem, define the constitutional rules by which such chiefs or sachems were to be selected, or grant legislative, executive or judicial powers to them. On the contrary, colonial statutes were premised upon the important assumption that native institutions and the constitutional rules defining their structure, composition and relation to native communities derived legitimacy from some source other than statute law. In short, they constitute implicit acknowledgement of the (imperial) common law continuity of native customary laws relating to government. Where this assumption was not made, legislators expressly provided for alternatives; thus, statutes provided for interference with

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[72]*An Act for restraining Indians* (1715), in [North Carolina], "Collection of fifty-seven laws", 179.

[73][Conn.], *Book of the General Laws* (1673), 34. Also in [Conn.], *Acts...of Connecticut* (1715), 55-58.

native governments by providing for the appointment of native leaders,[74] and for the displacement of traditional governments with British officials or with local municipal governments exercising delegated powers.[75]

III. Conclusions

The preceding summary of how the *jus gentium*, English judicial opinions and commentary, and colonial statutory law addressed the legal status of native nations in British North America is not exhaustive. In many respects it simply confirms the conclusion of previous commentators that British sovereignty over native peoples in North America was, from the perspective of the seventeenth century, established by conquest or cession, not discovery and occupation or settlement.[76] However, the preceding analysis also emphasizes that even after submission to British sovereignty by treaty, native peoples were not initially subjected to local colonial law; rather, they remained under native customary law and government as recognized by treaty and colonial statutory law.

Because native customs and government were recognized by colonial statutory law, it can be argued that they were incorporated within the local colonial legal system, becoming, in effect, elements of colonial law. However, the analysis of Chapter Four will show that another interpretation is possible, namely, that the "native municipal system" was recognized by "imperial law", pursuant to the common-law presumption of continuity, as a separate system from the "colonial municipal system" governing settlers.

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[74]*Supra* note 58.

[75]*An Act for the Better Rule and Government of the Indians* (1693/4), *MAR*, I, 150 (English commissioner to have "care and government of the Indians in their respective plantations" and to enforce "acts and laws of the province"); *An act for incorporating the Indians and Molattoes* (1763), *MAR*, IV, 639 (incorporated Indian community and granted right to elect council with delegated powers of local government).

[76]*Supra* ch. 2, note 3.

Chapter Four

Development of Imperial Common Law:

Mohegan Indians v. Connecticut (1705-1773)

In the preceding chapter it was suggested that colonial statutes were consistent with the conclusion that native law and government might have continued in force under British imperial law. Under this interpretation two distinct systems of municipal law—colonial and native—co-existed under the umbrella of the imperial constitution. The constitutional relationship between these three systems of law is illustrated by *Mohegan Indians v. Connecticut* (1705-1773), one of the few cases of the eighteenth century in which British-native relations were judicially considered.

Although numerous sets of judicial reasons for judgment arose from the *Mohegan* case, these reasons, and their significance to arguments about aboriginal rights, remain obscure. J.H. Smith provided a detailed summary of the case in *Appeals to the Privy Council from the American Plantations*,[1] but he was concerned more with the history of the proceedings than their legal significance. Because he did not quote the judgments at length, it is not clear whether his statement that the Mohegan nation was "juristically regarded as sovereign"[2] was the conclusion of a judge or his interpretation of a judge's conclusion. Furthermore, the tendency of other commentators and advocates to cite an interim ruling from the case without analysis of its relation to the final judgments has resulted in an incomplete and misleading understanding of the full legal significance of

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[1]Smith, *Appeals to the Privy Council* (1950), ch. VII. Also, De Forest, *History of the Indians of Connecticut* (1852), 303-46; Washburne, *Imperial Control of the Administration of Justice* (1923), 103-106; Holdsworth, *History of English Law*, XI (1926), 99.

[2]Smith, *ibid.*, 442.

the case.[3] In this chapter, the case will be examined in detail so that its significance can be properly assessed.

I. *Mohegan Indians v. Connecticut* (1705-1773)

A. The Dispute

The case involved a dispute about certain lands in Connecticut reserved under treaty to the Mohegan nation. Upon arriving on the Connecticut coast in the 1630s English settlers treated with the "Sovereign Head, or Heads" of the Mohegan nation.[4] In 1640 the Mohegan sachem Uncas ceded to them all Mohegan lands except a reserve of farms and hunting grounds.[5] In 1659 the Mohegan conveyed their reserved lands to Major John Mason and his heirs "as their Protector and Guardian In Trust for the whole Moheagan Tribe".[6] In 1660 Mason transferred this land to the colony in return for its undertaking that, when opening it to settlement, it would leave sufficient lands to the Indians for their farms. The Mohegan claimed this transfer was invalid as they had not been privy to it, and for the next century would argue that Mason's heirs held the reserved lands in trust for their use.[7]

In 1662 the settlers of Connecticut were incorporated by royal charter into "a

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[3]For example, Barsh and Henderson, *The Road: Indian Tribes and Political Liberty* (1980), 32; Union of British Columbia Indian Chiefs, Indian Association of Alberta and the Four Nations Confederacy, "Memorandum of Law", Canada, House of Commons, Special Committee on Indian Self-Government, *Proceedings* (1983), vol. 20A: 18-19; Battiste, "Submission of Grand Council of the Mikmaw Nation" (1989), 85-6; Clark, *Native Liberty, Crown Sovereignty* (1990), 39-45; *R. v. Williams*, [1994] 3 C.N.L.R. 173 (B.C.S.C.), *per* counsel.

[4]Defence of Governor and Company, 1738, *JP*, XI, 428.

[5]Deed of 28 Sept. 1640, *CO* 5/1269: 90.

[6]*Case of the Appellants (Mohegan Indians)* (c. 1751), *TS* 11/1006, f. 3888, 2 (hereinafter, "*Case of the Mohegan*"). See Deed of 15 Aug. 1659, *CO* 5/1269: 91.

[7]*Case of the Mohegan*, 2.

Body Politique & Corporate" with legislative, executive and judicial powers.[8] The boundaries of Connecticut established by charter included the reserved, or trust, lands claimed by the Mohegan.[9] The colony therefore argued that, whatever doubt might have existed before the charter as to land titles, after the charter the reserved lands were "vested in the Govr and Company in full and Absolute Property and Right in Law".[10] Despite the inclusion of Mohegan lands within the chartered limits of Connecticut, the colony continued to treat with the Mohegan as a separate nation. In 1681, the parties entered into a treaty which implied that the colonial legal regime did not extend over the Mohegan: the colony promised to administer "Equal Justice" to them "as our own people" if they "before hand declared their Subjection to our Laws".[11]

In 1687 the colony, by legislation and orders in council, began granting the disputed reserved land to townships.[12] In 1704 the Mohegan, through their English "guardians", petitioned the crown, arguing that these acts violated "Treaties" and were "illegal".[13] The crown commissioned the governor and council of Massachusetts to hear and determine the dispute. In 1705 this tribunal decided in favour of the Indians. The colony appealed the 1705 decision, and in 1706 the appellate committee of the Privy Council granted a commission of review. This commission never met, and a new commission of review was established in 1737. This commission of review overturned

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[8]Connecticut Charter, 10 May 1662, Conn. His. Soc., *Collections* (1907), I, 52.

[9]"A Map of ye Mohegan Sachims Hereditary Country", 1 Aug. 1705, *MPG* 397.

[10]"Defence of the Govr & Company", in *Governour & Company of Connecticut & Mohegan Indians by their Guardians; Certifyed Copy of Book of Proceedings, before Commissrs. of Review, 1743, CO* 5/1272 (hereinafter, *Book of Proceedings*), 119.

[11]"Articles of Agreement...", 18 May 1681, *CO* 5/1269: 93-94.

[12]*Case of the Mohegan*, 7; *Book of Proceedings*, 123-124.

[13]*Case of the Mohegan*, 8-9. Also, *CSP* (1702-3), #1353; *CSP* (1704-5), #11.

the 1705 decision in 1738, but, due to alleged irregularities, in 1743 the crown set aside its decision and created yet another commission of review. This new commission of review overturned the 1705 decision in 1743. The Mohegan Indians appealed this decision to the Privy Council, which in 1773 without reasons for judgment upheld the decision of the 1743 commission of review.

B. Constitutionality of the Imperial Tribunal

The colony objected from the outset to the 1704 commission as an illegal interference by an imperial court into matters properly determined by the local judicial system, the jurisdiction of which was entrenched by the 1662 charter. In general, the common law restricted the ability of the crown to create non-common-law courts,[14] and legal disputes arising within colonies were subject to the original jurisdiction of those colonial common-law courts established locally.[15] However, disputes between colonies were subject to the original jurisdiction of the imperial crown-in-council.[16] This jurisdiction of the crown was not unique to inter-colonial disputes. In articulating the rule in *Penn v. Baltimore* (1750) Lord Hardwicke drew upon general principles of imperial law relating to the crown's jurisdiction over disputes between other political units of the empire, citing in particular its jurisdiction over disputes between two Welsh lordships marcher.[17] Like colonies, lordships marcher had jurisdiction over disputes arising "between private parties".[18] But, where the dispute was between two lordships marcher,

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[14]*Case of Commissioners of Enquiry* (1608), 12 Co. Rep. 31; generally: Campbell, "The Royal Prerogative to Create Colonial Courts" (1964), 348-50.

[15]*Roberdeau v. Rous* (1738), 1 Atk. 543.

[16]*Penn v. Baltimore* (1750), 1 Ves. Sen. 444, at 446.

[17]*Ibid.*

[18]*Ibid.* Also, Dodridge, *History of the Ancient and moderne Estate of The Principality of Wales* (1630), 38.

the crown-in-council had, "by the common law" (according to Hale), original jurisdiction and could resolve the dispute "by special commission".[19] The reason for the rule was simple: it was "repugnant to demand justice of him whose jurisdiction is questioned", and therefore "for want of a Superiour" the parties "had recourse unto the King their Supreame Lord".[20] In short, the crown had an inherent power as sovereign of the empire to manage relations between components of the empire; this head of the royal prerogative may be labelled the "intra-imperial relations prerogative".

Because the intra-imperial relations prerogative derived from general principles described by Hale as "common law", it could presumably extend to authority over disputes between other units of the empire, including those between colonies and Indian nations. Indeed, an imperial tribunal had been created in 1664 to hear and determine both disputes between the New England colonies and disputes between the colonies and the "Natives of those Countryes".[21] The royal commissions and instructions surrounding the creation of this tribunal addressed the same constitutional concerns which would be raised in the *Mohegan* case. In granting jurisdiction to the tribunal the crown instructed that cases involving "any particular right between party & party" were to be left to the "usuall proceedings" of the local colonial courts.[22] However, disputes between settlers and native nations did not fall within this category. The tribunal was empowered to "take effectuall course" to ensure that "Treatyes or Contracts" made with native "Kings" were

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[19]*Hale Prerog.*, 28. Also, Dodridge, *ibid.*, 38; *Process into Wales* (1668-74), Vaugh. 395, at 403-404.

[20]*Process into Wales* (1668-74), Vaugh. 395, at 404 and Dodridge, *ibid.*, 38. Also, *Penn v. Baltimore* (1750), 1 Ves. Sen. 444, at 447.

[21]"Comission for New England", 23 April 1664, *CO* 324/1: 205.

[22]"Instructions to ye Comissrs to visite ye Colony of ye Massachusetts..." (1664), *CO* 324/1: 232.

"punctually performed", and that "full reparation and satisfaction" was paid for breaches.[23] Also, the tribunal was instructed to determine whether the native sachems at Narragansett Bay had submitted to the king as "his Subjts", and if they had to inform them that it was empowered "to dow them justice" in relation to "any injuryes done to them" by settlers.[24] Royal instructions re-assured Connecticut that in creating a tribunal to hear native complaints the king would "not suffer to be violated in ye least degree" any of its "Libertyes and privileges" granted by the 1662 charter.[25] In short, the Narragansett natives, having submitted to the crown, must have been considered a component of the empire; but, since they were a distinct component, legal disputes between them and the colonists were subject to the original jurisdiction of the imperial crown by virtue of the intra-imperial relations prerogative.

The analogy between inter-colony or inter-lordship marcher disputes and colonial/native disputes is obvious where the native nation resided beyond the colony's boundaries, but less obvious where the nation was located within colonial boundaries. The 1664 royal commissions made no distinction between natives living within or outside colonial boundaries (although the Narragansetts were outside Connecticut's charter boundaries[26]). The matter became of central concern in the *Mohegan* case because imperial jurisdiction was invoked in relation to a native nation located within colonial boundaries. The argument "that ye Suit was in effect like one between 2 colonies" was

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[23]*Ibid.*, 230-231.

[24]"Instructions to Our Commrs for ye Visitacon of Our Colony of Connecticut" (c. 1664), *CO* 324/1: 240.

[25]"Instructions to ye Govor & Council of Connecticutt", 23 April 1664, *CO* 324/1: 245.

[26]Jennings, *Invasion of America* (1976), Pt. II; Springer, "American Indians and the Law of Real Property" (1986), 34.

opposed by Connecticut throughout the proceedings for this reason.[27]

Although a strict analogy to inter-colonial disputes did not apply, the Mohegan nation may nevertheless have been considered to have had sufficient independence from the colonial legal regime to allow the invocation of the intra-imperial relations prerogative. This possibility appears to have informed an opinion in 1751 by Attorney-General J. Ryder and Solicitor-General William Murray (later Lord Mansfield). Their immediate concern was the legality of an imperial tribunal created to determine a dispute between the colony of New Jersey and a group of landholders who claimed title under purchases made from Indian nations. Ryder and Murray initially concluded that there were no precedents of imperial commissions issuing to determine "matters of Private Property between the Subjects", matters which were "only proper for the Conusance of the Ordinary Courts of Justice".[28] However, they were asked to re-consider this opinion in light of the 1704 commission issued in the *Mohegan* case. Upon considering this commission, they concluded that there was a material difference between the two cases: the New Jersey dispute involved "the Rights & possession of Lands disputed between his Majesty's Subjects of that Government, to whom his Majestys Courts there ought to be & are open", whereas the commissions issued in the *Mohegan* case "were for determining disputes between the Whole Province of Connecticut & the body of Mohegan Indians between whom there is no common Court of Justice there".[29] The location of the Mohegan within the colony was apparently not considered relevant; instead, the legality

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[27]R. Jackson, Conn. London agent, to W. Pitkin, Gov. Conn., 6 Feb. 1767, Conn. His. Soc., *Collections*, IXX, 68-69.

[28]"Report of the Attorney & Sollr. Genl....into the Cause of the Rise Progress and Continuance of Commotions in New Jersey", 14 Aug. 1751, *PC* 1/49, bundle 41.

[29]J. Ryder, Att. Gen., and W. Murray, Sol. Gen., to Mr. Sharpe, 17 Aug. 1751, *PC* 1/49, bundle 41.

of the imperial crown's jurisdiction was contingent upon the finding that there was a dispute between two political units neither of which had judicial jurisdiction over the other.

C. The 1704 Dudley Commission

In 1704 the crown issued a commission to Governor Dudley of Massachusetts and his council empowering them to form a tribunal to determine the Mohegan complaints.[30] This tribunal was a court of law.[31] It was ordered to summon both the Governor and Company of Connecticut and the Chief Sachems of the Mohegan nation, "take Examinations upon Oath or otherwise", and, "having hear'd both parties...to determine [the matter] according to Justice and Equity, and to restore the said Indians to their Settlements in case they be unjustly dispossessed...."[32] The commission's ruling was to have legal force without crown approval, although a right of appeal to "Our Privy Council" was provided.[33]

At the tribunal's first sitting Connecticut entered a plea to jurisdiction and then refused to participate further.[34] According to Dudley, the colony also submitted that Oweneco (who had succeeded Uncas) was "no Sachem or Gov[ernor]" of the Mohegan,

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[30]Commission to J. Dudley, Gov. Mass., and others, 3 April 1704, *CO* 324/29: 280-283.

[31]The tribunal must have been a court of law because it was empowered to set aside colonial statutes, and as a charter colony Connecticut's laws were "not repealable by the Crown" and could only be declared invalid by judicial process: Board of Trade to House of Lords, 13 June 1733, *CSP* (1734-35), #20. Indeed, the colony refused to acknowledge the Dudley tribunal because it was to "Judicially Determine" the cause: "Protestation", 24 Aug. 1705, *CO* 5/1272: 48-49.

[32]*Supra* note 30.

[33]*Ibid.*

[34]"Protestation", 24 Aug. 1705, *CO* 5/1272: 48-49.

and therefore lacked authority to represent the Indians.[35] Although the court did not address the constitutional argument of the colony in its judgment, Dudley informed the Board of Trade that in his opinion if the crown could not grant a commission to hear "so apparent a breach between that Government and a Tribe of independent [*Indians*]", then "that Corporation must be [beyond] all challenge".[36] Dudley also stated that the colony's challenge to the "government" of Oweneco over his nation was not sustainable, as the colony's own records demonstrated that it had considered him to be the proper sachem.[37]

D. The 1705 Judgment

The Dudley commission delivered its judgment in 1705, stating:

> [T]he Court confirms the justice of the Mohegans' case & complaint. The Court determine[s] (1) that Owaneco is the true Sachem of the Mohegan Indians. (2) That he & his ancestors have always been loyal to the Crown of England (3) and that the Government of Conecticut have by several treaties acknowledged them to have lands of their own....[38]

It went on to hold that by these treaties, the reserved lands constituted both "trust" lands, held by the Masons for Mohegan use, and "sequestered" lands, which were trust lands deeded back to the Mohegan with a limitation against alienation. The court concluded that, "[c]ontrary to these reservations & treaties", the colony had granted these lands to settlers, and it therefore ordered their return to the Mohegan.[39]

The 1705 judgment was not explicit about the constitutional status of the Mohegan nation. It is unlikely that it considered the Mohegan to be internationally sovereign given

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[35]Dudley to Board of Trade, 1 Nov. 1705, *CSP* (1704-5), #1422.

[36]*Ibid* (brackets and emphasis appear in text).

[37]*Ibid.*

[38]"Proceedings of the Court of Enquiry & determination of the Complaint of the Mohegan Indians", 3 Nov. 1705, *CSP* (1704-5), #1312.

[39]*Ibid.*

its finding that the reserved land was either held in trust by individual Englishmen or under deed issued by those individuals. However, as Dudley's extra-judicial comments suggest, the ground for the court's rejecting the colony's constitutional challenge to the commission must have been that the Mohegan were "independent" from the colony. The judgment seems predicated upon the view that the Mohegan nation was a constitutional unit within the empire. If so, in declaring Oweneco to be "true Sachem" and in upholding treaty rights against colonial law, the court may be said to have applied "imperial" law. It is unclear, however, whether the court determined Owaneco's sachemship by applying aboriginal custom or whether it simply relied upon records of the colony.

E. The 1706 Privy Council Appeal

The colony appealed the 1705 judgment, and in 1706 both parties submitted arguments before the Privy Council's committee for hearing appeals from the plantations. Among the seven members of the appellate committe were Holt C.J. and Trevor C.J..[40] The colony again argued that the creation of an imperial court to determine land titles within the colony was an illegal infringement of the 1662 charter.[41] In making this argument, it had to establish that the Mohegan nation was subject to the jurisdiction of colonial courts, an argument undermined by its practice, evidenced by the 1681 treaty, of "treating with them as independent".[42]

In its judgment the appellate committee of the Privy Council stated:

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[40]Smith, *op. cit.*, 427, n. 59.

[41]*Ibid.*, 427.

[42]Sir H. Ashurst, Conn. London agent, to Governor & Council of Connecticut, 21 May 1706, *WP*, V, 324.

> Their Lorps. have fully heard the Parties concerned by their Councill Learned upon the matter of the said appeal...[and] Agree humbly to Report their Opinion that...it Appearing the Mohegan Indians are a Nation with whom frequent Treatys have been made, the Proper way of Determining the aforesaid Differences, is by Her Matys Royall Commission; Their Lordps are further humbly of Opinion that a Commission of Review...be Expedited at Her Matys Charge....[43]

In essence, the Privy Council's judgment stands for the following propositions of imperial constitutional law: (a) treaties entered into between a colony and an Indian nation were relevant to the determination of the legal status of the Indian nation and the legal powers of the colonial government, such that (b) where a colony had, by treaty, recognized the independent character of an Indian nation, its constitutional authority to exercise judicial jurisdiction over that nation was limited, and it was open to the imperial crown to intervene. However, the judgment did not indicate whether the treaty was an absolute bar to colonial jurisdiction, such that the nation could claim exemption as a matter of right, or whether the colony's authority over the nation was limited only in those instances where the imperial crown had decided, as a matter of discretion, to intervene. Furthermore, the judgment was ambiguous about the legal character of the Mohegan "Nation". Although Smith's summary of the judgment stated that the Privy Council held that the treaties made with the Mohegan "revealed that the Mohegans were a sovereign nation",[44] the Privy Council did not use the word "sovereign" and there is nothing in the judgment which precludes the conclusion that the Mohegan nation was a component of the imperial order. If the Mohegan nation was not, to some degree at least, incorporated within the empire, why would their rights have been determinable "by Her Matys Royall Commission"? It has been argued elsewhere that unless the Privy Council concluded that

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[43]"Report of the Committee for hearing of Appeals from the Plantations touching ye Mohegan Indians Lands", 21 May 1706, *PC* 2/81: 204-205.

[44]Smith, *op. cit.*, 427-28.

the Mohegan were "sovereign" the establishment of the Dudley commission by the crown would have violated the general rule that rights between subjects could only be determined by common-law courts.[45] This conclusion, however, ignores the inherent jurisdiction of the crown under the intra-imperial relations prerogative to determine disputes between components of the empire "by special commission".[46]

F. The 1738 Commission of Review

1. Arguments and evidence

The 1706 commission of review, though appointed, never sat, and a second commission of review—consisting of the Governor of Rhode Island and Rhode Island and New York council members—was created in 1737.[47] During the intervening years, the colony recognized Ben Uncas, grandson of the original Uncas, as chief sachem, and obtained from him a signed release from all Mohegan claims.[48] The Mohegan refused to recognize this act, and at the commencement of the 1738 hearing argued that John Uncas, another grandson of the first Uncas, was rightful sachem. The court therefore proceeded to determine which person was sachem.[49] To this end, it accepted written and oral evidence from witnesses.[50]

Affidavits submitted to the court reveal two types of argument corresponding to the two features of aboriginal constitutional custom identified in Chapter One—election

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[45]Campbell, *loc. cit.*, 357-58.

[46]*Supra* note 19.

[47]Smith, *op. cit.*, 428-430.

[48]*Ibid.*, 429; *Case of the Mohegan*, 16.

[49]Proceedings of the 1738 Commission of Review, *CO* 5/1269, T 17, 68a.

[50]*Ibid.*, 68a-69b.

and hereditary succession.[51] The affidavits supporting Ben Uncas emphasized the ceremony at which he was purportedly elected. One witness stated: "I was there Present at the Time when he was Invested with the Sachemship with Much Pomp Expressions of Joys And by the Universall Consensus of all the Mohegan Indians".[52] The affidavits supporting John Uncas emphasized rules of succession. One witness, purporting to be acquainted with Mohegan "Customs", traced the descent of the sachemship through several generations and argued that this succession of the office within the Uncas lineage revealed a custom upon which "a Right to the Sachemship" could be established.[53]

The majority of the court declared Ben Uncas to be the lawful sachem of the Mohegan Indians. The two New York council members dissented, stating to the Board of Trade: "[I]t came out that by the constitution of the tribe the sachemship was hereditary and that John Uncas was sachem *de jure*", and although Ben Uncas had been "sachem *de facto*" he had been "deposed by the tribe".[54] Suspecting bias on the part of the Rhode Island members of the court, the New York commissioners withdrew from the proceedings.[55] The Rhode Island commissioners proceeded to hear the merits of the case, finding for the colony.

2. The 1738 judgment

The court explained its decision on the Mohegan sachemship in this way:

> We find, by the Evidence of Sundry indifferent Persons of good Credit, yt. Ben Uncas is ye present Chief Sachem of the Moheegan Indians, and

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[51]*Supra* ch. 1, IV, B.

[52]Affidavit of Johnathan Wickwine, 30 May 1738, *CO* 5/1269: 112a.

[53]Affidavit of John Waterman, 30 May 1738, *CO* 5/1269: 116.

[54]P. Cortlandt and D. Horsmanden to Board of Trade, 20 Nov. 1738, *CSP* (1738), #508.

[55]*Ibid*.

> yt. he has been Solemnly Installed into yt. Office According to the Indian Method, & yt. ye Sd. Ben Uncas is ye Eldest Son of his Father Major Ben Uncas his predecessor, and yt. He was appointed to Succeed his Sd. Father by an Agreement made between his Father & the Tribe Anno 1723, which Agreement is ye first Plan or Modell of Governmt. yt. we Can discover to have been Among sd. Tribe; and we also find yt. Ben Uncas, & his Father Major Ben Uncas, have, at all Times Since their Respective Installments, been acknowledged by ye Government of ye Colony of Connecticut to be ye true & Rightfull Sachems of sd. Tribe.[56]

The court then proceeded to consider the relevant deeds and treaties, accepting the colony's interpretation of their legal implications. It also observed that the 1662 charter granted to the corporation "*all ye Lands* in sd. Colony", and that any reserved lands remaining in the possession of the Mohegan were "secured to ye sd. Chief Sachem and Mohegan Indians by the Colony...."[57] It therefore overruled the 1705 judgment.

Like the 1705 judgment, the 1738 decision revealed a certain conception of Mohegan constitutional status. Its conclusion that Mohegan lands were, by charter, within the colony of Connecticut and held from the corporation implies that the Mohegan were not regarded as internationally sovereign. However, it clearly held the Mohegan nation to have had a "Governmt" distinct from that of the colony in which it was located. Thus, despite differences in opinion on the merits of the case, the 1738 and 1705 courts both seemed to regard the Mohegan nation as an independent unit within the imperial order.

If this interpretation of the judgment is accepted, then it has significant implications for the analysis of the court's conclusions on Mohegan sachemship. Even if the court was biased, its judgment in this respect was nevertheless justified by reference to legal arguments: the relevant part of native customary law was introduced as evidence and was applied (although perhaps incorrectly) by the court. Indeed, the court recognized

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[56]Judgment of 1738 Commission of Review, 5 June 1738, *CO* 5/1269, T 17, 72a.

[57]*Ibid.*, 72b.

both elements of constitutional custom common to tribal societies: hereditary succession (in this case patrilineal—Ben Uncas was "Eldest Son" of his predecessor) and election (reference was made to "an Agreement" with "the Tribe"). The judicial recognition of the "Indian Method" and the Mohegan "Plan or Modell of Governmt" therefore represents the application of native customary constitutional law by an imperial court. If the Mohegan nation was a component of the imperial constitutional order, the court may be said to have applied customary law which had been incorporated into imperial law under the common-law principle of continuity. It is important to observe, however, that native custom was not the only basis for decision; the court also considered the colony's recognition of Ben Uncas as relevant. In short, it sought to determine the "Rightfull" sachem both from the internal native perspective and the external British perspective, an approach which confirmed the extent to which native and British laws were woven together.

G. The 1743 Commission of Review

Arguing that Ben Uncas was not their "Lawfull or right Sachem", a segment of the Mohegan nation petitioned for a re-hearing.[58] On recommendation of the Board of Trade, the crown set aside the 1738 judgment, and a new commission of review was established. The royal commission creating the 1743 Commission of Review is significant for its treatment of that part of the 1738 judgment on the Mohegan sachemship. It stated that the commission "Declared one Ben Uncas to be Chief Sachem of the Sd Indians (whose Right the Sd. Lords Commissioners for Trade did not think themselves Competent Judges)", and then proceeded to instruct the new tribunal to summon, among other persons, the "Chief Sachem of the Mohegan Indians".[59] In other

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[58]Petition of June 1739, *CO* 5/1269, T 16, 62a.

[59]Commission to Governor and Council of New York, 8 Jan. 1743, *CO* 5/1272: 6-11.

words, the crown confirmed in an instrument under the great seal that native customary law on sachemship was—at least in this case—justiciable in a British imperial tribunal. Ultimately, the 1743 Commission of Review did not decide upon the matter as the colony withdrew its objection to the court's hearing testimony or argument from John Uncas.[60]

While Mohegan customary law thereupon ceased to be of concern, the constitutional status of the nation and the constitutionality of the commissions creating the various courts again became relevant. This time a third party—"tenants" who had been granted interests by the colony in the lands in controversy—entered a plea to jurisdiction, arguing that a juryless court could not make an order affecting their land titles.[61] Counsel for the Indians demurred. An interim ruling was therefore rendered upon the question of the commission's constitutionality insofar as it affected the freehold rights of private persons within the colony. It is this interim ruling which has recently been cited as support for the proposition that aboriginal nations were "sovereign" in British law,[62] and therefore it deserves close attention.

1. 1743 interim ruling on jurisdiction

The majority of the court overruled the plea to jurisdiction, and two commissioners, Daniel Horsmanden in the majority and Cadwallader Colden in dissent, wrote opinions. In his reasons, Horsmanden stated:

> The Indians though Living amongst the Kings Subjects in these Countries, are a Separate and Distinct People from them, they are treated with as Such, they have a Polity of their own, they make Peace and War with any Nation of Indians when they think fit, without controul from the English.
>
> It is apparent the Crown looks upon them not as Subjects, but as a Distinct People; for they are mentioned as Such throughout Queen

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[60]*Book of Proceedings*, 130.

[61]*Book of Proceedings*, 192.

[62]*Supra* note 3.

> Ann's, and his Present Majesty's Commissions by which we now Sit.
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> ....
>
> So that from hence I draw this consequence, that a Matter of Property in Lands in Dispute between the Indians a Distinct People (for no Act has been Shewn whereby they became Subjects) and the English Subjects, cannot be Determined by the Laws of our Land, but by a Law Equal to both Parties, which is the Law of Nature and Nations; and upon this foundation, as I take it, these Commissions have most properly Issued.[63]

Horsmanden appeared to have concluded that the Mohegan nation was a sovereign nation independent of both colonial and imperial orders. Under these circumstances, the crown had authority to erect a special court to apply the law of nations in the determination of a dispute between the nation and an English colony, notwithstanding the powers of judicature granted to the colony in 1662 (he did not address how or why an internationally sovereign nation would submit to the judicial jurisdiction of the crown-in-council). In his view, unless this court could order restitution of lands if it found for the Indians it would be unable to provide a remedy; therefore, although the tenants were not expressly mentioned in the commission, the court's jurisdiction over them was "a Matter Incident to the Cause".[64]

Colden commenced his dissenting opinion by expressing a contrary view of native constitutional status:

> I can in no manner consider the Mohegan Indians as a Separate or Sovereign State, or that Either Ben Uncas, or John Uncas are in any Sense Sovereign Princes; Such a Position in this Country where the state and Condition of Indians are Known to every Body, would be Exposing Majesty and Sovereignty to Ridicule; It might be of Dangerous Consequence, and not to be Suffered in any of his Majesty's Courts, Could I imagine it could have any Influence on the Minds of the People who heard it advanced; Both Ben Uncas and John Uncas and every one of the Mohegan Nation are born under the allegiance to the Crown of

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[63] *Book of Proceedings*, 192.

[64] *Ibid.*

> great Brittain...
>
> Notwithstanding of this I hope no Man can think I do these Indians any Injury in the Present Case before the Court, when I allow them to be Subjects of Great Brittain, Enjoying the Benefit and Protection of the English Law, and all the Priviledges of British Subjects.[65]

He then concluded that, as the proceedings were in "Subversion of the Common Law", the commission had to be narrowly construed and jurisdiction could not be extended over any parties "other than the Govr & Company of Connecticut, or the Sachem and Tribe of the Mohegan Indians" who had been expressly named.[66] Thus, although Colden thought the Mohegan were subjects with rights under English law, he apparently accepted that an imperial court might determine those rights without violating the colony's charter rights, suggesting that by "English" law he may have been referring to English, or British, *imperial* law, and not local colonial *municipal* law.

To summarize, both opinions on the plea to jurisdiction had two parts. Horsmanden concluded: (1) that natives were an alien people whose relations with Britain were governed by the law of nations, and (2) that as an incident to its authority to determine a dispute between a native people and a colony, an imperial court could make orders which affected the municipal legal rights of individuals resident within the colony. Colden concluded: (1) that natives were subjects whose relations with settlers were governed by English law, and (2) that a commission establishing an imperial court to determine a dispute between natives and a colony was valid only in relation to parties expressly named. The conclusions on the court's jurisdiction over tenants in the second parts of these arguments were not contingent upon the conclusions on the constitutional status of natives made in the first parts. Thus, one could agree with Horsmanden that natives were distinct peoples under the law of nations and still agree with Colden that

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[65]*Ibid.*, 193.

[66]*Ibid.*, 193-4.

instruments creating imperial courts must be narrowly construed; conversely, one could agree with Colden that natives were subjects under English law and still agree with Horsmanden that instruments creating imperial courts could be broadly construed. In short, the comments on the constitutional position of Indian nations were, in both arguments, *obiter dicta* in relation to the point of jurisdiction being decided. The other members of the majority, commissioners Cortlandt, Rodman and Morris, did not indicate whether or not they agreed with Horsmanden's reasons.[67]

2. 1743 judgment on the merits

The majority of the court, President Colden and commissioners Cortlandt and Rodman, issued its judgment on the merits on 16 August 1743. The reasons for judgment, in which all three commissioners concurred,[68] focused upon the deeds of 1640, 1659 and 1660, concluding that they had the effect of conveying to Major Mason and later to the colony legal title to the reserved Mohegan lands "on condition" that the Mohegan "be provided with a Sufficient Quantity of Land to Plant on...."[69] Any remaining doubt about land titles was resolved by the 1662 charter, by which all lands in the colony "were Vested in the Said Govr and Company *in full and Absolute Property and Right in Law....*"[70] The legal effect of the deeds and charter was, concluded the court, that "the Sachem of the Mohegan Indians had no Right remaining in them to any

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[67]The court's decision, and Horsmanden's reasons, were entered onto the record in this way: "The Court were of Opinion that the Said Plea to Jurisdiction Should be Overruled.—And in favour of Said Opinion Mr. Commissr. Horsmanden Offer'd his Reasons in Writing and Desired them to be Enter'd on the Minutes as follows." *Ibid*, p. 192. *Cf.* wording of judgment on merits in this respect, *infra* note 68.

[68]The record stated: "M. Colden, Mr. Cortlandt and Mr. Rodman having Concur'd in Opinion upon the Merits of this Cause, and Drawn up the Same in writing, 'twas Read in Court as follewth...." *Ibid*, 209.

[69]*Ibid.*, 210.

[70]*Ibid.*, 211.

of the Lands in Controversy, besides an Equitable Right to a Quantity of Land Sufficient for their Subsistence by Planting...."[71] The colony had fulfilled this obligation in equity and therefore the 1705 judgment was overturned.[72] As for the constitutional position of the Mohegan, the court concluded that the colony had had to enter into treaties with them because they were "Indians[,] a Barbarous People, *not then Subject to the Regular Course of any Law*, easily misled by misapprehensions, and as easily Provoked to violent mischievous Actions...."[73]

Throughout the judgment the court referred to law, equity, rights, and title without expressly indicating from which system of law these juridical concepts derived. However, the court's observation that treaties were necessary in part because the Mohegan were not "Subject to the Regular Course of any Law" confirms that the Mohegan were not governed—at least in a *de facto* sense—by local colonial law. Furthermore, the court's assumption that the crown could, by charter, unilaterally vest the property of the Mohegan nation in the colonial proprietor suggests it was applying imperial law and not (as Horsmanden had wanted) "a Law Equal to both Parties, which is the Law of Nature and Nations".[74]

Horsmanden dissented from the majority on the merits. He interpreted the majority's conclusion that the Mohegan were not subject to any regular course of law as meaning not subject to any law "That the English were acquainted with", that instead they "were a Law unto themselves" under "their constitution".[75] As for the merits of the

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[71]*Ibid.*

[72]*Ibid.*, 212-13.

[73]*Ibid.*, 212 (emphasis added).

[74]*Supra* note 63.

[75]D. Horsmanden (dissent), *CO* 5/1060: 119b, 109b.

claim, Horsmanden disagreed with the majority's interpretation of the treaties, deeds and charter, arguing that the Mohegan did not surrender title to or jurisdiction over the land but only recognized the colony's exclusive right to purchase the land and its right, prior to purchase, to govern settlers therein.[76] Consistent with his interim ruling, he applied "a Law Equal to both Parties" and concluded that the crown could not, by charter, unilaterally make unceded Mohegan lands "part of the Colony".[77]

To summarize, the commissioners in majority applied imperial law, while those in minority applied the law of nations. Apparently those commissioners who had agreed with Horsmanden that the interim plea to jurisdiction be rejected yet sided against Horsmanden on the final judgment either had not endorsed Horsmanden's opinion on the interim ruling that the law of nations governed,[78] had changed their minds on this point, or had endorsed the final judgment on the assumption that it represented the application of the law of nations not as a law equal to both parties but as incorporated (and qualified) by imperial law.

H. The 1772 Privy Council Appeal

The Mohegan Indians appealed the 1743 decision to the Privy Council. The appeal did not begin until 1770, and a decision was not issued until 1772.[79] Without reasons, the Privy Council stated that the "Judgment or Decree of the said Commissioners of Review of 16th August 1743 should be Affirmed...."[80] Several commentators have

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[76]*Ibid*, 105b-119b. Morris dissented on similar grounds: *CO* 5/1272: 214-15.

[77]*Ibid.*, 105b.

[78]See *supra* note 67.

[79]Smith, *op. cit.*, 437-38.

[80]Report of 19 December 1772, *PC* 2/116: 513-515; aff'd, order in council, 15 January 1773, *PC* 2/117: 10.

argued that the Privy Council's 1772 decision affirmed Horsmanden's opinions on the constitutional status of Indian nations rendered after the plea to jurisdiction.[81] This argument must be carefully considered.

The appellate committee of the Privy Council affirmed the 1743 judgment of August 16th. The interim ruling on the plea to jurisdiction had been rendered earlier and was not part of this judgment.[82] However, it might be argued that by affirming the final judgment the interim ruling was implicitly affirmed. Such an argument is presented by Clark, who says that the "Privy Council in effect accepted the view of Commissioner Horsmanden" that Indian nations were "juristically sovereign".[83] Clark's argument, however, is premised upon the mistaken conclusion that the interim ruling was a condition precedent to the final judgment.[84] In fact, the judgment on the merits of the dispute between the major parties was not contingent upon the outcome of the plea to jurisdiction made by the intervening tenants, and it would not have been legally inconsistent for the Privy Council to have expressed approval for both the majority decision on the merits *and* Colden's minority opinion on the tenants' plea to jurisdiction. In short, it cannot be said that the Privy Council *necessarily* adopted Horsmanden's opinions on the plea to jurisdiction. At best, it might be said that because the Privy Council did not distance itself from these opinions it must not have disagreed with them. But even this argument cannot be accepted, for it must be concluded that the Privy Council, by expressly confirming the final judgment, impliedly rejected the interim

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[81]Barsh and Henderson, *supra* note 3; Union of British Columbia Indian Chiefs, *supra* note 3; Clark, *supra* note 3.

[82]Smith, *op. cit.*, 434-435.

[83]Clark, *op. cit.*, 45.

[84]*Ibid.*, 39-45.

opinions of Horsmanden insofar as they conflicted with the final judgment. As seen, the final judgment rejected Horsmanden's approach and concluded that although the Mohegan were "not then Subject" to local municipal law, their rights, if they had not already been ceded by treaty, had been extinguished according to British (imperial) law by royal charter.

II. *Mohegan Indians v. Connecticut* Summarized

Mohegan Indians v. Connecticut confirms three important points for the purpose of this study: first, that native nations on reserved lands within colonial boundaries were not necessarily subject to colonial municipal law but might retain an independent status in imperial law; second, that courts, in determining whether or not natives were subject to municipal law, considered local crown practice, in particular treaties entered into between local officials and native nations; and, third, in those cases where treaties indicated that natives were not subject to local colonial law, their own customary laws, including those relating to government, continued in force and were justiciable in British imperial courts. In short, the *Mohegan* case may be said to support the conclusion that native law and government could become incorporated within British *imperial* law by the common-law principle of continuity as a distinct system separate from colonial *municipal* law.

It is difficult to see how the *Mohegan* case supports the view that nations on reserved lands within colonial boundaries were, from the perspective of British law, internationally-sovereign nations; however, the case is certainly consistent with the view that, in a political or *de facto* sense, the Mohegan nation had elements of internal, or local, sovereignty. And, it is at least arguable that British legal theory at the time could accommodate the notion of a jurisdictional unit within British sovereignty exercising sovereign-like authority over internal matters (for example, counties palatine).[85]

The *Mohegan* case did not establish rules applicable to all native nations.[86] Indeed, the Privy Council affirmed colonial judicial jurisdiction over those nations which had been "surrounded by the white Inhabitants", had become "Domesticated", and had "submitted to the [colonial] Laws...."[87] In other words the extent to which an Indian nation occupied a position of independence within British *imperial* constitutional law depended, at least in part, upon the degree of its integration within *local colonial* law. As a result, a nation's independence at imperial law depended upon whether the imperial crown took steps to protect the nation from the imposition of colonial law. *Ad hoc* measures to this effect were taken by the imperial ministry in the *Mohegan* case, but the creation of an imperial Indian Department in the mid-eighteenth century represented the interposition of a permanent imperial institution between Indian nations and colonial governments—and it was the permanence of this institution which served to solidify the independence of aboriginal nations from local colonial systems at imperial common law.

III. The Imperial Indian Department

By the mid-eighteenth century British Indian policy had reached a crisis point. Control over Indian affairs by individual colonies precluded the development of a cohesive policy necessary to the defence of British settlements against France and its

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[85] *Supra* ch. 2, IV, D.

[86] The Plantation Indians in New England were subject to colonial law and courts: *supra* ch. 3, note 75. Also, Noble, ed., *Records of the Court of Assistants* (1901), 21, 52-54, 295; Smith, ed., *Colonial Justice in Western Massachusetts* (1961), 85-6, 123; Springer, *loc. cit.*, 47-48; Kawashima, "Jurisdiction of the Colonial Courts over the Indians in Massachusetts" (1969); Kawashima, "Forced Conformity: Puritan Criminal Justice and Indians" (1977); Kawashima, *Puritan Justice and the Indian* (1986), 21-40.

[87] Sir W. Johnson, Ind. Dept. Supt., to Lord Shelburne, Sec. of State, 15 Jan 1767, *DRCHSNY*, VII, 891-2, in relation to the Wappinger nation, whose land claim was referred back by the Privy Council to local courts: Hamilton and Mark, eds., "Chief Daniel Nimham v. Roger Morris" (1964), 210.

native allies.[88] Part of the problem, it was argued, was that Indian affairs were "properly matters of State" falling "within the Kings Prerogative", yet because the exercise of the royal prerogative by colonial governors had been frustrated by colonial assemblies, Indian affairs were "almost intirely in the hands of the People".[89] The solution was to delegate the exercise of the prerogative over Indian affairs to an imperial appointee unassociated with any colonial government. The commissioning of Sir William Johnson as "Colonel over the Six Nations" in 1755 therefore marked the beginning of an imperial Indian Department which would operate for over a century.[90] From 1761 British North America was divided into two districts, northern and southern, each having superintendents of Indian Affairs appointed by the imperial crown and instructed by the imperial ministry through the commander-in-chief of British forces in America. Attempts to provide the Department with a statutory footing failed in the 1760s, and therefore its legal foundation throughout derived from commissions and instructions issued under the royal prerogative. The policies of the Department will be examined in Part Two.

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[88] Atkin, "Report on Indian Affairs to the Board of Trade" (1755), 3, 7.

[89] *Ibid.*, 37.

[90] Allen, *History of the British Indian Department* (1971), 8; Sosin, *Whitehall and the Wilderness* (1961), 27-31.

Chapter Five

Competing Theoretical Models of British Imperial Law

The analysis of the *Mohegan* case in Chapter Four confirms the inferences drawn from colonial statutory law in Chapter Three: notwithstanding the crown's assertion of rights of property and sovereignty in North America by discovery and occupation or settlement, and notwithstanding the introduction of English municipal law, either by grant or by the birthright of settlers, native nations were regarded as having political and territorial rights which could be obtained by conquest or treaty and, after native submission to the British, the continuity of native customary law and government as a distinct system, sanctioned by the imperial constitution but separate from local colonial municipal systems, was possible, even in relation to nations residing on reserved lands within colonial boundaries. These basic propositions form a framework of legal principle within which the constitutional history of colonial Canada between 1760 and 1860 is to be considered in Part Two of this study.

Before commencing that task, however, it is important to observe that imperial law continued to evolve throughout the nineteenth century and that these changes contributed to the normative context in which opinions were formed about the legal status of native laws and governments in colonial Canada. The purpose of this chapter is to summarize those developments and to identify several competing theories, or models, of imperial law which may be said to challenge the interpretation of imperial law presented thus far. Three developments are of central concern: first, the development of the settled/conquered distinction by British commentators and courts; second, the development of the doctrine of Indian tribal sovereignty by American courts; and, third, the development of the doctrine of aboriginal wardship by both British and American courts.

I. The Settled/Conquered Colony Distinction

Nineteenth-century commentators on imperial law adhered strictly to Blackstone's dichotomy: colonies either were settled, in which case relevant parts of English law applied, or were conquered, in which case local laws continued in force except where abrogated by the crown.[1] Nineteenth-century English and British colonial courts consistently held that Britain had acquired its North-American colonies by settlement and therefore English law had been introduced for settlers automatically as their birthright and was not contingent upon prerogative or Parliamentary legislation; in making this conclusion, these courts either implicitly or explicitly rejected the Holt/Blackstone conclusion that North-American colonies were conquests/cessions governed by crown prerogative until English law was introduced legislatively.[2] In determining the content of the common law after the independence of the United States, American courts adopted the same approach.[3]

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[1]*Chitty Prerog.*, 29-30; Clark, *Colonial Law* (1834), 4-10; Burge, *Colonial and Foreign Laws* (1838), xxxi-xlii; Woodcock, *Laws and Constitution of the British Colonies* (1838), 156-62; Mills, *Colonial Constitutions* (1856), 18-22; Creasy, *Imperial and Colonial Constitutions of the Britannic Empire* (1872), 60-70; Tarring, *Law Relating to Colonies* (1882), 3-23.

[2]*Kielly v. Carson* (1843), 4 Moo. P.C. 63 (P.C.), at 84-85; *The Lauderdale Peerage* (1885), 10 App. Cas. 692 (H.L.), at 744-46; *R. v. Kough* (1819), 1 Nfld. L.R. 172 (S.C.), at 174-75; *Jennings v. Hunt* (1820), 1 Nfld. L.R. 220 (S.C.), at 225; *Yonge v. Blaikie* (1822), 1 Nfld. L.R. 277 (S.C.), at 283; *Hanington v. McFadden* (1836), 2 N.B.R. 260 (S.C.), at 267, 277; *Anderson v. Todd* (1845), 2 U.C.Q.B. 82 (Q.B.), at 83-84 (*obiter*: Holt C.J. was wrong to conclude that Virginia was conquered); *Uniacke v. Dickson* (1848), 2 N.S.R. 287 (Ch.), at 287-89 (Blackstone's statement on settlements was applied to Nova Scotia without mentioning that Blackstone thought North American colonies were conquests).

[3]Some American courts cited British authorities for this conclusion: *U.S. v. Worrall*, 2 Dall. 384 (Penn. Cir. Ct., 1798), at 394 ("Judges and lawyers of England"); *Bogardas v. Trinity Church*, 4 Paige's Rep. 198 (N.Y. Ch., 1833), (citing *Blankard v. Galdy* (1693), 2 Salk 411); *Canal Appraisers v. The People*, 17 Wendell's Rep. 587 (N.Y. Ct. of Errors, 1836), at 583-84, 616-17, and *Morgan v. King*, 30 Barb. 9 (N.Y.S.C., 1858),

The cases in which the settlement rule was articulated concerned *settler* rights only, and it is far from clear whether courts were rejecting the possibility of defining *native* rights under the conquest/cession paradigm. As will be seen, American courts did not perceive any inconsistency between defining settler rights under the settlement paradigm and native rights under the conquest/cession paradigm. Although no British courts of the nineteenth century took this approach in relation to North America, courts addressing the legal consequences of British expansion into places like India and Africa, places which did not fit neatly into one or other of the two categories, were prepared to acknowledge a variety of hybrid constitutional arrangements. From these nineteenth-century decisions, as well as from twentieth-century decisions and commentary, four general models of imperial law may be identified. The distinction between conquered and settled colonies remains important to the identification of these competing models of imperial law, but added to the "simple" forms of conquest and settlement which preclude any legal pluralism are "complex" forms of conquest and settlement which accommodate a degree of legal pluralism.

A. Simple and Complex Constitutional Models

1. The Simple Conquest/Cession-Model

Under the simple conquest/cession-model, British settlers in a newly-acquired territory became subject to the same local laws and institutions which were presumed to

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at 13-14 (both applied Blackstone's birthright principle as applied to settled colonies without mentioning that Blackstone considered the principle inapplicable to American colonies). Story J., who applied the birthright principle in *Town of Pawlett v. Clark*, 9 Cranch. 292 (U.S.S.C., 1815), at 333, *Van Ness v. Pacard*, 2 Pet. 137 (U.S.S.C., 1829), at 144 and *Patterson v. Winn*, 5 Pet. 233 (U.S.S.C., 1831), at 241, argued at *Story Const.*, Bk. I, Ch. XVI, §§152-55, that even if Blackstone were correct in labelling American colonies conquests, the abandonment principle would have rendered them settlements into which English law ran automatically.

continue in force for local inhabitants under the common-law principle of continuity.[4] The application of this model was apparently limited to British acquisitions of territories held by other European states.

2. The Simple Settlement-Model

In the seventeenth and eighteenth centuries it was asserted that occupation gave rights of property in and concomitant rights of territorial sovereignty over land in which no one had property rights, but not sovereignty over people, even non-sovereign families.[5] However, by the nineteenth-century, courts and commentators began to assert that it was *sovereignty*, not property, that was the primary subject of acquisition by occupation. It was argued that Britain could assert sovereignty over native peoples without their conquest or consent and regardless of whether they had property in their lands, provided such peoples lacked the salient features of sovereign government, or "an established system of law".[6] Said Prendergast C.J. in relation to New Zealand:

> On the foundation of this colony, the aborigines were found without any kind of civil government, or any settled system of law....The Maori tribes were incapable of performing the duties, and therefore of assuming the rights, of a civilised community....
>
> In fact, the Crown was compelled to assume in relation to the Maori tribes...these rights and duties which, *jure gentium*, vest in and devolve upon the first civilised occupier of a territory thinly peopled by barbarians without any form of law or civil government.[7]

The simple settlement-model integrates this nineteenth-century idea that natives

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[4] *Campbell v. Hall* (1774), Lofft 655, at 741.

[5] *Supra* ch. 3, I.

[6] *Cooper v. Stuart* (1889), 14 App. Cas. 286 (P.C.), at 291. Also, *MacDonald v. Levy* (1833), 1 Legge 39 (N.S.W.S.C.), at 45.

[7] *Wi Parata v. Bishop of Wellington* (1877), 3 N.Z. Jur. (N.S.) 72 (S.C.), at 77. Also, *State v. Foreman*, 16 Tenn. R. 171 (Tenn. S.C., 1835), at 189; *Milirrpum v. Nabalco Pty. Ltd.* (1971), 17 F.L.R. 141 (N.T.S.C.), at 201; *Coe v. Commonwealth of Australia* (1979), 24 A.L.R. 118 (H.C.), at 129.

were automatically subject to British sovereignty in settled territories with the older idea that English municipal law was automatically in force in such territories as the birthright of settlers, and concludes that natives instantly became British subjects governed by the same body of English municipal law as settlers. The fact that native peoples followed their own customs both before and after the assertion of British sovereignty was deemed irrelevant; if these customs were sufficiently "barbarous" to be incapable of constituting an established system of law displaceable only by conquest or cession, then they were not customs "capable of being understood and administered by the Courts of a civilised country...."[8]

With respect to criminal law, under the simple settlement-model colonial courts applied English law to criminal acts committed by one native upon another, notwithstanding their remoteness from English settlements, their lack of knowledge of English law and the validity of the conduct under their own customs.[9] The justice of this policy was debated during the 1830s,[10] with the imperial ministry deciding (in one colony) that adherence to native custom might be considered at sentencing as reason for leniency without "perverting or exceeding in any degree the Letter and Spirit of the British

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[8]Grey, "Report Upon the Best Means of Promoting the Civilization of the Aboriginal Inhabitants of Australia" (1840), 34 and *Wi Parata v. The Bishop of Wellington* (1877), 3 N.Z. Jur. (N.S.) 72, at 78. Also, *R v. Billy William* (Demerara and Essequibo, 1831), *PP* 1834, XLIV, #617, 339, p. 180 (court cannot apply "Indian laws" of "wild, untutored savage tribes"); *Rira Peti v. Ngaraihi Te Paku* (1888), 7 N.Z.L.R. 235 (S.C.), at 239 (re: Maori marriage customs).

[9]*R. v. Jack Congo Murrell* (1836), 1 Legge 72 (N.S.W.S.C.) and cases discussed at Chemnitz, "Application of the Criminal Law to the Aborigines" (1960-2), 18-20.

[10]*Rep. Sel. Comm. Aborigines, 1837*, 79-80; Grey, *loc. cit.*, 35-37; Merivale, *Lectures on Colonization* (1861), 496-7.

laws...."[11]

With respect to native land rights, the simple settlement-model provided that the body of English municipal law which was *ipso facto* in force throughout the territory included the doctrine of tenures according to which the crown had not only ultimate or radical title as sovereign, but proprietary title as owner of all ungranted lands; as natives had not been granted any interest in their lands, they had no municipal legal right to them, and their land therefore became part of the royal demesne subject only to those native rights which the crown expressly conferred or implicitly recognized by some course of conduct.[12]

3. The Complex Conquest/Cession-Model

The idea underlying the simple conquest-model, that British settlers were subject to the local laws of conquered peoples, was questioned in the seventeenth century in relation to English "colonies" established in territories acquired by conquest/cession from non-Christian nations.[13] Indeed, various nineteenth-century courts confirmed that where, for religious or cultural reasons, local law was "little suited" to British settlers and English law was unsuitable for local inhabitants, a degree of legal pluralism was

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[11]Viscount Goderich, Sec. of St., to Sir B. D'Urban, Gov. British Guiana, 17 Feb. 1832, in Menezes, *Amerindians in Guyana* (1979), 97-98. Generally, *Rep. Sel. Comm. Aborigines, 1837*, 79-80.

[12]*The King v. Steel* (1834), 1 Legge 65, at 68-69; *Att. Gen. v. Brown* (1847), 1 Legge 312, at 316-18; *Wi Parata v. Bishop of Wellington* (1877), 3 N.Z. Jur. (N.S.) 72, at 77; *Hophepa Wi Neera v. Bishop of Wellington* (1902), 21 N.Z.L.R. 655 (C.A.); *Calder v. British Columbia* (1970), 13 D.L.R. (3d) 64 (B.C.C.A.), at 66-67; *Milirrpum v. Nabalco Pty. Ltd.* (1971), 17 F.L.R. 141, at 206-7, 221-23; *New South Wales v. The Commonwealth* (1975), 135 C.L.R. 337, at 438-39. Generally, McHugh, "Aboriginal Title in New Zealand Courts" (1984), 245-53; McNeil, "Question of Title" (1990), 93-95.

[13]*Supra* ch. 2, VI, B.

necessary.[14] Under these conditions, the common law recognized both the introduction of English municipal law into British enclaves within the conquered/ceded territory as the birthright of settlers as if their settlement were in an uninhabited place, and also recognized the continuity of local law for local communities under the principle of continuity.[15] In this latter respect, early twentieth-century courts stated that the customs of "tribally organized" people conquered by Britain could be recognized if they were reconcileable with "the legal ideas of civilized society",[16] although in considering these customs the imposition of English legal conceptions on "systems of native jurisprudence" was to be avoided.[17]

To summarize, two parallel municipal systems might initially be recognized in a conquered/ceded territory, the native system retaining an identity distinct from the English one. Thus, it was argued in relation to India that native peoples "living under their own laws", although "under the authority of the British Legislature", were nevertheless "considered, to many purposes, as a separate nation under a different government" from that of the "English colonies" established in their midst.[18] Under these circumstances, the application of law was not "territorial" but "personal".[19]

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[14]*Adv.-Gen. (Bengal) v. Ranee* (1863), 2 Moo. P.C. (N.S.) 22, (P.C.), at 60-61.

[15]*The 'Indian Chief'* (1801), 3 C. Rob. 12, at 31-32 (*obiter* re: India); *Ruding v. Smith* (1821), 2 Hag. Con. 371 (re: Cape of Good Hope); *Freeman v. Fairlie* (1828), 1 Moo. Ind. App. 305 (re: Calcutta); generally, McHugh, *Aboriginal Rights of the New Zealand Maori* (1987), 114, 138-145, 163-68, 184; McHugh, *Maori Magna Carta* (1991), 43-44, 83-89, 90-97.

[16]*In re Southern Rhodesia*, [1919] A.C. 211 (P.C.), at 214-15, 233.

[17]*Amodu Tijani v. Sec., Southern Nigeria*, [1921] 2 A.C. 399 (P.C.), at 403.

[18]*In re Justices of Bombay* (1829), 1 Knapp 1 (P.C.), *per* counsel at 31-32.

[19]*Supra* ch. 2, VI, B. Also in relation to India, Bowyer, *Universal Public Law* (1854), 156-60; McHugh, *Maori Magna Carta* (1991), 85.

In articulating a test of "suitability" the imperial common law was motivated by the same general principles which justified the principle of continuity itself, namely, maintenance of social order and respect for the division between judicial and legislative functions. It was simply unreasonable for the common law to sanction the disruption to social order inevitable from the sudden application of foreign legal rules to either British or non-British peoples—if such a radical result was to occur, it was a matter for "express enactment" by crown or Parliament.[20]

4. The Complex Settlement-Model

The complex settlement-model is primarily a twentieth-century interpretation of imperial law. It recognizes the possibility of legal pluralism within those colonies in which British sovereignty was asserted over native peoples by settlement alone. It may be summarized as follows:

First, British sovereignty could be established over lands and peoples lacking European forms of law and government by settlement; there was no need for conquest or cession in such cases.[21] Second, under the "birthright" principle, those parts of English common and statutory municipal law applicable to local conditions applied automatically throughout the settled colony as its municipal law.[22] As there was no conquest or cession, and because English municipal law was in force, the crown had no special rights to legislate under the prerogative, although it did have authority to introduce

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[20]*Adv.-Gen. (Bengal) v. Ranee* (1863), 2 Moo. P.C. (N.S.) 22, (P.C.), at 61.

[21]Lester, *Territorial Rights of the Inuit* (1981), 942; *Mabo v. Queensland* (1992) 107 A.L.R. 1 (H.C.), *per* Deane and Gaudron JJ. at 57-58; *Delgamuukw v. The Queen* (1993), 104 D.L.R. (4th) 470 (B.C.C.A.), *per* Wallace J.A. at 565-66.

[22]McNeil, *Common Law Aboriginal Title* (1987), 180; McNeil, "Question of Title", 92; *Mabo v. Queensland*, *ibid.*, *per* Brennan J. at 23-25; *Delgamuukw v. The Queen*, *ibid.*, *per* Wallace J.A. at 566.

local common-law courts and representative legislatures.[23]

Third, natives resident in the territory were instantly British subjects governed by colonial municipal law (i.e., English municipal law as adjusted to local conditions); their status as subjects vested without their consent or conquest, and, like other subjects, they were protected by the common law from acts of state or other extra-ordinary prerogative powers of the crown.[24]

Fourth, because it was adjusted to local conditions, English municipal law recognized the continuity of at least some native customs, and rights secured by these customs were, upon assertion of British sovereignty, instantly transformed into rights secured by colonial municipal law; as the crown had no prerogative legislative powers, it could not abrogate these rights except with the consent of natives, Parliament or the local legislature, and consequently the justiciability of these rights was not contingent upon evidence that the crown had recognized them or waived its right to abrogate them.[25] Native customs continued in force as part of colonial municipal law except where contrary to British standards of morality,[26] and (perhaps) where they failed to meet the

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[23]Lester, *Territorial Rights of the Inuit*, 972-74; Lester, *Inuit Territorial Rights*, 36; McNeil, *Common Law Aboriginal Title*, 179.

[24]Lester, *Territorial Rights of the Inuit*, 942-43; Lester, *Inuit Territorial Rights*, 15; McNeil, *Common Law Aboriginal Title*, 182; McNeil, "Question of Title", 105; *Mabo v. Queensland*, *supra* note 21, *per* Brennan J. at 24-25; Deane and Gaudron JJ. at 58-59; Toohey J. at 143-44; *Delgamuukw v. The Queen*, *supra* note 21, *per* Wallace J.A. at 568-69, 591.

[25]Lester, *Territorial Rights of the Inuit*, 1432; Lester, *Inuit Territorial Rights*, 15, 36; McHugh, "Aboriginal Title in New Zealand Courts" (1984), 239-40; McNeil, *Common Law Aboriginal Title*, 181-83; McNeil, "Question of Title", 92-93; *Mabo v. Queensland*, *ibid.*, *per* Brennan J. at 41; Deane and Gaudron JJ. at 58-59; *Delgamuukw v. The Queen*, *ibid.*, *per* Wallace J.A. at 568-69, 577-78; *Baker Lake v. Minister of Indian Affairs*, [1980] 1 F.C. 518 (F.C.T.D.), at 559; *Calder v. A.G. British Columbia*, [1973] S.C.R. 313, *per* Hall J. at 388, 404-6; *Tito v. Waddell (No. 2)*, [1977] Ch. 106, at 132.

[26]McNeil, *Common Law Aboriginal Title*, 181; *Mabo v. Queensland*, *ibid.*, *per* Brennan J. at 44-45.

English municipal common-law criteria for "particular customs".[27]

Fifth, whereas the simple settlement-model provides that settlement gave the crown full rights of sovereignty and property regardless of the presence of native occupants, the complex settlement-model provides that settlement gave the crown full rights of property only in those parts of the territory which were genuinely unoccupied; in territories held by natives under customary law, the crown got sovereignty and radical or ultimate title to the land, but the proprietary interest it would otherwise have gained had the lands been unoccupied was diminished to the extent necessary to accommodate the native interest in land as defined by native law and custom.[28] Whatever its nature, the native interest as defined by native law and custom was enforceable as a colonial municipal legal right in local colonial courts without crown grant or recognition, and its abrogation by the crown without statutory authority was illegal even if, for procedural reasons, the native right's immunity from such abrogation may have been unenforceable directly against the crown.[29]

B. Distinguishing the Complex Conquest/Cession- and Complex Settlement-Models

Both the complex settlement- and complex conquest/cession-models recognize the continuity of native customary law, but they offer radically different interpretations of that continuity. There are two important distinguishing features. First, under the complex

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[27]Lester, *Territorial Rights of the Inuit*, 884, 887; Lester, *Inuit Territorial Rights*, 40; McNeil, *Common Law Aboriginal Title*, 183; McNeil, "Question of Title", 92-93; *contra, Mabo v. Queensland, ibid., per* Brennan J. at 41.

[28]*Milirrpum v. Nabalco Pty. Ltd.* (1971), 17 F.L.R. 141, *per* plaintiff at 149-50; Lester, *Territorial Rights of the Inuit*, 264-66, 1432; McNeil, *Common Law Aboriginal Title*, 181-83; McNeil, "Question of Title", 92-93; *Mabo v. Queensland, ibid., per* Brennan J. at 30-33, 41-45; Deane and Gaudron JJ. at 60, 64-65; *Baker Lake v. Minister of Indian Affairs*, [1980] 1 F.C. 518, at 556-57, 565; *In re The Lundon and Whitaker Claims Act, 1871* (1872), 2 N.Z.C.A. 41, at 49 (crown is bound "by the common law of England" to recognize "Native proprietary right").

[29]*Mabo v. Queensland, ibid., per* Deane and Gaudron JJ. at 68-71.

conquest/cession-theory, native nations are regarded as sufficiently sovereign to require either their conquest or their consent as a precondition of the assertion of British sovereignty over them. In recognizing native sovereignty, however, the model also recognizes the crown's right to commit acts of state upon natives prior to their submission and the crown's prerogative rights to confirm, alter or abrogate their laws and government after their submission; consequently, although native law and government is presumed to continue in force at imperial common law in cases arising between natives, rights derived from local law are not justiciable against the crown until they are expressly or impliedly confirmed by the crown. In contrast, the complex settlement-model disregards native sovereignty, but by gratuitously extending British sovereignty over natives without their knowledge or consent it extends over them the full protection of the common law from both acts of state and special crown powers of legislation under the royal prerogative; their customs are immediately transformed into common-law rights secure from unilateral abrogation by the crown.

Second, under the complex conquest-model, native law continues, at least initially, as a municipal *system* supported by imperial law but distinct from the municipal English legal system imported by British settlers. Under the complex settlement-model, however, native law continues in force merely as a *custom* or *law* forming an element of the locally-adjusted English municipal system. Thus, in the former model there is systemic pluralism, in the latter there is merely legal pluralism. Indeed, the continuity of aboriginal custom under the complex settlement-model may be explained in the same manner as the continuity of local laws in a conquered territory after the legislative introduction of English municipal law and the organization of territory into shire ground, namely as the result of the hybrid continuity/particular custom rule.[30]

The continuity of a native legal *system* as opposed to native *law* therefore appears contingent upon the categorization of the colony (for purposes of aboriginal rights at least) as a conquest or cession. This point was made by Wallace J.A. in *Delgamuumkw v. The Queen*. After concluding that British Columbia was a settled colony into which the English municipal common law ran automatically, albeit as adjusted to protect certain aboriginal customs, he stated:

> The assertion of an all-encompassing aboriginal right to an exclusive social and legal system—under the so-called "doctrine of continuity"—would result in the common law affording protection to a system which is both outside and independent of the [local municipal] common law and, at the same time, extend to the aboriginal community the benefits and protection afforded by the common law to all residents of the province. This would be inconsistent with, and a fundamental departure from the principle that, upon the exercise of sovereignty, the adjusted common law became the [local, municipal] law of all subjects—native and non-native alike. Certainly it overturns the settled-conquered distinction which in British Columbia is a fundamental premise of our legal system.[31]

This is not to say that the complex settlement-model is incapable of accommodating some sort of aboriginal right of self-government,[32] but only that that right would be defined and limited by colonial as opposed to imperial law.

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[30]*Supra* ch. 2, IV, F, 2.

[31]*Delgamuukw v. The Queen*, *supra* note 21, 569-70.

[32]*Ibid.*, *per* Lambert J.A. (dissenting), at 717-30; *Hineiti Rirerire Arani v. Public Trustee* (1919) [1840-1932] N.Z.P.C.C. 1 (P.C.), at 6 (Maori customs are unlike particular customs in that Maori may have "some internal power of self-government" to alter them).

II. Other Developments in Imperial Law

A. Confirmation of Continuity by Crown Usage and Practice

Like earlier courts, courts of the nineteenth century relied upon crown usage and practice when articulating general principles of imperial common law.[33] And, when determining how those general principles were applied to specific colonies, they referred to local crown practice. It was stated in Chapter Two that before rights derived from local laws of a conquered people became justiciable against the crown the continuity of that law (which was otherwise presumed at common law in cases arising among local inhabitants) had to be expressly recognized by the crown, or at least implicitly confirmed by consistent crown usage and practice.[34] It was argued that in determining crown usage and practice it was open to courts to consider official state documents, like "rolls" or "treaties" which indicated the extent and terms of imperial expansion.[35] Nineteenth-and twentieth-century courts confirmed and further developed this judicial practice of deferring to crown usage and practice as evidenced by official state documents when determining the constitutional position of the inhabitants and local laws of newly-acquired territories.[36] In general it was held that "circumstantial evidence, such as the mode of

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[33]*The Queen v. Symonds* (1847), [1840-1932] N.Z.P.C.C. 387, at 388; McHugh, *Aboriginal Rights of the New Zealand Maori* (1987), 6-7.

[34]*Supra* ch. 2, IV, C.

[35]*Supra* ch. 2, note 44.

[36]Beginning in the nineteenth century some cases appeared to cast the presumption *against* continuity unless local law was expressly or impliedly confirmed by the crown: *Vajesingji Joravarsingji v. Sec. of State India* (1924), L.R. 51 Ind. App. 357, at 361 ("silence" does not imply "indulgence"; for those wishing to assert rights derived from local law "the onus [is] cast on them" of showing the crown's positive "acts of acknowledgment"); generally, O'Connell, *State Succession* (1967), I, 9-35, 250-56. These cases involved either challenges to the crown, or grantees of the crown, and the issue was whether the crown had abrogated local legal rights by act of state: O'Connell, *supra*, 250-57; Slattery, *Land Rights of Indigenous Canadian Peoples* (1979), 54-59. Courts were not denying the essential principle that local law continued in force in

dealing with" local people was relevant to the determination of whether the crown regarded its right to commit acts of state as remaining in place or whether it had tacitly recognized the introduction of the rule of law.[37] Courts derived such evidence from a variety of state documents, including: instructions to colonial officials,[38] official reports, correspondence and dispatches,[39] treaties,[40] local ordinances,[41] and even House of

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absence of crown abrogation but rather were denying that that principle governed cases in which the crown was itself involved; they are consistent with Hale's conclusion that confirmation of local law may be by crown usage, and they establish the type of usage which would serve to transform the continuity of local law from legal presumption to legal right justiciable against the crown.

[37]*Sec. of State India v. Bai Rajbai* (1915), L.R. 42 Ind. App. 229 (P.C.), at 237.

[38]*The King v. Picton* (1804-1812), 30 St. Tr. 225, at 535 (in determining "what was the law of that island [Trinidad] as confirmed by the English authorities" reference was made to royal instructions to the governor); *Elphinstone v. Bedreechund* (1830), 1 Knapp. 316 (P.C.), at 336-7 (counsel referred to instructions to official charged with securing conquered area in successfully arguing that "no civil rule" existed); *Sirdar Bhagwan Singh v. Sec. of State India* (1874), L.R. 2 Ind. App. 38 (P.C.), at 47-48 (examined directions to board created to deal with native land rights, concluding that the crown's acts of recognizing certain rights "were not acts affecting to justify themselves on grounds of [local] municipal law"); *Oduntan Onisiwo v. Attorney-General* (1912), 2 Nig. L.R. 79 (S.C.), at 86 (considered royal instructions to governor to determine whether rights of "white-cap chiefs" remained in force).

[39]*Sec. of State India v. Kamachee Boye Sahaba*, [1859] 7 Moo. Ind. App. 528 (P.C.), at 534-36 (examined correspondence between East-India Company and Government of Madras, and report of commissioner appointed to seize territory, concluding that seizure of an estate was an act of state); *Forester v. Sec. of State India* (1872), L.R. (Sup. Vol.) 10 (P.C.), at 16 (relied, *inter alia*, upon letter of Lord Metcalfe to determine that certain rights of property and jurisdiction under local law were *not* susceptible to abrogation by act of state); *Rajah Salig Ram v. Sec. of State India* (1872), L.R. (Sup. Vol.) 119 (P.C.), at 129 (considered "correspondence" between British Governments of India and Punjab in concluding that, in seizing lands, the "rule of law" was not intended to apply).

[40]*Forester v. Sec. of State India* (1872), L.R. (Sup. Vol.) 10 (P.C.) (support derived from treaty between relevant parties for conclusion that rights of jurisdiction and property under local law continued in force); *Oduntan Onisiwo v. Attorney-General* (1912), 2 Nig. L.R. 79 (S.C.) (considered certain agreements in determining whether the rights of "white-cap chief" remained in force).

[41]*Oduntan Onisiwo v. Attorney-General, ibid.*

Commons debates.[42]

It is important to emphasize that in relying upon these documents courts were not purporting to rely upon their inherent, or legislative, force—in some cases they had none—but rather on their value as circumstantial evidence indicating whether a system of constitutional government and rule of law had been introduced by the crown, and the extent to which local law was part of that system. In this sense, the official documents had only what may be called *common law* implications specific to the locality in which they originated. As noted, one of the key differences between the complex conquest/cession- and the complex settlement-models is that the former requires crown confirmation of rights derived from local law prior to their being justiciable against the crown, while the latter does not.

B. Exclusive Continuity: the American Doctrine of Indian Tribal Sovereignty

In interpreting the legal implications of British colonialism in North America, the courts of the United States developed a unique approach to aboriginal legal status which combined elements of both the conquest and settlement paradigms. American courts concluded that, by discovery and occupation, the British crown acquired (a) rights of property and territorial sovereignty in all lands,[43] and (b) the exclusive right as against all other European states of extinguishing, by conquest or cession, the native right to self-government and the native right to use and occupy land.[44] With respect to settlers,

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[42]*Amodu Tijani v. Sec., Southern Nigeria*, [1921] 2 A.C. 399 (P.C.), at 406-7.

[43]*Johnson v. M'Intosh*, 8 Wheat. 543 (U.S.S.C., 1823), at 595-96; *Fletcher v. Peck*, 6 Cranch 87 (U.S.S.C., 1810); *Cherokee Nation v. Georgia*, 5 Peters 1 (U.S.S.C., 1831), at 22; *Story Const.*, Bk. I, Ch. I, §2.

[44]*Johnson v. M'Intosh, ibid.*, 573, 589; *Fletcher v. Peck, ibid.*, at 142-43, 147; *Worcester v. Georgia*, 6 Peters 515 (U.S.S.C., 1832), at 544, 580; *Cornet v. Winton's Lessee*, 10 Tenn. Rep. 129 (S.C., 1826), at 138-9; *State v. Foreman*, 16 Tenn. R. 171 (S.C., 1835), at 226-27; *Story Const.*, Bk. I, Ch. I, §§3, 6; *Kent Comm.*, Pt. VI, Lec. LI, §§2, 3.

relevant parts of English municipal law were automatically in force, independently of crown grant, as their "birthright".[45] But the acquisition of property and territorial sovereignty by the crown and the introduction of English municipal law for settlers had no effect on the existing position of Indians as sovereign, self-governing nations, except that Britain claimed the exclusive right among European states to conquer and treat with them.[46] Thus, within British territories were resident-alien nations governed by laws and governments independent from the British imperial constitution. As a matter of constitutional theory, the co-existence of British (and later American) sovereignty with native sovereignty was predicated upon the difference between *territorial* and *personal* (or as Maine called it, "tribal") sovereignty.[47]

American courts did not conclude (like the complex conquest-model) that native laws and governments became incorporated by imperial law after the conquest of or commencement of treaty relations with Indian nations; instead, they developed what may be called the *doctrine of Indian tribal sovereignty*. At the heart of this doctrine is the common-law principle of continuity, but its application by American courts may be said

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[45]*Supra* note 3.

[46]*Fletcher v. Peck*, 6 Cranch 87 (1810), at 147; *Johnson v. M'Intosh*, 8 Wheat. 543 (1823), at 587-89; *Cherokee Nation v. Georgia*, 5 Peters 1 (1831), at 6; *Worcester v. Georgia*, 6 Peters 515 (1832), at 542-3; *State v. Foreman*, 16 Tenn. R. 171 (1835), at 232-33; *Story Const.*, Bk. I, Ch. I, §7; *Kent Comm.*, Pt. VI, Lec. LI, §3.

[47]*Cherokee Nation v. Georgia, ibid., per* Johnson J. at 27 ("Though without land that they can call theirs in the sense of property, their right of personal self-government has never been taken from them; and such a form of government may exist though the land occupied be in fact that of another"); *Goodell v. Jackson*, 20 Johns. Rep. 486 (N.Y. Ct. of Errors, 1823), *per* Kent C. at 501-502 ("mere territorial jurisdiction" of Britain not inconsistent with continuity of "*Indian* sovereignty"); *Fletcher v. Peck, ibid., per* Johnson J. at 147 ("their sovereignty" was limited insofar as Britain (and U.S.A.) had right to govern others "within their limits except themselves"); *Worcester v. Georgia, ibid., per* McLean J. at 580 (natives did not have "sovereignty of the country" but had "attributes of sovereignty," or "self-government"). Maine, *supra* ch. 1, note 46.

to reflect adherence to the *exclusive* theory of continuity.[48] Because they regarded natives as "fierce savages", American courts held that the law which "in general" regulated "relations between the conqueror and conquered" (by which the conquered were usually incorporated within the conqueror's constitutional system) "was incapable of application" and a "new and different rule" was followed.[49] The new rule provided that, after conquest but before being dispossessed of their lands, natives remained subject to their customary systems of law and government outside the American (or British) rule of law; they remained subject to further acts of state. Under these circumstances, neither natives nor any settlers who had placed themselves "under their protection, and subject to their laws" could challenge the application of native customary law in American (or British) courts.[50] Native people remained aliens and native law remained part of an alien legal system unconnected to the American (or British) system. Even after conquest, then, native customary law continued in force in the exclusive sense.

Although it was possible to argue that native nations and laws remained foreign after conquest, this argument became less plausible in those cases where natives submitted to British sovereignty. Nevertheless, American courts adhered to the argument in these cases as well. Judicial interpretations of the Six Nations-British covenant chain are illustrative. As seen, Board of Trade reports, royal instructions and royal commissions indicated that the Six Nations-British covenant chain represented—from the perspective of the imperial ministry—a submission by the Six Nations to British sovereignty as

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[48]*Supra* ch. 2, IV, G.

[49]*Johnson v. M'Intosh*, 8 Wheat. 543 (1823), at 589-91.

[50]*Ibid*, 593-94; *Worcester v. Georgia*, 6 Peters 515 (1832), *per* McLean J. at 581 (in applying "their own laws" natives were "responsible to no earthly tribunal").

subjects.[51] However, Kent C.—like Sir William Johnson—refused to accept this interpretation, holding instead that "the declared sense and practice of colonial government" indicated that the Six Nations remained "sovereign communities" which "in consideration of protection, ow[ed] a qualified subjection, in a national, but not in any individual capacity, to the *British* crown".[52] Kent C. did not attempt to reconcile this conclusion with the fact that imperial documents characterized members of the Six Nations as British subjects. However, Marshall C.J. (speaking of British-Indian treaties generally) did seek to do so, concluding—as did Johnson—that because natives were "[n]ot well acquainted with the exact meaning of words" and did not consider it "material" if they were called "subjects" they did not become subjects by treaty "so long as "their actual independence was untouched, and their right to self-government acknowledged...."[53]

The Kent-Marshall interpretation of the British-Indian treaty relationship looked to the substance of the relationship instead of the terms of state documents. While their refusal to defer to express manifestations of crown intention may have reflected the hostility with which courts of the new republic regarded institutions of the British empire, it also reflected a degree of judicial detachment and objectivity requisite to the identification of the *consensus ad idem* underlying the treaties. American courts appreciated that their interpretation of British imperial policy represented the articulation

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[51]*Supra* ch. 3, II, A.

[52]*Goodell v. Jackson*, 20 Johns. Rep. 486 (N.Y. Ct. of Errors, 1823), at 498-499, 502. Also *per* Kent C.: *Jackson v. Hudson*, 3 Johns. Rep. 375 (Ch., 1808), at 384; *Jackson v. Wood*, 7 Johns. Rep. 290 (Ch., 1810), at 294; *Kent Comm.*, Pt. VI, Lec. LI, §3. *Cf.* British concept of "Protectorate" developed in 1890s: McHugh, *Aboriginal Rights*, *op. cit.*, 35.

[53]*Worcester v. Georgia*, 6 Peters 515 (1832), at 546-547, 555. *Cf.* views of Johnson, *supra* ch. 3, note 48.

of a novel constitutional arrangement. Using a term which is now frequently employed in Canadian judgments on aboriginal rights, Kent C. characterized the legal status of aboriginal nations as "*sui generis*".[54]

This approach to British-Indian treaties informed subsequent interpretations of the status of Indian nations settling onto reserves in American states: Indians were aliens[55] whose internal affairs on reserves were governed not by state courts and governments but by their own laws and governments (except where limited by federal legislation).[56] In exercising jurisdiction, natives did not exercise "delegated powers" but rather had "inherent powers of a limited sovereignty which have never been extinguished".[57] Although American courts rarely expressed it in this manner, it has been stated that the doctrinal foundation for the continuity of "tribal sovereignty" is "the general principle that 'It is only by positive enactments, even in the case of conquered and subdued nations, that their laws are changed by the conqueror'...."[58] This general principle is, of course, simply the common-law principle of continuity. However, it has been articulated in a unique manner by American law: while British imperial law provided that conquest did not by itself affect existing laws or institutions of a nation, which continued in force "excepting in point of soveraignty",[59] American law provided that "[c]onquest...does not

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[54]*Jackson v. Wood*, 7 Johns. Rep. 290 (1810), at 294.

[55]*State v. Ross*, 15 Tenn. R. 44 (1834), at 46; *Elk v. Wilkins*, 122 U.S. 94 (U.S.S.C., 1884); C. Cushing, Att. Gen., "Relation of Indians to Citizenship," (1856), 7 *Ops. Att. Gen.* 746.

[56]*Ex parte Crow Dog*, 109 U.S. 556 (U.S.S.C., 1883).

[57]Cohen, *Handbook of Federal Indian Law* (1945), 122.

[58]N. Margold, Int. Dept. Sol., 25 Oct. 1934, U.S. Dept. of Interior, *Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs*, I, 448, and Cohen, *ibid.*, both sources quoting *Wall v. Williamson*, 8 Ala. 48 (S.C., 1845), at 51.

[59]*Supra* ch. 2, note 33.

by itself affect the internal sovereignty of the tribe".[60] Even in those entities in British law which might be described as internally- or quasi-sovereign (like feudal principalities or counties palatine) residents were still subjects of the British crown; from the American judicial perspective of the nineteenth century, however, native peoples had not been British subjects, nor were they American citizens.

The distinctive American articulation of the principle of continuity had significant implications for the doctrinal foundation of the judicial recognition of aboriginal customary law. Although internal reserve matters were exempt from state judicial jurisdiction, questions of native customary law (like the validity of native marriages) often arose in cases otherwise subject to state courts. In these cases, American courts consistently applied native customs, not as part of American law, but as the law of foreign jurisdictions pursuant to conflicts of law principles.[61] As stated in *Morgan v. M'Ghee* (1844): "Our courts of justice recognize as valid all marriages of a foreign country...and there is no reason why a marriage made and consummated in an Indian Nation should be subject to a different rule...."[62]

C. The Compound-Continuity Principle

Whatever the nature of rights of European states to North American territories in the seventeenth and eighteenth centuries, those rights were transferred between those states, by conquest and/or cession, with some frequency. The assertion of rights over Indian lands and nations by one European state followed by the transfer of those rights to a second European state gave rise to the possibility of a double, or compound,

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[60]Margold, *loc. cit.*, 449.

[61]*Holland v. Pack*, 7 Tenn. R. 157 (C.A., 1823); *Johnson v. Johnson's Administrator*, 30 Mo. 72 (S.C., 1860); *Earl v. Godley*, 44 N.W. 254 (Minn. S.C., 1890); *McBean v. McBean*, 61 Pac. 418 (Or. S.C., 1900).

[62]*Morgan v. M'Ghee*, 24 Tenn. R. 5 (S.C., 1844), at 6-7.

application of the principle of continuity: the status of native customs under the law of the first European state continued under the law of the second European state to the extent that that law acknowledged the continuity of the law of the first European state.

The compound-continuity principle is clearly illustrated by Baldwin J.'s decision in *Mitchel v. United States* (1835)[63] which addressed the continuity of British and Spanish laws relating to native nations in Florida. After setting out the basic common-law principle of continuity as articulated by Lord Mansfield in *Campbell v. Hall*,[64] Baldwin J. concluded that, pursuant to this principle, native land rights continued in force after Britain acquired Florida in 1763, and that these native rights in British law continued in force after Spain acquired sovereignty in 1783. When the United States acquired Florida in 1821, the principle of continuity was applied a third time:

> [A]s the new sovereign...[the United States could] adopt any system of government or laws for the territory consistent with the treaty [of cession with Spain] and the constitution; but instead of doing so, all former laws and *municipal regulations* which were in existence at the cession, were continued in force...the United States...thus became the protectors of all the rights they [Florida natives] had previously enjoyed, or could of right enjoy under Great Britain or Spain, as individuals or nations....[65]

The compound-continuity principle has significant implications for the status of native customs in colonial Canada where part of the territory was acquired by Britain by conquest and cession from France.

D. The Doctrine of Aboriginal Wardship

As noted, the common law of the seventeenth century regarded infidels as peoples from whom English subjects required protection;[66] in the nineteenth century, however,

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[63]*Mitchel v. United States*, 9 Peters 711 (U.S.S.C., 1835).

[64](1774), Lofft 655, at 740-42.

[65]*Supra* note 63, 754-55.

[66]*Supra* ch. 2, VII.

the common law regarded them as peoples in need of protection, at least until they were sufficiently "civilized" to be able to protect their own interests. This change in the common law was reflected by an increasing concern in Britain about the negative effects of colonization on aboriginal peoples. It was asserted in Parliament that, "in her intercourse with less civilized countries", Britain had failed in her duty to "pav[e] the way for better things than barbarism and paganism...."[67] It was assumed that the assimilation of native people to British modes of living—"teaching them to become 'as one of us'"—represented the proper goal of colonialism.[68] The extent to which native people remained socially, economically and legally distinct was taken as evidence of political failure. In many colonies, then, policies of protection and civilization were undertaken.

This paternalistic attitude toward native peoples had important legal implications. It was successfully argued that to accord natives equal legal status as settlers would have been to recognize a "fictitious equality".[69] Instead, courts articulated what may be called the *doctrine of aboriginal wardship*. Said Chapman J. in *The Queen v. Symonds* (1847), in relation to the crown, native peoples were under a "species of guardianship".[70] Other British and American courts invoked similar terms.[71]

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[67]*Debate on the Motion of T. Fowell Buxton* (1834), 3. Also, *Rep. Sel. Comm. Aborigines, 1837*, 76; Bannister, *British Colonization and Coloured Tribes* (1838), 2-13; Merivale, *Lectures on Colonization* (1861), 502-503.

[68]Motte, *Outline...for securing Protection to the Aboriginal Inhabitants* (1840), 10. Also, Merivale, *ibid.*, 510; Bannister, *Justice to the Aborigines* (1830), 19.

[69]Merivale, *ibid.* (*1861 Appendix*), 522.

[70]*The Queen v. Symonds* (1847), [1840-1932] N.Z.P.C.C. 387 (S.C.), at 391.

[71]*Wi Parata v. Bishop of Wellington* (1877), 3 N.Z. Jur. (N.S.) 72, at 78-79 (crown was "supreme protector of aboriginies"), *Goodell v. Jackson*, 20 Johns. Rep. 486 (1823), at 502-3 (non-natives were "their guardians and protectors"); *Cherokee Nation v. Georgia*, 5 Peters 1 (1831), at 17 (Indians were "in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian"). But see *Kent Comm.*, Pt. VI, Lec. LI, §4 (native "pupilage" was not "carried so far as to destroy the existence of

In determining the legal status of native rights in British territories, the doctrine of aboriginal wardship cannot be overlooked: in essence, it justified the exercise by the crown of broad discretionary powers, not pursuant to any special rights as conqueror, but pursuant to its inherent prerogative powers as "*parens patriae*"[72] in relation to persons deemed incapable of governing their own affairs. Although its articulation was no doubt influenced by the reform movements of the early nineteenth century,[73] the doctrine of aboriginal wardship also followed in the tradition of the seventeenth-century's *perpetui-inimici* theory. The expansion of the British empire over non-Christian peoples rendered the *perpetui-inimici* theory obsolete; yet courts were still reluctant to recognize native peoples as having the same legal status as Europeans. As a result, the justification for denying them this status was re-articulated: non-Christians might become subjects, but until "enfranchised" they were subject to the discretionary authority of the crown. In the seventeenth century enfranchisement came with conversion to Christianity, in the nineteenth century it came with their detachment from tribal society—i.e., with their "civilization".

III. Selecting a Theoretical Model for Colonial Canada

The four models of imperial law, the importance of crown usage and practice, the doctrine of tribal sovereignty, the compound-continuity principle and the doctrine of aboriginal wardship together form a theoretical context within which the constitutional history of colonial Canada is analysed in Part Two. Of the four models of imperial law, the complex conquest/cession-model best reflects the status of native nations in British

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the Indians as self-governing communities").

[72] *Chitty Prerog.*, 155.

[73] Surtees, "Development of an Indian Reserve Policy" (1969), 90; Allen, *His Majesty's Indian Allies* (1992), 178.

North American colonies of the seventeenth and eighteenth centuries, as identified in the interpretations of colonial statutory law and *Mohegan Indians v. Connecticut* presented in Chapters Three and Four. And, as the analysis of Canadian constitutional history unfolds in Part Two, it will be argued that it is this model, as qualified by the shire-ground argument developed in Chapter Two, the doctrine of aboriginal wardship and, at least initially, the doctrine of tribal sovereignty, which best explains the legal status of native law and government in colonial Canada.

PART TWO

The Legal Status of Native Nations, Laws and Government in Colonial Canada, 1760-1860

Part One identified the general principles of British imperial law governing the relationship between native nations and the British empire in seventeenth- and eighteenth-century North America. In Part Two these principles will be applied to the constitutional history of colonial Canada to determine the legal status of aboriginal customary law and government between 1760, when British claims to Canada were consolidated with the defeat of New France, and 1860, when the imperial government transferred control over Indian affairs to the colonial government of Canada. As indicated at the outset, the examination will be limited to *colonial* Canada, which will be taken to mean the British colonies established in territories surrounding the St. Lawrence Valley and the Great Lakes which formed the Province of Canada at the time of confederation in 1867.

After the conquest of French Canada in 1760 colonial Canada underwent four stages of constitutional development prior to the creation of the Dominion of Canada in 1867: (a) between 1763 and 1774 part of it was included within the initial British province of Quebec and part within Indian Territory, (b) between 1774 and 1791 it fell within the enlarged province of Quebec, (c) between 1791 and 1841 it was divided into the provinces of Upper and Lower Canada, and (d) between 1841 and 1867 it constituted the province of Canada. In examining these four regimes the following chapters follow a pattern: the express terms of constitutional instruments establishing governments and judicatures will be examined in light of both general imperial common-law principles and sources of imperial law specific to colonial Canada to determine the status of native law and government under imperial law. The primary focus will be upon the territory between the Ottawa River and Lakes Ontario, Erie and Huron (present-day southern

Ontario; see map, Appendix A). For the purposes of this discussion, this region will be labelled the "Great Lakes Region", and will be distinguished from territories south of the Great Lakes labelled the "Western Interior" and territories originally settled by the French around Montreal and Quebec labelled the "St. Lawrence Valley".

Chapter Six

Legal Status of Native Nations and Customary Law under the *Royal Proclamation of 1763*, 1763-1774

By 1760 Britain had effectively conquered New France, although France did not formally cede the vague region known as "Canada" to Britain until the Treaty of Paris, 1763.[1] By Royal Proclamation of 7 October 1763 the crown exercised its prerogative rights of conquest to establish permanent colonial governments for these and other territories conquered from France; thus, governments were established for the British provinces of Grenada, East and West Florida and Quebec. The boundaries of Quebec did not correspond with French perceptions of "Canada"; rather, Quebec was limited to the St. Lawrence Valley where French settlers were most concentrated (see map, Appendix A). The Great Lakes Region and the Western Interior, although arguably within French Canada, were left without civil government and instead were subjected by the *Proclamation* to certain general rules relating to aboriginal rights. In this chapter the constitutional regimes established by the *Proclamation* for both Quebec and the Great Lakes Region will be analysed with a view to determining the status of native laws and government in each.

I. Native Law and Government in Quebec, 1763-1774

A. At Imperial Common Law

In the seventeenth and eighteenth centuries the French established Jesuit and St. Sulpician missions among the Indian nations resident near Montreal and Quebec.[2] Some of these "domiciliés", or resident, nations, like the Huron of Lorette, were refugees from

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[1]Treaty of Paris, 1763, *DICC*, 61-65.

[2]Generally, Bartlett, *Indian Reserves in Quebec* (1984), 2-12.

other regions; others, like the Mohawk of Caughnawaga (Kahnawake), St. Regis or Aughquisasne (Akwesasne) and Lake of Two Mountains or Canasadaga (Kanesatake), the Algonquin and Nippissing of Canasadaga and the Abenaki of St. Francis and Bécancour, were (although in some cases it is a point of debate) indigenous to the region (for locations see maps, Appendices A and B).[3] These resident nations were considered "alliés" and were, to a certain degree, independent of the French colonial regime; they were not subjected to seignorial "haute, moyenne ou basse" jurisdictions, and although the "chef" "de chaque nation" was instructed to inform their people that colonial laws on serious crimes, like murder and rape, applied to them, those few natives accused of such crimes were tried by not regular courts but military tribunals.[4] As the British commander at Quebec City, James Murray, reported in relation to the Lorette Huron: "it has ever been the policy of the French Government to make them retain...as much of their ancient customs as possible...."[5]

In determining the common-law status of the customs and governments of these nations in British Quebec, the effect of the interposition of the French colonial regime must be considered. With respect to French colonial law generally, the basic rules of imperial common law applied after the conquest: the "King of England became King of Canada" and the inhabitants became "his subjects", but their rights were "determinable by the local, that is, the Canadian law" which was presumed to continue in force.[6] If the

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[3]Courts deny Mohawk/Iroquois arguments that they were indigenous to the region: *Corinthe v. Séminaire de Saint-Sulpice* (1911), 21 Que. K.B. 316, at 328-29; *R. v. Adams*, [1993] 3 C.N.L.R. 98 (Que. C.A.).

[4][Can.], *Arrêts et Réglements*, 16-17, 65, 70, 112; generally, Eccles, "Sovereignty-Association" (1984), 487-89; Dickinson, "Native Sovereignty and French Justice in Early Canada" (1994), 27-33.

[5]Genl. J. Murray to Board of Trade, 5 June 1762, *CO* 42/87: 32.

[6]*Donegani v. Donegani* (1835), 3 Knapp. 63 (P.C.), at 85.

resident nations had been subject to the French crown and the same French colonial law as French-Canadian settlers prior to the British conquest of New France, after the conquest they would have become subject to the British crown and would have remained subject to French colonial law insofar as it continued in force at common law. However, if before the conquest the resident nations had been subject to the French crown but allowed to live under their own customs and chiefs, then after the conquest the compound-continuity principle may have applied: British imperial law, in recognizing the continuity of French colonial law, might have recognized the continuity of native law and government insofar as it had continued in force under French colonial law. Finally, if the resident nations had been independent of the French colonial regime, and British sovereignty over them had been established by a treaty process independent of the French capitulation, then presumably their customs and government might have been recognized independently of French colonial law, pursuant to the direct application of British imperial common law.

Consistent with the ambiguity surrounding the legal status of native nations in North America at this time, elements of each of these three constitutional scenarios characterized British relations with the resident nations of Quebec. At one extreme, an Indian Department officer informed the Lorette Huron in 1773 that because they had subjected themselves to the French colonial regime before the conquest, after the conquest they "became Subject to the Crown of England" and to the same laws as "the French Inhabitants".[7] But this statement reflected neither general Departmental policy nor historical events after the conquest; in fact, the Huron had had "sufficient independence...for it to be a good policy to maintain relations with them very close to

[7]D. Claus, Dpty. Supt. Ind. Dept., to Lorette Huron, 28 July 1773, *JP*, XIII, 628-29.

those maintained between sovereign nations".[8] Although the Articles of Capitulation signed by the British and French at Montreal in 1760 contained an ambiguous provision for the resident nations ("The Savages or Indian allies of his most Christian Majesty, shall be maintained in the Lands they inhabit"[9]), Huron, Mohawk and Algonquin nations made peace with the British separately from, and in some cases before, the French.[10] For example, the "Chain of Friendship"—or covenant chain—was established by Indian Department Superintendent Sir William Johnson with the various Mohawk nations on September 16, 1760, at Montreal.[11]

From the fact that the resident nations treated independently with the British it may be inferred that their legal relations with Britain were determined independently of French colonial law; but this interpretation is also too extreme. During the 1760 treaty negotiations Mohawk chiefs were anxious that Superintendent Johnson "know the Way our Affairs were managed while under the Care of the french...."[12] Indeed, they later argued that "at the Surrender of Canada they were promised by Sr. Wm. Johnson in behalf of His Majy. to enjoy the same Priviledges they did under the french Govemt. and perhaps greater...."[13] Thus, when in 1774 they feared that English law would be imposed upon them, the resident nations petitioned that "under the French they were permitted to

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[8] *R. v. Sioui*, [1990] 1 S.C.R. 1025, at 1052-53.

[9] *DRCHC*, 25, §40. See, *Regina v. St. Catharines Milling Co.* (1885), 10 O.R. 196 (Ch.), at 210; *Corinthe v. Seminary of St. Sulpice* (1910), 38 Que. S.C. 268 (Que. Sup. Ct.), at 277.

[10] On Huron-British treaty: *R. v. Sioui*, [1990] 1 S.C.R. 1025; on Algonquin-British treaty: *R. v. Côté*, [1994] 3 C.N.L.R. 98 (Que. C.A.).

[11] Council with Eight Nations, Montreal, 16 Sept. 1760, *JP*, XIII, 163-66.

[12] *Ibid.*, 165.

[13] Journal of D. Claus, Dpty. Supt. Ind. Dept., 12 July 1773, *JP*, XIII, 622.

follow their own Customs", and that their rights in this respect had been guaranteed to them in 1760.[14] In short the arguments of natives reflected the compound-continuity principle: the French recognized the continuity of native law and government and the British were bound to recognize it as well.

The decision by the military governor of Montreal, General Thomas Gage, and his council, in *Iroquois Indians of Sault St. Louis v. The Reverend Fathers of the Society of Jesus* (1762)[15] provides at least some judicial support for the application of the compound-continuity principle. In this case the Caughnawaga Mohawk sought to prevent Jesuit missionaries from granting to non-native tenants parts of the Seignory of Sault St. Louis, which included the Mohawk village of Caughnawaga. Although the Jesuits had been granted the seignory by royal patent in 1680, the court held that under the terms of the patent they held the land in trust for the Mohawk nation, and that consequently grants to non-native tenants were illegal. The court did not evict non-native tenants, but rather ordered their rents to be collected by a British trustee and paid to the Mohawk.

In interpreting the 1680 patent the court rejected the Jesuit contention that by the patent they had become seigniors and the Mohawk people their tenants. In the court's opinion, the Jesuit claim to seignorial rights over the disputed land was, in essence, a claim to seignorial governmental and judicial rights over the Mohawk nation resident on that land—rights which were impossible to exercise over Indian nations. Said the court, the Jesuits could not have been "the Temporal Lords of the said lands" because the "Indians...from their nature could not be subjected to the rights of *lods et ventes*, [and]

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[14]G. Johnson, Supt. Ind. Dept., to Gen. T. Gage, Comm. in Chief, 26 Aug. 1774, *JP*, XIII, 675.

[15]*ITS*, II, App. H, 298. Although the case was decided by a military court, it was decided "by the means of the law" (at 302).

High, Mean or Low justice".[16] In other words the court concluded that nations resident within the seignories of New France were exempt from seignorial jurisdictions, which had represented the lowest level of courts and government under the French.[17] Furthermore, in framing its order the court concluded that their exemption from local jurisdictions continued after the British conquest. It held that, although the Mohawk had a right to rents owed by non-native tenants, the British crown was seignior over these tenants. Said the court, "the rights of jurisdiction *over others than the Indians*...can belong only to [the king]...."[18] Although ambiguous, this statement may imply that at least in local matters otherwise within seignorial jurisdictions the Mohawk were self-governing. Of course, this implication is not necessary. If by concluding that the Mohawk were exempt from the crown's "rights of jurisdiction" the court meant only seignorial jurisdiction, this exemption might just as easily have been attributed to the fact that the Mohawk were not tenants as to the fact that they were self-governing; in such case, the crown might have exercised a local jurisdiction over the Mohawk directly rather than as seignior. However, reading the case as judicial recognition of Mohawk jurisdiction over local matters is consistent with Gage's subsequent extra-judicial comments. In response to the 1774 native petition discussed above,[19] Gage (then commander-in-chief) instructed Indian Department Superintendent Guy Johnson that it was a "Mistake" to assert that the resident nations were subject to English law; "they may have been informed that in Cases of Murder, or Robbery, they wou'd be tried agreable to English law", he continued (perhaps

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[16]*Ibid.*, 301.

[17]Munro, *Seigniorial System in Canada* (1907), 146-153 (seigniors had rights of *haute, moyenne, ou basse justice* (high, middle or low jurisdiction) over criminal and civil matters from which appeals to crown courts were possible).

[18]*Supra* note 15, 304 (emphasis added).

[19]*Supra* note 14.

thinking that their subjection by the French to colonial law for serious crimes continued in force) but "Indians are commonly left to their own Usages and Customs in most Things...."[20]

Iroquois Indians v. Jesuit Fathers is consistent with the proposition that, at imperial common law, French colonial law continued to govern the rights of both French and native inhabitants of Quebec after the conquest, and to the extent French colonial law recognized a distinct native jurisdiction in native missions, that jurisdiction continued to be recognized under the British regime. Colonial law officers and Canadian and British courts subsequently determined native land rights (or lack thereof) in Quebec by reference to French colonial law.[21] The determination of the imperial common-law status of the resident nations in British Quebec by reference to French colonial law may be regarded as inconsistent with their having established a treaty relationship with the British independent of the French; however, any inconsistency can be explained by the fact that, as Canadian courts would say today, native nations occupied a constitutional status which was "*sui generis*", having elements of both sovereignty and subjecthood.[22] As a general rule it may be said that the status of the resident nations under the French regime

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[20]Gage to Johnson, 18 Sept. 1774, *JP*, XIII, 679-80.

[21]Caughnawaga: *Mowat v. Casgrain* (1897), 6 Que. Q.B. 12 (Q.B.), *Rex v. Bonhomme* (1917), 38 D.L.R. 647 (Ex. Ct.); *Myiow v. Perrier et Le Procureur Général*, [1958] Que. P.R. 212 (Que. Sup. Ct.). Canasadaga: J. Sewell, Att. Gen. Low. Can., Report on Iroquois Claims to Seigniory of Lake of Two Mountains, 22 June 1808, *RG10* Vol. 486, 4179; *Corinthe v. Seminary of St. Sulpice* (1910), 38 Que. S.C. 268 (Que. Sup. Ct.), (1911), 21 Que. K.B. 316 (K.B.), [1912] A.C. 872 (P.C.). Lorette: J. Sewell, Att. Gen. Low. Can., Report on Lorette Huron Claim to Seigniory of Sillery, 3 Aug. 1797, *RG10* Vol. 625, 182255; G. Bowen, Att. Gen. Low. Can., Report on Lorette Huron Petition, 17 Aug. 1810, *RG10* Vol. 625, 182427; J. Stuart, Att. Gen. Low. Can., Report on Lorette Huron Claims, 25 Nov. 1829, *PP* 1834, XLIV, #617, 339, p. 105.

[22]*R. v. Sioui*, [1990] 1 S.C.R. 1025, at 1038. Also, *Guerin v. The Queen*, [1984] 2 S.C.R. 335, at 387 (crown-native relations are *sui generis*).

remained the same in British Quebec at imperial common law except where altered by treaty or crown usage or practice.

B. Introduction of Constitutional Government: The *Royal Proclamation of 1763*

1. British government and judicature under the *Proclamation*

If *Iroquois Indians v. Jesuit Fathers* reflects the presumption at imperial common law of the continuity of local laws after conquest, the *Royal Proclamation of 1763* reflects—on first glance—the abrogation of those local laws. The *Proclamation* created a colonial government in Quebec consisting of a governor, council and elected general assembly with power to make laws "as near as may be agreeable to the laws of England". Until the assembly was elected, the *Proclamation* guaranteed that "all Persons Inhabiting or resorting to" the province were to enjoy "the Benefit of the Laws of our Realm of England" in courts established by governor and council.[23] By ordinance a Court of King's Bench and a Court of Common Pleas were established at Quebec City; judges from these courts were commissioned to sit as Courts of Oyer and Terminer and General Gaol Delivery in other locations; also, Justices of the Peace sitting in Courts of Quarter Sessions presided over minor matters and provided local government in each of two districts, Montreal and Quebec.[24] The *Proclamation* made no express provision for the continuity of French colonial (or native customary) law, and the first governor of Quebec, James Murray, concluded that the previous legal regime had been abrogated; all courts were therefore directed to determine new matters by reference to English law.[25]

The new colonial courts might have recognized (under the hybrid

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[23]*Royal Proclamation of 1763*, *DRCHC*, 163.

[24]Ordinance (Que.), 7 Sept. 1764 (see Riddell, "Introduction", *RECJUC*, 6-14).

[25]*Ibid.*

continuity/particular custom rule[26]) French-Canadian law as a "particular custom" forming an element of the new colonial municipal law, but they did not. Local inhabitants felt their existing legal rights were threatened, a constitutional crisis ensued, and Murray refused to call elections for the assembly.[27] The constitution remained in a state of uncertainty until the right to an elected assembly was repealed and the continuity of French-Canadian civil law was affirmed by the *Quebec Act 1774*.[28] In the meantime the imperial ministry repudiated Murray's interpretation of the *Proclamation*. Lord Hillsborough, for example, invoked the hybrid continuity/particular custom rule and argued that the courts of Quebec ought to have applied the "Laws and Customs of Canada, with regard to Property" just as English courts recognized "Gavel-kind Borough-English and several other particular customs...."[29] In other words, French law was to be regarded as continuing in force in certain localities as an element of the newly-introduced English municipal law. The law officers of the crown went even further. In their opinion, Murray had been incorrect to interpret the *Proclamation* as abrogating the (imperial) common-law presumption of continuity. "There is not a *Maxim* of the *Common Law* more certain", they argued, "than that a Conquer'd people retain their ancient Customs till the Conqueror shall declare New Laws".[30] In their view the *Proclamation*'s terms were insufficient to affect this presumption. The "true meaning"

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[26]*Supra* ch. 2, IV, F, 2.

[27]Knox, *Justice and Policy of the Late Act of Parliament, for...Quebec* (1774); Humphreys and Scott, "Lord Northington and the Laws of Canada" (1933).

[28]14 Geo. III, c. 83 (Imp.).

[29]Hillsborough, Sec. of State, to G. Carleton, Gov. Que., 6 March 1768, *DRCHC*, 297.

[30]C. Yorke, Att. Gen., and W. de Grey, Sol. Gen., to Board of Trade, 14 April 1766, *DRCHC*, 255-56.

of the *Proclamation*, they concluded, was that only English municipal *criminal* law had been introduced, that French-Canadian property law continued in force, and "general rules of equity and justice" governed other civil matters.[31] In other words, French-Canadian property law continued in force not as a particular custom under English municipal law, but as the general law of the province under British imperial common law. This became the accepted legal interpretation of the *Proclamation*,[32] and was reflected in additional royal instructions to Murray.[33]

2. Aboriginal rights under the *Proclamation*

The *Proclamation* provided no textual support for the continuity of French law, yet when read in light of its imperial common-law context it was interpreted by the imperial ministry as consistent with that continuity. The *Proclamation* must be interpreted similarly in relation to native customary law. If the imperial common-law context included *Iroquois Indians v. Jesuit Fathers*, as interpreted above, then it included that which was absent in relation to French-Canadian settlers—namely, the recognition of native jurisdiction over local matters in native missions. Indeed, there is textual support in both the *Proclamation* and royal instructions issued thereunder for the proposition that not only did native customs continue in force but that natives were excluded from the local governmental and judicial jurisdictions established under the *Proclamation* for settlers.

The textual support in the *Proclamation* for this conclusion derives from the fact

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[31]*Ibid.*

[32]E. Thurlow, Att. Gen., 26 May 1774, Cavendish, ed., *Debates...on the Canada Bill* (1839), 30-31; Marriott, Adv. Gen., *Plan of A Code of Laws for The Province of Quebec* (1774), 17. Generally, *Stuart v. Bowman* (1851), 2 L.C.R. 369 (S.C.); (1853) 3 L.C.R. 309 (Q.B.); *Wilcox v. Wilcox* (1858), 8 L.C.R. 34 (Q.B.).

[33]Additional Instructions to J. Murray, Gov. Que., 24 June 1766, *CO* 43/1: 311.

that the entire question of aboriginal rights was addressed in a section of the *Proclamation* distinct from that establishing colonial government and courts. After establishing British government in the territories conquered from France, the *Proclamation* addressed the question of aboriginal rights in both new and old British colonies in North America, introducing it in this way:

> And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds....[34]

The *Proclamation* proceeded to distinguish between two sorts of Indian land: that which was open to settlement and that which was not. The latter sort of lands were outside Quebec's boundaries and therefore will be discussed later. With respect to the rights of Indian nations within lands in which settlement was to be allowed, which included Quebec, the *Proclamation* provided that to prevent the "great Frauds and Abuses" which had been "committed in purchasing Lands of the Indians", the following rules were enacted: (a) unceded Indian lands were reserved to Indians as their hunting grounds; (b) Indians were not to be "molested or disturbed" in the use of them; (c) their purchase by private persons was prohibited; (d) their purchase from the Indians by the governor of the colony in which they were located was allowed, if done in a public meeting, whereupon they were open for settlement; and (e) trade with the Indians was allowed under licence and subject to regulations made by the crown.[35]

Although there is no inconsistency between subjecting natives to the same legal regime introduced for settlers and protecting their rights to unceded land, it is at least

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[34]*Supra* note 23.

[35]*Ibid.*

arguable that the separate treatment of native land rights in the *Proclamation*'s second part represented an implicit exemption of native peoples from the laws and government introduced by the first part.[36] Royal instructions to the governor of Quebec support this interpretation.

Like the *Proclamation*, Murray's instructions addressed matters relating to the establishment of courts and government in Quebec separately from directions on Indian nations.[37] With respect to Indian nations, article 60 observed that the province was "in part inhabited and possessed by several Nations and Tribes of Indians" with whom "a strict Friendship and good Correspondence" was required. Unlike the "French inhabitants" who were ordered to take oaths of allegiance immediately or depart the province (§29), natives were to be "induced by Degrees, not only to be good Neighbours to Our Subjects, but likewise themselves to become good Subjects to Us...." To this end the governor was instructed to appoint an officer "to assemble, and treat with the said Indians, promising and assuring them of Protection and Friendship on Our part...." Apparently British sovereignty over native nations in Quebec was to be derived from treaties made with them independently of the French capitulation and cession of Canada. Article 61, in directing the governor to report on "the Rules and Constitutions, by which they *are* governed or regulated", suggests that native customary law was considered to have continued to govern native nations during the French regime and after, and can be contrasted to article 72 in which the governor was directed to report on what "*was* the Nature, Form and Constitution of the Civil Government; what Judicatures *were* there established, and under what Regulations *did* the *French* Inhabitants carry on their

[36]Royal Commission on Aboriginal Peoples, *Partners in Confederation* (1993), 16-17.

[37]Royal Instructions to J. Murray, Gov. Que., 7 Dec. 1763, *ROBA,* IV, 7-27.

Commerce".[38] Finally, article 62 directed the governor to enforce the *Proclamation*'s prohibition on private purchases of, or settlements in, lands "reserved to the several Nations of Indians", and provided that trade regulations made pursuant to the *Proclamation* were to be followed. Although it would later be argued that the *Proclamation* did not protect unceded Indian lands in Quebec because French colonial law did not recognize aboriginal title to land, modern courts have held that the *Proclamation* did protect the rights of the resident nations to the occupancy of mission lands.[39]

Although the royal instructions to Murray were without inherent legislative authority,[40] they represent the sort of indicia of crown practice or usage from which common-law conclusions regarding the constitutional conditions of a newly-acquired territory could be drawn.[41] In this respect, they support the proposition that the *Proclamation*'s introduction of colonial government and English municipal law was not intended (at least initially) to affect the internal affairs of native nations—on the contrary, their legal position was to have been determined by treaties to be made with delegates of that colonial government. After some confusion and debate, it was determined that these colonial delegates were subject to the authority of the *imperial* Indian Department northern district superintendent, Sir William Johnson, and his deputy for Canada, Daniel Claus.[42] In subsequent years, Claus visited the resident nations, hearing their complaints,

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[38]Emphasis added.

[39]On unceded lands: *St. Catharines Milling Co. v. The Queen* (1887), 13 S.C.R. 577, at *per* Taschereau J. at 644-649. Mission lands: *R. v. Adams*, [1993] 3 C.N.L.R. 98 (Que. C.A.), at 109; *R. v. Côté*, [1994] 3 C.N.L.R. 98 (Que. C.A.), at 107-08.

[40]*Supra* ch. 2, note 19.

[41]*Supra* ch. 2, text at notes 43-45; ch. 5, II, A.

[42]J. Murray, Gov. Que., to Sir. W. Johnson, Ind. Dept. Supt., 2 March 1765, *JP*, XI, 615; Johnson to Murray, *JP*, XI, 755-56; T. Gage, Comm. in Chief, to G. Johnson, Ind. Dept. Supt., 28 Nov. 1774, *JP*, XIII, 697-98. Colonial and imperial appointees

settling their disputes and confirming the succession of chieftainships by customary law.[43] It was through Claus that Superintendent Johnson informed "the Chiefs" of resident nations "To Maintain their Authority" and prevent conduct among their people which was "contrary to all custom...."[44] The policies pursued by Johnson were implemented independently of the colonial government; his authority derived from the "Imperial Government", and he was "responsible directly to the crown...thus superseding the Provincial Governments...."[45]

To summarize, although the *Proclamation* introduced a new municipal legal system and government for Quebec, when it is read in light of its imperial common-law context it appears that native nations in Quebec were not subject to that new system as were French-Canadian inhabitants. Instead their internal affairs remained governed (except, apparently, serious criminal offences) by their own chiefs and customs which were, in turn, recognized by the imperial crown through the Indian Department, an entity constitutionally distinct from the colonial government. These chiefs and customs were recognized by imperial common-law after the conquest, and this common-law recognition was not abrogated by the express introduction of a new municipal legal system for French and British settlers. In short, there were two parallel municipal legal systems in Quebec,

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seemed to have competed for jurisdiction; for example, in 1769 Caughnawaga and Aughquisasne Mohawk chiefs complained to Claus that colonial appointees were "meddl[ing] in their domestick Affrs" (*JP*, VII, 129).

[43]For example, Claus met with Canasadaga Mohawk in 1762 to hear complaints about priests (*JP*, X, 398), with Caughnawaga and Canasadaga Mohawk in 1767 to confirm succession, by the "Ceremony of Condolence", of a chief who "they had chosen" and to re-establish a chief "whom they had degraded unknown to me" (*JP*, XIII, 428-29), with Caughnawaga and Aughquisasne Mohawk in 1773 to hear complaints that the governor had appointed a chief without their concurrence (*JP*, XIII, 620-21), and with Lorette Huron in 1773 to hear a land claim against mission priests (*JP*, XIII, 623).

[44]Claus to St. Francis Abenakis, July, 1773, *JP*, XIII, 620.

[45]*St. Catharines Milling Co. v. The Queen* (1887), 13 S.C.R. 577, at 608.

both deriving legitimacy from the over-arching imperial constitution.

II. Native Law and Government in Indian Territory, 1760-1774

A. British Sovereignty over the Great Lakes Region

French settlement in Canada had been restricted to the St. Lawrence Valley. However, in the Great Lakes Region and the Western Interior French missionaries, fur traders and soldiers had established small settlements among the Ojibwa, Mississaga, Ottawa, Huron, Potowatomie and other "western" nations.[46] Notwithstanding this French presence in the Great Lakes Region, which included forts at Frontenac (Kingston), Niagara and Detroit (see map, Appendix A), Britain claimed the region throughout the eighteenth century. These claims derived from a 1701 treaty with the Five Nations who had driven the Huron, Petun and Neutral nations from the region in the mid-seventeenth century. As France and its Indian allies began to threaten their possession, the Five Nations placed the region under New York's protection. The resulting 1701 "deed" was confirmed by treaty in 1726.[47]

The effect of the 1701 and 1726 treaties was, from the British perspective, to

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[46]White, *The Middle Ground: Indians, Empires, and Republics in the Great Lakes Region* (1991), chs. 1-5.

[47]"Deed from the Five Nations to the King of their Beaver Hunting Ground", 19 July 1701, *DRCHSNY*, IV, 908-11:

> Wee the Sachims Chief men, Captns and representatives of the Five nations...living in the Government of New Yorke ...surrender, deliver up and for ever quit claime unto our great Lord and Master the King of England...all the title and interest...to [the Great Lakes Region]...[but] wee are to have free hunting for us and the heires and descendants from us the Five Nations for ever and that free of all disturbances expecting to be protected therein by the Crown of England....

Confirmed: Treaty of 4 Dec. 1726, *CSP* (1726-7), #362ii. See, *U.S. v. Belknap* (Mich. Terr. S.C., 1825), in Brown, "Judge James Doty's Notes" (1965), 159 (1701 treaty was "evidence of the fact that the English government did purchase *a part* of this territory of the Indians"); *Regina v. Ireland* (1991), 1 O.R. (3d) 577 (Gen. Div.), at 582-84 (hunting rights under 1701 treaty upheld); generally, Hurley, *Children or Brethren: Aboriginal Rights in Colonial Iroquoia* (1985), 293-305.

secure to the Five Nations their "property" in the region by placing it "under the King's Govern[men]t".[48] Indeed, this interpretation was confirmed by an imperial order in council issued in 1761 which adopted a report of the Board of Trade which referred to the "solemn compacts by which they [the natives] had yielded to us the Dominion, but not the property of those Lands...."[49] The treaties formed the basis of both domestic and international legal claims: they limited the rights of settlers under the municipal law of New York,[50] they defined the rights of New York in relation to other British colonies under imperial law,[51] and they buttressed the rights of Britain in relation to France under international law.[52] After the conquest of New France the treaties continued to inform imperial policy. In response to the suggestion that the Great Lakes Region be placed within Quebec's boundaries, the Board of Trade objected, stating that if such were done, "a Colour might be taken on some future Occasion, for supposing that Your Majesty's Title to it, had taken its Rise, singly from the Cessions made by France", when in fact "Title to the Lakes and circumjacent Territory as well as to the Sovereignty over the Indian Tribes, particularly of the Six Nations, rests on a more solid and even a more

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[48]Reply to Six Nations, 3 July 1754, *DRCHSNY*, VI, 872.

[49]Order in Council, 23 Nov. 1761, *DRCHSNY*, VII, 472-73 (prohibiting land grants in such areas).

[50]Report of Board of Trade, 13 May 1755, *APC* (1745-1766), IV, 283 (governor of New York to prohibit settlement "within the Limits marked out in that [1726] Deed").

[51]Gov. Tryon, N.Y., to Board of Trade, 11 June 1774, *DRCHSNY*, VIII, 436-7 (1701 and 1726 treaties made Great Lakes Region part of New York).

[52]The Great Lakes Region fell outside New France and "within the English Boundary" because it had been "subjected to the Six Nations", and as the Six Nations were "Subjects of Britain", the territories "under the Six Nations therefore belong to Britain". Anon. Memo. to Earl of Bute, 15 Jan. 1760, North MSS, "Transcript of documents relating to colonial policy...", ff. 79-82, Bodleian Library (Rhodes House), Oxford.

equitable Foundation"[53]—that is, on the 1701 and 1726 treaties.

In fact Britain did little to secure Six Nations interests in the region and by the time of the conquest of New France it was conceded to be "Chippawae or Mississagey [i.e., Ojibwa] Country".[54] When the British later moved to open the Great Lakes Region to settlement, they realized that land had to be purchased from the Ojibwa; thus, a 1764 treaty by which the Six Nations ceded lands around Niagara was considered as insufficient until a confirmatory treaty with the Ojibwa was signed.[55] By 1784 all pretensions to a continued Six Nations right to the region were set aside, and Governor Haldimand of Quebec, in seeking a refuge for the Six Nations, was forced to purchase tracts of their former hunting grounds for them from the Mississaga.[56]

B. Establishing the "Covenant Chain" in the Great Lakes Region, 1761-64

As in the province of Quebec, French settlers in the Western Interior and the Great Lakes Region were considered to owe allegiance to the British crown by virtue of the Treaty of Paris,[57] but native peoples were not; instead separate "Treatys, Conferences, and Intrigues" with natives were deemed necessary.[58] In the Great Lakes Region two treaty rounds were required. In 1761, the Wyandot (i.e. Detroit Huron), Ojibwa and Mississaga (including Chief Wabbicommicott of Toronto) met with Sir William Johnson at Detroit. Johnson extended to them "the antient Covenant Chain"—that is, the nations

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[53]Board of Trade to His Majesty, 5 Aug. 1763, *DRCHC*, 151-53.

[54]Sir W. Johnson, Ind. Dept. Supt., to Board of Trade, 13 Nov. 1763, *DRCHSNY*, VII, 572-73.

[55]Treaty of 9 May 1781, *ITS*, #381.

[56]*Infra* chs. 7 and 8.

[57]Sir F. Norton, Att. Gen., 1764, *Forsy.*, 253-54.

[58]Gen. T. Gage, Comm. in Chief, to H. Conway, Sec. of State, 23 Sept. 1765, *GC*, I, 65-66.

entered into an "Alliance with the British crown", and their people and "property" in lands to which they had "a lawfull Claim" were secured under "Royal protection"; within that protection, natives agreed "to live with the British subjects on the terms of friendship and alliance".[59] However, many of these nations sided against Britain in Pontiac's uprising[60] and so a second treaty round was required. In May 1764 at Niagara the "Chippeweighs of Toronto, of Lake Huron, and Lake Superior", the "Six Nations, & Indians of Canada", and the Wyandot were among those nations to which Johnson again extended "the great Covenant Chain Belt" which, like covenant chains generally, was a treaty of "Peace", "Alliance" and protection.[61] However, later that year the Wyandot, Ojibwa and Mississaga signed a treaty of peace with the British commander at Detroit, Colonel J. Bradstreet, the terms of which went beyond the traditional covenant chain to include recognition that the native signatories were British "Subjects" and that the crown had "Sovereignty" over their lands.[62] When Mississaga Chief Wabbicommicott of Toronto insisted that natives be referred to as "Brothers" as opposed to "Children" (and the crown their "Father") in the treaty, he was informed that "nobody were to be admitted into the...Submission and Articles of Peace, but such as acknowledge themselves Subjects and Children of the King of England".[63] Wabbicommicott accepted these terms. Upon hearing of this treaty, Superintendent Johnson was astonished. As noted, in his

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[59]Treaty of Detroit, Sept. 1761, *JP*, III, 471-79, 490-91. On Mississaga-British treaty relations generally, see Jones, *History of the Ojebway Indians* (1861), 216; Johnson, *Early Missisauga Treaty Process* (1986), 84-99; White, *op. cit.*, 305-07.

[60]Generally, Parkman, *History of the Conspiracy of Pontiac* (1851).

[61]Treaty of Niagara, May-July, 1764, *JP*, XI, 202, 281, 285-86.

[62]Treaty of Peace, Detroit, 7-10 Sept. 1764, *JP*, IV, 526-28, 532, 532.

[63]*Ibid.*, 532-33.

view native languages contained no word expressing the idea of subjection;[64] he feared a violent reaction when nations discovered the meaning of the written text.[65]

To summarize, British sovereignty over the Great Lakes Region derived from a number of sources. Britain claimed territorial sovereignty over the region by treaty with the Five Nations; these claims were opposed by France until it ceded Canada to Britain in 1763. By then Ojibwa and other French native allies had gained possession and, although British territorial sovereignty over the region was established, sovereignty over—or at least peace with—these peoples depended upon subsequent treaties made with them. As with earlier covenant chains, however, these treaties were not regarded by Sir William Johnson as establishing British sovereignty over native signatories.

C. The Legal Regime in the Great Lakes Region under the *Proclamation*

1. The *Proclamation*'s text

As noted above, the *Proclamation* identified certain lands in which settlement was prohibited. These lands were reserved "under our Sovereignty, Protection, and Dominion, for the use of the said Indians",[66] and may therefore be labelled *Indian Territory*. The boundaries of Indian Territory established by the *Proclamation* were imprecise: the territory included: (a) those lands outside the limits of the new British colonies (Quebec, East and West Florida) and outside the limits of territories which had been granted in 1670 to the Hudson's Bay Company (Rupert's Land), and (b) those lands (whether or not within the old colonies) which lay to the west of the sources of rivers which flowed into the Atlantic ocean. The Great Lakes Region was therefore part of

[64]*Supra* ch. 3, note 48.

[65]Johnson to Board of Trade, 30 Oct. 1764, *DRCHSNY*, VII, 670-74; Johnson to Col. H. Bouquet, 6 Dec. 1764, *JP*, IV, 610-11; Johnson to Gage, 31 Oct. 1764, *JP*, XI, 394-96.

[66]*Supra* note 23.

Indian Territory.

The legal regime for Indian Territory established by the *Proclamation* was also imprecise. It enacted several general rules: (a) land grants by colonial governors were prohibited; (b) the territory was reserved for the use of Indians; (c) purchases of lands by the British, in private or public capacity, were prohibited; (d) all settlements were prohibited and all settlers ordered to leave; (e) trading was allowed under licence and subject to regulations made by the imperial crown; and (f) British officers were ordered to seize criminals fleeing from established colonies. The essence of the juridical concept of Indian Territory, then, was its permanence: not only private settlers but colonial governors were prohibited by prerogative legislation from obtaining cessions in Indian Territory.

In contrast to its provisions on Quebec, the *Proclamation* did not expressly introduce or confirm the application of any law in or the jurisdiction of any colonial government over Indian Territory; instead, the *Proclamation* reflected the crown's decision to accept the Board of Trade's argument that "where no Settlement by planting is intended...no particular form of Civil Government can be established".[67] Nevertheless, it was recognized that military posts would be required to enforce trade regulations, ensure the "good Treatment" of native peoples, and defend British "Sovereignty" over the region.[68]

The imprecision of the *Proclamation* derives from its original status as a temporary instrument. At the time it was intended that permanent boundaries for Indian

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[67]Board of Trade to His Majesty, 8 June 1763, *DRCHC,* 139. Indian Territory included the western parts of some of the old colonies, but the *Proclamation* had the effect not of removing those parts from colonial boundaries but of "suspending...the powers of the royal governors within the territory reserved": *Fletcher v. Peck,* 6 Cranch 87 (U.S.S.C., 1810), at 142.

[68]*Ibid.*

Territory would be established by treaty with native nations, and that a detailed constitution governing the relationship between native governments, the imperial Indian Department and British traders would be the subject of an imperial statute. Although boundary treaties were later negotiated, political events conspired to prevent the enactment by Parliament of a constitution. The *Proclamation* therefore fulfilled an unintended function as the only legislative instrument defining the legal regime in the Great Lakes Region until the boundaries of Quebec were extended over it by the *Quebec Act 1774*. Under these circumstances the *Proclamation* cannot be considered a comprehensive source of legal rules. If its imperial common-law context was regarded as critical to the interpretation of its provisions on Quebec, this interpretative context becomes doubly important in relation to its provisions on Indian Territory.

2. The *Proclamation*'s interpretative context

In identifying the *Proclamation*'s interpretative context, reference must be made to both general imperial legal principles and specific indicia of crown usage and practice from which common-law conclusions may be drawn. These sources are examined separately.

(a) general principles of imperial common law

If the Great Lakes Region had been acquired directly by Britain, either by the 1701 treaty alone or by the combined effect of the discovery/occupation rule and native treaty, the general principles of imperial common law relating to the acquisition of North American territories would have applied: relations between British traders would have been governed by relevant parts of English municipal law as their birthright, and native law and government would have been presumed to have continued in force in native communities. In failing to introduce alternative government or laws, the *Proclamation* did not alter this common-law conclusion. However, by reserving Indian Territory under the crown's "Sovereignty, Protection, and Dominion" for the use of nations "connected" with the crown, the *Proclamation* is consistent with the view that the common-law continuity of their laws and government was "inclusive" not "exclusive"—that is, native laws and government had become subsumed under the umbrella of the imperial constitution.[69]

In addition to traders and natives, Indian Territory contained an unexpected third group—French settlers who remained at interior forts.[70] These French enclaves were regarded as conquests and therefore at common law they retained their lands and laws. The *Proclamation*'s prohibition of settlement in Indian Territory was therefore read in light of these common-law rights, and French settlers were allowed to remain.[71]

To summarize, each of the constituent components of Indian Territory—native nations, British traders and French settlers—were governed internally by their own respective laws and institutions insofar as they qualified for recognition under the imperial common law. Of course, these conclusions are only as strong as their premise, that Britain's acquisition of the territory was a direct acquisition of native lands. However, it has been held that Britain acquired Indian Territory—not just French enclaves but the whole territory—by conquest and cession from France in 1763, that French law was applicable throughout the territory prior to the cession, and that French law—including

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[69]*Cadwell v. Alabama*, 1 Stew. & Potter 327 (S.C., 1832), *per* Taylor J. ("To be within the 'dominion' is synonymous to being within the government or jurisdiction of the author of the proclamation"); *State v. Foreman*, 16 Tenn. R. 171 (S.C., 1835), at 182 (this clause of the *Proclamation* showed "the absurdity of conferring the right of sovereignty on the various tribes of Indians within the British limits"). But see *infra* ch. 7, II, A, 2(d).

[70]Their presence was not anticipated by the imperial ministry: Sosin, *White Hall and the Wilderness* (1961), 238.

[71]Board of Trade to J. Murray, Gov. Que., 29 May 1764, *CO* 43/1: 169-71; Lord Dartmouth, Sec. of State, to Gage, 3 March 1773, *GC*, II, 156; Gage to Dartmouth, 7 April 1773, *GC*, I, 347-48; Riddell, *Michigan under British Rule* (1926), 31.

French law on aboriginal rights—continued in force after the cession thereby forming the imperial common-law context of the *Proclamation*.[72] The soundness of this conclusion in relation to Indian Territory generally is at least questionable,[73] but in that part of Indian Territory where Britain had denied French sovereignty and, *a fortiori*, the legitimacy of French law, there was, from the imperial perspective, no French law for the imperial common law to recognize.

The *Proclamation* itself, by making *all* unceded Indian land in British North America subject to the same rules, lends support to the view that French colonial law did not form part of its interpretative context. As Strong J. concluded in 1887, the *Proclamation* gave "legislative expression and force" to an existing "system" of dealing with aboriginal peoples which had commenced before the *Proclamation* was made and, "by the constant usage and practice of the crown" had "either ripened into a rule of the common law as applicable to the American Colonies" or had "been derived from the law of nations and had in this way been imported into the Colonial law as applied to Indian Nations".[74] That is, the interpretative context of the *Proclamation* was the (imperial) common law which had developed, through crown usage and practice and the incorporation of principles of the *jus gentium*, in those territories Britain had acquired

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[72]Great Lakes Region acquired by conquest and cession from France: *Anderson v. Todd* (1845), 2 U.C.Q.B. 82; *Church v. Fenton* (1878), 28 U.C.C.P. 384 (Ont.C.P.), at 388; Burge, *Colonial and Foreign Laws* (1838), xxxv; *Forsy.*, 26. Continuity of French law negating aboriginal title therein: *St. Catharines Milling Co. v. The Queen* (1887), 13 S.C.R. 577, *per* Taschereau J. at 645-46, Gwynne J. at 651; Lester, *Territorial Rights of the Inuit* (1981), 987.

[73]Because most of the territory contained no French people or institutions after its cession to Britain the "abandonment" principle would have applied: *supra* ch. 2, V.

[74]*St Catharine Milling Co. v. The Queen* (1887), 13 S.C.R. 577, at 626, 608, 615-16. Also, *Mitchel v. United States*, 9 Peters 711 (U.S.S.C., 1835), *per* Baldwin J. at 746 ("The principles which had been established in the [original British] colonies were adopted by the king in the proclamation of October 1763").

directly from native nations and not that which had arisen in territories conquered from France.[75]

The continuity of native customary law and government in Indian Territory pursuant to general imperial common-law principles is confirmed by analysing evidence of crown conduct in the region. The most important evidence in this respect, the proposed imperial legislation which was intended to replace the *Proclamation* as the constitution for the territory, is often overlooked as a component of the interpretative context in which the *Proclamation* must be read. It is therefore considered in some detail.

(b) crown usage and practice: the "Plan of 1764"

A plan for an imperial statute on Indian affairs was drafted in 1764.[76] According to the Board of Trade, the object of the "Plan of 1764" was "the Regulation of Indian Affairs both commercial and political throughout all north America, upon one general System, under the Direction of officers appointed by the Crown, so as to sett aside all local interfering of particular Provinces...."[77] The Plan would have repealed all colonial statutes on native matters (§4), and would have given statutory foundation to the imperial Indian Department. The existing structure of the Department was confirmed: British North America was divided into northern and southern districts each having a superintendent assisted by officials residing at native towns and trading posts (§§2, 5, 7); the native nations of each district were listed, those resident within the Great Lakes

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[75]Modern cases adopt Strong J.'s approach: *Calder v. British Columbia*, [1973] S.C.R. 313, at 378 (Strong J. quoted with approval); *Le Chef Max c. La societé de development de la Baie James*, [1974] R.P. 38 (Que. S.C), at 61; *R. v. Isaac* (1975), 13 N.S.R. (2d) 460 (N.S.C.A.); *Guerin v. The Queen*, [1984] 2 S.C.R. 335, at 378.

[76]"Plan for the future Management of Indian Affairs", 1764, *CO* 324/17: 421.

[77]Board of Trade to Sir W. Johnson, 10 July 1764, *CO* 324/17: 409.

Region and Quebec falling within the northern district (App. A). Indian Department officers were to administer trade regulations therein provided, and, as Justices of the Peace, they were to exercise summary jurisdiction over minor criminal and civil disputes, both among traders and between traders and Indians (§15). The arbitrary boundaries of Indian Territory were to be re-defined in treaties with native nations (§42).

Although the southern district superintendent regarded the Plan of 1764 as "a Necessary Step towards the proper Government of Indians",[78] the Plan still did not provide a British government for Indian Territory, it did not address the internal government of native nations, and it confirmed that colonial governments had only limited jurisdiction over other Indian lands. It envisaged a system whereby the Indian Department and native chiefs regulated matters of mutual concern through councils, or "general Meetings". Under this system the superintendents were to have authority over "the Conduct of all public Affairs relative to the Indians" (§10), although in negotiating "Affairs of political consideration" they were "to advise and act in concert with" the colonial governments in their respective districts (§11).

The system of imperial Indian councils was to be extended not only to Indian Territory proper, but also to Indian land in colonies which was otherwise open to purchase and settlement. The Plan therefore confirmed the central principle of *Mohegan Indians v. Connecticut*[79] and *Iroquois Indians v. Jesuit Fathers*[80]: Indian nations were not, in general, integrated within the municipal legal systems of the colonies in which they resided. Not surprisingly, colonial governors regarded the Plan as an intrusion into their jurisdictions. Said Governor Murray of Quebec: to include the resident nations

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[78]Carter, "Observations of Superintendent John Stuart" (1915), 821.

[79]*Supra* ch. 4.

[80]*Supra* sec. I, A.

within the superintendent's authority was to establish "a power within a power the policy of which I do not comprehend".[81] The governor of Massachusetts claimed that the Plan made Sir William Johnson "a Governor within my Government".[82]

The Plan's system for regulating British-Indian concerns was premised upon the appropriation and adaptation of existing native institutions. According to the Board of Trade, the manner in which native nations "regulate their civil Concerns" demonstrated that the commitment to "Justice and Equity is one of their first Principles of Government", and that articles 18 and 19 of the Plan recognized their "Inclinations and Disposition" in this respect.[83] However, recognition of native inclinations toward "Justice and Equity" was not necessarily synonymous with recognition of existing native customs. In disregard of custom, article 18 contemplated the election by each native town in the southern district of representatives who would in turn elect "a Chief for the whole Tribe" to assist the superintendent.

However, article 19, which applied to nations in the northern district, attempted to reconcile the elective system of article 18 with existing customs. It provided for the introduction of the system, but only "as far as the Nature of the Civil Constitution of the Indians in this District, and the Manner of Administering civil affairs will admit". Superintendent Johnson concluded that changes to the elective system would be necessary if it was to be integrated with the customs of northern nations. His conclusions in this respect are significant, for they illustrate not only the extent to which native customs were

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[81]Murray, Comments on Plan of 1764, *CO* 323/20: 2-5.

[82]Gov. Bernard, Mass., 17 Nov. 1764, *CO* 323/20: 16a. *Cf.* Gov. Franklin, N.J., 27 Oct 1764, *CO* 323/20: 59-60 ("In New Jersey, & several other Provinces, Indians live among the Inhabitants: Should not these...be governed by the Laws where they reside?").

[83]Board of Trade to Johnson, *supra* note 77, 412-13.

understood by the Indian Department, but the extent to which it had been Departmental policy to confirm their continuity:

> The Northern Indians have, some three Tribes [clans], such as the Bear, Wolf and Turtle, some of the Nations have six or seven; to each of which are several Sachems, who tho' they may reside in one Village, are pretty equal, and interfere only with those of their own Tribe...I have always thought proper, to indulge them in their choice, as they never fail to come for my approbation; and the extreme jealousy which the Northern Indians entertain of one another, would render a particular choice of any one of them unserviceable, and make his Nation pay no regard to him. A Chief of every Tribe in a Nation to attend occasionally for the purposes in this article [i.e., §19], would I presume appear more satisfactory.[84]

In short, the elective system failed to accord with customary law because chiefs were selected from each clan ("Tribe") in a village, and there were several clans, or "clan segments",[85] in each village; Johnson therefore suggested that the practice of recognizing all clan chiefs in each village be continued.

Political tensions between the imperial and colonial governments prevented Parliament's enactment of the Plan of 1764.[86] The imperial Indian Department's legal foundation therefore continued to rest upon commissions and instructions issued under the royal prerogative to the two superintendents. Despite its lack of statutory basis, superintendent Johnson proceeded to implement the Plan as far as possible, appointing officers to trading posts in the northern district and issuing copies of the Plan as instructions.[87] Where the Plan interfered with either the jurisdictions of charter/proprietary colonies or the common-law rights of traders or settlers it would have

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[84]Johnson to Board of Trade, 8 Oct. 1764, *DRCHSNY*, VII, 663.

[85]*Supra* ch. 1, note 28.

[86]Lord Shelburne, Sec. of State, Minutes submitted to Cabinet, 11 Sept 1767, *TP*, 12-13; Sosin, *op. cit.*, 95; Alvord, *Illinois Country* (1920), 306.

[87]Johnson to Gage, 4 July 1766, *JP*, XII, 129-131. Also, Allen, *History of the British Indian Department* (1971), 23; Sosin, *ibid.*, 77.

been unenforceable without imperial statute (or, in the case of crown colonies, without amendments to the governor's commission and instructions); thus, the provisions which repealed colonial statutes, regulated intra-colonial trade, and gave summary jurisdiction to Indian Department courts over disputes could not have been implemented. Indeed, Johnson complained frequently about the inability of the Indian Department to proceed legally against fraudulent traders or encroaching settlers.[88]

However, those provisions of the Plan which fell within the imperial crown's inherent authority could have been, and were, implemented. The crown's jurisdiction under the royal prerogative included the management of political relations with Indian nations outside and, in some cases (on the principles articulated in *Mohegan Indians v. Connecticut*), inside colonial boundaries. The Plan's article on Indian Territory boundaries was implemented upon the negotiation of the Treaty of Fort Stanwix, 1768, which replaced the temporary boundary line established by the *Proclamation* with "a permanent Line of Separation between their Country and the Settlement of His Majy's Subjects".[89]

An ineffective substitute for the Plan's Indian Department courts was provided by an amendment to the *Mutiny Act* (1765) providing that criminal and civil disputes arising at forts and trading posts "within his Majesty's Dominions in *America*, which are not within the Limits or Jurisdiction of any Civil Government" were to be tried by the courts of the "next adjoining Province".[90] Although the terms of the Act were general they were

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[88]Johnson to Shelburne, 16 Dec. 1766, *DRCHSNY*, VII, 881-2; Johnson to Shelburne, 15 Jan. 1767, *DRCHSNY*, VII, 891-2; Johnson to Gage, 4 July 1766, *JP*, XII, 129-130; Johnson to Shelburne, Sept. 1767, *DRCHSNY*, VII, 975.

[89]Hillsborough to Gage, 15 April 1768, *TP*, 253. Treaty of Fort Stanwix, 5 Nov. 1768, *DRCHSNY*, VIII, 135-6. Also, Farrand, "The Indian Boundary Line" (1904-5).

[90]5 Geo. III, c. 33 (Imp.), ss. 25-26. Generally, Foster, "Long-Distance Justice" (1990), 2.

rarely applied to British-Indian offences. Where settlers offended against natives, officials respected native customary law either by allowing native nations to retaliate or by adhering to the ceremony of condolence at which satisfaction was paid.[91] Where natives committed crimes against British traders or settlers, initial attempts to persuade the nation to surrender the accused for trial in an adjoining colony proved either unsuccessful,[92] or where successful proved unhelpful.[93] In such cases officials were instructed by the commander-in-chief of British forces to seek satisfaction from the nations to which the accused natives belonged according to "their own Customs and Ceremonies".[94] It was not until 1773 that Sir William Johnson persuaded the Six Nations "to sacrifice their antient customs to our laws" by surrendering two Seneca Indians accused of murdering traders on Lake Ontario.[95] This surrender was significant, said Johnson, because in general the Six Nations "derive no benefit" and "are not admitted to partake of" English law, and they considered it "peculiarly hard to deviate from their own antient usages" which were "generally practiced to the present time...."[96] Finally, the resolution of criminal matters among natives *inter se* was governed by native customary

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[91]Gage to Johnson, 7 July 1766, *JP*, XII, 133-4; Gage to Johnson, 5 April 1767, *JP*, XII, 295; Gage to Shelburne, 7 April 1767, *GC*, I, 133-4; Gage to Johnson, 4 May 1767, *JP*, XII, 307-8.

[92]Johnson to Sir J. Amherst, Comm. in Chief, 6 June 1763, *DRCHSNY*, VII 522-23 ("impossible to persuade the Nations to deviate from a Custom which was their law"); G. Johnson, Depty. Supt. Ind. Dept., to Onondaga Nation, Dec. 1762, *DRCHSNY*, VII, 511-13.

[93]Gage to Hillsborough, 12 Aug. 1769, *GC*, I, 233-4 (transporting natives and witness to neighbouring colony was impractical).

[94]Gage to Dartmouth, 7 April 1773, *GC*, I, 347-9. Also, Gage to Shelburne, 23 Dec. 1766, *GC*, I, 115-16; Gage to Hillsborough, 18 June 1768, *GC*, I, 180-1.

[95]Johnson to Dartmouth, 2 May 1774, *DRCHSNY* VIII, 421.

[96]Johnson to Dartmouth, 16 Dec. 1773, *DRCHSNY*, VIII, 405.

law as applied by clan, village or national councils. Indeed, Johnson was instructed to avoid "as much as possible from interfering or becoming party in any councils the Indians may think fit to hold relative to their own Interests...."[97] Johnson did, however, preside over the resolution of inter-confederacy disputes.[98] In short, the central principle of the Plan—the resolution of matters of mutual concern in councils held between imperial officers and native chiefs—was implemented.

As the Plan was not under the great seal it lacked the inherent legislative force of an order in council or proclamation, and as it was not under the royal sign manual it lacked the authority of royal instructions issued to colonial governors; however, its status was at least equivalent to instructions issued by ministers of the crown in dispatches to colonial officials. It therefore constitutes the sort of "circumstantial evidence" which courts might consider in determining the common-law status of local laws and governments in territories newly acquired by the crown.[99] In this respect, the Plan clearly supports the proposition that aboriginal customary law and government in Indian Territory was to have continued in force at imperial common law in the "inclusive" sense: it expressly recognized the "Civil Constitution" of natives, but contemplated at least the possibility of amendments to that constitution by statute. It is in this imperial common-law context that the *Proclamation* must be read. As Viscount Cave observed when interpreting the *Proclamation* in relation to Quebec's boundary with Labrador:

> [W]here a document is ambiguous, evidence of a course of conduct which

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[97]Hillsborough to Johnson, 4 May 1771, *DRCHSNY* VIII, 270.

[98]Indian Council, July 1770, *DRCHSNY*, VIII, 231 (Seven Nations of Canada whose members had murdered some of Six Nations "obeyed the institutions of their Ancestors" by performing "ceremony of Condolence" and giving "necessary [wampum] Belts" with Johnson presiding); Gage to Hillsborough, 18 June 1768, *GC*, I, 180-1 ("Messessagas" came to Niagara to condole with Seneca for certain murders).

[99]*Supra* ch. 2, text at notes 43-45; ch. 5, II, A.

> is sufficiently early and contiguous may be taken into account as bearing upon the construction of the document.[100]

Of course, a distinction between British aspirations for Indian Territory and actual conditions in Indian Territory must be made. Although the *Proclamation* and Plan indicate that Britain considered native law and government to be sufficiently integrated within the imperial constitution to be amenable to amendment by Parliament, native nations in Indian Territory were sufficiently autonomous to be able to force Britain to conform to customary forms of dispute resolution which would certainly have violated settler and trader common-law rights and which may have been (insofar as they permitted private retaliation for crimes) abrogated automatically by the *malum in se* exception to the continuity principle. In short, the fact that these customs not only remained in force, but were applied where British settlers and traders were parties, suggests that Superintendent Johnson's interpretation of the treaty process was correct: native nations had not actually submitted to British sovereignty, and therefore native customary law and government continued in force in the "exclusive" sense. This distinction between British aspirations and *de facto* conditions in Indian Territory presents obvious difficulties for legal interpretation. At what point does the common-law deference to crown intention in matters of imperial expansion give way to the competing common-law deference to established usage and custom in such matters?

(c) judicial opinions

Unlike judges of the same period in the United States, judges of colonial Canada rarely indulged in extended discussions about the general principles underlying British-native relations. *R. v. De Reinhard* (1818)[101] is illustrative. Defence counsel's argument

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[100] *Re Labrador Boundary*, [1927] 2 D.L.R. 401 (P.C.), at 422.

[101] *R. v. De Reinhard* (Ct. of Oyer & Terminer, Low. Can., 1818), *Report of the Trials of Charles De Reinhard and Archibald M'Lellan* (1818).

reflected Johnson's "pre-emption" theory identified in Chapter Three: "discovery" gave rights only against "the kingdoms of Europe"; to acquire sovereignty over Indian lands the discoverer had to establish *de facto* possession and government therein "adverse to that of the Indians". In Indian Territory, however, Britain (counsel argued) had established neither; on the contrary, British-Indian treaties implied that Indian nations had "government *de facto*".[102] Crown counsel's responding argument reflected the simple settlement-model of imperial law identified in Chapter Five: British "occupancy" of Indian Territory, though limited, was sufficient to give "a civilized power" sovereignty over "any uncivilized territory that it may discover", and "[w]herever the Indians appear, whenever they appear [in such territories], they are always treated as British subjects...."[103] Refusing to enter into this debate, Sewell C.J. stated: "You will not of course expect me to refer to history upon this subject; it will be a sufficient answer that this claim [of British sovereignty] has been put up from almost time immemorial, and confirmed, in almost innumerable instances, by the solemn act of the King and Parliament...."[104]

Not all nineteenth-century judges in British North America declined comment on the general principles underlying British-native relations. Adam Thom, recorder for Rupert's Land, grappled with Blackstone's application of the conquest/settlement dichotomy to North America, concluding that because the Hudson's Bay territory was neither "uninhabited" nor "'cultivated' or possessed of 'laws' of its own'", it was "neither

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[102]*Ibid.*, 579-580. The case involved the murder by one trader of another in territories northwest of the Great Lakes, and counsel was arguing that Britain lacked authority to enact the *Canada Jurisdiction Act* (1803), 43 Geo. III, c. 138 (Imp.) giving Canadian courts extra-territorial jurisdiction therein.

[103]*Ibid.*, 599.

[104]*Ibid.*, 631.

'claimed by right of occupancy only', nor 'gained by conquest or ceded to us by treaties'".[105] Of the two possibilities, however, Thom regarded Rupert's Land as closer to a settlement than a conquest.[106] As for the continuity of native customary law within British law, Thom was clear: the application by courts of the principle of continuity to the customs of "wandering and disunited savages" was impossible, but even if the principle were applied, its *malum in se* exception would "effectively neutralize it".[107] Thom did not go on to conclude that natives therefore fell under English law as British subjects. Instead he argued that, insofar as they had been permitted to reside within British territories "in a national capacity" under their own "chiefs", natives were exempt from the jurisdiction of local courts; indeed, this recognition of aboriginal nationhood and jurisdiction only proved that they were not included within the imperial constitutional order—"if the Indians really were our fellow-citizens", he argued, "we could not extend to them this indulgence without helping to split society into factions...."[108] Thus, Thom denied only the *inclusive* continuity of native law and government; like Kent and Marshall he considered natives to constitute resident-alien nations subject to customs which continued independently of British law.

There are no judicial decisions addressing the continuity of native customs in the Great Lakes Region while it formed part of Indian Territory. However, *Connelly v.*

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[105]Thom, "Observations on the Law and Judicature of Rupert's Land", 18 May 1840, in *Council of Assiniboia Proposed Penal and Civil Codes for Rupert's Land, 1840-1842*, E. 16/1, *MG20 HBC* 4M25: 80, at 86-87.

[106]*Ibid.*

[107]*Ibid.*

[108]Thom, Charge to Grand Jury, Assiniboia (1845), quoted at Lester, *Territorial Rights of the Inuit* (1981), 1245-46. Also, Thom, "Trade and Judicature of Indian Territories", 26 Feb. 1842, E. 16/1, *MG20 HBC* 4M25: 142, at 156.

Woolrich (1867)[109] addressed the continuity of native customs in Athabaska upon the assumption that Athabaska fell within the *Proclamation*'s Indian Territory; it therefore identifies legal principles applicable to the constitutional conditions of the Great Lakes Region between 1763 and 1774. Significantly, it established a judicial approach to the continuity of native customary law which was fundamentally different from that taken by Johnson, Kent, Marshall and Thom.

Connelly v. Woolrich arose in the courts of Quebec and involved the validity of a marriage between a British trader and a Cree woman conducted in Athabaska in 1803 according to Cree customary laws. The parties agreed that in 1803 Athabaska was within British territorial sovereignty but outside the jurisdiction of a local colonial government; however, they disagreed on whether English law had been introduced into the region.

Monk J. began by considering general principles of (imperial) common law. He recognized that both the French and English had established certain claims in the northwest on the basis of discovery and settlement. With respect to the introduction of law, he concluded that as territories "acquired by discovery and occupancy" the law of the "parent states then in being was immediately and *ipso facto* in force" having been carried in by the discoverers as their "inalienable birthright".[110] The problem with this conclusion, Monk J. then observed, was that the discovery/occupation rule only applied to "newly discovered and uninhabited regions" and the territory under consideration was "occupied and held by numerous and powerful tribes of Indians...."[111] He therefore concluded that, even if it were admitted that French and English law were *ipso facto* in

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[109](1867), 1 C.N.L.C. 70 (Que.S.C.); aff'd, *sub nom, Johnstone v. Connolly* (1869), 1 C.N.L.C. 151 (Que. Q.B.).

[110]*Ibid.*, 78-79.

[111]*Ibid.*, 79.

force in their respective "trading posts", the principle could not serve to abrogate "the territorial rights, political organization, such as it was, or the laws and usages of the Indian tribes...."[112]

Although Monk J. concluded that all of Athabaska "belonged to the crown of France", and was later ceded to Britain so as to become "part of the British empire", it would appear that, by quoting Phillimore, he was indicating that he considered these rights to have derived not only from discovery and occupation but also from the tacit allowance by natives of the "joint occupation" of their territories by European nations.[113] In sum, Monk J. considered that at imperial common law: (a) France and Britain had acquired sovereignty over their respective territories by discovery and occupation and tacit native consent; (b) French and British law applied in their respective posts; and (c) native law and government applied elsewhere. *Connelly v. Woolrich* therefore does not fall neatly into either the settlement or conquest/cession paradigms. If emphasis is placed upon his references to "discovery and occupation" the decision is consistent with the complex settlement-model;[114] if emphasis is placed upon his appeal to Phillimore, it is consistent with the complex conquest/cession-model.

Having considered the implications of imperial common law, Monk J. then considered the implications of the *Proclamation*. He observed that, prior to 1763, the French did not "subvert or modify the laws and usages of the aboriginal tribes, except

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[112]*Ibid.*

[113]Phillimore, *International Law* (1854), §CCXLI ("the North American Indians would have been entitled to have excluded the British fur traders from their hunting grounds; and, not having done so, the latter must be considered as having been admitted *to a joint occupation of the territory*'"), quoted *ibid*, 82.

[114]Indeed, Badgley J.'s reasons on appeal distinguish the constitutional implications of "conquest" from those of mere "trading in furs" with natives, as was the case in Athabaska: *Johnstone v. Connelly* (1869), 1 C.N.L.C. 151 (Que.C.A.), at 218-19. Also, Walters, "British Imperial Constitutional Law and Aboriginal Rights" (1992), 388-89.

where they had established colonies and permanent settlements...."[115] Therefore, upon Britain's acquisition of the territory in 1763 French law applied in French posts and native customary law applied in native communities. Monk J. then proceeded to apply the imperial common-law principle of continuity:

> [N]o change could take place in their [the French] laws, or in the Indian usages, except by the express will of the conqueror....I find in the proclamation...dated 7th October, 1763, the following clauses: [quoting section which reserved territory for Indian nations under British sovereignty]....There is nothing to be found in this, or in any subsequent proclamation, abolishing or changing the customs of the Indians or the laws of the French settlers, whatever they may have been; nothing which introduced the English common law into these territories.[116]

Thus Monk J. concluded that Athabaska fell within the Indian Territory created by the *Proclamation* and that within this territory French and native law continued in force at imperial common law (it is not clear whether he viewed native law as continuing independently or as an element of French law). Therefore Monk J. concluded that the marriage at issue was governed by Cree marriage law.

After examining evidence of Cree marriage custom, Monk J. proceeded to identify the doctrinal foundation upon which its application by a Canadian court rested. Like *Morgan v. M'Ghee* and the other American cases which applied native custom,[117] he cited the general rule of private international law that the *lex loci contractus* governs marriages conducted in foreign countries.[118] But unlike the American cases he went further, stating that, besides this principle, there were two other "very plain" reasons for the court to apply Cree customary law, namely:

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[115]*Supra* note 109, 77.

[116]*Ibid.*, 91.

[117]*Supra* ch. 5, notes 61-2.

[118]*Supra* note 109, 127.

> 1st. The supreme authority of the empire, in not abolishing or altering the Indian law, and allowing it to exist for one hundred years, impliedly sanctioned it, and 2nd. The sovereign power in these matters, by [the royal] proclamation [of 1763], has tacitly acknowledged these laws and usages of the Indians to be in force, and so long as they are in force as a law in any part of the British empire or elsewhere, this Court must acknowledge and enforce them. This Indian custom or usage is, as regards the jurisdiction of this Court, a foreign law of marriage; but it obtains within the territories and possessions of the Crown of England, and until it is altered, I cannot disregard it. It is competent; it has been competent during the last hundred years, for the parliament of Great Britian to abrogate those Indian laws, and to substitute others for them, It has not thought proper to do so, and I shall not.[119]

This statement represents the clearest judicial application, in Canadian case-law, of the imperial common-law principle of continuity to native customary law. In applying Cree marriage law, Monk J. was applying Quebec law which had, for the purposes of this particular case, incorporated a marriage law foreign to the province of Quebec under the principles of private international law; however, the marriage law incorporated by Quebec was not foreign to the British imperial order, but formed part of an aboriginal customary legal system which had, as a whole, been incorporated within British imperial law by the imperial common-law principle of continuity. *Connelly v. Woolrich* therefore represents an approach to the judicial application of aboriginal custom which is fundamentally distinct from that taken by the American courts—Cree customary law had become *included* within British imperial law in a way in which native custom could not have been said to have been included within American law.

The principles identified in *Connelly v. Woolrich*, when applied to the Great Lakes Region during the years 1763 to 1774 when it was subject to the legal regime established by the *Proclamation*, support the conclusion that native customs continued in force in the region under the imperial common law in the *inclusive* sense.

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[119]*Ibid.*, 132.

III. Conclusions

Even if it is accepted that Britain acquired territorial sovereignty over colonial Canada by cession from France, it must be accepted that its relations with native nations resident within Canada were based upon a treaty process independent of that cession. Notwithstanding this separate treaty process, within Quebec there is some evidence that, at imperial common law, native rights to land, customary laws and government continued in force as elements of French colonial law pursuant to the compound-continuity principle. In the Great Lakes Region, however, there is no evidence that the crown considered itself bound by French colonial law relating to native legal status; indeed, it traced its territorial sovereignty over the region to native treaties made prior to the French cession of Canada, therefore precluding the assertion that French colonial law had any validity therein either before or after the cession. Furthermore, it initiated an independent policy under the *Proclamation* which may be interpreted as consistent with the assumption that the legal position of native customary law and government in that region was determined through a direct application of British imperial law rather than through the mediation of French colonial law. This policy suggests that the same legal assumptions which had guided British conduct in relation to native nations in its original American colonies continued to guide British policy in the Great Lakes Region: whatever the source of British sovereignty over the *territory*, British sovereignty over native *people*, to the extent that it vested at all, vested as a result of treaties signed with them.

Of course, serious doubts existed as to whether British-Indian treaties actually secured native submission to British sovereignty. The *Proclamation*, the Plan of 1764, the text of Bradstreet's 1764 treaty, and statements of the Board of Trade, all suggest that, from the *British perspective*, natives in the Great Lakes Region had submitted to British sovereignty. However, the terms of the 1761 and 1764 covenant-chain treaties, and Johnson's interpretation of them, as well as *de facto* conditions in the region, suggest that natives had not submitted to British sovereignty.

The fact that treaties with natives were deemed necessary before Britain could begin to possess posts in the Great Lakes Region suggests that the appropriate model of imperial law within which to analyse crown-native relations is the complex conquest/cession-model as opposed to the complex settlement-model. Under this model, a court informed by the common law's traditional deference to crown intentions would have held that native customary law and government continued in force in the region under the imperial constitution in the inclusive sense until altered or abrogated by the crown pursuant to the royal prerogative. It is important to stress, however, that this is only one possible interpretation. Judges who de-emphasized crown intentions in favour of *de facto* conditions and aboriginal conceptions of the treaty process might (as Kent C. and Marshall C.J. did) conclude that native customary law and government remained part of foreign, or sovereign, systems outside the imperial constitution, notwithstanding their presence in territories over which Britain claimed to be territorially sovereign. In fact, native nations occupied a position which had attributes of both sovereignty and subjecthood, a position which was, constitutionally, "*sui generis*".[120]

[120]*Supra* note 22; ch. 5, note 54.

Chapter Seven

The Introduction of British Colonial Government and Law into Indian Territory: The *Quebec Act 1774*

In 1774 the imperial Parliament introduced a colonial municipal legal system into Indian Territory which lasted until 1791. In this chapter the relationship between that municipal system and native municipal systems in the territory will be addressed. After briefly summarizing the basic structure of the colonial system, the legal status of native customary law and government during two periods will be considered. The dividing line between these two periods is 1783, the year Britain ceded much of Indian Territory to the United States.

I. The Colonial Municipal System under the *Quebec Act*

The *Quebec Act*[1] ended the uncertainty about the constitution of Quebec which had arisen from the various readings of the *Royal Proclamation of 1763*. The Act repealed the *Proclamation* and judicature ordinances in the colony, confirmed that the "laws of Canada" governed matters "relative to property and civil rights" (s. 8), and that English law governed criminal matters (s. 11), and, because it was "inexpedient to call an assembly", provided for a crown-appointed legislative council which, with the governor, was to make laws for the "peace, welfare and good government" of the colony (s. 12). The Act also stated that its provisions did not make void any existing "right, title, or possession" to land (s. 3).

The *Quebec Act* extended the boundaries of the province over much of Indian Territory. The Act observed that under the *Proclamation* "a very large extent of country" containing "several colonies and settlements of the subjects of France" had been

[1] 14 Geo. III, c. 83 (Imp.).

left without civil government. To remedy this problem it annexed to Quebec the Great Lakes Region and the Western Interior as far south as the Ohio River.

A new colonial judicature was established in 1777 consisting of a superior Court of King's Bench and district Courts of Quarter Sessions with jurisdiction over criminal matters, and district Courts of Common Pleas with jurisdiction over civil matters.[2] Justices of the Peace presiding in Courts of Quarter Sessions also provided local government for their respective districts.[3] Before the *Quebec Act* the province was divided into two districts, Montreal and Quebec; as a result of the Act the annexed part of Indian Territory was added to the district of Montreal and became subject to its judicial and administrative institutions.[4] As a result, civil and criminal matters arising at trading posts like Detroit were heard at distant Montreal.[5]

II. The Native Municipal Legal System under the *Quebec Act*

A. Native Customary Law and Government in Quebec, 1774-1783

1. The text of the *Quebec Act*

On the one hand, the *Quebec Act* may be regarded as a statutory abrogation of the imperial common-law continuity of native municipal law and government in the Great Lakes Region and the Western Interior. The Act extended colonial municipal law and government, and colonial ordinances extended the jurisdiction of courts and local government, over these areas. These instruments of positive law made no express exemption for native people or land and made no express recognition of native law or

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[2]17 Geo. III, c. 1 (Que.); Riddell, "Introduction", *RECJUC*, 14-19; Neatby, *Administration of Justice Under the Quebec Act* (1937), 37-38, 298.

[3]Spragge, "The Districts of Upper Canada" (1947), 95.

[4]Riddell, *loc. cit.*, 4; Riddell, *Michigan Under British Rule* (1926), 44.

[5]Neatby, *op. cit.* 287, 316.

government. However, there are strong reasons to believe that it was not the intention of Parliament in enacting the *Quebec Act* to alter the rules governing British-Indian relations in the Great Lakes Region and Western Interior. According to the Act's preamble the purpose of annexing Indian Territory to the colony was to provide colonial law and government for the "settlements of the subjects of France". As General Gage observed upon the *Quebec Act*'s enactment: "[T]he French Laws in most Instances are to have Force in Canada, but I don't imagine that the Indians are much interested in this Matter".[6] In short, the Act may not have abrogated the common law's recognition of native customs and chiefs in the annexed area. In support of this conclusion is the fact that the legislative rules governing British-Indian relations in the area remained at least partially in force.

The *Proclamation* established legislative rules governing crown-native relations throughout British North America, and therefore its repeal within Quebec did not constitute its repeal in other colonies. Moreover, it was accepted that the *Proclamation*'s provisions securing aboriginal title to land were not repealed in the Great Lakes Region after its annexation to Quebec.[7] Two parts of the Act support this conclusion. First, the preamble of the repealing provision, section 4 of the *Quebec Act*, observed that "in respect to the civil government" of Quebec the *Proclamation* was "inapplicable"; no mention was made of the provisions on native title being inapplicable. Second, section

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[6]Gen. T. Gage, Comm. in Chief, to G. Johnson, Ind. Dept. Supt., 18 Sept. 1774, *JP*, XIII, 679-80.

[7]Justice W.D. Powell, "Memoir on the Refusal of the Messasague Indians to cede their Land...", 1 Nov. 1797, *CO* 42/322: 64; F. Gore, Lt. Gov. Upp. Can. to Viscount Castlereagh, Sec. of State, 4 Sept. 1809, *CO* 42/349: 88-89; *St. Catharines Milling Co. v. The Queen* (1887), 13 S.C.R. 577, at 629-632; *R. v. Lady McMaster*, [1926] Ex. C.R. 68, at 73-4; *R. v. Foreign Sec., Ex p. Indian Ass'n*, [1982] Q.B. 892 (C.A.), at 912-14, 920, 934; *A.G. Ontario v. Bear Island Foundation* (1989), 68 O.R. (2d) 394 (C.A.), at 410.

3 of the Act protected the continuity of any "right, title, or possession" to land, which may be argued to include native title as protected by the *Proclamation*.[8] The question, then, is not whether the *Proclamation* remained binding in the territories annexed to Quebec, for it did; rather, the question is, did the annexed territories retain their status as "Indian Territory" in which both public and private purchases of native title were legislatively prohibited, or did they become subject to the rules which the *Proclamation* prescribed for Indian lands in other colonies in which public (but not private) purchase and settlement was legal.

Determining the legislative framework for aboriginal rights in the enlarged Quebec is critical to the interpretation of the imperial common-law context of the *Quebec Act*. Ultimately, the effect of the text of the *Quebec Act* upon the continuity of both the legislative concept of Indian Territory and the common-law status of native law and government depends upon how the *Quebec Act*'s interpretative context is regarded.

2. Interpretative context of the *Quebec Act*

In identifying the *Quebec Act*'s interpretative context, reference must be made both to general principles of imperial common law and to evidence of crown usage and practice. To this end, reference will be made to the political events leading up to the Act, the intention of Parliament in enacting it, crown conduct following its enactment, and official interpretations of native legal status under its provisions. These sources indicate that the legislative concept of Indian Territory was indeed destroyed by the Act, but that the common-law continuity of native law and government was not.

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[8]Both arguments were used by Strong J. in *St. Catharines Milling Co. v. The Queen* (1887), 13 S.C.R. 577, at 629-632.

(a) historical context

One of the reasons why the extension of Quebec's borders over Indian Territory had been resisted in 1763 was that it was intended by the imperial ministry that a detailed constitution for the region would soon be enacted by Parliament. When political conditions in the colonies precluded the statutory implementation of the Plan of 1764 the imperial government faced a dilemma: it recognized the need for a unified system for Indian affairs but lacked the constitutional authority and financial resources to implement fully such a system under the royal prerogative. It was therefore suggested by Secretary of State Lord Shelburne that the imperial Indian Department be abolished, its responsibilities re-delegated to colonial governments, and new British colonies erected in Indian Territory, thereby forcing Indians to "either become domiciliated and reconciled to our Laws and Manners or be obliged to retire to a distance".[9] In response the Board of Trade argued that the establishment of colonies in the interior was contrary to British security and economic interests, and that direct imperial control over cessions of Indian land and Indian political relations was still necessary; however, it accepted that the prevention of fraudulent trade practices and the prohibition of illegal settlement in Indian Territory were matters over which local colonial legislation would be politically, financially and constitutionally appropriate.[10]

The Board of Trade's representation became the basis of imperial Indian policy between 1768 and 1774.[11] The Indian Department ceased to concern itself with settlers

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[9]Shelburne to Board of Trade, 5 Oct. 1767, *DRCHSNY*, VII, 981-3. Also, Shelburne minutes submitted to cabinet, 11 Sept. 1767, *TP*, 12-20; Sosin, *Whitehall and the Wilderness* (1961), 158; Allen, *History of the British Indian Department* (1971), 24-27.

[10]"Representation of Lords of Trade on the State of Indian Affairs", 7 March 1768, *DRCHSNY*, VIII, 19-30.

[11]Lord Hillsborough, Sec. of State, to Governors in America, 15 April 1768, *DRCHSNY*, VIII, 55-6; Sosin, *op. cit.*, 167-68.

and traders but continued to manage relations with Indian nations in other respects. It was left to individual colonies to pass legislation keeping settlers out of and regulating traders within Indian Territory.[12] In the end local legislatures did not enact the necessary restrictions, but even if they had the resulting legislation would have been, in some parts of Indian Territory at least, extra-territorial in nature and thus of doubtful legality.[13] In short, Indian Territory was left with neither imperial nor colonial trade regulations. Furthermore, French settlements in Indian Territory remained without British civil government.[14]

(b) legislative intent

The inclusion of Indian Territory within the boundaries of a single colony solved the two problems identified above: first, responsibility over British traders and settlers in Indian Territory could be vested in a single local jurisdiction; second, French settlers in Indian Territory could be subjected to civil government. In selecting Quebec as the colony in which to include Indian Territory the imperial government could effectively ensure the continuity of the same policies which it had previously attempted to pursue by keeping the territory outside the jurisdiction of colonial governments. First, imperial control over the regulation of Indian trade could be indirectly maintained through instructions to Quebec's governor and un-elected legislative council;[15] second, the application of French-Canadian civil law to the area would not only respect the rights of

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[12]Sosin, *ibid.*

[13]Hillsborough to Governors in America, 15 Nov. 1770, *DRCHSNY*, VIII, 254; Hillsborough to Gage, 24 March 1769, *TP*, 514; Gage to Hillsborough, 13 May 1769, *GC*, I, 224; Coffin, *Province of Quebec and the Early American Revolution* (1896), 417-8.

[14]Gage to Hillsborough, 4 March 1772, *GC*, I, 317-8; Hillsborough to Gage, 1 July 1772, *GC*, II, 145.

[15]Sosin, *op. cit.*, 241; Alvord, *Illinois Country* (1920), 303.

French settlers but would, along with the absence of an elected assembly, discourage further settlement by British settlers.[16] As the under-secretary of state observed, "the whole of the derelict country is put under the jurisdiction of the government of *Quebec*, with the avowed purpose of excluding all further settlement therein, and for the establishment of uniform regulations for the *Indian* trade".[17] If this was the purpose of annexation, then it may be said that the Act was consistent with at least the principles inherent in the concept of Indian Territory established by the *Proclamation*.

However, it is one thing to conclude that the Act was consistent with the principles inherent in the concept of Indian Territory and another to conclude that those principles remained legislatively protected by the *Proclamation* after the Act was made. In fact few officials at the time regarded the *Proclamation*'s bar on public purchases of Indian land as remaining in force in the annexed region. Indeed, former Secretary of State Lord Hillsborough objected to the Act for this reason, arguing that the Act represented a declaration that it was "right and proper to *settle* the Territories annexed, for these Lands & Inhabitants are put in exactly the same state as those within the present Limits".[18] Reassurances by ministers of the crown, both within and outside Parliament, that the Act did "by no means imply an intention of further settling the Lands included within this extension"[19] would have doubtful legal weight[20] and, at any rate, are

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[16][Anon.], *Observations and Reflections, On an Act, passed in the Year 1774* (1782), 25; Alvord, *ibid.*, 305-06.

[17]Knox, *Justice and Policy of the Late Act of Parliament, for...Quebec* (1774), 43. Also, Allen, *op. cit.*, 30.

[18]Knox, "Lord Hillsborough's Objections to the Quebec Bill in its Present Form", 30 April 1774, *LBC*, III, 1115.

[19]Lord Dartmouth, Sec. of State, to Knox, 1 May 1774, *ibid*, 1117. Also, A. Wedderburn, Sol. Gen., 26 May 1774, statement in House of Commons, Cavendish, ed., *Debates on...the Canada Bill* (1839), 58.

themselves open to interpretation. Said Lord North in Parliament: "I hope there will be great caution and restriction on the part of governors against making grants" in this "uninhabited country added to Canada...."[21] The prohibition on the purchase of native title by governors and the granting of land to settlers—the *sine qua non* of the legal concept of Indian Territory—had apparently been reduced from a rule of prerogative legislation to a ministerial "hope".

(c) crown conduct

In determining the interpretative context of the *Quebec Act*, reference must be made to the royal instructions issued to the governor of Quebec in 1775. In his instructions Governor Guy Carleton was given authority to erect courts "through the whole Extent of Our Province" (§12), including inferior courts in new districts centred around French settlements in the annexed territory (§15).[22] However, by observing that the extension of the colony invoked "a Variety of new Matters and new Objects of Consideration", including the "protection and control of the various Settlements of Canadian Subjects" (§30), the instructions (like the Act's preamble) suggest that the annexation of territory to the colony and the establishment of colonial courts therein were policies undertaken primarily for French-Canadian settlers. No reference was made to extending judicial jurisdiction over Indian inhabitants outside these settlements. Instead, article 31 provided:

> [I]t will be highly proper, that the Limits of each of those Posts, and of every other in the interior Country should be fixed and ascertained; and that no Settlement be allowed beyond those Limits; seeing that such

[20]In construing the *Quebec Act* in 1889, the Privy Council considered royal commissions and instructions but refused to allow argument on Parliamentary debates: *Proceedings...respecting the Westerly Boundary of Ontario* (1889), 41-42.

[21]Cavendish, *op. cit.*, 195.

[22]Royal Instructions to G. Carleton, Gov. Que., 3 Jan. 1775, *ROBA*, IV, 58-79.

Settlements must have the consequence to disgust the Savages....

It is clear that at least the *Proclamation*'s *policy* of prohibiting cessions and settlement in the annexed territory remained in force as a policy. However, the fact that this policy was stated in instructions issued with the Act and not in the Act itself supports the conclusion that it had lost the legislative footing which it had had under the *Proclamation*. Subsequent abandonment of the policy by the imperial government would therefore require mere amendment to the governor's instructions.

Article 32 of the instructions stated that the Indian trade in the "interior Country" would be free to licensed British subjects as "was directed by our Royal Proclamation of 1763" and it directed the legislature of Quebec to enact regulations for this trade. The imperial government was explicit about the model to be followed: the Plan of 1764 was "annexed" to the instructions in order to "serve as a Guide". As noted in Chapter Six, the Plan represented a proposed imperial statute on Indian affairs, and because article 19 of the Plan recognized the existing "Civil Constitution of the Indians" in the northern district, it supports the conclusion that native customs and government had some common-law status in the 1760s. By directing that the Plan form the basis for a colonial statute on Indian trade in the 1770s, the instructions suggest that native law and government were considered by the imperial crown to have continued to have that common-law status under the *Quebec Act*. In fact, the resulting Quebec ordinance on Indian trade, enacted in 1777, was far less ambitious than the Plan of 1764. Nevertheless, by prohibiting "any person to settle in any indian village or in any indian country within this province, without a licence", the ordinance did embrace certain central principles of the *Proclamation* and Plan.[23]

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[23]*An ordinance...relative to the trade and intercourse with the said Indians* (1777), 17 Geo. III, c. 7 (Que.).

(d) official interpretations after 1783

During the American Revolution many native nations around the Great Lakes were allied to Britain. To these nations the war was not about retaining rebellious colonies within the empire but about restraining settlers from violating the boundary established by the Treaty of Fort Stanwix 1768. As they had been successful in defending Indian Territory from American incursions, it came as a surprise to both Indian and British leaders in Quebec that, by the Treaty of Paris 1783,[24] Britain ceded to the United States that part of Quebec south of the Great Lakes.[25]

Because Britain retained that part of Quebec north of the Great Lakes, it was forced to tread a fine diplomatic line in the years following the establishment of the United States. It could not admit to native nations that it had ceded part of their homeland without risking the loss of their alliance, but it could not, without risking renewal of war with the United States, assist those nations directly in their attempts to defend from the United States territory south of the Great Lakes.[26] Thus, between 1783 and 1794, Britain pursued two policies: first, it offered Indian nations normally resident in territories ceded to the United States grants of land in what remained of Quebec; second, it refused to surrender to the United States certain forts, including Niagara and Detroit, which fell within the ceded portions of Quebec, and thereby retained *de facto*

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[24]*DICC*, 267-70.

[25]Brig.-Gen. A. Maclean to F. Haldimand, Gov. Que., 18 May 1783, *CO* 42/44: 136; Haldimand to T. Townshend, Sec. of St., 7 May 1783, *CO* 42/44: 120-1; generally, *Francis v. The Queen* (1956), 3 D.L.R. (2d) 641 (S.C.C.), at 646.

[26]Haldimand to Townshend, *ibid.*; Council between Six Nations and Sir J. Johnson, Supt. Ind. Dept., July 1783, *CO* 42/44: 270-1.

control over that territory.[27] This latter policy was designed to give indirect support to Indian nations in the area in the hope that they could negotiate with the United States an independent Indian state between the American and British borders.[28] In pursuing this objective it was in Britain's interest to define the rights it had ceded to the United States in 1783 as narrowly as possible and, conversely, to define the rights of Indian nations as widely as possible. Consequently between 1783 and 1794 Britain argued that, prior to the Treaty of 1783, Indian nations in Quebec were recognized as sovereign. Although fashioned *ex post facto* in response to an international political dispute, this interpretation of the legal status of Indian nations in Quebec must be considered.

The legal foundation for the British position is reflected in a series of dispatches and speeches made by the Lieutenant Governor of Upper Canada, John Simcoe. Simcoe, relying upon earlier opinions of Sir William Johnson,[29] argued that "the Laws of Nations and undoubtedly those of Nature" regarded "the Indian Nation[s] as free and independent" and therefore the United States did not acquire sovereignty over the Indian territories ceded to it by Britain in 1783;[30] that territory remained under "Indian Sovereignty".[31]

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[27]Haldimand to Lord North, Sec. of St., 2 June 1783, *CO* 42/44: 126-134; North to Haldimand, 8 Aug. 1783, *CO* 42/44: 156-161; Burt, *Old Province of Quebec* (1933), 336-37.

[28]Haldimand to North, 27 Nov. 1783, *CO* 42/47: 46-8; H. Dundas, Sec. of State, to J. Simcoe & A. Clarke, Lts. Gov., 5 May 1792, *CO* 42/316: 58-9; Dundas to Simcoe, 16 March 1792, *CO* 42/316: 26; *Francis v. The Queen* (1956), 3 D.L.R. (2d) 641, at 646.

[29]Simcoe often cited Johnson's reports: Simcoe to G. Hammond, British agent in U.S.A., 23 May 1792, *SP*, I, 158; Simcoe to A. McKee, Ind. Dept. Dpty. Supt., 30 Aug. 1792, *CO* 42/317: 7-11; Simcoe to Hammond, 21 Jan. 1793, *SP*, I, 277-8.

[30]Simcoe's Speech to Indian Nations at Wyandot Village, 13 Oct. 1794, *CO* 42/318: 365-370, enclosed in Simcoe to Duke of Portand, Sec. of St., 24 Oct. 1794, *CO* 42/318: 360-64. Also, Simcoe to Dundas, 3 July 1794, *CO* 42/318: 139-145.

[31]Simcoe to A. Clarke, Lt. Gov. Low. Can., 20 Aug. 1792, *SP*, I, 199-204. Also, Simcoe to Hammond, 27 Sept. 1792, *CO* 42/317: 13-17.

Said Simcoe, British-Indian treaties confirmed "what the Claims of the British were before the grant [to the American colonies] of Independency...."[32] In a speech delivered to the Indian nations in 1794, Simcoe summarized the British interpretation of the past treaties (the most important of which was the Treaty of Fort Stanwix 1768):

> These authentic Papers will prove that no King of Great Britain ever claimed absolute power or Sovereignty over any of your Lands or Territories that were not fairly sold or bestowed by Your ancestors at Public Treaties.[33]

As for the rights Britain ceded to the United States in 1783, the speech stated that "the King's rights with respect to Your Territory were against the Nations of Europe, [and] these he resigned to the [American] States".[34]

In the end Britain's diplomatic efforts failed, and by Jay's Treaty, 1794, the 1783 boundaries of the United States over the Western Interior were confirmed and Britain agreed to surrender the posts therein; with respect to Indian nations, the treaty merely recognized their right to trade freely with Canada.[35] However, Simcoe's conception of the constitutional position of native nations had received the express approval of the imperial ministry.[36] Taken as a whole they support the following interpretation of the legal status of Indian nations, both generally and in relation to Quebec prior to 1783: (a) by the law of nations and nature, Indian nations enjoyed rights of "Sovereignty"; (b) the

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[32]Simcoe to McKee, 30 Aug. 1792, *CO* 42/317: 7-11.

[33]Simcoe's speech to Western Indians, 22 June 1793, *SP*, I, 363; delivered by Maj. E.B. Littlehales: "Proceedings of a Council held at Buffaloe Creek", 7-9 Feb. 1794, *CO* 42/318: 66-77.

[34]*Ibid.*, *SP*, I, 364.

[35]Jay's Treaty, 1794, §III; *Francis v. The Queen*, [1955] 4 D.L.R. 760 (Ex. Ct.), at 762; (1956), 3 D.L.R. (2d) 641.

[36]Duke of Portland, Sec. of State, to Simcoe, 8 Jan. 1795, *CO* 42/319: 1-4; Portland to Simcoe, 4 Oct. 1794, *CO* 42/318: 162-167; H. Dundas, Sec. of St., to Simcoe, 2 May 1793, *CO* 42/317: 133-5.

initial right of European nations over native nations (arising presumably upon discovery of native lands) was limited to a right of "pre-emption"—that is, an exclusive right as between European nations to acquire rights of sovereignty and property from native nations by treaty; (c) the transfer of unceded Indian lands between European nations was not the transfer of rights of sovereignty but the transfer of the exclusive right to obtain sovereignty; and (d) because Indian Territory had not been ceded by native nations to Britain (on the contrary, it had been confirmed to them in the Treaty of Fort Stanwix), Britain did not have absolute sovereignty over it, notwithstanding its inclusion within the governmental and judicial jurisdiction of Quebec by the *Quebec Act 1774*. Thus, "Indian Sovereignty" continued in relation to unceded Indian lands included within the province of Quebec. In essence, the imperial ministry was advocating the "pre-emption theory" articulated by Sir William Johnson in the 1760s.[37]

The position taken by Britain between 1783 and 1794 appears contrary to the *Proclamation*, which asserted sovereignty over Indian *Territory*, and the Plan of 1764, which contemplated sovereignty over native *people*. Apparently, Britain's legal arguments had shifted with the demands of British foreign policy. It is important to note, however, that legal arguments were not infinitely malleable in this respect. Britain was able to assert that Indian sovereignty existed within Quebec because, on a *de facto* level, it had.[38] As Johnson had argued earlier, and as Kent and Marshall ruled later, native nations did not regard their treaty relationship with Britain as submission to British sovereignty.[39] Ironically, British characterizations of its own sovereignty over Indian Territory only reflected reality after it ceded the territory to the United States.

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[37]*Supra* ch. 3, I.

[38]*Supra* ch. 6, II, C, 2(b).

[39]*Supra* ch. 3, II, A; ch. 5, II, B.

3. Summary: Indian Territory and the *Quebec Act*

To summarize, the initial impression given by the text of the *Quebec Act*—that it abrogated the legal concept of Indian Territory and the imperial common-law continuity of native law and government therein—proves inaccurate when the Act is read in its imperial common-law context, as derived from crown usage and practice. Although reduced to a non-statutory policy, the idea of Indian Territory remained important. And, although a competing municipal system had been introduced by positive law, the native municipal system remained in force in native communities beyond European settlements. Of course, whether native law and government had been included within, or remained excluded from, the imperial constitution was unclear, with British official opinion in this respect changing to fit British political objectives.

In response to this interpretation, it may be stated that this so-called "imperial common law" status of native law and government represented only a series of practical policies undertaken by the crown in response to certain political realities of the time, and that these policies did not have common-law implications which informed the interpretation of positive law. Indeed, it must be conceded that crown usage and practice did not always constitute or reflect common law rules. Clearly, further analysis is necessary to establish the interpretation of the relationship between colonial and native law presented above. This analysis is undertaken in Chapter Eight.

B. Native Customary Law and Government in Quebec, 1783-1791

1. Further demise of Indian Territory

The conclusion of the American Revolution had a radical impact upon British Indian policy in that part of Quebec which remained under British control. While the *Quebec Act* was interpreted as consistent with the idea of Indian Territory in the annexed region after 1774, the loss to the British empire in 1783 of all North American provinces except Nova Scotia, Newfoundland, Rupert's Land, and that part of Quebec north of the Great Lakes forced significant alterations in British settlement plans. The Great Lakes Region now represented a logical location in which to settle loyalist refugees from the United States. Because the status of the Great Lakes Region as Indian Territory derived from royal instructions and not from the *Quebec Act*, there existed no statutory inhibitions to reversing settlement policy (other than the provisions of the Act establishing an un-elected legislature and French-Canadian civil law, which might have discouraged British settlers). Indeed, grants of land in the region were made possible by amendments to the governor's royal instructions in 1783.[40]

Despite the need to accommodate loyalist refugees, British settlement policy in the Great Lakes Region changed only gradually. As mentioned, the region had been offered to Indian nations residing in that part of Indian Territory ceded to the United States. In 1784 members of the Six Nations accepted this offer, and large blocks of territory at the Bay of Quinte and the Grand River were purchased from Mississaga bands and granted to them by Governor Haldimand.[41] As a general rule, the Great Lakes Region, aside from lands around military posts, remained excluded from settlement. Royal instructions to the governor of Quebec, Lord Dorchester, still included the following admonition as of 1786:

> You are not to allow any Settlements to be made beyond the Boundaries ascertained to the different Posts among the Indian Nations within the Limits of Our Province of Quebec in Alliance with Us....[42]

Only after finding the Mississaga and Six Nations amenable to at least some British

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[40]Additional Instructions, 16 July 1783, *ROBA*, IV, 126.

[41]The Grand River was purchased from the Mississaga, Treaty at Niagara, 22 May 1784, *NR*, #39, 28-32, and then granted to the Six Nations, 25 Oct. 1784 (Haldimand grant, in Johnston, ed., *Valley of the Six Nations* (1964), 50).

[42]Instructions to Lord Dorchester, 23 Aug. 1786, *ROBA*, IV, 135, §31.

settlement in the region were grants made to loyalists.[43]

After initial hesitation, steps were taken to organize the Great Lakes Region for settlement. Although demands by loyalists for English law and separate governmental and judicial institutions were initially rejected,[44] in 1785 the jurisdiction of the justices of the peace in the Montreal District (in which the Great Lakes Region remained) was expanded "for the ease and convenience" of loyalists settled "in the upper parts of this province".[45] In 1788, local judicial and administrative institutions were introduced. The "upper country" was removed from the District of Montreal and divided into four new districts (Luneburg, Mecklenburg, Nassau, and Hesse), each having a Court of Common Pleas with full civil jurisdiction and Courts of Quarter Sessions with limited criminal jurisdiction.[46] The Justices of the Peace in these latter courts performed the function of local district governments.[47] In 1789 land boards were established in each of the four districts to receive loyalist applications for land.[48] And in 1791 it was enacted that the prohibition of settlement in "Indian country" in the 1777 Indian trade ordinance did not apply to settlers "resort[ing] to this Province with the Intention *bona fide* of settling the Waste Lands of the Crown", provided that they followed regulations made for that

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[43]Haldimand to North, 6 Nov. 1783, *NR*, #38, 66-67; Burt, *op. cit.*, 368-70; Craig, *Upper Canada: The Formative Years* (1963), 4-5; Gates, *Land Policies of Upper Canada* (1968), 13-16.

[44]Cruikshank, "Genesis of the Canada Act" (1932).

[45]*An Ordinance for granting a limited civil power and jurisdiction to his majesty's justices of the peace in the remote parts of this province* (1785), 25 Geo. III, c. 5 (Que.).

[46]Proclamation (Que.), 24 July, 1788, *NR*, #40, 35-6. Also Spragge, "The Districts of Upper Canada" (1947), 92-93.

[47]Bourinot, *Local Government in Canada* (1887), 37-39; Herrington, "Evolution of Municipal Government in Upper Canada" (1931), 7.

[48]"Notes on Land Tenure", *ROBA*, III, lxx; Paterson, *Land Settlement in Upper Canada* (1920), 24-5.

purpose.[49] Any idea that the Great Lakes Region retained its status as permanent Indian Territory within Quebec had clearly been abandoned. However, the demise of the legal concept of Indian Territory was not accompanied by the demise of the imperial common-law continuity of native law and government in Quebec. To complete the interpretative context of the *Quebec Act* during the years 1783 to 1791 reference must be made to the jurisdiction of the imperial crown, exercised through the Indian Department, over Indian nations in the colony.

2. The imperial Indian Department in Quebec after 1783

Although most of its northern district was ceded to the United States, the imperial Indian Department did not cease to function; on the contrary, any remaining confusion about whether colonial or imperial officers had authority over Indian affairs in Quebec[50] was ended in 1783 when the crown "put the whole under the direction and Management of one Person", the imperial appointee Sir John Johnson (Sir William's son).[51] Local control was not entirely lost, however, for Johnson received instructions through the commander-in-chief of British forces in America who was also the governor of Quebec. Nevertheless, the retention of Indian affairs under imperial control suggests that native nations were generally excluded from the colonial municipal system in Quebec, and the rules governing the Indian Department's relations with Indian nations suggest that, within this imperial jurisdictional enclave, native customary law and government prevailed.

Governor Haldimand's 1783 instructions to Johnson upon his appointment, which were confirmed by the imperial ministry and later revised and re-issued in 1787 by Lord

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[49]*An act to explain... 'An Act or Ordinance for promoting the Inland Navigation'* (1791), 31 Geo. III c. 1 (Que.).

[50]*Supra* ch. 6, note 42.

[51]F. Haldimand, Comm. in Chief, Instructions to Sir J. Johnson, Supt. Ind, Dept., 6 Feb. 1783, *CO* 42/44: 95.

Dorchester under the title "Instructions for the good Government of the Indian Department", formed a foundation of rules which governed the conduct of the imperial Indian Department well into the nineteenth century.[52] The first direction identified the general principle upon which the Indian Department was to act in relation to Indians:

> [A]s these People consider Themselves and in fact are free and independent, unacquainted with Control and Subordination, their Passions and Conduct are alone to be governed by Persuation and Address--Their disposition, Customs, and manners require the utmost Attention to external Appearances and, in Reality, an uncommon Share of Patience, good Temper and Forbearance....[53]

The instructions were premised upon the recognition that native nations were "inflexibly wedded to their Ancient Customs",[54] and that the task of the Indian Department was not to subvert or abrogate but to accommodate and appropriate those customs within British interests. Said Haldimand: "The great Object is to please and to secure the Attachment of the Chiefs & Heads of Tribes, by whose Influence the Conduct of their People is entirely governed".[55] The remaining articles therefore emphasize the importance of diplomatic ceremony and respect for native customs and chiefs; instrumental in this respect was the practice (followed until the 1850s) of distributing "presents" of

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[52]F. Haldimand, Comm. in Chief, Instructions to Sir J. Johnson, Supt. Ind. Dept. (hereinafter "*Ind. Dept. Inst. 1783*"), 6 Feb. 1783, *CO* 42/44: 95. Lord Dorchester, Comm. in Chief, to Johnson, "Instructions for the good Government of the Indian Department", 27 March 1787, *RG10* Vol. 789, 6759-65 (hereinafter "*Ind. Dept. Inst. 1787*"). Haldimand to T. Townshend, Sec. of State, 14 Feb. 1783, *CO* 42/44: 68-9 (enclosed copy of instructions to allow "any Alterations, or Amendments His Majesty shall be pleased to direct"; no such amendments were made).

[53]*Ind. Dept. Inst. 1783*, 95; *Ind. Dept. Inst. 1787*, §1.

[54]*Ind. Dept. Inst., 1783*, 97.

[55]Haldimand to Johnson, 6 Feb. 1783, *CO* 42/44: 90-1.

manufactured goods to the nations.[56]

The nature of the relationship between Britain and native chiefs was explicitly addressed in the 1783 instructions, which stated:

> [T]he Chiefs are always to be distinguished, for by pleasing them, their Parties are pleased, and this is usually done in Silver Trinkets; for instance, if an old Chief of their Council has no Medal, a large one with a Red, or Blue Ribbon should be given to Him. A young Counsellor, a smaller Medal, and to a War Chief, a Gorget with the King's Arms engraved upon it. These marks of distinction are to be put on by the Officer of their Affairs, when they are to be told that *their Installation into those Offices is then performed, in behalf of the King* their Father who expects they will fulfil the duties of their Stations, and will at all Times recommend to Their Warriors and young men Fidelity and a firm attachment to their Father the great King....[57]

Whether the characterization of the crown as "Father" equated to "sovereign" was a question of debate, illustrated by the earlier differences between Sir William Johnson and Colonel Bradstreet.[58] The royal commission to Sir John Johnson fails to clarify whether natives in Quebec were regarded as subjects: he was commissioned superintendent of "our faithful Subjects and Allies the Six Nations of Indians...and also of our Faithful Allies the Indians inhabiting Our Province of Quebec",[59] suggesting perhaps that the Six Nations occupied a status of subjecthood which other nations did not. But, whether natives were regarded as subjects of the crown or not, the instructions are consistent with

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[56]*Ind. Dept. Inst. 1787*, §§2, 11 (at customary exchange of "presents" at "Public conferences or councils" "Chiefs" to receive special treatment); *Additional Instructions, Indian Department 1790*, §3, 6 May 1790, *RG10* Vol. 789, 6766-67 (officers "to distinguish the Chiefs" with private gifts); *Ind. Dept. Inst. 1787*, §4, *Ind. Dept. Inst. 1783*, 96-97 (officers to obtain confidence of "intelligent Chiefs" who would be the agent's "Speaker" at any "Council"; the use of such speaker being "a custom amongst themselves" would increase the "influence" of the officer).

[57]*Ind. Dept. Inst. 1783*, 96 (emp. added).

[58]*Supra* ch. 3, text at note 48; ch. 6, text at notes 62-65.

[59]Royal Commission to Sir J. Johnson, Supt. Ind. Dept., 14 March 1789, *RG10* Vol. 625, 182298. *Cf.* Royal Instructions to Lord Dorchester, *supra* note 42.

the view that native institutions were incorporated in some degree within the imperial constitutional order: chiefs derived their authority from their "Installation" by "the King". Thus, at the same time as Britain asserted to the United States that native nations in the ceded part of Quebec had been sovereign while under the British, the British imperial Indian Department operated upon the assumption that native institutions were, to some degree at least, British institutions—that the authority of native customs and chiefs continued in force in the *inclusive* sense.

The instructions were premised upon a relationship between native chiefs and Indian Department officers which was independent of the local municipal system. This jurisdictional division is illustrated by the procedures adopted for converting the Great Lakes Region from lands held by natives under customary law into township units consisting of subdivided plots held from the crown by individual settlers under freehold tenure. As the governor informed Superintendent Johnson, private purchases of Indian land were "*totally void*, against law" (i.e. the *Proclamation*) and "whatever lands are wanted for the settlement of the King's Subjects, the King has made it an invariable rule to apply to the Indians and to satisfy them for the cession thereof...."[60] Moreover, the *colonial* government, through its district land boards, was "altogether obstructed" in granting land to settlers until the *imperial* Indian Department first obtained the requisite cession.[61] Of course, as long as the Indian Department was directed by the colonial governor in his capacity as commander-in-chief, and as long as the colonial government consisted of the governor and an un-elected, crown-appointed council, the distinction between imperial and colonial jurisdictions was more theoretical than practical (with later constitutional developments, the distinction would gain considerable practical

[60]H. Motz, Sec. to Gov., to Sir J. Johnson, 5 Oct. 1789, *ROBA*, III, 34.

[61]Hesse Land Board to Dorchester, 28 Aug. 1789, *ROBA*, III, 28.

consequence). The important point to emphasize, however, is that the statutory extension of colonial municipal law and government over the Great Lakes Region under the *Quebec Act* must be interpreted in light of the retention of control over Indian nations by the imperial crown, and in light of the policies it implemented pursuant to the royal prerogative. The recognition of native customary law and chiefs evidenced by the Indian Department instructions was inconsistent with the conclusion that colonial municipal law and government applied to native communities in the Great Lakes Region outside the limits of European settlements. Again, a full articulation of the legal relationship between imperial crown policies, colonial governments established under positive law and native nations requires further analysis, and will be re-examined in Chapter Eight.

Chapter Eight

The Status of Native Law and Government in the Unceded Indian Lands of Upper Canada

In 1791 and 1840 the imperial Parliament enacted new constitutions for colonial Canada. Like the *Quebec Act 1774*, these statutes were silent on the constitutional position of native nations. In this Chapter the colonial municipal systems established under these statutes will be briefly summarized and their relationship to native municipal systems will be examined. In considering the status of native law and government a distinction must be emphasized between two types of Indian land (unrelated to the two categories of Indian land under the *Royal Proclamation of 1763*): unceded Indian land and Indian reserves. Most of the Great Lakes Region was unceded Indian land in 1791. It was held by native nations, mainly Ojibwa (Chippewa or Mississaga), according to traditional forms of landholding. As this native title was ceded, Indian reserves—small territorial enclaves around traditional village sites secured for the exclusive use of native nations—were created. In general these enclaves were reserved in treaties by native nations out of larger cessions of territory. The Amherstburg Huron reserve (1790) and the Mississaga Credit River reserve (1806) were formed in this way. However, the old Indian missions inherited from the French, such as the Mohawk/Iroquois villages at Aughquisasne (Akwesasne or St. Regis), Caughnawaga (Kahnawake) and Canasadaga (Kanesatake or Lake of Two Mountains) and the Huron village at Lorette, and the territorial grants to refugees from the United States, such as the Six Nations Grand River tract (1784), the Mohawk Tyendinaga tract (1784), the Chippewa, Shawanese, Ottawa and Potawatomie tract at Walpole Island (1794-95), and the Moravian Delaware tract on the Thames River (1792), also became known as Indian reserves (for locations see maps, Appendices A and B). In this Chapter, the legal status of native customary law and government in *unceded* Indian land in the Great Lakes Region will be considered, although some reference to Indian reserves will be necessary. The status of native law and government on these reserves will be the subject of Chapters Ten and Eleven.

I. The Colonial Municipal System in Colonial Canada under the *Constitution Act 1791* and *Union Act 1840*

As the number of British settlers in the Great Lakes Region increased, so did pressure to re-structure Canada's constitution. The denial to Quebec of an elected assembly could no longer be justified, but because French Canadians still outnumbered British settlers the simple grant of an assembly was deemed impossible: the allegiance of loyalist settlers in the upper part of Quebec was contingent upon the introduction of English civil law, which French Canadians in the lower part could not have accepted. A new constitution, enacted by the imperial statute now known as the *Constitution Act 1791*,[1] therefore provided for the division of Quebec into two separate provinces, Upper Canada and Lower Canada. The boundary extended along the Ottawa River to Rupert's Land, and Upper Canada was defined ambiguously as all territory "commonly called or known by the Name of Canada" to the west and south of that line.[2] Upper Canada therefore included the Great Lakes Region and an uncertain amount of territory west of Lake Superior.[3]

Each province had its own legislature consisting of a governor, appointed legislative councils (ss. 3, 5 and 6) and elected legislative assemblies (ss. 20 and 22); each legislature was granted authority to make laws for the "peace, welfare, and good government" of the respective provinces (s. 2). The discretion of the governor in

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[1]31 Geo. III, c. 31 (Imp.).

[2]Order in Council, 24 Aug. 1791, *CO* 43/10: 96-99.

[3]*Proceedings...respecting the Westerly Boundary of Ontario* (1889).

granting royal assent to bills was to be exercised in conformity with royal instructions, and the governor was empowered to withhold assent and reserve bills for the imperial crown's consideration (s. 30); bills receiving royal assent from the governor were subject to disallowance by the imperial crown within two years of promulgation (s. 31). The governor of Quebec was re-commissioned as governor of both Upper and Lower Canada.[4] Lieutenant governors for each province were commissioned to exercise the powers in the governor's commission, according to royal instructions issued with that commission, whenever the governor was absent from their respective provinces.[5] Because the governor resided in Lower Canada, the government of Upper Canada was essentially in the hands of its lieutenant governor. In fact, the lieutenant governors of Upper Canada frequently took leaves of absence during which time their duties were performed by the president of the province's executive council as "Administrator".

Section 33 of the *Constitution Act 1791* provided that Quebec law remained in force after Quebec's division except where repealed by the Act or by subsequent colonial statutes. The first statute passed in Upper Canada repealed that part of the *Quebec Act* which had confirmed the continuity of French-Canadian civil law, and introduced the "laws of England".[6] The judicial and administrative units and institutions established by Quebec law continued.[7] Thus, upon its creation Upper Canada was already divided into four districts, each with courts of Common Pleas with civil jurisdiction and courts of

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[4]Commission to Lord Dorchester, Gov., Upp. and Low. Can., 12 Sept. 1792, *CO* 43/10: 117-134.

[5]Commission to J.G. Simcoe, Lt. Gov. Upp. Can., 12 Sept. 1792, *ROBA*, IV, 161.

[6]*An act to...introduce the English law* (1792), 32 Geo. III, c. 1 (U.C.).

[7]Proclamation (Upp. Can.), 9 July 1792, *ROBA*, IV, 175.

Quarter Sessions with criminal jurisdiction.[8] By the *Constitution Act 1791* the Governor and Executive Council were vested with a general appellate jurisdiction (s. 24). The first major judicial reform came in 1794 when the Courts of Common Pleas were abolished and replaced by one central Court of King's Bench vested with jurisdiction "throughout th[e] province" and having "all such powers and authorities as by the law of England are incident to a superior court of civil and criminal jurisdiction".[9] This court sat at the provincial capital, York (Toronto), and its judges were periodically commissioned to sit in each of the districts as civil courts of Assize and Nisi Prius and criminal courts of Oyer and Terminer and General Gaol Delivery.[10] Minor civil matters were dealt with by local District Courts and Courts of Requests, and minor criminal matters remained within the jurisdiction of the Courts of Quarter Sessions.[11] Aside from the creation of a Court of Chancery in 1837,[12] the judicature remained basically unaltered until 1849 when counties replaced districts as the basic judicial unit, a second superior common-law court, the Court of Common Pleas, was created with concurrent jurisdiction with the Queen's Bench, and appellate jurisdiction was transferred from the governor and council to a Court of Errors and Appeals.[13]

Although the *Constitution Act 1791* introduced representative government into Canada it did not introduce responsible government. Conflicts between elected and

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[8]Districts confirmed: 32 Geo. III, c. 8 (U.C.).

[9]*An act to establish a superior court of civil and criminal jurisdiction* (1794), 34 Geo. III, c. 2 (U.C.).

[10]Banks, "Evolution of the Ontario Courts" (1983), 501-502.

[11]*Ibid.*

[12]7 Wm. IV, c. 2 (U.C.).

[13]12 Vic., c., 63 (Can.).

appointed branches of government, complicated in Lower Canada by French-English divisions, led to rebellions in each province in 1837-38. In 1839 the Earl of Durham recommended the re-unification of the Canadas to create one unit with an English speaking majority—he believed that responsible government could thereby be introduced without granting too much power to French inhabitants, whom he considered to have aspirations inimical to British interests.[14] By the imperial statute now known as the *Union Act 1840*,[15] Lower and Upper Canada were combined to form the Province of Canada under one legislative council, assembly and governor with general legislative authority "to make Laws for the Peace, Welfare, and good Government" of the Province (s. 3); as before, the governor was empowered to give royal assent to bills, subject to royal instructions, or to withhold bills for the imperial crown's consideration (s. 37), and colonial statutes remained subject to disallowance by the imperial crown within two years of promulgation (s. 38). The principle of responsible government was introduced through royal instructions to the governors in the 1840s.[16] The distinction between the two former provinces was not lost: the Act provided that each former province was to be represented in the assembly by an equal number of representatives (s.12), and their unique laws (i.e., English civil law in Upper Canada and French civil law in Lower Canada) continued in force after unification (s. 27). In fact, government under the *Union Act* was "quasi-federal": by convention, ministries had two leaders and two attorneys general, and laws affecting only one unit required majority support from that unit's representatives, while laws affecting the whole province required majority support from both sets of

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[14]"Report on the Affairs of British North America, from The Earl of Durham", *PP* 1839, XVII; Coupland, *The Durham Report* (1945).

[15]3 & 4 Vic., c. 35 (Imp.).

[16]Todd, *Parliamentary Government in the British Colonies* (1894), 74-79.

representatives.[17]

II. The Native Municipal System in Unceded Indian Lands

With respect to the Great Lakes Region, the imperial statutes of 1791 and 1840 on colonial government, and the colonial statutes thereunder introducing English law and establishing or recognizing the jurisdiction of courts, did not expressly exempt native people or land nor recognize the continuity of native law or government. At least in relation to aboriginal title to land, crown-native relations were subject to the same rules in Upper Canada and, later, in the Province of Canada as they had been in Quebec: that part of the *Royal Proclamation of 1763* which recognized and prohibited private purchases of aboriginal title was considered statutorily binding, notwithstanding changes to the colonial municipal constitution.[18] In other respects, royal instructions to the governors reflected important changes in policy. The traditional prohibition of settlement in what had been Indian Territory was replaced by directions for the "speedy settling" of the province; and, while the fur trade in the "Interior Country" was to be open to licensed traders pursuant to the terms of "our Royal Proclamation of 1763", gone was any reference to the Plan of 1764 as a guide for trade regulations.[19] These changes in the royal instructions no doubt reflected and constituted a change in the interpretative context

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[17]Reesor, *Canadian Constitution in Historical Perspective* (1992), 40.

[18]Justice W.D. Powell, "Memoir on the Refusal of the Messasague Indians to cede their Land...", 1 Nov. 1797, *CO* 42/322: 64; F. Gore, Lt. Gov. Upp. Can., to Viscount Castlereagh, Sec. of State, 4 Sept. 1809, *CO* 42/349: 88-89; *R. v. Lady McMaster*, [1926] Ex. C.R. 68 (Ex. Ct.), at 72-73 (1817 lease of part of St. Regis reserve in Upper Canada by chiefs to settlers held void under *Proclamation*, which had "the force of a statute"); *Rex. v. Easterbrook*, [1929] Ex. C.R. 28 (Ex. Ct.), at 29, aff'd [1931] S.C.R. 210 (S.C.C.), at 217-18; *R. v. George* (1963), 41 D.L.R. (2d) 31 (Ont. H.C.), aff'd (1964), 45 D.L.R. (2d) 709 (C.A.), (1966), 55 D.L.R. (2d) 386 (S.C.C.).

[19]Royal Instructions to Lord Dorchester, 16 Sept. 1791, *CO* 43/4: 217-274 (§§31-38, 55).

of positive constitutional law: the Great Lakes Region was no longer "Indian Territory", even as a matter of non-statutory policy; instead, aboriginal title was to be obtained by treaty and lands were to be granted to settlers. The removal of references to the Plan of 1764 no doubt reflected another factor. With the introduction of representative institutions into Canada, the distinction between imperial and colonial governments became, in practical terms, more pronounced, and so long as the imperial government intended to retain direct supervision over Indian policy, it was inappropriate to include as a guide for the colonial legislature a plan which contemplated an entire scheme for that policy; as will be seen, there were political and (initially at least) legal restrictions upon the colonial legislature's authority over Indian affairs.

Notwithstanding the changes in policy reflected by the instructions, native law and government were regarded as continuing in force in Indian lands, at least until cession and settlement of those lands occurred. In 1797 Administrator Peter Russell asserted that unceded Indian land in Upper Canada represented an "Obstruction to Justice" because it was "extra-judicial Territory".[20] In 1819 the Chief Justice of the province, William Powell, stated that unceded Indian land distant from settled areas contained "no organized population of the province subjected to municipal regulations...but the soil is in the aborigines, and inhabited only by Indians...."[21] In 1827 an officer of the imperial Indian Department informed several native nations that if they harmed settlers or traders in unceded Indian land they would be subjected to "the Laws of the Land", but as for their "complaints against each other" regarding trespasses in their "Hunting Grounds" the governor had instructed that "[i]f the Custom of your Nations makes this an offence" such

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[20]P. Russell, Adm. Upp. Can., to Duke of Portland, Sec. of State, 28 Jan. 1797, *CO* 42/321: 46.

[21]Powell C.J. to Sir. P. Maitland, Lt. Gov., 1 May 1819, *PP* 1819, XVIII, #584, 1, p. 285.

conduct was to be stopped and their members were to "be admonished by the Chiefs not to trespass any more".[22] Together, these statements suggest that colonial and imperial officials accepted the following two propositions: (a) in unorganized portions of the province municipal law and judicial jurisdiction were not enforced in relation to the internal affairs of native communities, and (b) native customary law continued in force instead. These propositions may be explained by general principles of imperial common law, in particular the shire-ground argument, and crown usage and practice specific to colonial Canada, in particular the division between colonial and imperial authority over Indian affairs. These arguments are examined below.

A. The Shire-Ground Argument

As a general rule, the legislative introduction of a new municipal legal system into a colony abolished the imperial common-law presumption that existing local laws continued in force. One exception to this rule was the shire-ground argument: until the territory was organized under the supervision of crown officers capable of enforcing the new law, the imperial common law—being averse to the possibility of social disorder associated with a legal vacuum—continued to recognize the continuity of the preceding municipal legal system.[23] The application of this argument to native customs in Upper Canada will be considered in three parts: first, the division of the colony into subordinate constitutional units; second, difficulties in administering justice in territories distant from European settlements; and, third, judicial statements consistent with the exclusion of native peoples from colonial municipal law and the continuity of native customs in those distant territories.

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[22]Council with Caughnawaga, Canasadaga and Aughquisasne Mohawk and St. Francis Abenakis, 5 Oct. 1827, *RG10* Vol. 663 (*ad med.*). Although these nations resided in Lower Canada, some of their hunting grounds were in Upper Canada.

[23]*Supra* ch. 2, IV, F, 1.

1. Organizing Upper Canada into "shire ground"

Upon its creation in 1791 Upper Canada was primarily unceded Indian land. The process of obtaining the cession of land from native nations, organizing it into subordinate constitutional units, granting it to settlers, and subjecting it to the *de facto* control of local government and courts, was gradual. Consequently, for much of the nineteenth century there existed a distinction in colonial municipal law between "unorganized" and "organized" territory. Although not all unorganized territory was unceded Indian land, all unceded Indian land was unorganized.

In colonial law there were three subordinate constitutional units within the province: districts, counties and townships. Their relationship to "organized" land and to Indian land, both unceded and reserved, must be identified. As will be seen, colonial common and statutory law did not generally regard land as "organized" until it was included within a county and township.

(a) districts

Upper Canada inherited from Quebec the four district divisions established by proclamation in 1788. By a 1792 statute these districts were confirmed under the new names of Eastern, Midland, Home, and Western.[24] As settlements grew, the original districts were subdivided, and in 1849, when districts ceased to be relevant for municipal and judicial purposes, there were twenty.[25]

The district served the same purpose in Upper Canada as it did in Quebec: it defined the territorial jurisdictions of superior court judges sitting under commissions of assize and of inferior courts and local government. In each district Courts of Quarter Sessions, Courts of Requests and District Courts exercised judicial jurisdiction over minor

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[24]32 Geo. III, c. 8 (U.C.).

[25]Spragge, "Districts of Upper Canada" (1947), 99.

civil and criminal matters, and Justices of the Peace exercised certain legislative and administrative functions.[26] In 1841 local governmental jurisdiction was withdrawn from Justices of the Peace and delegated to district councils consisting of colonial appointees and elected councillors.[27] In 1849 counties replaced districts as the basic judicial and administrative unit, and county government was placed under county councils composed of township reeves.[28] The division of the province into districts bore no relation to the distinction between unceded and ceded Indian land. All unceded Indian land had fallen within some district ever since the extension of Quebec in 1774.

(b) counties

In 1792 Upper Canada was divided into nineteen counties defining constituencies for the election of assembly representatives.[29] The first eighteen counties divided land along the St. Lawrence and Ottawa Rivers and Lakes Ontario and Erie in which some settlement had been established; the interior territory to the north and west of this strip was left undivided. The nineteenth county, Kent, included all other territory "not being territories of the Indians...."[30] Thus, the unceded Indian land in the interior was expressly exempted from any county, suggesting that other unceded Indian lands and existing Indian reserves located in the divided strip were included within the first eighteen counties. Where this conclusion did not apply Indian land was expressly exempted.

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[26]Spragge, *ibid.*, 95; Crawford, *Canadian Municipal Government* (1954), 23-4; Bourinot, *Local Government in Canada* (1887), 30; Herrington, "Evolution of Municipal Government in Upper Canada" (1931), 7-8.

[27]4-5 Vic., c. 10 (Can.); Crawford, *ibid.*, 29-30; Herrington, *ibid.*, 9-10.

[28]12 Vic., c. 78 (Can.); Herrington, *ibid.*, 11-12; Landon, "Evolution of Local Government in Ontario" (1950).

[29]Proclamation (Upp. Can.), 16 July 1792, *ROBA*, IV, 176-181.

[30]*Ibid.*

Thus, York county was cut into two by "a tract of land belonging to the Mississague Indians".[31] This "unpurchased" Mississaga Tract, which included lands on Lake Ontario between the capital, York (Toronto), and the settlements around Niagara, was not included within any county, but rather was left for the "Comfort" of the Mississaga nation and for "an ample Magazine for Ship Timber" (for location see map, Appendix B).[32] Apparently, then, unceded Indian lands were left outside county boundaries unless their purchase and settlement were considered imminent. As lands in the interior were purchased and settlement expanded more counties were created.

Because the purpose of counties was to define constituencies for provincial elections, the exemption of Indian territories from them would not, in theory, have affected the judicial and governmental jurisdictions defined by districts. When the county replaced the district as the basic judicial and administrative unit in 1849, special provision had to be made for "unorganized tracts" not yet within any county.[33]

(c) townships

Every plot of land granted to a settler was a "parcel of a Township", and townships consisted of about ten square miles.[34] The township represented the lowest unit of local government, with resident ratepayers electing certain township officers.[35] As townships were units composed of land granted to settlers, they did not normally include either unceded or reserved Indian land. Indeed, a 1798 statute reflected a hierarchy of

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[31]*Ibid.*

[32]Simcoe to Board of Trade, 1 Sept. 1794, *CO* 42/318: 242.

[33]*An act to make better provision for the administration of justice in the unorganized tracts of country in Upper Canada* (1853), 16 Vic., c. 176 (Can.).

[34]Proclamation (Upp. Can.), 7 Feb. 1792, *ROBA*, IV, 171-172.

[35]*An act to provide for...town officers* (1793), 33 Geo. III, c. 2 (U.C.); Bourinot, *op. cit.*, 35; Herrington, *loc. cit.*, 2-6; Crawford, *op. cit.*, 26.

political units in which Indian reserves and townships occupied the same level: both were the constituent components of counties which in turn were combined to define districts.[36] There were, however, exceptions. Part of the Six Nations Grand River reserve was called Haldimand county, although no part of this county had been subdivided into settler townships,[37] and the Delaware Moravian reserve was called Orford township, although it had never contained settler plots.[38] In other cases, because of the presence of non-native lessees,[39] or perhaps because of surveying practice,[40] Indian reserves were occasionally included as parts of surrounding townships. In short, as Robinson C.J. observed in 1842, "generally speaking Indian lands are not surveyed and divided into townships, though in some cases they have been".[41]

To summarize, as a general rule unceded Indian lands fell within districts but not counties or townships, and Indian reserves fell within districts and counties but did not constitute or fall within townships.

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[36] *An act for the better division of this province* (1798), 38 Geo. III, c. 5 (U.C.). For example, with respect to the Mohawk Tyendinaga reserve, the Act provided "the townships of Sydney, Thurlow, the tract of land occupied by the Mohawks, Hungerford, Huntington, and Rawdon, do constitute and form the county of Hastings" (s. 16), and Hastings county, with four other counties, formed the "Midland district" (s. 18). The same formula was used in relation to the St. Regis (s. 1), Six Nations Grand River (s. 22), Moravian, Walpole Island (s. 38), and Huron (s. 34) reserves.

[37] *Ibid.*, s. 31.

[38] *Ibid.*, s. 38.

[39] Parts of the St. Regis reserve in which there were non-native lessees were annexed to neighbouring townships: Report of Select Committee on Unattached Townships, 24 March 1821, *ROBA*, X, 413-4.

[40] The Mississaga Credit River reserve was described as being "in the Township of Toronto, in the County of York, in the Home District and Province of Upper Canada": Treaty of 28 Feb. 1820, *ITS*, #23.

[41] *Little v. Keating* (1842), 6 U.C.Q.B. (O.S.) 265 (Q.B.), at 269.

2. Administering justice beyond the "pale"

In theory, local judicial and governmental jurisdictions vested as soon as land was included within a district. However, it is submitted that land in Upper Canada was not "organized" in the sense contemplated by the shire-ground argument until its division into counties and townships. Although the Earl of Durham observed that the colonial courts were "brought into every man's neighbourhood by a system of circuits",[42] as late as 1839 these neighbourhoods (by which was meant the settled parts of the province) were "scattered along an extensive frontier" linked together by only "imperfect", "limited" and "uncertain" means of communication.[43] The frontier character of the province had important implications for the practical administration of justice and government. Although district courts purported to assert their *de jure* jurisdiction throughout the respective districts from their creation in 1788 (and thus they determined commercial disputes between traders as well as criminal matters among traders and between traders and native people[44]), it was nevertheless recognized that, on a *de facto* level, the "unsettled tracts of Country" in the colony were "destitute both of proper Courts and Officers, by whom the process of the Law could be executed".[45]

Early statutes attempted to address this fact. In 1788 it was acknowledged by a Quebec ordinance that the King's writ could run only so far as private individuals on

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[42]Coupland, *op. cit.*, 105.

[43]*Ibid.*, 80, 106.

[44]For example, *Jalbert v. Schieffelin* (Ct. of Common Pleas, Dist. of Hesse, 1789), *RECJUC*, 70-1 (re: contract to work for Indian trader travelling "into the Indian country"); *R. v. Guillet* (Ct. of Oyer and Terminer, Dist. of Hesse, 1792), *RECJUC*, 180-81 (native indicted for murdering trader at Detroit); *R. v. Chabouguoy and Cawguochish* (Ct. of Oyer and Terminer, Dist. of Hesse, 1792), *RECJUC*, 180 (two natives indicted for murdering trader on Thames River).

[45]Wm. Stephen Jr. to Earl Bathurst, Sec. of State, c. 1819, *PC* 1/4175.

"adventuring voyage[s]" were empowered to take it;[46] and in 1796 the courts of Lower Canada were given jurisdiction over returning traders who had committed offences in Upper Canada.[47] Indeed, Lieutenant-Governor Simcoe advocated the creation of special courts to govern "Indian Traders" operating "within the jurisdiction of Upper Canada, but without its habitable pale...."[48] No such courts were created, although in 1839 special commissioners were empowered to "inquire into" and "determine" Indian complaints of unlawful settlement in "unsurveyed lands" "for the cession of which to Her Majesty no agreement hath been made with the Tribes occupying the same".[49]

The relationship between the administration of justice and the organization of territory into counties and townships was expressly recognized by an 1818 statute which observed that because large tracts of territory "in the several districts of this province" remained outside "the limits of any township or county", it was "inconvenient" to hold trials of persons charged with committing offences in such tracts in the district in which the offence was committed, and therefore it was enacted that such offences could be tried in any district of the province.[50] Thus, the Act abrogated the common-law rule relating to trial by jury "taken from the hundred or vicinage" in which the offence was

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[46]*An Act or Ordinance for promoting the inland navigation* (1788), 28 Geo. III, c. 3 (Que.) (leaders of trading expeditions were "to apprehend and bring to justice, upon their return from their adventuring voyage" persons of any crew committing any crime).

[47]*An Act for regulating...voyages to the Indian Country* (1796), 36 Geo. III, c. 10 (L.C.).

[48]Simcoe to Board of Trade, 1 Sept. 1794, *CO* 42/318: 254.

[49]*Act for the protection of the Lands of the Crown* (1839), 2 Vic., c. 15 (U.C.).

[50]*An act to authorize the inquiry and trial of crimes and offences committed within this province, without the limits of any described township or county* (1818), 49 Geo. III, c. 10 (U.C.). *Cf. An act to make better provision for the administration of justice in the unorganized tracts of country in Upper Canada* (1853), 16 Vic., c. 176 (re: "unorganized tracts" not "within the limits of any County or Township").

committed, a rule inapplicable to that situation where jurors were separated from the locality of the offence by "many hundreds of miles of savage wilderness...."[51] The Act also provided that "when and so soon as any new county or counties, town or township, shall be laid out", all offences committed therein would be tried in the district in which such new county or township was located. As Powell C.J. observed in interpreting the statute, "as the Indian Lands should be ceded and organized into Counties and Townships" the exclusive jurisdiction of the proper district was restored.[52]

The premise of the 1818 Act, that territory remained "unorganized" until included within counties and townships, must be considered in light of *Regina v. McCormick* (1859),[53] which held that, in some cases, even the inclusion of land within counties and townships was not sufficient to render it "organized" in law. In that case, the Attorney General sought to recover possession of Pelee Island located in the township of Mersea which had been possessed by settlers without crown grant since 1789. It was argued that the crown was barred from recovery by a statutory limitation period.[54] However, the court ruled that the limitation period did not apply to the unorganized portions of the province. Said Robinson C.J.:

> [T]his island had not for sixty years been part of the organized territory of the province, in which the title of the original Indian inhabitants had been extinguished, or if the Indian title had been extinguished, the land may never have been surveyed and laid out by the Crown with a view to granting it, but may have been suffered to lie like other waste lands from which the Crown had never derived either rents or profits, and which can never be supposed to have been under the actual supervision and charge

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[51]J.B. Robinson, Att. Gen. Upp. Can., to Sir. P. Maitland, Lt. Gov., 15 March 1819, *PP* 1819, XVIII, #584, 282-84.

[52]"Mr. Chief Justice Powell's Statement respecting the [1818] Act...", 27 Oct. 1819, *PC* 1/4175.

[53]*Regina v. McCormick* (1859), 18 U.C.Q.B. 131 (Q.B.).

[54]9 Geo. III, c. 16 (G.B.).

> of its officers. As to all waste lands so situated, I apprehend the entry of any stranger, and his continued possession for sixty years, would not, under the statute, bar the Crown....[55]

The island seemed to have been "regarded and treated by the Crown as Indian land, in which the right of the natives had not been extinguished, though it is by law a part of the township of Mersea...."[56] Notwithstanding its inclusion within a township (and therefore a county) and its "proximity to settlement", the island was part of the unorganized lands "which had never by any particular act been reduced into actual possession of the Crown...."[57] To summarize, the ultimate test of whether lands were "organized" or "unorganized" was not whether they had been included within districts, counties or townships, but whether, having been so included, they had been also placed within the "*actual* possession of the Crown" and "under the *actual* supervision and charge of its officers".[58] Unceded Indian land was an example of the sort of land which was out of the actual possession of the crown and supervision of its officers, and therefore was not considered "organized" even if included within a county and a township. Thus, a region's transition from an unorganized to an organized state was accomplished when the crown, first, extinguished native title and, second, took actual possession, usually by surveying the land with a view to granting it to settlers. Obtaining actual possession and dividing land into counties and townships usually happened simultaneously, but if the latter preceded the former it did not have the effect of rendering the land "organized" in

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[55]*Supra* note 53, 135.

[56]*Ibid.*, 136.

[57]*Ibid.*

[58]*Cf. Province of Ontario v. Dominion of Canada* (1909), 42 S.C.R. 1, at 110-111 (Ontario "has not yet got any actual, but only in a limited legal sense, possession of much of the land over which the Indian roams in his hunting and fishing as he had done before").

law.

The circumstances of Upper Canada's constitutional development, as recognized by both colonial statute and common law, was that unorganized territories in general and unceded Indian territories in particular were not within the *actual* possession of the crown and under the *actual* supervision of judicial or governmental officers. Colonial law therefore identified a constitutional condition analogous to that which Dodridge J. and the *Case of Tanistry* recognized in Wales and Ireland respectively after the legislative introduction of English municipal law but prior to the organization of land into shire ground. In short, without crown officers the law was unenforceable without the provision of some extraordinary means of enforcement. Like Anglo-Irish statutes of the sixteenth century, Canadian colonial law recognized that the normal administration of justice "beyond the pale" of colonial settlement was impossible in the absence of such special provisions. Unlike Anglo-Irish statutes, however, Canadian statutory law did not expressly recognize the continuity of native customary constitutions beyond the pale.

3. Judicial opinions

There is some judicial support for both the proposition that native peoples were excluded from colonial municipal law and jurisdictions in unceded lands and the proposition that native customary law continued in force in such lands notwithstanding the legislative introduction of colonial municipal law. *R. v. Shawanakiskie* (1823-26)[59] was one of the first cases in which the courts of Upper Canada were required to consider whether they had jurisdiction over offences committed between natives. The case did not involve an offence committed in unceded Indian land, but in his charge to the grand jury of the Western District Assize Campbell J. discussed general legal principles, including

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[59]Ct. of Oyer and Terminer, Western District Assize (U.C.), unreported, *CO* 42/370: 25-42.

the court's jurisdiction over natives in the unorganized parts of the province. He began by observing that doubts had been raised not only about the "legality" but also about the "*expediency* and *policy*" of "our interference" into criminal matters arising between Indians; however, the role of the court, he continued, was "to administer the law", and therefore arguments of policy and expediency were irrelevant.[60] As for what the law directed in this case, in his view it depended solely upon the location of the crime: if it had been committed within the Western District, then the court had jurisdiction. "[T]here can be no doubt", he stated, "that the laws of England and of this Province extend to and are in force in every part of the Province, and that our jurisdiction under those laws extends to the utmost limits of this District...."[61] But then he said:

> [T]his I state as a general proposition, to which however, with regard to the Indian Tribes, there may be some reasonable exceptions, and our business is to enquire whether or not the present case comes within those exceptions. A great extent of this Province, and particularly of this District consists of uncultivated wilderness inhabited only by wandering Tribes of Indians who have never been considered amenable to our Laws or Courts of Justice for any occurrence purely amongst themselves, and unconnected with European inhabitants or interests. Such exemption, I consider highly reasonable and just, altho' I cannot pronounce it strictly legal.[62]

In short, Campbell J. confirmed that English law was in force in unorganized lands but that, at least on a *de facto* level, it did not govern the internal affairs of native nations therein. With respect to the legality of this exemption, Campbell J. was ambiguous. By describing it as not "strictly legal" he may have meant that it had no *de jure* significance at all. However, the fact that he considered the possibility of this exemption, when read in light of his stated intention to consider only legal as opposed to political principles,

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[60]Justice W. Campbell, Charge to Grand Jury, Sandwich, Autumn, 1822, *CO* 42/370: 28.

[61]*Ibid.*

[62]*Ibid.*, 28-29.

suggests that he meant something else. For example, he may have meant that, as a matter of positive municipal law, the statutes creating districts, establishing courts of general jurisdiction, and introducing English law for their governance, did not expressly exempt Indians in unorganized lands, and therefore on a strict or literal reading of those laws no exemption existed, but that the exemption may nevertheless have been an implicit result of reading positive municipal law in light of crown usage and practice and the circumstances of Upper Canada's constitutional development—that is, in light of the imperial common law. In fact, Campbell J. did not come to any firm conclusion at such an early point of a case in which the question would be *obiter*. It may be concluded, then, that *R. v. Shawanakiskie* confirmed that native nations in unorganized lands were exempt from English law and colonial judicial jurisdiction in fact, and that it was at least arguable that this exemption existed in law as well. The outcome of *R. v. Shawanakiskie* will be considered in Chapter Ten.

The courts of Upper Canada did not consider whether native customary law continued at common law in unorganized lands. The analysis of *Connelly v. Woolrich* in Chapter Six established that native custom continued under British imperial common law in the region while it formed part of Indian Territory under the *Royal Proclamation of 1763*. The question, then, is whether the express introduction of French civil law and English criminal law into the region by the *Quebec Act 1774* and the replacement of French with English civil law under the *Constitution Act 1791* altered any such common-law conclusion. To answer this question, resort may be had to cases which addressed similar questions elsewhere in Canada.

In *The Queen v. Nan-E-Quis-A-Ka* (1889)[63] the North-West Territories Supreme

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[63] 1 Terr. L.R. 211 (N.W.T.S.C.).

Court *in banc* applied native customary law to determine the validity of a marriage. The trial from which the question had been referred took place in the Judicial District of Assiniboia in the North-West Territories, a region which had been within British sovereignty long before English law was expressly introduced by the *North-West Territories Act* (1886).[64] In considering whether native customary law remained in force in the territories, Wetmore J., writing for the court, stated that the "first question" to consider was the status of native customs "before the laws of England were introduced into this Territory".[65] The issue, he concluded, had been determined by *Connelly v. Woolrich*: prior to the statutory introduction of English law the "laws of the Indians", at least "among themselves", were in force.[66] Wetmore J. then considered whether this conclusion was altered by the statutory provision that "the laws of England...shall be in force in the Territories *in so far as the same are applicable to the Territories....*"[67]

The court held, in essence, that the statutory introduction of English law did not abrogate the common-law continuity of native customary law. Three reasons for this conclusion may be drawn from Wetmore J.'s comments. First, the court held that, in general, English marriage law was inapplicable to the conditions of the territory: it required solemnization at specific times and buildings which, "if they exist at all", were "often so remote from the contracting parties that they could not be reached without the greatest inconvenience".[68] Second, with respect to native people in particular, English

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[64]*North-West Territories Act* (1886), 49 Vic., c. 25 (Can.), s. 11. On introduction of English law into Assiniboia, *cf. Sinclair v. Mulligan* (1886), 3 Man. L.R. 481 (Q.B.), (1888), 5 Man. L.R. 17 (C.A.).

[65]*Supra* note 63, 213.

[66]*Ibid.*

[67]*Ibid.*, 214-15 (quoting *North-West Territories Act*, s. 11; emphasis in text).

[68]*Ibid.*, 215.

law was inapplicable because they were "unchristianized" and "yet adhere[d] to their own peculiar marriage customs and usages"; under these circumstances it would have been "monstrous" to subject them to English law.[69] And, third, native customs had not been expressly repealed. "I know of no Act of the Parliament of the United Kingdom or of Canada", observed Wetmore J., "which affects in any way these customs or usages".[70]

The doctrinal foundation upon which the recognition of native customary law was based in *R. v. Nan-E-Quis-A-Ka* is somewhat unclear. However, it is at least consistent with the shire-ground argument. Under this interpretation, Wetmore J.'s conclusions could be restated thus: native customary law continued in force at *imperial* common law, and the statutory introduction of English *municipal* law only abrogated this native law in organized lands; in "remote" places where natives "yet adhere[d]" to their own laws the statutory qualification to the introduction of English law—"in so far as the same are applicable to the Territories"—would have precluded the application of English law, and native customary law would have continued in force as an element of an aboriginal system which continued in force at *imperial* common law, until some practical steps were taken to ensure the *de facto* enforcement of English law. Subsequent courts, in determining whether native customs remained cognizable at common law after the legislative introduction of English municipal law into other parts of British North America, also considered whether natives resided in unorganized or remote territories in which the *de facto* enforcement of English law was impossible.[71] (Of course, while this

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[69]*Ibid.*

[70]*Ibid.*

[71]For example, *Robb v. Robb* (1891), 20 O.R. 591 (C.P.); *Smith v. Young* (1898), 3 C.N.L.C. 656 (B.C.S.C.); *Re Sheran* (1899), 4 Terr. L.R. 83 (N.W.T.S.C.); *Yew v. A.G.B.C.*, [1924] 1 D.L.R. 1166 (B.C.S.C.); *Re Noah Estate* (1961), 32 D.L.R. (2d) 185 (N.W.T.S.C.).

approach is consistent with the shire-ground argument, it may also be viewed as consistent with the hybrid continuity/particular custom rule.[72])

Although there are many differences between the constitutional histories of Assiniboia and Upper Canada, the principles articulated by *The Queen v. Nan-E-Quis-A-Ka* may be regarded as generally applicable to that situation—common in British North America—in which English law was statutorily introduced into unorganized territories possessed by native peoples adhering to native customary laws. The qualification in the *North-West Territories Act* that English laws were introduced "in so far as the same are applicable to the Territories" was considered by courts to be implicit to the statutory introduction of English law into Upper Canada.[73]

4. Summary

The shire-ground argument does not assert that a newly-introduced municipal system had no authority over local inhabitants who continued to live under their own systems of law. It states that if local law was recognized by imperial common law prior to the legislative introduction of the new, competing system, then that imperial common-law status was abrogated not by the legislation itself but (to avoid a legal vacuum) by the *de facto* enforcement of the system it introduced. The analysis above confirms that the requisite conditions for the application of the shire-ground argument existed in the unceded Indian lands of not only Upper Canada but the earlier province of Quebec.

B. The Division of Imperial and Colonial Powers

Aside from the fact that colonial law was not enforced, *de facto*, over natives in unceded Indian lands, there are grounds to argue that, even if steps had been taken to

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[72]*Supra* ch. 2, IV, F, 2. See for example, *Re Tucktoo and Kitchooalik* (1972), 27 D.L.R. (3d) 225 (N.W.T.S.C.) (in recognizing Inuit adoption customs both the continuity and particular custom rules were cited).

[73]*Anderson v. Todd* (1845), 2 U.C.Q.B. 82 (Q.B.).

enforce colonial law over natives, such steps would initially have been unconstitutional. This argument requires consideration of crown usage and practice specific to the colony, in particular the retention by the imperial crown of jurisdiction over Indian affairs.

1. Jurisdiction of the Indian Department

Upon the division of Quebec, Sir John Johnson was issued a new commission by the imperial crown, appointing him:

> Superintendent General and Inspector General of Our Faithfull Subjects and Allies the Six United Nations of Indians and their confederates, and of their Affairs, and also of our faithfull Allies the Indians inhabiting our Province of Upper Canada and Lower Canada in America, and the frontiers of our said Provinces and of their Affairs; and you are to observe and follow such orders and directions as you shall receive from our Commander in Chief of our Forces in our said Provinces of Upper Canada and Lower Canada....[74]

Arguably, then, Indian nations were not part of the general population subject to local municipal law and government, but "Allies" whose affairs were managed by the imperial crown through officers of the Indian Department, who received directions from the governor of Canada in his capacity as commander-in-chief. As in the past, direct imperial supervision of nations within colonial boundaries was criticized by the colonial governor.[75] Indeed, the division of powers made managing the relationship between settlers and Indians complex: as in Quebec, the civil government of Upper Canada lacked the authority to direct the Indian Department to purchase native lands required for settlement without first obtaining permission from the commander-in-chief, and the Indian Department lacked authority to take legal action against settlers or traders who defrauded

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[74]Royal Commission to Sir J. Johnson, Ind. Dept. Supt., 16 Sept. 1791, *CO* 42/316: 65.

[75]J. Simcoe, Lt. Gov. to H. Dundas, Sec. of State, 20 Sept. 1793, *SP*, II, 59-61; Simcoe to Dundas, 19 Oct. 1793, *CO* 42/318: 1-3; Simcoe to Duke of Portland, Sec. of State, 22 Dec. 1794, *CO* 42/319: 124-6.

native people without being empowered to do so by the local legislature.[76] After the division of Quebec the executive head of the colonial government in Upper Canada and the office of commander-in-chief became institutionally and geographically separated, the former being the lieutenant governor of Upper Canada resident in the province, the latter being the governor of Upper and Lower Canada resident in Lower Canada. Furthermore, unlike Quebec, colonial governments now included elected assemblies. In short, the legal distinction between colonial and imperial jurisdictions now took on practical dimensions. A degree of local control was recognized between 1796 and 1816 when the lieutenant governor of Upper Canada was permitted, in his capacity as commander of forces in the province, to direct the imperial Indian Department in Upper Canada subject only to "special Orders" of the commander-in-chief.[77] Between 1816 and 1830, however, management was returned to the commander-in-chief residing in Lower Canada.[78] Throughout, the Indian Department remained a branch of the military and subject to direct imperial control.[79]

2. Rules of the Indian Department

After the division of Quebec the "Instructions for the good government of the Indian department" issued by Lord Dorchester in 1787 remained in "full force".[80] As seen, article 1 of these instructions directed that the independence and customs of native

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[76]Lord Dorchester, Gov. Gen., to Sir J. Johnson, "Additional Instructions", 24 Dec. 1794, *RG10* Vol. 789, 6768-70, §§1-2; Simcoe to Board of Trade, 1 Sept. 1794, *CO* 42/318: 249-50; Simcoe to Dundas, 30 March 1792, *CO* 42/316: 60-2.

[77]Additional Royal Instructions to Lt. Gov. Upp. Can., 15 Dec. 1796, *CO* 42/325: 44-45.

[78]Milloy, *Era of Civilization* (1978), 37-41.

[79]Lord Dorchester to Duke of York, 12 July 1799, *CO* 42/330: 123-4.

[80]Orders of Sir J. Johnson, Supt. Ind. Dept., to W. Claus, Dpty. Supt. Ind. Dept., 6 Jan. 1798, *RG10* Vol. 789, 6774.

nations be respected.[81] The degree to which this article influenced imperial policy in Upper Canada is illustrated by events surrounding British efforts to purchase the Mississaga Tract, which separated the capital, York (Toronto), from the settlements around Niagara. In the 1790s the Credit River Mississaga formed an alliance with the Grand River Six Nations who advised the band against ceding the tract. Although the imperial government directed that such unions were to be prevented, attempts at breaking the alliance failed: the Six Nations were offended by the suggestion that the "Ancient Indian Custom of uniting" might be curtailed, and the British did not desire to provoke their enmity by pressing the matter.[82] Heeding advice about "how applicable the 1st Article of the Instructions for the good Government of the Indian Department is in the present instance",[83] Administrator Russell directed Indian Department officers to inform the Six Nations that "they were a free Nation" and that the British "had never any thoughts of interrupting their ancient Customs...."[84] Concluded Russell, "I do not conceive that I have anything to do with any of their meetings".[85] The purchase of the tract was delayed until 1805.

In 1794 Lord Dorchester issued "Additional Instructions" to the Indian Department supplementing his 1787 instructions. As seen, the *Royal Proclamation of 1763* required the public purchase of aboriginal title prior to the granting of lands to settlers. Although it was later concluded that the crown already had proprietary title to

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[81]*Supra* ch. 7, note 53.

[82]J. Brant, Mohawk Chief, to J. Givens, Dpty. Supt. Ind. Dept., 6 July 1798, *RP*, II, 199-200.

[83]R. Prescott, Lt. Gov. Low. Can., to P. Russell, Adm. Upp. Can., 6 Sept. 1798, *RP*, II, 251.

[84]Russell to Givens, 28 Sept. 1798, *RP*, II, 271-2.

[85]*Ibid.*

this land, and that the aboriginal rights purchased were usufructuary rights,[86] it was also acknowledged that the aboriginal rights confirmed by the *Proclamation* were "akin to those asserted by sovereign Princes...."[87] Consistent with this latter character of aboriginal title, article three of the Additional Instructions established a procedure for cessions which expressly recognized native customary law and government:

> All purchases [of Indian land] are to be made in Public Council with great solemnity and ceremony, according to the ancient 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.[88]

Pursuant to this instruction treaties were made for the surrender of Indian land which reflected adherence to native custom and respect for native chiefs.

3. Indian Department Policies: Treaty recognition of native law and government

Unlike earlier covenant chains of peace, protection and alliance, the British-Indian treaty relationship in Upper Canada was dominated by land cessions (for dates and boundaries of major cessions see map, Appendix B).[89] Nevertheless, treaties securing the surrender of aboriginal title recognized both explicitly and implicitly that native law and government had continued in force in unceded lands. As Viscount Haldane would later observe, the aboriginal title acquired by treaty in Canada derived from one of the

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[86] *St. Catharine's Milling Co. v. The Queen* (1888), 14 App. Cas. 46 (P.C.), at 53-54.

[87] *Rep. Ind. Affrs., 1858,* Pt. II, quoted with approval in *St. Catharines Milling Co. v. The Queen* (1887), 13 S.C.R. 577, *per* Gwynne J. at 663. *Cf. St. Catharines Milling* (1886), 13 O.A.R. 148 (Ont. C.A.), *per* Patterson J.A. at 169 (quoting Story, "on discovery" Britain acquired title to Indian lands, while natives retained rights of occupancy and in "a certain sense...rights of sovereignty").

[88] Dorchester to Sir J. Johnson, Supt. Ind. Dept., "Additional Instructions", 24 Dec. 1794, *RG10* Vol. 789, 6768-70.

[89] Generally, Surtees, "Indian Land Cessions in Upper Canada, 1815-1830" (1983); Hall, *Red Man's Burden* (1984), 43-62; Johnson, *The Early Missisauga Treaty Process* (1986).

"various systems of native jurisprudence [existing] throughout the Empire...."[90]

In general, treaties contained three components: a statement that certain chiefs were surrendering lands to the crown on behalf of their nations, a description of lands surrendered and any lands reserved for the continued use of the nation, and a description of the consideration paid by the crown. To the extent that the second two components recognized perpetual rights to reserves and payments, they are relevant to the determination of the legal status of native nations on reserves and will therefore be discussed in the next chapter. The first component, however, represented a statement about the status of the nation at the time of the treaty, and is therefore relevant to the determination of the nation's legal status while it occupied its unceded lands.

Treaties described native parties with varying degrees of specificity. The 1815 treaty ceding lands between Lakes Simcoe and Huron was typical. The cession was by "Kinaybicoinini, Aisaince and Misquuckkey, Principal Chiefs of the Chippawaw Nation of Indians on behalf of themselves and their Nation...."[91] The treaty expressly recognized that the Chippewa people constituted a nation with chiefs and territorial rights, and implicitly recognized Ojibwa customary law determining the identity of those chiefs and their authority to act for the nation in ceding those rights. The formula used in this treaty was common.[92]

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[90]*Amodu Tijani v. Sec., Southern Nigeria*, [1921] 2 A.C. 399 (P.C.), at 403 (citing *St. Catharines Milling Co v. The Queen* (1888), 14 App. Cas. 46 (P.C.) and *Star Chrome Case*, [1921] 1 A.C. 401 (P.C.)).

[91]Treaty of 18 Nov. 1815, *ITS*, #16.

[92]For example: Treaty of 12 May 1781, Chippewa surrender of Michilimackinac, *ITS*, #1 ("We the following Chiefs...in behalf of ourselves and all others of our Nation, the Chipwas...as being their Representatives and Chiefs"); Treaty of 7 Dec. 1796, Chippewa surrender of lands north of Thames River, *ITS*, #6 ("we the principal Chiefs, Warriors, People of the Cheppewa Nation of Indians...for ourselves and the rest of our Nation"); Treaty of 17 Oct. 1818, *ITS*, #18 (cession of lands betweeen Lake Huron, Lake Simcoe and Holland River by certain chiefs "as well for themselves as for the Chippewa

Other treaties were more explicit in their acknowledgement of customary law. The 1790 treaty ceding lands between Lake Erie and the Thames River described the native parties as "the principal Village and War Chiefs of the Ottawa, Chippawa, Pottowatomy and Huron Indians Nations", the chiefs signing with "the marks of our different Tribes [or clans]...."[93] The treaty therefore recognized two important elements of aboriginal custom: the distinction between civil and military authority, and the link between chieftainship and the social ordering of nations into village and clan units. The status of chiefs as representatives of clans was typically acknowledged by the practice of signing treaties with pictures, or totems, symbolizing the chief's clan.[94] Occasionally, treaty texts expressly identified chiefs by clan. The 1818 treaty ceding part of the Mississaga Tract described the native parties as "Adjutant, Chief of the Eagle Tribe, Weggishigomin of the Eagle Tribe, Kawwahkitahqubi of the Otter Tribe, Cabibonike of the Otter Tribe, and Pagitaniquatoibe of the Otter Tribe, Principal Men of the Mississagua Nation of Indians inhabiting the River Credit...."[95]

Attempts to draft treaties in conformity with aboriginal customary law led to confusion when the drafter's appreciation of that law was incomplete. Several treaties recognized the constitutional importance of clan mothers by including "Principal Women" in the description of the native party. Given the patriarchal character of the Ojibwa

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Nation inhabiting and claiming the said tract").

[93]Treaty of 19 May 1790, *ITS*, #2.

[94]For example, Treaty of 22 May 1798, *ITS*, #5 and pp. 26-7, ceding Penetanguishene described native party as "the Chiefs, Warriors and people of the Chippeway tribe or Nation of Indians" but drawn beside the names of the signatory chiefs were totems indicating their clans (Reindeer, Otter, and Pike).

[95]*ITS*, #19. Also, Treaty of 5 Nov. 1818, *ITS*, #20 with Chippewas of Newcastle District.

constitution this reference may have been inappropriate in relation to Mississaga bands,[96] but even in relation to the matriarchal Six Nations it was a source of controversy. Six Nations chiefs denied assertions that their treaties were defective unless signed by clan mothers, perhaps because the constitutional role of clan mothers was restricted to the selection and removal of clan chiefs.[97] The Indian Department accepted the chiefs' interpretation of their own law: "With respect to the Signature of your Women which you object to", stated Administrator Russell, "I really am too ignorant of Indian Customs to say, whether it may be necessary or not—But from what you have written to me I should rather think not...."[98]

It is important to note the issues which treaties did *not* address. They did not contain express submissions by native nations to British sovereignty, although in occasionally describing the grantee as "Our Sovereign Lord" an existing submission was implicit;[99] they did not expressly subject or exempt native nations to or from colonial law; and they did not expressly recognize the continuity of native customary law or government over any matter other than the cession of land. However, the policy of land-cession treaties was consistent with the assumption that native communities had existing laws and governments which extended beyond the matter of land cessions.

Land-cession treaties in colonial Canada were not regarded as international

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[96]For example, Treaty of 7 Dec. 1792 with certain Mississaga bands, *ITS*, #3 ("Sachems and War Chiefs and Principal Women of the Messissague Indian Nation").

[97]J. Brant, Mohawk Chief, to P. Russell, Adm. Upp. Can., 15 Dec. 1797, *RP*, II, 87-8; Brant to D.W. Smith, Sur. Gen., 15 Dec. 1797, *RP*, II, 41-42; Russell to R. Prescott, Gov. Gen., 19 Feb. 1798, *RP*, II, 85.

[98]Russell to Brant, 19 Dec. 1797, *RP*, II, 88-9.

[99]Treaty with Mississaga, 7 Dec. 1792, *ITS*, #3; Treaty with Mississaga, 1 Aug. 1805, *ITS*, #13. Other treaties were more ambiguous, describing the crown as "Our Great Father": Treaties of 7 Dec. 1796 and 22 May 1798, *ITS*, #5, #6, with Chippewa bands.

treaties. Although the colonial courts did not rule upon their legal status, in 1823 Lieutenant Governor Sir Peregrine Maitland compared them to private law "contracts".[100] Courts of the late nineteenth and early twentieth centuries followed the same approach, holding that at least treaty rights to annuity or interest payments were contractual rights enforceable against the crown in municipal courts.[101] At the same time, courts acknowledged that the policy of treating with native nations reflected their status as "distinct political communities"[102] and the fact that their chiefs stood "in the same position as any other high contracting power or government...."[103] As modern courts conclude, the land-cession treaties of colonial Canada have both public international and private contractual elements, and therefore reflect the "*sui generis*" character of native constitutional status at the time.[104]

4. Constitutional implications for the municipal system

As noted, with the introduction of representative assemblies into Canada in 1791 the distinction between imperial and local government crystallised. Although a large degree of local self-government was granted to the colony, the imperial crown continued

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[100]Sir. P. Maitland, Lt. Gov. Upp. Can., to R. Wilmot-Horton, Under-Sec. of State, 20 Nov. 1823, *CO* 42/370: 228-231.

[101]Indian treaties not international treaties: *Cayuga Indians (Great Britain) v. United States* (1926), 6 R.S.A. 173 (Inter. Arb.), at 309; *In re Indian Claims*, [1897] A.C. 199 (P.C.), at 211; *Simon v. The Queen*, [1985] 2 S.C.R. 387, at 404; *R. v. Sioui*, [1990] 1 S.C.R. 1025, at 1038. But they are analogous to international treaties and may be interpreted in that light: *A.G. Ontario v. Francis* (1889), 2 C.N.L.C. 6 (Ont. Ch.D.), at 13-14; *In re Indian Claims* (1895), 25 S.C.R. 443 (Arb.), at 448-49; *Simon v. The Queen*, [1985] 2 S.C.R. 387, at 404. Indian treaties contain contractual elements enforceable against the crown: *In re Indian Claims* (1895), 25 S.C.R. 434 (S.C.C.), at 534-35, [1897] A.C. 199 (P.C.), at 212; *Henry v. The King* (1905), 9 Ex. C.R. 417 (Ex.), at 445.

[102]*In re Indian Claims* (1895), 25 S.C.R. 443 (Arb.), *per* Boyd C. at 449.

[103]*A.G. Ontario v. Francis* (1889), 2 C.N.L.C. 6 (Ont. Ch.D.), at 13-14.

[104]*Simon v. The Queen; R. v. Sioui, supra* note 101.

to manage Indian affairs directly through the Indian Department. It is important to determine whether this political decision resulted in legal limits to the local legislature's authority over Indian nations living in unceded lands in Upper Canada.

In general, colonial legislatures were not agents or delegates of the imperial Parliament; rather, the grant by imperial statute of legislative authority over the "peace, welfare and good government" of the colony[105] gave the colonial legislature "plenary", "sovereign" or "supreme" legislative powers within the territory of the colony.[106] Of course, colonial legislative authority was not limitless. The imperial ministry could, for reasons of policy, preclude otherwise legal colonial legislation through the use of the royal powers of assent, reservation and disallowance;[107] alternatively, colonial legislation could be repealed by the imperial Parliament.[108] Even after receiving royal assent, colonial statutes could be declared by courts to be *ultra vires*, and therefore void, if they touched upon matters beyond the legislative competence of the colonial legislature as defined by its constituent imperial statute.[109] In general, a colonial legislature with authority over the "peace, welfare and good government" of the colony exceeded its legislative competence when it enacted legislation which was repugnant to those imperial

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[105]*Supra*, sec. I.

[106]Re: colonial Canada: Sir J. Campbell, Att. Gen., and Sir R. Rolfe, Sol. Gen., 6 Aug. 1838, *Forsy.*, 465-66; *McNab v. Bidwell* (1830), 1 Draper 152 (U.C.K.B.), at 160-61. Generally: *Beaumont v. Barrett* (1836), 1 Moo. P.C. 59 (P.C.), at 76; *Kielley v. Carson* (1843), 4 Moo. P.C. 63 (P.C.), at 84; *R. v. Burah* (1878), 3 App. Cas. 889 (P.C.).

[107]*Supra* sec. I. Generally, Todd, *Parliamentary Government in the British Colonies* (1894), 107-9, 157.

[108]*Beaumont v. Barrett* (1836), 1 Moo. P.C. 59 (P.C.), at 80; Todd, *ibid.*, 213.

[109]Royal assent did not cure a bill's illegality: Campbell and Rolfe, *supra* note 106; *Nadan v. The King*, [1926] A.C. 482 (P.C.), at 493; Jenkyns, *British Rule and Jurisdiction Beyond the Seas* (1904), 121; Roberts-Wray, *Commonwealth and Colonial Law* (1966), 383.

statutes which extended to the colony,[110] or which was extra-territorial in application.[111]

It has also been suggested that colonial legislation may have been *ultra vires* if it touched upon matters which, although not regulated by imperial statute and not outside colonial territories, were nevertheless of "imperial concern".[112] Although colonial legislatures could regulate or limit the exercise of the royal prerogative in the colony,[113] it has been argued by Roberts-Wray that this authority extended only to those prerogatives which Chitty described as "minor" prerogatives.[114] The minor prerogatives of the crown were defined by the common law of England and vested in those colonies where the English common law had been introduced as colonial municipal law.[115] In relation to the "fundamental"[116] or "major"[117] prerogatives of the Crown, colonial legislation was *ultra vires*.[118] The fundamental prerogatives were those inherent powers of the crown incidental to the crown's position as sovereign of the empire; they were applicable in all colonies whether the English common law had been introduced or not.[119] Included among

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[110]*Phillips v. Eyre* (1870), 6 L.J.Q.B. 28 (Ex.), at 36.

[111]Campbell and Rolfe, *supra* note 106; *British Coal Co. v. The King*, [1935] A.C. 500 (P.C.), at 516; *Halsbury's*, IV, §1028.

[112]Jenkyns, *op. cit.*, 70.

[113]*Chitty Prerog.*, 26; Sir J. Campbell, Att. Gen., and T. Wilde, Sol. Gen., 1841, *Forsy.*, 10-11; *Liquidators of Maritime Bank v. Receiver-General New Brunswick*, [1892] A.C. 437 (P.C.), at 441; Roberts-Wray, *op. cit.*, 377-78; *Halsbury's*, IV, §1027.

[114]Chitty, *ibid.*, 25-26; Roberts-Wray, *op. cit.*, 557-58.

[115]*Ibid.*

[116]Chitty, *ibid.*

[117]Roberts-Wray, *op. cit.*, 557-58.

[118]*Ibid.*, 379.

[119]*Ibid.*; *Chitty Prerog.*, 25.

the crown's fundamental prerogatives were its powers over the empire's foreign affairs, military, and treaties of war and peace.[120] Thus, it was argued that "the King, as supreme head of the empire...[had] the prerogative of regulating all the colonial military establishments...not only without but against the consent of the [colonial] Assemblies".[121] This head of the prerogative may be labelled the "extra-imperial relations prerogative" and is distinguished from another fundamental prerogative, the crown's inherent authority over managing relations and determining disputes between the various components of the empire, previously labelled the "intra-imperial relations prerogative".[122]

There is some judicial support for the argument that colonial legislatures could not regulate matters of fundamental prerogative. According to Roberts-Wray, one of the fundamental prerogatives was the imperial crown's right to hear appeals from colonial courts.[123] In *Cuvillier v. Aylwin* (1832) it was argued that it was "beyond the power" of the Lower-Canada legislature "to take away the rights of His Majesty to receive appeals".[124] The Privy Council upheld the impugned colonial statute in that case, but later cases suggest that this decision was based upon the fact that the *Constitution Act 1791*[125] gave the colonial legislature specific authority (in addition to its general legislative powers) to regulate appeals to the imperial crown. In *R. v. Eduljee Byramjee* (1846) the Privy Council discussed its ruling in *Cuvillier v. Aylwin*, concluding that "as the Act in Canada was made in pursuance of an Act of Parliament of Great Britain, the powers

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[120]Chitty, *ibid.*

[121]Clark, *Colonial Law* (1834), 47.

[122]*Supra* ch. 4, I, B.

[123]Roberts-Wray, *op. cit.*, 379-80.

[124]2 Knapp. 72 (P.C.), at 78.

[125]31 Geo. III, c. 31 (Imp.), s. 34.

contained in that Act did take away the prerogative of the Crown".[126] By implication, then, the colonial legislature could not have taken away this prerogative without first having been delegated specific authority to do so by imperial statute.[127] Of course, the argument that colonial statutes could not regulate matters of fundamental prerogative is related to the rule that colonial legislatures could not pass extra-territorial legislation, for many aspects of fundamental prerogative related to matters either wholly or partly outside colonial boundaries or matters which, although within colonial boundaries, were intrinsically related to concerns which extended beyond the colony.

With these general principles in mind, it is now possible to consider whether the colonial legislature of Upper Canada had authority to pass laws relating to Indian nations residing in unceded lands. Clearly, it could not have enacted legislation abrogating aboriginal rights secured by imperial legislation; thus, it could not limit native title to land protected by the *Royal Proclamation of 1763*. However, it did have legislative competence over settler-Indian trade. Royal instructions to governors were clear in this regard:

> It is our Royal Intention that the Peltry Trade of the Interior Country shall be free and open to all our Subjects...[who are] to observe such Regulations as shall be made by our Legislature of Our Province of Upper Canada for that purpose.[128]

But whereas colonial-legislative authority over settler-Indian trade was expressly provided in royal instructions, mention of colonial-legislative authority was conspicuously absent from royal instructions regarding the conduct of British-Indian relations generally. In

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[126]5 Moo P.C. 276 (P.C.), at 295.

[127]*Cf. Nadan v. The King*, [1926] A.C. 482 (P.C.), at 492, (general legislative powers under the *BNA Act* (1867), 30 Vic., c. 3 (Imp.) "do not...authorize the Dominion Parliament to annul the prerogative right of the King in Council to grant special leave to appeal").

[128]Royal Instructions to Lord Dorchester, 16 Sept. 1791, *CO* 43/4: 217-274 (§55).

contrast to the above-quoted instruction were the 1796 instructions which delegated authority over the Indian Department's operations within Upper Canada to the lieutenant governor of the province:

> Whereas we judge it to be conducive to the better Regulation of Our Concerns with the Indian Nations within Our Province of Upper Canada, that the same should be conducted by the Person exercising the Government of Our said Province for the time being.
>
> It is therefore our Will and Pleasure that You do take upon you the Conduct and Management of Our Concerns with the said Indians within the Province of Upper Canada, and that you do from time to time give to all Persons whom it may concern such Directions for the due Execution of these Our Instructions as occasion may require, such directions nevertheless to be subject to any special orders directed to you from such Person as shall at any time be constituted and appointed by Us to be Governor General of our Provinces in North America.[129]

Read together, these royal instructions suggest that colonial-legislative authority extended to settler-Indian trade, but in all other respects relations with native nations were to be managed by the crown under the prerogative through the governors general of Canada and lieutenant governors of Upper Canada.

Of course, it may be argued that these instructions were consistent with the colonial legislature's *legal* authority over native affairs, and it was merely a decision of *policy* by the imperial government to instruct that they be managed directly by the crown's representatives instead of by colonial statute, a decision which it might have enforced with its powers of disallowance had the colonial legislature enacted otherwise-valid legislation on Indian affairs. However, if the crown's management of Indian affairs at this time represented the exercise of a fundamental prerogative (under either the extra-imperial relations prerogative or, pursuant to the principles established in *Mohegan Indians v. Connecticut*, the intra-imperial relations prerogative), then the colonial

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[129]Additional Instructions to Lieutenant Governor of Upper Canada, 15 Dec. 1796, *CO* 42/325: 44-45.

legislature would not have had legal authority to interfere with the crown's conduct of Indian policy. The characterization of Indian affairs as within the extra-imperial relations prerogative is supported by royal commissions to superintendents of the Indian Department describing "the Indians inhabiting our Province of Upper Canada" as "Allies".[130] As Lord Dorchester said in 1799:

> [The] Indians, the Indian department, and *all Indian concerns, without exception,* are under the protection and control of the Commander in Chief; the Indians make part of the military strength of the Country; all presents to them, pass in the Military Line, and, in general, are considered as a retainer for Military Service.[131]

In short, there are strong reasons to conclude that the crown regulated Indian affairs under "the prerogative of regulating...colonial military establishments" and its policies could therefore be initiated "not only without but against the consent of the [colonial] Assemblies".[132] Even when located within colonial boundaries, their affairs were of intrinsically "imperial concern". Indeed, British-Indian relations did not initially vary depending upon the location of nations in or outside Upper Canada's borders: "similar methods" were required to prevent "danger from the Indians *without* the boundary" as were required "to preserve the good opinion of those who inhabit *within* the limit of his Majesty's Authority".[133] As long as Indian nations held the balance of power internationally, their affairs had to be managed by means of diplomacy—their concerns were inherently "imperial". This status lasted through the War of 1812, in which native nations contributed significantly to the defence of the province from the United States,

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[130]*Supra* note 74.

[131]Lord Dorchester to Duke of York, 12 July 1799, *CO* 42/330: 123-24 (emphasis added).

[132]*Supra* note 121.

[133]J. Simcoe, Lt. Gov., to Duke of Portland, Sec. of St., 29 May 1795, *CO* 42/319: 243.

but thereafter began to erode.[134]

To summarize, colonial statutes on Indian affairs would have been *ultra vires*, notwithstanding the grant of plenary powers of legislation to the colonial legislatures of Canada, at least as long as native nations were allies whose affairs were managed by the crown for larger imperial objectives. For the same reason, colonial statutes of general application were also *ultra vires* in relation to Indians, at least insofar as they interfered with the imperial policy, undertaken pursuant to fundamental prerogative, of recognizing native customary law and government. This same argument may be applied to the examination of imperial Indian policy in Chapter Seven to explain why the local colonial system in Quebec did not extend over "The Indian Nations within the Limits of Our Province of Quebec in Alliance with Us...."[135]

III. Summary

There were in colonial Canada two parallel constitutions: one based upon the express statutory provisions establishing the local municipal legal system, the other derived from general principles of imperial common law, like the shire-ground argument, and confirmed by royal commissions, instructions and treaties which recognized the continuity of aboriginal institutions and customary laws in unceded lands as part of native municipal systems distinct from the colonial municipal system. Whether the customary systems of these Indian "allies" were foreign systems or were incorporated in some degree by the imperial constitution remained unclear.

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[134]Calloway, *Crown and Calumet: British-Indian Relations, 1783-1815* (1987), 239-57; Allen, *His Majesty's Indian Allies: British Indian Policy in the Defence of Canada, 1774-1815* (1992), 120, 173.

[135]*Supra* ch. 7, note 42.

Chapter Nine

The Imperial Indian Department and Native Law and Government on the Reserves of Colonial Canada

In the preceding chapter it was argued that native law and government continued in force in Upper Canada's unceded Indian lands. The question to be addressed in the next two chapters is whether native law and government continued in force after the cession of Indian lands and the settlement of natives onto reserves. In this chapter, the creation and administration of reserves by the imperial crown pursuant to imperial law will be examined. In Chapter Ten the status of native law and government on reserves will be considered from the perspective of colonial municipal law.

I. Aboriginal Subjecthood and the Doctrine of Aboriginal Wardship

As seen in Part One, imperial law of the eighteenth century did not consider natives living within territories claimed by Britain to be British subjects until they had been conquered or had submitted by treaty. The treaties made between the crown and native nations in the Great Lakes Region in the 1760s established "covenant chains" of protection and alliance and, with the anomalous exception of Bradstreet's 1764 treaty, did not contain express submissions to British sovereignty. In the opinion of Indian Department superintendent Sir William Johnson, covenant chains did not secure sovereignty over native signatories. If this interpretation is accepted, then it is unclear if and when natives in the Great Lakes Region became British subjects, for they did not expressly submit to the crown as subjects in any subsequent treaty. Indeed, statements by colonial and imperial officials of the late eighteenth and early nineteenth centuries reflect adherence to Johnson's conclusion that natives were allies, not subjects.[1]

However, as these natives began to cede their land and settle onto reserves attitudes about their legal status shifted and by the 1830s it was concluded that natives on reserves were either "naturalized or natural born subjects",[2] a conclusion reflected in colonial statutory law[3] and eventually accepted by courts.[4] It is unclear whether this classification of natives as subjects derived from an interpretation of the initial treaties of the 1760s or from their new political circumstances. The latter possibility was accepted by Mississaga chief, Peter Jones:

> The treaty then made with the Indians [in the 1760s] placed them as allies with the British nation, and not subjects; and they were so considered until the influx of emigration completely outnumbered the aborigines. From that time the Colonial Government assumed a parental authority over them, treating them in every respect as children....[5]

Even if Johnson's and Jones's interpretation of the 1760s treaties is accepted, and even if a tacit native submission to British sovereignty cannot be inferred from the subsequent

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[1]J. White, Att. Gen. Upp. Can. to P. Russell, Adm. Upp. Can., 26 Sept. 1797, *CO* 42/321: 11-12, enclosed in Russell to Duke of Portland, Sec. of St., 28 Sept. 1797, *CO* 42/321: 7-8 (Grand River Six Nations call themselves "Allies" and are therefore "Aliens"); F. Gore, Lt. Gov. Upp. Can., to Viscount Castlereagh, Sec. of St., 4 Sept. 1809, *CO* 42/349: 90 (natives "become subjects to His Majesty" only if granted fee simple to land, which should not be allowed); Sir J. Johnson, Supt. Ind. Dept., to Col. H. Darling, Milit. Sec., 25 Aug. 1824, *RG10* Vol. 494, 30922 (natives are *"Allies"* not *"Vassels"*).

[2]Justice J.B. Macaulay, "Report on Indian Affairs", 22 April 1839, *RG10* Vol. 117, 168835.

[3]*An act the better to protect the Mississaga tribes* (1829), 10 Geo. III, c. 3 (U.C.), s. 2 (re: rights of "Indian people...as other subjects of his Majesty").

[4]*Regina Ex Rel. Gibb v. White* (1870), 5 P.R. 315 (Ont. Chambers).

[5]Jones, *History of the Ojebway Indians* (1861), 217.

conduct of native nations,[6] the unilateral assertion of sovereignty by the crown would have been an act of state which, although perhaps contrary to the terms of the original treaty relationship and aboriginal conceptions of their legal status, could not have been questioned by a municipal or imperial court.[7] It is difficult to identify with precision the point when, from the British perspective, sovereignty over natives vested fully—it seems to have been one of those cases in which sovereignty over foreign peoples was "gradually acquired...by imperceptible steps...."[8] At the very latest, it must be concluded that at imperial common law natives became subjects when the crown began to assert "parental authority" over them, which usually occurred when they agreed to cede their land and settle onto reserves. It remains to determine, however, the legal implications of the fact that the authority asserted was *parental* in nature.

The growing public concern about the plight of aboriginal peoples in British colonies which, as noted in Chapter Five, led to various Parliamentary committees and resolutions in the 1830s was in part the result of outrage over the state of Indian nations

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[6]See, for example, native petitions to the governor (which may, however, have been drafted by missionaries or Indian Department officials): Caughnawaga Mohawk to J.H. Craig, Gov. Can., 1808, *RG10* Vol. 486, 4244 ("les sauvages iroquois...loyaux subjects de sa Majesté"); St. Regis Iroquois to Sir J. Sherbrooke, Gov. Gen. (c. 1816-18), *RG10* Vol. 118, 169587-8 ("your Petitioners, faithful and true Subjects"); Mud Lake Mississaga to Sir J. Colborne, Lt. Gov. Upp. Can., 11 Aug 1830, *RG10* Vol. 5, 2580 ("We His Majesty's peaceable and dutiful Subjects"); and see treaties by which chiefs ceded parts of reserves to the crown as "our sovereign lord/lady": Treaties with St. Regis Iroquois, 5 June 1847, *ITS*, #41.5, Tyendinaga Mohawk, 20 July 1824, *ITS*, #24, Grand River Six Nations, 4 Aug. 1826, *ITS*, #28.5, 26 March 1835, *ITS*, # 39. *Cf.* Long, *Voyages and Travels of an Indian Interpreter* (1791), 50 (Mohawk of Canada "laugh when you talk to them of obedience to kings; for they cannot reconcile the idea of submission with the dignity of man"); and, modern claims of Mohawk/Six Nations to sovereignty, *supra* ch. 1, note 7.

[7]*Supra* ch. 2, note 20.

[8]*Lyons (Mayor of) v. East India Co.* (1836), 1 Moo. Ind. App. 175 (P.C.), at 275.

in Canada.[9] The social and cultural upheavals associated with increased settlement, the loss of hunting grounds and the introduction of disease and alcohol, were devastating.[10] It had long been recognized that the crown's "paternal benevolence"[11] was necessary to protect native people and lands from fraudulent traders and encroaching settlers, but as of 1830 this *protective paternalism* was supplemented with policies of *dispositive paternalism*: steps were taken not only to insulate natives from negative elements but also to introduce to natives "positive" elements of the surrounding British society.[12] Native reserves were an integral part of this new strategy, representing enclaves in which the first steps towards "civilization" were to occur.

The imperial Indian Department continued to manage Indian affairs even after nations settled onto reserves, thus becoming the crown's vehicle for policies of dispositive paternalism. Its primary task therefore shifted from securing Indian "friendship in times of war" to "reclaiming them from a state of barbarism".[13] These tasks were "essentially civil in their character" and inappropriate for a branch of the military; therefore control over the Indian Department in Upper Canada was delegated to the "civil governor" in

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[9]*Rep. Sel. Comm. Aborigines, 1837*, 7-8; Aborigines Protection Society, *Report on the Indians of Upper Canada* (1839).

[10]West, *Journal of a Mission to the Indians of the British Provinces* (1827), 252-53; MacTaggart, *Three Years in Canada* (1829), II, 136-37; Beaven, *A Visit to the Indian Missions in Upper Canada* (1846), 158; Jones, *Life and Journals of Kaw-Ke-Wa-Quo-Na-By* (1860), 1-6.

[11]Lord Dorchester, Gov. Que., to Sir J. Johnson, Supt. Ind. Dept., 17 June 1790, *NR*, #41, 49-51.

[12]Such policies were suggested as early as 1768: Knox, *Three Tracts Respecting the Conversion and Instruction of the Free Indians* (1789), 8. However, they were not instituted until 1827-28: *Rep. Ind. Affrs., 1844*, 20; Aborig. Prot. Soc., *Rep. Inds. Upp. Can.* (1839), 6; Milloy, *Era of Civilization* (1978), ch. 2.

[13]Sir G. Murray, Sec. of State, to Sir J. Kempt, Adm. Can., 25 January 1830, *PP* 1834, XLIV, #617, 339, p. 88. Also, Surtees, "Development of an Indian Reserve Policy" (1969), 92; Milloy, *ibid.*; Hall, *Red Man's Burden* (1984), 97-105.

1829.[14] Indeed, the position of native nations in the Great Lakes Region as a significant military force affecting the international balance of power had begun to erode after the War of 1812.[15]

The change in the political position of natives—the decline in their military strength as well as their settlement onto reserves—had significant constitutional implications. According to Boyd C., "relations between the Government and the Indians change upon the establishment of reserves", with natives becoming "wards of the State".[16] Thus, natives in colonial Canada were described as having a legal status analogous to minors, incompetent persons, or wards, and the crown's position in relation to natives was analogous to a parent, guardian or trustee.[17] Although regarded as subjects, natives were not allowed to enjoy the full rights of subjecthood until their tutelage was over, until they were civilized and the doctrine of aboriginal wardship ceased to apply.[18] Notwithstanding the shift in native status from allies to wards, the imperial crown

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[14]Sir G. Arthur, Lt. Gov. Upp. Can., Memo. re: Indian Department (c. 1841), *AP*, #1623. Also, Murray to Kempt, 22 March 1830, *PP* 1834, XLIV, #617, 339, p. 90; Kempt to Murray, 27 Jan. 1830, *PP* 1834, XLIV, #617, 339, pp. 89-90; *Rep. Ind. Affrs., 1844*, 26-7.

[15]*Supra* ch. 8, note 134.

[16]*Regina v. St. Catharines Milling Co.* (1885), 10 O.R. 196 (Ch.), at 229-230.

[17]H.C. Darling, Supt. Gen. Ind. Dept., "Report upon the exact state of the Indian Department" (1828), *PP* 1834, XLIV, #617, 339, p. 30; Macaulay J., "Report on Indian Affairs", 22 April 1839, *RG10* Vol. 117, 168837.

[18]Lord Glenelg, Sec. of St., to Earl Durham, *PP* 1839, XXXIV, #223, 217, p.8 (native wardship to last until natives gained "the Capacity to enjoy and appreciate the Rights of free British Subjects"); *Regina v. St. Catharines Milling Co.* (1885), 10 O.R. 196, at 211 (natives in "pupillage" until "deemed worthy to possess all the rights and immunities and responsibilites of complete citizenship").

continued to manage Indian affairs as before—without Parliamentary authority.[19] While this exercise of the prerogative was previously justifiable under the crown's inherent authority under the "extra-imperial relations" prerogative, the change in the character of Indian policy suggests that it now had a new justification, namely the crown's inherent authority as "*parens patriae*"[20] over persons deemed incapable of managing their own affairs.

With this change in the constitutional basis for the exercise of the royal prerogative over Indian policy, however, came a potential change in the constitutional authority of the colonial legislature over that policy. It may be argued that the crown's authority over Indian affairs ceased to be a matter of "fundamental" prerogative of intrinsically imperial concern outside the legislative competence of the colonial legislature and became instead a matter of "minor" prerogative over which the colonial legislature could enact valid legislation pursuant to its plenary legislative authority over the internal affairs of the colony. This argument will be addressed in Chapter Ten. For now it is important to emphasize that, whatever the *legal* capacity of the colonial legislature, for *political* reasons at least it was prevented by the imperial government from exercising jurisdiction over internal reserve affairs. As the Governor General, the Earl of Durham, was instructed in 1838, it was "a fixed Principle" that Indians were "under the exclusive Care and Superindendence of the Crown" and not until it was "expedient" would they be

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[19]Attitudes about the royal prerogative in imperial matters changed over the course of the nineteenth century, and by 1859 an imperial statute was deemed necessary to vest the crown in council with authority to make regulations "for the Conduct of the Trade with the *Indians*" and "for promoting their Moral and Religious Improvement" (*Act to make further Provision for the Regulation of the Trade with the Indians* (1859), 22 & 23 Vic., c. 26 (Imp.), s. 3). This statute applied to territories between the Provinces of Canada and British Columbia having no colonial government, and at no time between 1760 and 1860 was a similar delegation of authority made to the crown in relation to natives within colonial Canada.

[20]*Chitty Prerog.*, 155.

"turned over by the Crown to the Provincial Legislature, and receive legislative Provision and Care...."[21]

Underlying the retention of imperial control was the perceived "danger" that the "Provincial Legislature" would not "prevent complaints on the part of Indians" or "check the infringements of rights and privileges originally guaranteed by the Crown of England...."[22] When control was finally devolved in 1860 it was contingent upon the statutory entrenchment in colonial municipal law of native rights to land unless ceded by native "chiefs" at councils held "according to their rules".[23] Until this devolution there persisted, as Governor Murray had stated in 1764, "a power within a power", or as settlers would argue in 1852, "a petty, little, despotic, irresponsible Government, within a 'responsible Government'".[24] That is, imperial law continued to govern a segment of people and land within territories otherwise subject to a local municipal legal system.

Notwithstanding the wide discretion available to the crown under the doctrine of aboriginal wardship, the position of native nations as political units whose relations with the crown were governed by treaty did not evaporate upon the initiation of policies of dispositive paternalism; instead, Indian nations on reserves occupied an "anomalous position" "at once labouring under the disabilities imposed by law upon minors, and

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[21]Glenelg to Durham, *supra* note 18. Also, *Rep. Ind. Affrs., 1844*, 255.

[22]E. Head, Gov. Gen., to Lord Stanley, Sec. of State, 12 May 1858, *PP* 1860, XLIV, #595, 751, p. 21.

[23]*Act respecting the management of the Indian lands and property* (1860), 23 Vic., c. 151 (Can.), s. 4(1). Also, Head to Executive Council, 11 May 1858, *PP* 1860, XLIV, #595, 751, p. 22; Head to Duke of Newcastle, Sec. of State, 30 April 1860, *PP* 1860, XLIV, #595, 751, p. 30; *Rep. Ind. Affrs., 1858*, Pt. III.

[24]Petition to Sir J. Pakington, Sec. of State, 25 Oct. 1852, *PP* 1852-3, LXV, #1003, 10.

enjoying some of the territorial privileges of independent sovereigns...."[25] How the imperial crown reconciled the recognition of natives as "minors" and "sovereigns" on reserves is the subject of the rest of this chapter.

II. Imperial Recognition of Native Law and Government on Reserves

A. The Treaty Basis for Native Law and Government

In the preceding chapter it was observed that land-cession treaties in Upper Canada recognized the continuity of native law and government in unceded Indian lands. The same treaties, in creating rights to reserves and payment of monies, recognized the continuity of native nations, law and government after the initial land cession.

1. Treaty provision for reserves

By creating territorial enclaves for the exclusive use of native nations, treaties recognized the continuity of at least some degree of native nationhood. Rights to reserves were defined by treaties as collective rights held "in common", not as individual rights.[26] Treaties did not expressly identify the government to which natives on reserves were subject. However, treaty terms creating reserves confirmed that native chiefs had some continuing role. These terms were usually in one of two general forms: "the chiefs of the nation surrender tract x, reserving therefrom tract y for the continued use of the said chiefs and their nation",[27] or, "the chiefs of the nation surrender tract x, reserving

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[25]R.T. Pennefather, Supt. Gen. Ind. Dept., Annual Report 1856, *PP* 1860, Sess. 595, XLIV, 751, p. 4.

[26]Treaty with Ojibwa of Lake Superior, 7 Sept. 1850 , *ITS*, #61 (reserve for "said Chiefs and their tribes in common for the purposes of residence and cultivation").

[27]For example, treaty creating Credit River Mississsaga reserve, 6 Sept. 1806, *ITS*, #14 ("the Principal Chiefs, Warriors and people of the Mississagua Nation of Indians" ceded certain lands "except and always reserved out of this present grant unto [ten chiefs listed]...and the people of the Missisagua Nation" certain reserves); treaty with Lake Superior Ojibwa, *ibid.*; treaty creating Ojibwa Saugeen, Owen Sound, Cape Crocker and Colpoy's Bay reserves, 13 Oct. 1854, *ITS*, #72 ("We, the Chiefs" cede lands except reserves which "we hereby retain to ourselves and our children in perpetuity").

therefrom tract y".[28] In the former example continuity of chieftainship was explicit, in the latter it was implicit. Underlying both forms, however, was the assumption that the nation reserved to itself not only part of the territory ceded but also, in relation to the reserved part, the constitutional position which it had theretofore enjoyed in relation to the whole territory.[29] This interpretation is supported by the fact that reserve land was itself acquired by the crown from native chiefs "in Council" by treaties modelled after the initial land-cession treaties.[30]

Treaties did not identify which law governed internal affairs on reserves, nor did they explain the relationship between native treaty rights to reserves and colonial

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[28]For example, treaty creating Chippewa Munceytown reserve, 9 March 1819, *ITS*, #21 ("Principal Men of the Chippewa Nation of Indians" ceded certain lands "reserving a tract of land"); treaty creating Ojibwa St. Clair, Sarnia, River aux Sable and Kettle Point reserves, 10 July 1827, *ITS*, #29 ("Chiefs and Principal Men of...the Chippewa Nation of Indians" ceded certain lands "saving and excepting the several reserved tracts"). Also: treaty creating Huron Amherstburg reserve, 19 May 1790, *ITS*, #2; treaty creating Ojibwa Christian Island reserve, 5 June 1856, *ITS*, #76; treaty creating Mississaga Alnwick reserve, 19 June 1856, *ITS*, #77; treaty creating Mississaga Rice, Mud and Scugog Lakes reserves, 24 June 1856, *ITS*, #78.

[29]It would later be held that the nature of the native right in reserve land was the same as the aboriginal right in unceded land: the crown held the proprietary title while natives had rights of use and occupancy: *Fegan v. McLean* (1869), 29 U.C.Q.B. 202 (Ont. Q.B.), at 204; *Regina v. St. Catharines Milling Co.* (1885), 10 O.R. 196 (Ch.), at 213, 230; *Ontario Mining Co. v. Seybold*, (1899), 31 O.R. 386 (Ch.), (1901), 32 S.C.R. 1, [1903] A.C. 73 (P.C.); *Star Chrome Case*, [1921] 1 A.C. 401 (P.C.); *Guerin v. The Queen*, [1984] 2 S.C.R. 335, at 379.

[30]For example, treaty ceding part of Huron Amherstburg reserve, 2 Feb. 1836, *ITS*, #42 ("we the said Sachems or Principal Chiefs of the said Huron or Wyandott Tribe of Indians, in Council now assembled...have hereunto, as well on our own behalf as also for and on behalf of the said Huron or Wyandott Tribe of Indians" made the cession). Other treaties relating to Huron reserve follow this pattern: 11 Sept. 1800, *ITS*, #12; 20 Sept. 1836, *ITS*, #46; 19 July 1853, *ITS*, #71. Treaty ceding part of Chippewa Munceytown reserve, 13 Feb. 1849, *ITS*, #58.5b ("Chiefs and Principal Men of the Chippewa Indians...in full Council assembled, have agreed, and do hereby agree to surrender"); Treaty ceding part of St. Clair reserve, 25 Aug. 1852, *ITS*, #69 ("the Chiefs...on their own behalf and for and with the consent of the Warriors whom they represent, being the Chippewas of the Upper Reserve on the River St. Clair, in the County of Lambton, Canada West, now in full Council assembled" cede part of reserve).

municipal law. However, light may be shed on both of these points by examining the reserves created for nations seeking refuge in the Great Lakes Region after the American Revolution.[31] The example of the Six Nations Grand River and Tyendinaga reserves are illustrative. In 1784 Governor Haldimand granted to the "Mohawk Nation" and "other of the Six Nations Indians" "Possession of" six miles of land on each side of the Grand River, from Lake Erie to its source "to enjoy for ever".[32] A similar grant was made to the Tyendinaga Mohawk for a tract at the Bay of Quinte. These grants, or treaties,[33] were not considered by colonial officials to convey legal estates under colonial municipal law.[34] Therefore, in order sell portions of the reserve to non-natives, certain Six Nations chiefs led by Mohawk leader Joseph Brant sought a patent from the colonial government in fee simple.[35] Although amenable to issuing a deed confirming the Haldimand grants, the governor and lieutenant governor refused to grant the Six Nations an alienable property interest in municipal law. The Six Nations were informed by the lieutenant

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[31] *Isaac v. Davey* (1974), 51 D.L.R.(3d) 170 (Ont. C.A.), at 181 (crown intended to confer on these refugees "the same rights as were enjoyed by those Indians who had always been there").

[32] Haldimand Proclamation, 1784, printed at *Isaac v. Davey, ibid.*, App. B.

[33] Justice W.D. Powell, "Memoir of the Claim of the Six Nations", 3 Jan. 1797, *CO* 42/321: 60 (Haldimand grant was a "compact"); *The King v. Phelps* (1823), 1 Taylor 47 (U.C.K.B), *per* counsel at 52 (Haldimand grant based on "treaty"); *Isaac v. Davey* (1973), 38 D.L.R.(3d) 23 (Ont. H.C.), at 27 ("Haldimand Treaty"); *contra: Logan v. Styres* (1959), 20 D.L.R.(2d) 416 (Ont. H.C.), at 419 (denied Haldimand grant was a treaty).

[34] Lord Dorchester, Gov., to J. Simcoe, Lt. Gov., 25 Jan. 1796, *SP*, IV, 182; P. Russell, Adm. Upp. Can., to Duke of Portland, Sec. of State, 28 Jan. 1797, *CO* 42/321: 45; Allcock C.J. Upp. Can., to Sir G. Shee, Under-Sec. of State, 14 March 1806, *CO* 42/342: 126-131.

[35] Six Nations council, 8 Sept. 1795, *RG10* Vol. 9, 8996-9004; Brant to Russell, 10 July 1797, *CO* 42/321: 117; Russell to Portland, 21 July 1797, *CO* 42/321: 108. For historical context, and Brant-Russell compromise, see: *Miller v. The King*, [1948] Ex. C.R. 372, [1950] 1 D.L.R. 513 (S.C.C.), at 515-16; *Isaac v. Davey* (1974), 51 D.L.R.(3d) 170 (Ont. C.A.), at 174-75; Kelsay, *Joseph Brant* (1984), 553-648.

governor that any patent issued had to accomplish two objectives: it had to secure "the King's Sovereignty over all his subjects" (by which was meant "all settlers within the province") according to "our laws and regulations", while at the same time it had to "safeguard...the Indian interest" according to "their own customs and wishes".[36] Letters patent under the Great Seal of Upper Canada issued in 1793 can be seen to accommodate both ends. These letters patent confirmed to the "Chiefs, warriors, women, and people of the said Six Nations and their Heirs, the full and entire possession, use, benefit and advantage" of the tract "to be held and enjoyed by them...*according to the several customs and usages of them*"; however it expressly prohibited the private sale or lease of lands "other than among themselves", and any external surrender had to be to the crown at a "public meeting or assembly of the Chiefs, warriors and people...."[37] In effect, there existed two legal systems (or sets of systems) in the province, a system of native "customs and usages", or "native jurisprudence",[38] on reserves and a colonial municipal system elsewhere, and before settlers could acquire title to reserve land an intermediary step—cession of that land by native chiefs to the crown by a further treaty—was required.[39]

Like treaties ceding portions of other reserves, treaties surrendering portions of reserve land which had been granted to refugee nations revealed functioning native

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[36]E.B. Littlehales, Sec. to Lt. Gov., to Brant, 8 April 1796, *SP*, IV, 238.

[37]Letters Patent (Upp. Can.), 1 April 1793, *ITS*, #4 (Grand River), #3.5 (Tyendinaga). Because these letters patent did not recognize a right of alienation, they did not achieve that which at least certain native leaders desired.

[38]*Supra* ch. 8, note 90.

[39]*Contra: Sero v. Gault* (1921), 50 O.R. 27 (H.C.), at 33-34 ("There is nothing in the [1793] grant suggesting exclusion [of the Tyendinaga reserve] from the ordinary laws of the land").

"councils", or governments.[40] And, like the initial land-cession treaties, the treaties ceding reserve land remained unexamined by courts until after confederation; however, courts attributed to them the same legal status as the earlier treaties.[41]

2. Treaty terms on payment

In addition to the provision for reserves, treaties recognized the continuity of native nationhood by the form in which provision for payment was made. Instead of a lump sum, the crown often recognized the nation's right to future payments. Consideration was often in the form of a "perpetual annuity...delivered to the said Chiefs and their Tribes".[42] Or the treaty might provide that the ceded land was to be sold by the crown with the proceeds held in trust for "the use, benefit and behalf of them the said [Chiefs]...and their people and posterity forever".[43] Finally, treaties often provided that the proceeds from the crown's sale of ceded lands were to be "invested and funded in perpetuity for the use, benefit and behoof of...[the] Chiefs aforesaid...as representing

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[40]For example, Six Nations Grand River reserve: Treaty of 26 March 1835, *ITS*, #39 ("Chiefs or Principal Men of the Mohawk or Six Nations Indians...in pursuance of...[a] resolution and agreement in Council" cede certain lands). Also, Treaty of 2 April 1835, *ITS*, #40. Tyendinaga Mohawk reserve: Treaty of 11 July 1846, *ITS*, #56 ("we the Chiefs, Warriors, Women and People of the said Six Nations...in Council assembled" surrender part of reserve which is "held and enjoyed by them in the most free and ample manner and according to the several customs and usages by them"). Also, treaties of 20 Jan. 1836, *ITS*, #41.5 and 15 April 1843, *ITS*, #51. Moravian Delaware reserve: Treaty of 25 Oct. 1836, *ITS*, #47 ("We, the undersigned Chiefs...having had...several Councils at which we have considered the subject of giving up to our Great Father the King all our interest in the lands"). Also, treaty of 15 May 1857, *ITS*, #83.

[41]*Miller v. The King*, [1950] 1 D.L.R. 513 (S.C.C.), at 523 (re: Grand River reserve).

[42]Treaty with Ojibwa of Lake Superior, 7 Sept. 1850, *ITS*, #60. Also, Treaties with Kingston Mississaga, 31 May 1819, *ITS*, #27, #27.25; Moravian Delaware, 25 Oct. 1836, *ITS*, #47; Thames Chippewa, 9 March 1819, *ITS*, #21.

[43]Treaty with Lake Huron and Simcoe Ojibwa, 17 June 1852 , *ITS*, #66. Also, treaties with Thames Chippewa, 5 Feb. 1834, *ITS*, #37; Amherstburg Huron, 2 Feb. 1836, *ITS*, #42; Kingston Mississaga, 25 May 1836, *ITS*, #44; St. Clair Ojibwa, 18 Aug. 1843, *ITS*, #53.5.

the[ir] tribe", the interest to be paid annually for "all time coming".[44] Each of these forms of consideration clearly recognized the continuity of nations and chiefs subsequent to initial land cession and settlement onto reserves. Indeed, the payment of annuities was itself an annual treaty in which the "chiefs and principal men" acknowledged receipt from the crown "in the name of...[their] Nation...."[45]

B. Crown Confirmation of Native Chiefs

In 1839 the Indian Department superintendent summarized the duties of the Department with respect to nations on reserves as follows:

> To watch over the interests of all Indian Tribes...to keep the accounts of land payments with each Tribe—to procure for them any advance of money on accounts of such land payments, or in lieu of money obtain any articles of food, clothing, cattle, horses, farming implements or any thing else, which their necessities may require—to keep the Lieutenant-Governor informed of the state of feeling existing among the Tribes, whether political or otherwise—to endeavour, by every reasonable means to induce them to abandon their roving habits, and apply themselves to the cultivation of the soil—to persuade them to unite together, and build Villages for permanent residences—to point out to them the advantages of embracing Christianity, and becoming civilized...to preside in General Councils—advise the Chiefs and Warriors, in all matters connected with their temporal affairs—to protect their lands from the encroachments of the white inhabitants—to exercise any influence he may possess in inducing them to adopt such measures as the Government may, from time to time, suggest for their general welfare and advantage....[46]

This summary reveals the extent to which the function of the Department had changed. Its officers were concerned not so much with retaining nations as allies as with managing their treaty monies and persuading them to re-order their societies along European lines.

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[44]Treaty Lake Huron and Simcoe Ojibwa, 5 June 1856, *ITS*, #76. Also: treaties with Amherstburg Huron, 20 Sept. 1836, *ITS*, #46; Lake Huron and Simcoe Ojibwa, 26 Nov. 1836, *ITS*, #48; Tyendinaga Mohawks, 15 April 1843, *ITS*, #51; Kingston Mississaga, 15 June 1838, *ITS*, #49; Saugeen and Owen Sound Ojibwa, 2 Sept. 1851, *ITS*, #67.

[45]"Receipt from the Chippewa Indians of Lake Simcoe & Huron, 10th Annual Payment" (1830), *RG10* Vol. 46, 24235-37.

[46]*Rep. Ind. Dept., 1840*, 31.

However, the summary also indicates that the principles of article 1 of Dorchester's 1787 instructions continued to inform Departmental practice in achieving its new objectives. Instead of governing native people directly, the Department governed indirectly by advising and influencing native chiefs—chiefs were "Subordinate Organs through which the Government c[ould] act with & upon the people".[47]

This appropriation of native institutions by the imperial order was achieved by clothing the office of chieftainship with external indicia of legitimacy. Recognition of chiefs was most formally manifested in the practice of commissioning them to their offices. An 1837 commission under the governor's seal-at-arms to Chief Kiconse of the Algonquin nation at the Lake of Two Mountains reserve is illustrative:

> By virtue of the Power and Authority in me [Governor General Earl of Gosford] vested, and reposing especial trust and confidence in your Courage and good conduct, and in your zealous and faithful attachment to His Britannic Majesty, KING WILLIAM THE FOURTH,
>
> I do hereby appoint you to be *Grand Chief* of the Algonquin Tribe of Indians, and you are punctually to discharge your duty in that capacity, and to observe and follow all such Orders as you shall, from time to time, receive from me, or any other your Superior Officer, in His Majesty's Service.[48]

The commissioning of chiefs was not generally intended to disrupt the course of native custom in determining the composition of a nation's government—it would have been counterproductive to recognize chiefs lacking the authority provided by kinship and

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[47]W. Spragge, Dpty. Supt. Ind. Dept., "Report regarding Manitoulin Island" (c. 1862), *RG10* Vol. 722, 49. Also, Sir G. Murray, Sec. of State, to Sir J. Kempt, Adm. Upp. Can., 25 Jan. 1830, *PP* 1834, XLIV, #617, 339, pp. 88-9 (department was to "perpetuat[e] that influence which should be maintained by the chiefs, and which will not be without its use in maintaining good order in that society"); *Rep. Ind. Affrs., 1844*, 441, 444 (department was to "support the Chiefs" in "preserving subordination" and "peace and good order" in their nations). Use of native chiefs in general, Bannister, *Justice to the Aborigines of New Settlements* (1830), 196, and *British Colonization and Coloured Tribes* (1838), 73, 153-54.

[48]Commission to Chief Kiconse, 1 June 1837, *RG19*, F14, f. 1.

election—rather commissions confirmed and legalized from an external British perspective conclusions already made internally by native constitutional custom.[49] Indeed, native nations often submitted petitions seeking crown confirmation of their election or removal of chiefs, or of the legality of their councils.[50]

Occasionally, however, the Indian Department went beyond the mere recognition of chiefs selected by native custom and interfered with the composition of native councils. Such a tactic was allegedly employed in order to facilitate the cession of the Saugeen Peninsula in 1836. The Saugeen Ojibwa responded to the interference with this petition:

> We claim the right to appoint our own chiefs and other officers, according to our established custom and laws; and while we ask your Excellency to sanction, we will not recognize the dismissal from office, or the nomination, or appointment to office, by Captain Anderson [their Indian Department agent], of any person without our concurrence.[51]

In short, natives sought to strike a balance between the *de facto* necessity of British

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[49]J. Givens, Chief Supt. (Upp. Can.) Ind. Dept., to G. Ironside, Ind. Dept. Agent, 26 Oct. 1836, *RG10* Vol. 501, 200-1 (re: Amherstburg Huron, governor did not wish "in the slightest degree to interfere with the Indians in the election of their Chiefs"); W. Claus, Dpty. Supt. Ind. Dept., to G. Hillier, Sec. to Lt. Gov., 16 Sept. 1823, *CO* 42/370: 255-7 (re: Six Nations Grand River, "Brant is the person who succeeds to Tekisakuga *in Office* [as] he is the son of the nearest female relation of this Chief").

[50]Council of 1 Aug. 1805, *CO* 42/340: 51 (Credit River Mississaga elected son of deceased chief to succeed, pursuant to Ojibwa custom, and then requested Dpty. Supt. Ind. Dept. W. Claus "to acknowledge him to be a Chief on this River according to the customs of the Indians"); Petition to Sir J. Sherbrooke, Gov. Gen. (c. 1816-18), *RG10* Vol. 118, 169587-8 ("principal Chiefs of the St. Regis Indians" denounced certain "Rebel Chiefs" and sought confirmation that they "be the only Chiefs and legal Council"); Council of 11 June 1827, *RG10* Vol. 496, 31591-92 (upon death of chief, Mud and Rice Lake Mississaga petitioned "to revive the Chieftainship in the person of his son"); Tyendinaga Mohawks to J. Givens, Dpty. Supt. Ind. Dept., 19 Aug. 1830, *RG10* Vol. 46, 24219-21 (requested that governor deal only with "council of the three tribes [clans], i.e. the Turtle, Wolf, and bear"); Council at Munceytown, 1858, *RG10* Vol. 453, 32 (Thames Chippewa chiefs "in full Council" deposed head chief, and asked that "Head quarters" cease to recognize him); Petition of Thames Chippewa, 22 June 1861, *RG10* Vol. 453, 14-15 (seeking re-instatement of chief).

[51]Saugeen Ojibwa to Sir E. Head, Gov. Gen., 26 June 1855, quoted in Van Dusen, *Indian Chief* (1867), 97-98.

recognition of their councils and the integrity of the customary law by which chiefs were selected to councils. The crown accepted this balance, but only when it was not inconsistent with larger imperial objectives. As will be seen,[52] it asserted a supervisory jurisdiction over the application of customary law, and thus acquired a mechanism to depose chiefs whose conduct did not meet its standards of good government.

C. Native Constitutional Law on Reserves

Although the crown was prepared to recognize native constitutional customary law, the state of that law was in continual flux. The cultural and social upheaval associated with settlement and reservation, and in some cases the acceptance of at least elements of Christianity, forced political and legal changes in native society. Some aboriginal customs fell into disuse and were abandoned. With respect to the resident nations of the old French missions in Lower Canada, for example, it was stated: "Few, if any, of their national institutions and customs remain since their conversion".[53] This observation may have over-stated the extent to which customary law in Lower-Canada reserves had eroded.[54] In fact, aboriginal governments were capable of adapting to radical change, and in most reserves old customs evolved to meet new challenges. For example, the traditional Huron confederal constitution evolved significantly between the dispersal of the Huron from the Great Lakes Region in the mid-seventeenth century and the settlement of a remnant of the confederacy onto the Amherstburg reserve in the early nineteenth century; the original national distinctions of the confederacy dissolved into one

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[52]*Infra* sec. III.

[53]*Rep. Ind. Affrs., 1844*, 68.

[54]See *infra*, sec. III.

Huron, or Wyandot, nation, although the clan system remained in force.[55]

With respect to the Six Nations, clan sachems continued to perform the function of government after settlement onto the Grand River and Tyendinaga reserves, although that function had altered dramatically.[56] The Grand River Six Nations re-established the traditional "Long House" and re-instituted the councils of "Chiefs", "Warriors" and "Chief Women"; and, according to "ancient customs", ceremonies were held at which new chiefs were invested and the "ancient agreements from the time of the Confederacy" and the "usages" of "Forefathers" were recited.[57] However, Mohawk chiefs settling at Tyendinaga did not participate in the confederal councils at the Grand River[58]—apparently, there developed confederal segments on each reserve just as there had been "clan segments"[59] in each village under their original constitution.

In fact, the role of the Grand River Six Nations confederal council was initially limited. The nations of the confederacy settled onto the reserve in distinct villages which were, in turn, divided according to clan; villages were governed internally by respective national councils.[60] By the mid-nineteenth century, however, much of the original reserve had been ceded and, in 1847, the nations were consolidated onto a smaller tract where,

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[55]Powell, *Wyandot Government* (1881); Trigger, *Children of Aataentsic* (1976), II, 825. Re: Huron of Lorette near Quebec City, Morissonneau, "Huron of Lorette" (1978).

[56]Hale, "An Iroquois Condoling Council" (1895), 46; MacKenzie, *Six Nations Indians in Canada* (1896), 27-39; Noon, *Law and Government of the Grand River Iroquois* (1949), 17-18; Montgomery, "Legal Status of the Six Nations in Canada" (1963), 94.

[57]Six Nations Council with W. Claus, Dpty. Supt. Ind. Dept., 18 Feb. 1804, *RG10*, Vol. 717, 34-40.

[58]Torok, "Tyendinaga Mohawks" (1965), 76-77.

[59]*Supra* ch. 1, note 28.

[60]*Rep. Ind. Affrs., 1844*, 142; Johnston, "Six Nations in the Grand River Valley" (1994), 170; Weaver, "The Iroquois: Consolidation of the Grand River Reserve" (1994), 189.

because of their close proximity to one another, matters which had previously been national in character became confederal concerns, and the practical reach of the confederal council's authority was consequently extended.[61]

In response to the demands of reserve life, and no doubt under the influence of the missionaries who resided at and in many cases initiated native settlement on reserves,[62] some nations adopted written constitutions. Amherstburg Huron constitutions in 1843 and 1846 were premised upon the need to codify customary law for the Huron reserve. The preamble to the 1843 constitution provided that, whereas it had "ever been the custom of the Wyandotes" to appoint "Chiefs", and whereas they were "determined to adhere to that good old custom of their Forefathers", to prevent "any misunderstanding" it had been decided "to declare and to explain in writing, the general powers & authority which they understand the Chiefs ought to possess...."[63] The preamble to the 1846 constitution stated:

> "*We* the Chiefs and Warriors of the Wyandott Indians of the Huron Reserve in full Council assembled being fully impressed with the necessity of having a written Constitution for the future government of our People *Do* by these presents solemnly pledge our word and honor to keep and maintain the following Rules and Regulations, believing as we do that a due regard to the principles of equal and impartial justice will ever ensure peace, prosperity and happiness....[64]

The 1843 constitution provided that chiefs had governmental powers over "the Common interest of the tribe" and judicial powers over "all matters of dispute or difficulty" arising

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[61]Weaver, *ibid.*, 182.

[62]On missionary influences, Graham, *Medicine Man to Missionary: Missionaries as Agents of Change among the Indians of Southern Ontario* (1975), 1-5; Hall, *Red Man's Burden* (1984), chs. 4, 5.

[63]Wyandot Constitution, 15 May 1843, *RG10* Vol. 457, 81036-37 (certified as true copy by G. Ironside, Ind. Dept. Agent).

[64]Wyandot Constitution, 11 Aug. 1846, *RG10* Vol. 441, 899-903.

between individuals about "their separate allotments of land within or upon the Wyandott Reserve...."[65] There was no mention of criminal jurisdiction. In the exercise of these powers the chiefs were to act "conscientiously and impartially", and in determining disputes to base their judgments upon the "justice of the case".[66] The 1846 constitution provided that the "Head Chief" could only make decisions with the "advice and consent of the other Chiefs", with a majority needed for decisions.[67] This provision may have related to judicial decisions, for elsewhere it was stipulated that a "full Council", consisting of chiefs and warriors, was to decide upon matters "affecting the general interests of the People of the said tribe".[68] The 1846 constitution also recognized the degree to which the Wyandot government was integrated within the imperial constitutional order: resolutions, after being passed by a majority of the full council, were to be submitted "for the further consideration of the officer of the Indian Department in Charge of the said tribe".[69] Neither constitution identified rules governing the selection of chiefs, the importance of clans or the role of clan mothers.

In 1830 the Credit River Mississaga enacted a constitution for the government of their reserve which represented both a confirmation of and a departure from the customary Ojibwa constitution. Article 1 provided that, in accordance with "our ancient customs", the "Indians of this village, shall be governed by Chiefs...."[70] There were to

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[65]*Supra* note 63.

[66]*Ibid.*

[67]*Supra* note 64.

[68]*Ibid.*

[69]*Ibid.*

[70]"By Laws and Regulations for the Indian Village at the Credit", 23 April 1830, *RG10* Vol. 46, 23976-23983 (filed in "Deputy Superintendent General's [Indian Department] Office Correspondence, 1830").

be three chiefs, including a "Head Chief" who would preside in legislative councils and administer the laws. Although vested with "the supreme authority", he was "to govern according to law" and not to enforce any regulation "till it regularly becomes a law by receiving the sanction of the Council".[71] By article 3, the chiefs were, "[a]ccording to the old customs of our nation", to be elected for life by a majority of the people.[72]

Part Three of the code addressed the constitution and function of the "General Council" and the "occasional council". The general council, consisting of "the whole nation in the village" was the legislative body, and was to be conducted "according to our old customs, the chief presiding".[73] Laws were made by a simple majority vote, and could be repealed by a two-thirds majority vote. Occasional councils, consisting of one chief and ten householders, were to regulate matters of general welfare requiring no legislation.[74]

The Mud Lake Mississaga enacted a written constitution in 1845. Its preamble read:

> We the undersigned Indians residing at Mud Lake do this 13th day of June 1845 organize ourselves under the following Rules and regulations and mutually agree to act accordingly. If any Person that break these articles we shall proceed against him constitutionally and further these articles shall be renewed annually.[75]

It was provided that there would be a chief, a president or general speaker, and six counsellors. The speaker was to investigate complaints, which would then be determined

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[71]*Ibid.*

[72]*Ibid.*

[73]*Ibid.*

[74]*Ibid.*

[75]Mud Lake Constitution (1845), *RG10* Vol. 154, 89582 (approved by Indian Department: S.P. Jarvis, Chief Supt. (Upp. Can.) Ind. Dept., to Mud Lake Mississaga, 20 June 1845, *RG10* Vol. 154, 89584).

by the chief, speaker and council who had the "power to adjust all matters in dispute".[76] Like the Wyandot constitution, the Mud Lake constitution did not identify the rules governing the selection of chiefs, although the Mud Lake Mississaga had previously adhered to general Ojibwa customary law in this respect.[77]

These constitutions represent the synthesis of aboriginal and British jurisprudential concepts. They reflect a commitment to the possibility of positive law, the importance of subjecting government to the rule of law, the distinction between legislative, executive and judicial functions, the identification of individual rights and duties distinct from those of clan or village collectivities, and the recognition that disputes were public, not private, matters to be adjudicated by village (reserve) councils and not lineages or clans. Nevertheless, these instruments either expressly or implicitly confirm the continued relevance of at least some elements of customary law. The Mud Lake constitution, in failing to provide sufficient detail in certain areas, made reference to customary law necessary. The Huron and Credit River constitutions, by expressly incorporating and codifying customary law, must be interpreted in light of that law.

In this latter respect difficulties of interpretation emerge. For example, the 1818 treaty by which the Credit River band ceded part of the Mississaga Tract was signed by five chiefs representing the Eagle and Otter clans, suggesting adherence to the traditional Ojibwa constitution.[78] Although the Credit River written constitution provided for the election of chiefs "[a]ccording to the old customs of our nation", by failing to identify

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[76]*Ibid.*

[77]*Supra* note 50.

[78]Treaty of 1818, *ITS*, #19. *Cf.* Jones (a Credit River chief), *History of the Ojebway Indians* (1861), 107-8 (by Ojibwa custom, chiefs were selected by election *and* hereditary succession); Van Dusen, *Indian Chief* (1867), 7 (Credit River Mississaga had several "bands" each having several chiefs).

electors and candidates by clan it apparently deviated from those customs. An interpretation of the written constitution which reconciled its terms with the original customary constitution would therefore necessitate reading into the text certain additions, such as the restriction of candidates to traditional clan chiefs. Like statutes to the common law, then, native written constitutions of the nineteenth century stood to customary law as a parallel though paramount source of law.[79] The difficulty with this conclusion, however, is that many elements of the original customary constitutions had already been either abandoned or modified prior to the enactment of written law. As the nature of native life had changed in response to settlement onto reserves (or the influence of missionaries), the diplomatic character of inter-lineage or inter-clan councils had ceased to be effective (or acceptable), and village and national—or reserve—councils had begun to assert authority over matters previously within the jurisdiction of lineage or clan councils.[80] The absence of mention of clan systems in written constitutions no doubt reflected this fact. In short, the body of customary law which native written law confirmed likely represented traditional law as previously adjusted to reserve conditions.

D. Native Legislation and Orders in Council

Although the Six Nations confederal council at the Grand River tended to govern through non-legislative, or customary, mechanisms,[81] other native governments managed reserves through both general legislation and resolutions of chiefs-in-council. Thus, the Wyandot enacted general rules relating to the use of public property, and the Credit River

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[79] *Cf.* Cherokee Constitution (1839), in *Constitution and Laws of the Cherokee Nation* (1892) (modelled on United States Constitution, appeared to abrogate all aspects of customary law).

[80] Noon, *op. cit.*, 42; Shimony, *Conservatism Among the Iroquois of the Six Nations Reserve* (1961), 20-34. These commentators refer to conditions after 1860, but the trends they observed no doubt commenced earlier.

[81] Noon, *ibid.*, 41-42.

Mississaga enacted rules governing the Credit River salmon fishery and highway labour.[82] The Credit River Mississaga also met in council with other Ojibwa bands to frame regulations on matters of inter-reserve concern. In 1836 regulations were enacted (in the presence of Indian Department officials and later approved by the lieutenant governor) on such matters as immigration, families, and alcohol.[83]

The daily administration of reserve government was carried out through resolutions of chiefs-in-council. The resolutions of the Credit River council are illustrative.[84] On constitutional matters, resolutions were passed recognizing the election of chiefs and the appointment of other public officers,[85] adopting regulations made at Ojibwa general councils,[86] confirming treaties made with the Six Nations,[87] and creating

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[82]"A Plan adopted by the Wyandotts," (c. 1852), *RG10* Vol. 441, 871 (rules for use of wagons and horses); Credit River, "By Laws and Regulations", *supra* note 70.

[83]Account of Council between Chiefs of Grape Island, Rice Lake, River Credit, Balsam Lake, Sahgenge, Coldwater and Narrows, 28 Jan. 1836, *CO* 42/516: 534-536, approved by lieutenant governor (*RG10* Vol. 1011, II, 31). Regulations provided that: permission from one's own "Tribe" was required before moving to another village, and tribes could reject immigrants (§5); persons of mixed race could "become a part of or attached to any Tribe" provided they "submit to the rules and regulations of the said Tribe" (§10); inter-village marriage required consent of respective "Tribes", and the couple were to reside at the husband's village "unless otherwise agreed upon by the Chiefs" (§5); extra-marital cohabitation was prohibited, with penalties "to be determined in Council" (§5); parents of children born outside of marriage were to be denied their share of presents and land payments for three years, and separation was prohibited except in cases of adultery (§6); and abusers of alcohol would lose rights to presents (§§7-9).

[84]*Minutes of Credit River Councils* (1834-47), Vol. II, *RG10* Vol. 1011.

[85]James Young elected third chief (2 March, 1835, §1, *ibid.*, 9), Samuel Wabbahneeb elected third chief and "Minghinahwas (aide-camps)" for chiefs appointed (1 Jan. 1836, §§1, 2, *ibid.*, 22).

[86]Regulations made at 1836 Ojibwa General Council (*supra* note 83) adopted (5 July 1836, §1, *ibid.*, 24).

[87]"[O]ld treaty of friendship" with Six Nations renewed (14 Sept. 1837, *ibid.*, 49).

an elected advisory committee.[88] Resolutions were also passed on matters of immigration and adoption,[89] public welfare,[90] public enterprises[91] and labour thereon,[92] and private business.[93] Similar resolutions were made at the Sarnia Ojibwa reserve.[94]

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[88]Committee of six elected for "advising and Counselling with our Chiefs" (11 Jan. 1842, *ibid.*, 115).

[89]Inter-reserve immigration discouraged and "John Johnson & family were adopted into this Tribe" (15 Sept. 1834, §§4, 5, *ibid.*, 4), John Tebeco and family "receive[d] back into this Tribe" upon producing "from the Rice Lake Chiefs a certificate of their having given them permission to return home to the Credit" (12 May 1840, §1, *ibid.*, 106).

[90]Each adult allowed "2/6" work at blacksmith done "gratis" (24 March 1835, §2, *ibid.*, 13), funds allocated for "support" of blind man (15 March 1836, §8, *ibid.*, 27), one bushel potatoes granted to each resident (6 May 1837, §1, *ibid.*, 45), "all Debts due by our people to the Tribe be forgiven" and cows bought for widows (10 May 1839, §§1, 5, *ibid.*, 63).

[91]Blacksmith operation "purchased for the Tribe" and rented to operator (20 Jan. 1835, §5, *ibid.*, 5-6), lessee of nation's saw mill selected (24 March 1835, §5, *ibid.*, 13), funds allocated to purchase oxen and cow (2 March, 1835, §2, *ibid.*, 9), funds allocated to build road (25 April 1835, §1, *ibid.*, 16), materials purchased to build chapel (2 Oct. 1835, §4, *ibid.*, 20).

[92]Male residents ordered to "clear the town plot (25 April 1835, §3, *ibid.*, 16), "put up a coal pit" and "fix the dam in the river" (2 Oct. 1835, §§1, 3, *ibid.*, 20), and "repair the fences on the flats" (20 April 1839, §3, *ibid.*, 61).

[93]Permission granted to blacksmith to establish business (2 March 1835, §4, *ibid.*, 9), permission denied to another blacksmith (20 April 1835, §2, *ibid.*, 15), permission granted to establish a brickyard (3 March 1837, §7, *ibid.*, 43), blacksmith prohibited from extending credit to individuals "on account of the Tribe" (24 March 1835, §3, *ibid.*, 13).

[94]For example, council at Ojibwa Sarnia reserve passed the following resolutions in 1856, *RG10* Vol. 453: provision for sick and those suffering from fire (15 Dec., §§4, 5, pp. 19-20, 26 May, pp. 23-4); chapel steward appointed (15 Dec., §6, pp. 19-20), ploughs and fences purchased (26 May, pp. 23-4); constable to withhold annuity payments from certain "bad Girls" (21 July, §5, pp. 21-22), and to admonish drunks to reform (26 May, pp. 23-4); certain families who had been admitted to the band "on the condition that they would strictly govern themselves according to the rules of the Reserve" expelled "for repeated bad conduct" (19 Sept., p. 43).

E. Native Jurisdiction over Reserve Land Use

As seen above, letters patent and treaties relating to the Six Nations Grand River and Tyendinaga reserves confirm that native customary law governed the internal use of reserve land by natives. The continuity of native land customs on other reserves was also recognized. According to the Indian Department, in general "the internal System or Constitution" of native nations provided that lands were held "in common as a Body", and not individually.[95] Although the typical reserve of the mid-nineteenth century was "not subdivided into regular plots", the pattern established in pre-reserve villages was followed, and individuals, families or larger clan units acquired rights of possession to areas of cultivated land which could be purchased or inherited by others of the nation.[96]

The chiefs regulated reserve land use. Not only did the crown treat with reserve chiefs for the surrender of reserve land (as noted above), but it obtained the consent of native governments for non-native use of reserve land in other circumstances as well. Thus, plans for building roads, schools, and churches and settling other native bands on reserves were submitted to reserve chiefs for their approval prior to execution.[97] Reserve

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[95]Rep. of Ind. Dept. Supt. to Earl of Gosford, Gov. Gen., 28 April 1836, *PP* 1839, XXXIV, #223, 217, p. 38.

[96]*Rep. Ind. Affrs., 1844*, 147, 355, 179; J. Givens, Ind. Dept. Supt., to Z. Mudge, Sec. to Lt. Gov., 12 Feb. 1830, *RG10* Vol. 5, 2342-3. The crown's assumption that natives held land "in common" may have frustrated the establishment of pre-reserve landholding systems in which clans and lineages held rights: Shimony, *op. cit.*, 19.

[97]J. Givens, Chief Supt. (Upp. Can.) Ind. Dept., to Captain Vield, Sarnia, 1 Nov. 1836, *RG10* Vol. 501, 205 (re: request by township for road through Ojibwa Sarnia reserve denied as governor was "averse to interfere with or influence the Indians respecting their lands except in cases of a very urgent nature"); Givens to J.B. Clench, Ind. Dept. Agent, 21 June 1831, *RG10* Vol. 499, 152 (re: chiefs' permission to build school); J.M. Higginson, Civil Sec. Ind. Dept., to J.W. Keating, Ass. Supt. Ind. Dept., 13 Sept. 1844, *RG10* Vol. 456, 256-58 (re: "consent of the Chiefs of the Tribe [of Walpole Island]" for Catholic building); Givens to W. Jones, Ind. Dept. Agent, 17 Dec. 1831, *RG10* Vol. 499, 221 (settlement of Ottawa band on St. Clair Chippewa reserve if "the Chippewas, in Council, notify their Consent"); Jones to Higginson, 1 June 1844, *RG10* Vol. 142, 81450 (request "Chiefs in Council to assign a Location" to Pottawatomie

chiefs-in-council also exercised jurisdiction over the management of land use among natives.[98] Although it was Indian Department policy to encourage "detached farms" or "individual lots", final decisions about land use were left to chiefs.[99] Further, the policy of encouraging individual lots was not considered inconsistent with traditional conceptions of collective landholding; indeed, when natives sought title under colonial municipal law to lots on reserve land, arguing that their "individual rights" were violated by "laws and usages" according to which reserve land was held by "tribal tenure", they were refused.[100]

Native customary law regarding landholding, use and regulation was codified and supplemented by the 1830 Credit River constitution, which contained the following provisions: all lands, timber and fisheries in the reserve were "held as publick property", and were inalienable by individuals without permission of council; everyone had the right to fish and cut timber "for their own use"; no individual had the right to possess land without permission of chiefs; lands allocated to families were to be "possessed by them

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band on Sarnia reserve). Generally, Beaven, *A Visit to the Indian Missions in Upper Canada* (1846), 38-9 ("so far...no step has been taken towards them [the reserves] without the consent of a council of their chiefs").

[98]*Rep. Ind. Affrs., 1844*, 355 (land possessed "with the sanction of the Chiefs"), 147 (at Walpole Island "inferior Chiefs" met with "Head Chief" and "subdivided the farms and arable land").

[99]Givins to T.G. Anderson, Ind. Dept. Agent, 24 Aug. 1830, *RG10* Vol.499, 65-6 ("endeavour to persuade" chiefs of this policy); Givens to Clench, 18 Dec. 1830, *RG10* Vol. 499, 94-5.

[100]Memorial to Duke of Newcastle, Sec. of State, April 1858, in *Colonial Intelligencer* (1860), 153. Also, Memorial to Imperial Government by John Norton, 2 Aug. 1804, *CO* 42/336: 175-8 (Grand River reserve was "possessed according to their ancient customs" giving rise to problems which they had "no Laws to remedy" therefore fee simple patents required); Givens to Anderson, 13 Nov. 1835, *RG10* Vol. 501, 93-4 (petition for lot by Ojibwa native on Narrows reserve not granted without chiefs consent); D. Napier, Sec. Ind. Dept., to H.C. Darling, Dpty. Supt. Ind. Dept., 31 Jan. 1827, *RG10* Vol. 496, 31398-400 (petition by member of Caughnawaga Mohawk to hold land under same terms as non-native lessees rejected because chiefs, who thought it would "lead to the dissolution of their Common Property", refused consent).

and their descendents forever", subject to "the control of the councils"; landholders had the liberty, "with the advice of the chiefs", to exchange their lots and to sell their improvements to one another.[101] Under these laws, the Credit River council passed resolutions allocating lots to individuals,[102] regulating leases to non-natives,[103] setting town plots,[104] and regulating use of timber.[105] Similar resolutions were made at the Ojibwa Sarnia reserve.[106] Insofar as resolutions were made in relation to non-natives, it may be said the jurisdiction of councils was "territorial"—extending over all people within the reserve—as opposed to "personal"—or extending only to natives within the reserve.

Parallel native and colonial land laws were accompanied by parallel native and

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[101]Credit River, "By Laws and Regulations," *supra* note 70.

[102]*Minutes of Credit River Councils, supra* note 84: Sally McLean granted lot "on condition that the person with whom she is now living shall marry her" (20 Jan. 1835, §4, p. 5), Samuel McCallum granted lot "lying on the creek near Mike's" (24 March 1835, §9, p. 13), lot "lately occupied by S. Wabbahneeb granted to Isaac Henry" and Wm. Jackson granted lot on condition that he "relinquish his claims to the lot joining Wm. Herkermer's land" (6 May 1837, §§3, 4, p. 45).

[103]William Herkermer granted permission "to put a white man on his farm as a Tenant" (2 March 1835, §5, *ibid.*, 9), a non-native denied permission to lease land (20 April 1835, §4, *ibid.*, 15), "That our People shall not be allowed to Lease their farm lots to White people" (15 March 1836, §2, *ibid.*, 27), "all white people" prohibited from cutting wood "on the Indian land" and "Rent" from "White people" residing on reserve to be collected (25 Jan. 1837, §3, *ibid.*, 39), "That no person belonging to our Tribe shall have the power to let or lease his her or their farms or houses to the white people without first obtaining the sanction of this council or the majority of the Chiefs" (7 Feb. 1837, §4, *ibid.*, 40).

[104]25 April 1835, §2, *ibid.*, 16.

[105]"[W]hite people" to pay "reasonable price for all the timber they may cut on the Indian Reserve" "except where special permission is given by the Chiefs" (20 Jan. 1835, §3, *ibid.*, 5), "no individual shall be allowed to sell timber on the public lands" (1 Jan. 1836, §3, *ibid.*, 22), "our People who may wish to clear their lands, shall be at liberty to sell the timber or wood on the land they may wish to clear" (3 March 1837, §5, *ibid.*, 43).

[106]Resolutions in 1856, *RG10* Vol. 453, allowed certain individuals to cut and sell trees (15 Dec. 1856, §§7, 8, pp. 19-20) and alloted reserve land to particular families (15 Dec. 1856, §§9, 10, pp. 19-20, and 26 May 1856, pp. 23-4).

colonial jurisdictions over land disputes. Internal disputes over reserve land use were determined by chiefs-in-council.[107] In *Crane v. Johnson* (1844), for example, the Credit River Mississaga council held that the purchaser of a lot who took possession without paying the full purchase price was either to restore the vendor to possession or to pay rent to the nation and offer the vendor another lot on the reserve as compensation.[108]

F. Native Jurisdiction over Criminal Matters

At an 1820 council with Indian Department officials at the Muncey Delaware reserve, native delegates responded to the assertion that they were subject to colonial criminal law in this way:

> [W]e do not consider ourselves subject to the Laws of the White People. When any bad thing is committed by us we have a mode of our own of punishing the person who is guilty thereof, or of compromising the matter by a few thousand grains of Wampum.[109]

Deputy Superintendent William Claus summarized the Indian Department's response:

> They were then told that...they must consider themselves subject to our Laws if they committed any outrage or offences on our Land....Any outrage among themselves committed on their own Lands they might punish or compromise as they thought proper.[110]

A similar "treaty" was made with the Six Nations during the War of 1812 which Mohawk Chief Peter later claimed "guaranteed our laws and customs" over native crimes "within

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[107]Amherstburg Huron: Wyandot Constitution (1843), *RG10* Vol. 457, 81036-37. Lorette Huron: 1794 deed, *ITS*, #413 (disputes to be "inquired into and settled by the Chiefs in council with the old men"). Six Nations Grand River reserve: *Rep. Ind. Affrs., 1844*, 147.

[108]Resolution of 12 Sept. 1844, *supra* note 84, 206.

[109]Council with Munsey Delaware of River Thames, 25 Nov. 1820, *RG10* Vol. 14, 11497.

[110]W. Claus, Dpty. Supt. Ind. Dept., to Sir J. Johnson, Supt. Ind. Dept., 25 Nov. 1820, *RG10* Vol. 14, 11491-92.

our Territory".[111] Thus, it was imperial policy (at least as of 1820) to recognize the continuity of native customary law and jurisdiction over criminal offences committed by natives *inter se* on reserves. Native jurisdiction existed within the territory of the reserve, but within this territory it was apparently "personal" in that it extended only to "themselves" and (by implication) not to non-natives entering the reserve.

In fact, with the social changes accompanying settlement onto reserves the effectiveness of customary forms of dispute resolution diminished—there was, as settlers neighbouring the Six Nations Grand River reserve petitioned in 1818, "a laxity in their former modes of regulating and punishing offenders...."[112] Certain native chiefs themselves acknowledged that community respect for chiefs (upon which traditional non-coercive methods of maintaining social order depended) was eroding.[113] Also, the close proximity of lineages and clans within small, fixed territories increased the likelihood of inter-clan conflict and decreased the efficacy of inter-clan condolence councils; consequently, reserve councils attempted to fulfil this role instead.[114]

Perhaps for these reasons (as well as the influence of missionaries) the exercise of criminal jurisdiction by the Credit River chiefs deviated from traditional Ojibwa customary law. Instead of confirming the jurisdiction of lineages and clans over disputes, the 1830 constitution provided that claims of theft, assault, slander, bearing false witness, damaging property "or other offences against the laws and customs of our nation" (no express mention was made of more serious crimes) were to be heard before the chiefs,

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[111]Council between W. Claus, Depty. Supt. Ind. Dept., and Six Nations, August, 1826, quoted at Williams, *The Chain* (1982), 123-24.

[112]Petition of Inhabitants of Niagara, Gore and London Districts to Leg. Council, Upp. Can., 24 Feb. 1818, *ROBA*, IX, 471-72.

[113]*Infra* ch. 10, note 22.

[114]Noon, *op. cit.*, 42.

with the option of a jury of six men, and offenders were punishable at the discretion of the chiefs and council.[115] The Credit River council passed several resolutions relating to public order and criminal law, including resolutions expelling people guilty of "bad conduct",[116] authorizing officers to control young people,[117] prohibiting excessive alcohol consumption,[118] sentencing those guilty of misconduct to be lashed,[119] appointing constables to arrest suspicious people at night,[120] and hearing and determining allegations of stealing.[121]

Thus, although native jurisdiction over crimes on reserve land and between natives was initially recognized, the continued effectiveness of traditional aboriginal customs was questioned by some natives and settlers, and in at least one case native municipal law was adapted to the new conditions of reserve life through the incorporation of certain juridical concepts of English/colonial municipal law. As will be seen in Chapter Ten, by the mid-1820s colonial courts began to exercise at least a concurrent criminal jurisdiction over reserves.

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[115]Credit River, "By Laws and Regulations", *supra* note 70, §6.

[116]*Minutes of Credit River Councils*, *supra* note 84: 15 March 1836, §3, p. 27; 21 May 1839, §2, pp. 63-4.

[117]6 June 1836, §1, *ibid.*, 34.

[118]24 May 1838, *ibid.*, 57.

[119]21 May 1839, §3, *ibid.*, 63-4 (for "drunkenness" and "bad conduct").

[120]18 Aug. 1840, *ibid.*, 107-8 ("Guardians of our Village" authorized to "take into custody and bring before the chiefs & council" anyone acting in "unlawful or suspicious manner").

[121]1 Aug. 1842, *ibid.*, 118 (man accused of stealing horse from St. Clair Ojibwa reserve brought before council where he confessed and was ordered to pay compensation to complainant).

G. Native Jurisdiction over Expenditures

Although resident Indian Department agents exerted varying degrees of influence over chiefs in the exercise of the jurisdictions examined above, the primary source of Departmental control over native reserve governments was the parental manner in which it released native funds held in trust by the crown pursuant to land-cession treaties. Although annuity or interest payments were occasionally paid in lump sum to be expended by chiefs at their discretion,[122] in general funds were released only for specific approved expenditures. By controlling the uses to which a nation's money could be put, the Department was able to influence the course of its internal policies. The release of funds to reserves was guided by regulations established by the governor. These regulations reflect four basic principles.

First, chiefs-in-council had primary authority over their nation's funds, and before money was released they had to submit a signed requisition form to the Department stating the nature of the planned expenditure.[123] Requests by individual natives or chiefs or by the resident Departmental agent were rejected.[124] Second, expenditure decisions by chiefs-in-council were made in consultation with the resident agent. The Department's role was limited to persuasion: the agent was to "meet the Chiefs in Council to ascertain

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[122]Givens to Clench, 5 April 1837, *RG10* Vol. 501, 258 (annuity payment to Moravian Delaware made to "Chiefs for distribution...as they may think proper"); Givens to Anderson, 2 Jan. 1837, *RG10* Vol. 501, 226-27 (to Coldwater and Narrows Ojibwa chiefs); Givens to Anderson, 2 March 1837, *RG10* Vol. 501, 245 (same).

[123]S.P. Jarvis, Chief Supt. (Upp. Can.) Ind. Dept., to Chief Mebanick, 5 Oct. 1844, *RG10* Vol. 508, 459-62; Givens to Anderson, 30 March 1831, *RG10* Vol. 499, 127; Givens to Clench, 2 Jan. 1832, *RG10* Vol. 499, 226-27; *Rep. Ind. Dept., 1840*, 33-4.

[124]Requests submitted by agents without chiefs' signatures were returned: Higginson to Jones, 26 Aug. 1844, *RG10* Vol. 142, 81569; Anderson to J. Morrison, 3 Dec. 1845, *RG10* Vol. 532, 76. Agents were directed to refuse to sanction requests "which have not been discussed in Council and approved by a Majority of the Chiefs present" (Jarvis to Jones, 29 March 1844, *RG10* Vol. 456, 177-79).

their wants and to offer such suggestions for their consideration as he may deem most beneficial to the Community at large".[125] He would then either approve the council's decision by countersigning the requisition, or recommend that the Department superintendent deny the request.[126] Third, treaty payments were regarded as national revenues, and the Department's primary objective was to ensure that expenditures benefited the public interest.[127] And, fourth, the Department asserted the right to deny requisitions made by chiefs-in-council.[128] Although the determination of public interest was, in the first instance, made by chiefs-in-council, requisitions were vetoed unless they reflected Departmental perceptions of a nation's public interest—that is, unless expenditures were consistent with the objective of creating Christian farming communities.[129]

The whole system was at once a confirmation and a restriction of native rights of self-government. The continuity of the native institution of chieftainship was recognized,

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[125]Jarvis to Jones, 29 March 1844, *RG10* Vol. 456, 177-79.

[126]*Ibid.*

[127]Jarvis to Chief J. Snake, 9 April 1844, *RG10* Vol. 508, 187-88; Jarvis to Jones, 27 May 1841, *RG10* Vol. 505, 129.

[128]Jarvis to Higginson, 30 Sept. 1844, *RG10* Vol. 143, 82247-49 (whether expense was "too large" or was in "the interest of the community" were ultimately matters for the governor).

[129]Funds refused for chiefs' debts (Jarvis to Darling, 19 Sept. 1844, *RG10* Vol. 147, 84765-76 and Givens to C. Clarke, 24 Feb. 1836, *RG10* Vol. 501, 120), an orator (Anderson to G. Vardon, 4 Feb. 1847, *RG10* Vol. 532, 332), and breeding mares (Givens to Anderson, 21 May 1832, *RG10* Vol. 499, 246). Credit River chiefs were directed to build houses and farms before saw mills and storehouses, and were prohibited from buying a schooner, paying medical bills, sending chiefs to England, and buying a cow for a chief: Givens to Credit River Chiefs, 10 May 1831, *RG10* Vol. 499, 135; Jarvis to Higginson, 28 Aug. 1844, *RG10* Vol. 142, 82008-9; Jarvis to Higginson, 20 Aug. 1844, *RG10* Vol. 142, 81866-67; Jarvis to Higginson, 1 Oct. 1844, *RG10* Vol. 143, 82297-99, Higginson to Jarvis, 18 Oct. 1844, *RG10* Vol. 143, 82305, Chiefs Sawyer and Jones to Jarvis, 2 April 1845, *RG10* Vol. 147, 84715-20.

but only as a "Subordinate Organ",[130] the function of which was re-defined to meet the objectives of the imperial government.

III. Imperial Judicial, or Quasi-Judicial, Recognition of Native Law and Government: Indian Department Courts of Inquiry

The functions of the Indian Department superintendent included "settl[ing] disputes, which not infrequently arise among the Chiefs", and, "settling disputes existing between Chiefs or particular individuals of the community", and when necessary submitting these cases "for consideration of the Governor in chief...."[131] Thus, to the extent that internal reserve disputes were determined by British authorities, they were determined not by municipal courts but by the Indian Department or, more specifically, "by Tribunals appointed under the Royal authority for that purpose".[132] Proceedings were typically initiated by native petitions to the governor seeking relief. If the governor thought it appropriate, the Indian Department was directed to institute a "Court of Enquiry"[133] presided over by the resident agent, the superintendent, or by judges from colonial courts. In at least one case the nation's chiefs sat with Indian Department officials to determine a complaint. Insofar as their decisions were guided by rules and based upon findings of fact established by evidence given under oath, it may be said the Indian Department courts of inquiry were "judicial" in form. However, they differed from municipal courts of law in several respects. First, parties were apparently not represented by counsel, and witnesses were apparently questioned directly by members of the court. Second, decisions took the form of recommendations to the governor and

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[130]*Supra* note 47.

[131]*Rep. Ind. Dept., 1840*, 31; *Rep. Ind. Affrs., 1844*, 441.

[132]Duke of Richmond, Gov. Gen, to Leg. Ass. Low. Can., 2 Feb. 1819, *RPA*, 9-10.

[133]Jarvis to Chief Wawanosh, 29 March 1844, *RG10* Vol. 508, 152-53.

became binding only upon his approval. Third, the courts did not apply municipal law, but determined complaints according to rights and duties defined either by native customary law or by treaties, deeds or other instruments defining native-crown relations. Fourth, unlike the colonial judicature, which was a permanent component of the colonial constitution deriving authority from colonial statutes, the courts of inquiry were *ad hoc* entities deriving authority from instructions issued under the royal prerogative through the imperial Indian Department. In this respect they resembled the imperial tribunal established in *Mohegan Indians v. Connecticut.*

To summarize, it may therefore be appropriate to classify these courts as exercising "quasi-judicial" powers like those of modern administrative tribunals. As quasi-judicial imperial tribunals resolving internal reserve disputes according to native custom, Indian Department courts of inquiry may be seen as a source of imperial common law in much the same way as colonial courts were a source of colonial municipal common law. To illustrate the extent to which these tribunals recognized the continuity of native customary law and government, several decisions are examined below.

A. Challenges to Chiefs' Jurisdiction over Land Disputes

1. *Keutrokwen's Case* (1828)

This case arose at the Caughnawaga Mohawk reserve, and was heard before the Secretary of the Indian Department for Lower Canada, Duncan Napier, the Departmental agent for the reserve, Captain Hughes, and four "Principle Chiefs". The complainant argued that, while away from Caughnawaga, he had been wrongfully dispossessed of his house located in the village, that the chiefs had wrongfully denied him relief upon his complaint to them, and that the complaint was within the jurisdiction of provincial authorities.[134] The chiefs held that the complainant had been absent for some twenty years and "that According to the Custom of their Nation" the complainant's wife had been entitled to dispose of his property.[135] With respect to jurisdiction, the chiefs concluded that "in conformity with the Custom of their Nation all Complaints relating to property in their Village should be settled amongst the Indians themselves...."[136] Although not clear from the record, the Indian Department officials on the court apparently concurred with the chiefs' conclusions. The decision was a confirmation of the continuity of native customs relating to land use and of the chiefs' jurisdiction over land disputes at Caughnawaga. It is therefore consistent with the interpretation of *Iroquois Indians v. Jesuit Fathers* (1762) (which also arose at Caughnawaga) presented above[137] and with the conclusions on native authority over reserve land use reached above.[138]

2. *The Lorette Chiefs' Case* (1843)

In this case, members of the Lorette Huron challenged the authority of their chiefs to make a regulation forbidding residence outside the village of Lorette.[139] In support of the impugned regulation the chiefs cited the provisions of the deed by which they held the reserve, which made Huron rights of possession contingent upon their residence within the village, and which provided that the chiefs had jurisdiction over disputes

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[134] "Minutes of an Enquiry held at Montreal upon the petition addressed to His Excellency the Commander of the Forces by Chas. Keutrokwen, alias Simonet, Warrior of the Iroquois Tribe of the Sault St. Louis", 22 Dec. 1828, *RG10* Vol. 792, 7525-29.

[135] *Ibid.*, 7526-27.

[136] *Ibid.*

[137] *Supra* ch. 6, I, A.

[138] *Supra* sec. II, E.

[139] Memorandum of Edw. Glackmeyer, 16 Nov. 1843, *RG10* Vol. 7, 3532.

arising with respect to the reserve.[140] This inquiry was held before Indian Department Secretary Napier who, "[a]fter a separate examination of each case of complaint", informed the complainants that they should cease "in their resistence to the acknowledged Chiefs of the Tribe...."[141] In his report, Napier observed that it had "always been the practice to uphold the authority of Chiefs in preserving proper subordination", and that presents were to be refused "to Indians who resist[ed] the lawful command of Leaders...."[142] In this case it may be said that the chiefs had "authority" and their order was "lawful" by virtue of native customary law as recognized by a deed originally issued under the French regime, which in turn was recognized under the principle of continuity by British imperial law.

B. Claims of Negligence, Misconduct and Fraud of Chiefs

1. Chief Bernabé's Case (1843)

This case involved a complaint by certain chiefs of the Restigouche Micmac that one of the chiefs, Thomas Bernabé, was disloyal to the crown and had "abused his authority as a chief" by leasing reserve land for personal profit.[143] The inquiry was held before Thomas Bustead and John Fraser, Justices of the Peace for the District of Gaspé. With respect to the first charge, it was found that Bernabé had indeed refused to take an oath of allegiance to the crown; however, it was held that this refusal was justifiable given his "Apprehension" about the meaning of the oath.[144] With respect to the second

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[140]Statement of Chiefs of Lorette, *RG10* Vol. 7, 3524; deeds of 1742 and 1794, *ITS*, #412-13 (also, *supra* note 107).

[141]D. Napier to R. Rawson, 13 Dec. 1843, *RG10* Vol. 7, 3521-2.

[142][Napier], Notes on Memorial, c. 1843, *RG10* Vol. 7, 3530.

[143]Napier to R. Rawson, 4 Oct. 1843, *RG10* Vol. 7, 3441-42.

[144]Napier, Report on Chief Bernabé's Case, 9-11 March 1843, *RG10* Vol. 7, 3454-57.

charge, several witnesses were questioned by the court, but none had any direct knowledge of the alleged fraud.[145] The Governor General therefore instructed "Bernabé to be restored [as chief] in consequence of the charges of disloyalty and dishonesty...having on inquiry been disproved...."[146]

2. *Chief Wawanosh's Case* (1844)

This case arose as a result of petitions from the Walpole Island and Aux Sable Ojibwa "praying the sanction of His Excellency for the removal of Waywagnosh from his office of Chief".[147] The petitioners sought a "General Council" so they could prove, first, that Wawanosh was not "the legitimate Heir" and had "usurped the Head Chieftainship" and, second, that he had misappropriated the nation's funds.[148] After a "Court of Enquiry" held by Deputy Superintendent J.B. Clench, the Governor General concluded that Wawanosh's "authority as Head Chief should cease", that one Mishibashzu be recognized as Head Chief, but that Wawanosh be allowed to retain his "rank" as a chief so as to have "a voice in the Councils of...[the] nation...."[149]

Courts of inquiry held on several other Ojibwa reserves also addressed the standard of conduct to be met by chiefs in carrying out official duties.[150]

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[145]Report of Thos. Bustead and John Fraser, Justices of the Peace, 18 June 1843, *RG10* Vol. 7, 3469-72.

[146]Napier to Ind. Dept. Agent, Restigouche, 13 Oct. 1843, *RG10* Vol. 7, 3443.

[147]Givens to Jones, 17 Nov. 1836, *RG10* Vol. 456, 129.

[148]Petition to Baron Sydenham, Gov. Gen., from Ojibwa Chiefs of Sable, Sarnia and Walpole Island (c. 1841), *RG10* Vol. 76, 68694.

[149]Jarvis to Chief Wawanosh, 29 March 1844, *RG10* Vol. 508, 152-53.

[150]*Chief Nogee's Case* (1844)--Mud Lake Mississaga complained that their councils were "disorderly" due to "misconduct" of chief (Petition to Gov. Gen. Lord Metcalf (c. 1844), *RG10* Vol. 406, 105); court of inquiry found complaint caused by "Envy and Malice" (Anderson, "Report on the investigation into the affairs of Peter Nogee the Chief and his people of the Mud Lake", 1844, *RG10* Vol. 154, 89410-15).

C. Challenges to the Constitutional Authority of Chiefs and Councils under Native Customary Law

1. *Chief Tekanasontie v. Agent Hughes* (1840)

This case was heard before Indian Department Secretary Napier and four magistrates of the District of Montreal. It was alleged by a faction of chiefs that Captain Hughes, the Indian Department agent at Caughnawaga, had breached Iroquois custom in his recognition of a second faction of chiefs.[151] This second faction of chiefs counterclaimed that the complainant chiefs had misappropriated the nation's funds. The witness for the complainant chiefs, Chief Tekanasontie, after being "duly sworn", was asked by the court whether the resident agent had "made any Chiefs at Caughnawaga Contrary to the Established Indian Usage", whether the agent had attempted "to change the established Rules and Customs of your Village", or whether the agent had encouraged members of the nation "to set at naught the authority of the Lawful Chiefs...."[152] The witness answered these questions in the affirmative. The integration of native customary

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Yellowhead's Case (1844)--Rama Ojibwa complained about misconduct of Chief Yellowhead (Petition to Sir C. Metcalf, Gov. Gen., 4 Aug. 1845, *RG10* Vol. 405, 380; Jarvis to Chief Nanigishkung, 9 July 1844, *RG10* Vol. 508, 347-48); court of inquiry recommended complaint be dismissed; governor directed department to "impress upon the complainants the necessity of yielding obedience to the authority of the Chief" (Higginson to Anderson, 2 Feb. 1846, *RG10* Vol. 511, 241; 12 Dec. 1845, *RG10* Vol. 154, 89628.

Wa-be-brich's Case (1845)--Owen Sound Ojibwa complained about Chief Wa-be-brich; court of inquiry concluded that "strict inquiry" would find most chiefs guilty of minor misconduct; recommended that chief be reprimanded only and that in future "two others should be associated with him to conduct the affairs of the Tribe" (Anderson to Higginson, 31 Dec. 1845, *RG10* Vol. 532, 100-2; approved by governor: Higginson to Anderson, 29 June 1846, *RG10* Vol. 511, 239-40).

[151] Minutes of the Proceedings of an Inquiry holden at La Chine, on Friday the 10th April 1840, upon the complaints of certain Chiefs and Indians of the Iroquois Tribe of Caughnawaga Contained in a Petition addressed to His Excellency The Governor General, 19 March 1840", *RG10* Vol. 663 (no page numbers).

[152] *Ibid.*

law within British imperial law was raised by the court's next question. It asked whether the witness considered a chief "to be fully installed and entitled to assist in your Council, who has not been approved of by your Father, The Governor", to which he replied, "We consider our appointment of a Chief Conclusive: The Governor's Approval is a mere matter of form...[for] when did he ever reject one that we recommended?"[153] The respondent chiefs were asked "whether Mr. Hughes ever made Chiefs, or interfered with the Affairs of your Village, contrary to the usual custom and usage?"[154] They denied that he had.

In its report the court stated:

> [I]n the Course of the preceding Inquiry into the Allegations Contained in the Petition...[we] do hereby express our Unanimous opinion, that the Evidence adduced on the part of the Petitioners, Appears to be insufficient to Establish any of the Charges therein Contained...[and therefore the agent] stands fully and honourably acquitted of all the Charges preferred against him....[155]

On the counterclaim, the court concluded that the complainant chiefs had indeed wasted the "Public Revenue" of the village, and that "the Indians themselves desire[d] a change" in their council to prevent future waste.[156] The court therefore made the following recommendations: that "all the Commissions granted to Chiefs of that Village be Cancelled", that "the number of Chiefs be reduced to Seven: Vizt. One to each Band [or clan], as they are at present constituted", and "That each Band shall select their Chief, subject to the Approval of the Governor General".[157]

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[153] *Ibid.*

[154] *Ibid.*

[155] *Ibid.*

[156] *Ibid.*

[157] *Ibid.*

Thus, the court of inquiry confirmed not only the continuity of the central feature of Iroquois constitutional custom, the right of each clan to select chiefs for the village council, but also that the authority of these chiefs in British law derived from commissions issued by the governor.

2. *Chief Tekahonwasen v. Agent Chesley* (1845)

This dispute arose at the St. Regis Iroquois reserve and also involved Iroquois constitutional customs. The complainant, Chief Alexis Tekahonwasen, submitted that pursuant to custom he had been made chief, but after allegations of fraudulent conduct had been dismissed by the resident agent, Captain Chesley. The complainant argued that the allegations were untrue and that he could not be divested of his office "but through the intervention of the same council, or their successors, who elected him".[158]

Chesley's arguments in response indicate the extent to which Iroquois constitutional custom prevailed at St. Regis. In earlier reports he had observed that the council consisted of chiefs from each of four clans, or "bands"—namely the Bear, Wolf, Great and Small Turtle clans.[159] With respect to Tekahonwasen's claim, Chesley acknowledged that Tekahonwasen was a descendent of a Wolf clan chief, and when a "vacancy in the wolf band" had occurred, he had been selected successor by the clan.[160] Chesley then turned to the question of the council's confirmation of the clan's nomination, stating that the "ceremony of Election and introduction to that Council, is according to Indian usage (since their civilization) but two preliminary steps": the nominee underwent a one year trial period "*as a listener* in the Council", when, if he

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[158]Petition of Chief Tekahonwasen, St. Regis, to Gov. Gen. Lord Metcalfe, 26 April 1845, *RG10* Vol. 147, 85119-22.

[159]S.Y. Chesley, Ind. Dept. Agent, to Darling (c. 1830), *RG10* Vol. 496, 31503-06.

[160]Chesley to Jarvis, 8 May 1845, *RG10* Vol. 147, 85126.

met the council's approval, he "is *then* recommended by the Council...to the Government and gets a Commission".[161] In other words, there was internal recognition by native customary law followed by external recognition by the imperial crown. However, in this case, Tekahonwasen assumed full powers before the end of the trial period, and was therefore expelled from council.[162]

A court of inquiry held by Indian Department Secretary Napier dismissed Tekahonwasen's charges against Chesley and recommended the "disallowance of Alexis Tekaonwateus's Appointment as Chief...."[163] The governor confirmed Napier's decision. However, confusion arose about the accuracy of the order's interpretation. The interpreter, after stating that the crown no longer recognized Tekahonwasen as chief, added that, "notwithstanding this order, he might still according to Indian custom be a chief in their view if they wished it...."[164] This statement no doubt reflected Iroquois conceptions of native sovereignty: they had a right to follow chiefs selected by traditional means regardless of which chiefs the crown recognized. From the Indian Department's perspective, however, this interpretation of the law was "erroneous" and would have the effect of "setting the power of the Gov. Genl. at naught".[165] Native custom determined the chief's identity, but his authority over both internal and external matters derived from commissions issued by the Governor General. This weaving together of native custom

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[161]*Ibid.*

[162]*Ibid.*, 85127-9.

[163]Napier to Higginson, 7 June 1845, *RG10* Vol. 149, 85826.

[164]Memorandum of British Indian Chiefs at St. Regis, 30 Aug. 1845, *RG10* Vol. 151, 87546. Also, Ed. N. de Lorimier, Interpreter, "Rapport de ce qui s'est passé a St. Regis le 25 Aout dernier", 20 Sept. 1845, *RG10* Vol. 151, 87547-49.

[165]Napier to Higginson, 9 Oct. 1845, *RG10* Vol. 152, 87916; G. Vardon, Memorandum on de Lorimier's report, no date, *RG10* Vol. 151, 87550-51.

and British imperial law was reflected in Napier's subsequent instructions to the nation: "[T]he election [for a replacement for Tekahonwasen] is confined to the Wolf band" of the St. Regis Iroquois "who alone have the right to make choice of one", and any nominations made "without the knowledge or concurrence of the Wolf band, and contrary to the acknowledged custom of the Tribe" would not be recognized by the crown.[166] Napier's conclusions received the express approval of the Governor General.[167] This dispute between Iroquois customary chiefs recognized by the imperial crown and customary chiefs not so recognized foreshadowed modern disputes between Iroquois/Six Nations customary (or elected) chiefs recognized by the federal government under the *Indian Act* and customary or Longhouse chiefs who refuse to acknowledge the authority of the federal government or *Indian Act* chiefs.[168]

IV. A Common-Law Right to Native Law and Government

The analysis of this chapter establishes that the imperial crown recognized the legality of native customary law within native communities, and that imperial tribunals

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[166]Napier to Higginson, 9 Oct. 1845, *RG10* Vol. 152, 87917-8.

[167]Higginson to Napier, 15 Oct. 1845, *RG10* Vol. 152, 87921-22.

[168]*Point v. Dibblee Construction Co.*, [1934] 2 D.L.R. 785 (Ont. H.C.), at 788 (St. Regis/Akwesasne: "life chief...selected by the oldest woman in his own particular clan" sought injunction against chiefs elected pursuant to *Indian Act*); *Logan v. Styres* (1959), 20 D.L.R. (2d) 416 (Ont. H.C.) (Grand River Six Nations: hereditary chiefs sought injunction against elected *Indian Act* chiefs); *Isaac v. Davey* (1973), 38 D.L.R.(3d) 23 (Ont. H.C.), rev'd (1974), 51 D.L.R.(3d) 170 (Ont. C.A.). (Grand River Six Nations: elected *Indian Act* chiefs sought injunction against hereditary chiefs); *Rice c. Conseil de la bande des Iroquois de Caughnawaga* (1975), 8 C.N.L.C. 598 (Que.Sup.Ct.) (Caughnawaga/Kahnawake: traditional chiefs challenged use of customary law to determine *Indian Act* band council); Canada, House of Commons Standing Committee on Aboriginal Affairs, *Summer of 1990* (1991), 4-6 (Canasadaga/Kanesatake: Longhouse and *Indian Act* band council chiefs both selected by customary law, but former asserts sovereignty and latter recognizes Canada's sovereignty); *Claudia Jock v. The Queen*, [1992] 1 C.N.L.R. 103 (F.C.T.D.), (St. Regis/Akwesasne: traditional chiefs challenged use of customary law to determine *Indian Act* band council).

were created to enforce that law against native people, chiefs and Indian Department officials who violated it. The application of native customary law by these judicial or quasi-judicial imperial tribunals represents the clearest evidence of the continuity of customary law as an element of the imperial common law in colonial Canada. Pursuant to the general principles of imperial law examined in Chapter Two, however, the *presumption* of continuity of local law within local communities was not the equivalent in all cases of a *right* of continuity of local law justiciable against the crown.[169] Thus, although it may be clear that the imperial common law acknowledged that customary law on reserves was justiciable among natives and even by natives against crown officials, it is not so clear whether the imperial common law recognized a *right* to customary law justiciable by natives against the crown itself.

The course of crown usage and practice summarized above provides an historical record from which an interpretation of the common-law status of native law and government may be drawn. In constructing this interpretation, it is important to consider the historical record in light a theory of imperial law. It has been argued in preceding chapters that the complex conquest/cession-model of imperial law forms an appropriate theoretical model in which to consider British-native relations in colonial Canada.[170] As was seen in Chapter Two, the legal status of the laws of a conquered or ceded territory varied depending upon the territory's constitutional development: first, the crown might disregard local law by acts of state which were not subject to review by courts; second, after recognizing locals as subjects protected by the rule of law, and after confirming implicitly or explicitly that local law formed part of that rule of law, the crown, if it had retained its prerogative right to legislate for the conquered/ceded territory, might abrogate

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[169]*Supra* ch. 2, IV, C.

[170]*Supra* ch. 6, III.

or alter local law by prerogative legislation; and, third, after it had introduced local representative institutions, the crown could only abrogate or alter local law by local or imperial statute. The status of native customary law and government in Canada can now be considered in light of these principles.

Whether it is concluded that the crown asserted sovereignty over natives in Canada as subjects as early as the 1760s when treaty relationships commenced, or only as late as the 1820s when natives (in Upper Canada) began to settle onto reserves under the parental control of the crown, it is clear from the analysis of this and preceding chapters that the crown did not abrogate native law and government by act of state. Even after recognizing natives as subjects, the crown recognized the continuity of their customs and chiefs. Although it may be argued that the continuity of native customs in unceded Indian lands prior to the 1820s was "exclusive" of the imperial constitution, once natives settled onto reserves, were considered to be subjects, and their customs and chiefs were subjected to the supervisory jurisdiction of the imperial crown, it must be concluded that continuity became "inclusive". And, because crown recognition of native customs and chiefs was so consistent it may be argued that there arose a right to native law and government by (to use Hale's words) "long prescription, usage and custom" amounting to "tacit concession or capitulation".[171] If so, there was a justiciable common-law right to native law and government against the crown—the crown could only have abrogated or altered native law by valid prerogative or Parliamentary legislation, or treaty.

The difficulty with this argument is that the crown conduct upon which it relies is contradictory. Although the crown recognized the continuity of native law and government, its objective in doing so was the appropriation of indigenous institutions as vehicles for its policy of dispositive paternalism. Chiefs were "Subordinate Organs" used

[171]*Supra* ch. 2 note 42.

to implement a policy the ultimate goal of which was the gradual transformation of native communities into Christian agricultural communities. Where native customs or chiefs operated in a manner inconsistent with this objective, they were not recognized or, if recognized, enjoyed only transient recognition until they could be effectively replaced by alternative rules or more co-operative chiefs. In other words, the doctrine of aboriginal wardship represents a sort of *caveat* on crown recognition of native law and government.

Still, the crown's discretion as guardian, while broad, was not without legal limits. At least in Upper Canada, the crown entered into land-cession treaties with native nations. Because the land-cession treaties of colonial Canada were considered not international treaties (which would have secured rights in British law only if incorporated by legislation) but (at least in part) contracts, they effectively transformed certain native rights into justiciable contractual rights; they represented a positive source of rights secure from non-legislative crown abrogation. In many cases these treaties, in creating perpetual rights to reserves and payments, contemplated the continuity of native chiefs and councils, and therefore a liberal interpretation of their terms might identify a treaty right to native law and government on reserves.

The land-cession treaties of colonial Canada also have a second, and perhaps more significant, legal consequence. Aside from representing a positive source of "contractual" rights, they represent "circumstantial evidence" of crown conduct to be balanced against the implications of the wardship doctrine in determining the degree to which the crown confirmed the continuity of native law and government as justiciable rights. It may be argued that the general treaty policy, when viewed as a whole, supports the inference that the crown lost its competence to abolish fully native law and government over reserve land without native consent (or legislation). Indeed, it was asserted in 1858 that although "the gradual destruction of the tribal organization" of native nations was to be sought, it was preferable that native governments only be "dissolved" by "formal Treaty".[172]

When considered together, the crown's wardship and treaty policies suggest there were legal limits to the extent to which the crown could unilaterally abrogate native law and government on reserves without either native consent or legislation. Although it is difficult to determine the precise location of those limits, it may be argued that crown conduct was consistent with the conclusion that the crown intended to assert a right to alter or abrogate without legislation marginal elements of native law and government, but waived its right to abrogate the very existence of native law and government without legislation. The question of what form of legislative instrument—imperial prerogative legislation (order in council or proclamation), colonial statute or imperial statute—would have been necessary to abolish the common-law right to the basic existence of native law and government on reserves will be considered in Chapter Ten. Of course, where traditional native customs were not adapted to reserve conditions and fell into disuse and no alternative customs or rules were developed in their place—as apparently was the case on some reserves in relation to customs governing the resolution of criminal disputes—it may be argued that no formal act of abrogation would have been required before the crown introduced new rules.

It has been stated that there could not have been a legal right to aboriginal self-government in colonial Canada because "these 'rights' were *never* recognized in the courts of colonial British North America and of the Dominion of Canada...."[173] However, unless an extreme positivist jurisprudential perspective is taken, it must be concluded that if there existed a factual, political and customary basis from which a court could, if asked, have drawn the common-law conclusion that a right existed, then the fact

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[172]*Rep. Ind. Affrs., 1858*, Pt. III.

[173]*Director of Support v. Nowegejick*, [1989] 2 C.N.L.R. 27 (Ont. Prov. Ct.), at 34.

that no court was asked to draw the conclusion does not mean that the right did not exist. In fact, there are a number of reasons why the question never arose in court, the most obvious of which is that, prior to 1860, the crown did not attempt to abrogate unilaterally the core elements of native government on reserves. Even if it had, natives might have been barred from seeking a judicial remedy by rules of crown immunity. However, the natives' inability for procedural reasons to enforce their legal rights against the crown does not mean that those rights did not exist or that they could not have been raised as a defence in legal proceedings commenced by the crown against natives. For example, if the crown by special commission had instituted proceedings in the nature of *quo warranto* against a native chief, the above analysis suggests that the commissioners would not have been unjustified in declaring that a right of aboriginal self-government existed at common law. Of course, given the "biases and prejudices" (to use Dickson C.J.'s words[174]) of the time, it may have been unlikely that any British court would have upheld native rights to law and government against the crown, but the analysis of this chapter suggests that there were legal grounds upon which a judge, if so disposed, could properly have done so.

Even if it is not accepted that there was a common-law right to native law and government justiciable against the crown, it is inaccurate—or at least incomplete—to conclude, as one recent court has done, that native law and government existed merely "at the sufferance of the Crown...."[175] Even if the crown had the legal right to disregard native law and government at its discretion, it may be argued that during the century of imperial control of Indian affairs crown usage and practice was consistent with the

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[174]*Supra* ch. 1, note 21.

[175]*A.G. Ontario v. Bear Island Foundation* (1984), 49 O.R. (2d) 353 (H.C.), at 438-39.

conclusion that that legal right was constrained by non-justiciable constitutional rules—the sort of rules which Dicey would later call constitutional *conventions*.[176] If native law and government on reserves was supported by constitutional convention, the sudden unilateral divergence of the crown from that convention may not have been subject to judicial sanction in itself, but because conventions are "mixed up with law"[177] it might have been indirectly illegal; for example, the crown's refusal to acknowledge chiefs would have precluded crown performance of those parts of land-cession treaties which were later held to be justiciable (such as treaty provisions that annuity payments were to be made to chiefs).[178]

Aside from rules of procedure and historical circumstance, there is another reason *colonial* courts did not rule directly on the status of native law and government, namely, the initial legal limits to their jurisdiction over internal reserve matters. This argument, as well as the general question of how a common-law right to distinct systems of native jurisdiction on reserves could survive the statutory introduction of colonial legal systems, is addressed in Chapter Ten.

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[176]Dicey, *Law of the Constitution* (1885), pt. III.

[177]Maitland, *Constitutional History of England* (1926), 342.

[178]*Supra* sec. II, A, 1.

Chapter Ten

The Relationship between the Colonial Municipal Legal System and Native Law and Government on Indian Reserves

Determining the legal status of native law and government on reserves in colonial Canada is complicated by the fact that local legislative and judicial institutions had no direct concern with internal reserve matters. With respect to legislative jurisdiction, it was observed that as long as the imperial crown managed native affairs "[o]ur Canadian Parliament and Ministry...had nothing to do with the Indians...."[1] Illustrative of this division of responsibility was the fate of a motion introduced in the Legislative Assembly of Canada in 1841 requesting from the Indian Department a detailed account of affairs on the Grand River reserve. Although it was argued that the object of the motion "was not to interfere with the management of the Indian affairs but to obtain information", the motion was defeated on the grounds that Indian affairs "had always been under the especial protection of the Crown and that hitherto no interference had been allowed on the part of the popular branch of the Legislature".[2] Indeed, a few years before, the Legislative Assembly for Upper Canada had been instructed by the Lieutenant Governor to cease its investigation of certain Huron land claims because all Indian matters were "constitutionally within the jurisdiction and prerogative of the Crown...."[3] With respect

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[1]*Colonial Intelligencer* (1861), 210.

[2]Can., *Debates Leg. Ass. United Canada*, I, 936.

[3]Sir. F. Bond Head, Lt. Gov., to Leg. Ass. Upp. Can. (c. 1836), *RG10* Vol. 60, quoted by Hall, *Red Man's Burden* (1984), 132. *Cf.* Duke of Richmond, Gov. Gen., to Leg. Ass. Low. Can., 2 Feb. 1819, *RPA*, 9-10 (assembly instructed not to inquire into certain native land claims because Indians were "for weighty reasons of state, under the immediate superintendence and protection of the Crown").

to judicial jurisdiction, the Attorney General for Lower Canada (echoing the crown law officers' 1751 opinion in the *Mohegan* case[4]) stated that in relation to aboriginal claims, "the courts of law of the province can hardly be called upon" because the "rules of municipal law, by which they are regulated, contain no provisions which embrace the relative rights and obligations...between the Aborigines of this continent and the European settlers"; instead, they could seek relief only from the "spontaneous justice" of "His Majesty's Government".[5]

Although primarily a matter of imperial law, native issues were addressed in an incidental manner by municipal law. Because reserves were located in the midst of settled territories, the colonial system had to address the legal problems arising at the margins of settler and native communities. Thus, municipal law determined what legal rights native nations had or did not have in municipal law, the legal consequences for settlers of their interaction with native peoples, and the process whereby native people could acquire the same legal status as settlers. However, as institutions of a legal system distinct from the native customary systems recognized by imperial usage and practice, municipal courts and legislatures offered only fragmentary glimpses of the internal legal reality on reserves.

The purpose of this chapter is, first, to consider the status of native peoples, customs and governments from the perspective of colonial municipal law, and, second, to consider the constitutional relationship between the native, colonial and imperial systems. Of particular concern in this latter respect is the question of whether the colonial municipal system had the legal right to intervene in internal reserve matters but

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[4]*Supra* ch. 4, note 29.

[5]J. Stuart, Att. Gen., Report on Lorette Huron, 17 Aug. 1830, *PP* 1834, XLIV, #617, 339, p. 113.

was prevented from exercising it by the imperial ministry as a matter of policy, or whether it lacked the legal capacity to intervene in such matters altogether.

I. Colonial Municipal Legal Perspectives on Native Peoples, Customs and Government on Indian Reserves

A. The Doctrine of Aboriginal Wardship in Municipal Law

1. Common law

The application of the doctrine of aboriginal wardship in colonial Canada was not expressly mandated by statute; rather, it was a conclusion of (imperial) common law made by colonial courts after considering crown practice. In creating native reserves, said Robinson C.J. in *Sheldon v. Ramsay* (1852), the crown was acting "in the light of a parent and guardian" for natives.[6] In general, the doctrine was cited to explain the inability of native peoples to act collectively as "tribes" or nations at municipal common law. Thus it was asserted that, as wards of the crown, native nations could not hold or alienate the fee to their reserves.[7] This inability to hold property in land had other results in municipal law, including the exclusion of reserve residents from township and provincial elections and their immunity from statutory labour, and the exemption of reserve lands from taxation, distress and seizure for debt.[8] Finally, as wards, natives

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[6]9 U.C.Q.B. 105 (Q.B.), at 133. Also *Mutchmore v. Davis* (1868), 14 Grant 346 (Ont. Ch.), at 358.

[7]O'Sullivan, Sol. Gen. Low. Can. to Earl of Gosford, Gov. Gen., 5 Jan. 1836, *RG10* Vol. 7, 3346-7 ("the property being held by the Crown in trust for the Indians, the latter are in the same situation as Minors, and can, therefore, give no valid title"). Also, S.P. Jarvis, Chief Supt. (Upp. Can.) Ind. Dept., to Macaulay J., 28 March 1838, *RG10* Vol. 502, 132 (as "Guardians of these Children" governments are seised of fee); Macaulay J., "Report on Indian Affairs", 22 April 1839, *RG10* Vol. 117, 168837 (while in "state of pupilage" requests for fee simple refused).

[8]Sir P. Maitland, Lt. Gov., to Earl Bathurst, Sec. of State, 1 Nov. 1823, *CO* 42/370: 248; *Regina v. St. Catharines Milling Co.* (1885), 10 O.R. 196 (Ch.), at 213.

were precluded from taking legal action collectively in municipal courts.[9]

However, the restrictions arising in municipal common law from the doctrine of aboriginal wardship all related to the rights of Indian nations *as nations*; insofar as native people acted individually, apart from their nations, the status of wardship and its attendant legal restrictions ceased to be relevant. Although Indian nations were unable to sue settlers trespassing on reserve land, individual Indians could sue settlers in municipal courts for damage (arising on reserves or off) to their persons or personal property. As the Attorney General for Upper Canada concluded, "they may sue the sued [and] indict the indicted in the same manner as other People for their individual wrongs sustained or for their individual crimes committed".[10] Furthermore, individual natives were free to acquire fee-simple title to land outside reserves, and then were subject to all the rights and duties of property owners in municipal law.[11] In other words, natives could unilaterally cast off the status of wardship by leaving the reserve and joining the settler society.

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[9]S. Chesley, Ind. Dept. Agent, to L.H. Lafontaine, Att. Gen. Low. Can., 28 March 1843, *RG10* Vol. 7, 3353-4 ("the Indians are regarded as minors under the guardianship of the Crown, and as such they are not competent to sustain actions (collectively) in Courts of Law"); J.B. Robinson, Att. Gen. Upp. Can., to D. Boulton, Sol. Gen. Upp. Can., 31 Oct. 1829, *RG10* Vol. 5, 2290-1 (natives incapable of suing trespassers on reserves); *Regina v. McCormick* (1859), 18 U.C.Q.B. 131 (Q.B.), at 136 (natives could not bring "any legal proceedings...in a corporate capacity"). *Cf. Lorimier v. Smith* (Dist. of Luneberg, Ct. of Common Pleas, 1794), *RECJUC* 448, wherein the plaintiff sued in his capacity as "agent for the Indians of Oswegatchie" on a contract "made with him or them" for timber. But see *infra* text at note 28.

[10]Robinson to Boulton, *ibid*. The ability of non-Christian subjects to testify and bring actions was confirmed in *Omichund v. Barker* (1744), Willes 538 (Ch.), which was applied in Canada in *The Queen v. Pah-mah-gay* (1860), 20 U.C.Q.B. 195 (Q.B.).

[11]*Totten v. Watson* (1858), 15 U.C.Q.B. 392 (Q.B.), at 395-96 ("Indian tribes" could not hold fee simple, but "individual Indian" could).

2. Statutory law

Prior to 1857, colonial statutes reflected policies of *protective paternalism*. Thus, legislation enacted for the "protection of the Indians" from "designing and unprincipled" settlers made the purchase of or settlement in Indian lands without crown approval a criminal offence and empowered certain commissioners to hear and determine native complaints about encroaching settlers.[12] Statutory law also prohibited judgments in debt or contract against Indians who were not seised in fee simple of lands of a minimum value, exempted Indians living on unceded or reserve lands from taxes, prohibited the sale of liquor to Indians, and exempted articles purchased with treaty annuity or interest payments to further "agriculture and other civilizing pursuits" from seizure or distress.[13] Municipal courts interpreted these protective statutes as evidence of native wardship status.[14]

In Lower Canada, the 1777 Quebec ordinance on Indian trade remained in force and, subject to minor amendments in 1840, prohibited settlement on Indian lands and prohibited the sale of liquor to and the purchase of clothes, blankets or firearms from Indians.[15] In 1850 proprietary title in existing native reserves (many of which had been

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[12] *An act for the protection of the Indians in Upper Canada* (1850), 13 & 14 Vic., c. 74 (Can.). Also, *Act for the protection of the Lands of the Crown* (1839), 2 Vic., c. 15 (U.C.). On difficulties of enforcement re: Grand River reserve, see *PP* 1852-3, LXV, #1003.

[13] Act of 1850, *ibid.* Other protective acts: *An act to prevent the sale of spirituous liquors...[to] the Moravian Indians on the river Thames* (1801), 41 Geo. III, c. 8 (U.C); *An act the better to protect the Mississaga tribes* (1829), 10 Geo. IV, c. 3 (U.C.); *An Act to prevent trespasses to Public and Indian Lands* (1859), 22 Vic., c. 81 (Can.).

[14] *Totten v. Watson* (1858), 15 U.C.Q.B. 392, at 395; *The Queen v. Hagar* (1857), 7 U.C.C.P 30 (C.P.).

[15] *Ordinance relative to the trade with Indians* (1777), 17 Geo. III, c. 7 (Que.); *Ordinance to provide for the further protection of the Indians* (1840), 4 Vic., c. 44 (L.C.).

missions established during the French regime) was vested in a Commissioner for Indian Lands who was given the power to bring and defend actions relating to the reserves.[16] Because aboriginal title to unceded Indian lands was not initially recognized in the old province of Quebec, land-cession treaties were deemed unnecessary;[17] consequently there was no mechanism for the creation of new reserves. In 1851 statutory provision was made for the setting aside of crown lands for new reserves.[18]

The first statute to embody policies of *dispositive paternalism* was the *Act to encourage the gradual civilization of the Indian Tribes* (1857), the stated objects of which were the "Civilization" of Indians, the "gradual removal of all legal distinctions between them and Her Majesty's other Canadian Subjects", and the "acquisition of property and of the rights accompanying it" by "Individual Members of the said Tribes".[19] These objects were to be attained by gradually breaking up tribal tenure in reserves by subdividing them and granting municipal legal title to lots to "enfranchised" Indian males—natives meeting certain criteria of education and morality who, upon order of certain commissioners, were thereafter barred from having any "voice in the proceedings" of their nations and were "deemed" to cease being Indians. There were no reasons at common law why native individuals could not leave their reserves, purchase property under the municipal legal system and thereby subject themselves to the same legal regime as settlers; the purpose of the Act was to encourage natives, who were generally

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[16]*An act for the better protection of the Lands and Property of the Indians in Lower Canada* (1850), 13 & 14 Vic., c. 42 (Can.).

[17]*Supra* ch. 6, note 39.

[18]*An Act to authorize the setting apart of Lands for the use of certain Indian Tribes* (1851), 14 & 15 Vic., 106 (Can.).

[19](1857), 20 Vic., c. 26 (Can.). Individual property rights and civilization were regarded as inherently linked: Bannister, *British Colonization and Coloured Tribes* (1838), 277.

disinclined to abandon customary forms of landholding,[20] to make this transition.

Colonial statutes enacted to protect natives, or to assist them to join the settler society, were exceptions to the general rule that prior to 1860 Indian policy was carried out by the imperial crown and not by colonial legislatures. Whether or not these statutes are evidence of the colonial legislature's constitutional authority over Indian policy will be addressed below. For the moment, however, it is sufficient to emphasize that before 1860 colonial statutes of protective and dispositive paternalism only addressed matters of mutual settler-native concern (indeed, resort to colonial statute would have been constitutionally necessary whenever settler rights or municipal land titles were altered[21]); they did not intervene in the internal, day-to-day governance of reserves.

B. Native Law and Government in Municipal Law

Although municipal law classified natives as wards of the crown, it also recognized their status as self-governing communities. The following analysis indicates, however, that that recognition was rare, indirect and ambiguous.

1. Statutory law

As seen in Chapter Nine, native reserve government was based upon native customary law as recognized by imperial treaties, commissions, instructions and usage. During the century that the imperial crown managed Indian affairs in colonial Canada, native chiefs derived no authority over their nations from the local colonial legislature. Although there were occasional calls from both native and non-native leaders for the legislature to "pass an Act incorporating the chiefs to act as councillors", no such statute

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[20]Few natives were enfranchised. It was argued that the Act was too "cumberous and exacting" (*Colonial Intelligencer* (1861), 253-4), although it is more likely that natives simply preferred to retain their nationhood: Milloy, *Era of Civilization* (1978), 280.

[21]Sir W. Garrow, Att. Gen., and Sir S. Shepherd, Sol. Gen., 22 June 1817, *Forsy.*, 153-56 (re: alteration in land tenure in Canada).

was made.[22] In 1858 commissioners investigating Indian affairs concluded that it was "premature" "to substitute Municipal Institutions" for "tribal organization".[23] It was not until 1869 (after control over Indian affairs was transferred to the colonial legislature) that chiefs were delegated by-law making powers by a statute upon which the present *Indian Act* is modelled.[24]

Nevertheless, colonial statutes occasionally acknowledged native reserve governments indirectly. The vague references to "Chiefs" and native "rules" in the Act of 1860 (which, as seen,[25] secured the delegation of authority over Indian affairs to the colonial government) were preceded by equally vague references to native government in other statutes.[26] To the extent that any authority was delegated to native chiefs, it was

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[22]Native: Jones (a Credit River chief), *History of the Ojebway Indians* (1861), 243-44 (legislation was necessary because chiefs had lost respect and faced "ridicule"); Chief Jones, Testimony before Commission on Indian Affairs, 13 Oct. 1842, *RG10* Vol. 720, 768050 (chiefs needed "some higher authority"); Narrows Ojibwa Chief Yellowhead, General Ojibwa Council, 26 Jan. 1836, *RG10* Vol. 1011, 79-81 ("the chiefs might be invested with power to act as magistrates and...application might be made to the government to that effect"). Non-native: W. Landon to F. Hinks, 16 May 1843, *RG10* Vol. 7, 3569-70 (Grand River Six Nations should "be constituted a Municipal Corporation"); "Memorandum upon a draft for a Bill to incorporate the Six Nation Indians", 4 April 1862, *RG10* Vol. 722, 16-17 (if "the Authority of the Chiefs and principal Men is insufficient for the repression of intemperance and other vices, including theft...powers might be committed...[to them] to assume limited Magisterial functions"). Generally, Motte, *Outline for securing Protection to the Aboriginal Inhabitants* (1840), 16-17.

[23]*Rep. Ind. Affrs., 1858*, Pt. III.

[24]*Act for the gradual enfranchisement of Indians* (1869), 32 & 33 Vict., c. 6 (Can.), s. 12. *Cf. Indian Act* (1876), 39 Vic. c. 18 (Can.) and *Indian Act*, R.S.C. 1985, c. I-6. Also, *An act to enable the Huron Indians of La Jeune Lorette, to regulate the cutting of wood* (1864), 27 & 28 Vic., c. 69 (Can.).

[25]*Supra* ch. 9, note 23.

[26]For example, *Act to appropriate certain sums of money to the encouragement of education* (1833), 3 Will. IV, c. 20 (L.C.) (allocated money to "Missionary and Chiefs" of Lorette Huron); *Act for the better protection of the Lands and Property of the Indians in Lower Canada* (1850), 13 & 14 Vic., c. 42 (Can.), s. 1 (mentioned "chiefs" in passing).

authority over non-natives. The *Act the better to protect the Mississaga tribes, living on the Indian reserve of the river Credit* (1829)[27] provided that anyone hunting or fishing within the Mississaga reserves, "against the will of the said Mississaga people, or without the consent of three or more of their principal men or chiefs", was guilty of an offence and could be arrested by "one of the principal men" and a constable and tried before a Justice of the Peace. The offender's equipment could be "held and taken to be public property of the said Indian tribe, disposable at the discretion of their principal men or chiefs, for the public benefit of the said tribe". The Act also stated that the Mississaga people, "as other subjects of his Majesty", retained common-law remedies to protect their lands.[28]

This Act was premised upon the assumption that, although subjects, the Mississaga constituted a distinct political unit having a government composed of "chiefs and principal men" and a capacity to have "public" property and interests separate from those of settlers in the colony. Like the seventeenth- and eighteenth-century colonial statutes examined in Chapter Three, the Act did not purport to create or define the office of "chief" or invest that office with delegated legislative or administrative powers over *natives* on the reserve; native customs defining chiefs and their ability to determine the public interest were therefore presumed to have authority independently of statutory law. Instead, the Act delegated to the chiefs authority over persons over whom they had no inherent authority, namely, non-native trespassers. The Act is therefore consistent with the conclusion that the jurisdiction of native law at common law was "personal" and not "territorial".

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[27] 10 Geo. IV c. 3 (U.C.).

[28] *Contra*, *supra* note 9.

2. Common law

Colonial judges took a one-dimensional approach to native issues, focusing upon reasons why Indian nations did not have municipal legal rights. Thus, in relation to the Grand River reserve, *Jackson v. Wilkes* (1835) held that because the 1784 Haldimand grant was not under the great seal, the grantee (the "Mohawk Nation" and "other of the Six Nations") was neither a series of named individuals or a corporation under charter of incorporation, and no words of inheritance were used, the Six Nations did not have a freehold estate in English law.[29] Instead, it held that the crown was seised of the fee in reserve land and that the native right was usufructuary. Indeed, this conclusion was applied to all reserves, no matter what their origin.[30] From the perspective of municipal law, the courts were at least partly correct: native communities were not corporations holding land under English municipal law (but *nations* holding land under *imperial* law).

Consistent with this one-dimensional approach, courts did not generally acknowledge the continuity of native law and government on reserves—and, on the rare occasions when they did so, acknowledgment was as indirect and ambiguous as acknowledgment by statutory law. In *Bown v. West* (1846),[31] for example, the non-native defendant had purchased part of the Grand River reserve under a deed stating that the Indian vendor was lawful owner "according to the custom of the said Six Nations Indians".[32] The defendant sold these rights to the non-native plaintiff, who sought to rescind the contract, claiming the amount of lands sold had been misrepresented. Both parties understood that the deed passed no property rights under municipal law, but the

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[29]4 U.C.K.B. (O.S.) 142 (K.B.). Also *supra* ch. 9, text at notes 29-32.

[30]*Supra* ch. 9, notes 29, 31.

[31]1 U.C. Jur 639 (Ch.); aff'd, 1 Grant's E. & A. 117 (U.C. Ex. Council).

[32]*Ibid.*, 649

plaintiff argued that a contract transferring rights under native customary law, with the expectation that the crown might transform them into municipal rights of property, was subject to the jurisdiction of the municipal courts of equity.

The granting of relief to the plaintiff therefore required the municipal court to determine the quantity of lands held and transferred under native customary law. However, the court could not make that determination. According to Jameson V.C., because the bill did not show "what is 'the custom of the Six Nations Indians, in apportioning and settling their lands among each other'", it was "only on knowledge dehors the pleadings" that the court could have understood "any thing like an approach to a right to the land in question".[33] But even had evidence of native customary law been provided, the contract was void *ab initio* because the original purchaser was non-native—the private sale of reserve land by individual natives was "a fraud upon the whole body, for whose use it was set apart".[34] Furthermore, it was held that the parties were, in effect, "co-tresspassers", and the court could not determine equitable rights to land unless the "*apparent* legal owner", i.e., the crown, was a party.[35] *Bown v. West* therefore provides indirect support for the idea that natives held reserve lands amongst each other by customary law and settlers held other lands under municipal law—that there were two parallel municipal systems in the province.

The extent to which the municipal legal system was regarded as distinct from the aboriginal customary system is illustrated by Robinson C.J.'s judgment in *Sheldon v. Ramsay* (1852).[36] The court held that a 999-year lease of Grand River reserve lands by

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[33]*Ibid.*, 651-2

[34]*Ibid.*

[35]*Ibid.*, 653

[36]9 U.C.Q.B. 105 (Q.B.).

Mohawk leader Joseph Brant to a non-native did not convey a legal estate in English law. In reaching this conclusion, the court was merely confirming a conclusion already reached in *Jackson v. Wilkes* and *Bown v. West*. However, Robinson C.J. observed that, even *if* the Six Nations had had an alienable interest, Brant's lease would have been defective because it failed to show by what authority he leased the nation's land. "He was, no doubt, a chief among them", stated Robinson C.J., "but we cannot say that that gave him any right to alienate to individuals whatever portion [of the reserve] he pleased...."[37] As Burns J. stated in a concurring opinion, "chiefs" often purported to "bind the tribe in respect of their dealings", but whether tribes recognized such authority and whether it had to be "delegated by a council" were irrelevant for, "whatever may be the Indian laws or customs in this respect", once the crown acquired lands "the general law of the country" applied.[38] Robinson C.J. adopted a similar approach: "We cannot recognize any peculiar law of real property applying to the Indians—the common law is not part savage and part civilized".[39]

By denying that the common law on property rights was "part savage" it may be argued that Robinson C.J. denied the continuity of native customary law within the colony's municipal common law (which might have been the case had the hybrid continuity/particular custom rule[40] applied); however, his comments do not preclude the conclusion that native customs continued as part of the *imperial* common law (although

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[37]*Ibid.*, 123.

[38]*Ibid.*, 135.

[39]*Ibid.*, 123.

[40]*Supra* ch. 2, IV, F, 2.

he did not allude to that possibility[41]). Indeed, Robinson C.J.'s comments concerned a hypothetical assumption, and may be re-stated in the larger imperial legal context as follows: if Indian nations had a municipal property right in reserves then that right would have been governed by colonial property law, and the alienation of that right by a "chief" would not have been legal, for the authority of chiefs was a matter of native customary law of which the municipal common law knew nothing; but, because Indian nations did not have proprietary title to reserves under municipal law, "peculiar" native customs, including those determining the authority of chiefs to make surrenders, could govern internal native land use and cessions by treaty to the crown. In keeping with the one-dimensional approach of colonial courts, Robinson C.J. only stated the first branch of this argument expressly; and, his insistence upon retaining the insularity of the municipal common law from native legal concepts confirmed the extent to which the municipal and native legal systems were mutually exclusive.

If it is accepted that native customary and colonial municipal law were distinct and parallel systems, the question remains whether a court of the municipal system could nevertheless have applied native customary law. As seen, *Bown v. West* involved a dispute about the implications of customary law, but the parties were not legitimate residents of the reserve and no evidence was adduced on the content of the custom, and for these reasons the court could not consider the dispute. In contrast, *Bastien v. Hoffman* (1867)[42] involved a dispute over reserve land between legitimate reserve residents, and the relevant parts of native customary law were established by evidence.

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[41]Still, Robinson C.J. must have been aware of that the imperial crown obtained cessions of native title from chiefs on the assumption that they had authority to represent their people; indeed his brother, William B. Robinson, represented the crown in negotiating such treaties ("Robinson-Huron" and "Robinson-Superior" treaties, 1850, *ITS*, #60, #61).

[42]17 L.C.R. 238 (Q.B.).

The plaintiffs, certain members of the Lorette Huron, claimed that the defendant, a non-native mill owner operating on the reserve, had encroached upon reserve lands over which they had acquired rights by prescription. The defendant denied the claim under both municipal and native customary law, arguing first that the *property* of the reserve was by colonial statute vested in the Commissioner of Indian Lands, and second that rightful *possession* of the disputed land could not have been acquired by the plaintiffs because, "by the law and custom of the tribe", which had been "fully proved by the chiefs of the tribe", a family could not possess more than one lot, and the plaintiffs were already possessed of another lot.[43] The plaintiffs argued that this general custom was subject to exceptions, such as acquisition of further lots by succession or, as in their case, prescription.[44]

Drummond J. confirmed the conclusions on the jurisdiction of reserve chiefs over land use reached in Chapter Nine: reserves were "managed by the chiefs elected from time to time by each tribe" who had "the power of apportioning out the tract under their control to heads of families" as well as "the right of disposing of certain lots, for the interests of the community at large".[45] However, in Lower Canada this jurisdiction had been circumscribed somewhat by the 1850 colonial statute which vested in the Commissioner of Indian Lands the property, rights of action relating to the property, and the right to sell or lease the property of Indian reserves.[46] This statute, said Drummond J., precluded the plaintiffs' action; their rights could only be asserted in court by the commissioner. Even if the Act had not been made, he continued, neither the plaintiffs

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[43]*Ibid.*, 242, 239.

[44]*Ibid.*, 241.

[45]*Ibid.*, 243.

[46]*Supra* note 16.

"nor any other individual member of the Huron tribe possess one foot of property in which the whole *communauté* or tribe has not a share", and no "tenant in common" can acquire rights by prescription against "his co-tenant".[47]

Bastien v. Hoffman represents judicial recognition of internal reserve law and government relating to land use, and judicial reluctance to participate in the resolution of disputes arising out of that internal system. In fact, the 1850 Act could have been interpreted to allow the action.[48] As for the substance of the claim, by concluding that the Huron were like tenants in common, each having equal rights in the whole tract, Drummond J. described the nature of Huron rights in relation to the external world and ignored the internal division of rights of possession between Huron families according to customary law—and it was conflicting interpretations of this customary law that formed the real essence of the dispute.

In general the judicial reluctance to intervene in internal reserve matters was consistent with both the jurisdiction of reserve chiefs to apply customary law and the jurisdiction of the imperial Indian Department to supervise that native jurisdiction. Insofar as colonial courts were concerned with native people or lands, it was not with internal matters but with those issues arising at the point where colonial and native societies collided.[49] The division between native and colonial jurisdiction is clearly

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[47]*Supra* note 42, 245.

[48]The purpose of 13 & 14 Vic., c. 42, was "to make better provision for preventing encroachments" on reserves (s. 1), and it provided that the rights of the commissioner did not derogate from "the rights of any individual Indian or other private party, as possessor or occupant of any lot" in a reserve (s. 4); thus, the commissioner's exclusive right to bring actions to defend reserves from external encroachments should not have affected the resolution of disputes about the internal division of possessory rights among lawful residents.

[49]For example, *Commissioner of Indian Lands v. Payant Dit St. Onge* (1856), 8 R.J.R.Q. 29 (L.C.S.C.) (Commissioner for Indian Lands sued under 13 & 14 Vic., c. 42 on behalf of Caughnawaga Mohawk seeking judicial support from the municipal

illustrated by the 1843 case of Joseph White, a native who possessed and then leased to a non-native part of the Amherstburg Huron reserve contrary to orders of the reserve chiefs. In resolving the matter the Governor General directed the Attorney General to initiate legal proceedings in the colonial courts to remove the non-native lessee from the reserve, but directed that White's right of possession be "decided by the Chiefs of the Tribe".[50] Thus, there were not only separate laws governing the possession and use of land, but separate institutions for the application of those laws. However, as the White case suggests, the jurisdiction of the native institutions was apparently "personal", not "territorial".

II. The Extent to Which Municipal Law and Jurisdiction Extended over Reserves

The recognition by colonial law of native chiefs and customs relating to land use and landholding on reserves is not necessarily inconsistent with the conclusion that reserves were, in other respects, subject to general laws applicable elsewhere in the colony. It therefore remains to determine the extent to which municipal law considered reserves to be exempt from colonial laws and judicial and legislative jurisdictions, and whether the conclusions reached were correct.

A. Statutory Law

The presence of imperial-native jurisdictional enclaves in the midst of territories

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system for "local regulations of the chiefs"prohibiting sale by natives of timber to non-natives; in this case the timber was in the possession of a non-native off the reserve). Courts were primarily occupied with the enforcement of statutory prohibitions on settler purchases of and encroachments on reserve land: *Little v. Keating* (1842), 6 U.C.Q.B. (O.S.) 265 (Q.B.); *The Queen v. Johnson* (1850), 1 Grant 409 (U.C. Ch.); *The Queen v. Strong* (1850), 1 Grant 392 (U.C. Ch.); *R. v. Baby* (1854), 12 U.C.Q.B. 346 (Q.B.); *The Queen v. Hagar* (1857), 7 U.C.C.P 30 (C.P.); generally, Harring, "'The Liberal Treatment of Indians': Native People in Nineteenth Century Ontario Law" (1992).

[50]S.P. Jarvis, Chief Supt. (Upp. Can.) Ind. Dept., to Mssrs. Duff and McLean, 6 Oct. 1843, *RG10* Vol. 456, 217; R. Rawson to Jarvis, 21 Oct. 1843, *RG10* Vol. 456, 225.

otherwise subject to local colonial jurisdiction created a certain degree of constitutional confusion. As noted in Chapter Eight, in organizing Upper Canada into districts, counties and townships, colonial statutes initially treated Indian reserves like townships: groups of reserves and townships formed counties and groups of counties formed districts. For purposes of at least the lowest level of governmental jurisdiction, this division made some sense: native reserve chiefs could have been regarded as equivalent to township officers. Thus, as long as native reserves remained outside township boundaries and were populated by native people only, there was no jurisdictional conflict over local matters normally subject to township control. However, in those cases where reserves fell within township boundaries, or where non-native settlers resided on native reserves, potential for jurisdictional conflict between chiefs and townships existed.

Township by-laws were not regarded as applicable to natives resident on reserves located within township boundaries.[51] Conversely, native jurisdiction was, as seen, personal, and non-natives within reserves were (apparently) exempt from native governments.[52] If so, and if the reserve was not included within a township, non-natives on reserves would have been denied the right to elect township officers. It was to remedy this sort of situation that an 1810 statute was enacted to authorize "the *white* inhabitant householders" of the Grand River reserve to elect township officers notwithstanding their

[51]It was argued unsuccessfully that legislation from which townships derived powers did not expressly exempt reserves located within township boundaries, and therefore natives therein were subject to by-laws: Municipal Council of Sarnia Township to Col. Bruce, 3 Dec. 1850, *RG10* Vol. 441, 105-7; J. Givens, Chief Supt. (Upp. Can.) Ind. Dept., to Captain Vield, Sarnia, 1 Nov. 1836, *RG10* Vol. 501, 205. Post-confederation cases also hold reserves exempt from township and county by-laws (although for reasons of federal/provincial division of powers): *Re Milloy and Municipal Council of Township of Onondaga* (1884), 6 O.R. 573 (Ont. C.P.); *In re Armour and Township of Onondaga* (1907), 14 O.L.R. 606 (H.C.).

[52]White's case, *supra* note 50; but see *supra* ch. 9, II, E.

being outside township boundaries.[53] The need for this statute and its restriction to non-natives may be interpreted as implicit recognition by municipal statutory law of the exemption of reserves from the lowest level of colonial jurisdiction, township government, and the exemption of non-natives on reserves from native reserve governments.

With respect to the exemption of native reserves from general municipal law and jurisdiction, however, colonial statutes were more ambiguous. On the one hand, general statutes regulating fishing and hunting and prohibiting work on Sundays expressly exempted "Indians".[54] These statutes are consistent with both the idea that all statutes which did not expressly exempt natives applied to natives, and the idea that native individuals were (unless expressly exempted) subject to laws of general application when outside reserves, but that reserves were generally not regulated by colonial statutory law. Statutes passed in relation to natives and native reserves specifically were also unclear in this respect. On the one hand, the *Act for the protection of the Indians in Upper Canada* (1850) expressly exempted natives from taxation as long as they lived on either unceded

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[53]*Act to authorize the inhabitants of the county of Haldimand to hold annual meetings* (1810), 50 Geo. III, c. 12 (U.C.) (emphasis added). *Cf. An Act to extend to the Inhabitants of the Indian Reservation of Saint Regis and Dundee, the rights, privileges, and advantages enjoyed by the other inhabitants of this Province* (1831), 1 Will. IV, c. 39 (L.C.), which stated that, because doubts had arisen as to whether legislation passed for townships applied to "the inhabitants" of the St. Regis reserve, the reserve was thereby constituted a township. Although (unlike the 1810 Act) it did not expressly limit its application to non-native residents, it was apparently intended to apply to non-native lessees of reserve land. Later statutes suggest native chiefs retained their existing authority: *An act to change the tenure of the Indian lands in the Township of Dundee* (1864), 27 & 28 Vic., c. 68 (Can.) (non-native lessees given opportunity to convert interests from leasehold to freehold if "Chiefs" ceded native title to crown).

[54]*An act for the preservation of deer* (1821), 2 Geo. IV, c. 17 (U.C.), s. 2; *An act...relative to the preservation of salmon* (1821), 2 Geo. IV, c. 10 (U.C.), s. 8; *An Act to prevent the Profanation of the Lord's Day* (1845), 8 Vic., c. 45 (Can.), s. 14; *An Act to prevent certain Wild Fowl...from being destroyed* (1845), 8 Vic., c. 46 (Can.), s. 5; *An Act respecting Game Laws* (1859), 22 Vic., c. 61, s. 9.

or reserved land,[55] which suggests that without this express exemption they would have been subject to general taxation laws. On the other hand, the Act made natives who supported themselves by agricultural pursuits subject to the Indian Department superintendent's orders respecting the performance of labour on "public roads" passing through Indian lands, the superintendent having "the like power" to enforce such orders "as may now be done" pursuant to general colonial laws on statute labour, provided that the burden imposed did not exceed "what shall or may be required of *other inhabitants* of Upper Canada, under the *general laws*";[56] this suggests that natives were not otherwise subject to general laws relating to statute labour.

To summarize, no firm conclusion can be drawn from colonial statutory law on whether the colonial legislature considered reserves subject to colonial laws of general application.

B. Views of Colonial Judges

One initial reason why colonial criminal law was not enforced between natives was fear of native hostility. For example, after a coroner's jury "composed of Whites and Indians" returned a verdict of manslaughter in relation to the killing in 1808 of one native by another at Restigouche in the Gaspé District of Lower Canada, the Justice of the Peace refused to issue a warrant for the accused's arrest "thinking such a Measure would be attended with some danger...."[57] Aside from the prospect of hostility, however, certain judges thought there might be legal reasons for considering reserves exempt from colonial law. Their opinions must be carefully considered.

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[55]13 & 14 Vic., c. 74 (Can.), s. 4.

[56]*Ibid.*, s. 5 (emphasis added).

[57]Justice Wm. Crawford to Lewis Foy, 16 April 1811, *RG10* Vol. 627, 182851-52.

1. Opinions of Justice Powell

In 1797 Justice William Dummer Powell issued two extra-judicial opinions on the status of the Six Nations. The first concerned the Six Nations' request for "legal" title to the Grand River reserve. Powell J. observed that although lands had been granted in Quebec to non-native and native refugees after the American Revolution the tenure granted to the former was fundamentally different from that granted to the latter.[58] Whereas non-natives were individually granted lots under certificates of possession to be exchanged for patents in *fief* and *roture*, and later, in free and common socage, the circumstances of native nations necessitated a different kind of tenure secured by a different legal instrument. Said Powell J.:

> The manners of the Indians required that the Tract assigned them should be in common[,] inalienable[,] and kept out of the view of our Municipal Laws, at least so long as they affected to consider themselves independant Allies, for this purpose a Council, a Treaty, a [wampum] Belt, was adequate; it was a Compact of one nation with another, to be governed by general rules and not by the provisions of the common Law of England....[59]

He conceded that a "less equivocal Dominion" over the reserve allowing "Municipal protection to Travellers and occasional Sojourners in it" would eventually be necessary;[60] until then (he stated in his second opinion), his "personal opinion was ever in favour of the entire Independence of the Indians in their Villages", and therefore it was inappropriate to assert municipal judicial jurisdiction over natives accused of murdering

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[58]Justice W.D. Powell, "Memoir of the Claim of the Six Nations Indians", 59, enclosed in Powell to P. Russell, Adm. Upp. Can., 3 Jan. 1797, *CO* 42/321: 57-64, which was enclosed in Russell to Duke of Portland, Sec. of State, 28 Jan. 1797, *CO* 42/321: 43-48.

[59]*Ibid.*, 59-60.

[60]*Ibid.*, 60.

non-natives who lived with natives on reserve land.[61] Apparently Powell J. viewed native civil and criminal jurisdiction over reserves as "territorial" and not "personal".

Powell J.'s opinions represent the clearest statement by a judge supporting the proposition that Indian reserves in colonial Canada were excluded from the colonial municipal system. However, how he viewed the legal status of the native municipal system was unclear. Powell J. believed that treaty rights to reserves were secured by "general rules", by which he may have meant general rules of the *jus gentium*. If so, it is not clear whether he regarded the *jus gentium* as part of imperial law regulating relations between components of the empire, or as international law regulating the crown's foreign relations. Thus, it is not clear whether Powell J. regarded the continuity of native nationhood to be *inclusive* or *exclusive*. The Attorney General for Upper Canada, John White, argued that legal title to the Grand River reserve could not be granted because "the Six Nations do not acknowledge the Sovereignty of the King", and if they called themselves "Allies" they were "to be considered Aliens" incapacitated by common law from holding freehold estates.[62] Reading Powell's opinions in light of White's, it may be said that the Six Nations in Upper Canada occupied a legal position similar to that which, according to Kent C., the American segment of the confederacy occupied in New York—that is, native law and government continued in force under the exclusive theory of continuity.[63] However, such an interpretation may be argued to conflict with contemporary Indian Department policy, as reflected in Haldimand's 1783 instructions, which emphasize the inclusion of native institutions within the imperial

[61]Powell, "Statement Respecting Mr. Brant", 63, in Powell to Russell, *supra* note 58.

[62]J. White, Att. Gen. Upp. Can., to P. Russell, Adm. Upp. Can., 26 Sept. 1796, *CO* 42/321: 11-12, enclosed in Russell to Portland, 28 Sept. 1796, *CO* 42/321: 7-8.

[63]*Supra* ch. 5, II, B.

order.[64] Read in light of the 1783 instructions, Powell J.'s opinions confirm that native nations had distinct municipal systems under the "general rules" of British *imperial* law, and their internal concerns were therefore not regulated by colonial municipal, or English, common law.

2. *R v. Shawanakiskie* (1822-26)

R v. Shawanakiskie[65] was cited in Chapter Eight to demonstrate that it was arguable that municipal courts had no (or only inchoate) jurisdiction over internal native matters in unceded Indian lands. The case also indirectly addressed judicial jurisdiction over reserves. Shawanakiskie, a member of the Ottawa nation, was convicted at the 1822 Western District assize of murdering a native woman "in the Streets of Amherstburg".[66] Campbell J., the trial judge, respited the sentence of death and submitted the case to Lieutenant-Governor Maitland on the grounds that "other Judges had on former occasions expressed an Opinion that the Indians of this Country are in no case amenable to our Laws, being exempted therefrom by Treaty...."[67] Maitland consulted Powell C.J. and Boulton J. about the case, and submitted their reports, together with Campbell J.'s grand-jury charge, to the imperial government. Although natives had been regularly subjected to colonial criminal jurisdiction for offences against settlers and traders since the establishment of local courts in the Great Lakes Region in 1788,[68] in seeking directions from the imperial ministry the Lieutenant Governor observed that there was "no precedent

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[64]*Supra* ch. 7, II, B, 2.

[65]*R v. Shawanakiskie* (1822-26), Ct. of Oyer and Terminer, Western District Assize, *CO* 42/370: 25-42.

[66]Sir P. Maitland, Lt. Gov., to Earl Bathurst, Sec. of State, 14 Feb. 1823, *CO* 42/370: 25.

[67]Report of Justice Campbell, 9 Sept. 1822, *CO* 42/370: 27.

[68]*Supra* ch. 8, note 44.

on record in this Province" of jurisdiction being exercised over native offences *inter se* and that, furthermore, there existed a "discrepancy in the sentiments of the Judges on the Policy of making individuals of the Indian Tribes amenable to our Laws for Offences committed amongst themselves...."[69]

The first part of Campbell J.'s grand-jury charge was discussed in Chapter Eight. As noted, Campbell J. concluded that there might be "some reasonable exceptions" to the general rule that municipal law and jurisdiction extended throughout the colony, including internal native matters in unorganized lands. Also exempted, he continued, might be internal native matters arising on lands "reserved...for the almost exclusive use of particular nations or Tribes of Indians, but situated in the immediate vicinity of, and indeed surrounded by extensive settlements of European or civilized Inhabitants".[70] He acknowledged that "it might be extremely dangerous to extend such exemption from the laws of the land" to reserves.[71] He therefore drew a distinction between two kinds of laws: those prohibiting conduct which was "against the law of nature, or against the universally acknowledged rights of *meum* and *tuum*", and those made for reasons specific to the colony "and of which the Indians can have no knowledge".[72] The former might apply to reserves, the latter might not. Thus, the court might have jurisdiction to enforce the law of murder but not specific statutory rights and duties like participating in elections, performing labour on highways, or paying taxes.

Thus, Campbell J. appeared to conclude that reserves were exempt from

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[69]Maitland to Bathurst, *supra* note 66.

[70]Justice W. Campbell, Charge to Grand Jury, Sandwich, Autumn, 1822, *CO* 42/370: 28-29.

[71]*Ibid.*, 29.

[72]*Ibid.*

municipal law generally, and that where municipal courts had jurisdiction it was not to enforce municipal law *per se* but to prevent "dangerous" conditions around reserves through the enforcement of "universally" accepted principles of the law of nature as recognized by municipal law. This interpretation of his comments is consistent with popular sentiment at the time. Settlers living near reserves were under the impression that colonial law did not apply on reserves; however, the introduction of liquor and the breakdown in traditional methods of social control among natives[73] resulted in the increase of violent offences not only "on each other" but also "on the property of His Majesty's subjects" nearby, and therefore, to preclude the spill-over of disorder into non-native communities, settlers petitioned for "legislative interference...to render the enormous crimes among them cognizable and duly punished" by colonial courts.[74] As seen, special legislation was enacted to address a similar situation in Connecticut,[75] but no such legislation was passed in colonial Canada. Campbell J.'s comments may therefore be read as a suggested solution to this perceived problem: judicial jurisdiction could be asserted under the law of nature (presumably pursuant to the courts' inherent jurisdiction as a superior court[76]) as opposed to express statutory law.

Campbell J.'s conclusion that there existed at least the possibility of a legal foundation for the exemption of reserves from most aspects of colonial law contrasted with the opinions of other colonial officials. Speaking of the Six Nations Grand River reserve, Lieutenant-Governor Maitland stated in 1823:

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[73]*Supra* ch. 9, II, F.

[74]Petition of Inhabitants of Niagara, Gore and London Districts to the Legislative Council, 24 Feb. 1818, *ROBA*, IX, 471-2.

[75]*Supra* ch. 3, note 73.

[76]Courts created by commissions of Oyer and Terminer exercised inherent not legislative powers: *McNab v. Bidwell* (1830), 1 Draper 152 (K.B.), at 163.

> Hitherto these Indians though residing in the very centre of the organized parts of the Province, have asserted a sort of claim to be exempt from the ordinary application of the municipal law of the land, and indeed the Government, by declining to punish offenders among the Indians themselves, except in atrocious cases, has appeared to lend some sanction to this idea, though in fact, I am advised, that no such exemption can in contemplation of law be admitted for a moment.[77]

Maitland conceded that natives were exempt from many statutory obligations, but he attributed this exemption to the fact that these obligations only fell upon property owners and natives were not seised of the fee to reserve lands.[78] Maitland may have received his advice from the Attorney General, John Beverley Robinson, who insisted that natives enjoyed no exemption from colonial laws.[79] Thus, there was agreement between colonial judges and officials that colonial law was not generally enforced on reserves, but there existed a difference of opinion on whether there might be legal grounds for the exemption of natives from colonial law.

Campbell J. continued his address to the grand jury by stating that if the offence had been committed in lands settled by Europeans—which it had been—then the court had jurisdiction.[80] Turning to the question of choice of laws, he observed that even if the court had jurisdiction the killing might be argued to be "just retaliation pursuant to a custom universally used amongst the Indians...."[81] While he concluded that the court would "readily" apply native customary law "in any situation where the custom could

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[77]Maitland to Bathurst, 1 Nov. 1823, *CO* 42/370: 247.

[78]*Ibid.* And see *supra* note 8.

[79]J.B. Robinson, Att. Gen. Upp. Can., to J. Givens, Ind. Dept. Agent, 9 July 1827, *RG10* Vol. 5, 2349 ("the Governor has no power to exempt the Mohawk Indians inhabiting the Province from the operations of the laws Civil and Criminal").

[80]*Supra* note 70, 29.

[81]*Ibid.*, 30.

legally be enforced",[82] a custom permitting retaliatory killing did not fall within this category. Said Campbell J., "by all laws Divine and human,—in all Countries and ages of the world, and in all states of society whether civilized or Savage", murder was prohibited.[83] In short, the custom would have failed the *malum in se* threshold of the principle of continuity.

The grand jury indicted Shawanakiskie and it was only after he was tried and convicted that the potential existence of a treaty exempting natives from municipal law came to light. It was for this reason that Campbell J..submitted the case to the Lieutenant Governor. Thus, once the case reached the Lieutenant Governor, the issue was not the legality of the potential exemptions identified by Campbell J. but the existence of a treaty.

The Lieutenant Governor sought opinions from Boulton J. and Powell C.J. In his report, Boulton J. stated that "all [native] Nations are under the protection of our Law whilst resident amongst us", and if a treaty exempting them existed it could only apply "to cases within Indian Territory".[84] In his report, Powell C.J. stated that the notion that judges recognized the exemption of natives under a treaty might have mistakenly arisen after his grand-jury charge at the Western District assize the year before *R v. Shawanakiskie*, in which he had mentioned the "supposed Treaty" in relation to a native accused of killing another native.[85] However, he had made no ruling upon the treaty;

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[82]*Ibid*. *Cf.* Aborigines Protection Society, *Report on the Indians of Upper Canada* (1839), 51 ("Their laws and usages should be carefully collected; and observed in our courts"); Bannister, *British Colonization and Coloured Tribes* (1838), 280 ("The laws and usages of the natives should be referred to in the colonial courts").

[83]*Ibid*.

[84]Justice D. Boulton to G. Hillier, Sec. to Lt. Gov., 10 Oct. 1822, *CO* 42/370: 34.

[85]Powell C.J. to Hillier, 8 Oct. 1822, *CO* 42/370: 36.

instead, the native accused was tried and acquitted for lack of evidence. To end any misunderstanding about his charge, he enclosed its text in his report.

Powell C.J.'s grand-jury charge had begun by stating that he had "some hesitation" about the indictment by a coroner's inquest of a native for the murder of another native.[86] He noted that in the past "enquiry" into such cases was "abstracted" upon the "representation of a Treaty" stipulating that native offenders were "accounted for amongst themselves...."[87] Then Powell C.J. observed:

> These people are ignorant of our Law, and we of their habits, which perhaps supply the place of what we call Law. We know that our own law on matters of homicide makes wide discrimination, from the highest character of crime to absolute justification--but we are ignorant of the opinions and habits of the red man in this respect. We may punish capitally that offence which the perpetrator considered as venial, or justifiable, or praiseworthy. Such considerations have led to discountenance such prosecutions in our courts, but in the present instance the Coroner has acted, and if his Jury have, on Inquisition, made the charge, that is to a certain degree equivalent to Indictment, and can only be discharged by verdict of a Petit Jury or the King's pardon.[88]

In short, Powell C.J. neither confirmed nor denied the existence or legal relevance of the treaty. However, he stated that, aside from any treaty, jurisdiction had not been asserted over natives in the past because of their continued adherence to their own "habits", or customary laws (although he was unclear whether the "discountenance" of jurisdiction was the result of judicial ruling or crown discretion). Indeed, he appeared to regret that, given the coroner's verdict, a trial was necessary in this case. Presumably it would have been open to the accused to enter a plea to jurisdiction at trial, although no mention of such a plea was made.

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[86]Powell C.J., Charge to Grand Jury, Western District, Autumn, 1821, *CO* 42/370: 38-9.

[87]*Ibid.*

[88]*Ibid.*

In the end the "supposed Treaty" was never found and the imperial government confirmed the jurisdiction of the colonial court over Shawanakiskie.[89] The significance of this confirmation was minor. Neither of the two examples of native exemption from colonial law suggested by Campbell J. (internal native matters other than serious crimes on unceded and reserved land) applied, and nothing in the subsequent reports and opinions cast doubt upon the validity of those examples; indeed, they were consistent with Powell C.J.'s 1821 charge and his 1797 opinions. *R. v. Shawanakiskie* therefore stands for the relatively narrow proposition that natives offending against natives in settled parts of the colony were subject to colonial jurisdiction.

Powell C.J.'s 1797 opinions and *R. v. Shawanakiskie* were considered in *Sero v. Gault* (1921).[90] In that case Riddell J. conceded that the Tyendinaga Mohawk claim to independent status was supported by Powell C.J.'s 1797 opinions. However, Riddell J. inferred from his 1822 report on *R. v. Shawanakiskie* and his 1821 grand-jury charge that Powell C.J. "did not continue to hold" the views expressed in these opinions.[91] In making this inference, however, Riddell J. summarized without quoting the opinions rendered in *R. v. Shawanakiskie*, and his summary is misleading. He said that Campbell J. respited the sentence of death because of confusion caused by the belief that Powell C.J. had asserted in his grand-jury charge of the year before that "the Indians amongst themselves were governed wholly by their own customs".[92] According to Riddell J., Powell C.J. "denied this and sent a copy of his charge, which was quite to the

[89]Warrant for Execution, 13 Feb. 1826, *DRCHC, 1819-28*, 177.

[90]50 O.R. 27 (H.C.).

[91]*Ibid.*, 31-2.

[92]*Ibid.*, 32

contrary".[93] Said Riddell J., in their reports Powell, C.J., Campbell and Boulton JJ. "concurred in the opinion that an Indian was subject to the general law of the Province", and with the imperial confirmation of Shawanakiskie's conviction in 1826 the law "has never been doubtful".[94]

This summary of *R. v. Shawanakiskie* misrepresents Powell C.J.'s position. Powell C.J.'s 1822 report did not deny that "the Indians amongst themselves were governed wholly by their own customs", but denied that he had upheld the treaty exemption in his 1821 jury charge. Far from denying the continuity of native customary law, Powell C.J.'s jury charge stated that continued adherence to native custom was the reason why natives were not prosecuted for crimes *inter se*, and that it was only the coroner's verdict which necessitated the trial in that instance. Even if Powell C.J. had concluded that Shawanakiskie was subject to the jurisdiction of the court, it is difficult to see, given the difference between the facts of the cases, why this conclusion represented a repudiation of his 1797 opinion; *R. v. Shawanakiskie* involved an offence committed in a British town and the facts of the case leading to his 1797 opinion involved an offence committed on an Indian reserve—like Campbell J., he may have thought that the court's jurisdiction over cases involving Indians was contingent upon the matter arising off Indian lands. Finally, Riddell J.'s conclusion that Campbell and Boulton JJ. concurred in the opinion that Indians were subject to provincial law in all cases is misleading. As seen, Campbell J.'s jury charge reflected serious doubts in this respect. Riddell J.'s interpretation of Powell C.J.'s opinions and *R. v. Shawanakiskie* has been cited by modern courts to deny that natives ever enjoyed an exemption from municipal

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[93]*Ibid.*

[94]*Ibid.*

law,[95] and therefore the articulation of a competing interpretation of these sources is particularly important.

While questions may be raised about Riddell J.'s interpretation of the *Shawanakiskie* case itself, he was right in concluding that *after* the 1826 imperial confirmation of Shawanakiskie's conviction it was generally assumed that colonial courts had jurisdiction over inter-native crimes on reserves. In response to the Six Nations' claim in 1826 that their jurisdiction over inter-native crimes on the Grand River reserve was confirmed by an earlier treaty,[96] Indian Department Deputy Superintendent William Claus (who accepted this principle in 1820 in relation to the Muncey Delaware[97]) cited the *Shawanakiskie* case and explained that "important changes...had intervened since the treaty"—namely non-native settlement around reserves ("their situation had reversed by a change of population")—which required that the imperial crown confirm colonial criminal jurisdiction within reserves.[98] If Claus was relying only upon the imperial crown's confirmation of Shawanakiskie's conviction, then his conclusion is legally suspect for that case involved neither treaty rights to jurisdiction nor reserves. However, his comments supply an alternative legal foundation for his conclusion: he interpreted the treaty right to jurisdiction as contingent upon certain political and demographic assumptions which, by then, no longer applied. Under this interpretation, the imposition of colonial criminal jurisdiction over reserves by the imperial crown was not a breach of the treaty right since there was no treaty right left to breach.

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[95]*Rex v. Groslouis* (1943), 81 C.C.C. 167 (Que. Sess. of Peace), at 172; see also, "Appeal of the 'Six Nations' to the League", *League of Nations Official Journal* (1924), VI, 829.

[96]*Supra* ch. 9, note 111.

[97]*Supra* ch. 9, notes 109-110.

[98]Claus to Six Nations, August 1826, quoted at Williams, *The Chain* (1982), 124.

3. *The King v. Phelps* (1823)

One year after *R. v. Shawanakiskie*, Powell C.J., Boulton and Campbell JJ. again considered arguments about the constitutional position of Indian nations. In *The King v. Phelps* (1823)[99] the issue was whether part of the Grand River reserve which had been leased for 999 years to the non-native husband of a Mohawk woman was subject to forfeiture under colonial law upon the lessee's being attainted with treason. Counsel argued that because the lands were held by the lessee "according to the custom of the said Six Nations", colonial law did not apply.[100] Echoing Powell C.J.'s 1797 opinion and Campbell J.'s jury charge in *R. v. Shawanakiskie*, counsel argued that the Six Nations were a "distinct, though feudatory people", who settled on the Grand River "by compact" and who were "not subject to mere positive laws" of the colony, "though perhaps to punishment for crimes against the natural law, or law of nations".[101]

In reply, the Solicitor General stated that the idea that Indians were not subject to colonial law was "absurd".[102] But even if the forfeiture was in error, he argued that the crown's title in the land could not be divested "without the traverser shew[ing] a better title", which was impossible because the 1784 Haldimand grant had failed to give the lessor, the Six Nations, legal title to the Grand River lands.[103]

Boulton and Campbell JJ. (Powell C.J. did not participate) gave judgment for the crown without reasons. The basis for this judgment is not clear. The court may have accepted the argument that the Six Nations were not distinct nations independent from the

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[99]1 Taylor 47 (U.C.K.B.).

[100]*Ibid.*, 51.

[101]*Ibid.*, 52.

[102]*Ibid.*, 53.

[103]*Ibid.*, 52.

colonial legal regime, or it may have decided the case on the narrower ground that the plaintiff's right, as derived ultimately from the Haldimand grant, was not sufficient to divest the crown of its title. On the basis of their opinions in *R. v. Shawanakiskie*, it may be said that Boulton J. would have accepted and Campbell J. would have at least doubted that it was "absurd" to consider reserves exempt from municipal law. Establishing the inconclusiveness of *The King v. Phelps* is important, because courts have interpreted the judgment as a rejection of counsel's argument that reserves were excluded from colonial law.[104]

4. Justice Macaulay's report

Insofar as Powell's opinions and the *Shawankiskie* and *Phelps* cases confirm that internal native concerns on reserves were not regulated by colonial law, they are consistent with at least the pre-1826 policies of the imperial Indian Department. By the 1830s, however, attitudes about the constitutional position of native peoples on reserves had changed in the opinion of at least some colonial judges and officials. A report of Macaulay J. in 1839 is illustrative.[105] Said Macaulay, although natives entertained "the cherished belief of independence as a separate people" because they were "domiciled within the organized portions of the Province" it was "difficult to point out any tenable ground, on which the claim to an exempt or distinctive character could be rested".[106] He observed that he had presided over trials relating to offences committed between natives

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[104]*Director of Support v. Nowegejick*, [1989] 2 C.N.L.R. 27 (Ont. Prov. Ct.), at 33; Harring, *loc. cit.*, 304-5.

[105]Macaulay J. "Report on Indian Affairs", 22 April 1839, *RG10* Vol. 117, 168711. This report was influential, being cited in subsequent judicial and governmental opinions: *Rep. Ind. Affrs., 1844*, 20n; *Rep. Ind. Affrs., 1858*, Pt. II; Federal Order in Council, P.C. 2102, Nov. 13, 1890 (quoted in Montgomery, "Legal Status of the Six Nations Indians in Canada" (1963), 96-7); *Director of Support v. Nowegejick*, [1989] 2 C.N.L.R. 27 (Ont. Prov. Ct.), at 32.

[106]*Ibid.*, 168827.

on reserves and had refused to entertain the argument that such offences were "only cognizable among the Indians themselves, according to their own usages and customs...."[107] Courts also had civil jurisdiction over internal native matters on reserves, he continued, although he acknowledged that it was "very rare" for natives to resort to it.[108] Although Macaulay observed the native settlement onto reserves ensured their "collective and isolated character", he insisted that they could "enjoy peculiar privileges or exemptions" only if "conferred by Legislative enactments" and any form of self-government granted would have to be "moulded more in analogy to corporate establishments, engrafted on the general municipal Government of the County".[109] Other colonial judges and officials adopted similar views. For example, in *Sheldon v. Ramsay* (1852), Burns J. stated in *obiter* that the Six Nations, "while situated within the limits of this province", could not be recognized as "a separate and independent nation, governed by laws of their own, distinct from the general law of the land", and that they had "no national existence nor any recognized patriarchal or other form of government...."[110]

While Macaulay J.'s observations are consistent with the Indian Department's assumption as of 1826 that colonial courts had criminal jurisdiction over reserves, in other respects they are both factually and legally suspect. Whatever their *de jure* authority, colonial courts had not actually asserted criminal jurisdiction in all cases. Mississaga Chief Peter Jones testified in 1842 that "Magistrates will not act in Indian cases" and at the Credit River reserve (which neighboured the provincial capital) natives

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[107] *Ibid.*, 168836.

[108] *Ibid.* *Cf.* *Nianentsiasa v. Akwirente* (1860), 4 L.C. Jur. 367 (Q.B.), at 370 (court exercised jurisdiction over native suit in *délict* against other natives on Caughnawaga reserve).

[109] *Ibid.*, 168837-40.

[110] 9 U.C.Q.B. 105 (Q.B.), at 133-34.

followed "a code of several Rules & regulations among themselves" (i.e., the 1830 Credit River constitution examined in Chapter Nine).[111] Aside from criminal matters, the general characterization which Macaulay and Burns JJ. attributed to native nations is legally questionable. Their conclusions conflict with the fundamental tenets of imperial Indian policy for reserves undertaken pursuant to the royal prerogative (as reviewed in Chapter Nine). Indeed, they may be contrasted with the opinion of the Permanent Under-Secretary of State for the Colonies, Sir James Stephen, who, in the course of discussing the application of New Zealand municipal law to the Maori in 1843, stated:

> I know not why they should not be governed by their own laws and customs to the utmost possible extent: gradually of course superceding them by our own law, as the natives may learn to understand and appreciate it. At this moment this is the case in Ceylon in many respects. It is the custom throughout the whole of British India. Even in Canada, the Indian is at once subject to the British Crown, and exempt from subjection to very much of the laws of the province. Establish this distinction, and the Queen's sovereignty would in no exercisable manner injure the native chiefs or their people.[112]

5. Summary

Up until the late-1820s there was at least a *de facto* exemption of reserves from colonial law, afterwhich there was at least some *de facto* inclusion of some internal reserve matters within colonial criminal jurisdiction. Natives were considered as exempt from other aspects of colonial statutory law, although debate existed about whether this exemption was general in nature or merely derived from the fact that they did not have proprietary title in land. Colonial judges did not provide a detailed legal analysis of the *de jure* status of these exemptions and inclusions, nor did they analyse the constitutional

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[111]Testimony before Commission on Indian Affairs, 13 Oct. 1842, *RG10* Vol. 720, 768050-51.

[112]Sir J. Stephen, Perm. Under-Sec. of State, to G. Hope, Parlia. Under-Sec. of State, 28 Dec. 1843, *CO* 209/22: 253-54; quoted at McHugh, *Aboriginal Rights of the New Zealand Maori* (1987), 174.

relationship between the imperial crown, colonial legislatures and native reserves. It is therefore important to re-consider these relationships from the perspective of general legal principles.

C. The Relationship between Imperial, Municipal and Native Law

The exclusion of reserves from municipal law may be justified under both general principles of imperial common law and crown practice and usage specific to Canadian constitutional development. These two grounds are examined separately.

1. The shire-ground argument

The statements of some colonial judges and officials suggest that the exclusion of natives from municipal law was related to reserve tenure, so that the acceptance by natives of patents in fee simple for reserve land (which part of their number desired) would not only have subjected natives to statutory duties imposed on property owners, but would have ended the existence of native customary law and government as a *system* outside the jurisdiction of the municipal legal system. Said Powell J. in 1797, issuing patents in fee simple for reserve land was inappropriate because disputes arising thereunder would have been subject to English law and municipal courts, and "[t]he Government cannot wish to constrain them or to introduce our Laws among them, as long as they continue a people apart...."[113] Lieutenant-Governor Francis Gore concluded in 1809 that the effect of transforming native rights in reserve land to that of "Free and Common Soccage" would have been "to abridge their National or Personal Independence...."[114] Similarly, Indian Department Deputy Superintendent William Claus informed the Six Nations that, by "accepting of a Deed from the King" for their lands,

[113]Powell, "Memoir of the Claim of the Six Nations," *supra* note 58, 60.

[114]F. Gore, Lt. Gov., to E. Cooke, Under-Sec. of State, 14 Oct. 1809, *CO* 42/349: 186.

their "ancient custom" would end and they would be "subject to every call by the civil authorities that the whites are".[115] In response, Mohawk and Onondaga chiefs argued that if patents in fee simple would "destroy our confederacy" and "take away from us all our customs", then they should remain satisfied with the present basis of landholding.[116] Finally, Lieutenant-Governor Sir Francis Bond Head stated in the 1830s that because His Majesty had "never exercised his paramount right" over Indian lands, "within their own communities they have hitherto governed themselves by their own unwritten laws and customs".[117]

The argument that no municipal law applied to reserves as long as they were held by customary law derives some legal support from the shire-ground argument. As Robinson C.J. concluded, territory was not considered "organized land" in the "actual possession" of the crown or its officers until native title was extinguished, even if that land were included within a county or township;[118] and until lands were placed under the crown's actual supervision, the shire-ground argument provided that indigenous customs and jurisdictions continued in force under imperial common law. Although Robinson C.J. was referring to unceded Indian land as opposed to reserve land, because it was held that the native interest in reserve land was the same as that in unceded land, it may be argued that the shire-ground argument supplies the legal foundation for the conclusions reached by the above-cited officials. The shire-ground argument does not assert that the colonial system had no constitutional authority over the native systems on reserves, but

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[115]Council with the Six Nations, 30 April 1824, *RG10* Vol. 16, 12605-6. *Contra*: Maitland to Bathurst *supra* note 77.

[116]*Ibid.*, 12608, 12610.

[117]Bond Head to Upp. Can. Leg. Ass., *supra* note 3.

[118]*Supra* ch. 8, notes 55-57.

merely that until some special steps were taken to enforce that constitutional authority in a *de facto* sense the common law, being averse to a legal vacuum, recognized the continuity of the native system in the same way it had done prior to the legislative introduction of colonial municipal law. In essence, under the shire-ground argument the *de facto* continuity of native law and government on reserves was, under certain transient conditions at least, *de jure* continuity.

2. Constitutional implications of imperial control over Indian affairs

(a) the *ultra vires* doctrine and fundamental prerogative

The next question to be addressed is whether there were legal reasons preventing the extension of the colonial system over reserves. As seen in Chapter Eight, the grant of legislative authority over the "peace, welfare and good government" of Canada gave colonial legislatures plenary authority over the internal affairs of the colony. It was therefore assumed that, as Robinson C.J. stated, the colonial assembly "represent[ed] all the people" and the colonial legislature had the "power to bind the lives, liberties and estates, of all the inhabitants of this country".[119] In making this statement, however, Robinson C.J. did not address the legislature's authority over native peoples. Indeed, his comments stand in contrast to the following recommendation of the 1837 Parliamentary Select Committee on Aborigines:

> The protection of the Aborigines...is not a trust which could conveniently be confided to the local Legislatures....For a local Legislature, if properly constituted, should partake largely in the interests, and represent the feelings or the settled opinions of the great mass of the people for whom they act. But the settlers in almost every Colony, having either disputes to adjust with native tribes, or claims to urge against them, the representative body is virtually a party, and therefore ought not to be the judge in such controversies.
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> ...

[119] *McNab v. Bidwell* (1830), 1 Draper 152 (K.B.), at 160.

> Whatever may be the legislative system of any Colony, we therefore advise that as far as possible, the Aborigines be withdrawn from its control.[120]

In Canada it was not necessary that Indian affairs "be withdrawn" from colonial control—as seen, the imperial crown had always exercised direct control over native policy, and continued to do so until 1860. The important question is this: did the colonial legislature have legal power to legislate over native peoples which the imperial crown held in abeyance as a matter of policy (enforceable through its rights of assent and disallowance), or was the colonial legislature incapacitated as a matter of law from enacting laws for native peoples? Any colonial statutes which expressly related to the internal affairs of native communities would probably have been disallowed by the imperial crown, and so whether they were legally invalid or merely politically unacceptable was not judicially determined. However, the question of the colonial legislature's legal authority over Indian policy remains relevant to the determination of whether colonial statutes of general application (which would not have attracted the disallowance power), including those creating courts and defining their jurisdictions, were *ultra vires* insofar as they purported to govern the internal affairs of native reserves.

It was argued in Chapter Eight that, as of the late eighteenth and early nineteenth centuries, native nations were regarded as allies and their affairs were managed by the crown through the commander-in-chief and the Indian Department, and on this basis colonial legislation regulating the internal affairs of native communities would have been *ultra vires* as trenching upon the "fundamental" prerogative of the crown over "extra-imperial relations". In Chapter Nine it was observed that once natives lost their military strength and settled onto reserves in the 1820s the management of their affairs by the

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[120] *Rep. Sel. Comm. Aborigines, 1837*, 77.

crown apparently acquired a new constitutional basis: under the doctrine of aboriginal wardship, the crown managed Indian affairs pursuant to prerogative powers analogous to its traditional powers as *parens patriae*. It may be argued that because the exercise of this branch of the royal prerogative lacked an intrinsically "imperial" character, it was the exercise of a "minor" or "local" prerogative and was therefore susceptible to limitation or regulation by the local colonial legislature. In other words, it may be argued that the changing political circumstances of native nations in colonial Canada resulted in the evolution of Indian affairs into a matter over which the colonial legislature had constitutional authority.

In response to this argument, it may be stated that the evolution of the constitutional basis for the crown's Indian policy from the "extra-imperial relations" head to the *parens patriae* head of the royal prerogative did not necessarily mean that Indian affairs ceased to be a matter of fundamental prerogative. As noted,[121] the crown's *parens patriae* authority was invoked in relation to native *nations*, not native individuals. If the crown intervened to protect national units, then perhaps it acted pursuant to the "intra-imperial relations" prerogative and the principles articulated in *Mohegan Indians v. Connecticut*.[122] Indeed, the statement of the 1837 Parliamentary committee suggests that the settler body-politic, as represented by the colonial legislature, did not include aboriginal peoples; it suggests, in other words, that aboriginal peoples constituted distinct political communities. The committee's observation that the settler society stood as a "party" in relation to natives and therefore ought not to be "judge" over their interests echoed the law officers's opinion of 1751, made in relation to the *Mohegan* case, that the imperial crown had authority to hear "disputes between the Whole Province of

[121]*Supra* sec. I, A, 1.

[122]*Supra* ch. 4.

Connecticut & the body of Mohegan Indians between whom there is no common Court of Justice there".[123] If native people in colonial Canada were distinct political communities, integrated within the empire but not the local municipal system, then the exercise by the crown of authority over their affairs would have been constitutionally justified not only under the *parens patriae* prerogative but also under the intra-imperial relations prerogative. And, because the exercise of the intra-imperial relations power—the power of regulating relations between components of the empire—was distinctly imperial in character, it represented one of the fundamental prerogatives of the crown in relation to which conflicting colonial legislation was *ultra vires*.

In considering which of these interpretations best explains the constitutional position of the colonial legislature in relation to native peoples in the nineteenth century it is important to emphasize that the situation was fluid: the legal authority of the legislature varied with the constitutional foundation for the exercise of the royal prerogative in relation to Indian affairs, which in turn varied with the political circumstances of native communities. Aside from Strong J.'s observation in 1887 that the Indian Department superintendents were "responsible directly to the crown...thus superceding the Provincial Governments",[124] courts which acknowledged the imperial/colonial division of responsibilities over Indian affairs did not consider its implications for colonial jurisdiction.[125] However, it is significant that they did not describe the devolution of responsibility from the imperial to the colonial government in

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[123]*Supra* ch. 4, note 29.

[124]*St. Catharines Milling Co. v. The Queen* (1887), 13 S.C.R. 577, at 608.

[125]For example, *Mutchmore v. Davis* (1868), 14 Grant 346 (Ont. Ch.), at 358; *In re Indian Claims* (1895), 25 S.C.R. 434, at 497, 503; *Ontario Mining Co. v. Seybold* (1901), 32 S.C.R. 1, at 3. But see, *Rex v. Hill* (1907), 15 O.L.R. 406 (C.A.), at 411 (some doubt expressed about the idea that natives were exempted from colonial laws because the imperial government managed their affairs).

1860 as the "delegation" or "grant" of "legislative authority"; instead it was described as the "transfer" of "management" of Indian affairs.[126] This suggests that an existing legislative competence existed, and that it was the discretion over how that authority would be implemented and administered which was devolved. This conclusion is confirmed by the lack of imperial statutory amendment: the existing plenary powers over "peace, welfare and good government" must have, by 1860 at least, included Indian affairs.[127] Indeed, given the assertion by some colonial judges of criminal jurisdiction over reserves by 1830, and given the increased legislative activity of the colony over native issues in the 1850s, that legislative competence probably vested much earlier. Although the point in time at which it vested cannot be identified with precision, the following general dates are suggested: Indian affairs may be characterized as falling within the fundamental extra-imperial relations prerogative until about 1814 (the end of the War of 1812), then within the fundamental intra-imperial relations prerogative until the mid-1820s (after which colonial criminal jurisdiction over reserves was recognized), and then within the minor *parens patriae* prerogative.

(b) the *ultra vires* doctrine and crown divisibility

Even after Indian affairs ceased to be of intrinsically imperial concern and colonial legislative authority vested, the exercise of that authority remained legally restricted as long as the imperial government maintained its policy of managing Indian affairs directly. The source of this restriction is the doctrine of crown divisibility. As a general rule it

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[126]*In re Indian Claims* (1895), 25 S.C.R. 434, at 503; *Ontario Mining Co. v. Seybold* (1901), 32 S.C.R. 1, at 3.

[127]The *Act respecting the management of the Indian Lands* (1860), 23 Vic., c. 151 (Can.), "declares the terms upon which Her Majesty the Queen assented to the transfer of the management of Indian affairs from under the direct supervision of the Imperial Government" (*Ontario Mining Co. v. Seybold et al.* (1901), 32 S.C.R. 1, at 7); it was reserved by the governor for the assent of the imperial crown in London.

has been stated that colonial statutes could not "affect the exercise by the Crown *in the United Kingdom* of the Crown's legislative, executive or judicial powers in respect of the [colonial] territory".[128] This rule may be viewed as an application of the extra-territoriality principle:[129] if the crown was considered to be located at Whitehall, colonial statutes affecting crown powers were extra-territorial and therefore *ultra vires*; alternatively, if the crown was considered to be located in the colony, colonial statutes affecting crown powers were not extra-territorial. The question of colonial legislative competence over the crown therefore becomes a question of determining the "situs of the rights and obligations of the Crown".[130] According to the doctrine of crown divisibility, the crown's situs varied according to whether the crown acted "in right of" the colony or the empire.

Although the doctrine of crown divisibility was not clearly articulated until the twentieth century, it was judicially recognized as early as 1861 that, for some purposes, "the Queen should be considered as present in Canada...."[131] Of course, the Queen was not *in* Canada, but as constitutional monarch she could only act upon the advice of ministers, and if she acted upon the advice of ministers located in Canada then, at least insofar as those actions were concerned, the crown's situs was Canada. As May L.J. stated in *R. v. Foreign Sec., Ex p. Indian Ass'n* (1982), "the Crown 'in right of Canada'...is only a short way of referring to the Crown acting through and on the advice of Her [Majesty's] Ministers in Canada...."[132]

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[128]*Halsbury's*, IV, §1027 (emphasis added).

[129]*Supra* ch. 8, note 111.

[130]*R. v. Foreign Sec., Ex p. Indian Ass'n*, [1982] Q.B. 892 (C.A.), at 922.

[131]*In re Holmes* (1861), J. & H. 527 (Ch.), at 543.

[132][1982] Q.B. 892 (C.A.), at 928.

The question facing the Court of Appeal in *R. v. Foreign Sec., Ex p. Indian Ass'n* was whether the "Imperial Crown" (that is, the "Crown in right of the United Kingdom") was, as of 1982, legally responsible for crown obligations to Canadian natives under the *Royal Proclamation of 1763* and eighteenth- and nineteenth-century British-Indian treaties. The court held that legal responsibility for aboriginal rights under these instruments had, with the development of the doctrine of crown divisibility, devolved upon the crown in right of Canada. Denning M.R. concluded that the doctrine did not develop until the early twentieth century, while Kerr L.J. and May L.J. concluded that the doctrine may have developed as early as the late eighteenth century when local colonial governments were introduced into Canada. The court did not purport to identify the precise point in time at which the imperial crown ceased to be responsible for native peoples in Canada; it was sufficient for the determination of the case at bar to conclude that by 1982 the crown in right of Canada was fully responsible. The court did not consider—or even acknowledge—the fact that the imperial government retained control over Indian policy in colonial Canada until 1860. However, if May L.J.'s assertion that the situs of the crown in Canada depended upon whether the Queen was "acting through and on the advice of Her Ministers in Canada" is accepted, then it must be concluded that the crown was, insofar as the exercise of the royal prerogative over Indian affairs before 1860 was concerned, located at Whitehall. With the introduction of the principle of responsible government into Canada in the 1840s, the crown acted on the advice of local Canadian ministers in relation to most matters of internal colonial concern, but this was not the case in relation to Indian affairs. Said Strong C.J. in 1895:

> [T]he Indians were under the protection of the Imperial Government, and their affairs were administered by the Governor General, *not through the responsible ministers of the province, but directly as representing the*

Crown....[133]

Thus, whether or not Indian affairs were legally within the plenary legislative authority of the colony is irrelevant; for political reasons at least they were, until 1860, under the control of the crown acting upon the advice of the imperial ministry. The crown's situs when determining Indian policy was therefore Whitehall—beyond the boundaries of Canada, and therefore, according to the extra-territoriality principle, beyond the legislative competence of the Canadian legislature.

As a result, colonial legislation which interfered with the exercise of the royal prerogative over Indian affairs was *ultra vires*. This argument can be extended to legislation which was general in application and enacted for purposes other than the regulation of Indian affairs. The constitutionality of statutes of general application therefore depended upon reading into their provisions an implicit exemption for Indians and Indian lands insofar as the legislation conflicted with official crown policies undertaken under the royal prerogative and implemented through the Indian Department. At least some support for this argument can be derived from the judicial interpretation of colonial statutes governing the granting of letters patent for crown lands.[134] As for judicial jurisdiction, there are grounds to argue that reserves were implicitly exempted by colonial statutes establishing courts. Although the King's (Queen's) Bench was, by

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[133]*In re Indian Claims* (1895), 25 S.C.R. 434, at 503.

[134]Unceded Indian lands were regarded as crown lands, and colonial statutes of general application governing the disposal of crown lands did not expressly exempt them (for example, *An Act to provide for the disposal of the Public Lands in this Province* (1837), 7 Wm. IV, c. 118 (U.C.)); nevertheless, it was held that these statutes did not to apply to unceded Indian lands until they were expressly included (which was done by *An Act for the Management of Public Lands* (1853), 16 Vic., c. 159 (Can.)), in part because they were managed by the imperial Indian Department: *Mutchmore v. Davis* (1868), 14 Grant 346 (Ont. Ch.), at 357-58; *Church v. Fenton* (1878), 28 U.C.C.P. 384 (Ont. C.P.), at 391-92; *St. Catharines Milling Co. v. The Queen* (1887), 13 S.C.R. 577, at 661-65.

colonial statute, given jurisdiction "throughout th[e] province", that jurisdiction was defined by reference to the "powers and authorities as by the law of England are incident to a superior court of civil and criminal jurisdiction".[135] Said Lord Brougham in 1838, this statute meant that "the constitution of our Courts, and with it the practice, prevails in Upper Canada".[136] Although by "practice" Lord Brougham meant procedures[137], the general principle underlying his comments may be extended to practices relating to jurisdiction. As seen, the historical practice of English courts of superior jurisdiction was to recognize rights of local jurisdiction—even rights of "local sovereignty"—established by custom and usage.[138] The argument above suggests there were constitutional reasons why courts ought to have applied this principle in colonial Canada so long as the imperial crown's practice and usage recognized native jurisdictions.

To summarize, there was legal justification for the conclusion that the extension of colonial law over reserves was contingent upon the state of imperial Indian policy. Because this policy evolved with time, there was therefore a legal mechanism for the crown's recognition of native "laws and customs" while "gradually...superceding them by our own law...."[139] Of course, the extent to which imperial policy could have evolved, without legislation or treaty, to the point of ceasing to recognize native law and government altogether is subject to arguments about the common-law right to native law and government.[140] However, as imperial policy developed after the 1820s it seems clear

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[135]34 Geo. III, c. 2 (U.C.).

[136]*Powell v. Washburn* (1838), 2 Moo. P.C. 199 (P.C.), at 210-11.

[137]The issue in *Powell v. Washburn, ibid.*, was procedures relating to appeals.

[138]*Supra* ch. 2, IV, D.

[139]*Supra* note 112.

[140]*Supra* ch. 9, IV.

that the barriers between the two parallel municipal systems in colonial Canada had, to a certain degree at least, begun to erode; aboriginal peoples in Canada were therefore already partially integrated within the colonial legal system by 1860, at which point their status as distinct political units under the imperial constitution was ended, and their status as distinct political units under the local colonial constitution began.

Chapter Eleven

Conclusion

From the conquest of New France in 1760 to the devolution of control over Indian affairs to the colonial government in 1860, the imperial crown recognized the continuity of native customary law and government in Canada. The treaties, commissions, instructions, and general Indian Department practice and usage evidencing this recognition created constitutional barriers around native communities through which laws and jurisdictions of local colonial systems which conflicted with imperial Indian policy could not penetrate. Special imperial tribunals were created to apply native customary law among native peoples and to protect its continuity from abrogation by Indian Department officials. Of course, at times the imperial crown disregarded native law and government, interfering with the composition of native councils and directing their policies away from traditional and toward European objectives, and after 1826 it permitted colonial criminal jurisdiction to be exercised over reserves. But at no time prior to 1860 did it purport fully to abolish native law and government on reserves; native chiefs applied both customary and written laws to such matters as land and resource use, purchases and succession of land rights, private commercial concerns, the welfare of disadvantaged reserve residents, public building enterprises, and at least minor criminal and public order concerns. Where the extinguishment of native government over reserve land was achieved it was through the consent of the nation's chiefs-in-council obtained by treaty. In short, the affairs of native people in unceded and reserved Indian lands in colonial Canada were, for the most part, governed by native customs and institutions; some of these customs and institutions were truly aboriginal in origin, others evolved in response to the social changes forced by British colonialism, but in both cases their legality and authority were acknowledged by the imperial crown.

The objectives of this study have been to establish these historical facts and to explain their legal significance in light of a theoretical framework of imperial law. Part One of this study constructed such a framework, identifying as its cornerstone the common-law presumption of continuity. This presumption was, in turn, supported by principles integral to the very coherence of the common law itself; namely, judicial aversion to the prospect of lawless conditions, and judicial respect for the division between judicial and legislative functions of state. Part Two of this study established that, notwithstanding the general introduction of municipal law and government into colonial Canada by imperial statute, the *de facto* introduction of that law and government was a gradual process, and that in the interim it was crown practice to recognize native law and government in both unceded and reserved Indian lands. These conclusions, when considered in light of the general principles identified in Part One, suggest that native law and government must have had some common-law status which had not been abrogated by the legislation introducing colonial laws and governments for settlers. Indeed, given the century of crown recognition of aboriginal customs and chiefs, the conclusion that they had no British legal status seems somewhat incredible. The common law would not have ignored the practical reality of native life and crown practice in colonial Canada. It would not have sanctioned a legal vacuum within native communities, and yet for constitutional reasons it could not have recognized the applicability of colonial municipal law where to do so would have interfered with the imperial recognition of customary law; in short, it would have sought to maintain social order and to respect the prerogatives of the crown by recognizing the continuity of native customary law and government.

If it is accepted that the common law recognized the continuity of native law and government, questions still exist as to the character it attributed to that continuity. The presumption of continuity forms a cornerstone common to a variety of theoretical models of imperial law within which the status of native customs may be explained. In Chapter Five, two such models were summarized, the complex settlement- and the complex conquest/cession-models. As a theoretical explanation for the continuity of native customary law, the complex settlement-model does not fit the historical reality of colonial Canadian constitutional development. British sovereignty over natives was not asserted by either settlement or the cession of territory from France alone, natives were not regarded as instantly subject to either the French or English law which had been introduced for settlers, and native customs were not recognized as forming an element of the local colonial legal system.

The complex conquest/cession-model, however, is more promising. It is consistent with the interpretation of seventeenth- and eighteenth-century British imperial common law and colonial statutory law presented in Chapters Three and Four. It also fits the historical record: first, notwithstanding British claims to Canada on the basis of either discovery and occupation or cession from France, sovereignty was only exercised over natives—to the extent it was exercised at all—following the establishment of an independent treaty relationship with them; second, native customary law continued as part of distinct systems of law separate from the colonial municipal system introduced for settlers. Insofar as natives were regarded as allies, their customs may have continued as part of foreign systems excluded from the imperial constitution; but even after sovereignty was asserted over them, native customs derived their legitimacy from distinct imperially-recognized "systems of native jurisprudence"[1] and did not form elements of the system of locally-adjusted English municipal common law introduced for settlers. Although the complex settlement-model may explain the continuity of aboriginal customs in such former British colonies as Australia and British Columbia, it fails to explain adequately

[1] *Supra* ch. 8, note 90.

the status of native law and government in colonial Canada. Recent judicial opinions in Ontario which adopt judgments from these other jurisdictions in concluding that native nations do not enjoy separate legal systems are, from the perspective of constitutional history at least, inaccurate.[2]

To conclude that the common law recognized the continuity of native law and government in cases between natives, or even in cases between native nations and the colonial government, is not necessarily to conclude that the common law recognized a justiciable right to native law and government enforceable against the imperial crown. Under the complex conquest/cession-model, judges deferred to crown usage and practice when determining if rights to local laws justiciable against the crown existed; but in colonial Canada, crown usage and practice contained conflicting elements. The determination of whether there was a common-law right to native law and government justiciable against the crown therefore required judicial balancing of the implications of the doctrine of aboriginal wardship and the crown's treaty policies, and (as in all instances when judges balance competing policy factors in articulating principles of common and constitutional law) historical circumstances, cultural perspectives, and prevailing ideas of political morality all combined to form a normative context influencing the outcome. No colonial judge recognized a common-law right to native law and government, and it may have been unlikely that, had the matter been properly placed before a court, a judge at that time would have done so. However, it is at least arguable that there were grounds upon which a judge might have recognized such an aboriginal right.

The conclusions of this study have significant implications for current debates on constitutional interpretation and reform in Canada. While the era of imperial management

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[2]For example, *Regina v. Pamajewon* (1995), 21 O.R. (3d) 385 (Ont. C.A.).

of Indian affairs was characterized by the absence of legislation on internal reserve matters, the subsequent era of local colonial, and now federal, control has been dominated by the legislative regime of the *Indian Act*, the basic structure of which has changed little between 1869 and the present.[3] Courts have interpreted this legislation in a common-law vacuum, insisting that the juridical concepts of Indian "chief" and "band council" upon which reserve government under the *Indian Act* is premised are mere creations of Parliament granted to native communities.[4] The conclusions of this study challenge that view by documenting the emergence of a common-law foundation for native law and government in Canada prior to the enactment of Indian affairs legislation. The acceptance of the view that Parliament recognized but did not create native governments on reserves is an important component to the argument that native government is an "existing aboriginal right" constitutionally protected by s. 35(1) of the *Constitution Act 1982*.

Of course, a modern judicial interpretation of the Canadian constitution would not necessarily incorporate all of the conclusions reached in this study. It might adopt a "redemptive" interpretative perspective rather than an "historical" or even a "modified historical" perspective.[5] A redemptive interpretation might reject as "unacceptable in Canadian law today"[6] certain principles of law which constrained the conclusions of this study. For example, this study may be criticized for advocating a theory of "contingent" aboriginal rights, according to which the justiciability of aboriginal rights is dependent upon crown recognition, as opposed to a theory of "inherent" aboriginal rights, according

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[3]*Supra* ch. 10, note 24.

[4]*Supra* ch. 1, note 5.

[5]*Supra* ch. 1, II.

[6]*Supra* ch. 1, note 21.

to which their justiciability is not so dependent.[7] Of course, it was not argued in this study that rights arising from native law and government were not justiciable between native peoples without crown recognition, but only that, in the context of colonial Canada's constitutional history, such recognition was necessary before the possibility existed for courts to recognize a right to native law and government which was justiciable against the crown. While this approach, in a certain sense at least, denies the inherent rights theory, it is the by-product of the assertion that British imperial law initially recognized that native peoples had sufficient attributes of sovereignty to warrant the conclusion that conquest or treaty was required before their inclusion within the British imperial constitutional order. If British imperial law recognized that conquest or treaty was necessary before the assertion of British sovereignty, then it also recognized the crown's right to commit acts of state and its right to legislate under the prerogative after British sovereignty was established over natives—and where these crown rights existed, British courts insisted that rights derived from local law could only be enforced against the crown if the continuity of that law had first been either expressly or impliedly confirmed by the crown.[8]

This imperial common-law deference to crown usage and practice is also consistent with two fundamental assumptions of English municipal constitutional law which this study did not challenge: the position of the crown as fountain of justice from which all rights of jurisdiction must flow; and the possibility that (therefore) rights of jurisdiction exercised by particular localities within crown dominions without express crown grant became justiciable only when supported by consistent usage and practice

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[7]For distinction between the two theories: Asch and Macklem, "Aboriginal Rights and Canadian Sovereignty" (1991), 501-3.

[8]*Supra* ch. 2, IV, C; ch. 5.

impliedly sanctioned by the crown. A redemptive interpretation of Canadian law may reject these principles as inapplicable to the modern interpretation of aboriginal rights to self-government and jurisdiction in Canada. From an *historical* perspective at least, it is difficult to argue that *imperial* law—which was, after all, designed to support the crown's consolidation of power over foreign peoples—bound the crown to recognize the continuity of governments in lands which it forcibly subjected to its sovereignty.

To conclude that native sovereignty was recognized but that the crown's rights to abrogate, confirm or alter native law and government after the assertion of British sovereignty was not, an interpretation of aboriginal rights derived from some other basis than the principle of continuity is necessary.[9] This principle subordinates aboriginal law and jurisdiction to British law and jurisdiction, implying either forced or consensual submission of aboriginal nations to British sovereignty and crown prerogative. An alternative interpretation might emphasize that the initial British-Indian treaties in the Great Lakes Region were covenant chains of alliance and protection, not native submissions to British sovereignty. An interpretative perspective informed less by deference to crown usage and practice and more by respect for aboriginal understandings of the terms by which the British-Indian relationship was commenced in colonial Canada might lead to a re-articulation of the principle of continuity which approximates the aboriginal conception of the *Gus-Wen-Tah*, or "Two Row Wampum", according to which the covenant chain bound together nations on the basis of equality.[10]

Although confined by the historical parameters of British imperial law, it is hoped that the conclusions of this study contribute to the general legal and political context in

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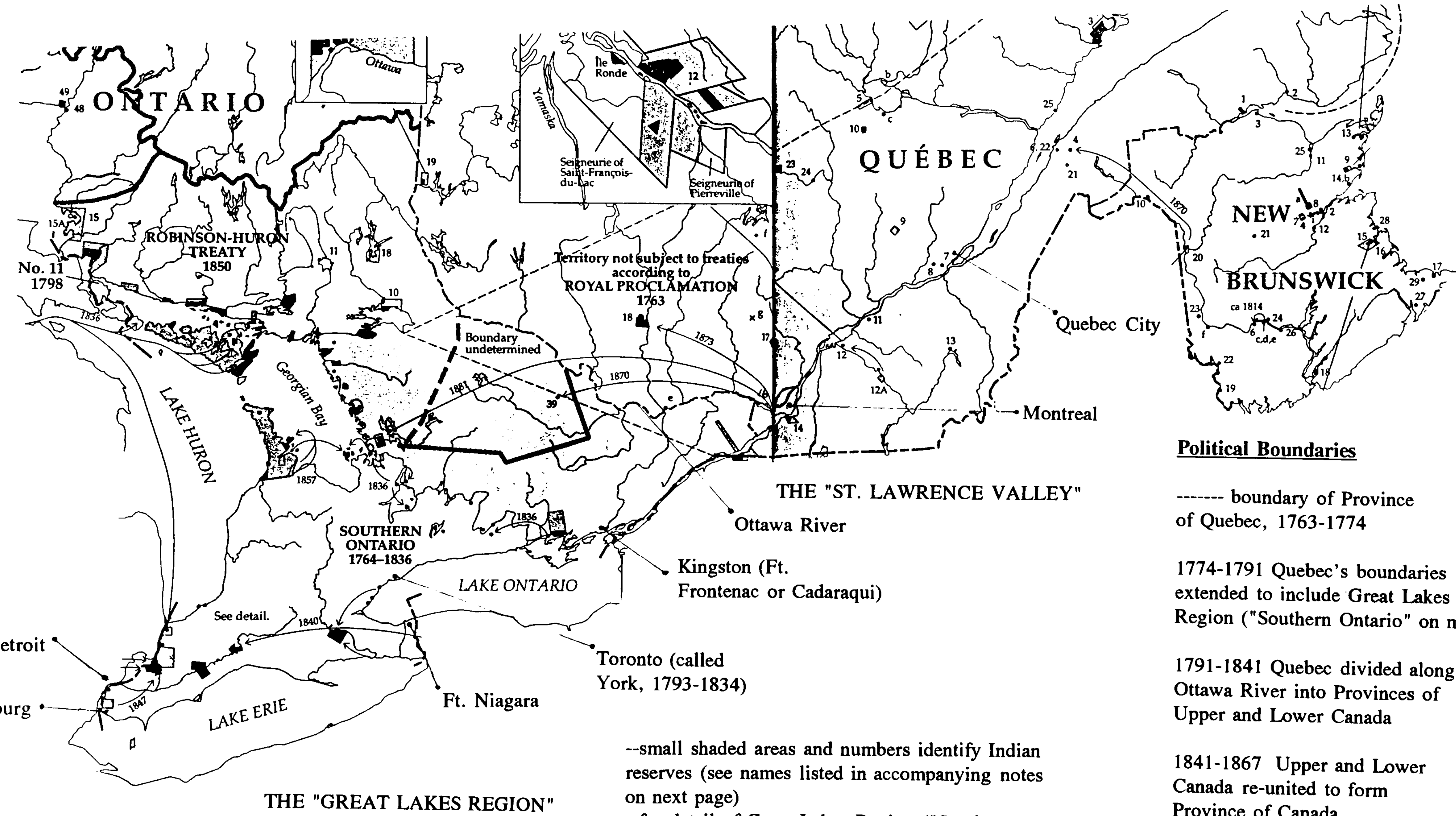
[9]This argument, as applied in the context of American law, is presented by Barsh, "Indigenous North America and Contemporary International Law" (1983), 105-7.

[10]*Supra* ch. 3, note 39.

which debates about future amendments to the Canadian constitution take place. Significantly, this study confirms that the principles adopted by the failed Charlottetown Accord were far from novel. The co-existence of native, colonial and imperial legal systems in colonial Canada is (broadly speaking) analogous to the recognition by the Accord of a federal system consisting of three orders of government. Even if the basic premises of British imperial law are deemed to be so fundamentally inimical to the modern aspirations of aboriginal peoples in North America as to prevent the use of that law as a foundation for future redemptive amendments to, or judicial re-interpretations of, the Canadian constitution, it must be acknowledged that the recent development in Canada of a theory of the constitution which embraces the concept of an inherent right of aboriginal self-government is nevertheless the acceptance of an idea which resonates with certain legal traditions inherent to British imperial law which are old as the British empire itself.

APPENDIX A
MAP OF THE GREAT LAKES REGION AND ST. LAWRENCE VALLEY

reproduced from plate 32 of *Historical Atlas of Canada, Volume II, The Land Transformed, 1800-1891*, R.L. Gentilcore, ed. (Toronto: University of Toronto Press, 1993) with the permission of the publisher



--small shaded areas and numbers identify Indian reserves (see names listed in accompanying notes on next page)
--for detail of Great Lakes Region ("Southern Ontario" on map) see Appendix B

Political Boundaries

------- boundary of Province of Quebec, 1763-1774

1774-1791 Quebec's boundaries extended to include Great Lakes Region ("Southern Ontario" on map)

1791-1841 Quebec divided along Ottawa River into Provinces of Upper and Lower Canada

1841-1867 Upper and Lower Canada re-united to form Province of Canada

Notes on Appendix A

Those reserves shown on this map which are mentioned in this study are listed below. Dates refer to the year in which the reserve was officially created.

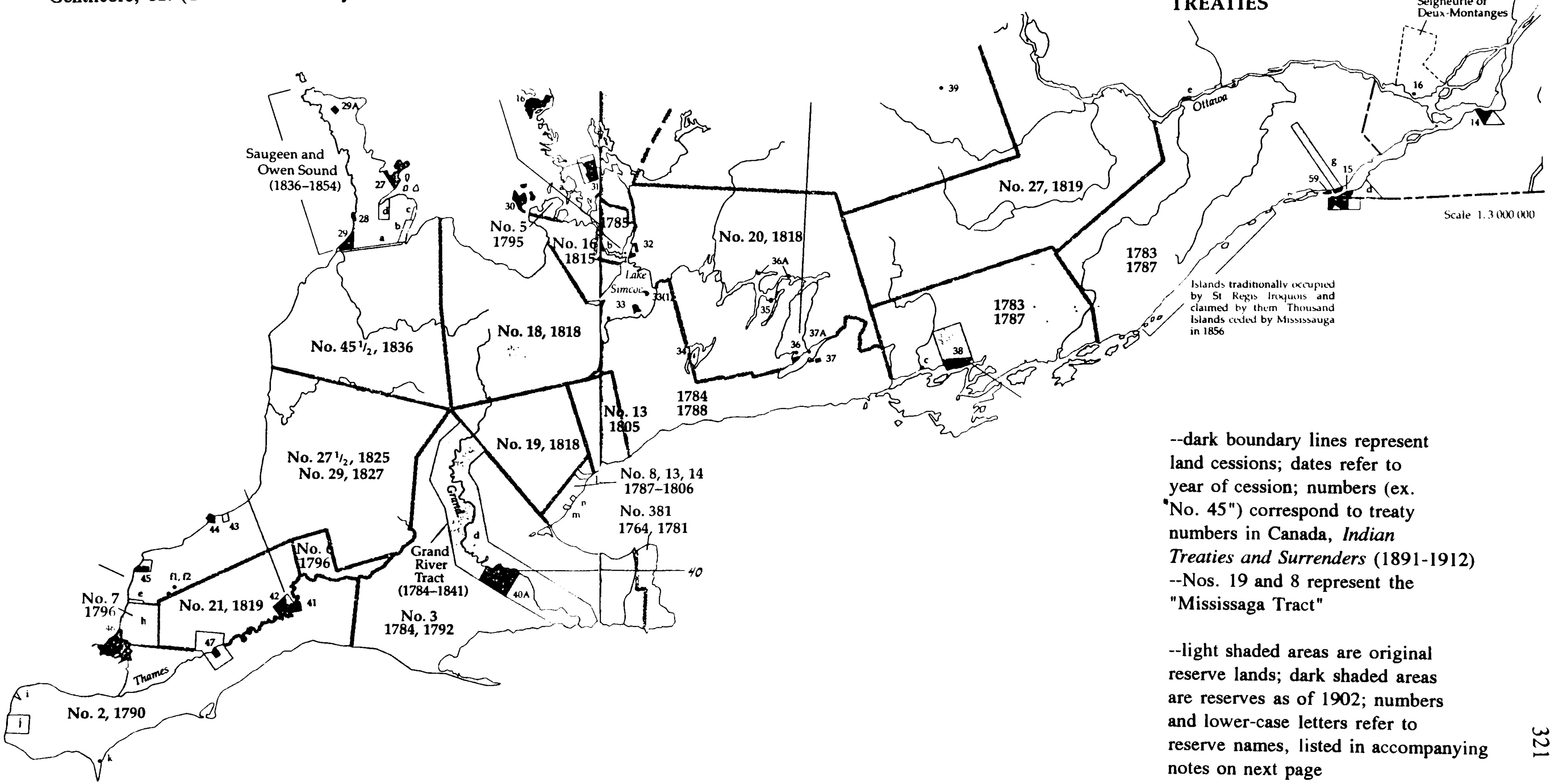
Reserve Number	Reserve
1	Restigouche, Micmac (1853)
7	Lorette, Huron (*Wendat*), (1794) [first Lorette mission established by French in seventeenth century]
11	Bécancour, Abenaki (1708)
12	Pierreville (Odanaki) [St. Francis], Abenaki (1700-1701)
14	Caughnawaga (Kahnawake), Iroquois/Mohawk (1680)
16	Oka (Kanesatake) [or Canasadaga], Iroquois/Algonquin/Nipissing (1717)

(information taken from Gentilcore, ed., *Historical Atlas of Canada* (1993), II, plate 32, with additional information in square brackets)

APPENDIX B

MAP OF LAND CESSIONS AND INDIAN RESERVES IN THE GREAT LAKES REGION

--this map is the detail referred to on the map in Appendix A, and is reproduced from plate 32 of *Historical Atlas of Canada, Volume II, The Land Transformed, 1800-1891*, R.L. Gentilcore, ed. (Toronto: University of Toronto Press, 1993) with the permission of the publisher



--dark boundary lines represent land cessions; dates refer to year of cession; numbers (ex. "No. 45") correspond to treaty numbers in Canada, *Indian Treaties and Surrenders* (1891-1912)
--Nos. 19 and 8 represent the "Mississaga Tract"

--light shaded areas are original reserve lands; dark shaded areas are reserves as of 1902; numbers and lower-case letters refer to reserve names, listed in accompanying notes on next page

Notes on Appendix B

Those reserves shown on this map which are mentioned in this study are listed below. Dates refer to the year in which the reserve was created.

Reserve Number/Letter	Reserve
14	Caughnawaga (Kahnawake), Iroquois/Mohawk (1680)
15	St. Regis (Akwesasne) [or Aughquisasne], Iroquois (1755)
16	Oka (Kanesatake) [or Canasadaga], Iroquois/Algonquin/Nipissing (1717)
32	Rama, Ojibwa (1838)
35	Mud Lake (Curve Lake), Mississaga/Ojibwa (1898) [1856]
38	Tyendinaga, Mohawk (1793) [1784]
40	Six Nations Grand River reserve (1847) [formed out of Grand River Tract, see "d"]
41	Oneida (1840)
42	Caradoc, Chippewa and [Delaware] Muncey (1819)
43	Stoney Point (Aux Sable), Chippewa/Ojibwa (1827)
45	Sarnia, Chippewa/Ojibwa (1827)
46	Walpole Island, Potawatomi, Chippewa/Ojibwa (1831) [1794-95]
47	Orford, Moravian Delaware/Muncey (1793)
b	Coldwater and Narrows, Ojibwa (1830)

[continued...]

d	Six Nations Grand River Tract (1784)
e	Moore, Lower Reserve/St. Clair, Chippewa (1827)
j	Huron/Wyandot (Anderdon) [Amherstburg] (1790)
l	River Credit, Mississaga/Ojibwa [1806]

(information taken from Gentilcore, ed., *Historical Atlas of Canada* (1993), II, plate 32, with additional information in square brackets)

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