2020

The Contrasting Fates of French Canadian and Indigenous Constitutionalism: British North America, 1760-1867

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Source Publication:
(2020) 7 law&history 1-29

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August 2019

In recent years scholars in law and history have devoted a good deal of attention to the position of Indigenous peoples in settler societies. Much of this scholarship has focused on the development of what Lisa Ford calls 'perfect settler sovereignty': the trifecta of colonial assertions of sovereignty, jurisdiction and territory that aimed to replace Indigenous self-determination and control over land.[1] A related strand focuses on treaty relationships between settler and Indigenous societies, in which the latter tried to preserve some elements of self-determination and control over land—and in some cases at least, to shape their future relationship with settlers.[2] Treaties, then, were one means by which Indigenous peoples sought to fashion a constitution that would govern relationships between the two societies. This 'constitutional' aspect of treaties has been somewhat understudied in the literature, and will be the focus of this study.

In the Canadian context it has become commonplace to speak of the 'Indigenous constitution,' in particular the Covenant Chain (kaswentha) that was initially entered into between the Dutch and the Five Nations in the early seventeenth century, then taken over by the British after their conquest of New Netherland, and finally expanded to include the former allies of the French after the latter's defeat in the Seven Years' War.[3] While trade and military alliance were essential elements of the covenant chain, it was also, as Mark Walters notes, meant to 'structure governance and social life within and between distinctive societies.'[4] A similar type of constitutional arrangement had been concluded between the French and dozens of Indigenous peoples at the Great Peace of Montreal of 1701, one that endured until the withdrawal of the former from the continent. While the precise nature of the law that governed these constitutions

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[1] *Settler Sovereignty: Jurisdiction and Indigenous People in North America and Australia, 1788-1836* (Cambridge, MA: Harvard University Press, 2010), 3.

[2] Saliha Belmessous, ed., *Empire by Treaty: Negotiating European Expansion, 1600-1900* (Oxford and New York: Oxford University Press, 2015).

[3] John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010).

[4] 'The Covenant Chain and Criminal Justice in Canada, 1760-1800' (unpublished paper, 2019), 2. Much of the scholarship on the covenant chain is indebted to Paul Williams, "The Chain" (LL.M. thesis, Osgoode Hall Law School, York University, 1982).

is still being explored, many regard it as a kind of hybrid intercultural law that incorporated elements of both European and Indigenous legal traditions.[5]

The purpose of this study is not to debate the nature of the law governing the Indigenous constitution. Rather, it is to explore the legal discourse surrounding it, in particular the virtual disappearance of the very notion of an Indigenous constitution from that discourse in the British Atlantic world between about 1700 and 1860. From being fairly widely acknowledged in the eighteenth century, the idea of an Indigenous constitution as a form of law had vanished in settler and imperial legal discourse by the mid-nineteenth century (though not in the practice or mentalité of Indigenous peoples themselves). In the course of this inquiry I propose to bring the Indigenous and settler constitutions, particularly those of the Canadas, into conversation with one another. How is it that the French-Canadians, also a colonized people, were able to see their constitutional demands largely secured over the century after the conquest, while those of Indigenous peoples to respect their early arrangements with the French and British crowns were constantly deflected and ignored? Politics and demography of course have a lot to do with these differential outcomes. The military contribution of, and military threat from, Indigenous peoples became much less relevant after the end of the War of 1812, even as the French-Canadian population surged and British and Irish immigration increased dramatically after 1815.

While acknowledging the importance of these broader contextual factors, the argument of this paper is that shifts in legal thought, in conceptions of law in general and constitutional law in particular, also contributed to the rise of French-Canadian constitutionalism and the decline of Indigenous constitutionalism. The eighteenth century had little trouble treating Indigenous constitutionalism as part of imperial legal pluralism, at a time when law itself was less hard-edged and more open to a variety of sources. The mid-nineteenth century turn to Austinian positivism and written constitutions led to the unwritten Indigenous constitution becoming literally invisible. Even though Indigenous communities remained largely self-governing down to Confederation (and beyond), their relations with settler societies were no longer governed, in the mind of settler officialdom, by any set of constitutional constraints. After the achievement of responsible government in the mid-nineteenth century, any restraint demonstrated by newly empowered colonial legislatures was based on considerations of expediency, or sometimes by a

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[5] See, e.g., John Borrows, 'Wampum at Niagara: The Royal Proclamation, Canadian Legal History and Self-Government,' in M. Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference* (Vancouver: UBC Press, 1997); Mark D. Walters, 'Brightening the Covenant Chain: Aboriginal Treaty Meanings in Law and History after *Marshall*' (2001) 24 *Dalhousie Law Journal* 75; Brian Slattery, 'The Organic Constitution: Aboriginal Peoples and the Evolution of Canada' (1995) 34 *Osgoode Hall Law Journal* 101. Others prefer to speak of a 'normative community' rather than law, as characterizing relations between Indigenous peoples and settler society: Jeremy Webber, 'Relations of Force and Relations of Justice: The Emergence of Normative Community between Aboriginal Peoples and Colonists' (1995) 34 *Osgoode Hall Law Journal* 623. On the Great Peace of Montreal, see Gilles Havard, *The Great Peace of Montreal of 1701: French-Native Diplomacy in the Seventeenth Century*, trans. Phyllis Aronoff and Howard Scott (Montreal and Kingston: McGill-Queen's University Press, 2001).

vague sense of the honour of the Crown, rather than actuated by any sense of Indigenous rights. Legislative supremacy had triumphed.

A brief review of the settler constitutions of British North America will be necessary to set the stage. The constitutions of the eastern provinces of Nova Scotia (1713), Prince Edward Island (1769) and New Brunswick (1784) were pure creatures of the prerogative, embodied in the governors' commissions and instructions, as was that of Quebec prior to the Quebec Act 1774 With that Act, Parliament demonstrated more of an interest in colonial constitutions, an interest that a generation later resulted in the 1791 Constitutional Act creating the governments of Upper and Lower Canada. In earlier work I argued that the drafting of the 1791 Act was more affected by the American Revolution than has often been assumed, and pointed out the important strengthening of the powers of the democratic element, the assembly, when compared with the prerogative constitutions.[6]

Although the 1791 constitution was replaced after the rebellions of 1837-38 with another statute somewhat less liberal in its orientation, the Act of Union of 1840, that Act in turn became a focus of discontent for both francophone and anglophone reformers over the next generation. Their agitation resulted ultimately in responsible government, itself achieved through changes in constitutional practice rather than statutory amendment, until the British North America Act 1867 was enacted as the statutory constitution for the new Dominion of Canada.[7] In that constitution French-Canadians in Quebec achieved virtual autonomy as the Quebec legislature was endowed with the very broad powers given to all the other provinces, subject only to certain entrenched linguistic and religious guarantees regarding education, the publication of legislation, and the use of both languages in the Quebec and federal courts and in Parliament and the Quebec legislature (French-Canadians outside Quebec secured much less in the way of linguistic or educational guarantees). Meanwhile, Indigenous peoples were referred to only once, in s.91(24) of the Act, which recognized 'Indians and Indian lands' as being a subject of federal jurisdiction, and no Indigenous representatives had taken part in the debates or processes leading up to the drafting and passage of the Act.

Lauren Benton's distinction between 'strong' and 'weak' legal pluralism assists in explaining the differing constitutional outcomes for French Canadians and Indigenous peoples. The first, she explains, 'denotes legal orders in which politically prominent attempts have been made to fix rules about the relation of various legal authorities and forums,' while the latter 'occurs where there is an implicit (mutual) recognition of "other" law but no formal model for

[6] Philip Girard, Jim Phillips and R. Blake Brown, *A History of Law in Canada, vol. I, beginnings to 1866* (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 2018), 187-94; the ideas put forward there are explored at greater length in my paper 'Rearguard or vanguard? A new look at the Constitutional Act 1791,' currently under review.

[7] On these later developments, see ibid, chaps. 26 and 27.

the structure of the legal order, or where the model is in formation.'[8] These categories can shift over time: as will be seen below, after the Royal Proclamation 1763 and the Treaty of Niagara 1764, recognition by the British of Indigenous law was arguably stronger than their recognition of the civil law in Quebec, which the Royal Proclamation left in a sort of legal limbo. The Quebec Act 1774, however, was a very 'politically prominent' attempt to recognize the civil law in the legally pluralistic environment of that colony, one that inspired impassioned debate on both sides of the Atlantic. But, as will be seen, no legal measure of parallel importance with regard to Indigenous law or the Indigenous constitution ever succeeded, and the debate on the subject was confined largely to North America. The mission of this paper is to explore, from an intellectual legal history viewpoint, how and why these differential outcomes resulted.

The argument will proceed along three axes. First, the imperial plan of 1764 for reshaping Crown-Indian relations in North America will be examined as an historical moment when the Indigenous constitution would have received at least indirect statutory recognition through a 'politically prominent attempt' to reconcile settler and Indigenous jurisdictions. Next, the issue of the juridical capacity of Indigenous nations to act within the settler legal order will be considered, an area where changing legal definitions of legal personality dramatically undermined the capacity of Indigenous communities to shape their own destiny. Here, the absence of a 'formal model' guaranteeing Indigenous legal agency allowed settler judges to deny legal pluralism in this crucial area, and to impose settler legal notions pure and simple. This occurred at the same time as the legislative assembly of Quebec served as a powerful voice for protecting French-Canadian interests and traditions (including, and perhaps especially, the civil law) and advancing their aspirations. Finally, the eighteenth- and nineteenth-century British and domestic colonial legal literature will be canvassed for what it says (or does not say) about the Indigenous constitution.

I *The plan of 1764*

Three events in 1763-64 were critical to the future of any constitutional arrangement between native peoples and the British Crown. The first two are well known, the Royal Proclamation of 1763 and the Treaty of Niagara of 1764 by which the British not only renewed the covenant chain with the Haudenosaunee and other Indigenous peoples but also substituted themselves in place of the French with regard to the Great Peace of 1701. The third, the British plan for reshaping the relationship between the Crown and Indigenous peoples in North America known to historians as the 'Plan of 1764,' is only a footnote in American colonial history and barely that in the history of British North America, but it deserves to be better known even

[8] Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900* (New York: Cambridge University Press, 2002), 11.

though it was not fully adopted.[9] It was described succinctly by undersecretary for North America William Knox in his 1774 pamphlet defending the Quebec Act. At the time the Royal Proclamation was being drafted, Knox said,

> a general plan for the regulation of the trade with the savages was under consideration of the Board of Trade, and in great forwardness. To give this plan uniformity and effect, it was thought necessary to exclude all provinces from jurisdiction in the interior or Indian country; but all persons resorting thither for trade … were to be subject to a police, deriving authority immediately from the Crown, and supported from a revenue arising from a tax upon the trade to be imposed by Act of Parliament.[10]

Knox went on to explain that 'the events of the following year were fatal to this plan'—referring to the ill-fated Stamp Act of 1765 and the strong reaction to it in the American colonies. The plan was to be embodied in a statute, but while this never came to pass, some elements of it were implemented pursuant to the royal prerogative, and the entire plan continued to appear as a 'guideline' in subsequent instructions to governors, for example in those issued to Governor Guy Carleton on 3 January 1775 with respect to the implementation of the Quebec Act.[11]

Most of the provisions of the Plan of 1764 related to the imperial bureaucracy that was to be set up to administer it, setting out the powers of the Superintendents of the Northern and Southern Departments (the dividing line between them being the Ohio River) and those of the commissaries who would be appointed at the trading posts within these areas. The superintendents were to visit personally or by deputy 'the several Posts or Tribes of Indians within their respective Districts [at least] once in every year,' at which time they were to 'hear Appeals; and redress all Complaints of the Indians; make the proper Presents; and transact all Affairs relative to the said Indians.' The Superintendents and commissaries were given the powers of justices of the peace, but it is not clear whether the 'offenders' contemplated in the plan were only Europeans or also Indigenous inhabitants. With regard to civil matters the Plan was more specific: commissaries were given power to decide in a summary way 'actions between the Indians and Traders, as between one Trader and another,' up to ten pounds sterling, with an appeal to the superintendent, whose decision was final. Clearly civil disputes between Indigenous persons themselves were to be left to their own systems of ordering.

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[9] For an overview from the American viewpoint, see Daniel K. Richter, 'Native Americans, the Plan of 1764, and a British Empire That Never Was,' in Robert Olwell and Alan Tully, eds., *Cultures and Identities in Colonial British America* (Baltimore, MD: Johns Hopkins University Press, 2006). For a Canadian view, Mark Walters, 'The extension of colonial criminal jurisdiction over the aboriginal peoples of Upper Canada: Reconsidering the *Shawanakiskie* Case (1822–26)' (1996) 46 *University of Toronto Law Journal* 273.

[10] *The Justice and Policy of the Late Act of Parliament for Making more Effectual Provision for the Government of the Province of Quebec …* (London: for J. Wilkie, 1774), 39-40.

[11] The plan can be found in Adam Shortt and Arthur G. Doughty, *Documents relating to the constitutional history of Canada, 1759-1791*, 2nd rev. ed., 2 vols., (Ottawa: J. de L. Taché, 1918), vol. 2, 607. Carleton's instructions can be found in *Report of the Canadian Archives for the Year 1904* (Ottawa: S.B. Dawson, 1905), 229.

The Plan also provided for Indigenous input in all disputes with Europeans. Each 'Tribe' was to elect a 'beloved man' who would act as 'Guardian for the Indians and Protector of their Rights,' with liberty to be present 'at all Meetings and upon all Hearings and Trials relative to the Indians … and to give his Opinion upon all Matters under Consideration at such Meetings or Hearings.' These provisions were laid out in full with respect to the Southern Department, with the direction that similar establishments were to be made in the Northern Department, 'as far as the Nature of the Civil Constitutions of the Indians of this District, and the Manner of Administering civil affairs, will admit.' The references to the 'Rights' of the Indians and their 'Civil Constitutions' were not unusual in the eighteenth century. In earlier instructions to Carleton in 1768, he was directed to inform himself 'with the greatest Exactness of the Number, Nature and Disposition of the several Bodies or Tribes of Indians, of the manner of their Lives, and the Rules and Constitutions by which they are governed and regulated.' In the same instructions he was enjoined to 'maintain a Strict Friendship and good Correspondence, so that [the Nations and Tribes of Indians] may be Induced by Degrees not only to be good Neighbours to Our Subjects, but likewise to be good Subjects to Us.'[12] While the meaning is not perhaps entirely clear, it suggests that the Indigenous inhabitants of Quebec at least were not yet 'subjects' of the King but might in due time agree to become so if treated properly.[13]

Finally, the Plan of 1764 enlarged on the provisions of the Royal Proclamation with regard to Indian lands. The latter provided that such lands could only be ceded to the Crown after 'some Publick meeting or assembly of the said Indians' had been convoked for that purpose by the governor of the relevant colony. The Plan of 1764 went further. Clause 42 directed that

> That proper Measures be taken, with the Consent and Concurrence of the Indians, to ascertain and define the precise and exact Boundary and Limits of the Lands, which it may be proper to reserve to them, *and where no Settlement whatever shall be allowed.*[14]

The next clause repeated the Royal Proclamation's requirement for a public meeting but went on to state

> all Tracts, so purchased, shall be regularly surveyed by a Sworn Surveyor in the presence and with the Assistance of a person deputed by the Indians to attend such Survey; and the said Surveyor shall make an accurate Map of such Tract, describing the Limits, which Map shall be entered upon Record, with the Deed of Conveyance from the Indians.[15]

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[12] Shortt and Doughty, *Documents 1759-1791*, vol. 1, 319-20.

[13] Michel Morin argues that Indigenous nations were always allies of the French kings, not subjects, down to 1760: 'Fraternité, souveraineté et autonomie des Autochtones en Nouvelle-France' (2013) 43 *Revue générale de droit* 531. See also his *L'usurpation de la souverainete autochtone* (Montreal: Boreal, 1997).

[14] Shortt and Doughty, *Documents 1759-1791*, vol. 2, 437 (emphasis added).

[15] Ibid.

The Plan was to be enacted in an imperial statute. Had that happened, Indian affairs in British North America might have taken a different course. The statute of 1764 could have become what the Quebec Act became for French Canadians: a parliamentary affirmation of legal continuity for a non-British population. In the face of such a statute it is more likely that a 'strong' –or at least 'stronger' – form of legal pluralism would have emerged to the benefit of the Indigenous population, though clearly there are no guarantees in this regard. The Plan of 1764 did not explicitly affirm the continuance of Indigenous laws as the Quebec Act confirmed the continuance of the Custom of Paris and other French sources of the "Laws of Canada." However, in the direction to 'make the proper Presents,' the Plan confirmed a key and longstanding element of the Covenant Chain, the cementing of an alliance and quasi-familial relationship by the annual exchange of gifts. Moreover, in calling for the participation of Indigenous peoples in virtually all matters affecting their relations with settler society, in implicitly confirming that disputes between Indigenous parties were to be governed by their own laws, and in affirming that some regions were never to be settled, it clearly followed in the tradition of the Covenant Chain and the Treaty of Niagara, providing considerably more scope for Indigenous agency than the Royal Proclamation.

Another might-have-been along these lines occurred in the early nineteenth century in the Mohawk community of Kahnawake near Montreal. In the 1790s the chiefs had been dealing with a particularly troublesome member of their community, Thomas Arakwente, whose entrepreneurial activities went against the communitarian ethos of Mohawk law and culture. Some of these disputes went before the colonial courts and the chiefs of Kahnawake sought legal advice about how they could best maintain their customary laws and protect their own authority. The first step was to have their laws written down by a notary in 1801, a 'code' written in French which they revised and updated in 1804. In that year they appointed the resident agent of the Indian Department, Guillaume de Lorimier, as their special agent with a mandate to seek the enactment of these laws by the House of Assembly. De Lorimier had been a member of the first House of Assembly from 1792-96 and hence was an entirely plausible intermediary for this task, but for reasons unknown nothing came of his efforts. The decision to seek legislative sanction for their laws reveals a shrewd understanding on the part of the chiefs of the way power dynamics were shifting in settler society. Had they achieved their goal of statutory recognition, it would have been more difficult later in the century for the very idea of Indigenous law to fade into obscurity.[16]

[16] On these events, see Daniel Rueck, 'Enclosing the Mohawk Commons: A History of Use-Rights, Land Ownership, and Boundary-Making in Kahnawá:ke Mohawk Territory (PhD dissertation, McGill University, 2013), 100-104 (1801 code); Isabelle Bouchard, 'Des systèmes politiques en quête de légitimité: terres, pouvoirs et enjeux locaux dans les communautés autochtones de la vallée du Saint-Laurent' (PhD dissertation, Université du Québec à Montréal, 2017), 233-34 (1804 code).

II *Shifting ideas related to the corporate legal personality of Indian nations*

Eighteenth-century colonial governments dealt with Indigenous communities on the basis that their chiefs had the juridical capacity to bind their people not only for purposes of Indigenous law but also within the settler legal order. They were capable grantors and grantees under both civil law and common law, and were treated, in effect, as a *sui generis* type of body corporate. In the long-running litigation in *Mohegan Indians v. Connecticut*, finally decided by the Privy Council in 1772, it was at least implicit that 'Indian nations' in North America possessed some kind of legal personality under the common law.[17] In Upper Canada, no one raised any objections to Governor Haldimand's grant to the Six Nations in 1785 on the basis that the latter did not possess legal personality and could therefore not hold the land.[18] In Lower Canada, no one questioned that the traditional councils of Indigenous mission communities could act as seigneurs, in a way similar to ecclesiastical bodies, collecting seigneurial dues from settler individuals who resided on their lands, often via French-Canadian agents appointed by the chiefs.[19]

The first indication of a change in position by jurists occurred in an 1820 decision of the Montreal Court of King's Bench where the legal capacity of the chiefs at Kahnawake to administer the seigneury was denied. The result was illustrative of a growing trend to view corporate status as flowing only from royal charter or legislative act, and not from prescriptive right, past practice or the recognition of other legal orders such as Indigenous law. That this was a meta-trend in legal thought and not just a discriminatory practice directed at Indigenous communities is demonstrated by the fact that the Sulpicians of Montreal encountered similar legal difficulties at this time. Although the order was recognized by the king of France prior to 1760 as possessing a form of legal personality, the British did not accept this as equivalent to corporate status by the nineteenth century and much legal uncertainty resulted. The matter was not resolved until an ordinance of the Special Council in 1840 formally endowed the order with

[17] Mark D. Walters, '*Mohegan Indians v. Connecticut* (1705-1773) and the Legal Status of Aboriginal Customary Laws and Government in British North America' (1995) 33 *Osgoode Hall Law Journal* 785; Paul McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-Determination* (Oxford: Oxford University Press, 2004), 153-57.

[18] A large group of the Six Nations who remained loyal to the British during the American Revolution were granted a large tract of land in what is now southwestern Ontario, but until 1791 was part of the province of Quebec, known as the Haldimand Grant or Tract after its grantor. The Six Nations in turn granted and leased various lots to settlers in the ensuing decades. The Five Nations, referred to earlier, became the Six Nations with the addition of the Tuscarora to the confederacy in 1722.

[19] Both Rueck, 'Enclosing the Mohawk Commons' and Bouchard, 'Des systèmes politiques' document this practice extensively among the Mohawk and the Abenaki down to the 1820s in the former case and the 1840s in the latter. The lands on which they resided were not ancestral territories. Rather, the lands in these 'mission communities' had been granted to these and other Indigenous collectivities as seigneuries by the French crown in an effort to encourage them to settle in one place after their extensive migrations due to war and internal conflicts resulting from their conversion to Christianity.

corporate status.[20]

The impact of the 1820 decision regarding Kahnawake was soon felt elsewhere. When the Huron-Wendat of Jeune-Lorette near Quebec City petitioned the assembly of Lower Canada in 1823 to recover their seigneury at Sillery they were advised that they had a right to it, but could not take any legal action to enforce it in court because they lacked legal personality.[21] They would have to depend on the grace of the government, which was not forthcoming. The Abenaki at Odanak in Lower Canada continued to appoint a 'procureur' or 'syndic' to represent them in court until 1842, when a judge doubted their legal capacity to do so. Only a legally recognized corporate entity, he observed, could name an agent to act for it.[22]

It may have been this case that spawned the 1847 'Bill pour incorporer les diverses Tribus Sauvages du Bas-Canada,' which passed the assembly but was rejected by the legislative council. Speaking for the Seven Fires (a loose confederacy of the mission communities in Lower Canada), the chiefs at Kahnawake opposed it, possibly because it would have resulted in the incorporation of the nation as a whole, leaving their own role in the direction of the corporation uncertain.[23] By 1856 the Seven Fires were themselves requesting incorporation, but of the chiefs as opposed to the nation. Their request was not granted, but in 1850 the legislature of the United Province of Canada passed an *Act for the better protection of the lands and property of Indians*, applicable only to Lower Canada, in which the position of Commissioner of Indian Lands was created and endowed with legal personality.[24] This settler official was thus empowered to protect Indigenous lands, but was unaccountable to Indigenous communities.

The issue of legal personality also came up in Upper Canada and was decided in the same way without reference to the situation in Lower Canada, suggesting that broad legal-intellectual trends were at play.[25] The argument was made first in 1835 in *Doe ex dem. Jackson v. Wilkes*, in which a settler in possession of a small parcel of land within the Haldimand Grant sought to defend his title against a direct grantee from the Crown.[26] The defendant could not show a clear chain of title from the Six Nations, but even assuming he could, Chief Justice Robinson concluded that they had no title to give: the instrument conveying the Haldimand Grant was a nullity because it had only the governor's military seal attached to it and not the great seal of the

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[20] Brian Young, *In its Corporate Capacity: The Seminary of Montreal as a Business Institution, 1816-1876* (Montreal and Kingston: McGill-Queen's University Press, 1986). On the Special Council, see below, text following note 28.
[21] Michel Lavoie, *C'est ma seigneurie je réclame: La lutte des Hurons de Lorette pour la seigneurie de Sillery, 1650-1900* (Montreal: Boréal, 2010), 276-78. When the Hurons petitioned for incorporation in 1835, they were denied: Bouchard, 'Systèmes politiques,' 342.
[22] Bouchard, 'Systemes politiques,' 257.
[23] Ibid., 343.
[24] Statues of the Province of Canada 1850, c. 42.
[25] Sidney Harring, *White Man's Law: Native People in Nineteenth-Century Canadian Jurisprudence* (Toronto: University of Toronto Press, 1996) notes at 83 that Chief Justice Robinson 'never cited Quebec or American cases, and he never made reference to Quebec, American, or even British colonial history' in his 'Indian law' cases.
[26] (1835), 4 Upper Canada King's Bench 142. at 150.

province of Quebec. Title thus remained in the Crown, which had validly conveyed it to the plaintiff. According to the court the Six Nations were licensees who held the Grand River lands at the pleasure of the Crown, though as Robinson said in the next case to be considered, the invalid Haldimand deed was 'well understood and intended to be a declaration of the government that it would abstain from granting these lands to others, and would reserve them to be occupied by the Indians of the Six Nations.'[27] This conclusion alone, while disappointing for the Six Nations, would not have affected other Indigenous lands in the province, which did not depend on a Crown grant but on long possession for their validity.

It was a claim that Robinson addressed in *obiter* in *Jackson* that was more alarming and of wider import because it struck at the ability of all Indigenous communities to be recognized actors in the colonial legal order. This was the argument that the grant failed because it did not specify a capable grantee. Chief Justice Robinson would have decided this point in the plaintiff's favour as well if necessary, holding that a grant to 'the Mohawk Nation and such other of the Six Nations Indians as wish to settle on the lands described' did not describe a capable grantee, the Six Nations not being a body corporate recognized by English law.[28]

Obiter in 1835, the lack of legal personality argument became the *ratio* in *Doe d. Sheldon v. Ramsay* in 1851, another decision of Chief Justice Robinson and 'arguably his most important Indian law opinion.'[29] The plaintiff asserted title derived from the commissioners of forfeited estates, who had seized under an 1819 statute of Upper Canada the property of Benajah Mallory, convicted of treason for his role in the war of 1812.[30] Among his property was a 999-year lease of some of the Haldimand Tract lands, granted to him in 1805 by Joseph Brant as agent of the Six Nations. The court held that the Six Nations had no legal personality sufficient to appoint an agent, hence Mallory had no title for the commissioners to seize and none to convey to the plaintiff. Nor was there any issue of Haudenosaunee law to be considered: 'We cannot recognize any peculiar law of real property applying to the Indians—the common law is not part savage and part civilized.'[31]

Perhaps realizing that the logical consequence of this decision was the invalidation of any treaty between the Crown and an Indigenous nation, Justice Burns in his opinion was prepared to confine the court's decision to matters of property alienation. 'The government perhaps in transactions with a tribe may recognize the acts of those known to be the principal chiefs as being the acts of the whole body; but that is a very different matter from calling upon a court of justice to give effect to the alienation of lands.'[32] Even so confined, the decision disempowered

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[27] (1851), 9 Upper Canada Reports 105 at 123.
[28] (1835), 4 Upper Canada King's Bench 142, 150.
[29] (1851), 9 Upper Canada Reports 105. Quotation from Sidney L. Harring, *White Man's Law: Native People in Nineteenth-Century Canadian Jurisprudence* (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 1996), 72.
[30] The statute was Statutes of Upper Canada 1819, c. 12.
[31] (1851), 9 *Upper Canada Reports* 105, 123.
[32] Ibid., 135-36.

the governments of Indigenous polities from engaging in ordinary transactions with the settler world, forcing them to act through agents appointed by the government on their behalf and fostering the idea that they existed in a state of wardship. There could hardly be a more fundamental 'constitutional' shift than this, from Indigenous communities being treated as juridically capable entities in the eighteenth century, to their being wards of the Crown in the nineteenth, labouring under disabilities similar to those affecting married women, minors, and the mentally incapable, none of whom could act on their own behalf in law.

Thus, while the Indigenous peoples of Canada were never conquered, their juridical status gradually became inferior to that of the French, who were. The British dealt with the seigneurial class and the Roman Catholic hierarchy as the spokespersons for French-Canadian society for the first few decades after the conquest, admitting some seigneurs to membership in the Legislative Council, the appointive governing body established under the Quebec Act. The views of the Canadien population at large were a closed book to the British until the Constitutional Act 1791 established an assembly in which most males (and indeed some females) had the vote. The first election in 1792 returned mostly seigneurs in the francophone ridings, but their presence became exceptional thereafter, as francophone advocates, notaries and merchants became the voice of the French-Canadian nation. Conflict over many issues eventually brought the assembly to a standstill in the 1830s, as the French-Canadians used the leverage provided by their majority to block passage of various legal reforms considered essential by the British element of the population.[33] After the rebellions of 1837-38, the constitution of Lower Canada was suspended and an unelected Special Council was authorized to implement the reforms that had been resisted for so long. The imperial Act of Union 1840, reuniting Upper and Lower Canada under one legislature in which the lower population of Upper Canada had an equal number of representatives with Lower Canada, was meant to dilute French-Canadian political and cultural power. Yet a renewed resistance by French-Canadian reformers, strategically allied with anglophone reformers in Upper Canada, led to the eventual repeal of the objectionable elements of the Act of Union and the securing of strong powers to the province of Quebec that would be part of the new Confederation in 1867.

The key difference here with Indigenous peoples is that the resistance of French-Canadians took place within a recognizable constitutional context, one in which they possessed some leverage. While British-descended judges appointed to Quebec courts might whittle away at aspects of the civil law that they did not understand or did not find congenial, the statutory guarantee of the core of the civil law tradition in the Quebec Act remained the sheet-anchor of French-Canadian demands for respect for their distinctive society. In addition, French-Canadians

[33] Evelyn Kolish, *Nationalismes et conflits de droit: le débat du droit privé au Québec, 1760-1840* (Lasalle, QC: Hurtubise, 1994).

soon acclimated themselves to British constitutional law; they learned how to claim the rights of British subjects for themselves, turning the colonizers' own legal tools against them.[34]

The Native peoples were supposed to have some leverage based on the provisions of the Royal Proclamation 1763, but it related only to the surrender of land. Once land was surrendered, the Indigenous constitution provided no real means of preventing incursions of all kinds on the legal, cultural or physical integrity of Indigenous communities by the Crown or colonial legislatures. Without the statutory recognition that the Plan of 1764 might have provided for the maintenance of Indigenous traditions, native peoples were left with Benton's 'weak' form of legal pluralism, one that recognized—perhaps 'tolerated' would be a better word—the existence of distinct Indigenous laws but provided no institutional anchor for them in the settler/imperial world. The Indigenous constitution, one embodied largely in customary practice and oral traditions, was no longer seen as providing protection for the continuance of Indigenous customs and traditions. Indeed, Indigenous collectivities no longer possessed even the most fundamental right of being seen as capable juridical entities.

III *Indigenous law and constitutionalism in the British and local literature on 'colonial law'*

The eighteenth-century literature on Indigenous law and constitutionalism presents a mixed bag. Early writers such as John Oldmixon, who was not a lawyer and never visited North America, reported in his 1708 work *The British Empire in America* that Indian stories were filled with 'fable and impertinence' (in the original sense of non-pertinence – i.e., irrelevance). His slim coverage of Indigenous interactions was limited to war and trade, and questions of Indigenous law or treaties held no interest for him.[35]

Thomas Pownall's 1764 work *The Administration of the Colonies* is of quite a different order. Pownall came from the minor gentry in England and had worked with the Board of Trade before coming to America in 1753. He came as private secretary to the governor of New York, but the latter committed suicide only days after Pownall's arrival. Pownall then spent a couple years travelling around America, meeting colonial leaders and developing useful contacts. He

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[34] See Michel Morin, "The Discovery and Assimilation of British Constitutional Law Principles in Quebec, 1764-1774" (2013) 36 *Dalhousie Law Journal* 581; and his "Blackstone and the Birth of Quebec's Distinct Legal Culture 1765-1867", in Wilfrid Prest, ed., *Re-Interpreting Blackstone's Commentaries: A Seminal Text in National and International Contexts* (Oxford: Hart Publishing, 2014).

[35] John Oldmixon, *The British Empire in America, containing the history of the discovery, settlement, progress and present state of all the British colonies, on the continent and islands of America,* vol 1 (London, 1708) at xiv. His approach to Indigenous matters did not change significantly in the second edition of this work, published in 1741. Interestingly, in the second edition he stated that so much was already known about the natives of America that it was not worth devoting much space to them: 1741 edition at 21.

was fortunate to get an early crash course in colonial affairs, including the importance of relations with Native peoples, at the Albany conference of 1754. On this, the first occasion in which the colonies came together to discuss the looming threat from France, concluding treaties with Indigenous peoples to secure their military aid was a major agenda item. It was Pownall's 'first opportunity to witness an Indian treaty, to hear from interpreters and traders the details of frontier commerce, to see the bitterness of Indians as they complained of the "unlimited quantities of rum" being given to their people, and to talk with important colonials on matters of American defense.'[36] With the aid of his brother John, secretary to the Board of Trade, Pownall was appointed lieutenant governor of New Jersey in 1755, governor of Massachusetts Bay in 1757, and governor of South Carolina in 1759. In the latter post he served only briefly before returning to England, where he sat as an MP from 1767-80 and supported the American cause in Parliament. Pownall wrote extensively on colonial affairs after his return to Britain, and his 1764 work appeared in five subsequent editions.[37]

In the 1765 edition comprising 202 pages, Pownall spent 26 pages covering Indian affairs. In his introduction he wrongly assumed that native Americans relied exclusively on hunting, and hence 'They would consequently never have, as in fact they never had, any one communion of rights and actions as extended to society; any one civil union; and consequently they would not ever have any government.'[38] While he did not understand Indigenous governance very well, equating the apparent lack of formal coercive power with 'no government,' Pownall was very well informed about relations between the Crown and the Indigenous nations of the northeast, especially the Six Nations. He noted treaties of 1684 with the Mohawk and Oneida, who 'In the year 1701, … put all their hunting lands under the protection of the English, as appears by the records, and by the recital and confirmation thereof in the following deed,' which he reproduced in the text, complete with doodem signatures by the parties. This agreement is now known as the Nanfan Treaty. He went on to note the adherence of the Senecas, Cayugas and Onondagas to this arrangement in a 1726 treaty,

> So that the whole of the dwelling and hunting lands of the Five-nation confederacy were put under the protection of the English, and held by them IN TRUST, for and to the USE of these Indians and their posterity.' [However], instead of executing *this trust* faithfully and with honour, by extending to the Indians our civil protection against the frauds of the English, and our military protection against the attempts of the French, we have used this

[36] John Schutz, *Thomas Pownall, British Defender of American Liberty: A Study of Anglo-American Relations in the Eighteenth Century* (Glendale, CA: A.H. Clark, 1951), 38.
[37] See the entry on Pownall by Eliga Gould in the *Oxford Dictionary of National Biography*, which does not, however, note his engagement with Indian affairs. The later editions appeared in 1765, 1766, 1768, 1774, and 1777. The 1765 edition enlarged the 1764 edition considerably, and it is the one that will be cited here. Later editions did not materially alter what was said about Indian affairs in the 1765 edition.
[38] Thomas Pownall, *The Administration of the Colonies*, 2d ed. (London: printed for J. Dodsley and J. Walter, 1765), 155.

> trust only as a pretence to *assume a dominion* over them—We have suffered the English settlers to profit of every bad occasion to defraud them of their lands.[39]

While the Nanfan Treaty is in form a deed, Pownall understood it not as an ordinary conveyance but as a form of alliance and as comporting an obligation to hold the lands in trust for the Six Nations as beneficiaries.

Pownall summed up his argument in three points. Unless the British wanted to be at perpetual war with native peoples, he advised, they should be '[d]oing justice to our faith and honour, by treating the Indians according to the real spirit of our alliance with them, doing the Indians justice in their lands, and giving up that idle, useless claim of dominion over them.'[40] While he used the politico-military language of alliance rather than the language of rights and constitutionalism, his plea was to treat the Indians 'according to the real spirit of our alliance with them,' by which he meant not exerting a dominion over them but letting them follow their own ways: in essence, this was the message of the two-row wampum of the Covenant Chain, even though he never used those words.

After the American Revolution Pownall's work, whether on native affairs or other aspects of the governance of the American colonies, seemed of much less relevance in Britain, or in America for that matter. The Covenant Chain was based on a relationship with the British Crown, which no longer had any authority in the new republic. Any idea of an 'Indigenous constitution' in American law thus disappeared almost immediately. The Six Nations covered the council fire in New York and re-established it at Grand River on the lands granted to them as a reward for their loyalty, where the continuity of the Covenant Chain was assumed, and indeed more or less respected by the imperial government for some generations. While American jurisprudence on Indian title to land was occasionally referred to later (and often misinterpreted) by British North American/Canadian courts,[41] the divergent constitutional contexts meant that American jurisprudence on other Indigenous-related topics had less appeal,

The person who could have written a much more informed account than Pownall of the Indigenous constitution and Indigenous law, the famous 'forest diplomat,' Sir William Johnson, never did so.[42] A literature on 'colonial law' authored by British jurists did emerge, but its authors had not resided in or even visited North America, although their interest in the subject was often stimulated by residence in other parts of the empire. William Burge, for example, author of the four-volume *Commentaries on Colonial and Foreign Laws*, a work which was 'greeted rhapsodically by reviewers' when published in London in 1838, was attorney-general of Jamaica from 1816 to 1828, while Sir Edward Shepherd Creasy wrote *The imperial and colonial*

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[39] Ibid., 169-70.
[40] Ibid., 179-80.
[41] For examples, see Kent McNeil, *Flawed Precedent: The St. Catherine's Case and Aboriginal Title* (Vancouver: UBC Press, 2019), 52-54, 82-87.
[42] Julian Gwyn, "Sir William Johnson," *Dictionary of Canadian Biography online*, www.biographi.ca.

constitutions of the Britannic Empire: including Indian institutions (1872) during his tenure as chief justice of Ceylon (1860-75).[43] The former was organized according to legal categories and 'systems of jurisprudence,' while the latter took a historical approach to the various parts of the empire, but neither contained more than passing reference to Indigenous peoples; treaties with them, or Indigenous laws, were never mentioned. Burge referred to no fewer than ten 'systems of jurisprudence' encountered around the empire, including the Roman law, Scots law, Dutch law, and so on, but all were European in origin. Creasy, for his part, in virtually his only reference to Indigenous peoples, was content to observe that 'districts [in British North America] fit for agriculture and for the permanent abode of settlers will be found and utilised, now that these territories have passed away from the hands of those who regarded them, and who wished them to be regarded by others as valuable only in respect of the furs of the wild animals, that lurked or wandered in their wildernesses.'[44]

Aside from their racist assumptions, it is not surprising that these British authors devoted so little attention to treaties or covenants with Indigenous peoples. They had virtually no written sources to rely upon. Knowledge of these matters was generated in North America and among settlers was restricted to a small circle of colonial officials. Copies of the written text of treaties (even assuming they accurately reflected Indigenous understandings, which they often did not) were not always sent to London and when they were, remained buried in archives and did not circulate. The Covenant Chain itself was largely a product of oral tradition, recorded in material form only in wampum belts that would not have been understood by a British audience, assuming they were available for inspection.

The blossoming literature on law authored by local jurists in the various British North American colonies also, with few exceptions, largely ignored treaties and Indigenous law even though many of its authors were well versed in their region's history. Lawyer-author Thomas Chandler Haliburton's two-volume *Historical and Statistical Account of Nova-Scotia* (1829) contained little more than passing reference to the Mi'kmaq or to the treaties of peace and friendship entered into 1760-61, themselves renewals of a treaty of 1726.[45] In his *Epitome of the Laws of Nova-Scotia* (1832-33) Halifax lawyer Beamish Murdoch was mainly concerned to establish that the Mi'kmaw people had no justiciable title to lands in the province; he did not mention treaties of peace and friendship entered into in 1760-61, which were meant to establish a framework for an ongoing relationship between the two peoples. In his *History of Nova-Scotia, or Acadie,* published in the 1860s, Murdoch gave bare notice to the treaties but referred to them only as treaties of peace and did not provide their text or any commentary, leading the reader to assume they were now only of historical interest.[46] Murdoch evinced a more sympathetic interest in the Mi'kmaq later in life, but it took an anthropological/linguistic turn, as he worked on a

[43] See entries for both men in the *Oxford Dictionary of National Biography* online, www.oxforddnb.com.
[44] Edward Shepherd Creasy, *The imperial and colonial constitutions of the Britannic Empire: including Indian institutions* (London: Longmans, Green & Co., 1872), at 190.
[45] Vol. 1 contains a passing reference at p. 228, while vol. 2 discusses the Mik'maq at pp. 130-36.
[46] *History of Nova-Scotia, or Acadie*, 3 vols. (Halifax, NS: J. Barnes, 1865-67), vol. 2, 407.

Mi'kmaq-English dictionary for some years.[47] His contemporary, the Rev. Silas Tertius Rand, did frame Mi'kmaw 'claims' in legal terms in his writings and in public lectures he gave in Halifax in the 1849, but whatever sympathy these may have aroused, they did not have much impact. As he observed sadly, 'We have treated [the Mi'kmaq] almost as though they had no rights.'[48]

A partial exception among colonial jurists in his treatment of Indigenous peoples was Nicolas-Benjamin Doucet, the title of whose 1841 work on Quebec law demonstrated his inclusive ambition: it purported to cover the *Fundamental Principles of the Laws of Canada as They Existed under the Natives, as They were Changed under the French Kings, and as They Were Modified and Altered under the Domination of England*. Unfortunately, Doucet was not up to the task of describing or analyzing Indigenous law, making only passing comments on the subject. This is doubly unfortunate as Doucet was appointed as the Indian agent for three Indigenous communities (Kahnawake, Saint-Régis and Oka) in the 1820s, and would have had access to knowledge about Indigenous law from chiefs and elders had he chosen to avail himself of these opportunities. Curiously, when he very occasionally mentioned an Indigenous custom, he referred to his source as Hudson's Bay Company factors who visited Montreal in connection with the fur trade. No other colonial legal author followed Doucet's weak lead, and the *Civil Code of Lower Canada* adopted in 1866, which purported to be a complete statement of the law applicable on the territory of the province, made no mention of Indigenous law whatsoever.

There was, however, a larger problem at work here, beyond the issue of access to information about Indigenous law: the reconceptualization and rigidification of law itself. Eighteenth-century jurists recognized a somewhat unscientific type of legal pluralism even within the common law legal order, with its multiplicity of sources in Roman law, ecclesiastical law, particular local customs outside the common law, manorial law, equity, and so on. Within this polyglot understanding, the body of intercultural law governing settler-Indigenous relations in North America was not an obvious outlier. And specifically with regard to constitutions, the British constitution itself was famously unwritten, albeit composed in part of a hodge-podge of written charters, proclamations, statutes, and case law, as well as various conventions and practices. Again, the covenant chain was not an obvious outlier in this context. In the wake of the abandonment of the Plan of 1764, for example, London made clear that colonial governors were to have the power to renew 'antient Compacts or Covenant-chains' with Indigenous peoples, treating such matters as more or less routine.[49]

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[47] Philip Girard, *Lawyers and Legal Culture in British North America: Beamish Murdoch of Halifax* (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 2011), 177-81.
[48] Silas T. Rand, *A Short Statement of Facts relating to the History, Manners, Customs, Language and Literature of the Micmac Tribe of Indians, of Nova Scotia and P.E. Island* (Halifax, NS: James Bowes and Son, 1850), 24; and see generally D.G. Bell, 'Was Aboriginal Dispossession Lawful? The Response of 19th-Century Maritime Intellectuals' (2000) 23 *Dalhousie Law Journal* 168.
[49] Lords of Trade to the Earl of Hillsborough, 17 March 1768, cited at Richter, 'Plan of 1764,' 290.

The nature of law in general and constitutional law in particular shifted in the early nineteenth century under the influence of legal positivism and the more hard-edged view of 'constitutions' arising from the American and French revolutions. Viewed from these vantage points, Indigenous law and the Covenant Chain no longer looked like law at all. William Burge, for example, described one set of colonial possessions as those 'in which the jurisprudence is composed of the common law and statutes of England, and the enactments of their own legislatures,' effectively setting aside all other sources of law, especially those based on custom and practice.[50] The enhanced role of legislation in Britain and the growing body of reported cases seemed to provide all the 'law' one could possibly need, casting other forms of law into the shadows or excluding them from the category of 'law' altogether. In this sense Indigenous law shared the fate of many other 'alternative' bodies of law or legal institutions that were abolished or recourse to which was drastically cut back as part of Victorian legal reforms aimed at creating a more coherent legal 'system.' The difference with regard to Indigenous law is that it was never formally superceded, but rather faded out of imperial and colonial legal consciousness as the new legal paradigm, more positivist and state-centred, emerged.

In a parallel development, the idea of a constitution also changed. In the eighteenth-century British world, the legal boundaries and content of the 'constitution' were hazy indeed. In the wake of the American and French revolutions, however, the legal nature of the ideal constitution changed markedly. It was now expected to be contained in a single document setting out the organization of the state, the relationship between the state and the individual, and the nature of citizens' rights under it.[51] And, as Linda Colley has observed about these new constitutions, of which no fewer than sixty had been adopted or attempted in continental Europe alone by 1820, the textual element was key:

> Made up of words; capable of being excerpted in newspapers, handbills, placards, magazines, posters and letters; potentially translatable into any written language; and usually light in weight and therefore moveable over very long distances, the new constitutions were from the outset superbly well adapted to a world where transport opportunities were expanding, and different kinds of printed and written material were becoming more widely available, which was a crucial reason why these instruments were able to multiply so persistently.[52]

While Britain itself participated only indirectly in this move to the formalization of constitutions in a single foundational document (Colley notes the growing profile of Magna Carta in the eighteenth century as the foundational document of British constitutionalism), the statutory constitutions of the Canadas were much closer to this emerging norm even though they did not contain bills of rights as such. The Act of 1791, for example, quickly became known as the

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[50] William Burge, *Commentaries on Colonial and Foreign Laws*, 4 vols. (London,1838), 1, xiv.
[51] Zachary Elkins, Tom Ginsburg and James Melton, *The Endurance of National Constitutions* (New York: Cambridge University Press, 2009), 41.
[52] 'Empires of Writing: Britain, America and Constitutions, 1776-1848' (2014) 32 *Law & History Review* 237, 247.

Constitutional Act even though the word was nowhere found in its official title. Even before the American Revolution, the imperial civil servant William Knox was highly critical of the prerogative constitutions of many of the North American colonies, which could be altered at the whim of the Crown; he advocated that all of them receive constitutions enacted by Parliament that would guarantee stability to their forms of government.[53] He was a strong defender of the Quebec Act owing to its statutory form as well as its content, and had advocated that the Royal Proclamation 1763 be enacted as a statute rather than merely under the prerogative. Parliament should be involved, he asserted, 'not only because the Crown can neither revoke its Charters, nor abrogate Laws, which have received the Royal Assent, but because no other Authority than that of the British Parliament will be regarded by the Colonys, or be able to awe them into acquiescence.'[54]

Some Indigenous communities began writing down their 'constitutions' in the 1820s-1840s, but they related mainly to internal matters of governance and dispute resolution, did not purport to deal with relations with settler society, were not statutorily affirmed by colonial legislatures, and hence did not receive wide circulation or recognition in settler society. These documents did not reproduce the broad understandings of the Covenant Chain, but resembled rather collections of by-laws by municipal governments, directed to safeguarding local peace and order.[55] As a result they seem to have had little impact on settler consciousness, legal or otherwise, although this is a matter where further research needs to be done.

The Indigenous constitution was above all a product of negotiation, custom and practice between imperial and settler representatives on the one hand, and Indigenous representatives on the other. It was a living relationship, but one whose realities were not well understood on the far side of the Atlantic. It is instructive that the British author who was able to provide some glimpses, albeit incomplete and flawed, of the Indigenous constitution in the 1760s and 70s, did so on the basis of personal experience and knowledge in North America. Colonial authors themselves, however, were too caught up in legitimizing the settler presence and too anxious about securing British title to land to afford any serious treatment to the Indigenous constitution, or to regard treaties as possessing some legal vitality with contemporary consequences.

Conclusion

The relative constitutional position of Indigenous peoples and French-Canadians in the century between the Royal Proclamation 1763 and the British North America Act 1867 presents a study in contrasts. The first enjoyed a unique constitutional relationship with the British Crown

[53] Jack P. Greene, 'William Knox's Explanation for the American Revolution' (1973) 30 *William & Mary Quarterly*, 3d ser. 293 at 301.
[54] Thomas Barrow, ed. 'A Project for Imperial Reform: "Hints Respecting the Settlement for our American Provinces" 1763' (1967) 24 *William & Mary Quarterly* 108 at 118.
[55] Girard, Phillips and Brown, *History of Law in Canada*, vol.1, 451.

and its North American representatives in the mid-eighteenth century. Yet, although Indigenous peoples were never conquered, the Indigenous constitution had nonetheless withered away in the imperial/settler mind by the mid-nineteenth century, its decline symbolized by the unilateral decision of the imperial government to cease giving presents to Indigenous chiefs in 1858 and the recharacterization of Indigenous persons as wards of the Crown.[56] The position of French-Canadians was the inverse: conquered in 1760, their constitutional position went from strength to strength after 1774, with only a brief setback under the Act of Union 1840. The 1867 Act saw the province of Quebec, with its strong French-Canadian majority, endowed with a high degree of autonomy as a province in the new Confederation.

The concepts of 'strong' and 'weak' legal pluralism map well on to this historical dichotomy, without explaining why French-Canadians ended up in the first category and Indigenous peoples in the second. Changing concepts of law within the imperial/settler world, it has been argued here, go some way to providing such an explanation. The polymorphous world of eighteenth-century law was receptive to the idea of Indigenous 'rights' and an Indigenous 'constitution' in a way that the much more state-centred and positivist world of Victorian law never could be. Imperial officials in British North America continued to observe some tenets of the Indigenous constitution through sheer inertia and adherence to tradition, a continuity assisted by the fact that the progeny of Sir William Johnson occupied key posts in the Indian Departments in both Upper and Lower Canada for a half-century after the American Revolution.[57] When the imperial government was minded to cease giving presents to Indigenous chiefs in the 1820s, for example, Sir John Johnson, son of Sir William and head of the Indian Department, resisted so strongly that the proposal was dropped.[58] But once the imperial government divested itself of responsibility for Indian affairs in North America, its colonial successors did not feel similarly bound, using their new-found powers to reimagine the relationship with Indigenous peoples in a vein more coercive than relational.

Nor did the Royal Proclamation 1763 serve as the 'politically prominent' instrument that might have led to a stronger form of legal pluralism vis-à-vis the Indigenous constitution. It imposed a certain process for land surrender that was usually, though not always, observed in the years thereafter, but it did not flesh out any larger relationship between the two peoples; the subsequent Treaty of Niagara, which did so, was soon forgotten on the settler side in the swirl of events that accompanied the American Revolution. Although in more recent times the Royal Proclamation has been seen as a cornerstone of the relationship between Indigenous peoples and

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[56] See generally Mark Walters, 'Rights and Remedies within Common Law and Indigenous Legal Traditions: Can the Covenant Chain be Judicially Enforced Today?' in John Borrows and Michael Coyle, eds., *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017).
[57] Sir William's two sons-in-law, Guy Johnson and Christian Daniel Claus, as well as his grandson William Claus, also held positions as superintendent or deputy superintendent of the Indian Department until 1830.
[58] Earle Thomas, 'Sir John Johnson,' *Dictionary of Canadian Biography* online, www.biographi.ca.

the Canadian state, it did not and could not play the key role for Indigenous peoples (or Indigenous law) that the Quebec Act 1774 represented for French-Canadians.

As ideas of law within the imperial/settler world shifted, so did ideas about constitutions. The new insistence on the particular form of a constitution—textual, contained in one document, dealing with governmental institutions and 'rights'—once again worked against the interests of Indigenous peoples at the same time as it advanced the interests of settlers in general and French-Canadians in particular, especially under the Constitutional Act 1791. The latter was not an American-style constitution due to its silence on the issue of individual rights, but it nonetheless created a legislative body in which French-Canadians had a majority and had to be reckoned with. Moreover, the Act itself generated constitutional discourse and action on both sides of the Atlantic that recognized French-Canadians as agents in their own destiny. The involvement of the imperial Parliament in the settler constitution of the Canadas gave the issue a transatlantic profile that was almost totally lacking in the case of the Indigenous constitution, a relationship that involved the royal prerogative, not Parliament. Without parliamentary imprimatur or recognition in juristic writings on either side of the Atlantic, by the mid-nineteenth century the Indigenous constitution and indeed Indigenous law in general had returned, in the settler mind, to where it had been in John Oldmixon's view in 1708: a matter of 'fable and impertinence.'