"ACCORDING TO THE OLD CUSTOMS OF OUR NATION": ABORIGINAL SELF-GOVERNMENT ON THE CREDIT RIVER MISSISSAUGA RESERVE, 1826-1847

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This article examines the development of Aboriginal law and government on the Credit River Mississauga reserve in order to demonstrate the dynamic nature of Aboriginal constitutional and legal structures in response to British colonialism. The author begins by briefly describing Ojibway / Mississauga law and government as it existed prior to contact with Europeans, and then reviews the development of treaty relations between the Mississauga and the British and the events leading up to the settlement of a Mississauga community on the Credit River. The article then analyzes the legal and constitutional rules that were developed for the reserve between 1826 and 1847, with particular reference to the 1830 "By Laws and Regulations" drafted by Mississauga chief and Methodist missionary Peter Jones, as well as the acts and resolutions of the Credit River council. The author concludes by arguing that although Mississauga society changed in fundamental ways in the nineteenth century, the laws and government which were developed to cope with the effects of colonialism embraced both native customary and non-native juridical concepts so as to secure a degree of cultural and national continuity. These conclusions suggest that the Van de Peet test for aboriginal rights should be applied to the question of self-government in a flexible manner in order to accommodate this paradox of cultural change and continuity.

Dans cet article, l'auteur examine l'élaboration du droit et du gouvernement autochtones dans la réserve Mississauga de Credit River afin de démontrer la nature dynamique des structures juridiques et constitutionnelles autochtones face au colonialisme britannique. L'auteur commence par décrire brièvement le droit et le gouvernement Ojibway / Mississauga tels qu'ils existaient avant le contact avec les Européens et les Européennes, puis il passe en revue l'établissement des relations par traités entre les Mississauga et les Britanniques ainsi que les événements qui ont mené à l'établissement d'une communauté Mississauga sur la Credit River. L'auteur analyse ensuite les règles juridiques et constitutionnelles qui ont été élaborées pour la réserve entre 1826 et 1847 et se penche en particulier sur les «By Laws and Regulations» de 1830 qui ont été rédigés par le chef Mississauga et le missionnaire méthodiste Peter Jones, ainsi que les lois et les résolutions du conseil de Credit River. En conclusion, l'auteur soutient que bien que la société Mississauga ait changée de manière fondamentale au cours du dix-neuvième siècle, les lois et le gouvernement qui ont été élaborés pour faire face aux effets du colonialisme renferment aussi bien des concepts coutumiers autochtones que des concepts juridiques non autochtones, de sorte qu'une certaine continuité culturelle et nationale est maintenue. Ces conclusions donnent à penser que le critère Van de Peet concernant les droits autochtones devrait être appliqué de manière flexible à la question de l'autonomie gouvernementale afin de composer avec ce paradoxe du changement culturel et de la continuité.

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[1] Fellow of New College, Oxford. I would like to acknowledge the benefit I have had from discussions with Jim Morrison, Brian Slattery, John Milloy, Elizabeth Grace, and Edward Benton-Benai about Ojibway customary law and government.

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I. INTRODUCTION

The story of Ontario's early legal and constitutional history has been told, in large part, from the "settler" perspective, and has focused in particular upon the introduction of English laws and British colonial institutions into the colony of Upper Canada and the evolution of those laws and institutions within the successor provinces of Canada and Ontario.[2] Comparatively little attention seems to have been given to the evolution of the legal systems of the indigenous nations already present within the territory around the Great Lakes that fell within Upper Canada.[3] Prior to contact with Europeans, North American Indian nations had, in the now familiar words of Marshall C.J. in *Worcester* v. *State of Georgia*, "institutions of their own, and [they] govern[ed] themselves by their own laws...."[4] *Worcester* upheld the rights of self-government of the Cherokee Nation, but by the time of that case, 1832, the Cherokee had already transformed their laws and institutions in response to European contact and colonization,

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[2] See, *e.g.*, W. R. Riddell, "Introduction" in A. Fraser, ed., *14th Report of the Bureau of Archives for Ontario* (Toronto: The King's Printer, 1918); W.R. Riddell, "A Criminal Circuit in Upper Canada: A Century Ago" (1920) 40 Canada Law Times 711; W.R. Riddell, *The Bar and The Courts of the Province of Upper Canada, or Ontario* (Toronto: Osgoode Hall, 1928); H. M. Neatby, *The Administration of Justice Under the Quebec Act* (Minneapolis: University of Minneapolis Press, 1937); M. A. Banks, "The Evolution of the Ontario Courts, 1788-1981" in D.H. Flaherty, ed., *Essays in the History of Canadian Law*, vol. 2 (Toronto: University of Toronto Press, 1983) 492. For an overview of literature in this area, see D. H. Flaherty, "Writing Canadian Legal History: An Introduction" in D.H. Flaherty (ed.), *Essays in the History of Canadian Law*, vol. 1 (Toronto: University of Toronto Press, 1981) 3.

[3] The development of First Nations' government after colonization in Upper Canada has been considered, but usually as an incident to more general historical analysis of their social and religious transformations. See *e.g.*, E. S. Rogers, "The Algonquian Farmers of Southern Ontario, 1830-1945" in E. S. Rogers and D. B. Smith, eds., *Aboriginal Ontario: Historical Perspectives on the First Nations* (Toronto: Dundurn Press, 1994) at 143-47 [hereinafter Rogers]; E. Graham, *Medicine Man to Missionary: Missionaries as Agents of Change among the Indians of Southern Ontario, 1784-1867* (Toronto: Peter Martin, 1975) at c. 5 [hereinafter Graham]. For examples of more specific inquires into First Nations law and government in the Great Lakes region after colonization, see J. A. Noon, *Law and Government of the Grand River Iroquois* (New York: Viking Fund, 1949) [hereinafter Noon]; A. A. Shimony, *Conservatism Among the Iroquois at the Six Nations Reserve* (New Haven: Yale University Publications in Anthropology, No. 65, 1961) [hereinafter Shimony]; H. Hickerson, *Land Tenure of the Rainy River Chippewa at the Beginning of the 19th Century* (Washington: Smithsonian Press, 1967) [hereinafter *Land Tenure*]; J. J. Borrows, "A Genealogy of Law: Inherent Sovereignty and First Nations Self-Government" (1992) 30 Osgoode Hall L.J. 291 [hereinafter Borrows].

[4] (1832), 6 Peters 515 at 542 (U.S.S.C.). The paragraph from which these words are taken was quoted in *Calder* v. *Attorney General of B.C.*, [1973] S.C.R. 313 at 383, 4 W.W.R. 1 at 55, per Hall J., *R.* v. *Van der Peet*, [1996] 2 S.C.R. 507 at 543, 9 W.W.R. 1 at 23, per Lamer C.J.C. [hereinafter *Van der Peet* cited to SCR], and Canada, *Report of the Royal Commission on Aboriginal Peoples*, c. 4 "Looking Forward, Looking Back", vol. 1(Ottawa: Canada Communication Group, 1996) at 45 [hereinafter *RCAP*].

so that they resembled in many respects those of the surrounding settler society.[5] Did a similar process of internal legal reform in response to the external challenge of colonization occur amongst the First Nations of Upper Canada, or did aboriginal laws and governments simply disappear the moment competing British laws and institutions were first introduced? The answer to this question is important, not only to provide a more complete picture of Canadian legal and constitutional history, but also to provide a context within which the present law on aboriginal rights in Canada can be analyzed critically. For example, the Supreme Court of Canada recently stated in *R.* v. *Pamajewon*[6] that s. 35(1) of the *Constitution Act, 1982,*[7] which entrenches "existing aboriginal and treaty rights", may protect rights of aboriginal self-government; however, it also said that such rights are limited to the exercise of unextinguished aboriginal customs and traditional laws that originated in, and are integral to the modern-day continuity of, the distinctive aboriginal cultures that pre-dated European contact.[8] Before the implications of this test can be understood, much more needs to be known about the content of pre-contact systems of aboriginal law and government and the effects of colonization upon those systems.

Aboriginal laws and government in fact did not cease upon the introduction of British law and institutions into Upper Canada—on the contrary, their continuity was recognized by the Crown. Before opening land to settlement, the Crown first obtained the cession of aboriginal title from relevant First Nations by executing treaties with chiefs in public councils held "according to the ancient usages and customs of the Indians".[9] Typically, these treaties reserved to the First Nation a small tract of land in relation to which its aboriginal rights remained intact.[10] These treaties did not purport to identify the nature of the legal system that would govern Indian reserves, and no effort was initially made to introduce the laws and institutions of the surrounding settler society.[11] Thus, some 45 years after representative settler government and English laws

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[5] See *e.g., Cherokee Constitution of 1839,* reproduced in *Constitution and Laws of the Cherokee Nation* (Parsons, Kansas: Cherokee National Counsel, 1892) at 11-13; R. Strickland, *Fire and the Spirits: Cherokee Law from Clan to Court* (Norman: University of Oklahoma Press, 1975); J. P. Reid, *A Law of Blood: The Primitive Law of the Cherokee Nation* (New York: New York University Press, 1970) at 271-76.

[6] [1996] 2 S.C.R. 821, (*sub nom. R.* v. *Gardner; R.* v. *Jones*) 138 D.L.R. (4th) 204 [hereinafter *Pamajewon* cited to SCR].

[7] Part II of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[8] *Pamajewon, supra* note 6 at 832-33 (applying *Van der Peet, supra* note 4).

[9] Lord Dorchester, Commander in Chief, to Sir John Johnson, Superintendent Indian Dept., "Additional Instructions" (24 December 1794) National Archives of Canada, Record Group 10, vol. 789 at 6768-70 [hereinafter *NA RG10*]. See generally, R. J. Surtees, "Indian Land Cessions in Upper Canada, 1815-1830" in I.A.L. Getty and A.S. Lussier, eds., *As Long as the Sun Shines and Water Flows: A Reader in Canadian Native Studies* (Vancouver: University of British Columbia Press, 1983) 65.

[10] See generally, R. J. Surtees, "The Development of an Indian Reserve Policy in Canada" (1969) 61 Ontario History 87.

[11] M. D. 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 L.J. 273 [hereinafter *Colonial Criminal Jurisdiction*].

were introduced into the colony, the Attorney General for Upper Canada observed in relation to the province's Indian nations: "[t]hey have within their own communities governed themselves by their own laws and customs."[11] It was not until 1869 that the federal Parliament placed reserve band government upon statutory foundation by enacting legislation (upon which the present-day *Indian Act* is modeled), delegating to Indian chiefs certain by-law making powers.[12] Until this time, native communities, influenced in varying degrees by missionaries and Indian Department officials, developed reserve governments and legal systems of their own, adapting some of their original aboriginal customary laws to reserve conditions and replacing others with juridical concepts borrowed from the surrounding British colonial regime.[13] The synthesis of aboriginal and British legal traditions produced hybrid reserve legal systems, the legitimacy of which was acknowledged by the Crown, but the origins of which lay in the capacity of native communities to define and re-define their own constitutional structures.

To contribute to a better understanding of the dynamic character of aboriginal law and government after the commencement of British colonization in Canada, this article examines the development of aboriginal law and government at the Credit River reserve between 1826, when missionary/chief Peter Jones re-established a Mississauga village near the mouth of the Credit River near Toronto, and 1847, when the band was pressured by surrounding settlement to move to its present location, the New Credit reserve near Hagersville, Ontario. The Credit River example is particularly helpful because there remains a written record of the legal evolution of the Credit River Mississauga nation. In particular, the nation enacted a constitution for its reserve in 1830 that incorporated certain British-inspired juridical principles within an aboriginal system that was premised upon, as the constitution itself stated, the "old customs of our nation".[14] It was this sort of existing aboriginal system of reserve government that Parliament appropriated in 1869 as the foundation for its statutory band council system. A more complete understanding of these older, aboriginal-based systems of reserve law and government may confirm, as the New Credit Mississauga argued in one recent case, that the *Indian Act* band council provisions are "not exhaustive" and that there still exist "traditional forms of government to the extent that the *Indian Act* does not expressly preclude them."[15]

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[11] R. Jamieson, Attorney General of Upper Canada, to J. Joseph, Secretary to Lieutenant Governor Sir F. Bond Head (18 February 1836), *NA RG10*, *supra* note 9, vol. 60 at 60737-38.

[12] *An Act for the gradual enfranchisement of Indians* (1869), 32 & 33 Vict., c. 6 (Can.), s. 12. Compare *Indian Act* (1876), 39 Vict., c. 18 (Can.) and *Indian Act*, R.S.C. 1985, c. I-6.

[13] M. D. Walters, *The Continuity of Aboriginal Customs and Government under British Imperial Constitutional Law as Applied in Colonial Canada, 1760-1860* (D.Phil. Thesis, Oxford University, 1995), c. 9 and 10 [hereinafter Walters].

[14] See *infra* note 131 at Art. I.3.

[15] *Sault* v. *Mississaugas of the New Credit Indian Band Council* (1989), (*sub nom. Sault* v. *LaForme*) [1990] 1 C.N.L.R. 140 at 144, 2 F.C. 701 at 707 (F.C.T.D.). On the relationship between traditional and statutory band council governments, see K. McNeil, "Aboriginal Governments and the *Canadian Charter of Rights and Freedoms*" (1996) 34 Osgoode Hall L.J. 61, at 79-88; W. Daugherty and D. Madill, *Indian Government Under Indian Act Legislation, 1868-1951* (Ottawa: Department of Indian and Northern Affairs, 1980) at 1-13; R. A. Reiter, *An*

In Part II this article summarizes the nature of Mississauga/Ojibway customary laws and government as they existed at the point of European contact. Part III describes the history of British-Mississauga treaty relations from the mid-18th century to the creation of the Credit River reserve in the early nineteenth century, as well as the subsequent re-establishment of a Mississauga village on the reserve in the 1820s. Part IV examines the unique legal system that evolved on the reserve, contrasting that system with the pre-contact customary system examined in Part II. In conclusion, it will be argued that the examination of the evolution of aboriginal law and government on the Credit River reserve illustrates the dynamic quality of aboriginal cultures and laws, and that the recent Supreme Court of Canada rulings limiting the constitutional right of self-government to customary laws and government originating in and integral to pre-contact aboriginal cultures should be interpreted and applied flexibly in order to respect this dynamic character.

II. PRE-CONTACT MISSISSAUGA/OJIBWAY CUSTOMARY LAW AND GOVERNMENT

It is beyond the scope of this article to summarize in detail pre-contact North American aboriginal, or even Mississauga/Ojibway, customary law and government. It will be sufficient for the following analysis to identify the general characteristics of the Mississauga/Ojibway system at the time of European contact. Even in relation to this more modest objective, problems of methodology and interpretation nonetheless abound. European contact with the Ojibway occurred during the first two or three decades of the 17th century,[16] and the Ojibway themselves left no written records of their culture and customs—in these circumstances accounts of pre-contact Ojibway law and government are invariably informed by the cultural and historical perspectives of the commentator.[17] Europeans writing just after contact were usually missionaries or military personnel whose opinions may not have been accurate, complete or unbiased.[18] By the time more exhaustive European accounts were made in the 18th century,[19] and

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Examination of the Evolving Concept of Band Councils, Their Authorities and Responsibilities, and their Statutory Instruments of Power (Edmonton: First Nations Resource Council, 1990) c. 1 and 2.

[16] In *R.* v. *Adams*, [1996] 3 S.C.R. 101 at 128, 138 D.L.R. (4th) 657 at 673, the date of contact for the St. Lawrence River-Lake Ontario area was held to be the arrival of Champlain in 1603 and the consequent establishment of French control over the area that became New France.

[17] See generally *RCAP*, *supra* note 4, vol. 1 at c. 3 "Conceptions of History".

[18] For Jesuit missionary accounts of Great Lakes nations see, *e.g.*, G. Sagard, *Le Grand Voyage Du Pays des Hurons, situé en l'Amerique vers la Mer douce, es derniers confins de la nouvelle France, dite Canada*, G.M. Wrong (ed.) and H.H. Langton (trans.) (Toronto: Champlain Society, 1939) [hereinafter Sagard]; J. de Brébeuf, "Relations of the Hurons" in R. G. Thwaites, ed., *The Jesuit Relations and Allied Documents*, vol. 10 (Cleveland: Burrows Bros., 1896-1901) [hereinafter Brébeuf]. On the strengths and weaknesses of these sorts of commentaries, see B. G. Trigger, *The Huron: Farmers of the North* (Toronto: Holt, Rinehart & Winston, 1969) at 3-5 [hereinafter *The Huron*].

[19] See, *e.g.*, N. Perrot, *Memoire sur les moeurs, coustumes et relligion des sauvages de l'Amérique septentrionale* (Paris: Librairie Franck, 1864) [hereinafter Perrot]; J. Lafitau, *Moeurs des sauvages ameriquains, comparées aux moeurs des premiers temps* (Paris: Charles Estienne Hochereau, 1724) [hereinafter Lafitau]; C. Le Beau, *Avantures du Sr. C. Le Beau, ou voyage*

certainly by the time Ojibway commentators began writing about their own society in the 19th century,[20] the pre-contact era had receded by a century or more into the past and aboriginal society in the Great Lakes region had already undergone dramatic change in response to both internal factors and increased contact with Europeans.[21] Although modern non-native anthropologists, historians and ethnohistorians have developed increasingly sophisticated understandings of pre-contact aboriginal culture—in part because they have become more sensitive to the importance of the oral histories of aboriginal elders—their views still often diverge in important respects from modern-day Ojibway accounts of pre-contact Ojibway culture derived from those oral histories.[22] My objective is not to identify a single authoritative version from these competing accounts, but merely to summarize those salient features of the pre-contact Mississauga/Ojibway system about which most commentators tend to agree. Of course, my own account of pre-contact aboriginal law and government, like my analysis of reserve law and government in Part IV, is itself informed, if only subconsciously, by my own (non-native) cultural perspective on the relevant issues, and must be read in that light.

"Ojibway" and "Chippewa" are alternative names used to describe the *Anishinabeg*—the aboriginal peoples who were, at time of contact, located primarily in the Great Lakes region. The name "Mississauga" is used in relation to that sub-set of Ojibway peoples who, by the late 17th century, possessed the north shores of Lakes

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curieux et nouveau, parmi les sauvages de l'Amérique septentrionale, vol. 1 and 2 (Amsterdam: Herman Uytwerf, 1738) [hereinafter LeBeau]; C. Colden, *The History of the Five Indian Nations of Canada, Which Are Dependent on the Province of New-York in America, and Are the Barrier Between the English and French in that Part of the World* (London: T. Osborne, 1747); P.F. de Charlevoix, *Journal of a Voyage to North-America, Undertaken by Order of the French King Containing The Geographical Description and Natural History of that Country, particularly Canada, Together with An Account of the Customs, Characters, Religion, Manners and Traditions of the Original Inhabitants*, vol. 1 and 2 (London: R. & J. Dodsley, 1761) [hereinafter Charlevoix]; R. Rogers, *A Concise Account of North America* (London: J. Millan, 1765); J. Long, *Voyages and Travels of an Indian Interpreter and Trader Describing the Manners and Customs of the North American Indians* (Toronto: Coles Publishing, 1971).

[20] G. Copway (Kah-Ge-Ga-Gah-Bowh), *The Traditional History and Characteristic Sketches of the Ojibway Nation* (London: Charles Gilpin, 1850) [hereinafter Copway]; W. Warren, *History of the Ojibways based upon Traditions and Oral Statements* (Minneapolis: Ross & Haines, Inc., 1957) [hereinafter Warren]; P. Jones (Kah-ke-wa-quo-na-by), *History of the Ojebway Indians; with Especial References to their Conversion to Christianity* (London: A.W. Bennett, 1861) [hereinafter *Jones: History*].

[21] These changes are detailed in R. White, *The Middle Ground: Indians, Empires, and Republics in the Great Lakes Region, 1650-1815* (Cambridge: Cambridge University Press, 1991) [hereinafter White]. Huron society was particularly affected by contact: compare, *e.g.*, the accounts of the Huron from the 1630s by Sagard, *supra* note 19, and Brébeuf, *supra* note 19, with the account by Charlevoix from the 1720s, *supra* note 20, vol. 1 at 115-20, written after their settlement onto the Lorette reserve near Quebec City. Notwithstanding these changes, however, Charlevoix stated that the Huron "retained" "that spirit of society" that was the "soul of all their councils in all matters regarding the community" (vol. 1 at 303).

[22] C.E. Cleland, *Rites of Conquest: The History and Culture of Michigan's Native Americans* (Ann Arbor: University of Michigan Press, 1992) at 29-30 [hereinafter Cleland].

Ontario and Erie.[23] Ojibway laws and government, like the laws and government of any society, were shaped by social, political, economic and spiritual/religious factors. The Ojibway were primarily a hunting people who lived in small, mobile groups capable of harvesting limited natural resources over a large and, at times, inhospitable territory.[24] The systems of norms that regulated Ojibway life reflected these societal attributes. For example, Ojibway "law" consisted largely of customary norms that emerged from practice and experience and became part of Ojibway oral tradition.[25] These customs tended to recognize personal and family autonomy; communal sharing of resources and possessions; flexible, consensual, community-based decision-making processes; and the necessity of spiritual balance with the natural environment.[26]

Unlike the neighbouring Iroquois (or Five, later Six, Nations or *Haudenosaunee*) and Huron (or Wyandot or *Wendat*) who had formed unified, confederal systems of government,[27] Ojibway peoples were divided into politically autonomous communities that were only loosely associated through language, culture and kinship.[28] In considering Ojibway government, these communities, which may be called "bands", represent the most relevant social/political unit. A typical Ojibway band consisted of about 20 or so extended family groups, or about 75 to 200 people.[29]

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[23] D. B. Smith, "Who are the Mississauga?" (1975) 67 Ontario History 211; White, *supra* note 22 at 146-47.

[24] See, for example, B. Johnston, *The Manitous: The Spiritual World of the Ojibway* (New York: HarperCollins, 1996), at xvii ("....the Anishinaubae people were hunters; fishers; harvesters; homemakers; healers; storytellers; and, only as a last resort, warriors. Their major purpose in life was to survive as individuals and communities.") [hereinafter Johnston]. Survival for these hunting bands was not always easy: in the winter of 1675-76 sixty-five Mississauga starved to death north of Lake Erie due to lack of game (White, *supra* note 22 at 47).

[25] For the purposes of this article it is assumed that aboriginal customary norms are "law", although it should be acknowledged that some colonial officials concluded that aboriginal peoples had no law (see M. 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 L.J. 785 at 796 [hereinafter *Mohegan Indians*]), and that there is a jurisprudential debate about whether customs qualify as "law" properly so called (see *e.g.*, J. Austin, *Lectures on Jurisprudence, or The Philosophy of Positive Law*, 3d, R. Campbell (ed.) (London: John Murray, 1869) at 104, 204 and 237-38; H.L.A. Hart, *The Concept of Law* (Oxford: The Clarendon Press, 1961) at 3-4 and 89-90) [hereinafter Hart].

[26] See generally, J. G. E. Smith, *Leadership among the Southwestern Ojibwa* (Ottawa: National Museum of Man, 1973) at 11 [hereinafter *Leadership*]; *RCAP*, *supra* note 4, vol. 2 at c. 3.

[27] See *e.g.*, on the Iroquois, A. C. Parker, *The Constitution of the Five Nations, or The Iroquois Book of the Great Law*, printed as "Book Three" in William N Fenton, ed., *Parker on the Iroquois* (Syracuse: Syracuse University Press, 1968) [hereinafter Parker], and on the Huron, B. G. Trigger, *The Children of Aataentsic: A History of the Huron People to 1660*, vol. 1 and 2 (Montreal: McGill-Queen's University Press, 1976) [hereinafter Trigger].

[28] P. S. Schmalz, *The Ojibwa of Southern Ontario* (Toronto: University of Toronto Press, 1991) at 11 [hereinafter Schmalz].

[29] Cleland, *supra* note 23 at 24 and 47. Over 100 people gathered at the Credit River during spring and autumn salmon runs: D. B. Smith, *Sacred Feathers: The Reverend Peter Jones (Kahkewaquonaby) and the Mississauga Indians* (Toronto: University of Toronto Press, 1987) at 8 [hereinafter *Sacred Feathers*].

Band members congregated in villages near fisheries and corn, bean and squash fields during spring and summer months, and then broke into smaller family-based units to travel inland for the autumn and winter hunts.[30] Belief in a supernatural world dominated Ojibway perceptions of themselves and their environment. As such, the successful exploitation of natural resources, and therefore survival, was regarded as contingent upon performance of customary ceremonies designed to meet obligations—which were often revealed in dreams and/or visions—towards "manitous", or spirits that animated animals, trees, rocks, waters and the weather.[31] Thus, important community decisions that might be called "governmental" and important customary norms that might be called "law" (such as decisions and norms relating to where, when or how to exploit a certain natural resource) cannot really be conceptually divorced from customary rules relating to spirituality or religion.[32]

Ojibway conceptions of law and government were also informed by a social order based on ties of actual and spiritual kinship. The "clans" (or "tribes"[33]) created by these ties divided nuclear families, and linked individuals from different villages and bands together as "brothers" and "sisters" on the basis of their assumed descent from common animal ancestors, symbolized by the clan's totem or *do-daim*.[34] It has been argued that there were originally five Ojibway clans with that number increasing to 20 or more, the most common being the Loon, Crane, Catfish, Bear, Marten and Wolf clans.[35] As siblings, members of the same clan could not intermarry, and upon marriage men and women kept their original clan membership. Indeed, marriages were carefully managed to ensure intra- and inter-band solidarity, and to this end polygamy was occasionally permitted.[36] Unlike the matrilineal clan system of the Huron and Iroquois, Ojibway clan membership was determined patrilineally.[37] The population of an Ojibway village or band therefore consisted of members of a variety of clans, these same clans having members in the villages of other Ojibway bands. In other words, villages and

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[30] J. J. Borrows, *Traditional Use, Treaties and Land Title Settlements: A Legal History of the Anishnabe of Manitoulin Island* (D.Jur. Thesis, Osgoode Hall Law School, 1994) at 22 [hereinafter *History of the Anishnabe*]; N. Ferris, *Continuity Within Change: Settlement-Subsistence Strategies and Artifact Patterns of the Southwestern Ontario Ojibwa A.D. 1780-1861* (M.A. Thesis, York University, 1989) at 169-83.

[31] Charlevoix, *supra* note 20, vol. 2 at 141-64; Warren, *supra* note 21 at 65-67, 77-81; J.G. Kohl, *Kitchi-Gami: Wanderings Round Lake Superior* (London: Chapman and Hall, 1860) at 40-52 [hereinafter Kohl]; Schmalz, *supra* note 29 at 6-12; Cleland, *supra* note 23 at 32-33.

[32] O. Lyons, "Spirituality, Equality and Natural Law" in L. Little Bear, M. Boldt and J. A. Long, eds., *Pathways to Self-Determination: Canadian Indians and the Canadian State* (Toronto: University of Toronto Press, 1984) 5 at 5-6 [hereinafter Lyons].

[33] Some 18th and 19th century writers use "tribe" to describe clan: Charlevoix, *supra* note 20, vol. 2 at 21; Lafitau, *supra* note 20 at 472-73; *Jones: History, supra* note 21 at 138.

[34] Warren, *supra* note 21 at 34-35.

[35] *Ibid.* at 44-45.

[36] *Ibid.* at 35; Cleland, *supra* note 23 at 58.

[37] *The Huron, supra* note 19 at 55; "The Great Binding Law, Gayanashagowa" §44 in Parker, *supra* note 28 [hereinafter *Great Binding Law*]; L. H. Morgan, *Houses and House-Life of the American Aborigines* (Washington: Government Printing Office, 1881) at 8; F. Densmore, *Chippewa Customs* (Washington: Government Printing Office, 1929) at 10; R. Landes, *Ojibwa Sociology* (New York: Columbia University Press, 1937) at 31 [hereinafter Landes].

bands were aggregations of what Trigger calls "clan segments".[38]

The customary rules underlying the clan system clearly regulated personal and family relationships, but the extent to which they regulated larger political and constitutional matters in Ojibway society is unclear. According to one interpretation of Ojibway customary law, the elders from each clan selected a chief, or *ogima*, to speak on behalf of the clan members in council, the Crane clan chief being the "head" chief and the Loon clan chief being the "speaker" of the band.[39] It has also been argued that chiefs were selected for life by a complex combination of hereditary right and election: chieftainship descended patrilineally within certain lineages, and the "principal men", or elders, of the clan or lineage had the right to select from amongst their number the successor, which tended to be the son (if there was one) of the deceased chief.[40] This sort of formal clan system of government, if it existed, would have been analogous to the clan systems of village, national and, to a lesser degree, confederal councils under Huron and Iroquois law,[41] though chieftainship descended materilineally and selection was by clan mothers in those societies.[42]

There are, however, two alternative theories of pre-contact Ojibway government to the one summarized above. First, Hickerson argues that the merging of different clans within single band units was a 19th century phenomenon, and that originally each clan was itself a band or several bands.[43] According to this view, the clan's chief(s) would have been the band's only chief(s), there being no other clans in the band. According to Hickerson, by the 19th century the only remaining single-clan bands were the Mississauga bands on the north shores of Lakes Ontario and Erie. Although the Mississauga may have been, at some stage, all members of the Eagle clan,[44] other clans were found within Mississauga bands by the early 19th century. Treaty records from that time indicate Mississauga signatories from three or four clans (Eagle, Otter, Fish, Deer),[45] and it has been suggested that there may have been up to ten

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[38] *The Huron, ibid.* at 55.

[39] Warren, *supra* note 21 at 86-89; Cleland, *supra* note 23 at 50; *Leadership, supra* note 27 at 17. Writing in the 1720s after visiting numerous Iroquois and Mississauga bands along the shores of Lakes Ontario and Erie, Charlevoix, *supra* note 20, vol. 2 at 21-22, stated: "Several nations have each of them three principle families or tribes....These tribes are mixed, without being confounded, each of them having a distinct chief in every village: and in such affairs as concern the whole nation, these chiefs assemble to deliberate upon it. Every tribe bears the name of some animal".

[40] *Jones: History, supra* note 21 at 107; Copway, *supra* note 21 at 140; Warren, *supra* note 21 at 335; *Leadership, supra* note 27 at 16.

[41] Lafitau, *supra* note 20 at 464; *Great Binding Law, supra* note 38 at §94-95; Sagard, *supra* note 19 at 148; J.W. Powell, *Wyandot Government: A Short Study of Tribal Society* (Washington: Bureau of Ethnology, 1881) at 61.

[42] Powell, *ibid.* at 61; *Great Binding Law, ibid.* at §54; Parker, *supra* note 28 at 11; *Jones: History, supra* note 21 at 107.

[43] H. Hickerson, *The Chippewa and their Neighbors: A Study in Ethnohistory* (Montreal: Holt, Rinehart & Winston, 1970) at 42-45.

[44] *Jones: History, supra* note 21 at 138.

[45] See Treaty no. 8 (21 August 1797), Treaty no.13 (1 August 1805), Treaty no. 14 (5-6 September 1806) and accompanying maps in Canada, *Indian Treaties and Surrenders*, vol. 1 (Ottawa: Queen's Printer, 1891) at 23 and 34-37 [hereinafter *Indian Treaties and Surrenders*].

clans altogether.[46]

The second alternative theory is that although bands may have consisted of more than one clan segment, clans only regulated family matters and had nothing to do with the identity of chiefs or the composition of councils. Under this theory leaders rose and fell spontaneously and varied depending upon the matter(s) in issue; the "chief", according to this view, was merely that person who had demonstrated sufficient qualities of good leadership (including, perhaps, "kinship with the manitous"[47]) to warrant respect and/or obedience on a particular matter.[48] This theory may have been accurate in relation to some of the smaller Ojibway bands north of Lake Superior,[49] but commentators on the southern Ojibway characterize chieftainship in more formal terms.[50] While the *de facto* influence and/or power of chiefs no doubt varied with community opinion about their abilities, the *de jure* status of such chiefs was probably regulated by the customary norms of heredity and election identified above.[51] At the very least it can be stated that, regardless of whether a formal clan system of government existed or not, bands did consist of several extended family groups, and decisions affecting any particular such group would not have been made without the participation of its most respected male member, the family's chief or "father", as well as its elders or "principal men".[52]

Ojibway government was not divided institutionally according to legislative, executive and judicial functions. Instead, the various clan segments and/or extended family groups of an Ojibway band met in council to negotiate a consensus on each matter of common concern, and, in so doing, performed tasks that were broadly equivalent or analogous to each of these three functions. Thus, it acted "legislatively" when it discussed and interpreted (and thereby clarified and/or evolved) the customary norms of the community relating to, say, use of a particular fishery; it acted as "executive" when it made specific decisions affecting the community, such as whether to relocate the summer village site; finally, it acted "judicially" when it met to reconcile a victim of a crime and his or her family/clan with the criminal offender and his or her

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[46] *Jones: History, supra* note 21 at 137; *Sacred Feathers, supra* note 30 at 6.

[47] Johnston, *supra* note 25 at xix.

[48] Cleland, *supra* note 23 at 60; *Leadership, supra* note 27 at 13-16; Johnston, *ibid.*; Landes, *supra* note 38 at 2.

[49] E.J. Danziger Jr., *The Chippewas of Lake Superior* (Norman: University of Oklahoma Press, 1979) at 10-11; *Leadership, ibid.* at 15.

[50] Warren, *supra* note 21 at 34-37, 44-46 and 335; *Jones: History, supra* note 21 at 107-08; *Leadership, supra* note 27 at 17-18.

[51] Credit River Chief Peter Jones described a formal hereditary/election process of selection, but noted that chiefs' "influence depends on their wisdom, bravery, and hospitality.": *Jones: History, ibid.* at 108.

[52] *Ibid.* at 108-09. Compare Lafitau, *supra* note 20 at 472-73: "L'autorité des Chefs s'étend proprement sur ceux de leur Tribu [clan], qu'ils considerent comme leurs enfans (*sic*)....". Writing in the 1720s, Charlevoix, *supra* note 20 at 21 (vol. 2), observed in some cases there was only one chief for each "town" but that "no affair of any consequence [was] resolved upon, but by the advice of the Elders."

family/clan through the customary payment of gifts.[53]

Whatever the nature of the matter being discussed, however, the objective was the same: to attain consensus. Consensus was required because the Ojibway did not have any formal or coercive laws or institutions by which either customary norms or council decisions could be enforced against those who refused to abide by them—as it was observed in the 1720s, they were "eternally negociating (*sic*)".[54] The need for community consensus meant that councils had to be much more than meetings of chiefs—they were public gatherings of the band's people, or at least "chiefs and principal men",[55] at which anyone could speak, subject to procedural customs and ceremonies that gave precedence to "age and wisdom".[56] For a small, family-based, relatively mobile polity that lived by hunting and was constantly attempting to ensure a spiritual balance with the natural world around it, customary norms did not require coercive sanctions to be binding; rather, social pressure ensured that conformity with custom was attained without restricting the personal liberty of individuals.[57] Thus, Ojibway writer George Copway stated in the 1850s:

> Customs handed down from generation to generation have been the only laws to guide them. Every one might act different (*sic*) from what was considered right did he choose to do so, but such acts would bring upon him the censure of the nation, which he dreaded more than any corporal punishment....This fear of the nation's censure acted as a mighty band, binding all in one social, honourable compact. They would not as brutes be whipped into duty. They would as men be persuaded to the right.[58]

The absence of coercive laws and sanctions is illustrated by Ojibway customary law relating to crime. Allegations of criminal wrongdoing gave rise to certain collective responsibilities: members of the victim's household, clan or band were under a duty to seek satisfaction from members of the accused's household, clan or band. To avoid cycles of retaliatory violence, chiefs from the opposing units met in council to perform customary gift-giving ceremonies designed to achieve reconciliation.[59] No independent trier of fact presided, and the primary objective was not to determine the truth or to attach individual blame, but to restore balance to the community by ensuring that the

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[53] See *e.g.*, Le Beau, *supra* note 20, vol. 2 at 256 (in council "On y juge toutes sortes de Causes....de criminelles &....des affaires d'Etat" like contracting alliances); Johnston, *supra* note 25 at xx ("The only authority was the collective of elders who adjudicated disputes put before them, counseled observance of the laws that governed the seasons, fostered friendship and goodwill within the community, and deferred to the manitous and the mystery of life by performing rituals and ceremonies and making offerings as prescribed by customs and tradition").

[54] Charlevoix, *supra* note 20, vol. 2 at 27.

[55] *Jones: History, supra* note 21 at 107.

[56] Copway, *supra* note 21 at 141. See also Landes, *supra* note 38 at 2.

[57] *Jones: History, supra* note 21 at 108; *Leadership, supra* note 27 at 13; Kohl, *supra* note 32 at 270; Johnston, *supra* note 25 at xix; Charlevoix, *supra* note 20, vol. 2 at 24: chiefs "request or propose, rather than command....Thus....obedience is founded in liberty."

[58] Copway, *supra* note 21 at 144.

[59] Perrot, *supra* note 20 at 73-76; Charlevoix, *supra* note 20, vol. 2 at 33; Le Beau, *supra* note 20 at 259-60; Kohl, *supra* note 32 at 269.

relevant family and clan relations of the victim and the offender were reconciled with one another.

Ojibway bands held and defended their own territories, which included village sites, planting fields, fisheries, sugar bush areas, and hunting regions.[60] In relation to the external world, land and resources were collectively held by band units. By internal band customary law, however, special rights of land use and resource access were often recognized in particular clan segments or smaller family units, and land use was regulated by the appropriate level of council.[61] Thus, it has been suggested that family groups might acquire usufructuary-like rights to sugar bush areas and gardens, but that larger hunting territories were held by the band itself and rights of access would have been allocated by the band council.[62] With respect to the products of planting, fishing and hunting, a complex web of customary sharing and gift obligations regulated distribution within family, clan segment and band units.[63] Whatever particular norms emerged in relation to land and resources—and these norms likely varied somewhat between bands—the general approach was premised upon Ojibway attitudes towards the spiritual animation of the natural world, and their own position within that spiritually-animated natural world. The Ojibway did not consider humans superior to other animal and non-animal beings, and every effort was made to ensure that human activity—especially land and resource use—respected the spiritual integrity of the environment around them.[64]

To summarize, it is clear that the general characteristics of the pre-contact Ojibway system of law and government were inextricably bound up with the general characteristics of pre-contact Ojibway society itself. The normative foundations of the system of usages and customs that regulated Ojibway life derived from, first, the unique manner in which Ojibway peoples harvested natural resources within their territories—i.e., the economic basis of Ojibway society—and, second, the spiritual relationship that existed between Ojibway peoples and the natural world around them—i.e., the spiritual/religious basis of Ojibway society. Although the above summary of Ojibway customary law and government fails to capture the detail and subtlety of the pre-contact system, it is sufficient to provide a context for the analysis in Part IV of the legal and constitutional transition necessitated in the 19th century by the settlement of Ojibway bands within Indian reserves and by the consequent challenge to the normative foundations of the aboriginal customary system. Before this analysis

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[60] *Jones: History, supra* note 21 at 107 and 113-14; Copway, *supra* note 21 at 140.

[61] *Land Tenure, supra* note 3 at 41-42; C. A. Bishop, "Northern Algonquians, 1760-1821" in *Aboriginal Ontario, supra* note 3 at 296-97 (observing that it is not clear whether family rights to hunting areas developed before or after contact); *Sacred Feathers, supra* note 30 at 8 (refers to "family hunting grounds"); Kohl, *supra* note 32 at 421.

[62] H. Hickerson, *The Southwestern Chippewa: An Ethnohistorical Study* (Washington: American Anthropological Association, 1962) at 51.

[63] Cleland, *supra* note 23 at 54-58; Kohl, *supra* note 32 at 266 (discussing the "customs and laws....as, for instance, those which refer to the careful division and regulation of the game").

[64] Schmalz, *supra* note 29 at 6-10; Lyons, *supra* note 33 at 6; F. Plain, "A Treatise on the Rights of the Aboriginal Peoples of the Continent of North America" in M. Boldt, J. A. Long and L. Little Bear, eds., *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985) at 34.

can be made, however, it is necessary to review briefly the treaty relationship between the British and the Credit River Mississauga, and the events leading up to the settlement of the nation on their reserve in the 1820s.

III. THE BRITISH-MISSISSAUGA "COVENANT CHAIN"

The Mississauga bands on the north shores of Lakes Ontario and Erie initially sided with the French in the French-British struggle for continental domination. However, by the summer of 1759 the Toronto-area Mississauga had anticipated the fall of New France and had begun negotiating with the British.[65] With the French capitulation in Montreal in 1760, a formal treaty of peace and alliance was possible, and in September 1761 the various nations of the Great Lakes region met in Detroit with the Superintendent of the British Indian Department, Sir William Johnson, to establish a "Covenant Chain", i.e. a treaty relationship symbolized by a wampum belt according to which (in Johnson's terms) "Royal protection" was extended to "Indian Allies" living in the Crown's "dominions".[66] The Pontiac-led uprising of 1763 necessitated a further round of peace negotiations, and Johnson therefore met with the Great Lakes nations again at Niagara in July and August of 1764 to confirm the "great Covenant Chain", this time incorporating into the treaty relationship measures for the recognition and protection of aboriginal title to land which had been promulgated by the Crown in the *Royal Proclamation of 1763*.[67] Present at both treaties was "*Wabbicomicot* a chief of the *Chippaweighs* living near *Toronto....*"[68] Chief Wabbicomicot also attended a treaty council held at Detroit in September 1764 which, in contrast to the earlier covenant chain treaties, characterized the native signatories as "Subjects", not allies, of the Crown.[69] Indeed, the treaty records suggest that Wabbicomicot objected to this language, insisting that the usual "Brothers" metaphor be used to describe the British-Indian relationship. The presiding British officer, Colonel J. Bradstreet, responded by saying that "nobody (*sic*) were to be admitted into the aforesaid mentioned Submission and Articles of Peace, but such as acknowledge themselves Subjects and Children of the

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[65] General Amherst to Sir William Johnson, Superintendent Indian Dept., 11 September 1759 (discussing a council on the north shore of Lake Ontario at which the Mississauga were brought "into our Interest") in J. Sullivan (ed.) *The Papers of Sir William Johnson*, vol. 5 (Albany: State University of New York, 1921-65) at 136 [hereinafter *Johnson Papers*]. See also, Amherst to Johnson, 2 October 1759, *ibid.*, vol. 10 at 126.

[66] Treaty of Detroit, September 1761, *ibid.*, vol. 3 at 471-78.

[67] Royal Proclamation of 7 October 1763, in C.S. Brigham (ed.), *British Royal Proclamations Relating to America, 1603-1783*, vol. 12 (Transactions and Collections of the American Antiquarian Society, 1911) at 212-18 [hereinafter *Royal Proclamation of 1783*]. On the Proclamation's incorporation into treaty terms, see Treaty of Niagara, 17 July to 4 August 1764, in *Johnson Papers, ibid.*, vol. 11 at 278-307; Johnson to Cadwallader Colden, 23 August 1764, in *Johnson Papers, ibid.*, vol. 4 at 511-14; *History of the Anishnabe, supra* note 31 at 64-70.

[68] Treaty of Niagara 1764 in *Johnson Papers, ibid.*, vol. 11 at 306-7. Said Johnson in 1761 with respect to Chief Wabbicomicot of the "Toronto Chipeweighs": "We now take him by the hand, as all the Nations have done": Treaty of Detroit,September 1761, *ibid.*, vol. 3 at 491.

[69] Treaty of Detroit, 7-10 September 1764, *ibid.*, vol. 4 at 526-28.

King...."[70] Apparently Wabbicomicot agreed,[71] although the Bradstreet Treaty was later repudiated by Johnson because of its assertion of sovereignty over Indian nations.[72]

By the *Royal Proclamation of 1763* the Great Lakes region, including the Mississauga territory on the north shore of Lake Ontario, was left as part of an Indian reserve in which cessions and settlement were prohibited; no British laws or institutions were introduced into this territory, and Indian nations were left to govern themselves according to their customary legal systems.[73] The territory was annexed to the province of Quebec in 1774, and therefore, in theory, became subject to the colonial law and government of that province. However, in fact (and, probably, in law), Indian nations within unsurrendered lands remained excluded from the settler legal system.[74] The end of the American Revolution resulted in loyalist settlers demanding land in Canada, and the process of treating for the surrender of aboriginal title began. As a result, by the late 1780s most Mississauga territories on the north shores of Lakes Erie and Ontario had been ceded to the Crown.[75] Thereafter English-speaking settlements increased, and in 1791 the area around the Great Lakes was separated from the French-speaking settlements to the north and east; within this newly-created colony of Upper Canada a system of institutions and laws modeled upon those in England was introduced. The colonial legislature, which sat at the provincial capital of York (Toronto) mirrored the Westminster Parliament, its lieutenant governor, legislative council and legislative assembly representing and/or emulating the Crown, House of Lords and House of Commons; the colonial courts of King's Bench, Common Pleas and Chancery bore the same names and applied the same laws as the common law and equity courts of England; and the King's writ was (in theory) enforced throughout the colony by a system of assizes and quarter sessions which differed little from those found "at home".[76] Within this little England, however, aboriginal law and government continued to regulate the internal affairs of Indian nations in unsurrendered lands, and little attempt was made to assert English law in native communities.[77] Indeed, the Mississauga-British treaty relationship remained a "Covenant Chain" relationship: when, in 1796,

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[70] *Ibid.* at 532-33.

[71] *Ibid.*

[72] Sir William Johnson, Superintendent of the Indian Department, to the Board of Trade, 30 October 1764, in E.B. O'Callaghan, ed., *Documents Relative to the Colonial History of the State of New York*, vol. 7 (Albany: Weed, Parsons & Co., 1856-61) at 670-74 [hereinafter *Colonial History*]; Johnson to Colonel H. Bouquet, 6 December 1764, in *Johnson Papers, ibid.*, vol. 4 at 610-11; Johnson to General Thomas Gage, 31 October 1764, in *Johnson Papers, ibid.*, vol. 11 at 394-96. See White, *supra* note 22 at 294.

[73] *Connolly* v. *Woolrich* (1867), 17 R.J.R.Q. 75 at 84 and 96, 11 L.C.J. 197 at 205 and 214-15 (Que. S.C.), aff'd *(sub nom. Johnstone* v.*Connolly)* (1869), 17 R.J.R.Q. 266; 1 R. L. 253 (Que. Q.B.) [hereinafter *Connolly*]; *Colonial Criminal Jurisdiction, supra* note 11 at 279.

[74] *Colonial Criminal Jurisdiction, ibid.* at 282-84.

[75] D. B. Smith, "The Dispossession of the Mississauga Indians: A Missing Chapter in the Early History of Upper Canada" (1981) 73 Ontario History 67 [hereinafter "Dispossession"]; I. Johnson, *The Early Missisauga Treaty Process, 1781-1819, In Historical Perspective* (Ph.D. Thesis, University of Toronto, 1986).

[76] See generally the sources cited *supra* note 2.

[77] *Colonial Criminal Jurisdiction, supra* note 11.

Chief Wabikinine of the Credit River was killed by a drunken British soldier near Toronto, hostilities were prevented and peace assured by a British-Mississauga council at which the treaty symbolized by the "great Belt" given by Johnson in the 1760s was confirmed.[78] Thus, although English law and institutions had been introduced around the Credit River Mississauga, their status remained one of quasi-independence—as Sir William Johnson himself frequently asserted, the Covenant Chain was a relationship of peace, alliance and protection under which the British Crown did not purport to assert any right to control the internal affairs of the native signatories.[79]

Although most Mississauga lands along Lake Ontario were ceded by the 1780s, the lands to the immediate west of Toronto remained unceded: York County was initially cut into two by a "tract of land belonging to the Mississague Indians".[80] According to Lieutenant Governor John Graves Simcoe, this "unpurchased" tract was to be left for the "Comfort" of the Mississauga Indians, who had villages and fisheries at the Credit River and other creeks flowing into Lake Ontario, and for "an ample Magazine for Ship Timber".[81] However, it was not long before the Mississauga tract was regarded by settlers as a hindrance, and in 1798 the Executive Council concluded that communications along the provincial waterways "should not be broken & interrupted by Tracts of Indian Territory intervening to obstruct the Course of Justice."[82] Efforts therefore began to obtain a surrender.

It was eight years before the Crown succeeded in this objective. The Credit River Mississauga had formed an alliance with the Grand River Six Nations, and, following the advice of the influential Mohawk leader Joseph Brant, held out for what was described as "an exorbitant price."[83] Efforts were made by Peter Russell, who administered the colony in Simcoe's absence, to break this alliance,[84] leading Brant to

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[78] "Minutes of a Council with the Missassagas", 26 September 1796, in 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*, vol. 1 (Toronto: Ontario Historical Society, 1932-36) at 44-45 [hereinafter *Russell Papers*]. Officials believed the murder would cause an Indian attack: Peter Russell, Administrator of Upper Canada, to Robert Prescott, Governor of Canada, 18 April 1797, in *Russell Papers, ibid.*, vol. 1 at 164. See generally, "Dispossession", *supra* note 76 at 76-77.

[79] Sir William Johnson, Supterintendent Indian Dept., to General Thomas Gage, 7 October 1772, in *Johnson Papers*, *supra* note 66, vol. 12 at 994-5; Johnson to Gage, 31 October 1764, *Colonial History*, *supra* note 73.

[80] Proclamation of Upper Canada, 16 July 1792, in Ontario, *Reports of the Ontario Bureau of Archives*, vol. 4 (Toronto: The King's Printer, 1909-1918) at 176-81.

[81] "The Report of Col. Simcoe Lieutenant Governor of Upper Canada to the Lords of the Committee of the Privy Council for Trade and Plantations," 1 September 1794, in 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*, vol.3 (Toronto: Ontario Historical Society, 1923-31) at 59.

[82] P. Russell to Lord Portland, Secretary of State, 21 March 1798, in *Russell Papers, supra* note 79 at 122-23

[83] *Ibid.* Also, Russell to Prescott, 15 June 1798, in *Russell Papers, supra* note 79, vol. 2 at 185; J. Brant to Lieutenant J. Givens, 6 July 1798, in *Russell Papers, ibid.*, vol. 2 at 199-200.

[84] Russell to Prescott, 9 August 1798, in *Russell Papers, ibid.*, vol. 2 at 232.

charge the British with attempting to bring about "an end to our being a free people" and of "depriving us of the liberty of enjoying our old Customs."[85] Upon being reminded by the Lieutenant Governor of Lower Canada of the applicability of Article 1 of the "Instructions for the good Government of the Indian Department", which stated that Indian nations were "free and independent",[86] Russell relented. The Indian Department was instructed to inform the Six Nations that the British had no intention "of interrupting their ancient Customs; they were a free Nation."[87]

In the end, demographic changes forced the Mississauga to compromise. During the first decade of the 19th century, non-native encroachment on the tract increased and traditional resource use was threatened. In 1805 the chiefs informed the Indian Department that settlers "drive us away instead of helping us" and that although "it is hard for us to give away more Land", they would agree to cede part of the tract in return for Crown protection of their villages and fisheries at the main rivers.[88] The treaty text was finalized at the Credit River in 1806. Ten chiefs agreed to surrender a six by twenty-six mile lake-front block of the Mississagua Tract from the Etobicoke River to Burlington Bay, reserving for the continued use of the chiefs and the "people of the Missisagua Nations of indians, and their posterity for ever the sole right of the fisheries in the Twelve Mile Creek, the Sixteen Mile Creek, the River Credit and the River Etobicoke", as well as the land one mile each side of the Credit River from its mouth to the back boundary of the purchase.[89]

Even express treaty recognition of rights to lands and resources could not stop the devastating effects of cultural dislocation that the Mississauga, like other First Nations, experienced once European settlement of their territories began in earnest.[90]

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[85] Brant to Givens, 3 August 1798, *ibid.*, vol. 2 at 235.

[86] "Instructions for the good Government of the Indian Department", Lord Dorchester, Commander in Chief, to Sir John Johnson, Supterintendent Indian Dept., 27 March 1787, at *NA RG10, supra* note 9, vol. 789 at 6759-65; Prescott to Russell, 6 September 1798, in *Russell Papers, ibid.*, vol. 2 at 251.

[87] Russell to Givens, 28 September 1798, in *Russell Papers, ibid.*, vol. 2 at 271-2. Secretary of State Lord Portland instructed Russell to "defer" purchasing the Mississauga Tract until "an opportunity" arose to do so "on reasonable Terms": Portland to Russell, 5 November 1798, at Public Record Office (London, UK) 42/322 at 143-48 [hereinafter PRO CO].

[88] "Proceedings of a Meeting with the Mississagues at the River Credit", 31 July 1805, at *PRO CO, ibid.*, 42/340 at 49ff and 51-52.

[89] Treaty No. 14 (6 September 1806), in *Indian Treaties and Surrenders, supra* note 46, vol. 1 at 38.

[90] On the deplorable living conditions within native communities in Upper Canada, see Great Britain, House of Commons, "Report From the Select Committee on Aborigines (British Settlements)" in *Parliamentary Papers*, 1837, vol. 7, no. 425 at 46-48 [hereinafter "Report From the Select Committee on Aborigines (British Settlements)"]; Aborigines Protection Society, *Report on the Indians of Upper Canada* (London: William Ball, Arnold, 1839); J. West, *A Journal of a Mission to the Indians of the British Provinces, of New Brunswick, and Nova Scotia, and the Mohawks, On the Ouse, or Grand River, Upper Canada* (London: L.B. Seeley & Son, 1827) at 252-53; John MacTaggart, *Three Years in Canada: An Account of the Actual State of the Country in 1826-7-8*, vol. 2 (London: Henry Colburn, 1829) at 136-37; J. Beaven, *Recreations of a Long Vacation; or, A Visit to the Indian Missions in Upper Canada* (London: James Burns, 1846) at 158.

After 1815, traditional methods of resource exploitation became increasingly difficult for the Credit River Mississauga to sustain, and yet as late as the 1820s the nation had not embraced any alternative economic base.[91] The threat posed by neighbouring settlement to their traditional relationship with the land was just one aspect of the assault by European culture upon the spiritual, economic and social assumptions upon which Mississauga society was based. By the 1820s the Mississauga, suffering from poverty, disease, malnutrician and alcoholism, were described as "wandering pagans"[92] in a "degraded state of heathenism and destitution."[93] Within one generation, the band's population had decreased by two-thirds, and the Indian Department had no trouble in convincing this vulnerable people to cede most of its remaining lands.[94] Treaties in 1818 and 1820 left the band with a much smaller tract on Credit.[95]

Most of the Credit River nation had migrated to the Six Nations Grand River reserve, and the prospect of the nation's disintegration seemed likely, when there emerged from amongst their number a leader who initiated a remarkable process of national reform and rebuilding, as well as a return to the Credit River tract. This leader was Kahkewaquonaby, or Peter Jones, son of Tuhbenahneequay, a Mississauga woman, and Augustus Jones, the Welsh-born provincial surveyor general. Peter Jones, who was raised within the Mississauga community and later converted to Methodism and became an ordained minister, made it his objective to save his people from destruction by reoganizing them as a Christian farming community on the Credit River reserve.[96] Assisted by his brother John, Jones gathered the band onto the reserve in April 1826 and began to instruct them in reading, writing and agriculture.[97] According to one observer, under the Jones' influence, the Mississauga "perceived the advantage of cultivating the soil...they became industrious sober & useful."[98] Under the terms of the 1820 treaty, the Crown was obligated to make provision for their "maintenance", and thus Lieutenant

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[91] P. Jones, *Life and Journals of Kaw-Ke-Wa-Quo-Na-By: (Rev. Peter Jones,) Wesleyan Missionary* (Toronto: Anson Green, 1860) at 1-6 [hereinafter *Life and Journals*]; *Sacred Feathers*, *supra* note 30 at 38; Schmalz, *supra* note 29 at 149-50 (the non-native population of Toronto (York) increased from 224 in 1799 to 1677 in 1830 to 19,706 in 1845).

[92] "Report of the State of the Indians on the River Credit, Township of Toronto, Upper Canada; presented to his Excellency Sir John Colborne, &c. by the Rev. James Magrath, Missionary", March 1828, in House of Commons, *Imperial Blue Books on Affairs Relating to Canada. Reports, Returns, and other Papers, Presented to the Imperial House of Parliament of Great Britain and Ireland Relating to Canada*, 1834, vol. 5, no. 617 at 42 [hereinafter Report of the State of the Indians on the River Credit; *Imperial Blue Book*, 1834]; Copway, *supra* note 21 at 185.

[93] Copway, *ibid.*

[94] *Sacred Feathers*, *supra* note 30 at 39-40.

[95] Treaty no. 19 (28 October 1818) and Treaty no. 22 (28 February 1820), in *Indian Treaties and Surrenders*, *supra* note 46 at 47-48, 50-53.

[96] Peter Jones to Col. J. Givens, Deputy Supt. Indian Dept., 8 August 1825, at *NA RG10*, *supra* note 9, vol. 1011, p. 1; *Life and Journals*, *supra* note 92 at 38.

[97] Graham, *supra* note 3 at 15.

[98] "Report of the State of the Indians on the River Credit; *Imperial Blue Book*, 1834", *supra* note 93 at 42. See also, Ernest J. Hathaway, "The River Credit and the Mississaugas" in Ontario Historical Society, *Papers and Records* (1930) vol. 26, pp. 432-44, at 438.

Governor Sir Peregrine Maitland agreed to assist in the building of houses.[99] A "handsome village" was soon built on the Credit, and by November 1828 there were 226 residents, 61 acres had been cleared and planted, 30 houses had been built, and the village had 27 cows, 18 oxen, and 11 horses.[100] On the surface at least, the Credit River village might have appeared to a passerby not unlike neighbouring communities.

The development of the Credit River Mississauga reserve coincided with, and was to a certain extent the inspiration for, a significant shift in British Indian policy in Canada.[101] In the last half of the 1820s, the imperial ministry resolved to alter the emphasis of Indian policy from securing Indians as military allies to "reclaiming them from a state of barbarism"[102] and to encouraging them "to shake off the rude habits of savage life, and to embrace Christianity and civilization."[103] This policy of "civilization" involved that which Jones was doing at the Credit River: encouraging settlement onto reserves, introducing Christianity and developing an agrarian economic base. Indeed, in 1837, the Credit River Mississauga village was touted by a select committee of the British Parliament as a model for other reserves, and for British-native relations throughout the empire.[104]

Although the goal of Indian policy was now a "civil" one, control over policy was retained by the imperial ministry, and the civilization policy was carried out by the imperial Indian Department, not the local colonial government.[105] However, the imperial government made no provision for law and government on reserves. Instead, it chose to influence native communities indirectly through existing native institutions.[106]

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[99] Treaty no. 22 (28 February 1820), in *Indian Treaties and Surrenders*, *supra* note 46 at 50-53; *Life and Journals*, *supra* note 92 at 45-46.

[100] *Life and Journals*, *supra* note 92 at 190. By 1838, some 820 acres were under cultivation: Graham, *supra* note 3 at 29-30.

[101] An influential report stated that the Credit River Mississauga, "who were lately notorious for drunkenness and debauchery," were "now settled in a delightful spot on the banks of the Credit" and their improvement afforded good reason "to extend to the other tribes now disposed to Christianity and civilization" the same "experiment" (Maj. Gen. H.C. Darling to Lord Dalhousie, Gov. Can., "Report upon the exact state of the Indian Department," 24 July 1828, in *Imperial Blue Book*, 1834, *supra* note 93 at 27).

[102] Sir G. Murray, Secretary of State for the Colonies, to Sir J. Kempt, Adm. Can., 25 January 1830, in *Imperial Blue Book*, 1834, *supra* note 93 at 88. See generally, "Report on the Affairs of the Indians in Canada" (R.W. Rawson, J. Davidson and W. Hepburn, Commrs.), 22 January 1844, at Sec. I, 5-9 (Sections I and II printed in *Journals of the Legislative Assembly of Canada* (1845), Appendix EEE; Section III printed in *Journals of the Legislative Assembly of Canada* (1847), Appendix T [hereinafter *Report on the Affairs of the Indians in Canada*]; John S. Milloy, *The Era of Civilization —British Policy for the Indians of Canada, 1830-1860*, c.2 (D. Phil. Thesis, Oxford University, 1978).

[103] Darling to Dalhousie, "Report upon the exact state of the Indian Department", *supra* note 102, in *Imperial Blue Book*, 1834, *supra* note 93 at 29.

[104] "Report from the Select Committee on Aborigines (British Settlements)," *supra* note 91 at 45-46.

[105] Walters, *supra* note 14 at 217-224.

[106] R. Jameson, J.B. Macaulay and W. Hepburn, "Report of Committee No. 4, On Indian Department," in *Report on the Public Departments of the Province of Upper Canada in 1839* (January, 1840) PRO CO, *supra* note 88 at 42/472 at 31: the duties of the Indian Department

In these circumstances, aboriginal customary law and government, to the extent that they still existed and were not inconsistent with reserve conditions, continued to regulate native communities after settlement onto reserves. Indeed, the traditional government of the Credit River Mississauga received statutory recognition in 1829. In response to a petition by the band's council,[107] the colonial legislature enacted a statute providing that anyone hunting or fishing within the Mississauga 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...,[and disposed of] at the discretion of their principal men or chiefs for the public benefit of the said tribe."[108] This statute was therefore premised upon the assumption that the Mississauga had a lawful, pre-existing government composed of "chiefs and principal men" and that the Mississauga community had "public" property and interests separate from those of settlers in the colony. 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 presumed to have authority independently of statutory law. The Act delegated to the Chiefs authority over persons whom and property over which they had no inherent authority, namely non-native trespassers and their possessions.

To summarize, the Mississauga began their relationship with Britain as a component of a strong alliance of Indian nations that held the balance of power in North America and whose independence was reflected in the terms of Covenant Chain treaties made with the Crown. Although the Covenant Chain relationship was never expressly abrogated, once Mississauga territories were inundated with settlers, reliance upon traditional means of resource use became impossible and the Mississauga people were left physically impoverished and culturally disoriented. Only their adoption of an agrarian economic base within a fixed reserve settlement prevented what seemed to be an otherwise inevitable demise.

Having examined Ojibway pre-contact aboriginal law and government, and the events that led to the creation of a Mississauga village at the Credit River, it is now possible to consider how the Credit River Mississauga managed to adjust their

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superintendent were said to include:

> to persuade them to unite together, and build Villages for permanent residence — 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 exercise any influence he may possess in inducing them to adopt such measures as the Government may, from time to time suggest ...

Murray to Kempt, *Imperial Blue Book, 1834, supra* note 93 at 88-89: the Indian Department was to "perpetuat[e] that influence which should be maintained by the chiefs, and the Indians in Canada,"; "Report on the Affairs of the Indians in Canada", *supra* note 103 at Sec. III, 32: department was to "support the Chiefs" in "preserving subordination" and "peace and good order" on reserves.

[107] *Life and Journals, supra* note 92 at 199.

[108] *Act the better to protect the Mississaga tribes, living on the Indian reserve of the river Credit* (1829), 10 Geo. IV c. 3 (U.C.).

aboriginal customary system to the radically different demands of reserve life.

IV. ABORIGINAL LAW IN A CHRISTIAN AGRICULTURAL COMMUNITY: THE PARADOX OF CULTURAL CHANGE AND CONTINUITY

Peter Jones wanted the Mississauga people to adapt to the new realities presented by British colonialism in Upper Canada through embracing "civilization", but he did not want them to assimilate into settler society completely, abandoning all vestiges of aboriginal culture, nationhood and rights of self-determination.[109] The Ojibway peoples who followed the lead of reformers like Jones did not perceive any inconsistency between adopting certain aspects of settler culture and maintaining aboriginal nationhood—indeed, it has been suggested that Jones provided an example of native leadership that was regarded by many Ojibway peoples "as a means of revitalizing their traditions, [and] of reestablishing their communities."[110] There is, in other words, a certain paradox in the case of aboriginal national survival under colonial conditions: cultural continuity was contingent upon a considerable degree of cultural change. It has been observed in relation to the political and legal transformation of the Cherokee Nation—which provides a well-documented example of an aboriginal nation that adopted laws, government and lifestyles modeled on those of the surrounding settler society—that acculturation was "partly a defensive mechanism to prevent further loss of land and extinction of native culture; the very goals whites saw as the objective of acculturation."[111] These comments are equally applicable to the Credit River Mississauga. As John Borrows observes, under the Credit River "model" of aboriginal cultural survival, the status of a self-governing aboriginal nation was maintained through the incorporation of elements of the British colonial society that threatened distinctive aboriginal national existence.[112] An appreciation of this paradox is central to an understanding of the aboriginal legal systems that emerged on Indian reserves in nineteenth-century Canada.

Although "civilization" (to use the nineteenth-century term) and self-determination may not have been inconsistent native aspirations, did "civilization" sever the link between native communities and their pre-contact systems of customary law and government? Even before the move toward "civilization" in the 1820s, the Indian nations of the Great Lakes region had endured some two hundred years of European contact during which time both native and non-native communities underwent considerable cultural and political change in order to accommodate each other.[113] Yet, it is important not to overstate the significance of these changes for the internal laws and government of native communities. Of course, the pre-contact system could not have

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[109] *Sacred Feathers, supra* note 30 at 238-39.

[110] Christopher Vecsey, *Traditional Ojibwa Religion and Its Historical Changes*, (Philadelphia: American Philosophical Society, 1983) at 55 [hereinafter Vecsey].

[111] W. L. Anderson, "Introduction" in William L. Anderson (ed.), *Cherokee Removal: Before and After* (London: University of Georgia Press, 1991), viii-ix. See also references *supra* note 5.

[112] Borrows, *supra* note 3 at 306-310.

[113] See generally, White, *supra* note 22.

survived unaffected by such a long and tumultuous period of history, but the general characteristics of the pre-contact system, as described in Part II, were likely recognizable in systems of law and government that regulated native communities in Upper Canada at the beginning of the nineteenth century. As the century opened, Mississauga peoples were still organized in clans and village/band units, they still lived primarily by hunting, and they still conceptualized themselves and their world according to customary spiritual perspectives that informed their oral traditions.[114] Indeed, it was because they had retained so much of their traditional way of life, that the cultural dislocation resulting from the influx of settlers in early 1800s was so severe. Assuming that the pre-contact system did continue between the early seventeenth and early nineteenth centuries, albeit as a living, organic customary system that had evolved in response to the changes arising from European contact, did "civilization" imply an added degree of cultural change which that system could not withstand?

As stated in Part II, the Ojibway customary system of law and government can be seen to have rested upon two basic normative pillars: (a) aboriginal approaches to land and resource use, and (b) aboriginal concepts of spirituality. From the perspective of the imperial government, its Indian Department and the missionaries, "civilization" meant destruction of both of these pillars. Non-native advocates of the "civilization" policy claimed victory in this respect. Thus, it was said that the Credit River Mississauga and other Ojibway bands settling onto reserves had "perceived the evils attendant upon their former ignorant wandering state...[and] perceived the advantage of cultivating the soil"[115], and that the "Errors" of the "Pagan Creed" had been "eradicated", and "the superstitions and baneful Rites practised by the *Pow Wows*" had been "utterly abolished".[116] Once deprived of the normative support of aboriginal economic and spiritual concepts, would not customary laws and governments have collapsed?

While some old customs clearly became obsolete or had to be significantly modified after religious conversion and settlement onto a reserve, there are grounds upon which to argue that the normative foundations of the customary system as a whole had not been destroyed. The first missionary stationed at the Credit River reserve, Egerton Ryerson, stated in 1828: "I think the Indians are growing in knowledge and in grace. They are getting on pretty well with their spring work. But in some respects they are Indians, though they have become Christians."[117] In light of more recent evaluations of native reactions to colonization, this tentative acknowledgment of the continuity of aboriginal identity is clearly understated.[118] Indeed, some missionaries and officials at the time questioned the depth of the cultural changes that were taking place within

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[114] See generally, *Sacred Feathers*, *supra* note 30 at chapter 1.

[115] "Report of the State of the Indians on the River Credit", *supra* note 93 at 42.

[116] R. Alder, Weslayan Missionary, to Lord Glenelg, Sec. of State, 14 December 1837, in House of Commons, *Imperial Blue Book. Copies or Extracts of Correspondence Since 1st April 1835, Between the Secretary of State for the Colonies and the Governors of the British North American Provinces, Respecting the Indians in those Provinces*, 1839, Paper No. 93, at 92 [hereinafter *Imperial Blue Book*, 1839].

[117] E. Ryerson, *"The Story of My Life"* (Toronto: William Briggs, 1883) at 70.

[118] See generally *Report of the Royal Commission on Aboriginal Peoples (RCAP)*, *supra* note 4 at Vol. 1, *Looking Forward, Looking Back*, chapter 6 "State Three: Displacement and Assimilation".

aboriginal societies, arguing that religious conversion was only nominal or partial,[119] and that traditional seasonal harvesting of resources continued, albeit in modified form.[120] One Indian Department official stated that "Civilization" would be "gradual" and that hunting and fishing traditions would, "with every Nation, be a lingering Operation."[121] Lieutenant Governor Sir Francis Bond Head went so far as to "refute" the idea of "christianizing and civilizing" Indians, arguing that the attempt to "make Farmers" of them was "a complete Failure".[122] These various missionaries and officials may have had political or personal reasons for emphasizing the change or lack of change in aboriginal communities, and the true extent of acculturation no doubt lay somewhere between these competing views. It may be possible that what observers were witnessing was a process of cultural synthesis in which natives were struggling to accommodate certain European/Christian principles within a conceptual and institutional framework that remained distinctively Ojibway. It may even be argued that the aboriginal worldview was (and is) a deeply entrenched normative system that transcended the economic, religious and legal forms in which it happened to be manifested at the time of contact, and that it continued to inform native approaches to law and government even after new economic and religious forms were gradually embraced as natives made the transition to reserve life.

The difficulty in assessing the validity of this argument is that commentators at the time were not necessarily interested in looking beyond formal, outward manifestations of law and government to determine the extent to which traditional aboriginal ideas remained the normative force behind those forms. Thus, Copway, an Ojibway writer who had rejected the value of traditional aboriginal customs altogether,[123] stated: "Of late, the general councils of the Christian Ojibways have been convened and carried on in the same manner as the public meetings of the whites are

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[119] On the difficulties experienced by missionaries in achieving more than superficial change, see: J. Halkett, *Historical Notes Respecting the Indians of North America: with Remarks on the Attempts to Convert and Civilize Them* (London: Constable & Co., 1825); J. Buchanan, *Sketches of the History, Manners, and Customs of the North American Indians* (London: Black, Young & Young, 1824) at 100 (many nations in Upper and Lower Canada had "nominally converted"); H.N. Burden, *Manitoulin; or Five Years of Church Work among Ojibway Indians and Lumbermen, resident upon that Island or in its Vicinity* (London: Simpkin, Marshall, Hamilton, Kent & Co., 1895) at 46-50; D. A. Nock, *A Victorian Missionary and Canadian Indian Policy: Cultural Synthesis vs Cultural Replacement* (Waterloo, Ont.: Canadian Corp. for Studies in Religion, 1988); Vecsey, *supra* note 111 at 51-56; Rogers, *supra* note 3 at 150. Graham, however, suggests that it is arguable that missionaries did not destroy native culture because so much of it had, by this time, already been destroyed; she also suggests that missionaries may have helped natives to "preserve the remnants of their culture" by encouraging them to settle in units, not to inter-marry with non-natives and to insist on respect for their land rights. Graham, *supra* note 3 at 91.

[120] As soon as the "Hunting Season" began natives abandoned their "warm housing" on reserves and left for the forest: 'Memorandum', Sir Francis Bond Head to Lord Glenelg, Sec. of State, 20 November 1836, in *Imperial Blue Book*, 1839, *supra* note 117 at 125.

[121] T.G. Anderson, Supt. Indian Department, to Sir John Colborne, Lt. Gov. Upp. Can., 24 September 1835, in *Imperial Blue Book*, 1839, *ibid.* at 121.

[122] Bond Head to Glenelg, *Imperial Blue Book, 1839, supra* note 117 at 125.

[123] Vecsey, *supra* note 111 at 55.

conducted."[124] Similarly, Jones stated in one such general council:

> As we (the Christian part of the nation) have abandoned our former customs and ceremonies, ought we not to make our own laws, in order to give character and stability to our chiefs, as well as to empower them to treat with the [colonial] government under which we live, that they may, from time to time, present all our grieveances, and other matters to it?[125]

These statements, by two of the most influential Ojibway men of nineteenth-century Canada, asserted the continued status of the Ojibway people as self-governing nations capable of defining their own internal constitutional and legal structures. But the statements also seem predicated upon the notion that the cultural and religious revolution through which their people were going was also a *legal* revolution that served to destroy all "former customs" and that in the resulting legal vacuum, they could either adopt "white" legal forms or legislate their "own" new system. In fact, the Credit River Mississauga did make their "own laws" for their reserve, but as the following analysis demonstrates, there is at least some support for the view that these new laws did not derive from a wholly new and different constitutional root but rather represented the continuity in a new form of the traditional aboriginal customary system that originated prior to European contact—in other words, it may be argued that the Ojibway cultural revolution was not accompanied by a legal revolution.

The laws of the Credit River reserve will now be examined in four sections, addressing constitutional law, criminal law, family law and land/natural resources law respectively.

A. The Credit River Constitution

In his diary, Jones noted that in May 1826 Reverends Elder Case and Alvin Torry visited "and gave us some instruction how to regulate and bring the society into order..."[126] Although missionaries did not generally sit on, or even attend, reserve council sessions,[127] their influence was, at least on the surface, apparent. For example, Jones' summary of the council's decisions for January 1829—it had appointed a road master, constables, chapel keepers, and tax collectors for the year and had taken into consideration the erection of a saw mill, workshop, and hospital—could easily have been made in relation to a village or parish council in England.[128] While many other Indian nations in Upper Canada eventually took similar steps to regulate their reserves, what made the Credit River example unique was the promulgation by the band of an instrument that purported to set out the reserve constitution and codify certain of its

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[124] Copway, *supra* note 21 at 146.
[125] Quoted in Copway, *ibid.* at 149-150.
[126] *Life and Journals, supra* note 92 at 66.
[127] Graham, *supra* note 3 at 63.
[128] *Life and Journals, supra* note 92 at 193-94.

substantive laws.[129] In 1830, the band met in council to enact the "By Laws and Regulations for the Indian Village at the Credit."[130] This instrument was drafted by Jones (who had become a chief the year before), perhaps in consultation with other Methodist missionaries.[131] The Credit River "By Laws and Regulations" contained provisions on the constitutional structure of reserve government, the apprehension, trial and punishment of criminal offenders, and the regulation of land and resource use. These matters were addressed by the instrument under seven unnumbered titles, most of which contain several articles that are numbered. For ease of reference, I will number the titles with Roman numerals, and I will insert the title number before the article number when referring to articles (e.g., Art. I.2 is Article 2 under Title I). The titles are: Title I. "Government"; Title II. "Laws Relating to Various Offences"; Title III. "General Councils"; Title IV. "Occasional Councils"; Title V. "Regulations Concerning the Fishery"; Title VI. "Concerning Labor on Roads"; and, Title VII. "The Duty of Overseers of Roads, Etc.".

The legal framework for the reserve's government was addressed in Titles I (Government), III (General Councils) and IV (Occasional Councils). The articles under Title I were primarily concerned with describing the office of chief and the basic executive, legislative and judicial functions that chiefs were to perform. Article I.1 of the By Laws provided:

> According to our ancient customs, the Indians of this village, shall be governed by Chiefs, at present three, one of whom shall be called the Head Chief or Keche-Ookemah, who shall have the supreme authority. It shall be his duty to preside in Councils—to see that the Laws are duly executed and observed—and to call councils when he deems it necessary, or when he is requested to do so by three or more resident householders. He is in all cases to govern according to law, and in no case to enforce any Regulation till it regularly becomes a law by receiving the sanction of the Council.

The "second" chief, who was also the "war chief", was to perform the functions of head chief in the event of the head chief's absence or incapacity (Art. I.2). Article I.3 explained how the chiefs were to be selected: "According to the old customs of our nation the Chiefs shall be chosen by a majority of our people, and shall retain their office during life...." Public notice was to be given at least one month before "the council" met for the purpose of selecting a chief (Art. I.4). The chiefs were to be assisted by "a Mezhenahway or secretary" who was to keep the "publick (*sic*) accounts"

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[129] Several other nations enacted their own written constitutions: see, Wyandot (Huron) Constitutions for the Amherstburg reserve, 15 May 1843, at *NA RG 10, supra* note 9, vol. 457, 81036-81037, and 11 August 1846, at *NA RG 10, supra* note 9, vol. 441, 899-903 [hereinafter *Wyandot Constitution*]; and Mud Lake Ojibway Constitution, 1845, at *NA RG 10, supra* note 9, vol. 154, 89582. These constitutions were acknowledged and recognized by the Indian Department.

[130] "By Laws and Regulations for the Indian Village at the Credit", passed in council, 23 April 1830, *NA RG 10, supra* note 9, vol. 46, 23976-23983. The By Laws are printed in Graham, *supra* note 3 at Appendix III, 107-110 [hereinafter *Credit River By Laws and Regulations*].

[131] Graham, *supra* note 3 at 63.

and to "transcribe and keep the laws and regulations made by the councils" (Art. I.5).

Articles 6 to 9 under Title I identified the judicial functions of the chiefs. Article I.6 provided: "The Chiefs shall act as judges in all trials for debt, theft, drunkenness etc. or other offences against the laws and customs of our nation." When the chiefs acted in this "judicial capacity" the head chief was to "preside," although "the sentence" was to be determined by "a majority of voices" (Art. I.7). In such a "trial" either of the "parties" could request the chiefs to "cause a jury of six men to be called"; otherwise the chiefs were empowered to "decide the cause alone" (Art. I.7). The "writs, executions etc." associated with the administration of justice were to be "in the name of the Head Chief for the time being" (Art. I.7), and there were to be two sheriff-like officers, "one Keche tah koonewa weneneh, and one tahkoonewaweneneence," whose duty it was "to keep the peace, and to execute the writs, executions and summonses issued by the chief" (Art. I.8). Like the quarter-sessions of the colonial justices of the peace outside the reserve, the chiefs were to "hold a council or court...for the trial of offences committed against the laws and regulations of this village" four times a year, on the first Wednesday in March, June, September and December (Art.I.9).

Under Title III, "General Councils", provision was made for a legislature. This legislative body, or "General Council", consisted of "the whole nation in the village". The quorum for such a council was two-thirds of the "resident householders". General Councils were to be held annually on the first day of January (unless that day fell "on the Sabbath" in which case it was to be held the next day), or whenever called into session by the Head Chief pursuant to Art I.1. The powers of the General Council were described as: "regulating the affairs of the nation," "choosing publick (*sic*) officers for the ensuing year", enacting "any new law or regulation" (by majority "vote"), repealing "any old law" (by a "vote of two-thirds"), choosing new chiefs (by majority vote), and deposing existing chiefs "for great offences, gross immorality, or notorious incapacity" (by a "vote of two-thirds"). General Councils were to be "conducted according to our old customs, the chief presiding."

Title IV, "Occasional Councils", was separated into two parts, which I will label Parts A and B. In Title IV, Part A, provision was made for a council, called an "occasional council", which was to perform a cabinet-like function. Occasional Councils consisted of "at least one chief and ten or more house holders". Such councils had "no power to make or repeal laws"; rather, their purpose was to "regulate all such things relating to the general improvement and welfare, as are not otherwise expressly provided for by law." Occasional Councils also had a judicial role: they could "in certain cases in conjunction with the chiefs fix the degree of punishment to be inflicted on offenders." Title IV, Part B, listed various provisions, relating mainly to lands and resources, that Occasional Councils were empowered to "control". The substantive content of Title IV, Part B, will be analyzed under the section on lands and resources below.

The most obvious difference between the pre-contact Ojibway system and the 1830 Credit River constitution was that the latter was written. Of course, a written constitution for an Indian reserve might have sought merely to codify or declare what custom was, as the 1843 Wyandot constitution purported to do for the Huron reserve

near Amherstburg.[132] However, the 1830 Credit River constitution did much more than that, for it introduced some significant changes to the pre-contact Ojibway customary system. For example, it provided for the possibility of positive law (as opposed to customary law or even codified customary law); it recognized the need to subject government to the rule of law; it distinguished institutionally between legislative, executive and judicial functions, and constructed a system of checks and balances usually associated with the doctrine of the separation of powers; and, finally, it recognized that criminal disputes were not matters for inter-family/clan retaliation or negotiation but matters to be adjudicated upon by court-like institutions having coercive powers. These principles were not found in the pre-contact Ojibway system, but were manifested by, and were presumably borrowed from, the surrounding British colonial regime. On the other hand, the constitution referred to the "old customs of our nation" and "our ancient customs", confirming that the constitution was premised upon the continuity of at least certain aspects of aboriginal customary law and government. In short, the 1830 constitution reflected a synthesis of juridical traditions. However, the precise nature of that synthesis is confusing.

The office of "chief" and the institution of "council" were expressly linked to "ancient" or "old" customs. Although the labels General Council and Occasional Council were new, it was probably the case under the customary system that community-wide councils discussed and developed important customary norms—a function resembling legislation by the General Council—while routine, day-to-day decisions were made in smaller councils consisting of representatives from any clan or extended family group that was interested or concerned in the matter—a function resembling the executive role played by the Occasional Council. The 1830 constitution can therefore be seen to have formalized different types of councils that already existed in the customary system.

However, the written constitution's provisions concerning councils and chiefs diverged from the pre-contact Ojibway system in some important respects. Two significant features of the customary system of government seemed to be missing from the written constitution, namely, (a) that councils were meetings of members from all clan segments, or extended family groups, concerned in a matter, and (b) decisions resulted from negotiation of a consensus on such matters. Indeed, the written constitution made no mention at all of clans or family groups. Although the provisions concerning the Occasional Council may be interpreted consistently with customary rules relating to clans (the ten householders that met to form such a council in order to administer or manage a certain activity could, in fact, have been representatives from interested clan segments), it is difficult to do the same in relation to the provisions on the General Council. Title III provided that such councils were to be "conducted according to our old customs" but then went on to provide that the quorum was two-thirds resident householders and decisions were to be made by either simple or two-

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[132] *Wyandot Constitution* of 15 May 1843, *supra* note 130 (the preamble stated: 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").

thirds majority vote. These rules seem to conflict with customary law: they seem to have permitted a council to convene even if members from an affected clan segment, or extended family group, were absent, and for laws to have been enacted over the objections of clan segments/family groups that were represented. Can these rules be reconciled with the reference to "old customs"?

A similar question of interpretation arises in relation to Art. I.3, which provided that chiefs were to be selected "[a]ccording to the old customs of our nation" for life by a majority vote of the village in council. This provision is inconsistent with that interpretation of pre-contact Ojibway customary law according to which chiefs were selected by a combination of hereditary right and election by their clan segments in order to represent clan interests in council. The Credit River Mississauga did contain between three and eleven clans, and Jones himself suggested that, at some point, Mississauga chiefs represented their clans.[133] How is the 1830 constitution's reference to "ancient" customs to be reconciled with the rules on elections that it enacts?

One way of reconciling the written constitution with customary law is to read the customary rules into the written text. For example, Art I.3 would be interpreted as providing that only traditional, hereditary clan chiefs could stand for election for the new, legislatively-created office of "village" head chief. Similarly, Title III would be interpreted as providing that some members from each clan segment had to be among the two-thirds householders present in order for a quorum to exist, and that for voting purposes, a majority had to include some members from each clan segment. To ensure full compliance with customary law those members would, in either case, have had to have been the chiefs and principle men from each clan segment. However, it seems unlikely that the band, or at least the reformers like Jones responsible for drafting the constitution, would intentionally create such a confusing legal arrangement. At best, these sorts of qualifications to the written text by customary rules, if they existed, would have been *de facto* compromises, or constitutional conventions, necessary to attract the support of traditionalists in the community who had not fully accepted the new rules.

Perhaps a better method of reconciling the written rules with customs is to reconsider the content of certain customs. Although reference is made to "old" and "ancient" customs concerning councils and chiefs, presumably the objective was not to resurrect Ojibway customary norms as they existed at the time of contact—after all, the constitution was designed to provide a practical framework for future reserve government. Rather, the intention was likely to confirm, and legislatively modify, the "ancient" customs in their dynamic, practical sense as they had evolved in relation to that place and time, i.e., the Credit River Mississauga reserve in 1830. In other words, certain of the written rules may be regarded as reflecting developments that had already occurred in the law through evolution of customary norms.

For example, there is some evidence to suggest that customs regulating the selection of chiefs had evolved prior to 1830 to the point of recognizing a form of general election independent of hereditary claims and clan control. In 1805, Okemapenesse was selected as a Credit River Mississauga chief "in the place of his Father", a deceased chief, "according to the customs of the Indians"; however, the record of the meeting at which this selection took place suggests that the band membership as

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[133] *Jones: History, supra* note 21 at 108 and 138.

a whole, regardless of clan membership, met to "appoint" him.[134] Perhaps at this point heredity was regarded as significant but clans no longer controlled the confirmation process. This development need not have implied that clan membership ceased to be relevant to the structure of Mississauga government. The 1818 treaty by which the Credit River band provisionally agreed to surrender reserve lands to the Crown described the Mississauga signatories in these terms:

> 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...[135]

No matter how these chiefs/principal men gained their positions, their clan status was clearly regarded as significant—Adjutant (or Ajetance), for example, was described not as a chief of the nation but as a chief of a clan segment within the nation. Some ten years later, however, the principle of heredity appeared, like clan control over confirmation, to be weakening. On January 1, 1829, Jones was elected by the band to succeed Okemapenesse (by then known as John Cameron) even though he was not his son and even though Jones had a separate, hereditary claim to chieftainship as the adopted son of Ajetance; instead of electing Jones to succeed Ajetance, the band decided, at the very same council at which Jones was elected, to elect John Sawyer to replace Ajetance.[136] The election of these Methodist chiefs was not initially greeted with enthusiasm by the Indian Department, which favoured the established church; however, in defending their choices before departmental officials, the band did not invoke customs concerning hereditary right or clan prerogative but simply argued that it had selected Jones and Sawyer because they had proven to be effective in leading the nation in its adjustment to reserve life.[137] Chiefs, and no doubt the Mississauga people generally, still identified themselves by clan—indeed later in 1829 the chiefs signed a petition in the traditional way, "by marking their *totems*"[138]—but the 1805 and 1829 examples cited above suggest that customary law had evolved to the point where heredity and clan election were being gradually displaced by a form of general band election. Thus, the 1830 constitution was able to provide for a general election *and* purport to recognize the continuity of "ancient customs" without inconsistency—the ancient customs of the nation that the written constitution incorporated represented an organic, not frozen, conception of customary law. Similar conclusions can be drawn in relation to Wyandot constitutions for the Amherstburg reserve made in 1843 and 1846: the stated intention of these instruments was to "adhere to that good old custom of their Forefathers" of appointing chiefs and, to prevent "any misunderstanding", "to declare

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[134] Speech of Chief Quinipeno, 31 July 1805, "Proceedings of a Meeting with the Mississagues at the River Credit", PRO CO, *supra*, note 88 at 42/340: 49-52.

[135] Treaty no. 19 (28 October 1818), in *Indian Treaties and Surrenders, supra* note 46 at 47-48.

[136] *Life and Journals, supra* note 92 at 193; *Sacred Feathers, supra* note 30 at 67 and 104.

[137] *Life and Journals, ibid* .at 223-24; *Sacred Feathers, ibid.* at 103-04.

[138] *Life and Journals, ibid.* at 199 (re: a petition signed on 31 January 1829).

and to explain in writing, the general powers & authority which they understand the Chiefs ought to have", but the rules so declared do not resemble the pre-contact customs of the Huron as described by historians like Trigger.[139] By the time of codification, then, custom had (not surprisingly) evolved.

This same explanation may apply to the rules governing the composition of councils and voting procedures. The idea of a plenary legislative/governmental body consisting of the "whole nation in the village" (Title III) was broadly consistent with pre-contact custom, and there is evidence to suggest that the decision-making process continued to be inclusive well after contact—Credit River chiefs and principal men made their decisions in consultation with "old women and young men".[140] However, the introduction of majority voting by the constitution is, as noted above, problematic. The basic rule of pre-contact Ojibway law was that consensus was required to reach decisions because there were no coercive means of enforcing decisions against clan and family components of a village if they had not consented to them. It seems unlikely that an Ojibway band could have dispensed with the requirement of consensus as long as clans remained a central feature of Ojibway social structure. However, if clans were declining in influence prior to 1830, perhaps the customary norms surrounding decision-making in council had already evolved to provide a degree of majoritarianism. Indeed, settlement on the reserve may have been accompanied by a shift in the focal points of allegiance, power and concern from clan and family collectivities downward to individuals and upward to band, or national institutions. The development of a conception of individuals as autonomous political actors rather than as members of sub-national units would have made any continuing adherence to a rule requiring consensus difficult, as it would have given veto power to each person instead of (as previously) a handful of extended family groups. In short, the "old customs" referred to in 1830 by Title III may already have recognized, in response to changes in Ojibway social structure, a form of majoritarian democracy, and therefore, no inconsistency existed between the written rules on voting and the customary rules to which the written rules referred.

Of course, any attempt to explain the relationship between the written and customary rules must take into account as a factor the personal and/or political motivations of the drafter of the 1830 constitution. It is at least possible that Jones sought to institute far-reaching legal and constitutional reform while at the same time appearing to defer to tradition. The constitution expressed an intention to confirm customary law but, in effect, it may have achieved significant amendments to customary law, even abolishing whatever influence that clans may have retained over Mississauga government and altering the consensus basis of decision-making in Mississauga society.

To summarize, the exact relationship between the 1830 constitution and customary law is somewhat unclear and it varies between different parts of the constitution. What is clear, however, is that the relationship between the written and

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[139] *Wyandot Constitution* of 15 May 1843, *supra* note 130; Trigger, *supra* note 28.

[140] Peter Russell, Adm. Upp. Can., to Lord Portland, Sec. of State, 21 March 1798, at PRO CO, *supra* note 88 at 42/322: 119-120. See also, "Proceedings of a Meeting with the Mississagues at the River Credit", 31 July 1805, *supra* note 89 (the chief spoke of the opinions of the "young men and women").

customary constitutions existed. Instead of repealing the old customary system and filling the vacuum with a wholly new system, the 1830 Credit River By Laws and Regulations expressly acknowledged that pre-existing custom was not only the system from which reserve law and government derived but was, to a certain extent, an on-going component of reserve law. There was, in other words, legal continuity between the customary and written constitutions. In this respect, the 1830 constitution is not unlike the *British North America Act, 1867*, which created a written constitution for Canada that was somewhat different from the (largely) unwritten United Kingdom constitution, and which not only derived its legal legitimacy from that unwritten constitution but, in its preamble, expressly incorporated by reference customary laws and conventions from that unwritten constitution.[142]

It is now necessary to determine whether the 1830 Credit River constitution operated as a practical, functioning system of government. To this end, reference must be made to the official acts of the Credit River Mississauga council made pursuant to that constitution. Again, the Credit River example is noteworthy because, unlike many other Upper Canadian reserves, relatively extensive written records, found in council minutes, were made of the acts and resolutions of the reserve government.[143] The council enacted a number of measures of constitutional importance, including resolutions recognizing the election of chiefs and the appointment of other public officers,[144] confirming treaties made with the Six Nations,[145] and creating an elected committee "of six of our people" for "advising and counselling with our Chiefs, in the management of our affairs".[146] Resolutions were also passed on matters of immigration

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[142] *British North America Act, 1867* (U.K.) (now *Constitution Act, 1867*), 30 & 31 Vict., c. 3, the preamble of which states that the constitution of Canada is "similar in Principle to that of the United Kingdom." The preamble therefore provides that the written Canadian constitution is based upon "constitutional principles of a customary nature" derived from the UK constitution: *Att. Gen. Quebec* v. *Blaikie et al.*, [1981] 1 S.C.R. 312, at 319-20.

[143] *Minutes of Credit River Mississauga Councils* (1834-47), Vol. II, *NA RG10*, *supra* note 9, vol. 1011 [hereinafter *Minutes of Credit River Mississauga Councils*].

[144] *Ibid.* at 9: James Young elected third chief (2 March, 1835, §1); at 22: Samuel Wabbahneeb elected third chief and "Minghinahwas (aide-camps)" for chiefs appointed (1 Jan. 1836, §1 and §2).

[145] *Ibid.* at 49: "old treaty of friendship" with Six Nations renewed (14 Sept. 1837).

[146] *Ibid.* at 115: 11 Jan. 1842.

and adoption,[146] public welfare,[147] public enterprises[148] and labour thereon,[149] and private business.[150] Although there were no formal external restrictions upon the sort of governmental decisions the council could make in these areas, the Indian Department did assert some *de facto* control over policy through its control over the band's expenditures: the band's funds (mainly treaty annuity monies) were held in trust and released to the council only upon prior departmental approval of the expenditure.[151]

Some of the above mentioned measures, like confirming treaties, regulating immigration and adoption and providing necessities for the less fortunate members of the community, related to matters analogous to those matters addressed by custom under the pre-contact Ojibway system; the council acts are therefore merely the continued exercise of jurisdiction over these same matters in a different form. Of course, some of these matters (like immigration, adoption and caring for the less fortunate) might previously have been regulated by smaller clan/extended family councils; once the band settled onto its reserve, these matters apparently came to be seen as village concerns appropriate for the reserve council. Certain of the measures, like those acts regulating public and private business enterprises, related to matters that are less obviously linked to the pre-contact system. The purchasing, leasing and/or regulating of brickyard and blacksmith businesses represent governmental responses to the new economic and social basis of Mississauga life upon settlement within a reserve. Although the task of identifying a link between these governmental acts and the pre-contact system may be,

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[146] *Ibid.* at 4: inter-reserve immigration discouraged and "John Johnson & family were adopted into this Tribe" (15 Sept. 1834, §4 and §5); at 106: 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).

[147] *Ibid.* at 13: each adult allowed "2/6" work at blacksmith done "gratis" (24 March 1835, §2); at 27: funds allocated for "support" of blind man (15 March 1836, §8); at 45: one bushel potatoes granted to each resident (6 May 1837, §1); at 63: "all Debts due by our people to the Tribe be forgiven" and cows bought for widows (10 May 1839, §1 and §5).

[148] *Ibid.* at 5-6: blacksmith operation "purchased for the Tribe" and rented to an operator (20 Jan. 1835, §5); at 13: lessee of nation's saw mill selected (24 March 1835, §5); at 9: funds allocated to purchase oxen and cow (2 March, 1835, §2); at 16: funds allocated to build road (25 April 1835, §1): at 20: materials purchased to build chapel (2 Oct. 1835, §4).

[149] *Ibid.* at 16: male residents ordered to "clear the town plot" (25 April 1835, §3); at 20: male residents to "put up a coal pit" and "fix the dam in the river" (2 Oct. 1835, §1 and §3); at 61: male residents to "repair the fences on the flats" (20 April 1839, §3).

[150] *Ibid.* at 9: permission granted to blacksmith to establish business (2 March 1835, §4); at 15: permission denied to another blacksmith (20 April 1835, §2); at 43: permission granted to establish a brickyard (3 March 1837, §7); at 13: blacksmith prohibited from extending credit to individuals "on account of the Tribe" (24 March 1835, §3).

[151] Thus, the Credit River chiefs were directed by the Indian Department to build houses and farms before saw mills and storehouses, and they were prohibited from buying a schooner, paying medicial bills, sending certain chiefs to England, and buying a cow for a chief: J. Givens, Supt. Indian Dept., to Credit River Chiefs, 10 May 1831, *NA RG10, supra* note 9, vol. 499, 135; P. Jarvis, Supt. Indian Dept., to R. Higginson, Sec. to Lt. Gov., 28 Aug. 1844, *NA RG10, supra* note 9, vol. 142, 82008-9; Jarvis to Higginson, 20 Aug. 1844, *NA RG10, supra* note 9, vol. 142, 81866-67; Jarvis to Higginson, 1 Oct. 1844, *NA RG10, supra* note 9, vol. 143, 82297-99, Higginson to Jarvis, 18 Oct. 1844, *NA RG10, supra* note 9, vol. 143, 82305, Chiefs Sawyer and Jones to Jarvis, 2 April 1845, *NA RG10, supra* note 9, vol. 147, 84715-20.

in light of recent judicial rulings,[152] difficult, it should be emphasized that they were (consistently with the paradox of cultural change and continuity) the very sort of governmental act that the Mississauga nation had to undertake if it was going to survive as a self-governing nation having a distinct aboriginal culture within the colonial society growing around it.

The extent to which the Credit River chiefs and council legislated, governed and adjudicated in relation to other substantive matters, like criminal, family and land law, will be examined separately below. Before addressing these specific examples, however, a more general point should be made about the nature of law under the 1830 constitution. Certain of the acts and resolutions of the Credit River council made pursuant to the 1830 constitution performed a function that was probably absent from the aboriginal customary system—that is, they created new laws of general application that derived normative force not from custom but from the act of legislation itself. For example, in January 1836, various Ojibway bands, including the Credit River Mississauga, met in council to establish some fairly significant resolutions concerning immigration, family matters and alcohol abuse.[153] Neither the adoption of these resolutions at this inter-band council, nor their subsequent affirmation by the provincial lieutenant governor, served, from the band's perspective, to make them law on the reserve; rather, they became law only after enactment by the Credit River legislature, the General Council. Thus, in May of 1836 it was resolved by the Credit River council "that the said Resolutions ... do now pass into a Law, and that from this date they shall

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[152] See *Pamajewon, supra* note 6 and *Van der Peet, supra* note 4.

[153] Account of Council between Chiefs of Grape Island, Rice Lake, River Credit, Balsam Lake, Saugeen, Coldwater and the Narrows, 28 January 1836, at PRO CO, *surpa* note 88 at 42/516: 534-536, approved by lieutenant governor, at *NA RG10, supra* note 9, vol. 1011, II, 31. Eleven "resolutions" were accepted by sixteen chiefs, and were to constitute "Regulations to be in force for two Years", including: that "for the good Government of our respective Tribes", the chiefs were to "advise and encourage their people to every good work" (§3), that "our young men" were to "assist and support the Chiefs in their endeavours to promote the happiness & prosperity of their respective Tribes" (§4); that no person was to remove from one village to another without written permission "from the Tribe to which he belongs", and "the Tribe with whom he wishes to reside" may refuse him (§5); people were not to marry into other villages "without the consent of their Tribes", and if such consent was obtained, "the man shall take his wife to his own village, unless otherwise agreed upon by the Chiefs" (§5); "no members of the Community shall be allowed to live together as man and wife without being lawfully married" (§5); "if any unmarried or single woman shall have a child" it was the "duty" of her "Tribe" to request the Indian Department Superintendent not to issue "Presents" and "land payments" to the mother and father (if the father was an "Indian") for three years (§6); a child born out of wedlock was "to be considered in every respect as an Indian" (§6); persons leaving their spouses were to lose their presents and land payments for three years, except where the spouse had committed adultery (§7); the consumption of liquor was to be discouraged, with "drunkards" losing their presents for two years and persons "getting drunk" while away from a village to deliver messages or to perform "other business" were to be punished "as a Council of the Tribe to which the offender belongs may direct" (§§7-9); any person "being a half Indian" desiring to "become a part of or attached to any Tribe" may be "claimed and in every respect considered as belonging to that Tribe" provided that they "submit to the rules and regulations of the said Tribe" (§10); and, the practice of incurring debt was to be discouraged (§11).

be in force for the term specified in the said Resolutions".[154] Again, the matters addressed by these resolutions are analogous to the sort of matters that would have been addressed by customary law, but, clearly, they were being addressed in a constitutionally and jurisprudentially different manner. The need for a *legislative* rather than *customary* form of articulating norms arose from the wholly unprecedented circumstances confronting the Mississauga: the world around them was changing quickly, and their survival as a nation within this changed world demanded speedy, clear and flexible legislative responses instead of, or at least in addition to, the more traditional method of legal reform according to which new usages and practices gradually emerged from which customary norms were identified and worked into the existing oral tradition. As H.L.A. Hart would have said, the Mississauga needed "secondary rules" of "recognition" and "change" to supplement the "primary rules" they had.[155] The 1830 constitution can be seen to have provided such rules.

B. Credit River Reserve Criminal Law

Perhaps the most dramatic way in which the Credit River reserve legal system differed from pre-contact Ojibway customary law was the replacement of customary forms of dispute resolution, according to which private family or clan revenge was allowed unless families and clans were reconciled by the payment of presents, with a court system according to which the nation itself apprehended, tried and punished criminal offenders by means of public officers and a form of independent judiciary. It is not clear whether the pre-contact customary rules concerning dispute resolution were still followed by the Credit River Mississauga by 1830. The Indian Department recognized the legitimacy of such customs on the nearby Muncey reserve in the 1820s,[156] but even so the system may have been undergoing change. In their descriptions of Ojibway customary law, Copway and Van Dusen suggest that Ojibway chiefs had the power to judge cases and impose penalties and it was only if the chiefs did not exercise this power that families had a right to take their own action.[157] Jones, on the other hand, suggests that chiefs had the power to judge cases and it was only after they found the accused party guilty that the victim's family could impose punishment.[158] Although these commentators purport to summarize pre-contact custom, their views about the judicial capacity of Ojibway chiefs may have been informed by the evolving status of chiefs in Upper Canada at the time they were writing in the mid-nineteenth century. If, as mentioned, clans were of declining importance to the selection of chiefs and the composition of councils prior to 1830, then it seems likely that their role in dispute resolution may also have declined after settlement onto reserves; indeed, it has

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[154] *Minutes of Credit River Mississauga Councils*, *supra* note 143 at 31 (16 May 1836).

[155] Hart, *supra* note 26 at 89-94.

[156] Walters, *Colonial Criminal Jurisdiction*, *supra* note 11 at 287-88.

[157] Copway, *supra* note 21 at 143; Enemikeese (Conrad Van Dusen), *The Indian Chief: An Account of the Labours, Losses, Sufferings, and Oppression of Ke-zig-ko-ne-ne (David Sawyer) A Chief of the Ojibbway Indians in Canada West* (London: 1867; reprint, Toronto: Coles Canadiana Collection, 1974) at 7.

[158] Jones, *History* supra note 21 at 108-110.

been suggested that the only function retained by the clan system was the regulation of marriage.[159] If so, then it is not surprising that the 1830 Credit River "By-Laws and Regulations" made no mention of clans when addressing dispute resolution; however, it is perhaps remarkable that the By-Laws provided in Articles I.6-I.9 that persons accused of committing criminal offences were to be tried by a court consisting of the chiefs, or if they elected, the chiefs and a jury of six men, and, in so doing, made no reference at all to the idea of reconciliation through payment of presents or some other method.

Under Title II, "Laws Relating to Various Offences", the 1830 code addressed criminal law in further detail and, again, the provisions suggest a significant departure from the customary system. Title II provides: any "Indian inhabitant convicted of stealing" was to "restore fourfold", unless the chiefs thought a lesser amount was sufficient "according to the circumstances of the case", and repeat offenders were to be "punished at the discretion of the Chiefs and Council" (Art. II.1); "[a]ny one assaulting or beating another" was to be fined at the chiefs' discretion (Art. II.2); those guilty of "slander" were to "make such amends to the injured persons as the chiefs shall direct" (Art. II.3); persons guilty of "bearing false witness, injuring a neighbour's property by fire, by throwing down his fences, killing or wounding his cattle or offences of the like kind" were to be punished by fine or by banishment as determined by "the chiefs and council" (Art. II.4); and, "[y]oung persons" who were "disobedient to their parents, disorderly in their conduct, or otherwise misbehave to the injury of the publick (*sic*)" were to be "corrected at the discretion of the chiefs, either by their parents, or by the officers of justice" (Art. II.5). The 1830 code also provided that no "stranger" was allowed to reside in the village "without the permission of the chiefs in council" (Art. IV.B.7), and no one was to "harbour" persons in their houses "except in cases of distress" (Art. IV.B.8). Further legislation on criminal law matters was enacted by the Credit River council pursuant to the legislative powers given to it by the constitution. In particular, a measure was enacted in response to "bad conduct" by "young people and children" empowering the chiefs and several named individuals "to punish them whenever they deserve it by whipping".[160] Another legislative measure created the office of village "Guardian" who was "authorized to take into custody and bring before the chiefs and council" anyone "strouling about the Village in an unlawful or suspicious manner after dark".[161] A resolution admonished alcohol abusers and ill-behaved young people to reform or face banishment from the reserve.[162]

The terminology used by the 1830 By-Laws and subsequent legislation (i.e., "judge", "jury", "court", "trial", "writs", "parties", "sentence", etc.) are obviously imported from the settler legal system, and it would be tempting to assume that the substantive concepts behind those terms were also imported, so that the criminal justice system on the reserve was in both form and substance just like that of the English

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[159] Vecsey, *supra* note 111 at 19-20; Rogers, *supra* note 3 at 143. On the decline in importance of the clan system on the Six Nations Grand River reserve, see Noon, *supra* note 3 at 42; Shimony, *supra* note 3 at 20-34.

[160] *Minutes of Credit River Mississauga Councils, supra* note 143, at 34 (6 June 1836).

[161] *Ibid.* at 107 - 08 (18 August 1840).

[162] *Ibid.* at 57 (24 May 1838).

common law system. The code was, however, silent as to the method of adjudication. Trials by the chiefs may have resembled trials by magistrates in neighbouring York County; alternatively, the chiefs might have performed the function that clans used to perform, namely, attempting to secure non-coercive reconciliation of parties; finally, the chiefs may have administered justice using elements of both systems. The chiefs and council acted judicially in relation to criminal/public disorder matters on several occasions, but unfortunately the records are not clear about the manner in which justice was administered and whether traditional aboriginal customary approaches to dispute resolution informed the application of the "law" as established in the legislative instruments mentioned above. The chiefs expelled, or threatened to expel, individuals from the reserve for "bad conduct" on two occasions,[163] and it ordered that one Agnes Tunewah be "brought before the council...to receive 25 lashes" for "her repeated drunkenness, and for her bad conduct"[164] (the records do not indicate what her bad conduct was). But, perhaps the clearest example of a judicial criminal jurisdiction being exercised is the 1842 case of Jacob Finger.[165]

Finger's case arose after Henry Puhghedooh, a member the St. Clair Chippewas, "lodged" a "complaint" with the council against Finger for "horse stealing".[166] Under Ojibway customary law, an inter-band dispute like this would have led to a council between the Credit River band chiefs and the St. Clair band chiefs, or at very least a council between the chiefs of Finger's and Puhghedooh's clan segments respectively, with the objective of reconciling the disputing clan segments/bands with the payment of presents. In other words, council jurisdiction would have been determined by the *personal* status (clan and band membership) of the victim and the accused. In Finger's case, however, the Credit River council alone exercised jurisdiction. The case represents a shift from customary approaches to jurisdiction to some different jurisdictional theory, perhaps even a move to a theory of *territorial* jurisdiction. The record does not indicate where the offence took place, but Puhghedooh may have invoked the jurisdiction of the Credit River council rather than that of either St. Clair Chippewa council or the colonial courts of the province of Canada because the offence took place within the territorial jurisdiction of the Credit River council—i.e., within the reserve—and not within either one of the St. Clair reserves or within the province but outside a reserve. If so, then Finger's case suggests a shift from personal jurisdiction to territorial jurisdiction—or, as Sir Henry Maine would have said, a shift from "tribal sovereignty" to "territorial sovereignty".[167]

Finger was brought before the chiefs and confessed. The records do not reveal the nature of judicial proceedings in this or other cases, and it is therefore unclear whether the proceedings were adversarial, inquisitorial or conciliatory, whether the complainant or some official or the chiefs themselves played a prosecutorial function,

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[163] *Ibid.* at 27: a Frenchman and three white women expelled (15 March 1836, §3); at 63-64: Mrs. Bluejay threatened with expulsion (21 May 1839, §2).

[164] *Ibid.* at 63-64 (21 May 1839, §3).

[165] *Ibid.* at 118 (1 Aug. 1842).

[166] *Ibid.*

[167] Sir H. Maine, *Lectures on the Early History of Institutions* (London: John Murray, 1875) at 73.

or whether there would have been an opportunity to question and cross-examine witnesses. By the time of the proceedings, Finger had already sold the stolen horse to a non-native; the chiefs therefore ordered that he pay to the complainant thirty dollars (the value of his share of Indian Department presents for three years), and further that he "shall not be allowed to run about at large, but that he keep close to the Village, and among his brethren; and that when he shall again steal he shall be sent off to jail." The record does not indicate to which "jail"—a reserve or colonial institution—he would have been sent, but the use of even the threat of physical incarceration as a means of enforcing community norms was a significant departure from the customary system.

Although the prospect of inter-family retaliation as a method of resolving disputes may have been contrary to the Mississauga's newly-adopted Christian values, there was nothing about reserve life that was inherently inconsistent with a form of dispute resolution premised upon reconciling disputing parties. However, the legal texts of reserve law suggest that the Credit River Mississauga adopted a coercive criminal justice system complete with courts and the possibility of nation-imposed physical punishment—a system that was inimical to pre-contact aboriginal approaches to dispute resolution. These reforms may have resulted both from a desire to emulate the surrounding settler society and from increased frustration with the social costs of cultural dislocation. The records confirm that the most common form of misconduct experienced on the reserve was alcohol-related misconduct—a reflection, no doubt, of the difficulties that individual members of the community experienced as the community struggled to adjust to foreign forms of economic, social and religious life. The pre-contact aboriginal customary system achieved social cohesion without coercive laws because the community was bonded by a common and unquestioning vision of its identity and its spiritual position in the surrounding natural environment; in these circumstances, social pressure was sufficient to ensure conformity with customary norms. That sense of social unity was severely fractured once aboriginal peoples were pressured by the realities of colonization to question and repudiate so many of the normative assumptions underlying their society; in these circumstances some other form of social control was apparently deemed necessary. In his 1843 submissions to a commission investigating Indian affairs in Canada, Jones lamented the declining moral authority of chiefs on reserves, observing that "many of the young people ridicule the attempts of the chiefs to suppress vice"; indeed, he suggested that the authority of chiefs be supplemented by a colonial statute.[168] In short, the introduction of a European-type criminal justice system paralleled the social upheaval that accompanied the struggle to cope with a new religion and economic base on a reserve that was located in close proximity to growing European settlements.

C. Credit River Reserve Family Law

The 1830 By-Laws and Regulations did not contain any provisions concerning family law matters. However, as mentioned, the Credit River council enacted into law a series of resolutions made at an Ojibway inter-band council in 1836 that included

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[168] *Jones: History, supra* note 21 at 243-44.

measures relating to families.[169] These resolutions contained the following provisions: people could not marry into other bands without consent from their own band; married couples were to live with the husband's band unless the chiefs agreed otherwise; extra-marital cohabitation was prohibited; parents of children born out of wedlock were to be deprived of their share of Indian Department presents and annuity payments for three years, though such children were considered Indians; leaving one's spouse, unless that spouse had committed adultery, was prohibited and punishable by loss of presents and annuity payments for three years; and a "half Indian" could become a member of a band if he or she agreed to submit to its laws.

Many of these measures, especially the heavy penalties for extra-marital unions, were likely novel innovations for Ojibway bands, introduced to reflect the Christian morality of the settler society they were being encouraged to emulate. On the other hand, the measures concerning movement between bands and adoption of new members into bands would have had parallels in customary law, although such matters would likely have been dealt with by clan segments or extended family groups, rather than the band council or, as here, an inter-band council. As mentioned, clans probably ceased to have a very significant role in relation to selection of chiefs, composition of councils, and dispute resolution, and it is likely that even in relation to family matters, they were declining in influence, though clan membership probably still regulated who could marry whom.[170] It is significant, then, that the above-summarized family laws from 1836 make no mention of clans.

Aside from the introduction of strict laws on extra-marital cohabitation, conversion to Christianity would have led to other legal reforms as well, such as the abandonment of certain aboriginal customs, like polygamy,[171] and the introduction of new customs, like Christian solemnization ceremonies. Indeed, many Ojibway couples who had been married "according to the Indian Rite" were re-married by Methodist ministers upon their conversion to Methodism.[172] On the surface, this abandonment of aboriginal customary forms of marriage (which have been recognized as valid at common law[173]) appears to represent the voluntary relinquishment of aboriginal identity and powers of self-government. In the case of the Credit River and other Ojibway bands converting to Methodism, however, the alteration of marriage laws and customs was actually an exercise of legal reform that illustrates clearly the nation's on-going ability to define and re-define its internal legal structures. Until 1831, only Church of England ministers could perform marriage ceremonies in Upper Canada, and in 1828, Jones and other Ojibway chiefs whose bands had converted to Methodism questioned whether Methodist marriages conducted within their communities might, therefore, be like Methodist marriages between non-natives in the province, legally invalid. However, they ultimately dismissed this concern, concluding "that the chiefs had the power to

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[169] See *supra* note 154.

[170] Rogers, *supra* note 3 at 143.

[171] Missionaries insisted that converted native men give up all but one wife: Graham, *supra* note 3 at 82.

[172] "Report of the State of the Indians on the River Credit", *supra* note 93 at 42 - 43.

[173] *Connolly, supra* note 74.

solemnize the marriage of their own people in such a form as they thought proper."[175] Thus, the displacement of aboriginal marriage ceremonies with Methodist ones illustrates the adoption of a European-based rule through an exercise of aboriginal self-determination—the content of the rule was European, the legal root of the rule was aboriginal.

D. Credit River Land and Resource Use Law

The 1830 Credit River "By-Laws and Regulations" contained detailed provisions concerning land and resource use. In Title IV, Part B, the code established, or confirmed, certain basic principles governing land and resources, and then provided that their application and implementation were "subject to the control of the occasional councils." Article IV.B.1 stated:

> All our lands, timber, and fishery shall be held as publick (*sic*) property, and no person shall be allowed to sell, lease or give any part of the lands, timber or fishery, unless granted by the council for the general benefit of our people.

The subsequent articles provided additional detail: "our people" were free to fish and cut timber for personal use "upon any part of the Reserve" (Art. IV.B.2); no one was to possess land without the chiefs' "permission" (Art. IV.B.3); lands "allotted" to families were to be "possessed by them and their descendents forever", unless they failed to make improvements on them within three years in which case their rights were forfeited (Art. IV.B.4); possessors of land could, "with the advice of the chiefs," exchange their lots and sell their improvements to one another (Art. IV.B.5); houses in the village were to be made of "hewed logs" and of a certain size (at least eighteen by twenty-four feet) and were to be constructed "under the control of the councils" and paid for with monies "appropriated for that purpose" from the "publick (*sic*) funds" (Art. IV.B.6); no one was to discard wood, filth or dead carcasses within the village, and, "in order to preserve health in the place", all "householders" had a "duty" to maintain the village free from "filth and dirt" (Art. IV.B.9). Furthermore, Title V, "Regulations Concerning the Fishery", provided that fishing was prohibited in the River Credit on Saturday or Sunday nights "during the fall run of salmon" (Art. V.1), and that no one was to give permission to any "unauthorized person" to fish "unless it be thought expedient at a future council" (Art. V.2).

Under these laws, the Credit River council enacted measures that allocated lots

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[175] *Life and Journals, supra* note 92 at 154-55.

to individuals,[175] regulated leases to non-natives,[176] set town plots,[177] and regulated use of timber.[178] The council also exercised judicial jurisdiction over land disputes. The clearest example of this judicial jurisdiction is the case of William Crane and J. Johnson, decided in 1844. Crane claimed a lot of land by virtue of his deceased father's title. The lot had been possessed by Johnson for ten years, though whether he gained possession with Crane's consent or not is unclear. Johnson acknowledged Crane's right to the lot, and contracted to pay him $150 for improvements thereon; however, he did not pay the full amount, and Crane therefore sought possession of the lot. The council held for Crane, but did not give him possession; instead, it held that the band would provide Crane with an alternative lot on the reserve and that Johnson would either be ejected from the lot he possessed or be required to pay rent to the band.[179]

Credit River land and natural resource law was, to a certain extent, declaratory of general Ojibway customary law, according to which property in land and resources was held communally. It also modified customary law: whereas customary law recognized special rights of access to particular planting fields or hunting areas as vesting in certain clans or extended family groups, the law now allocated to individuals exclusive possessory rights to building lots. Finally, it supplemented customary law by providing detailed rules on building, waste management, and fishery access. It is very important to emphasize, however, that this system was one of internal reserve law and government, and whatever legal reforms it made or whatever changes to customary law on land it reflected did not reform or reflect changes in the legal rules governing the cession of land to the Crown—rules governing land cessions to the Crown were part of a separate system of "intersocietal" law, or British imperial law, that regulated relations between aboriginal nations and their internal laws and governments on the one hand, and the Crown and the internal systems of law and government it established for settler

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[175] *Minutes of Credit River Mississauga Councils, supra* note 143 at 5: Sally McLean granted lot "on condition that the person with whom she is now living shall marry her" (20 Jan. 1835, §4); at 13: Samuel McCallum granted lot "lying on the creek near Mike's" (24 March 1835, §9); at 45: lot "lately occupied by S. Wabbahneeb be 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 and §4).

[176] *Ibid.* at 9: William Herkemer granted permission "to put a white man on his farm as a Tenant" (2 March 1835, §5); at 15: a non-native denied permission to lease land (20 April 1835, §4); at 27: "That our People shall not be allowed to Lease their farm lots to White people" (15 March 1836, §2); at 39: "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); at 40: "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).

[177] *Ibid.* at 16 (25 April 1835, §2).

[178] *Ibid.* at 5: "white 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); at 22: "no individual shall be allowed to sell timber on the public lands" (1 Jan. 1836, §3); at 43: "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).

[179] *Ibid.* at 206 (Resolution of 12 Sept. 1844).

communities on the other.[180] Thus, under Title IV.B an Occasional Council consisting of a chief and ten householders could "control" the allocation and alienation of land on the reserve as between reserve residents, but it would have exceeded its lawful authority, from the perspective of both Mississauga reserve and British imperial law, if it purported to alienate or authorize an alienation of reserve land to the Crown or to settlers.[181]

Although all of the provisions summarized above may be seen to be analogous to the sorts of land and resource management rules that might have existed under the customary Ojibway system, it must be acknowledged that the 1830 code and the acts and resolutions made under it are expressed in rather hollow, legalistic terms that fail completely to capture the spiritual normative foundation of pre-contact aboriginal customs on lands and resources. Missing, of course, are references to the "manitous" and the ceremonial customs that were necessary to ensure spiritual balance between people and the natural environment—it was not likely that such customs would have made their way into a Methodist-inspired legal instrument. Also missing, however, is a secularized vision of environmental respect and stewardship that might have informed reserve laws on land and resource use without offending missionary sentiments. Elements of the customary approach to land and resource use no doubt survived conversion of Christianity and settlement on the reserve, but these elements can only be inferred from the legal texts—underlying the rules limiting the hours and days during which one could fish for salmon in the Credit River, for example, there may have existed an oral tradition about the customary norms governing the fishery that had developed over the previous generations which formed the basis of the written rules. Reference to oral tradition is, therefore, critical to the proper assessment of written reserve laws, for without that context one might be led to conclude from the legal texts alone that the system of resource management followed by the Credit River Mississauga on their reserve had become detached from the spiritual root that anchored their pre-contact customary norms.

Whether or not the Credit River Mississauga continued to have the same spiritual connection to their farm lots on the reserve as they had in relation to their traditional hunting territories, the reserve laws which they developed confirm that they continued to exercise jurisdiction over their lands. Insofar as reserve land law recognized exclusive individual rights to land that could be (subject to control by chiefs)

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[180] See B. Slattery, "Understanding Aboriginal Rights" (1987), 66 Can. Bar Rev. 727 at 736 - 39; *Van der Peet, supra* note 4 at 547; Walters, *Mohegan Indians, supra* note 26 at 789 - 803.

[181] Land cessions to the Crown were not expressly addressed by the 1830 constitution, though presumably execution by the chiefs and principal men of a treaty that altered the boundaries of the reserve itself would, under reserve law, have required a General Council (i.e., a public meeting of the "whole nation in the village"), as altering the treaty would have represented a significant amendment to the reserve constitution and, under reserve law, would have required, at very least, a "vote of two-thirds" of those present at a General Council at which at least two thirds of the resident householders were present: *Credit River By-Laws and Regulations, supra* note 131 at Title III. The basic rules of imperial law are reflected in the *Royal Proclamation of 1763, supra* note 68, which provides that Indian lands can only be purchased by the Crown "at some public Meeting or Assembly of the said Indians to be held for that Purpose".

alienated within the nation and inherited by the landholder's descendants, it must be acknowledged that the law was beginning to resemble the land laws of the surrounding settler society (although similar customs likely regulated camp sites and garden plots within pre-contact villages). However, even if one accepts that the Mississauga were emulating settler land law, it is important to emphasize that this legal reform arose from the community's own powers of self-determination. In response to the idea proposed by Lieutenant Governor Sir Francis Bond Head that the province's aboriginal peoples be removed from their reserves and settled together on Manitoulin Island, Jones sought an audience with Queen Victoria to press for the grant of title deeds to supplement treaty rights to reserve lands. The petition that he presented to the Queen on behalf of the Credit River Mississauga captured the sense in which the nation had exercised powers of self-determination to combine cultural change with national continuity:

> May it please your Majesty,
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> We are the Descendants of the original Inhabitants of the Soil, who formerly possessed this their native Country in Peace and Harmony long before the French...came over the great Waters, and settled upon our Territories. Then your People came too, and with great Valour drove away the French...
>
> We have been happy and contented to live under the Protection of such a great and powerful Empire...Our People have been civilized and educated...We have also learned the Ways of the White People. They have taught the Children of the Forest to plough and to sow. Our People are now very few in Number; the White People have settled all around us. But our Great Father King George the Third allowed us to reserve a Tract of Land at the River Credit...Some time ago our People in Council said it was proper now to divide the Land, so we gave some of them small Farms of about Fifty Acres to be held by them and their posterity for ever. Our People have begun to improve their Farms...but they are afraid to clear much Ground, because they are told by evil-minded Persons that their Farms can be taken from them at any Time....
>
> Will your Majesty be pleased to assure us that our Lands shall not be taken away from us, or our People, who have begun to cultivate their Farms; and will your Majesty be pleased to permit us to go on dividing our Lands among our People as our People in Council think best. Our people and our Children then will continue to cultivate the Wild Lands of our Forefathers, and will be contented and happy....[182]

After considering representations from Jones and other advocates of the "civilization" policy in Upper Canada, the imperial ministry abandoned the idea of removal. Although the Queen took no specific steps to "assure" the Credit River Mississauga of their title in and jurisdiction over their lands, the Mississauga continued—and, it may be argued (athough the argument is beyond the scope of this article), continue today—to exercise

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[182] Petition from Credit River Mississauga Chiefs in Council to Queen Victoria, 4 October 1837, in *Imperial Blue Book*, 1839, *supra* note 117 at 160-61 [hereinafter *Petition*]. On Jones' audience with the Queen, see *Life and Journals*, *supra* note 92 at 405-07; *Sacred Feathers*, *supra* note 30 at 164-68.

rights of self-determination according to the will of their "People in Council".[183]

V. CONCLUSION

The Credit River reserve was located about eighteen miles from the growing city of Toronto, and ultimately the pressures upon the community from the surrounding settlements made its survival there impossible; the nation decided to accept the offer of its traditional allies, the Six Nations, of 6000 acres on the Grand River, and in 1847, it moved to this new tract.[184] During the years that the nation resided on the Credit River reserve it developed a truly unique legal system, based upon existing aboriginal customary laws and institutions originating in pre-contact times—"the old customs of our nation"—but modified and supplemented to accommodate radically novel circumstances forced upon the nation by the realities of colonization. This legal system was not imposed upon the Mississauga people by some other sovereign power, rather, it was created by themselves through an on-going exercise of their own sovereign powers in response to social, economic and political factors imposed upon them by other sovereign powers. It is beyond the scope of this article to consider what legal status the Credit River legal system had from the perspective of the surrounding colonial legal system introduced for settlers under the British imperial constitution.[185] It is worth noting, however, that in 1842, Jones testified before the Bagot Commission inquiry into Indian affairs in Canada that provincial magistrates "will not act in Indian cases" and that instead, "[t]he Indians have established a code of several Rules & Regulations among themselves", a copy of which the Indian Department held.[186] His comments, when read in light of the analysis of reserve law and government presented in this article, confirm the extent to which the Credit River Mississauga nation was an aboriginal nation exercising legislative, executive and judicial power of its own over a full range of civil and criminal matters with the full knowledge and active encouragement of colonial and imperial officials whose own legal and governmental institutions were based in a capital located only a short distance away. It would strain credulity to suggest that this legal system did not have some legal status in colonial and imperial law, either at common law or as an incident to treaty rights to reserve land.

Whatever the historical status of the Credit River legal system under 19th century Canadian and British-imperial law, the recent decision in *R.* v. *Pamajewon* suggests that modern Canadian law may be beginning to acknowledge an inherent right of aboriginal self-government, though the decision limits that right to the exercise of aboriginal customs and laws that originated in and are integral to the modern-day

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[183] *Petition, ibid.*

[184] *Minutes of the Credit River Mississauga Councils, supra* note 143 at 315 (resolution of 19 April 1847); Graham, *supra* note 3 at 30.

[185] On this issue, see Walters, *supra* note 14.

[186] Testimony of Chief Peter Jones, Minutes of the Proceedings of the Commissioners (Rawson, Davidson, and Hepburn), 13 October 1842, *NA RG10, supra* note 9, vol. 720, 768046-51. A copy of the By-Laws and Regulations is found in the Indian Department Deputy Superintendent General's office correspondence file for 1830: *NA RG10* vol. 46, 23976-83.

continuity of distinctive pre-contact aboriginal cultures.[187] In light of the express policy of the imperial Crown in the 19th century of: (a) encouraging aboriginal nations to abandon their distinctive cultures, and (b) encouraging aboriginal nations to develop their own laws and governments to accommodate the consequent cultural changes, it seems somewhat unfair for modern law to exclude from the scope of the evolving inherent right of self-government all instances of aboriginal law and government that arose in response to the cultural changes forced upon aboriginal peoples by means of this "civilization" policy. How many provisions of the Credit River legal system would have failed a distinctive aboriginal culture test of this sort because of their remoteness from the pre-contact Ojibway system? If an approach such as that in *Pamajewon*[188] were taken, some of the more innovative provisions would presumably have failed—and yet it was precisely because the Credit River Mississauga adopted these sorts of provisions that it managed to survive (and today survives) as a distinct aboriginal nation. The Credit River Mississauga really had no choice: adherence to the pre-contact aboriginal customary system, without some significant modifications, was impossible in 1830; it had to find an alternative economic base, and develop a legal system appropriate to that new base, to avoid destruction. Peter Jones, having helped his nation avert destruction by this means, would have been surprised indeed to find that the courts of subsequent generations would regard legal reforms of the sort that his nation undertook in exercising its powers of self-determination to be tainted by non-aboriginal culture and, therefore, undeserving of constitutional protection as elements of an inherent right of aboriginal self-government.

The Credit River example demonstrates the dynamism of aboriginal cultures and laws, and the difficulties associated with drawing lines between laws and governmental institutions that are "aboriginal" with those that are not. It suggests that perhaps the focus should not be on the content of the rule of law at issue, but on its constitutional source: if the law, practice, custom or institution was the result of an internally-driven process of legal reform, albeit in response to the external challenge of colonialism, then it represents an exercise of an inherent right of self-government, and unless it was lawfully prohibited or lawfully extinguished by British imperial law or, later, Canadian law, the right should be regarded as continuing. If some link with pre-contact aboriginal culture is deemed necessary, the nature of that link should be considered in light of the paradox of cultural change and cultural continuity: a law, practice, custom or institution developed after contact in response to colonization should be regarded as qualifying for constitutional protection as long as it played some role in combating the threat presented by colonization to the continuity of the nation's status as a distinct nation. In essence, this approach is based upon the same principle that the Credit River Mississauga asked Queen Victoria to confirm in 1838—namely, that they be allowed to continue the process they had begun of responding to the changing world around them by introducing "among our People" necessary legal reforms "as our People

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[187] *Pamajewon, supra* note 6.

[188] In *Pamajewon, ibid.*, the Supreme Court of Canada held that two Ojibway First Nations in Ontario did not have an aboriginal right to conduct and regulate high stakes gambling on their reserves because they had failed to show that conducting and regulating gambling was an integral part of pre-contact Ojibway culture.

in Council think best".[189]

[189] *Petition, supra* note 183.