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Brightening the Covenant Chain: Aboriginal Treaty Meanings in Law and History After Marshall

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The decision of the Supreme Court of Canada in R. v. Marshall raises some difficult questions about the interpretation of Crown-Aboriginal treaties, especially treaties dating from the eighteenth century. The Court acknowledged that the treaty context is important to establishing the meaning of treaty texts, and Aboriginal and non-Aboriginal perspectives must be considered. As a result, judges must have regard to historical analyses of Crown-Aboriginal relations when interpreting these old treaties. In this article, the author explores some of the complex theoretical problems that such legal-historical analyses create, focusing in particular upon the possibility that lawyers and judges may reach very different understandings about the meanings of old treaties than historians. As a vehicle for exploring this problem, the author considers competing approaches to the definition of the 'Covenant Chain' treaties. He argues that although British and Aboriginal peoples appeared to define the effect of the Covenant Chain on Aboriginal sovereignty very differently, British officials always acknowledged the Aboriginal perspective. Examination of evolving attitudes about the Covenant Chain in three separate periods (1763-65, 1783-94 and 1830-60) confirm that sometimes this official acknowledgement was a subordinate one and at other times it was elevated to a dominant position. The author concludes by considering whether legal and historical interpretations about shifting approaches to this treaty may lead to different understandings about Aboriginal sovereignty or, in other words, about the inherent right of Aboriginal self-government.

La décision de la Cour suprême du Canada dans R. c. Marshall a soulevé des questions délicates quant à l'interprétation des traités entre la Couronne et les autochtones, en particulier celle des traités qui remontent au XVIII^e siècle. La Cour suprême a reconnu qu'il est important de connaître le contexte pour déterminer la signification des textes. Il faut en outre prendre en considération tant le point de vue des autochtones que celui des non autochtones. En conséquence, les magistrats ne doivent pas ignorer les analyses historiques des relations entre la Couronne et les autochtones pour fins d'interprétation de ces traités anciens. Dans cet article, l'auteur explore les problèmes théoriques fort complexes associés à ce type d'analyse où l'on tente de juxtaposer les dimensions historiques et juridiques, et démontre combien il est facile pour les

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magistrats et les historiens d'en arriver à des conclusions différentes. L'auteur explore le problème en se penchant sur les approches rivales proposées pour définir les traités de la «chaîne d'alliance». Selon lui, même si les autorités britanniques et les autochtones avaient un entendement très différent de l'incidence de la chaîne d'alliance sur la souveraineté autochtone, celles-ci ont toujours reconnu le point de vue autochtone. Lorsque l'on examine l'évolution de l'attitude des autorités à l'égard de la chaîne d'alliance à trois périodes distinctes (1763-1765, 1783-1794, 1830-1860), on constate que cette reconnaissance officielle du point de vue autochtone était tantôt secondaire tantôt primordiale. L'interprétation que font les historiens et les juristes des attitudes changeantes à l'égard des traités a-t-elle mené à des entendements différents de la notion de souveraineté autochtone, c'est-à-dire du droit inhérent des autochtones à l'autonomie.

Introduction

I. The Covenant Chain in the Seventeenth and Eighteenth Centuries

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Introduction

[W]e the said Sachims chief men Cap[tai]ns and representatives of the Five Nations ... have lived peaceably and quietly with the people of Albany our fellow subjects above eighty years when wee first made a firm league and covenant chain with these Christians ... which covenant chain hath been yearly renewed and kept bright and clear by all the Governours successively and many neighbouring Governments of English and nations of Indians have since upon their request been admitted into the same.

So reads the introductory passages of a “deed” made three hundred years ago between the Five Nations, or Haudenosaunee, and officials representing King William III by which a land called “Canagariarchio” – now

southern Ontario – was placed under the Crown’s protection.¹ This text purports to reflect the words of the sachems of the Five Nations; indeed, the use of the aboriginal diplomatic metaphor concerning the formation and annual brightening of the covenant chain suggests that perhaps it is a transcription of oral statements made during negotiations. It may therefore evoke the image of an eighteenth-century treaty conference, complete with council fire, feathered chiefs, bewigged Englishmen, lengthy orations, and exchanges of wampum strings.² Of course, one would have to include at the edge of this dramatic scene a figure with quill, ink and parchment scribbling down the words as the sachems spoke, producing this document that, so many years later, we still have. However, as one reads on the language of the deed changes, and so does the image. “Wee... By these presents,” the sachems say, “doe for us our heirs and successors absolutely surrender, deliver up and for ever quit claime” such-and-such land. The council-fire oratory is gone, and the language begins instead to sound more like the conveyance of an easement over “Blackacre,” that ubiquitous English manor of common-law texts.³ Has

1. “Deed from the Five Nations to the King of their Beaver Hunting Ground” 19 July 1701, in E.B. O’Callaghan, ed., *Documents Relative to the Colonial History of the State of New York* (Albany: Weed, Parsons & Co., 1856-1861) vol. 4 at 908-911 [hereinafter *Doc. Re. Colonial Hist. N.Y.*]. The 1701 deed recognized hunting rights in the territory, which were enforced in *R. v. Ireland* (1990), 1 O.R. (3d) 577 (Gen. Div.).

2. Paintings and engravings of such scenes are numerous. See e.g., “Council between Indians assembled and Colonel Henry Bouquet” (1764), painted by Benjamin West, reproduced in R.S. Allen, *His Majesty’s Indian Allies: British Indian Policy in The Defence of Canada, 1774-1815* (Toronto: Dundurn Press, 1992) at 99, or “Indian Council at Johnson Hall” (n.d.), painted by E.L. Henry, reproduced in I.T. Kelsay, *Joseph Brant, 1743-1807: Man of Two Worlds* (Syracuse: Syracuse University Press, 1984) at 136.

3. The 1701 deed, *supra* note 1, is based upon the standard quit-claim deed used in common law jurisdictions. For e.g., it provides:

To all Christian & Indian people ... to whom these presents shall come ... Wee ... have freely and voluntarily surrendered delivered up and for ever quit claimed, and by these presents doe for us our heirs and successors absolutely surrender, deliver up and for ever quit claime unto our great Lord and Master the King of England...all the title and interest and all the claime and demand whatsoever which wee the said five nations of Indians...now have or ought to have of in or to all that vast Tract of land or Colony called Canagariachio....

Compare quit-claim precedent in J.D. Whetham, J.R. Runball & A.J. Milligan, eds., *The Standard Conveyancer: A Comprehensive Collection of Conveyancing Forms and Precedents* (Toronto: Burroughs & Co., 1925) at 954-55:

Now therefore this Indenture Witnesseth that the said party of the first part ... hath granted, released and quitted claim and by these presents doth grant, release and quit claim unto the said party of the second part, his heirs and successors forever, all the estate, right, title, interest, claim and demand whatsoever both at law and in equity ... in, to or out of and singular that certain parcel or tract of land and premises, lying and being ... [description]....

the council retired indoors to a comfortable parlour, and have the sachems begun reading from a book of English real property precedents? Surely not. Another, more plausible, image therefore springs to mind: the council is over, or not yet begun, there are no sachems present, and the scribe sits alone in the parlour with his book of precedents before him. In this quiet solitude, the “treaty” is written.⁴

That crown-aboriginal treaty texts were sometimes written before or after agreements were actually reached in council is perhaps not surprising.⁵ Even the use of an English quit-claim precedent to express cross-cultural, nation-to-nation agreements, though odd, is understandable – common lawyers then (as now) were adept at applying existing forms to novel circumstances. What is difficult to understand, however, is how anyone today could be fooled into thinking that written texts such as the 1701 deed accurately reflect the actual agreements reached between aboriginal nations and crown officials. Fortunately, the Supreme Court of Canada’s decision in *R. v. Marshall*⁶ now prevents such an approach to the interpretation of crown-aboriginal treaties. *Marshall* is premised upon the idea that treaties with aboriginal nations are not *documents* or *written instruments* but rather are *relationships* – or, more precisely, they represent a shared understanding of and commitment to a normative framework for cross-cultural relationships. According to *Marshall*, the identification of modern treaty meanings requires that the shared understandings of treaties that existed when they were made be discovered. To this end the context of treaties – the rich narrative of aboriginal-crown relations during the colonial era from which, as Robert A. Williams Jr. writes, “a normative universe of shared meanings”⁷ emerged – may be as

4. In fact, the deed was drafted by Robert Livingston, Secretary of Indian Affairs for the colony of New York, and signed after several days of conferences between Haudenosaunee chiefs and the governor of New York: J.W. Brandão and W.A. Starna, “The Treaties of 1701: A Triumph of Iroquois Diplomacy” (1996) 43 *Ethnohistory* 209 at 225.

5. A distinction should be made, however, between legal instruments like the 1701 deed, signed after negotiations in council (see *ibid.*), and records or transcripts of council sessions themselves, which (where they exist) do provide a far more direct, albeit still imperfect, account of aboriginal meanings. See the transcript of council proceedings of July 14 and 19, 1701, which led to the 1701 deed: P. Wraxall, *An Abridgment of the Indian Affairs, Transacted in the Colony of New York, 1678-1751* (1754), C.H. McIlwain, ed. (Cambridge: Harvard Univ. Press, 1915) at 38-41. Even council minutes fail to capture fully the private negotiations that invariably preceded formal treaty councils: J.H. Merrell, *Into the American Woods: Negotiators on the Pennsylvania Frontier* (London: W.W. Norton & Co., 1999) at 30-31, 254-55 [hereinafter *Into the American Woods*].

6. *R. v. Marshall* [No. 1], [1999] 3 S.C.R. 456 [hereinafter *Marshall*]. See also *R. v. Marshall* [No. 2], [1999] 3 S.C.R. 533.

7. R.A. Williams Jr., *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600-1800* (Oxford: Oxford University Press, 1997) at 47.

important to the meaning of treaties as the written texts themselves.⁸ In other words, in defining treaty meanings, we may leave the quiet solitude of the scribe's parlour and return to the edge of the council fire to hear what the parties were actually saying to each other.

The legal interpretation of old treaties after *Marshall* will not be easy. The reconstruction of the normative universe occupied by colonists and aboriginal peoples from ambiguous written sources and (where they exist) aboriginal oral histories, represents a monumental interdisciplinary, cross-cultural project in which historical, ethnohistorical, and anthropological interpretations must be consolidated from a legal perspective that somehow reconciles aboriginal and non-aboriginal viewpoints. There are many unresolved questions about the practical and theoretical nature of this project.⁹ In this essay I consider just one of these questions - namely, does the *legal* articulation of shared meanings for old treaties involve a fundamentally different interpretative method than the *historical* analysis of such treaties? I consider this theoretical question by analyzing a concrete example: I explore the many meanings of the "covenant chain" that linked - and may still link - the crown to the aboriginal nations of the Great Lakes region. In particular, I will examine the covenant chain as a treaty statement about sovereignty. In light of *Marshall* there is now no reason in law to regard as accurate the statement made by the sachems (or was it the scribe?) in the above-quoted 1701 deed that the Five Nations were *subjects* of the crown.¹⁰ The question, then, is whether it can *now* be said that there *was* a shared treaty-meaning concerning the issue of sovereignty under the covenant chain.

8. See *Marshall*, *supra* note 6 per Binnie J. at 474: "The Court's obligation is to 'choose from among the various possible interpretations of the *common* intention [when the treaty was made] the one which best reconciles' the Mi'kmaq interests and those of the British Crown" (emphasis in original). This approach was foreshadowed in *R. v. Sioui*, [1990] 1 S.C.R. 1025 [hereinafter *Sioui*], per Lamer J. at 1035: when reading treaties courts must "take into account the historical context and perception of each party might have as to the nature of the undertaking contained in the document"; and *R. v. Badger*, [1996] 1 S.C.R. 771 at 798. See generally, J.Y. Henderson, "Interpreting *Sui Generis* Treaties" (1997) 36 Alta. L. Rev. 46.

9. For detailed analysis of the *Marshall* decisions see L. Rotman, "Marshalling Principles From The *Marshall* Morass" (2000) 23 Dalhousie L.J. 5; R. Normey, "Angling for 'Common Intention': Treaty Interpretation in *R. v. Marshall*" (2000) 63 Sask. L. Rev. 645; C. Bell & K. Buss, "The Promise of *Marshall* on the Prairies: A Framework for Analyzing Unfulfilled Treaty Promises" (2000) 63 Sask. L. Rev. 667.

10. It may have been the case that even Robert Livingston, who drafted the 1701 deed (*supra* note 4), did not believe that it reflected aboriginal intentions. Elsewhere he wrote: "altho' the French Governours are pleas'd to call their Indians, subjects of the French King, and our Governours in like manner call the Indians of the Five Nations Subjects of the Crown of England, they [the Indians] do not so understand it, but look upon themselves in the state of freedom," quoted in T.J. Shannon, *Indians and Colonists at the Crossroads of Empire: The Albany Congress of 1754* (Ithaca: Cornell University Press, 2000) at 23-24.

The analysis is reflective rather than argumentative: the objective is not to identify the correct legal or historical interpretation of the covenant chain but instead to consider the ways in which legal and historical analyses may involve conflicting methodological assumptions about the “normative universe” within which the covenant chain existed. Although I focus upon the covenant chain and the issue of sovereignty, the theoretical issues addressed are relevant to the interpretation of crown-aboriginal treaties generally. Part I examines aboriginal and non-aboriginal accounts of the covenant chain’s initial meaning, and identifies the nature of potential methodological differences between legal and historical interpretations. Part II considers British documentary sources relating the covenant chain and the issue of sovereignty in more detail. The documents are selected from three discrete time periods: the assertion of British sovereignty over Canada in 1763-65; the withdrawal of British sovereignty from the American mid-west in 1783-94; and the reconfiguration of Indian policy in Canada in 1830-60. These were periods of crisis that produced a heightened appreciation of aboriginal perspectives about the British-Indian treaty relationship in imperial and local officials, and hence particularly insightful and revealing statements by them about what they thought aboriginal people thought the treaty meant. Although these documents reveal that British perspectives on the covenant chain were multi-dimensional and shifted to suit political objectives, they also confirm that officials were cognizant of aboriginal views of the treaty and of the tensions between British and aboriginal views. In Part III, I consider the modern theoretical implications of this conclusion for legal and historical interpretations of the shared meanings of crown-aboriginal treaties.

I. The Covenant Chain in the Seventeenth and Eighteenth Centuries

1. Oral Tradition versus Written Records

The covenant chain began as an “iron” chain treaty in the early seventeenth century between Dutch colonists and the Haudenosaunee confederacy.¹¹ The Haudenosaunee (People of the Longhouse), consisting of the Mohawk, Seneca, Onondaga, Cayuga, Oneida and (from the 1720s) Tuscorara nations, were called Iroquois by the French and the Five (later Six) Nations by the British. After ousting the Dutch from what is now

11. F. Jennings, *The Ambiguous Iroquois Empire: The Covenant Chain Confederation of Indian Tribes with English Colonies* (New York: W.W. Norton & Co., 1984) at 47-57 [hereinafter *Ambiguous Iroquois Empire*]. M. Dennis, *Cultivating A Landscape of Peace: Iroquois-European Encounters in Seventeenth-Century America* (Ithaca: Cornell University Press, 1993) at 268-69.

New York state in 1664, English colonists held a council at Albany at which the first *gus-wen-tah* – or two-row wampum belt – was given to confirm the English-Five Nations iron chain.¹² In a treaty council in 1677, in which a Mohawk speaker stated to the governor of New York that the parties “were of one heart and one head (mind),” the relationship was reconfirmed as a “silver” chain and thereafter was called the “silver covenant chain,” or simply the “covenant chain.”¹³ The agreement was essentially one of peace, alliance, trade and protection, but from the aboriginal perspective it was informed by a degree of spiritual force as well. The chain metaphor implied notional links of kinship, an extrapolation of the clan unit that was the basic building block of local, national and confederal aboriginal political organizations.¹⁴ Its meaning was therefore closely connected to pre-existing aboriginal concepts and customs. However, the expression “chain” itself may have been an English translation of an aboriginal expression that may have been more closely conveyed by the imagery of *linked* or *clashed* arms; for English officials, the links of a silver chain may have served their purposes better than links formed by arms alone.¹⁵ Even as a term, then, it seems that the covenant chain was the result of a synthesis of words, concepts and political aspirations derived from two very different linguistic and cultural traditions.

The covenant chain began as a New York-Five Nations treaty, but with the consolidation of Indian affairs in imperial hands in the 1750s, and the extension of the chain to all the Great Lakes nations in the 1760s, it became a generalized crown-aboriginal treaty relationship. After Britain

12. Articles of a Treaty made on 24 September 1664, in *Doc. Re. Col. Hist. N.Y.*, *supra* note 1, vol. 3 at 67-68. See A.W. Trelease, *Indian Affairs in Colonial New York: The Seventeenth Century* (New York: Kennikat Press, 1971) at 228. On wampum belts generally, see M.K. Foster, “Another Look at the Function of Wampum in Iroquois-White Councils” in F. Jennings, ed., *The History and Culture of Iroquois Diplomacy: An Interdisciplinary Guide to the Treaties of the Six Nations and their League* (Syracuse: Syracuse University Press, 1985) at 99-114 [hereinafter *History and Culture of Iroquois Diplomacy*].

13. W.N. Fenton, *The Great Law and the Longhouse: A Political History of the Iroquois Confederacy* (Norman: University of Oklahoma Press, 1998) at 303, 301 [hereinafter *Great Law and the Longhouse*]. See also, *Ambiguous Iroquois Empire*, *supra* note 11 at 167 and D.K. Richter, *The Ordeal of the Longhouse: The Peoples of the Iroquois League in the Era of European Colonization* (Chapel Hill: University of North Carolina Press, 1992) at 136-37 [hereinafter *Ordeal of the Longhouse*].

14. W.N. Fenton, “Structure, Continuity and Change in the Process of Iroquois Treaty Making” [hereinafter “Structure, Continuity and Change”] in *History and Culture of Iroquois Diplomacy*, *supra* note 12 at 12; *Ordeal of the Longhouse*, *supra* note 13 at 41.

15. R.L. Haan, “Covenant and Consensus: Iroquois and English, 1676-1760” in D.K. Richter & J.H. Merrell, eds., *Beyond the Covenant Chain: The Iroquois and Their Neighbours in Indian North America, 1600-1800* (Syracuse: Syracuse University Press, 1987) at 45 [hereinafter *Beyond the Covenant Chain*]; Williams, Jr., *supra* note 7 at 52-53.

defeated the French in Canada in 1759-60, councils were held to admit the Ojibway, Mississauga, Algonquin, Huron, Ottawa and other nations in possession of the Great Lakes region and territories beyond. This new covenant chain was extended and confirmed between 1764 and 1766 in the aftermath of Pontiac's War.¹⁶ As British officials at the time recognized and as the Supreme Court of Canada recently acknowledged, British-French transactions concerning Canada had no effect on British-Indian relationships.¹⁷ If there is a treaty basis to crown sovereignty over this region and its indigenous inhabitants, the covenant chain is it.

Once the covenant chain is re-interpreted in light of *Marshall*, however, doubts arise about whether it can support the weight of British claims to sovereignty.¹⁸ By aboriginal oral tradition the covenant chain secured a partnership between two independent peoples, not submission by one to the sovereignty of the other. The two rows of purple shells found in the *gus-wen-tah* represent the separate though parallel paths along which aboriginal and non-aboriginal "vessels" travel; within their respective vessels, nations "keep their government, their laws, their ways and beliefs."¹⁹ The covenant chain may have extended crown protection over aboriginal nations, but from *their* perspective they remained "independent and sovereign."²⁰

By aboriginal tradition, the covenant chain did not "maintain itself" but required "constant effort and renewal to keep it bright and shiny" ensuring that it did not "rust."²¹ The brightening of the chain was

16. J. Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History and Self-Government" in M. Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference* (Vancouver: U.B.C. Press, 1997); J.W. Parmenter, "Pontiac's War: Forging New Links in the Anglo-Iroquois Covenant Chain, 1758-1766" (1997) 44 *Ethnohistory* 617.

17. See e.g., T. Pownall, *Administration of the Colonies* (London: 1765) at 178:

We have seen that Sir William Johnson [Superintendent General of the imperial Indian Department], although he took Niagara *from the French* by force of arms, never considered this as a conquest of these lands *from the Indians*; but has agreeably to his usual prudence and his perfect knowledge of Indian affairs, obtained by formal treaty, a cession of these lands from the Indians to the crown of Great Britain.

See also *Sioui*, *supra* note 8 at 1063.

18. Of course, it did not take *Marshall*, *supra* note 6, to prompt such a critical reassessment of British claims to sovereignty over the Great Lakes nations. See e.g. Borrows, *supra* note 16 at 169.

19. "Statement of the Haudenosaunee Concerning the Constitutional Framework and International Position of the Haudenosaunee Confederacy" in Canada, House of Commons, *Special Committee on Indian Self-Government, Proceedings and Submissions*, 32nd Parlia., 1st Sess., 1983, No. 31A, at 6-8 [hereinafter "Statement of the Haudenosaunee"]. See also D. Johnston, "The Quest of the Six Nations Confederacy for Self-Determination" (1986) 44 *U. T. Fac. L. Rev.* 1 at 11.

20. "Statement of the Haudenosaunee", *ibid.* at 9.

21. *Ibid.* at 7-8.

achieved through nation-to-nation councils conducted according to elaborate customary procedures. The customs included the preliminary “at wood’s edge” ceremony (to remove symbolic obstacles encountered in travel) and the “ceremony of condolence” (to cover the dead and wipe away tears), the kindling of the council fire, lengthy formal speeches filled with metaphor and use of mnemonic devices, periods of private deliberation and consultation, the giving of wampum strings or belts and the exchange of presents.²² The meaning of diplomatic metaphors was embedded deep within aboriginal culture and custom, and communication and agreement was therefore contingent upon effective translation and interpretation. The father-child metaphor that was used to describe crown-aboriginal relations beginning in the 1760s was sometimes wrongly interpreted as a sign of aboriginal subjection to the crown; in fact, it reflected aboriginal assumptions about the spiritual kinship link that was forged between nations by compact, as well as aboriginal customs regarding the responsibility of kindred members to protect and provide for the more vulnerable of their number.²³

The brightening of the chain, then, was the customary institutional manifestation of the treaty as a meaningful normative order. In many respects, this institution was simply an extension into a cross-cultural context of pre-existing customary constitutional forms.²⁴ The Haudenosaunee constitution, the *Ne’ Gayanesha’gowa* (Great Law of Peace), established the Five Nations as a confederacy of self-governing nations under which matters of common concern or disagreement were resolved through appeals to accepted norms in the *Ho-de-os’-seh*

22. “Structure, Continuity and Change”, *supra* note 14 at 6, 16, 22-27. See also, M.R. Druke, “Linking Arms: The Structure of Iroquois Intertribal Diplomacy” in *Beyond the Covenant Chain*, *supra* note 15 at 35-38.

23. Druke, *ibid.* at 33-34; N.L. Hagedorn, “‘A Friend To Go Between Them’: The Interpreter as Cultural Broker During Anglo-Iroquois Councils, 1740-1770” (1988) 35 *Ethnohistory* 60; R. White, *The Middle Ground: Indians, Empires, and Republics in the Great Lakes Region, 1650-1815* (Cambridge: Cambridge University Press, 1991) at c. 2 [hereinafter *The Middle Ground*]; N. Shoemaker, “An Alliance between Men: Gender Metaphors in Eighteenth Century American Indian Diplomacy East of the Mississippi” (1999) 46 *Ethnohistory* 239 at 253-54; Parmenter, *supra* note 16 at 618-19, 636-37. See also “Glossary of Figures of Speech in Iroquois Political Rhetoric” in *History and Culture of Iroquois Diplomacy*, *supra* note 12 at 115-24.

24. *Great Law and the Longhouse*, *supra* note 13 at 29; *Linking Arms Together*, *supra* note 7 at 119-20; *Ordeal of the Longhouse*, *supra* note 13 at 141.

(confederal civil councils) rather than by war.²⁵ A shared understanding of the Great Law was consistently confirmed in the *Ho-de-os'-seh* through songs and oral recitations of principles symbolized by wampum belts.²⁶ The resolution of conflict through the restatement in council of past commitments ensured that the confederal order evolved as a meaningful normative framework capable of guiding member nations under changing circumstances. If the crown-aboriginal covenant chain was "legally" binding from the aboriginal perspective, it was probably in this same sense: normativity was experienced through the perennial confirmation, or "brightening," of the chain at councils which addressed and resolved differences through negotiation and present-giving, and defined the shape and content of acceptable political behaviour.²⁷

Early English accounts of the covenant chain are similar in some respects to aboriginal oral traditions. Impressed by the "*Indian Genius in the Arts of negotiating*," Colden provided a detailed description of the chain's evolution in his 1747 *History of the Five Nations*.²⁸ According to a 1698 memorandum, Europeans and "the Iroquaes or five Canton Indians" had maintained good relations from the early seventeenth century and "almost every yeare [they] sent down their Chiefe Sachems and Captains" in order to "Receiv[e] the Antient peace and Covenant

25. A.C. Parker, ed., *The Constitution of the Five Nations, or The Iroquois Book of the Great Law* (Albany: University of the State of New York, 1916, N.Y. Museum Bulletin, No. 184); L.H. Morgan, *League of the Ho-de'-no-sau-nee, or Iroquois* (Rochester: Sage & Brother, 1851) at 108. For more recent analysis asserting that Parker and Morgan present an overly idealized picture of Iroquois confederal government, see D.K. Richter, "Ordeals of the Longhouse: The Five Nations in Early American History" [hereinafter "Five Nations in Early American History"] in *Beyond the Covenant Chain*, *supra* note 15 at 14-18; *Ordeal of the Longhouse*, *supra* note 13 at 40; and, *Great Law and the Longhouse*, *supra* note 13 at 4-5.

26. Parker, *ibid.* the Great Law of Peace was symbolized and recorded by wampum strings (art. 55-56 at 44-45); when the confederate council decided to have "a reading of the belts of shell calling to mind these laws" a special mat was to be made for the "speaker," a "formality" "honouring the importance of the laws" (art. 62 at 48); whenever two chiefs from opposite sides of the council fire desired "to hear the reciting of the laws of the Great Peace and so refresh their memories," the Onondaga chiefs would convene a general council and appoint one chief "to repeat the laws" (art. 63 at 48); the recitation was, it seems, a song, requiring an "expert speaker and singer of the law" (art. 64 at 49).

27. On the derivation of covenant chain ceremonies from pre-existing aboriginal customs, and in particular the Iroquois confederacy's Great Law of Peace, see *Ordeal of the Longhouse*, *supra* note 13 at 141 and *Great Law and the Longhouse*, *supra* note 13 at 12, 29-30, 308. For a more general account of the emergence of a normative community through early aboriginal/non-aboriginal relations see J. Webber, "Relations of Force and Relations of Justice: The Emergence of Normative Community Between Colonists and Aboriginal Peoples" (1995) 33 *Osgoode Hall L.J.* 623.

28. 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, 1727 (pt. 1), 1747 (pt. 2)) at pt. 2, 150 [hereinafter *History of the Five Indian Nations of Canada*].

Chaine (soe called by them) ... making at all these Treaties presents to each other.”²⁹ The renewing – or brightening – of the chain continued throughout the eighteenth century. In 1753, for example, the imperial Lords of Trade instructed colonial governors to “make proper Provision ... for renewing the Covenant Chain with the six Nations, and for making such Presents to them as has been usual....”³⁰ It was essential to provide these “favours” or presents annually, observed an official in 1764, because “as amongst themselves a neglect of renewing their Treaties of Friendship is looked on as an open violation of the peace of Nations....”³¹ Though the covenant chain rituals persisted, the history of the British-Five Nations relationship was hardly an even one. During the first half of the eighteenth century the Five Nations pursued a policy of peace and neutrality with the French and English. In the late 1740s, the chain was strained almost to the breaking point only to be rescued and transformed into an alliance against the French in the late 1750s. The character of the chain changed after 1764 when it was extended to former French native allies in the Great Lakes region, and changed again after some nations sided against Britain in the American revolution.³² Despite its evolution, the customary ceremonies of the brightening process continued. As will be seen in Part II below, annual present-giving councils remained a central feature of crown-aboriginal relations in Canada until 1858.

Though similar in many respects, the aboriginal and non-aboriginal accounts of the covenant chain in the seventeenth century diverge on the question of sovereignty. The author of the 1698 memorandum stated:

I myselfe have been present in many of these treaties for the space of neare forty yeares past, where the said Indians, or five Canton Indian nations have often *declared their Submission* to the Government of this province, and Desired to be protected by the same against the ffrench of Canada, Comparing the said Government to a Great large tree, under whose branches they Desire to Shelter....³³

29. “Memorial presented to the Earl of Bellomont by Coll Bayard relating to the Right of the Crown of England to the Sovereignty over the Five Nations of Indians. New Yorke, July 6 1698” [hereinafter “Memorial presented to the Earl of Bellomont”], National Archives of Canada, Ottawa [hereinafter NA] MG 21 Lansdowne MSS 849, file 77 at 66-67.

30. Lords of Trade to Jonathan Belcher, Governor of New Jersey, 18 September 1753, Public Record Office, London, U.K. [hereinafter PRO] CO 324/15 at 171-2. Similar letters went to Virginia, Massachusetts, New Hampshire, Maryland and Pennsylvania.

31. George Croghan to Board of Trade, January 1764, in *Doc. Rel. Col. Hist. N.Y.*, *supra* note 1, vol. 7 at 602-604.

32. *Ordeal of the Longhouse*, *supra* note 13 at 214-54 (on neutrality), 272 (Mohawk chief Hendrick declares the chain “broken” in 1753); *Great Law and the Longhouse*, *supra* note 13 at 450, 512 (on abandonment of neutrality and transformation of chain into alliance against French); *The Middle Ground*, *supra* note 23 at 315-66 (on post-1766 developments); Allen, *supra* note 2 at 46 (on post-1783 developments).

33. “Memorial presented to the Earl of Bellomont”, *supra* note 29 (emphasis added).

The protective-tree metaphor was drawn from aboriginal oral traditions – it is a key metaphor in the Haudenosaunee *Ne' Gayanesha' gowa*³⁴ – but the inference of submission conflicts with the equality of nations central to the aboriginal perspective. Nevertheless, written treaty records commonly include assertions of crown sovereignty and aboriginal submission. At a 1684 council Onondaga and Cayuga chiefs were reported as stating: “We have submitted our Selves to the Great Sachem Charles [i.e., King Charles II] who liveth on the other side of the Great Lakes....”³⁵ The transcript for a 1689 council includes the entry: “Next Spoke the Indians... [who acknowledged] That they are Subjects of the King of England....”³⁶ Assertions of crown sovereignty over the Five Nations appear in other treaty entries³⁷ as well as other state papers, including British representations to France,³⁸ Board of Trade reports,³⁹ a British-French treaty,⁴⁰ and royal instructions to governors.⁴¹ Finally, it may be argued that the reported cases and legal opinions from this time suggest that English and colonial courts would have regarded the written treaty

34. Parker, *supra* note 25, art. 1 at 30 “I am Dekanawidah and with the Five Nations' Confederate Lords I plant the Tree of the Great Peace.... Under the shade of this Tree ... shall you sit and watch the Council Fire of the Confederacy ... and all the affairs of the Five Nations shall be transacted at this place....”

35. Wraxall, *supra* note 5 at 11-12 (Council of 2 August 1684). The Five Nations were internally divided between “anglophiles,” “francophiles” and “neutralists” at this time, and chiefs from the latter two camps were especially critical of English assertions of dominance in such treaty conferences: *Ordeal of the Longhouse*, *supra* note 13 at 151-60.

36. Wraxall, *ibid.* at 14-15 (Council of 3 February 1689).

37. *Ibid.* at 9-10 (Council of 21 July 1679: the Mohawk delegation was said to have “acknowledge[d] themselves to be under this Government [and] renew[ed] the Chain of Peace & Friendship ... [the Governor said] the French have no Authority over you”); at 13 (Council of 5 August 1684: Governor Dongan (New York) chastises the Five Nations for treating with the French, “wch as Subjects of His Britannick Majesty they ought not to have done”); at 32 (Council of 12 June 1699: “you are the Subjects of the Great King of England under whose Govt you have been time out of Mind, and the Covenant Chain hath been so often renewed with this Govt that there is none living can remember the beginning of it”); at 88 (Council of 19 June 1711: “the Queens Arms are a Sign of her Sovereignty wch he [the governor] hopes they will be always ready to defend....”).

38. Report of negotiations in Canada, 2 July 1698, in *Doc. Rel. Col. Hist. N.Y.*, *supra* note 1, vol. 4 at 349; Earl Bellomont to Count de Frontenac, 13 August 1698, in *Doc. Rel. Col. Hist. N.Y.*, *supra* note 1, vol. 4 at 367.

39. Board of Trade to the King, 2 June 1709, in *Doc. Rel. Col. Hist. N.Y.*, *supra* note 1, vol. 5 at 75.

40. Treaty of Utrecht, 1713, in W. Houston, ed., *Documents Illustrative of the Canadian Constitution* (Toronto: Carswell, 1891) at 3-5 (§15: Five Nations are “subject to the Dominion of Great Britain”).

41. Royal Instructions to New York governors from 1690 to 1770 provided that the Five Nations were to renew “their submission to our government” yearly and be protected “as our subjects”: L.W. Labaree, ed., *Royal Instructions to British Colonial Governors, 1670-1776* (London: Appleton-Century, 1935) vol. 2 at §§666-67.

assertions of crown sovereignty as determinative⁴² and may even have regarded aboriginal peoples as “Barbarians” or “infidels” excluded from the benefits of the rule of law altogether.⁴³

2. *Reconstructing A Shared Treaty-Meaning: Initial Steps*

On the issue of sovereignty, then, aboriginal oral accounts and non-aboriginal written accounts of the covenant chain are very different – the parties did not appear to be “of one heart and one head.”⁴⁴ The identification today of a shared understanding of the treaty as it related to sovereignty therefore involves constructing an interpretation of the treaty’s meaning that finds coherence and reconciliation between positions that appear to be contradictory.⁴⁵ Although I do not attempt to construct that interpretation here, it is worthwhile to identify the steps that might be taken in doing so. One approach might be to suggest ways in which the covenant chain could have been, in a general sense, a normative foundation for a common crown-aboriginal understanding about sovereignty, and then proceed to seek specific evidence that there was – notwithstanding the apparent divergence of views noted above – a “meeting of minds” on a particular conception of sovereignty. One might begin by re-considering the juridical concept of “sovereignty” itself. It might be acknowledged, for example, that although the (supposed) European conception of sovereignty of the time – the notion of an absolute “Hobbesian” authority capable of issuing and coercively enforcing commands to the people of a particular territory⁴⁶ – may not have been

42. Just a few years after the covenant chain was established, the Court of Common Pleas held in *Craw v. Ramsey* (1669), Vaugh 274 at 288, that courts should refer, with the King’s permission, to the “roll,” or official written record, containing the appropriate “treaty” to see if a foreign people had been made subjects of the Crown, referring expressly to British North America as an example (“[t]he like may now happen in Virginia, Surenam, or other places, part of which are in the King’s liegeance, part not”).

43. Opinion by Counsel c. 1675, printed in *Doc. Rel. Col. Hist. N.Y.*, *supra* note 1, vol. 8 at 486 and quoted in *Regina v. St. Catharines Milling Co.* (1885), 10 O.R. 196 (Ch.) at 206-208 (referring to “Barbarians”); *Calvin’s Case* (1608), 7 Co. Rep. 1a at 17b (“infidels” subjected to King’s discretionary authority); *Butts v. Penny* (1677), 2 Lev. 201 (trover lies to recover a slave because “the Negroes were infidels, and the subjects of an infidel prince”); *East-India Company v. Sandys* (1683-85), 10 St. Tr. 371 per Holt (as counsel) at 374 (“infidels...[are] excluded...from the benefit of the law”).

44. *Supra* note 13.

45. An alternative might be to disregard the written treaty text altogether on the basis that it is wholly inaccurate. Whether the broad contextual approach to treaty interpretation adopted by the Supreme Court of Canada allows such an approach is still an open question. Although I think that this approach may be required in some cases, I will conclude in Part III below that an interpretation of the covenant chain may be possible that accommodates both written and oral versions.

46. See G. Williams, *Salmond on Jurisprudence*, 11th ed. (London: Sweet & Maxwell, 1957) at 517; D.E.C. Yale, “Hobbes and Hale on Law, Legislation and the Sovereign” (1972) 31 Cambridge L.J. 121.

shared by aboriginal nations – which were generally organized around clan or kindred units governed by customary norms and non-coercive councils⁴⁷ – a shared understanding about sovereignty could still have been developed in the seventeenth century. The pre-existing *Ne' Gayanesha'gowa* acknowledged as inherent in each of the member nations of the confederacy a freedom to regulate its own internal affairs,⁴⁸ and pre-existing British law relating to imperial expansion indicated that the crown acknowledged customary or prescriptive rights of internal sovereignty (*jura regalia*) in constitutional units, like counties palatine, which were strategically located at the edges of the imperial frontier.⁴⁹ In short, aboriginal and non-aboriginal conceptions of “sovereignty” under the covenant chain may not have been mutually exclusive: common conceptual ground may well have existed upon which a shared understanding of sovereignty under the covenant chain may now be constructed.

Furthermore, it can be argued that the covenant chain could have provided a *normative* foundation for this shared understanding of sovereignty. It was suggested above that aboriginal nations likely regarded the chain's legal meaning and authority as manifested in the brightening process, whereas English judges may have focused upon the written texts of the treaty and concluded that it was an assertion of crown sovereignty that secured no justiciable rights for aboriginal peoples. This latter conclusion, however, is based upon very narrow jurisprudential assumptions. If the covenant chain's authority arose from participation by parties

47. For a discussion of pre-contact aboriginal law and government in the Great Lakes region, see M.D. Walters, “‘According to the Old Customs of Our Nation’: Aboriginal Self-Government on the Credit River Mississauga Reserve, 1826-1847” (1999) 30 *Ottawa L. Rev.* 1 at 6-14 [hereinafter “According to the Old Customs of Our Nation”]. For more generalized discussions, see M.S. Marule, “Traditional Indian Government: Of the People, by the People, for the People” in Leroy Little Bear, M. Boldt & J. A. Long, eds., *Pathways to Self-Determination: Canadian Indians and the Canadian State* (Toronto: University of Toronto Press, 1984) at 36-45, and M. Boldt & J.A. Long, “Tribal Traditions and European-Western Political Ideologies: The Dilemma of Canada's Native Indians” (1984) 17 *Can. J. Pol. Sci.* 537.

48. The Great Law of Peace provided that matters of common concern were addressed by the confederal council, but it also provided: “Before the real people united their nations, each nation had its council fires. Before the Great Peace their councils were held. The five Council Fires shall continue to burn as before and ... [t]he Lords of each nation in future shall settle their nation's affairs”: Parker, *supra* note 25, art. 97 at 55-56.

49. *Cotton v. Johnson* (1689), 3 Salk. 110 (counties palatine may arise “by prescription” giving the owner “*jura regalia*, and a King-like power”). See generally *Le Case del Countie Palatine de Wexford* (1612), Davis 58; Sir E. Coke, *The Fourth Part of the Institutes of the Laws of England* (London: R. Brooke, 1797) at 204-205; Sir M. Hale, *The Prerogatives of the King*, D.E.C. Yale, ed., (London: Selden Society, 1976) at 211-14; Sir W. Blackstone, *Commentaries on the Laws of England*, vol. 1 (Oxford: Clarendon Press, 1765; reprint, Chicago: University of Chicago Press, 1979) at 116-17.

within the norm-generating and norm-confirming exercise of “brightening” the chain, then it can be argued that it constituted an “inter-societal” law,⁵⁰ or “multicultural *nomos*,”⁵¹ separate from the municipal laws of England or particular colonies but acknowledged by British imperial law.⁵² Of course, the British tendency to equate “law” with decisions of courts obscures the legal regime within which the covenant chain existed, for that regime did not produce “judgments” of the sort then (or now) familiar to common lawyers. If evidence of judicial enforcement of crown-aboriginal treaty norms is deemed necessary for their characterization as “law” then some evidence can be found (*e.g.* the creation in 1664 by the imperial crown of an *ad hoc* tribunal empowered to “take effectuall course” to ensure that “Treatyes or Contracts” made with native “Kings” were “punctually performed” and “full reparation and satisfaction” paid for breaches).⁵³ However, once it is acknowledged that the covenant-chain customs of the brightening council had normative force for both parties – that political action really was constrained by these customs in a meaningful way – then nothing further should be required to demonstrate the authority of the covenant chain within the unique cross-cultural legal order that governed crown-aboriginal relations of the colonial era.

In short, by reconsidering the meanings of “sovereignty” and “law” and by taking a broad contextual approach to interpreting treaties and juridical concepts, emphasizing customs and practices over literal readings of written texts such as treaty records or case reports, that which at first appeared irreconcilable now appears reconcilable. The (re)construction of the elusive shared meaning of the covenant chain that *Marshall* mandates has begun. The next step in the analysis is to seek evidence of a “meeting of minds” upon a specific conception of sovereignty under the chain. Part of this process requires a careful examination of British documentary sources in order to determine whether aboriginal

50. B. Slattery, “Aboriginal Sovereignty and Imperial Claims” (1991) 29 Osgoode Hall L.J. 681 at 691; B. Slattery, “Understanding Aboriginal Rights” (1987) 66 Can. Bar Rev. 727 at 736-37.

51. Williams, Jr., *supra* note 7 at 51; also at 28-29 (it was part of a “multicultural jurisgenesis”).

52. M.D. Walters, “The ‘Golden Thread’ of Continuity: Aboriginal Customs at Common Law and Under the Constitution Act, 1982” (1999) 44 McGill L.J. 711 at 718-35 [hereinafter “Golden Thread of Continuity”].

53. “Instructions to ye Commissrs. to visite ye Colony of ye Massachusetts ...” (1664), PRO CO 324/1 at 230-32. See generally 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 809-810 [hereinafter “*Mohegan Indians v. Connecticut*”].

traditions concerning the chain were understood by British officials and/or influenced British policy in any way. These issues are discussed in Part II below. First, however, it is important to define in more precise terms the theoretical problems raised by the interpretative process itself.

3. *Identifying Theoretical Concerns: Lawyers versus Historians*

In one sense, the task of constructing shared meaning involves interpretative methods similar to those used by common-law lawyers in the process of (for example) interpreting conflicting lines of case law, reconciling contradictory statutory provisions, and, of course, locating the *consensus ad idem* underlying a contract about which parties disagree. The integration of superficially discordant rules, principles and facts into a coherent normative system by interpretative processes of analogising, distinguishing, classifying, inferring, and extrapolating is the key feature of common-law reasoning. It represents an interpretative dimension within which the importance of distinctions between law and fact, past and present, and *is* and *ought* are discounted in favour of one overriding objective: a coherent normative order that produces just results for litigants today in light of the commitments society has made in the past. Seen from this perspective, the reconstruction of a shared meaning for a treaty – even one several centuries old – through the reinterpretation of both context and concepts makes sense.

However, to the historian of law and politics – even an ethnohistorian specializing in the post-contact history of indigenous peoples – this reconstruction project may *not* make sense. An historian may be reluctant to engage in the interpretative exercise of constructing a shared understanding of an old treaty if, upon examining the “record,” he or she concludes that, in fact, none existed. If parties to a treaty developed different, self-interested definitions of its meaning then that is a historical fact that such an historian would presumably seek to expose and explain, not to obscure through the development of a hypothetical “shared understanding” that did not exist.

The following statements of two leading scholars of aboriginal ethnohistory in the Great-Lakes region are instructive in this respect. In explaining his interpretative technique of cultural “upstreaming”—the tracing back of present native oral traditions through past non-native documentary records in order to corroborate those traditions and better understand past documents—William N. Fenton states:

My interest in the treaties is scholarly. In them I seek to trace the roots of customs that I have observed among the living Iroquois of this century, and with these observations I hope to illuminate the past. The quest is

ethnological and historical. Litigation of treaty claims, or defence against such claims, is not my concern.⁵⁴

Likewise, Bruce Trigger has observed that the goal of ethnohistory is essentially that of orthodox (non-native) history: to provide an objective explication of the past.⁵⁵ Indeed, it is this pursuit of objectivity that gave rise to a unique *ethnohistorical* perspective. This perspective recognizes that the post-contact history of non-literate native peoples could only be identified accurately through non-native documentary sources if those sources were read critically in light of anthropological, ethnological, linguistic, and archaeological findings, as well as oral histories of native peoples themselves.⁵⁶ The pursuit of objectivity also explains why some (non-native) ethnohistorians are wary about some native oral histories. Insofar as native oral histories collapse ideas about past, present and future into a holistic, supernatural account of a community's story, says Trigger, they are inconsistent with the linear and "scientific" premises of ethnohistory, and therefore are of limited value in the ethnohistorical explication of past events unless supported by other empirical data.⁵⁷

54. "Structure, Continuity and Change", *supra* note 14 at 3. Compare S.E. Patterson, "Anatomy of a Treaty: Nova Scotia's First Native Treaty in Historical Context" (1999) 48 U.N.B.L.J. 41 at 41, 64 (defining crown-aboriginal treaties raise "historical rather than legal questions" and "[u]nless the courts can find a way to breathe new life into old treaties, the treaties of Boston and Annapolis are interesting historical artefacts but they lack the evidentiary support they would need to be viewed as valid treaties today"). On "upstreaming," see D.K. Richter, "Up the Cultural Stream: Three Recent Works in Iroquois Studies" (1985) 32 *Ethnohistory* 636 at 365 [hereinafter "Up the Cultural Stream"]. This method can be applied to treaty interpretation: W.C. Wicken, "'Heard It From Our Grandfathers': Mi'kmaq Treaty Traditions and the *Syliboy* Case of 1928" (1995) 44 U.N.B.L.J. 145 at 154-55.

55. B. Trigger, "Ethnohistory: The Unfinished Edifice" (1986) 33 *Ethnohistory* 253 at 263 [hereinafter "Unfinished Edifice"]. For general accounts of non-native historical methodology, see e.g., R.G. Collingwood, *The Idea of History* (Oxford: Oxford University Press, 1946); E.H. Carr, *What is History?* (New York: Random House, 1961); E. Hobsbawm, *On History* (London: Abacus, 1997), and on ethnohistorical method in particular, see J. Axtell, "The Ethnohistory of Native America" in D.L. Fixico, ed., *Rethinking American Indian History* (Albuquerque: University of New Mexico Press, 1997) at 11-27.

56. "Unfinished Edifice", *ibid.* at 263. Also B. Trigger, "Ethnohistory: Problems and Prospects" (1982) 29 *Ethnohistory* 1 at 3 [hereinafter "Problems and Prospects"] and R. Thorton, "Institutional and Intellectual Histories of Native American Studies" in R. Thorton, ed., *Studying Native America: Problems and Prospects* (Madison: University of Wisconsin Press, 1998) 79 at 93.

57. "Problems and Prospects", *ibid.* at 6-7. For the holistic native approach to history see e.g. *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol. 1 (Ottawa: Supply and Services Canada, 1996) at 32-36. For contrary approaches to Trigger that emphasize oral history and native perspective, see A.C. Wilson, "Power of the Spoken Word: Native Oral Traditions in American Indian History" in Fixico, *supra* note 55 at 101-116 and C. Martin, "The Metaphysics of Writing Indian-White History" in C. Martin, ed., *The American Indian and the Problem of History* (Oxford: Oxford University Press, 1987) at 27-34.

Furthermore, Trigger argues, native oral histories should not be used for partisan or political purposes:

[Historians must avoid] the temptation to twist the findings of ethnohistorical research to suit the aims of political movements....Public wrongs cannot be ...excused merely by rewriting history...If professional historians allow a past-as-wished-for to subvert their endeavour to understand the past as it really was, they will fail to provide a valid, and hence a useful, guide to understanding past relations between Euroamericans and native peoples.⁵⁸

For ethnohistorians like Fenton and Trigger, then, the entire project of (re)constructing shared treaty-meanings through the (re)interpretation of both aboriginal oral histories and non-aboriginal written sources, with a view to identifying a legal treaty meaning for the resolution of modern-day litigation, may be inappropriate.

In fact, the founding of the discipline of ethnohistory in the 1940s and the proliferation of historical analyses of native societies in North America beginning in the 1970s were largely responses by historians to modern aboriginal political and legal claims.⁵⁹ Even so, the views of Fenton and Trigger contrast sharply with those of legal scholars like Robert Williams Jr. and James Youngblood Henderson. Williams presents native oral traditions and customs concerning treaties of the colonial era (including the covenant chain) as an independent and meaningful source of legal principles that ought to be regarded as relevant to the resolution of modern legal problems. Says Williams:

[A]s a legal scholar, I concede that I have immediate concerns in mind when I examine the history of legal thought in the European conquest of the Indian in America....[T]he reemergence of the Two Row Wampum ... is not an isolated story of the continuing relevance of tribal traditions in the contemporary indigenous rights movement....⁶⁰

For Henderson old treaties must be read in light of aboriginal languages, oral traditions, and legal orders existing when treaties were made if they are to be interpreted properly "to promote the new constitutional order of Canada."⁶¹ Williams and Henderson are clearly engaged in a very

58. "Problems and Prospects", *supra* note 56 at 8. For similar statements, see Hobsbawm, *supra* note 55 at 10, W.E. Washburn, "Distinguishing History from Moral Philosophy and Public Advocacy" in Martin, *ibid.* at 91-97, and R. White, "Using the Past: History and Native American Studies" in Thorton, *supra* note 56 at 236.

59. M.L. Meyer & K. Lee Klein, "Native American Studies and the End of Ethnohistory" in Thorton, *supra* note 56, 182-216 at 185, and K. Coates, "Writing First Nations into Canadian History: A Review of Recent Scholarly Work" (2000) 81 Can. Hist. Rev. 99 at 99.

60. Williams, Jr., *supra* note 7 at 4-5.

61 "Interpreting *Sui Generis* Treaties", *supra* note 8 at 64-74, 95. For another legal scholar adopting this approach see B. Wildsmith, "Treaty Responsibilities: A Co-Relational Model" (1992) 26 U.B.C. L. Rev. 324 at 326.

different interpretative project than Fenton and Trigger; it appears as though serious tensions exist between historical and legal interpretations of old treaties. Still, these differences should not be overemphasized. Some historians argue that historical scholarship must be crafted with an eye on its modern legal implications for aboriginal peoples.⁶² Furthermore, both forms of interpretation noted above purport to be premised upon genuine fidelity to historical materials and commitments. Indeed, Williams' and Henderson's legal arguments would collapse without the historical foundations they build. It is therefore important to be precise about the points at which the historian's and the lawyer's fidelity to historical materials and commitments may take different interpretative forms.

The most important difference between historical and legal interpretative method is that between reading law historically, as empirical fact, and reading it legally, as part of a normative system.⁶³ For example, a legal historian examining nineteenth-century case law might conclude that, as an empirical fact, aboriginal title was not then acknowledged at common law in Canada, but a lawyer today would have to conclude that the common law in Canada does now, and *always has*, acknowledged aboriginal title.⁶⁴ Similarly, a legal historian might conclude that it was the original intent of the framers of the *British North America Act, 1867* to divide legislative power in Canada exclusively between provincial and federal legislatures, but a lawyer today might conclude that the *BNA Act* does not, and *never did*, affect the inherent legislative powers enjoyed by First Nations.⁶⁵ These legal arguments concerning common law and constitutional meanings do not ignore empirical-historical statements about the law; on the contrary, their success as legal arguments depends in part upon demonstrating that the empirical statements of law identified by legal historians are, *and were*, wrong according to the relevant normative legal standard. From a legal perspective, however, the relevant normative standard is an amalgam of historic commitments interpreted today with a view to the coherence - or, as Dworkin would say, the "integrity" - of the present legal order. Cases and constitutions, even if

62. See e.g. R. Brownlie and M. Kelm, "Desperately Seeking Absolution: Native Agency as Colonialist Alibi?" (1994) 75 Can. Hist. Rev. 543.

63. E.g. J. Finnis, "The Fairy Tale's Moral" (1998) 115 L.Q. Rev. 170 at 170.

64. *St. Catherine Milling & Lumber Co. v. The Queen* (1888), 14 App. Cas. 46 (P.C.); *Calder v. British Columbia*, [1973] S.C.R. 313; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 [hereinafter *Delgamuukw*].

65. See e.g., the interpretation of the *British North America Act, 1867* [now *Constitution Act, 1867*] U.K. 30 & 31 Vict., c. 3 in *Campbell v. British Columbia (Attorney General)*, [2000] B.C.J. No. 1524 (Q.L.) (B.C.S.C.) [hereinafter *Campbell*].

first posited centuries ago, are not historical artifacts but present-day norms affecting living people, and legal reasoning about their meanings is (unlike historical interpretation) a form of "practical reasoning."⁶⁶

Treaties could be read in Canadian law like cases or constitutions, the meanings of which shift with normative context regardless of the "original intent" of the parties or "framers." Indeed, in relation to certain other aboriginal rights, the Supreme Court of Canada has rejected even this form of historically constraining legal interpretation and has fashioned new rules from first principles in a wholly modern context.⁶⁷ However, in Canadian law at present treaties are not interpreted as mere platforms upon which modern rights can be judicially constructed from first principles; nor are they treated, at present, like cases or constitutions as "living trees" independent of "original intent." Instead, they are treated in Canadian law as a species of contract, or agreement, for which the original intent of the parties is not only relevant but central to the identification of legal meaning.⁶⁸ Although the historic treaty right, once found, can be exercised in a modern context (e.g., a right to fish for "necessaries" is, today, a right to fish for a "moderate livelihood"),⁶⁹ the inquiry purports to be primarily an historical one. While courts do not usually rely upon historical evidence presented by expert witnesses when interpreting old cases or constitutional provisions, since they are laws not facts, courts must consider such evidence when interpreting old treaties; shared treaty-meanings appear to be treated as facts and not laws.

In short, the principal distinction between legal and historical interpretative technique appears not to be relevant to the identification of shared treaty-meanings. Both judges and historians appear to be operating in the same interpretative dimension, both asking and seeking to answer the same sort of factual question by reference to the same sort of empirical data. Even so, there are a number of reasons why judges and historians may answer this question differently. Four reasons for this difference in approach may be identified in particular, two of which are practical and two of which are theoretical in nature.

66. Legal reasoning is a form of practical reasoning insofar as it involves identification of reasons for acting (or norms): J. Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980) at 15; R. Dworkin, *Law's Empire* (Cambridge: Belknap Press, 1987) at 13-14 (and on law as "integrity" see c. 7).

67. They have done so in relation to certain sorts of non-treaty aboriginal rights: "Golden Thread of Continuity", *supra* note 52.

68. "Interpreting *Sui Generis* Treaties", *supra* note 8 at 72.

69. *Marshall*, *supra* note 6 at 501-502.

First, a judge unfamiliar with historical issues may misunderstand documents and expert testimony and therefore define the shared meaning of a treaty differently than an historian due to a genuine mistake about the empirical data.⁷⁰ Second, a judge may understand the historical evidence but that evidence may contain gaps that historians are unwilling to fill by inference; in such cases, the judge may, in order to render judgment in the case, make a decision about *what happened* that an historian concerned about professional integrity could not make.⁷¹ Third, judges and non-native historians may approach native oral history differently. A non-native ethnohistorian like Trigger may refuse to weigh oral history equally with other historical data unless it is corroborated by other data, but Canadian law may now require that judges give oral history equal weight with other sources, *especially* when it is not corroborated by other sources.⁷²

For the purposes of this analysis, these three examples of how judicial and historical interpretations of shared treaty-meanings may differ are not important. The first issue can be assumed not to arise. As will be seen in Part II below, the second issue is also immaterial: while more evidence would be useful in identifying perspectives on the chain, it is fair to say that there is no gap in evidence about how parties viewed the covenant chain which historians would refuse to fill, just conflict between those views. Finally, the question of oral history – which presents fascinating and complex theoretical problems for law and history – may not be a significant source of tension between legal and historical interpretations of the covenant chain, for – as Part II below suggests – aboriginal oral traditions concerning its meaning were manifested in the written record. This is not to say that oral histories regarding the covenant chain are unimportant. Indeed, it is worth emphasizing that although ethnohistorians credit Francis Jennings with rediscovering and rescuing from obscurity the covenant chain in his 1984 book, *The Ambiguous Iroquois Empire: The Covenant Chain Confederation of Indian Tribes with English Colo-*

70. Thus, the Crown's expert historian in *Marshall*, *supra* note 6, Professor Stephen Patterson, argues that the Supreme Court misunderstood the empirical data by inferring treaty terms for one aboriginal community from a treaty made with another aboriginal community: Patterson, "The *Marshall* Decision As Seen By An 'Expert Witness'" ("1999 Constitutional Cases: An Analysis of the 1999 Constitutional Decisions of the Supreme Court of Canada", Osgoode Hall Law School Professional Development Programme, 7 April 2000) [unpublished]. See also W.C. Wicken, "The Mi'kmaq and Wuastukwiuk Treaties" (1994) 43 U.N.B.L.J. 241 at 241 [hereinafter "The Mi'kmaq and Wuastukwiuk Treaties"].

71. D. Bourgeois, "The Role of the Historian in the Litigation Process" (1986) 67 Can. His. Rev. 195 at 197; G.M. Dickson & R.D. Gidney, "History and Advocacy: Some Reflections on the Historian's Role in Litigation" (1987) 68 Can. His. Rev. 576 at 580-581; *Marshall*, *supra* note 6 at para. 37.

72. *Delgamuukw*, *supra* note 64 at paras. 84-87. On Trigger's views, see *supra* notes 55-58.

nies,⁷³ for the Haudenosaunee the covenant chain was hardly in need of rescuing: it has *always* been central to their oral traditions and to their claims against non-native authorities.⁷⁴ The point is simply that the identification of a shared meaning of sovereignty under the covenant chain is probably not an example of a dispute about treaty meaning in which having to give aboriginal oral history equal weight will alter judicial interpretation from historical interpretation. In light of the manner in which aboriginal traditions were clearly reflected within the written record even an ethnohistorian like Trigger who seems wary about oral history would still have to give those traditions full evidentiary weight.

Even if none of these three reasons for differences between legal and historical interpretations of shared treaty-meanings arise, there may be a fourth reason, which I explore in more detail in Part III below. For now it is sufficient to observe that even if the law regards treaty meanings as historical facts to be proven by empirical data, it must also account for the existence of these historical facts as historical norms. As such they cannot be defined without a form of normative or practical reasoning. A reason why legal and historical interpretations of historical treaty-meanings may differ is that lawyers and historians may differ upon the extent to which treaty meanings can *now* be characterized as both historical facts and historical norms. To demonstrate how evolving definitions of the covenant chain help illustrate this point, it is necessary first to consider the documentary record surrounding the covenant chain as it developed over time, seeking within it both British and aboriginal conceptions of its meaning.

II. *Re-Interpreting the Covenant Chain Through the Marshall Lens: Three Historical Periods Considered*

The following analysis considers British documentary sources of both a legal and political nature in an attempt to determine how the British conceived of their treaty relationship with aboriginal nations in the Great Lakes region, and whether these conceptions conflicted with or complemented native oral traditions concerning the covenant chain and the issue

73. *Ambiguous Iroquois Empire*, *supra* note 11. For assessments of Jennings's contribution in this respect see "Up the Cultural Stream", *supra* note 54 at 367; J.H. Merrell, "Review of *Ambiguous Iroquois Empire*" (1985) 71 J. of Am. Hist. 853.

74. This point is confirmed by Part II below in relation to the seventeenth to nineteenth centuries. In the twentieth century, the covenant chain was the basis of two important submissions, made in 1924 and 1983 respectively: "Appeal of the 'Six Nations' to the League" in *League of Nations Official Journal* (June, 1924) vol. 6 at 829, and "Statement of the Haudenosaunee", *supra* note 19.

of sovereignty. The covenant chain was a dynamic, on-going treaty relationship, and therefore I have assumed that the identification of its shared meaning requires consideration of how its meaning developed over time.⁷⁵ For each of the three historical periods examined, statements by political actors are considered first, followed by a brief consideration of legal principles that might have been relevant to the determination of the covenant chain's British legal status during the historical period in question.

1. 1763-1765: *The Assertion of British Sovereignty over Canada*

Sir William Johnson was the Superintendent General of the imperial Indian Department (Northern District) from the mid-1750s until his death in 1774.⁷⁶ His nephew, Guy Johnson, and then his son Sir John Johnson, succeeded him in office, the latter Johnson occupying the position of Superintendent General of the Indian Department for Upper and Lower Canada until 1828.⁷⁷ William Johnson lived in close proximity to the Mohawks in the colony of New York, and he understood (as well as any eighteenth-century British official could) their language, politics, customs and culture. He was accepted in both non-native and native worlds, earning a baronetcy from George II and the Mohawk name *Warraghiyagey* from the Six Nations. Johnson's second wife, Molly Brant (Joseph Brant's sister) was Mohawk, but like other powerful Europeans of the time, Johnson was actively involved in legally and morally questionable speculation involving aboriginal lands.⁷⁸

Johnson's contribution to Indian policy in British North America was profound. It has been said that Johnson's views formed "the foundation" of that policy,⁷⁹ that he "spoke for England" in Indian matters,⁸⁰ and that he was "the most critical figure" in Indian policy development.⁸¹ His

75. It must be acknowledged that, as G. Christie, "Justifying Principles of Treaty Interpretation" (2000) 26 Queen's L.J. 143 at 152-57, observes, Canadian courts have tended to interpret treaties as one-off surrenders or submissions rather than as constitutional frameworks regulating on-going relations.

76. See generally, F.W. Seymour, *Lords of the Valley: Sir William Johnson and his Mohawk Brothers* (London: Longmans, Green & Co., 1930); J.T. Flexner, *Mohawk Baronet: Sir William Johnson of New York* (New York: Harper, 1959); Allen, *supra* note 2 at 22-30.

77. C. Calloway, *Crown and Calumet: British-Indian Relations, 1783-1815* (Norman: University of Oklahoma Press, 1987) at 52-53.

78. Kelsay, *supra* note 2 at 68-70.

79. D.C. Scott, "Indian Affairs, 1763-1841" in A. Shortt et al., eds., *Canada and Its Provinces* (Toronto: Glasgow, Brook & Co., 1914-1917) vol. 3 at 698.

80. R.S. Allen, *A History of the British Indian Department in North America (1755-1830)* (Ottawa: National Historic Sites Service, Department of Indian Affairs and Northern Development, 1971) at 14.

81. *The Middle Ground*, *supra* note 23 at 223.

opinions concerning the legal status of aboriginal peoples and their land rights correspond closely with the structure of American law as it was later developed by the United States Supreme Court in the classic decisions of the nineteenth century on Indian title and self-government. Marshall C.J.'s conclusions in *Johnson v. M'Intosh*⁸² and *Worcester v. Georgia*⁸³ – that discovery gave Britain title over North America as against other European states but Indian nations retained legal rights to land and self-government until divested of them by conquest or treaty – judicially confirmed conclusions that Johnson had already derived from his own understanding of British imperial constitutional law. Johnson informed the Attorney General for New York in 1765 that (in his view) the King's "Dominion" did not extend over aboriginal peoples "to whom the [English] Laws have never Extended" and whose "native rights" had not been purchased or taken by conquest.⁸⁴ Johnson argued that "our rights of Soil Extend no farther than they are actually purchased by Consent of the Natives, "tho" in a political Sense our Claims are much more Extensive...[since] our Kings...& their Adventurers took possession of several places in the Language of the times by Setting up Crosses etc." These claims based upon discovery and possession were "kept up by European powers to prevent the Encroachments or pretensions of each other" and it was not "consistent with the Justice of our Constitution" to extend them further, for the "right of Soil always remained to the Ind[ian]s."⁸⁵ Johnson represented the crown at the key treaty councils of the eighteenth century; indeed, according to Fenton, it was Johnson who was responsible for re-discovering, mending and re-defining the covenant chain after it had lapsed in the mid-eighteenth century.⁸⁶ If the effect of *Marshall* is to require a contextual reading of these treaties, Johnson's many reports and letters must form a principal documentary source from which that context is reconstructed.⁸⁷

Johnson's position on the legal status of aboriginal nations under the covenant chain was articulated in correspondence written in the aftermath of the British conquest of New France. In September of 1763, Johnson informed the Lords of Trade that he had met "to renew the

82. 21 U.S. (8 Wheat.) 543 (1823).

83. 31 U.S. (6 Pet.) 515 (1832).

84. Sir William Johnson to J.T. Kempe, Att. Gen. New York, 7 September 1765, in J. Sullivan, ed., *The Papers of Sir William Johnson* (Albany: State University of New York, 1921-1965) vol. 11 at 923-27 [hereinafter *Johnson Papers*].

85. *Ibid.*

86. *Great Law and the Longhouse*, *supra* note 13 at 450, 468-69, 512.

87. The Supreme Court of Canada relied upon Johnson's correspondence when construing a 1760 British-Huron treaty in *Sioui*, *supra* note 8 at 1053-59.

Covenant Chain” with the Six Nations and Caughnawaga (Kahnawake) Mohawks, and that he felt it necessary to remind their Lordships that hostilities might result unless “erroneous accounts” of treaties like this one were not corrected.⁸⁸ The error, according to Johnson, was that the Indians had “been represented” as having submitted to the crown as “subjects” when “the very word would have startled them, had it been ever pronounced by any Interpreter....”⁸⁹ Johnson would have occasion in subsequent months to reiterate this argument in more detail.

In October of 1763 the imperial crown-in-council enacted the *Royal Proclamation of 1763*.⁹⁰ The *Proclamation* was omnibus legislation designed to address simultaneously the organization of various colonial constitutions in territories acquired from France as well as the land rights of aboriginal peoples in both new and old colonial territories. The *Proclamation* acknowledged aboriginal title to land in British North America, prohibited settlement in the interior of the continent, and confirmed rules governing the purchase by the crown of Indian lands located in colonies where settlement was permitted.⁹¹ Although these provisions were welcomed by Johnson, the *Proclamation* also contained assertions of crown sovereignty that appeared inconsistent with Johnson’s interpretation of the covenant chain: it stated that unceded Indian lands were reserved to Indians under “our Sovereignty, Dominion and Protection.” These words would later lead the Supreme Court of Canada to conclude in *Sparrow* that there was never any doubt that the crown had sovereignty over the territories to which the *Proclamation* applied.⁹²

But was crown sovereignty as expressed by the *Proclamation* inconsistent with some on-going aboriginal sovereignty in Canada? In Johnson’s view it was not. Although he did not offer a theoretical reconciliation of crown and native sovereignty, Johnson’s actions and statements suggest that he considered such reconciliation not only possible but legally necessary. This reconciliation may have derived from Johnson’s view of the crown-aboriginal treaty relationship, for – as John Borrows has demonstrated and the Ontario Court of Appeal has recently accepted – he took elaborate steps to ensure that the *Proclamation* was incorporated

88. Sir William Johnson to Lords of Trade, 25 September 1763, in *Doc. Rel. Col. Hist. N.Y.*, *supra* note 1, vol. 7 at 559.

89. *Ibid.*

90. Reprinted in R.S.C. 1985, App. II. No. 1.

91. One of the best judicial accounts of the *Proclamation* is that by A. Campbell J. in *Chippewas of Sarnia Band v. Canada (Attorney General)*, [1999] O.J. No. 1406 (QL) (Sup. Ct.) at paras. 241-335; *rev’d in part* (2000), 51 O.R. (3d) 641 (C.A.) [hereinafter *Chippewas of Sarnia*].

92. *R. v. Sparrow*, [1990] 1 S.C.R. 1075, per Dickson C.J and LaForest J. for the Court at 1103.

into the existing covenant chain between the crown and aboriginal nations of the Great Lakes region.⁹³ In July and August of 1764, a huge number of aboriginal nations, including the Six Nations, the "Indians of Canada" (including the Kahnawake and Akwesasne Mohawks), and the "western Indians" (including the Ojibways from "the back of Toronto on the North and East sides of Lake Huron," the Mississaugas of the north shore of Lake Ontario, the Huron and Ottawa of the Detroit region) met in council with Johnson at Niagara, and there the "great Covenant Chain" was renewed and brightened, the terms of the *Proclamation* having first been formally explained to and accepted by native delegates.⁹⁴ The terms agreed upon at this treaty conference formed – and maybe still form – the legal foundation for crown-aboriginal relations in Canada. But what were the terms of this treaty? Did they reflect the principles of the *gus-wen-tah*? Or, did the incorporation of the *Proclamation* into the covenant chain mean that Indian nations recognized crown sovereignty and, in so doing, gave up their own?

Writing to the imperial ministry just a few months after the covenant chain and the *Proclamation* were confirmed at Niagara, Johnson stated: "the Six Nations, Western Indians, ettc, having never been conquered, either by the English or French, nor subject to the [English or French] Laws, consider themselves as a free people...."⁹⁵ Aboriginal attitudes had not been affected by the legal phraseology adopted in the *Proclamation*, and neither had Johnson's. Thus, Johnson was shocked when, a few months later, he saw the written text of a treaty made in his absence at Detroit in September 1764, between Colonel J. Bradstreet on behalf of the crown and a number of these "Western Nations," including the Mississauga of the Toronto area.⁹⁶ The written text contained an uncompromising

93. Borrows, *supra* note 16 at 161 (the Proclamation "became a treaty at Niagara"). Borrows' conclusions were recently accepted by the Ontario Court of Appeal in *Chippewas of Sarnia*, *supra* note 91 at paras. 54-56.

94. Treaty of Niagara, 17 July to 4 August 1764, in *Johnson Papers*, *supra* note 84, vol. 6 at 202, 278-307. See "Wampum at Niagara", *supra* note 16 and *Great Law and the Longhouse*, *supra* note 13 at 529.

95. Sir William Johnson to Lords of Trade, 8 October 1764, enclosing "Sentiments, Remarks, and additions humbly offered to the Lords Commissrs for Trade and Plantations, on their plan for the future management of Indian Affairs," in *Doc. Re. Col. Hist. N.Y.*, *supra* note 1, vol. 7, 661 at 665.

96. "Congress with the Western Nations," Detroit, 7-10 September 1764, in *Johnson Papers*, *supra* note 84, vol. 4 at 526-28. Parmenter, *supra* note 16 at 632 observes that Bradstreet was completely ignorant of, or wilfully subverted, customary Indian council protocol, and his "reckless diplomacy" caused considerable "uproar."

assertion of British sovereignty over native signatories. The first article stated:

[Y]ou are the Subjects and Children of ... George the third of Great Britain...and he has ...Sovereignty Over all and every part of this Coun[try]...[in as] full and as ample a manner as in any part of his...Dominions whatever....⁹⁷

To Johnson it was inconceivable that this written text reflected accurately the agreement reached orally at Detroit. So confident was he in this conclusion that he proceeded to write letters of clarification and warning to both the imperial government in London and civil and military authorities in North America. Johnson's often-quoted letter to the Lords of Trade, dated October 30, 1764, indicates both his understanding of the covenant-chain treaty he had just negotiated at Niagara and the reasons why the subsequent Bradstreet treaty text must have been inaccurate:

I have just received from Genl. Gage a copy of a Treaty lately made at Detroit by Coll: Bradstreet with the Hurons and some Ottowaes, & Missisagaes; these people had subscribed to a Treaty with me at Niagara in August last, but by the present Treaty I find, they make expressions of subjection, which must either have arisen from the ignorance of the Interpreter, or from some other Mistake; for I am well convinced, they never mean or intend, any thing like it, and that they can not be brought under our Laws, for some Centuries...I am impatient to hear the exact particulars of the whole transaction, and I dread its consequences, as I recollect that some attempts towards Sovereignty not long ago, was one of the principle causes of all our troubles, and as I can see no motive for proposing to them terms, which if they attended to them, they most assuredly never meant to observe....⁹⁸

Johnson wrote to the Lords of Trade on the same subject on December 26, 1764, and again he was adamant that the written version of the agreement failed in a fundamental way to reflect the oral agreement reached in council:

That all this [*i.e.*, the actual treaty agreements reached with native nations] has been misrepresented, and put on another footing[,] can be fully proved by those who understood the words which *really* passed between the Coll. & the Indians. – That a Treaty was huddled up with some of the Nations at Detroit, on which occasion not a syllable was mentioned concerning Subjection or Dominion.⁹⁹

97. "Congress with the Western Nations", *ibid.*

98. Sir William Johnson to the Lords of Trade, 30 October 1764, in *Doc. Re. Col. Hist. N.Y.*, *supra* note 1, vol. 7, 670 at 674. Also quoted in *The Middle Ground*, *supra* note 23 at 294; Borrows, *supra* note 16 at 164 and L.I. Rotman, "Taking Aim at the Canons of Treaty Interpretation in Canadian Aboriginal Rights Jurisprudence" (1997) 46 U.N.B.L.J. 11 at 13 [hereinafter "Taking Aim"].

99. Sir William Johnson to Lords of Trade, 26 December 1764, in *Doc. Re. Col. Hist. N.Y.*, *supra* note 1, vol. 7 at 685.

Both Johnson, who had read the *Proclamation* to aboriginal nations at Niagara, and the Lords of Trade, who had helped draft it, knew that it purported to be a clear legislative expression of imperial will regarding the territories to which it applied.¹⁰⁰ It is unlikely that by his comments Johnson meant to challenge that legislative will. One can only assume that, in his mind, there was no inconsistency between accepting the general legislative assertion of crown sovereignty over territory and refusing to accept specific “attempts”¹⁰¹ at asserting sovereignty over aboriginal nations within that territory.

On October 31, 1764, Johnson wrote to the Commander in Chief of British forces in North America, General Thomas Gage. Though he described the terms of Bradstreet’s treaty as “extraordinary” he accepted that it was common “to Insinuate” that Indians considered themselves to be subjects.¹⁰² Perplexed by both the specific terms of Bradstreet’s treaty and general assumptions made about treaties, Johnson conducted a review of Indian Department papers hoping to find an explanation. His letter to Gage continued:

I have been Just looking into the Indian Records, were I find in the Minutes of 1751 that those who made ye Entry say, that Nine different Nations acknowledged themselves to be his Majestys Subjects, altho I sat at that Conference, made entrys of all the Transactions, in which there was not a Word mentioned, which could imply a Subjection....¹⁰³

To return to the images described at the outset of this essay, it would appear that the scribe in the ‘parlour’ and the scribe at the edge of the council fire were writing up the treaty in very different words. As Johnson had suspected, oral agreements were not being faithfully incorporated into official written treaty texts. But why not? Had British officials been genuinely confused by linguistic, legal and cultural differences and thereby prevented from transcribing oral treaty promises accurately? Or had officials intentionally read into native diplomatic rhetoric legal conclusions about sovereignty and subjection that grossly misrepresented aboriginal meanings? Johnson conceded to Gage that during peace negotiations following hostilities Indians were “apt to say many civil things...to please those with whom they transact Affairs....”¹⁰⁴ Indeed,

100. The Board of Trade correspondence concerning the drafting of the *Proclamation* is found at A. Shortt & A.G. Doughty, eds., *Documents Relative to the Constitutional History of Canada, 1759-1791* (Ottawa: King’s Printer, 1907) at 93-119.

101. *Supra* note 98.

102. Sir William Johnson to Thomas Gage, 31 October 1764, in *Johnson Papers*, *supra* note 84, vol. 11 at 394-96.

103. *Ibid.* at 395.

104. *Ibid.* at 394.

this was an aboriginal cultural trait that non-native observers of the time may have had some difficulty appreciating: as mentioned above, aboriginal nations adhered to customary rules of diplomatic protocol designed to achieve reconciliation through an oral, rhetorical form that was respectful, dignified, polite and metaphorical.¹⁰⁵ However, these customary forms of diplomatic exchange were, understandably, potential sources of interpretative confusion. According to Johnson, “no Nation of Indians have any word which can express, or convey the Idea of Subjection,” but they often acknowledge the British King to be “our Father” and pledge to “hold him fast by the hand” and do “w[ha]t he desires” and “many such like words.”¹⁰⁶ In the course of transforming these oral expressions into terminology deemed by officials to be suitable for a British legal instrument, European assumptions about sovereignty, statehood, subjection and allegiance prevailed and the error was made. Said Johnson, “our People too readily adopt & insert a Word very different in signification, and never intended by the Indians....”¹⁰⁷

The eagerness with which officials assumed native subjection to crown sovereignty may have been the result of innocent misunderstanding. Writing in 1727, Colden asserted that treaty minutes “are genuine and truly related, as delivered by the sworn Interpreters, of whom Truth only is required.”¹⁰⁸ However, he went on to make the following critical concessions:

...I must own, that I suspect our Interpreters may not have done Justice to the Indian Eloquence. For the Indians having but few Words, and few complex Ideas, use many Metaphors in their Discourse, which interpreted by an unskillful Tongue, may appear mean, and strike our Imagination faintly.¹⁰⁹

Colden noted he was “disappointed” by the interpretation of treaty proceedings, for lengthy speeches that “pleased and moved” listeners and produced “full Force on the Imagination” were often translated “by one single Sentence,” the interpreter being content to express “the Sense” of the speech “in as few Words as it could be expressed.”¹¹⁰

105. E.g., Guy Johnson, Depty. Supt. Ind. Dept., to Arthur Lee, 28 March 1772, in *Johnson Papers*, *supra* note 84, vol. 12, 950 at 952 (“at all Treaties . . . Deliberations are Conducted with Extraordinary regularity and Decorum. They never interrupt him that speaks, & very rarely use any harsh Language whatever their thoughts are . . .”). See generally, “Structure, Continuity and Change”, *supra* note 14 at 16.

106. Johnson to Gage, 31 October 1764, in *Johnson Papers*, *supra* note 84, vol. 11 at 395. On the father-child metaphor, see *supra* note 23.

107. *Ibid.*

108. Colden, *supra* note 28, pt. 1 at xiii.

109. *Ibid.*

110. *Ibid.*

Misunderstandings also arose from deliberate misrepresentation. In the French-British struggle for continental supremacy, Indian treaties were diplomatic weapons: they represented paper armies by which claims of territorial sovereignty could be extended far beyond areas over which *de facto* European control was possible. If treaties evidenced that the Six Nations were subjects, then (so it was argued) Six Nations' conquests of interior territories were, in law, British conquests.¹¹¹ The Lords of Trade could not have been more open about the surreptitious nature of written treaty texts when, in the course of asking for authority to make a treaty with a delegation of Cherokee chiefs similar to the Five Nations covenant chain, they observed:

We conceive it is at present in our power to put the Cherikees upon the same footing [as the Five Nations] ... To which may be added that in such a Treaty, *words may easily be inserted acknowledging their dependence upon the Crown of Great Britain, which agreement remaining upon record in our Office, would upon future disputes with any European Nation, greatly strengthen our title in those parts*, even to all the lands which these people now possess. ... As this treaty is to be only with savages, we presume Her Majesty's Orders signified to us by your Grace in a letter [as opposed to letters patent] may be a sufficient power for us to act by upon this occasion.¹¹²

If this was the broader political context within which treaties were made, it is not surprising that translators were inclined to "insert" words of subjection and sovereignty in place of aboriginal covenant-chain metaphors. As Johnson insisted, the claim that Indians became subjects of the crown by treaty was a claim made "for *our* Interest ... when we were squabbling with the French about Territory" and it was a "very gross Mistake" to conclude that they had, in reality, submitted to the crown by these treaties.¹¹³ Like Johnson, Thomas Pownall contended in his 1765

111. Sir William Johnson to Thomas Gage, 7 October 1772, in *Johnson Papers*, *supra* note 84, vol. 12 at 994-95: "It is asserted as a general Principle that the Six Nations having conquered such and such Nations, their Territories belong to them, and the Six Nations being the Kings Subjects which by treaty they have acknowledged themselves to be, those Lands belong to the King."

112. Board of Trade to Duke of Newcastle (Secretary of State), 20 August 1730, in Public Record Office, *Calendar of State Papers, Colonial Series, Americas and West Indies*, Cecil Headlam, ed., (London: H.M. Stationers Office, 1880-1969), 1730, No. 404 [emphasis added].

113. Johnson to Gage, 7 October 1772, in *Johnson Papers*, *supra* note 84, vol. 12 at 995 [emphasis added]. For a general discussion of how and why treaty records were edited and/or revised in ways inconsistent with oral transactions, see *Into the American Woods*, *supra* note 5 at 254, 412-13, n. 6.

book, *The Administration of the Colonies* that the “real spirit” of treaties should be honoured and the “useless claim of dominion” over Indian nations abandoned.¹¹⁴

Johnson’s critique of the Bradstreet treaty reflected his sincere belief that written treaty texts misrepresented actual treaty agreements on the point of subjection and sovereignty. His reports represent a clear and concise account of the covenant chain that corroborates native oral traditions surrounding the *gus-wen-tah*. In short, both aboriginal signatories and the highest-ranking British official in the Indian Department accepted that there was a treaty right to native sovereignty within the territories of the Great Lakes region.

If the objective after *Marshall* is to seek a shared understanding of treaties beneath their written texts, then the material examined from this first historical period under consideration suggests that significant portions of the written texts may be wholly unreliable because the native understandings of the oral agreements reached were to the opposite effect. But in such circumstances, how can a shared view be identified which does not distort completely the intentions of one of the two parties to the agreements? Johnson’s voice on this matter may have been like the moral conscience of the British empire, reminding it of inconvenient truths that, if taken seriously at a higher policy level, would have frustrated grand designs of continental domination. Is it to this dimension of the multi-dimensional British understanding of the covenant chain that one must look to discover the true legal meaning of the treaty? Leonard Rotman argues that as the crown’s representative Johnson spoke for and bound the crown in treaty councils.¹¹⁵ This conclusion must be right. But even if it is, it is unclear whether it was Johnson or the ministers of the imperial crown in London who determined finally and authoritatively the imperial position as to what Johnson’s words meant. The dominant theory in British imperial thought as to the covenant chain’s meaning, at least when the imperial ministry discussed crown sovereignty in relation to other European states, was that it involved native submission as subjects. Johnson’s theory may have been a subordinate one, but in terms of its ability to capture the genuine meaning of oral agreements, it was no doubt closer to the mark. From this web of contradictory meanings and purposes, which is the one that forms the British side of the elusive shared understanding of the covenant chain that *Marshall* suggests we must seek?

114. Pownall, *supra* note 17 at 179-80.

115. “Taking Aim”, *supra* note 98 at 14-15.

Judicial statements from this time suggest that courts may not have been too concerned with these sorts of issues. On the one hand, crown-aboriginal treaties were regarded by then as constitutive of legal rights and duties. In *Mohegan Indians v. Connecticut* an appellate committee of the Privy Council rejected the argument of the government of Connecticut that the creation of an *ad hoc* tribunal by the imperial crown to determine a treaty-based claim by the Mohegan nation to land within the colony violated the colony's jurisdiction, stating: "it Appearing the Mohegan Indians are a Nation with whom frequent Treatys have been made, the Proper way of Determining the aforesaid Differences, is by Her Matys Royall Commission...."¹¹⁶ Clearly, the treaty had important legal effects in British imperial constitutional law: it limited (or it permitted the imperial crown to intervene to limit) the jurisdiction of Connecticut's courts and legislatures.

On the other hand, however, the *Mohegan* case suggests that the judicial focus would have been on *written* treaty texts. In a 1743 appellate judgment, upheld by the Privy Council in 1772, the judges "Carefully Considered and Inspected the Proofs & Exhibits relating to the Writing Exhibited in Court" observing in relation to one deed:

...the Marks of Uncas [the chief Mohegan sachem], and Poxon as Indian Witness thereto, appear by the Heavy bearing of the Hand on the Paper; and the Irregularity and Stiffness in the Turnings to be made by Persons not Accustomed to form regular Shapes or Figures, and are done in such Manner as is not easy for any Person to Imitate.¹¹⁷

Having determined that this "Writing is the Genuine Act and Deed of Said Uncas"¹¹⁸ the court proceeded to read it, and a long line of subsequent deeds and treaties, literally. The extreme care which was taken in examining these physical pieces of paper and the native signatories' "Marks" upon them contrasts sharply with the court's failure to address expressly the gist of the Mohegan claim that the real intent behind these deeds was that the colony held the disputed lands in trust for the Mohegan nation. The court likewise failed to acknowledge as problematic the fact that the native parties relied upon interpreters and could not read or write.

The court departed from this text-centred approach only once. The government of Connecticut acknowledged Mohegan rights to the disputed lands by accepting a surrender of certain of them in a 1681 treaty.

116. Quoted in "*Mohegan Indians v Connecticut*", *supra* note 53 at 814.

117. *Governour & Company of Connecticut & Mohgean Indians*, Judgment of 15 August 1743, PRO CO 5/1272: 209 at 209-210 (aff'd: Report of the Appellate Committee of the Privy Council, 19 December 1772, PRO PC 2/116: 513-15 and Order in Council, 15 January 1773, PRO PC 2/117: 10).

118. *Ibid.*

However the court decided that the colony might lawfully decide to appear to acknowledge Mohegan claims without “any Impeachment” of the colony’s “former Right” to the lands because the “Indians [were] a Barbarous People, not then Subject to the Regular Course of any Law, easily misled by misapprehensions, and as easily Provoked to violent mischievous Actions....”¹¹⁹ In other words, the textual recognition of rights was not legally meaningful in this one instance because the colonists, unbeknownst to the native party, never really meant to accept fully the legal implications of the text that they signed but rather were merely seeking to hold off a “barbarous” and potentially violent foe by giving the impression of acknowledging the validity of their land claim. In effect, the judges found that the government was not bound because when the agreement was reached it held its fingers crossed behind its back.

This consideration of eighteenth-century judicial approaches to crown-aboriginal treaty meanings illustrates another way in which “legal” and “historical” interpretations of old treaties may differ. After considering the above material, an historian today might conclude that in (British) law of the time aboriginal-crown treaties would not have incorporated the *shared understanding* of agreements but would have focused upon written texts (at least when they favoured the crown). This legal-historical conclusion may be accurate, but it is meaningless under the *Marshall* test. *Marshall* defines modern treaty meanings today by reference to actual treaty meanings at the time, not British judicial interpretations about treaties that were, or might have been, generated at that time.

2. 1783-1794: *The British Withdrawal From the American Mid-West*

Even if it is accepted that the covenant chain secured a treaty right to aboriginal sovereignty for the aboriginal nations of the Great Lakes region, it might be argued that subsequent constitutional developments abrogated, or at least severely modified, that right. Many of the Indian nations included in the 1764 Niagara covenant chain possessed territories that, by the *Royal Proclamation of 1763*, were expressly left outside the boundaries of any local colonial government or legal system. Once those territories were included within the limits of a British colony, and once English law and judicial jurisdiction were extended over these territories, could it still be said that a treaty right to aboriginal sovereignty existed? The first imperial legislative reform of the constitution of the Indian territory created by the *Proclamation* came with the *Quebec Act, 1774*.¹²⁰

119. *Ibid.* at 212.

120. 14 Geo. III, c. 83 (Imp.).

By that Act, the boundaries of the colony of Quebec were extended over the territory as far south as the Ohio River, including all of what is now southern Ontario and the mid-western American states. Thereafter British courts began sitting in Detroit and some effort was made to bring British justice (English criminal law and French-Canadian civil law) to this frontier.¹²¹ The pace of non-native settlement north of the Great Lakes quickened after 1783, when Britain lost its territories south of the Great Lakes to the newly-formed United States. By the *Constitutional Act, 1791*, what was left of Quebec was divided into Upper and Lower Canada and English civil law was introduced into the upper province soon after.¹²² The various imperial and colonial statutes by which these constitutional changes were implemented are completely silent upon the question of aboriginal legal status.

The notion that within the same colonial territories the British recognized both aboriginal sovereignty secured by a covenant-chain treaty and crown sovereignty manifested by statutes of the imperial Parliament establishing local colonial governments, legislatures and court systems, is, to say the least, problematic in light of assumed principles of British constitutional law and theory. Still, as mentioned in Part I above, it might be argued that British conceptions of sovereignty were not initially as rigid as they would later become. It is beyond the scope of this paper to attempt to build a larger constitutional argument that explains how aboriginal and crown sovereignty might have coexisted within the colonies of Quebec or Upper and Lower Canada (let alone their successor constitutional units, the province of Canada and the dominion of Canada) in a manner consistent with British constitutional principles. However, the strength of any such argument will depend in part upon the proposition that the covenant-chain treaty relationship was regarded by both British officials and native leaders as surviving post-1774 constitutional developments. To that end, attention is now turned from Johnson's views to those of John Graves Simcoe, the first lieutenant governor of Upper Canada. In response to what may be called the "western post" crisis,¹²³

121. M.D. Walters, "The Extension of Colonial Criminal Jurisdiction over the Aboriginal Peoples of Upper Canada: Reconsidering the *Shawanakiskie* Case (1822-26), 46 U.T.L.J. 273 at 282-84 [hereinafter "Extension of Colonial Criminal Jurisdiction"].

122. *Constitutional Act, 1791*, 31 Geo. III, c. 31 (Imp.) created Upper and Lower Canada; the *Act to introduce English law, 1792*, 32 Geo. III, c. 1 (Upp. Can.), s. 3 repealed French-Canadian law and introduced English law on "property and civil rights" into Upper Canada; and *An act to establish a superior court of civil and criminal jurisdiction, 1794*, 34 Geo. III, c. 2 (Upp. Can) erected a Court of King's Bench for Upper Canada having "all such powers and authorities as by the law of England are incident to a superior court of civil and criminal jurisdiction."

123. See in general Calloway, *supra* note 77. Also Allen, *supra* note 2 at 55-86; *The Middle Ground*, *supra* note 23 at 410, 434, and *Francis v. The Queen* [1956] S.C.R. 618, 3 D.L.R. (2d) 641, per Rand J. at 646.

Simcoe adopted and applied Johnson's interpretation of the covenant chain as determinative of aboriginal legal status in the Great Lakes region *after* its inclusion by imperial statute within the limits of a colonial government and legal system.

In 1783, Great Britain recognized the United States and ceded to it, *inter alia*, that part of the province of Quebec south of the Great Lakes.¹²⁴ The cession of this territory was made by the imperial ministry without much regard for practical realities in the region; indeed, local officials regarded it as a strategic blunder of monumental proportions.¹²⁵ The governor of Quebec, Frederick Haldimand, after informing aboriginal nations that their ally had just ceded their lands to their enemy, confessed: "I own that I was much embarrassed."¹²⁶ It was clear that, on the one hand, Britain could not surrender *de facto* control over this territory to the United States without provoking a war with Indian nations, but that, on the other hand, it could not assist its aboriginal allies in defending their territory from the Americans without renewal of war with the United States. Thus, between 1783 and 1794 Britain pursued two policies: it offered Indian nations normally resident in territories ceded to the United States grants of land in what remained of its territories north of the Great Lakes, and it refused to give up *de facto* control of posts in the ceded region south of the Great Lakes until Jay's Treaty in 1794.¹²⁷ This latter

124. Treaty of Paris, 1783, in Houston, *supra* note 40 at 267-70.

125. Brig.-Gen. A. Maclean to F. Haldimand, Gov. Que., 18 May 1783, in C.M. Johnston, ed., *The Valley of the Six Nations: A Collection of Documents on the Indian Lands of the Grand River* (Toronto: Champlain Society, 1964), 35 ("The Indians from the Surmises they have heard of the Boundaries, look upon our conduct to them as treacherous and Cruel; they told me they never could believe that our King could pretend to Cede to America What was not his own to give...."); Haldimand to T. Townsend, Sec. of State, 7 May 1783, PRO CO 42/44 at 120-21 ("My own anxiety at present arises from an apprehension of the effects which the Preliminaries will have upon the minds of our Indian Allies, who will consider themselves abandoned to the resentment of an ungenerous and implacable Enemy"). The decision not to protect native interests was made during a time of political instability in Britain, and may have been based upon hopes of a future Anglo-American reunion: Calloway, *supra* note 77 at 7-8.

126. Haldimand to Lord North, 2 June 1783 PRO CO 42/44 at 126.

127. A. Burt, *The Old Province of Quebec* (Toronto: Ryerson Press, 1933) at 336-37. Also, Lord Sydney to Brig. Genl. Henry Hope, 6 April 1786, in E.A. Cruikshank, ed., *Records of Niagara: A Collection of Documents Relating to the First Settlement* (Niagara-on-the-Lake: Niagara Historical Society, 1927-30) No. 39 at 87-88 ("if...the Indians should not accede to any Proposals that may be made to them by the American Deputies, or cannot be prevailed upon peacefully to accept the Asylum already directed to be offered to them, within the Province of Quebec, Our situation will in some degree become embarrassing. To afford them open and avowed Assistance, should Hostilities commence, must at all Events ... be avoided, but His Majesty's Ministers at the same time do not think it either consistent with justice or good policy entirely to abandon them ...").

policy was designed to give indirect support to Indian nations in the area in the hope that they could negotiate with the U.S. an independent Indian "barrier" state between the British and American borders.¹²⁸

With respect to the covenant chain and the question of sovereignty, the result was the converse of the diplomatic position of Britain adopted from the mid-seventeenth century to the mid-eighteenth century: *then* Britain portrayed Indian nations as subjects by treaty in order to support its westward expansion in the face of French opposition, but *now* it portrayed Indian nations as independent sovereigns by treaty in order to frustrate American claims as it prepared to withdraw from the American interior. Although Britain's portrayal of aboriginal legal status shifted from subject-hood to sovereignty, the legal basis for its portrayals was the same throughout: the covenant-chain treaties.

The British position is reflected in a series of dispatches and speeches made by Lieutenant-Governor Simcoe. In a 1792 dispatch to the Secretary of State for the Colonies, Henry Dundas, Simcoe described the Indian nations of the Great Lakes region as "Free Nations" and "Independent Nations," and he cited a 1763 dispatch from Johnson to show that aboriginal nations had allowed British settlement in their territories but "they never understood such Settlement as a Dominion."¹²⁹ According to Simcoe, "the Indian sense of their own Independency" was readily apparent from Johnson's reports of treaty councils with them.¹³⁰ For their part, the Americans conceded that their relationship with aboriginal nations within the territory was somewhat uncertain. Thomas Jefferson was said to have asserted that "the nature of the sovereignty of the United States was not yet precisely defined," but it held a "sort of Paramount Sovereignty" over the Indian nations and could therefore insist that all British activities in their lands cease.¹³¹ Simcoe rejected Jefferson's

128. H. Dundas, Sec of State, to J. Simcoe & A. Clarke, Lts. Govrs., 5 May 1792, PRO CO 42/316 at 58-59 ("the great object to be attended to is to secure such a Barrier against the American States by the intervention of the Indians ... as may render encroachments on either side very difficult..."). See generally Burt, *ibid.* at 341.

129. Simcoe to Dundas, 28 April 1792, in E.A. Cruikshank, ed., *The Correspondence of Lieut. Governor John Graves Simcoe, with Allied Documents relating to his Administration of the Government of Upper Canada* (Toronto: Ontario Historical Society, 1923) vol. 1, 137 at 140 [hereinafter *Simcoe Correspondence*], [emphasis added].

130. *Ibid.* Simcoe's acceptance of Johnson's position is confirmed by his frequent references to Johnson's reports to the Lords of Trade. See e.g., Simcoe to George Hammond, 21 January 1793, in *Simcoe Correspondence*, *supra* note 129, vol. 1 at 277-78: "I enclose for Your Excellency's perusal an Extract from Sir William Johnson's Letter to the Board of Trade, on which our System of Management of the Indians seems to me to have been expressly founded..."

131. George Hammond to Lord Grenville, 8 June 1792, in *Simcoe Correspondence*, *supra* note 129, vol. 5 at 14-17.

position: Jefferson's assertion of American sovereignty was unfounded because it was contrary to "the nature of the *Indian Sovereignty*...."¹³² This Indian right to sovereignty had been secured by treaties with the crown prior to the cession of territory to the U.S., and once the U.S. was made aware of these treaties it was compelled to acknowledge that the rights it had received from Britain were limited by the Indian sovereignty – or at least so Simcoe thought.¹³³ To this end, Simcoe encouraged Indian nations to request British mediation in their negotiations with the Americans on forming the "Barrier" state, so that the British could "assist them with the Copies of their former Treaties with the Indians, and Deeds of Cession, to Shew what the Claims of the British were before the grant of Independency [to the United States]...."¹³⁴ The Americans refused British offers of mediation, and so Simcoe delivered certain treaty documents to aboriginal nations directly. His view of their treaty relationship with the crown was revealed clearly during a council held at Niagara in 1793:

The Documents Records & Treaties between the British Governors – in former times and your wise Forefathers, of which in consequence of your request authentic copies are now transmitted to you, all establish the *Freedom & Independency* of Your Nations.

...

These authentic Papers will prove *that no King of Great Britain ever claimed absolute power or Sovereignty over any of your Lands or Territories that were not fairly sold or bestowed by Your ancestors at Public Treaties*. They will prove that your natural Independency has ever been preserved...that the Right resulting from such Independency have been *reciprocally and constantly acknowledged*....¹³⁵

Simcoe's line of reasoning is, of course, quite remarkable. Not only did he insist that Indian sovereignty existed in Quebec up until 1783, but that this sovereignty was secured to the Indian nations by their "former Treaties" with the crown. In other words, Simcoe thought that the

132. Simcoe to Alured Clarke, 20 August 1792, in *Simcoe Correspondence*, *supra* note 129, vol. 1 at 199-200 (emphasis added).

133. Simcoe to Alured Clarke, 1 April 1793, in *Simcoe Correspondence*, *supra* note 129, vol. 1 at 308-309: "I hope speedily to receive from the Supt. General's office every deed and document that shall be necessary to establish the *Indian Rights*, and I cannot but entertain a strong belief that the Indians will universally persist in those rights; that they will declare them to be unalienable without common consent, and that in consequence of their resolutions, Great Britain will nearly obtain that intermediate boundary which His Majesty's Ministers have in their contemplation".

134. Simcoe to Alexander McKee, Depty. Supt. Ind. Dept., 30 August 1792, in *Simcoe Correspondence*, *supra* note 129, vol. 1 at 207-208.

135. Speech of Col. Simcoe to the Western Indians, Navy Hall, Niagara, 22 June 1793, *Simcoe Correspondence*, *supra* note 129, vol. 1 at 363-65 (emphasis added).

covenant chain constituted a treaty right to aboriginal sovereignty within the boundaries of the British colony of Quebec. Simcoe's views were not those of a renegade official: they were expressed in dispatches to imperial ministers of the crown who, for their part, approved them.¹³⁶

Questions may be raised, however, about the value of Simcoe's views as part of the documentary context of the covenant-chain treaty. It might be argued that Simcoe was merely using aboriginal sovereignty as a diplomatic tool in order to diffuse an international political crisis, and that his assertions lacked genuine conviction about the inherent merits of the case. In other words, he could trumpet the treaty basis for Indian sovereignty loudly and forcefully because his purpose was simply to restrict the scope of American sovereignty in favour of Indian nations in territories that Britain had already ceded to the U.S. In response, it may be said that even though non-native states rarely have a self-interest in asserting native sovereignty within their own boundaries, it is not the case that when they do arguments made in favour of native sovereignty are for that reason alone discredited. Presumably the arguments have intrinsic merit or not on their own account. It is hard to say that Simcoe's assertion of a treaty right to Indian sovereignty was a self-interested representation of a state that had already divested itself of the relevant territory. Once it was accepted that Indian nations within that part of Quebec ceded to the Americans had treaty rights to sovereignty then it must also have been accepted that Indian nations in that part of Quebec not ceded to the Americans had the very same treaty rights to sovereignty—after all, these nations were parties to the same covenant-chain treaties.¹³⁷ Indeed, for

136. Simcoe summarized his view that aboriginal nations were "entirely independent" in Quebec prior to the surrender of territory by the crown to the United States in 1783, and therefore remained so afterwards: Simcoe to H. Dundas, Sec. State Colonies, 3 July 1794, in *Simcoe Correspondence*, *supra* note 129, vol. 2 at 303-304. Secretary of State for the Colonies, Lord Portland, responded that this letter "contains a very satisfactory Statement of the question as it stands between us and the American States, in respect of the Indian Country and shews on your part, a clear and distinct conception of the terms of the Treaty of 1783" which was "perfectly silent" on rights to "the Indian Country South of the Treaty line": Portland to Simcoe, 4 October 1794, PRO CO 42/318: 162 at 165-66. In response to the claim by the Americans that there was a "maxim that the affairs of the Indians within the boundary of any Nation exclusively belong to that Nation" Simcoe said he could not "admit so general and so novel a principle"; it was "never assumed by the British Nation" and it is incompatible with the "natural rights" and "acknowledged Independency" of aboriginal peoples in the Americas: Simcoe to G. Hammond, 20 October 1794, PRO CO 42/318 at 372-75. Again, this letter was expressly approved by the imperial ministry: Lord Portland to Simcoe, 8 January 1795, PRO CO 42/319 at 1-3.

137. See *e.g.*, the imperial ministry encouraged "Indians who are within His Majesty's Provinces" to join the negotiations between the United States and aboriginal nations south of the Great Lakes: H. Dundas to Simcoe, 4 July 1794, PRO CO 42/318 at 100-2.

Simcoe's argument to have credibility its substance had to be accepted by Britain as a valid statement of law vis-à-vis Indian nations remaining within its own provinces for it is unlikely that Britain could have persuaded the U.S. to respect crown-aboriginal treaty rights that the crown itself refused to acknowledge. In fact, in outlining his view of relations with "those Nations within the boundary line" of Upper Canada, Simcoe followed Johnson's model: the chiefs of the various nations would assemble annually at a "Council Fire" to be lit at a purpose-built "Council House" at the provincial capital. At such councils matters of common concern would be regulated according to "ancient forms and usages" that Johnson and aboriginal nations had, over the years, made customary.¹³⁸ Simcoe used the language of the brightened covenant chain: "all the Nations should be bound in one covenant" and receive "presents" accordingly.¹³⁹ An example of adherence to these principles was a British-Mississauga council at Toronto in 1796 at which the "great Belt" given by Johnson in the 1760s was brightened in order to avoid hostilities after a drunken soldier killed several Mississaugans.¹⁴⁰

In the first historical period examined, aboriginal and non-aboriginal understandings of the covenant chain seemed diametrically opposed, yet at a certain level the British empire (through Johnson) acknowledged the problems with its position. British imperial thought therefore contained dominant and subordinate theories about the covenant chain. In the second historical period, the previously subordinate approach gained ascendancy and took over the position as dominant paradigm. Aboriginal and non-aboriginal understandings of the covenant chain seemed, momentarily at least, to coalesce around a common position.

From the British judicial perspective, if crown-aboriginal treaties recognized aboriginal nations as internationally sovereign, the treaties

138. Simcoe to Lord Dorchester, 9 March 1795, in *Simcoe Correspondence*, *supra* note 129, vol. 3, 318 at 322.

139. *Ibid.*

140. Minutes of a Council with the Mississaugas, 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 Lieutenant Governor J.G. Simcoe while on Leave of Absence* (Toronto: Ontario Historical Society, 1932-36) vol. 1 at 44-45 [hereinafter *Russell Correspondence*].

would not have been justiciable in municipal courts.¹⁴¹ However, as long as the covenant chain was “brightened” properly then this would not have been a concern to aboriginal nations. Some legal support for the Simcoe approach exists. In 1796 the Attorney General for Upper Canada, John White, concluded that a freehold estate could not be granted to the Six Nations for their lands in Upper Canada because “the Six Nations do not acknowledge the Sovereignty of the King” and as they “call themselves Allies” they “are, I presume, to be considered as Aliens” and therefore (like all aliens) incapacitated by common law from holding freehold estates from the crown.¹⁴² Justice William Dummer Powell of the Upper Canada King’s Bench stated in a 1797 extra-judicial report on the Six Nations in Upper Canada:

The manners of the Indians required that the Tract assigned them should be in common[,] inalienable[,] and kept out of the view of our Municipal Laws, at least so long as they affected to consider themselves Allies, for this purpose a Council, a Treaty, a [wampum] Belt, was adequate; it was a Compact of one nation with another, to be governed by general rules and not by the provisions of the common Law of England ... [The] Government cannot wish to constrain them or to introduce our Laws among them as long as they continue a people apart¹⁴³

Although this statement seems to have gone unnoticed by modern Canadian courts, it is one of the more powerful assertions by a Canadian judge that aboriginal peoples within the boundaries of Canadian colonies occupied an independent national status governed by treaty. Both Powell and White approached the question of aboriginal legal status from the aboriginal perspective: *aboriginal peoples* considered the relationship as one of treaty alliance between two independent nations, and this perspective was considered determinative of the non-native response. Because these statements were not made in a judicial context it is hard to say whether they reflect law or merely political realities.¹⁴⁴ Nevertheless, it

141. Treaties “between two sovereigns” in other imperial contexts (e.g. India) were held to be beyond “municipal jurisdiction”: *Nabob of Carnatic v. East India Co.* [No. 2] (1793), 2 Ves. Jun. 56 at 60. Still, international treaties were regarded as creating norms binding upon the crown: the crown’s treaties with sovereign states created a “species of obligation” not cognisable in municipal courts: *Nabob of Carnatic v. East India Co.* [No. 1] (1791), 1 Ves. Jun. 371 at 390; Lord Mansfield went so far as to say that treaties by which the crown acquired sovereignty from other states were “sacred and inviolable, according to their true intent”: *Campbell v. Hall* (1774), Loft. 655 at 741.

142. John White, Att. Gen. Upp. Can., to Peter Russell, Adm. Can., 26 September 1796, in *Russell Correspondence*, *supra* note 140, vol. 1 at 46.

143. William Dummer Powell to Peter Russell, 3 January 1797, in *Russell Correspondence*, *supra* note 140, vol. 1 at 120-21.

144. I have discussed Powell’s views in more depth at “Extension of Colonial Criminal Jurisdiction”, *supra* note 121.

is fair to say that those judges and crown lawyers who had turned their minds to the issue tended to share Simcoe's general stance: they appeared to accept that the *shared understanding* of the crown-aboriginal treaty relationship was the relevant one, and that this understanding included acknowledgment of aboriginal sovereignty. For a tenuous moment at the end of the eighteenth-century – just as Upper Canada was about to be “settled” in earnest – legal and political, and aboriginal and non-aboriginal, conceptions of the covenant chain converged.

3. 1830-1860: *The End of Imperial Control over Indian Affairs and the Rusting of the Covenant Chain*

Over the next thirty to forty years political, social and demographic conditions changed dramatically and aboriginal nations in colonial Canada saw their position of power crumble in the face of non-native settlement and the consequent assault on traditional native hunting economies.¹⁴⁵ And yet, notwithstanding these contextual changes, the forms within which crown-aboriginal relations were conducted were resilient. The Indian Department in Upper and Lower Canada remained, as it was in Sir William Johnson's day, an imperial department constitutionally independent from local colonial governments and legislatures.¹⁴⁶ That department was headed by Sir William's son, Sir John Johnson, until 1828.¹⁴⁷ (The deputy superintendent for Upper Canada was, until 1826, William Claus, Sir William Johnson's grandson.)¹⁴⁸ Indian Department regulations directed Johnson the younger to conduct Indian affairs according to the principles developed by Johnson the elder.¹⁴⁹ These regulations stated that the Department's function was to keep up “a

145. For a general discussion of immigration and settlement, see G.M. Craig, *Upper Canada: Its Formative Years, 1784-1841* (Toronto: McClelland and Stewart, 1963) at 124-144.

146. *St. Catharines Milling and Lumber Co. v. The Queen* (1887), 13 S.C.R. 577, per Strong C.J. at 608 (Indian Department superintendents were appointed by the imperial crown to which they were “responsible directly ... thus superceding the Provincial Governments”). See also, Minute of the Executive Council of Canada (25 November 1845) NA RG1 Canada State Books, 1841-67, vol. E at 84: the Indian Department was “not one under the superintendence and management of the local authorities, but rather, one especially intrusted to Your Excellency [the governor] by Her Majesty, as a matter, the direct control of which belongs to Imperial Authority”.

147. Sir John Johnson held office from 1782 to 1828: F. Armstrong, *Handbook of Upper Canadian Chronology and Territorial Legislation* (London: University of Western Ontario, Lawson Memorial Library, 1967) at 19.

148. Allen, *supra* note 2 at 90-91.

149. F. Halidmand, Commander in Chief, Instructions to Sir John Johnson, Supt. Gen. Indian Dept., 6 February 1783, PRO CO 42/44:95, reissued by Lord Dorchester, Commander in Chief, as “Instructions for the Good Government of the Indian Department” (27 March 1787, NA RG 10 vol. 789, 67759-67765); reissued again in 1812 (PRO CO 42/146).

150. *Ibid.*

friendly intercourse and communication" with Indian nations in Canada who "consider themselves free and independent, and are in fact unacquainted with Control and Subordination."¹⁵⁰ "Ceremonies and external appearances" were to be given the "utmost attention" with "presents" given "at Public Conferences or Councils" in order "to secure the Attachment of their Chiefs and Heads of Tribes, by whose influence the Conduct of their People is entirely governed."¹⁵¹ The regulations adopt the diplomatic *forms* employed by Johnson the elder, but they also hint at a recurring theme in evolving British attitudes toward the *substance* of the crown-aboriginal treaty relationship: securing the treaty relationship was still contingent upon adherence to the customary brightening councils. However, the reference to *external appearances* may imply a lack of *internal commitment* to the substantive implications of the treaty process. A similar split between, on the one hand, the message about the treaty relationship conveyed to aboriginal nations through external appearances and, on the other hand, internal attitudes of crown ministers about the treaty relationship, was identified in relation to the first historical period examined above. In this last historical period, the split reappears and widens.

Sir John Johnson seemed to share his father's views of the treaty relationship. For example, when he was criticized in 1824 for not ordering the Kahnawake Mohawk chiefs to meet with their Indian Department agent, he stated:

On this subject I think it necessary to remind you, that the Indians have been always considered by His Majesty's Government as *Allies*, and not as *Vassels*; and under all the circumstances of the case, I could not feel myself Justified in *Commanding* the Chiefs to attend upon W: Doucet, when it is evidently his duty to attend upon them.¹⁵²

The minutes of a council held in December of 1817 between Claus and the Six Nations confirm that covenant-chain customs still prevailed.¹⁵³ An Onondaga speaker, through an interpreter, commenced by recalling "their Ancient Customs" and proceeded to perform the "Ceremony of Condolence." He then gave an account of the formation of the "Silver Chain" and how it had been preserved by the crown's Indian Department representatives "who have always conformed to our manners and Customs."¹⁵⁴ The speaker then made various submissions on matters of

151. *Ibid.*

152. Sir John Johnson, Supt. Genl. Indian Dept., to Col. Darling, Military Secty., 25 August 1824, NA RG 10 vol. 494, 30921-22 [emphasis in original].

153. Proceedings of a Council held at Fort George on the 3rd December 1817, NA RG 10 vol. 785, 181465-181474.

154. *Ibid.* 181465.

common concern, such as land rights, war pensions, prohibition of liquor sales and presents. He also alluded to their internal governance, noting that unlike soldiers they could not be subjected to “regularity” as “it is contrary to our Customs.” He observed as well that in relation to their “private Affairs” they had followed advice and remained internally united.¹⁵⁵ The next day, Claus replied. After salutations in the “customary form” and delivery of “Four Strings of Wampum,” he asserted that the “Assurances” made during transactions with “our fore fathers” had and will be maintained, as far as circumstances permit.¹⁵⁶ He addressed each of the submissions made the previous day, and closed by saying that he rejoiced at hearing of their internal unity; giving five strings of black and white wampum, he advised the “Warriors” to “attend to your Chiefs and Sachems.”¹⁵⁷

By the late 1820s, however, the objectives of British Indian policy were being re-defined, and when in 1828 the Indian Department passed out of the control of the Johnson family for the first time since the 1750s it was given a new mission: the “civilization” of aboriginal peoples.¹⁵⁸ Even so, at least some customary diplomatic forms survived and the annual present-giving councils continued. For aboriginal peoples, present giving ensured the supply of manufactured goods necessary for survival as their traditional economies eroded, but it also performed the constitutional function of brightening the covenant chain that was first established in 1759-60 with Sir William Johnson. Presents attracted large numbers of diverse nations to councils held in or near settled regions.¹⁵⁹ The ceremonies often included a “parade” and demonstrations of “their national costume, habits, [and] dances” which attracted curious on-

155. *Ibid.* 181466, 181468.

156. *Ibid.* 181472.

157. *Ibid.* 181474.

158. In the last half of the 1820s, the imperial government decided to alter the primary objective of Indian policy from maintaining Indians as military allies to “reclaiming them from a state of barbarism” (Sir G. Murray, Sec. State Colonies, to Sir J. Kempt, Adm. Can., 25 January 1830, in U.K. Parliamentary Papers, *Imperial Blue Books on Affairs Relating to Canada; Reports, Returns and Other Papers, Presented to the Imperial Houses of Parliament of Great Britain and Ireland Relating to Canada* vol. 5 *Papers Relative to the Aboriginal Tribes in British Possessions*, 1834, No. 617 at 87-88 [hereinafter *Imperial Blue Books*] and encouraging them to “shake off the rude habits of savage life, and to embrace Christianity and civilization” (Maj. Gen. H.C. Darling to Lord Dalhousie, Gov. Gen. Can. “Report upon the exact state of the Indian Department,” 24 July 1828, in *Imperial Blue Books* at 29).

159. Over 2,500 people attended a council on Manitoulin Island in 1838: J.B. Macaulay, “Report on Indian Affairs,” submitted to Sir George Arthur, Lieutenant Governor Upper Canada, 22 April 1839, NA RG 10 vol. 117, 168711 at 168717 [hereinafter “Macaulay Report”].

lookers.¹⁶⁰ Occasionally there were scenes of cultural conflict: as the chiefs of one band observed in 1849, some settlers found the sight of “many (almost) naked wild, and uncultivated Indians pitching their tents in the vicinage” to be “disagreeable.”¹⁶¹

Over time, British officials appeared to lose sight of the constitutional significance of present giving as the mechanism by which the covenant chain was brightened. Local officials often defended the custom whenever the imperial government questioned the need for the expense; but, in so doing, they rarely mentioned the larger treaty context that gave the custom its full meaning. Instead, presents were explained as compensation for losses sustained during the American Revolution,¹⁶² as additional payment for territories ceded for “very little consideration,”¹⁶³ or as “humane consideration” to assist their “civilization.”¹⁶⁴ In 1858, the imperial ministry ceased funding presents. It assured aboriginal peoples that the local Canadian government - to which control over, and financial responsibility for, Indian affairs was then being devolved - would respect

160. See sec. 3, pt. 2 [unpaginated] of *Report on the Affairs of the Indians in Canada, Laid Before the Legislative Assembly* (Rawson W. Rawson, John Davidson, William Hepburn, commissioned by Sir Charles Bagot, Gov. Gen.), 22 January 1844 (Sections 1 and 2 printed at *Journals of the Legislative Assembly of Canada* (1844), Appendix EEE; Sec. 3 printed at *Journals of the Legislative Assembly of Canada* (1847), Appendix T) [hereinafter “Bagot Report”].

161. Chiefs and Council of the Chippewas of Beausoleil Island to Captain T.G. Anderson, Supt. Ind. Dept., 19 June 1849, NA RG 10, vol. 408 at 376-77.

162. G. Francis Gore, Lt. Gov. Upp. Can., to Viscount Castlereagh, Sec. State Colonies, 4 September 1809, PRO CO 42/349: 88 at 92: the Indians “during the American War were faithful ... they bled most freely, and the Government pledged itself to relieve their necessities...”; T. Higginson, Supt. Gen. Indian Dept., to T.G. Anderson, Supt. Ind. Dept., 19 August 1845, NA RG 10 vol. 409, 223-25: presents were based on a “claim on the country for [military] services rendered.”

163. Gore to Castlereagh, *ibid.*: “stipulations were also made when they surrendered after the War, immense Tracts of Country to the Crown, for very little consideration, that such Presents as they had heretofore then accustomed to receive, should not be withdrawn or lessened....”

164. Colonial Office Memorandum, “Question whether the Imperial Govt. is bound by any agreements to continue giving Presents to the Indians in Canada,” 10 January 1854, PRO CO 325/48: “the Presents were not granted to the Indians as a matter of right, and that they should only be continued so long as was demanded by a humane consideration of the recipients”; Col. Bruce, Supt. Gen. Indian Dept., to T.G. Anderson, Supt. Indian Dept., 8 July 1852, NA RG 10 vol. 411, 454: presents “were originally issued to the Indians by the munificence of the Crown as a means of promoting their comfort and civilization at a time when it was not in their power to procure them by their own exertions or from their own resources.”

their claims.¹⁶⁵ After taking responsibility for Indian affairs in 1860,¹⁶⁶ the Canadian government did not revive the present-giving custom. The annual process of brightening the covenant chain through present giving that began in the early seventeenth century came to an abrupt end.

So long as presents were given at least, it can be said that the covenant chain was brightened and aboriginal sovereignty was acknowledged in nineteenth-century colonial Canada. However, if the British were ignorant, or even indifferent, about the constitutional point behind presents, it may be difficult to identify this as the “shared understanding” of the treaty relationship as it then evolved. Still, like the first historical period examined, some British officials acknowledged the aboriginal view. The “Character of the Indian Race,” wrote Lieutenant-Governor Sir Francis Bond Head in 1836, was such that oral agreements made in “solemn Form” with “the Delivery of a Wampum Belt of Shells” are “remembered and handed down from Father to Son with an Accuracy and Retention of Meaning which is quite extraordinary.”¹⁶⁷ He went on to observe that presents were, according to aboriginal peoples, part of the “Promises which, accompanied by the Delivery of Wampums, were made to them by our Generals during and at the Conclusion of the American Wars.”¹⁶⁸ The aboriginal perspective was also acknowledged by a committee of the Executive Council for Lower Canada in 1837. It conceded that an end to presents – which it recommended – would meet with aboriginal opposition in light of the aboriginal understanding of the origins of presents:

Although the Indians have no Express Agreement with the King’s Government to refer to, which entitles them to a Continuation [of presents] ... the whole tenor of the conduct observed to them since the Year 1759 has led them to such an expectation, nor were there wanting Public Acts to confirm it; for besides their having been at all times treated by the British

165. “Report of the Special Commissioners Appointed on the 8th of September, 1856, to Investigate Indian Affairs in Canada” (Richard T. Pennefather, Supt. Genl. Indian Affairs, Froome Talfourd and Thomas Worthington, commissioners), printed in *Journals of the Legislative Assembly of the Province of Canada*, vol. 16 (1858), Appendix No. 21, Pt. I [unpaginated] [hereinafter “Pennefather Report”].

166. *The Act respecting the management of the Indian Lands*, 1860, 23 Vict., c. 151 (Can.), which was reserved by the governor for the assent of the imperial crown in London, “declares the terms upon which Her Majesty assented to the transfer of the management of Indian affairs from under the direct supervision of the Imperial Government”: *Ontario Mining Co. v. Seybold* (1901), 32 S.C.R. 1 per Gwynne J. at 7.

167. “Memorandum” enclosed in Sir F.B. Head, Lt. Gov. Upp. Can., to Lord Glenelg, Sec. State Colonies, 20 November 1836 [hereinafter “Memorandum”], in U.K. Parliamentary Papers, *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* (House of Commons, 17 June 1839) 124 at 128 [hereinafter *Correspondence Respecting the Indians*].

168. *Ibid.*

Government as Allies or Dependents in the Continental Wars, since that period, by the Royal Proclamation of 1763, the Lands held or claimed by them ... were in an especial manner taken under the Administration of the Crown for their benefit

This Public Instrument [the *Royal Proclamation of 1763*] was formally Communicated to the Indians of Canada, by the Officer who had a few Years before been Appointed for their special Superintendence [Sir William Johnson], and ... they have since regarded it as a Solemn Pledge of the King's Protection of their interests....¹⁶⁹

The report confirms three important aspects of the aboriginal approach to presents: first, the covenant chain established with Sir William Johnson at the Treaty of Niagara included as treaty pledges the provisions of the *Royal Proclamation of 1763*; second, the Niagara treaty provided that aboriginal peoples were "Allies" not subjects of the crown; and third, the annual distribution of presents confirmed this treaty relationship. This summary of aboriginal views is very similar to that given in 1858 by T.G. Anderson, an Indian Department officer who described information he had "gathered from Indian traditions relative to their past history," including their description of the council held by "a great English chief (Sir Wm. Johnson)" held after the British conquest of New France "at the 'Crooked Place'" (Niagara), the giving of "great presents to the Indians" by Johnson, the "spreading before them [of] the great wampam belt of friendship", and, finally, the promise that "the king of England wished to adopt them as his own children, [and] that if they would become his true and faithful allies, he would continue to give them presents as long as water flowed, or trees grew...."¹⁷⁰ Lower level officials in direct contact with aboriginal nations could not help but appreciate the aboriginal

169. Report of a Committee of the Executive Council of Lower Canada to the Earl of Gosford, Governor of Lower Canada, 13 June 1837, NA RG 10, vol. 116, 168618 at 168621-22.

170. "Evidence of Capt. Anderson, Visiting Superintendent of the Central District [Cobourg], Appendix No. 29 of the "Pennefather Report", *supra* note 165. Another example is the evidence of Marcus Blair, Deputy Warden of Six Nations Lands, quoted in "Report of Committee No. 4, On the Indian Department (R. Jameson, J.B. Macaulay, Wm. Hepburn)," January 1840, submitted as part of *Report on the Public Departments of the Province of Upper Canada in 1839*, PRO CO 42/472 at 42 (also printed at *Journals of the Legislative Assembly of Canada* (1847), Appendix T, No. 1):

Independent of political reasons, it is to be remembered, that these Presents originated in solemn Treaties, made by the Representatives of the British Crown, at times when the assistance of the Indians was of momentous consequence. The Wampums by which these Treaties were ratified, are still preserved amongst the Tribes, and the memory of them is fondly cherished.

perspective on presents, for once the decision was made to limit present giving aboriginal peoples voiced their objections to these officials.¹⁷¹

It is significant, then, that certain British officials indicated a relatively clear appreciation of aboriginal oral traditions concerning the covenant chain; however it is also significant that none of these various reports appeared to attribute much moral weight to the aboriginal perspective. Bond Head observed that covenant chain ceremonies “sank deep in the Minds of the Indians” but had “little Effect” on British officers present.¹⁷² Similarly, the Lower Canada Executive Council report conceded that the customary practices and public acts of the crown’s representatives had given rise to treaty expectations on the part of aboriginal peoples, but then concluded that they had no “express Agreement” giving them enforceable treaty “entitle[ments]”¹⁷³ – presumably because their understanding of the treaty relationship had not been committed to writing.

There was, in short, a widening gulf between aboriginal attitudes toward their treaty relationship with the crown, as encouraged by the “external appearances” of crown officials, and internal non-aboriginal attitudes. This gulf is clearly manifested in several influential non-native reports. In 1839 Justice James Macaulay of the Upper Canada King’s Bench acknowledged in an extra-judicial report that Indians associated the present-giving custom with “National alliance and tribute” and continuance of the custom therefore tended to uphold “the[ir] cherished belief of independence as a separate people.”¹⁷⁴ In his view, however, the origin of presents was inexplicable, but rather than inquire into the basis of the aboriginal interpretation by considering their oral traditions, he concluded that resort to “the Public Departments in London” was

171. In 1845 the imperial government decided to refuse presents to Indians born after 1846. The response of the chiefs of the Chippewas of Beausoleil Island was described in this way (Alvan T. Carson to T.G. Anderson, Beausoleil Island, 20 April 1845, NA RG 10 vol. 408, 556-59):

To this the Chiefs and people positively object declaring in their broken expressions that such a course is contrary to every rule of Justice; and to their *original covenant* with the British Government. Indeed the general opinion is that such an order never came from the British Government, but rather from some section of the Indian Department.

Also responding to the decision, Joseph Sawyer, a chief of the Credit River Mississauga, expressed regret that “the Government do not consider themselves bound” to continue presents because “[o]ur Ancestors have always told us ... that the British Government promised and covenanted” to maintain presents “as long as the sun shall shine the waters flow, and grass grow ...” (“The Speech of Mr Joseph Sawyer Chief of the Credit Indians, in reply to the Speech of Mr Supt. Thomas G. Anderson, on his first visit to the Indians under his Superintendence &c. River Credit,” 24 October 1845, NA RG 10 vol. 410, 72 at 74 [emphasis added]).

172. “Memorandum”, *supra* note 167.

173. *Supra* note 169.

174. “Macaulay Report”, *supra* note 159 at 168827.

necessary to find the historical rationale for presents.¹⁷⁵ In Macaulay's opinion the official written record would provide firm answers and the "cherished belief[s]" – or oral traditions – of aboriginal peoples about their treaty relationship with the crown were mere "complacent notions."¹⁷⁶ The most exhaustive survey of Indian affairs in nineteenth-century Canada, the 1844 Bagot Commission report, concluded that it did "not clearly appear how and when this practice [of present giving] arose."¹⁷⁷ On the one hand, it found "no record of any agreement on the part of the British Government" to give presents; on the other hand, it accepted that the "practice" and "language" (i.e., oral statements) of the "Officers of the Crown" toward aboriginal nations since 1759 "have led the latter to expect it, and to consider the Government pledged."¹⁷⁸ Once again, there was a tendency to emphasize written records and to dismiss aboriginal oral traditions and legitimate expectations arising from crown practice and oral commitments.

The attitude adopted in the Macaulay and Bagot reports was also embraced at the highest imperial levels. For example, the Secretary of State for the Colonies during the 1830s, Lord Glenelg, accepted that present giving may well have had something to do with securing help from aboriginal nations during the American Revolution, but he concluded that there was simply no point in "pursuing that inquiry" further for the written record confirmed that the crown had made "no formal obligations" to aboriginal nations concerning presents.¹⁷⁹ The Secretary of State in the 1840s, Lord Grey, rejected an argument presented by the Legislative Assembly for Canada in 1846 that a "pledge [to give presents] was given and renewed from the remotest period of British Supremacy in *North America*" and discontinuance of presents would "be regarded by the Indians as a breach of a sacred compact."¹⁸⁰ In his view, there was simply no evidence that the crown had made any such treaty commitment and it was an error to regard "the general conduct" of local officials in their dealings with Indian nations as "implying a pledge."¹⁸¹ Instead, the answer lay in the "records of this Office" which, he said, contained no

175. *Ibid.* at 168826.

176. *Ibid.* at 168827.

177. "Bagot Report", *supra* note 160 at sec. 1 [unpaginated].

178. *Ibid.*, sec. 3 at pt. 2 [unpaginated].

179. Lord Glenelg to the Lt. Governors of Upper and Lower Canada, 14 June 1836, quoted in the "Bagot Report", *supra* note 160, sec. 3 at pt. 2 [unpaginated].

180. Address of the Legislative Assembly of Canada to Her Majesty, 1846, quoted in "Pennefather Report", *supra* note 165 at pt. 1 [unpaginated].

181. Lord Grey's dispatch responding the Legislative Assembly's address is quoted in "Pennefather Report", *supra* note 165 at pt. 1 [unpaginated].

evidence that such treaty commitments had “ever received the deliberate sanction of Her Majesty’s Government.”¹⁸² A clearer statement of divergent approaches to treaties is hard to imagine: Lord Grey’s assertion that a treaty was a piece of paper and could not arise (in absence of writing) from participation in a treaty council would, of course, have directly conflicted with the customary aboriginal approach to treaty conferences.

To summarize, official statements from the 1830s and 1840s confirm that there had been a loss of institutional knowledge about the meaning of ancient constitutional and diplomatic forms. Although officials appreciated that aboriginal peoples had an oral tradition concerning the relationship between presents, treaties and aboriginal sovereignty, they concluded that the tradition was irrelevant to the task of defining treaty obligations. Instead, they looked to the written record, and finding no express pledges of the sort identified by aboriginal peoples, concluded that none existed. Had they been so inclined, officials of the nineteenth century could have (like Simcoe did in the 1790s) read Sir William Johnson’s reports, or otherwise attempted to understand the aboriginal traditions that gave normative content to the diplomatic forms still followed. However, they were unwilling to engage in a process of cross-cultural learning. Their objective was to destroy aboriginal political and cultural distinctiveness, and presents frustrated that objective by (as it was said) encouraging aboriginal peoples “to maintain their Indian Habits, their Costume, and their hunting Excursions” thus making it impossible to “assimilate them to the rest of the Population.”¹⁸³ Present-giving councils should be abolished, concluded the Bagot report, because the yearly “assemblage of this interesting race” led to the “objectionable practice” of shows of “their national costume, habits, dances etc.” with the effect “of keeping them a distinct people ... of fostering their national pride” and thus of retarding their “civilization.”¹⁸⁴

Understanding the covenant chain required sensitivity to and respect for aboriginal cultures and norms, as well as willingness to let go of the written record as the exclusive determinant of normative commitments. British officials at this time were capable of neither. Yet non-aboriginal

182. *Ibid.*

183. R. J. Routh to Earl of Gosford, Sec. State Colonies, 27 November 1835, in *Correspondence Respecting the Indians*, *supra* note 167 at 37. The position of aboriginal nations, it was said elsewhere, “ought to change with the Times” and presents merely served to “keep alive Recollections in contradiction with every thing around them”: Commissariat (Quebec), Memorandum, 28 April 1836, enclosed in Earl of Gosford, Gov. Gen., to Lord Glenelg, Sec. State Colonies, 13 July 1837, in *Correspondence Respecting the Indians*, *supra* note 167 at 38-39.

184. “Bagot Report”, *supra* note 160, sec. 3 at pt. 2 [unpaginated].

officials were not wholly ignorant of the aboriginal perspective. Reading the documentary record as a whole it is fair to say that, at a subordinate level of institutional consciousness, non-aboriginal officials appreciated the fact that so long as the present-giving custom continued aboriginal people inferred from this custom an intention to brighten the covenant chain. But unlike Sir William Johnson's assertions of an earlier time, official acknowledgements of aboriginal views in the mid-nineteenth century did not represent an attempt to call the conscience of the British empire into play; they were wholly dismissive of aboriginal understandings of the covenant chain, regarding them as legally irrelevant.

More research is necessary to identify written sources from this period that represent aboriginal views directly, rather than as summarized by non-aboriginal officials. As seen in Part I above, the covenant chain was regarded by aboriginal peoples as a dynamic relationship that evolved with changing political contexts. It is clear that British views of the chain changed as settlement increased and the "civilization" policy was implemented, but did aboriginal views change too? In the opinion of at least one aboriginal leader, the chain was an enduring commitment that was altered but not destroyed by settlement and 'civilization'. Credit River Mississauga chief Peter Jones (Kahkewaquonaby) wrote in his 1861 book *History of the Ojebway Indians* that the "silver chain" made between aboriginal nations and the crown in the 1760s "placed them as allies with the British nation, and not subjects," and "down to the present day, [it] has not been violated."¹⁸⁵ However, he conceded that aboriginal peoples were considered as allies and not subjects only "until the influx of immigration completely outnumbered the aborigines," after which the crown "assumed a parental authority" over them.¹⁸⁶ If Jones was right – the chain remained in force, unviolated, but aboriginal status had shifted in response to demographic and other changes – what, precisely, was the constitutional status that aboriginal people thought the chain secured for their nations? If it resembled anything like the model of self-government that Jones helped to establish on his own reserve then it would be fair to say that even after the civilization project was underway, aboriginal nations considered themselves as internally self-governing, or internally sovereign, national units of crown subjects under the protection of the crown.¹⁸⁷

185. P. Jones (Kahkewaquonaby), *History of the Ojebway Indians; with Especial Reference to their Conversion to Christianity* (London: A.W. Bennett, 1861) at 216.

186. *Ibid.* at 217.

187. See "According to the Old Customs of Our Nation", *supra* note 47.

During this time, the covenant chain was marginalized by judges as well as other officials. In his 1839 report Justice Macaulay observed that natives' "cherished belief of independence as a separate people" was untenable because they were "domiciled within the organized portions of the Province."¹⁸⁸ In the 1852 case of *Sheldon v. Ramsey* Burns J. stated that the Six Nations "while situated within the limits of this province" could not be recognized as "a separate and independent nation, governed by laws of their own...."¹⁸⁹ In other words, colonial judges regarded crown sovereignty and aboriginal submission as an inevitable result of aboriginal residency within provincial territories. This was a new basis upon which to found crown sovereignty over aboriginal nations. Whereas in the first period examined, the covenant chain was critical to British claims to sovereignty, in this third period it was superfluous: crown sovereignty over aboriginal peoples no longer depended upon twisting the meaning of the covenant chain into a treaty about aboriginal subject-hood as opposed to aboriginal sovereignty; subject-hood was now simply a result of native residence in British territories.

Conclusions

The past reality of the covenant chain was manifested by and through the behaviour of political actors of the past. Present understandings of that past reality, however, can only ever be manifested through language – language, spoken or written, used or repeated, today in a process of reasoned argument or interpretation. Interpretation is always a politically charged enterprise, and so the discursive reality of the covenant chain today will necessarily be a politically contested one. Still, sensible discourse requires an interpretive community within which words have some common meaning, and rules of engagement can be established limiting the "political" contest between competing meanings of normative relationships like the covenant chain. "Law" provides one such interpretive community. Its rules of discursive engagement ensure that the political nature of interpretation is conducted in a particular manner. The discipline of "history," or "ethnohistory," provides another interpretive community. There is no use in pretending that a single meaning exists for the covenant chain independently of the interpretative constructions we might give it today. There is no covenant-chain "form" floating in the ether. In this sense, it is fair to say that the covenant chain has multiple meanings. However, it is also fair to say that within particular interpretive

188. "Macaulay Report", *supra* note 159 at 168827, 168835.

189. *Doe d. Sheldon v. Ramsey* (1852), 9 U.C.Q.B. 105 at 133-34.

communities, and according to the rules of discursive engagement that define the boundaries of those communities, there are better and worse interpretations of the covenant chain. There is no reason to think that the *best* interpretation for one interpretive community (like law) will necessarily be the same as that for another (like history). Needless to say, aboriginal and non-aboriginal communities may also constitute interpretive communities with their own distinctive rules of discursive engagement – and these communities may cut across those of law and history.

Still, the implicit message of *Marshall* is that competing cultural and disciplinary views can somehow converge and connect to produce an historical shared meaning that satisfies each of these interpretive communities: as a matter of *law* the meaning of crown-aboriginal treaties today involves an *historical* question about treaty-meanings that were *shared* in the past by two very different *cultures*. I do not attempt to address all of the theoretical problems arising from such an ambitious project. Instead, I focus on the problem identified in Part I above: even assuming that Canadian law treats the identification of treaty meanings as an historical issue, are there differences in legal and historical interpretative methods that may lead to different approaches to this issue? Might the legal search for a shared treaty-meaning conflict with the enthohistorian's objective of uncovering the past "as it really was"?

In Part I above, I suggested that one source of difficulty in this respect might arise from different approaches to defining facts and norms. In considering this issue, it may be helpful to begin with the description of a legal problem arising from an abstract "legal" jurisdiction. X enters into a valid oral agreement with Y that secures χ . However, X secretly desires to acquire β (the opposite of χ), and knowing that Y will not agree to β , X proceeds to write up an instrument that purports to record the X-Y agreement in such a way as to suggest that Y actually agreed to β not χ . X obtains Y's signature to this instrument, but Y could not read or understand it. Would X be able to insist after acting consistently for some time with the original oral agreement concerning χ , that the X-Y agreement secures β and not χ ? X might argue that its outward acceptance of χ was irrelevant because inwardly it really wanted β - *i.e.* X is not bound by the initial agreement because it kept its 'fingers crossed' behind its back. X might also say that Y is bound by anything Y signs - even if Y had no way of knowing the meaning of the written text and even if that text was contrary to the actual agreement that it purported to represent. Finally, X might say that its consistent behaviour acknowledging χ is irrelevant because, from *its* perspective, χ is now obsolete and β has been established in a *de facto* sense. X could, of course, say all of this and more, but it is difficult to imagine a rational legal system that would support any

other conclusion but that X is bound to Y to respect the original – and true – agreement concerning χ to the extent that that agreement has not been lawfully abrogated or frustrated in the interim. X's 'fingers-crossed' approach to the law of obligations would reduce agreements in general to a grotesque joke.

I assume that this conclusion flows from the very notion of obligations created by agreements within any political context informed by the rule of law. It is important to emphasize, however, that this conclusion results from a process of practical, or normative, reasoning: it identifies a norm (binding agreements arise from what people *agree together*, not from what one side inwardly desires), and applies this norm to the fact-scenario described. This sort of interpretative engagement with norms and facts is perhaps similar to what H.L.A. Hart described as an "internal" perspective about rules, for it seems to manifest that "reflective critical attitude" toward human behaviour and the norms against which that behaviour can be measured that Hart identified as essential to the viewpoint of someone internally committed to a normative system.¹⁹⁰ Of course, the scenario could be described in purely empirical terms: a social scientist observing the events from an external perspective might well conclude that X and Y each define the agreement differently and that no single meaning exists. As linguistic representations of the facts, both the normative and the empirical views are plausible. However, according to the rules of discursive engagement that define the "legal" interpretive community - or the "internal" perspective - the social scientist's interpretation is incomplete and misleading. Indeed, it is difficult to imagine what, if any, "social science" would adopt rules of discursive engagement according to which the simple "empirical" description would, without more, be the best interpretation of the scenario. Presumably social scientists would want to capture in some sense the normative character of relationships they observe. A social scientist who merely records patterns of social behaviour without considering issues of obligation or duty would be adopting what Hart described as an "extreme external point of view," and accordingly would "miss out a whole dimension of the social life of those whom he is watching."¹⁹¹

Assuming for the sake of argument that the normative, or "internal," evaluation of the X-Y scenario is accepted as a sound approach to the identification of the *true* agreement, the next question is whether this process remains sound if the following details are added to the scenario: X and Y are radically different in culture, language, and legal traditions;

190. H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961) at 55; also, 89-90.

191. *Ibid.* at 87.

X is the British crown and Y represents aboriginal nations; the oral agreement is the covenant chain; χ is aboriginal sovereignty and β is crown sovereignty; and, finally, the events in question took place between 140 and 340 years ago. Although there is perhaps no obvious reason why the internal normative interpretative process adopted in relation to the X-Y scenario could not apply with equal force to the more detailed covenant-chain scenario, it must be conceded that, in light of the additional facts, this approach seems less obvious than it did before and the social scientific, or empirical, approach may now appear more plausible. Indeed, this latter approach may be seen to inform the following statement by Francis Jennings from his exhaustive examination of the covenant chain in pre-revolutionary British North America:

...the Covenant Chain was legally ambiguous. Because of its bicultural membership it was dual in aspect and must be defined twice. From the Indian point of view, it was an organization of peers ... In the view of the English statesmen, however, the Chain was an expedient to be maintained until the empire could muster enough local power to actualize the crown's pretensions to sovereignty. The English gave only *de facto* recognition to Indian nations. Never, at any time, did they relinquish their own crown's *de jure* pretensions to sovereignty.¹⁹²

More recent historical assessments of the covenant chain are similar.¹⁹³

Many of Jennings' conclusions were confirmed in Parts I and II above. The covenant chain was "legally ambiguous". When considered in relation to both pre- and post-revolutionary British North America it can be defined *more* than "twice": not only did it have different meanings in

192. *Ambiguous Iroquois Empire*, *supra* note 11 at 373; also at 402: "British colonials had to bide their time, they recognized Iroquois independence *de facto* by bowing to the necessity for negotiation while preserving *de jure* claims to sovereignty."

193. E.g. Dennis argues that the Dutch-Five Nations covenant chain was an "ambiguous relationship" in which each side "conceived of the alliance in terms of its own world view and historical experience...Each bowed to the other without ever fully confronting the lack of mutual understanding...[they] delude[d] themselves that they understood each other": *supra* note 11 at 178-79. Richter asserts: "Around the diplomacy of the Covenant-Chain developed a rich body of intercultural rituals that...had different meanings for Indians and English": *Ordeal of the Longhouse*, *supra* note 13 at 141. Fenton, in speaking of the kinship terms used in covenant chain ceremonies, says: "The two cultures, Iroquois and European, employed kinship terms for each other that had different meanings for each. To Europeans the term 'father' implied subordination to authority, whereas in Iroquois society 'father' took second place to 'mother's brother'. The Five Nations never really acknowledged themselves 'subjects' of either France or Britain. They preferred the term 'brothers' in political discourse": *Great Law and the Longhouse*, *supra* note 13 at 718. Merrell, in relation to 18th century treaties generally, observes that although treaties served as practical solutions for day-to-day issues, and there were "magical moments" when true agreement was reached, there was an "enduring sense of difference that neither side could shake", and in the end "friendship and understanding" eluded the parties because "attitudes, impulses and visions that divided colonist from Indian" were overwhelming: *Into the American Woods*, *supra* note 5 at 39-40, 255-56.

each of the three historical periods examined, but from the British perspective alone the chain was defined in multiple ways in each period. Finally, Jennings' description of the British attitude toward the covenant chain – a “fingers-crossed” approach to agreements or (as he later wrote) acceptance of the chain “with mental reservations”¹⁹⁴ – accurately describes official imperial views in the first and third periods examined. The question with which I am concerned, however, is whether the legal ambiguity of the covenant chain can now be resolved and a legal meaning attributed to it. Why cannot the process of practical reasoning adopted in relation to the X-Y scenario above be applied and the “fingers-crossed” treaty meaning adopted by the crown be judged as either right or wrong?

There are a number of reasons why the social-science approach underlying Jennings's conclusion seems persuasive even though that approach lacked persuasive force in relation to the X-Y scenario described above. First, it might be said that, unlike relations between X and Y, crown-aboriginal relations in the colonial era existed in a purely political or extra-legal dimension; there was no normative order within which a legal meaning for an agreement could be defined. The analysis in Parts I and II above suggests, however, that crown-aboriginal treaties were regarded by *both* sides as constitutive of normative arrangements, a conclusion confirmed by the customary practice of renewing past commitments and redefining acceptable political conduct through the annual “brightening” of the covenant chain in nation-to-nation councils.¹⁹⁵ To the extent that these councils established norms guiding the behaviour of political actors, there *was* a normative system – a “bicultural” rule of law – against which competing expressions of treaty meaning can *now* be critically evaluated and judged as either right or wrong. As an empirical statement, Jennings' description of the crown's “finger's-crossed” approach to the covenant chain is accurate; however, as an assessment of the normative reality of the covenant chain his conclusion is like the social scientist's assessment of the X-Y scenario in that it fails to appreciate or account for the ways in which the relevant agreement operated as a normative force upon the parties.

194. F. Jennings, *The Founders of America: How Indians Discovered the Land, Pioneered in It, and Created Great Classical Civilizations; How They Were Plunged into a Dark Age by Invasion and Conquest; and How They are Reviving* (New York: Norton, 1993) at 217.

195. This is not to say that parties always honoured the requirements of the chain – the Five Nations were frequently frustrated by the failure of the British to provide military aid against the French: *Great Law and the Longhouse*, *supra* note 13 at 12; but still the chain provided a standard against which such a failure could be identified and measured.

Even assuming a bicultural rule of law existed, one might question whether, in the case of the covenant chain, cultural differences frustrated the establishment of a true agreement on the point of sovereignty. In the X-Y scenario, it was assumed that X and Y really did reach a genuine oral agreement that X then subsequently contrived to avoid. However, it might be argued that the covenant chain was never really a true agreement in this sense because even at the oral stage there was no “meeting of minds” on the question of sovereignty: the two sides talked past each other for hundreds of years, each genuinely misunderstanding the other. If so, one would have to concede that there was no true agreement, just two false impressions about an agreement that never existed. The problem with this defence of the Jennings’ approach is that the British documentary record simply does not support it. British officials knew perfectly well how aboriginal peoples interpreted British conduct in brightening the chain. As Simcoe observed in the 1790s, aboriginal sovereignty was, through treaty councils, “reciprocally and constantly acknowledged”¹⁹⁶ by the crown; or, as the Bagot report concluded in the 1840s, the “practice” and “language” of “Officers of the Crown” constantly confirmed the aboriginal view, “fostering” their impression that they were independent nations.¹⁹⁷ These statements acknowledge a “shared understanding” or *consensus ad idem* of sorts – one that the crown encouraged, albeit with fingers crossed.

Finally, it might be said that historians like Jennings are not in the business of judging the positions taken by history’s actors. It might be said that historians are supposed to adopt the social-scientific stance described above: their concern is to identify in an empirical manner what people said and did without taking sides. As Trigger argues, they are not to involve themselves in partisan or political movements. Indeed, in light of the passage of time, the evolution of moral, political, and jurisprudential attitudes, and the fundamentally different cultures involved, it might be argued that it is impossible for an historian today to evaluate critically but objectively the expressions of treaty-meaning adopted by past political actors against some ambiguous set of norms that supposedly emerged from custom and usage. A legal historian may wish, instead, to identify how British judges of the time would have reacted to these questions – in which case the 1743 *Mohegan* decision is clearly supportive of Jennings’ description of the British view as a “finger’s crossed” approach to treaty meaning.

196. *Simcoe Correspondence*, *supra* note 129, vol. 1 at 363-65.

197. *Supra* note 160, sec. 3 at pt. 2 [unpaginated].

This argument must be considered in light of the conclusions drawn at the end of Part I above, for it is based upon the supposed difference between identifying historical facts and legal norms. In resolving this theoretical problem, it is useful to develop with more precision the “internal” (or normative) and “external” (or empirical) viewpoints. To this end, we must return to Hart’s treatment of interpretative perspective. As discussed, Hart described the point of view of a participant for whom rules have normative force as the “internal point of view,” and he contrasted that perspective with the “extreme external” perspective of the observer of such a system who merely records facts without any account of their normative aspect for participants. Neither of these two interpretative perspectives seem to capture the appropriate point of view of judges who must identify the shared meaning of old treaties in present Canadian law. As seen in Part I, in contemporary Canadian law, judges are not supposed to interpret treaties as cases or constitutions – or as present “law.” Instead, they are meant to find an historical meaning for parties established in another time. This interpretative stance does not resemble the “internal” perspective as defined by Hart. The historian too would not adopt the internal perspective, for that perspective requires the sort of “partisan” commitment to normative outcomes that (according to Trigger) historians should avoid.

However, to adopt the social-science perspective and define treaty meanings as mere historical facts would, in many cases, preclude the articulation of a shared treaty meaning. The covenant chain is an excellent example of a treaty which, defined in this manner, is nothing but a series of conflicting facts. In reality, however, this so-called social-science perspective is an artificial one, for historians and other social scientists are capable of explaining – and, indeed, may be required to explain – the normative aspect of human behaviour.

Historians of aboriginal-colonial relations acknowledge that they render normative or moral judgments about historical events in a number of different ways. They acknowledge, for example, that historians make moral judgments implicitly, even subconsciously, they summarize and interpret empirical data. In postmodernist terms, the interpreter is always, to some degree, a participant in the linguistic construction of meaning from historical texts.¹⁹⁸ Even assuming that this sort of moral evaluation is inevitable, there remains a difference between an historian who seeks

198. J. Axtell, “Forked Tongues: Moral Judgments in Indian History” in J. Axtell, *After Columbus: Essays in the Ethnohistory of Colonial North America* (Oxford: Oxford University Press, 1988) at 34-44 [hereinafter *After Columbus*]; R.R. Gadacz, “Understanding and Interpretation in Historical Ethnology” (1981) 23 *Anthropologica* 181.

merely to describe in a detached manner aboriginal-colonial relations and an historian who seeks explicitly to judge the conduct of aboriginal or colonial actors against some moral standard. Trigger, for example, sought to describe Huron-French relations in an objective manner, minimising moral judgment about either Huron or French conduct.¹⁹⁹ He later claimed that his approach was not designed to preclude moral judgment about Huron-French relations but was a necessary foundation for such critical evaluation.²⁰⁰ Still, his approach is said to conflict with that of other leading scholars who insist that the question is not whether but how to evaluate, in moral terms, conflicting native and colonial values and actions.²⁰¹ According to James Axtell, it is a fundamental part of the historian's task in analysing aboriginal-colonial relations to judge the conduct of history's actors against the moral standards of their own communities as defined and understood in their own time – so long as judgment is given subtly and sensitively after mastering the historical record.²⁰²

The express acknowledgment by historians of the desirability of this sort of "moral" history has coincided with, or is perhaps part of, the rise of the so-called "new Indian history," in which aboriginal peoples are depicted not as victims located at the margins of significant historical events but as moral agents composing diverse and complex communities whose responses to colonial peoples and policies were critical to the shaping of political and cultural realities in colonial North America.²⁰³ Historians adopting this approach, says Richard White, emphasise the native perspective, but in a detached fashion. They regard both native and non-native cultural and national identities as contingent and problematic, and colonialism is therefore depicted as a "tangled set of cultural contacts and power relations" in which vastly dissimilar peoples influenced each other in complex and often unintended ways.²⁰⁴ These scholars treat the shifting middle ground upon which aboriginal and colonial peoples interacted as fraught with "complicated [cultural] reinventions, misun-

199. B. Trigger, "Brecht and Ethnohistory" (1975) 22 *Ethnohistory* 51.

200. B. Trigger, "Interest Groups, Alienation, and Humanity: A Reply to René Gadacz" (1982) 24 *Anthropologica* 19 at 22-23.

201. W.E. Washburn, "A Moral History of Indian-White Relations: Needs and Opportunities for Study" (1957) 4 *Ethnohistory* 47; J. Axtell, "A Moral History of Indian-White Relations Revisited" [hereinafter "A Moral History"] in *After Columbus*, *supra* note 198 at 9-33.

202. "A Moral History", *ibid.* at 9, 23.

203. *The Middle Ground*, *supra* note 23; "Using the Past", *supra* note 58.

204. "Using the Past", *ibid.* at 231, 235. See, e.g., Calloway, *supra* note 77 at 111, 122.

derstandings, and appropriations for new purposes,” and inter-cultural exchanges “were as likely to be based on misunderstandings as understanding.”²⁰⁵

These brief observations about the recent approaches to historical method and native-colonial relations suggest that although historians are willing to undertake a limited degree of explicit moral evaluation when assessing native-colonial histories, this evaluative process is likely to be conducted within a larger context of analysis that explores competing, conflicting and shifting cultural identities. The focus is therefore as likely to be on the misunderstandings as the understandings, and therefore moral evaluation will tend to be in the form of criticism of respective positions in light of each community’s own moral standards rather than in the form of practical reasoning that seeks to construct a specific shared understanding, or norm, against which conflicting positions can be judged. In other words, historians may be willing to assert that an aboriginal custom or a colonial law was “morally wrong”²⁰⁶ but unwilling to undertake the distinctive process of normative evaluation necessary to construct a norm from inter-cultural practices as the basis for judgments of right and wrong.

In many respects, Jennings’ work as a whole exemplifies this pattern. His 1975 book, *The Invasion of America*, which denounced the abandonment by English colonists of their own moral standards, has been described as “[v]irtually a casebook in moral history.”²⁰⁷ Jennings, it seems, is an historian unlikely to shy away from normative analysis. Indeed, it must be emphasized that his conclusions about the covenant chain were far more sophisticated and subtle than the above-quoted statement on the double meaning of the covenant chain, taken in isolation, suggests. Elsewhere he characterized the covenant chain as a mode of political accommodation with sufficient “structure” to be called “a constitution,” an institution that effectively structured “intercultural activity.”²⁰⁸ Jennings was apparently pulled toward a form of normative

205. “Using the Past”, *ibid.* at 232.

206. Brownlie & Kelm, *supra* note 62 at 547 (discussing recent scholarship on potlatch laws).

207. “A Moral History”, *supra* note 201 at 26, discussing F. Jennings, *The Invasion of America: Indians, Colonialism, and the Cant of Conquest* (Chapel Hill: University of North Carolina Press, 1975).

208. *Ambiguous Iroquois Empire*, *supra* note 11 at 368, 402. But see D.V. Jones, *License for Empire: Colonialism by Treaty in Early America* (Chicago: University of Chicago Press, 1982) at 3, who argues on the one hand that the crown-Indian treaty relationship was a mechanism for colonialism and native dispossession, and on the other hand that it was, for a while, an “accommodation system, worked out by mutual agreement and compromise.”

reasoning that would have acknowledged the chain as having a *single* meaning; indeed, at least one historian thought he had been pulled *too* far in that direction.²⁰⁹ Yet, Jennings seems to have resisted that pull to a certain extent, for he refused to take the final, legalistic step of judging winners in the contest of meanings. His analysis edges from a statement of the covenant chain as a series of conflicting historical facts and toward the view of the covenant chain as historical norm. By acknowledging the normative aspect of the covenant chain, however, Jennings has not adopted the “internal” interpretative perspective; rather, he has incorporated into the “external” viewpoint an account of how human behaviour in a past setting may have been constitutive, for participants in that setting, of a normative order. He has, in other words, adopted that viewpoint that Hart argued was necessary for the social-scientific analysis of legal systems – an “external” perspective in which “the observer may, without accepting the rules himself ... refer to the way in which *they* [the participants in the system] are concerned with them [the rules] from the internal point of view.”²¹⁰ From this detached viewpoint, one could presumably measure political positions against customary norms and offer principled conclusions about their validity without descending into the sort of partisan interpretation that Trigger regards as inappropriate for historians.

The interesting point, however, is that while historians *could* adopt such an approach they may choose not to do so. Many historians seem to resist venturing as far as Jennings into the realm of normative reasoning that is necessary to identify shared treaty meanings. Recent scholarship tends to affirm: (a) that the covenant chain often secured practical solutions to specific, or micro, problems; (b) that disagreement persisted at the macro level about what constitutional status the parties occupied under the chain; and (c) that English assertions of sovereignty were in

209. Richard Haan criticized Jennings’s characterization of the chain as a constitution as a Euro-centric conclusion that ignored the fragmented and competing visions of the chain held by various aboriginal factions; the chain was, argued Haan, “even more ambiguous” than Jennings thought: *supra* note 15 at 41-42, 57.

210. Hart, *supra* note 190 at 89.

some sense morally suspect.²¹¹ However, historians seem uninterested in proceeding expressly to the next step of characterizing the chain as having a singular and independent normative meaning on this point. One notable exception is White.²¹² Although his “middle ground” concept was used to describe political and diplomatic relations with nations of the Great Lakes region generally, it extended to – and was exemplified by – the covenant chain. The following description of the middle ground suggests a very different approach to the British-Indian treaty relationships, one that finds shared meaning in conflict:

On the middle ground diverse peoples adjust their differences through what amounts to a process of creative, and often expedient, misunderstandings. People try to persuade others who are different from themselves by appealing to what they perceive to be the values and practices of those others. They often misinterpret and distort both the values and the practices of those they deal with, but from these misunderstandings arise new meanings and through them new practices – the shared meanings and practices of the middle ground.²¹³

White does not use legalistic terms when describing middle ground, but his analysis is consistent with the image of the covenant chain as a singular normative order constituted through inter-cultural practice and custom. Like the historians cited above, he notes the divergent aboriginal

211. Merrell’s study of English-Indian eighteenth century treaties is a good example. He asserts that treaties – or more accurately treaty negotiators or “go-betweens” – did create the opportunity for a “cross-cultural conversation,” and in the resolution of day-to-day problems (e.g. specific criminal offences) it is possible to identify a “meeting of minds,” but ultimately treaties could not produce a common understanding on larger issues. Merrell himself does not entertain the possibility that such a common understanding might now be constructed: *Into the American Woods*, *supra* note 5 at 33, 38-40, 52, 256. Similarly, Fenton describes the conflicting views about sovereignty under the covenant chain, but does not attempt to define which view was right and which wrong according to the chain’s true meaning – although by using the morally-loaded term “concocted” to describe the English view, his opinion on this matter is perhaps clear: *Great Law and the Longhouse*, *supra* note 13 at 301, 313, 321, 356, 718. See also, Dennis, *supra* note 11 at 178-79, 268-71; *Ordeal of the Longhouse*, *supra* note 13 at 141; Allen, *supra* note 2 at 16-18.

212. *The Middle Ground*, *supra* note 23. Another exception, perhaps, is Calloway, *supra* note 77 especially at 4-5.

213. *The Middle Ground*, *ibid.* at 10.

and non-aboriginal views concerning subjecthood and sovereignty, but unlike those historians he is willing to measure those views against the true, shared meaning of the covenant chain.²¹⁴

The reluctance by some historians to entertain questions from the legalistic light of “shared meaning” may be justified. There is, however, a real danger that the conclusion of Jennings – that the covenant chain must be defined two (or more) times – may be taken out of context and accepted as *the* historically accurate one. It is *an* accurate historical conclusion – accurate, that is, for historians who choose to stop their inquiry short of an evaluation of treaty meanings against the relevant historical normative standard. However, it is an historical interpretation of the covenant chain that would not meet the criteria for *best* interpretation set by the “legal” interpretive community, for in that community the search for an historical normative-meaning is not only acceptable but necessary. In the end, however, the difference between legal and historical interpretive communities may be less a matter of methodology and more a matter of emphasis. The construction of colonial-aboriginal “normative community” by Jeremy Webber²¹⁵ or “just paradigms for [colonial-indigenous] behavior” by Robert Williams,²¹⁶ both legal scholars, may be absent from many historical analyses, but it is certainly consistent with the substance of the scholarship of White and even Jennings. So long as an external viewpoint that seeks to articulate the internal viewpoint of others is maintained, these “legalistic” conclusions cannot be rejected as ahistorical.

214. See, for example, White’s characterization of British policy between 1760-63, which violated customary norms and led to Pontiac’s War, and the subsequent return to customary norms: “General Amherst’s new vision ... was a simple one: the British were conquerors; the Indians were subjects. It was a view that abolished the middle ground”; “Years of experience in Indian affairs had taught [Sir William] Johnson and [George] Croghan what weight the middle ground could bear; Amherst landed ponderously upon it and it cracked”; problems in trade relations were “another sign of the deterioration of the old arrangements of the middle ground”; “it seemed that the middle ground itself was about to crumble and cave in, leaving a cultural and political chasm... Many of the fraternal kinship metaphors that had guided earlier British-Algonquian relations yielded to Amherst’s counterformulation of conquerors and unruly subjects”; as Johnson “abandoned Bradstreet’s claims of absolute sovereignty over the Indians” the “political contours of the middle ground” re-emerged, and although the father-children kinship metaphors were used, “the precise meaning” of the treaty metaphors “had once more to be worked out in practice”; “Johnson carefully used the accustomed language of the covenant chain and the usual diplomatic procedures of the middle ground to assure the Indians of their continued independence”; the foundation of the middle ground arrangements was “ancient custom”, “a mutually comprehensible, jointly created world”: *ibid.* at 256, 257, 264, 268, 306, 307, 323.

215. Webber, *supra* note 27.

216. Williams, Jr., *supra* note 7 at 11

Whether accepted by historians in relation to crown-aboriginal treaties or not, the external-internal viewpoint articulated by Hart is probably an accurate description of the appropriate interpretative perspective for judges seeking to articulate a shared treaty meaning under *Marshall*. Returning to the specific issues of the covenant chain, it is important to conclude by emphasizing that the process of constructing a shared meaning in relation to sovereignty will not simply involve (as in the X-Y scenario) selecting χ and rejecting β . The construction of a shared normative meaning for the treaty from what both sides said and did will likely result in the conclusion that χ (aboriginal sovereignty) and β (crown sovereignty) really were—to continue the covenant-chain metaphor—linked together in a genuine sense, and that over time (especially after settlement increased and the ‘civilization’ policy was introduced after 1830) the linkages between aboriginal and crown sovereignty were implicitly increased and strengthened with each present-giving ceremony. The aboriginal sovereignty that was *international* in status in 1760 or 1790 may have become, through the dynamism of the chain itself, *domestic* in status by 1860.

While the construction of shared meaning may not involve rejecting either crown or aboriginal sovereignty, it will likely require the rejection as legally significant those expressions of crown and aboriginal sovereignty on either side that are extreme and mutually exclusive, thereby leaving as legally relevant only those treaty-meanings that occupied the middle ground. In other words, the *dominant* expressions of treaty meaning adopted by British officials in the first and third historical periods examined above likely will not be accepted as accurate for purposes of legal interpretation today; in contrast, the *subordinate* views of these periods probably will be. This conclusion may be difficult for judges trained in the common-law tradition to accept, for it means that the *official* imperial crown position on the treaty will have little legal significance today, and marginalized or *unofficial* interpretations from the past will have comparatively greater legal significance today. This conclusion is justified, however, because it can now be said that, as a matter of legal *and* historical interpretation, the subordinate views not only acknowledged the aboriginal perspective on the covenant chain’s meaning but they also reveal that British officials were either consciously aware, or had sufficient information to allow us to conclude today that they could have been and ought to have been consciously aware, that their own conduct had given rise to a legitimate understanding among aboriginal nations that the aboriginal perspective on the covenant chain was shared by the crown. The *subordinate* views more accurately reflect a

plausible interpretation of the “shared understanding” that we are now seeking to articulate.

I suspect that the resulting shared meaning of the covenant chain as it existed in Canada on the eve of confederation was that aboriginal nations enjoyed an inherent right of self-government, or internal sovereignty, under the protective umbrella of crown sovereignty.²¹⁷ Such an approach is consistent with comments made by Binnie J. in the recent *Mitchell* case.²¹⁸ “The modern embodiment of the ‘two-row’ wampum concept, modified to reflect some of the realities of a modern state, is,” wrote Binnie J., “the idea of a ‘merged’ or ‘shared’ sovereignty,” with federal, provincial and aboriginal components of Canadian federalism being sovereign within their respective spheres.²¹⁹ In making these observations, Binnie J. appeared willing to re-configure the two-row wampum metaphor as (in effect) a one-row wampum (representing the path of “a single vessel (or ship of state)”),²²⁰ and this may concern those aboriginal peoples for whom the *gus-wen-tah* has ancient and sacred meaning. But while there are limits to the extent to which unilateral judicial pronouncements are capable of “brightening” or otherwise redefining the covenant chain treaties for a modern world, Binnie J.’s observations in *Mitchell* are a positive first step towards a judicial re-consideration of crown-aboriginal treaties and sovereignty, a step which is essential to re-building a legal context within which the covenant chain can be brightened properly by the treaty parties themselves.

217. Compare J.Y. Henderson, “Empowering Treaty Federalism” (1994), 58 Sask. L. Rev. 241 and “Treaty Responsibilities” *supra* note 61 at 326.

218. *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911.

219. *Ibid.* at paras. 129, 130 (Binnie J.’s observations came in a concurring judgment with which Major J. agreed; his comments about aboriginal sovereignty are phrased in a tentative manner).

220. *Ibid.* at para. 130.