Legal Pluralism and Hybridity in Mi'kma'ki and Wulstukwik, 1604-1779: A Case Study in Legal Histories, Legal Geographies, and Common Law Aboriginal Rights

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JD, University of New Brunswick, 2014
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A Dissertation Submitted in Partial Fulfillment
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Abstract:

This dissertation is shaped by a concern with how the doctrine of Aboriginal and treaty rights in Canada can develop to meaningfully recognize Indigenous self-determination. A number of inherited concepts (e.g. law, sovereignty, state, jurisdiction, and territory) have constrained legal and political imaginations and supported a legal apparatus that confines Indigenous peoples to a subordinate place in the constitutional order. Drawing on scholarship on common law Aboriginal rights, legal pluralism, legal geography, legal history, and political theory, this work develops a novel legal and theoretical critique by historicizing the concepts courts have relied on in mediating Crown-Indigenous relations and demonstrating that the retrospective application of these concepts, which supports the subordination of Indigenous peoples in the present day, is empirically suspect. Using Canada's Maritime provinces as an example, this is accomplished by describing in detail the legal pluralism that characterized the 17th and 18th centuries in the region, particularly how social and legal spaces were constituted by a plurality of legal and normative orders. By analyzing the territorial reach and subject matters of eight distinct legal systems that were operative in the region during this period, this work demonstrates that absolute jurisdiction through fixed territorial boundaries has never been an accurate way to describe Crown, or later state, authority in the region. Rather, the region's legal spaces were constituted by a plurality of overlapping, entangled, and hybrid legalities that structured territorial jurisdiction in discrete and unique ways. This challenges Aboriginal rights doctrine that too often relies on unstated presuppositions about the effect of Crown assertions of sovereignty in retroactively applying conceptions of territorial jurisdiction that are tailored to meet the requirements of the contemporary nation-state and have the effect of minimizing Indigenous claims and supporting the unilateral authority of the state. The final chapter applies this legal-historical analysis to the present-day through an analysis of recent treaty fishing rights disputes in Mi'kma'ki/Nova Scotia.

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This project would not have been possible without the love, care, friendship, guidance, and support of many people. I will name specifics, but first I want to acknowledge the many scholars and colleagues I met as a student or early career academic who were supportive and lent me kind words and generosity, who stoked my curiosity and constructively challenged my thinking. There are far too many to name, but the broad network of people I've engaged with at conferences and workshops, through academic journals and book projects, in classrooms and in coffeshops, have had a tremendous impact through their kindness and willingness to engage.

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Joshua Nichols and Ryan Beaton deserve special thanks. We joined the PhD program at UVic at the same time, and their presence enriched my experience immeasurable. They have been consistent collaborators and interlocutors, and I've benefitted tremendously from our many conversations and collaborations and from their friendship. My intellectual trajectory would be markedly different without their engagement, and I have no doubt that all the work I have done in recent years was much improved through their influence. And, since long before this project began, Brendan Marshall and Toby Couture have supported, challenged, and motivated me. They are friends of the best kind, and I'm lucky to have them.

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Introduction: Present-Oriented Legal History and the Common Law in Mi'kma'ki and Wulstukwik

Canada is a legally pluralistic society. Varieties of state law, international law, and the laws of the many distinct Indigenous peoples shape territories and jurisdictions at different scales, structuring the lives of culturally, socially, and politically diverse populations. Many forms of law, however, particularly the legal orders of Indigenous peoples, have historically been marginalized through the imposition of colonial law and authority. This imposition, however, has always met resistance. Recently, that resistance has been articulated through vocabularies of self-determination and the revitalization and resurgence of Indigenous law, as international and Indigenous law have been deployed to create and exploit cracks in state law's hegemony. Much as Canada's constitutional order was challenged to incorporate both civil and common law traditions following confederation, it must now complete the unfinished task of finding a negotiated space for the legitimate inclusion of Indigenous peoples as distinct self-determining political communities.[1] The country's legal and political structures are being pushed to respond to the reality of legal pluralism.

Where states acknowledge the existence of multiple legal orders and seek to institutionalize responses to legal pluralism, one way to frame these attempts is as taking place through three modes: denial, deferral, and translation.[2] Denial refers to an approach where the empirical fact of pluralism is acknowledged but its legal validity or import is rejected. Deferral is characterized by a tenuous balance; the entanglement of plural legal and normative orders is recognized, but the relationship between them is seen as static and not open to change. Deferral as a strategy puts off the settlement of claims by providing forms of accommodation yet placing the terms of interaction beyond debate.[3] A politics of deferral supports state power by giving ambiguous effect to the recognition of subaltern legal orders while maintaining the rules that govern the interaction

[1] For an overview of the historical development of Canada's constitution and the challenges of accommodating a plurality of distinct peoples, see Peter Russell, *Canada's Odyssey: A Country Based on Incomplete Conquests* (Toronto: University of Toronto Press, 2017).
[2] I have adopted this taxonomy from Tobias Berger: see Tobias Berger, "Denial, Deferral, Translation: Dynamics of Entangling and Disentangling State and Non-State law in Postcolonial Spaces" in Nico Krisch, ed, *Entangled Legalities Beyond the State* (Cambridge: Cambridge University Press, 2021) [*forthcoming*].
[3] *Ibid*.

between orders.[4] Finally, a process of translation involves a mutual negotiation of plural legalities and norms and how they co-exist. Canada, pushed by international law and Indigenous law, has begun to move from a period of deferral to one of translation.[5]

A note of caution here: the word translation will be immediately problematic for some, partly because of how it has historically been used to support processes of denial and deferral. In the *Marshall/Bernard*[6] decision, for example, the Supreme Court of Canada articulated a notion of translation that undermined Indigenous legal orders, rendering them cognizable to the courts only where they were transformed beyond recognition. The common law, the Court insisted, can only makes sense of, and give legal effect to, Indigenous claims if they are translated to a language it understands.[7] The type of translation that can move states beyond mere deferral as a strategy of engagement, by contrast, is characterized by the mutual negotiation of the norms that mediate entangled and plural legal orders; it is a process of mutual translation and transformation, not a form of engagement that is imposed on one party or requires change from one party alone. It is a

[4] In this, the politics of deferral is open to the same critique as the politics of recognition: see e.g. Audra Simpson, *Mohawk Interruptus: Political Life Across the Borders of Settler States* (Durham: Duke University Press, 2014)*;* Glen Coulthard, *Red Skin, White Masks* (Minneapolis: University of Minnesota Press, 2014).

[5] Berger, *supra* note 2.

[6] *R v Marshall; R v Bernard*, 2005 SCC 43, [2005] 2 SCR 220.

[7] Nigel Bankes captures this reasoning clearly: "[b]y focusing on aboriginal practices and yet at the same time failing to inquire into the normative context of that practice, the majority opinion denies the indigenous society and culture any opportunity to influence the translation process that the court describes. Translation becomes a one way street in which, despite protestations to the contrary, aboriginal practices are forced into existing common law categories and reconciliation is little more than a judicial conclusion or label for the process and its outcome, rather than a balancing of views or a rapprochement": Nigel Bankes, "Marshall and Bernard: Ignoring the Relevance of Customary Property Laws" (2006) 55 UNBLJ 120 at 127. For a similar critique, see See Paul Chartrand, "*R v Marshall; R v Bernard:* The Return of the Native" (2006) 55 UNBLJ 135. This version of translation tracks what James Tully refers to as "hegemonic ventriloquism", which describes a process in which "the more powerful partners consult with and listen to the less-powerful others and then translate what they hear into the presumptively universal or higher language of their hegemonic discourses." James Tully, "Deparochializing Political Theory and Beyond: A Dialogue Approach to Comparative Political Thought" (2016) 1 Journal of World Philosophies 51 at 64. In arguing that the legal educators professionals must developed more sophisticated conceptions of culture and difference in order to effectively facilitate intercultural and cultural competence (and indeed, whether these are the most appropriate terms to employ), Pooja Parmar argues that particular attention must be paid to processes of translation across, or between, legal traditions. Parmar points out that "for lawyers in plural legal societies, the task [of translating lived experience into legal narratives] is even more challenging, as they are called upon not only to translate social realities into legal facts, but are often also required to translate claims that arise from, and are shaped by, one legal system (e.g. an Indigenous legal system) into claims that will make sense within another legal system (e.g. the common law)." Some claims, however, are not translatable, and attempts to do so – as in *Marshall/Bernard* - change "the nature of the claim to such an extent that it ceases to represent the original grievance, often making any response from a court meaningless." Pooja Parmar, "Reconciliation and Ethical Lawyering: Some Thoughts on Cultural Competence" (2019) 97 Can Bar Rev 527 at 553-554. See also: Kirsten Anker, "Reconciliation in Translation: Indigenous Legal Traditions and Canada's Truth and Reconciliation Commission" (2016) 33:2 Windsor Yearbook of Access to Justice 15.

process of reciprocal elucidation.[8] Reciprocal elucidation requires the negotiation of new forms of association and engagement.[9] I refer to some of these forms of association throughout this work as treaty federalism, treaty constitutionalism, Indigenous constitutionalism, plurinational federalism, agonistic constitutionalism, and interstitial federalism.[10] While these are all distinct concepts, they all de-centre the nation state as a fixed and immutable territorial jurisdiction structured by a single legal order applicable to an easily definable "people." Each opens state law and modern constitutionalism to contested and negotiated forms of political authority that territorialize spaces through a plurality of legal and normative orders.

State courts can play an important role in this process. The Supreme Court of Canada has made many statements about the relationship between Indigenous peoples and the Canadian state that seem directed toward the development of a generative constitutional order in which Indigenous peoples can meaningfully exercise their inherent rights of self-determination.[11] That self-determination is often tied to the existence of Indigenous social and political orders that pre-date Crown sovereignty. In the *Delgamuukw* decision, for example, the majority of the Court held that "the common law should develop to recognize aboriginal rights…as they were recognized by either de facto practice or by the aboriginal system of governance."[12] This reflects the Court's recognition that Indigenous legal orders pre-dated and survived the Crown assertion of sovereignty and are recognized as common law Aboriginal rights and protected undert section 35 of the

[8] Tully, "Deparochializing Political Theory" *supra* note 7.
[9] Berger, *supra* note 2, puts it this way: "translation refers to the proactive transformation of norms that occurs as they move back and forth between different contexts."
[10] On these terms, see: John Borrows, *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016); James [Sakej] Youngblood Henderson, "Empowering Treaty Federalism" (1994) 58:2 Sask L Rev 241; Kiera Ladner, "Treaty Federalisms: An Indigenous Vision of Canadian Federalisms" in Francois Rocher & Miriam Smith, eds, New Trends in Canadian Federalism, 2nd ed (Toronto, Ontario: Broadview Press, 2003) 167; Andrew Bear Robe, "Treaty Federalism" (1992) 4:1 Const Forum 6. Rhett Larson, "Interstitial Federalism" (2015) 62:4 UCLA L Rev 908; Robert Hamilton, "Indigenous Peoples and Interstitial Federalism in Canada" (2019) 24:1 Rev Const Studies 43; Requejo, Ferran and Miquel Caminal Badia, eds, *Federalism, Plurinationality and Democratic Constitutionalism: Theory and Cases* (London and New York: Routledge, 2015); Jeremy Webber, *The Constitution of Canada: A Contextual Analysis* (Oxford: Hart Publishing, 2015) at 8.
[11] I use the term "generative" here in reference to Dr. Brian Slattery's work applying the term to the doctrine of Aboriginal rights: Brian Slattery, "The Generative Structure of Aboriginal Rights" (2007) 38:2 SCLR 595; Brian Slattery, "Aboriginal Rights and the Honour of the Crown" (2005), 29:2 SCLR 433. The Court itself has embraced this framing: see e.g. *Mikisew Cree First Nation v Canada (Governor General in Council),* 2018 SCC 40 at para 87; *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 38. Whether the court's use of this is an accurate portrayal of the doctrine or an overstatement will be explored throughout this work, particularly in chapters five and six.
[12] *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 159.

Constitution Act, 1982.[13] This conception of Aboriginal rights reflects the pre-existing political organization and laws of Indigenous peoples and the complex interaction between Crown and Indigenous legal orders.[14]

Aboriginal rights doctrine, however, has been unable to meet the higher aspirations that seem to animate some of the Court's prescriptions. With governments frequently working only to the legal minimum required, this has put Indigenous peoples seeking to exercise self-determination at a disadvantage. Frequent litigation, direct action, and heavy-handed state enforcement have frequently resulted.[15] One reason for this is the uncritical reliance on inherited concepts – sovereignty, the state, jurisdiction, territory, law – that shape the Court's understanding of the place of Indigenous peoples in the constitutional order and the relationship between state and Indigenous law. These concepts shape the "present limits of the necessary" of the legal imagination: the background set of beliefs and presumptions that appear natural and inevitable and draw boundaries around the possibilities of thought.[16] When not subject to ongoing contestation, interpretation, re-

[13] As the Court wrote *Mitchell v MNR*, 2001 SCC 33, [2001] 1 SCR 911 at para 9: "Long before Europeans explored and settled North America, aboriginal peoples were occupying and using most of this vast expanse of land in organized, distinctive societies with their own social and political structures. The part of North America we now call Canada was first settled by the French and the British who, from the first days of exploration, claimed sovereignty over the land on behalf of their nations. English law, which ultimately came to govern aboriginal rights, accepted that the aboriginal peoples possessed pre-existing laws and interests, and recognized their continuance in the absence of extinguishment, by cession, conquest, or legislation."

[14] *R v Van der Peet*, [1996] 2 SCR 507; *Haida Nation v British Columbia (Minister of Forests),* 2004 SCC 73; *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44; Brian Slattery, "The Hidden Constitution: Aboriginal Rights in Canada" (1984) 32:2 The American Journal of Comparative Law 361; Brian Slattery, "The Aboriginal Constitution" (2014) 67:2 SCLR 319.

[15] Indigenous resistance has been a consistent feature of Crown-Indigenous interaction since Europeans began encroaching on Indigenous lands and resources. For summaries and analysis of contemporary instances, see: Arthur Manuel and Grand Chief Ronald M. Derrickson, *Unsettling Canada: A National Wake-up Call* (Toronto: Between the Lines, 2015); John Borrows, *Freedom and Indigenous Constitutionalism, supra* note 10 at 50-102; John Borrows, "Crown and Aboriginal Occupations of Land: A History of Comparison" (Toronto: Ipperwash Inquiry, 2005); Yale Belanger and P. Whitney Lackenbauer, eds, *Blockades or Breakthroughs? Aboriginal Peoples Confront the Canadian State* (Montreal-Kingston: McGill-Queen's University Press, 2014); Val Napoleon, "Behind the Blockades" (2010) Ind LJ 9; Nicholas Blomley, "'Shut the Province Down": First Nations Blockades in British Columbia, 1984-1995" (1996) 111 BC Studies 5; The Kino-nda-niimi Collective, eds, *The Winter We Danced: Voices from the Past, the Future, and the Idle No More Movement* (Winnipeg: APR Books, 2014); Shiri Pasternak, *Grounded Authority: The Algonquins of Barrier Lake Against the State* (Minneapolis: University of Minnesota Press, 2017).

[16] The phrase "present limits of the necessary" is borrowed from Foucault and is given helpful elucidation by Tuomo Tiisala, who links the present limits of the necessary to a status of "obviousness" such that they are implicit within a discursive practice without being made explicit. These limits are constituted by "the habitual enactment of the implicit norms of a practice — their status as pattern governed dispositions of second nature — confers a status of obviousness to those implicit norms and thus turns them into, to borrow Foucault's expression, the *present limits of the necessary.*" Tuomo Tiisala, *Power and Freedom in the Space of Reasons* (PhD Diss, University of Chicago, 2016) at 5; Tuomo Tiisala, "Overcoming 'The Present Limits of The Necessary': Foucault's Conception of a Critique" (2017) 55 The Southern J of Phil 7.

negotiation, and processes of reciprocal elucidation, these concepts constrain the development of the law and the constitutional order. Judicial doctrine, insofar as it sets the rules of engagement, has fixed Indigenous peoples in a subordinate position in the constitutional order and placed hurdles on the path to meaningful self-determination through its reliance on interpretations of concepts such as sovereignty, state, law, territory, and jurisdiction that seem natural and necessary but are in fact contested. Presuppositions about Indigenous peoples, their laws, and the nature of their constitutional relationships with colonizing nations have constrained the development of common law doctrine, tying it to many of the colonial structures of law and authority that the Court at times seems eager to revise.[17] This work starts from the position that the ongoing inability or unwillingness of the executive, legislative, and judicial branches of the Canadian state to meaningfully recognize Indigenous peoples as partners in the constitutional order is a pressing and fundamental problem and that judicial doctrine plays an important role in this.[18] From this animating problem, the theoretical approaches best suited to crafting a response can be considered.

i) Legal Questions and the Present Limits of the Necessary

This work adopts an approach that can be characterized as a present-oriented legal history. A present-oriented legal history is guided first and foremost by problems in the present. The questions that shape the interrogation begin with a contemporary problem and work backwards to explore that problem's legal genealogies: the specific historical, theoretical, and legal developments and circumstances that gave shape to the present problem, that made it *possible*.[19] An investigation of this sort uncovers the genealogical roots of contemporary legal relations and identifies practices, concepts, and modes of thought that shape, constrain, or open up possibilities in the present.[20] The aim is to historicize concepts and, by uncovering their history, show the

[17] For a development of this argument, see Robert Hamilton & Joshua Nichols, "Reconciliation and the Straitjacket: A Comparative Analysis of the *Secession Reference* and *R v Sparrow*" (2021) 52:2 Ott L Rev 205.
[18] As will become evident, I do not mean here a rote recognition of self-government of the type that Glen Coulthard rightly criticizes. See Coulthard, *supra* note 4. Rather, I refer here to the negotiated development of means of self-determination and self-rule. I develop this at length in chapters 5 and 6.
[19] In this it adopts Foucault's notion of the "history of the present." See e.g. David Garland, "What is a 'history of the present'? On Foucault's genealogies and their critical preconditions" (2014) 16:4 Punishment & Society 365; Hugh Baxter, "Bringing Foucault into Law and Law into Foucault" (1996) 48:2 Stan L Rev 449 at 460; Jerry D Leonard, "Foucault: Genealogy, Law, Praxis" (1990) 14:1 Leg Studies Forum 3.
[20] For examples of this in a legal context see John J Borrows, "A Genealogy of Law: Inherent Sovereignty and First Nations Self-Government" (1992) 30:2 Osgoode Hall LJ 291; Joshua Ben David Nichols, *A Reconciliation Without*

contingency of "norms that are given to us as necessary, universal, and mandatory."[21] A present-oriented legal history of the type proposed here is not only structured by a present problem but, where that problem is a *legal* problem, is also aimed at the development of the common law. Such an approach interrogates contemporary *legal* problems to illustrate the contingency of the historical development of the common law and the contexts in which it developed, pointing to alternative lines of reasoning and possibilities for development in the process.[22] This approach reveals incongruities between inherited concepts that courts adopt and the actual practices of law and governance in the historical periods in question. Those practices, being plural, hybrid, and mutually constituted through negotiation and customary practice, are obscured or eclipsed when retroactively overlaid with histories of absolute Crown sovereign authority applying through fixed territorial boundaries.

Contemporary laws that obscure or undermine pluralism in the present have a twofold relationship to these practices in the past. First, they rely on inherited concepts with deep

Recollection? An Investigation of the Foundations of Aboriginal Law in Canada (Toronto: University of Toronto Press, 2020); Ruti G Teitel, "Transitional Justice Genealogy" (2003) 16 Harv Hum Rts J 69.There is debate regarding the normativity of Foucault's genealogical approach, specifically whether it supports arguments *for* any particular alternative form of social ordering: See Charles Taylor, "Foucault on Freedom and Truth" (1984) 12:2 Political Theory 152; Giovanni Maria Mascaretti, "Foucault, Normativity, and Freedom: A Reappraisal" (2019) 27 Foucault Studies 23; Christopher R. Mayes, "Revisiting Foucault's 'Normative Confusions': Surveying the Debate Since the *Collège de France* Lectures," (2015) 10:2 Philosophy Compass 841.

[21] Tiisala, "Foucault's Conception of a Critique", *supra* note 16 at 9. For an example of historicizing a concept following this methodology, see Durba Mitra, *Indian Sex Life: Sexuality and the Colonial Origins of Modern Social Thought* (Princeton, Princeton University Press, 2020).

[22] In this, I draw on several lines of legal historiography, including the critical approaches outlined in Robert Gordon's influential "Critical Legal Histories": Robert Gordon, "Critical Legal Histories" (1984) 36 Stanford L Rev 57) and 1. These approaches seek to destabilize assumptions about the role of law in social change. In this, they challenge explanations about how and why current law has taken the shape that it has, as well as the constitutive role of law in social relations, questions at the heart of this work. This work also borrows from Markus Dubber's "New Historical Jurisprudence", which emphasizes the necessarily normative and critical dimensions of legal history and casts legal history "as the critical analysis of contemporary law on the basis of norms emerging from historical analysis of foundational moments in the evolution of a particular legal system": Markus D. Dubber, "New Historical Jurisprudence: Legal History as Critical Analysis of Law" (2015) 2:1 Critical Analysis of Law. These approaches also need to be nuanced. Substantive engagements with Gordon's essay were published in 37 Law & Social Inquiry (2012). Christopher Tomlins argued in "After Critical Legal History: Scope, Scale, Structure" (2012) 8 Ann Rev Law & Soc Sci that legal history informed by the Critical Legal Studies movement overlooked the importance of causal explanation. Justin Desautels-Stein and Samuel Moyn have recently articulated a similar line of critique, arguing that American legal historians have fetishized "contingency" as an explanatory concept at the expense of critical engagement with legal historiography: see Justin Desautels-Stein and Samuel Moyn, "On the Domestication of Critical Legal History" (2021) 60:2 History and Theory 292. For a comprehensive account and engagement with these issues, see Anne Orford, *International Law and the Politics of History* (Cambridge: Cambridge University Press, 2021).

Eurocentric roots.[23] They take up and use concepts with exclusively European genealogies which are implicated in European imperial projects. Second, in applying inherited concepts as if they represent actual historical practice, contemporary courts and legal thinkers unconsciously construct histories that support contemporary legal frameworks and colonial power structures. Take the notion of Indigenous peoples as subordinate to Crown sovereign authority as an example: while this was an undeniable feature of European legal and political theory from the 16th century onward, it only slowly became a descriptive reality in North America between the late 18th and early 19th centuries and, even at that, has been subject to continuous resistance. In practice, European nations engaged in Indigenous forms of diplomacy, recognized Indigenous practices of law and governance, and engaged in negotiated forms of political rule and association.[24] Yet, in uncritically deploying contested concepts, contemporary courts have tended to treat the theoretical positions of European thinkers and legal claims of European sovereigns as representative of the historical reality and, in so doing, maintained Indigenous peoples in a subordinate position within the domestic constitution of the nation state.[25] A present-oriented legal history disentangles the various threads of knowledge and discourse that hold together present configurations of law. In this, it provides the tools necessary to re-evaluate inherited concepts and historical interpretations that constrain possibilities in the present. Two further theoretical frames inform a present-oriented legal history and assist in describing these processes: legal pluralism and legal geography.

ii) The "What" of Law: Legal Pluralism and Multiple Legalities

Legal pluralism is an increasingly varied and capacious field.[26] Some commonalities across the field, however, are particularly useful here. Legal pluralists tend to reject rigid statist definitions

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[23] See Dipesh Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference* (Princeton: Princeton University Press, 2000). As Chakrabarty explains, his efforts to *provincialize* Europe is an attempt to "decenter.. an imaginary figure" that exists in the shorthand and "everyday habits of thought" of thinkers in other parts of the world. That is, "it is impossible to *think* of anywhere in the world without invoking certain categories and concepts, the genealogies of which go deep into the intellectual and even theological traditions of Europe": *ibid* at 4.

[24] Robert A. Williams Jr., *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600 – 1800* (Routledge: New York, 1999); James (Sa'ke'j) Youngblood Henderson, *Wabanaki Compact: The Foundation of Treaty Federalism in North America, 1621-1728* (Saskatoon: Indigenous Law Centre, 2020).

[25] Hamar Foster, "Another Good Thing: *Ross River Dena Council v Canada* in the Yukon Court of Appeal, Or: Indigenous Title, Presentism in Law and History, and a Judge Begbie Puzzle Revisited" (2017) 50:2 UBC L Rev 293; Hamilton & Nichols, *Reconciliation and the Straitjacket, supra* note 17.

[26] Indeed, Sally Moore argues that the term "legal pluralism" has been deployed so variously that it is now without identifiable meaning: Sally Falk Moore, "Legal Pluralism as Omnium Gatherum" (2014) 10:1 FIU L Rev 5. For some

of law. In exploring legally complex terrains, they accept a range of legal and normative practices as relevant.[27] In this, they seek "to identify places where state law does not penetrate or penetrates only partially, and where alternative forms of ordering persist to provide opportunities for resistance, contestation, and alternative vision."[28] While legal pluralists provide a range of responses to the question of whether particular social and cultural norms of a community constitute *law* per se, the field as a whole provides a way of seeing, and a grammar for discussing, sites of complex interaction between a plurality of legal and normative orders.[29] Decentralized and non-hierarchical conceptions of law provide the basis for sophisticated reasoning about the interactions of overlapping systems and practices.

Explicit theorizing on legal pluralism is supplemented by the burgeoning literature on Indigenous law. John Borrows, Valerie Napoleon, Aaron Mills, Leanne Simpson, Darcy Lindberg, Alan Hanna, Robert Clifford, Aimée Craft, Sarah Morales, and Sakej Henderosn, to name only a few, have developed a substantial literature providing descriptive and analytical accounts of a range of distinct Indigenous legal orders and entering theoretical debates about the nature of law and the interactions between legal orders.[30] This work provides descriptively rich accounts of legal pluralism and advances theoretical discussions on law and the relationships between state and non-state legal orders, enriching the grammar of legal pluralism. While some legal pluralists may prefer to hold to a law-norm distinction that could exclude some forms of Indigenous law, the set of

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of the range of writing on legal pluralism, see Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (Cambridge: Cambridge University Press, 2012).

[27] Berman, *Global Legal Pluralism, supra* note 26.

[28] *Ibid* at 54.

[29] For a comprehensive overview of approaches to legal pluralism, see Brian Z. Tamanaha, *Legal Pluralism Explained: History, Theory, Consequences* (New York: Oxford University Press, 2021). For an analysis of legal pluralism in the context of Indigenous rights, see Anker, Kirsten. *Declarations of Independence: A Legal Pluralist Approach to Indigenous Rights* (London & New York: Routledge, 2014).

[30] See e.g.: John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010); John Borrows, *Freedom and Indigenous Constitutionalism*, *supra* note 10; John Borrows, *Law's Indigenous Ethics* (Toronto: University of Toronto Press, 2019); Valerie Napoleon, *Ayook: Gitksan Legal Order, Law, and Legal Theory* (PhD Dissertation, University of Victoria, 2009) [unpublished]; Leanne Betasamosake Simpson, *Dancing on Our Turtle's Back: Stories of Nishnaabeg Re-Creation, Resurgence, and a New Emergence* (Winnipeg: Arbeiter Ring Publishing, 2011); Leanne Betasamosake Simpson, *As We Have Always Done: Indigenous Freedom Through Radical Resistance* (Minneapolis: University of Minnesota Press, 2017). James [sakéj] Youngblood Henderson, "First Nations' Legal Inheritances in Canada: The Mikmaq Model" (1996) 23 Man LJ 1; Sarah Morales, "'a'lha'tham: The Re-Transformation of s. 35 through a Coast Salish Legal Methodology" (2017) 37:2 NJCL 145; Hadley Friedland & Val Napoleon, "Gathering The Threads: Developing A Methodology For Researching And Rebuilding Indigenous Legal Traditions" (2015-2016) 1:1 Lakehead LJ 16; Lindsay Borrows, "*Dabaadendiziwin*: Practices of Humility in a Multi-Juridical Legal Landscape" (2016) 33:1 Windsor YB Access Just 149; and the contributions to *Indigenous Law and Legal Pluralism* (2016) 61:4 McGill L J*,* a special issue of the McGill law Journal.

conceptual tools theorizing the interactions of the plural laws and norms remains useful.[31] It provides a vocabulary and mode of analysis to interrogate the interstices of state law in ways that challenge that law's totalizing impulses. A pluralist lens informs the type of present-oriented legal history outlined here because a legal history that fails to account for legal pluralism in past risks reifying statist conceptions of law, sovereignty, and territorial jurisdiction that underpin the ongoing marginalization and dispossession of Indigenous peoples while providing only partial accounts of the historical record.

An emphasis on legal hybridity also emerges from a pluralist perspective. Law must be considered not only as the product of distinct political communities, but as emerging through the entanglements of multiple legal orders. Where multiple orders exist, accommodation and co-existence can take place through changes to legal regimes that facilitate that co-existence. It can also lead to the development of new hybrid legalities and processes of hybridization. Most commonly, hybridity refers to diverse phenomena – physical materials, concepts, objects, identities, cultures - coming together to produce a new phenomenon. It can also be understood as a kind of dynamism, not a fixed endpoint produced by a synthesis, but a mingling and evolving.[32] Studying legal hybridity, then, is less methodological than perspectival, a way of seeing how legal regimes can interact. It is "a way of seeing things differently by looking critically at invented histories of 'pure' laws and discrete 'families' of 'closed legal systems'. Legal traditions are instead complex and dynamic."[33] Understanding the complex and dynamic nature of legal traditions and their interactions frees law from narratives that portray it as a unified, fixed, and hierarchical state-

[31] For an overview of how legal pluralists have approached the "what is law?" question, see Tamanaha, *supra* note 29 at 169-208. I will avoid the entering into the "what is law?" debate in this work. I proceed from the position that all concepts, including law, are subject to continual contestation and re-interpretation. In this, I adopt what Tamanaha refers to as "folk legal pluralism" (contrasted with "abstract legal pluralism"): *Ibid* at 169. Folk legal pluralism avoids the "over-inclusiveness problem" of legal pluralism (put simply, the suggestion that legal pluralists default to including *everything* as law) by instead looking "at what people collectively identify as law" (*Ibid* at 170). That is, rather than adopting a definition of law at the outset and debating whether given social phenomena fit the definition, folk legal pluralism takes up and works with the law as given communities understand it. This approach is important because law has often been defined narrowly so as to create a hierarchy between law and "non-law" forms of social and normative ordering or between "law" and "culture." In so doing, non-state forms of social ordering have been marginalized. As Pooja Parmar points out, the law-culture distinction can be relied on to exclude Indigenous legal orders and create a hierarchy between state and Indigenous law: Parmar, *supra* note 7 at 547-548. By adopting a folk pluralist approach, I hope to sidestep the problem of reifying a given understanding of law in a way that marginalizes competing normative orders.

[32] Seán Patrick Donlan, Biagio Ando, and David Edward Zammit, "'A Happy Union'? Malta's Legal Hybridity" (2012) 27 Tul Eur & Civ LF 165 at 169.

[33] *Ibid.*

based structure.[34] Hybridity takes into account the plurality of legal and normative orders, avoiding a reification of state or positive law that prevents the researcher from seeing a fuller picture of the complex interactions between legal and normative systems that are always present, particularly in colonial contexts. In this sense, legal hybridity is descriptive and empirical rather than normative.

The concept does, however, have normative implications, and notions of hybridity should be approached cautiously when considered in relation to pluralism. In post-colonial literature, questions have been raised about the "discourse of hybridity" and its relationship to colonial rule, imperialism, and globalization.[35] Does any discussion of hybridity in the context of the highly uneven power relations that characterize a colonial context really refer to a process of forced assimilation? What risks being subsumed or erased if hybridity is emphasized at the expense of unique or discrete cultural, legal, or normative orders? These concerns animate Marwin Kraidy's warning that "hybridity is a risky notion. It comes without guarantees."[36] Hybridity can be relied on to support processes of assimilation or oppressive power relations. It can also, however, be construed as a form of resistance or means of altering power. As Anjali Prabhu writes, "it is claimed that [hybridity] can provide a way out of binary thinking, allow the inscription of the agency of the subaltern, and even permit a restructuring and destabilizing of power."[37] Forms of hybridity can emerge through the exercise of agency in creating dynamic identities, cultures, and social forms. In this, hybridity can reflect what John Borrows has called "Indigenous conceptual mobility," working against problematically static and essentialized conceptions of Indigeneity and Indigenous social, legal, and political thought and organization.[38] Equally, however, discourses of hybridity, when sanctioned or even reified by given hegemonic power structures can reinforce, rather than challenge, those structures.[39] Forced assimilation and symbolic forms of recognition that fail to meaningfully challenge (or worse, work to support) asymmetrical power relations are

[34] In light of this, Donlan et al draw a distinction between legal and normative hybridity, arguing that "*'Legal hybridity* … refers to state laws and legal principles, those elements - usually highly formalized and institutionalized - of a legal tradition recognized as properly legal by modern lawyers. *'Normative hybridity'* is a far wider concept, largely synonymous with 'normative pluralism' and including both laws and wider patterns of normative ordering and non-state norms." *Ibid*

[35] See e.g. Marwin M. Kraidy, *Hybridity, or the Cultural Logic of Globalization* (Philadelphia: Temple University Press, 2005).

[36] *Ibid* at vi.

[37] Anjali Prabhu, *Hybridity: Limits, Transformations, Prospects* (Albany: State University of New York, 2007) at 1.

[38] Borrows, *Freedom and Indigenous Constitutionalism, supra* note 10 at 40-49.

[39] Prabhu, *supra* note 37; Kraidy, *supra* note 35 at 148.

but two examples.[40] Used prescriptively or normatively, then, hybridity is a nuanced concept whose effects need to be assessed closely. From a descriptive standpoint, it is a helpful lens through which seemingly stable concepts and practices can be shown to be more complex and dynamic than initially assumed. Notions of hybridity can help clarify the nature of the entanglements that characterize legally and normatively plural spaces.

iii) The "Where" and "When" of Law: Incorporating Legal Geography

A second theoretical vantage point that is useful to this work is caught broadly under the label of legal geography. As with legal pluralism, legal geography is a diverse field shaped by a range of inquiries and approaches.[41] Thinkers in the field place an emphasis on the spatial and temporal dimensions of law, arguing that social spaces are constituted in important ways by law. Law governs the relationship between people and the physical world, both reflecting the uses of that world and shaping them. Law is constitutive not only of legal spaces, but of all social spaces, as law structures the relational aspects of social existence.[42] Physical *places* become legal *spaces* as law guides the practices of groups and individuals and determines forms of use and occupation. This occurs at various scales, from "micro-territories" such as an apartment, to extensive territorial jurisdictions such as nation states.[43] Yet, lines that are drawn demarcating territorial jurisdictions have little effect in the world until law-governed practices bring them into being. The boundaries of an Indian reserve, for example, are brought into being, made real, through the application and enforcement of the *Indian Act* and *Indian Act* governance in those places. Territorial jurisdiction is constituted through specific legal practices that give effect to asserted authority. Similarly, the

[40] Borrows, *Freedom and Indigenous Constitutionalism, supra* note 10 at 126.
[41] See David Delaney, *Territory: a Short Introduction* (Oxford: Blackwell, 2005); Austin Sarat, Lawrence Douglas, and Martha Merrill Umphrey, eds, *The Place of Law* (Ann Arbour: University of Michigan Press, 2006); Tayanah O'Donnell, Daniel F. Robinson, and Josephine Gillespie, eds, *Legal Geography: Perspectives and Methods* (New York: Routledge, 2020); Nicholas Blomley, David Delaney, and Richard T. Ford, eds, *The Legal Geographies Reader* (Oxford: Blackwell, 2001); Franz von Benda-Beckmann, Keebet von Benda-Beckmann, and Anne Griffiths, eds, *Spatializing Law: An Anthropological Geography of Law in Society* (London & New York: Routledge, 2016); Irus Braverman, Nicholas Blomley, David Delany, and Alexandre Kedar, eds, *The Expanding Spaces of Law: A Timely Legal Geography* (Stanford: Stanford University Press, 2014).
[42] Richard T. Ford, "Law's territory: a history of jurisdiction" in Nicholas Blomley, David Delaney, and Richard T. Ford, eds, *The Legal Geographies Reader* (Oxford: Blackwell, 2001) at 200-217.
[43] Delaney, *Territory, supra* note 41 at 4-5.

legal spaces of empire are constituted through the extension of law in a variety of forms.[44] Legal geography provides a useful lens for considering how imperial powers sought to constitute new spaces as English or French possessions and how colonies sought to create and extend territorial jurisdiction through specific legal practices. Consideration of the spatial dimensions of law illustrates how tangential or partial its reach can be even where authority is broadly asserted. In this, legal geography illustrates how law structured given territories historically and how contemporary law continues to structure territory on some of those same bases, naturalizing conceptions of territory and jurisdiction and given legal relationships across spaces.

A present-oriented legal history can take the insights of legal pluralism and legal geography together to support descriptive analyses of how legally plural spaces were, and are, differentially constituted by plural legal orders.[45] This can help elucidate key features of "plural legal constellations in which unalike and often-contradictory notions of space and boundaries come to coexist in mutual interdependence within the same physical or sociopolitical space."[46] That is, where a plurality of legal and normative orders and practices overlap, legal spaces are constituted by those plural legal orders, the interactions between them, and the practices they guide. Interventions concerning the plurality, temporality, and spatiality of law can therefore inform a present-oriented legal history. These lenses provided a way of seeing legal history as a pluralized set of legal histories or legalities that structured legal spaces in distinct and shifting ways. The common law, in its efforts to reflect Indigenous modes of governance and generative interactions between Indigenous and settler law, can take guidance from the thick descriptions this theoretical approach makes possible. In short, the aim of this work is to bring legal history, pluralism, and geography into conversation with contemporary Aboriginal rights issues.

iv) Presentism and Present-Oriented Legal History

The approach outlined here might be criticized as presentist.[47] In the historical context, presentism refers to the concern that an objective or scientific approach to history is undermined if the

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[44] See Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires* (Cambridge: Cambridge University Press, 2009).

[45] Legal geography has at times engaged explicitly with pluralism: see e.g. Franz von Benda-Beckmann, Keebet von Benda-Beckmann, and Anne Griffiths, "Space and Legal Pluralism: An Introduction" in Benda-Backmann et al, eds, *Spatializing Law, supra* note 41 at 1-30.

[46] Franz von Benda-Beckmann and Keebet von Benda Beckman, "Places that come and go: a Legal Anthropological Perspective on the Temporalities of Space in Plural Legal Orders" in Braverman et al, *supra* note 41 at 30.

[47] See e.g. PG McHugh, *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (Oxford: Oxford University Press, 2011) at 274-76; PG McHugh, "Aboriginal Title: Travelling from (Or to) an Antique Land" (2015) 48:3 UBC L Rev 793.

historian either judges the past according to contemporary norms or allows present concepts, norms, beliefs, etc. to shape their understanding of the past to too great an extent.[48] A present-oriented history, being methodologically defined by a commitment to interrogating the past in light of present concerns, seems designed specifically to raise concerns of presentism.[49] A nuanced approach to the question of presentism, however, shows that there is ample room for histories of the present that, while perhaps uncomfortable for some historians, avoid the pitfalls that most concern them.

Considerations of the rights of Indigenous peoples in contemporary nation states inevitably raise questions that transcend the disciplinary bounds of law and history (and, for that matter, political theory, anthropology, and legal history). To simplify, history is concerned with the elucidation of the past, while law, as an academic discipline and as a practice, is concerned with interpreting past legal pronouncements and texts to explain the law or shape the current state of the law through argumentation. Legal history, by turn, studies legal dimensions of history or the historical dimensions of law, in particular how law and legal institutions changed and how they related to broader social and political changes.[50] A present-oriented legal history of the type I propose here adopts the methodological approach of present-oriented history, which aims to interrogate the past in order to clarify a contemporary problem – that is, which makes *explicitly instrumental* use of historical analysis – and applies it to legal history.

A threshold question, then, is whether a history of the present is irredeemable from the outset as far as a charge of presentism is concerned. A history of the present is undoubtedly shaped by present concerns.[51] Is presentism, then, baked into the very structure of the approach? Whether histories of the present are presentist and, if so, whether the form of presentism they adopt undermines their cogency, depends on our definition of presentism. A first important distinction is between what Hamar Foster refers to as "historical presentism" and "legal presentism."[52]

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[48] David Armitage, "In Defense of Presentism" in Darrin M. McMahon, ed, *History and Human Flourishing* (Oxford: Oxford University Press, 2020).
[49] See e.g. PG McHugh, *infra* 47.
[50] Foster, "Another Good Thing", *supra* note 25 at 314; Kent McNeil, "Indigenous Rights Litigation, Legal History, and the Role of Experts" (2014) 77 Sask L Rev 173; Alfred L. Brophy, "How Legal History Shapes the Present" (2016) OUPblog, online at https://blog.oup.com/2016/04/how-legal-history-shapes-the-present/.
[51] Yet, a history of the present does not seek to assess the past in light of present norms. Rather, it is shaped by a present concern in the sense that it turns its gaze backwards not to understand the past alone, but to understand a present problem. It seeks to understand the genealogy of a problem not by uncovering it necessary or sufficient cause, but by how certain configurations in the present were made possible.
[52] Foster, "Another Good Thing", *supra* note 25 at 314

Historical presentism refers to instances where present concerns distort analysis of the past; it has conventionally been seen as among the most grievous errors in historical analysis. Put simply, "historical presentism is seeing the past in the light of the present. The goal of the historian is to illuminate the past in its own terms."[53] By contrast, *legal* presentism consists of "adapting today's law to today's needs."[54] The lawyer and judge take past pronouncements of the law and apply them to present circumstances. The challenge is that judges, drawing on past authority, often use language that makes it appear as though they are *applying* rather than *re-making* law, making them easy targets for a charge that they have misinterpreted the past when they make doctrinal pronouncements. The distinction between historical presentism and legal presentism is illustrated when considering the distinction between the use of the past as *authority* and as *evidence*. As authority, common law lawyers rely on past pronouncements to support a present-day legal argument: it is part of the toolkit lawyers use to persuade.[55] As evidence, the past is approached instrumentally, yet in a more conventional sense: the aim is to provide an accounting of events or actions that support a client's position, but one which provides an objective accounting of past events. This evidence-based approach, while still oriented toward a present concern, has more in common with conventional historical approach of an objective, scientific account of the past.[56]

Let us return, then, to the question of whether a history of the present is guilty of presentism, beginning with the question of historical presentism. As discussed, in its pejorative senses the term refers either to an error in historical analysis whereby the historian misconstrues the historical record by applying contemporary norms or concepts, where one assesses past actions on the basis of present norms, or where one interprets the past as an inevitable march toward progress (the "Whiggish" conception of history).[57] Each of these errors would be fatal to an effective history of the present, which requires accurate historical analysis: an understanding of how present configurations and exercises of power were made possible would be fundamentally undermined if it were based on "bad" history. Further, the emphasis on contingency that underpins histories of the present is designed precisely to undermine Whiggish conceptions of history. The

[53] Peter Charles Hoffer, "The Pleasures and Perils of Presentism: A Meditation on History and Law" (2014) 33:1 Quinnipiac L Rev 1 at 1.
[54] Foster, "Another Good Thing", *supra* note 25 at 314.
[55] This is a distinction drawn by Maitland and taken up by McHugh, McNeil and Foster in their engagements: see *infra* 47 and 50.
[56] McNeil, "Indigenous Rights Litigation", *supra* note 50.
[57] Jeffrey R. Wilson "Historicizing Presentism: Toward the Creation of a Journal of the Public Humanities" at 2

point of a critically oriented history of the present is to illustrate the contingency of things that are taken as natural and universal, the antithesis of a Whiggish approach that portrays history as a heroic march to an idealized present.[58] From a methodological perspective, then, a history of the present is no less concerned about historical accuracy then a conventional history, even if it is guided by questions. Anachronism, or what I call simplistic presentism, is not an inherent feature of a history of the present. A history of the present may well fall into anachronistic or presentist analysis, but it is not inherent to the methodology, and a researcher has motivation to avoid it.

Indeed, there is little disagreement about whether simplistic presentism ought to be avoided.[59] Yet, presentism is an intensely contested topic among historians and historiographers. We can see why when we take a slightly different definition of presentism as that error which undermines the historian's goal "to reconstruct the past without the distorting effects of the present."[60] Framed as a concern with "distorting effects", the notion of presentism immediately raises a number of questions about the position of the historical researcher, the distorting effects of language and symbolic representation, the conception of time engaged, and the possibility of truly objective analysis. In other words, the invocation of "distorting effects" that undermine a pure or unadulterated knowledge raises a host of epistemological questions. A history of the present will be unavoidably presentist on these grounds: allowing present questions to shape the inquiry in the way this methodology suggests could not help but have a distorting effect. If defined in relation to an idealized historian's goal "to reconstruct the past without the distorting effects of the present", however, the charge of presentism loses much of its force and calls out for more nuanced analysis. There are two reasons for this.

First, all historical research is situated: no researcher can stand "outside" ("nowhere", as it were) and describe history *as it was* in a purely objective sense.[61] The notion of history as an

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[58] As Tuomo Tiisala notes, in Foucault's view the limits of present discourse are shaped by "a historically dynamic configuration of norms that not only govern how we use concepts in thought and action but, crucially, also constitute a space of semantic possibilities that defines what kinds of contents we can so much as recognize as possible candidates to entertain as our thoughts in the present. In other words, the present limits of the necessary function as a *historical a priori*." Tuomo Tiisala, "Foucault's Conception of a Critique", *supra* note 16 at 8.

[59] As Marcus Colla writes, "Presentism used to be so simple. In the old vernacular it referred to a tendency to view the past from the perspective of the present (or, at its most extreme, maybe even use the past to illuminate the present). Historians disagreed furiously on the intellectual virtues of orienting their views of the past to the needs of the current day. But the content of the term itself was rarely disputed." Marcus Colla, "The Spectre of the Present: Time, Presentism and the Writing of Contemporary History" (2021) 30 Contemporary European History 124 at 124.

[60] Armitage, "In Defence of Presentism", *supra* note 48.

[61] Jeffrey Wilson outlines this argument clearly: "because we human beings, situated in the world as we are, are constitutionally incapable of engaging with the past outside the present's conditioning influence upon us.3 Here

objective science that can simply represent the past in its own terms has been critiqued from several vantage points. Different schools of historiography have shown how the gaze of the researcher shapes the past that they report.[62] In imperial contexts, singular, linear, and often Whiggish views of history have marginalize non-European peoples. Edward Said, for example, argues that European discourses rendered the Orient static and unchanged by time.[63] Chakrabarty identifies a conception of historicism deployed by Europeans to frame non-European peoples as "not yet" ready to achieve equal status with Europeans, as "not yet civilized enough to rule themselves."[64] As thinkers have challenged the objective and scientific pretences of Western history and illustrated how given conceptions of history and approaches to historiography are implicated in colonial projects, various historical approaches guided by contemporary questions have emerged.

As distinct approaches to the study of the past and its relation to the present have taken shape, notions of presentism have been nuanced. In "In Defense of Presentism" David Armitage identifies five types of historical presentism and considers strengths and weaknesses of each.[65] Historians, he argues, ought to take a nuanced approach to distinguishing between types of presentism and "defend those forms that are defensible."[66] Foregoing the opportunity to engage with the present undermines the historian's ability to contribute historical knowledge to present issues and, in so doing, contribute to the project of human flourishing.[67] Armitage sees histories of the present as one of those justifiable types of presentism that can contribute to such a project. He argues, in effect, that there are a range of historical approaches that are presentist yet avoid the pitfalls of simplistic presentism. Thus, a second reason that a charge of presentism may lose its persuasive force is that these various approaches enrich historical analysis and provide historians with tools to contribute to broader projects supporting human flourishing, freedom, and dignity.

This same reasoning applies to legal history, including present-oriented legal history. A present-oriented *legal* history must be considered in relation to both historical and "legal

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presentism is not something to avoid or pursue. It's a condition of being. We have never not been presentist." Wilson, *supra* note 57 at 3.

[62] On representations of Indigenous peoples in schools of Canadian historical and anthropological thought, see Bruce G. Trigger, *Natives and Newcomers: Canada's "Heroic Age" Reconsidered* (Montreal-Kingston: McGill-Queen's University Press, 1985) at 1-49.

[63] Edward W. Said, *Orientalism* (New York: Vintage, 1994) at 240.

[64] Chakrabarty, *Provincializing Europe, supra* note 23 at 8.

[65] Armitage, "In Defense of Presentism", *supra* note 48. I say "historical presentism" here to distinguish these five types from forms of scientific or philosophical presentism that Armitage also identifies.

[66] *Ibid*.

[67] *Ibid.*

presentism." A conventional legal history engages issues of presentism in the same way as any other work of history. The present-oriented legal history outlined here is distinct because it is both framed by or shaped by contemporary legal issues and because it does so to critique contemporary doctrine through legal argumentation. That is, it straddles the worlds of law and history not by studying historical aspects of law alone but by incorporating critical legal-historical analysis into contemporary legal argumentation. This leads to the second sense in which charges of presentism are relevant to this project: the specific relation of the idea to the doctrine of common law aboriginal rights. The first question is whether some influential thinkers in the field have adopted a presentist approach that has led them to misstate the historical state of the law, the second, whether the doctrine of Aboriginal rights writ large ought to take guidance from the past and, if so, to what extent. Here, major questions of historiography take on a more parochial tone.

Questions of presentism as they relate to common law Aboriginal rights have been ongoing in Australia and New Zealand for a number of years and have been raised in Canada in recent years, notably by Professor Paul McHugh.[68] McHugh's allegation, in short, is that Canadian courts and a number of influential academics are guilty of presentism.[69] McHugh alleges that the Supreme Court of Canada treats the doctrine of Aboriginal rights and title as a timeless monolith in a way that distorts the past. It has been guilty, in other words, of the simplistic presentism outlined above, a sort of Whiggish history that judges the past according to present standards and has an unavoidable distorting effect. Courts and commentators have, in his view, confused law and history and failed to grasp the distinction between "practical" and "scientific" approaches to the past.[70] Further, he sees Canadian courts and academics as reading the past in light of a mistaken conception of Aboriginal title and argues for more explicit acknowledgement that the present

[68] See works cited in note 47 and 50 for discussions in the Canadian contexts. More generally, see Bain Attwood, *Telling the Truth About Aboriginal History* (Crows Nest, NSW: Allen & Unwin, 2005); Lorenzo Veracini, "A Prehistory of Australia's History Wars: The Evolution of Aboriginal History during the 1970s and 1980s" (2006) 52:3 Australian Journal of Politics and History 439; Bain Attwood & Tom Griffiths, *eds*, *Frontier, Race, and Nation: Henry Reynolds and Australian History* (Melbourne: Australian Scholarly, 2009).

[69] For criticism of the courts see McHugh, "Antique Land", *supra* note 47 at 819, where he argues that "Canadian courts continue to misleadingly treat common-law Aboriginal title as though it were both a historical legal reality and a late-20th century judicial contrivance. It is, of course, almost entirely the latter" and PG McHugh, "Time Whereof--Memory, History and Law in the Jurisprudence of Aboriginal Rights" (2014) 77 Sask L Rev. For critique of scholars see McHugh, "Antique Land", *supra* note 47 and McHugh, *Aboriginal Title, supra* note 47 at 314-319.

[70] Thus, he argues that "Those who say the common law has 'always' taken a particular position are erecting an Ozymandias, a statue of seeming permanence that is a memorial to the product of their thought and enterprise at a particular time" in McHugh, "Antique Land", *supra* note 47 at 796. The distinction between "practical" and "scientific" approaches are adopted from Michael Oakeshot: McHugh, *Aboriginal Title, supra* note 47 at 275-276.

doctrine of Aboriginal title has not always existed: the "Indian title" of the 19th century is not the same as the "Aboriginal title" of the Supreme Court of Canada in the 21st. McHugh's central concern appears to be that the past state of the law not be misrepresented, particularly through contemporary legal doctrine being projected into a past to which it did not apply.

McHugh's concern is that those advocating for Indigenous "claims" in the present day are distorting the past to support those claims. They do so, in his view, either by misrepresenting the past to suit their narrative (as with descriptions of the effect of the *Royal Proclamation, 1763*)[71] or by projecting legal obligations into a period to which those obligations were non-justiciable and using that as a basis for contemporary claims.[72] Canadian government lawyers, who have frequently hired McHugh as an expert witness, have made similar allegations. In the *Alderville* trial, for example, the Crown argued that "Presentism [is collapsing] the present and the past together. It's wrong historically and it's wrong legally."[73] The Crown relied on this to argue that Indigenous peoples cannot seek a legal remedy today for an act that did not give rise to a justiciable cause of action when it was committed.[74] While couched primarily as a concern with historiography, then, it can be seen that this line of argument is also concerned with the present development of the law and seeks to reject certain articulations of doctrine on the basis that they are "ahistorical."

Hamar Foster helpfully reduces this argument to three propositions. The first is a matter of historical fact, the proposition that Aboriginal rights were not justiciable prior to the mid-20th century, at least to the extent that Indigenous peoples themselves could not bring actions against the Crown to enforce such rights. The second proposition relies on a certain conception of law and holds that rights which are not justiciable are not *legal.* The third proposition builds on the first two, holding that if rights were not justiciable in the past, remedies may not be granted now for harms that occurred when they were not justiciable.[75] These three propositions aptly capture the

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[71] McHugh, *Aboriginal Title, supra* note 47 at 314-319

[72] As I will return to below, the clear motivation here is to argue against Indigenous claims to remedies on the basis of past harms. If an interest was non-justiciable in 1832 or 1888, the argument goes, then it ought not be today. The bizarre irony of this is that it relies on precisely the logic that McHugh argues so fervently against. In "Antique Land", *supra* note 47, he argues that courts and commentators fail to realize that law is not monolithic, that it is subject to change, and that it has "historicity." And yet, he argues that present claims ought to be available only if such claims could be made out in the past.

[73] *Alderville Indian Band et al v Her Majesty the Queen et al* (Federal Court of Canada, Court File No. T-195-92), transcript of proceedings for 29 October 2012 at 51 cited in Foster, "Another Good Thing", *supra* note 25 at 306 n42.

[74] Foster, "Another Good Thing", *supra* note 25at 305-306.

[75] *Ibid* at 296-297.

basic framework supporting parochial allegations of presentism in the context of common law aboriginal rights.

The first proposition is largely correct, though subject to two important qualifications. First, while it is true that Indigenous peoples could not bring an action against the Crown to recover Aboriginal title lands in the 19th century, this needs to be considered with the added context that no actions could be brought against the Crown without the Crown's permission until relatively recently, whether the claimant be Indigenous or not.[76] Courts had no trouble articulating and applying a conception of Aboriginal title when mediating disputes between settlers or colonial governments where such title was at issue, but an Indigenous claimant could not bring an action against the Crown demanding recognition of their title or alleging a violation of their rights. Again, this limitation must be set in the broader context of the time, in which such claims were not available to anyone. Further, the mode of redress sought at the time – the petition against the Crown – was used frequently.[77] Indigenous peoples sought to enforce their interests according to the legal means available in the era. The second qualification is that we must realize that law is subject to ongoing contestation and modification over time. While common law courts were not prepared to recognize claims to title, such claims were brought, indicating that Indigenous peoples believed they held a cognizable interest that ought to be enforceable in the courts. Thus, to say "the interest was not justiciable" is to prioritize the views of a given interpretative community at the expense of others.[78]

The second proposition relies on a narrow conception of law as encompassing only those rights or interests that are judicially enforceable. This relies on a distinction between moral and

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[76] *Ibid.*

[77] The Mi'kmaq, for example, made petitions to the Crown decrying their losses of land in 1794, 1825, 1841, 1849 and 1853: see Ruth Holmes Whitehead, *The Old Man Told Us: Exceprts From Micmac History 1500 – 1950* (Halifax: Nimbus, 1991) at 114; William C. Wicken, *Mi'kmaq Treaties on Trial: History, Land, and Donald Marshall Jr.* (Toronto: University of Toronto Press, 2002) at 222; Harald E.L. Prins, *The Mi'kmaq: Resistance, Accommodation, and Cultural Survival* (Orlando: Harcourt Brace, 1996) at 169; L.F.S. Upton, *Micmacs and Colonists: Indian-White Relations in the Maritimes, 1713 – 1867* (Vancouver: UBC Press, 1979) at 191). They also petitioned the colonial assembly of Prince Edward Island for access to their lands in 1831 (Prins, *ibid*). For a discussion of what can be gleaned about Mi'kmaw conceptions of the Peace and Friendship treaties from these petitions, see William C. Wicken, *The Colonization of Mi'kmaw Memory and History, 1794-1928:* The King v. Gabriel Sylliboy (Toronto: University of Toronto Press, 2012) at 114-130.

[78] On the role that courts play when mediating between the claims of competing interpretive communities, see Robert M. Cover, "The Supreme Court 1982 Term - Forward: *Nomos* and Narrative" (1983) 97 Harvard L Rev 4; Judith Resnick, "Living Their Legal Commitments: Paideic Communities, Courts, and Robert Cover" (2005) 17:1 Yale JL & Human 17; Robert C Post, "Who's Afraid of Jurispathic Courts?: Violence and Public Reason in *Nomos and Narrative*" (2005) 17:1 Yale JL & Human 9.

legal obligations: while the Crown may well have had self-imposed moral obligations that constrained its actions towards Indigenous peoples, it had no legal obligations. How narrow this conception of law is can be seen when we consider two things. First, there are many presumptively legal interests that are not judicially enforceable. Further, the question of justiciability is itself a form of presentism: no interests of this type were justiciable as against the Crown in the 18th century, and petitions were the primary instrument used to get the Crown to meet its obligations.[79] Lack of justiciability can hardly be the barometer of legality in a period when few legal interests were justiciable as against the Crown. Second, this view must reject any Indigenous conception of the rules at play. In saying, for example, that the *Royal Proclamation*, 1763 is not law or that Aboriginal title was not a legal interest, there is no acknowledgement of the Indigenous perspective.[80]

The third proposition, that rights that were not enforceable in the past cannot be now, recalls the argument of the crown lawyer outlined above: presentism is wrong at law, it was argued. It bears noting that the Supreme Court has explicitly rejected this position, holding that s.35 recognizes some rights that "would not have been recognized under pre-1982 Canadian law."[81] Here Foster's distinction between historical and legal presentism is important. Where legal presentism is concerned, the key distinction to observe is between evidence and law. Where historical fact or narrative is tendered as evidence, the concerns of historical presentism apply. The law, however, is always subject to change, and when courts take up past legal statements they do no always purport to apply law as it existed in some past time. Courts rely on past judgements for principles that can be used as authority to craft law that responds to the needs of the present. As Foster points out, virtually all leading cases in the common law decide the law on the basis of a different legal interpretation that that which prevailed at the time of the dispute. Rarely do courts explicitly "change" the law in these situations. Rather, they use past principles and apply them to present contexts. Admittedly the language they use may at times cause confusion about court's

[79] Foster, "Another Good Thing", *supra* note 25.
[80] McHugh acknowledges this, stating that "my perspective is entirely western, predominantly that of a common lawyer and historian of constitutional thought": McHugh, "Time Whereof", *supra* note 69 at 137. This is an important acknowledgement both because it situates the speaker and because, as the Supreme Court has repeatedly insisted, "a morally and politically defensible conception of aboriginal rights will incorporate both legal perspectives" (*R v Van der Peet*, [1996] 2 SCR 507 at para 42 citing M.D. Walters, "British Imperial Constitutional Law and Aboriginal Rights: A Comment on Delgamuukw v. British Columbia" (1992) 17 Queen's L.J. 350 at 412-413).
[81] *R v Desautel*, 2021 SCC 17 at para 34.

own understanding of what they are doing, but a deferential stance to principles of stare decisis should not cloud our understanding of the nature of legal adjudication and decision-making.

Somewhat ironically, this reveals that the concern with presentism in the context of common law Aboriginal rights is often a rhetorical charge used to support arguments for the ongoing application of 19th century doctrine. This is most evident in McHugh's article on the *Tsilhqot'in Nation* decision, where he argues that common law title reflects current, rather than past, occupation of territory.[82] This is case, in his view, because title was not recognized as a justiciable legal interest at the time of Crown sovereignty. This is, however, a clear misunderstanding (or misstatement) of what the Court said in *Tsilhqot'in Nation*. The Court was clear that title is proven with reference to occupation at the time of sovereignty and that continuity is required only where present occupation is relied on to ground past occupation.[83] McHugh is correct that the this has created doctrinal uncertainty concerning third party interests, but that is not because the court has refused to recognize title except on the basis of present occupation.[84] Further, the entire structure of the Duty to Consult and Accommodate is based on the idea that there may be outstanding aboriginal title in areas that a group historically occupied but do not in the present day.[85] In either event, the Supreme Court's decision in *Desautel,* which recognized that an American citizen with ties to an ancestral community who exercised rights in what is now Canada can exercise those rights in Canada, puts to rest any further confusion on this point.[86]

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[82] It appears that McHugh would like to re-write the continuity branch of the Aboriginal title test. He argues that Aboriginal title is an interest that is meant to protect present occupation and that pre-sovereignty occupation cannot, without continuity with present occupation, give rise to a title interest. This is clearly at odds with the Supreme Court's holding in *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at paras 45-46.

[83] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at paras 45-46.

[84] McHugh points to the Ontario Court of Appeal's decision in *Chippewas of Sarnia Band v Canada (Attorney General)*, [2000] OJ No. 4804; 51 OR (3d) 641 as evidence that the Canadian courts have never understood Aboriginal title as running from the date of sovereignty. In that case, however, the ONCA did not hold that Aboriginal title could not be "revived" if the Indigenous party lost occupation between the assertion of sovereignty and the present day. The court relied on equitable principles of bona fide purchaser for value without notice to protect the third-party interests. This step would have been completely unnecessary if McHugh were correct about the conception of Aboriginal title at play: if the court believed that Aboriginal title required present occupation there would have been no need to allow private property owners to avail themselves of equitable defences: the claimants would simply have had no claim.

[85] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73. One could, of course, construe the doctrine more narrowly as applying only where Indigenous peoples have present occupation but have not yet acquired recognition of a title interest. In light of the facts of *Haida Nation* and *Tsilhqot'in Nation,* however, this would be a significant modification of the doctrine, and no such qualification is hinted at in the copious DTCA case law or commentary. In both cases the DTCA was held to apply to areas subject to forestry licences and non-Indigenous occupation on the basis that there were strong *prima facie* title claims there.

[86] *Desaultels, supra* note 81.

What does this mean for the present-oriented legal history I've outlined here? Legal history need not have any explicit connection to the present: one might study the development of early 20th century homesteading legislation in Alberta or post-war labour law statutes with little express concern for present-day issues and while making every effort not to allow the analysis to be unduly coloured by contemporary beliefs or attitudes. A present-oriented legal history approaches the past more instrumentally, but it still need not have any connection to common law argument. A researcher might be concerned with the legality of torture in the present day and undertake a present-oriented legal history of the concept of torture as a legal category in order to clarify how given contemporary discourses around torture became naturalized. By contrast, the present-oriented legal history I undertake here is explicitly concerned with the development of the common law. Yet, the analysis is not strictly a common law one. I do not look to the past as a source of authority to ground legal argument.[87] Rather, I look for evidence that can be used for two purposes: one, to help explain, at least in part, how current configurations of power (and I include here law, sovereignty, territory, and jurisdiction) were made possible, and, two, to evidence alternative configurations, different political configurations and legal frameworks, that illustrate alternative practices.

The risk of presentism in such an analysis, again, depends on the definition we adopt. The analysis I propose would be undermined by simplistic presentism. In another sense, however, this project is unapologetically presentist. It is shaped by present concerns and interested in how the past has shaped contemporary law and policy. In this, however, it is a merely a recognition that analysis of the past can have value to analysis to present. Indeed, much of the argument I present here is concerned with unravelling discourses created by a presentist reading of history and legal history, in particular the retroactive application of notions of state, sovereignty territory, and jurisdiction to a period to which they are inapplicable. Prioritizing the narrow dictates of imperial constitutional law at the expense of negotiated intersocietal agreements is itself a present choice, a choice that shapes a legal doctrine designed to meet the requirements of the contemporary nation state.

[87] The lone exception here is chapter six, which does look to past common law arguments to support a present argument. But it does not do so in the way McHugh criticizes, which is to make a claim about the state of the law in the past and argue that it ought to be applied in the same way today. Rather, it uses past decisions as a resource for reasoning: cases can contain persuasive legal reasoning, even if those persuasive points of analysis formed only one small part of a decision or were contradicted elsewhere.

This brings me to the final concern about presentism as it relates to this project: the specific relationship between a present-oriented legal history and the common law. My concern here is, in part, to show how concepts that courts have unreflexively relied on have shaped the doctrine of aboriginal rights. The argument I advance is not that the legal and constitutional structure of Canada is irredeemable because the acquisition of Crown sovereignty was legally and morally problematic. Rather, foundational myths about the acquisition of sovereignty and the effect that acquisition had on Indigenous peoples have continued to constrain the generative development of the doctrine, as have inherited notions of the state, federalism, jurisdiction, law, and territory. While this work cannot unpack the historical development and deployment of each of these concepts, the approach outlined above can show inconsistencies between legal and constitutional practice in the past and how the contemporary doctrine of aboriginal rights explicitly and implicitly relies on these concepts and suggests they were used in the past. While courts often rely on the historical record when adjudicating Aboriginal rights claims, more nuanced understandings of the legal and normative pluralism of earlier eras can help legal thinkers develop doctrine that facilitates Indigenous self-determination in a renewed federal association. An example helps illustrate the point. In 1928, Mi'kmaq Grand Chief Gabriel Syliboy argued in a Nova Scotia court that he could not be prosecuted for hunting out of season because he had a treaty protected right to hunt free from interference. Judge Patterson rejected this defence, holding the treaty of 1752 that Syliboy relied on was not in fact a treaty at all because the Mi'kmaq were never a sovereign people and did not have the capacity to enter into treaties.[88] While the implications of this reasoning are taken up in a later chapter, it is Judge Patterson's use of history that helps illustrate the point being made here. Judge Patterson made several technical legal arguments rejecting the legal relevance of the treaty. He supported much of the analysis with historical claims. In doing so, he relied extensively on a single source: Beamish Murdoch's *History of Nova Scotia.* This is hardly surprising. Murdoch, sometimes referred to a "Nova Scotia's Blackstone",[89] was the leading legal chronicler and historian of Nova Scotia in the 19th century. Murdoch's account of the dispossession of the Mi'kmaq and any rights they may hold to land is telling:

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[88] *Rex v Syliboy*, 1928 CanLII 352 (NS SC). For historical analysis of the case see William C. Wicken, *The Colonization of Mi'kmaw Memory and History, 1794-1928:* The King v. Gabriel Sylliboy (Toronto: University of Toronto Press, 2012).

[89] See DC Harvey, "Nova Scotia's Blackstone" (1933) 11:5 Can Bar Rev 339; Philip Girard, *Lawyers and Legal Culture in British North America: Beamish Murdoch of Halifax* (Toronto: University of Toronto Press and Osgoode Society for Canadian Legal History, 2011) at 23.

> The question has often been suggested by theoretical men, as to the right of the European nations to dispossess the aboriginal inhabitants .... [O]ur own nation and ... France took possession of an uncultivated soil which was before filled with wild animals and hunters almost as wild. It might with almost as much justice be said that the land belonged to the bears and wild cats, the moose or the carriboo, that ranged over it in quest of food, as to the thin and scattered tribes of men, who were alternately destroying each other or attacking the beasts of the forest.[90]

Murdoch neatly captures here the range of legal justifications Europeans used to justify the dispossession of Indigenous peoples, including both the agriculturalist conception of property and 19th century notions of civilizational hierarchy.[91] He also demonstrates how these legal justifications are supported by bad history and racist caricatures. Most importantly for present purposes, Murdoch also connects his historical account to a contemporary legal conclusion: the "aboriginal inhabitants" had no ownership or right to the land, therefore there is no legal consequence for their dispossession. It is notable, then, that Judge Patterson cites Murdoch no fewer than six times (in a seven-page decision). The following passage has particular resonance with Murdoch's narrative:

> A civilized nation first discovering a country of uncivilized people or savages held such country as its own until such time as by treaty it was transferred to some other civilized nation. The savages' rights of sovereignty even of ownership were never recognized. Nova Scotia had passed to Great Britain not by gift or purchase from or even by conquest of the Indians but by treaty with France, which had acquired it by priority of discovery and ancient possession; and the Indians passed with it.[92]

Here Judge Patterson mimics Murdoch's reasoning and, in so doing, illustrates the importance of historical narratives to the development of Aboriginal rights. Patterson relied on bad history – both his own and Murdoch's – to minimize the legal purchase of the Peace and Friendship treaties and construe Indigenous peoples in ways commensurate not with the facts but with their own racist beliefs. Legal doctrine has since shifted in a way that more accurately reflects history: beginning in cases like *Simon,* and *Sioui,* Canadian courts developed principles of treaty interpretation that sought to give effect to Indigenous perspectives and acknowledged the shortcomings of documents drafted by one party in their own language.[93] In *Marshall* the Supreme Court held that extrinsic

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[90] Beamish Murdoch, *History of Nova Scotia, Or Acadie Vol. 1* (Halifax: James Barnes, 1865). For a discussion of the views on this issue among influential 19th century intellectuals in the Maritimes, see D.G. Bell, "Was Amerindian Dispossession Lawful? The Response of 19th Century Maritime Intellectuals" (2000) 23 Dal LJ 168.
[91] These are explored at length in chapter 1.
[92] *Syliboy, supra* note 88 at 313.
[93] *R v Simon*, [1985] 2 SCR 387; *R v Sioui*, [1990] 1 SCR 1025.

evidence can be considered in ascertaining the common intention of the signatories of a treaty.[94] More recently, the decision in *Restoule* has shown how a less Eurocentric conception of history can impact the application of legal doctrine. There, Hennessy J. held the Anishnaabe law could be relied on in ascertaining the common intention of the parties to the treaty. That is, in seeking to understand how an Indigenous party understood the nature of a treaty with the Crown, evidence of the laws and legal traditions of the Indigenous signatories can be relied on. The transition, then, from legal and historical narratives that construed Indigenous peoples as uncivilized and lawless to ones that recognize the complex law governed social organization of Indigenous peoples can be used in the development of legal doctrine. Similarly, historical narratives that emphasize the legal pluralism of earlier eras can provide more robust contextual analysis for courts to draw on; a present-oriented legal history can be directed toward the development of the common law. History can provide guidance to the courts not in the sense that the version of title or self-government or self-determination that they might make use of now or in the future has always been the law, but that there are resources of legal reasoning and, perhaps most important, actual practices of law and governance that can be drawn on for inspiration in refining judicial doctrine and the envisioning alternative modes of association towards which that doctrine might be oriented.

v) Sources and Voice: A Methodological Point

This study traverses a wide range of material, from medieval natural law theories to varieties of liberalism, from contemporary theorizing on legal pluralism and legal geography to Indigenous legal theory, Mi'kmaw law, and the common law. The historical period in question spans nearly two centuries, the intellectual and legal lineages much longer. Accordingly, I've drawn on many different types of sources. In examining the ideological and intellectual justification for the expansion of European empires, I have relied primarily on secondary sources or the primary texts of (mostly canonical) European thinkers. In outlining the key features of British and French legal regimes, as well as British and French colonies, I have supplemented these same sources with case law, legal treatises, and primary source material from colonial archives. My decision to rely

[94] Previously courts would consider extrinsic evidence only where there was textual ambiguity. Here the Court held that such evidence could be relied on even in the absence of ambiguity. *R v Marshall (No. 1),* [1999] 3 SCR 456 at para 11.

primarily on secondary sources speaks both to the aim of this work and the richness of the available secondary sources. This work concerned primarily with reading the historical record from a particular vantage point: in light of the questions raised by contemporary legal doctrine and from a perspective informed by the insights of legal pluralism and geography. While archival sources may well contribute meaningfully to such a study, they are not necessary for the type of re-evaluation and re-description engaged in here. The aim here is to apply a novel interpretive frame to the historical record and to illustrate clearly the contemporary legal relevance of historical developments. The secondary materials on offer provide rich and varied interpretations of primary materials that can support the type of inquiry this work pursues, supplemented with primary sources, particularly historical legislation and commissions and instructions to colonial governors, in some areas.

When researching Indigenous law, either historical or contemporary, external definitions or conceptions of law should not be imposed. [95] The domestic legal traditions of the Mi'kmaq, for example, are shaped and defined in Mi'kmaw social, cultural, and ecological contexts, and Mi'kmaw law should not be framed from Canadian, British, or French perspectives and in light of the background assumptions that animate those perspectives.[96] Indigenous law must be considered in light of the specific contexts in which it exists and cannot be read against the backdrop of expectations of different legal cultures.[97] Importantly, as Mi'kmaw poet Rita Joe writes: "we are the ones who know about ourselves."[98] My approach, draws on Indigenous scholars who have worked on Mi'kmaq law, as well as historians and anthropologists, both Indigenous and non, who have engaged substantively with Mi'kmaw knowledge holders and whose work speaks to particular elements of Mi'kmaq law.[99] This approach can provide a sketch of Mi'kmaw law in light of the three features I have identified as a basis for this study (subject matter, legal subjects, territoriality) and begin to examine how the fifty thousand square kilometers the Mi'kmaq considered their territory was structured as a space of Mi'kmaw legality and how the "social

[95] Aaron Mills, "The Lifeworlds Of Law: On Revitalizing Indigenous Legal Orders Today" (2015-2016) 61 McGill LJ 847 at 853.
[96] *Ibid* at 850.
[97] *Ibid* at 854-855.
[98] Rita Joe, *Song of Rita Joe: Autobiography of a Mi'kmaq Poet* (Charlottetown: Ragweed, 1996) at 96. See also Daniel N. Paul, *We Were Not the Savages: Collision Between European and Native American Civilizations,* 3d ed (Halifax; Fernwood Publishing, 2006).
[99] Fortunately, there is ample scholarship to draw on to this end. The work of Mi'kmaw writers and scholars such as Jamie Batiste, Stephen Augustine, Marie Batiste, Ruth Holmes Whitehead, Brian Francis, Pamela Palmeter, and others provides an outline of salient features of Mi'kmaq law. See extensive citations in chapters 3 and 4.

spaces, lived places, and landscapes"[100] of Mi'kma'ki were inscribed with legal significance through Mi'kmaw law.[101]

It is important to note, though, that I remain engaged in processes of translation that may distort Mi'kmaw law or legal perspectives. The attempt to explain the nature of past injustices and potential remedies across distinct cultures is fraught. As Pooja Parmar writes:

> Translation is not, however, a simple transference of information from one language to another, but rather, an attempt to bridge difference. In a world of unequal languages, it is also often a "process of power." Although translation of a particular experience into a recognized category of violation or "rights-talk" can sometimes be enabling, when practiced as decontextualization, translation can also be an experience of loss. The inequality in the power of languages and knowledges often enables the dominant languages to name violations, and in the process, appropriate and reorder narratives. [102]

Work of the type I propose here cannot be undertaken without translation. And there is always risk inherent in practices of translation. There are cultural and linguistic limitations to my ability to articulate and engage with Indigenous law, as well as distant European sources. As such, I have attempted to outline the Indigenous legal traditions explored here on their own terms, drawing on Wabanaki voices to the greatest extent possible. I address these issues in more detail in chapter 3 as I turn to a substantive engagement with Mi'kmaw law.

vi) Why Mi'kma'ki/Wulstukwik?

The region now known as Canada's Maritime Provinces – New Brunswick, Nova Scotia, and Prince Edward Island – is an ideal site for the application of the approach outlined above. The chapters that follow analyze the legal history of the region from 1604-1779. These dates mark the first sustained attempt at European settlement in the region and the last known Crown-Indigenous treaty. The latter date also precedes by less than a decade a marked demographic shift caused by

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[100] Irus Braverman, Nicholas Blomley, David Delany, and Alexandre (Sandy) Kedar, "Introduction: Expanding Spaces of Law" in Braverman et al, *supra* note 41 at 1.

[101] The relationship between *Mi'kma'ki* and Mi'kmaw law is a complex one. Mi'kmaw law emerges from the knowledge of and connection to specific physical spaces and the responsibilities that Mi'kmaq hold in relation to the resources (gifts) of those places. See generally L Jane McMillan, *Koqqwaja'ltimk: Mi'kmaw Legal Consciousness* (PhD Diss, University of British Columbia, 2002); James (Sa'ke'j) Youngblood Henderson, *Elilewake Compact: The Mi'kmaw, Wolastoqey, and Passamaquoddy Nations' Confederation with Great Britain, 1725-1779, Vol 1* (Saskatoon: Indigenous Law Centre, 2020) at 85-135.

[102] Pooja Parmar, *Indigeneity and Legal Pluralism in India: Claims, Histories, Meanings* (New York: Cambridge University Press, 2015) at 13.

the arrival of Loyalist settlers following the American revolutionary war. This, coupled with the expulsion of over ten thousand Acadians three decades earlier, transformed the region by bringing the long-imagined jurisdiction of "Nova Scotia" into being in a tangible sense and beginning a period of British dominance.[103] This marked dramatic change over the two centuries since the first attempts at European settlement. By the end of the 16th century, northeastern North America had become connected to Europe economically through the fishery. Fishermen from many European countries crossed the Atlantic to fish and process their catches on the shores, supplying markets throughout Europe upon their return.[104] Opportunistic captains had begun a trade in furs as well, a trade that was beginning to attract capital investment from European merchant houses. Fish, though, remained the biggest pull for Europeans in the late 16th and early 17th centuries: the French had some 300 fishing boats in the waters around Newfoundland by 1603, and the English at least 150 by 1600.[105] Neither trade, however, had led to permanent settlements in the present-day Canadian Maritime provinces.[106] What would come to alternately be called "Acadie" and "Nova Scotia" by Europeans had yet to experience what John Reid terms "non-aboriginal ascendency."[107]

The region, known to its inhabitants as Mi'kma'ki and Wulstukwik, was Indigenous, the territory of the Mi'kmaq, Wolastoqey (Maliseet), and Passamaquoddy. Mi'kma'ki encompassed present day Nova Scotia and Cape Breton, Prince Edward Island, the eastern and northeastern shores and river valleys of New Brunswick, and part of the Gaspé Peninsula. Wulstukwik comprised the St. John River valley and watershed, while the Passamaquoddy lived on New Brunswick's southwestern coast and into Maine.[108] John Reid argues that European activity and

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[103] John G. Reid, "Empire, the Maritime Colonies, and the Supplanting of Mi'kma'ki/Wulstukwik, 1780-1820," (2009) 38:2 Acadiensis 78.
[104] NES Griffiths, "1600-1650: Fish, Fur, and Folk" in Phillip A. Buckner and John G. Reid, eds, *The Atlantic Region to Confederation: A History* (Toronto: University of Toronto Press, 1994) at 40.
[105] *Ibid* at 46-48. As Griffiths explains: Two ways of bringing fish back to Europe – "wet" or "green" in which the fish were processed on board and packed in salt, and dry, where they were dried… Wet would be done with approx. 100 ton ships and crews of 15-18, would bring back 20-25k fish. The dry product required bigger ships and more equipment and labour. But the product was worth more and boats could bring back 200,000 cod a year. 47 Importantly, the dry fishery required the use of shore "and thus temporary settlements, the seasonal establishment of communities of European men on what, for them, was the coast of a new world."
[106] Griffiths, "Fish, Fur, and Folk", *supra* note 103 at 50.
[107] John G. Reid, "The Lost Colony of New Scotland and Its Successors, to 1670" in John G. Reid, *Essays on Northeastern North America: Seventeenth and Eighteenth Centuries* (Toronto: University of Toronto Press, 2008) at 64.
[108] Ralph Pastore, "The Sixteenth Century: Aboriginal Peoples and European Contact" in Buckner and Reid, *supra* note 103 at 32.

settlement in the region in the 17th century was peripheral to the life of the majority of the region's inhabitants:

> The historical significance of European transatlantic migration and its consequences is, of course, beyond dispute. There is also, however, an alternate historical perspective, in which colonial settlement in a seventeenth-century region such as northeastern North America can be seen as essentially peripheral to aboriginal societies that continued to control all but a few coastal and riverine enclaves.[109]

European authority, such that it existed, prevailed in specific locales and in relation to particular subject matters rather than absolutely across entire territories.[110] The vast majority of the territory and population were not subject to European control, and Indigenous peoples were recognized by Europeans as separate and autonomous nations. The history and legal history of Mi'kma'ki/ Wulstukwik, L'Acadie, Nova Scotia in this period must be told in a way that reflects this and avoids focusing only on European agency to the exclusion of Indigenous agency. Power remained dispersed in the region from 1604-1779; no single group or nation enjoyed uncontested military power, and a plurality of legal orders and structures of governance bound the diverse inhabitants and actors and structured the legal spaces of the region through diverse legalities.

This same diffusion and diversity extend to the histories of ideas. European notions of sovereignty that were asserted over North American territories did not shape political relations on the continent. Though these political imaginaries impacted how Europeans managed their relations with each other and their subsequent approaches to colonization, they did not define the legal and political relationships on the continent itself, nor on the waters around it.[111] This is clearly the case in respect of relations between Indigenous peoples, but it is also true of relations between Indigenous peoples and Europeans. The extension of imperial and colonial rule was gradual, unfolding over centuries, and there are many historical examples of European-Indigenous relations

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[109] Reid, "The Lost Colony of New Scotland", *supra* note 106 at 67.

[110] As Stephen Patterson writes: "While French and British civil and military authorities sought to implement their respective official policies, New England fishermen and merchants largely did what they wanted, French missionaries dabbled in politics and diplomacy, and Acadians did their best to avoid either British or French control. Interests were fragmented and behaviours frequently individualistic." Stephen E. Patterson, "Indian-White Relations in Nova Scotia, 1749-61: A Study in Political Interaction" (1993) 23:1 Acadiensis 23-59 at 23-24.

[111] Robert A. Williams Jr. puts this succinctly: "Radically different peoples were required to negotiate as rough economic, military, and political equals for survival on the land. No one group's narratives occupied a privileged or dominant position in the new type of society that was emerging on the multicultural frontiers of seventeenth-and-eighteenth-century North America." Williams, *Linking Arms Together, supra* note 24 at 10.

being governed not by European political thought and practice, but either by Indigenous political thought and practice or some mix of European and Indigenous approaches.[112]

The process of structuring physical locations in North American as spaces of French and British legality was dependent on forgetting this. One of the most potent tools of colonial power is the imposition of historical narratives and epistemologies which support that power. Colonization is facilitated in part by the extension of epistemologies associated with cartography, geography, political theory, history, economics, and religion that displace competing conceptions.[113]A telling of the history of the 17th and 18th centuries in Mi'kma'ki/ Wulstukwik thatfocuses only on European settlement and trade excludes the Indigenous history of the region from a period in which they were dominant actors. Much scholarship, for example, expresses some variation of the view that "the area the French called Acadia and the British Nova Scotia" was "[l]egally British from 1713, but almost exclusively French and Indian in population until the 1750s."[114] While such a statement recognizes the lack of British control over the region, it fails to recognize the impact of the prevalent demographic and political realities on the lived legal reality of the region's inhabitants. In stating that the territory was "legally British" without inquiring into which body of law labelled the territory as British, this narrative prioritizes only inter-European "international law" and removes from the historical record the complex and well-developed systems of law that prevailed in Indigenous and Acadian communities and structured the lives of the region's inhabitants.[115] To state that the territory legally became British in 1713 without noting that this was contested by other bodies of law is to rearticulate the very pretenses that led European nations to assert absolute sovereignty on the basis of discovery and "first possession."[116] It ignores the fact that a territory could only be legally British on paper until specific legal practices structured

[112] The most widely cited study of this sort is likely Richard White's *The Middle Ground.* Other examples include Nancy Shoemaker, *A Strange Likeness: Becoming Red and White in Eighteenth-Century North America* (Oxford: Oxford University Press, 2006), Jenny Hale Pulsipher, *Subjects Unto the Same King: Indians, English, and the Contest for Authority in Colonial New England* (Philadelphia: University of Pennsylvania Press, 2006); McDonnell, Michael A. *Masters of Empire: Great Lakes Indians and the Making of America* (New York: Hill and Wang, 2015).

[113] See Christopher Tomlins, "The Legalities of English Colonizing Discourses of European Intrusion upon the Americas, c. 1490–1830" in Shaunnagh Dorsett and Ian Hunter, eds, *Law and Politics in British Colonial Thought* (New York: Palgrave MacMillan, 2010) at 51-52.

[114] Graeme Wynne, "A Province Too Much Dependent on New England" (1987) 31:2 The Canadian Geographer 98 at 98. This came to be accepted by the courts, which established 1713 as the date of the acquisition of British sovereignty in Nova Scotia: *Marshall;Bernard, supra* note 6 at para 71.

[115] John Mack Faragher, *A Great and Noble Scheme: The Tragic Story of the Expulsion of the French Acadians From Their American Homeland* (New York: W.W. Norton, 2005); Lennox, *supra* note 1.

[116] On discovery as the legal basis for Crown authority and title, see *Johnson & Graham's Lessee v McIntosh*, 21 U.S. 543 (1823).

it as a British jurisdiction and ignores the various legalities that brought into being territories of different scale and density throughout the region.

Understanding the history of the region and how that history can serve as an example in the development of a critical approach to State-Indigenous relations in Canada requires an interrogation of what conventional legal and historical accounts take for granted. The presuppositions that shape legal and historical narratives and displace the complex legal and normative pluralism of the region must be re-examined. A present-oriented legal history informed by the theoretical interventions of legal pluralism and geography can provide a contrapuntal re-description of the legal history of the region while illustrating where inherited notions continue to constrain the present legal imagination. In doing so, it can explore avenues for the development of legal doctrine and renewed forms of constitutional association.[117]

In exploring these questions, I am indebted to numerous works. The work of John Reid and William Wicken, for example, has done much to re-inscribe Indigenous agency in sophisticated and nuanced historical accounts of political authority in the region. Jim Phillips, Philip Girard and R. Blake Brown, in *A History of Law in Canada: Volume 1,* identify the plural legal regimes of pre-confederation Canada and many of the specific legal regimes discussed in the following chapters.[118] Jeffers Lennox, in his excellent *Homelands and Empires,* develops an analysis closely aligned to this work conceptually.[119] Lennox examines the creation of geopolitical territories and the "shared, contested, and defined"[120] spaces that developed as political authority and contests over territorial control were worked out by the actors in the region. The present work, like Lennox's, is concerned with how spaces constituted by the imperial imagination were brought into being through specific practices.[121] Lennox provides a rich account of how processes of geography, mapping, and diplomatic negotiation contributed to this process. The historical and legal-historical work of Elizabeth Mancke, Daniel Paul, David Bell, Sakej Henderson, L Jane MacMillan and others has also provided invaluable guidance. The present work contributes to this literature through a closer examination of the role of law in structuring geographies of authority and political

[117] I have borrowed contrapuntal here from Edward Said - see the phrase "contrapuntal reading" - in Edward Said, Culture and Imperialism. (Vintage Books: New York, 1993) at 66-7. See its use in James Tully, "Deparochializing Political Theory", *supra* note 7 at 64; Nichols, *A Reconciliation Without Recollection?, supra* note 20 at 183.
[118] Philip Girard, Jim Phillips, and R. Blake Brown, *A History of Law in Canada: Volume 1, Beginnings to 1866* (Toronto: University of Toronto Press, 2018).
[119] Lennox, *supra* note 1.
[120] *Ibid* at 125.
[121] *Ibid* at 3-14, 124-126.

rule, by emphasizing the relationships between plural legal orders and how those relationships mutually constituted legal spaces, and through an increased emphasis on the importance of marine spaces. This work is also unique in that it engages the historical record in order to illustrate the contemporary legal relevance of historical events and circumstances and, further, does so in consideration not only of established legal doctrine, but with an emphasis on the generative development of the common law. In short, this work makes a unique contribution by analyzing existing historical and legal historical accounts through the lens outlined above and with a view to thereby contributing to the development of theoretical and practical approaches to Aboriginal rights doctrine.

This latter orientation illustrates why this is far from an abstract historical pursuit. The contemporary legal significance of re-examining the early colonial period can be seen in Lamer CJ's statement in *Delgamuukw,* cited above, that the substantive content of s.35 rights should be determined by reference to "*de facto* practice or…aboriginal systems of governance."[122] The possible implications of this approach are clear. If taken seriously, this statement provides a blueprint for a development of the common law that can meaningfully reconcile settler and Indigenous legal orders and provide the basis for a negotiated federal constitutional order within which legal pluralism can flourish. If *de facto* practice accommodated Indigenous autonomy and structures of law and governance, that should translate to a greater range of common law rights – to be developed and recognized by the courts.[123] Two things must be examined to give effect to Lamer CJ's statement. The first is a distinctly historical question: what rights were recognized by de facto practice at the date of the assertion of sovereignty? That is, when the historical record is examined, what did Indigenous peoples and imperial and colonial actors, through their actions and practices, accept as the rights of Indigenous peoples? The second question is somewhat more methodologically fraught, at least for scholars in the western tradition. For them the question spans law, history, political theory, and anthropology, among other disciplines. The question is, what rights were recognized by what Lamer CJC called "aboriginal systems of governance"? Fortunately, there are many Indigenous scholars developing frameworks for understanding such

[122] *Delgamuukw, supra* note 12 at para 159.
[123] This same argument was put forward by the Royal Commission on Aboriginal Peoples in its report: *Partners in confederation: aboriginal peoples, self-government, and the Constitution.*

questions.[124] The aim of this work is to outline one way to answer these questions in relation to a specific historical and geographic context.

Chapter 1 examines ideologies of empire. The question that animates the chapter is: what conception of sovereignty were imperial and colonial actors working with in two centuries preceding the signing of the last known Peace and Friendship Treaty in 1779, and what are the roots of that conception? This examination provides a basis from which the contemporary court's use of the concept of sovereignty, and associated notions of the state, law, territory, and political authority, can be critiqued. The approach is genealogical and seeks to open avenues to critique both contemporary notions of sovereign authority and the unquestioned use of inherited concepts by courts, legal experts, and historians. It does so by examining the contingency of historical definitions that contemporary actors have inherited and, in so doing, illustrating where alternative visions existed that may be brought back into the light to inform critiques or shape contemporary alternatives. The chapter illustrates how European theorists, geographers, historians, and legal thinkers developed and deployed concepts to structure the "New World" as a space of European legality. It illustrates the prefigurative conceptual work that was undertaken to prepare the "New World" for imperial control and colonial settlement.

Chapter 2 critiques the doctrines outlined in the first chapter – the collection of theoretical and conceptual innovations captured under the encompassing notions of the *doctrine of discovery* and *terra nullius* - with the aim of illustrating how inherited concepts that courts and theorists often take for granted must be re-thought if we are to 1) accurately describe the historical context in light of lived reality and practice rather than theoretical concepts, 2) allow contemporary law and policy to develop in a way that is unhindered by inherited concepts that are deeply entangled with imperial projects. Specifically, this chapter critiques notions of state, sovereignty, and territory in arguing that legal pluralism provides a more compelling analytical frame through which to assess the early colonial era. This provides the basis for challenging the retrospective application of theoretical commitments to concepts such as sovereignty to the past in an ahistorical manner and opens spaces for re-imagining contemporary relations. The past must be assessed in light of actual practices of law and governance, not theoretical visions of European philosophers or extravagant legal claims made on the basis of those theories. Colonial spheres were legally pluralistic and constituted by many overlapping legal, normative, and political orders that interacted in complex ways. This

[124] See *infra* 30.

chapter engages the theoretical developments required to develop legal and constitutional grammars that adequately capture and reflect this reality.

Chapters 3 and 4 substantiate the empirical claim that grounds this work as a whole: past practices of law and governance are not adequately captured by the ideology of empire outlined in chapter 1 and inherited by state law and policy makers in settler-colonial contexts. These chapter do this through "thick" descriptions of the legal pluralism that characterized the 17th and 18th centuries in Mi'kma'ki/ Wulstukwik.[125] The chapters examine eight bodies of law that were in use in the region in the 18th century in order to properly situate the agency of the many competing groups in the region and make visible the legal pluralism and partial and attenuated forms of sovereignty and authority that prevailed.[126] Of these eight bodies of law, five are labelled "internal" and three "external" or "transnational." The internal forms, examined in chapter 3, are: Indigenous (Mi'kmaq, Wolastoqey, and Passamaquoddy, approached under one heading for the purposes of this analysis), Acadian, French, British, and Massachusettsan. The transnational forms of law, analyzed in chapter 4, are: inter-Indigenous, inter-European, and Indigenous-European.

Each form or body of law is analyzed through three characteristics: subject-matter, territorial scope, and legal subjects. That is: what subject matter did it touch upon (or what aspects of life did it speak to and reflect), what was the law's territorial reach, and whose actions did the law shape, constrain, or guide? The temporality of each characteristic – how it changed through the period of study – is also considered, as temporality illustrates the dynamic nature of the practices in question. This approach is attentive to concerns about properly representing Indigenous agency, as it situates Indigenous peoples not at the periphery of a colonial/imperial legal-historical narrative, but as consequential, at times dominant, actors within a complex web of overlapping spheres of legal and political authority. Attending to the three characteristics of the various bodies of law and how they shifted over time illustrates the contested and negotiated nature of the political and legal authority and social imaginaries at play. This, in turn, tangibly illustrates

[125] On thick descriptions, see Clifford Geertz, *The Interpretation of Cultures: Selected Essays* (New York: Basic Books, 1973).

[126] In this the approach is similar to Robert A. Williams Jr's in *Linking Arms Together.* Williams Jr. writes that, in contrast to his first book ,which sought to explain the "legal ideas that the West brought to the New World to justify colonization of American Indian people," his second work "attempts to tell a history of the legal ideas that American Indian peoples sought to apply in their relations with the West during the North American Encounter era": Williams Jr., *Linking Arms Together, supra* note 24 at 3.

the deep pluralism and Indigenous-centric nature of political authority that prevailed well into the 18th century.

Chapter 5 turns to the question of how the legal pluralism detailed in chapters 3 and 4 could flourish in the ways that it did. While it is important not to romanticize the past – the era in question was one shaped by imperial wars, conflict between Indigenous and European nations, and often brutal colonialism, including the ethnic cleansing of the Acadians by the British - a range of legal and political orders also found ways to co-exist during this period. This chapter explores this pluralism through consideration of diplomacy, negotiated forms of subjecthood and affiliation, and pragmatic and instrumental uses of law as key features that promoted agonistic practices of constitutionalism in the context of deep legal pluralism. As with the rest of this work, the aim here is to illustrate alternative visions that can inform a more robust reading of the past, in the service of developing new alternatives for the present. This is essential to the broader argument of this work, which joins others in arguing that there is a version the history of present-day Canada that can be drawn on to point to new possibilities for present relationships and political arrangements. The contingent historical developments which led to current structures, then, including the legal developments which assisted in the dispossession of Indigenous people, may be assessed on this basis. To return to the statement from Lamer CJC that animates this work, this analysis provides a comprehensive account of the de facto practices and Aboriginal systems of governance that prevailed in Mi'kma'ki/ Wulstukwik, L'Acadie, Nova Scotia in the 17th and 18th centuries.

Chapter 6 returns explicitly to the question of how the present-oriented legal history of the previous chapters can influence judicial doctrine. In particular, the chapter focuses on avenues for the development of the common law that can reflect what Chief Justice Marshall of the US Supreme Court referred to as the "political existence" of the parties.[127] Treaties with Indigenous peoples must be interpreted, he held, in a way that preserves the political character, or political existence, of the parties. The alternative, which would permit the domestic constitutional framework to eliminate the political character of distinct political communities, was not tenable for Marshall CJ. This insight is applied to the Canadian context in the chapter through a comparison of 1928 *Syliboy* decision from the Nova Scotia County Court and the 1985 *Simon* decision from the Supreme Court of Canada, two prominent cases involving Mi'kmaq assertions

[127] *Worcester v Georgia,* 31 US 515 (1832) at 541.

of rights under the Peace and Friendship treaty of 1752.[128] In *Syliboy,* Judge Patterson had held the treaty was not in fact a treaty at all because the Mi'kmaq were never a sovereign people and did not have the capacity to enter into treaties.[129] In *Simon,* the Supreme Court rejected this conclusion, holding that the Mi'kmaq did indeed have the capacity to enter into treaties.[130] Crucially, this preserves the political character of the Mi'kmaq by recognizing their capacity to enter into political agreements reflecting negotiated forms of authority. This inaugurates a tension in the Canadian case law between its more generative features, those that recognize the political character of Indigenous peoples as *peoples,* and its colonial features that continue to confine Indigenous peoples to a subordinate position in the constitutional order and place significant constraints on the ability of Indigenous peoples to exercise meaningful self-determination. This chapter argues that the features of legal pluralism and hybridity that characterized Mi'kma'ki/ Wulstukwik in the 17th and 18th centuries - diplomacy, negotiated forms of subjecthood and affiliation, and pragmatic and instrumental uses of law – can illustrate the types of doctrinal changes required. In particular, it argues that doctrine must be modified to recognize the jurisdictional nature of Crown-Indigenous disputes and to promote negotiated solutions. A final brief section identifies current practices of decentralized federalism and constitutionalism that reflect the mutual construction of orders of shared and exclusive jurisdiction, the terms of which are subject to ongoing negotiation through agonistic practices, thereby providing provisional examples of current practices that reflect the principles outlined in chapter 5 and towards which negotiated outcomes may point.

vii) Final Note: Terminology

A note on terminology. As a rule, I have preferred to use "England" and "English" when referring to the period prior to the *Act of Union* of 1707. I use "British" after 1707 to reflect the creation of "Britain" that year. This is by no means a complete, or perhaps even satisfactory, solution. Scottish colonization in North America was important in its own right, especially in the 17th century, and I've tried to maintain a distinction between the English and Scottish in describing their actions. I occasionally use the term British in a more encompassing sense even prior to 1707 to reflect the

[128] *Syliboy, supra* note 88; *R v Simon,* [1985] 2 SCR 387.
[129] *Syliboy, supra* note 88.
[130] *Simon, supra* note 127.

fact that Scotland, in particular, played an important role in shaping the ideological basis for both English and Scottish colonizing, and that attempts to understand the intellectual and ideological underpinnings of the British empire cannot always easily tease apart the three kingdoms of England, Scotland, and Ireland.[131] "British" imperial thought may well be said to have a longer provenance than "Britain" in some senses. I have also tried not to be overbroad in my use of either "English" or "British" when referring to peoples of New England. Often acting according to their own designs and interests, considerable and important nuance is lost if the actions of Massachusettsans, for example, are simply labelled "English" activities.[132]

I have used the term "Wabanaki" to refer both to the Wabanaki confederacy – the confederacy of the Penobscot, Passamaquoddy, Wolastoqey, Mi'kmaq, and, later, Abenaki, nations - and in an encompassing sense to refer to the peoples of the nations who joined in that confederacy – i.e. "the Wabanaki", which refers to the people of the Dawn land.[133] As Sa'ke'j Henderson writes, "Wabanaki" is the L'nuk (Algonkian) term for all North Atlantic territory.[134] Where appropriate I use Wabanaki to refer to these people as a whole. Where dealing with specific nations, I have identified them as such. Finally, I note the distinction between Mi'kmaq and Mi'kmaw. *Mi'kmaw* is the singular, possessive, and adjectival form, while Mi'kmaq is the plural form and refers to the nation or people as a whole.[135]

[131] On this point see David Armitage, *The Ideological Origins of the British Empire* (Cambridge: Cambridge University Press, 2000) at 24-60.
[132] Bill Wicken, "26 August 1726: A Case Study in Mi'kmaq-New England Relations in the Early 18th Century" (1993) 23:1 Acadiensis 5 at 6.
[133] Frank Speck, "The Eastern Algonkian Wabanaki Confederacy" (1915) 17:3 American Anthropologist 492; James (Sa'ke'j) Youngblood Henderson, *Wabanaki Compact: The Foundation of Treaty Federalism in North America, 1621-1728* (Saskatoon: Indigenous Law Centre, 2020).
[134] As Henderson writes: "In contemporary Mi'kmaw language, the variant forms of Mi'kmaw play two grammatical roles: 1) it is the singular of Mi'kmaq and 2) it is an adjective in circumstances where it precedes a noun (e.g. Mi'kmaw nation, Mi'kmaw treaties, Mi'kmaw person, etc.)." Henderson, *Elilewake Compact, Vol 1, supra* note 100 at 85 n3.
[135] *Ibid.*

Chapter 1: Sovereignty and Empire

When Europeans began fishing the shores of Mi'kma'ki/ Wulstukwik in the 16th century and attempted year-round settlement in the 17th, they exercised no control over the lands and waters of the region. Yet, from the earliest cross-Atlantic trips Europeans began to extend European legalities to the 'New World', bringing its regions, resources, and peoples into being in European legal consciousness. While Mi'kma'ki/ Wulstukwik remained predominantly Indigenous until well into the 18th century, European legal concepts structured the space for European audiences and began to regulate the behavior of European nations; territories were beginning to be structured through European law and legal practices.[1] The process of appropriating lands and resources began at the conceptual level well before it did at the material level, and the legal concepts and discourses that primed the "New World" for material appropriation shaped the relationships between incoming Europeans and Indigenous peoples. While the reality of Indigenous power required that Indigenous laws and modes of diplomacy be respected well into the 19th century, European legal and political theory also established the basis for the legitimation of unilateral rule and the subordination of Indigenous peoples.[2] The failure of the common law to recognize the political character and self-determination of Indigenous peoples in the 19th and 20th centuries results in part

[1] On the legal and social construction of territories – that is, how physical spaces become *territories* – see David Delany, *Territory: a short introduction* (Oxford: Blackwell, 2005). As Delaney notes, territoriality is "a social (and political, economic, cultural) *process* that unfolds not only in place but through time": *ibid* at 2. Recognizing territory as a social product foregrounds the contingency of given territorial configurations and challenges the assumption that they are "necessary or natural features of our life-worlds" *ibid* at 12.

[2] The ways that European political and legal thought supported colonialism have been canvassed in a number of works that are explored more fully below. See in particular: Anthony Pagden, *Lords of all the World: Ideologies of Empire in Spain, Britain and France c.1500 – c.1800* (New Haven: Yale University Press, 1995); Robert A. Williams Jr., *The American Indian in Western Legal Thought: Discourses on Conquest* (Oxford: Oxford University Press, 1990); David Armitage, *The Ideological Origins of the British Empire* (Cambridge: Cambridge University Press, 2000); James (Sa'ke'j) Youngblood Henderson, *Wabanaki Compact: The Foundation of Treaty Federalism in North America, 1621-1728* (Saskatoon: Indigenous Law Centre, 2020); Robert J. Miller, Jacinta Ruru, Larissa Behrendt, and Tracey Lindberg, eds, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford: Oxford University Press, 2010); Ken MacMillan, *Sovereignty and Possession in the English New World: The Legal Foundations of Empire, 1576 – 1640* (Cambridge: Cambridge University, 2006); Christopher Tomlins, "The Legalities of English Colonizing: Discourses of European Intrusion upon the Americas, c. 1490–1830" in Shaunnagh Dorsett and Ian Hunter, eds, *Law and Politics in British Colonial Thought* (New York: Palgrave MacMillan, 2010). For the ways that the extension of conceptions and practices of property facilitated colonial rule see John McLaren, A.R. Buck, Nancy E. Wright. *Despotic Dominion: Property Rights in British Settler Societies* (Vancouver: UBC Press, 2005); Allan Greer, *Property and Dispossession: Natives, Empires and Land in Early Modern North America* (Cambridge: Cambridge University Press, 2018); Brenna Bhandar, *Colonial Lives of Property: Law, Land, and Racial Regimes of Ownership* (Durham: Duke University Press, 2018)

from the inheritance of this intellectual tradition.[3] A consideration of how the common law might finally move past these inheritances, and facilitate the development of negotiated forms of constitutionalism in the process, must untangle contemporary legal discourses from these roots. The concept of sovereignty played a particularly important explanatory and legitimizing role in the extension of empire. An analysis of the historical development and deployment of the concept illustrates the disjunction between the practices of negotiated rule and legal pluralism that characterized the centuries following European arrival on Turtle Island and the support for unilateral authority found in European legal and political theory of the same period. It also illustrates the contingency of the concepts put to use by courts and state actors in settler-colonial contexts in minimizing Indigenous claims to self-determination and situating them within the bounds of constitutional orders that exclude their legal orders.

This chapter tracks the historical development of the concept of sovereignty and its relationship to empire to clarify the English (later British) and French understandings of the legal character of their overseas "possessions" when they "acquired" and exchanged what are now Canada's Maritime provinces – Nova Scotia, New Brunswick, and Prince Edward Island - through several 17th and 18th century treaties. This chapter considers how they understood and articulated the nature of their sovereign authority in their extended empires and examines the legal justifications that supported the extension of empire the dispossession of Indigenous peoples in North America. These legal justifications are of two types: those that European powers developed to justify their asserted sovereignty to other European nations, primarily according to the law of nations; second, and those they relied on to justify their colonizing activities internally, according to their domestic legal regimes. These justifications provide insight into the legal and historical roots of the ongoing assertion of unilateral Crown sovereignty in Canada. This review does not seek to re-write the extensive literature on the doctrine of discovery and the ideology of empire. Rather, it draws together several strands of thought to illustrate the roots of the legal framework that continues to support claims to unilateral Crown authority in contemporary jurisprudence. This

[3] John Borrows, "Sovereignty's Alchemy: An Analysis of *Delgamuukw v. British Columbia*" (1999) 37 Osgoode Hall LJ 537; Brian Slattery, "Aboriginal Sovereignty and Imperial Claims" (1991) 29 Osgoode Hall LJ 681; Joshua Ben David Nichols, *A Reconciliation Without Recollection? An Investigation of the Foundations of Aboriginal Law in Canada* (Toronto: University of Toronto Press, 2020).

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analysis emphasizes materials only up to the mid-eighteenth century (and secondary materials dealing with that period) to avoid confusing the legal and intellectual terrain of the 17th and early 18th centuries with the more positivistic and systematized legal frameworks concerning territorial acquisition that began to develop in the later 18th and into the 19th centuries.

Two points should be noted about the orientation of this chapter. First, the emphasis here is on European conceptions of sovereignty and legal justifications for the appropriation of Indigenous territories. One of the present concerns that animates this work is understanding how an ongoing reliance on colonial epistemologies grounded in beliefs about European cultural and legal superiority and supported by a number of legal categories and concepts are reproduced in contemporary law in ways that minimize Indigenous agency and self-determination. In particular, a critical eye must be turned towards the concept of Crown sovereignty that courts deploy, how they understand the attributes of Crown sovereignty and their own capacity to review exercises of sovereign authority in relation to Indigenous peoples, and how that understanding structures relations between Indigenous peoples and the state. Canadian courts frequently draw unreflexively on an inherited intellectual heritage that constrains possibilities for the negotiated development of forms of political authority that are responsive to Indigenous demands for self-determination.[4] Sovereignty, however, is not fixed concept. It is re-interpreted and re-articulated over time in light of the uses to which it may be put. As Mark Walters writes: "[a]s a construct of ordinary legal discourse, sovereignty is, like all ordinary legal constructs, something that must be constantly interpreted and reinterpreted over time to ensure that it contributes to the general understanding of law as an enterprise that integrates legality and legitimacy."[5] The purpose here is not to critique given notions of sovereignty in the abstract but to historicize the concept in order to revisit and re-interpret it so that it might ground a legitimate constitutional order, an order that includes Indigenous peoples on a consensual basis. A historical approach to the concept of sovereignty opens up critiques of the present state of the law by illustrating the role that given interpretations

[4] See Gordon Christie, *Canadian Law and Indigenous Self-Determination: A Naturalist Analysis* (Toronto: University of Toronto Press, 2019); James Youngblood Henderson, "Dialogical Governance: A Mechanism of Constitutional Governance" (2009) 72 Sask L Rev 29; Robert Hamilton & Joshua Nichols, "The Tin Ear of the Court: *Ktunaxa Nation* and the Foundation of the Duty to Consult" (2019) 56:3 Alta L Rev 729; Joshua Nichols & Robert Hamilton, "In Search of Honorable Crowns and Legitimate Constitutions: *Mikisew Cree First Nation v Canada* and the Colonial Constitution" (2020) 70:3 U of T LJ 341.

[5] Mark D. Walters, "Law, Sovereignty, and Aboriginal Rights" in Patrick Macklem and Douglas Sanderson, eds, *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights* (Toronto: University of Toronto Press, 2016) at 40.

the concept play in contemporary doctrine.[6] An understanding of the roots of the concept and its role in supporting imperial endeavours can help us see which inherited features might best be reconsidered.

This type of approach risks placing Indigenous peoples as the object of legal-historical analysis at the expense of recognizing their voices and agency as historical actors.[7] As Robert Williams Jr. writes, "A major problem with the way most non-Indian scholars have discussed the law governing relations between the United States and Indian tribes is that there are no Indians in the story." Williams argues:

> The emphasis of most scholars who have written on the role of law in the relations between Indian and European-derived peoples focuses almost exclusively on the story of 'the white man's Indian law.' The story builds on a narrative theme, either express or implied, that the legal rules and principles adhered to in the course of this country's historical dealings with Indian peoples are the exclusive by-products of the Western legal tradition … A deeper, more complex understanding of the decolonizing principles that have enabled tribalism to survive under U.S. law will begin to emerge only when we begin to seriously consider the contributions of American Indians to this struggle.[8]

Much of the literature concerning the relationship between law and colonization looks for agency only in Western legal traditions. To the extent that territorial jurisdiction is constituted by specific legal practices, an examination of only European law and practice risks construing those as the only constitutive elements of given territorial configurations.[9] That concern notwithstanding, it is important to analyze European legal and political thought in order to draw out the historical development of the imposed forms of law that continue to restrict Indigenous peoples today. It is important to show that notions of cultural superiority and justifications for the dispossession of Indigenous lands and resources are not historical anomalies but belong to entire schools of European and later North American thought. In this, European conceptions of sovereignty and

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[6] As Quentin Skinner notes: "When we trace the genealogy of a concept, we uncover the different ways in which it may have been used in earlier times. We thereby equip ourselves with a means of reflecting critically on how it is currently understood." Quentin Skinner, "The Sovereign State: A Genealogy" in Hent Kalmo and Quentin Skinner, eds, *Sovereignty in Fragments: The Past, Present and Future of a Contested Concept* (Cambridge: Cambridge University Press, 2010) at 26.

[7] Dale Turner, *This is Not a Peace Pipe: Towards a Critical Indigenous Philosophy* (Toronto: University of Toronto Press, 2006) at 104.

[8] Robert A. Williams Jr., *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600 – 1800* (Routledge: New York, 1999) at 6- 7.

[9] On jurisdiction as a 'bundle' of practices see Richard T. Ford, "Law's territory: a history of jurisdiction" in Nicholas Blomley, David Delaney, and Richard T. Ford, eds, *The Legal Geographies Reader* (Oxford: Blackwell, 2001) at 200-217.

legal justification for empire can be examined as a mode of critique with a view to creating space for Indigenous political and legal authority to challenge dominant systems.

The second preliminary point about this chapter concerns its approach to the history of ideas. This chapter takes a cursory and largely exegetical approach to a broad swath of theoretical ground. Such an approach always underrepresents, and always runs the risk of misrepresenting, its subjects. Further, a singular emphasis on canonical texts and authors can obscure the context in which those ideas took form, rendering them problematically abstract. Thus, Quentin Skinner advises against relying on perceived canonical texts alone and emphasizes the importance of understanding where those texts sit "in broader traditions and frameworks of thought."[10] This chapter attempts to set the thinkers examined within a broader narrative in which their thought on particular issues – sovereignty, colonialism, empire - holds a place. Nonetheless, because only one chapter of this work is devoted to summarizing this vast terrain, it focuses by necessity almost exclusively on canonical figures and works.

These preliminary concerns laid out, we can move on to discussing the historical development of the notion of sovereignty and European justifications for colonization and Indigenous dispossession with a view to clarifying the British positions on each in the early 18th century. This involves an analysis of the much-criticized Doctrine of Discovery. A clear understanding of the Doctrine of Discovery, however, requires an understanding of the ideological frameworks that animated it and the social contexts in which it arose. The Doctrine of Discovery, as a legal doctrine that supported colonialism, cannot be considered in isolation from the dominant forms of knowledge that shaped the world in which it developed. Knowledge and power are co-constitutive and create discourses which exert a positive force in structuring and supporting given relations of power.[11] The legal justifications for empire, and the knowledges - of geography, navigation, agriculture, history, economics, etc. – that supported them, cannot be separated from the broader ideological basis of empire.

The Doctrine of Discovery only came to be identified as a singular and unified doctrine upon its incorporation into the common law in the early 19th century.[12] What became so labelled

[10] Quentin Skinner, *Liberty Before Liberalism* (Cambridge: Cambridge University Press, 1998) at 101.
[11] As Foucault writes, "[w]hat makes power hold good, what makes it accepted, is simply the fact that it doesn't only weigh on us as a force that says no, but that it traverses and produces things, it induces pleasure, forms knowledge, produces discourse." Michel Foucault "Truth and Power" in Paul Rainbow, ed, *The Foucault Reader* (New York: Pantheon Books, 1984) at 61.
[12] *Johnson & Graham's Lessee v McIntosh*, 21 U.S. 543 (1823).

was in fact, as Tracey Lindberg writes, "a dogmatic body of shared theories (informing theory, law, and understanding) pertaining to the rightfulness and righteousness of settler belief systems and the supremacy of institutions (legal, economic, governmental) that are based upon those belief systems."[13] Understanding how the basic notion that rights to a given territory sat with the first nation to "discover" it could structure imagined imperial spaces in the "New World" and facilitate the dislocation of Indigenous peoples requires an examination of that body of shared theories and practices. A useful distinction in this analysis is between *de jure* and *de facto* sovereignty. This distinction should be approached with some trepidation. As discussed in more detail below, the distinction is much less clear cut than it seems. Where the distinction is helpful, however, is in ensuring that the physical possession and occupation of territory is not conflated with claimed sovereign authority over lands which were held by Indigenous peoples, regardless legal justifications European nations might put forward. The first section of this chapter examines the *de jure* basis of Crown sovereignty. The second section takes up *de facto* sovereignty.

i) When in Rome: *De Jure* Sovereignty, the Legal Justifications for Empire

Two questions arise repeatedly in respect of sovereignty. One is its source, the other its location.[14] On what basis is sovereign authority held, and who (or what) holds its? These questions have occupied political philosophy, theology, and legal theory for many centuries; the *de jure* basis of European assertions of sovereignty in North America can be traced back, at least, to Roman roots.[15] While this chapter focuses on English and British conceptions of sovereignty and empire during the centuries leading up to and following the Treaty of Utrecht in 1713, British legal and political thought of the time was sufficiently influenced by Roman law – and contemporary European civil law – that a review of the Roman roots provides insight into how British thought and legal justifications of the 18th century were shaped. In Rome, the model for subsequent empires was established; it was "Rome which provided the ideologues of the colonial systems of Spain,

[13] Tracey Lindberg, "The Doctrine of Discovery in Canada" in Miller et al, *supra* note 2 at 94.
[14] Articulated another way, Lorenzo Zucca looks to both the 'ground' and 'form 'of sovereignty: Lorenzo Zucca, "A Genealogy of State Sovereignty" 16 Theoretical Inquires in Law 399 at 400.
[15] See for example: Pagden*, Lords of all the World, supra* note 2; MacMillan, *Sovereignty and Possession, supra* note 2*;* Tomlins, "The Legalities of English Colonizing", *supra* note 2; Armitage, *The Ideological Origins of the British Empire, supra* note 2 at 29-33.

Britain and France with the language and political models they required."[16] Thus "the *Imperium romanum* has always had a unique place in the political imagination of western Europe."[17] The roman influence provided parameters within which the legal, political, and philosophical discourses in the "Age of Discovery" developed.

A related discourse that had a profound influence was developed during the medieval crusades. At the time of Europe's "discoveries" of the "New World," European thinkers already had at their disposal "a systematically elaborated discourse on colonization."[18] This discourse, developed during, and in support of, the crusades, "asserted that normatively divergent non-Christian peoples could rightfully be conquered and their lands could lawfully be confiscated by Christian Europeans enforcing their peculiar vision of a universally binding natural law."[19] In establishing a legal basis for colonization, England was concerned first with legitimizing its claims as against other European nations. It chose, therefore, to rely on a body of law those nations were familiar with and which they would presumably respect. European powers developed legal justifications compatible with their legal traditions and supporting models of empire that facilitated their broader goals.[20] Thus, while each imperial power developed distinctive legal frameworks for colonization on the basis of their domestic law, Roman law and derived forms of natural law and civil law provided a basis for the development of legal justifications for the acquisition of overseas territories that would be recognized by transnationally.[21]

As Anthony Pagden has noted, it is perhaps most fruitful for this kind of study to emphasize not the particularities of the roman empire, or even what those who lived in it believed about it; rather, the more pertinent question in understanding the state of 16th and 17th century law is: when people in the early 16th century set out to provide legal and political justifications for empire, what elements of the Roman tradition influenced their thought?[22] In this respect, the Roman law concepts of *imperium* and *dominium* are central. *Dominium* refers to rights to property and lordship

[16] Pagden, *Lords of all the World, supra* note 2 at 11.
[17] *Ibid* at 11. It should also be noted that early modern British theorists were extensively educated in the Roman historical, legal, and moral traditions: Armitage, *The Ideological Origins of the British Empire, supra* note 2 at 125.
[18] Williams Jr., *The American Indian in Western Legal Thought, supra* note 2 at 13.
[19] *Ibid.*
[20] Pagden, *Lords of all the World, supra* note 2 at 90-93.
[21] MacMillan, *Sovereignty and Possession*, *supra* note 2 at 13.
[22] As Pagden writes: "those features which by the early sixteenth century had come to dominate the discursive practices of all who were driven to ask what sort of thing and empire was, what it should be, and whether or not its existence could be justified." Pagden, *Lords of all the World, supra* note 2 at 12.

while *imperium* refers to something akin to absolute sovereignty.[23] Thus, roman law draws a distinction between rights to property (ownership) and political power through/over territory (sovereignty). The question that would vex European thinkers was how to justify the acquisition of both *imperium* and *dominium* in the "New World."

The distinction between the two concepts, however, is not always as clear as a contemporary distinction between property and sovereignty. Ken MacMillan, for example, defines *imperium* as "independent and absolute sovereignty" and *dominium* as the "right to possess and rule territory under [a state or government's] jurisdiction."[24] Morris Cohen frames the distinction somewhat differently, arguing that the distinction is based on who holds the interest or power: *dominium* is the power of the individual over things (including land), *imperium* is the power of the prince over individuals.[25] Thus, *dominium* is often said to have a *jurisdictional* element which seems to bleed into *imperium*.[26] *Dominium* refers to ownership and possession. The jurisdictional component relates to the ability to decide how to use the things one owns. Thus, *dominium* guarantees the holder the right "to use, enjoy the benefits and fruits of", and "use up" or consume."[27] Dominium, then, is a propriety right to use and enjoy, and to govern the use and enjoyment of, the property one owns. Some of the confusion may be attributed to the multiple senses in which *dominium* was used in Roman Law. The possession and ownership of lands and moveable goods, *dominium rerum,* was distinct from *dominium jurisdictionis,* which referred to sovereignty or jurisdiction.[28] Further, as Cohen points out, private property can be understood "as a form of sovereignty."[29] In some sense, there is no resolution to these puzzles: neither property nor sovereignty are natural phenomena whose eternal essence can be uncovered; they are legal

[23] Jacob Metzer and Stanley L. Engerman, "Some considerations of ethno-nationality (and other distinctions), property rights in land, and territorial sovereignty" in Stanley L. Engerman and Jacob Metzer, eds, *Land Rights, Ethno-Nationality, and Sovereignty in History* (London: Routledge, 2004) at 7. MacMillan, supra note 2 at 7-8. Williams, *The American Indian in Western Legal Though, supra* note 2 at 13.
[24] MacMillan, *Sovereignty and Possession*, *supra* note 2 at 6.
[25] Morris R. Cohen, "Property and Sovereignty" (1927) 13:1 Cornell Law Rev 8 at 8-9. See also Anna Stilz, *Territorial Sovereignty: A Philosophical Exploration* (Oxford: Oxford University Press, 2019) at 27.
[26] MacMillan, *Sovereignty and Possession*, *supra* note 2 at 6. The proper meaning and translation of *imperium* is also subject to some debate. As will be discussed below, authors disagree on whether it should be characterized as "sovereignty" or as a form of jurisdiction or, again, as a form of civic body. The Oxford International Encyclopedia of Legal History defines it simply as "property."
[27] Stanley N. Katz, ed, *The Oxford International Encyclopedia of Legal History* (Oxford: Oxford University Press, 2009)
[28] Pagden, *Lords of all the World, supra* note 2 at 90. Armitage notes the distinction as being between property and jurisdiction: Armitage, *The Ideological Origins of the British Empire, supra* note 2 at 125
[29] Cohen, *supra* note 26 at 14.

constructs, subject to continuous redefinition and reinterpretation. At the conceptual level, however, European legal systems inherited a distinction between *imperium* and *dominium,* or sovereignty and property*,* even if the boundaries between the concepts or the extent of their overlap has been variously expressed and at times imprecise.[30]

The distinction can be seen in the British imperial context, where it was clearly understood that colonized peoples could maintain rights to *dominion* while *imperium* sat with the British Crown. This was contemplated in the *Royal Proclamation, 1763* and, as will be discussed in detail in chapter 4, the Treaty of 1726 signed between the British and several Indigenous nations, including the Mi'kmaq, Wolastoqey, and Passamaquoddy. In both instances, rights of Indigenous occupancy and possession (*dominium*) were recognized in territories the British claimed (that is, where they asserted sovereignty – *imperium*).[31] The Proclamation states that

> the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds.[32]

Crucially, accompanying this framework was the belief that Indigenous *dominium* was an interest that must have been ceded before the British could hold an unburdened interest. Thus, challenges arose in "providing simultaneous and equally persuasive justifications of both *dominium* and *imperium.*"[33]

Notions of *imperium* changed over time. In the iteration dating to the third century BCE it referred to "the right of command within the Roman state, vested in the magistrates and pro-magistrates who were responsible for the official activity of the Roman people."[34] In this sense

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[30] Anne Orford, "Jurisdiction Without Territory: From the Holy Roman Empire to the Responsibility to Protect" (2008-2009) 30 Mich J Int'l L 981.

[31] See for example William C. Wicken, *Mi'kmaq Treaties on Trial: History, Land, and Donald Marshall Jr.* (Toronto: University of Toronto Press, 2002) at 73 – 140.

[32] Full text available at Indigenous and Northern Affairs Canada: https://www.aadnc-aandc.gc.ca/eng/1370355181092/1370355203645. Of course, the use of "dominions" in this context speaks again to the ambiguity of the term. While originally referring to the personal demesne of the Crown (something akin to a privately held property interest, it also had a jurisdictional element. Over time, "dominions" assumed a more jurisdictional position.

[33] Armitage, *The Ideological Origins of the British Empire, supra* note 2 at 125.

[34] J.S. Richardson, "Imperium Romanum: Empire and the Language of Power" (1991) 81 The Journal of Roman Studies 1, at 1, 3-4. As Pagden notes, "[i]n the first instance the Latin term 'empire', *imperium,* described the sphere of exclusive authority possessed by the Roman magistrates, and like everything in the Roman state it had marked sacral overtones, which would survive well into the modern period." In this sense, *imperium* had two elements, military power or concern with external affairs, and domestic, or political power within the roman [state]": Pagden, *Lords of all the World, supra* note 2 at 12

imperium was synonymous with authority and was divided between, and restricted to, domestic (*domi*) and external (*militae*) spheres.[35] *Imperium* was considered infinite and could be distributed among any number of officials[36] By the latter part of the first century CE, the term had increasingly come to refer to something akin to the contemporary term "empire" and included in it a sense of territoriality or control over territory, with the term *imperium Romanum* emerging.[37] This meaning was taken up by later European thinkers and, as Pagden argues, the term came to be used in the 15th and 16th centuries "in the somewhat indeterminate sense which would later be captured by the word 'sovereignty.'"[38] As the meaning extend to include empire it came to refer to roman control of territory and populations, and increasingly was used "to describe a polity, rather than a form of command."[39] The domestic and external notions of *imperium* started to collapse along with the expansion of the Roman polity, as the city itself began to merge with the provinces and colonies to form a single polity covering the full territorial expanse of the empire.[40] Thus, *Imperium romanum* came to 'describe the geographical extent of the authority of the Roman people."[41] Distinct from a magistrate exercising a share of the power of the state, *imperium* belonged to Rome *qua* Rome and extended throughout the roman world.[42] Put otherwise, *imperium* had come to mean "ultimate, self-sufficient, indivisible authority over a territorial expanse formally known as the Empire itself."[43]

Central to this conception was the notion of universal jurisdiction.[44] As the notion of *imperium* expanded, so too did the idea that anything which fell within Roman *imperium* was subject to the jurisdiction of the Holy Roman Emperor. A central feature of this was the distinction between internal and external political worlds. In the Roman legal mind, the civilized world was encompassed by Rome. To be a part of the *civitas,* of Roman civilization, meant to be within *imperium,* to be under the jurisdiction of roman law. One was civilized precisely by inclusion. To

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[35] Richardson, *supra* note 34 at 29.
[36] *Ibid* at 4-5.
[37] *Ibid* at 1.
[38] Pagden, *Lords of all the World, supra* note 2 at 12; MacMillan, *Sovereignty and Possession*, *supra* note 2 at 23.
[39] Anthony Pagden, "Fellow Citizens and Imperial Subjects: Conquest and Sovereignty in Europe's Overseas Empire" (2005) 44 History and Theory 28 at 28.
[40] Armitage, *The Ideological Origins of the British Empire, supra* note 2 at 30; Pagden, *Lords of all the World, supra* note 2 at 13.
[41] Pagden, *Lords of all the World, supra* note 2 at 13
[42] Richardson, *supra* note 34 at 5: ""not individual but corporate, relating to the power/empire of the populus Romanus rather than of any particular Roman."
[43] Armitage, *The Ideological Origins of the British Empire, supra* note 2 at 30.
[44] MacMillan, *Sovereignty and Possession*, *supra* note 2 at 19.

be outside jurisdiction, outside the *civitas*, was to be outside the law, but also outside civilization. Inspired by Aristotle, Cicero notably considered the *civitas* the "the sole place of human flourishing."[45] The nature of the *civitas* was identified explicitly with both the Roman political community and law.[46] Law begins to be contrasted with a state of savagery, a lack of civilization and the virtues cultivated in political community. As Peter Fitzpatrick points out, establishing a legal realm as against the savage and lawless realm of the other was prominent among Greek and Roman theorists, who often identified "an uncivilized or wild state with the absence of law."[47] The historical examples are many, from Homer's Cyclops race, "arrogant lawless beings", to Aristotle's notion of rules of natural justice derived from "norms of conduct universally recognized and accepted by all civilized peoples."[48] It has also been fundamental in the North American experience. As Audra Simpson writes: "'Law' may be one instrument of civilization, as a regulating technique of power that develops through the work upon a political body and a territory. Designating 'savagery' was required for the forceful imposition of law, as was designating brutishness."[49]

This division is reflected in Agamben's reading of the Roman notion of *homo sacer,* the individual at roman law without any legal standing, existing outside the law. For Agamben this concept represents the state of exception, the defining of which, drawing on Schmitt, characterizes

[45] Cicero is cited for this phrase in Anthony Pagden, "The Legacy of Rome" in James B. Collins and Karen L. Taylor, eds, *Early Modern Europe: Issues and Interpretations* (Oxford: Blackwell, 2006) at 23.
[46] Pagden, *Lords of all the World, supra* note 2 at 19
[47] Peter Fitzpatrick, *The Mythology of Modern Law* (London: Routledge, 1992) at 72. As Fitzpatrick writes, the essential framing relies on the myth of "the lawless nature of the savage, the emergence of law being associated with agriculture, the equation of law and sociality in contrast to the solitary state of the savage or the savage family." For an account of how the concept and legal category of the pirate supported the image of a lawless and disordered "outside" that necessitated the law-governed, and civilized, "inside" see: Amadeo Policante, *The Pirate Myth: Genealogies of an Imperial Concept* (New York: Routledge, 2015). The notion of the savage in Western thought is tracked in Robert A. Williams Jr., *Savage Anxieties: The Invention of Western Civilization* (New York, St. Martin's Press, 2012).
[48] Williams Jr., *The American Indian in Western Legal Thought, supra* note 2 at 42. Jens Bartleson identifies this double-bind this creates: "If the Indian is knowable, he is knowable on the basis of his resemblance to the familiar, he is either *assimilated* to the Christian and therefore denied an identity of his own, or he is *dissimilated* from the Christian, and therefore denied the status of epistemic and legal subjectivity." Jens Bartleson, *A Genealogy of Sovereignty* (Cambridge: Cambridge University Press, 1995) at 131.
[49] Audra Simpson, *Mohawk Interruptus: Political Life Across the Borders of Settler States* (Durham: Duke University Press, 2014) at 144. As Simpson further points out, the representation of "Indian lawlessness" continues to be an important technique of colonial control, noting government preoccupation with cigarette "smuggling" in the 1990's as an example.

sovereign authority.[50] There are problems with applying the state of exception thesis in colonial contexts, in particular insofar as such a theory misrepresents sovereignty as extending absolutely and evenly through space and downplays the porous nature of borders and contested nature of sovereign authority.[51] Nonetheless, the notion of the *homo sacer* as representing the outside, the excluded, from Roman law powerfully illustrates the fundamental characteristic. This exclusionary formula was taken up, with notable and important nuances added by Vitoria and others, in justifying North American colonization, as Indigenous inhabitants were construed as "wild, promiscuous, propertyless and lawless."[52]

The sense of universal jurisdiction sitting with a single emperor was prevalent in both the Holy Roman Empire and the Catholic church. The most influential and well-known argument concerning the rights of non-Christian nations during the crusade-era was Pope Innocent IV's *Quod super his*.[53] The explicit focus of this commentary was to determine "[u]nder what circumstances might Christians legitimately dispossess pagan peoples of their *dominium* – that is, their lordship and property?"[54] It is important to note that Innocent was not concerned with *imperium.* That is because, while he recognized that non-Christian peoples had natural law rights to *dominium* over their property, he believed that these rights were subject to the higher authority of the papacy.[55] Infidels held equal rights under natural law, so their property could not be confiscated on the basis of non-belief alone. But, if they violated natural law, there were consequences.[56] Innocent reasoned that the pope ruled over "Christ's universal Christian commonwealth on earth."[57] But the responsibility of the pope extended not only to Christians: he

[50] Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford: Stanford Univeristy Press, 1995) at 8-10. See also Tara Williamson, "The Edges of Exception: Implications for Indigenous Liberation in Canada" (2009) 14 Appeal 68.
[51] Lauren Benton develops this critique of Agamben in Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400 – 1900* (Cambridge: Cambridge University Press, 2010) at 282-292.
[52] Fitzpatrick, *Mythology, supra* note 47 at 72.
[53] Williams Jr., *The American Indian in Western Legal Thought, supra* note 2 at 13 and 44.
[54] *Ibid.*
[55] Innocent IV attempted to synthesize two divergent arguments in medieval legal discourse, one derived from Alanus, who held that infidels possessed no rights to *dominium* which bound Christians, the other an Aristotelian-derived conception which recognized a natural law basis for property ownership and lordship among infidels: See Williams Jr., *The American Indian in Western Legal Thought, supra* note 2 at 45, 47. See also James Muldoon, "Papal Responsibility for the Infidel: Another Look at Alexander VI's *Inter Ceatera*" (1978) 64:2 Catholic Historical Review 168, at 168-172.
[56] Williams Jr., *The American Indian in Western Legal Thought, supra* note 2 at 47; Muldoon, "Papal Responsibility", *supra* note 55 at 172.
[57] Williams Jr., *The American Indian in Western Legal Thought, supra* note 2 at 13.

was responsible for the spiritual well-being of non-Christians as well.[58] This responsibility was backed by a divine mandate. The pope, therefore, possessed *de jure* power over all people even where he possessed no *de facto* authority and had a responsibility for the salvation of infidels even where they denied his legal authority.[59] On the issue of where to exercise this jurisdiction, Innocent was careful to note that this extended to situations where the so-called infidels violated natural law but were not punished by their rulers. The pope could thus instruct preachers of the Gospel to go among the infidels to teach them. Should they refuse, the pope reserved the right to have the secular arm use war as a means of persuasion or punishment. In this way, Innocent formulated a justification for colonizing non-European peoples, through either conversion or wars of conquest. The universal jurisdiction of the pope supported the authority to "enforce Christianity's vision of 'civilization' and natural law legitimated and dignified the conquest, dispossession, and enslavement of non-Christian peoples throughout the non-European world."[60]

These views were central to canonical thought for several centuries. The impact on the inhabitants of the New World became evident some two centuries after Innocent IV wrote. In 1493 in the infamous papal bull *Inter caetera,* Pope Alexander VI divided "the entire non-western world between the Portuguese and the Castilians."[61] This bull was not an anomaly. Indeed, *Inter caetera* "reflected not simply Alexander's view of the papal role in the world, but, rather a conception of papal responsibility for mankind rooted in the tradition of canon law that formed the intellectual framework within which the pope's curia operated."[62] As James Muldoon points out, the bull was less about dividing the world between two monarchs than it was about the nature of the relationship between Christians and infidels and the proselytizing mandate of the pope to protect and convert infidels.[63] The Spanish Crown, in particular, was chosen for this role because of close familial ties to the Holy Roman Emperor, making the Castilian monarchs "logical inheritors of Christ's universal sovereignty, the canon law obligation to bring all infidels and pagans into a state of

[58] Muldoon, "Papal Responsibility", *supra* note 55 at 171.
[59] Williams Jr., *The American Indian in Western Legal Thought, supra* note 2 at 14. See also Charles Covell, *The Law of Nations in Political Thought: A Critical Survey from Vitoria to Hegel* (London: Palgrave MacMillan, 2009) at 4.
[60] Williams Jr., *The American Indian in Western Legal Thought, supra* note 2 at 14-15. As Williams Jr. writes: "Innocent's formulation of Crusading-era Christianity's duty to enforce its own normative conceptions of natural law upon non-Christian societies provided European medieval legal discourse with a broad legitimating mandate for wars of conquest and colonization in the lands of other peoples."
[61] Muldoon, "Papal Responsibility", *supra* note 55 at 168.
[62] *Ibid,* at 168-169.
[63] *Ibid,* at 169.

Christianity and, therefore, civility."[64] In this way, the papal bulls created "a form of delegated spiritual guardianship that granted title to the discovering Christian prince, who was commanded in turn to instruct the inhabitants in the Catholic faith."[65] Innocent IV embraced a deeply teleological understanding by which those who are not yet members of the flock will one day come to be "one flock and one shepherd."[66] This divine purpose would be carried on to the "Age of Discovery." Thus, Roman notions of *imperium* and early iterations of the law of nations, along with Roman Catholic notions of a universal jurisdiction grounded in the *de jure* power of the Pope in respect of all peoples and revealed by papal access to divine reason, combined in the "Age of Discovery" to provide a legal-moral-theological basis for oversees colonization.[67]

ii) The Age of 'Discovery'

The European "discovery" and exploration of the Americas in the late 15th and early 16th centuries caused a critical re-evaluation of many areas of European legal, historical, geographical, philosophical, and theological thought. Two issues, in particular, contributed to this: the need to determine what rights European powers had in territories they hoped to occupy, and the need to determine what rights the Indigenous peoples occupying those territories held.[68] The shifts in thinking this engendered would eventually lead to the development of modern international law.[69] Of course, this framing ignores the Indigenous perspective, presuming that it was the purview of the colonizing powers to determine the scope of both parties' rights in Indigenous territories.[70]

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[64] MacMillan, *Sovereignty and Possession*, *supra* note 2 at 19.
[65] Tomlins, "The Legalities of English Colonizing", *supra* note 2 at 53.
[66] Muldoon, "Papal Responsibility", *supra* note 55 at 171.
[67] As Robert Williams Jr. put the matter: "[s]pun from this Old World medieval loom were threads of ideas that came to inform all later European-derived legal thought on the rights and status of the indigenous inhabitants of the New World": Williams Jr., *The American Indian in Western Legal Thought, supra* note 2 at 49.
[68] Anthony Pagden, "Fellow Citizens and Imperial Subjects: Conquest and Sovereignty in Europe's Overseas Empires" (2005) 44 History and Theory 28 at 30.
[69] Anthony Pagden, "Law, Colonization, Legitimation, and the European Background" in Michael Grossberg and Christopher Tomlins, eds, *The Cambridge History of Law in America: Volume 1, Early America (1580-1815),* (Cambridge: Cambridge University Press, 2008) at 1.
[70] As James Tully has argued, "Aboriginal peoples had every right to recognise the Europeans as immigrants subject to their laws (perhaps granting them some sort of minority status), as nations did then and now." James Tully, *Public Philosophy in a New Key, Vol. I: Democracy and Civic Freedom* (Cambridge: Cambridge University Press, 2008) at 234.

This presumption continues to shape the relationship between the state and Indigenous peoples to this day.[71]

As outlined above, European thinkers were not starting from scratch in theorizing about the Americas. They had a significant body of applicable thought to draw on. Nonetheless, the unique circumstances of the era required new approaches as well. The first clear attempt to address the rights of Indigenous peoples and provide legal justifications for New World colonization came from Spain. The Spanish made little use of *res nullius* arguments (the roman law concept denoting land without an owner that would foreground later British theorizing on the subject). There were two reasons for this. First, Spanish legal claims to *imperium* and *dominium* derived from a papal charter that preceded their own occupation. Second, the lands in question were clearly occupied (applying *res nullius* to occupied lands would require a further English innovation requiring agricultural production to establish occupation).[72] Further, the Spanish found *res nullius* arguments failed to meet their particular needs: they were less concerned with rights over property than rights over people, and the legal justifications they sought had to facilitate access to labour.[73] The explicit basis of Spanish colonization, then, was conquest.[74] Territory acquired by conquest could provide the conqueror the legal rights that the Spanish sought. To acquire a legitimate interest through war, however, "the procedures for launching it must be carefully proscribed by the same political authorities that will later claim to have established lawful dominion."[75] It was to this end that, from about 1512 on, the Spanish had started making using of the infamous *requiremento,* a declaration read aloud to Indigenous peoples upon Spanish arrival which purported to establish a legal basis for war should its mandates not be followed by the local population.[76] This is the context in which Fransiscus de Vitoria would deliver his lectures on the legality of Spanish colonization and the rights of Indigenous peoples, *De Indis et de Ivre Belli Reflectiones,* in the late 1530's.[77]

In formulating his conception of international law, Vitoria looked explicitly to Spanish conquest in the Americas, in particular the merits of the legal claims the Spanish made "in

[71] I explore this at length in chapter 6.
[72] Pagden, *Lords of All the World, supra* note 2 at 91.
[73] *Ibid.*
[74] Patricia Seed, *Ceremonies of Possession in Europe's Conquest of the New World: 1492-1640* (Cambridge: Cambridge University Press, 1995) at 70.
[75] *Ibid* at 70.
[76] *Ibid* at 69-99.
[77] Fransiscus de Vitoria, *De Indis et de Ivre Belli Reflectiones* [1534], ed by Ernest Nys, trans. John Pawley (Washington, DC: Carnegie Institution, 1917)

justification …for the forcible conquest of the Indians, as in line with the rights of war, and for the exercise of rights of dominion over them and their lands and possessions."[78] As Vitoria himself framed the issue: "I ask first whether the aborigines in question were true owners in both private and public law before the arrival of the Spaniards; that is, whether they were true owners of private property and possessions and also whether there were among them any who were the true princes and overlords of others."[79] Vitoria and other neo-Thomist theologians of the Salamanca School rejected the authority of the Papal Bulls, particularly the purported exercise of *dominium* in the temporal sphere.[80] Vitoria rejected several arguments supporting the legality of Spanish conquest. In addition to the rejection of discovery alone as a legitimate basis for sovereignty,[81] he rejected *Inter Caetera,* arguing that the pope was without jurisdiction in temporal matters, and therefore could not grant lands to Spain, and that temporal rule was everywhere governed by the law of nations.[82] While the pope undoubtedly held spiritual power over kings and could authorize evangelizing missions, in Vitoria's view he did not have the authority to grant *imperium* and *dominium.*[83] Vitoria also argued that Indigenous Americans had legitimate rights to property, concluding that "the people in question were in peaceable possession of their goods, both publicly and privately. Therefore, unless the contrary is shown, they must be treated as owners and not be disturbed in their possession unless cause be shown."[84] They had established rulers exercising civil dominion and their rights to land and self-government were not negated solely on the basis of their non-belief.[85] Given the recognition that the inhabitants of the Americas had rights to property and self-government under natural law, Vitoria sought a legal justification for abrogating those rights by conquest.[86]

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[78] Covell, *The Law of Nations, supra* note 59 at 29. Anthony Anghie argues that "while Vitoria's jurisprudence relies in many respects on existing doctrines, he reconceptualizes these doctrines or else invents new ones in order to deal with the novel problem of the Indians": Antony Anghie, "Francisco Vitoria and the Colonial Origins of International Law" (1996) 5:3 Social & Legal Studies 321 at 322.
[79] Vitoria, *supra* note 77 at 129.
[80] Pagden, *Lords of All the World, supra* note 2 at 47.
[81] Covell, *The Law of Nations, supra* note 59 at 30
[82] Tomlins, "The Legalities of English Colonizing", *supra* note 2 at 53.
[83] MacMillan, *Sovereignty and Possession*, *supra* note 2 at 68.
[84] Vitoria, *supra* note 77 at 120.
[85] *Ibid* at 122; Covell, *The Law of Nations, supra* note 59 at 29-30.
[86] As Covell writes, "For Vitoria, the negating of the rights of Indians, and their subjection to the power of the Spanish, required some proper ground or title such as to justify the Spanish in making war on the Indians and in exercising rulership over them: Covell, *The Law of Nations, supra* note 55 at 30.

It is here that he drew on the canonical interpretations of past papal bulls, despite his rejection of elements of *Inter Caetera*. Like Innocent IV, Vitoria developed a justification for Spanish conquest based on the right of Christians to compel non-believers by force for purported violations of natural law. Vitoria held that it was a requirement of natural law and the law of nations that people may travel through foreign lands and expect to be treated well while travelling there. Thus, providing that the Spanish were not harming the Indigenous population, that population had an obligation to treat them humanely.[87] A failure to do so would justify war. Vitoria was not content, however, to ensure that Spanish were treated well while travelling the Americas; he adduced further rights from natural law and the law of nations. Two of these were rights to freedom of trade, by which the Spanish were entitled to engage in trading activities, including the export of gold and other precious minerals, and the right of common use, which entitled "the Spanish to have access to, and the use of, such things in the Americas as were common both to the Indians and to themselves as foreign visitors, and with these including the gold in the land and the pearls from the seas and rivers."[88] For Vitoria, any obstruction of the exercise of these rights was just ground for war.

An asserted right of Christians to bring the gospel to infidels provided another basis for Just War. While non-conversion was not itself grounds for war, attempts to prevent Spanish proselytization were. Similarly, if Indigenous leaders sought to influence their own subjects to reject Christianity, the Spanish were justified in waging war on them to the point of overthrowing them. If a significant percentage of the population of a non-Christian polity had converted to Christianity, the Spanish were justified, with the permission of the pope, in removing any remaining non-Christian rulers.[89] Thus, Vitoria applied Aquinian legal categories and canonical principles of universal jurisdiction to justify Spanish conquest. These positions are directly related to his theorizing on Just War, where he pushed past Aquinas in arguing that Christians could legally wage both offensive and defensive war, "and with war being lawful for the defence of the person and property, the recovery of things unjustly taken, the punishing of wrongs and the achieving of future peace and security."[90] In sum, natural law was relied on in two ways by Vitoria. First, through natural law he recognized the rights of non-believers in the lands they used and

[87] Vitoria, *supra* note 77.
[88] Covell, *The Law of Nations, supra* note 55 at 31.
[89] *Ibid* at 31-32.
[90] *Ibid* at 33.

occupied and their rights to govern themselves. Second, the supposed universal nature of natural law meant that breaches of it could be punished. War was justified, for both Innocent IV and Vitoria, when there had been breaches of natural law. One notable development that may be drawn from Vitoria, and where he has continued to be ahead of much common law reasoning, is that he considered it "entirely appropriate for jurists and theologians alike to inquire into the legality of sovereign claims over the Indians in the Americas."[91]

This is the intellectual context English thinkers situated themselves in as the English began their own colonizing missions in the 16th century. As with other European powers, the English sought to create legal and political justifications for their overseas activities. These legal justifications concerned two distinct elements on colonization – the rights of Indigenous peoples and the regulation of competing European claims.[92] The English looked to natural law and the law of nations, believing these bodies of law "to be binding on all humankind no matter what their civil constitution might be."[93] The specific arguments they developed depended on whether they were advancing claims against Indigenous peoples or justifying their claims to domestic or European audiences.

The most prominent early proponents and theorists of English overseas expansion were John Dee and the two Richard Hakluyt's (cousins often referred to as Hakluyt the elder and the Hakluyt the younger, who wrote between 1570 and 1610).[94] They drew heavily on roman law and the papal thought in developing their justifications for English New World rights vis-à-vis both the New World's Indigenous inhabitants and competing European colonizers.[95] In particular,

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[91] Walters, "Law, Sovereignty, and Aboriginal Rights", *supra* note 5 at 37.

[92] MacMillan, *Sovereignty and Possession*, *supra* note 2 at 8. Anthony Pagden writes that "Claims to sovereignty and property in the Americas had, that is, to be sustained on two fronts: first against prior claims by another European power – in this case Spain – and then against all those others, the "Natural people," whose rights would seem to be antecedent to those of any European." Anthony Pagden, *The Burdens of Empire: 1539 to the Present* (Cambridge: Cambridge University Press, 2015) at 122.

[93] Pagden, *Burdens of Empire, supra* note 92 at 122.

[94] The influence of John Dee is the subject of some debate. He entertained a number of fanciful ideas and may have had difficulty gaining political influence at court. See for example, Glyn Parry, "John Dee and the Elizabethan British Empire in Its European Context" (2006) 49:3 The Historical Journal 643. Parry does, however, accept that Dee did have an influence on Elizabethan policy, even if only briefly. As Ken MacMillan argues, Dee's work found an audience with Queen Elizabeth's advisors between 1576-1580: Ken MacMillan, "Discourse on History, Geography, and Law: John Dee and the Limits of the British Empire, 1576-80" (2001) 36 Can J of Hist 1. And, as Christopher Tomlins has argued, "Dee was instrumental in encouraging Crown investment in Frobisher's first voyage. His subsequent treatise, 'The Limits of the British Empire,' presented to Elizabeth I in 1577–78, sustained Crown interest in Frobisher's voyaging and resulted in the grant of letters patent to Sir Humphrey Gilbert licensing voyages of discovery and conquest to Newfoundland.": Tomlins, "The Legalities of English Colonizing", *supra* note 2 at 52.

[95] As Ken MacMillan writes: "by the late sixteenth century, the English Crown, like its European counterparts, had acquired certain internal and external sovereign rights and obligations that allowed and required it to maintain imperial

"[t]he English claims the Haklyuts propagandized were founded on the papal-asserted rights of Christian rulers to authorize occupation of the lands of non-Christian rulers and convert their inhabitants."[96] But Dee and the Hakluyts went beyond the theological, civil, and natural law arguments put forward by Innocent IV and taken up by the Spanish. As Christopher Tomlins writes, the Haklyuts "outlined not simply an ideology of expansion but also offered a methodology for appropriation (in both the material and intellectual sense) based on four powerful interrelated components – Christianity, commerce, geography and law."[97] While Christianity and commerce were important elements of this, they were directed to the *justifications* for colonization. In developing the tools required for the *realization* of "colonization's essential processes, they mobilized geography and law."[98]

Religious justifications had to be tailored to the English context while sufficiently engaging continental discourses to plausibly legitimate English claims to European powers. English thinkers rejected the papal bulls as a means of acquiring sovereignty or property, unsurprisingly as they seemed to grant the western hemisphere to the Spanish. Hakluyt, in his *Discourse Concerning Western Planting* (1584),[99] followed Vitoria in arguing that the pope had no authority to grant newly found lands: what the pope had purported to grant "clearly did not belong to him."[100] Hakluyt based his rejection of the papal bulls on a distinction between the spiritual and temporal realms and an insistence that the awarding of lands in the New World was clearly an act confined the latter realm and outside the jurisdiction of the pope.[101] John Dee, for his part, read the bull as a contract and argued that Portugal and Spain had failed to fulfill their end of the bargain and were essentially "in breach of contract."[102]

Nonetheless, the intellectual framework developed by the canonists and natural law theorists provided a useful template and, again, the English were compelled to adopt legal

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authority over the lands within its sovereign jurisdiction. In order to facilitate this requirement, a system of legal pluralisms developed in England, within which Roman law was used alongside common law by an important body of civilian lawyers." MacMillan, *Sovereignty and Possession*, *supra* note 2 at 14.

[96] Tomlins "Law's Empire", *supra* note 2 at 28.

[97] *Ibid.*

[98] *Ibid.*

[99] Richard Hakluyt, *Discourse Concerning Western Planting* (1584), Charles Deane, ed, (Cambridge: John Wilson and Son, 1877).

[100] MacMillan, *Sovereignty and Possession*, *supra* note 2 at 68.

[101] Pagden, *Lords of all the Word, supra* note 2 at 47.

[102] MacMillan, *Sovereignty and Possession*, *supra* note 2 at 69.

resources and legal reasoning recognized by European nations.[103] In particular, the English found a powerful justification for New World appropriations in the notion of a universal sovereignty grounded in the proselytizing mandate of the Church. Dee emphasized that, "consistent with the notion of universal sovereignty … it was the natural and divine obligation of Christian monarchs to bring all infidels and pagans into a state of Christianity."[104] Thus, the 1578 charter to Sir Humphrey Gilbert allowed that he could take and hold in fee simple any lands not occupied by "any Christian prince or people."[105] This echoed Alexander VI's *Inter caetera,* which had also purported to grant territories not under the authority of a "Christian Prince." In Dee's view, this restatement of the long held papal position was gaining currency in the law of nations, as it increasingly reflected the practices and norms of European monarchs. Dee drew on a range of geographical sources and a speculative historical account to argue for English claims to most of the North Atlantic world, including much of Scandinavia and Western Europe.[106] In so doing, he asserted the right of English monarchs to make grants by letters patent on the basis of ancient *imperium.*[107] The echoes of Dee's argument in Gilbert's charter was not anomalous; rather, it reflected the impact he and the Hakluyt's had on Crown policy in the late 16th century. As Tomlins notes, Dee's arguments "were recapitulated six years later by the younger Hakluyt, whose "Discourse of Western Planting" was presented to Elizabeth I in support of Sir Walter Raleigh's petition for letters patent licensing further expeditions of discovery and conquest, for which the elder Hakluyt prepared instructions and advice."[108] Dee and the Hakluyts developed a repertoire of legal arguments that could be deployed both internally and externally to justify colonial appropriation. What they developed was a uniquely English approach.

As the English were relative latecomers in colonizing the Americas, they had to develop an approach that rejected, or at the very least limited, Spanish claims in the western hemisphere.[109] Their goals in colonizing also differed from Spain's. While Spain was concerned primarily with

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[103] Elizabethan era theorists also had the English experience in Ireland, which the English crown had claimed since the medieval era, to draw on: see Williams Jr., *The American Indian in Western Legal Thought, supra* note 2 at 136-147.
[104] MacMillan, *Sovereignty and Possession*, *supra* note 2 at 63 – 65. Dee argued that Queen Elizabeth should take possession of lands not in the possession, or under the jurisdiction, of any Christian prince.
[105] Andro Linklater, *Owning the Earth: The Transforming History of Land Ownership* (New York: Bloomsbury, 2013) at 2. See also Christopher Tomlins, "The Legalities of English Colonizing", *supra* note 2 at 51-52.
[106] Tomlins, "The Legalities of English Colonizing", *supra* note 2 at 52.
[107] *Ibid* at 54.
[108] *Ibid* at 52.
[109] See for example: Robert J. Miller, "The Doctrine of Discovery" in Miller et al, *supra* note 2 at 19-21.

resources and human labour, the English and French were interested in land and trade.[110] The different legal justifications they relied on reflected this. In rejecting the papal bulls and the authority of the Treaty of Tordesillas, the English shifted to at least a nominal level of occupation as precondition for sovereign claims.[111] As Robert Miller has noted, "Elizabeth I wrote to the Spanish minister in 1553 that first discovery alone 'cannot confer property.' England repeatedly argued in 1580, 1587, 1600, and 1604 that it could colonize any lands where Europeans were not in possession."[112] Despite this, the Iberian powers continued to refuse to recognize European claims outside Europe until the 1640's.[113] Increasingly, however, "[w]hereas the Iberian powers legitimized their imperium and dominium to other Europeans based on discovery, papal donation, and temporal treaty, or preemption, the northern powers legitimized their claims through actual, physical occupation of the territory."[114] In the 17th century, the English also wanted to move away from justifications based on conquest. This was in part because natural law traditions which informed the law of nations had always had difficulty justifying war on any basis other than self-defence, Vitoria's innovations notwithstanding[115]

Thus, the question remained: having rejected papal donation and temporal treaty as a means of acquiring *imperium* and *dominium,* what justifications could the English rely on? It was in the English interest to minimize the legitimacy of conquest and the papal bulls, and they consistently sought to justify their own assertions of sovereignty by way of a combination of discovery and occupation.[116] Protestant thinkers found that they could justify colonizing the Americas on the basis of scripture, but they ran into problems in doing so. First, any justification grounded in scripture had the problem of being accessible to all Christian peoples.[117] Thus, while such

[110] As MacMillan writes "The English also had different aims than the Spanish. While the Spanish were seeking gold, the English "were always more interested in the possession and exploitation of land than the subjugation and conversion of native peoples." MacMillan, *Sovereignty and Possession*, *supra* note 2 at 9.
[111] Miller, "The Doctrine of Discovery"*, supra* note 2 at 19. As Miller writes, "England and France thus added to the Doctrine the element of actual occupancy and possession as a requirement to establish European claims to title by Discovery."
[112] *Ibid.*
[113] Elizabeth Mancke, "Empire and State" in David Armitage and Michael J. Braddick, eds, *The British Atlantic World, 1500-1800* (UK: Palgrave-MacMillan, 2009) at 197.
[114] MacMillan, *Sovereignty and Possession*, *supra* note 2 at 11. While there was a shift in emphasis in the English context, with the focus on possession or occupation of territory rather than mere discovery, this point should not be taken too far. While the English putatively required a territory to be occupied, the degree of occupation that would suffice to establish sovereignty was virtually none. The British believed themselves to have sovereignty over the whole of Canada's Maritime provinces while occupying no more than a single fort at Annapolis Royal.
[115] Pagden, *Burdens of Empire, supra* note 92 at 123.
[116] Tomlins, "The Legalities of English Colonizing", *supra* note 2 at 60.
[117] Armitage, *The Ideological Origins of the British Empire, supra* note 2 at 94.

justifications may have convinced the English that they had a right of occupation as against Indigenous peoples, they were not sufficient to deter the claims of other European powers.[118] As David Armitage notes, Genesis and the Gospels could provide a foundation for evangelization and migration, but "neither argument could provide a foundation for exclusive *dominium,* or the grounds for secular *imperium.*"[119] Thus "the problem of uniting *dominium* and *imperium* would persist … as the fundamental and ultimately combustible dilemma at the core of British imperial ideology."[120]

The English resolved this dilemma by construing the lands they aimed to colonize as empty, relying on the notion that "unoccupied and uncultivated territories (*res nullius*) become the possession of the first person to discover them and put them to productive use, usually through cultivation."[121] This required the development of rules for determining what constituted "empty" land and how such lands could be acquired. Two arguments were used to construe the land as empty. First, the English contrasted the Indigenous peoples in the northern and southern hemispheres, arguing that the Indigenous occupants in more northern reaches, unlike southern counterparts, did not exhibit any of the indicia of sovereignty such as those discussed by Vitoria. Second, the English emphasized that title to land was determined not by occupation, but by *use.*[122] It was not enough that a people occupied lands. To *own* property required that one *used* it in a manner which indicated ownership. Most often, this required agricultural development. This idea became prominent in the early 17th century, being advocated particularly strongly by proponents of the Virginia Company.[123] In these justifications "[t]he evangelical and appropriative justifications tended to merge into one characterization of a prior 'emptiness' that permitted occupancy."[124] The English supplemented the natural law and universal jurisdiction arguments

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[118] Armitage, *The Ideological Origins of the British Empire, supra* note 2 at 95.
[119] *Ibid* at 96.
[120] *Ibid* at 94.
[121] MacMillan, *Sovereignty and Possession*, *supra* note 2 at 9.
[122] Tomlins, "The Legalities of English Colonizing", *supra* note 2 at 61; MacMillan, *Sovereignty and Possession*, *supra* note 2 at 63.
[123] Tomlins, "The Legalities of English Colonizing", *supra* note 2 at 61. This also reflected an important internal development. Starting in about 1450, wool prices had begun rising drastically as European demand increased. This coincided with the arrival of Spanish silver and gold from the Americas and the construction of silver mines in Germany, resulting in the development of a highly lucrative market. These forces put pressure on tradition feudal landholding arrangements as the potential for private profits drove the enclosure of communal grazing lands. The idea of privately held lands from which a profit would be derived began to take hold in a significant way during the century preceding early English settlement in North America. See Linklater, *supra* note 105 at 12-18.
[124] Tomlins, "Law's Empire" *supra* note 2 at 33-34.

developed by Innocent and Vitoria with agriculturalist arguments which held that the failure to cultivate land rendered Indigenous lands legally empty. The most famous articulation of the agriculturalist argument was given by John Locke. In Locke's construction, *improved* property is the basis of civil society. Society is entered into precisely to protect the fruits of one's labour, that is, one's right to the land they have improved and the excess of their agricultural protection. As Barbara Arneil writes:

> Property lies at the heart of John Locke's *Two Treatises of Government.* The creation of property and its preservation constitute the foundation of the state of nature and civil society respectively. Property, its origin, and protection are also central to England's colonial settlements in America… Locke's chapter on property is, simultaneously, a philosophical treatise expounding the natural right to property as the basis of civil government, an exposition of the economic benefits of the English plantation, and a defence of England's right to American soil.[125]

Property is intertwined with the agricultural use of land, a use which stands in explicit juxtaposition to Indigenous modes of territorial use and occupation. As James Tully writes, in Locke's *Two Treatises of Government*:

> the central sections on labour, value, and commodities are designed to legitimate and to celebrate the superiority of English colonial market agriculture over the Amerindian hunting, gathering, and replacement agriculture that it forcibly displaced. The destruction of centuries-old native American socio-economic organizations and the imperial imposition of commercial agriculture is made to appear as an inevitable and justifiable historical development.[126]

For Locke, property and agricultural development formed both the basis of civil society and the justification for British expansion in the Americas. The American Indian was, after all, the instantiation of the state of nature thesis.[127] Essential to this configuration was a dichotomy between waste lands and improved land. The very existence of the state was grounded on a need to protect that which had been improved. What had not been improved, what no one had transformed into value, had no owner.[128] The view that Indigenous peoples had no conceptions of private property like those that Europeans held is often wrongly put forward. More accurate would

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[125] Barbara Arneil, *John Locke and America: The Defence of English Colonialism* (Oxford: Clarendon Press, 1996) at 132.
[126] James Tully, *An Approach to Political Philosophy: Locke in Contexts* (Cambridge: Cambridge University Press, 1993) at 162.
[127] Locke's state of nature was crafted on the basis of empirical accounts from the New World. Arneil, *supra* note 125 at 45, citing Tully*, Locke in Contexts*, *supra* note 126.
[128] Greer, *Property and Dispossession, supra* note 2.

be to say that "[t]he idea that nature is a wasteland of no value until it is 'improved' by commercial agriculture is sacrilegious to them."[129] That is, it was not, generally speaking, the notion that a given group or individual may have exclusive rights to occupy a given territory that was novel to Indigenous peoples; rather, it was the idea that land was without value until brought under the plough.[130]

Though Locke offers the most famous articulation of the agriculturalist thesis, it was not without precedent. Support for the agriculturalist argument can be found in Grotius: in *De Iure Belli ac Pacis*, Grotius, "quietly adds uncultivated land to the class of things that might be made property by first takers."[131] Grotius draws on Roman Law to assess where discoverers or first takers may legitimately take title to lands and adds lands that are uncultivated to the list. As Edward Keene notes, a significant legacy of Grotius's work "lies in its relevance to people who wanted to justify colonialism on the basis of individuals' rights in the law of nations to appropriate unoccupied or uncultivated lands."[132] Before both Locke and Grotius, however, the emphasis on *use* of territory led the Younger Hakluyt to emphasize "Planting" as a form of colonizing activity.[133] This approach would give English colonies a "distinctive legal character."[134]

The shift to use as a standard has framed Indigenous territorial rights since. In the 19th century, the Secretary of the Hudson's Bay Company advised the James Douglas, then HBC employee and colonial governor of Vancouver Island, that:

> With respect to the rights of the Natives, you will have to confer with the Chiefs of the tribes on that subject; and in your negotiations with them you are to consider the natives as the rightful possessors of such Lands only as they occupied by cultivation, or had houses built on, at the time when the island came under the undivided sovereignty of Great Britain.[135]

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[129] Tully, *Locke in Contexts*, *supra* note 126 at 163.
[130] Similarly, Indigenous peoples often had quite explicit uses of land that Europeans simply were not aware of. See Nancy Shoemaker, *A Strange Likeness: Becoming Red and White in Eighteenth-Century North America* (Oxford: Oxford University Press, 2004) at 13-15.
[131] Tomlins, "The Legalities of English Colonizing", *supra* note 2 at 62.
[132] Edward Keene, *Beyond the Anarchical Society: Grotius, Colonialism, and Order in World Politics* (Cambridge: Cambridge University Press, 2002) at 60.
[133] Tomlins "Law's Empire", *supra* note 2 at 29.
[134] Pagden, *Burdens of Empire, supra* note 2 at 122.
[135] HBCA, Letter of Archibald Barclay to Sir James Douglas, 17 December 1849, London Correspondence Book Outward. Reproduced in part in James E. Hendrickson, "The Aboriginal Land Policy of Governor James Douglas, 1849-1864" (BC Studies Conference Presentation, Burnaby, BC: Simon Fraser University, 1988), 4-5. See also Neil Vallance, *Sharing the Land: the Formation of the Vancouver Island (or 'Douglas') Treaties of 1850-1854 in Historical, Legal, and Comparative Context* (PhD diss: University of Victoria, 2015) at 71-72. Importantly, Douglas did not take this advice.

This framework has shaped contemporary legal doctrine in profound ways. As Groberman JA wrote in *William v British Columbia*:

> Aboriginal title must be proven on a site-specific basis. A title site may be defined by a particular occupancy of the land (e.g., village sites, enclosed or cultivated fields) or on the basis that definite tracts of land were the subject of intensive use (specific hunting, fishing, gathering, or spiritual sites).[136]

Tying of Indigenous land rights to specific uses, particularly cultivation, shaped the ideological bases of Canadian jurisprudence.[137] While the Supreme Court of Canada overturned the *William* decision and adopted a conception of Aboriginal title less tied to the agriculturalist thesis, many features of the doctrine continue to be shaped by these ideas, and contemporary jurisprudence draws on a long history of English justifications construing the land as legally vacant and justifying settlement accordingly.

iii) Early English Legal Forms of Colonization: Planting, Charters, and Early Colonies

The English Charters of the 16th and 17th centuries reflected the legal and ideological context outlined above. The elder Hakluyt, for example, penned *Notes on Colonization* to guide Humfrey Gylberte in implementing the patent he received from Elizabeth to explore and settle in North America.[138] The Charters gave legal form to Thomas More's vision of "a site upon which to project an ideal civic order: an insular commonwealth founded on an invading monarch's deliberate acts of conquest and material transformation."[139] Charters were the legal mechanisms that formalized the appropriation of territory and the extension of legal and political authority, particularly insofar as they created jurisdictions by purporting to "distribute powers and institutions of government,

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[136] *William v British Columbia,* 2012 BCCA 285; [2012] 3 CNLR 333, at para 230.
[137] There are also ample Supreme Court cases which make the same reliance on 'use' based occupation tests. In *R v Marshall; R v Bernard,* [2005] 2 SCR 220, for example, the majority of the court rejected a Mi'kmaq assertion of title on the basis that they had failed to demonstrate use of particular sites. As John Borrows notes, in failing to give weight to centuries of evidence supporting Mi'kmaq assertions of territorial control, "the Court neglected the tie between the jurisdictional and territorial aspects of Mi'kmaq occupation." John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 18. See also Robert Hamilton, "After *Tsilhqot'in Nation:* The Aboriginal Title Question in Canada's Maritime Provinces" (2016) 67 UNB LJ 58 at 67-76; Nigel Bankes, "Marshall and Bernard: Ignoring the Relevance of Customary Property Laws" (2006) 55 UNBLJ 120; Paul Chartrand, "*R v Marshall; R v Bernard:* The Return of the Native" (2006) 55 UNBLJ 135.
[138] Tomlins "Law's Empire", *supra* note 2 at 31.
[139] Tomlins, "The Legalities of English Colonizing", *supra* note 2 at 52.

grant subsidies and define and dispose of land and minerals."[140] These legal tools reflected centuries of thought outlining justifications for the dispossession of non-Christian peoples and applied them in practice to lay claim to, and legitimate colonization of, North America. While legal justifications for colonization were well-developed by the 16th and 17th centuries, the early charters formalized these justifications in legal instruments of colonization. If early claims based on discovery and first occupation began to structure the Americas as spaces of European legality, the charter was a more sophisticated, pronounced, and effective instrument at doing so. As MacMillan writes, in Humphrey Gilbert's 1578 patent "Elizabeth assumed the *imperium* and *dominium* of whatever territory Gilbert found and settled, because in discovering, inhabiting, remaining in, and defending land not currently under Christian jurisdiction, sovereignty was asserted according to the precepts of Roman law and was justified according to the law of nations."[141] The charter also reflected the religious justifications for colonization. That is, "by remaining studiously silent about non-Christian occupants, notwithstanding clear knowledge of their existence, the Crown appeared to hold that land without specifically Christian possessors was indeed either vacant or should be thought as good as vacant."[142] The echoes of *Inter Caetera* found in the references to lands held by Christian princes in the early charters was not accidental – this represented both a legal justification for the content of the charter and the performative nature of the charter's assertions of sovereignty, adopting the proselytizing justifications of canon law while challenging the authority of the pope to make grants in the temporal sphere.

As outlined above, by the early 17th century possession as a mark of sovereign authority was increasingly important. While the British claimed vast tracts by way of mere assertion (the 1606 Virginia charter claimed sovereignty over some 2,000,000 square miles),[143] they insisted that possession was required and increasingly situated settlements in strategic locations and fortified them against possible attack from other European powers seeking to assert sovereignty.[144] As Patricia Seed has noted, the construction of homes was essential to British colonizing discourses and colonists themselves rarely relied on discovery to legitimate their claims.[145] An important

[140] Tomlins "Law's Empire", *supra* note 2 at 32.
[141] MacMillan, *Sovereignty and Possession*, *supra* note 2 at 63
[142] Tomlins, "The Legalities of English Colonizing", *supra* note 2 at 55-56.
[143] H.E. Egerton, "The Seventeenth and Eighteenth Century Privy Council in its Relation with the Colonies" (1925) 7 J Comp Legis & Int'l L 1 at 1
[144] MacMillan, *Sovereignty and Possession*, *supra* note 2 at 133-135.
[145] Seed, *Ceremonies of Possession, supra* note 74 at 70.

distinction needs to be drawn here. Even where colonists justified their *dominium* on the basis of physical occupation, their ability to make legal claims regarding the nature of their occupation depended on the existence of an asserted British *imperium* justified, even if implicitly, on the basis of discovery. Further, the colonists themselves, through asserting *dominium* on the basis of occupation, brought about the effects of that discovery-based assertion of *imperium.* Property claims, in other words, were both dependent on a prior sovereign claim and the means through which sovereign claims were given effect.

While early attempts at settlement in North America were being made in the early 17th century, Europe was undergoing shifts in governance as the nation-state was emerging as the central political unit. The universal jurisdiction of the pope and emperor had been effectively challenged. In early colonial ventures, however, powerful sovereigns could possess overseas territories as their personal demesnes and exercise extensive forms of sovereignty: "the concept of a monarch as an independent, or absolute sovereign ruler (emperor) free from all external human control within his or her own territories (empire) had become commonplace."[146] Sovereign claims to personally own overseas colonies and uncertainty around the legal status of colonies led to several different legal arrangements prevailing in the 17th century. While the earliest charters focused primarily on exploration, they came to form the explicit legal basis for the establishment of colonies. Charter, proprietary, and royal (or provincial) colonies were the most common forms. In proprietary colonies, an individual was granted the entire territorial base of the colony as personal property and vested with absolute power and authority. This power was exclusive to the proprietor: the crown and parliament retained no jurisdiction except where noted in the initial grant. The executive power and all royal prerogatives were vested in the proprietor.[147] Royal colonies were established under a commission from the crown which established an office of governor or vicegerent. The form of government was detailed in the commission and subsequent royal instructions. It typically provided for the formation of an executive council, usually appointed by the governor, and made provision for the establishment of an elected assembly. The latter would form the lower house, the former the upper house, of the legislative branch of the colonial government. Executive authority sat with the governor. Administration of the colonies

[146] MacMillan, *Sovereignty and Possession*, *supra* note 2 at 24.
[147] Henry Sherman, *The governmental history of the United States of America: from the earliest settlement to the adoption of the present federal Constitution* (Hartford: Case, Lockwood, 1860) at 382-383.

was to take place in accordance with the laws of England.[148] Charter colonies were created by a charter of incorporation through which a company was granted jurisdiction to establish and govern a colony.[149] In each form of colony, the authority of the English crown and parliament differed. There was no established imperial constitution in the period preceding 1713, nor were the respective powers of the Crown and Parliament in the colonies clearly delineated.[150] Thus, while charters and other legal instruments were used to structure North American lands and waters as spaces of English legality, imperial authority remained diffuse and contested even in relation to colonies.

The legal justifications for colonization and the internal development of sovereignty met in shaping the legal character of English colonies The principle of parliamentary sovereignty is foundational to British constitutional law. Though gained gradually, by 1688 the King-in-Council had clearly become subordinate to the will of Parliament.[151] This dramatic shift in internal governance in England in the 17th century was mirrored in the colonies as disputes over the relative powers of the king and the parliament included disputes over the legal standing of colonies.[152] At the time of the early 17th century English attempts to establish colonies in North America, colonial governance was the exclusive purview of the Monarch. When Virginia was established in 1607,[153] there no imperial government department to deal with the colonial administration and "the whole administration, both executive and legislative, was exercised by the Sovereign and Privy Council with the very occasional interference of Parliament."[154] The early colonies were thus considered part of the royal demesnes and, therefore, not subject to the jurisdiction of Parliament.[155] The Imperial Parliament attempted to legislate in respect of the fishery off the coasts of Virginia and New England in the early 17th century but was rebuffed by Crown Ministers who argued that

[148] Sherman, *supra* note 147 at 384.
[149] *Ibid* at 385.
[150] The charter and royal constitutions of this era are their own example of legal pluralism and hybridity. See Vicky Hsueh, *Hybrid Constitutions: Challenging Legacies of Law, Privilege, and Culture in Colonial America* (Durham: Duke University Press, 2010)
[151] Edward Creasy, *The Rise and Progress of the English Constitution*, 16th ed (London: Richard Bentley & Son, 1892) at 168 – 274, 336.
[152] Jack P. Greene, *Peripheries and Center: Constitutional Development in the Extended Polities of the British Empire and the United States 1607 – 1788* (New York: W.W. Norton and Company, 1986) at 56.
[153] The Charter authorizing the establishment of the colonies was granted in 1606 and the first settlers arrived on May 13, 1607. Howard, A.E. Dick. *The Road From Runnymede: Magna Carta and Constitutionalism in America* (Charlottesville: The University Press of Virginia, 1968) at 23.
[154] Arthur Mills. *Colonial Constitutions: An Outline of the Constitutional History and Existing Government of the British Dependencies* (London: John Murray, 1856) at 2.
[155] *Ibid* at 2. See also Pagden, *Burdens of Empire, supra* note 92 at 128.

Parliament had no authority to legislate there.[156] The first legislation from Parliament respecting the colonies was the *Navigation Act,* 1651.[157] The *Navigation Act* was the result of an increase in trans-Atlantic trade, a development which also required a more robust administrative apparatus for managing colonial affairs. This developed only gradually, with Charles II delegating the responsibility for managing the affairs of British dependencies to a newly created committee of the Privy Council in 1660, the Committee of the Privy Council for the Plantations, which was the first iteration of the Colonial Office. [158] Prior to this, "there was no organized machinery for handling business concerned with the colonial settlements."[159] This development was part of a conscious effort to more closely emulate centralized Spanish imperial rule.[160] The monarch's insistence that overseas colonies were his personal property resulted in ongoing tensions with Parliament. In 1660, for example, Charles II acquired Jamaica, Dunkirk, and Tangier and claimed them as part of the royal demesne. The House of Commons, in an attempt to assert its own authority, passed a bill annexing the territories to the Crown. Ignoring Parliament's stated will, Charles sold Dunkirk to Louis XIV.[161]

For Parliament, the issue was clear. It had always assumed that it had jurisdiction for the American colonies.[162] As a matter of administration, however, the management of colonial affairs was an executive responsibility and "throughout the seventeenth century the king-in-council, not the king-in-Parliament, assumed most of the burden for overseeing the administration of both Ireland and the colonies."[163] Much of this debate came to be centered around how a colony was acquired. If acquired by conquest or cession, it was a demesne of the King or Queen and thus subject to rule by royal prerogative.[164] If acquired through settlement, the settlers brought the law of England with them, include the rights they held to representation by parliament. Thus, while the English tended to shy away from justifications for overseas colonies based on conquest, especially trying to distance themselves from the Spanish approach, there was an internal pressure to construe colonies as legally acquired by conquest. In any event, this was simply a legal designation to the

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[156] *Ibid.*
[157] *Ibid.* For detailed discussion of the *Navigation Act,* 1651 see Hugh Edward Egerton, *A Short History of British Colonial Policy,* 2nd ed (London: Methuen & Co, 1908) at 60 – 63.
[158] Mills, *supra* note 154 at 3-4. Sir Charles Jefferies, *The Colonial Office* (Westport: Greenwood Press, 1983) at 24
[159] *Ibid.*
[160] Pagden, *Burdens of Empire, supra* note 92 at 132
[161] *Ibid* at 128.
[162] Greene, *Peripheries and Center, supra* note 152 at 56.
[163] *Ibid*.
[164] Charles James Tarring, *Chapters on the Law Relating to the Colonies* (London: Stevens & Haynes, 1882) at 3

English, and one which tended, curiously, to change over time. The Maritime provinces, for example, have at different times been said to have been acquired by conquest, cession, and settlement.[165] It is not clear, however, when this legal arrangement developed. It is first found in case law in *Campbell v Hall* (1774), which is after the period being looked at in this chapter.

While internal debates about the scope of Parliamentary authority remained, the royal prerogative was an essential instrument of governance in the colonies, including the Crown's relationship with Indigenous peoples. As the Ontario Court of Appeal stated in *Chippewas of Sarnia*:

> First and foremost, dealings between the English Crown and First Nations were viewed as involving relations between sovereign nations to be governed by agreements or treaties made by the English Crown and the First Nations. Relations with the First Nations were an imperial concern to be administered primarily through the exercise of the royal prerogative.[166]

The 17th century saw two major shifts in how sovereignty was conceived of and practiced that impacted the colonies. One was the shift just outlined, wherein *internal* sovereignty shifted significantly to parliament. The other was a clearer articulation of the nation state, which impacted how sovereignty was conceived both internally and externally.

iv) The State

In many senses the development of states and empires seems almost antithetical: while developing European states sought to solidify their borders and refine and centralize structures of internal governance, at the same time they issued charters and signed treaties with highly ambiguous borders and, especially in the English case, founded colonies with a range of institutional forms.[167] Empire-building and state-formation, however, were in fact interdependent in the realm of foreign policy and "international relations offers a starting point for analyzing the dialectical relationship between the two."[168] The centralization of the administration of foreign affairs in the state that developed to meet the needs of empire impacted and shaped the development of the state.

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[165] See e.g. Margaret McCallum, "Problems in Determining the Date of Reception in Prince Edward Island" (2006) 55 UNB LJ 3.
[166] *Chippewas of Sarnia Band v Canada (Attorney General)*, [2000] OJ No. 4804; 51 OR (3d) 641at 51.
[167] Elizabeth Mancke, "Empire and State" in David Armitage and Michael J. Braddick, eds, *The British Atlantic World, 1500-1800* (UK: Palgrave-MacMillan, 2009) at 194.
[168] *Ibid* at 195.

At the same time that European thinkers were developing justificatory schemes for overseas settlement, the notion of sovereignty was being given its first major modern treatment.[169] The question of sovereignty, or of political power, was central to political and philosophical debate in the 17th century.[170] Sovereignty and the state are, in the modern conception, fundamentally connected: it is the very nature of the state as sovereign - within its territorial bounds not subject to any external power - which is the essential characteristic of the modern state.[171] A Hobbesian account would suggest, for example, that "[e]ither the state is sovereign and there is no other authority beyond it, or it is not sovereign and therefore it is not a state."[172] In the middle ages there were two distinct forms of sovereign authority: the universal jurisdiction asserted by the Holy Roman Emperor and the Catholic church, and the local autonomy claimed by city-states.[173] The move from autonomous city states under a weak and contested universal jurisdiction grounded in natural law and the law of nations was replaced by individual state units free from any overarching jurisdictional body, each extending their sovereign authority more broadly through territory than their city-state predecessors. The shift to the state model destabilized political authority, replacing a pluralistic and diffused legal ordering with state dominated legal orders.

The gradual shift from the Holy Roman Empire to the modern state changed the parameters of theoretical debates, as "questions about the limits and divisibility of power began to be framed as questions about the relationship between jurisdiction and territory."[174] In the early 16th century, Machiavelli conceived of the state as an impersonal form of rule exercising political authority through an effectively delineated territory.[175] In 1576, Jean Bodin published *Six Livres de la République,* which was first translated into English in 1606 as *The Six Bookes of a Common-weale* and is commonly seen as the first treatment of the concept of sovereignty as such.[176] Bodin himself

[169] C.E. Merriam Jr. *History of the Theory of Sovereignty Since Rousseau* (PhD Diss. Columbia University, New York, 1900) at 13.
[170] Tully, *Locke in Contexts, supra* note 126 at 11.
[171] As Hymen Ezra Cohen writes: "Sovereignty resides in the nation; it cannot reside elsewhere. This is the basic assumption of national sovereignty." Hymen Ezra Cohen, *Recent Theories of Sovereignty* (Chicago: University of Chicago Press, 1937) at 7.
[172] Zucca, "A Genealogy of State Sovereignty", *supra* note 14 at 401.
[173] *Ibid* at 400.
[174] Anne Orford, "Jurisdiction Without Territory", *supra* note 30 at 981.
[175] Zucca, "A Genealogy of State Sovereignty", *supra* note 14 at 407. John Ruggie argues that the retrieval of Roman law in the Renaissance contributed to the formation of the state when Roman property law concepts of exclusive possession and control of private property came to be applied at the political level: Ben Holland "Sovereignty as Dominium? Reconstructing the Constructivist Roman Law Thesis" 54 (2010) *International Studies Quarterly* 451.
[176] Skinner, "The Sovereign State", *supra* note 6 at 28.

wrote that sovereignty required a definition because "no jurist or political philosopher has defined it."[177] In so doing, Bodin inquired into the nature and location of sovereignty. Bodin's thinking about these features of sovereignty in the political community established the parameters of modern discourse on the subject.[178] For example, Bodin defined sovereignty as absolute, perpetual, and indivisible.[179] Thus, "the sovereign must be independent of any higher law-giver."[180] Further, the sovereign must hold sovereignty perpetually. Sovereignty is absolute, indivisible, and cannot be held by two individuals or bodies at once.[181] Bodin took pains to hold popular sovereignty at bay, arguing that, owing to the radical autonomy he attributed to the sovereign, it would be logically inconsistent to regard sovereignty as residing in both the sovereign and the subject.[182] Thus, the sovereign power of the people is passed to the sovereign "without any conditions whatever, so that it passes completely out of their control."[183] In this sense, there is no *internal* limitation on sovereign authority. Crucially, however, Bodin did recognize limitations on the sovereign's lawful authority, suggesting that every sovereign is bound by the "laws of God, of nature, and of nations."[184] Bodin also recognized *leges imperii,* or laws of the kingdom, which could bind the sovereign. While not well developed, this seems to point toward some form of constitutionalism whereby certain meta-norms derived from community standards limit the discretion of the sovereign. This should not be conflated with placing the "rule of recognition" legitimating the legal system in the people. If anything, such a rule for Bodin would seem to be in the sovereign itself or in the divine law.[185] Nonetheless, there are limits upon the exercise of sovereignty despite its absolute character.

These qualifications notwithstanding, Bodin's seemingly absolutist stance produced a backlash. Johannes Althusius, writing in the early 17th century, placed sovereignty with the people and emphasized an essentially contractual approach to determining political legitimacy, one which

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[177] Jean Bodin & M.J. Tooley, abridge & trans, *Six Books of the Commonwealth* (Oxford: Basil Blackwell, 1955) at 25 [Book 1 ch.8].
[178] Julian H. Franklin, "Sovereignty and the Mixed Constitution: Bodin and his Critics" in J.H. Burns, ed, *The Cambridge History of Political Thought, 1450-1700* (Cambridge: Cambridge University Press, 1991) at 298.
[179] *Ibid* at 298.
[180] Merriam, *supra* note 169 at 14; Keene, *supra* note 132 at 43.
[181] Ibid at 14-15. Bodin strongly preferred a monarchical form of government with sovereignty residing in a single individual, though he accepted that democratic bodies may hold sovereign power: Merriam, *supra* note 169 at 16.
[182] Edward Keene, *Beyond the Anarchical Society, supra* note 135 at 43; Franklin, *supra* note 178 at 298.
[183] Merriam, *supra* note 169 at 15.
[184] *Ibid* at 16.
[185] John F. Wilson, "Royal Monarchy: 'Absolute' Sovereignty in Jean Bodin's *Six Books of the Republic*" (2008) 35:3 Interpretation: A Journal of Political Philosophy 241 at 242.

understood all governmental authority as delegated from the people.[186] Althusius also developed a notion of citizenship as grounded in civic autonomy; it was through the right "to possess and administer in common matters useful and necessary to their conservation and development" that members of the political community exercised civic autonomy and became citizens.[187] From this, and again in contrast to Bodin, Althusius argued that important laws required the consent of the governed.[188] Bodin did, however, have many followers. As Quentin Skinner has noted, the absolutist strain of Bodin's analysis was taken up in England as support for the divine right of kings and by the neo-Thomists in Spain who, while holding that sovereignty ultimately resided in the people, recognized that submission to government authority involved an alienation of rights.[189]

Grotius, writing in the first decades of the seventeenth-century, also argued that sovereignty could be characterized as a power that is not subject to control by any other human will.[190] He differed from Bodin, however, in arguing that the duration of sovereignty does not affect its character; he saw no problem with a temporary sovereign. Grotius also followed Bodin in recognizing natural law, the law of nations, and divine law as limiting sovereign authority. Unlike Bodin, Grotius recognized this as compromising the absolute nature of sovereignty. He further allowed that sovereign authority could be limited by agreement between the ruler and subjects.[191] Grotius also recognized a distinction between *power* and sovereignty, drawing on a property law analogy in arguing that sovereignty is like "a field over which one may enjoy full ownership, the usufruct, or a temporary right only."[192] Thus, while sovereignty is an authority which is free from control by another, its exercise may be circumscribed by law and it may be held and practiced in more or less absolute forms. Such considerations led Grotius to accept the possibility of a divided sovereignty which could be distributed among multiple political actors.[193]

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[186] Johannes Althusius, Frederick S. Carney, trans, *Politics* (London: Eyre & Spottiswoode, 1964). See also John Witte Jr. "Natural Rights, Popular Sovereignty, and Covenant Politics: Johannes Althusius and the Dutch Revolt and Republic" (2009-10) 87 U Det Mercy L Rev 565; Merriam at 17-19.
[187] Alain de Benoist, "The First Federalist: *Johanne Althusius*" (2000) 118 Telos 25 at 36
[188] *Ibid* at 36.
[189] Skinner, "The Sovereign State", *supra* note 6 at 29.
[190] Merriam, *supra* note 169 at 21; Keene, *supra* note 132 at 43. For discussion of the importance of Roman Law in Grotius' thought see Daniel Lee, "Popular Liberty, Princely Government, and the Roman Law in Hugo Grotius's 'De Jure Belli ac Pacis'" (2011) 72:3 Journal of the History of Ideas 371.
[191] Grotius nevertheless argued, drawing on Roman law governing acts of self-subjugation, that an individual or a body of free persons could consent to their own subjugation, or alienate their liberty: Lee, *supra* note 190 at 383.
[192] Merriam, *supra* note 169 at 21.
[193] Keene, *Beyond the Anarchical Society, supra* note 132 at 57-59; Lee, *supra* note 190 at 385, Merriam, *supra* note 169 at 22.

The revolutionary move in Grotius was to combine elements of Bodin and Bodin's critics by arguing that sovereignty could be held by both the people and the rulers at the same time. By conceiving of a sovereignty which could reside in both a 'general' and a 'special' subject, that is, by recognizing the principle of divided sovereignty, Grotius maintained that the whole body politic could possess sovereignty while a special organ of that body, the government, could possess it uniquely.[194] He resorted to the familiar body metaphor in explaining sovereign authority, arguing that while the whole body (general) in some regard possesses the sense of sight, the eye in particular (special) is the unique part of the body upon which seeing depends.

Grotius argued that a free people in possession of sovereign rights could alienate any of those particular rights to a sovereign, thus remaining free, on his view, under a government of princes (i.e. a sovereign).[195] Again, however, the inverse of this is that the rights of sovereignty held by the sovereign are delineated through compact with the people. That is, a "free and *sui juris* people can voluntarily choose to make a limited concessive grant of power to a princely form of government, just as they also can freely choose to alienate their rights completely and irrevocably."[196] Grotius, then, provides a framework which sees sovereign bodies, each sovereign within their own sphere, exercising a sovereign authority which is bound by the laws governing association with other nations and by compact with their own subjects. Framed slightly differently, in the international sphere Grotius saw sovereignty as residing with the state, even if the concept of the state is still underdeveloped. Domestic constitutional arrangements determine the nature and extent of internal, sovereignty.[197] While Grotius was prepared to recognize divisible sovereignty, he maintained the importance of maintaining a recognizable sovereign in the political community. As Richard Tuck argues, "what mattered to Grotius by 1625 was that there should be a definite sovereign in every state."[198]

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[194] Merriam, *supra* note 169 at 22-23.
[195] Lee, *supra* note 190 at 386.
[196] Lee, *supra* note 190 at 386. See also Richard Tuck, "Grotius and Selden" in Burns, *supra* note 178 at 519-520. This position was taken up clearly by Hobbes in arguing that a democracy, on his formulation of the concept, could opt to dissolve itself and transfer the whole of its powers to a single sovereign: Richard Tuck, "Hobbes and Democracy" in Annabel Brett, James Tully, and Holly Hamilton-Bleakley, eds, *Rethinking the Foundations of Modern Political Thought* (Cambridge: Cambridge Univeristy Press, 2006) at 184-185.
[197] Benjamin Straumann, "Early Modern Sovereignty and Its Limits" (2015) 16 Theoretical Inquiries 423 at 424.
[198] Tuck, "Grotius and Selden", *supra* note 196 at 520.

The extent of the similarities between Hobbes and Grotius is a matter of considerable debate.[199] Rousseau argued that "their principles are exactly the same: they differ only in their expression."[200] Indeed, key features of Grotius' thought are present in Hobbes. For Grotius, for example, the point of entering into civil society was self-preservation.[201] This has clear resonance with the Hobbesian argument regarding the social contract and the state of nature that shaped Hobbes' absolutists conception of sovereignty as centralized in the figure of the sovereign.[202] This absolutist conception, however, is much closer to Bodin than to Grotius.[203] Hobbes wrote in a political context in which theoretical debates concerning the location of sovereignty were being played out in real conflicts; the outbreak of civil war of 1642 had led to a rash of theorizing from parliamentary sovereigntists and Royalists.[204] Through his famous articulation of the social contract - entered into, in his view, to escape the vicissitudes of the state of nature - Hobbes argued that individuals surrendered their rights to an artificial individual of the state. That is, sovereignty did not reside in "the people", nor in the monarch, but in a legal construct, an artificial person.[205] The role of the sovereign, as determined by the law of nature (i.e. reason) is "the procuration of *the safety of the people*."[206] Crucially, the future subjects remain bound by the contract, while the sovereign is outside it: "there is no possibility of a reserved sovereignty, for the supreme power comes into existence only with the creation of the governmental person who is its bearer."[207] As a consequence, sovereignty is not delegated from the people to the ruler – the sovereign and the subjects are created simultaneously upon entering into the social contract to escape the state of nature. The people were never in possession of sovereignty and could not delegate what they did

[199] For an overview of competing approaches see: Martin Harvey, "Grotius and Hobbes" (2006) 14:1 British Journal for the History of Philosophy 27.
[200] Jean-Jacques Rousseau, *Political Writings,* ed. C.E. Vaughan (Oxford: Oxford University Press, 1915) 2:147. As quoted in Richard's Tuck's introduction in Hugo Grotius, *The Rights of War and Peace,* ed. Richard Tuck (Indianapolis: Liberty Fund, 2005) at 1: xvi.
[201] Tuck, "Grotius and Selden", *supra* note 196 at 519.
[202] The state of nature, in Hobbes's famous formulation, is a war of all against all in which life is "solitary, poore, nasty, brutish, and short.": Thomas Hobbes, *Leviathan,* ed. Richard Tuck, rev edn (Cambridge: Cambridge University Press, 1996) at 91.
[203] Keene, *Beyond the Anarchical Society, supra* note 132 at 105.
[204] Skinner, *Liberty Before Liberalism, supra* note 10 at 1-4.
[205] Ibid. at 3-5. As Skinner notes, this was highly contested, in particular by neo-roman "free state" thinkers of the mid-17th century who held that sovereignty always resided in the people, argued for recognition of what would become the traditional liberal rights to life, liberty and property, and argued for consent as the marker of the legitimacy of laws: *Ibid.,* esp at 5-30.
[206] Hobbes, *Leviathan, supra* note 202 at 232.
[207] Merriam, *supra* note 169 at 25.

not possess.[208] This removes from "the people" as a whole a basis of resistance to, or ability to limit, sovereign authority, while particular individuals retained the right to resist only where the sovereign threatens or fails to protect their life.[209] This conception of sovereignty is thus more absolute than that expressed by either Bodin or Grotius.[210]

The notions of sovereign authority within states as developed by thinkers such as Hobbes, Bodin, and Grotius made possible the development of European "international" law, understood as a body of positive law ordering relations between *sovereign* states, and pre-figured the positivist shift in the realm of international law in the 19th century. Hobbes explicit focus, however, was the relation between the sovereign and its subjects, not between or among sovereigns, and Hobbes said very little on the subject of international law. Hobbes did, however, say enough about the law of nations to leave some indication of his thinking on the matter and, as David Armitage has noted, his paucity of writing on the issue not stopped Hobbes from having a considerable impact on the field of international relations.[211] In a marked shift from previous theorizing that maintained a distinction between the law of nations, the law of nature, and the civil or domestic law, Hobbes collapsed the law of nature and the law of nations, insisting that the law of nature be derived from reason.[212] Thus, the law of nature applied to commonwealths, while the civil law, constituted by the commands of sovereigns, applied domestically.[213] The law of nature, once applied to commonwealths, reflects what was, before their constitution, the law of nature "among men."[214]

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[208] *Ibid*.

[209] While limited, Grotius did recognize a right of resistance in cases where a ruler was in breach of contractual obligations or acted unlawfully. As Benjamin Straumann notes: "a possible right to resistance against legal holders of the sovereign power was based on the original contract or promise in which the form of authority was determined. Because Grotius saw the sovereign contract as a promise by the person holding the highest sovereign power to his subjects, subjective rights could arise from such a promise." Straumann, *supra* note 197 at 435.

[210] According to Dimitris Vardoulakis, this also marks the culmination of a radical re-working of the notion of sovereignty which began in the early 16th century when Machiavelli began to inquire into how a sovereign may maintain their power. Vardoulakis, drawing on Foucault, argues that this question signals a shift from ancient conceptions of sovereignty, in which the end justified the means, to modern sovereignty, in which this relationship is reversed. In the ancient conception, sovereign authority is recognized in relation to a transcendental and teleological end (as in Aristotle's conception of the *polis*). The modern state has dispensed of these transcendental ends and, as a result, the "modern sovereign produces his own power by creating the conditions to perpetuate his power." Dimitris Vardoulakis, *Sovereignty and its Other: Toward the Dejustification of Violence* (New York: Fordham University Press, 2013) at 77.

[211] David Armitage, "Hobbes and the Foundations of Modern International Thought" in Brett et al, *Rethinking the Foundations, supra* note 196 at 219.

[212] Hobbes states that "a Law of Nature, (*Lex Naturalis*), is a Precept, or general Rule, found out by Reason." Hobbes, *Leviathan, supra* note 202 at 91. See also Armitage, "Hobbes and the Foundations of Modern International Thought", *supra* note 211 at 223-228.

[213] Armitage, "Hobbes and the Foundations of Modern International Thought", *supra* note 211 at 224.

[214] *Ibid.*

Thus, "the commonwealth once constituted as an artificial person took on the characteristics and the capacities of the fearful, self-defensive individuals who fabricated it."[215] Individual commonwealths then stood in relation to one another as individuals in the state of nature, with Hobbes arguing that the relations between commonwealths is the best evidence – other than the "savage people in many places of America" - of the existence of the state of nature.[216]

In Bodin, Grotius, and Hobbes we see the beginnings of a shift toward a notion of international or transnational law premised on individual sovereign states which relate to one another through a set of positive laws. The foundation of the modern state has often been attributed to the Peace of Westphalia in 1648.[217] Many historians, however, argue that this shift was not a result of Westphalia, but, rather, that "the peace of 1648 simply codified a lengthy process that had its start in the twelfth century in European courts and schools of law."[218] Certainly the state had already become an important subject of political inquiry by the beginning of the seventeenth century.[219] Regardless of whether Westphalia marked something new or, more likely, articulated developments that were already underway, it provides valuable articulations of key topics. First, it marked a definitive shift away from rule by universal jurisdiction of the Holy Roman Emperor and Roman Catholic Pope, under which disputes between western monarchs could be arbitrated by these "lords of all the world."[220] This was part of the emergence of a "formal, positive, legally binding system"[221] which replaced the earlier law of nations. Since Westphalia, states have been governed "on the principles of 'mutual recognition,' an acceptance that each state is equal in political and legal standing, and 'coexistence," based on the understanding that no state has the right to interfere in the internal affairs of another."[222] One problem with this, as Michael Asch points out, is that to have standing in this system, to have access to these sets of norms, a party must first have the status of a territorial state.[223] In other words, "[i]n a system of sovereign states,

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[215] *Ibid* at 225
[216] Hobbes, *Leviathan, supra* note 202 at 89; Armitage, "Hobbes and the Foundations of Modern International Thought", *supra* note 211 at 226.
[217] MacMillan, *Sovereignty and Possession*, *supra* note 2 at 18-20; Armitage, "Hobbes", *supra* note 211 at 234; Covell, *The Law of Nations, supra* note 59 at 2
[218] MacMillan, *Sovereignty and Possession*, *supra* note 2 at 20.
[219] Quentin Skinner, *The Foundations of Modern Political Thought,* 2 Vols. (Cambridge: Cambridge University Press, 1978) at II, 349.
[220] MacMillan, *Sovereignty and Possession*, *supra* note 2 at 19.
[221] *Ibid* at 42
[222] Michael Asch, *On Being Here to Stay: Treaties and Aboriginal Rights in Canada* (Toronto: University of Toronto Press, 2014) at 102.
[223] *Ibid.*

each recognizes the others as the final authorities within their given territories, and only they can be considered actors within the system."[224] In this narrative, the development of the international law sense of sovereignty was dependant on the development of Westphalian state system under which notions of internal sovereignty developed as between the sovereign and subjects.[225] I will return to the development of international law in subsequent chapters; here the focus will remain on the period prior to 1713.

Hobbes most influential writing on the state emerged immediately following the peace at Westphalia. To bridge the gap from Hobbes until the Treaty of Utrecht another important development must be mentioned. This is a shift not so much in the character or nature of sovereign authority, though there are important differences in this respect, but in its location. With the Glorious Revolution of 1688 and the Bill of Rights of 1689, the power of the monarch was permanently circumscribed, with parliamentary supremacy becoming a reality. The thinker most closely associated with theorizing this shift is John Locke. Like Hobbes, Locke relied on the state of nature to ground his central arguments concerning political authority. Also like Hobbes, Locke discussed Indigenous peoples of the America as existing in a pre-society, pre-law state of nature.[226] Unlike Hobbes, however, the state of nature for Locke is not a state of war, but a state in which individual rights are not adequately protected.[227] On the contractarian model, people enter into civil society and establish a government to escape the state of nature, thereby securing their rights. Individuals surrender their rights to society to the extent necessary for the society to perform its role. For Locke the legislature is the supreme governmental power and the source of law in the community. Locke recognized that the executive power may be vested in an individual who is a part of the legislature. Thus, the sovereign individual, the monarch, is bound by the limits of the law established by the legislature. The legislature itself is subordinate to the civil society that created it.[228] The executive is supreme insofar as it acts within the bounds of the law, the legislature is the "sovereign governmental organ", and civil society holds a latent sovereignty that may be activated if the government is dissolved.[229] Locke did not reject Hobbesian sovereignty

[224] Derek Croxton, "The Peace of Westphalia of 1648 and the Origins of Sovereignty" (1999) 21:3 The International History Review 569 at 570.
[225] Anghie, Antony, "Western Discourses of Sovereignty" in Julie Evans, Ann Genovese, Alexander Reilly, Patrick Wolfe, eds, *Sovereignty: Frontiers of Possibility* (Honolulu: University of Hawai'I Press, 2013) at 21.
[226] Tully, *Locke in Contexts*, *supra* note 126 at 164; Hobbes, *Leviathan, supra* note 211 at 89.
[227] Merriam, *supra* note 169 at 30.
[228] *Ibid* at 31.
[229] *Ibid* at 32.

completely; rather, he insisted "on retaining for the People the sovereignty which Hobbes had transferred wholly to the state."[230] Further, he recognized that "because of the necessity for government, political authority must be divided among several independent spheres of right."[231] The central shift here is the location of sovereignty, placing it with the people rather than the sovereign. This would have an important impact on the governance of colonies when the question concerning the right of the parliament to legislate in respect of the colonies emerged.[232]

The above tracks how sovereignty was conceived by European thinkers until the 18th century, emphasizing three specific points: *where* political authority was located, who (or what) held sovereignty, and what were its fundamental attributes? As the modern state emerged, centralized control over bounded territory was increasingly emphasized and the nation-state became the primary actor in the international law system. Sovereignty at this point clearly came to be seen as being a final authority within a specifically bounded territory, recognized by other sovereigns of equal status. This notion is central to how the control of overseas territories came to be conceived and was an important part of the legal framework that facilitated imperialism.

v) Conclusions on *De Jure* Sovereignty

When Britain acquired French interests in Acadie at the Treaty of Utrecht in 1713, the law of nations continued to draw heavily from Roman Law and natural law theories. The shift to a positivist international law, such as that explicitly articulated by Bentham in in 1783, was still only in its formative stages.[233] Nonetheless, there had been considerable centralization of power within state forms, and the nascent international system excluded those not deemed sovereign by western European nations. Justifications for colonial appropriations had been refined, the basic arguments supporting colonialism established. By the turn of the 18th century "possession or sovereignty in the Americas could only be made legitimate on three distinct grounds: by right of conquest; by 'discovery', which crucially … implied that the territory being 'discovered' was also unoccupied; or by purchase from, or voluntary cession by, the native and legitimate owners or rulers."[234]

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[230] F.H. Hinsley, *Sovereignty* (London: C.A. Watts & Co., 1966) at 146.
[231] *Ibid*.
[232] Greene, *supra* note 152.
[233] For an account of this transition, see Benjamin Allen Coates, *Legalist Empire: International Law and American Foreign Relations in the Early Twentieth Century* (New York: Oxford University Press, 2016) at 16-21.
[234] Pagden, *Burdens of Empire, supra* note 92 at 123.

Internal sovereignty had also evolved. Parliament had unquestionably gained the upper hand in its battle with the Crown. While managing the relationship with colonies remained an executive function, Parliament had a strengthened hand in asserting its authority in the colonies. At least, this was true vis-à-vis the monarch. Issues of self-government would plague parliamentary attempts to legislate in the colonies, as the Stamp Act Crises would show. Parliamentary sovereignty also relied on conceptions of the divisibility of sovereignty which would become central to shaping the delegated forms of colonial governance that would come to prevail in the 18th and 19th centuries. The imperial relationship with Indigenous peoples was distinct from that with colonial governments and was a matter exclusively dealt with through the royal prerogative throughout the period discussed here. The conceptions of sovereignty at play, while shifting in response to the demands of imperial constitutionalism and increasingly centralized political authority in state-like assemblages, continued to exclude Indigenous peoples and sit at odds with the negotiated forms of political rule and substantive legal pluralism that shaped the colonial spheres. Attempts to imagine generative new forms of constitutional association, and to craft common law doctrine that can assist in that, must revisit the genealogy of foundational concepts to see where they continue to shape contemporary law and doctrine in potentially unseen ways. In particular, contemporary notions of sovereign territorial jurisdiction must be reconsidered and cannot be retroactively applied a period to which they are inapplicable. As this chapter has outlined, while European world-makers were structuring the New World as a space of European legality, there were few tangible practices that brought non-Indigenous jurisdictions into being or displaced Indigenous law and authority.

Chapter 2: *De Facto* Sovereignty: Legal Pluralism, Territorial Occupation, and Sovereign Claims

The *de jure* basis of assertions of sovereign authority over Indigenous territories can be traced through the history of empire, the development of the law of nations and international law, and nascent notions of the state which framed sovereignty as an absolute form of authority and jurisdiction extending evenly throughout well-defined borders. The state came to be associated with what Lisa Ford refers to as "[t]he legal trinity of nation statehood – sovereignty, jurisdiction, and territory."[1] These discourses on the legal nature of sovereignty and the state excluded Indigenous legal orders and legitimized the dispossession of Indigenous lands and resources on the basis of legal justifications wholly foreign to Indigenous peoples themselves. The legal and moral legitimacy of this form of unilateralism has been rightly questioned. Western law and political theory, on their own terms, have difficulty sustaining legal and moral justifications for unilaterally imposing a legal and political system on resistant independent peoples.[2] Only the most glaring of double standards can justify excluding Indigenous peoples from the system of laws mediating relations between nations in the way that the domestic and international legal systems of western nations have.

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[1] Lisa Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788 – 1836* (Cambridge: Harvard University Press, 2010) at 1. Anna Stilz draws a distinction between the internal and external dimensions of state rights and authority. Internally, this concerns the classic questions of political authority and legitimacy. Stilz identifies four rights states claim over territory in relation to external actors: territorial jurisdiction, nonintervention, control of borders, and resources rights: Anna Stilz, *Territorial Sovereignty: A Philosophical Exploration* (Oxford: Oxford University Press, 2019) at 1-2.

[2] Of course, the legitimacy of the imposition of unilateral rule has been theorized and fought over for centuries. Narrowing our view to the context of Indigenous peoples in Canada, Indigenous peoples have consistently objected to imposed forms of rule, questioning the moral legitimacy of these impositions, for centuries. The legal legitimacy has also been questioned. David Bell, for example, has tracked discourses on the legality of Indigenous dispossession in the 19th century maritime provinces: D.G. Bell, "Was Amerindian Dispossession Lawful? The Response of 19th Century Maritime Intellectuals" (2000) 23 Dal LJ 168. Canadian courts have also recently been open to considering the issue. In *Haida Nation,* for example, the Supreme Court drew a distinction between *de jure* and *de facto* sovereignty, seemingly suggesting that there was a deficiency (i.e. a problem of legitimacy) with the Crown's sovereign claims: see *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73; [2004] 3 SCR 511. Richard Stacey and Ryan Beaton articulate this as a judicial attempt to remedy a deficit in Crown sovereignty or to procedurally legitimize sovereign authority, respectively" see Richard Stacey, "Honour in Sovereignty: Can Crown Consultation with Indigenous Peoples Erase Canada's Sovereignty Deficit?" (2018) 68:3 UTLJ 405; Ryan Beaton, "De Facto and De Jure Crown Sovereignty: Reconciliation and Legitimation at the Supreme Court of Canada" (2018) 27:1 Const Forum Const 25. The Court made the same recognition in a different context in the Quebec Secession Reference, linking notions of legality and legitimacy to consensual forms of political rule: *Reference re Secession of Quebec*, [1998] 2 SCR 217, at paras 33, 89-105. For analysis of the principles articulated in the *Secession Reference* in the context of Indigenous claims, see Robert Hamilton & Joshua Nichols, "Reconciliation and the Straitjacket: A Comparative Analysis of the *Secession Reference* and *R v Sparrow*" (2021) 52:2 Ott L Rev 205.

Consideration of the factual basis of sovereign claims illustrates this double standard clearly. As discussed in Chapter 1, Western European nations largely came to accept that a measure of occupation of land was required to establish legitimate claims.[3] Absent a double standard in the application of these rules, Indigenous peoples occupying Turtle Island would hold property, sovereignty, and jurisdiction across the continent. Untangling imperial claims, then, requires us to ask whether those claims were accompanied by the settlement of populations or the extension of jurisdiction through territory.[4] While chapter 1 dealt with legal conceptions of sovereignty that developed alongside, and in service of, the expansion of empire, chapter 2 provides an alternative reading. This is done in two ways. First, the factual basis of sovereign claims is examined. While chapters 3 and 4 examine this question in detail in respect of the Maritime Provinces, this chapter approaches the question in a general way applicable across settler-colonial contexts. Second, this chapter works at the conceptual level to argue that inherited notions and histories of state and sovereignty obscure historical and prescriptive analysis. Interrogating how these concepts – particularly as outlined in chapter 1 – have shaped historical narratives and constrained legal and political imaginations is essential to any attempt to clearly articulate the historical relationships between European and Indigenous peoples and the interactions between their legal systems. This chapter sets out the basis for these re-articulations by setting out challenges to notions of state and sovereignty as those concepts are frequently deployed in legal settings and illustrating the limited factual basis for sovereign claims.

i) Occupation: the challenge of factual sovereignty

Overwhelmingly, European nations did not occupy the territories they claimed in North America when assertions of sovereignty were made. While the British and French traded sovereign claims

[3] Ken MacMillan, *Sovereignty and Possession in the English New World: The Legal Foundations of Empire, 1576 – 1640* (Cambridge: Cambridge University, 2006) at 133-135.

[4] Kent McNeil has addressed this at length: Kent, McNeil, "Sovereignty and Indigenous Peoples in North America" (2016) 22:2 University of California Davis Journal of International Law and Policy 81; Kent McNeil, "Indigenous Nations and the Legal Relativity of European Claims to Territorial Sovereignty in North America" in Sandra Tomsons and Lorraine Mayer, eds, *Philosophy and Aboriginal Rights: Critical Dialogues* (Don Mills, Ontario: Oxford University Press, 2013) at 242-253; Kent, McNeil, "Indigenous Sovereignty and the Legality of Crown Sovereignty: An Unresolved Constitutional Conundrum" (2017). All Papers. 320. http://digitalcommons.osgoode.yorku.ca/all_papers/320; Kent McNeil, "Factual and Legal Sovereignty in North America: Indigenous Realities and Euro-American Pretensions" in Julie Evans, Ann Genovese, Alexander Reilly, and Patrick Wolfe, eds, *Sovereignty: Frontiers of Possibility* (Honolulu: University of Hawai'i Press, 2013).

to the Maritime provinces in the 17th century, for example, there were never more than a few hundred settlers present during that time, little effective governance for those settlers, and no ability to exclude others from the use and occupation of the territory.[5] Indeed, the few settlers present were dependent for their survival on the acquiescence of the Mi'kmaq, Wolastoqey, and Passamaquoddy peoples. The story was much the same elsewhere.[6] The English Charters granted in the what would become the United States were based on claimed sovereignty, yet those claims conflicted with the claims of Spain and France and purported to grant lands occupied by Indigenous Nations.[7] By some estimates: "until the late nineteenth century more than half of the habitable hemisphere… remained under indigenous control."[8] Even this statement needs to be qualified, as it assumes that whole territories fall unequivocally under the control of a single authority. In fact, many territories subject to territorial and jurisdictional claims, and even legislated about on the basis of those claims, created only "patches" of sovereignty and jursidiction.[9] For example, provincial Crown Lands legislation is made on the basis of an assumption of jurisdiction over clearly bounded territory. Indeed, in some regards it is constitutive of that jurisdiction. Yet, those territorial claims have been consistently resisted by Indigenous peoples and courts have had to begin to address whether such legislation could 'extinguish' pre-existing Indigenous interests in land.[10] Conflicts between Aboriginal title and provincial legislation shows how legislation has extended jurisdiction and how it rested on notions of territoriality which

[5] Jeffers Lennox, *Homelands and Empires: Indigenous Spaces, Imperial Fictions, and Competition for Territory in Northeastern North America, 1690-1763* (Toronto: University of Toronto Press, 2017) at 15-16.
[6] James (Sa'ke'j) Youngbloog Henderson, *Wabanaki Compact: The Foundation of Treaty Federalism in North America, 1621-1728* (Saskatoon: Indigenous Law Centre, 2020) at 30-36; J.R. Miller, *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada, 3ed* (Toronto: University of Toronto Press, 2000) at 37-42.
[7] Ford, *Settler Sovereignty, supra* note 1 at 13-29.
[8] Amy Turner Bushnell, "Indigenous America and the Limits of the Atlantic World, 1493 – 1825" in Jack P. Greene and Philip D. Morgan, eds, *Atlantic History: A Critical Appraisal* (Oxford: Oxford University Press, 2009) at 191.
[9] Benton describes this process clearly: "territory plays tricks. Mere patches of regulated land may appear to signify claims to vast holdings, while integral "sovereign" space may fracture into many odd-shaped pieces. The prob- lem is not just that tumultuous times and distant realms produce unmanageable complexity. Political space everywhere generates irregularities: polities and subpolities secure exemptions from legislation, jurisdictions guard their autonomy, and subjects and citizens seek to expand or protect extraterritorial legal rights." Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400 – 1900* (Cambridge: Cambridge University Press, 2010) at 279.
[10] In the *Calder* decision, for example, the court was split on the issue of whether general legislation that was inconsistent with ongoing existence or practice of an Indigenous interest in land could have extinguished that interest. Judson J. held that it could, while Hall J. would have applied a higher standard, requiring legislation evidencing a 'clear and plain intent' to extinguish a right: *Calder et al v Attorney-General of British Columbia,* [1973] SCR 313; 34 DLR (3d) 145 at 338-344, 404-412. Justice Hall's position was adopted by the Supreme Court in *R v Sparrow,* [1990] 1 SCR 1075 at 1098-1099.

ran contrary to practice. While a map might show Crown land as under provincial jurisdiction, Indigenous peoples have frequently resisted that by enacting their own jurisdiction. Legislation is a means through which jurisdiction is extended, but it is only one means among many and, without specific practices giving it effect it is near meaningless insofar as jurisdiction is concerned.

That England (later Britain) did not occupy all of the territory over which it claimed sovereignty is recognized in the very structure of Aboriginal title in common law countries. As Judson J. famously wrote in *Calder*: "the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries."[11] In *Delgamuukw* the Court held that the test for establishing title requires demonstrating *exclusive occupation at the date of the assertion of sovereignty*.[12] Assuming this is a test which the court considered it would be possible to meet, the test for establishing common law Aboriginal title includes the explicit acknowledgment that the Crown lacked physical occupation of territories over which it claimed sovereignty. Indeed, the test is designed to "reconcile" Indigenous prior occupation with Crown claims.[13] The fact of Indigenous occupation, however, did little to hold off claims of sovereignty. Despite European legal requirements that occupation was required to ground sovereignty, such justifications were not required in legitimating sovereignty in relation to lands held by Indigenous peoples. While the British imposeed a use-based standard on Indigenous peoples, requiring that they demonstrate their occupation through use of land, the standard they established for themselves required much less.[14]

Part of this is owing to the distinction between *imperium* and *dominium.* If the British were prepared to recognize the property rights of Indigenous peoples, the existence of such rights would, in their mind, in no way prohibit them from acquiring *imperium.* Indeed, in many cases the British recognized the need to acquire the Indigenous interest in land before settling: they recognized that while they held sovereignty, they could not hold rights of property until the pre-existing interests were acquired.[15] Despite the availability of legal justifications for ignoring Indigenous ownership

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[11] *Calder, supra* note 10 at 328.
[12] *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, at para 155
[13] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 71, 81-82.
[14] As John Borrows writes: "if the doctrine of occupation were applied without bias, most people would likely conclude that at Canada's formation the Crown had not effectively *occupied* Indigenous lands in this manner such as to justify displacing their laws." John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 18.
[15] Olive Dickason, "Amerindians Between French and English in Nova Scotia, 1713-1763" in J.R. Miller, ed, *Sweet Promises: A Reader on Indian-White Relations in Canada* (Toronto: U of T Press, 1991) at 47-48; Kent McNeil, "Self-Government and the Inalienability of Aboriginal Title" (2002) 47:3 McGill LJ 473; Kent McNeil, "The Source,

and territorial jurisdiction, British practice was, by and large, to obtain the Indigenous interest in land by cession or purchase prior to settlement.[16] While this policy was certainly not always followed, the extensive practice of treaty-making and record of land purchases indicate that, regardless of theoretical justifications arguing against its necessity, the British practice was to acquire some form of Indigenous consent. The practice of acquiring the Indigenous interest prior to settling lands was directed at acquiring their *dominium,* or their proprietary interests.[17] That interest was, in the British mind, already subject to an *imperium* acquired by other means, primarily discovery, conquest, or cession from another European power. This distinction allowed the British to assert sovereignty where they had little or no presence. Yet, the reality of Indigenous occupation and power required British settlement be negotiated. Indigenous occupation prior to British claims came to be understood as placing a burden on the Crown to acquire land before settlement and provided the space for continued Indigenous self-determination in respect of domestic affairs. As Indigenous nations were excluded from the purview of Eurocentric norms of international law or, earlier, the law of nations, however, the laws governing the relations between European states did not apply.[18] European sovereignty, therefore, could be acquired over Indigenous lands in ways that it could not over the lands of another European nation.

While this explains the *assertion* of sovereignty, the actual exercise of sovereign authority was much more attenuated. It is well established that the British recognized that claims to *dominium* could not be made absent Indigenous consent; in some instances, perfecting *imperium* required Indigenous consent as well. Lisa Ford describes this as acquiring "perfect settler sovereignty."[19] In Ford's analysis, the extension of colonial jurisdiction *over* Indigenous peoples was a crucial constitutive element of settler sovereignty. Ford's insights are illustrative in Mi'kma'ki/ Wulstukwik, where the British consciously sought to negotiate the perfection of sovereignty, unable to impose jurisdiction unilaterally. In 1725-26 treaty negotiations, the British explicitly sought to have their claims to sovereignty, based on their acquisition of such from the

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Nature, and Content of the Crown's, Underlying Title to Aboriginal Title Lands" (2018) 96:3 Can Bar Rev 273 at 286: "Aboriginal title cannot be acquired by private persons or corporations, as they lack the legal capacity to acquire governmental authority from anyone other than the Crown."

[16] Stuart Banner, *How the Indians Lost Their Land: Law and Power on the Frontier* (Cambridge: Harvard University Press, 2005 at 22-29.

[17] *Ibid.*

[18] Michael Asch, *On Being Here to Stay: Treaties and Aboriginal Rights in Canada* (Toronto: University of Toronto Press, 2014) at 103.

[19] Ford, *supra* note 1 at 2.

French in the Treaty of Utrecht, recognized by the Wabankai.[20] Britain understood its asserted sovereignty and the interests it received from France to be relevant to their relations with other European nations; its impact on Indigenous peoples was a separate matter to be negotiated with them. Britain understood that sovereignty was a legal construct that extended a precarious and uneven political authority. There was, to use Ford's phrase, "a fictive, aspirational quality to their sovereignty talk."[21] In parsing these approaches, timing is essential. While by the mid-nineteenth century it was clear that Indigenous rights were conceived of as rights of occupancy which sat atop an underlying Crown title derived from the assertion of sovereignty, in the 18th century matters were considerably less well settled. Notions of sovereignty and territorial jurisdiction developed through the process of colonial expansion and shifted as political realities did.

The British and French recognized that factual occupation was required to ground sovereignty – at least vis-à-vis other Europeans – and that they did not in fact have that factual occupation of much of Mi'kma'ki/ Wulstukwik. The French deliberately settled in areas that were little used by Indigenous peoples.[22] The British, through the practice of negotiating treaties to acquire Indigenous lands, demonstrated that lands were not under physical occupation of the British and needed to be acquired before they could be settled. The considerable malleability underlying the notion of occupancy and its legal consequences is evident. To ground territorial claims, Indigenous peoples were required to demonstrate factual occupation of territory. Even then, by the 19th century this was limited to a limited right of occupancy that did not disturb the Crown's sovereign claims.[23] Europeans, by turn, grounded their claims in assertion. Minimal levels of occupation were relied on to ground claims vis-à-vis other European nations. The actual evidence of occupation required to ground those assertions was subject to constant debate, as were the territorial basis of the claims.

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[20] William C. Wicken, *Mi'kmaq Treaties on Trial: History, Land, and Donald Marshall Jr.* (Toronto: University of Toronto Press, 2002).
[21] Ford, *supra* note 1 at 25.
[22] Cornelius J. Jaenen, "French Sovereignty and Native Nationhood during the French Régime" in Miller, *supra* note 15 at 27.
[23] See John Borrows, "The Durability of Terra Nullius: *Tsilhqot'in Nation v British Columbia*" (2015) 48 UBC L Rev 701.

ii) Perforating Sovereignty

The factual acquisition of territorial sovereignty occurred slowly and unevenly, over the course of centuries. Indeed, even concepts of territorial sovereignty did not arrive pre-formed in colonial spheres but were shaped by and through imperial expansion. How, then, to characterize those colonial spheres in a way that uncouples them from contemporary notions of sovereignty? Lauren Benton has used the phrase "layered sovereignties" in conceptualizing how sovereignty operated in the early colonial period.[24] She argues:

> Empires did not cover space evenly but composed a fabric that was full of holes, stitched together out of pieces, a tangle of strings. Even in the most paradigmatic cases, an empire's spaces were politically fragmented; legally differentiated; and encased in irregular, porous, and sometimes undefined borders. Although empires did lay claim to vast stretches of territory, the nature of such claims was tempered by control that was exercised mainly over narrow bands, or corridors, and over enclaves and irregular zones around them.[25]

When empires extended control beyond the metropolitan centre, they did not extend law, political authority, or force evenly throughout territories as one would colour a space on a map. Rather, there was an emphasis on the control of narrow enclaves, resources sites, and trade routes which led to the development of "variegated legal geographies."[26] Crucially, "these zones were not lawless but legally complex – places where political authority was widely understood as a work in progress."[27] Indigenous territories subject to imperial intrusions were complex sites of jurisdictional contestation and negotiation where partial and layered forms of political authority and multilayered relationships arose. Imperial arenas were characterized by a deep legal pluralism, and the transnational practices and legalities linking competing European powers and non-European nations and peoples were complex and, at times, unstable.[28] Legal pluralism, therefore, provides an apt conceptual lens for assessing the convergence of imperial ventures and colonial

[24] Benton, *A Search for Sovereignty, supra* note 9 at 31-32.
[25] *Ibid* at 2.
[26] *Ibid* at 38.
[27] *Ibid* at 39. As Trevor Burnard suggests, from the 15th century on the Atlantic was not only an ocean, but "a particular zone of exchange and interchange, circulation and transmission." Trevor Burnard, "The British Atlantic" in Jack P. Greene and Philip D. Morgan, eds, *Atlantic History: A Critical Appraisal* (Oxford: Oxford University Press, 2009) at 111.
[28] Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900* (Cambridge: Cambridge University Press, 2002) at 3.

and Indigenous societies in Mi'kma'ki/ Wulstukwik /Acadie/Nova Scotia in the 17th and 18th centuries.

Various legal concepts and tools were used to facilitate extension of sovereignty and jurisdiction. The extension and portability of legal subjecthood and the delegation of legal authority were particularly useful in this regard.[29] It is precisely through the extension of law in this way – by maintaining *subjects* in lands previously outside one's jurisdiction – that control is gained over time. This coincided with delegated forms of legal authority wherein proprietors, governors, or military officials were delegated the executive authority of the Crown in colonial spheres. As early as the letters patent to Humphrey Gilbert in 1578, authority was delegated to dispose of lands "according to the laws of England."[30] This patent also illustrates another element of the way that law moved through space in imperial settings: the enactment of legal rituals.[31] The surveying of land, for example, was a legal ritual deployed in the New World under the auspices of a delegated legal authority to appropriate, and remake, territory. Thus, "the land had to be measured, mapped, and registered in the name of its owner"[32] before it could be prepared for settlement.

The first step was not physical taking or occupation – Gilbert found the land around St. John's harbor occupied by more than two dozen fishing vessels from various European countries when he arrived – but the intellectual appropriation realized through the imposition of a colonial epistemology concerning the nature of land ownership and the "discovery" of "unowned" territory. As Christopher Tomlins writes, "the achievement of intellectual control over appropriated territory through survey and mapping would become an essential aspect of European expansion and overseas colonizing."[33] These diverse approaches led to different practices of sovereign authority, each with distinct relationships to territoriality: they moved through, used, and structured space differently. In each instance, however, sovereign control was acquired in relation to specific places and in only a partial and incomplete manner rather than absolutely through broad territories. While notions of absolute sovereign authority structured colonial spheres as spaces of European legality,

[29] Benton, *A Search for Sovereignty, supra* note 9 at 288.
[30] Andro Linklater, *Owning the Earth: The Transforming History of Land Ownership* (New York: Bloomsbury, 2013) at 2. See also Christopher Tomlins, "The Legalities of English Colonizing Discourses of European Intrusion upon the Americas, c. 1490–1830" in Shaunnagh Dorsett and Ian Hunter, eds, *Law and Politics in British Colonial Thought* (New York: Palgrave MacMillan, 2010) at 51-52.
[31] Benton, *A Search for Sovereignty, supra* note 9 at 24, 31, 41.
[32] Linklater, *supra* note 30 at 2.
[33] Tomlins "Law's Empire", *supra* note 2 at 29.

the apparatus was rickety. Spaces were constituted by a plurality of legal orders. Territories subject to imperial intrusions should, therefore, be considered as legally pluralistic spaces where sovereignties existed in partial, overlapping, and hybrid forms.

These territories should also be understood as predominantly Indigenous spaces until much later than is frequently recognized. This requires an acknowledgement that conceptions of law imported from Europe failed to adequately capture lived experience and the various legalities that proliferated in political life in North America. It also requires that we resist the retrospective application of rigid statist conceptions of sovereignty that incorporate nothing less than absolute authority and complete territorial integrity.[34] These conceptions can prevent accurate descriptions of the legal plurality and hybridity of colonial spheres. Thus, "the pluralist framework captures a dialectical and iterative interplay that we see among normative communities … an interplay that rigidly territorialist or positivist visions of legal authority do not address."[35] To this must be added to role of contestation – the active role of Indigenous peoples in resisting, confronting, and negotiating forms of legal and political authority shaped the forms of law that emerged. As Paul Berman argues, legal pluralists seek "to identify places where state law does not penetrate or penetrates only partially, and where alternative forms of ordering persist to provide opportunities for resistance, contestation, and alternative vision."[36]

iii) Contested Sovereignty: "this land belongs to me, the Indian"[37]

Robert Williams Jr. writes that "Indians helped create a legal world during the Encounter era – a world made up of multicultural negotiations, treaties, and diplomatic relations with Europeans.

[34] Stilz, *supra* note 1.
[35] Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (Cambridge: Cambridge University Press, 2012) at 25.
[36] *Ibid* at 54.
[37] On 18 October, 1749, Mi'kmaw elders and chiefs addressed Governor Cornwallis …. "The place where you are, where you are building dwellings, where you are now building a fort, where you want, as it were, to enthrone yourself, this land of which you wish to make yourself now absolute master, this land belongs to me. I have come from it as certainly as the grass, it is the place of my birth and of my dwelling, this land belongs to me, the Indian, yes I swear, it is God who has given it to me to be my country forever… Your residence at Port Royal does not cause me great anger because you see that I have left you there at peace for a long time, but now you force me to speak out by the great theft you have perpetrated against me." As reprinted in Ruth Holmes Whitehead, *The Old Man Told Us: Exceprts From Micmac History 1500 – 1950* (Halifax: Nimbus, 1991) at 114.

Indian visions of law and peace exercised a profound and direct impact on this world."[38] Indigenous people's laws and other expressions of their agency contributed to the "variegated" nature of imperial sovereignty and existence of multiple legalities. Imperial expansion was not partial and halting by chance – it encountered resistance that shaped how and where it was able to extend. The concept of sovereignty itself - its nature, scope, and content - was shaped through this process.[39] Imperial rule, in both the material and ideational realms, was always subject to negotiation and contestation. The contested nature of sovereignty and imperial rule must be made explicit, as must the fact that resistance did not only occur at borders, but throughout territories. As Benton writes, "[o]ne benefit of the analysis of the formation of corridors and enclaves within imperial spheres of influence is that it moves us beyond a reliance on the concept of borderlands to describe spaces in which imperial sovereignty was contested."[40] Resistance occurred throughout territories and was essential to shaping the lived political and legal realities of individuals and collectives and the forms of political and legal authority that developed between and within nations. As Williams Jr., paraphrasing Edward Said, writes: "nearly everywhere in the non-Western world, the coming of the white man brought forth a response."[41] That response had constitutive effects on the hybrid legalities of colonial spaces.

Indigenous resistance to imperial intrusions has been prominent since Europeans first made claims to Indigenous lands.[42] In the face of European intrusions, "[i]f their rights were not recognized, Indigenous peoples would take direct action and re-occupy areas recently claimed by others."[43] Direct action has been an important way that Indigenous peoples have contested the absolute sovereign authority of imperial, colonial, and state legal orders. It can be argued that most of the contemporary concessions the state has made, for example in the form of the formal recognition of Aboriginal and Treaty rights, have been the result of Indigenous resistance through

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[38] Robert A. Williams Jr. *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600 – 1800* (Oxford: Oxford University Press, 1997) at 8.
[39] Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge: Cambridge University Press, 2005).
[40] Benton, *A Search for Sovereignty, supra* note 9 at 37.
[41] Williams Jr. *Linking Arms Together, supra* note 38 at 3.
[42] For an example of occupation from 1922 see, John Sandlos, "Point Pelee's Summer of Discontent" in Yale D. Belanger and P. Whitney Lackenbauer, eds, *Blockades or Breakthroughs? Aboriginal Peoples Confront the Canadian State* (Montreal & Kingston: McGill-Queen's University Press, 2014) at 51-69. For discussion of an Indigenous occupation of a mining site in 1849 and the activism that surrounded it, see Janet Chute, "Shingwaukonse: A Nineteenth-Century Innovative Ojibwa Leader" (1998) 45:1 Ethnohistory 65.
[43] Borrows, *Canada's Indigenous Constitution, supra* note 14 at 132.

direct action.[44] Historically, resistance to assertions of sovereign authority took many forms, including the development of counter-hegemonic discourses on the nature of sovereignty, law, and political authority. These counter discourses were developed consciously, and they also emerged through specific practices.[45] Resistance can be understood in light of the relations of power that it is contesting. Power is productive and constitutive in nature, it "brings into being meanings, subjects, and social order."[46] Power not only coerces through formal restraints on possible actions, but also through establishing social norms such as those "borne by words, images, and the built environment, then popular discourses, market interpellations, and spatial organization."[47] On this conception of power, resistance must be conceived of both as *a resistance to* and as *an expression of* power. Resistance opposes power in the diverse and discrete forms through which it is exercised, while also expressing alternative modes of power through a similarly diverse range of means. As Foucault has argued, it is through resistance that power becomes visible in its many modes of expression.[48] Framed another way, Tully describes "practices of freedom" that groups or individuals engage in to resist dominant practices of governance and power relations.[49]

In this frame, a range of practices of *indirect resistance* must be considered in addition to forms of direct physical resistance. These include what Gene Sharp calls "microresistance," (practiced by individuals or small groups) as well as "cultural resistance," which he defines as "[p]ersistent holding to one's own way of life, language, customs, beliefs, manners, social organization, and ways of doing things despite pressures of another culture."[50] Further, "[t]his resistance may protect a culture of indigenous origin or be directed specifically against a culture imposed by a military occupation or colonialism. Cultural resistance may take very undramatic forms, such as teaching one's language to one's children."[51] Cultural resistance includes the use of language, artistic endeavor, and the practice and revival of important cultural practices. In

[44] Glen Coulthard, *Red Skin, White Masks* (Minneapolis: University of Minnesota Press, 2014).
[45] *Ibid.*
[46] Wendy Brown, "Power After Foucault" in John S. Dryzek, Bonnie Honig, and Anne Phillips, eds, *The Oxford Handbook of Political Theory* (Oxford, Oxford University Press, 2008) at 70.
[47] *Ibid* at 66.
[48] Michel Foucault, *The Subject and Power* in Hubert L. Dreyfus and Paul Rabinow, *Michel Foucault: Beyond Structuralism and Hermeneutic* at 780.
[49] This is discussed in detail in Robert Hamilton, "Indigenous Peoples and Interstitial Federalism in Canada" (2019) 24:1 Review of Constitutional Studies 43.
[50] Gene Sharp, *Sharp's Dictionary of Power and Struggle: Language of Civil Resistance in Conflicts* (New York: Oxford University Press, 2012) at 107.
[51] *Ibid.*

response to the imposition of colonial power, Tully argues, "there is always a range of possible comportments – ways of thinking and acting – that are open in response, from the miniscule range of freedom exercised in hidden insubordination in total institutions such as residential schools to the larger and more public displays."[52] These practices make up a "vast repertoire of arts of infrapolitical resistance."[53]

The concept of *indirect resistance* articulated here goes beyond Sharp's articulations of "microresistance" and "cultural resistance." There is an important space between these forms of resistance and direct action, a space which is occupied by a range of modes of *indirect action* concerned with narratives and the deployment of power through the development of knowledge. Foucault argues that "[t]ruth is a thing of this world: it is produced only by virtue of multiple forms of constraint. And it induces regular effects of power. Each society has its regime of truth, its 'general politics' of truth: that is, the types of discourse which it accepts and makes function as true."[54] This insight was grasped and applied to the colonial situation by Frantz Fanon, who analyzed how the narratives of a colonizing power cemented colonial power by shaping the subjectivities of the colonized in a manner which rendered them compliant to colonial rule; as he argued, "a host of information and a series of propositions slowly and stealthily work their way into an individual through books, newspapers, school texts, advertisements, movies, and radio and shape his community's vision of the world."[55] This information contributes to a person's conception of themselves and their place in the world. Given the insight that power is constituted by and though the creation of regimes of knowledge or ways of knowing, the contestation, production, and reproduction of narrative is essential to resistance.

This is another sense, then, in which we should consider sovereignty as subject to contestation in the imperial arena. Wherever the written or oral record provides evidence of the deployment of narratives which challenge the assertion of sovereign authority and associated epistemologies validating the acquisitive nature of colonialism, those narratives should be understood not only as contesting the unilateral assertion of sovereignty, but as an indication of its porous and attenuated nature. By holding open discursive spaces against the totalizing impulse of

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[52] James Tully, *Public Philosophy in a New Key, Vol. I: Democracy and Civic Freedom* (Cambridge: Cambridge University Press, 2008) at 265.
[53] *Ibid.*
[54] Michel Foucault "Truth and Power" in Paul Rainbow, ed, *The Foucault Reader* (New York: Pantheon Books, 1984) at 73.
[55] Frantz Fanon, *Black Skin, White Masks* (New York: Grove Press, 2008) at 131.

sovereign authority, discourses of resistance illustrate the existence of an unappropriated landscape resisting incorporation into the boundaries of a sovereign whole. The numerous examples of such discourses, including those that are discussed in subsequent chapters, are evidence of the "variegated" nature of imperial sovereignty.[56]

Thus, in the sense of factual occupation and control, the acquisition of sovereignty took place much later and at a much more languid and inconsistent pace than is usually described. Legal thinkers and courts, in particular, are prone to the retrospective application of contemporary conceptions of sovereignty, territory, and jurisdiction which either distort the past, unjustifiably support only one side of a contested constitutional arrangement, or both. Put simply, the territories claimed by Europeans were largely populated and controlled by Indigenous and governed by their systems of law.[57] It is only by minimizing the political character of the peoples actually populating colonial spheres that unilateral sovereign claims were plausible. Indigenous resistance to those sovereign claims illustrates their porous and attenuated nature. Resistance, in its many varied forms, illustrates that the structures and languages of 'perfect settler sovereignty' were always subject to contestation.

An important result of this resistance is the negotiation of political and legal relations. John Borrows explains the mutual construction of political and legal orders and varied ways this occurred:

> Yet treaties are not the only area where indigenous traditions influenced the development of law in Canada and continue into the present day. When the British and Indians met in North America, diplomacy was not centralized, but diffuse. The parties developed their own protocols and ceremonies, and these were rarely solely European. They attempted to create a social context that supported peace. Diplomacy was conducted by many actors, including orators, headmen, war chiefs,

[56] Adopting Benton's framing, the problem with the *de facto/de jure* distinction is clear. It is precisely through *law* that sovereignty is extended. Factual sovereignty is acquired by the extension of legal rituals and jurisdiction. Factual sovereignty cannot be conceived of as apart from legal sovereignty. But is the inverse also true? Can legal sovereignty extend where there is no factual sovereignty? The conventional argument answers this in the affirmative, subject to the qualification that different legal systems may give different answers. If international law adopts the doctrine of discovery, then asserted sovereignty is legal insofar as it is recognized by the other nations bound by that legal system. Certainly it is tempting to say that a colonizing nation had legal sovereignty vis-à-vis other European countries. One issue with this, however, is that, while the doctrine of discovery was accepted, it was not applied consistently. It is tempting to retroactively say that settler colonial nations developed on the basis of discovery. In fact, discovery rarely worked as a justification and European nations continually disputed discovery-based claims. In other words, it is clear that there was no *de jure* sovereignty in relation to Indigenous peoples except where their consent was given.

[57] Chief Justice Lance Finch of the British Columbia Court of Appeal drew the connection between occupation and law clearly, stating that "[i]t is artificial to separate the concept of *pre-existing societies* from *pre-existing legal orders*.": Lance S.G. Finch, "The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice" (2012) Continuing Legal Education Society for British Columbia at 1.

> peace chiefs, civil leaders, village and colonial councils, missionaries, traders, speculators, traditionalists and dissidents, those with authority and those without. From the 1500s onward, many European individuals submitted themselves to indigenous legal orders. For example, many traders and explorers adopted indigenous legal traditions and participated in their laws. A perusal of the fur trade literature reveals that commercial transactions were often conducted in accordance with indigenous traditions. The giving of gifts, the extension of credit, and the standards of trade were often based on indigenous legal concepts.[58]

Sovereign authority and the extension of jurisdiction was subject to ongoing contestation and negotiation between a variety of actors - in political, military, and economic spheres - pursuing various ends. Legal relationships were negotiated through treaties, but also through an array of more quotidian acts.

Treaty relationships, however, stand as an exemplar the negotiated nature of sovereignty. In treaty relationships, parties are recognized as "equal, coexisting and self-governing nations and govern their relations with each other by negotiations, based on procedures of reciprocity and consent."[59] This understanding has only been obscured by after the fact re-imaginings supported by the shift to an imposed model of unilateral and coercive authority in the 19th century.[60] As Tully notes, "Aboriginal peoples agreed to recognise the settlers as co-existing, self-governing nations, equal in status to themselves, with the right to acquire land from them, over which the settler governments could then exercise jurisdiction and sovereignty, by means of nation-to-nation treaties based on mutual agreement."[61] As will be explored in more detail in subsequent chapters, the negotiation of political relationships shaped concepts of nationhood and alliance and resulted in the development of negotiated intersocietal law. These bodies of law stood against the unilateral imposition of European law, providing space for settlers and Indigenous peoples to manage their internal affairs while establishing legal regimes to mediate relations between peoples on the basis of principles of negotiation and consent, the meaning of which was worked out in practice.

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[58] John Borrows, "Crown and Aboriginal Occupations: A History & Comparison" (2005) Report for the Ipperwash Commission at 10-11. John Borrows, "An Analysis of and Dialogue on Indigenous and Crown Blockades" in Sandra Tomsons and Lorraine Mayer, eds, *Philosophy and Aboriginal Rights* (Don Mills: Oxford University Press, 2013) See also James Axtell, *The Invasion Within: The Contest of Cultures in Colonial North America* (Oxford: Oxford University Press, 1985).
[59] Tully, *Public Philosophy, supra* note 52 at 226.
[60] *Ibid.*
[61] *Ibid* at 234.

iv) State and sovereignty as objects of analysis

Sovereignty was never acquired in the manner it has frequently been retroactively assigned by courts of law and in national histories. Empires relying on assertions of sovereignty grounded in European legal traditions were, as Brian Slattery has written, "paper empires."[62] The utility of sovereignty as an object of analysis therefore must be called into question in two ways. Undoubtedly, an understanding of how notions of sovereignty have been deployed is crucial to understanding the development of states and empires and histories of colonization. Yet, as that analysis has shown, sovereignty itself is insufficient to understanding the extension of colonial rule and the particular practices that guided that extension. Saying that the British acquired sovereignty over present-day Nova Scotia through the Treaty of Utrecht tells us only so much. What is much more important is understanding how the legal spaces of Mi'kma'ki came to be structured as "Acadie" and "Nova Scotia" and how British sovereignty was realized in practical terms. That can only be seen by looking at discrete practices that extended jurisdiction throughout territory and over legal subjects.[63] Legal and historical accuracy require that European notions of sovereignty be but one aspect of an analysis of empire and colonial rule. All discussion of sovereignty must be caveated to note that sovereign claims relied more on European pretense than lived reality. The contingent, contested, and negotiated forms of sovereignty outlined above suggest that an overreliance on the concept of state sovereignty, and the practices of transnational law it supports, can serve to re-inscribe problematic assumptions of Indigenous inferiority and cement unequal and coercive power relations. As Anthony Anghie argues, traditional, classic international law is a powerful "Western discourse" about the whole question of sovereignty. This Western discourse of sovereignty, furthermore, was used for several centuries precisely as a means of justifying the expansion of Western sovereignty through the process of colonialism.[64] The concept was defined and re-defined through the processes of colonization. The fluid nature of the

[62] Brian Slattery, "Paper Empires: The Legal Dimensions of French and English Ventures in North America", in John McLaren, A.R. Buck and Nancy E. Wright, eds. Despotic Dominion: Property Rights in British Settler Societies (Vancouver: University of British Columbia Press, 2005) at 50-78.
[63] Ford, *supra* note 1
[64] Antony Anghie, "Western Discourses of Sovereignty" in Julie Evans, Ann Genovese, Alexander Reilly, Patrick Wolfe, eds, *Sovereignty: Frontiers of Possibility* (Honolulu: University of Hawai'i Press, 2013) at 19

concept of sovereignty suggests that one must be cautious in retroactively assuming its stability and applicability in historical analysis.[65]

Similarly, a contemporary notion of the state cannot be projected backwards. Statist conceptions of law and jurisdiction must be used cautiously in analyzing the 18th century, particularly in colonial contexts. Though the state had been an important part of European political thought since the early 17th century, the state as such was a relatively novel legal/political structure, and contemporary notions of sovereignty and the nation-state were only beginning to be developed. One of the sites where that was occurring was in the interplay between conflicting European and Indigenous claims of territorial jurisdiction.[66] By the early 17th, the state, its rights, and its "right to command obedience" were central question of European political philosophy.[67] And, though the idea of the state as an "independent political apparatus" can be dated to the 16th century,[68] the relationship between state and empire was yet to be worked out and the coupling of 'nation-state' not yet articulated.[69] States as such were not the dominant mode of political association until well after the state as an object of study in a distinct branch of theory developed. Later still came the formulation of an 'international' world shaped by the interaction between independent states. As David Armitage writes, "[i[t would be anachronistic to see the origins of a world defined by states as early as 1648 and the Peace of Westphalia which is often held to have inaugurated a 'Westphalian order' of mutually acknowledged independent states." Indeed, "it might even be anachronistic to find the roots of a state-based international order even 200 years later in the mid nineteenth century when empires were still on the rise and on the march across the world from Mexico to Russia in the late nineteenth century."[70] Crucially, in the 18th century period which concerns this work, empires were a more prominent mode of association than states, and those empires were considered primarily in commercial, rather than territorial, terms.

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[65] The usefulness of sovereignty also must be questioned from a prescriptive vantage. Should sovereignty be embraced as a grounding for political and legal authority moving forward? What conception of sovereignty can most fruitfully be deployed to meet society's needs in the future?

[66] David Armitage, *Foundations of Modern International Thought* (Cambridge: Cambridge University Press, 2013) at 3. On the development of the state and how it came, by the 17th century to be a distinct and central unit of analysis for political philosophers, Quentin Skinner, *The Foundations of Modern Political Thought,* 2 Vols. (Cambridge: Cambridge University Press, 1978), vol II.

[67] Skinner, *Foundations, Vol II* at 349.

[68] *Ibid* at 353. See also David Armitage, *The Declaration of Independence: A Global History* (Cambridge MA: Harvard University Press, 2007) at 37-38: "By the end of the sixteenth century the word "state" had taken on its recognizably modern meaning of an impersonal political power distinct from its holder."

[69] Eric Hobsbawm and Ranger, eds, *The Invention of Tradition* (Cambridge: Cambridge University Press, 2012).

[70] Armitage, *Foundations supra* note 65 at 191-192.

Armitage convincingly argues that it was not until the American Declaration of Independence that an international order grounded on independent states rather than empire began to emerge.[71] Similarly, Lisa Ford and Lauren Benton argue that the "international order" was, until at least the mid-19th century, structure primarily by supra-national empire:

> [the] Austinian idea of international order urges us to regard empires simply as unusually large and complex states whose imprint on international law flows through their relation with other sovereign states. In contrast, most early nineteenth-century political actors understood an empire to be a politically plural order of a different sort, a *state system* in itself rather than merely a state among states.[72]

Empires were not understood as states in the 19th century, but as means of structuring the international order. The American declaration of independence began a new era, in which "[i]n order to assert their own statehood, most of the world's present-day states had at some point in the last two centuries declared their independence of the larger units that had once contained them."[73] The history of sovereignty must therefore be thought as much in relation to empire as state.

The relationship between the idea of the state and a correlative "people" is also of relatively recent vintage.[74] The "people" came to be the basis of the nation, ordered through a political-legal apparatus. The nation, now construed as a distinct "people", was then coupled with the state in the emergence of the contemporary nation-state. Both "nation" and "state", however, are contingent constructs which can, and do, arise independently from one another.[75] Paul Berman explains that "[i]n response to the inherently imagined nature of their existence, nations make claims upon something called national 'identity.' Such national identity is formed through self-categorization: articulating attributes that make 'us' of one group different from 'them' in another group."[76] The concept of 'national identity' would not appear until the late 19th century.[77] National identity is

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[71] Armitage, *The Declaration, supra* note 68.
[72] Lauren Benton and Lisa Ford, *Rage for Order: The British Empire and the Origins of International Law, 1800 – 1850* (Cambridge MA: Harvard University Press, 2016) at 150.
[73] Armitage, *Declaration, supra* note 68 at 21-30.
[74] Hobsbawm, *supra* note 69.
[75] Armitage, *The Declaration, supra* note 68 at 20. This is recognized in Vattel's definition of state, "Every nation which governs itself, under any form whatsoever, without dependency on any foreign country, is a sovereign state. Its rights are by nature the same as those of every other state. These are the moral persons who live together in a natural society subject to the law of nations. For any nation to make its entrance into this great society, it is enough that it should be truly sovereign and independent, that is to say, that it governs itself under its own authority and its own laws."
[76] Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (Cambridge: Cambridge University Press, 2012) at 85-86.
[77] Armitage, *Foundations supra* note 66 at 137

essential to the contemporary coupling of "nation-state": it is only possible to imagine the state as a single political community if one understands that community as in a sense homogenous.[78] An important element in the creation of national identities is the creation of a unified history. Thus, "it is no coincidence that the ascendency of nation-states was accompanied by the creation of national historical tales."[79] These "national historical tales" consist in part of original stories which rely on the anachronistic projection of contemporary notions into the past. From a given point of origin, the fundamental attributes of a nation-state - territorial integrity, bundled sovereignty, a distinct unified "people" – are narrated as being stable and unchanging.[80] The notion of the state is thus tied to fixed territorial bounds and unilateral authority; as Quentin Skinner writes, "A further precondition for arriving at the modern concept of the State is that the supreme authority within each independent *regnum* should be recognised as having no rivals within its own territories as law-making power and an object of allegiance."[81]

In interrogating the past, contemporary conceptions of sovereignty and the nation state should therefore not be applied to a past to which they are inapplicable – they must be understood as those who used them in the period under examination understood and used them.[82] Law and legal theory have not followed historians of thought with sufficient commitment on this point. While legal thinkers are concerned with what the law *was* in a given period, they rarely attend to foundational concepts in which that doctrine is embedded and without which it cannot be understood. This is seen clearly in the way that common law courts deal with Indigenous rights. The unquestioned assumption of a given view of sovereignty by courts leads them to retroactively apply anachronistic notions of territorially bounded sovereign authority in a manner which dispossesses Indigenous peoples in the present. It is a form of presentism which applies categories and concepts to a past to which they are inapplicable and in so doing constrains present articulations of the law.

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[78] Berman, *supra* note 76 at 80-85.
[79] *Ibid* at 85-86.
[80] See Stilz, *supra* note 1 at 2-5; 12-15
[81] Quentin Skinner, *The Foundations of Modern Political Thought,* 2 Vols, (Cambridge: Cambridge University Press, 1978), vol II at 351.
[82] As J.G.A. Pocock explains: "[f]or me, as for Skinner, the point of importance has been that the study of the contexts in which political speech acts have been performed can entail, and even become, the study of the diverse languages, ways of thinking and views of the world in which they have been conducted." J.G.A. Pocock, "Foundations and Moments" in Annabel Brett, James Tully & Holly Hamilton-Bleakly, eds, *Rethinking the Foundations of Modern Political Thought* (Cambridge: Cambridge University Press, 2006) at 38.

This has important consequences in prescriptive analysis. To build legal theory and doctrine on the unquestioned assumption of a statist conception of sovereignty is to work within an unjustified set of prior constraints. Legal theory must follow those political theorists who have questioned sovereignty as a grounding for political and legal thought. For example, "theorists have "questioned the accuracy of the inherited concepts of self-contained, Westphalian representative nation-states in representing the complex, multilayered global regimes of direct and indirect governance of new forms of inequality, exploitation, dispossession and violence, and the forms of local and global struggles by the governed here and now."[83] Not only do inherited concepts fail to adequately represent the past, as I have argued, they fail to adequately represent the present or provide an adequate basis for further development. Despite this, theorists have had considerable difficulty moving beyond sovereignty, and its "command-obedience" structure, as a grounding principle.[84] As Jonathan Havercroft argues "A picture holds the study of politics captive. It is a picture of politics organized into sovereign states … This picture of political order continues to set the terms of political discourse."[85] Havercroft ties the development of this absolute notion of sovereignty to challenges posed by skepticism. Hobbes and Spinoza, for example, responded to problems raised by skeptical philosophy. The absolutist notion of sovereignty they developed can be understood as part of this movement. Philosophical skepticism is related to political life in that "skeptical problems enter our political life when there are disputes over how to apply criteria in our political judgements."[86] That is, making political judgments requires the application of criteria of truth. Skepticism undermines the criteria upon which political judgements are being made by eroding certainty. The response of Hobbes and Spinoza to this is to shift the religious commitment to an all-knowing god to the political sphere such that "the individual or entity with supreme authority makes a final judgement. In these cases, finality replaces certainty."[87] Havercroft argues that the "modern political ontology of state sovereignty was developed out of this new epistemology."[88] It is this new epistemology that continues to ground approaches to sovereignty in the present. This is the result of an overemphasis on the ideal and

[83] James Tully, *Public Philosophy, supra* note 52 at 20.
[84] Jonathan Havercroft, *Captives of Sovereignty* (Cambridge: Cambridge University Press, 2011) at 10
[85] *Ibid* at 1.
[86] *Ibid* at 2.
[87] *Ibid.*
[88] *Ibid.*

reliance on a concept of sovereignty which is divorced from "everyday political practice." [89] This echoes Lisa Ford's insistence that it is in contests over "everyday local practice" that we find "the secret history of modern settler sovereignty."[90] In prescriptive thinking, then, there is limited utility to continuing to hold fast to concepts of state sovereignty that support unilateral assertions of sovereign authority at the expense of pluralism.[91] In a practical sense, this reliance has caused thinkers to overlook a range of practices, institutional arrangements, and scales of governance that are often more influential that the state, conceived of at a level of general abstraction.[92] This is not to argue against sovereignty *per se;* rather, it is to suggest that the characteristics and attributes of sovereignty ought to be openly contested such that the concept deployed can reflect, rather than actively undermine, legal and normative pluralism.

v) Conclusions on *de facto* Sovereignty

The *de jure* basis of assertions of sovereign authority over Indigenous territories has a specific legal genealogy, much of which was traced in chapter 1. Chapter 2 has examined the dangers of unreflexively taking up notions of state, sovereignty, jurisdiction, and territory ways that support an absolute form of authority and jurisdiction extending evenly throughout well-defined borders. Doing so challenges discourses on the legal nature of sovereignty and the state that exclude Indigenous legal orders and legitimize the dispossession of Indigenous lands and resources in two ways.

First, a consideration of the factual basis of sovereign claims reveals an unjustifiable double standard under which European nations must demonstrate factual occupation of particular places to ground legal claims as against other European nations while claiming those lands vis-à-vis Indigenous peoples on the basis of mere assertion, at the same time giving little or no legal effect to Indigenous occupation. Second, destabilizing concepts and legal categories of state and sovereignty provides a basis for accurate descriptive analyses and prevents interpretations that reify and support unjust structures of colonial domination. To this end, a number of descriptive

[89] *Ibid* at 5.
[90] Ford, *supra* note 1 at 12.
[91] See Stilz, *supra* note 1; Stephen Krasner, *Sovereignty: Organized Hypocrisy* (New Jersey: Princeton, 1999) at 11-13.
[92] Bob Jessop, *State Power: A Strategic-Relational Approach* (Cambridge: Polity, 2007) at 105-106; Bob Jessop, *The State: Past, Present, Future* (Cambridge: Polity, 2016) at 41-49.

phrases were used in this chapter – layered sovereignties, partial sovereignty, patchwork authority, variegated legal spaces – that capture the nature of sovereignty in the early imperial period more accurately than narrow statist definitions. In this, the role of contestation and resistance to imperial claims was central, as competing social, legal, and epistemological frames pushed back against the imposition of imperial rule, holding open spaces for alternative modes of ordering and territorial configurations. This recognition calls for comprehensive descriptions of the pervasive forms of pluralism and hybridity that prevailed in spaces subject to imperial intrusions and the ways in which legal spaces were shaped by a plurality of legal and normative orders. In light of the argument outlined here, Chapters 3 and 4 turn to 17th and 18th century Mi'kma'ki/ Wulstukwik, L'Acadie, Nova Scotia to examine specific practices of legal pluralism and hybridity and the shared and exclusive structuring of legal spaces and territory in that region.

Chapter 3: Internal Legal Regimes

All political communities regulate behavior and relationships through law. Shared laws are a constitutive feature of political community. I use the phrase "internal legal regimes" here to refer to the internal or domestic laws of a given political community. External or transnational law, the subject of the following chapter, is that mediating relations between political communities. These categories are malleable, and political communities are, by their very nature and to varying degrees, fragmentary. Quebec is a political community within the broader Canadian political community. Within Quebec, the Cree signatories to the James Bay Cree agreement are a distinct political community. The Haudenosaunee are another. Political associations such as labour unions create political communities which make demands in the interests of their members. Identity-based movements take shape around particular identities, which make demands for forms of cultural or identity-based recognition.[1] Particular political communities are both embedded within broader political communities and contain smaller ones within their bounds. How a given individual prioritizes and understands their various identities and affiliations and situates those in relation to other people varies from person to person.[2] In this context, the drawing of borders around a given community and the privileging of one community over another, that is, identifying one community as *the* political community at the expense of others, is a political act which serves to reinforce given relations of power through which those communities are constituted. Recognizing this, one can nonetheless identify a given political community as an object of study while attending to the concerns just laid out. Doing so requires explicitly recognizing that the political community in question is constructed through particular symbols, languages, and contingent historical narratives and supported and reproduced by structures and relations of power. Law within a political community is the product of a tension between competing forces within that community, including negotiation and contestation between its individuals and its constituent political communities. In identifying a single community as an object of study, the Mi'kmaq for example, it must be acknowledged from the outset that there is no single homogenous Mi'kmaw identity, political

[1] James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995).
[2] Amartya Sen, *Identity and Violence: The Illusion of Destiny* (New York, W.W. Norton, 2007).

community, or law. These are fluid categories, subject to contested borders and frames of reference.[3]

There is also overlap between internal and external law. These types of law influence each other, and the values that support one are used in shaping the other. A given legal space or territory is constituted both through internal laws and practices of jurisdiction and through transnational laws that define it as a legal space as against spaces dominated (and constituted) by other legalities. Despite this, the two forms can be held apart conceptually and as objects of analysis. As Richard Ford points out, jurisdiction can be understood as a set of practices that give effect to asserted authority. Lines that are drawn demarcating territorial jurisdictions have no effect in the world apart from the law-governed practices that bring them into being. Law, in this sense, is constitutive of social and socio-legal spaces.[4] This chapter analyzes the constitution of legal spaces (territories, jurisdictions) through an analysis of five types of internal law: Wabanaki, Acadian, British, French, and Massachusettsan.[5] It assesses how the physical spaces of the present-day Maritime provinces were structured as legal territories and jurisdictional spaces through these distinct bodies of law. Doing so clarifies how the region was constituted through legal pluralism and hybridity as a complex jurisdictional ensemble where competing and complimentary social and legal norms were

[3] As Sa'ke'j Henderson writes, recognizing this fluidity, and the constant change it portends, is central to Mi'kmaw epistemology and influenced the shape of Mi'kmaw political structures, in particular insofar as they were designed to reflect the autonomy of individuals and groups and to be flexible in design: James (Sa'ke'j) Youngblood Henderson, *Elilewake Compact: The Mi'kmaw, Wolastoqey, and Passamaquoddy Nations' Confederation with Great Britain, 1725-1779, Vol 1* (Saskatoon: Indigenous Law Centre, 2020) at 85-135 [Henderson, *Elilewake Compact, Vol 1*]. John Borrows emphasizes the importance of these notions of fluidity in relation to Indigenous agency and political self-determination through what he refers to as "conceptual mobility: John Borrows, *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2017) 19-49. The borders of Indigenous identity are particularly fraught, as many have pointed out the challenges posed to the ongoing existence of Indigenous political communities and cultures by settler "self-Indigenization" (Adam Gaudry and Darryl Leroux, "White Settler Revisionism and Making Métis Everywhere: The Evocation of Métissage in Quebec and Nova Scotia" (2017) 3:1 Critical Ethnic Studies 116) and nations confront the challenges of managing questions of membership and identity in the face of centuries of assimilatory policies and territorial dislocations (see e.g. Audra Simpson, *Mohawk Interruptus: Political Life Across the Borders of Settler States* (Durham: Duke University Press, 2014) at 37-66.

[4] Richard T. Ford, "Law's territory: a history of jurisdiction" in Nicholas Blomley, David Delaney, and Richard T. Ford, eds, *The Legal Geographies Reader* (Oxford: Blackwell, 2001) at 200-217.

[5] While I have used the term Wabanaki here, referring to the original member nations of the Wabanaki Confederacy – the Mi'kmaq, Wolastoqey, Passamaquoddy, and Penobscot, I will focus most of my attention on Mi'kmaw law in a concession to space and because of a greater number of sources to draw on. On the Wabanaki Confederacy, see Henderson, *Elilewake Compact, Vol 1, supra* note 3 at 139-149; Rosalie Marie Francis, "The Mi'kmaq Nation and the Embodiment of Political Ideologies: Ni'kmaq, Protocol and Treaty Negotiations of the Eighteenth Century" (MA Thesis, Halifax: Saint Mary's University, 2003) at 73-84; James (Sa'ke'j) Youngblood Henderson, *Wabanaki Compact: The Foundation of Treaty Federalism in North America, 1621-1728* (Saskatoon: Indigenous Law Centre - University of Saskatchewan, 2020) at 2-20 [Henderson, *Wabanaki Compact*].

worked out through ongoing negotiation and diverse practices of law and governance. The aim is not to thoroughly articulate the content of the distinct internal forms of law. The more modest focus is on three particular aspects of each internal body of law: subject matter (what did it regulate), subjects (to whom did it apply), and territorial scope (what was its reach). In each case, temporality (how the three characteristics shifted over time) is a crucial consideration that illustrates the dynamic nature of these discrete legalities and their interrelations.[6] Attending to these features of legal regimes illustrates the dynamic and fluid ways that distinct legalities constituted socio-legal spaces and national territories in overlapping, exclusive, contested, and complimentary ways.

i) Indigenous Law

The majority of the residents of Mi'kma'ki/ Wulstukwik in the 17th and early 18th centuries lived according to Indigenous laws, those of the Mi'kmaq, Wolastoqey, and Passamquoddy peoples, even if these laws were not always discernable to European observers and have only infrequently drawn explicit attention from historians and legal thinkers. Indigenous laws may have eluded European observers for many reasons: beliefs in the superiority of European civilization caused European observers to downplay Indigenous structures of law and governance, law was often communicated in oral traditions and with reference to symbolic worlds and normative assumptions that were inaccessible to foreigners, and understandings of law as flowing only from a sovereign authority could obscure the existence of law flowing from other sources.[7] Pierre Biard, for example, a Jesuit missionary in the early 17th century, wrote that the Mi'kmaq of the Gaspé Peninsula "have at present no fundamental laws which serve them as regulations."[8] Yet, Biard noted in the same passage that disputes were resolved through "arbiters" and that murder was punished by death "by command of the Elders, who assemble upon the subject, and often by the

[6] Mariana Valverde uses the term "chronotopes of law" to explore the spatio-temporal dimensions of practices of law and governance. In particular, this concept, borrowed from Bhaktin, was developed not only to emphasize that space and time are both important considerations, but "for the precise purpose of analyzing how the temporal and the spatial dimensions of life and governance affect each other." Mariana Valverde, *Chronotopes of Law: Jurisdiction, Scale, and Governance* (New York: Routledge, 2015) at 9.

[7] John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 23-24. Henderson discusses a number of these themes, highlighting the importance of symbolic literacy to communicating and understanding Mi'kmaw legal consciousness: Henderson, *supra* note 3.

[8] Cited in L. Jane McMillan, *Truth and Conviction: Donald Marshall Jr. and the Mi'kmaw Quest for Justice* (Vancouver: UBC Press, 2018) at 78-79.

private authority of individuals."[9] Biard presumed that the processes of dispute resolution and deliberation he observed were not grounded in legal principles or norms and did not see them as expressions of Mi'kmaw legality.

This provides a lesson in approaching Indigenous law, be it historical or contemporary: caution should be exercised not to impose external definitions or conceptions of law when considering Indigenous legal traditions.[10] The domestic legal traditions of the Mi'kmaq, for example, are shaped and defined in Mi'kmaw social, cultural, and ecological contexts – Aaron Mills employs the more encompassing term "lifeworlds"[11] - and Mi'kmaw law should not be reframed from Canadian, British, or French cultural contexts and in light of the background assumptions that reside in those contexts. Mills warns of the "absurdity of trying to identify another society's legal system against the expectations of one's own… distinct lifeworlds make meaning of law (and processes and institutions of norm generation, etc.) in distinct ways."[12] In considering Indigenous law, and in particular when attempting to interface it in some way with Western law (e.g. through comparison or reading together), the essence of Indigenous law may be lost if read against the backdrop of expectations of different legal culture.[13]

A comprehensive approach to articulating Wabanaki law, then, would have to do so in light of the cultural context from which it emerged. The approach in this chapter is less ambitious for two reasons. First, a comprehensive account of this type is beyond the scope of this work and could

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[9] *Ibid.*

[10] Aaron Mills, "The Lifeworlds Of Law: On Revitalizing Indigenous Legal Orders Today" (2015-2016) 61 McGill LJ 847 at 853 FN12. This is not to suggest that Indigenous law should not be analyzed and scrutinized from the variety of vantage points. Rather, we should be cognizant of the fact the historically definitions of that that exclude Indigenous law *as law* have been relied on, implicitly and explicitly, to justify the imposition of colonial forms of law. If one seeks to understand Indigenous social, legal, and political orders, it is not fruitful to come with a given set of categories and definitions and inquire whether they fit within them. The better approach, the one that leads to fuller understanding is to attempt to understand people as they understand themselves: see Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 1983).

[11] Mills, *supra* note 10 at 850.

[12] Mills, *supra* note 10 at 853. L Jane McMillan makes a similar point in her analysis of Mi'kmaw legal consciousness, arguing that "[c]onceptualizations of justice shift and change over time and place, and are mediated through experiences. These experiences are contextualized in individual legal consciousness, and embody culturally derived meaning making processes." L Jane McMillan, *Koqqwaja'ltimk: Mi'kmaw Legal Consciousness* (PhD Diss, University of British Columbia, 2002) at 1 [McMillan, *Koqqwaja'ltimk*]. This point is explored at length in Geertz, *Local Knowledge, supra* note 10. Another way to frame the point is to say that law is implicated in what Nelson Goodman calls "worldmaking": Nelson Goodman, *Ways of Worldmaking* (Indianapolis: Hackett, 1978).

[13] As Mills puts it, "[o]ne can't simply translate law across distinct constitutional contexts and expect it to retain its integrity and thus its functionality." Mills, *supra* note 10 at 854-855. See also Sherry Mae Pictou, *Decolonizing Mi'kmaw Memory of Treaty: L'sitkuk's Learning with Allies In Struggle For Food And Lifeways* (Dissertation: Dalhousie University, 2017).

not be done justice in the space available here. While I will confine most of my analysis to Mi'kmaw law rather than the internal laws of all Wabanaki peoples, even this more limited task would require several books of its own.[14] Second, and perhaps more importantly, I am not the person to undertake such a study. Mi'kmaq law is in Mi'kma'ki, with the elders, communities, and knowledge keepers there. As Mi'kmaw poet Rita Joe writes: "we are the ones who know about ourselves."[15] My approach, then, is to draw on Indigenous scholars who have worked on Mi'kmaq law, as well as historians and anthropologists, both Indigenous and non, whose work speaks to particular elements of Mi'kmaq law.[16] This more restrained approach can provide a sketch of Mi'kmaq law in light of the three features I have identified as a basis for this study (subject matter, subjects, territoriality). This can provide a view of how the fifty thousand square kilometers the Mi'kmaq considered their territory was structured as a space of Mi'kmaw legality, of how the "social spaces, lived places, and landscapes"[17] of Mi'kma'ki were inscribed with legal significance through Mi'kmaw law.[18]

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[14] For more comprehensive analysis see: McMillan, *Koqqwaja'ltimk, supra* note 12; Francis, "The Mi'kmaq Nation", *supra* note 5; David J. Leech, *Strength Through Sharing: Mi'kmaq Political Thought to 1761* (PhD Diss, University of Ottawa, 2006); Leslie Jane McMillan, *Mi'kmawey Mawio'mi*: Changing Roles of the Mi'kmaq Grand Council From the Early Seventeenth Century to the Present (MA Thesis, Dalhousie University, 1996) [McMillan, *Mi'kmawey Mawio'mi*]; Henderson, *Wabanaki Compact, supra* note 5 at 61-156; James [sakéj] Youngblood Henderson, "First Nations' Legal Inheritances in Canada: The Mi'kmaq Model" (1996) 23 Man LJ 1[Henderson, "The Mi'kmaq Model"].

[15] Rita Joe, *Song of Rita Joe: Autobiography of a Mi'kmaq Poet* (Charlottetown: Ragweed, 1996) at 96. As Rita Joe writes, "the way our views were passed into history and literature by the so-called 'discoverers' has done harm in more ways than can be imagined" *ibid* at 14.

[16] Fortunately, there is ample scholarship to draw on to this end. The work of Mi'kmaw writers and scholars such as Jamie Batiste, Stephen Augustine, Marie Batiste, Ruth Holmes Whitehead, Brian Francis, Pamela Palmeter, and others provides an outline of salient features of Mi'kmaq law. See *infra* 5 and 14.

[17] Irus Braverman, Nicholas Blomley, David Delany, and Alexandre (Sandy) Kedar, "Introduction: Expanding Spaces of Law" in Irus Braverman, Nicholas Blomley, David Delany, and Alexandre Kedar, *The Expanding Spaces of Law: A Timely Legal Geography* (Stanford: Stanford University Press, 2014) at 1.

[18] As will be discussed in more detail below, the relationship between *Mi'kma'ki* and Mi'kmaw law is a complex one. Mi'kmaw law emerges from the knowledge of and connection to specific physical spaces and the responsibilities that Mi'kmaq hold in relation to the resources (gifts) of those places. See generally McMillan, *Koqqwaja'ltimk*, *supra* note 12; Henderson, *Elilewake Compact, Vol 1, supra* note 5 at 85-135. Another way to frame the question: what role did Mi'kmaw law play in the territorialization of Mi'kma'ki? As David Delaney argues, "'to territorialize' is to deploy territory in a particular context by linking some phenomenon or entity to a meaningfully bounded space… to emphasize territorializing *practices* situates territory more firmly within the realm of social action." David Delany, *Territory: a short introduction* (Oxford: Blackwell, 2005) at 17. The question in relation to this section, then, is how the physical spaces of the region were structured as a territory, *Mi'kma'ki,* through specific practices that imbue the spaces with social meaning. More specifically still, what role did Mi'kmaw law play in making Mi'kmaw territorial configurations possible and how were law and the social practices it conditioned constitutive of a Mi'kmaw sense of territoriality?

What, then, was Mi'kmaw law in the 17th and 18th centuries? What subject matters did it attend to? To whom did it apply? How did it structure and move through territory? It is possible that looking at Mi'kmaw law this way, asking these questions of it, distorts it in precisely the way Mills cautions about. These frames of references may already be shot through with expectations derived from the cultural contexts of Western law. These categories are based on certain expectations about what law does, how it is used, and how it relates to the lifeworlds, ecologies, and territories of given peoples. My claim will be narrow, then: Mi'kmaw law can be analyzed in terms of these categories, not exhaustively, but in terms of a minimum set of common features shared with the other bodies or types of law analyzed in this work. Allowing the content of the categories themselves to be shaped by the type of law at issue further ensures that the categories do not deform the object of analysis. What it means to be a "subject" of Mi'kmaw law and the nature of the legal spaces and processes of territorialisation that Mi'kmaw law produces must be considered as emerging from Mi'kmaw legal consciousness and must reflect that to the greatest extent possible.

Recognizing the important distinctions between Indigenous and Western law, however, we should not too easily concede the position that distinguishing features of Indigenous law made it invisible to Europeans in the early colonial era. In fact, early Europeans often acknowledged the existence of Indigenous law, even if their perception of it was shaped by preconceptions which obscured it or led them to construe it as lesser than European law. While Indigenous peoples were frequently described as lawless, those early colonists, traders, and explorers who interacted with Indigenous peoples frequently believed otherwise. As Henderson writes:

> Neither European adventurers nor missionary priests of the seventeenth century who encountered the sacred order of the Mikmaq (Míkmáki) perceived an unorganised society. They did not find the anarchy that their state of nature theory presumed. Instead, they reported a natural order, with a well-defined system of consensual government and both an international and domestic law.[19] [Emphasis mine]

There are many examples of such recognition. Vitoria argued in the early 16th century that the peoples of the Americas had rights of property deriving from natural law *and* their own structures of governance and civil authority.[20] In the 1690's, missionary Chrestien Le Clercq observed that,

[19] Henderson, "The Mi'kmaq Model", *supra* note 14 at 10.
[20] Fransiscus de Vitoria, *De Indis et de Ivre Belli Reflectiones* [1534], ed by Ernest Nys, trans. John Pawley (Washington, DC: Carnegie Institution, 1917) at 120-122.

among the Mi'kmaq of the Gaspé Peninsula, hunting grounds were distributed "according to the customs of the country, which serve as laws and regulations to the Gaspesians."[21] Even in the early 19th century, as the shift to construing Indigenous peoples as wards of the state rather than independent peoples was well underway, Nova Scotia Judge T.C. Haliburton wrote of the Mi'kmaq: "[t]hey never litigate or are in any way impleaded. They have a code of traditionary and customary laws among themselves."[22] Even through a colonial lens that distorted and minimized Indigenous law, the existence of such law was frequently explicitly acknowledged.

The legal traditions of the Wabanaki peoples were not written traditions. This does not mean they were, or are, any less complex. John Borrows identifies five possible sources of Indigenous law: sacred law, natural law, deliberative law, positivistic law, and customary law.[23] These are not exhaustive categories, but they provide a way to start considering how to "see" Indigenous law in its various modes. While Indigenous law has frequently been framed as customary law, customary law is only one source, and "not all Indigenous laws are customary at their root or in their expression."[24] Much as common and civil law traditions draw on statute, judicial decisions, written and unwritten constitutional principles, and a range of customary social norms and practices, so too are Indigenous legalities made up of law from a variety of sources, sources that are "entwined with the social, historical, political, biological, economic, and spiritual circumstances of each group."[25]

When the French first made sustained attempts at settlement in Mi'kma'ki in the early 17th century, Mi'kmaw law prevailed throughout Mi'kma'ki. Internal Mi'kmaw law dealt with the many issues that any political community deals with, including those that contemporary Canadian law categorizes as tort, criminal law, constitutional law, and property law. Political structures, governance, dispute resolution, individual freedoms, resources use, marriage, remedies and punishment, and adoption, for example, were dealt with through Mi'kmaw law.[26] The Mi'kmaw

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[21] William C. Wicken, *Mi'kmaq Treaties on Trial: History, Land, and Donald Marshall Jr.* (Toronto: University of Toronto Press, 2002) at 34.
[22] L.F.S. Upton, *Micmacs and Colonists: Indian-White Relations in the Maritimes, 1713 – 1867* (Vancouver: UBC Press, 1979) at 143; McMillan, *Truth and Conviction, supra* note 8 at 83.
[23] Borrows, *Canada's Indigenous Constitution, supra* note 7 at 23-58.
[24] *Ibid* at 24. Henderson identifies all of these sources and elements in discussing Mi'kmaw law. He also emphasizes the importance of language, place, and ecology as sources of law, which is discussed in more detail below: Henderson, *Elilewake Compact, supra* note 3 at 99 n22, 101.
[25] Borrows, *Canada's Indigenous Constitution, supra* note 7 at 23-24.
[26] McMillan, *Truth and Conviction supra* note 8 at 66-84. Henderson, *Elilewake Compact, Vol 1, supra* note 3 at 85-135. Borrows, *Canada's Indigenous Constitution, supra* note 7 at 23-24.

language included many legal concepts, including words referring to "injury, loss, security, empowerment, harmony, revenge, shame, forgiveness, banishment, integration, and balance."[27] Mi'kmaw legality and legal consciousness was based on core values and principles, "such as love, honesty, humility, respect, truth, patience, and wisdom."[28] The Mi'kmaw worldview and legal order emphasized reciprocity and relationality.[29] Specific laws developed that reflected these principles and allowed them to be applied in specific circumstances, though they were guided by processes rather than detailed regulations or rules.[30] The subject-matters covered by domestic Mi'kmaw law in the 17th and early 18th centuries, then, were extensive and touched the whole of the normative universe the Mi'kmaq inhabited.

A national political framework reflected the fact that the Mi'kmaq recognized political community beyond the family unit.[31] Drawn together by linguistic, ecological, spiritual and familial connections, the families of Mi'kma'ki formed the *Awitkatultik,* a confederation that referred to "many families living in one house."[32] This was later divided into six, and then seven, districts (*Sakamowti*).[33] These districts were, and are now, under the guidance of the Grand Council. There is some disagreement about when this structure developed. Mi'kmaw oral history suggests that the Grand Council developed prior to 1600. Some historians disagree, arguing that the Grand Council was formed as a response to the increasing imperial presence or after 1763 with French authority in the region coming to an end.[34] Sable and Francis argue that the Grand Council most likely "reflected a postcolonial adaptation to the military presence of French and English vying for Mi'kmaw lands (and souls) throughout the 17th and 18th centuries."[35] Henderson identifies an earlier date, writing:

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[27] McMillan, *Truth and Conviction supra* note 8 at 73.
[28] *Ibid*. See also Henderson, *Elilewake Compact, Vol 1, supra* note 3 at 129.
[29] Trudy Sable and Bernie Francis, *The Language of This Land, Mi'kma'ki* (Sydney: Cape Breton University Press, 2012) at 32.
[30] As Sakej Henderson explains, "Mikmaq customary law produced a matrix of processes which provided guidelines in broad outline, not in precise detail." Henderson, "The Mi'kmaq Model", *supra* note 14 at 15.
[31] Wicken, *Mi'kmaq Treaties, supra* note 21 at 39.
[32] Henderson, "The Mi'kmaq Model", *supra* note 14 at 12.
[33] James (Sakéj) Youngblood Henderson, *The Mikmaw Concordat* (Halifax: Fernwood, 1997) at 32-34; McMillan, *Koqqwaja'ltimk, supra* note 12; Francis, "The Mi'kmaq Nation", *supra* note 5; David J. Leech, *Strength Through Sharing: Mi'kmaq Political Thought to 1761* (PhD Diss, University of Ottawa, 2006); Leslie Jane McMillan, *Mi'kmawey Mawio'mi*: Changing Roles of the Mi'kmaq Grand Council From the Early Seventeenth Century to the Present (MA Thesis, Dalhousie University, 1996) [McMillan, *Mi'kmawey Mawio'mi*]
[34] Wicken, *Mi'kmaq Treaties, supra* note 21 at 53.
[35] Sable and Francis, *supra* note 29 at 50.

> The missionary priests initially observed the operations of the Awitkatultik order in Mikmaq. They described it from their contextual European heritage and biases. As early as 1616, Father Biard described the "commonwealth" or "sovereign" of the Holy League or Grand Council of the Mikmaq people. He noted the seven geographical hunting districts that comprised their national territory, roughly forty- seven thousand square miles in modem Atlantic Canada, from Newfoundland to Quebec and northern Maine. He commented on the Mikmaq's continued use and regulation of their lands and territorial waters. Like other Europeans, he was amazed at how the commonwealth was bound together by councils, held at all levels of Mikmaq society, from the local family to the extended families at a regional level.[36]

Henderson explains that "[e]ach district was a legal abstraction, as well as an extended family under the guidance of a "*Sakamow*" (district chief, elder, leader). The *Sakamow* had collective responsibility along with the "*saya*" (leaders of many extended families) and "*kaptins*" (community spiritual leaders), to guide districts in all matters."[37] The leaders of families, communities, and districts formed the Grand Council (*Sante Mawiomi*). This was a deliberative body governed by consensual decision-making. It did not have legislative or adjudicative powers.[38] Matters of national significance were dealt with in this forum. Shared and consensual decision-making also took place at the summer villages, where several hundred people gathered for the summer months and conducted much of the business that superseded the individual hunting groups and immediate family groups with which people were associated during the winter months. In the summer, hunting grounds were distributed, marriages were arranged, and decisions affecting the entire nation, or a broader base of communities and families, were made. The concept of Mi'kma'ki as a place was bound up with Mi'kmaw values and ecological knowledge, and political structures were shaped by family responsibilities and obligations in respect of particular sites and territories. Thus, the law, the way of being in the world, extended throughout the territory as a sacred space. *Mi'kma'ki* was structured as a legal space through specific legal practices concerning political authority, social relations, and resource use and through the development and reproduction of

[36] Henderson, "The Mi'kmaq Model", *supra* note 14 at 10-11. This debate does not need to be resolved for the purposes of this chapter. It is clear that the territory was divided into hunting areas in the 17th century which were distributed by the "head of the nation," indicating a degree of centralized governance beyond the leaders of individual hunting groups. Similarly, whether it arose post contact is immaterial to its 'authenticity' or legitimacy. All societies have, and will, change as they respond to, adopt, and reject influences brought on by interaction with others. Recognizing only those structures of Mi'kmaw governance that unequivocally existed before contact would be the epitome of the 'frozen rights' theory, which embraces notions of European superiority to tether indigenous peoples to an imagined past and identity.
[37] *Ibid* at 12. Henderson, *Elilewake Compact, Vol 1, supra* note 3 at 87.
[38] Henderson, "The Mi'kmaq Model", *supra* note 14 at 12.

knowledge of particular places and place-based obligations. As a concept and a territory, Mi'kma'ki was a product of Mi'kmaw "worldmaking."[39] Mi'kmaw law played an important part in this process.[40]

Mi'kmaw law is inseparable from the worldview, culture, ecological connections, and language of the Mi'kmaq. It is expressed in part in stories, legends, and ceremonial protocols.[41] Legends and stories of Kluskap, who is both a creator and trickster figure in Mi'kmaw and Wabanaki legends, expressed many aspects of Wabanaki legal consciousness. As L Jane McMillan writes, "Kluscap legends made clear the consequences of wrongdoing and encouraged the fair treatment of all peoples and caring for the spirits in objects."[42] These stories taught examples and lessons about how to act in honourable ways and avenge wrongdoing in socially acceptable ways; they "specified the value of *utkunajik* (sharing) – so integral to Mi'kmaw identity and culture – and the consequences of greed."[43]

The story of "The Boy Who Visited Muini'skw", as recorded by Ruth Holmes Whitehead, illustrates how norms and legal principles could be expressed through stories.[44] The story illustrates the way an ethic of reciprocity, standards for judgement, connections between human and non-human worlds, and guidelines for community responsibilities are expressed in story. The story tells of a young orphan boy who was shuttled between families in the community, with none adopting him as their own. He was lost one day while out looking for berries. It was some time before the village noticed he had gone missing. He took shelter with a mother bear and her cubs where he stayed through the winter. In the spring hunters discovered the boy fishing with the bears. The mother bear told the boy to return to the village, but not before advising him to tell the people not to hunt the bears anymore, to make a peace between them. The boy fought to stay with the

[39] On processes of worldmaking, see Nelson Goodman, *supra* note 12.
[40] Henderson speaks to the relationship between knowledge, place, and legality in Mi'kmaw consciousness: "These shared teachings, ceremonies, stories, and discussions of their gather generated and informed Mi'kmaw knowledge. They also created Mi'kmaw law and jurisprudence (*teliwtqulultimkl*), which is a shared, communal belief that people must live in respectful, harmonius relationships with nature, with one another, and with themselves. The Mi'kmaw laws and concepts of humanity are spiritual, imbuing, permeating all aspects of life. These laws and concepts are expressed in unique ways through performance and language." Henderson, *Elilewake Compact, Vol 1, supra* note 3 at 88.
[41] As L Jane McMillan writes, "Law lived in the language." McMillan, *Truth and Conviction, supra* note 8 at 73.
[42] *Ibid* at 74.
[43] Ibid at 74-75.
[44] For an analysis of one prominent methodology for researching Indigenous law, including through story, see Hadley Friedland & Val Napoleon, "Gathering The Threads: Developing A Methodology For Researching And Rebuilding Indigenous Legal Traditions" (2015-2016) 1:1 Lakehead LJ 16

bears; he had made a home with the bears and was welcomed into their family. He had even started growing black hair all over his body. But the hunters took him back to the village. This time, they incorporated him into the family and community, and he eventually became a grandfather to many.

There is much to be taken from this story, beginning most explicitly with norms concerning adoption. When the community did not adopt the orphaned boy or provide a home for him, he became lost to them. After retrieving him, when he was properly adopted, he became a member of the community. Crucially, one cannot be a member of the society unless they are accepted into its web of kinship relations, and families have an obligation to ensure people are brought into these social systems. One becomes who they are through their inclusion in community. Notable in this sense, when the boy lived with the bears, he started to become bear. Again, a person becomes a reflection or a part of the community in which they are embedded; they are constituted by the community in which they exist. The importance of the principles outlined above, such as love, interdependence, and reciprocity, can be seen. The story illustrates the forming of bonds or agreements between political communities or families, as well as broader relational conceptions of the ties between human and non-human.[45] The full versions of the story also contain information about the habits of bears, and it is a useful pedagogical tool in a quite literal sense: it contains helpful information about bear's fishing locations, seasonal behaviours, etc.[46] It also teaches more foundational principles concerning Mi'kmaw governance. As Henderson writes:

> Each species of animals was viewed as constituting a spectrum of life forms, or separate nation: they live in their own realm or village, and have their own guardian spirits, chiefs, and holy people. This concept influenced the organization of Mi'kmaw civilization; they learned form observing and communicating with the animals, and developed their ceremonies and structure of their civilization based on their comprehension of their ecological relationships.[47] [Emphasis mine]

These spectrum of life forms are animated by spiritual guardians that can transform themselves into human and non-human forms,[48] much as the boy moves between forms in this story. This

[45] As Henderson writes, "the Mi'kmaw concept of the living lodge is also manifest by conceptions of and relationships belonging to the animals (*waysisewy*)." Henderson, *Elilewake Compact, Vol 1, supra* note 3 at 100.
[46] Rita Joe and Leslie Choyce, eds, *The Mi'kmaq Anthology* (Lawrencetown Beach: Pottersfield Press, 1997) at 26-30. For another example of other a story embodying these principles, see Sable and Francis, *The Language of This Land, supra* note 2 at 33. Sable and Francis further discuss how many of these notions are embedded in the language itself, arguing that many Mi'kmaw words, by their verb-oriented and relational nature, lead one to question whether "anything or anybody can be extracted and isolated from any relationship or constellation of relationships in which he/she exists" see 34-35. Henderson, *Elilewake Compact, Vol 1, supra* note 3 at 100-101.
[47] Henderson, *Elilewake Compact, Vol 1, supra* note 3 at 100
[48] *Ibid* at 101.

story shows one way that covenants concerning the many subject matters dealt with by Mi'kmaw law could be communicated and taught.

The "who" (the Mi'kmaq) and the "where" (Mi'kma'ki) of Mi'kmaw were closely tied conceptually and, indeed, are inseparable from the "what", particularly insofar as the subject matter concerned resources (gifts). Mi'kmaw law included concepts of territoriality and notions of national association that contributed to the construction of spaces of Mi'kmaw legality. The word "Mi'kma'ki" refers to the territory extending from the places also now known as Newfoundland and St.-Pierre de Miquelon, westward to the mainland of modern Nova Scotia, New Brunswick, Prince Edward Island, the Magdalene archipelago, and the Gaspé Peninsula of Québec.[49] The territorial scope of Mi'kmaw law is related to the territorial conception of the Mi'kmaw nation itself: "Mi'kma'ki" referred to a national territory. It translates as the "land of friendship," stressing the voluntary political confederation of the various families and extended kin groups.[50] Law extended through a community of legal subjects – the Mi'kmaq – and the territorial scope of law was defined less by established physical borders than by the presence of Mi'kmaw peoples. Mi'kma'ki was, and is, the concept reflecting the places where individuals and groups related through ties of language, kinship, political structures, and laws lived.[51]

The content of Mi'kmaw law and its relation to territory was shaped by social and environmental knowledge and by the cultural context of the people: law was but one of the ways of "imagining the real"[52] that shaped and structured the socio-legal spaces the Mi'kmaq occupied. Language and ecological knowledge were sources of law and shaped the territorialisation of Mi'kmaw legalities. Physical boundaries were less important than linguistic connection and place-based epistemologies.[53] Oral maps, for example, described travel routes as well as sites for resource gathering or extraction.[54] As Trudy Sable and Brian Francis explain:

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[49] Henderson, "The Mi'kmaq Model", *supra* note 14 at 19.
[50] Henderson, *Elilewake Compact, Vol 1, supra* note 3 at 85-86.
[51] As will be discussed in more detail below, considering the territorial scope of law in terms of the presence of legal subjects is not novel and was understood by all of the European colonial powers. Throughout the first half of the 18th century, Britain was concerned precisely with populating Mi'kma'ki/ Wulstukwik, L'Acadie, Nova Scotia with British, preferably Protestant, subjects who would bring into existence the sovereignty "acquired" at the Treaty of Utrecht by carrying British law with them.
[52] See Boaventura De Sousa Santos, "Law: A Map of Misreading - Toward a Postmodern Conception of Law" (1987) 14:3 JL & Soc'y 279 at 286.
[53] "Like other indigenous federations, the Mi'kmaq defined themselves linguistically. Language, rather than territorial boundaries, was, and remains, at the core of the Mi'kmaq consciousness and normative order." Henderson, "The Mi'kmaq Model", *supra* note 14 at 14.
[54] Sable and Francis, *supra* note 29 at 19.

> "[p]rominent and/or anomalous landscape features, such as large rocks or rock formations, also acted as guide posts for Mi'kmaq travelling along the waterways of Eastern Canada much like latter-day lighthouses. These rock formations were honorifically referred to as Kukumijinu ("our Grandmother") or Kniskamijinu ("our Grandfather") and commonly have legends associated with them, such as Kluscap turning his Grandmother or Grandfather to stone."[55]

Stories included histories and myths which related specific geographical information and the territory was "mapped" through these stories. For example, legends of Kluscap sometimes included specific geographic information which identified the location of valuable resources. Place names played a similar role, often telling "a story of the land."[56] Place names related not only geographical information, but expressed normative values concerning the relationships between the Mi'kmaq and their world; the names "not only tell of features of the landscape, historical events and important resources, but act as a mnemonic device to remind people how to 'live right.'"[57] As Henderson explains "Mikmaq words for particular locations were encoded to identify both the particular uses of a place and that place's special significance for specific families. Certain families had responsibilities to use certain animals, plants, materials and access sites, e.g., hunting and fishing traps, because of their particular relationships."[58] Thus, place names, stories and myths concerning the use of territory and resources were intertwined with normative guidelines. Rules and guidelines concerning the relation of Mi'kmaq to the land and resources were expressed through stories mapping the territory, guiding the use of resources, and detailing the relations between human and non-human animals.

Principles or covenants associated with responsible harvesting (*netukulimk*) were of particular importance. These principles "guided Mi'kmaw resource use and management and lay at the heart of Mi'kmaw legal consciousness and *tplutaquan* (law)."[59] Following the protocols associated with *netukulimk* was a means of honouring the resources (or gifts) that had been provided by the creator and reflected the sacredness of places of resource use and gathering. *Netukulimk* was part of the process of connecting Mi'kmaq families to particular places, bringing

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[55] *Ibid* at 43.
[56] *Ibid* at 50. See also Patrick J. Augustine, "Mi'kmaw Relations" in Marie Battiste, ed. *Living Treaties: Narrating Mi'kmaw Treaty Relations* (Sydney: Cape Breton University Press, 2016) at 52.
[57] Sable and Francis, *supra* note 29 at 50.
[58] Henderson, "The Mi'kmaq Model", *supra* note 14 at 21. As Henderson writes, "Certain resources or gifts of the territory came to be recognized as the responsibility of certain families." Henderson, *Elilewake Compact, Vol 1, supra* note 3 at 87.
[59] McMillan, *Truth and Conviction supra* note 8 at 72.

those places into being in Mi'kmaw language and knowledge and bringing the gifts of that place (and the spirits who provided them) into a web of responsibilities and obligations. *Netukulimk* turned physical places into socio-legal spaces constituted by practices of Mi'kmaw legality. Knowledge of *particular* places and the obligations related to it were of particular importance in establishing "the special responsibility that shapes Mi'kmaw consciousness and law."[60] These ecological responsibilities created a dynamic sense of territory and place:

> Belief in their humanity has always been rooted in transformative process of interconnected networks of life at a place (*sitqamu'k*), and an ecological consciousness (*weji-sqalia'timk*). The Mi'kmaw concept of territory was not a physical manifestation of geographical space or boundary lines drawn on a map, as in Eurocentric practice, but rather an interrelated organic, spiritual, respectful, empathetic relationship with all the life forces in an ecology that creates their livelihood and distinct roles that define their knowledge system and way of life. The territories were continually made and remade to generate the concepts of taking care of certain responsibilities of their ecological covenants.[61]

Thus, knowledge is tied to specific collective understandings of place and the obligations, the legal consciousness that accompany that place. This collective understanding is fostered by shared language (itself a reflection of the ecology). Henderson adopts the terms "langscape" to capture the connection between the collective sense of place and belonging that shaped *Mi'kma'ki* as a *Mi'kmaw territory* and language.[62] Mi'kma'ki was structured as a space of Mi'kmaw legality through sets of obligations developed in relation to specific places and brought into collective consciousness through common language.

While losing much important nuance in reframing it in the language of the common law, Canadian law has also recognized this sense of Mi'kmaw territoriality. Curran J. of the Nova Scotia Provincial Court, for example, acknowledged that the Mi'kmaq had "a sense of territoriality" and that this was demonstrated "from everything they said to the British from 1713 to 1760 and beyond well into the 19th century."[63] As Curran J. noted, the Mi'kmaq "made it clear they considered all of Nova Scotia their land, their territory. They repeatedly accused the British of taking their land without permission."[64] The Mi'kmaq had the capacity to exclude other peoples from their territory

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[60] Henderson, *Elilewake Compact, Vol 1, supra* note 3 at 95.
[61] *Ibid* at 90-91.
[62] He writes, "The Mi'kmaw language grew from and with the landscape of Mi'kma'ki and generates the dynamic relations with the spirits and the gifts of the territory." *Ibid* at 97.
[63] *R v Marshall*, 2001 NSPC 2.
[64] *Ibid.*

in the 17th century and succeeded for much of the 18th century in substantially limiting British settlement and land use.[65] The Mi'kmaq believed that it was lawful for them to exclude others from Mi'kma'ki as well as defined family or community territories within it. As an expert witness in Mi'kmaw aboriginal title litigation, historian William Wicken described this function:

> ...[T]here was a protocol, there was a relationship, a customary relationship that evolved over time between these people and which governed their relationships. If somebody come [sic] on to your territory then in fact there was a law, if I can use that word, aboriginal law, their law, about how this infringement upon their territory would be dealt with.[66]

Territory, as seen above, was a subject-matter of Mi'kmaw law, and the territorial scope of Mi'kmaw law was established in part by laws which governed who could enter, use, and occupy what they considered their territory.

This was true of the Wolastoqey as well. In 1778, for example, they warned the British to leave the Wolastoq (or St. John River) valley. Their spokesman told the British:

> the King of England with his Evil Councilors has been Trying to Take away the Lands & Liberties of our Country…Now, as the King of England has no business, nor ever had any, on this River, we Desire you to go away with your men in Peace, & Take all those Men who has been fighting or Talking against Amarica [sic]. If you Dont [sic] go Directly, you must take Care of yourself, your Men, & all your English Subjects, on this River for if any or all of you are Killed it is not our faults, for we give you Warning Time Anough [sic] to Escape.[67]

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[65] John G. Reid, "Pax Britannica or Pax Indigena? Planter Nova Scotia (1760 – 1782) and Competing Strategies for Pacification" (2004) 85:4 Can Hist Rev 669; John Mack Faragher, *A Great and Noble Scheme: The Tragic Story of the Expulsion of the French Acadians from Their American Homeland* (New York: W.W. Norton, 2005) at 4-19.

[66] *R v Bernard*, 2003 NBCA 55 at para 146 (Daigle JA). As will be discussed below, the Mi'kmaq also believed that the treaty of 1726 protected their right to control lands over which they exercised hunting and fishing rights, including "the right to regulate outsiders' travel through their lands – a right that included regulating the movement of New England traders." (Wicken, *Mi'kmaq Treaties, supra* note 21 at 132); Also, recall the statement made by McLachlin CJ in *Tsilhqot'in*, where she stated: "[f]inally, I come to exclusivity. The trial judge found that the Tsilhqot'in, prior to the assertion of sovereignty, repelled other people from their land and demanded permission from outsiders who wished to pass over it. He concluded from this that the Tsilhqot'in treated the land as exclusively theirs. There is no basis upon which to disturb that finding." *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at 58.

[67] James P. Baxter, ed, *Documentary History of the State of Maine,* Vol. XVI, Portland, 1910, at 74 – 75 as reprinted in W.D. Hamilton and W.A. Spray, eds, *Source Materials Relating to the New Brunswick Indian* (Fredericton: Hamray, 1977) at 50 – 51. The time period referenced in these comments is important. By the mid-late 18th century, European settlement had increased substantially in the region. The founding of Halifax in 1749 had brought 2500 settlers, and communities such as Lunenburg were established shortly thereafter. The Acadian population, about one thousand in 1700, was over ten thousand by the 1750's. Settlement in the Wolastoqey River valley had moved beyond La Tour's 17th century fort at the mouth of the river, with French villages established at present day Jemseg and Fredericton and a number of grants made to British subjects as far up the river as Fredericton. It is notable, then, that the Mi'kmaq and Wolastoqey expressed this sense of ownership, jurisdiction, and territoriality during this period. As discussed below, there may have been a thinning of Indigenous law in particular spaces, the town of Halifax for example, yet the Indigenous peoples of the region did not believe this undermined their territorial claims.

Though this also speaks to Indigenous-European transnational law, it reflects the existence of domestic law relating to the use and occupation of territory. The act of exclusion relies on domestic structures of law and governance – an "unorganized" people could not conceptualize a political community and territory from which to exclude others. Land and resource use were governed both as against outsiders, though conceptions of territoriality and the complex practices of transnational law discussed in detail below, and within individual Wabanaki nations through the identification of localized hunting and resource use rights for particular groups or families.

Though cursory, the outline above provides a general sketch of Mi'kmaw law in the 16th and 17th centuries. European trade goods and sicknesses had a significant effect on Mi'kmaw society during this period, but the non-Indigenous presence in the region remained minimal. The accounts based on oral history and the available historical evidence provide a reasonably clear picture of this period, at least in terms of the criteria and methodology employed here. How Mi'kmaw law changed over time is a more challenging question, especially in relation to the territorial reach of the law and the legal subjects living by it. The subject matter of Indigenous law does not seem to have changed in significant ways. But as new people arrived in the territory, did they become subject to, or *subjects of*, Mi'kmaw law? How did the specific practices of non-Mi'kmaw individuals challenge the constitution of the region as a space of Mi'kmaw legality? Arrivals came in several stages. Basque and Portugese fishermen visited seasonally in the 16th century. The first French settlers arrived in the early 17th century, Acadians developed as a distinct political community in the middle part of that century, and British settlement began in earnest a century later. Indigenous peoples were a demographic majority in the region until the 18th century, and the Acadians and Wabanaki outnumbered British settlers until the latter part of the century. The complex interactions between these settlers and Indigenous law is addressed in chapters four and five.

The role of internal Indigenous legal regimes changed considerably between 1604 and 1779. The region came to be structured as a legal space in which a plurality of legal subjects, first French and Acadian, later British, engaged in practices that constituted distinct jurisdictions, and legal spaces were shaped differentially through diverse legalities and legal practices. While in 1604 the territory was a space of exclusive Mi'kmaq, Wolastoqey, and Passamaquoddy legalities, by 1779 those legal regimes, especially in their internal dimension, pertained to a minority of peoples and at an increasingly small territorial scale. Much of the physical space was subject to a plurality

of laws, carried by distinct legal subjects. For example, while Indigenous law continued to bind Indigenous peoples in their hunting or fishing, British settlers did not consider themselves bound by those internal laws and quickly turned away from their legal commitments under shared Indigenous-European law. Further, colonial governments increasingly considered Indigenous peoples to be bound by colonial laws. These changes happened gradually, however. As Phillip A. Buckner and John G. Reid write, "[u]p to and even beyond the eighteenth century, the truth was that the European presence supplemented the existing Native order rather than displacing it."[68] While spaces shaped by other legalities began to take form in the early 17th century, in the 1760's the Mi'kmaw and the Wabanaki allies continue to constrain the extension of other forms of law in important respects. Thus, changes in the territorial reach of Mi'kmaw law happened gradually as other jurisdictions and territories were built.

ii) Acadian Law

By the late 17th and into the early 18th centuries, Acadian settlers around the Bay of Fundy had developed their own law and custom. Forms of French law, including the *Coûtume de Paris* or customs of other northern regions of France, as well as ecclesiastical law, were adapted to the local circumstances. French imperial and colonial law also played important roles in Acadian communities. These inherited forms, however, were less prominent in Acadie than in the settlements in the St. Lawrence Valley.[69] Unique forms of law and governance developed in Acadian communities that drew on inherited forms but were extensively adapted, while distinct local forms of customary law developed.[70] In considering internal Acadian law, the century from 1650-1755 is of particular interest. Prior to about 1650 there was not a distinctly Acadian political community to speak of. While individual French colonialists such as Charles La Tour acted with considerable independence from the imperial Crown and frequently relied on imperial commissions or delegations to press claims against their rivals, self-sufficient agricultural communities of French settlers were only beginning to take shape. A more comprehensive study

[68] Phillip A. Buckner and John G. Reid, "Preface" in Phillip A. Buckner and John G. Reid, eds, *The Atlantic Region to Confederation: A History* (Toronto: University of Toronto Press, 1995) at xi.
[69] Allan Greer, *The People of New France* (Toronto: University of Toronto Press, 1997) at 96-97.
[70] Carol A. Blasi, *Land Tenure in Acadian Agricultural Settlements, 1604-1755: Cultural Retention and the Emergence of Custom* (PhD diss, University of Maine, 2019).

might take the law of the forts that men such as La Tour, Biencourt, and Nicholas Denys owned and controlled as another of the plural legal and normative systems in the region. Indeed, their engagements with Massachusetts are outlined below as examples of the complex legal hybridity in the region. Yet, in discussing internal Acadian law, the focus here is on law generated by and for that community of settlers that began to develop with the arrival of 300 settlers with Isaac de Razilly in 1632 and was most prominent from about 1650 until to the expulsion of the Acadians in 1755.[71]

Acadian law can be seen both in the positive structures and practices of law and governance that developed Acadian communities, as well as in Acadian resistance to the imposition of law from other political communities. A refusal to abide by English or French law prohibiting trade with New England, for example, was an assertion of the right to regulate trading behavior according to Acadian legal standards. Acadian law extended to property rights, marriage, dispute resolution, trade, and, perhaps most importantly, their political status within empire. It applied only to Acadians – that is, French settlers living in or around the five main Acadian communities. The territorial reach was modest, reaching only those communities and the surrounding agricultural lands. Acadian place-making was pronounced: it included the re-making of lands in a distinctly Acadian way to bring them into agricultural production. Yet, it was also limited: there was no attempt to comprehensively remake the region as an Acadian one, as Acadians focused on their discrete farming communities. Following the British capture of Port Royal in 1710, Acadian law was thicker in those communities more distant from the British influence. This chapter outlines four examples that illustrate the subject-matter, territorial reach, and legal subjecthood of Acadian law: property rights and the seigneurial system of land holding; the oath of allegiance; deputation; and shadow government.

French attempts at settlement in Acadia began in 1604-1605. Settlement was small scale and exclusively male. Few remained throughout the winters, and those who did often spent the season with the Mi'kmaq or Wolastoqey to increase their chances of survival.[72] French colonizing efforts were driven forward in the early 17th century by individual colonial promoters backed by merchant houses; settlers were typically under the direction of these colonial promoters. Though

[71] *Ibid.*
[72] N.E.S. Griffiths, *From Migrant to Acadian* (Montreal & Kingston: McGill-Queen's University Press, 2014) at 17-18; Faragher, *supra* note 65 at 23-26.

French individuals were present from 1605 on, an identifiable social and political community did not begin to take shape until the 1630's, after Scottish attempts at colonization were aborted following the return of the region to France in the Treaty of Saint-Germaine-en-Laye.[73] From the 1630's to the 1650's, the development of the colony was stunted in part by internal competition between Charles de La Tour and Charles D'Aulnay.[74] Nonetheless, the beginning of a distinct community was forming, and by the 1650's there were 250-300 French settlers.[75]

In 1654, the forts of Charles La Tour at the mouth of the Saint John River and d'Aulnay's former fort at Port Royal, which had been in the hands of his creditor Le Borgne since d'Aulnay's death in 1650, were captured by Robert Sedgwick. From 1654-1670, the territory would be under the putative control of Massachusetts.[76] The negotiations of Sedgwick's conquest demonstrate the independence of the Acadian political community that had developed by that time. The signatories of the surrender agreement made between Sedgwick and those at Port Royal provide evidence of this. The signature of Trahan, for example, is telling. Trahan was a "syndic", which "was a long-standing institution of French civic government but in spite of, or perhaps, because of this heritage, its attributes changed, according to time and place. By the sixteenth century, syndics were basically people elected by their local community, for a limited period, to take care of some matter that demanded both time and attention."[77] As Griffiths argues, "Trahan's signature on the agreement, together with that of Jacques Bourgeois, is an indication of the extent to which the settlers were regarded as something more than colonists with no political identity, under the absolute control of officials dispatched from France."[78] In other words, the existence of offices of civic government, modelled on the French tradition but not under the direction of imperial authorities and adapted to local circumstances, illustrates the existence of a distinct political community. The role of Trahan

[73] John G. Reid, "The Lost Colony of New Scotland and Its Successors, to 1670" in John G. Reid, *Essays on Northeastern North America: Seventeenth and Eighteenth Centuries* (Toronto: University of Toronto Press, 2008) at 58.
[74] Faragher, *supra* note 65 at 50-56; James Hannay, *The History of Acadia, From its First Discovery to its Surrender to England by the Treaty of Paris* (St. John, J&A McMillan, 1879) at 140-188.
[75] Griffiths, *From Migrant to Acadian, supra* note 72 at 38.
[76] It is this period that led to the notion of Acadia as an "outpost" of New England. This is exemplified, for example, in the title to George Rawlyk's well-known work "*Nova Scotia's Massachusetts*": see George A. Rawlyk, *Nova Scotia's Massachusetts: A Study of Massachusetts-Nova Scotia Relations, 1630 – 1784* (Montreal & London: McGill-Queen's University Press, 1973).
[77] Griffiths, *From Migrant to Acadian, supra* note 72 at 78. Blasi, *supra* note 70.
[78] Griffiths, *From Migrant to Acadian, supra* note 72 at 78.

in the agreement with Sedgwick illustrates the role of the distinct political community of settlers, apart from the dictates of the imperial government.

Sedgwick's invasion marks a good point to begin a discussion of Acadian law for several reasons: first, as mentioned, the invasion made clear that a distinct *Acadian* political community had coalesced by that time; second, for the Acadians this marks the beginning of more than half a century during which Port Royal would change hands several times and 'Acadia' would be transferred by Treaty repeatedly. As John Reid writes, "Any comprehensive Acadian narrative of the conquest [of Acadia] would have to begin, not in 1707 [as many accounts suggest], but in 1654 at the latest."[79] The importance of this to an account of Acadian law is that it is in responses to competing European powers that the distinctly Acadian political and legal structure is most visible. Sedgwick's invasion and the period of English "control" that followed provided an opportunity for Acadians to move away from French legal practices while maintaining independence vis-à-vis the English. In doing so, they relied on norms that had begun to develop within the distinctly Acadian communities. As Griffiths notes, Acadians during this period relied "on oral traditions and the customs that had evolved over the past twenty years."[80]

Sedgwick's approach to property rights and the fate of seigneurial forms of property in the period of English rule are illustrative. I discuss the seigneurial system in more detail as an element of French colonial law. Notable here is its adaptation to suit Acadian circumstances, particularly under shifting imperial powers. Little is known about the particular sub-grants and seigneurial dues and obligations in the 17th century.[81] What is clear is that, prior to 1710, the institution in Acadia showed considerable local variation, distinguishing it from forms in France and other colonial spheres in New France. Central authorities under the French regimes in Acadia, such that they existed, lacked the capacity to rigorously enforce the payment of seigneurial obligations and the holders of the largest seigneurial grants were more interested in profiting from the fur trade than

[79] John G. Reid, "The 'Conquest' of Acadia: Narratives" John G. Reid, Maurice Basque, Elizabeth Mancke, Barry Moody, Geoffrey Plank, and William Wicken. *The 'Conquest' of Acadia, 1710: Imperial, Colonial, and Aboriginal Constructions* (Toronto: University of Toronto Press, 2004) at 21.
[80] Griffiths, *From Migrant to Acadian, supra* note 72 at 38.
[81] As Andrew Clark writes: "the majority of the grants made remained paper entities and, of those which had more or less reality, we are poorly informed about their actual operation, the payment of dues of various kinds, the geographical limits of the individual *rotures* or seigneurial 'domains,' and the process of granting, inheriting, or transferring the rights to either. Indeed there are serious doubts as to whether understanding of them is advanced by thinking of them as seigneuries of the Canadian type." Andrew Hill Clark, *Acadia: The Geography of Early Nova Scotia to 1760* (Madison: University of Wisconsin Press, 1968) at 114.

from agricultural development.[82] As a result, "[t]he Acadians appear to have treated the system, and the obligations it imposed on the individual land holder or farmer, in a very cavalier way."[83] While seigneurial forms structured land holding in theory, in practice local adaptations prevailed. Geographical variation resulted, and "[t]he degrees of reality in the seigneurial forms and procedures, such as they were, were largely restricted to the settled areas of Port Royal and its river, Minas, Beaubassin, and, to some degree perhaps, in the Pisquid, Cobequid, and Pubnico areas."[84] What did exist of the seigneurial systems came under pressure in 1654 when Sedgwick brought the colony under the putative rule of Massachusetts for 16 years.

While the terms of capitulation indicated that the change in military control would not alter civil affairs, landholding regulations were changed.[85] This was not, however, the result of the imposition of a new structure. The Massachusetts system of landholding, based on the distribution of free tenure, was not brought to Acadia.[86] As Griffiths notes, "[s]uch a profound change would have meant a deliberate choice of some form of government that granted political rights to the settlers within English law, rather than an interpretation of their rights from French law."[87] While Massachusetts sought to exert control over the colony, including the establishment of an executive council, it did not impose a freehold system. Neither, however, were French institutions strictly enforced. As a result, Acadian customs and traditions that had evolved to that point were left to continue on as prior to the conquest. Though this policy considered that pre-existing seigneurial obligations should be fulfilled, in practice the impact of the seigneurial system on individual settlers was substantially undermined.[88] Further, in the absence of attempts to fortify French custom or to replace it through the introduction of English practices, the land tenure system in Acadia began to assume a unique character closer to the English freehold system than the seigneurial system.[89] Acadians understood the opportunity represented by the invasion of 1654, and had "taken advantage of a loose English regime to burst the bounds of the seigneurial system."[90] After the disruption of 1654, therefore, the seigneurial system had little influence on

[82] Blasi, *supra* note 77.
[83] Clark, *Acadia, supra* note 81 at 115.
[84] *Ibid* at 118.
[85] Griffiths, *From Migrant to Acadian, supra* note 72 at 71, 80.
[86] *Ibid* at 38.
[87] *Ibid.*
[88] Griffiths, *From Migrant to Acadian, supra* note 72 at 79.
[89] *Ibid* at 80.
[90] Reid, "The 'Conquest' of Acadia", *supra* note 79 at 21.

quotidian Acadian life.[91] The result was the development of local variation, one in which seigneurial forms continued to influence landholding patterns while elements and patterns resembling a freehold structure emerged, effectively intermingling elements of French and English property law structures in a uniquely Acadian formulation.

Acadia was returned to the French following the Treaty of Breda in 1667, and a second generation of proprietors made efforts at enforcing some seigneurial forms and dues. The son of Emmanuel Le Borgne, Alexandre Le Borgne de Belle-Isle, was a proprietor of the area around Port Royal, and he further alienated land on a seigneurial basis. In the grant to Pierre Martin in 1679, for example, Le Borgne asked for "cens et rentes, a penny, a capon, and one bushel of oats per year."[92] Aubert de la Chesnaye, who had purchased three seigneuries along the St. Lawrence in the 1680's, was also granted one in Acadia.[93] Until the British capture of Port Royal in 1710 "most of the Acadians at Port Royal, and some at Minas and Chignecto, continued to pay their token seigneurial dues and rents to the various La Vallière, La Tour, d'Aulnay, and Le Borgne heirs who had successfully established claims with French authorities. After the takeover of 1710 British governors had been insisting on such payments being made to the Crown, but without much success."[94] The last seigneur was bought out by the British in the 1730's.[95] The form of landholding and governance survived changes in authority but was bent and modified to suit local needs.

Notable in terms of *Acadian* law is that, for various reasons relating to the contingent circumstances of the region and the practices that arose in response to those conditions, seigneurial property relations were, in practice, distinct from those in France and elsewhere in New France. After 1713, this included appeals to British authority to resolve disputes: a committee of the colonial council was established specifically for dealing with claims to land, including competing claims between Acadians.[96] It also involved assertions of ownership rights beyond those recognized by either French or British systems. In 1738, for example, colonial officials complained about Acadians squatting on "crown lands."[97] By the 1740's, the British questioned the legal basis of many Acadian claims, with surveyor Morris calling attention to the "squatters" and arguing that

[91] Elizabeth Mancke and John Reid, "Elites, States, and the Imperial Contest for Acadia" in Reid et al. *The Conquest of Acadia, supra* note 79 at 38.
[92] Clark, *Acadia, supra,* note 81 at 119.
[93] Richard Colebrook Harris, *The Seigneurial System in Early Canada* (McGill-Queen's University Press, 2014).
[94] Clark, *Acadia, supra,* note 81 at 197.
[95] *Ibid.*
[96] *Ibid* at 198 FN 28.
[97] *Ibid.*

they had only "title by possession."[98] Acadian settlers developed norms and expectations regarding proprietary interests and "were careful to mark divisions between individual holdings on the upland with barriers or fences of wood – or at least piles of brush and trunks of trees. The marshland drainage ditches, shared with a neighbor, seem to have served such purposes admirably."[99] The intermingling of seigneurial and freehold systems, along with the development of customary norms of property holding based on usage, illustrate a distinctly Acadian legal approach to property.

Perhaps the most well-known political contest in Acadian history is the dispute with British colonial authorities over the taking of an oath of allegiance. Following the formal acquisition of sovereignty in the Treaty of Utrecht in 1713, the British were faced with governing a territory populated by Indigenous peoples and Acadians who had no loyalty to the British crown. Both were Catholic and closely linked to the French politically and culturally. By the 1680's the Acadians had formed "an economically self-sustaining and demographically self-generating colony,"[100] while the Mi'kmaq, Wolastoqey, and Passamaquoddy considered the territory as belonging to them and subject to their law and jurisdiction. As a result, the sovereignty that the British acquired in 1713 was a limited form of external sovereignty that only had purchase as against other European nations. British control of the territory itself, they would quickly learn, required cooperation and acquiescence of the local populations who, by and large, reacted to British pretenses to authority with suspicion or outright hostility.

Conscious of the tenuous nature of their control, the British believed that they could not secure rule in the region without a body of loyal subjects.[101] Territorial variations in authority and

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[98] *Ibid.* Here "title by possession" only was meant to undermine the legality of the claims. As in the case of justifications for British claims to territory in the New World, there is an important double standard here. When Indigenous peoples or others who pre-existed the British claims to territorial dominion asserted rights of ownership on the basis of possession or exclusive occupation, they were described at best as mere "occupants" and at worst as squatters. At the same time, British occupation of Indigenous territory was justified precisely on the basis that they had come to occupy by it and that occupation was sufficient in itself to support claims to ownership.

[99] *Ibid* at 238.

[100] Naomi E.S. Griffiths, *The Contexts of Acadian History, 1686-1784* (Montreal & Kingston: McGill-Queen's University Press, 1992) at 3.

[101] As Elizabeth Mancke argues, "The internationally negotiated transfer of Acadia from French to British sovereignty needed acceptance and legitimation on the ground by the Acadians, if not the natives as well." Elizabeth Mancke, "Imperial Transitions" in Reid et al., *The Conquest of Acadia, supra* note 79 at 178. It is not clear why Mancke qualifies her inclusion of "the natives" here (or declines to name them specifically), as there is little doubt that the British recognized that their asserted sovereignty required recognition from the Mi'kmaq. This is reflected in the Treaty of 1726 between the British and the Mi'kmaq, wherein the British explicitly sought to have the interests they believed themselves to have acquired at Utrecht recognized by the Mi'kmaq.

the uneven reach of imperial law in the colonial sphere were intertwined with the legal definitions of subjecthood and the "portability of subjecthood" through empire.[102] The British could not construct "Nova Scotia" as a space of British legality without populating it with British subjects. They believed they could acquire subjects in Nova Scotia in two ways: the settlement of subjects, preferably Protestant, likely to remain loyal to the Crown, or the conversion of the socially and culturally diverse populations already living there. They would try both approaches.

The British vision of the contest over subjecthood in the region was made explicit in the Treaty of Utrecht. By the terms of the Treaty, Acadians who wished to leave the colony within one year would be able to do so and would be able to take their possessions with them. Those who sought to remain in the colony would have their property rights and freedom of worship respected, though they would be expected to take an oath of allegiance to the King, thereby becoming British subjects. As Geoffrey Plank writes, "Acadians were formally granted the power as individuals to determine their own legal status."[103] The approach to the Mi'kmaq was different and is outlined in chapter 5. In brief, the treaty of Utrecht stated that Indigenous peoples in the territories being ceded would have their imperial affiliations – their subject-status – determined by imperial negotiators. These negotiations never took place, and the status (under European law) of the region's Indigenous peoples was not settled.

After the signing of Utrecht, British attention went first to the Acadians. In 1713, Queen Anne sent a letter to Lieutenant-Governor Francis Nicholson restating the provisions of the treaty and personally guaranteeing that any Acadians who were "willing to Continue our Subjects" would have their property rights protected.[104] A systematic effort to convince the Acadians to become subjects through an oath of allegiance to the Crown did not occur until 1717.[105] The Acadians rejected attempts by new lieutenant-governor John Doucett to have them sign an oath, proffering a number of reasons for their refusal, including fear of reprisals from the French or Mi'kmaq, indecision about whether to relocate to the French colony of Île Royale, and a desire to remain neutral in future disputes between the French and British.[106]

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[102] Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400 – 1900* (Cambridge: Cambridge University Press, 2010) at 3, 286, 289.
[103] Geoffrey Plank, *An Unsettled Conquest: The British Campaign Against the Peoples of Acadia* (Philadelphia: University of Pennsylvania Press, 2001) at 71.
[104] Mancke, *supra* note 101 at 178.
[105] *Ibid* at 191. Requiring oaths of allegiance was a common means of extending authority and jurisdiction in imperial spheres: Benton, *supra* note 102 at 96, 289.
[106] Acadians had used the neutrality approach in the 1690's as well: Rawlyk, *supra* note 76 at 77.

Colonial authorities tried to coerce the Acadians to sign an oath, threatening to invoke the Navigation Acts to cut off their profitable trading activities with New England. The Acadians understood that the threats were empty without the ability to follow through with enforcement.[107] The British also realized at this time that allowing the Acadian farmers to move to Île Royale, where the French had just begun construction of a fortress at Louisbourg, would substantially strengthen the French colony by facilitating the arrival of thousands of seasoned agriculturalist settlers. Understanding the relative strength of their bargaining position, the Acadians declined to take an oath. In the result, "Acadians implicitly, though whether wilfully is unclear, challenged British sovereignty in Nova Scotia."[108] Regardless of whether the Acadians understood their actions as a direct challenge to British sovereignty, it is clear that they were consciously negotiating what their status as legal subjects of the British Crown meant. While subjecthood was unilaterally imposed on all those who wished to remain in the colony, the Acadians understood that the power dynamics in the region provided them the opportunity to negotiate the legal rights and political status that would pertain to that subjecthood.

A renewed attempt to convince the Acadians to sign an oath began in 1725. The central concern of the Acadians at this juncture was whether they would be required to participate in future British conflicts with the French or Indigenous peoples in the region.[109] Under considerable pressure, the Acadians near the fort at Annapolis Royal swore an oath of allegiance in the fall of 1726. A regional variation developed, with the Acadians closer to the site of British settlement developing closer relations to the British and acquiescing more readily to their authority, while those in more distance communities continued to balk at the prospect of becoming British subjects, rejecting British claims to authority. The governor and council invited the Acadians outside the reach of the fort to take an oath in 1727 and were again rejected, barring trade in the Bay of Fundy as a result. In 1729, Lieutenant-Governor Philipps re-iterated that any Acadians taking the oath would be protected in the practice of their religion and have their existing property rights, under French law, respected.[110] Lieutenant-Governor Richard Philipps also sought to secure an oath in 1729 and in May 1730 he told the council that he had persuaded all but seventeen Acadians at

[107] Mancke, *supra* note 101 at 194.
[108] *Ibid* at 178.
[109] *Ibid* at 195.
[110] *Ibid* at 187.

Chignecto to sign an unqualified oath. Philipps may have made concessions to secure this oath, but there is no record of him having done so.[111]

As a result of these overtures and threats oaths were taken by most Acadian men in 1729 and 1730.[112] The oath remained qualified, however, by Acadian refusal to take up arms in future conflicts with the French or Indigenous nations and by their Catholicism. The Acadians certainly believed their allegiance to be qualified, relying in part on the agreement they entered into with Robert Wroth, who had been sent by the Governor to proclaim the ascension to the Throne of King George II and seek an oath of allegiance from the Acadians. Wroth had accepted the Acadian's request to be exempted from military service. Though the Nova Scotia council immediately declared the agreement null and void, saying that Wroth had exceeded his authority in making the concessions, they voted that the Acadians' "acknowledgment of George II's 'Title and Authority to and over this Province,' their qualifications notwithstanding, made them eligible for 'the Libertys and Privileges of English Subjects.'"[113] In the decades to come, the qualified nature of the oath taken by many Acadians would lead some British officials to "question the validity of such conditional oaths and ask whether the Acadians had effectively declared themselves British subjects."[114] The reach of British imperial law, the British realized, was restricted by their inability to establish legal subjects in the territory. In Acadian occupied areas, as well as in trading routes they used to move their goods, often illicitly according to British law, Acadians negotiated a form of subjecthood which refused the unilateral imposition of British law. Instead, Acadian law was drawn on to articulate different modes of political association than those envisioned by the British.

Despite this challenge to their authority, the British were inclined to seek participation of the Acadians in civil institutions of the colony. There were several reasons for this. The British understood that they could not attract settlers to the colony so long as there remained an absence of civilian government. The perception that the colony was being run by a military government, which, despite nascent efforts to establish institutions of civilian governance, was true, inhibited incoming settlement. Before the founding of Halifax in 1749, however, there were not enough British subjects in the colony to support the cost or infrastructure of a civilian government. Making

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[111] *Ibid* at 196.
[112] As Geoffrey Plank writes, "After the oath-taking ceremonies in 1729 and 1730 the Acadians were officially deemed subjects of the British crown, but questions persisted concerning the extent to which they had become 'British' or fully acquired the rights normally associated with that status." Plank, *supra* note 103 at 104.
[113] Mancke, *supra* note 101 at 196.
[114] Plank, *supra* note 103 at 88.

the Acadians British subjects would create the tax base required to support a government and provide people to fill governmental offices.[115]

Even if the Acadians were willing to take an oath of allegiance, however, there were several obstacles to their participation in government. First, their Catholicism prohibited them from holding public office under the *English Test Act* of 1673.[116] A solution was found that relied on a negotiated form of subjecthood distinct from that unilaterally envisioned by the British diplomats who negotiated at Utrecht. Because they wanted to include the Acadians in the day-to-day governance of the colony, rather than recognizing them as an autonomous or self-governing people, a system of deputies was developed, and some administrative positions were staffed by Acadians at Annapolis Royal. In the 1720's the deputies, elected from each of the five Acadian communities, played a largely diplomatic role. It was deputies who informed the colonial government of the Acadians' refusal to sign the oath in 1720.[117] This structure of deputation was crafted by the colonial government and went beyond the authority delegated in the governor and lieutenant-governor's royal instructions. As such, the system of deputies, which was a crucial part of government in the early part of the century, represented a local adaptation that was beyond the authority of the colonial government to sanction.[118] Further, it appears to have been crafted in response to demands from the Acadian community.[119] In an adaptation of older traditions of the common law, the deputies were also called to give evidence and act as witnesses at criminal and civil trials involving Acadians.[120]

Here again, Acadian law is visible. In deciding whether to take the oath, the Acadians displayed their autonomy from both British and French imperial powers. Decisions were made on the basis of community driven norms and standards for behavior that were communicated to the deputies. While the office of the deputies was an administrative construct of the colonial government, the decision-making procedures which informed the deputies positions in diplomatic

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[115] "The near absence of Protestant settlers in Nova Scotia before 1749 meant that under existing laws there were not enough people to establish the full apparatus of British government that had become conventional in other colonies: an assembly that would vote taxes to run the colony, county and/or town government for local administration, a land office and registry of deeds, and a judicial system." Mancke, *supra* note 101 at 180.
[116] *Ibid.*
[117] *Ibid* at 186.
[118] *Ibid.*
[119] Clark, *Acadia, supra* note 81 at 189.
[120] Mancke, *supra* note 101 at 186. On the use of respected community members to deliver evidence or statements in the common law tradition, see: Frederick William Maitland and Francis C. Montague, *A Sketch of English Legal History* (New Jersey: The Lawbook Exchange, 1998) at 46-58.

negotiations were driven by Acadian law. Despite ongoing difficulties, Acadians participated in the civil government of the colony through these negotiated forms of shared governance. With the trading bans lifted after oaths were taken, their trading activities burgeoned, and they thrived during the 1730's and 40's. By 1744 their population had expanded significantly; they were by far the most populous peoples in the region, counting a population over ten thousand compared to about three thousand Mi'kmaq and five hundred English.[121] As Plank notes, however, this demographic strength and economic prosperity did not lead to political or economic strength at the regional level.[122] As a result, their legal and political status remained tenuous, still subject to ongoing negotiation.

Within a decade, the balance could no longer hold. In the 1750's, Britain resumed hostilities with the French and the Mi'kmaq. With the founding of Halifax in 1749, they had increased their population substantially and had a base for civil government. As a result, the settlement of Protestant subjects was again prioritized. The Acadians were considered untrustworthy. By 1754 the Board of Trade instructed Governor Lawrence "not to do anything that might imply official recognition of the Acadians' title to land unless they took a new, unconditional oath of allegiance."[123] In 1755, the British began to systematically expel the Acadians from the region in an act of dispossession and ethnic cleansing known now as the *Grand Dérangement.* Even at this, the British seemed to believe that the Acadians could yet be turned to "faithful subjects." Governor Lawrence believed that if they were scattered widely enough across the empire so that their social and communal bonds were severed, they might adapt sufficiently to become such subjects. The project of turning Nova Scotia British, of making it an unqualified space of British legality, would, however, require legal subjects whose allegiance was unqualified and who were not tied to pre-existing property rights. Thus, a negotiated form of subjecthood, in which the legal category of subject was given content through the negotiation of competing interests, gave way to a unilateral approach, with force ultimately being used to obviate the need for negotiated concessions. Customary forms of land holding that made fertile agricultural lands unavailable for non-Acadian settlement were also dissolved.

[121] Plank, *supra* note 103 at 88.
[122] *Ibid.*
[123] *Ibid* at 142.

Prior to their dispossession, the Acadian experience with the oath taking and negotiated forms of subjecthood, particularly their negotiated neutrality, is an important illustration of the role of Acadian law. The role of deputies as liaisons between the Acadian communities and the colonial government, and the Acadian insistence on negotiating the terms of their imperial allegiance, is evidence of domestic Acadian law at work. The deputies were also viewed with suspicion by some Acadians, who saw them as an arm of the colonial government. Other forms of local governance emerged, notably that organized by the clergy. As Andrew Clark notes, many observers in the early 18th century "believed that there was a much more effective *de facto* local government and system of justice administered by the priests and headed by the Bishop of Quebec."[124] In practice, a "sort of clandestine local government" was conducted by priests, whose "chief civil function… was the settlement of a host of minor civil differences between the parishioners."[125] The clergy acted in a civil capacity and "the criteria they applied in their judgements came from the only bodies of law they knew, those of the church and the ancient *coûtumes* of France, which often differed sharply from the precedents of English common law."[126] The reach of the colonial government at Port Royal, in other words, even through the system of deputation, was weak in the Acadian communities. Ecclesiastical law (which itself could be a separate body of law considered in this study) and customary French law were active in Acadian communities within the territory over which Britain asserted sovereignty, some of which was contested by France, but most of which was recognized as British at Utrecht.

The use of customary French law and ecclesiastical law may appear to be a form of colonial law rather than internal Acadian law, albeit one directed by religious rather than secular authorities. Two factors, however, suggest viewing this as an example of internal Acadian law. First, while the priests were in some ways responsible to the French crown, they also acted in the interests of the Catholic faith, such as those interests were interpreted by their denominational adherence. Thus, the priests are difficult to peg as operatives of colonial or imperial law both because they were at times working outside the ambit of French authority and because in the Maritimes between 1713 and 1763 they were often working in areas over which the British claimed sovereignty. While many were certainly working under the direction of the French authorities to undermine the British,

[124] Clark, *Acadia,* supra note 81 at 190.
[125] *Ibid* at 190-191.
[126] *Ibid* at 191.

this was only one of many roles they played. Second, there was a local adaptation to Acadian circumstances shaped in part by the relatively limited authority of the priests. While priests would sometimes issue ecclesiastical penalties, for example, Acadians would appeal to the executive council in Annapolis if they felt they were dealt with unjustly by the church. Acadians, therefore, used the threat of an appeal to a competing authority to pressure the clergy to resolve disputes in accordance with the norms of the community. Should those norms not be upheld, the community would pursue an authority who they perceived as more likely to resolve the dispute in line with those norms. Indeed, they appealed to the colonial council, acting in its judicial capacity, often, and a "large military council had to meet on call in a civil judicial capacity to decide matters of *meum* and *tuum* among the Acadians habitants, usually brought to them by deputies."[127]

Again, while it may be tempting to view this as an acquiescence to the power of colonial law, it can also be seen as evidence of the development of internal law. Contemporary decisions of Tribal Courts in the United States provide an analogy. The decisions of the Supreme Court of the Navajo Nation, for example, draw freely on common law, statutory law from state and federal levels, Navajo statutory law, previous decisions of the SCNN, and traditional or customary Navajo law.[128] The resulting law is undoubtedly "Navajo" law and it responds to and resolves disputes under Navajo jurisdiction in a manner considered legitimate by those bound by that law. The law is not less "Navajo" because it draws on the common law to assist in resolving disputes. To take another example, early Canadian *Charter* jurisprudence drew heavily on decisions of the US Supreme Court to help navigate its new role in relation to constitutionalized rights.[129] The law so made is no less the law of Canada because of this borrowing from the legal reasoning of another jurisdiction.

Similarly, appeal for dispute resolution to French priests or to an external body such as the council at Annapolis Royal should not be taken as evidence of a lack of Acadian law. The ability to choose the venue of dispute resolution illustrates a degree of control over the norms that would be brought to bear to resolve disputes. The disputes themselves arose where internal norms were

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[127] Clark, *Acadia,* supra note 81 at 188.
[128] See, for example, *Arviso v Muskett* No. SC-CV-18-17 (Nav. Sup. Ct. April 5, 2017) which applies, among many other decisions, *In re Grievance of Wagner*, No. SC-CV-01-07, slip op, at 3 (Nav. Sup. Ct. May 14, 2007) and interprets the Navajo Nation Election Code.
[129] See e.g. *Ford v. Quebec (A. G.),* [1988] 2 SCR 712 at paras 47-49; *R v Big M Drug Mart Ltd.,* [1985] 1 SCR 295 at paras 73-77.

breached. That is, it was a breach of the internal community norms which caused Acadian individuals to seek redress with the council or the clergy. Emphasizing the role of the dispute resolution bodies also places too great an emphasis on law as happening only at the stage of dispute resolution rather than the production of norms which govern behavior. Andrew Clark notes that the "Acadians evidently had a very keen property sense from the number of boundary disputes that are reported. If a more readily available legal apparatus had existed they might well have proved as litigious as their Canadian neighbours."[130] This is notable in part for the presumptions that Clark makes – he does not see a "legal apparatus" only because he is assuming a dispute resolution function. Moving away from the assumption that law is responding to disputes *after* they occur, we can see that the very things Clark discusses are evidence of customary law. In the event the law was breached, it may have been dealt with in several ways. Some of these we are aware of, such as appeals for redress to a legal system under which such claims might be made (colonial British, French, or church). Others may have existed in which consequences flowed from the community in ways that are not now known.

The examples of Acadian law chosen here - property rights and the seigneurial system, the oath of allegiance and negotiated subjecthood, the system of deputation, and the presence of the shadow government - were not chosen as an exhaustive account of Acadian law. Rather, they show some of the subject-matter of that law: property, citizenship, trade, etc. This law applied to legal subjects, the Acadians themselves, and impacted "external" actors insofar as they were compelled to accommodate Acadian law when dealing with Acadian peoples. The territorial reach was restricted. Because Acadians settled in agricultural communities within Mi'kmaw territory, they did not have the need, the capacity, or, seemingly, the desire, to extend their laws and jurisdiction beyond their communities. While an economy developed between these agricultural settlements and commercial outposts, they were not connected by a sense of territoriality. As will be discussed below, this in part reflects French approaches to colonization, which tended to identify lands for settlement that would not disrupt Indigenous patterns of land and resource use.[131] It also reflected

[130] Clark, *Acadia,* supra note 81 at 238.
[131] Olive Dickason, "Amerindians Between French and English in Nova Scotia, 1713-1763" in J.R. Miller, ed, *Sweet Promises: A Reader on Indian-White Relations in Canada* (Toronto: U of T Press, 1991); Laxer, *supra* note 73. As Edward Cavanagh cautions, however, and as will be discussed below, this point needs to be nuanced. While the French often settled on lands that were not in continuous use, they were nonetheless interlopers in Indigenous territories and had no legal framework recognizing Indigenous rights to land: Edward Cavanagh, "Possession and Dispossession in Corporate New France, 1600-1663: Debunking a 'Juridical History' and Revisiting 'Terra Nullius'" (2014) 32:1 Law and Hist Rev 97

political necessity. Until the 18th century they were a demographic minority receiving little organized support from France[132] and dependent on the acquiescence of the Mi'kmaq for the survival of their communities. Even as they became a strong majority by the mid-18th century, the Acadians never established, or sought to establish, anything like political rule or territorial jurisdiction outside of their communities. Acadian law remained strictly internal, and Acadians navigated the legal pluralism of the era through strategic engagement with the overlapping regimes that impacted their lives.

iii) British Law

England (later Britain) developed a comprehensive body of imperial constitutional law that governed the relationship between the imperial centre and the colonies. As Mark Walters writes, "[t]here were both legislative and non-legislative sources of imperial law. Legislative sources included statutes of the English (later British) Parliament and, in certain cases, instruments issued under the royal prerogative and passed under either the Great Seal (like proclamations, orders-in-council, commissions, and letters patent) or the royal sign manual and signet (like royal instructions to colonial governors)."[133] British "imperial law" as it applied to the colonies is considered internal law for the purposes of this analysis. The body of prerogative instruments, governor's commissions and instructions and so forth – so called "pocket constitutions" – are internal affairs of the British constitutional order, as distinct from laws that govern their affairs with other nations. Certainly, some of these prerogative instruments dealt with relations with other nations and peoples, but what is of interest here is how they worked as a matter of internal constitutional law.

In addition to imperial constitutional law, British statutory law could be extended to colonies in two ways: 1) existing statutes could be extended directly to colonies through the doctrine of reception, 2) the Parliament in London could pass legislation targeted directly at one

[132] As Jean Daigle notes, "the residential colonies of Newfoundland and Acadia would develop without significant support from their respective governments." Jean Daigle, "1650-1686: 'Un pays qui n'est pas fait'" in Buckner and Reid, *supra* note 69 at 62.
[133] Mark D. Walters, "Mohegan Indians v. Connecticut (1705-1773) and the Legal Status of Aboriginal Customary Laws and Government in British North America" (1995) 33 Osgoode Hall LJ 785 at para 6.

or more colonies.[134] The extension of British law must be considered in light of these distinct forms: imperial law governing imperial-colonial relations, common and statutory law as "received" upon acquisition of a territory, and statutory law directed specifically at the colonies subsequent to the date of reception. A broad view of British law includes not only the domestic law of Britain and its associated body of imperial law, but also the laws of its colonies themselves. The chapter draws a distinction between "domestic" colonial law, for instance that of Nova Scotia, and forms of British law. The constitutional delineation of authority held that "local affairs" fell under the jurisdiction of colonial legislatures.[135] I treat this law as a distinct form of colonial law where it emanates from local law-making bodies and concerns local affairs. The term "British law", then, refers here to *four forms* of internal law: imperial constitutional law, British statutory law as received in colonies, British statutory law extending specifically to the colonies after reception, and colonial law, created by local bodies. A fifth is the common law, which straddles British and colonial law, as it is applied and interpreted in local colonial courts.[136] Here the concern is primarily with three of these: Imperial law, statutory law, and colonial law.

It should also be recalled that law in the period discussed here was in flux and subject to conflicting interpretations; it resists rigid definition. As Jack Greene has detailed, for example, the applicability of British statutes in colonies was a matter of considerable dispute.[137] While many in Britain believed the principle of parliamentary sovereignty extended the reach of parliamentary authority to any dominion of the Crown, this was intensely contested. Colonialists in North America rejected imperial authority both from parliament and the executive. The role of the *Stamp Act* crisis and discontent over the *Royal Proclamation, 1763* in strengthening sentiments towards American independence are but two examples.[138] The move for American independence, however,

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[134] Elizabeth Brown, "British Statutes in the Emergent Nations of North America 1609 – 1949" (1963) 7 Am J Legal Hist 95.

[135] Alpheus Todd, *Parliamentary Government in the British Colonies* (Boston: Little, Brown, and Company, 1880) Joseph Chitty, *A Treatise on the Law of the Prerogatives of the Crown and the Relative Rights and Duties of the Subject* (London: Butterworth and Son, 1820); Enid Campbell, "Colonial Legislation and the Laws of England" (1964-1967) 2 U Tas L Rev 148, at at 149; Charles James Tarring, *Chapters on the Law Relating to the Colonies* (London: Stevens & Haynes, 1882).

[136] See e.g Barry Cahill and Jim Phillips, "The Supreme Court of Nova Scotia: Origins to Confederation" in Philip Girard, Jim Phillips, and Barry Cahill, eds, *The Supreme Court of Nova Scotia, 1754-2004: From Imperial Bastion to Provincial Oracle* (Toronto: University of Toronto Press and Osgoode Society for Canadian Legal History, 2004) at 53-57.

[137] Jack P. Greene, *Periphery and Center: Constitutional Development in the Extended Polities of the British Empire and the United States 1607-1788* (New York: W.W. Norton, 1986).

[138] *Ibid* at 79-81; Colin G. Calloway, *The Scratch of a Pen: 1763 and the Transformation of North America* (New York: Oxford University Press, 2006) at 98-99.

was not a radical break, but the culmination of long simmering disputes over the nature and distribution of legal authority between the periphery and center. It developed out of contests over the scope of imperial authority and interpretations of imperial constitutional law that were occurring elsewhere as well. In contested areas, legal principles can resist rigid definition even before considering change over time. In light of this, this sections draws out salient elements of the general legal and constitutional regime, while bringing attention to points that were strongly contested.

a) *Imperial Constitutional Law*

Through a system of delegated authority, the British developed a body of imperial law that governed the relations between the metropolitan centre and the colonies. This was a body of prerogative law that developed haphazardly and in response to developments on the ground rather than in a structured, organized fashion.[139] It also had two very distinct elements: that dealing with the governance of the colonies themselves and that dealing with Indigenous peoples in whose territories those colonies were interloping. The first British legal acts concerning the New World were commissions and charters. On August 5, 1583, Sir Humphrey Gilbert sailed into Saint John's habour on the east coast of Newfoundland. There were some 40 fishing boats there when he arrived, the men who worked them drying and salting their catch on shore. Gilbert landed with a crew of surveyors who began the process of measuring and delineating the land, having been given permission in by letters patent granted by Queen Elizabeth to take and hold in fee simple any lands not occupied by "any Christian prince or people."[140] Any lands not under the control of such a prince "could become [Gilbert's] property to be sold, rented, or mortgaged as though he were in England."[141] On the basis of this charter, Gilbert took "ownership "of the land around the harbour, unconcerned that it was considered by the Indigenous peoples of the region to be part of their territory and that European fishermen had been using it seasonally for decades. Once the surveys

[139] Lisa Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788 – 1836* (Cambridge: Harvard University Press, 2010).
[140] Andro Linklater, *Owning the Earth: The Transforming History of Land Ownership* (New York: Bloomsbury, 2013) at 2. See also Christopher Tomlins, "The Legalities of English Colonizing Discourses of European Intrusion upon the Americas, c. 1490–1830" in Shaunnagh Dorsett and Ian Hunter, eds, *Law and Politics in British Colonial Thought* (New York: Palgrave MacMillan, 2010) at 51-52.
[141] *Ibid.*

were complete, Gilbert rented the land to the fishermen, promising that in return for payment they would enjoy the right to use the same piece of land in the years to come. The power to take ownership of land merely by asserting such ownership was aptly referred to by Andro Linklater as "the magic that Gilbert carried to the newfound land beyond the Atlantic."[142] This magic was given effect through the use of legal instruments and legal rituals that structure and organized the lands and waters according to British legality.

The earliest such English device impacting the Maritime provinces may have been the letters patent granted to John Cabot (Zuan Caboto), his sons, and their heirs by King Henry VII. The patent itself was expansive:

> to sail to all parts, regions and coasts of the eastern, western and northern sea, under our banners, flags and ensigns, with five ships or vessels of whatsoever burden and quality they may be, and with so many and with such mariners and men as they may wish to take with them in the said ships, at their own proper costs and charges, to find, discover and investigate whatsoever islands, countries, regions or provinces of heathens and infidels, in whatsoever part of the world placed, which before this time were unknown to all Christians.[143]

The patent was careful, however, to respect Spanish claims based on Columbus' voyage three years prior, excluding the Caribbean islands as "they were in southern waters and known to Christians."[144] The patent ignored, however, the older Spanish and Portuguese claims from papal grant. In doing so, Henry VII dismissed the legality of the papal grant while simultaneously asserting prospective rights of discovery secured by his own legal instruments. The English insisted on "possession" - however imaginably weak that term might be defined - as opposed to mere assertion, to secure colonial possessions. As Peter Pope notes, "Planting a cross with national and religious banners is a symbolic act, a deed that is meant to say something. The formulaic language of Henry's patent makes it clear that this was intended as a ritual enactment of possession."[145]

The significance of this patent to the Maritime provinces is not immediately apparent. Though it has been argued that Cabot made landfall on Cape Breton, the weight of opinion points

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[142] *Ibid.*
[143] As reprinted in Peter O. Pope, *The Many Landfalls of John Cabot* (Toronto: University of Toronto Press, 2000), at 14.
[144] *Ibid* at 14.
[145] Pope, *supra* note 143 at 138.

to Newfoundland as the more likely landing spot.[146] In either event, the exorbitant nature of the claims associated with the "discovery" render the specific landing spot of little importance. By claiming ownership of vast territory by mere "discovery" of specific coastal areas already well traversed by European fishers, the effect is to either strengthen the claim through its breath of application or weaken it through its evident absurdity. Jeffers Lennox has noted that "to talk about Acadia or Nova Scotia in the 18th century is an act of imagination."[147] This is even more true of the 16th century, before those names were even conjured, and in early letters patent and charters the early stirrings of an imaginary of northeastern North America as a European legal space can be seen. The specific question here is the reach of imperial law, specifically the letters patent granted to John Cabot. To what extent could this form of imperial law move the territories in question from the European imagination into tangible jurisdictions based on discrete, grounded legal practices? In one sense, the legal instruments clearly seem to "apply" to the parts of North America where Cabot landed. Cabot was charged, after all, not only with investigating and discovering new lands, but was instructed to "conquer, occupy and possess whatsoever such towns, castles, cities and islands by them thus discovered that they may be able to conquer, occupy and possess, as our vassals and governors lieutenants and deputies therein, acquiring for us the dominion, title and jurisdiction of the same towns, castles, islands and mainlands so discovered."[148] That is, it was presumed that that the "islands, countries, regions or provinces" that he reached would be "of heathens and infidels," and he was instructed to "conquer, occupy and possess" those places. British law, in the form of the letters patent, thereby extended to these territories and the people occupying them. But who did this legal instrument bind? Certainly, it is a form of contractual agreement between Henry VII and Cabot. The public nature of the patent is also revealing. It was intended to operate as against other colonizing nations. While speaking to the lands *of* heathens - note the preposition *of*, denoting possession - it had no impact on those peoples

[146] *Ibid.*
[147] Jeffers Lennox, *Homelands and Empires: Indigenous Spaces, Imperial Fictions, and Competition for Territory in Northeastern North America, 1690-1763* (Toronto: University of Toronto Press, 2017) at 3. Sa'ke'j Henderson makes a similar point: "there European journeys were more mental explorations than physical, as they forced these travellers to grapple with disjointed pieces of information and to decipher an Indigenous and geological jigsaw puzzle. These explorers did not discover a New World, they invented America." James (Sa'ke'j) Youngblood Henderson, *Wabanaki Compact: The Foundation of Treaty Federalism in North America, 1621-1728* (Saskatoon: Indigenous Law Centre, 2020) at 31.
[148] Reprinted in Pope, *supra* note 143 at 138.

until such time as jurisdiction could be negotiated or imposed through force.[149] While imperial law asserted jurisdiction over the "New World," including the present-day Maritime provinces, the legal subjects to whom that law applied resided across the Atlantic.

For the better part of a century following Cabot's first transatlantic trip, the English would largely ignore the other side of the Atlantic. It was not until the Elizabethan era that overseas colonies became a priority, with Sir Humfrey Gylberte's letters patent issued on June 11, 1578. Those were followed in 1584 by a Charter to Sir Walter Raleigh. Despite the claim that Humfrey "shall have, hold, occupy and enjoy to him, his heires and assignee, and every of them for ever, all the soyle of all such lands. countries, & territories so to be discovered or possessed as aforesaid," it does not appear that either of these claims had an impact on the Maritime Provinces beyond the imperial jockeying for rights of discovery and first possession. These early imperial legal instruments had several distinct legal aspects. As Peter Pope details:

> There were, in legal terms, three groups of participants in each of these adventures: the owners of the ship, the crew, and the merchants who hired or 'freighted' the ship - in the case of fishing voyages supplying provisions rather than an outward cargo, although of course they expected to see an inward cargo of fish. The legal instrument that brought owners and freighters together for the purposes of a voyage was the charter party, a signed and notarized document specifying the terms and conditions for the lease of the vessel by the owners to the freighters. A vessel of even fifty tons represented a considerable commercial investment at the dawn of the sixteenth century. It is, in fact, difficult to think of larger investments in this period, except perhaps in mining. Property in ships had been organized, since medieval times at least, in shares. In a period before insurance was widespread, this form of ownership constituted a simple hedge against loss, for the part-owner of several ships was much less likely to suffer a total loss than the outright owner of a single vessel. The economic institutions of the voyage, the share, and the legal instrument of the charter party were invisible, of course, to Native Americans.[150]

The early imperial instruments that sought to extend imperial legality across the vast territories of North America - the letters patent and charters to early explorers - were supported by laws that

[149] As discussed in Chapter 1, the British would increasingly require actual possession to ground claims - JCPC said in 1884 that the Charter required the [HBC] company to "make themselves masters of the country" before they actually had a right to the land…. "In other words, even in domestic law the grant was prospective, requiring effective occupation for title to vest." Kent McNeil "Factual and Legal Sovereignty in North America: Indigenous Realities and Euro-American Pretensions" in Julie Evans, Ann Genovese, Alexander Reilly, Patrick Wolfe, eds, Sovereignty: Frontiers of Possibility (Honolulu: University of Hawai'i Press, 2013). 48

[150] Pope, *supra* note 143 at 148.

structured their ventures. These internal British laws structured imperial ventures in often overlooked ways.

The Anglo-Spanish War, lasting from 1585-1604, precluded much overseas activity for the remainder of the 16th century.[151] When overseas activity resumed after the close of the war, the next wave of patents created the American colonies. Letters patent were the legal form used to create three types of government in North America, proprietary governments, provincial governments, and charter colonies.[152] Each type was subject to different legal parameters and specific legal procedures had to be followed in the granting of Charters and letters patent. Charters pertaining to commercial or colonial interests were obtained by first addressing a formal petition to the Majesty in Council. A draft charter was to be sent with the petition. These documents together were submitted to the King or Queen in Council and then sent to the Board of Trade and Plantations for consideration. The Board of Trade considered the expediency of the proposed plan and take oral submissions from proponents or opponents of the plan. Upon approving the application, the Board of Trade made an order officially referring the draft for an opinion from the Attorney and Solicitor General.[153] If the law officers, in turn, returned the petition to the board with approval, the board typically advised the Majesty in Council to grant the charter or letters patent. The monarch would then typically grant approval and make "an order commanding one of the principal Secretaries of State for the Colonial Department, to prepare a warrant for the royal signature, directing the Attorney and Solicitor General to prepare the Bill for passing the charter."[154]

The legal justifications for empire, which, as outlined in detail in chapter 1, drew heavily on roman law precedents and the law of nations, were incorporated at the first stage, where the justification for the charter was made through a petition to the Majesty in Council. The crown played an active role in deciding whether a proposed overseas activity would be sanctioned. These decisions were based in part on foreign policy goals and considerations; James I, for example, was anxious to avoid sparking conflict with Spain, while increasing trade was becoming a central

[151] Ken MacMillan, *Sovereignty and Possession in the English New World: The Legal Foundations of Empire, 1576-1640* (Cambridge: Cambridge University Press, 2006) at 82.
[152] Henry Sherman, *The Governmental History of The United States of America: From The Earliest Settlement To The Adoption Of The Present Federal Constitution* (Hartford: Case, Lockwood, 1860) at 382-385.
[153] Charles Deane, "The Forms in Issuing Letters-Patent by the Crown of England" (Cambridge: John Wilson & Son, 1870) at 5-6.
[154] *Ibid.*

policy concern.[155] There was also concern that the charters be *legal.* The petitioners, therefore, included legal justifications for the proposed overseas activity. John Dee's *Limits of the British Empire* was submitted to Queen Elizabeth and Lord Burghley, leading to instructions for Martin Frobisher and a patent for Humfrey Gylbert. Richard Hakluyt's *Discourse of Western Planting* was submitted to Secretary Walsingham to secure a patent for Sir Walter Raleigh.[156] The legal justifications for empire being developed by legal thinkers were turned into formal legal instruments through this process.

The instruments themselves, then, spoke to and reflected different legal orders. In so far as they were concerned with legitimizing claims to an external audience (in the European world), they draw on the language of the law of nations and roman law. Having secured claims vis-à-vis European rivals, they extended domestic British property law and ancient liberties. Both these internal and external functions, and the distinct bodies of law drawn on in shaping them, are evident in the small number of British letters patent which applied to the present-day Maritimes. Though the journeys of Cabot and Gylbert may, in British eyes, have given them rights in the region based on discovery, those claims could not be legitimized absent acts of possession.[157] Since those claims were not followed by any settlement in the northeast, and given the existence of competing French claims, a number of overlapping and competing charters emerged.

The Charter of New England of 1620, for example, granted extensive rights up to the 48th parallel, which would include all of the present-day Maritime Provinces. It reads:

> between the Degrees of Fourty and Fourty-Eight, that there is noe other the Subjects of any Christian King or State, by any Authority from their Soveraignes, Lords, or Princes, actually in Possession of any of the said Lands or Precincts, whereby any Right, Claim, Interest, or Title, may, might, or ought by that Meanes accrue, belong, or appertaine unto them, or any of them.[158]

In the early 17th century, a new name for the region emerged. A Scotsman, Sir William Alexander, was granted the whole of the Maritime Provinces and the Gaspé Peninsula by royal charter in

[155] For discussion of James I's foreign policy concerns see MacMillan, *supra* note 151 at 82.
[156] *Ibid* at 80.
[157] *Ibid* at 84. As MacMillan writes, a legal claim required that "The territory had been discovered by English travail and no other Christian prince had taken physical possession. This was the formula that, according to Roman law and the type of arguments propounded in England since Dee's time, assured the crown that it had the right to establish sovereignty by virtue of first discovery, an inchoate claim that could be finalized by royal authorization and the establishment of effective occupation."
[158] Full text available online at https://avalon.law.yale.edu/17th_century/mass01.asp

1621.[159] The colony of "New Scotland" would thus emerge as the project of a single colonial promoter.[160] The name "New Scotland", later changed to the Latin form, Nova Scotia, would compete with "Acadie" for supremacy among European diplomats and cartographers for the next century. Alexander had solid state support through his connections to powerful aristocratic families, but he lacked connections with the merchant class and had difficulty mobilizing merchant capital. He therefore created "the order of the knights-baronets of Scotland, a scheme designed to raise funds for New Scotland by conferring titles of honours and lands in the colony to individuals who would make financial contributions in return."[161] This found little success. To strengthen his efforts, he chartered the English and Scottish Company with the English Kirkes family. As John Reid explains, "With the formation of the English and Scottish Company, Alexander was freed from the possibility of English competition in New Scotland and proceeded to send a colonizing expedition."[162] Nonetheless, Alexander's efforts at establishing a colony were unsuccessful and came to a more or less official end with the transfer of the region to France in 1632 under the Treaty of St. Germaine-en-Laye. The region was once again the subject of imperial grant in 1655. Oliver Cromwell granted the fur trade monopoly in 'Acadia' to Charles de Latour, Sir Thomas Temple, and Williame Crowne.[163] Thomas Temple received commissions as governor of Nova Scotia from both Cromwell and Charles II.[164] At the same time Alexandre Le Borgne was appointed as governor of Acadie by the King of France, a conflict that is discussed in more detail below.

The justifications for empire outlined in chapter 1 worked their way into domestic British law in two ways. First, the petitions for charters and letters patent were crafted by colonial promoters incentivized to create *legal* justifications for overseas colonization. They did so by drawing on the civil law tradition, specifically the body of Roman law that informed the law of nations. Second, the common law, in cases such as *Calvin's Case,* explicitly endorsed doctrines of conquest which had supported European aggression against non-Christian peoples since the

[159] John G. Reid, "Sir William Alexander and North American Colonization" in John G. Reid, *Essays on Northeastern North America: Seventeenth and Eighteenth Centuries* (Toronto: University of Toronto Press, 2008) at 25-26.
[160] Reid, "The Lost Colony of New Scotland", *supra* note 73 at 54.
[161] *Ibid* at 55.
[162] *Ibid.*
[163] Beamish Murdoch, *History of Nova Scotia, Or Acadie Vol. 1* (Halifax: James Barnes, 1865) at 134.
[164] *Ibid* at 134; Rawlyk, *supra* note 73 at 26.

crusades.[165] These are some of the specific legal mechanisms and modes of legal reasoning through which the doctrine of discovery was applied in North America.

In the early imperial era, British sovereigns thought of these dominions "rather as part of their own demesnes than as subject to the jurisdiction of the state."[166] In the early 17th century, Ministers specifically told parliamentarians that they could not legislate in respect of colonies.[167] Colonial affairs were understood as being governed exclusively through the exercise of the royal prerogative and the colonies themselves as belonging to the Monarch personally. While British law applied, it was not statutory or common law, but law crafted by the executive. Something of a domestic apparatus began to emerge to govern the colonies in the latter part of the 17th century, with the First Minister for colonies given office under Charles II following the restoration in 1660. Charles II, seeking "a more uniform way of civil government"[168], created a council on foreign plantations in 1660. In 1672 the council became the board of trade and plantations.[169]

In the context of a growing bureaucratic structure administering colonial affairs, prerogative instruments continued to play a central role. By the 18th century a different form of prerogative legal instrument took prominence, with Commissions and royal instructions replacing charters as the most common legal instrument. Legal authority was delegated by way of commissions that outlined the scope and nature of legal authority being delegated. The commissions, which might, for example, appoint a governor of a colony and outline their responsibilities, were followed by royal instructions.[170] This represents something of a second phase in the development of imperial constitutional law, as a more structured form of delegated governance based on divisible powers took shape. The creation of subordinate colonial governance institutions was directed by the exercise of the Royal Prerogative while the imperial government retained oversight through repugnancy provisions and powers of disallowance.[171]

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[165] 7 Coke Report 18 a, 77 ER; Williams, *The American Indian, supra* note 103 at 200.
[166] Arthur Mills, *Colonial Constitutions: An Outline of the Constitutional History and Existing Government of the British Dependencies* (London: John Murray, 1856) at 2.
[167] *Ibid* at 2.
[168] *Ibid* at 5.
[169] *Ibid* at 6.
[170] T. Olawale Elias, *British Colonial Law: A Comparative Study of the Interaction Between English and Local Laws in British Dependencies* (London: Stevens & Sons, 1962) at 39
[171] Bruce Clark outlines the delegated nature of this authority and the constitutional structures created thereby in Bruce Clark, *Native Liberty, Crown Sovereignty: The Existing Aboriginal Right of Self-Government in Canada* (McGill-Queen's University Press: Montreal & Kingston, 1990). See Brown, "British Statutes", *supra* note 134 at 102.

Throughout the 17th century, the reach of this form of British law in the Maritimes was extremely limited. While charters had granted the territory to colonial promoters, these acts had little to no effect on the residents of the territory, nor were they respected for long, if at all, by competing imperial powers. It was not until the 18th century that British imperial law began to impact the Maritimes in a more significant way. Several military commissions were of immediate importance in the Maritimes. The first were the many military commissions which provided authority for military action in the region. British attacks on Port Royal in 1690 and 1702, for example, were authorized by such commissions. Interestingly, Sedgwick's raid in 1654 was not authorized. The Massachusetts general court was furious with Sedgwick for the attack, demanding to know "by what authority" he had undertaken it. Hierarchical structures of delegated rule set expectations for behavior. This illustrates the reach of English imperial law insofar as the activities in the region were supported by imperial legal authority. The incident also shows the limited reach of English law; legal justifications and authority would be used, but if they were not the English government had little immediate recourse.

Following the conquest of Port Royal in 1710, the early governors were all high-ranking military officials and often received commissions reflecting their dual role.[172] Until at least 1749, and despite the efforts of military leaders to establish institutions of civil government and distinguish their military and civil roles, the British holdings in the colony were essentially under military-rule. Among the most important British legal instruments of this period were the commissions to Francis Nicholson and Samuel Vetch which led to the capture of Port Royal in 1710. Nicholson and Vetch planned the 1710 attack and were instrumental in lobbying imperial authorities to permit it. They travelled to London to seek authority for the mission and were granted the authority to carry the attack out. Nicholson was "Commissioned 18 March 1709/10 commander-in-chief of an expedition to recover Nova Scotia for the queen"[173]

Nicholson was also to be appointed governor. If British law could be said to have gained a foothold following the 1710 conquest, the legal instruments through which it was extended were the commissions and instructions to Nicholson and the terms of capitulation or surrender received

[172] See for example the Commission to Samuel Vetch, Governor of Nova Scotia and Annapolis Royal, 17 August 1717 in Nova Scotia Archives: Records and Manuscripts From British Repositories: Letters Patent, Commissions and Instructions, Commissions to Governors, Nova Scotia 1710-1776, MG 40 B12 Pt.1 at 9-10.

[173] Bruce T. McCully, "Nicholson, Francis", in Dictionary of Canadian Biography, vol. 2, University of Toronto/Université Laval, 2003 accessed March 4, 2017, http://www.biographi.ca/en/bio/nicholson_francis_2E.html.

upon French surrender. This illustrates the limited reach and scope of the law in terms of the territory, legal subjects, and subject-matter to which it applied, and it illustrates the limited extent to which a British territory had been created. The reach was limited to the fort at Port Royal. The legal subjects were primarily the handful of British soldiers remaining there who were bound by the legal authority delegated to their leaders. The local population was not directly impacted by these legal instruments. Even the New England soldiers who had carried out the attack had a tenuous relationship to British authority. For domestic British law to extend, changes in external law would be required. Yet, it is precisely this pretence, that legal authority over the territory could be gained by agreement between European sovereigns, which this work seeks to challenge. Specific legal mechanisms and instruments purporting to create or exercise legal authority in the region illustrate the tenuous nature of British control and limited reach of their legal authority.

Nicholson received two commissions in 1712. One spoke to his military role, appointing him the "General and Commander in Chief" of the British forces "employed or to be employed in our Province of Nova Scotia or Acadia."[174] This commission also delegated authority to Nicholson to make rules and ordinances, though they were only applicable to the British soldiers in Nova Scotia.[175] Appropriate punishment for mutiny or desertion were central concerns. Nicholson was appointed Governor under a second 1712 commission. Though this extended his authority to all British subjects in Nova Scotia, it did not delegate the authority to make statutes, rules or ordinances. As the Mi'kmaq, Wolastoqey, and Acadians who lived in the region were not British subjects, Nicholson's authority, even as governor, was limited. Later commissions to Vetch in 1714 and Cornwallis in 1749 did not delegate legislative powers and provided a limited basis for establishing meaningful territorial jurisdiction beyond that which may have followed soldiers or traders at they moved outside the forts and settlements.

Richard Philipps' commission in 1719 was distinct in that it included an instruction to create a twelve-person council and an assembly, both with legislative capacity.[176] He was instructed to govern not only on the basis of the laws of Britain, but "according to such reasonable

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[174] Commission to Francis Nicholson, *Commission and Instructions, Nova Scotia Archives,* at 7 in Nova Scotia Archives: Records and Manuscripts From British Repositories: Letters Patent, Commissions and Instructions, Commissions to Governors, Nova Scotia 1710-1776, MG 40 B12 [*Nicholson's Commission*].
[175] *Ibid.*
[176] Commission to Richard Philipps, *Commissions and Instruction, Nova Scotia Archives*, at 17 in Nova Scotia Archives: Records and Manuscripts From British Repositories: Letters Patent, Commissions and Instructions, Commissions to Governors, Nova Scotia 1710-1776, MG 40 B12 [*Philipps' Commission*].

laws and statutes as hereafter shall be made and assented to by you with the advise and consent of our Council and Assembly of our said province."[177] This was the first imperial instrument which began to establish the basis for civil government in the province. In this, the British-law-derived constitutions of the Maritime provinces were established through the issuance of prerogative instruments of imperial law. Governor's commissions and royal instructions formed the basis of this constitutional structure.[178] The constitutional structure of the colonial governments and the legal authority accruing to those institutions was detailed in these instruments. The influence of the Imperial Parliament remained negligible, limited primarily to the strict requirement that colonies enforce the Shipping and Navigation Acts.[179]

As outlined above, by the mid-18th century, a well-developed body of imperial constitutional law had taken shape. It was, however, intensely contested. In the 17th century the dominant argument was the colonial "possessions" were the personal demesne of the Crown. They were governed under the Royal Prerogative, beyond the reach even of the imperial parliament. The status of the laws and customs of colonial peoples – the colonized peoples over whom the Crown claimed sovereignty – were also subject to debate. The doctrine of continuity held that they carried on until such time as explicitly modified, while several justifications, such as those in *Calvin's Case,* were put forward as exceptions to that rule. Drawing on justifications that can be traced at least to the crusades, "heathen" laws and rights to property were argued to be abrogated immediately and owed no recognition.

Two processes complicated this picture. First, the development of parliamentary sovereignty led many to argue that the imperial parliament could legislate in colonies if it so desired. There was no such thing as a Crown possession beyond the reach of parliament. Second, As governance developed in colonies, they become more independent from the imperial centre, asserting various degrees of independence. Massachusetts, for example, frequently contested the idea that it was subject to imperial Crown or parliament. These two factors resulted in tensions in imperial constitutional law as the scope of authority of the various parties was subject to constant negotiation and contestation. In addition to these two processes, which one might consider internal

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[177] *Ibid.*
[178] Sir John G. Bourinot, *Builders of Nova Scotia* (Toronto: The Copp-Clark Co., 1900) at 27-28. As Elizabeth Brown has stated, "[t]hese commissions instructions, and statutes were the constitutional framework within which the statutes of Great Britain were introduced into the several Canadian jurisdictions." Brown, "British Statutes", *supra* note 135 at 102.
[179] Mills, *Colonial Constitutions, supra* note 166 at 5.

to imperial constitutional law, Indigenous peoples met imperial claims as active agents who helped define the scope of what imperial powers could hope to achieve. Much of this in the 17th and early part of the 18th centuries was outlined above. The crucial development in the later period is the *Royal Proclamation, 1763.* The Proclamation verges on the type of intersocietal law that is discussed in the following chapter. Though it does incorporate elements that that body of law, however, it is a unilateral imperial instrument that outlines the constitutional authority of actors under imperial constitutional law. It is, in this sense, internal to imperial constitutional legality.

b) *Acts of the Imperial Parliament*

The laws of Parliament also must be considered as an aspect of imperial law. The specific role of Parliament in imperial affairs was often contentious. The reach of legislation, of Parliamentary authority, was contested not only by peoples who resisted British imperial rule in their territories, but within Britain itself. In the Elizabethan era, colonization was dealt with exclusively through the royal prerogative and the executive branch. Following 1688, with Parliamentary sovereignty entrenched, from a constitutional perspective Parliament could legislate anywhere the Crown assumed control. In practice this was uncommon, in part because colonies resisted such impositions. A second, less visible but much more common place, way that statutes of the imperial parliament applied was through the doctrine of reception. The doctrine was applied differentially depending on how the colony was acquired. Where it was acquired through settlement, the laws of Britain were said to follow the settlers. Where it was acquired by conquest or cession, the date of reception was when a local legislature was established. Once a local legislature was promised, no subsequent Imperial legislation would apply unless explicitly stated.[180] Thus, two types of legislation must be considered.

Of legislation applying directly to the Maritime region, the Navigation Acts had the clearest impact. The Navigation Acts prohibited trade between British subjects and non-subjects. So long as the Acadians were not subjects, the Navigation Acts could be, and were, used by the colonial government to prohibit the lucrative trade with New England. The threat of using the Navigation Acts for this purpose was made explicit in attempts to compel the Acadians to take an oath of

[180] Mills, *Colonial Constitutions, supra* note 166.

allegiance. Of course, this prohibition would only impact Acadian behavior if it could be enforced. For the most part, it could not. Illicit trade between the Acadians and New England was an important part of the Acadian economy, illustrating the limited reach of imperial and colonial authority in the late 17th and early 18th centuries. The unglamorous, though crucial, spending bills that authorized the spending required to establish, and then support, the settlement at Halifax should also be noted at this juncture.

The other type of Act that could have impacted the Maritimes prior to 1784 were those that were received as the law of Nova Scotia or Prince Edward Island.[181] English law was received in Nova Scotia in 1749 and Prince Edward Island in 1769.[182] After these dates any English law passed before the date of reception would be applicable in the colonial courts, such that the whole of the English criminal law, for example, applied at that time.[183] There are also a host of Acts which, though they would be received at the times noted above, impacted the exercise of law and authority in the colony before then. The most immediate example is the *English Test Act* of 1673, which was cited as the reason that Catholic Acadians could not participate in civil government in the colony.[184] There are a host of other important pieces of legislation that were incorporated into the law of Nova Scotia, for example, *The Petition of Right* (1628),[185] *Tenures Abolition Act* 1660,[186] the *Statute of Frauds* (1677).[187] The impact of such acts is both hard to overstate and negligible, if any sense can be made of such a contradictory statement. Over the course of several centuries, a series of foundational acts of Parliament reconfigured the relationship between the Crown and Parliament and restructured feudal property relations. As a result, the style of government and modes of property ownership in Nova Scotia were shaped by these pieces of legislation. Thus, whether because the acts continue to apply directly or because of how foundationally they have shaped the systems of governance and property, the impact of these acts can be hard to overstate.[188]

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[181] Establishing the date of reception in the Maritime Provinces is not straightforward. See for example: Margaret McCallum, "Problems in Determining the Date of Reception in Prince Edward Island" (2006) 55 UNB LJ 3; D G Bell, "A Note on the Reception of English Statutes in New Brunswick" (1979) 28 UNBLJ 195; D G Bell, "The Reception Question and the Constitutional Crisis of the 1790's in New Brunswick" (1980) 29 UNBLJ 157.
[182] See Philip Girard, Jim Phillips, and R. Blake Brown, *A History of Law in Canada, Volume 1: Beginnings to 1866* (Toronto: The Osgoode Society, 2018) at 278-279.
[183] *Ibid.*
[184] Faragher, *supra* note 65 at 139, 199.
[185] 3 Car 1 c 1
[186] *Tenures Abolition Act* 1660 (12 Car 2 c 24).
[187] *Statute of Frauds* (1677) c. 3 (Reg 29 c 2).
[188] Many of these acts still apply in their original form in parts of Canada where they have not been modified. The Statute of Frauds, for example, still applies in Alberta and attracts litigation. See Jonnette Watson-Hamilton, "Two

Yet, given the dates of reception outlined above and the lack of institutions of civil government - including courts - or territorial control until the mid-18th century, the direct application of statutory British law occurred only for the latter part of the period covered here, and there only occasionally.

c) *Colonial Law of Nova Scotia*

Though forces from Britain and New England conquered the fort at Port Royal in 1710, it was not until 1719 that Governor Philipps was instructed to form a twelve-person council and an assembly, both with legislative capacity.[189] At Port Royal, laws were made by an appointed executive council from 1720 until 1749. The capital was moved to Halifax that year, though a legislative assembly was not established until 1758. Present-day New Brunswick was a disputed borderland until after the fall of Quebec in 1758 and would not become an independent province until 1784. Prince Edward Island [Île St.Jean/Epekwitk] and Cape Breton [Île Royale/Unima'ki] remained under French sovereignty – at the European law of nations - until 1763 when they were ceded to Britain at the Treaty of Paris and annexed to Nova Scotia in the Royal Proclamation issued that year.[190] Prince Edward Island became an independent colony in 1769, at which point a colonial government, consisting of a Lieutenant Governor and a Council, was formed. The Council possessed both executive and legislative powers, while an elected assembly was formed and met in 1773.[191] Colonial law in the pre-Loyalist era, then, refers to law created by the governments in Nova Scotia from 1720-1784 and Prince Edward Island from 1769-1784.[192]

Though Philipps was instructed to establish a council and legislative assembly in 1719, only the council would take shape, as there were not enough British subjects to support an elected legislative assembly. As discussed above, the *English Test Act*, which prohibited Catholics from holding public office, and the refusal of most Acadian settlers to take an oath of allegiance, combined to exclude the Acadians from official roles in the civilian government. The effect was to preclude the development of civilian government altogether. Thus, the council would be the

cases concerning the Statute of Frauds (1677, U.K.)" Ablawg, Feb 26, 2008, considering *Leoppky v Meston*, 2008 ABQB 45, *Wasylyshyn v Wasylyshyn*, 2008 ABQB 39.

[189] *Philipps' Commission*, *supra* note 177 at 17

[190] Mills, *Colonial Constitutions, supra* note 166 at 214.

[191] Arthur Berriedale Keith, *Responsible Government in the Dominions,* (Oxford: Clarendon, 1912) at 5; Bourinot, *Builders of Nova Scotia, supra* note 178 at 30.

[192] Nova Scotia was divided into three colonies in 1784, Nova Scotia, New Brunswick, and Cape Breton. The latter merged with Nova Scotia in 1820.

only British law-making body in the region until mid-century. The legislative authority of the council was limited both geographically and in respect of the scope of delegated authority which created the council. As a result, "[t]heir acts did not extend beyond temporary regulations relative to trade in grain in the Bay of Fundy, or else local enactments touching the people of the village of Annapolis."[193] The territorial reach of the council's positive laws was limited to Annapolis Royal and trade routes into the bay. Even on the latter point, the Acadians frequently ignored prohibitions on trade with New England from communities around the Bay of Fundy. The legal subjects touched by the council's enactments were those British subjects, primarily soldiers, at Annapolis, and some of the Acadian population living in the village around the fort. The subject matter focused on local matters of concern only to Annapolis Royal.

Nonetheless, the basis for government in the colony was established during this period, and law was created and extended through more than enactments of the council. The council also created law through its judicial role. Acadians themselves often looked to the council for resolution of disputes over land. A range of legal actors also began to extend law through the territory. The first Surveyor General, David Dunbar was appointed September 30, 1730.[194] His job included implementing the "broad arrow" policy, wherein lands could not be granted until they were first searched for lumber suitable for the Queen's Royal Navy. Suitable trees for masts were marked with an arrow.[195] This legal authority, then, extended quite broadly in a territorial sense, but was incredibly "thin", dealing with a very narrow issue. Like the oaths of allegiance, surveys were an important legal ritual that sought to expand spaces of British legality.

In 1749 the seat of government moved to the newly established settlement at Halifax, where Governor Cornwallis appointed a twelve-person executive council.[196] Cornwallis was delegated the authority to create an elected assembly in his 1749 commission, though one would not be called until 1758.[197] At imperial constitutional law, this delay had consequences for the authority of the Governor and Council. According to the rule in *Campbell v Hall,* the authority of the executive branch to legislate in colonies under the auspices of the royal prerogative was abrogated when a

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[193] Bourinot, *Builders of Nova Scotia, supra* note 178 at 22; For a discussion of the symbolic importance of renaming Acaida and its towns see Wicken, *Mi'kmaq Treaties, supra* note 21 at 99.
[194] Ralph S. Johnson, *Forests of Nova Scotia* (Halifax: Department of Lands and Forests, 1986) at 39.
[195] *Ibid.*
[196] *Ibid.*
[197] Keith, *supra* note 191 at 4-5. Keith suggests that the legislature then established was done so "under the royal prerogative to create a legislature in a settled Colony."

legislative assembly was promised. As a result, from 1749-1758, the Governor and Council in Nova Scotia would have been without authority to legislate.[198] Though *Campbell v Hall* was not delivered by the Privy Council until 1774, the legislative authority of the governor and council in this period was called into question in 1755, with the Attorney and Solicitor General of England stating in that "the Governor and Council of Nova Scotia had no authority from His Majesty to make laws."[199] That is, the Attorney and Solicitor General held that the royal commission granted to Governor Cornwallis did not delegate legislative authority.[200] The presumption was that there was no residual prerogative legislative authority in the executive; any legislative authority must have been strictly delegated.[201] According to British imperial law, the granting of a legislature reduced the scope for the exercise of the royal prerogative. The territorial reach of British law shifted somewhat as the Crown had a reduced level of legal authority and authority was increasingly exercised by colonial bodies. Only after 1758, when an assembly was called and a systematic approach to crafting legislation was implemented, did a body of "colonial" law truly began to emerge.

The territorial reach of this British-colonial law and the subjects it aimed to bind can be gleaned in part from the subject matter of the laws themselves. From 1758-1783, the Assembly passed 433 Acts. Perhaps of third of these were no longer in force as of their consolidation by Richard Uniacke in 1805.[202] Much of the legislation was passed in initial form in the first years of the assembly, with later acts focused on amendments to these. Nonetheless, it is a substantial body of legislation. The legislation drew inspiration from that of the British parliament. The bulk of the

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[198] Robert Hamilton, "After *Tsilhqot'in Nation:* The Aboriginal Title Question in Canada's Maritime Provinces" (2016) 67 UNB LJ 58.
[199] Murdoch, *supra* note 163 at 189.
[200] Keith, *supra* note 191 at 4-5, Bourinot, *Builders of Nova Scotia, supra* note 178 at 52.
[201] A decision delivered of Chief Justice Belcher had long been thought to be consistent with the views of the Imperial law officers. For example. John Bourinot wrote: "[d]uring nine years the governor-in-council carried on the government without an assembly, and passed a number of ordinances, some of which imposed duties on trade for the purpose of raising revenue. The legality of their acts was questioned by Chief Justice Belcher, and he was sustained by the opinion of the English law officers, who called attention to the governor's commission, which limited the council's powers" (Bourinot, *supra* note 179 at 52-53). It has been shown, however, that Belcher in fact believed that "the primitive circumstances of Nova Scotian society justified the application of the 17th-century Virginian precedent of legislating for a colony in the absence of an elected assembly Nonetheless, it is important to note that, while the characterization of Belcher's decision was mistaken, the English law officers did determine that the legislative activity of the Governor and Council was invalid with reference to the Governor's commission." S. Buggey, "Belcher, Jonathan," in Dictionary of Canadian Biography, vol. 4, University of Toronto/UniversitéLaval,2003– ,accessedAugust 4, 2015, http://www.biographi.ca/en/bio/belcher_jonathan_4E.html.
[202] Richard John Uniacke, *The Statutes at Large, Passed in the Several General Assemblies Held in Her Majesty's Province of Nova-Scotia: From The First Assembly, 1758-1804* (Halifax: John Howe and Son, 1805).

legislation can be put into four categories: public morals and crime, trade, public works, and public institutions (courts). These Acts demonstrate the reach of the law through the subject-matter they legislate about and illustrate how the spaces of colonial legality were created through statute.

In the first category, public morals and crime, we find a law prohibiting trespasses and requiring fences of a certain height (1758), a wills and estate act (1758), an act concerning marriages and divorce, punishing incest and adultery, and categorizing polygamy as a crime (1758), a law for preventing frauds and perjuries (1758), an act for "punishing criminal offenders" which outlawed heresy, cursing, drunkenness, and counterfeiting (1758), and an act providing for the support of bastard children and outlining provisions for the punishment of their birth-parents (1758). Though these acts were not explicitly bound geographically, the nature of the subject-matter was such that it required British legal-subjects to whom it could adhere. That is, the laws could not extend absent subjects to apply to. The geographical reach of such laws, then, was limited to areas of British settlement at Halifax, Port Royal, and Lunenburg.[203] Many other laws in this category had explicit geographical bounds. These include laws prohibiting the unnecessary firing of guns in the town or suburbs of Halifax (1758), preventing the establishment of distilleries in the town limits of Halifax (1758), making or shooting fireworks in the city (1762), preventing the disorderly riding of horses in Halifax or any other town (1758), and An Act for Encouraging the Improvement of Lands in the Peninsula of Halifax, and Further Quieting Possessions (1758).

In respect of trade, laws were passed establishing import duties on rum and liquors (1758), prohibiting the exporting of raw hides, sheep or calf skins except to Great-Britain (1761), and providing for import duties on: sugar, bricks, and lumber (1761), billiard tables and shuffle boards (1763), and tea, coffee, and playing cards (1770). Such laws would apply only where large ports were operating and only to individuals engaged in trade. As such, the reach was limited primarily to Halifax. Laws pertaining to public works also applied almost exclusively to Halifax, such as acts for establishing a house of correction or workhouse in Halifax (1758), erecting a light house at mouth of Halifax harbour (1758), and establishing a public school in Halifax (1780). Another provided for the construction of a lighthouse on Sambro Island, just off the coast.

[203] I have labelled Lunenburg and area of "British settlement" here, aware that it was settled by German-protestants. I have done so because the settlement activity was directed by the British government and the Protestantism of the settlers was thought by the British to ensure their loyalty.

The creation of structures of civilian government also required the development of institutions and procedures governing their activity. Thus, we find acts for determining differences by arbitration (1768), for establishing the times of holding the Supreme Court (1768), regarding pleadings, suits, etc. (1764), and regulating petit juries (1759). The charter incorporating Halifax as a city would not come until 1851.[204] It was not until 1760 or so that other settlements begun to be regulated in a significant way. Liverpool, for example, which was founded in 1760, was initially established on unsurveyed land.[205] The vast majority of the laws passed by the colonial legislature between 1758 and 1784 applied, both in terms of subject-matter and legal subjects, only to the town of Halifax. In the late 1750's and early 1760's, specific acts began to first create, and then apply to, other townships. There were exceptions, laws which were designed to apply more broadly. *An Act to Prevent Waste and Destruction of Pine or other Timber Trees, on Certain Reserved and Ungranted Lands in This Province* (1774), for example, reserved all lands on the St. John River "above present settlements" for the use of the navy. Similarly, *An Act to prevent trespass on Crown Lands* (1767), primarily concerned with preventing squatters on 'Crown' land, applied to all 'ungranted' lands.[206]

Another piece of legislation of note dealt with Acadian lands and preventing suits brought on account of their dispossession in 1755. In the *Grand Derangement*, the British removed Acadians from their homes, forcing them into exile. It was a policy that had been discussed for decades but only became feasible mid-century. Following this mass dispossession, the British authorities hoped to settle Acadian farmland with Protestant planters. They were concerned, however that Acadians might disturb this plan by brining suits challenging their dispossession. The colonial legislature, therefore, passed *An Act for the quieting the possessions to the protestant grantees of the lands formerly occupied by the French inhabitants, and for preventing vexatious Actions relating to the same* (1759 c.III). The Act perfected the title of the new inhabitants and prevented former Acadian inhabitants from seeking redress in the colonial courts.[207] With the statute to quiet titles to lands formerly held by Acadians, colonial law extended to territory

[204] See: An Act Concerning the City of Halifax (1851) as reprinted in Beamish Murdoch, *The Charter and Ordinances of the City of Halifax* (Halifax: William Gossip, 1851) at 5 – 43.
[205] Elizabeth Mancke, *The Fault Lines of Empire: Political Differentiation in Massachusetts and Nova Scotia, ca. 1760-1830* (New York: Routeledge, 2005) at 45.
[206] All the legislation mentioned in the preceding paragraphs is available in Uniacke, *supra* note 202 and are cited in full in the bibliography.
[207] *The Perpetual Acts of the General Assemblies of His Majesty's Province of Nova Scotia* (Halifax, NS: Robert Fletcher, 1767), 73-75.

formerly occupied by Acadians. As Christopher Tomlins writes, as important as force to processes of colonialism "are the techniques that permit one to plan, explain, and justify one's appropriations, to and for oneself. Colonization, this suggests, has an epistemology of its own – a theory of knowing that enables the processes of 'discovery' and ordering (or more accurately re-ordering) inherent in appropriation to take place. Colonization is a matter of intellectual as well as material possessing that, in the act of taking, reinvents what it appropriated for its own purposes."[208] The history of Acadian dispossession illustrates the point. Force was used to effectuate the dispossession. Law was then used to secure the dispossession, erasing previous legal interests in land and preventing recourse. This took place within a narrative of British rights of possession and supposed Acadian obstinance in refusing to become 'good' British subjects, a move that would have seemingly also required them to become protestant. In terms of the territorial reach of the law, however, it remained limited to Acadian settlements around the Bay of Fundy. This is reflected in a maps of the era that identify "Mikmaks and Cap Sable Indians" as occupying broad swaths of the province.

Most British maps of the era include present-day New Brunswick, reflecting the British assertion of sovereignty over the region before the fall of Quebec, during which time the British and French were actively asserting rights to the region. This continues a trend from the negotiations leading up to the Treaty of Utrecht, in which both French and British negotiators used maps that were designed to make territorial assertions rather than reflect realities.[209] As Jeremy Black argues:

> Maps are not life-size; they are models, not portraits, let alone photographs, of life. Most are minute compared with what they depict. As a result, map-makers have to choose what to show and how to show it, and by extension, what not to show. The word 'show' is deliberately chosen. It conveys a sense of art and artifice, of the map-maker as creator rather than reflector. A map is a show, a representation. What is shown is real, but that does not imply any completeness or entail any absence of choice in selection and representation.[210]

In other words, maps, especially ones drawn in the context of decades of imperial contests over the control of a region, must be considered in light of the objectives and biases of the map-maker. The identification of Indigenous territories *within* firmly set territorial bounds is important in this light. The prominence of Indigenous people over large swaths is distinguishable from small ports

[208] Tomlins, "Law's Empire", *supra* note 2 at 27.
[209] See generally, Lennox, *Homelands and Empires, supra* note 147.
[210] Jeremy Black, *Maps and Politics* (Chicago: University of Chicago Press, 1997) at 11.

identified as British, which have specific points identified alongside small text. This reflects what we know the historical situation to have been, insofar as British settlement was limited to a small number of specific locales surrounded by broader areas of Indigenous control. Maps reveal, to the extent of the cartographer's knowledge, what regions were inhabited by whom. They also reflect British policy, which in the 18th century recognized no incongruity between asserted sovereignty at inter-European law and the presence of non-subject peoples. Certainly, the British strove to construe Indigenous peoples as "subjects" where possible, but, as will be discussed in more detail below, the categories of "friends" and "neighbours" – or indeed enemies - prevailed for the better part of the 18th century. The inclusion of Indigenous peoples at all in 18th century maps is of interest and may reflect the desire of the map maker to provide needed information for the audience. The Mi'kmaq were at war with the British for much of the 1750's; knowing their location would be important.

Areas of British settlement were minimal when the colonial legislature began producing colonial law. Accordingly, colonial law was concerned almost exclusively with the local affairs of the township of Halifax and the few new settlements that had just been established. The result is the development of "a unique jurisdiction enclave."[211] Such enclaves would have been familiar to the British. Cockburn used the phrase in reference to a 'county palantine', in the instance the Isle of Ely under the authority of the Bishop of Ely. Counties palantine were areas wherein nobleman or religious leaders exercised powers which rivaled those of the crown. As Cockburn describes the operation of the courts of assize in counties palantine, "thirteenth-century bishops claimed almost complete immunity from secular justice within their ancient franchise, reserving all pleas depending on anything emergent within the Isle to be determined before their justices at Ely, and asserting their rights against the king's itinerant justices."[212] That this form of "unique jurisdiction enclave" was in the contemplation of those contemplating the legal parameters of imperial expansion is clear from the fact that the term 'county palantine' itself was included in the proprietary charters.[213] While the royal or provincial colonies were no doubt under greater crown supervision, the mention of counties palantine demonstrates an acceptance of complex jurisdictional overlap and the possibility of jurisdictional enclaves within broader constitutional

[211] J.S. Cockburn, *A History of English Assizes, 1558 – 1714* (Cambridge: Cambridge University Press, 1972) at 33.
[212] *Ibid.*
[213] See for example Albert J. Martinez, Jr., "The Palatinate Clause of the Maryland Charter, 1632-1776: From Independent Jurisdiction to Independence" (2008-2010) 50:3 Am J of L Hist 305.

structures. Thus, while the British may have believed they held the legal authority to extend colonial law throughout the whole of the region, in practice its extension was limited to jurisdictional enclaves focusing on local affairs until the latter part of the 18th century.

iv) French Law

As in the case of British law, there were two forms of domestic French law at work in the region: French imperial law and French colonial law. Imperial law refers to those imperial instruments and doctrines that created the legal regime structuring overseas colonization. As above, these are considered internal law in order to draw a distinction between transnational legal orders, such as the law of nations or the European-Indigenous treaty relationships, and imperial forms of colonial rule based on delegated forms of authority.[214] The second type of relevant French laws were the laws developed within the colony itself by institutions of civil authority established on the authority of the French crown. As outlined in the discussion of Acadian law, a distinction is made here between French colonial laws and Acadian law. The distinction delineates between those laws that developed within the distinct Acadian political community and those developed by the apparatus of French colonial government. This is not always an easy distinction to maintain, particularly where Acadian communities and individuals used French colonial law. Yet, it is a worthwhile distinction, as it illustrates the pluralism and hybridity of the region; in drawing a distinction between the types of law, each reveal themselves more clearly and the relationships between them become easier to grasp. French imperial and colonial law can be considered through two distinct eras; until 1663 colonization was driven mainly by individual colonial promoters and financed by wealthy merchant houses, using the company form as a tool for facilitating trade and settlement. The Compagnie de la Nouvelle France was the central colonizing force from its inception in 1627 until it was dissolved in 1663. The role of the company was such that the decades preceding 1663 are sometimes referred to as "the age of company rule in New France."[215] The role

[214] Edward Cavanagh makes this point effectively in respect of the various charters and commissions through which the Crown authorized overseas activity. Cavanagh notes that these instruments could only bind French subjects (even if cast in a language that sought to legitimize claims against other nations, explicitly comparing the relationship these instruments had to the law of nations as that of a contemporary state statute to international law: Cavanagh, "Possession and Dispossession", *supra* note 131 at 112.

[215] *Ibid* at 103. On importance of companies as state-like entities carrying out the work of empire, see Philip J. Stern, *The Company-State: Corporate Sovereignty and the Early Modern Foundations of the British Empire in India* (Oxford and New York: Oxford University Press, 2011); Andrew Phillips & JC Sherman, *Outsourcing Empire: How*

of imperial law was limited primarily to granting charters and royal commissions establishing trading monopolies. French colonial law also became much more structured, its role much more pronounced, after 1663 when Louis XIV dissolved the Compagnie de la Nouvelle France and governance was "integrated and rationalized" and directly supervised by the imperial centre.[216] The territorial reach of both imperial and colonial French law was in constant flux, ebbing and flowing as tenuous occupation and control in the region was exchanged between the British and the French and the Wabanaki remained a powerful force and, until the 18th century, a demographic majority.

a) *French Imperial Law*

Prior to 1663, French imperial law in New France was almost exclusively confined to the use of legal instruments to sanction overseas activity, particularly by individual explores, traders, missionaries, and companies.[217] The Crown had a limited role in granting lands, which were granted by companies on a seigneurial basis.[218] As a result, as Edward Cavanagh has noted, "the procedures and conventions of colonizing on the ground" were developed and put into practice by company officials and employees.[219] Further, imperial instruments could only bind French subjects and, even there, could not be meaningfully enforced. To the extent that French imperial law was able to structure "New France" through French imperial law, it was confined to authorizing the actions of colonizing agents who and it had little impact on Indigenous peoples or other European nations.[220] This should not be overstated, however. While these domestic instruments could not

Company-States Made the Modern World (Princeton: Princeton University Press, 2020); Philip J. Stern, "British Asia and British Atlantic: Comparisons and Connections," William and Mary Quarterly 63 (2006): 702; Edward Cavanagh, "A Company with Sovereignty and Subjects of its Own? The Case of the Hudson's Bay Company, 1670-1763," (2011) 26:1 C J of Law and Society 25. Of particular importance to this work, such companies can also be conceived as legal communities that contribute to the pluralism of law in colonial settings: see Philip J Stern, "'Bundles of Hyphens': Corporations as Legal Communities in the Early Modern British Empire" in Lauren Benton, and Richard J. Ross, eds, *Legal Pluralism and Empires, 1500-1850* (New York: New York University Press, 2013) at 21-48.

[216] Greer, *People of New France*, *supra* note 69 at 5.

[217] Cavanagh, "Possession and Dispossession", *supra* note 131.

[218] *Ibid* at 97-98.

[219] *Ibid* at 102-103.

[220] *Ibid* at 109-111. As Cavanaugh writes, "These companies sought royal permission to seek maximum profits by excluding other, unauthorized merchants from the realm of France only. This was in the king's power to authorize, but little else was. The subtlety of this point has sometimes escaped historians. Therefore, when Eccles suggests that grants of monopoly rights were designed 'to exclude foreigners,' and that charters could 'forestall claims by other powers,' he appears to be somewhat overestimating royal capacity. Charters, commissions, letters patent, and other similar royal instructions were issued to establish guidelines for subjects of the realm of the issuing monarch; subjects of other

bind other nations, they spoke to other European states, invoking the law of nations to provide a legal basis for colonization and legitimate sovereign claims. They also drew domestic law into the process of territorializing New France in two ways: one, the creation of chartered companies and exploratory and colonizing missions required financing and forms of co-ownership that made use of domestic property, contract, and business law; second, explorers, traders, missionaries, and colonists brought domestic French law with them. While it may be true that the reach of the French crown was limited before 1663, imperial law authorized, and provided the legal justifications for, the first century and a half of French activity in North America.

"New France", as both a concept and a nascent legal/political construct, began with Jacques Cartier's explorations of the Northeastern Coast and St. Lawrence River in the early 16th century.[221] By the 18th century, New France was a vast territory that stretched from Newfoundland to the Hudson's Bay and south to the Gulf of Mexico, encompassing the Maritime Provinces, Quebec, and the Great Lakes region.[222] French claims derived from early journeys of "discovery" took on an almost mythical place in the construction of national and imperial narratives and grounded the extension of imperial jurisdiction. Cartier sailed to the shores of Labrador in 1534 and reported back to a European audience about the lands and peoples he encountered. The lands were like "the land that God gave to Cain."[223] The people were "scary and wild."[224] A sixteenth-century European audience would have quickly linked the description of "wild" people with Cartier's biblical analogy, conceptually linking the two in an image of a land populated by "Cain's progeny."[225] This imagery also drew on the notion of the barbarian other, common in European

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sovereigns, whether 'infidel' or Christian, had minimal (if any) obligation to acknowledge the concessions contained within these documents."

[221] Greer, *People of New France, supra* note 69 at 3-10. There is an account of the naming of New France in Jesuit Relations Vol 3, Father Pierre Biard 1616 Relation of New France, and the Jesuit Fathers' Voyage to that country. CHAPTER I. "They have given it this name of New France principally for two reasons. The first, because (as I have said) these lands are parallel to our France, nothing lying between Guienne and said countries, except our Western sea, in its narrowest part more than eight hundred leagues wide; in its widest, a little less than a thousand leagues, or thereabout. The second reason is that this country was first discovered by French Bretons, in the year 1504, one hundred and eleven years ago, and since then they have not ceased to visit it… After the year 1523, Jean Verazan skirted all the coast from Florida to Cape Breton, and took possession of it in the name of his master, Francis I. I believe it was Jean Verazan who was Godfather to this title of "New France;" for Canada (a name by which they also frequently call it) is not, properly speaking, all this extent of country which they now call New France; but it is only that part, which extends along the banks of the great River Canada" *Jesuit Relations,* vol. 3 ch 1at page 38-39.

[222] Greer, *People of New France, supra* note 69.

[223] As quoted in Christophe Boucher, "'The land God gave to Cain': Jacques Cartier Encounters the Mythological Wild Man in Labrador" (2003) 35:1 Terrae Incognitae 28 at 29.

[224] *Ibid* at 28.

[225] *Ibid* at 29-30.

'civilized' nations at least since ancient Greeks constructed conceptual walls around the *polis.*[226]

Writing shortly after Cartier's first voyages, Michel de Montaigne commented on this proclivity in European thinking. In *On Cannibals,* he wrote: "I do not believe, from what I have been told about this people, that there is anything barbarous or savage about them, except that we call barbarous anything that is contrary to our own habits."[227] This insight, however, did not lead him to conceive of the "New World's" inhabitants as equal to Europeans in all regards. He concluded that "these people are wild in the same way as we say that fruits are wild, when nature has produced them in her ordinary way; whereas in fact, it is those that we have artificially modified, and removed from the common order that we ought to call wild. In the former, the true, most useful, and natural virtues and properties are alive and vigorous; in the latter we have bastardized them, and adapted them only to the gratification of our corrupt taste."[228] It follows, he reasons, that "these nations, then, seem to me barbarous in the sense that they have received very little moulding from the human intelligence, and are still very close to their original simplicity. They are still governed by natural laws and very little corrupted by our own."[229] Montaigne laments that Lycurgus and Plato could not have known of these peoples, for "they could not imagine an innocence as pure and simple as we have actually seen; nor could they believe that our society might be maintained with so little artificiality and human organization."[230] With a proto-Romantic deification of the "natural" world, Montaigne provides an anticipatory rebuttal to Hobbes, arguing that life in that state of nature is "pure and simple", uncorrupted by the vices nourished by the intellect. While it is perhaps notable that Montaigne, like Vitoria, saw Indigenous peoples as subjects of natural law, his early "noble savage" discourse did little to deter imperial ambition.

In 1603, Henri IV commissioned Pierre du Gast, Sieur de Monts as Vice-Roy and Captain-General "on sea and on land in La Cadie, Canada and other parts of New France between 40 and 60 [degrees latitude]."[231] It was not until 1663, however, that civil administration in New France was assumed by the French Crown and not until 1670 that it would be established in Acadie.[232]

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[226] See Robert A. Williams Jr., *Savage Anxieties: The Invention of Western Civilization* (New York, St. Martin's Press, 2012); Peter Fitzpatrick, *The Mythology of Modern Law* (London: Routledge, 1992).
[227] Michel Montaigne, J.M. Cohen, trans, *Essays* (Middlesex: Penguin, 1973) at 108.
[228] *Ibid.*
[229] *Ibid*
[230] *Ibid* at 110.
[231] Griffiths, *Contexts of Acadian History, supra* note 100 at 3.
[232] William C. Wicken, *Encounters With Tall Sails and Tall Tales: Mi'kmaq Society, 1500-1760* (PhD Diss, McGill, 1994) at 214 [*Tall Sails, Tall Tales*]. This had impacts on modes of colonization and how the French related to Indigenous peoples. As Edward Cavanaugh explains: In the 16th century French "interest was confined to the region's

The commissions of the first half of the 17th century were concerned primarily with establishing trading monopolies. These monopolies attracted the private investment required to finance colonization efforts, and individuals promoters and companies were responsible for much administration on the ground.[233] There was some acknowledgement that the territories had prior inhabitants; de Monts, for example, was instructed to develop "the friendship already begun with some of the tribes found there"[234] These relationships had in fact been developing for close to a century by that time as seasonal fisherman from several European nations visited the region.[235] Despite recognizing the importance of gaining friendship with Indigenous peoples, de Monts appears to have shared the sense of European cultural superiority evinced by Cartier's generation. As Naomi Griffiths argues:

> To de Monts and his companions, in common with most of his countrymen as well as the majority of other Europeans, the indigenous people of the Americas were unquestionably without enduring political rights to the lands in which they lived. Further, the assumption behind the commissions and patents which de Monts had received was that the culture of those natives in the lands now claimed by France was unarguably inferior to that of Europe.[236]

Despite this, it is important to note that these notions of cultural superiority did not frequently translate to attempts at the unilateral imposition of authority on the ground. In some of the earliest recorded encounters, Marc Lescarbot noted that Membertou and other leaders of the Mi'kmaq

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potential deposits of minerals and then diverted realistically to the trade of furs, before ultimately, during the seventeenth century, it diversified to take into account the prospect of agricultural smallholding. So confined, this interest did not account for customary tenure and systems of property relations among indigenous inhabitants; generally these were matters avoided by merchants, traders, missionaries, and early settlers until the expediencies of settlement on the ground required otherwise. These were matters for which, in New France, the companies in charge devised no coherent policy. These were matters for which, at home, the French Crown was no beacon of advice either, meting out meager and inconsistent policies of empire before 1663, preferring instead to endorse trade monopolies while preparing for disputes with neighboring nations with competing designs to the New World." Cavanaugh, "Possession and Dispossession" *supra* note 131 at 97.

[233] As Naomi Griffiths argues, "European colonization of what is today Atlantic Canada was both the expansion of a complex society and the action of many differing groups of individuals." Colonization, when considered at the level of specific practices, must therefore be seen as both "the expansion of a complex and structured civilization" and as depending "upon the actions of very specific groups of people." N.E.S. Griffiths, "1600-1650: Fish, Fur, and Folk" in Buckner and Reid, *supra* note 69 at 46.

[234] As cited in Griffiths, *From Migrant to Acadian*, *supra* note 72 at 4.

[235] The Portuguese established a short-lived colony on Cape Breton in 1525. The account of a French pilot in 1559 reported that the Mi'kmaq ended the attempted settlement and killed all of the prospective settlers. Fifty years after this report, Samuel de Champlain wrote that the settlement was abandoned due to the harsh climate. Which version is true is unknown. By the mid-16th century hundreds of vessels crossed the Atlantic each year to fish, and by 1581 at the latest voyages were organized specifically to trade in furs: see Harald E.L. Prins, *The Mi'kmaq: Resistance, Accommodation, and Cultural Survival* (Orlando: Harcourt Brace, 1996) at 45-48.

[236] Griffiths, *From Migrant to Acadian, supra* note 72 at 8.

"came from time to time ... sat at [our] table, eating and drinking like ourselves … and we were glad to see them, while, on the contrary, their absence saddened us."[237] The early French settlers were dependent on Indigenous peoples for survival and acted accordingly. Settlement itself was merely incidental to the main goals of French colonization in the early 17th century, which were trade and, correlatively, excluding the English from accessing resources. Keeping the English out of the region was mentioned in de Monts' commission: "certain strangers design to go to set up colonies and plantations in and about the said country of La Cadie [Acadia], should it remain much longer as it has hitherto remained, deserted and abandoned."[238] The French, like the English, had come to believe that signs of physical possession were required to substantiate claims based on discovery; De Monts was tasked with securing the area from the British and converting the Indigenous inhabitants to Christianity, and he was to do so without cost to the royal treasury.[239]

While the crown could not afford the expense of financing overseas colonization, it was not indifferent to the process. The crown asserted royal authority over the process of colonization, in part by the issuance of legal instruments condoning it. Further, commissions could act as a reward to men that the King was personally indebted to.[240] The Crown achieved both goals by incentivizing private financing of overseas exploitation through the granting of trade monopolies. De Monts, for example, received the financial backing of mercantile interests from four major ports on the basis of the ten-year fur trade monopoly he was granted.[241] As a result, early colonization in Acadia, like that in New France generally, was organized and financed through private business.[242] Imperial involvement "did not include the provision of money, goods, or salaried officials."[243]

The Crown had no ability to enforce the monopolies it granted, and its inability to do so illustrates the limited reach of imperial law in this period. Griffiths recounts a telling example:

> On the 12 May, de Monts seized a ship whose captain, Jean Rossignol, was illegally trading for furs. The fury of both captor and captive on this occasion was a presage of many similar confrontations in the future. De Monts, and later leaders of official expeditions, displayed righteous indignation in defence of their legal authority;

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[237] *Ibid* at 17.
[238] *Ibid* at 4.
[239] *Ibid.*
[240] *Ibid* at 5.
[241] John G. Reid, "The Lost Colony of New Scotland" *supra* note 73 at 60.
[242] Griffiths, "Fish, Fur, and Folk", *supra* note 233 at 52.
[243] *Ibid* at 46.

> Rossignol, and later transgressors of monopolies, blustered about their traditional rights.[244]

The French crown was unable to enforce the monopolies it granted traders and colonists, and competing French traders would ignore the monopolies with relative impunity. Legal authority followed individuals or companies and was effective only to the extent that they could enforce it.

French imperial ambition in the first half of the 17th century, then, was focused primarily on resources, especially in Acadie. The crown did, however, make vast grants of land to facilitate the extension of the seigneurial system.[245] On the basis of his commissioned authority, de Monts granted Poutincourt land in Acadie and an accompanying monopoly on fishing and furs.[246] Griffiths aptly explains this structure and the role of imperial law:

> Poutrincourt's grant was the first to be made by de Monts, and it signified one of the ways in which contemporary French practices of property ownership and central authority were to organize life in Acadia. Proprietorship over the land was to be directly dependent on the king and grants; the latter were made by those who held royal commissions and were to be ratified by the crown. Ownership was not outright but dependent on the fulfilment of particular conditions. At the same time, the rights of the proprietor included privileges of exploitation which would, it was expected, fund the obligations incurred. For more than two generations the rights and land accorded Poutrincourt would make him and his heirs the most important landowners in the colony.[247]

This was, however, the extent of the reach of imperial law in the early 17th century. By 1632 the French had begun to take more of an interest in the colonial venture, with colonies having taken on increased significance as a matter of national prestige.[248] That year Isaac de Razilly was appointed governor of Acadia, a putative extension of imperial law through the establishment of formal governance roles, and led a major colonizing effort. He is thought to have brought about 300 settlers, though little is known about them.[249] Razilly believed that adopting conventional European land holding practices in the colonies was a prerequisite to successful colonization. This included French seigniorial structures. The principal agricultural settlement throughout the 17th

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[244] Griffiths, *From Migrant to Acadian, supra* note 72 at 10.
[245] As Edward Cavanagh notes, these were made without consideration of Indigenous rights to land. Even if *terra nullius* was not a comprehensive legal doctrine justifying the grants, it was the practical approach: Cavanaugh, "Possession and Dispossession" *supra* note 131.
[246] Griffiths *From Migrant to Acadian, supra* note 72 at 10-11.
[247] *Ibid.*
[248] John G. Reid, "Environment and Colonization Styles in Early Acadia and Maine" in Reid, *Essays, supra* note 73 at 43
[249] Griffiths, "Fish, Fur, and Folk", *supra* note 233 at 57.

century was at Port Royal. Razilly had his headquarters on the opposite side of the peninsula at La Hève while serving as Lieutenant General of New France from 1632 until 1636.[250]

Charles de Menou d'Aulnay moved the headquarters to Port Royal when he took over command upon Razilly's death in 1636. For D'Aulnay, monopolization of the fur trade was a central concern.[251] This created an intense rivalry between d'Aulnay and Charles de La Tour.[252] After Razilly's death, each had claimed the right to govern the colony. The feud ended when d'Aulnay drowned at Port Royal in 1650 and La Tour married his widow.[253] D'Aulnay had managed an overarching power in Acadia for several years and held an official position since at least 1638. In 1647 had received "wide powers and privileges" as a governor and lieutenant-general.[254] He had seized rival fishing and trading establishments in Cape Breton and Miscou. Until 1650, then, settlement remained sparse. Control of the territory remained Indigenous, while imperial powers made competing claims that neither could back with meaningful control on the ground. Competition, and at times fighting, between French fur traders and Scottish colonizers, and between French themselves, as with d'Aulnay and La Tour, was one factor preventing any effective and durable structures of governance from forming.[255] As Griffiths notes, "those who gathered together people and supplies for the settlement expeditions had to struggle to obtain monopolies and patents from their respective monarchs in order to confront vested interests with legal authority."[256] As a result, "It was not until the late 1680's that an economically self-sustaining and demographically self-generating colony could be found there."[257]

It was not until 1670, with the return of Acadie to the French and the end of the period of "Massachusetts rule" that French imperial law became more concrete, though even then it tended to reach primarily through delegation and authorization than through the application of specific

[250] Reid, "Colonization Styles in Early Acadia", *supra* note 248 at 44-45.
[251] *Ibid* at 46.
[252] Reid, "The Lost Colony of New Scotland", *supra* note 73 at 59.
[253] Griffiths, "Fish, Fur, and Folk", *supra* note 233 at 59.
[254] Reid, "Colonization Styles in Early Acadia", *supra* note 248 at 41.
[255] French financial interests had also opposed settlement -- Challenges to creating new settlements – "Those who sought to plant a settlement had both to raise the money for the enterprise and also to fight established merchants, whether in Bristol or Rouen, who saw no profit for them in such undertakings but rather a loss of monopoly and control." Griffiths, "Fish, Fur, and Folk", *supra* note 233at 40. Insofar as settlement impeded profit, powerful merchants opposed settlement. See also Clark, *Acadia, supra* note 81 at 108 for the challenges faced by Nicholas Denys.
[256] Griffiths, "Fish, Fur, and Folk", *supra* note 233 at 42.
[257] Griffiths, *Contexts of Acadian History, supra* note 100 at 3.

norms.[258] As of the latter part of the century, elements of French law were incorporated, for example, the presence of functionaries such as notaires, an intendant, and a registry office.[259] These structures were imposed on the existing seigneurial structure, through which much colonial governance in New France and Acadie had been structured, moving authority from the principle seigneurs to delegated officials responsible to the crown. Yet, these offices and structures will be discussed as incidents of colonial, rather than imperial law. As outlined above, imperial law refers to the structures, norms, and practices that regulate and facilitate colonial activity rather than the rules promulgated by the colonial forms of governance. Admittedly, we have now come up to the spot where the distinction starts to fall away. It is worthwhile maintaining, even if one would prefer to explain their distinction in terms of the vertical relationship between them rather than as a difference in kind, as each impacted the process of legal and territorial transformation in ways that deserve independent attention.

After 1713, the geography of French imperial law shifted dramatically. The cession of Acadie led the French to renounce claims to peninsular Nova Scotia and relocate its imperial activity to Île Royale and Île St. Jean (Cape Breton and Prince Edward Island, Unamaki and Epekwitk, respectively). The French presence on Île Royal was primarily limited to Louisbourg, a significant fort and major outpost on the eastern seaboard. Louisbourg fell to New England troops in 1745, was returned in 1749, and was captured again in 1758 as part of the seven years' war that culminated with the fall of New France. While the French initially sought to convince the Mi'kmaq and Acadian farmers to relocate to Île Royale, that plan met with little success. As a result, Île Royale was much different from Acadie. It was an urban colony and was effectively dominated by the military.[260] Present-day New Brunswick remained a contested borderland in the imperial imagination until the French defeat at fort Beausejour in 1755 effectively ended their resistance to British assertions of authority. The century from 1663-1763 is bookended by the establishement of New France as a royal province under centralized imperial control and the Treaty of Paris 1763

[258] For example, Carol Blasi notes that: "Nouvelle-France became a royal province in 1663 and administrative structures were established in Québec that mirrored those of provinces in France. This included an intendant, a gouverneur, the Conseil souverain (becoming the Conseil supérieur in 1717), with administrative and judicial appellate functions much like those of the parlements in France, inferior courts, and numerous government functionaries. This new scheme was superimposed on, and played an oversight function with regard to the existing seigneurial structure. By the time the French regained l'Acadie in 1670, the colony had some catching up to do with in regard to the new administrative system that Louis XIV had prescribed for his North American colonies." Blasi, *supra* note 70 at 158.
[259] *Ibid.*
[260] Greer, *The People of New France, supra* note 69 at 97-98.

ceding all French interests in North America to the British. In between, the locus of French imperial authority shifted, the reach of imperial law fluctuating.

As with the British, then, the reach of French imperial law must be considered from multiple angles. In the 17th century there were several sources of law at work under the umbrella of French law imperial law: positive law (charters, monopolies), customary law (free trading rights of fishermen in the port cities), spiritual law, natural law (from which the justifications for excluding the English were drawn, as described in chapter 1.) The French crown made vast territorial claims. Early charters and patents made claims to the entire region or sizeable parts of it, while purporting to grant exclusive access to trade and natural resources. Yet, the monopolies that were granted could not even prevent French traders from carrying on, let alone control the inhabitants of North America. While the territorial scope of the claims were vast, they ensured only the thinnest veneer of tangible legal authority. In the late 17th century the imperial law got somewhat more of a foothold when New France became more formally structured as a royal province. This was short lived, as the French imperial presence was moved out of peninsular Nova Scotia in 1710. Île Royale then became the central locus of French imperial rule in the region until 1758. Present day New Brunswick remained a contested borderland, notable as an example of how the contest between the imperial visions of two competing European nations played out in a specific context. While both mobilized history, geography, and law to support their claims, neither in fact exercised control and the region remained more a space of Indigenous than imperial legality.[261]

b) *French Colonial law*

1663 is a useful reference point for the analysis of French colonial law, with markedly different processes unfolding in the century preceding it and that following it. In the discussion of Acadian law I drew a distinction between structures of law and governance established by colonial actors relying on delegated imperial authority and those internal communities norms and legal traditions that developed within Acadian communities and apart from formal colonial authorities. The focus here is on French colonial, rather than Acadia, law. The two are not always easy to keep distinct,

[261] Lennox, *Homelands and Empires, supra* note 147.

and the points where they hold together or pull apart are telling in themselves. The first colonial law in New France, including Acadie, was the law of the seigneurie. While not as prominent an institution as in the St. Lawrence valley, the institution was present in Acadie and, to the extent that there was colonial governance, it was shaped through this. The earliest attempts at sustained settlement in the early 17th century were accompanied by seigneurial grants. The whole of the region was then granted to the Compagnie de la Nouvelle France in 1627. The settlement established by Isaac de Razilly in 1632 was based on a grant he received from the company.[262] The rationalized and centralized colonial rule established in Canada in 1663 did not take shape in the Acadie until 1670. Governance centered in Port Royal and colonial authority was put into practice primarily by administrative actors. As Andrew Clark notes, "While French authorities effectively controlled Port Royal there were, of course, many *notaires, greffiers,* or *procureurs du roi* who filled out the think cadres of government."[263] These individuals "helped the priests and the few with seigneurial pretensions to solve problems when formal government machinery was absent."[264] Institutions of governance, however, were much weaker than in Canada, and the aristocracy was relatively less significant.[265] Acadie was, in practice, a subsistence agrarian economy with intermittent military rule and a largely self-reliant and self-governing French population.[266]

In the 17th century, then, practices and structures of colonial law were limited. While seigneurial grants covered significant parts of the territory, nothing like the robust forms of "seigneurial justice" of the St. Lawrence valley developed. In Acadian communities, colonial legal actors played relatively minor roles. From 1670-1710, there was an apparatus of colonial government in Port Royal that reached the other Acadian communities through specific legal actors who would draft contracts for land sales or wills and resolve disputes. Communities retained a high degree of independence, however, and it appears that some of the communities may have been settled from a desire to be further from the authority at Port Royal. After the British formally acquired Port Royal in 1713, some institutions of French colonial governance continued to be present in Acadian communities, but the centre of French activity moved to Louisbourg on Île

[262] Prins, *supra* note 235 at 63.
[263] Clark, *Acadia, supra* note 81 at 113 n4.
[264] *Ibid.*
[265] Greer, *The People of New France, supra* note 69 at 96.
[266] *Ibid* at 97.

Royale. Île Royale was much different from peninsular Nova Scotia. Farming was impractical on a large scale, and Acadians declined to relocate en masse when suggested by French authorities. As a result, it was an urban colony effectively dominated by the military with a staple economy based on a single resource: fish.[267] This economic reality impacted the legal and political structures of the colony. The lack of domestic food production left it dependent on imports and without the self-sufficient agricultural communities or agrarian landlord class that shaped much social life in Canada and peninsular Nova Scotia.[268] Colonial law, then, dealt with the French subjects at Louisbourg and primarily concerned military discipline and trade.

An infrequently discussed aspect of colonial law in Ile Royal is the law concerning slavery. Slavery shows clearly how integrated networks of law worked at different scales and across jurisdictions. Between 1713-1758 there were 266 slaves in Île Royale, nearly ninety-percent of which were in Louisbourg.[269] Unlike elsewhere in New France, where about seventy-percent of slaves were Indigenous, in Île Royal about ninety-percent were black. Only two dozen were Indigenous.[270] Slavery was, in fact, dealt with as a matter of French imperial law. The official policy – the *code noir* – was established in 1685 and reissued in 1724.[271] The code was never registered in Île Royale, but it appears to have been followed.[272] Domestically, the law of property and contracts were central to supporting the institution, with individual slaves being owned as property and contracts both facilitating trade and binding slaves to owners. Trade in slaves, meanwhile, connected the entire Atlantic world. As Kenneth Donovan writes, "slaves in communities such as Île Royale were part of 'Atlantic history,' and as such, slaves circulated like ambulant property throughout the Atlantic basin, connecting communities around the Atlantic

[267] *Ibid* at 98-99. That it was a single resource economy should not diminish its importance. With a few years of being founded, Louisbourg's cod exports were worth three times the fur trade from Canada. Christopher Moore, "The Other Louisbourg: Trade and Merchant Enterprise in Île Royale 1713-58" (1979) 12:23 Histoire Sociale – Social History 79 at 79.
[268] Greer, *The People of New France, supra* note 69 at 99. Louisbourg also had labour problems. Fishermen were reduced to wage workers by mid-century as investors with access to significant capital purchased larger boats and recalibrated the market. As a single resources economy, the fishing industry dictated social and economic relations in many respects. As Christopher Moore notes: "Île Royale's only product was dried cod. The patterns of settlement and labour recruitment dictated by the fishing industry limited the development of other industries and of subsistence agriculture": Moore, *supra* note 267 at 79.
[269] Kenneth Joseph Donovan, "Slaves in Île Royale, 1713-1758" (2004) 5 French Colonial History 25 at 26.
[270] *Ibid* at 29-30. I have use the general term Indigenous here because it is not clear which Indigenous nations these individuals were from. The French term *panis* was used as a generic term to refer to Indigenous slaves.
[271] *Ibid* at 30.
[272] *Ibid.*

world."[273] In the 1750's, slaves from Africa and the West Indes were frequently bought and sold between Louisbourg, Halifax, and New England.[274] The institution of slavery, then, functioned on the basis of an intersection of colonial, imperial, and transnational legal regimes regimes.

Colonial law in Île Royale was thick in the administrative centre of Lousibourg. Domestic property and contract law structured the business activities of the merchant and trading class. Administration was centralized and highly structured. Yet, as with Halifax in the decade after its establishment, the density of colonial law quickly dissipated outside of the urban centre. The lack of agriculture meant that the practices of landholding associated with agricultural development were few. Practices of French colonial territorial governance were therefore restricted primarily to Louisbourg, its proximate waters and coasts, and small outposts and settlements.

For the one-hundred and sixty years that French colonial law purported to apply in the region, then, it created very little exclusively French territory. During the 17th century Port Royal was an administrative centre, but the reach of colonial law was minimal. French colonial law followed particular actors – notaries, clerks, and attorneys - to Acadian communities, though there it existed alongside Acadian law and facilitated, rather than shaped, Acadian social and political life. Following 1713, French law shifted to Île Royale and Ile St. Jean and, while dense in specific locales, the orientation towards trade with Europe, the Eastern seaboard, and the West Indes limited its territorial ambition.

c) *Missionaries and Warrior Priests*

The role of French missionaries in colonization in Mi'kma'ki in the 17th and 18th centuries was considerable.[275] It is important to highlight their role briefly, as their work illustrates the tenuous reach of several forms of colonial and imperial law and one of the varied ways these legal regimes reached into new places. These ideas may seem incompatible: how can missionary priests be said both to extend law and illustrate its limitations? The answer is twofold. While missionaries undoubtedly played a role in extending French authority to an extent, the fact that they were often

[273] *Ibid* at 26.
[274] *Ibid* at 34-35.
[275] Prins, *supra* note 235 at 73. There were important differences in approaches between the orders. As early as 1622 the Jesuits officially adopted a policy known as the Doctrine of Adaptivity, under which they were encouraged to adapt to local customs and to avoid portraying Indigenous peoples as lesser than Europeans. The Franciscans did not shy away from a more ethnocentric position based explicitly on a "civilizing" mission.

the strongest French presence indicates how limited that reach was. Second, as outlined below, the ongoing presence and role of French priests in putatively British territory illustrates how tenuous and partial British imperial and colonial law was. The role of priests in mediating cultural exchange complicates any attempt to construe them merely as imperial actors. The Mi'kmaq, for example, used baptism ceremonies as a way to bring French settlers into Mi'kmaq social relationships, and many Mi'kmaq communities developed close relationships with priests that had both spiritual and political valences.

In 1611 the French Crown authorized Jesuits to convert Mi'kmaq peoples to Christianity and to lay the groundwork for their assimilation in the (at this point merely imagined) French colonial society.[276] Several early commissions, charters, and seigneurial grants stipulated that missionaries be supported.[277] A mission was established at Port Royal where local Mi'kmaq were baptized and Mi'kmaq and Wolastoqey were known to attend weekly church services. While the missionaries played an important role in developing and maintaining relationships with the Wabanki, they also clashed with the colonists at times. In a notable example Biencourt's authority was challenged, with priests arguing that their mission was more important than his.[278] The Franciscans, known by the Mi'kmaq as the "bare feet", arrived in Acadie in 1619. Though the Franciscans returned to France when the territory was ceded to Britain in 1629, they returned when it was ceded again to France in 1632 and expanded their operations significantly until 1654. They served the small communities at forts and trading posts throughout the present-day provinces of Nova Scotia and New Brunswick. During this period, proselytizing work was not the primary aim of the Franciscans, who focused on serving settlers, traders, and military personnel.[279] This marked an important change in social role that became more pronounced as Acadian communities developed. Before 1710 there were "forty to fifty different priests and missionaries had been present in Acadia at one time or another and there were regular parish priests in Port Royal from 1676, in Grand Pré from 1687, and at Beaubassin from 1686."[280] In this role they would resolve disputes, solemnize marriages, and perform the varied duties associated with the priesthood at that time. The Jesuits had continued with their missionary work, though by the mid-17th century their

[276] *Ibid* at 73.
[277] *Ibid* at 64.
[278] Faragher, *supra* note 65 at 23.
[279] Prins, *supra* note 235 at 74-75.
[280] Clark, *Acadia, supra* note 81 at 113 n4.

missions in Mi'kma'ki had all been closed and the Jesuits focused their energy on the interior of the continent.[281] Franciscans established a mission at Gaspé from 1673-1690 which was destroyed when Dutch and English privateers attacked French settlements and posts across the region.[282]

While the traditional roles within French settlements and as missionaries continued into the 18th century, what Harald Prins refers to as "warrior priests" also came to play a key role in the region. These priests worked in step with French imperial ambitions in motivating the Wabanaki to take up arms against the British. Thus, into the 18th century another new role developed, that of power broker and diplomat. As Prins notes, "[f]inancially supported by the French Crown, missionaries distributed gifts from the king, thus obliging the recipients to the 'father.' Their success as power brokers translated not only in political capital but also in added spiritual prestige."[283] They used this influence to maintain alliances between the Wabanaki and the French Crown and to develop military alliances on behalf of the French Crown in their contests against the British.

Father Jean-Louis Le Loutre is perhaps the best known example. Such was his influence that one of the central 18th century conflicts in the region, the series of battles and raids between 1749-1755, is sometimes referred to as Father Le Loutre's War.[284] These conflicts illustrate that the Acadians, Mi'kmaq, and Wolastoqey were independent actors in the middle of the 18th century and the limited extent to which the British had managed to create a defined territorial jurisdiction subject to their control by mid-century. Indeed, there was still no effective British civil government by the mid-18th century, and Le Loutre's activities illustrate how porous their authority was.[285] Le Loutre, for example, operated missions in what was putatively British territory beginning in the 1730's.[286] As outlined above, the transfer of Acadie in 1713 had not resulted in anything like the creation of an undisputed British territorial jurisdiction. The French contested the boundaries of

[281] Prins, *supra* note 235 at 77.
[282] *Ibid* at 80.
[283] *Ibid* at 121.
[284] Conflict was constant in the 18th century until the fall of New France, and the specific conflicts have been retroactively grouped in several ways. Prins, for example, refers to 1744-1748 as the "fifth Anglo-Wabanaki War" and 1755-1760 as the "sixth Anglo-Wabanaki War", but does not assign a name to the collection of conflicts between the two: Prins, *supra* note 233 at 137-152. John Grenier refers to these as "King George's War" and "The Guerilla War", respectively: John Grenier, *The Far Reaches of Empire: War in Nova Scotia, 1710-1760* (Norman: University of Oklahoma Press, 2008) at 107-137, 177-206).
[285] Grenier, *supra* note 284 at 141-142.
[286] Gérard Finn, "LE LOUTRE, JEAN-LOUIS," in Dictionary of Canadian Biography, vol. 4, University of Toronto/Université Laval, 2003. http://www.biographi.ca/en/bio/le_loutre_jean_louis_4E.html

what had been ceded, effectively redrawing the ancient boundaries of "Acadie" to limit the cession to peninsular Nova Scotia. Le Loutre was not happy with this concession, and he would make it his goal to force the British from the region.[287]

Le Loutre arrived on Île Royal in 1737 and began work in British territory at Shubanacadie in 1738 as a missionary to the Mi'kmaq. Lieutenant-Governor Armstrong was displeased that Le Loutre had not come to Annapolis Royal to make his presence known, but on the whole, it appears that Le Loutre's relations with the British at this time were not strained.[288] The Subanacadie mission had a territory associated with it, which covered a significant portion of present-day peninsular Nova Scotia. Le Loutre's work included ministering to French posts at Cobequid and Tatamagouche. If one were visually representing the region at this juncture, one layer would be the territorial jurisdiction of the French missions. Thus, within what inter-European law acknowledged as British territory, another form of territorialisation contested the extension of colonial authority, and French priests such as Le Loutre continued to play an important social role. This reflects in part the negotiated forms of subjecthood and alliance that characterized the relatively peaceful co-existence of the plural communities in the region in the early decades of the 18th century. It reflects the notable British concession that the Acadians could continue to practice their religion and that the Wabanaki would continue to have access to priests. The presence of the priests was part of the accommodation that allowed relatively peaceful co-existence in the early decades of the 18th century. This accommodation reflects the way that the territory continued to be structured through multiple legal orders. The demands made by the Acadian and Wabanaki were not merely for certain concessions (e.g. access to French priests). They were the means through which Acadian, Wabanaki, and French law continued to reach into the spaces claimed by the British and shape those as spaces of plural and hybrid legalities. If we adopt the frame of British imperial law and inter-European transnational law, peninsular Nova Scotia's "official" law at this time was British. Yet, other forms of law lingered in the space.[289]

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[287] Grenier, *supra* note 284 at 139

[288] Finn, *supra* note 286.

[289] This shows the need to nuance the idea of lingering law. It always must be lingering in relation to some official law, and the identification of the "official" law by which others will be considered subaltern is an important move. In this instance we might retroactively refer to non-British forms of law as lingering because of the hegemonic position British law was to assume later in the century. At the time, however, British law, while claiming official and universal application for itself, had very little tangible reach: it had only begun to *fade in.*

While these forms of accommodation took shape in the early 18th century, imperial war returned mid-century and began to open lines of conflict in the region again. With it, the role of the priests changed. In 1744 King George's War, the North American branch of the War of Austrian Succession, began. The French were determined to re-take Acadie.[290] Le Loutre by this point was acting with considerable independence. In July 1744 he led three-hundred Mi'kmaw warriors in an attack on Fort Anne at Annapolis Royal.[291] The attack was rebuffed. When the French set out from Île Royale later that summer to organize another attack on the fort there were one-hundred Mi'kmaq involved and seventy Wolastoqey who were said to have been led by another Jesuit priest, Father Maillard.[292] Le Loutre was sent out of the region before the war's end and did not return until 1749.

Le Loutre returned after the end of the imperial war that set off the conflict of the preceding years. The establishment of Halifax that same year, however, shifted the balance of power in the region considerably. Further, the British entered into a peace treaty with many Wabanaki groups that year. Le Loutre feared what this rapprochement meant for French interests and wanted to confine the reach of British authority. He worked with French authorities to develop a strategy of encouraging the Mi'kmaq to engage in a guerilla war in the territory recognized as British under the treaties of Utrecht (1713) and Aix-en-Chappelle (1748). The Mi'kmaq declared war on the British, though the Wolastoqey did not. Governor Cornwallis refused to declare war on the Mi'kmaq, arguing that to do so would be to recognize them as independent peoples and that they were subjects of the King and therefore classified as rebels.[293]

This set off violence between the Mi'kmaq and the British that would consume the peninsula for the next six years. In some cases, such as the raid on Lawrencetown in 1754, the Mi'kmaq were joined by Acadians. The Chignecto Acadians took up arms against the British.[294] The infamous scalping proclamation, offering an award for Mi'kmaw scalps, was issued by Governor Lawrence during this period.[295] Showing the connections to New England, ads were

[290] Grenier, *supra* note 284 at 108
[291] *Ibid* at 110.
[292] *Ibid* at 113. It is important to note that, while groups of Wabanaki may have followed the leadership of French priests or military leaders at certain times, they continued to exercise agency and act in their own interests. The 300 who went with Le Loutre in 1744, for example, did not participate in the second siege on Fort Anne, and most declined to fight with the French in the defence of Fort Louisbourg a year later: *Ibid* at 120-128.
[293] Grenier, *supra* note 284 at 152.
[294] *Ibid* at 158.
[295] *Ibid* at 159.

placed in Boston newspapers about the scalps. This period of instability led to the expulsion of the Acadians in 1755 and the last significant period of British-Wabanaki treaty making in 1760-61. Throughout, Le Loutre and other priests played key roles as diplomats, interpreters, and military leaders. In doing so they resisted the creation of British territorial jurisdiction with appeals to French imperial law and Mi'kmaw authority. Le Loutre, in particular, brought forward claims of Mi'kmaw ownership to contest British settlement. Even if these were more rhetorical than legal claims, per se, they brought plural legal regimes into conversation in negotiating the forms of political authority and association in the region.

French priests, over two centuries, played a number of important roles in mediating and shaping the legal regimes in the region. From translators and missionaries involved in intercultural processes, to ministering and dispute resolution, to active agents in imperial and colonial military disputes, priests contributed to both the extension and limitation of imperial rule while contributing to processes of intercultural mediation and hybridization.

v) Massachussetts Law

The role of Massachusetts in the region is complicated by several factors, not least the question of whether the colony ought to be considered as an example of British colonial law or as an independent source of law and authority in its own right. The colony was protective of its independence, and the fault lines of imperial and colonial rule are evident in the many conflicts between Massachusetts and London.[296] The decision to examine the law of Massachusetts independently is based on the recognition that Massachusetts did indeed act independently for important parts of the period covered here. It leaves as a grey area the issue of whether a court in Massachusetts can be best said to have been applying British or Massachusettsan law. While it might be said that the law of Massachusetts ought to best be considered as 'colonial law' much as Nova Scotia was above, Massachussetts was independent enough and sought to exercise its independent agency on a regional basis frequently enough, that it is worth dealing with on its own.[297] The reach and impact of New England colonies, and the laws of Massachusetts in

[296] Greene, *supra* note 69 at 58; Jenny Hale Pulsipher, *Subjects Unto the Same King: Indians, English, and the Contest for Authority in Colonial New England* (Philadelphia: University of Pennsylvania Press, 2006) at 37-69.

[297] This independence must be considered both in relation to England/Britain and other colonies. As Wicken points out, the fledgling government in Nova Scotia faced logistical problems "in co-ordinating each government's policies

particular, show the complicated networks of law in Indigenous spaces subject to colonial and imperial intrusions and the complex and layered forms of authority that prevailed in these locales.

From the time of the founding of the Massachusetts Bay colony, "Nova Scotia" had been understood as important to the fortunes of the colony.[298] On sailing for Massachusetts in 1630, John Winthrop saw peninsular Nova Scotia. He recorded in his journal that he believed it would be the northern frontier of the Massachusetts colony.[299] The return of Acadie to the French in 1632 led to the arrival of some 300 French settlers and traders. Winthrop immediately perceived the loss of a buffer between the Puritan colony and the French Catholic settlements in the St. Lawrence as a threat.[300] From the beginning, then, Massachusetts perceived the colonial developments in Nova Scotia to be tied to its own interests, and it tried to exert regional influence that brought Nova Scotia into its orbit on several occasions. The question of relevance here is how Massachusetts law reached into Mi'kma'ki/Acadie/Nova Scotia and contributed to the increasingly variegated legal space that shaped that territory.

The first prominent example of Massachusetts law playing a role is the treaty of commerce signed with Charles La Tour in 1641.[301] This agreement, which La Tour sought in a bid to secure his authority against his rival D'Aulney, allowed for free trade between La Tour and Boston based traders, including access to contested territory between Massachusetts and the western boundary of Acadie (the contested territory was the area that roughly comprises present-day Maine). After La Tour's collaboration with Massachusetts led to a raid on Port Royal, which was at that point

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towards the Mi'kmaq. Nova Scotia officials could not guarantee that people held captive in Boston would be released [as requested by the Mi'kmaq during negotiations]. Nor could they control the policies of Massachusetts colonial officials whose actions affected Mi'kmaq-English relations in Nova Scotia and placed the garrison there in jeopardy." Bill Wicken, "26 August 1726: A Case Study in Mi'kmaq-New England Relations in the Early 18th Century" (1993) 23:1 Acadiensis 5 at 21 ["Case Study in Mi'kmaq-New England Relations"]. Wicken further argues that historians have too readily applied the term "English" to non-Indigenous, non-French actors in Nova Scotia, a label that obscures the level of independence New Englanders exercised. Thus, he writes: "L.F.S. Upton uses the term "English" interchangeably when describing Mi'kmaq relations with the garrison at Annapolis Royal, Massachusetts political authorities and New England fishermen. Since his analysis of the "English" relies upon source materials written by colonial officials, the expansionist ideology revealed in this correspondence becomes, for Upton, the principal means to understand relationships established by English people with the Mi'kmaq. The assumption is that all English-speaking peoples shared similar attitudes and interests and that therefore their relationships with the Mi'kmaq were also similar. By implication, this interpretation suggests that colonial fishermen, farmers, tradesmen and artisans absorbed the ideology of ruling elites and transposed them into their relationships with native peoples." *Ibid* at 6.

[298] The two foundational works on the relationship between the two colonies are John Brebner, *New England's Outpost: Acadia Before the Conquest of Canada* (Hamden: Archon, 1927) and Rawlyuk, *Nova Scotia's Massachusetts, supra* note 77.

[299] Rawlyuk, *Nova Scotia's Massachusetts, supra* note 76 at 2.

[300] *Ibid* at 2-3.

[301] *Ibid* at 7.

held by d'Aulnay, d'Aulnay himself negotiated a peace treaty with Massachusetts. Thus, the two men competing for authority and control of trade in Acadie both negotiated direct treaties with the government of Massachusetts. Admittedly, this might better be understood as external, as opposed to internal, law. It does show, however, how closely connected the region was. Further, on the basis of these agreements internal law structured the use of space and the constitution of the territory; Massachusetts fishermen in the mid-seventeenth century relied on the peace and trade treaties with d'Aulnay to largely monopolize the fisheries in the Bay of Fundy and along the peninsula's south shores.[302] In 1653 the Massachusetts General Court passed a regulation prohibiting trade with the French in Acadia.[303] The General Court seems to have then granted exceptions to the prohibition in order to maintain a trading monopoly for connected merchants.[304] In this way, the internal laws of Massachusetts structured trading activity and economic practices in Acadie. In other words, the close economic ties in the region, between distinct colonies, settlers, and Indigenous peoples, meant that the internal laws concerning trade and resource access of one of the parties could influence the lives of the others and shape their behaviours through law. In this period, however, these legal relationships structured life in only a minimal way. There was no meaningful settlement in Acadia until the 1650's. To the extent that France was represented, it was through individual colonial promoters backed by mercantile interests who used their delegated authority primarily to monopolize trade rather than to establish administrative governance. Massachusetts fishermen, while present along the coasts of Nova Scotia, would not arrive in significant numbers until the latter part of the 17th century.[305]

In light of this, Massachusettsan law became more pronounced in the region in the period following Robert Sedwick's capture of Port Royal in 1654.[306] Following the fall of the fort, Cromwell granted Acadie/Nova Scotia to Charles La Tour, William Crowne, and Thomas Temple. Temple was commissioned as governor.[307] France contested this and commissioned its own governor. In fact, there was little effort at governance from either France or Britain, and the period

[302] *Ibid* at 18. Importantly, nearly a century later the presence of fishers from Massachusetts in these areas contributed to Mi'kmaq participation in broader Wabanaki conflicts with the British.
[303] *Ibid* at 21.
[304] *Ibid* at 22.
[305] Wicken, *Tall Sails, Tall Tales, supra* note 232 at 258-259.
[306] Murdoch, *History of Nova Scotia, supra* note 163 at 134; Daigle, *supra* note 132 at 67.
[307] Huia Ryder, "TEMPLE, SIR THOMAS," in Dictionary of Canadian Biography, vol. 1, University of Toronto/Université Laval, 2003, http://www.biographi.ca/en/bio/temple_thomas_1E.html.

was one where the Acadian population developed strong relations with New England.[308] As outlined above, the grants of the period were foremost concerned with establishing trading monopolies. The grant to La Tour, Crowne, and Temple was no different, and after La Tour was bought out it effectively established a trading monopoly for Temple. Notable where the issue of Massachusetts law is concerned is that the General Court enforced the trading monopoly. As Rawlyk writes,

> the General Court not only showed its concern for good relations with Nova Scotia but it also asserted that breaking Temple's monopoly was in a sense an offence against the law of Massachusetts. Temple's regulations would be enforced in Massachusetts by Massachusetts courts. Nova Scotia was therefore conceived to be in 1658, at least, the economic and legal appendage of Massachusetts.[309]

Thus, while commissions continued to be held directly from the imperial Crown through the exercise of the royal prerogative, in this instance enforcement came through the internal law of Massachusetts. The commission mingled with the colony's other laws prohibiting or regulating trade with Acadians and "Indians" in Nova Scotia. In this way, the internal laws of Massachusetts contributed to the construction of Nova Scotia as a legal space, likely having more direct impact than either British of French law during this period.

This would continue for the remainder the 17th century. After Phips attacked and subdued Port Royal in 1690, for example, Massachusetts appointed a governor for Nova Scotia. From the British perspective, Nova Scotia "became part of the territory of Massachusetts at this point."[310] This was the result of a conscious effort to bring Nova Scotia within the jurisdiction of Massachusetts and to extend territorial jurisdiction over the region. Phips, for example, proclaimed that the region belonged to Massachusetts and that Acadians could bring their disputes and issues with the government to Boston.[311] This offer, to make Massachusetts the site of dispute resolution and to bring the Acadians within the legal realm of Massachusetts rather than the French, changed the nature of the jurisdictional assertions by Massachusetts. Previous claims placed restrictions on the behaviour of residents, prohibiting trade or determining where fishing could occur along Nova Scotia's coasts. These approaches were by no means abandoned. In 1696, for example, all trade

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[308] Daigle, *supra* note 132 at 66
[309] Rawlyuk, *Nova Scotia's Massachusetts, supra* note 76 at 31.
[310] *Ibid* at 75.
[311] *Ibid* at 76-77. Increase in political control a reflection of the fact that Massachusetts had increased its economic influence in the region considerable, acquiring what Rawlyk called "economic suzerainty over Nova Scotia" by the late 17th century: *ibid* at 84

with Nova Scotia was prohibited by the General Court.[312] Yet, in the period immediately following the 1690 capture of Port Royal there was an attempt to bring the Acadians themselves within the legal ambit of Massachusetts in a distinct way: Acadians would no longer be impacted by laws of Massachusetts only as collateral but would be subjects of that law in important respects.[313]

This extended inland jurisdictional claims that had already been pushed in the marine areas and foreshore. Fishing boats from New England had plied the waters off Mi'kma'ki with increasing frequency from the 1660's onwards, bringing New Englanders into frequent contact with Mi'kmaq on the shores and coasts.[314] Massachusetts asserted the authority to regulate this fishery. This brought the colony into conflict with the Mikmaq, particularly in the period from 1690-1725. During this period, the Mi'kmaq's Wabanaki allies were engaged in conflicts over land in New England. The movement of settlement eastward along the Kennebec River over the express objections of the Abenaki, for example, elicited responses from the Abenaki and their allies. Mi'kma'ki was buffered from this land conflict by the Wolastoqey and Passamaquoddy, but conflict in marine spaces brought them into the dispute in a tangible way.[315] The Mi'kmaq were a coastal people: they lived in villages along the coast, at harbours, and at the mouths of rivers for much of the year and fished extensively in coastal waters.[316] Thus, Massachusetts attempting to bring marine areas under their jurisdiction brought them brought them into conflict with the Mi'kmaq. New England fishermen consciously sought to structure the marine areas through British law. As William Wicken writes, "New England fishermen appear in records during the late 17th and early 18th centuries because boats in which they worked had been involved in conflicts with Eastern Coast Mi'kmaq. Merchant proprietors of such vessels lodged complaints, made depositions and signed petitions to the Massachusetts government asking for the protection of their boats."[317]

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[312] *Ibid* at 84.

[313] Another important story about Massachusetts and Acadians, unfolds after 1755 following the *Grand Dérangement*. Massachusetts was a stopping point for many ships several ships leaving Nova Scotia in 1755, and some Acadians re-located further south made their way back to Massachusetts. The policy of the General Court was to accept and support them, and many remained for several years. By 1775, for example, twenty years after the expulsion, some 1500 Acadians resettled in Quebec via New England, many of whom had been in Massachusetts. See Richard G. Lowe, "Massachusetts and the Acadians" (1968) 25:2 The William and Mary Quarterly 212.

[314] Wicken, "Case Study in Mi'kmaq-New England Relations", *supra* note 298 at 13.

[315] Wicken, *Tall Sails, Tall Tales, supra* note 232 at 7

[316] *Ibid* at 25-29, 91-114.

[317] *Ibid* at 7. For example, "In 1715 and again in 1720, Mi'kmaq chiefs told the governor of lie Royale of their displeasure at the number of New Englanders fishing along the coasts." Further, "A letter written by an Englishman described what the natives had told the fishermen: "The Indians spoke very good French, and told the English they only came for the Merchandize and such things as would suit them on shoar [sic]; for the Land was theirs, and they would not suffer any English to live upon it, as for the Vessels and Fish they would not meddle with either"" In the

There is evidence of such disputes being heard in Massachusetts' courts. On August 25 1726, a Massachusetts fishing boat arrived at a harbor in Mi'kma'ki. There were two men, later identified as French in court proceedings, and a group of Mi'kmaq from the nearby Mi'maw village on shore.[318] The two men identified as French were of mixed ancestry and were related through marriage to the Mi'kmaw men who would feature prominently in the story. The two French men were invited on board. One stayed to drink in the cabin while the remaining crew and the other French man went on shore. That French man returned sometime later along with two Mi'kmaw men. The four of them tied up the remaining crew member, took down the boat's colours and began inspecting the boat's cargo. They were joined at this point by four other Mi'kmaw men, a woman, and two children. The other crew members then returned and were also detained. They were told that they "would be released to inform Massachusetts authorities that the others would be exchanged for prisoners in Boston."[319] This is telling and provides important context for the encounter. A treaty of peace had been ratified in June of that year. The Mi'kmaq men had believed that when peace was made their brothers, who were being held in Boston for their attacking New England fishing boats, would be released. When they were not released, the Mi'kmaw men indicated that they would seek retribution.[320] Thus, it appears this was a retaliatory act. The following morning, however, the crew re-took the ship and, while three Mi'kmaw men escaped, the rest of the offending party were taken to Boston. The five men "were tried for piracy and sentenced to death by a special session of the Massachusetts Admiralty."[321] They were hanged less than a month later. There is no record of what happened to the woman and children.

Notably, the Admiralty court that heard the case was created by the Lieutenant-Governor of Massachusetts, William Dummer, the same man who signed the treaties of peace and friendship with the Wabanaki immediately preceding this dispute.[322] Dummer also presided over the trial along with fifteen members of the Massachusetts General Council and two others sitting as a seventeen-person jury.[323] Thus, Dummer was engaged not only in direct diplomacy with the

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early 1720's, "the Massachusetts government commissioned a galley ship to protect its fishermen. The commander of the vessel, Joseph Marjory, ranged the Eastern Coast, intercepting Acadian-owned boats an indiscriminately attacking Mi'kmaq." Wicken, "Case Study in Mi'kmaq-New England Relations", *supra* note 298 at 14-18.

[318] This account is taken from Wicken, "Case Study in Mi'kmaq-New England Relations", *supra* note 298.

[319] *Ibid* at 6.

[320] *Ibid* at 19.

[321] *Ibid.*

[322] Andrea Bear Nicholas, "Mascarene's Treaty of 1725" (1994) 43 UNB LJ 3.

[323] Wicken, "Case Study in Mi'kmaq-New England Relations", *supra* note 298 at 9. The court also took depositions in Mi'kmaq and French.

Wanabaki and their allies, he was actively structuring a legal regime to extend the jurisdiction of Massachusetts in marine and foreshore areas of Mi'kma'ki. The charge of piracy should also be noted. As Lauren Benton has noted, the charges of piracy and treason are closely related to the extension of jurisdiction in empires.[324]

The laws of Massachusetts played an important part in producing "Nova Scotia" as a social, legal, and political space. It is too simple to say that Massachusetts helped bring Nova Scotia into being as a British legal space. Officials, traders, fishermen, and settlers from Massachusetts, frequently acting not at the behest of London but in their own interest and in light of their tangible entanglements with the peoples of Mi'kma'ki/Acadie, contributed to the construction of a distinctly new legal space. Nova Scotia moved from an imperial imaginary to a tangible jurisdiction shaped by legal practices in part through the influences of Massachusetts law. This law shaped trading relations between Massachusetts merchants and the Acadians and Wabanaki. The use of terrestrial spaces was shaped in part by these laws. Most prominently, Massachusetts worked to govern marine spaces through Massachusetts law, at least where Massachusetts fishermen were concerned. There were never attempts to regulate the access or use of marine spaces or resources of the Wabanaki themselves, even though the moves to bring conflicts to the Massachusetts courts extended jurisdiction in important respects. While infrequently extending laws through the region to give effect to their jurisdictional claims, Massachusetts law nonetheless reached into the region and shaped practices there. The legal relationship between Massachusetts and the subjects (and subject matters) it managed was not territorially bound by the borders of the Massachusetts colony.[325]

vi) Conclusions on Internal Legal Regimes

This chapter turned an empirical eye to five bodies of internal law – five domestic legal orders. They were considered separately in order to illustrate how each was tied to specific political and legal communities and how each were constitutive, in different ways and to various extents, of socio-legal spaces, jurisdictions, and territories. Specifics of each legal order were examined in

[324] Benton, *A Search for Sovereignty, supra* note 102 at 104-161. See also Guy Chet, *The Ocean is a Wilderness: Atlantic Piracy and the limits of State Authority, 1688-1856* (Amherst and Boston: University of Massachusetts Press, 2014).
[325] On this process in broader imperial contexts, see Benton, *A Search for Sovereignty, supra* note 102 at 290-297.

consideration of the idea that "spatial relations are often 'multinormative' and contextual, and what the 'true' nature is depends on the perspective of the groups and persons that have authority in that context."[326] That is, understanding the layered and partial forms of authority and jurisdiction, the plural and hybrid forms of law, that shaped the legal geographies of the region and the relations within and between its distinct political communities requires adopting the internal perspective of each legal order to the extent possible. Thus, the subject matters, legal subjects, and territorial reach of each type of law was considered in the hopes of illustrating how each of these bodies of law created and sustained territorial jurisdictions and legal spaces. Changes over time were considered in recognition to the fact that "the processes that create, sustain, and dissolve places all have their own specific temporality that is shaped by a complex interplay of physical, social, and legal factors."[327] These complex interplays have only been hinted at to this point, with each legal order being examined more or less in isolation. The interactions, and the transnational legal orders that facilitated them, are the subjects of the following chapters.

By way of brief summary, Wabanaki law was the single most prevalent and dominant form throughout the 17th century. The Wabanaki were not only the demographic majority, but their laws also had the greatest territorial reach. Most of the people in the region were Wabanaki, and the social spaces they occupied and shaped were constituted by and through practices of Wabanaki law. Competing internal forms that reached the region during this time were confined to small agricultural communities, as with Acadian law and French colonial law, and could not support territorial ambitions with actual practices of jurisdiction. Imperial law operated at a different scale, one that allowed it to function without impact on many of the region's inhabitants, such that the territory could be structured as a space of British or French imperial legality without tangible impact on other legal orders. The state of affairs was the inverse of that portrayed on maps of the era: maps colour whole territories evenly on the basis of vast imperial territorial claims, leaving localized forms nearly or completely invisible. A more accurate portrayal would have these extensive territories shown in only the lightest of shadings with the plural legal communities within those asserted borders shown in much more pronounced colours. While there were undoubtedly

[326] Franz von Benda-Beckmann and Keebet von Benda Beckman, "Places that come and go: a Legal Anthropological Perspective on the Temporalities of Space in Plural Legal Orders" in Irus Braverman, Nicholas Blomley, David Delany, and Alexandre Kedar, *The Expanding Spaces of Law: A Timely Legal Geography* (Stanford: Stanford University Press, 2014) at 36.
[327] *Ibid.*

important shifts in the spatial distribution of law and authority throughout the 17th century, these occurred at scales that did not impact the prevailing domestic legal orders. For example, France and England trading the territory back and forth repeatedly during the 17th and early 18th centuries impacted trade and settlement in minor ways but had little impact on Wabanaki or Acadian communities. Changes at the scale of imperial transnational law had little impact on the lived legal realities of the peoples living in the territory. The one notable exception to this is Port Royal, which was subject to constant attack and frequently changed hands. Here, however, the situation is the inverse: the scale was so localized as to have little impact on the broader territory. A change in whose soldiers occupied the fort had only marginal impact elsewhere.

Moving into the 18th century, the changes became more significant. The French were formally ousted from peninsular Nova Scotia in 1713 and from the region entirely by 1758. Acadian communities retained a high degree of independence throughout much of this period, but the independence came at an incredible cost, with the eventual deportation in 1755 motivated by their uncertain allegiance. British rule was largely confined to Port Royal for the early part of the century, but the establishment of Halifax in 1749 and the fall of New France dramatically shifted the balance of power in the region. In the 1750's colonial law began to expand beyond the borders of Port Royal and Halifax, with new communities being established and settlers being brought in to occupy the lands taken from the Acadians. Wabanaki law was pushed out of a growing number of spaces and came to apply to a smaller proportion of the inhabitants of the region. By the time of the signing of the last known peace and friendship treaty in 1779, Nova Scotia had replaced Mi'kma'ki and Acadie as the dominant socio-legal territorial formation and jurisdiction, a century and a half after "New Scotland" took shape in the imperial imagination with the grant of the region to Sir William Alexander.

Recalling the features of legally and normatively plural spaces identified by Franz von Benda-Beckmann and Keebet von Benda Beckman, several examples can be seen in this chapter that help bring the discussion of these legal orders into the broader argument of this work.[328] The notion of alternating legal spaces, in which people had access to different legal regimes at different times, is highly relevant.[329] Acadians are the most prominent example, as they relied on their

[328] Franz von Benda-Beckmann and Keebet von Benda Beckman, "Places that come and go: a Legal Anthropological Perspective on the Temporalities of Space in Plural Legal Orders" in Braverman et al, *The Expanding Spaces of Law, supra* note 326 at 30.
[329] *Ibid* at 38.

internal law, French colonial law, and British colonial law at different times. They also worked according to Mi'maw law, respecting Mi'kmaw territorial claims and, in some communities, intermarrying and entering into the Mi'kmaw system of kinship. Another descriptive frame refers to legal spaces that fade in and disappearing legal spaces. Fading in refers to legal orders that have an influence before the space formally becomes a legal space under that system of law, while disappearing legal spaces means precisely that.[330] Again, considering the subjects and subject matters of a given legal regime over time reveals where legal spaces grow thicker or thinner, where they fade in or disappear. British law faded in, particularly through intermittent periods of control and with the regional influence of Massachusetts. Indeed, the process of granting vast tracts of land and slowly building territorial jurisdiction over time through the enforcement of particular boundaries and laws reflects the fading in of new legal regimes. Attending to subjects and subject matters, however, also helps us see how this line is too brightly drawn. While British law "faded in", it did so much more prominently for some people and in respect of certain things. For example, it applied to Mi'kmaq individuals involved in attacking a merchant ship, but not in any of their internal affairs. These fades, in and out, were also explicitly negotiated, as discussed in the next chapter.

Disappearing legal spaces occur when there are changes in power and authority or other circumstances which lead a given space to no longer be structured by the legality that had previously prevailed there.[331] Certainly there were examples of this. The most dramatic example was the deportation of the Acadians, which was also followed by the most explicit legal erasure – legislation that precluded Acadians from ever seeking compensation for their losses. French colonial law disappeared from peninsular Nova Scotia in 1713 (formally, though, as discussed, French priests continued to have considerable influence operating in formally British territory, making the disappearing something of a fading out). French colonial law relocated to the islands but ended there in 1758. Mi'kmaw law, at least in its domestic forms, also largely disappeared from centres such as Port Royal, and Halifax. Again, though, using the frame of subjects and subject matters, individual Mi'kmaq would have carried many of their obligations with them into these spaces. While they may have also become subject to colonial law, Mi'kmaq law would follow them into these spaces. In light of this, a final category, *Lingering Law,* helps conceptualize

[330] *Ibid* at 38-39.
[331] *Ibid* at 40.

these internal regimes. Lingering law refers to law that remains even if formally ousted: "Once formally abolished, legal spaces do not necessarily disappear but may be maintained in practice or memory."[332] This can happen because change is contested, or for logistical reasons.

All of this is important because it helps show the legally pluralistic character of the region in a way that de-centres the state and hierarchical concepts of law and authority. This framing can inform the development of the common law by providing a clearer historical record, one which doesn't take up the 19th and 20th century displacements of Indigenous law and jurisdiction as natural and inevitable. Further, Canadian courts have consistently emphasized a need to recognize rights and jurisdiction *as practiced* historically, and the type of analysis above can help those courts to more clearly conceptualize those practices and the ways that multiple legal orders overlapped in tension and accommodation. The following chapter undertakes a similar analysis in respect of transnational varieties of law.

[332] *Ibid* at 41.

Chapter 4: Transnational Legal Regimes

Internal legal regimes, legal practices that political communities engage in and that govern their behaviours and regulate their social activities and relations, play and important constitutive role in creating legal spaces. Their subject matters and the legal subjects they govern determine the territorial scope and authority of the regimes. The scale, both spatial and temporal, of the territorial jurisdiction brought into being through internal legal practices is determined by how legal subjects carry that law through territories and how it regulates their behaviour. This is, in an important sense, what historians like John Reid, Jean Daigle, and Jeffers Lennox mean when that say that European settlement and activity was peripheral to the majority of the inhabitants of Mi'kma'ki and Wuastukwuk until the 18th century.[1] While the British and French created the jurisdictions of Acadie and Nova Scotia as concepts, they rarely engaged in practices that brought those jurisdictions into being. While much historical work on the region before the last few decades reads as though the only active agents were European settlers, traders, explorers, and privateers, a close reading shows that early colonialists never exercised control beyond poorly defended forts that they maintained to support a trade in fish or furs and that were regularly razed, captured, or exchange diplomatically. That is not to say their presence was without impact. The fur trade changed Indigenous economies and patterns of trade. European diseases had severe impacts. The presence of large colonies to the south and ongoing imperial contests between Britain and France caused re-alignments of Indigenous diplomacy, both with respect to Europeans and among Indigenous nations. By the 18th century, treaty-making between Indigenous and European peoples was a well-established practice in North America, one that Imperial nations understood a necessary to their broader objectives. In addition to internal legal regimes, then, legal spaces were constituted by practices of transnational law. As with internal law, for much of the first two centuries after

[1] See generally: Jeffers Lennox, *Homelands and Empires: Indigenous Spaces, Imperial Fictions, and Competition for Territory in Northeastern North America, 1690-1763* (Toronto: University of Toronto Press, 2017); John G. Reid, *Essays on Northeastern North America: Seventeenth and Eighteenth Centuries* (Toronto: University of Toronto Press, 2008); Reid, John G., Maurice Basque, Elizabeth Mancke, Barry Moody, Geoffrey Plank, and William Wicken. *The 'Conquest' of Acadia, 1710: Imperial, Colonial, and Aboriginal Constructions* (Toronto: University of Toronto Press, 2004); William C. Wicken, *Mi'kmaq Treaties on Trial: History, Land, and Donald Marshall Jr.* (Toronto: University of Toronto Press, 2002).

European arrival on the Atlantic coasts the predominant forms and practices of transnational law were those between Indigenous nations. Over time, Indigenous-European and inter-European transnational forms became increasingly important. This chapter explores these three foundational forms of transnational law.

i) Inter-Indigenous Law

Inter-indigenous law refers to those laws or systems of law that regulate the relationships between Indigenous nations. As Sakéj Henderson explains, transnational law in the Algonquian world differed from domestic legal orders in that transnational law was not based primarily on family structures, but "on consensual agreements among the First Nations."[2] In the Maritime region, the most prominent example of this is the Wabanaki Confederacy.[3] The Wabanaki Confederacy included the Mi'kmaq, Wolastoqey, Penobscot, and Passamaquoddy, nations inhabiting the present day Maritime Provinces, the Gaspé Peninsula, and parts of New England.[4] The prominence of the confederacy – known first as *putu'swaqn,* or "convention council" in Mi'kmaq - increased in the context of English and French empire-building contests which were leading to increasing warfare in North America in the late seventeenth-century.[5]

Most accounts suggest the Confederacy was created in the mid-late seventeenth-century to resolve conflict between Algonquian Indigenous nations and deter the expansion of the New England colonies, which were backed by Iroquois warriors.[6] Frank Speck, an Anthropologist writing in the early 19th century, provided a detailed account of the confederacy based Penobscot oral history. Speck noted that the confederacy was "an outgrowth of an organizing tendency shared

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[2] James (Sa'ke'j) Youngblood Henderson, "First Nations' Legal Inheritances in Canada: The Mikmaq Model" (1996) 23 Man LJ 1 at 24.

[3] James (Sa'ke'j) Youngblood Henderson, *Elilewake Compact: The Mi'kmaw, Wolastoqey, and Passamaquoddy Nations' Confederation with Great Britain, 1725-1779, Vol 1* (Saskatoon: Indigenous Law Centre, 2020).

[4] James (Sa'ke'j) Youngblood Henderson. "Mi'kmaw Tenure in Atlantic Canada" (1995) 18 Dal LJ 196 at 239; Wicken, *Mi'kmaq Treaties,* note 1 at 40; Harald E.L. Prins, *The Mi'kmaq: Resistance, Accommodation, and Cultural Survival* (Orlando: Harcourt Brace, 1996) at 117 – 19.

[5] Prins, *The Mi'kmaq, supra* note 4 at 117.

[6] John Grenier, *The Far Reaches of Empire: War in Nova Scotia, 1710-1760* (Norman: University of Oklahoma Press, 2008) at xiv; Prins, *The Mi'kmaq, supra* note 5 at 119. Henderson writes that the Confederacy was established to "end the constant fighting among the Lnu'uk nation": James (Sa'ke'j) Youngblood Henderson, *Wabanaki Compact: The Foundation of Treaty Federalism in North America, 1621-1728* (Saskatoon: Indigenous Law Centre, 2020) at 6. See also Lewis Mitchell, *Wapapi Akonutomakonol: The Wampum Records, Wabanaki Traditional Law,* ed and translated by Robert M Leavitt & David A Francis (Fredericton: Micmac-Maliseet Institute, 1990) at 56-60.

alike by the native founders of the League of the Iroquois, the Creek Confederacy, the Delaware Confederation, and others."[7] Like other Indigenous political confederations, the Wabanaki Confederacy was motivated by a need to organize a political association consisting of several distinct nations and capable of responding to shifting political, economic, and social realities in the post-contact period. Speck states that the four primary nations of the confederacy were Penobscot, Passamaquoddy, Wolastoqey and Mi'kmaq.[8] Henderson confirms this as the "original alliance" of the Wabanaki Confederacy.[9]

In the Penobscot oral history related to Speck, the origins of the Wabanaki Confederacy can be traced directly to Iroquoian aggression. The Iroquois often raided the eastern Abenaki and the Mi'kmaq.[10] After facing defeats in numerous raids, however, the Iroquois decided to seek peace. The counsel of the Ottawa was sought. As Speck explains, the foundation of the four member Wabanaki Confederacy was part of a broader alliance with the Iroquois:

> At length their deliberations brought an end to the wars in the foundation of an alliance between the four Wabanaki tribes, headed by the Penobscot, and the Mohawk of Caughnawaga and Oka, together with other neighboring tribes whose fortunes were in different ways linked with those of the principals. From this time onward, still following the general tradition, the confederacy grew in importance; the four Wabanaki tribes forming themselves into an eastern member with their convention headquarters at Oldtown among the Penobscot; and the whole confederated group, embracing the Wabanaki tribes, the Mohawk and the neighboring Algonkian associates with the Ottawa at their head, appointing Caughnawaga as the confederacy capital. Here regular meetings were held among delegates from the allied tribes where their formal relationship was maintained by series of symbolical ceremonies.[11]

While Speck acknowledges that there is "No doubt the political bonds which linked [the members of the Wabanaki confederacy] together existed long before the alliance with the Iroquois and their neighbours,"[12] he argues that the Wabanaki Confederacy grew out of the broader alliance structure outlined above and therefore dates the foundation of the confederacy at the mid-eighteenth century.

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[7] Frank Speck, "The Eastern Algonkian Wabanaki Confederacy" (1915) 17:3 American Anthropologist 492. See also Patrick J. Augustine, "Mi'kmaw Relations" in Marie Battiste, ed. *Living Treaties: Narrating Mi'kmaw Treaty Relations* (Sydney: Cape Breton University Press, 2016) at 57; Nancy Shoemaker, *A Strange Likeness: Becoming Red and White in Eighteenth-Century America* (Oxford: Oxford University Press, 2006) at 83-85.
[8] Speck, "Wabanaki Confederacy", *supra* note 7 at 493.
[9] Henderson, *Wabanaki Compact, supra* note 6 at 8.
[10] Speck, "Wabanaki Confederacy", *supra* note 7 at 493.
[11] *Ibid.*.
[12] *Ibid* at 498.

Others date the origins of Wabanaki Confederacy earlier, suggest that it pre-dated the alliance with the Haudenosaunee, and place greater emphasis on the alliances and practices of transnational law that pre-dated these specific meetings.[13] In either event, it is clear the Wabanaki nations had extensive systems of alliance and kinship that pre-dated the confederacy with the Haudenosaunee, whether one identifies this as the "Wabanaki Confederacy" or not. It is also clear that the pressures created by colonization fostered a greater need for inter-Indigenous alliance and collective mobilization, and alliances shifted over time in response to social, political, and ecological changes.[14]

What Speck's framing highlights is the need to consider the transnational dimension of the Wabanaki Confederacy in two ways, what Speck calls the "international aspect of the confederacy" and its internal operation.[15] Willard Walker refers to this as Speck's "implicit dichotomy" and writes that Speck

> distinguishes clearly between the larger, multi-ethnic and multi-lingual confederacy that emerged in the eighteenth century and a smaller confederacy made up of just four Wabanaki tribes. These four tribes, Speck says, participated in the Caughnawaga Confederacy, but they also met frequently at their own council houses, had their own agenda, and participated in social as well as political activities.[16]

Henderson makes substantially the same point but frames it somewhat differently. As he explains, the Wabanaki confederacy was one of seven confederacies of the Lnu'uk (Algoquian) civilization, and "these civilizations were in alliances with the Haudenosaunee and Lakota confederacies."[17] What Speck refers to as the "international" regime refers to the extended confederation between the Wabanaki and western nations, including the Haudenosaunee. This is extended confederacy, to use Henderson's term, is contrasted with the four member Wabanaki Confederacy. In Speck's account, the Ottawa were the head of the extended Confederacy, having been sought out to mediate the disputes between the Mohawk and the four eastern members.[18] The Ottawa chief determined

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[13] See e.g. Henderson, *Wabanaki Compact, supra* note 6.
[14] As Kenneth Morrison notes, "the Abenaki adapted to Europeans by strengthening intertribal relations. They pursued alliance with Europeans as one way of fostering unity among themselves." Kenneth M. Morrison, *The Embattled Northeast: The Elusive Ideal Of Alliance In Abenaki-Euramerican Relations* (Berkley: University of California Press, 1984) at 6.
[15] Speck, "Wabanaki Confederacy", *supra* note 7 at 495.
[16] Willard Walker, "The Wabanaki Confederacy" 37:3 Maine History 110 at 112.
[17] Henderson, *Wabanaki Compact, supra* note 6 at 5.
[18] *Ibid*.

that the capital of the confederacy would be Caughnawaga. That is where the council house was built and where the wampum belts detailing the council's foundations and ongoing business were kept. The Ottawa also determined the procedures and protocols of the council, stating that delegates from all member nations would be sent every three years to the council fire. These meetings were initiated with festivities which could last several weeks.[19] These procedures were based on long-standing practices, and the Wabanaki-Haudenosaunee alliance drew on shared procedures, symbols, and diplomatic protocols. Fire was the guiding metaphor for governance and structures of alliance, and the Mohawk were charged with protecting the central fire.[20] Wampum belts were used to record the business of the council and to communicate between members. Copies of the wampum were sent out to each member at the conclusion of the meetings and were kept in the council house of each member nation. When the next meeting occurred, the delegates would bring wampum belts and recount their meaning. These protocols and legal procedures were essential to maintaining the alliance and extended confederation. [21]

Alliance with the Mohawk seems to have lasted for the Penobscot until 1862, the Passamaquoddy until about 1870, and the Mi'kmaq until about 1872.[22] This shows the voluntary nature of the associations and the autonomy of individual member nations. As with the relations the individual nations of Haudenosaunee Confederacy had with the British, French, and Americans, members of the Wabanaki Confederacy maintained their autonomy and could determine their own alliances.[23] This autonomy within the Wabanaki suggests that what Speck refers to as the internal aspect of the Wabanaki Confederacy should also be considered an instance of transnational, or external, law. The confederacy bound together distinct nations, each of whom retained domestic legal orders and considerable autonomy. Many procedural elements of the

[19] *Ibid* at 495-496.
[20] *Ibid* at 496.
[21] Speck, "Wabanaki Confederacy", *supra* note 7 at 496. See also Patrick J. Augustine, "Mi'kmaw Relations" in Marie Battiste, ed. *Living Treaties: Narrating Mi'kmaw Treaty Relations* (Sydney: Cape Breton University Press, 2016) at 52; Prins, *The Mi'kmaq, supra* note 8 at 119. As Henderson explains, "All of the consensual laws of each nation and the Confederacy had to be made and represented in a variety of wampum, so that the laws could be known and recited on any occasion. The wampum laws (*tpaskuwakon*) and its narratives (*kotok*) explained how to greet one another (*wolasihkawotuwin*), how to visit each other (*wikuwwamkewey*), how to conduct wedding ceremonies (*nipuwultimkewey*), the process of making chiefs (*sakomak*) and warriors (*motapekuwinuwok*), and other laws to be performed." Henderson, *Wabanaki Compact, supra* note 6 at 7. This applied both to the extended confederacy and to the Wabanaki Confederacy.
[22] Speck, "Wabanaki Confederacy", *supra* note 7 at 498.
[23] Henderson writes that "the ceremonial structure insisted that each nation or tribe operated separately and freely through kinship to pursue their chosen way of life": Henderson, *Wabanaki Compact, supra* note 6 at 7.

confederacy reflected those of other confederacies and the extended alliances of the Wabanaki nations, including the voluntary nature of the association and autonomy of each member vis-à-vis each other and the group as a whole. The fire as an organizing principle of political association was also used in the internal association, and wampum belts were used to record council business and communicate between members. The nations participated in the election of each other's chiefs, taking part in multiday ceremonies to grieve the passing of a respect chief and select another. Speck writes that their council fire was in Old Town in Penobscot territory, though Henderson notes that councils were also held at St. Francis, Pleasant Point, Meductic, and Bear River.[24] The confederacy "never had a grand or paramount sachem or a permanent place of government", according to Henderson, but featured more diffuse forms of authority and association.[25]

The Wabanaki Confederacy included a mutual protection pact, meaning that members could call on each other for mutual defence if war was threatened.[26] Indeed, the Wabanaki had a long history of mutual participation in wars. Beginning in the mid 17th century, the members of the confederacy were implicated in Anglo-French imperial wars. The French had sought alliance against the British following the Treaty of Utrecht, building a number of churches in Wabanaki territories and, as an inducement, continuing to hold that the territory ceded to the British at Utrecht included only peninsular Nova Scotia. That is, the French contested imperial boundaries to strengthen their negotiating position with Indigenous nations. Further, "as the French made no direct claims to Indian hunting areas and preferred trade rather than settlement, present-day New Brunswick was therefore de facto Maliseet and Mi'kmaw land."[27]

Alliance with the French aligned with Wabanaki desires to limit the spread of British settlement. In Dummer's War (aka Lovewell's War or Father Rale's War), which lasted from 1722-1725, the confederacy fought against the British, more particularly against Massachusetts

[24] Speck, "Wabanaki Confederacy", *supra* note 7 at 498. Henderson, *Wabanaki Compact, supra* note 6 at 15; Mitchell, *Wapapi, supra* note 6.
[25] Henderson, *Wabanaki Compact, supra* note 6 at 15.
[26] Speck, "Wabanaki Confederacy", *supra* note 7 at 502. There are many examples of regional and international diplomacy. In 1721, for example, in response to the Massachusetts government reneging on a promise to return Abenaki prisoners, "[t]he Norridgewalk Abenaki, who lived along the Kennebec River, summoned their allies to pressure the British to release the prisoners. This council met at Norridgewalk in late July of 1721, and included delegates from the Mi'kmaq, Maliseet, and Passamaquoddy, as well as aboriginal communities along the St. Lawrence River, such as the Huron, Montagnais, and Houdenosaunee from Kahnewake and Kahneseteke. The Huron came from near Quebec and the Houdenosaunee from the Montreal area." Wicken, *Mi'kmaq Treaties, supra* note 1 at 76 – 77
[27] Grenier, *The Far Reaches of Empire, supra* note 6 at 53.

and the British in Nova Scotia.[28] This war was the only Wabanki-British war that took place during a time of peace between the British and French in Europe.[29] The war resulted from disputes over land, and the confederacy worked together to stop British expansion. As William Wicken writes, "if the Abenakis' primary objective had been to halt the Anglo-American advance on the Maine frontier, the skirmishes in which they had received Maliseet and Mi'kmaw support had accomplished just that and pointed to a reinvigorated Wabanaki Confederacy."[30] The confederacy once again took up arms against the British in the 1740's. Following the British-French Treaty of Aix-en-Chapelle in 1748, however, the Wabanaki Confederacy convened "at the Penobscot village of Panawamskek and agreed to make peace with New England.[31] The resulting 1749 Treaty again shows the voluntary nature of the confederacy's association and the continued autonomy of the members. The Mi'kmaq, angry at the founding of Halifax in their territory earlier that year, refused to enter the treaty and resumed hostilities with the British.

The Wabanaki took a united stand during the American Revolution. In June 1775, the Penobscot Chief Joseph Orono announced his support for the American forces. As Harold Prins argues, "[b]ecause the Wabanaki Confederacy still functioned and convened on a regular basis, the Penobscot decision was probably not made without informing their allies."[32] Indeed, at the Treaty of Watertown in 1776, both the Wolastoqey and the Mi'kmaq declared their support for the United States. The Wolastoqey declared their support for the American forces again in 1778 when Chiefs wrote the British on July 18 stating:

> the Chiefs, Sachems, & Young men belonging to the River St Johns duely Considered the Nature of this Great War, Between America & old England, they are Unanimous, that Amarica is right & the old English wrong… as the King of England has no business, nor ever had any, on this River, we Desire you to go away with your men in Peace, & Take all those Men who has been fighting or Talking against Amarica. If you Don't go Directly, you must take Care of yourself, your Men, & all your English Subjects, on this River for if any or all of you are Killed it is not our faults, for we give you Warning Time Anough to Escape.[33]

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[28] *Ibid* at 9.
[29] Wicken, *Mi'kmaq Treaties, supra* note 1.
[30] Grenier, *The Far Reaches of Empire, supra* note 6 at 62.
[31] Prins, *The Mi'kmaq, supra* note 4 at 144.
[32] *Ibid* at 156.
[33] "Malecite Declaration of War Against the English, 18 July 1778," James P. Baxter, ed, *Documentary History of the State of Maine,* Vol. XVI, Portland, 1910 at 74-75 as reprinted in W.D. Hamilton and W.A. Spray, eds, *Source Materials Relating to the New Brunswick Indian* (Fredericton: Hamray, 1977) at 50-51.

There are many examples of the confederacy members fighting together and taking unified diplomatic stances. In doing so, they relied on transnational legalities that governed diplomatic processes and protocols and outlined expectations concerning the behaviour of member nations. The practices reflect "an ancient pattern that is indigenous, adaptive, and independent of any dominant society."[34]

The existence of transnational law should not be taken as evidence of perfectly harmonious relations. As Kenneth Morrison has noted in detail, all of the Algonkian nations had competing internal political factions who favoured alliances with different Indigenous and European partners.[35] The 1693 Treaty with the English, for example, caused tension within the Wabanaki Confederacy, with members disagreeing on the wisdom of treating with the English.[36] During Queen Anne's War, which spanned from 1703 – 1713 in North America and was a spinoff of the War of Spanish Succession in Europe that culminated in the Treaty of Utrecht, the members of the confederacy were split on whether to remain neutral or support the French.[37] The decision to treat with the British in 1725-26 was again contested within the confederacy.[38] There was dissension within the confederacy, but it was a dissension that the constitutional structure could accommodate. The constitutional structure of the confederacy was designed to accommodate the autonomy of its members.[39] Both the internal and external dimension of the Wabanaki Confederacy are examples of transnational or external Indigenous law.

Inter-Indigenous diplomacy and law continued after the arrival of Europeans. Particularly in law, the tendency is to treat the arrival of Europeans as occurring at a "moment", a moment which irrevocably altered the nature and scope of the agency of Indigenous peoples. This is evident in the Supreme Court of Canada's Aboriginal rights doctrine which requires that an Indigenous claimant demonstrate that an activity was integral to their distinctive culture *at the time of European contact* in order to ground a contemporary right.[40] The majority in *Van der Peet* argued that this approach does not freeze rights in their pre-contact form because it allows for the

[34] Walker, *supra* note 16 at 112.
[35] Morrison, *The Embattled Northeast, supra* note 14 at 5, 173 – 175.
[36] Prins, *The Mi'kmaq, supra* note 4 at 126.
[37] *Ibid* at 129.
[38] *Ibid* at 138-39.
[39] Henderson, "Mi'kmaq Model", *supra* note 2 at 7.
[40] *R v Van der Peet*, [1996] 2 SCR 507; *R v Sappier; R v Gray,* 2006 2 SCR 6. For classic commentary, see Bradford W. Morse, "Permafrost Rights: Aboriginal Self-Government and the Supreme Court in R. v. Pamajewon" (1997) 42 McGill LJ 1011; RL Barsh, & J.Y. Henderson, "The Supreme Court's *Van der Peet* Trilogy: Naive Imperialism and Ropes of Sand" (1997) 42 McGill L.J. 993.

modern exercise of a pre-contact activity (e.g. the exercise of a right to hunt may be undertaken with a bow).[41] Yet, such an approach does tether Aboriginal rights to the pre-contact era by insisting that any development of socially or culturally integral activities post-contact are not worthy of constitutional protection because of the potential impact of Europeans. Post-contact activities are different *in kind* from pre-contact activities, and that difference precludes them from being "Aboriginal rights" as described in s.35(1).

The only way such an arrangement makes sense is if something occurred at contact that sufficiently changed the nature of Indigenous activities such that any activities developed since contact could not ground a "right." It is clear what the court has in mind. In writing that "the rights it protects are Aboriginal" the court draws on a discourse about Indigeneity that understands pre-contact Indigenous identity as pure, unchanged, and, therefore, authentic. Indigenous behavior shaped by contact with Europeans becomes tainted by European exposure. The only aspects of Indigenous identity worth preserving with the force of law are those "authentic" parts which pre-date European contact. This relies on problematic readings of history which assume, for one, that the date of first contact can be established with any kind of certainty. Second, it relies on the myth the European arrival irrevocably changed Indigenous societies and cultures. In fact, for at least two centuries after first contact in much of North America, Indigenous peoples remained dominant socially, culturally, politically, and demographically. Reading first contact as altering Indigenous peoples in this way radically recasts historical circumstances to accommodate contemporary conceptions of state domination and legitimatize the circumscription of Aboriginal rights. It is notable how broadly held the view that European arrival undermined the "purity" of Indigenous peoples is. It is found not only in the reasoning of the court, but in sympathetic commentators. Harald Prins, for example, questions whether the Wabanaki Confederacy was "Indigenous" in origin because it arose post contact.[42]

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[41] *R v Simon,* [1985] 2 SCR 387.

[42] Prins, *The Mi'kmaq, supra* note 4. Wicken rejects such an approach explicitly. He argues that the work of many historians has relied on a view that "Mi'kmaq culture in the seventeenth and eighteenth centuries was shaped, not by its own internal rhythms, but by forces external to itself, leaving little room for either social or individual action. As other authors have argued for other Native groups, in this chapter I intend to demonstrate the contrary: while adapting to the challenges posed by European settlement, Mi'kmaq responses continued to be internally generated." See William C. Wicken, *Encounters With Tall Sails and Tall Tales: Mi'kmaq Society, 1500-1760* (PhD Diss, McGill, 1994) at 207.

This is important in the context of a discussion of inter-Indigenous transnational law because it evidences a "structure of attitude of reference", to use Said's phrase[43], that allows for the ongoing limitation of Indigenous rights of self-determination by reading Indigenous agency out of the historical record. To articulate a vision of Aboriginal rights which conceives of the moment of contact as radically reorienting the Indigenous experience to such an extent that every subsequent social or cultural development has been coloured by European influence, one must inhabit a world shaped by colonial epistemologies foregrounded by European superiority and tethered to the remnants of 19th century civilizing discourses. This much is clear if we understand the basic fact that contact among Indigenous nations is not said to have modified Indigenous cultures in the same manner as contact with Europeans. Why should Mi'kmaq contact with a Basque fisherman forever freeze the rights of Mi'kmaq peoples, while contact with the Iroquois or Ojibwe did not? Such structures of attitude and reference lead to the mistaken belief that inter-Indigenous diplomacy and law was a pre-contact activity or that its post-contact variants are different in kind and ought to be subject to different legal considerations.

Inter-Indigenous legal practices shaped northeastern North America as a legal space before the 18th century. The legal subject matters these practices of transnational law dealt with included rights and obligations concerning war and peace, diplomatic protocols and structures of alliance and kinship, regulation of trade, and access to natural resources. The legal subjects were Indigenous peoples as political entities, who developed customary forms of transnational law through their engagements with other peoples and positive forms of law through negotiated treaties and structures of alliance.

ii) Inter-European Law

Inter-European law refers to the body of law that governed relations between European nations. This would come to be called "international law", though it was Eurocentric in nature and its reliance on European notions of sovereignty and statehood linked it inextricably to European imperialism.[44] As outlined in detail in chapter 1, however, international law as a body or system

[43] Edward Said, *Culture and Imperialism* (New York: Vintage Books, 1994) at 75.
[44] For a comprehensive and influential articulation of this argument, see Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge: Cambridge University Press, 2005). See also Antony Anghie, "Western Discourses of Sovereignty" in Julie Evans, Ann Genovese, Alexander Reilly, Patrick Wolfe, eds,

of law regulating a state-based international order had not yet taken shape during the period at issue here. Rather, the law of nations prevailed as a nascent form of inter-European international law.[45] This system of law had two important elements: the customary body of practices by which European nations considered themselves bound, and the body of treaties which bound parties by explicit agreement. The former has been covered in chapter 1 and will not be reviewed here, though reference will be made to its impact on the Maritime provinces in particular. The latter was the primary means through which competing territorial claims to the region by the British and French were negotiated. The Maritimes were rarely the immediate cause or concern of European treaties and were dealt with instead in the context of broader negotiations about what were considered more important and pressing matters.

France first attempted year-round settlement of Acadie in 1604.[46] European sovereignty over the territory was unsettled as competing claims to first discovery and possession were asserted based on the voyages of Cabot, Cartier, and later Gilbert. In 1621, James II of England (James VII of Scotland) granted the whole of the region to Sir William Alexander. This grant undoubtedly conflicted with French claims, though the French presence in the territory was minimal. The early French proprietor de Monts had fallen "victim to the caprices of royal favour in 1607," resulting in the loss of his monopoly and most settlers at Port Royal returning to France.[47] Though de Monts returned with more settlers in 1610, the fort was burned to the ground in 1613 by Samuel Argall, described as a "Virginian pirate." Settlers scattered to live among the Mi'kmaq and return to Europe, and, the odd trader excepted, settlement was non-existent until the 1630's.[48] It was competing claims to what the Europeans insisted was legally vacant territory, combined with the importance of the cod fishery, that led the region to become the subject not only of the customary

Sovereignty: Frontiers of Possibility (Honolulu: University of Hawai'i Press, 2013); Antony Anghie, "Francisco Vitoria and the Colonial Origins of International Law" (1996) 5:3 Social & Legal Studies 321.

[45] Charles Covell, *The Law of Nations in Political Thought: A Critical Survey From Vitoria to Hegel* (London: Palgrave MacMillan, 2009); Ken MacMillan, *Sovereignty and Possession in the English New World: The Legal Foundations of Empire, 1576 – 1640* (Cambridge: Cambridge University, 2006); Robert A. Williams Jr., *The American Indian in Western Legal Thought: Discourses on Conquest* (Oxford: Oxford University Press, 1990).

[46] John Mack Faragher, *A Great and Noble Scheme: The Tragic Story of the Expulsion of the French Acadians From Their American Homeland* (New York: W.W. Norton, 2005) at 1-23; James Laxer, *The Acadians: in Search of a Homeland* (Toronto: Anchor Canada, 2006) at 23-26.

[47] NES Griffiths, "1600-1650: Fish, Fur, and Folk" in Phillip A. Buckner and John G. Reid, eds, *The Atlantic Region to Confederation: A History* (Toronto: University of Toronto Press, 1994) at 53.

[48] *Ibid* at 53 - 57.

law of nations and associated doctrines of discovery, but of the positive body of inter-European treaty law.

Alexander made no attempt to settle the colony until 1629. That year Quebec had been surrendered by Samuel de Champlain to a Scottish expedition led by David Kirke. The Kirke family were backers of Alexander and the fall of Quebec facilitated the settlement of Port Royal. Though Scottish settlers were having some success at Port Royal and had developed trading relationships with the Mi'kmaq there, the venture was put to an end in 1632 when the colony was returned to France, along with Quebec and Cape Breton, in the Treaty of St Germain-en-Laye.[49] The Treaty itself was part of a broader set of peace negotiations following the siege de La Rochelle, which effectively ended an Anglo-French war that was part of the broader Thirty Year's War sweeping Europe.

The next treaty to impact the Maritimes was the Treaty of Westminster 1654-55, which ended the first Anglo-Dutch War. [50] In 1654, prior to the end of hostilities, Robert Sedgwick and John Leverett were instructed by Cromwell to travel to New England and "organize an attack against the Dutch in Manhattan."[51] Sedgwick went beyond his instructions, carrying on past Manhattan and electing to attack La Tour's fort at the mouth of the St. John River and Port Royal, then held by Le Borgne.[52] In negotiating the Treaty of Westminster, the fate of the forts in Acadia was tertiary. The negotiators, in fact, only learned of the siege months after negotiations had begun. The French argued that the forts should be returned, their negotiator arguing that "restitution was just since letters of reprisal could not entitle to the seizure of fortified places, and that treaties of peace had as their principal aim the restitution of seizures made during the war. He advised submitting the question to arbitrators, as in a similar dispute with the Dutch."[53] The English were hesitant to return the forts, arguing that they in fact held a stronger claim to the area on the basis of first discovery.[54] In the result, "[t]he twenty-fourth and twenty-fifth articles provided for the appointment of commissioners to determine the compensation due for prizes taken and losses

[49] *Ibid* at 57.
[50] Francis Gardiner Davenport, ed. *European Treaties Bearing on the History of the United States and Its Dependencies Volume 2: 1650 – 1697* (Washington: Carnegie Institute, 1929) at 41-42.
[51] *Ibid* at 41.
[52] James Hannay, *The History of Acadia, from its First Discovery to its Surrender to England by the Treaty of Paris* (St. John, J&A McMillan, 1879) at 196-198; John G. Reid, "Environment and Colonization Styles in Early Acadia and Maine" in Reid, *Essays, supra* note 1 at 42.
[53] Davenport, *European Treaties, supra* note 50 at 133.
[54] *Ibid.*

suffered by either side, and for settling the question of restoring the forts captured in America."[55] No arbitrators were in fact appointed and the English remained in nominal possession.[56]

The next British-French Treaty dealing with the area was the 1667 Treaty of Breda.[57] Again, the impetus for treaty negotiations was war in Europe. The Treaty of Breda brought an end to the second Anglo-Dutch war, in which France had supported the Dutch. The Treaty included much shuffling of colonial "possessions", with the Dutch winning several trade related concessions relevant to their free trade agenda and securing Surinam and east-Indian colonies, the English gaining New York and New Jersey from the Dutch and three colonies in the West Indies from the French, and the French securing French Guiana and Acadia.[58] The borders of the latter came into dispute during the formal cession. Cromwell had granted the fur trade monopoly in the territory in 1655 to Thomas Temple, William Crowne, and Charles de la Tour (the latter of whom also made a claim to the region on the basis of a knight-baronetcy granted by William Alexander). The borders of the grant were ambiguous, as it was said to include "Acadia and part of the country called Nova Scotia."[59] The formal cession of Acadia required letters patent from King Charles which describe the extent of the territory, defined as "the forts and habitations of Pentagoet (Penobscot), St. John, Port Royal, La Hève, and Cape Sable."[60] Temple refused to accept such a surrender, arguing that the forts on peninsular Nova Scotia, as well as those in present day Maine and at the mouth of the St. John River, were not in "Acadia" but a separate colony of Nova Scotia. Charles made the order a second time, compelling Temple to obey. The territory changed hands in 1670. At this point, there were some 500 Acadian settlers, of whom some 70 percent lived in the Port Royal region and the remainder were lived in small communities around the coasts of the region.[61]

Breda is the first of the inter-European treaties to deal explicitly with legal-subjects in Acadie/Nova Scotia. In Article 11 the parties agreed that any persons in the ceded territory who

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[55] *Ibid.*
[56] *Ibid.*
[57] Andrew Hill Clark, *Acadia: The Geography of Early Nova Scotia to 1760* (Madison: University of Wisconsin Press, 1968) at 107.
[58] Shavana Musa, "The Peace of Breda (1667)" Oxford Public International Law http://opil.ouplaw.com/page/peace-of-breda.
[59] Davenport, *European Treaties, supra* note 50 at 133.
[60] *Ibid*. In Article 10 of the Treaty, Charles agreed to "deliver" the colony through the requisite legal instruments, agreeing to sign "all acts and orders, properly drawn up, which shall be necessary to the said restitution."
[61] Elizabeth Mancke and John Reid, "Elites, States, and the Imperial Contest for Acadia" in Reid, et al, *supra* note 1 at 38.

wished to remain English subjects would be permitted to leave the colony unmolested within one year.[62] This clause would be recycled in the Treaty of Utrecht in 1713, though with those seeking to maintain French subjecthood compelled to leave. The Utrecht clause has received much more attention, leading as it did to contests over the oath of allegiance and, ultimately, to the *Grand Dérangement.* The limited impact of the subjecthood clause in the Treaty of Breda is likely a result of the limited number of people in the territory at the time who would have consider themselves English. It is notable nonetheless, as it shows that European powers were conceptually linking the presence of legal subjects with the extension of imperial rule.

The forts in the region would not remain under French control for long. Port Royal was captured by British forces in 1690 in King William's War, the name of the North American theatre of the War of the League of Augsburg in Europe.[63] In 1688-89, members of the Wabanaki Confederacy had joined French in raids in New England. The alliance effectively pushed English settlers out of present-day Maine, destroying Salmon Falls and taking Fort Loyal at Casco. New England troops, led by William Phips, then attacked Port Royal in May 1690. For much of the next decade, forts and settlements throughout the North Atlantic were subjects to raids, with those in Acadie suffering considerably. The Treaty of Ryswick brought fighting to an end in 1697, with French interests in Acadie being recognized once again by the British.[64].

In the 17th century, then, several inter-European treaties impacted the Maritime Provinces. The Indigenous nations inhabiting the region were never mentioned in these documents. As Elizabeth Mancke writes, "[w]hether from devout belief or from more self-serving motivations, Europeans acted with the conviction that Christian Europe had legal rights to exploit and govern the New World…the newcomers had no doubt that they had a moral duty to spread the Gospel, to trade, to settle and claim land in the New World, and to counter protest and hostility with military action."[65] These beliefs formed the ideological backdrop against which the territory was repeatedly exchanged at negotiating tables in Europe, and this is the context that would lead to the territory

[62] Reprinted in Davenport, *European Treaties, supra* note 50 at 140.
[63] *Ibid* at 351 – 352.
[64] John Reid, "The Conquest of 'Nova Scotia': Cartographic Imperialism and the Echoes of a Scottish Past" in Reid, *Essays, supra* note 1 at 88.
[65] Griffiths, "Fish, Fur, and Folk", *supra* note 47 at 45

once again be ceded between European powers when, On April 11, 1713, the British and French signed the Treaty of Utrecht, ending their participation in the war of Spanish Succession.[66]

The capture of Port Royal by British and New English forces in 1710 would likely have seemed to Acadian and Indigenous residents of the region merely another in a series of conflicts between the British and French.[67] There was no immediate reason to suspect that British control would now hold more permanently than it had the many other times the fort had changed hands. Indeed, the British left the fort poorly defended for several years and a French or Wabanaki attack likely could have retaken it. Events unfolding as they did over the next half-century, however, the cession of Acadia at Utrecht would prove to be the last time peninsular Nova Scotia would be exchanged by European nations. As such, historians have deemed 1713 as the time when Nova Scotia was "acquired", and in some sense "became", British. It also came to be a crucial date in law, as courts identified it as the date of the acquisition of British sovereignty and, therefore, the date at which Mi'kmaw "occupancy" would be assessed for the purposes of establishing Aboriginal title.[68] The current legal and territorial conception of "Nova Scotia" is constructed with Utrecht as its starting point.[69]

The notion of empire at play during the Utrecht negotiations was highly abstract, shaped by "a simulacrum constructed from dispatches, maps, and theory. Having none of the obduracy of a real world, it was especially amenable to colonialist 'remapping' that seemed rational and realistic."[70] Further, "[l]ike the Treaty of Ryswick (1697), Utrecht ignored the Abenaki's independent role in the colonial wars and assumed that land rights could be transferred between

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[66] Dale Miquelon, "Ambiguous Concession: What Diplomatic Archives Reveal about Article 15 of the Treaty of Utrecht and France's North American Policy" (2010) 67:3 The William and Mary Quarterly 459.

[67] See generally Reid et al, *The 'Conquest' of Acadia, supra* note 1. It should be noted that the fate of Acadia was of secondary interest to European negotiators as well. The limited importance of Acadia in the Peace of Utrecht can be seen by the fact that histories of the peace have been written without even mentioning it. See for example: James Watson Gerard, *The Peace of Utrecht: A Historical Review of the Great Treaty of 1713-14 and of the Principle Events of the War of the Spanish Succession* (London: G.P. Putnam's Sons, 1885).

[68] See e.g. *R v Marshall*, 2001 NSPC 2.; *R v Marshall*, 2003 NSCA 105; *R v Marshall; R v Bernard*, [2005] 2 SCR 220.

[69] In this, legal and historical reconstructions construe Utrecht in a manner that belies the limited factual control over the region. Contemporary legal discourse and the historical analysis on which it relies has often failed to pay sufficient attention to how territorial jurisdictions are constituted by specific legal practices and discourses: see Richard T. Ford, "Law's territory: a history of jurisdiction" in Nicholas Blomley, David Delaney, and Richard T. Ford, eds, *The Legal Geographies Reader* (Oxford: Blackwell, 2001) at 200-217.The lack of British presence and inability to engage in constitutive legal practices undermine claims of sovereign territorial jurisdiction. In failing to acknowledge this, contemporary law retroactively applies a notion of territorial control that creates a historical jurisdiction where one scarcely existed.

[70] Dale Miquelon, "Envisioning the French Empire: Utrecht, 1711-1713" (2001) 24:4 French Historical Studies 653 at 654.

European sovereigns without consulting Indians."[71] On the basis of the capture of the fort at Port Royal, the British insisted that Acadie be formally ceded at Utrecht, in addition to their demands for the Hudson's Bay and Newfoundland.[72] French negotiators, working from a position of weakness, were most concerned with securing access to the North Atlantic fishery.[73] But, Pontchartrain, the main French negotiator, hoped to establish an identifiable boundary between New England and Acadie, ideally at the Kennebec River. This, in his view, would conform to ''les anciennes limites" of Acadie.[74] Ultimately, it was agreed that the settling of boundaries would be left to be determined by commissioners in subsequent negotiations. Those commissioners would never meet, and the territory ceded under the treaty remained ill-defined until the Treaty of Paris, 1763. The British and French considered it settled that peninsular Nova Scotia was under British sovereignty while Île Royale and Île St. Jean (Cape Breton and Prince Edward Island) remained French "possessions." Present-day New Brunswick was disputed, essentially remaining a contested borderland as the French tried to redraw the "ancien limites" of Acadie, which seemed clearly to include most of New Brunswick. As Dale Miquelon notes, the approach of French negotiators had changed markedly in August of 1712 when the king decided that Acadie would be ceded. Acadie was then "newly defined as the peninsula only"[75] as part of a proposal which would divide "Acadie" as traditionally conceived by European cartographers and negotiators. What would remain for the French would be "the approaches to Canada by land and sea, the Cape Breton Island fishery, and the Acadian Atlantic fishery."[76] Such an approach would sacrifice the Acadian settlements, the Bay of Fundy, and a land border with New England.[77]

As Miquelon notes, this proposal is illustrative even though it did not survive to the final agreement. It shows that the French prioritized the protection of the fishery over the agricultural settlements and suggests "that the king had come to see Acadia, not as a bounded province, but as a defensive frontier or march, a zone of manifold possibilities across which France and Great Britain confronted each other."[78] Notably, then, the territorial conception of "Acadia" appears to

[71] Morrison, *supra* note 14 at 166.
[72] For comprehensive analysis of the capture of Port Royal and cession of Acadia, see Reid et al, *The 'Conquest' of Acadia*, *supra* note 1.
[73] Miquelon, "Envisioning the French Empire" *supra* note 70 at 657.
[74] *Ibid* at 656.
[75] *Ibid* at 663.
[76] *Ibid.*
[77] *Ibid*.
[78] *Ibid.*

have changed to reflect the reality of contested control on the ground. Throughout the 17th century, the complete lack of European presence outside the coastal forts allowed Europeans to conceive of the territory as a uniformly bounded whole. This was, however, an imagined entity. As a legal space, it may have been territorially extensive, but it was vanishingly sparse. As Miquelon has argued, the two most prominent maps of the region used during the time of the negotiations, Herman Moll's *Map of North America According to Ye Newest and Most Exact Observations* and John Senex's *North America*, were highly general in nature, demonstrating almost no knowledge of the finer details of the region. Thus, at Utrecht, maps "served to make cases, not to find truth. They were visions of empires more desired than actually possessed."[79] The contested visions of imperial space evident in the Utrecht negotiations compelled a rethinking of territorial formations. The shifting of territorial boundaries revealed imperial powers concerned more with the control of localized sites of resource extraction, trade routes, and defence of other colonies than control of broad, clearly defined and bordered territories. That is, the explicitly territorial aspects of this negotiated inter-European law, while making broad territorial claims, in fact reveals itself to be dealing with limited areas of European control.

Following the precedent set in the Treaty of Breda (1667), Utrecht dealt explicitly with the status of imperial subjects. Article 14 agreed that subjects of the French king who wished to remove themselves from territory ceded under the agreement would have one year to do so. Within that year, they could leave unmolested, taking with them all of their belongings. Those who stayed were expected to become British subjects, though on the condition that they would retain their rights to practice their Catholic faith to the same extent such rights existed in Britain itself.[80] As Geoffrey Plank argues, "Acadians were formally granted the power as individuals to determine their own legal status."[81] While one may question the extent to which uprooting from one's home or submitting to a foreign power is a reasonable choice to be faced with, at least formally the Acadian settlers were free to determine their imperial allegiance and political status.

The approach to Indigenous peoples was different. Unlike previous inter-European treaties dealing with the Maritime Provinces, Utrecht spoke to the status of Indigenous peoples. Under Article 15, the Treaty stated that the legal status of the Indigenous peoples of the territories under

[79] *Ibid* at 668.
[80] Davenport, *European Treaties, supra* note 50 at 204, 213.
[81] Geoffrey Plank, *An Unsettled Conquest: The British Campaign Against the Peoples of Acadia* (Philadelphia: University of Pennsylvania Press, 2001) at 71.

consideration, a vast territory including parts of present-day Ontario, Quebec, the Maritime Provinces, Newfoundland, and New England, would be determined by French and British negotiators at subsequent meetings. The imperial affiliation of the various groups was to be determined unilaterally by negotiators.[82] These negotiations never took place, and the status (under European law) of the region's Indigenous peoples was not settled.

Who, then, were the legal subjects of the Treaty of Utrecht, and what was its subject matter? Clearly the French and British crowns, and by extension the broader structures of governance in each nation, were legal subjects who were to be bound by the provisions of the treaty. The language of Articles 4 and 5, for example, state that "The most Christian King promises" and "the most Christian King engages" to follow through on provisions of the treaty.[83] Indeed, much of the treaty is written in the first person, clearly casting the monarch as the legal subject entering into and bound by the agreement. Those identified as "our subjects" in the treaty are in fact both subjects and subject-matter. The Acadians, for example, are identified as subjects of the French King and are legal actors whose actions are constrained by the treaty, thus making them "subjects" of the body of inter-European law. They are also subject-matter in the sense that their status within inter-European law, like trade matters or access to the cod fishery, was a matter to be dealt with by treaty negotiators and an issue which would then bind the behaviour of the primary subjects of the treaty, the British and French crowns.

The Treaty of Aix-la-Chapelle of 1748 was the next inter-European law to touch the Maritimes. In 1745, during the War of Austrian Succession, the British captured the French fort at Louisbourg on Île Royale. The return of the fort was an important consideration for the French negotiators to the 1748 treaty. In a "Separate and Secret Article between Great Britain and France, Concluded at Aix-la-Chapelle, October 7/18, 1748", British and French negotiators agreed that Île Royale would be returned to the French. While important to imperial ambitions in the region, in respect of the issues pertinent to this chapter the agreement simply returned the situation to the status quo following Utrecht.[84] The last major European treaty that would directly impact territorial claims in the region was the Treaty of Paris, 1763, which brought an end to the Seven Year's War.

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[82] Plank, *supra* note 81 at 71.
[83] George Chalmers, *A Collection of Treaties Between Great Britain and Other Powers*, *Vol 1* (London: John Stockdale, 1790) at 343-344.
[84] See Francis Gardiner Davenport, *European Treaties Bearing on the History of the United States and Its Dependecies, 4 Vols* (Washington: Carnegie Institution, 1917-1937) Vol 4 at 76.

The events of 1763 would radically alter the political boundaries and legal geographies of much of North America. Under Article IV the French King renounced "all pretensions which he has heretofore formed or might have formed to Nova Scotia or Acadia in all its parts, and guaranties the whole of it, and with all its dependencies, to the King of Great Britain." Boundaries were not at issue in this cession, as the vast territories ceded included Canada and Cape Breton, as well as "all the other islands and coasts in the gulph [sic] and river of St. Lawrence, and in general, every thing that depends on the said countries, lands, islands, and coasts." The scope was not only territorially broad, so too were the legal interests in those territories. The English crown was said to acquire:

> the sovereignty, property, possession, and all rights acquired by treaty, or otherwise, which the Most Christian King and the Crown of France have had till now over the said countries, lands, islands, places, coasts, and their inhabitants, so that the Most Christian King cedes and makes over the whole to the said King, and to the Crown of Great Britain, and that in the most ample manner and form, without restriction, and without any liberty to depart from the said cession and guaranty under any pretence, or to disturb Great Britain in the possessions above mentioned.[85]

While in one sense the cessions under the Treaty of Paris were only another in a long line of British-French negotiations over sovereignty in the region at European law, the terms of the Treaty also illustrate a greater British insistence on the absolute nature the cession. Boundaries in Acadia would no longer be an issue, as Canada, Prince Edward Island, and Cape Breton would all go to the British; "ancien limites" was replaced with "the whole of it." Not only was sovereignty ceded, but also all rights to "property" and "possession", including those acquired by treaty, "or otherwise." While French-Catholic inhabitants in Canada were promised the free exercise of religion as far as the laws in Britain permitted, French subjects in Acadia were not mentioned, coming as it did on the heels of the *Grand Dérangement.* The British had entered into treaties with the Mi'kmaq and other Wabanaki peoples in 1713, 1726, 1749, 1752, and 1760-61. Thus, by 1763 Britain pushed claims to property and ownership; it claimed both *imperium* and *dominium.*

[85] *Ibid.*

iii) Indigenous-European Law

Indigenous-European interaction began as soon as European's arrived on North American shores. Trade followed quickly thereafter, and with trade came intersocietal protocols governing relations between the parties. Cartier reported encountering people anxious to trade for European goods, people who likely already would have been familiar with Europeans through their contact with seasonal fishermen. By the time French attempted to build a settlement in Mi'kma'ki, the Mi'kmaq there spoke a pidgin Basque trading language.[86] Given the extensive interaction, norms would have developed governing the behaviours of the parties.[87] As Stephen Augustine writes, when the Mi'kmaq "traded with Europeans, we also hosted feasts and pipe ceremonies (*tabagies*), exchanged gifts, and praised each other in long speeches. This idea of gift exchange, feasting and ceremony had long been the code of conduct in maintaining peaceful relationships with the neighbouring Algonquian-speaking tribes."[88] That is, when Europeans arrived, Indigenous peoples brought them into trading practices like those they shared with other Indigenous peoples, repeating similar ceremonial and procedural aspects of the trade.[89] When considering Indigenous-European law, we must look not only at the treaty relationship, which is the most obvious example of intersocietal law in North America, but also forms of *customary* intersocietal law. This should not be conceptually difficult. The law of nations, especially in relation to the law of the sea, has been explicitly grounded in custom since at least John Selden's intervention in *Mare Clausum* in the 17th century.[90] Customary law is, of course, a constitutive part of contemporary international law as well. Yet, in considering European-Indigenous law, emphasis has almost exclusively been on the positive forms (i.e., negotiated treaties).[91]

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[86] Prins, *The Mi'kmaq, supra* note 4.

[87] For an example of customary intersocietal law, see Bill Wicken, "26 August 1726: A Case Study in Mi'kmaq-New England Relations in the Early 18th Century" (1993) 23:1 Acadiensis 5 at 15-16. As Wicken recounts, new England fisherman had camps along the eastern (now southern) shores of Nova Scotia, that were likely there with agreement with the Mi'kmaq. Also, alcohol became important to their meetings. Tellingly, "during the early 17th century a Basque fisherman fishing near Canso complained to the Parisian lawyer Marc Lescarbot that the Mi'kmaq regularly came onto his boat, helping themselves to whatever fish they wanted."

[88] Stephen J. Augustine, "Negotiating for Survival" in Battiste, *Living Treaties, supra* note 21 at 19.

[89] See, for example Henderson, *Wabanaki Compact, supra* note 6 at 21-89.

[90] John Selden, *Mare Clausum: Of the Domion, or, Ownership of the Sea, Two Books* (New Jersey: The Lawbook Exchange 2004) [first printing 1652].

[91] An exception to this is the doctrine of common law Aboriginal rights, which has developed in Canada such that customary intersocietal law is one of the constitutive elements of the rights protected by the common law.

Intermarriage is an important part of the history of any intermingling of peoples and cultures. The history of European settlement in the Maritime Provinces is no exception. Adam Gaudry and Darryl Leroux have pointed to possible dangers in placing too great an emphasis on intermarriage in narrating indigenous-settler relations, in which "identities are essentialized in ways that capitalize on settler puzzlement over forms of Indigeneity based on kinship and belonging and replace these forms with an imagined past of racial mixedness leading to supposed societal unification."[92] This points to the danger of prioritizing "racial" mixing at the expense of the formation of political communities in narrating histories of Indigenous-settler relations. In particular, there is a risk in assuming a social unification on the basis of intermarriage. Indigenous identity and political community may be undermined in troubling ways when claims are based merely on ancestry rather than on acceptance within political communities. Further, one cannot presume political or social affiliation merely owing to mixed heritage. For example, the fact of Acadian-Mi'kmaq intermarriage does not, in itself, say anything about political relations between those communities. Nonetheless, marriage, especially in the early colonial period, played an important function in shaping relations between distinct political communities, and practices around intersocietal marriage brought about the nascent forms of intersocietal law. That is, marriage was an important political tool and legal tool as it helped regulate the relationships between political communities.[93]

The earliest French settlers in Mi'kma'ki had good relations with the Mi'kmaq. Intermarriage was a part of this. As early as 1611, Jesuits noted that men who had been sent to make a colony had instead sought to live with the Mi'kmaq.[94] For early traders, life with the Mi'kmaq was sometimes preferable to trying to settle on their own, especially for those few individuals who remained in Mi'kma'ki through the winters in the early decades of the

[92] Adam Gaudry and Darryl Leroux, "White Settler Revisionism and Making Métis Everywhere: The Evocation of Métissage in Quebec and Nova Scotia" (2017) 3:1 Critical Ethnic Studies 116 at 116.
[93] Of course, the assimilatory nature of marriage should not be overlooked. British policy of intermarriage in the 18th century had specifically assimilatory intentions. Clause 23 of the Instructions to Governor Richard Philipps in 1729 read: "And as a further mark of His Majesty's goodwill to the said Indian nations, you shall give all possible encouragement to intermarriages between His Majesty's British subjects and them, for which purpose you are to declare in His Majesty's name that he will bestow on every white man, being one of his said subjects, who shall marry an Indian woman, native and inhabitant of Nova Scotia, a free gift of the sum of ten pounds sterling and fifty acres of land free of quit rent for the space of twenty years, and the like on any white woman. being His Majesty's subject, who shall marry an Indian man, native and inhabitant of Nova Scotia, as aforesaid." This seems to have been directed toward the creation of 'British subjects' in the colony.
[94] Griffiths, "Fish, Fur, and Folk", *supra* note 47 at 59.

seventeenth-century. The leaders of the French settlements were themselves intermarried. Charles de La Tour's first marriage was to a Mi'kmaq woman, with whom he had three daughters.[95] One of the daughters later married a Basque fur trader who owned land at the mouth of the St. John River. Two other daughters entered the convents in France. Marie Battiste argues that La Tour and his wife Louise (Llul's) were "married in Mi'kmaw tradition, and he reported that his wife and her family had taught him to become proficient in Mi'kmaw, adding to his learning a variety of dialects through trade with the Mi'kmaq and the Wabanaki allies."[96] Members of the Lejeune, Thibodeau, and Martin families also married Mi'kmaq women in 1630's and 40s.[97] The extent of intermarriage as the Acadian communities developed is a matter of some dispute. As William Wicken notes, several historians have presumed intermarriage to have been extensive.[98] Yet, in the main agricultural Acadian communities, this may be overstated. Wicken argues that the development of agricultural society and the Acadian's own balancing between imperial interests may have deepened divisions between themselves and the Mi'kmaq over time. Intermarriage in these communities may have been less frequent than assumed, especially in the 18th century. The exception to this is the south shore, where French settlers were frequently intermarried with Mi'kmaw communities and lived in close proximity to them. This nuance aside, marriage is one example of non-treaty forms of intersocietal law that were important in structuring the interaction within and between communities.

The Indigenous-European law with the most profound contemporary impact, however, are the treaties of peace and friendship signed with the British. These represent what Sakéj Henderson has called "an innovative strategy of treaty federalism" which established "an international relationship between First Nations and Great Britain and France"[99] As Henderson argues, "[t]hese treaties recognised and respected tribal autonomy and Aboriginal legal institutions. They united the First Nations directly to the English crown as protected partners."[100] The treaty relationship was the basis of an inter-societal constitutional structure which accommodated legal pluralism and

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[95] *Ibid.*
[96] Marie Battiste, "Resilience and Resolution: Mi'kmaw Education and Treaty Implementation" in Battiste, *Living Treaties, supra* note 21 at 264
[97] Griffiths, "Fish, Fur, and Folk", *supra* note 50 at 59.
[98] William C Wicken, "Re-Examining Mi'kmaq-Acadian Relations, 1635-1755" in Sylvie Dépatie, Catherine Debarats, Danielle Gavreau, Mario Lalancette, Thomas Wien, eds, *Vingt Ans Après: Habitants et Marchands* (Montreal-Kingston: McGill-Queen's University Press, 1998) at 94.
[99] Henderson, "Mi'kmaq Model", *supra* note 2 at 5.
[100] *Ibid.*

the autonomy of political actors. The British began entering into treaties with North American Indigenous nations in the 17th century. They developed a practice of acquiring a cession of land before proceeding with settlement.[101] The seventeenth-century treaties are said by western historians to have been signed between the British and the Indigenous nations of New England, and contemporary Canadian law has not recognized the Mi'kmaq or Wolastoqey as parties of these treaties. Mi'kmaw writers assert the Mi'kmaq to have been parties to British treaties as early as 1629.[102] There is much work yet to be done in bringing the colonial legal understandings of the treaties into closer alignment with the oral histories and understandings. As Marie Battiste writes, "Mi'kmaq are also contesting interpretations, urging the courts to hear and understand our ancestors' understandings and meanings of the treaties through our knowledge systems and oral traditions."[103]

For the purposes of this chapter, the primary analysis will be confined to the 18th century treaties. The 17th century treaties will be drawn on to supplement the interpretation of the 18th century treaties. Given the political, social, and cultural sharing between Algonquian peoples in New England and the Maritime Provinces, it is reasonable to assume that the latter would have an understanding of the content of these agreements even if they were not party to them. From the British side, the 17th century agreements clearly formed a template for their later approach. In considering how the treaties structured legal spaces in the region, the treaty negotiated in 1725 and ratified by Indigenous leaders at Annapolis Royal in 1726 is of particular importance. From a contemporary legal perspective, it is the earliest treaty recognized by Canadian courts as binding the Crown. From legal and historical perspectives, this treaty was renewed in treaties in the region, so the nature of the treaty relationship cannot be understood without it. There are four subject-matters as of the treaties that illustrate how they structured legal and political relationships: sovereignty, submission, friendship, and protection; land; criminal law; and hunting, fishing, and lawful occasions.

[101] For an account of the development of this practice, see: Stuart Banner, *How the Indians Lost Their Land: Law and Power on the Frontier* (Cambridge: Harvard University Press, 2005).
[102] Marie Battiste, "Resilience and Resolution: Mi'kmaw Education and Treaty Implementation" in Battiste, *Living Treaties, supra* note 21 at 2.
[103] *Ibid.*

a) *Sovereignty, Submission, Friendship, and Protection*

From the British perspective, there were two immediate aims in entering into the 1725 treaty. The first was to bring an end to the 1722-1725 war with Wabanaki peoples. This war was the first between the Wabanaki and the British which took place during a time of peace between the British and French. The war developed in response to unsanctioned British settlement, primarily along the Kennebec river. The British claimed the land had been purchased. The Abenaki disputed this and held that settlement had not received their consent. As William Wicken has noted, "the war was about land."[104] A second British goal was to have the cessions made by the French in the Treaty of Utrecht recognized by the Indigenous nations.[105]

The written part of the 1725-26 treaty is made up of two documents; the "Articles of Peace and Agreement", which detail the promises made by "the Indians", and the "Reciprocal Promises" detailing the promises made by the crown representatives. The Articles of Peace and Agreements address the Treaty of Utrecht explicitly:

> Whereas His Majesty King George by the Concession of the Most Christian King made att the Treaty of Utrecht is become ye Rightfull Possessor of the Province of Nova Scotia or Acadia According to its ancient Boundaries, wee the Said Chiefs & Representatives of ye Penobscott, Norridgewalk, St. Johns. Cape Sables & the said Tribes Wee represent acknowledge His Said Majesty King George's Jurisdiction & Dominion Over the Territories of the Said Province of Nova Scotia or Acadia & make our Submission to His Said Majesty in as Ample a Manner as wee have formerly done to the Most Christian King.[106]

The British were anxious to have the gains made at Utrecht recognized in North America, understanding that, absent buy-in from Wabanaki nations, inter-European legal agreements had little purchase on the ground. The clause above would seem on its face to achieve the British goal of having their sovereignty and jurisdiction recognized and acquiring a submission to the overarching sovereign authority of King George. Differing understandings of this clause were central to the disparate understandings the British and Mi'kmaq had of their new treaty relationship.[107] Both the legal and historical dimensions of this must be nuanced. From a legal perspective, the Supreme Court of Canada has repeatedly held that treaties must be interpreted in

[104] Wicken, *Mi'kmaq Treaties, supra* note 1 at 87
[105] *Ibid* at 74
[106] Reprinted *ibid* at 61.
[107] *Ibid* at 101.

a manner which gives equal weight to unwritten treaty histories and Aboriginal perspectives. Treaties must be given a "large, liberal" interpretation and ambiguities must be resolved in favour of Indigenous parties. At Canadian law, the written text of a treaty is only a starting point and is understood not to represent the entire agreement.[108]

From a historical perspective, understanding what was truly agreed to by the parties requires asking a similar set of questions. Given the fact that the written record represents the understanding of only one party, an historical analysis which hopes to accurately represent the treaties must go well beyond the written text. In both the legal and historical cases, the historical context in which the treaties were signed and the oral histories concerning their scope and content are crucial. In the Mi'kmaq view, the treaties are sacred oral agreements, and the written text should be considered is but one element of the treaty.[109] As Henderson wrote of former Grand Chief Alexander Denny, "Alex rejected the idea that the written copies of treaties in the archives were comprehensive or correct; they offered only a partial, English perspective alongside Mi'kmaw orally transmitted knowledge and law."[110] Further, as William Wicken points out, when interpreting the treaties it must be recalled that the Massachusetts and Nova Scotia treaty parties were "less concerned with defeating their enemy than with incorporating them into Great Britain's political orbit. Their goal in the treaty negotiations was to influence the Wabanaki to become allies of the British King and enemies of the French."[111] It is in this light that the submission and recognition of sovereignty outlined above must be read.

The Mi'kmaw oral history of the treaties rejects the notion that the Mi'kmaq submitted to the King or recognized absolute sovereignty over their territory. According to Alex Denny:

> the Mi'kmaw treaties were not only part of the foundation of Canadian law, but they also had to be read as the reverse of subsequent Canadian law. In the rest of Canadian law…everyone had to be granted powers and rights by the mystical Crown. In the treaties, however, Mi'kmaq retained sovereignty, law, their knowledge system, freedom of religion and their territory for themselves; they never granted the kings any power over those ancestral rights. The settlements, trade and dispute-resolution processes in Mi'kmaw treaties were a limited delegation to the British Crown.[112]

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[108] *R v Marshall (No. 1),* 1999 3 SCR 456 at paras 12-14.
[109] James (Sa'ke'j) Youngblood Henderson, "Alexander Denny and the Treaty Imperative" in Battiste, *Living Treaties, supra* note 21 at 100.
[110] *Ibid* at 101. See also Wicken, *Mi'kmaq Treaties, supra* note 1 at 94.
[111] Wicken, *Mi'kmaq Treaties, supra* note 1 at 87.
[112] James (Sa'ke'j) Youngblood Henderson, "Alexander Denny and the Treaty Imperative" in Battiste, *Living Treaties, supra* note 21 at 102.

In recognizing the British gains made in the Treaty of Utrecht, the Wabanaki accepted that it was now the British who had the right, as between European powers, to negotiate with Indigenous nations of the region for future settlement opportunities.[113] The Wabanaki further recognized existing British settlements as legitimate. From a British perspective, it was also important that the Wabanaki recognized Britain's claim to the "ancient limits" of Acadia, as the border dispute with the French was still underway.[114] But, as Marie Battiste writes, "The treaties make sense of the idea, in the Mi'kmaw language, of *elikewake* (the king in our house), just what was aspired and committed to in living with the king as a friend and ally, not as oppressed subjects."[115]

The recognition of British claims in Acadia on the basis of the Treaty of Utrecht were a recognition of a new relationship, not of absolute sovereign authority. Consider, for example, the treaty clause by which the Wabanaki "make our Submission to His Said Majesty in as Ample a Manner as wee have formerly done to the Most Christian King." As Wicken notes, this section creates "a direct relationship between the Mi'kmaq and the British king."[116] This has long been the position of the Mi'kmaq, who have consistently asserted a direct relationship with the crown. The Mi'kmaq oral tradition is clear that no submission took place in the sense that the British conceive of the word. Submission to a distant crown is not part of the Mi'kmaq memory of the treaty relationship.[117] In the Mi'kmaq tradition, the treaties "impart relationships of sharing based on negotiated peaceful settlements and shared resources that enable Mi'kmaq and settlers to live together peacefully as friends."[118] Part of any confusion may arise due to the reference to the French king. There is no evidence the Wabanaki ever made a submission of any kind to the French king. Structuring the relationship along the lines of that the Wabanaki had with the French would likely have looked much different than "submission" in the sense the term in the abstract would have been understood by the British. How the British themselves understood the term submission in this context is another question.[119]

More appropriate terms than "submission" to describe the nature of the treaty relationship are "friendship" and "protection." Indeed, in the reciprocal promises John Doucet promised "the

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[113] Wicken, *Mi'kmaq Treaties, supra* note 1 at 109.
[114] *Ibid.*
[115] Battiste, "Resilience and Resolution" *supra* note 21 at 4.
[116] Wicken, *Mi'kmaq Treaties, supra* note 1 at 110.
[117] Henderson, "Mi'kmaq Model", *supra* note 2 at 23-24
[118] Battiste, "Resilience and Resolution" *supra* note 21 at 2.
[119] Wicken, *Mi'kmaq Treaties, supra* note 1 at 111-113.

said Chiefs & their Respective Tribes all marks of Favour, Protection & Friendship." The 1752 treaty is described at the head of the document as "Treaty or Articles of Peace and Friendship." The second article promises that "the said Indians shall have all favour, Friendship & Protection shewn them from this His Majesty's Government."[120] Article 6 states that the Mi'kmaq will visit the governor each October to receive presents and "Renew their Friendship and Submissions." This was echoed repeatedly in governor's commissions and instructions. Governor Cornwallis, for example, was instructed to "send for the several heads of the said Indian nations or clans and enter into a treaty with them promising them friendship and protection on our part."[121] This emphasis lasted until the late eighteenth-century. The royal instructions to Thomas Carleton establishing him as the first lieutenant-governor of New Brunswick in 1784 instructed him:

> And Whereas it is highly necessary for Our Service that you should cultivate and maintain a strict Friendship and good correspondence with the Indians, Inhabiting within Our said Province of New Brunswick, that they may be induced by degrees not only to be good Neighbours to our Subjects, but likewise themselves to become good subjects to Us, you are therefore to use all proper means to attain those Ends, to have Interviews from time to time, with the several heads of the said Indian Nations or Clans and to endeavour to enter into Treaty with them promising them Friendship and Protection on Our part.[122]

Friendship and protection were returned to repeatedly. Friendship denoted peaceful relations and alliance. Protection reflects the nuanced reading of submission which reflects not an acceptance of a hierarchical relationship, but the development of a direct relationship with the Crown based on principles of Indigenous diplomacy and kinship metaphors. Henderson argues that the treaties "affirmed the notions of First Nation's territorial sovereignty under crown protection. The scope of British crown authority in North America thus depended on consensual agreements with the freely associated First Nations. Crown prerogative formed the first and fundamental legal structure for the British Empire, often called the hidden constitution of Canada."[123]

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[120] Bruce D. Clark, Micmac Grand Council, Lisa Patterson, *The Mi'kmaq Treaty Handbook* (Truro: Native Communications Society of Nova Scotia, 1987).
[121] As reprinted in Henderson, "The Mikmaq Model", *supra* note 3 at 8.
[122] 1784 Royal Instructions to Thomas Carleton, PANB, available online at http://archives.gnb.ca/exhibits/forthavoc/html/Royal-Instructions.aspx?culture=en-CA [*Instructions to Carleton*].
[123] Henderson, "Mi'kmaq Model", *supra* note 2 at 8.

b) *Land*

The war of 1722-1725 was a war about land and settlement. Land was therefore a central concern of those negotiating the treaties which brought the war to a close, and the treaties indeed included important provisions about land.[124] Each party assumed important obligations regarding land use and settlement. In clause 3 of the *Articles of Peace and Agreement*, the Wabanaki agreed "That the Indians shall not molest any of his Majesty's Subjects or their dependents in their Settlements already made or Lawfully to be made or in carrying on their Trade or other affairs within the said Province."[125] In the *Reciprocal Promises*, Doucet agreed that "the said Indians shall not be Molested in their Persons, Hunting Fishing and Shooting & planting on their planting Ground nor in any other of their Lawfull occasions." What, then, do these engagements mean for land in the region? It is acknowledged, including by the Supreme Court of Canada on multiple occasions, that land was not ceded in the Peace and Friendship treaties.[126] Indeed, the two clauses above are the only ones dealing with land, and it is difficult to construe them as cession clauses, especially given the interpretive considerations outlined above. As the only clauses dealing with land, these stand as the central negotiated framework governing settlement and land use in the region.

The central ambiguity in clause 3 of the *Articles of Peace and Agreement* is the phrase 'Lawfully to be made." The first part of the clause is unambiguous: the Wabanaki agreed not to molest settlements that had already been made. In 1726 this was likely limited to the fort at Annapolis Royal and the fishing settlement at Canso. In the second part of the clause, the Wabanaki further agreed not to "molest" any future settlements which were lawfully made. Under the treaty, then, they give consent to future settlements, so long as those settlements occur "lawfully." The challenge is in defining what lawfully was intended to mean given the absence of a definition in the written text itself. British policy and practice of the era and the specific context in which the

[124] This has been discussed in Robert Hamilton, "After *Tsilhqot'in Nation:* The Aboriginal Title Question in Canada's Maritime Provinces" (2016) 67 UNB LJ 58 and Robert Hamilton "Indigenous Land Rights and the Maritime Peace and Friendship Treaties" in Ian Peach, ed, *Learning the Truth, Seeking Reconciliation: Understanding the Historical Relationship Between Canada and the Indigenous Peoples of Turtle Island and Building a New Relationship* (Montreal-Kingtson: McGill-Queen's University Press, 2022) [*forthcoming*].
[125] Clark, *supra* note 120.
[126] *Simon*, *supra* note 71 at 50. At the Nova Scotia Court of Appeal, Cromwell JA noted that "the Supreme Court of Canada on two occasions has expressed the view that the 1760 - 61 treaties do not cede land": *R v Marshall*, 2003 NSCA 105 at 99. In *R v Isaac* [1975] NSJ 412, at 57, the Court of Appeal held that "[n]o Nova Scotia treaty has been found whereby Indians ceded land to the Crown, whereby their rights on any land were specifically extinguished, or whereby they agreed to accept and retire to specified reserves." *Marshall (No. 1), supra* note 108 at para 21.

treaties of peace and friendship were negotiated can provide some guidance. In terms of practice, the well-established British practice in the 17th and 18th centuries was to acquire lands through purchase or cession before making them available for settlement.[127] The wording of the 1726 treaty, the royal instructions to early colonial governors, and the historical context of the treaty signing all suggest that this policy was understood by the treaty parties and shaped their expectations.[128] The 18th century treaties between the British and the Wabanaki's Abenaki allies in New England would have done the same. Those treaties, like the 1726 treaty, were the result of disputes over land and Indigenous concerns about encroaching British settlement. The treaties, four of which were signed from 1678 -1713, restricted settlement to specific areas, and the Abenaki insisted that their permission would be required, with lands to be acquired through purchase, before settlement could occur elsewhere.[129] Both the British and the Mi'kmaq negotiators in 1726 would have been influenced by these earlier practices and treaty agreements.[130] That treaty, on which negotiations began in Boston on November 11th of 1725, was again negotiated by delegates of the Abenaki, Penobscot, Wolastoqey, and Mi'kmaq along with representatives from both Massachusetts and Nova Scotia.[131] Two treaties were signed on December 15 of 1725, one between the Mi'kmaq, Wolastoqey, and Nova Scotia, the other between the Abenaki, Penobscot, New Hampshire and Massachusetts. Together, these formed the basis of the relationship between the British colonies of north-eastern North America and the Aboriginal peoples of the region.[132] The conflict that eventually led to the 1726 treaty was in fact only the latest in a long string of conflicts in the region, many of which the Mi'kmaq participated in as partners against the British.[133] Indeed, it was the encroachment of British settlement beyond the borders the Abenaki

[127] Banner, *supra* note 101 at 22-28**;** Wicken, *Mi'kmaq Treaties, supra* note 1 at 115, 139; Olive Dickason, "Amerindians Between French and English in Nova Scotia, 1713-1763" in J.R. Miller, ed, *Sweet Promises: A Reader on Indian-White Relations in Canada* (Toronto: U of T Press, 1991) at 107 – 108; In the United States the Supreme Court has reiterated this policy. In *Minnesota v. Hitchcock* (1902) 185 US at 373 -399*,* the court stated that "the Indian right of occupancy has always been considered sacred; something not to be taken from him except by his consent and then upon such consideration as should be agreed upon."
[128] Wicken, *Mi'kmaq Treaties, supra* note 1; Henderson, *Elilewake Compact, supra* note 3 at 559-580.
[129] The war of 1722 – 1725 was a result of "the British intent to enclose lands and Abenaki attempts to mark the limits of English settlement." Wicken, *Mi'kmaq Treaties, supra* note 1 at 74.
[130] Reid, *Essays on Northeastern North America, supra* note 1 at 155. Professor Wicken argues that "[t]he experience of the Abenaki would have been central to how Mi'kmaq leaders understood British policies.": Wicken, *Mi'kmaq Treaties, supra* note 1 at 128.
[131] Wicken, *Mi'kmaq Treaties, supra* note 1 at 85 – 86.
[132] *Ibid.*
[133] *Ibid.* at 79; See also Prins, *supra* note 4 at 137 – 140.

understood to be established by the treaties that led to the war of 1722 – 1725.[134] The clause of interest here – that prohibiting all but 'lawful' settlement – was pulled directly from these Abenaki treaties.[135]

While the Indigenous treaty parties accepted that it was now the British who would negotiate terms of European settlement and trade, they rejected the notion that the British held ownership of, or authority over, their lands. The Penobscot delegates explicitly rejected the idea of submission to the King of England; Loron Sagourrab stated: "I recognize him King of all his lands, but… do not hence infer that I acknowledge thy King as my King, and King of my lands."[136] They also rejected the British claim to be 'master' of the lands they had purchased.[137] In this, the Indigenous parties seem to not only reject British claims to sovereign authority, but to assert that they continue to hold jurisdiction even where lands have been ceded for settlement. Framed in the context of imperial distinctions between *imperium* and *dominium,* they seem to be suggesting that they have disposed of the property right to allow for settlement while retaining the lands within their territorial ambit.[138] Whether this was the intention or not, the Indigenous negotiators rejected any claims that the British made to their lands. As Wicken writes, "[i]t was the British claim to their lands that the Abenaki found most puzzling."[139] Similarly, the Mi'kmaq believed that their

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[134] Wicken, *Mi'kmaq Treaties, supra* note 1 at 87.

[135] The 1713 Treaty, for example, to which the Maliseet were signatories, clearly conceived of two types of land, those already under British settlement, and the Indian lands outside those settlements. It stated in part: "That her Majesty's Subjects, the English, shall & may peaceably & quietly enter upon, improve, & forever enjoy, all and singular their Rights of Land & former Settlements, Properties, & possessions, within the Eastern Parts of the said Provinces of the Massachusetts Bay and New Hampshire, together with all the Islands, Islets, Shoars, Beaches, & Fisheries within the same, without any molestation or claims by us or any other Indians, And be in no wais molested, interrupted, or disturbed therein. Saving unto the said Indians their own Grounds, and free liberty for Hunting, Fishing, Fowling, and all other their Lawful Liberties & Privileges." W. Daugherty, *Maritime Indian Treaties in Historical Perspective*, Indian and Northern Affairs Canada, Research Branch , 2d ed, Ottawa 1983 at 70 – 71.

[136] For Loron Sagourrab's full statement see Colin G. Calloway, ed., *The World Turned Upside Down: Indian Voices From Early America.* (Boston: Bedford/St. Martin's, 1994) at 92 – 94.

[137] Wicken, *Mi'kmaq Treaties, supra* note 1 at 84. Negotiations began in Boston in mid-July of 1725 with a cessation of arms being announced on July 31st. The Mi'kmaq and Maliseet were represented at the July 1725 conference by two Penobscot delegates, Loron Sagourrab and John Ehennekouit, while the British were represented by the Lieutenant-Governor of Massachusetts William Dummer. The treaty would later be ratified by individual communities: *ibid* at 83.

[138] This reflects the early Mi'kmaw view of Acadian settlement, in which they considered the Acadians to have a usufructuary right only. Dickason, *supra* note 129 at 108. It also speaks to one of the essential grounds of the treaty. Through the treaty, the British were attempting to get Aboriginal support for the treaty of Utrecht by recognizing the British acquisition of sovereignty.

[139] Wicken, *Mi'kmaq Treaties, supra* note 1 at 85. The British account of the July peace conference differed and it seems that the parties left the conference with differing interpretation of their agreement. The Aboriginal delegates' views, expressed above, differed from the British account, recorded in English, which stated that the Abenaki had assumed responsibility for the war, submitted to the authority of the English King, promised to honour previous purchases of Abenaki lands, and agreed that disputes between the "Indians and Englishmen" would be settled by

consent was required before settlement could occur, and they rejected the notion that the British acquisition of sovereignty under Utrecht gave rise to an absolute jurisdiction over all of the lands in the region.[140] They explicitly argued that the French Crown never had the authority to settle lands Mi'kma'ki without their consent, rejecting the position that the right to do so could have been acquired by the British from the French.[141]

With all of this in mind we can return to the question of how the phrase "lawfully to be made" ought to be interpreted. Given the above, Wicken's view that both parties would have understood the phrase as meaning "having been purchased or otherwise ceded" before settlement occurred is the correct one. The, Massachusetts negotiators at the 1725 treaty conference stated, "[w]hen we come to Settle the Bounds We shall neither build or settle anywhere but within our own Bounds so settled, without your Consent"[142] and promised compensation for any lands acquired for the purposes of settlement. This is consistent with a belief that the treaties did not open lands for settlement – they were not land cession treaties, as the Supreme Court has noted – but created a framework for the negotiation of future settlement. The treaties were a constitutional undertaking that outlined the body of intersocietal law that would guide the parties moving forward. This framework was one that had been in practice for several decades and would be expressed a few decades later in the *Royal Proclamation* of 1763. Existing settlements were to be respected, while future settlements were to be made "lawfully" (i.e. through negotiated consent).

The second clause of the 1726 treaty limiting British settlement read: "the Indians shall not be molested in their persons, Hunting, Fishing, Planting Grounds nor any other of their Lawfull Occasions."[143] This clause is discussed in more detail below. At this point, it is helpful to note that this deepens our understanding of the previous clause as "[s]ettlements 'lawfully to be made' were those which did not infringe on the areas the Mi'kmaq used for hunting, fishing, and planting."[144] That is, the non-molestation clause ads an additional element to what would be considered a lawfully made settlement. A settlement must be made with Indigenous consent, yes, but it also

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British law. The perspective of the Aboriginal delegates discussed above was a view expressed by them some six months later, recounting what had transpired and rejecting that British interpretation. As Professor Wicken has pointed out, the later reliance on the written British copy of the text to "demonstrate that the Penobscot had recognized New England's title to the lands along the Kennebec [River]" was "a good example of how British officials used a written text to enforce agreements that emphasized their own understanding at the expense of native people's understanding."

[140] *Ibid* at 128.

[141] *Ibid* at 126 – 127.

[142] *Ibid* at 128.

[143] Clark, *The Mi'kmaq Treaty Handbook*, *supra* note 120 at 19 - 20.

[144] Wicken, *Mi'kmaq Treaties, supra* note 1 at 127.

must not interfere with hunting, fishing, or planting grounds. This not only limits settlement, but any British activity that might interfere with these uses of lands and resources. It also introduces an important consideration, that 'lawful' occasions might be defined in relation to Indigenous senses of legality.

As Sakéj Henderson explains, the Wabanaki agreed to allow the English coastal settlements to exist under their own jurisdiction and law within their reserved lands. But peaceful enjoyment of such settlements was not to be equated, in the Mi'kmaq worldview, with any cession of Aboriginal land tenure to the settlers or their abstract sovereign "over the great waters."[145] It is on this basis that many Mi'kmaq argue that most of the land in the region was "reserved by the Mi'kmaq under their treaties."[146] That is, under the treaties, the Mi'kmaq reserved *to themselves,* the majority of the lands in the region, accepting that future British settlement could occur with their consent.

c) *Criminal law*

As with land, criminal jurisdiction was dealt with in the treaties by outlining rights and obligations for both parties. The *Articles of Peace and Agreement* of the 1726 treaty include three clauses dealing with criminal jurisdiction. In the first, the Wabanaki agreed that they would ensure that restitution be made if one of their members committed a robbery "or outrage" against a British subject: "if there Happens any Robbery or outrage Comitted by any of our Indians the Tribe or Tribes they belong to shall Cause satisfaction to be made to ye partys Injured." Under this clause, Wabanaki law would guide the community's response to the individual offender to ensure they met their collective obligation to provide restitution to the victim. Under a second clause, the Wabanaki agreed to submit disagreements between themselves and settlers to the British for resolution; it reads "in the case of any misunderstanding, Quarrel or Injury between the British and the Indians no private revenge shall be taken, but Application shall be made for redress according to His Majesty's Laws." Under a third clause, the Wabanaki agreed to assist the British in enforcing British laws, agreeing that "the Indians shall not help to convey away any Soldiers belonging to

[145] Henderson, "Mi' kmaq model", *supra* note 2 at 23-24
[146] James (Sa'ke'j) Youngblood Henderson, "Alexander Denny and the Treaty Imperative" in Battiste, *Living Treaties, supra* note 21 at 100.

His Majesty's forts, but on the contrary shall bring back any soldier they shall find endeavoring to run away."[147]

The British also undertook obligations regarding criminal jurisdiction under the *Reciprocal Promises* of the 1726 treaty, agreeing that "if any Indians are Injured By any of his Majesty's Subjects or their Dependents They shall have Satisfaction and Reparation made to them According to his Majesty's Laws whereof the Indians shall have the Benefit Equall with his Majesty's other Subjects."[148] These provisions were echoed in later treaties. Article 8 of the 1752 Treaty, for example, reads: "That all Disputes whatsoever that may happen to arise between the Indians now at Peace, and others His Majesty's Subjects in this Province shall be tryed in His Majesty's Courts of Civil Judicature, where the Indians shall have the same benefit, Advantages and Priviledges, as any others of His Majesty's Subjects."[149] Civil and criminal matters, then, fell within a scheme of both shared and exclusive jurisdictions. Where internal matters were concerned, both the British and Wabanaki would deal with the matters internally, according to their own laws and customs. Where an individual caused harm to an individual from the other community, the community of the offender assumed a shared obligation to ensure restitution be made. Conflicts between Wabanaki and settler individuals were to be brought to the colonial courts, with the Wabanaki assuming an obligation not to pursue personal revenge and the crown assuming an obligation to ensure that Wabanaki individuals be afforded all the rights and privileges of a British subject when coming before His Majesty's Courts.[150] In the resulting structure of inter-societal law, "[e]ach community had the liberty and capacity to create and interpret law within their space, and to encourage harmony between the two cultures. The terms of the treaties established that consensual rules validated and legitimated boundaries and bridged the two co-existing legal inheritances."[151] The criminal law played an important role in the imposition colonial jurisdiction and structuring

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[147] Clark, *The Mi'kmaq Treaty Handbook, supra* note 120.
[148] *Ibid.*
[149] *Ibid.*
[150] Henderson writes, "the treaty terms prevented a Wabanaki or ally from asserting their law if an Englishman offended their people, and vice versa. The Wabanaki agreed that as a birthright, the English settlers were governed by English law in all of their conduct. This prevented the application of Algonquian law, especially the law of private revenge, if the English man killed or wronged a Wabanaki or any ally and prevented a Wabanaki family in its duty and right of retaliation to kill another Englishman or the actual killer in the reverse case. Under the treaty, the Aboriginal law of the land was suspended in these cases and transferred to English law and justice. In controversies between "Indians" however, the Aboriginal law applied. Under terms of the treaty, the Wabanaki agreed to maintain peace by allowing controversies between English settlers and the Wabanaki to be settle by his majesty's laws and tribunals." Henderson, "Mi'kmaq model", *supra* note 2 at 18.
[151] *Ibid* at 19.

of settler legal spaces. The development of negotiated intersocietal law pertaining to criminal law is something different. Here, the role of the criminal law in structuring legal spaces was the subject of explicit negotiations.

d) *Hunting, Fishing, and Lawful Occasions*

The *Reciprocal Promises* in the 1726 Treaty read in part: "That the Said Indians shall not be Molested in their Persons, Hunting Fishing & Shooting & planting on their planting Ground nor in any other their Lawfull occasions." To date, the treatment of the Peace and Friendship Treaties in Canadian courts has been largely confined to hunting, fishing, and lumber harvesting rights. Rights to hunt and fish for food, social, and ceremonial purposes have been broadly recognized throughout the Maritime provinces, as has the right to harvest lumber for personal purposes.[152] In *Marshall #1,* the Supreme Court held that the 1760-61 Treaty protected a commercial right to fish, though the court limited the scope of this right through a "moderate livelihood" test whereby the commercial right may only be exercised to the extent required to gain a judicially defined "moderate livelihood."[153]

Hunting and fishing are most often construed in Canadian legal discourse as rights *granted* in the treaties. However, "The Mi'kmaw treaties with the British kings did not bestow upon the Mi'kmaq any rights… rather, the Mi'kmaq gave certain rights to the British king for the benefit of British settlers in Mi'kmaw territory."[154] This Mi'kmaw conception of the treaty rights conforms to a "reserved rights" approach to treaty interpretation, an approach taken by courts in the United States. In *United States v. Winans*,[155] for example, the court held that treaty rights not as a grant of rights *to* indigenous peoples, but *from* them. Considering the Canadian canons of treaty interpretation requiring the courts to consider the Indigenous understanding of the treaty, there are strong grounds to argue for such an approach in Canada, especially when considering the principle that the courts must ascertain the "common intention" of the parties that entered the treaty.[156] Even

[152] See Thomas Issac, *Aboriginal and Treaty Rights in the Maritime: The Marshall Decision and Beyond* (Saskatoon: Purich, 2005).
[153] *Marshall (No. 1), supra* note 108 at para 59-61.
[154] James (Sa'ke'j) Youngblood Henderson, "Alexander Denny and the Treaty Imperative" in Battiste, *Living Treaties, supra* note 21 at 101.
[155] 198 U.S. 371 (1905).
[156] *Marshall (No. 1), supra* note 108.

absent this, there is considerable legal work yet to be done respecting the latter part of the hunting clause, which refers to "planting on their planting Ground" and the freedom to pursue 'Lawfull occasions" unmolested.

The phrase "Lawfull Occasions" was addressed at length by Cain J. at the New Brunswick Provincial Court in the *Sappier* decision. Cain J. found that there were no judicial precedents for the interpretation of this clause, stating that "[t]he Court searched through all of the sources available to it but in vain. Neither the Crown nor the Defense referred the Court to any so it must conclude that there are none."[157] Cain J. went on to state that "[t]he definition of "Occasions" clearly means need and the Signatories to the Treaty of 1725 had a need to use the product of the forest to maintain their traditional way of living. It was not unlawful to cut and carry away wood from the forest in 1725, and therefore liberally construing the expression "Lawful Occasions" would vest in the Signatories that treaty right."[158] This framing takes the common-sense approach that "lawful" can be defined in the negative as including those things that are not unlawful. This also implicitly takes something of a reserved rights approach; it is an interpretation that presumes the Indigenous signatories have the right to carry on with anything not addressed in the treaty. What Cain J.'s framing does not address is what body of law ought to define 'lawful.' To limit it to colonial law would run counter to the spirit of the treaty relationship: Indigenous law must be considered as well. Canadian case law requires that, at the very least, this treaty term must be defined in relation to both colonial and Wabanaki law.

e) *Subjects and Territory*

The treaties are a body of negotiated inter-societal law which acted as a constitutional structure in the 18th century Maritime Provinces. As Henderson writes, "[t]he proceedings and treaties cannot be accounted for solely on the basis of English or French, common or civil, laws, or Nikmanen law. The terms of the treaties drew upon the practices of all parties; thus the modern Supreme Court of Canada has characterised them as *sui generis.*"[159] This body of law was recorded in treaty documents in English, kept in the collective memory of Wabanaki peoples through oral histories, and detailed in wampum belts. Wampum did not only record treaties or agreements between

[157] *R v Sappier,* 2003 NBPC 2; [2003] NBJ No.25 at para 35.
[158] *Ibid* at paras 44, 47.
[159] Henderson, "Mi'kmaq Model", *supra* note 2 at 26

indigenous nations. It was also used to detail alliances with European nations. As Marie Battiste writes, "I was raised under the understanding that the wampum belt symbolically represented our treaties with other indigenous nations and the kings of France and Great Britain."[160]

This body of law applied to Wabanaki peoples individually and collectively and to the English at the individual and collective levels. The legal subjects contemplated within the treaties were both the governments and individual members of both societies. Thus, we find treaty provisions establishing guidelines for the behaviour of these individuals and collectives. The concluding clause of the *Articles of Peace and Agreement* of the 1726 treaty, for instance, reads that "every one of the aforegoing Articles … shall be punctually observed and duly performed by Each & all of us the Said Indians."[161] In the *Reciprocal Promises,* ensures that Mi'kmaq prisoners will be released as a mark of "true Observation & Faithfull Performance of all and Every Article Promised on His Majesty's part by the Government." The promises made were made on behalf of King himself. Further, the particular legal form employed by the British to denote royal assent was used, as the treaty was "given under [the] hand and seal" of the Lieutenant-Governor. Specific promises in the treaty bound English subjects, such as that which ensured that the Wabanaki would "not be molested" in various activities by "His Majesty's Subjects or Their Dependents." Illustrating the importance of the treaties to both communities, a proclamation announcing the terms of the 1752 Treaty was printed "on beautifully printed broadsides bearing the royal coat of arms and in both English and French" and posted at the English settlements and forts.[162] The territorial reach of treaty law determined by the subject matters it dealt with and the legal subjects who put it to use. It was, therefore, geographically extensive, covering lands used by the Mi'kmaq and Wolastoqey for hunting, fishing, and planting, their areas of settlement, and existing British settlements. The treaties were ratified by Mi'kmaw and Wolastoqey communities at different times, so the territorial reach was not even and fixed throughout the territory.

[160] Battiste, *supra* note 8 at 3.
[161] Clark, *The Mi'kmaq Treaty Handbook, supra* note 122 at 24
[162] Stephen E. Patterson, "Indian-White Relations in Nova Scotia, 1749-61: A Study in Political Interaction" (1993) 23:1 Acadiensis 23 at 49.

iv) Conclusions on Transnational Legal Regimes

The transnational legal orders considered here structured and mediated relations between a plurality of political communities vying for influence, lands, resources, and self-determination. In doing so, the territory was structured by diverse legalities as individuals and groups used these laws in different ways and jurisdictions took shape through specific practices. These transnational legal regimes operated at a different scale then the domestic regimes discussed in chapter 3. One of the effects of this is that the practices through which these legalities structure legal spaces are different. They are not the day-to-day jurisdictional practices associated with property rights, dispute resolution, marriages, and resource use. Rather, they deal with political affiliation, diplomacy, and territorial rights. Thus, the ways that territories are constituted by these bodies of law is different from how they are structured, or constituted, by internal orders. A contemporary example may make the point. In the city of Toronto, zoning by-laws and noise by-laws determine what uses a given piece of land can be put to and what types of activities may be prohibited there. If these are commercial spaces, provincial law determines how much sales tax will be applied to transactions there. Federal law determines what constitutes criminal activity and how constitutional rights are protected. International law imposes obligations on state actors in respect of the basic human rights of people living there. There are many redundancies in areas of human rights, labour, health services, and so on. Yet, each level of law shapes the physical place *as a legal space* in distinct ways. The same is true of the internal legal orders discussed in chapter three and the transnational orders discussed here. While in the most direct sense they apply to territory differently because they make different territorial claims (laws pertaining to public drunkenness in Halifax or land distribution in an Acadian farming community have a different scope of territorial ambition than a charter granting a trading monopoly over the entire northeast or a treaty ceding several present-day provinces), they also shape the territory itself differently by the subjects and subject matters they deal with and the types of regulation, enforcement, and deliberation that they embody. The creation of territory and territorial jurisdiction is a process, one that law is deeply implicated in. More, this territory is constitutive of social reality in important respects. Social reality and social life are shaped in part by nature of the legal spaces people inhabit, and those legal spaces are shaped by particular practices that give rise to notions of territoriality in various configurations and at different scales.

Transnational regimes are also entangled in different ways then domestic forms. The internal forms tend to structure spaces as exclusive. The creation of a space of British law at Halifax excluded other forms. This process was never complete: a Mi'kmaw person in Halifax may have found themselves bound by the city ordinances but also carried with them Mi'kmaw law respecting other matters. Law following people rather than places can disturb rigid notions of territoriality and neatly identifiable borders. As between internal legal orders there were processes of fading in and out, alternating spaces, and lingering effects, areas of overlap where jurisdictional complexity prevailed. Yet, domestic forms strive for an exclusivity within their sphere: to structure space through a single legality is to bring it within the jurisdiction – to make the territory – of a given political community. There is a constant tension between the homogenization of law in structuring a fixed legal space and the entanglement of plural legal and normative orders.

The transnational regimes discussed here co-existed more easily. The structure and operation of the Wabanaki confederacy operated independently of the European treaty system. Even where these two systems merged in the European-Indigenous treaty system, the result was a body of law that stood apart from the other forms. Inter-European law outlined how the law of nations and negotiated inter-European treaties determined the rights and obligations of European nations. Indigenous-European treaties, by turn, structured specific practices in the region in more substantial ways by outlining areas of shared and exclusive jurisdiction, clarifying the entanglements of domestic legal orders, and providing a basis for negotiated forms of authority. In other words, transnational regimes did not make the same claims to exclusivity as domestic law: inter-Indigenous and inter-European forms easily co-existed, their primary effect on each other being which parties would be participants in Indigenous-European treaty making. The points of co-existence overlap, tension, resistance, accommodation, and hybridization have to this point been discussed only briefly, as the preceding chapters considered the distinct bodies of law largely in isolation. This was by design, the intention being to understand each body or type of law on its own terms. The following chapter considers in further detail the features of these legal orders that facilitated their co-existence where accommodation was possible and what undermined pluralism where accommodation failed.

Chapter 5: '*De Facto* Practice': Legal Pluralism Between Agonism and Antagonism

As the two previous chapters detailed, Mi'kma'ki/Wulstukwik in the 17th and 18th centuries was a legally pluralistic sphere where multiple legal orders, both domestic and transnational, overlapped. Distinct legalities structured legal spaces - the 'where' of law - in different ways, while legal subjects - the 'who' of law - engaged in legal practices that brought into being various forms of place-based jurisdiction. These plural legal and normative orders, Indigenous and European in in origin, but also developed through shared interaction, shaped and constituted territory in different ways. Authority tied to these orders covered territorial spaces incompletely resulting in the partial and uneven extension of law through space and the entanglement of a plurality of orders. The territorial reach of a legal order, the degree to which it constituted spaces wherein it was the dominant or influential legality, was subject to constant revision through force, demographic change, renegotiation, and contestation of terms. Jurisdiction was structured by the practices of individuals and groups. The subject matters that the legal orders dealt with and the legal subjects who lived by them changed over time as the orders shaped one another through interaction and the participants renegotiated subject positions within shifting legal and political spaces. Territorial configurations were re-worked as legal actors engaged in jurisdictional practices, bringing new legal spaces into being, colouring over or modifying the features of others.

This raises a number of questions: how did the exclusive and shared political and legal practices of the region allow for the proliferation of a plurality of legal orders? What were the forms of contestation and accommodation that mediated this plurality? What lessons might this hold for contemporary law and policy? Finally, returning the idea that the common law should develop to reflect de facto practice and Indigenous governance and give meaningful effect to the doctrine of continuity, how can de facto practice in Mi'kma'ki/Wulstukwik in the 17th and 18th centuries be most clearly understood and how did Indigenous systems of governance manage the interaction between settler and Indigenous legal and political orders? These questions are partly explained by the transnational forms of law discussed in the previous chapter. Important elements of these will be reviewed here. The focus of this chapter, however, is less on the forms of transnational law and what they regulated than what legal practices associated with the plural legal orders allowed for legal and normative pluralism to flourish where it did. How were the

entanglements generative and respectful of the self-determining authority of distinct legal land political communities? This illustrates the foundational role this plurality of normative and legal orders played in shaping the forms of political association that preceded the development of the Canadian nation-state, constitutional practices that were inherited by the state.[1] This, in turn, illustrates the contingency of the historical development of the contemporary model of state-based federal association, which excludes Indigenous peoples as equal partners, showing us that it could have been otherwise. In this, this analysis provides a frame through which contemporary legal and political disputes can be reconsidered and new resolutions envisioned.

It is important not to romanticize: Mi'kma'ki/ Wulstukwik in the 17th and 18th centuries was a site of frequently brutal conflict and colonization. The British and French presupposed European superiority and frequently relied on that presumption to minimize Indigenous law and political authority. The English committed ethnic cleansing against the Acadian population, envisioning the development of a homogenous political community that they could govern peacefully and count on for allegiance during their imperial conflicts. They briefly considered taking a similar approach to the Mi'kmaq. European-Indigenous warfare was at times brutal: prizes were offered for Indigenous scalps, while English scalps were worked into wampum belts that were gifted from Indigenous peoples to the French.[2] In the 17th century and 18th centuries, many lost their lives on all sides of the regional and imperial conflicts in Northeastern North America, conflicts which the peoples of Mi'kma'ki/ Wulstukwik found themselves drawn into and in which they took active roles in seeking to expand their own regional influence and maintain their autonomy in the face of imperial intrusions.[3]

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[1] Seán Patrick Donlan, Biagio Ando, and David Edward Zammit, ""A Happy Union"? Malta's Legal Hybridity" (2012) 27 Tul Eur & Civ LF 165 at 170. As Donlan et al write, "Modern national traditions are unique hybrids rooted in diverse customary or folk-laws, summary and discretionary jurisdictions, local and particular iura propia, the romano-canonical 'learned laws' or ius commune, and other trans-territorial ura communia (including feudal law and the lex mercatoia). Over time, these various bodies of law were linked to public institutions and increasingly meaningful and centralized powers of enforcement. They only slowly came under the control of early modem states to form modern legal traditions."

[2] John Mack Faragher, *A Great and Noble Scheme: The Tragic Story of the Expulsion of the French Acadians From Their American Homeland* (New York: W.W. Norton, 2005) at 99-101, and 109 for bounties placed by Massachusetts. Father Jean-Louis LeLoutre paid 1800 livres for 18 British scalps in the mid-eighteenth century: Gérard Finn, "LE LOUTRE, JEAN-LOUIS," in Dictionary of Canadian Biography, vol. 4, University of Toronto/Université Laval, 2003. http://www.biographi.ca/en/bio/le_loutre_jean_louis_4E.html.

[3] James (Sa'ke'j) Youngblood Henderson, *Elilewake Compact: The Mi'kmaw, Wolastoqey, and Passamaquoddy Nations' Confederation with Great Britain, 1725-1779, Vol 1* (Saskatoon: Indigenous Law Centre, 2020).
Stephen E. Patterson, "Indian-White Relations in Nova Scotia, 1749-61: A Study in Political Interaction" (1993) 23:1 Acadiensis, 23. John G. Reid, "Pax Britannica or Pax Indigena? Planter Nova Scotia (1760 – 1782) and Competing Strategies for Pacification" (2004) 85:4 Can Hist Rev 669.

All of this shows the importance of force as a consideration in assessing the relationships between legal orders. It could be argued that to the extent that pluralism flourished, it did so only while the relative equality of military power allowed it to. Where force could be used to exert unilateral authority, it frequently was. It is not a coincidence that it was in the decades following the War of 1812, when Indigenous peoples were no longer seen as important allies for the British, that their autonomous political character was significantly undermined.[4] Once force was sufficiently concentrated and demographic changes had become overwhelming, Indigenous peoples increasingly came to be framed as racial or cultural minorities within a nascent nation-state, contrary to their continuous assertions of a direct political relationship with the Crown. While an inability to impose unilateral authority partially accounts for the robust pluralism of the earlier era, it does not provide a complete answer. The conceptual and institutional – or, one might say, constitutional - features that facilitated pluralism and hybridity are crucial to understanding the de facto practices of pluralism that mediated relations in the era. These legal orders were not always respected, nor were they necessarily or complimentary. Conflict was frequent and the relationships between legal orders produced dissonance as much as harmony.

The distinction between agonism and antagonism is helpful here. In Chantal Mouffe's articulation, agonism can be defined partly as the recognition that conflict is inevitable in any political society. More than that, it is constitutive of political society. Elimination of the ongoing interplay and contestation between political actors should not, then, be the goal; rather, parties should be understood as adversaries "whose ideas might be fought, even fiercely, but whose right to question those ideas is not to be questioned."[5] What facilitates this is the notion that adversaries "share a common allegiance to the democratic principles of 'liberty and equality for all.'"[6] Political contests are not over commitment to these basic values, but their interpretation.[7] Antagonism, by turn, refers to situations wherein this base-level common allegiance is missing and the contest

[4] John G. Reid, "Empire, the Maritime Colonies, and the Supplanting of Mi'kma'ki/Wulstukwik, 1780-1820," (2009) 38:2 Acadiensis 78; Peter Russell, *Canada's Odyssey: A Country Based on Incomplete Conquests* (Toronto: University of Toronto Press, 2017) at 82-89.
[5] See Chantal Mouffe, *Agonistics: Thinking the World Politically* (Verson: London, 2013) at 7. Mark Hickford, *Lords of the Land: Indigenous Property Rights and the Jurisprudence of Empire* (Oxford University Press, Oxford and New York, 2011/2012); Mark Hickford "Framing and Reframing the Agōn: Contesting Narratives and Counter-Narratives on Māori Property Rights and Political Constitutionalism, 1840-1861" in Saliha Belmessous, ed, *Native Claims: Indigenous Law against Empire, 1500-1920* (Oxford University Press, Oxford and New York, 2012).
[6] Mouffe, *Agonistics, supra* note 5.
[7] *Ibid.*

takes on the form of a struggle between enemies. The distinction, then, is between an enemy and an adversary.[8]

Much of the 17th and 18th centuries in the region can be seen as a vacillation between these two modes. While the form of "common allegiance" sought was not described explicitly as "liberty and equality for all," principles of individual and group autonomy reflecting an equality of standing within negotiated practices of governance were.[9] What are of particular interest here are the institutions and practices of governance through which the parties crafted an agonistic model of constitutional association and what moves they made to sustain that model. Ultimately Indigenous peoples were subsumed as "subjects" with rules imposed on them through force. Yet, the agonistic practices of the 17th, and particularly the 18th, centuries show that generative agonistic models of association were not only possible but existed alongside other forms.

In light of the above, this chapter focuses on two questions: 1) what were the legal practices of the era that facilitated the co-existence of multiple legal and normative orders? 2) Why were these practices able to do so? In parsing these themes from the historical record, particular attention has been paid to practice over theory. Theories and conceptions of law that cannot accord with lived reality and practice have limited utility outside of theoretical engagements.[10] The practices of law that parties engaged in provide the clearest understanding of the functioning of plural legal systems. The theories of law and politics that parties held, while important, provide only a partial, and frequently misrepresentative, account of *how the players played the game*.

i) Structures and Practices of Legal Pluralism

a) *Diplomacy, Autonomy, and Nationhood*

One way to view these forms of accommodation is through the lens of what I categorize here as diplomacy, autonomy, and nationhood. For significant periods of the history of the region, the French and British related to both the Wabanaki peoples and Acadians through diplomatic means

[8] *Ibid.*
[9] James [Sakej] Youngblood Henderson, "Empowering Treaty Federalism" (1994) 58:2 Sask L Rev 241; James (Sa'ke'j) Youngblood Henderson, *Wabanaki Compact: The Foundation of Treaty Federalism in North America, 1621-1728* (Saskatoon: Indigenous Law Centre, 2020).
[10] For an example of legal theorizing along these lines, see John Borrows, *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016).

– diplomacy was the practice. The success of this practice was made possible by the recognition of the autonomy and nationhood of the Indigenous peoples and, once the period of British colonization began, the recognition, for a time, of the Acadians as a distinct political community. Relying on diplomacy was not optional. Throughout the 17th century, one feature of the region that prevented the unilateral imposition of law and allowed legal pluralism to flourish was the absence of a single dominant military power. Of course, in the early 17th century, when the first prospective French settlers arrived, the Mi'kmaq and Wolastoqey were dominant in the region. The early French colonists were there at the sufferance of the Indigenous nations, and they were dependent on them not only for the viability of their enterprises, but frequently for their survival.[11] This remained the case for most of the century; until about 1650, the French forts were rarely well fortified enough to withstand an attack of any size.[12] While there were frequent military skirmishes and forts or trading posts at St. John, Jemseg, Port Royal, and Chebucto were attacked or razed on several occasions by English, pirates, or competing French interests, contingents of soldiers rarely exceeded 20 men.[13] When the colony came under the government of New England from 1654-1670, the forts were similarly defended. Even when the British captured Port Royal in 1710, they left the fort so poorly defended that it could have been easily re-captured.[14] The British presence was hardly enough to subdue the French and Indigenous populations. Indeed, European military activities consisted primarily of skirmishes over minor forts with very few fatalities and relatively quick submissions. There was no attempt to control whole populations, whether Acadian or Indigenous, through force until the expulsion of the Acadians in 1755. Even then, force was used to terrorize rather than as a means of supporting the extension of a legal and social order. The reality of Indigenous power was ever present throughout the 17th century and much of the 18th.[15] When New Englanders sought to establish a garrison at port royal in 1691 on authority of the

[11] James Hannay, *The History of Acadia, From its First Discovery to its Surrender to England by the Treaty of Paris* (St. John, J&A McMillan, 1879).
[12] *Ibid.*
[13] *Ibid.*
[14] Geoffrey Plank, "New England and the Conquest" in Reid, John G., Maurice Basque, Elizabeth Mancke, Barry Moody, Geoffrey Plank, and William Wicken, eds, *The 'Conquest' of Acadia, 1710: Imperial, Colonial, and Aboriginal Constructions* (Toronto: University of Toronto Press, 2004) at 76-77.
[15] Conflicts in New England, particularly King Phillip's War, influenced all of the parties and shaped English views of Indigenous power. See Jenny Hale Pulsipher, *Subjects Unto the Same King: Indians, English, and the Contest for Authority in Colonial New England* (Philadelphia: University of Pennsylvania Press, 2006); Daniel R. Mandell, *King Philip's War: Colonial Expansion, Native Resistance, and the End of Indian Sovereignty* (Baltimore: Johns Hopkins University Press, 2010); James D. Drake, *King Philip's War: Civil War in New England, 1675-1676* (Amherst: University of Massachusetts Press, 2000).

Massachusetts General Court following yet another seizure of the fort, the local Acadians welcomed the move as a means to obtain trade goods. Yet, they said "they could offer no guarantees for [the trader's] safety, that he would be at the mercy of the Mi'kmaq."[16] The tenuous balance of military power underlined the fact that no one group held the power to enforce social order through force. Forms of accommodation had to develop to reflect this, and several forms developed as soon as prospective European settlers arrived. Central to these were practices of diplomacy, frequently grounded in Indigenous practices and protocols.[17]

The centrality of these practices was not always reflected in European law. The mid-late 16th century commissions to French explorers, for example, evidenced a disposition seemingly inimical to pluralistic relations, justifying conquest and dispossession of non-Christian peoples.[18] They were a product of the intellectual lineages discussed in chapter 1, inherited from the Crusades and adopted explicitly by papal authorities into the 15th and 16th centuries. There are isolated incidents that suggest the early impacts of these worldviews and legal frameworks. A 1566 woodcut displayed in Augsburg, for example, representing an Inuit woman and child who had been taken captive, probably in Labrador, may provide some indication of the nature of the French-Indigenous relationship.[19] Yet, the impact of this vein of imperial ideology was minimal until much later; it simply could not be put into practice at a time when the few extant year-round European settlers were dependent upon Indigenous peoples for their survival. While the French had asserted sovereignty, they could not even bind colonial promoters and agents such as Charles LaTour who held commissions directly from the king, let alone Indigenous peoples.[20] Thus, in the 17th century the French practice was to trade, marry, and build relationships on the basis of Indigenous protocols and kinship structures. Indigenous modes of political relations were paramount, and "[h]ospitality, sharing of possessions, and exchange of gifts"[21] were central features of French engagements. These French practices are important to consider in the Maritime provinces, as the French were the most influential imperial power in the region in the 17th century. In one sense this

[16] Faragher, *A Great and Noble Scheme, supra* note 2 at 94.
[17] Robert A. Williams Jr., *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600 – 1800* (Routledge: New York, 1999). Henderson, *Wabanaki Compact, supra* note 9.
[18] Cornelius J. Jaenen, "French Sovereignty and Native Nationhood during the French Régime" in J.R. Miller, ed, *Sweet Promises: A Reader on Indian-White Relations in Canada* (Toronto: U of T Press, 1991) at 27.
[19] Ralph Pastore, "The Sixteenth Century: Aboriginal Peoples and European Contact' in Phillip A. Buckner and John G. Reid, eds, *The Atlantic Region to Confederation: A History* (Toronto: University of Toronto Press, 1994) at 23.
[20] La Tour and Le Bourge directly refused to obey directions from the king in Acadia without punishment: Hannay, *supra,* note 11 at 140-174.
[21] Jaenen, "French Sovereignty and Native Nationhood", *supra* note 18 at 20.

may overstate the case to an extent. The French were only intermittently interested in the region prior to 1690 or so, early colonization and settlement efforts were driven by private interests with little or no financial support from the Crown, and the region was under the putative control of Massachusetts for significant parts of the latter half of the century. The fisheries off the coast attracted the most European interest. Yet, from a cultural perspective the French influence in the region was much more pronounced than the British. The Acadian settlers had reasonably good relations with the Wabanaki, while French priests and missionaries had influence in Wabanaki communities.[22] Trading relationships with French forts were important until the French claims in the Northeast were effectively ended in 1763. Finally, the intersocietal norms – structures of diplomacy, alliance, and trade – that developed between the Wabanaki and the French influenced the shape of later relations with the British.

From an imperial perspective, trade and the spread of Christianity were central French imperial aims through most of the 17th century. In practice this resulted in the baptism and conversion of many Mi'kmaq, events which played an important role in linking the French and Mi'kmaq and establishing a basis for intersocietal norms. Beginning in the late 17th century, France's imperial aims became more explicitly strategic and Louis XIV assumed of a centralized and direct role in colonization. With control of North American territory as a part of imperial strategy increasing in prominence, "the need to reconcile native self-government with French claims remained imperative."[23] Two features of the French approach would shape the form this reconciliation would take: 1) the vision of sovereign authority the French deployed in their relations and 2) whether, or to what extent, they recognized Indigenous land rights. Moving into the 18th century, the French still could not exercise sovereignty in a meaningful way in relation to Indigenous peoples.[24] Importantly, the French rarely relied on coercive measures to do so.[25] Practices of co-existence were required, and French notions of sovereignty and land rights reflected this.

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[22] Harald E.L. Prins, *The Mi'kmaq: Resistance, Accommodation, and Cultural Survival* (Orlando: Harcourt Brace, 1996) at 70-81, 121.
[23] Jaenen, "French Sovereignty and Native Nationhood", *supra* note 18 at 21.
[24] Janean points out that Eccles correctly argued that, to the extent that the French claimed sovereignty over Indigenous peoples, they never exercised it. Eccles relied on a definition of sovereignty as "the right to levy taxes, to enact laws and enforce them, to demand military service and the right of eminent domain." *Ibid* at 22.
[25] *Ibid* at 27.

As notions of sovereignty in Europe were developing in response to domestic developments and through imperial processes, "[b]y the time France began to colonize North America, sovereignty was thought of in terms almost exclusively of diplomatic and political overlordship."[26] Sovereignty was seen as being subject to limitations and, though those limitations were structure through constitutional law domestically, where Indigenous peoples were concerned "the French had arrived at a more complex arrangement."[27] Without the centralization and unification characteristic of the contemporary nation state, the conception of sovereignty that prevailed allowed space for different models of political association than those which are imagined from within the confines of such states. Central to these during French imperial eras in North America were ideas of "Fealty and allegiance."[28] The French sought and maintained allegiances with Indigenous nations grounded in trade and both Indigenous and European forms of diplomacy, themselves built on longer standing processes of intercultural mediation. Rather than submission to the French Crown, the French sought fealty, in which Indigenous peoples would be allied with the French Crown and would operate with French colonialists under the aegis of a shared loyalty to that Crown.[29] To draw on Mouffe's distinction, the relationship was more often an agonistic, rather than an antagonistic, one, in which the "common allegiance" was both a formal allegiance to the Crown and a negotiated allegiance to principles of autonomy, nationhood, and mutual respect. This differed, of course, depending on whether a given Indigenous nations was allied with the French or hostile to them, but the structure of alliance is what is important here. Territorial jurisdiction, considered as "rigidly mapped territories within which formally defined legal powers are exercised by formally organized governmental institutions"[30] was not a conceptual or practical reality.

The French approach to Indigenous land rights also structured relation in important ways. One trend in the literature has been to say that the French simply did not recognize any form of Aboriginal rights, specifically title to land.[31] The British relied on this argument as early as the

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[26] *Ibid* at 28.
[27] *Ibid* at 23
[28] *Ibid* at 28. While there was a lack of centralization, this should perhaps not be overstated. The *coûtumes* played an important role in structuring French authority in colonial spheres: Philip Girard, Jim Phillips, and R. Blake Brown, *A History of Law in Canada, Volume 1: Beginnings to 1866* (Toronto: The Osgoode Society, 2018) at 44-58.
[29] Joseph L. Peyser, ed., *Letters from New France: The Upper Country, 1686–1783* (Urbana and Chicago: University of Illinois Press, 1992).
[30] Richard T. Ford, "Law's territory (A history of jurisdiction)" in Nicholas Blomley, David Delaney, and Richard T. Ford, eds, *The Legal Geographies Reader* (Oxford: Blackwell, 2001) at 200.
[31] Jaenen, "French Sovereignty and Native Nationhood", *supra* note 18 at 21.

18th century to argue that any previously held Indigenous rights to land had been extinguished by the lack of French recognition: the French acquisition of sovereignty extinguished Indigenous rights, meaning that when the British acquired sovereignty from the French, it came unburdened by any Indigenous interests, or so the argument ran. Though Mi'kmaq, Wolastoqey, and Abenaki peoples reacted strongly against this assertion, the argument was tough to root out: it was argued before the Supreme Court of Canada in 1996 in the *Côté* case.[32] While the court rejected the argument, it did so on the basis that rights at English law were not impacted by what was or was not recognized by the French. The Court avoided the question of whether the French regime did, in fact, recognize rights. The question is pertinent, however, in assessing what elements of the French approach may have facilitated pluralism.

In this light, one important feature of French colonization is that they tended to target lands for settlement that were not under the immediate use or occupation of Indigenous peoples.[33] While the French were undoubtedly entering Indigenous territories, they frequently did so without disrupting Indigenous patterns of land and resource use. Thus, "[e]ven where pursuit of trade and missionary work resulted in deep penetration into the heartland of North America, neither was associated with land acquisition."[34] While the French undoubtedly sought to gain access to territory and to bring regions under their authority, the acquisition of property on a significant scale was not itself a French imperial aim.[35] This should not be overstated. As Edward Cavanagh had noted, a better way to frame the question of land rights is to say that the French did not have an explicit theory of Indigenous land rights and did not, as a general matter, negotiate for the surrender of Indigenous interests in land.[36] This differed from the British, who from an early period determined that Indigenous rights in land had to be acquired before further dispositions based on Crown grant could be made.[37] This is not to say that the French did not enter treaties. While they were less prolific than the English, they did treat with Indigenous peoples.[38] Further, the modes of

[32] *R v Côté*, [1996] 3 SCR 139.
[33] Jaenen, "French Sovereignty and Native Nationhood", *supra* note 18 at 20.
[34] *Ibid.*
[35] *Ibid.*
[36] *Ibid* at 22.
[37] Stuart Banner, *How the Indians Lost Their Land: Law and Power on the Frontier* (Cambridge: Harvard University Press, 2005) at 22-28.
[38] See for example Gilles Havard, *The Great Peace of Montreal of 1701: French-Native Diplomacy in the Seventeenth Century* (Montreal-Kingston: McGill-Queen's University Press, 2001); Robert Englebert and Guillaume Teasdale, eds, *French and Indians in the Heart of North America, 1630-1815* (East Lansing: Michigan State University Press,

Indigenous diplomacy they entered into can be described as Indigenous forms of treaty-making. The French process of explicit treaty-making, however, was primarily concerned with recognition of French sovereign rights. Treaties were designed to acquire consent to the King's authority.[39] The French approach of pursuing diplomatic relations emphasizing nationhood, alliance, and protection was thus carried into their approach to treaty making. France "exercised their rights through the allied 'nations' as vassals of the crown in a quasi-feudal relationship."[40] While Indigenous nations viewed the relationship on more egalitarian terms than the French, the French approach of "unequal alliance" nonetheless provided space practices of governance that respected mutual autonomy and nationhood.[41] During this period, Indigenous legal orders and political thought played an important role in shaping practice. At the micro level, this meant inviting European visitors to feasts, ceremonies, etc. before trading or diplomatic exchanges took place. At the macro level, this meant participating in extensive kinship-based structures of alliance and interdependence. In the Great Peace of 1701, the French drew on these systems of alliance to negotiate a peace with the Iroquois confederacy.[42] Of the practices that facilitated both the co-existence of autonomous legal orders and the mutual construction of shared orders, French-Indigenous practices of alliance and diplomacy, themselves grounded in a respect for Indigenous nationhood, were foundational.

Until the early 18th century, Imperial-Indigenous relations in Mi'kma'ki/ Wulstukwik were shaped by the hybrid French-Indigenous approaches that emphasized diplomacy, alliance, and trade at the formal level and were grounded in practices of intersocietal mingling and customary norms. Physical, material spaces were constructed as legal spaces through Indigenous, French, Acadian, and intersocietal forms of law. The scales of the legal spaces and the density of law within them varied depending on the type of law at issue. The autonomous political character of the parties was always respected in practice, even where French theory construed Indigenous allies as subjects and considered French sovereignty as having been acquired absolutely through discovery and thin markers of possession. Military alliance was especially important during periods of French and

2013); Bruce G. Trigger, *Natives and Newcomers: Canada's "Heroic Age" Reconsidered* (Montreal-Kingston: McGill-Queen's University Press, 1985).

[39] Jaenen, "French Sovereignty and Native Nationhood", *supra* note 18 at 22.

[40] *Ibid.*

[41] Gilles Havard, "'Protection' and 'Unequal Alliance': The French Conception of Sovereignty Over Indians in New France" in Englebert and Teasdale, *supra* note 38.

[42] Havard, *Great Peace, supra* note 38.

British imperial conflict in North America. French conceptions of sovereignty in imperial realms focused on protection and alliances, recognizing Indigenous autonomy and nationhood, seeking to strengthen the ties by engaging in Indigenous modes of diplomacy. Indigenous legal orders easily accommodated the French into existing structures of kinship, alliance, and confederation. Principles of autonomy, consent, and non-interference structured the relations between equals. Both the French and Indigenous legal orders allowed for a plurality of normative and legal orders to exist in voluntary association.

With the treaty of Utrecht in 1713, the British role expanded as the territory began the transition to a British imperial arena. It was not until after 1763 that the British were able to fully oust French imperial interests, and the Wabanaki remained closely tied to the French until mid-century; their loss of peninsular Nova Scotia in 1713 caused French imperial authorities to suggest that the Mi'kmaq and French Acadians relocate to Cape Breton and the Gaspé Peninsula.[43] Both groups balked at this, however, and the reality of the British presence caused both to engage the British directly, frequently over the objections of the French. While the British-Indigenous model that developed in the Maritimes differed from the French-Indigenous one, it retained important elements. For example, the British were reluctant to engage in gift giving, but did so anyway in recognition of the political necessity of carrying on the practice. The British carried on the practice until after the war of 1812. Similarly, principles of protection and alliance were central. The British understood the importance of approaching the relationships with Indigenous peoples through diplomatic means.[44] Early governors in Nova Scotia were instructed to deal with the Mi'kmaq "according to the protocols of Algonkian diplomacy."[45] The British emphasized notions of friendship, seeking to ensure the Wabanaki were "good neighbours." They were not construed as subjects: though the British expressed hope that they would *become* subjects, as late as 1784 governors continued to be instructed to enter into treaties to ensure friendship and to make Indigenous peoples good "neighbours…to our subjects."[46]

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[43] LFS Upton, *Micmacs and Colonists* (Vancouver: UBC Press, 1979) at 31-32.
[44] See e.g. Jeremy Ademlman and Aaron, Stephen, "From Borderlands to Borders: Empires, Nation-States, and the Peoples in Between in North American History," (1999) 104:3 Am Hist Rev 814; Henderson, *Wabanaki Compact, supra* note 9.
[45] Geoffrey Plank, *An Unsettled Conquest: The British Campaign Against the Peoples of Acadia* (Philadelphia: University of Pennsylvania Press, 2001) at 70.
[46] 1784 Royal Instructions to Thomas Carleton, PANB, available online at http://archives.gnb.ca/exhibits/forthavoc/html/Royal-Instructions.aspx?culture=en-CA [*Instructions to Carleton*].

The treaty relationship was shaped by protocols and traditions of each nation. The British, for example, insisted on written treaties. The Indigenous parties emphasized the need for regular renewals of the relationship and the view that, owing to the horizontal structure and voluntary associations that characterized their internal political structures, each community was required to agree to treaty before they would be bound by it.[47] The result was the development of the body of intersocietal law described in chapter four, which provided for clear areas of shared and exclusive jurisdiction and territory. Legal spaces were constituted and regulated through this plurality of orders. As mentioned above, for example, the non-molestation clause in the 1726 Treaty stated that "the Said Indians shall not be Molested in their Persons, Hunting Fishing & Shooting & planting on their planting Ground nor in any other their Lawfull occasions." Intersocietal law thereby structured these as Indigenous spaces, which were layered, in a sense, with intersocietal and Indigenous legalities.

Similarly, consider the clause in which the Wabanaki agreed to return deserting soldiers to the British forts. In this way, the treaty extended British law throughout the whole of the region, yet only in relation to the subject matter agreed to in the treaty. Through the treaty the Wabanaki agreed that British law would follow certain British subjects as they moved through the territory, and the legality of the spaces was structured by who was involved. In a similar vein, where conflicts were between an Indigenous individual and a settler, they were to be resolved under the "King's laws" and in the King's courts. In this way legal spaces were constructed through the negotiated application of distinct bodies of law and through shared practices. Jurisdiction can be conceived of as "a set of practices, a code of etiquette."[48] These practices are social practices that "must be learned and communicated to others." It is only through these shared social practices that jurisdiction is "made real"; that is, assertions of jurisdiction or lines on a map mean little without specific legal practices that bring them into the world of everyday practice.[49] The treaty relationship represents one such practice, through which a form of negotiated shared jurisdiction was structured, while specific clauses of the treaty adverted to practices that brought complex, overlapping jurisdictions into being.

[47] Henderson, *Elilewake Compact, supra* note 3.
[48] Ford, *supra* note 30 at 202.
[49] *Ibid.*

Pluralism, at least insofar as it can be defined as the co-existence of a plurality of legal and normative orders within contested overarching sets of relationships and association, was maintained by the construction of shared legal orders that could accommodate a plurality of domestic or internal normative and legal orders.[50] This was achieved in part by ensuring that the shared legal orders, both in their customary and positive forms, were built through diplomatic relations – including principles of friendship, alliance, and protection – and a respect and acknowledgement of the autonomy and nationhood of the participants. Through these relationships, jurisdictions were structured in partial and overlapping ways. Legal spaces were constituted by plural legal orders.

b) *Subjecthood*

Law follows subjects. It moves through spaces with individuals who carry it, putting it to use or being bound by it. Territory is constituted, in part, through this process. Imperial powers were acutely aware of this. Populating territory with loyal subjects was considered essential to gaining and holding colonial "possessions."[51] In North America, the British and French vied for influence and control over legal subjects who would form a stable basis on which colonialism could proceed. A central British policy objective following the Treaty of Utrecht, for example, was to establish control by populating Mi'ki'ma'ki/ Wulstukwik with British subjects, either through the settlement of new subjects or the conversion of the existing population. Subjecthood was a legal category that facilitated the extension of law, jurisdiction, and empire.

In the 17th century, the French were only intermittently committed to the establishment of a population of colonial subjects in Mi'ki'ma'ki, and such a population developed slowly. French colonization was focused more on access to resources for trade than acquisition of land through settlement. The Crown did, however, consider a policy of bringing Indigenous peoples within the ambit of French authority by categorizing them as French "subjects."[52] The legal category of *régnicoles* denoted a naturalized French citizen. In the 17th century it was a category the king

[50] For an analysis in another context, see Michael J. Witgen, *An Infinity of Nations: How the Native New World Shaped Early North America* (Philadelphia: University of Pennsylvania Press, 2012); Juliana Barr and Edward Countryman, eds, *Contested Spaces of Early America* (Philadelphia: University of Pennsylvania Press, 2014).
[51] Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400 – 1900* (Cambridge: Cambridge University Press, 2010).
[52] Havard, "'Protection' and 'Unequal Alliance', *supra* note 41 at 113.

wanted to extend not only to colonists but to Indigenous peoples.[53] This reflected French practice in Europe, where territorial acquisitions in the latter half of the 17th century "were accompanied by incorporation mechanisms that included extending the status of *régnicoles* to the new inhabitants."[54] A further imperial policy, expressed in the charter to the Company of New France, suggested that converted Indigenous individuals who adopted Christianity would be "granted the same status as other colonial subjects."[55] In North America, the French soon realized this was not practical, and the diplomatic means outlined above took priority over explicit attempts to create new subjects of Indigenous peoples.

During periods when the British sought to establish control, but most particularly as they moved to more sustained efforts following Utrecht, they did so in the context of a population made up of two distinct political communities on peninsular Nova Scotia – the French Acadian settlers and the Mi'kmaq. Both were Catholic and closely linked to the French politically and culturally. Conscious of the tenuous nature of their control, the British believed that they could not secure political rule in the region without a body of subjects loyal to the Crown.[56] This could occur in two ways: the settlement of subjects, preferably Protestant, likely to remain loyal to the Crown, or the conversion of resident culturally diverse populations. In practice they would try both approaches.

In the decades following the capture of Port Royal in 1710, the British took distinct approaches to the Acadians and Mi'kmaq, and the distinctions show the partial and attenuated nature of British authority, the negotiated nature of subjecthood in the 18th century in the region, and two distinct approaches to the legal construction of empire. This, in turn, shows the agency of those peoples who were faced with the prospect imposed British rule in a rapidly changing political terrain and illustrates the ongoing importance of Indigenous systems of law – both domestic and transnational – in the Maritime region in the 18th century. The British vision of the contest over subjecthood in the region was made explicit in the Treaty of Utrecht. By the terms of the Treaty, Acadians who wished to leave the colony within one year would be able to do so and would be able to take their possessions with them. Those who sought to remain in the colony would have

[53] *Ibid.*
[54] *Ibid* at 114.
[55] Jaenen, "French Sovereignty and Native Nationhood", *supra* note 18 at 27.
[56] As Elizabeth Mancke argues, "The internationally negotiated transfer of Acadia from French to British sovereignty needed acceptance and legitimation on the ground by the Acadians, if not the natives as well." Elizabeth Mancke, "Imperial Transitions" in Reid, John G., Maurice Basque, Elizabeth Mancke, Barry Moody, Geoffrey Plank, and William Wicken, *The 'Conquest' of Acadia, 1710: Imperial, Colonial, and Aboriginal Constructions* (Toronto: University of Toronto Press, 2004) at 178.

their property rights and freedom of worship respected, though they would be expected to take an oath of allegiance to the King, thereby becoming British subjects. Acadians were given the choice, as individuals, to choose their legal affiliation.[57] Notably, there was not a formal mechanism for negotiating collective status of the Acadian *people*.

As discussed at length in chapter 3, the British made repeated and sustained efforts to induce Acadians to sign an oath of allegiance. The Acadians rejected various overtures and threats, expressing a willingness only to take a qualified oath that would permit them to be neutral in any future conflict between the British and French.[58] The majority of Acadians would come to eventually take an oath of allegiance, but the British continued to doubt their status as loyal subjects.[59] This was a problem for the British, as by 1744 the Acadian population had expanded significantly and they were by far the most populous peoples in the colony, counting a population near ten thousand compared to about three thousand Mi'kmaq and five hundred English.[60] They also occupied fertile and carefully cultivated lands. The project of turning Nova Scotia British, however, of bringing into being the imagined Nova Scotia, would require legal subjects whose allegiance was unqualified and who were not tied to pre-existing property rights. In 1755, the British began to systematically expel the Acadians from the region in an act of dispossession and ethnic cleansing known now as the *Grand Dérangement.* Thus, a negotiated form of subjecthood, in which the legal category of "subject" was given content through the negotiation of competing interests, gave way to a unilateral approach, with force ultimately being used to obviate the need for negotiated concessions.

As outlined above, the approach to the Mi'kmaq and Wolastoqey was different. Under Article 15 the Treaty stated that the legal status of the Indigenous peoples of the territories under consideration would be determined by French and British negotiators at subsequent meetings. The imperial affiliation of the various groups was to be determined unilaterally by negotiators.[61] These negotiations never took place, and the status (under European law) of the region's Indigenous peoples was not settled. The idea of assimilating Indigenous peoples or otherwise rendering them fit subjects was prominent in the imperial discourse. Samuel Vetch, who with Francis Nicholson

[57] Plank, *An Unsettled Conquest, supra* note 45 at 71.
[58] Mancke, *supra* note 56 at 191.
[59] Plank, *supra* note 45 at 88.
[60] *Ibid.*
[61] *Ibid* at 71.

had advocated for and carried out the 1710 attack on Port Royal, had planned to convert Indigenous peoples to Protestantism and make them "subjects of Queen Anne."[62] The terms of the treaty meant that until commissioners met the Mi'kmaq and Wolastoqey would "occupy an indeterminate legal status."[63] Until the commissioners met there would be no determination as to whether the Mi'kmaq and Wolastoqey were "subjects" or "friends" of the British or the French.

Several aspects of this are notable. First is the acknowledgment that Indigenous peoples living within territory claimed by European states were not necessarily, or presumptively, legal subjects of that imperial power. That is, the British and French recognized that while they could acquire sovereignty vis-à-vis other European powers, this did not immediately affect the legal status of the Indigenous peoples who also claimed the territory. The British acknowledged these peoples to be self-governing in respect of their internal affairs.[64] It also showed that the British were working on the assumption that the Mi'kmaq and Wolastoqey were distinct peoples who should be dealt with on a collective basis. Their allegiance should not be sought by having individuals take oaths of allegiance to the crown as with the Acadians.

Though the legal status of Indigenous peoples would never be resolved under the process envisioned at Utrecht, the 1726 treaty gave the British the opportunity to negotiate forms of political allegiance with the Wabanaki. There, the British asked that the sovereignty they acquired under Utrecht be recognized. Far from treating the Wabanaki as subjects, however, the treaty relationship reveals a British approach of negotiating political authority at the communal level. The relationship was a political one.[65] The Mi'kmaq and Wolastoqey were seen as autonomous peoples and the settlement of British subjects required engagement with them. Rather than individual oaths of allegiance, as seen with the Acadians, loyalty to the Crown was sought through political alliance. The language of "subject" was less common than the language of "friendship" and "neighbour." The legal status of the Wabanaki within the imperial realm was subject to negotiation and contestation.

It may, admittedly, seem odd to consider the extension of legal subjecthood in this manner as a practice of legal pluralism. And indeed, with respect to both the Acadians the Wabanaki, the

[62] *Ibid* at 50.
[63] *Ibid* at 71.
[64] Mancke, *supra* note 56 at 180.
[65] Stephen E. Patterson, "Indian-White Relations in Nova Scotia, 1749-61: A Study in Political Interaction" (1993) 23:1 Acadiensis 23-59.

eventual imposition of a defined conception of subjecthood tied to the constitution of British territorial jurisdiction had a colonial character that caused considerable harm. Yet, especially in the early 18th century, while the British sought to extend their jurisdiction by the extension of legal subjecthood, the culturally diverse peoples of the region exercised their agency in negotiating what forms that would take. Adopting Lauren Benton's terminology, imperial sovereignty extended unevenly in the first half of the 18th century and French, Acadian, British, and Wabanaki sovereignties were layered, producing complex sites of jurisdictional overlap and negotiation. At this juncture, when the unilateral imposition of a fixed version of legal subjecthood was not possible, the negotiated nature of the scope of subjecthood – who was bound and in what ways by imperial authority – facilitated ongoing pluralism in the region. While the British sought to turn inhabitants into subjects as a means of imposing a hierarchical system of law and creating an identifiably British territory, in practice subjecthood was open to being contested in ways that allowed multiple normative and legal systems to work at formal and informal levels to counter a unilateral and hegemonic assertion of British authority. Contests over subjecthood, in this sense, can be seen as counter-hegemonic movements that held open cracks for competing orders and resisted the construction of legal spaces constituted through a single form of law.[66]

c) *Pragmatic and Instrumental Uses of Law*

One of the practices, or set of practices, characteristic of plural legal spheres is the pragmatic and instrumental use of law. Where there are distinct bodies of law available, actors take up and work with different forms of law at their disposal, crafting novel legal resolutions to the challenges they face. Law, in this context, is not approached as monolithic and unchanging. Rather, it is used as a tool to achieve certain types of goals. Individuals living in legally pluralistic areas will forum shop to find a body or institution that will resolve a dispute or provide them redress in the way that they deem just. They will use different types of law to advance their interests and shape their social relations. This instrumental use of law will often reveal legal pluralism existing in practice where it may be formally non-existent in theory. It can reveal law in lingering spaces or where it has begun to fade in or out. This was evidenced very clearly in the 17th and 18th century in Mi'ki'ma'ki/

[66] Mancke, *supra* note 56 at 178. On the notion of jurisdictional "cracks" see Robert Hamilton, "Indigenous Peoples and Interstitial Federalism in Canada" (2019) 24:1 Rev Const Studies 43.

Wulstukwik, and it began with the arrival of early French settlers and colonial promoters in Mi'ki'ma'ki.

Charles La Tour, who we have already come to know, was a colonial promoter who began his colonizing mission under a commission from the King of France.[67] His allegiance, however, shifted depending on circumstances.[68] This could, of course, be seen as an underhanded violation of the law. That may well be part of the story. A different way to understand his actions, though, is that he used the legal means at his disposal to secure his interests and maintain his safety. The details are important in this regard. La Tour's colonizing in the region - which consisted of the establishment of forts, his primary one being at the mouth of the Wolastoq (St. John) River, and trading networks - was grounded in legal authority delegated by the French Crown. The French Crown, however, was highly unsystematic in its approach to colonization in the early 17th century, and the combined role of private finance in backing the ventures and domestic politicking in providing the legal basis for overseas activities had significant impacts on colonial projects. The limited interest and capacity in enforcing behaviours across the Atlantic meant that colonialists would frequently work outside, or even in contradiction to, their delegated authority. The result was significant competition between colonial promoters, competition that was not lessened by their shared purported loyalty to the French Crown. Both La Tour and Biencourt possessed commissions allowing them to work against the other, using whatever influence they had at the royal court to secure legal authority to act in the colonial realm. Where they could not get this authority, or where the delegations went against their interests, they would frequently ignore it. They refused to recognize commissions from the French King that ran against their interests: instead, they would travel to the France to contest those commissions in person before the Crown. They were, in other words, selective in their obedience to French law.[69]

This does not, without more, speak to legal pluralism as much as it does the tenuous reach of imperial French law. They also, however, made recourse to different systems of law to ground their authority and make claims against each other. La Tour, for example, received commission from the King of England in the early 17th century and from Cromwell in the 1650's. When threatened by Biencourt, he brought commissions from the French King to the Massachusetts

[67] Hannay, *The History of Acadia, supra* note 11.
[68] George A. Rawlyk, *Nova Scotia's Massachusetts: A Study of Massachusetts-Nova Scotia Relations, 1630 – 1784* (Montreal & London: McGill-Queen's University Press, 1973).
[69] Hannay, *The History of Acadia, supra* note 11.

council and to seek enforcement, thereby crossing between legal systems and instantiating the hybridity of those systems. This illustrates not only the attenuated nature of the authority in imperial spheres, but the porous nature of the territories claimed. While the French and British Crowns claimed complete territories in Northeastern North America, their laws moved through those spaces in complex ways. La Tour also used Indigenous legal orders. La Tour's first marriage in 'Acadie' was to a Mi'kmaw woman.[70] He entered into the Mi'kmaq system of kinship in order to legitimize his presence and support and grow his trading relations. His fur trading operations could not have survived without the support of the Mi'kmaq and Wolastoqey.

The Acadian settlers also used law instrumentally. As discussed in chapter 3, Acadians frequently made use of both British and French dispute resolution mechanisms. Where disputes arose within their communities, they would frequently seek out guidance or resolution from French priests. If one or both of the parties were not satisfied with the result, they would frequently appeal to the executive council at Annapolis Royal, which was empowered to act in a judicial capacity. In effect, they forum shopped. They were less concerned in this sense about which law *bound* them, then which law they could make use of.

The Wabanki used law instrumentally in the transnational realm. They were strategic, for example, in how they chose to appeal to European monarchs for assistance. They invoked the treaty relationship, but also appealed for protection them from the Crown's subjects. In doing so, they made appeals to British law – they asked the Crown to police the behaviour of its subjects, making appeals for the enforcement of British law. The British also engaged in this sort of pragmatic use of distinct types of law. The instruction to Richard Philipps in 1719 to engage with the Wabanki according to "Algonkian diplomacy" is one such example in the transnational realm. The nature of Acdian property rights is another. In the treaty of Utrecht, for example, the British agreed, as they had in earlier treaties, to recognize and protect Acadian property rights, as they existed at French law.

This pragmatic and instrumental use of law is evidence of the legal pluralism of the era; we can plainly see parties making use of different types, sources, and bodies of law. These practices facilitated pluralism, as the actors involved did not treat legal regimes as monolithic sources of absolute and unquestioned authority. Rather, they used different bodies of law – different sources of authority – in instrumental ways to resolve problems and negotiate their social

[70] *Ibid.*

lives with others. This shows that how laws exist in a given space reflects the lived reality of the peoples who occupy and live there, not an abstracted theoretical construct. There is no "law" apart from the people and groups that use it, and it is used in a way which shows how illusory the notion of a single homogenous "law" imposed uniformly through territory. The instrumental use of law also adds a layer of complexity to the idea of clearly defined 'legal subjects.' Jenny Hale Pulsipher, for example, has detailed the ways in which Indigenous peoples in New England would position themselves as British subjects in order to seek protection from the Crown against colonial governments and settlers.[71] Here, the category of legal subject itself is used as a means of accessing a given system of law. Groups and individuals move through different systems of law to negotiate their social terrain and complex territorial configurations take shape and are constituted by these practices. Recall again Richard Ford's argument that jurisdiction is best conceived as a set of practices and discourses. The practices of legal borrowing and forum shopping outlined above suggest a conception of layered jurisdiction that is constituted partially through the practices of legal subjects with multiple affiliations that they deployed strategically. Ford argues that seeing jurisdiction as constituted by practices and discourses

> does not mean that jurisdiction is "mere ideology," that the lines between various nations, cities and districts "aren't real." Of course the lines are real, but they are real because they are constantly being *made* real, by county assessors levying property taxes, by police pounding the beat (and stopping at the city limits), by registrars of voters checking identification for proof of residence. Without these practices the lines would not "be real" – the lines don't pre-exist the practices.[72]

We can push this further by expanding Ford's examples to include the actions not only of those who enforce law, but those legal subjects who take it up and use it in different ways. Jurisdiction is constituted not only by the French priest who applies ecclesiastical law or the *coûtume de Paris* in resolving a dispute, but by the Acadian settlers who make the conscious decision to rely on that priest for adjudication. In this, the "lines between various nations, cities and districts" blur as legal subjects make appeals across lines to various forms of authority. The reach of each type of law thickens and thins as it applies across geographical terrains unevenly and in relation to discrete subject matters by a range of subjects working multiple affiliations.

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[71] Jenny Hale Pulsipher, *Subjects Unto the Same King: Indians, English, and the Contest for Authority in Colonial New England* (Philadelphia: University of Pennsylvania Press, 2006).
[72] Ford, *supra* note 30 at 202.

ii) What Made it Work?

The above outlined practices that facilitated, and reflected, the existence of a plurality of legal and normative orders. Engagement though diplomacy and structures of alliance that respected the political character of the parties, recognizing autonomy and nationhood, was foundational. The spaces held open for negotiated forms of sovereign-subject relation allowed agency in shaping forms of authority. The instrumental and practical use of law showed law not to be monolithic and exclusive, but diffuse and attenuated. I turn now to the question of why these particular practices function to facilitate legal pluralism. What is it about these practices in particular?

a) *The (Dis)Unity of Constitutional Value and Agonistic Constitutionalism*

Political communities are not homogenous. There is always disagreement within them about fundamental issues. This is particularly true where distinct political communities make up a larger community and negotiate their co-existence in a shared social space. These contests can be described as debates over values, contests over recognition, struggles for self-making, or a form of symbolic identification.[73] In the work of thinkers who explicitly theorize agonism as a constitutive feature of political life - Mouffe, Tully, and Connolly, for example - each of these are present to an extent. Where agonistic theorizing differs from conventional approaches to political science and theory is that it does not confine its analysis to agonistic practices between competing "interest groups."[74] The contests in which individuals and groups are engaged include a broader range of groups, such as identity-based groups and sub-state peoples, and the negotiations and accommodations that characterize their contests are not limited to negotiations over their perceived interests, but shape all levels of interaction, including the modes of recognition themselves.[75] Any political theory that requires a universal notion of the good be posited ultimately fails when it comes up against the realities of human life and the pluralism – social, epistemological, ethical,

[73] This typology adapted from Mark Wenman, "'Agonistic Pluralism' and Three Archetypal Forms of Politics" (2003) 2 Contemporary Political Theory 165 at 167-168. See also James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995); James Tully, *Public Philosophy in a New Key, Vol. I: Democracy and Civic Freedom* (Cambridge: Cambridge University Press, 2008); Mouffe, *Agonistics, supra* note 5; William E. Connolly, *Pluralism* (Durham and London: Duke University Press, 2005); Stuart Hampshire, *Justice is Conflict* (Princeton: Princeton University Press, 2000).
[74] Wenman, *supra* note 73 at 168.
[75] Tully, *supra* note 73 at 160-184.

legal – of human communities. The imposition of a fixed legal, constitutional, or political order that is unable to shift to meet changing demands undermines the ability of a society's constitutive elements to negotiate the terms of their relations, leading to processes and institutions of domination. This is not limited to formal demands for changes to state law. It includes informal negotiations of identity and subject position within the broader governance terrain.

Framed another way, there is no way to fully resolve conflicting value claims in political society. Conflict arising from disparate values and interests is a fundamental aspect of political association. This is a descriptive, rather than normative statement. But it leads to a normative suggestion: if it is not possible to eliminate conflict, social institutions ought to be designed in ways that most fairly mediate it. Stuart Hampshire aptly summarizes this:

> Conceptions of the good, ideals of social life, visions of individual virtue and excellence, are infinitely various and divisive, rooted in the imagination and in the memories of individuals and in the preserved histories of cities and states. But the proper business of politics, as Hobbes perceived, is protection against the perennial evils of human life – physical suffering, the destructions and mutilations of war, poverty and starvation, enslavement and humiliation. The protection must be found in universally acceptable rational procedures of negotiation and in the intellectual procedures of adversary reasoning and compromise.[76]

Hampshire contrasts this approach with a Platonic approach which seeks to eliminate conflict by achieving harmony, both in the soul and in the city.[77] It is the ability to harmonize by properly managing competing desires that an individual can achieve wisdom and happiness. Drawing an analogy to the city, harmony can be achieved when all the parts work correctly. For those suspicious of utopian theorizing and attempts to ground political life in a single notion of the good, "[t]he desire to eliminate conflict and forge a legitimate political order based on mutual understanding is revealed as potentially authoritarian at worst and inherently partial and unintentionally oppressive at best."[78] Hampshire's rejection of utopian approaches to politics is best understood as supporting the view that the proper shape of legal and political institutions cannot be determined at the outset on the basis of abstract reasoning. It must be worked out through the push and pull of political life.

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[76] Hampshire, *supra* note 73 at xi. These conflicts can in themselves be generative, providing new visions of visions and possibilities forward into dialogue.
[77] Hampshire, *supra* note 73.
[78] Ed Wingenbach, *Institutionalizing Agonistic Democracy: Post-Foundationalism and Political Liberalism* (New York: Routledge, 2011) at 21.

His adoption of Hobbes, then, is an odd choice: it was precisely in response to the indeterminacy that skepticism threatened to bring to social and political life that Hobbes posited a sovereign whose will, singularly imposed, would resolve strife without the resort to the types of process Hampshire advocates.[79] This form of unilateral sovereign authority supported by a single authoritative voice is precisely what agonistic thinkers work against; for them, social life and political community are constituted by the ongoing, constantly shifting conflicts between incompatible or irreconcilable political visions and identities.[80] On account of these ongoing contests, "no particular hegemonic position can maintain its status for long."[81] Crucially, this extends not only to conventional political questions, but to the underlying social and political norms themselves.[82] Without the guiding hand of a hegemonic power and vision, political life - including laws and formal and informal institutional arrangements – are subject to ongoing contestation and re-negotiation. As Mouffe argues, "the domain of politics is not and cannot be the domain of the unconditional because it requires making decisions in an undecidable terrain." Accordingly, "the type of order which is established through a given hegemonic configuration of power is always a political, contestable one; it should never be justified as dictated by a higher order and presented as the only legitimate one."[83] Here we see clearly that, while Hampshire's emphasis on abandoning utopian thinking grounded on the identification of universal values or truths and instead grounding political life on negotiation and discourse, aligns with agonistic constitutionalism, his adoption of a Hobbesian conception of political life may not.

A lingering question is how, in an uncertain and shifting terrain, where recourse cannot be made to non-contestable universal principles or a priori assumptions, one can expect shared social meaning to be created.[84] If "impartiality and universal inclusion" [85] are off the table, how can

[79] Jonathan Havercroft, *Captives of Sovereignty* (Cambridge: Cambridge University Press, 2011).
[80] Wingenbach, *supra* note 78. Despite this framing, Wingenbach elides foundational questions of legal pluralism and does not engage with the foundational questions of legitimacy raised by Indigenous peoples.
[81] *Ibid.*
[82] *Ibid.*
[83] Mouffe, *Agonistics, supra* note 5 at 17
[84] Thus, Wiggenbach argues that "The disputation of principles and values characteristic of democratic life in an explicitly post-foundational era cannot rest on some deeper, non-contestable ground; nonetheless, to avoid the probable deeply undemocratic outcomes of unconstrained contestation between utterly incommensurable differences, a non-foundational and negotiated grounds for engagement must be established." Wingenbach, *supra* note 78 at 54
[85] As Wingenbach writes, "Drawing upon the scholarship of postmodernism, post-structuralism, and radical democracy, agonistic democracy articulates a powerful critique of the attempts to place economic reasoning, instrumental rationality, or impartial public reason at the center of democratic politics. Exposing the remainders and exclusions inevitably generated by the production of consensus and detailing the way in which "common sense"

political claims be adjudicated? In Hampshire's view, the best one can do is to fairly adjudicate competing claims though processes which "are all subject to the single prescription *audi alterem partem* ('hear the other side')."[86] Tully explicitly ties this requirement to the question of constitutional legitimacy, writing that "legitimacy does not rest on its approximation to some ideal consensus, but rather on the mutual relationship between the prevailing rules of law and the democratic and judicial practices of ongoing disagreement, negotiation, amendment, implementations and review."[87] Constitutional legitimacy is gained through the discursive processes that mediate competing claims and the development of rules of law that reflect these processes. What these processes of ongoing negotiation and accommodation require is the use of public reason and deliberation as means of asserting and contesting claims. Conflict is a feature of all social groups, and all social groups therefore develop norms of rationality for the public resolution of these disputes.[88] In order to maintain legitimacy over time, these norms of rationality, and the processes and frameworks of negotiation themselves, must always be open to negotiation.[89] While Mouffe cautions against the notion that rational deliberation can, or indeed should, lead to full inclusion and consensus, a broader notion of "public rationality" that includes the myriad forms of civic engagement through which governance is negotiated is essential to promoting agonistic, rather than antagonistic, relations.

These ongoing processes of negotiation apply equally to the development of legal meaning. Legal meaning is produced through deliberative contests and negotiations, not only in conventional "legal" arenas such as courts and legislatures, but in the everyday activities of groups and individuals engaged in shared meaning-making and the mutual creation of social and legal spaces. Law, in this sense, exists and takes shape within a multilogical governance terrain.[90] The unilateral imposition of law and legal meaning can be challenged through an emphasis on the dialogical or

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assumptions encapsulate and obscure the operation of power, agonistic theorists undermine all aspirations to impartiality and universal inclusion." *Ibid* at 21

[86] Hampshire, *supra* note 73 at 8.

[87] James Tully, "The Unfreedom of the Moderns in Comparison to Their Ideals of Constitutional Democracy" (2002) 65:2 Modern L Rev 204 at 208.

[88] Hampshire, *supra* note 73 at 8: As Hampshire writes, "A common norm of rationality develops naturally from the necessities of social life."

[89] Tully, *supra* note 87 at 208.

[90] Tully, *supra* note 73 at 160-184. On the importance of dialogical communication in the context of legal pluralism, see Kirsten Anker, *Declarations of Independence: A Legal Pluralist Approach to Indigenous Rights* (London & New York: Routledge, 2014).

multilogical processes that create meaning in the social sphere.[91] Processes of reciprocal elucidation can emerge through multilogical perspectives and engagements.[92]

The concepts of reciprocal elucidation and multilogical meaning-making stand opposed to a monological frame in which power is centralized and hierarchical and in which truth, knowledge, and meaning are expressed univocally. The powerful engage with others, but "translate what they hear into the presumptively universal or higher language of their hegemonic discourses."[93] The tension, negotiation, contestation, and accommodation that characterize political communities are subsumed within a single overarching narrative and vision. Concepts such as sovereignty, state, nation, peoples, and the law are promulgated that support established power arrangements and craft fixed subject positions within those relations. Monological thought and discourse are top-down forms of unilateral meaning-making. This form of monological reasoning characterizes the contemporary constitution, with the result that the pluralism of political communities is obscured or undermined.[94] As Mark Kingwell argues, under conceptions of justice that are strongly individualistic, "the social construction of meaning" is lost. [95]

With this theoretical frame summarized, we can return to 17th and 18th century Mi'ki'ma'ki/Wulstukwik. The first question is whether the agonistic frame outlined above is apt from a descriptive point of view. It clearly is. The institutionalized and informal ways that politics, law, and identity were contested constituted a descriptively agonistic social terrain. Shared structures of governance in the region developed in ways that reflected this, permitting the autonomy of groups in matters that were central to their collective self-determination and individual autonomy while jointly developing procedural mechanisms for mediating conflict. An agonistic account of the functioning of political society and law accurately reflects the reality of 17th and 18th century Mi'ki'ma'ki/ Wulstukwik.

Accepting that agonism provides an apt descriptive account, the question that follows is why that description may be relevant to the question at issue here: why the practices of legal

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[91] "The Bhaktin Circle" Craig Brandist, Internet Encyclopedia of Philosophy. Charles Taylor references Bhaktin for this same argument in the recognition paper. See also: James Tully, "Deparochializing Political Theory and Beyond: A Dialogue Approach to Comparative Political Thought" (2016) 1 Journal of World Philosophies 51.
[92] Berger, *supra* note 2, puts it this way: "translation refers to the proactive transformation of norms that occurs as they move back and forth between different contexts."
[93] Tully, "Deparochializing Political Theory", *supra* note 91 at 64.
[94] Tully, *Strange Multiplicity, supra* note 73 at 115-116.
[95] Mark Kingwell, *A Civil Tongue: Justice, Dialogue, and the Politics of Pluralism* (University Park: The Pennsylvania State University Press, 1995) at 64.

pluralism discussed above were able to facilitate the legal and normative pluralism of that they did. That is, in addition to providing a description of the relations between and within legal and normative systems, considerations of the agonistic nature of those of relations can provide a deeper descriptive analysis of how those processes, relations, and institutions both emerged from and facilitated legal plural. The agonistic practices of the parties can be seen as constitutive of a legally pluralistic constitutional order.[96] In this sense, "treaty federalism" is given a deeper meaning, one in which customary forms of law join with explicit negotiated agreements to bring multiple political communities together in constitutional association.

Recalling the caution not to romanticize the era too much, one might ask whether this is inconsistent in a context of frequent confrontation, military incursion, and guerilla warfare. Again, the distinction between agonism and antagonism is important. This is a crucial distinction "between conflict played out within a shared symbolic universe and an uncompromising conflict between those who share no symbolic unity."[97] In the pre-confederation Maritimes we can see these two movements unfolding side-by-side. The parties were undergoing the slow process of building a shared symbolic universe, drawing on British, French, and Indigenous traditions, within which agonistic relations could be productive and generative. This succeeded in many ways. Throughout the 17th century, for example, the mixing of Indigenous and European diplomatic protocols, intermarriage, and the development of customary law surrounding trade in furs and European goods all occurred in the context of an emerging shared symbolic universe within which agonistic relations could exist without falling into antagonism. The accommodations of the early decades of the 18th century, which facilitated a relatively peaceful co-existence, are another example. At other times, a reliance on force and unilateralism and the inability to find symbolic unity undermined these developments. Through diplomacy and the mutual constitution of a shared legal order, norms of reciprocal elucidation developed to mediate relations in the region. The parties could communicate because they each shared this norm of rationality through which conflict was mediated through rational public deliberation. This provided a shared language through which accommodations could be developed that were considered fair and impartial means of meditating conflicting claims. Again, the Peace and Friendship Treaty relationship is the clearest example of this.

[96] Wenman, *supra* note 73 at 167.
[97] *Ibid.*

This agonistic mode of relation predominated throughout the 17th century and was a crucial feature of the 18th, during which time it was in tension with agonistic mode. This study takes the 1780's as its end point in part because, with the arrival of Loyalist settlers, the more visibly agonistic and antagonistic elements begin to be transformed through a new type of relation at this time. While the 18th century was characterized by opposing poles – the agonistic forms of shared and deliberative constitutionalism of the treaty relationship and the outright antagonism of warfare – the arrival of the Loyalist settlers, the creation of New Brunswick, and the birth of a new international order with the conclusion of the American War of Independence marked the beginning of an era of imposed colonial rule under which the Wabanaki were gradually subsumed within a modern state and constitution under which a unitary and hierarchical system of values was imposed. A pronounced shift occurred in which the more generative features of the shared social and political world were eclipsed, and antagonistic practices shifted from open conflict to social, economic, and political exclusion based on the racist dogmas of the 19th century. With the close of the 18th century, we see the beginnings of a shift to a form of modern constitutionalism that continues to shape relations today.

iii) Conclusions on Pluralism and Agonism in 17th and 18th Century Mi'kma'ki/Wulstukwik

As a descriptive matter, Mi'kma'ki/ Wulstukwik was a legally and normatively plural space in the 17th and 18th centuries. While chapters three and four provided the empirical ballast for this claim, this chapter identified features of the shared legal and political framework of the era that facilitated that legal and normative pluralism. I focused here on the generative features of these arrangements and practices to help frame a conception of political arrangements distinct from that tied to notions of sovereignty as command within fixed territorial bounds. The first feature identified was an emphasis on diplomacy, autonomy, and nationhood that recognized the status of the various actors as distinct and largely autonomous political communities. The Crown's inflated sovereign claims were not understood, by any of the parties, as having eliminated the political character of the region's peoples or impacted their claims to autonomy, agency, and self-determination. Second, the category of Crown "subject" was open to negotiation and contestation. Both the Acadians and Wabanaki consciously articulated alternatives to imposed versions of subjecthood that preserved

a level of autonomy and resisted the imposition of a unilateral form of legal affiliation within the confines of a single legal system. The category of "subject" was malleable and reflected legal pluralism and hybridity as groups and individuals negotiated forms of subjecthood that were shaped by multiple legal orders. The pragmatic and instrumental use of law was the final feature examined here. Throughout 17th and 18th century in Mi'kma'ki/ Wulstukwik/ Acadie/ Nova Scotia, actors engaged with a plurality of legal orders not passively, but actively and strategically to advance their own interests and values. In doing so they structured the legal spaces through divergent legalities, thickening and thinning law through their practices. Legal regimes were treated not as monolithic, but as instrumental to other ends. Social spaces and relations were structured by the exercise of individual and collective agency through the instrumental use of law.

I also sought to illustrate that the era cannot be romanticized. Imperial imposition, dispossession, and alienation were central to the underlying process of turning Mi'kma'ki into Nova Scotia and structuring it as a space of British legality and British territorial jurisdiction. What this chapter shows, then, is the complex and messy interactions that unfolded, not as an idealized model that obscures the role of violence and force or should be adopted in the present day, but to clearly outline features of more decentralized forms of social and legal relationships that gave rise to a pluralized constitutional order that survived some two centuries. It cannot be ignored that imposed rule, force, and violence played an important role, and that notions of European superiority structured relations in important ways. The law facilitated these ends in many cases. Both traditions – negotiated forms of association based the recognition of legal and normative pluralism and imposed forms based on prejudice, violence, and self-interest - were inherited in Canada's constitutional order. The following chapter outlines how contemporary law can be re-assessed in light of this past and how the common law can relate to this history in a generative way.

Chapter 6: Present-Oriented Legal History and the Development of the Common law

In the introduction I referred to the approach taken in this work as a present-oriented legal history. A review of that idea may be helpful at this juncture. A present-oriented legal history is guided first and foremost by problems in the present. The questions that guided the analysis in the proceeding chapters reflected contemporary concerns; it was taken as axiomatic that the ongoing unwillingness of the executive, legislative, and judicial branches of the Canadian state to meaningfully recognize Indigenous peoples as partners –as *peoples* – in the constitutional order, is a pressing and fundamental problem. With this as a starting point, I worked backwards to explore legal genealogies of the ongoing denial of Indigenous self-determination. In the Mi'kma'ki/Wulstukwik, this denial has manifested as an ongoing refusal to recognize Indigenous rights to land and a narrow interpretation of the historical treaty relationship and the rights to lands, waters, resources, and governance that flow from it. A present-oriented *legal* history, however, is not only concerned with genealogies. It is also concerned with the development of the common law and differs from present-oriented histories in this sense. Like a present-oriented history, present-oriented legal history seeks to uncover genealogies and contingencies that give contemporary legal problems their form. In so doing, it reveals conceptual models, practices, and modes of thought that may crack open possibilities in the present. Uniquely, a present-oriented legal history does so in order to critique contemporary law and point to alternative legal configurations, including specific doctrinal changes.

In light of that distinction, the contemporary problem guiding this work might be re-framed slights as the way that the doctrine of Aboriginal rights has continued to constrain Indigenous self-determination by unilaterally assigning Indigenous peoples a subordinate position in the constitutional order, a position from which claims to meaningful self-determination simply cannot be heard. Indigenous peoples are limited to expressing their claims in a narrow language of constitutional rights that provides little space for Indigenous law and self-determination and to do so against a state apparatus that dictates the terms of engagement and takes judicial pronouncements as guiding the framework for engagement. This chapter brings the analysis of the previous chapters forward to the present day to consider how it may impact the development of

common law principles and the constitutional framework governing Crown-Indigenous relations, with a particular focus on Mi'kma'ki/Wulstukwik.

i) The Political Character of Indigenous Peoples: The Peace and Friendship Treaties from *Syliboy* to *Simon*

While Canadian legal doctrine has evolved to recognize a greater range of rights for Indigenous peoples and ensure that they are able to impact decision-making to some extent where those rights are at risk, it has nonetheless maintained Crown authority *over* Indigenous peoples in most circumstances. One reason for this is a persistent failure to recognize, or, if recognized, give legal effect to, the fact the Indigenous peoples are distinct political communities whose claims are not in the nature of claims for protection of minority right, but claims for jurisdiction. That is, Aboriginal and treaty rights are interpreted in a way that reduces the political existence of Indigenous peoples as *peoples.* The elimination of the political character of Indigenous peoples is articulated perhaps nowhere as clearly as it was in the infamous 1928 *Syliboy* decision.[1] Judge Patterson, at the Inverness County Court in Nova Scotia, held that:

> Treaties are unconstrained Acts of independent powers. But the Indians were never regarded as an independent power. A civilized nation first discovering a country of uncivilized people or savages held such country as its own until such time as by treaty it was transferred to some other civilized nation. The savages' rights of sovereignty even of ownership were never recognized. Nova Scotia had passed to Great Britain not by gift or purchase from or even by conquest of the Indians but by treaty with France, which had acquired it by priority of discovery and ancient possession; and the Indians passed with it.[2]

Two of Judge Patterson's conclusions are particularly relevant. First, he concludes that the Mi'kmaq did not have the capacity to enter treaties. This seems to contradict the historical evidence; indeed, Judge Patterson himself discusses several Mi'kmaw treaties.[3] To support this

[1] *Rex v Syliboy*, 1928 CanLII 352 (NS SC),There are a host of 19th century Canadian decisions that could be drawn on as illustrative of this point. For an account see Stanley Harring, *White Man's Law: Native People in Nineteenth-Century Canadian Jurisprudence* (Toronto: University of Toronto Press, 1998). *Syliboy* was chosen here because it is so explicit on this point – frequently the justifications relied on in decision remain unstated – and because it deals with the treaties being discussed in this work.
[2] *Syliboy, supra* note 1 at 313. For a detailed account of the decision see William C. Wicken, *The Colonization of Mi'kmaw Memory and History, 1794-1928:* The King v. Gabriel Sylliboy (Toronto: University of Toronto Press, 2012).
[3] *Syliboy, supra* note 1 at 309.

conclusion, he effectively re-writes the historical record: Indigenous peoples never had the capacity to enter treaties, therefore the "so-called" treaties are not, were not, treaties at all. He admits that the British themselves referred to these agreements as treaties (of course, the Mi'kmaq perspective on the matter is not relevant to him) but offers that they may have done so to deceive the Mi'kmaq, to trick them into believing they were entering treaties when in fact they were merely coming to an agreement.[4] They could not have been treaties, because "the Indians" never had the capacity to enter into treaties; they never had the requisite political status. This incontrovertible principle, dispositive of the issue before the court, is a mix of historical fact, accepted without argument, and legal finding, supported without argument.

The second conclusion that deserves attention is the claim that Indigenous "rights of sovereignty even of ownership were never recognized."[5] Again, this belies the historical record. The justification for this conclusion was that Britain acquired the territory from France, who had acquired it through discovery and first possession. While the British did claim at times that prior French "possession" of Acadie eliminated any Indigenous interests, in practice they realized they could not overcome Mi'kmaw and Wolastoqey objections to this claim by assertion alone. Further, no matter what the claims of some officials may have been, the opinions of military appointees do not determine the law. It is not clear that imperial constitutional law of the 18th century supports the claim that French colonization eliminated all Indigenous interests, and even less so that either the law of nations or Indigenous-European intersocietal law did. In respect of the latter, it is notable that the British sought Mi'kmaw and Wolastoqey recognition of the sovereignty they acquired under the Treaty of Utrecht of 1713 in the Peace and Friendship treaties in 1725-26.[6] They understood the need to negotiate the rights and obligations of the parties through Indigenous-European law regardless of what they believed about the impact of prior French claims under other legal systems. The claim that Indigenous "rights of sovereignty even of ownership were never recognized" is simply not tenable when assessed against the historical record.

While the historical record refutes many of the statements in *Syliboy*, and it may be tempting to read the decision as a relic of an earlier time, the decision continues to be useful as an illustration of the way that the law in the early 20th century confined Indigenous peoples to a

[4] *Ibid.*
[5] *Syliboy, supra* note 1.
[6] William C. Wicken, *Mi'kmaq Treaties on Trial: History, Land, and Donald Marshall Jr.* (Toronto: University of Toronto Press, 2002).

subordinate constitutional status. According to some early 20th century legal opinion, the Mi'kmaq were never recognized as sovereigns or owners. Even their treaties were not treaties. They never had capacity to enter them and never had ownership of land or waters. They were – always, as it were – subordinate minorities to whom generosity was exercised on a discretionary basis in the form of provisions or gifts but to whom no legal duties were owed. Fifty-six years later, in *Simon,*[7] the Supreme Court of Canada had the opportunity to interpret the 1752 treaty that was at issue in *Syliboy*. The SCC overturned several aspects of *Syliboy*, holding the Mi'kmaq did have the capacity to enter treaties and that, correlatively, the Treaty of 1752 was in fact a Treaty. In doing so, the Court held that "the language used by Patterson J. … reflects the biases and prejudices of another era in our history. Such language is no longer acceptable in Canadian law and indeed is inconsistent with a growing sensitivity to native rights in Canada."[8] *Simon* marks a decisive shift as the Court sought to excise explicitly racist views from Canada's judicial doctrine and recognized the legal relevance of Crown-Indigenous treaties. The significance of the shift in *Simon,* however, is not always clearly articulated: it is not merely that the decision rejected explicit racism as the basis for treaty interpretation. Of greater importance was the finding that Indigenous peoples had the *capacity* to enter into treaty agreements with the Crown. That is, the shift in *Simon* depended on the finding that Indigenous peoples were political entities and possessed political agency.

The importance of this holding, however, should not be mistaken for innovation. In the early 19th century Chief Justice Marshall of the US Supreme Court recognized the political character of Indigenous peoples. In 1832 in *Worcester v Georgia*[9] he held that the 9th clause of the Treaty of Hopewell, which provided that the Cherokee shall be free in "managing all their affairs" could not be interpreted as ceding rights of governance and making them subordinate to state authority. Marshall CJ held:

> [s]uch a construction would be inconsistent with the spirit of this and of all subsequent treaties, especially of those articles which recognise the right of the Cherokees to declare hostilities and to make war. It would convert a treaty of peace covertly into an act annihilating the political existence of one of the parties.[10]

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[7] *Simon v The Queen,* [1985] 2 SCR 387. For a comparative analysis of *Syliboy* and *Simon* similar to the one provided here, see Gordon Christie, "Justifying Principles of Treaty Interpretation" (2000) 26:1 Queen's LJ 143.
[8] *Ibid* at para 21.
[9] *Worcester v Georgia,* 31 US 515 (1832)
[10] *Ibid* at 518.

Marshall CJ, in other words, insisted that the treaties be understood in a way that *preserves* the political existence of the parties.[11] The acceptance in *Simon* that Indigenous peoples had the capacity to enter treaties, then, has a long judicial provenance. In the realm of practice, of course, the British for centuries treated Indigenous peoples as political actors with whom they negotiated complex structures and practices of trade, alliance, and diplomacy.[12] There was never any doubt in the 18th and 19th centuries that Indigenous peoples had the capacity to enter treaties with the Crown.[13] *Simon* merely recognizes this. That does not undermine its importance – the Court *could* have followed *Syliboy*; in charting another path, the Supreme Court recognized the political agency of Indigenous peoples while articulating important principles of treaty interpretation that reflected their constitutional importance.[14]

Yet, *Simon* was also limited by this qualification: "With regard to the substance of Patterson J.'s words, leaving aside for the moment the question of whether treaties are international-type documents, his conclusions on capacity are not convincing" [emphasis added].[15] When turning to the question of whether Crown-Indigenous treaties are *international* agreements, the *Simon* court held they were not, instead casting them as *sui generis* in nature.[16] Crown-Indigenous treaties are "neither created nor terminated according to the rules of international law."[17] These treaties are part of the domestic legal regime. The Court makes an interesting historical claim here. Recall that international law, as a state-based system of global law and governance, did not exist

[11] For a detailed analysis of this point see Philip Frickey, 'Domesticating Federal Indian Law' (1996) 81 Minn L Rev 31. And for an analysis on the context of Canadian constitutional law see Joshua Nichols & Robert Hamilton, "In Search of Honorable Crowns and Legitimate Constitutions: *Mikisew Cree First Nation v Canada* and the Colonial Constitution" (2020) 70:3 U of T LJ 341 at 370-372.

[12] For a comprehensive account, see James (Sa'ke'j) Youngblood Henderson, *Wabanaki Compact: The Foundation of Treaty Federalism in North America, 1621-1728* (Saskatoon: Indigenous Law Centre, 2020).

[13] The language "never any doubt" is used here advisedly. It is a phrase adopted from the SCC in *Sparrow,* where the court held that "there was never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown." *R v Sparrow,* [1990] 1 SCR 1075 at 1103. For critique of the way this phrase structures history in the service of a contemporary legal position, see Hamar Foster, "Forgotten Arguments: Aboriginal Title and Sovereignty in Canada Jurisdiction Act Cases" (1992) 21:3 Man LJ 343.

[14] Again, these were taken directly from the American case law. And, as has been seen where Aboriginal rights are concerned, the Canadian courts adopted the more limited elements of the US doctrine. In *Simon,* for example, the court cited the US decision of *Jones v Meehan* for the principle that treaties need to be interpreted in a large liberal manner construing ambiguities in favour of the Indigenous signatory. Yet, at the same time as *Jones,* the US court delivered *Winans,* which articulates the reserved rights doctrine. This is a much more powerful doctrine for Indigenous peoples. It should also be noted that the lower courts in *Simon* did in fact follow *Syliboy.* Until the 1980's, then, this perspective on treaties could still be found in the Nova Scotia courts.

[15] *Simon, supra* note 7 at para 21.

[16] *Ibid* at para 33.

[17] *Ibid.*

in the 18th century. What preceded the modern system was an international order structured by empire.[18] The law of nations provided the rhetoric of law among European nations, while an array of practices of transnational law and legal hybridity proliferated where those nations colonized other nations. When the Wabanaki treaties were signed in the early-mid-18th century, this carried on a practice that shaped relations between European and Indigenous nations for over a century.[19] As outlined in chapter 4, multiple forms of transnational law were used in Northeastern North America. The notion that Crown-Indigenous treaties were not created or terminated according to the rules of "international law" requires that a narrow system of law applicable between European nations be given priority over other varieties of transnational law.

Despite this, there may be important benefit to the Court's approach. The *sui generis* characterization was part of the justification for holding that the Treaty of 1752 continued to be in force in 1985: the Court met the argument that subsequent hostilities terminate a treaty at international law by rejecting the application of that body of law. Yet, the claim that the creation and termination of Crown-Indigenous treaties is not a matter of international law relies on the adoption of a conception of international law recognizing only sovereign nation-states as actors. According to this logic, Indigenous peoples, even if against their will, became sub-state peoples whose claims were met by domestic legal or constitutional frameworks.[20] Thus, the rights or jurisdiction recognized in these treaties today is a matter of domestic law. The Court in *Simon,* therefore, sees Indigenous peoples' rights of autonomy and self-determination as always having been limited in some sense by Crown sovereignty and by their exclusion from "international law." Does this vision accord with Marshall CJ's view that treaties should be interpreted in a way that *preserves the political existence* of the parties?

The extent to which the courts have limited Crown sovereignty in relation to Indigenous peoples provides a partial answer. Courts have wrestled with how to articulate the constitutional relationship between Indigenous peoples and the Crown as Indigenous peoples have continued to argue for constitutional arrangements that reflect their desire for self-determination, territorial jurisdiction, freedom, and dignity. *Sparrow,* the first case to consider s.35 rights, illustrates the

[18] See generally Lauren Benton and Lisa Ford, *Rage for Order: The British Empire and the Origins of International Law, 1800 – 1850* (Cambridge MA: Harvard University Press, 2016).
[19] Henderson, Wabanaki Compact, *supra* note 12.
[20] For an examination of this problem, see Duncan Ivison, *Can Liberal States Accommodate Indigenous Peoples?* (Cambridge: Polity, 2020).

tension that has animated the jurisprudence. The *Sparrow* court limited Crown sovereignty, holding that the courts can supervise discretionary acts of the sovereign and the legislature to ensure they respect Aboriginal rights.[21] Yet, the court also conceded to an inflated conception of Crown sovereignty that undermines Indigenous political agency.[22] An infrequently discussed part of the case illustrates this point. Ronald Sparrow had asserted a jurisdictional claim, that the right to fish included the right to regulate the fishery. The court dismissed it with little discussion, assuming from the outset that if Aboriginal rights were to be recognized, they were to be subject to Crown regulation. Any governmental or jurisdictional powers, aside from matters of internal allocation, were excised from s.35 at the outset. The Court adopted a framing of discrete rights rather than jurisdiction. Once the frame is set as dealing with a conventional liberal conception of rights, a unilateral Crown regulatory power flowed naturally, along with the conclusion that "no rights are absolute."[23] The Court's insistence that the Crown retains regulatory authority and the authority to infringe aboriginal rights subject to judicial supervision result from this conceptual framing. This has had a profound effect on the nature of s.35 rights and is one of the reasons why the doctrine has been unable to respond meaningfully to claims of self-government and self-determination.

This limitation can be seen in what is likely the most significant treaty case from the region, the *Marshall* decision.[24] Here, as in *Simon*, the Supreme Court recognized the ongoing relevance of the Peace and Friendship Treaties, with a majority of the Court recognizing that the treaties of 1760-61 protect a right to a commercial fishery.[25] On the question of jurisdiction – of who would regulate the exercise of the right – the Court did not disturb the status quo.[26] The effect of this constraint became clear in the months following the decision. When the Mi'kmaq of the Esgenoopetitj First Nation began exercising their recently recognized right under the auspices of their own fisheries management plan – that is, through their own jurisdiction – the Department of Fisheries and Oceans considered this a violation of their own jurisdiction and, along with the

[21] *Sparrow, supra* note 13.
[22] See e.g. Robert Hamilton, & Joshua Nichols, "Reconciliation and the Straitjacket: A Comparative Analysis of the *Secession Reference* and *R v Sparrow*" (2021) 52:2 Ott L Rev 205.
[23] *Sparrow, supra* note 13.
[24] *R v Marshall (No. 1),* [1999] 3 SCR 456; *R v Marshall (No. 2),* [1999] 3 SCR 533
[25] *Marshall (No. 1), supra* note 24 at 4, 66-67.
[26] *Ibid* at 57-61.

RCMP, moved to enforcement through force. The resulting violence was a national news story and has since taken its place as a pivotal moment of Indigenous resistance and state violence.[27]

The Supreme Court then took the remarkable step of issuing a second decision to clarify the matter, emphasizing that *Marshall #1* "did not hold that the Mi'kmaq treaty right cannot be regulated or that the Mi'kmaq are guaranteed an open season in the fisheries."[28] In other words, the treaty right, like the Aboriginal right in *Sparrow,* is subject to state regulation. The jurisdictional possibilities of s.35 are pushed out of the frame. The generative potential of the recognition of Indigenous political agency in *Simon* and *Marshall* has, therefore, been tempered by the underlying beliefs about the nature of the parties and their constitutional relationships, evident in the court's unexamined domestication of Crown-Indigenous treaties.[29] The equally generative possibilities that inhere in the *Delgamuukw* court's holding that the common law ought to develop to reflect *de facto* practice and Indigenous systems of governance have been similarly constrained. A present-oriented legal history can shed light on how the generative features of the doctrine can become more pronounced and facilitate decolonized constitutional arrangements and practices.

ii) Indigenous Law, Self-Determination, and Negotiated Constitutionalism

The revitalization and resurgence of Indigenous law in theory and practice, the increasing reliance on languages of self-determination to voice long-standing Indigenous claims, and the frequent direct action and civil disobedience engaged in by Indigenous peoples have foregrounded the need to develop negotiated forms of constitutional association. This movement of constitutional regeneration requires: 1) the development of the common law so that it might best facilitate negotiated resolutions to constitutional disputes, and 2) the identification and articulation of practices of federalism and constitutionalism that reflect a constitutional order that is not imposed on, but built with, Indigenous peoples.

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[27] L. Jane McMillan, *Truth and Conviction: Donald Marshall Jr. and the Mi'kmaw Quest for Justice* (Vancouver: UBC Press, 2018); Ken Coates, *The Marshall Decision and Native Rights* (Montreal-Kingston: McGill-Queen's University Press, 2000).
[28] *Ibid* at para 2.
[29] For a development of this argument, see Robert Hamilton & Joshua Nichols, "Reconciliation and the Straitjacket: A Comparative Analysis of the *Secession Reference* and *R v Sparrow*" (2021) 52:2 Ott L Rev 205.

a) Judicial Doctrine and Negotiated Outcomes

How can judicial doctrine best lead to negotiated outcomes that parties consider legitimate? It is, of course, not always possible, or even desirable, for a court to push parties to negotiated solutions. In many instances, a court must resolve disputes by appraising the legality of the parties' positions within a given framework. Consider, for example, a traditional division of powers case under the Canadian constitution. In a jurisdictional dispute between federal and provincial governments, the court may resolve the issue by deciding whether the subject-matter in question is a matter of federal or provincial jurisdiction under ss.91 and 92 of the *Constitution Act, 1867* and which judicial doctrine is relevant to resolving the dispute.[30] This is the court's role, and it could seem odd for the Court to direct the parties to resolve the dispute through negotiation. The Indigenous context, however, is unique. Where Indigenous peoples are concerned, there is always a prior question as to the legitimacy of the state's authority.[31] Indigenous peoples in state courts frequently do not challenge the application of existing agreed upon rules to a given set of facts; rather, they challenge the rules themselves. When courts adjudicate Indigenous claims through a set of fixed and unilaterally imposed rules – and here it is important to recall that, in relation to Indigenous peoples, courts are *state actors* – they confine Indigenous peoples to a subordinate role in the constitutional order that they did not consent to.[32] Courts then become part of the process of extending colonial rule through modern constitutional orders in the nation state. This feature of Aboriginal rights doctrine was outlined in the previous section. But so too was a tension between this and the more generative aspects of the doctrine, those aspects that recognize the *political character* of Indigenous *peoples.* The Supreme Court of Canada has seemed to recognize this tension and concluded that the preferred means of resolving it is through negotiated solutions. It has repeatedly

[30] *The Constitution Act, 1867*, 30 & 31 Vict, c 3, ss.91-92. Division of powers questions are dealt with through a number of doctrines such as paramountcy, inter-jurisdictional immunity, and concurrency. See *Alberta (Attorney General) v Moloney*, 2015 SCC 51, [2015] 3 SCR 327; *407 ETR Concession Co v Canada (Superintendent of Bankruptcy)*, 2015 SCC 52. *Quebec (Attorney General) v Lacombe*, 2010 SCC 38, [2010] 2 S.C.R. 453; *Rothmans, Benson & Hedges Inc v Saskatchewan*, 2005 SCC 13, [2005] 1 SCR 188.W R Lederman, "The Concurrent Operation of Federal and Provincial Laws in Canada" (1963) 9:3 McGill LJ 185; Jeremy Webber, *The Constitution of Canada: A Contextual Analysis* (Oxford: Hart Publishing, 2015).

[31] Ivison, *supra* note 20.

[32] Joshua Nichols develops this line of argument in *Reconciliation Without Recollection.* For further development see Robert Hamilton & Joshua Nichols, "The Tin Ear of the Court: *Ktunaxa Nation* and the Foundation of the Duty to Consult" (2019) 56:3 Alta L Rev 729; Joshua Nichols & Robert Hamilton, "In Search of Honorable Crowns and Legitimate Constitutions: *Mikisew Cree First Nation v Canada* and the Colonial Constitution" (2020) 70:3 U of T LJ 341.

signaled to the parties that it prefers negotiated outcomes and pointed to the limitations of the adversarial litigation process.[33]

Through these moves the Court has tried to relieve the constraints of an imposed constitutional order and encourage the Crown to negotiate the contours of constitutional association with Indigenous peoples. This feature of the case law resembles the approach the Court took to a similar issue – the contestation of the constitutional order by sub-state peoples – in the Quebec Secession Refence.[34] There, the Court held that, while the people of Quebec had no legal right of unilateral secession under either domestic Canadian or international law, an express democratic desire to modify the terms of a constitutional arrangement placed a duty to negotiate the terms of that modification on all of the constitutional partners.[35] In the Indigenous context, however, the unilateral and colonial aspects of the Aboriginal rights doctrine have been more pronounced than its generative aspects. The analysis of the negotiated forms of constitutionalism in 18th century Mi'kma'ki/Wulsukwik, and the pluralism and hybridity they supported, can help guide the common law toward its more generative possibilities.

One of the most generative aspects of the judicial doctrine of Aboriginal rights, for example, is its recognition of, and engagement with, intersocietal law. In *Van der Peet,* for example, the Court held that "what s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose."[36] In other words, the Aboriginal rights recognized and affirmed in the constitution must reflect the reconciliation of multiple legal orders: those of Indigenous peoples themselves, which pre-existed and survived the assertion of Crown sovereignty, and that which is given expression through Crown sovereignty. It is notable, however, that the substantive element is defined by the relationship between Indigenous legal orders and Crown *sovereignty*, not between Indigenous legal orders and the laws of Canada or a province. That is, the reconciliation the court envisions is between Indigenous *laws* and Crown sovereignty, not between Indigenous laws and Canadian

[33] *Delgamuukw v British Columbia*, [1997] 3 SCR 1010. See Paul L.A.H. Chartrand, "Indigenous Peoples: Negotiating Constitutional Reconciliation and Legitimacy in Canada" (2011) 19:2 Waikato Law Review 14.
[34] *Reference re Secession of Quebec*, [1998] 2 SCR 217 [*Secession Reference*].
[35] *Ibid.*
[36] *R v Van der Peet*, [1996] 2 SCR 507 at para 31.

laws. This is made clearer still in *Delgamuukw,* in the passage already cited in this work, where the majority held that the common law should develop to reflect *de facto* practice and Indigenous systems of governance.[37] There is no discussion here of Aboriginal rights being defined by state or colonial law. Rather, they are to be defined by the governance systems of Indigenous peoples and by the practices of shared governance that developed in the early colonial era to mediate the co-existence of Indigenous law and asserted Crown sovereignty (which permitted, for example, the negotiation of treaties and the exclusion of other European nations from trade and settlement). Later cases were more explicit. In *Mitchell,* the majority of the Court held that "English law … accepted that the aboriginal peoples possessed pre-existing laws and interests"[38] and that "aboriginal interests and customary laws were presumed to survive the assertion of sovereignty, and were absorbed into the common law as rights."[39] In *Haida Nation* the court spoke of "pre-existing Aboriginal sovereignty"[40] and labelled the Crown's sovereignty "*de facto*", seemingly indicating that the legality of the assertion of Crown sovereignty may be subject to some qualification.[41]

Yet, there are qualifications attached to these holdings that undermine judicial attempts to interpret s.35 in a way that preserves the political character of the parties. These limitations were discussed in the context of the *Sparrow* decision above, but each case has some version. In *Van der Peet* the Court undermined its expansive reading of the importance of Indigenous and intersocietal law by adopting a narrow culture-based test for proving Aboriginal rights claims.[42] In *Delgamuukw* the Court recognized an expanded range of justifications that the Crown might rely on in infringing Aboriginal title to include such encompassing matters as "the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations."[43] In *Mitchell* the majority recognized the pre-existence of Indigenous law and the fact that it survived the assertion of sovereignty but also

[37] *Delgamuukw, supra* note 33.
[38] *Mitchell v MNR*, 2001 SCC 33, [2001] 1 SCR 911 at para 9.
[39] *Ibid* at para 10
[40] *Haida Nation v British Columbia (Minister of Forests),* 2004 SCC 73, [2004] 3 SCR 511 at para 20.
[41] Ryan Beaton, "De Facto and De Jure Crown Sovereignty: Reconciliation and Legitimation at the Supreme Court of Canada" (2018) 27:1 Const Forum Const 25; Richard Stacey, "Honour in Sovereignty: Can Crown Consultation with Indigenous Peoples Erase Canada's Sovereignty Deficit?" (2018) 68:3 UTLJ 405.
[42] *Van der Peet, supra* note 36.
[43] *Delgamuukw, supra* note 33 at para 165. For analysis of decision-making authority on Aboriginal title lands, Gordon Christie, "Who Makes Decisions over Aboriginal Title Lands" (2015) 48:3 UBC L Rev 743.

held that "English law … ultimately came to govern aboriginal rights" and Indigenous laws only survived the assertion of Crown sovereignty "in the absence of extinguishment, by cession, conquest, or legislation."[44]

While these qualifications are consistent with Crown assertions of authority, they overlook the role of the very bodies of law that are said to have survived the assertion of sovereignty. If Aboriginal rights came to be defined and governed solely by "English law," what exactly survived the assertion of sovereignty? Legal orders re-imagined as permission to hunt and fish under Crown regulation stretches the definition of "survived" beyond its natural limits. The Court's decision that legislation could extinguish rights also requires some consideration. While it can be accepted that a Canadian court cannot question the Crown's acquisition of sovereignty, the legislative authority to unilaterally extinguish fundamental rights is not a necessary correlative of sovereign authority. While it may well have been common practice to usurp Indigenous lands and resources through legislation, unjust laws of the past do not need to be given legal effect today. This is where specific histories of pluralism and hybridity drawn from the range of discrete historical practices among European and Indigenous peoples can be useful. These histories provide the thick descriptions required to give s.35 substantive content in way the Supreme Court has explained it would like to do.[45] These descriptions can outline what it was that survived the assertion of Crown sovereignty and must be reconciled with that sovereignty to, in the Court's view, fulfill the purpose of s.35. They can outline in detail Indigenous forms of governance and what the *de facto* practice in the colonial era was. In this, they demonstrate the importance of maintaining the political character of the parties and promote the development of doctrine that can effectively facilitate negotiated outcomes.

Another potentially generative aspect of judicial doctrine is the increasing openness of Canadian courts to the existence and relevance of Indigenous laws, not as a something that vaguely provide "substantive content" to section 35 rights or that survived sovereignty only in some partial and unrecognizable form, but as applicable law in their own right. In *Pastion v Dene Tha' First Nation,* for example, Grammond J. wrote that "Indigenous legal traditions are among Canada's legal traditions. They form part of the law of the land."[46] Those legal traditions, as part of the law

[44] *Mitchell, supra* note 38 at para 9.
[45] *Van der Peet*, *supra* note 36 at para 31.
[46] *Pastion v Dene Tha' First Nation*, 2018 FC 648 (CanLII), [2018] 4 FCR 467 at para 8.

of the land, can be applied by courts where appropriate. The most common way this has been done recently has been in disputes concerning elections on First Nations.[47] In such cases, the Federal Court has frequently taken the existence and applicability of Indigenous law as a given. In *Potts v Alexis Nakota Sioux Nation*, for example, the Federal Court held "[i]f an alternative process rooted in Indigenous self-governance is available to adequately resolve the dispute, it would be inappropriate for this Court to intervene."[48] In these cases, the courts have effectively taken judicial notice of the existence of Indigenous laws and not questioned their capacity to recognize and give effect to such laws.

A competing articulation, however, has also emerged. In the *Coastal Gaslink* decision, for example, the British Columbia Supreme Court held that "[a]s a general rule, Indigenous customary laws do not become an effectual part of Canadian common law or Canadian domestic law until there is some means or process by which the Indigenous customary law is recognized as being part of Canadian domestic law, either through incorporation into treaties, court declarations, such as Aboriginal title or rights jurisprudence or statutory provisions."[49] Further, "Indigenous laws may … be admissible as fact evidence of the Indigenous legal perspective, where there is admissible evidence of such Indigenous customary laws. It is for this purpose that evidence of Wet'suwet'en customary laws is relevant in this case."[50] Indigenous law cannot, in other words, be given effect by a court unless it is first given some articulation through a negotiated agreement or court declaration. Absent such recognition, the role of Indigenous law will be limited to providing evidence of the existence of Aboriginal rights or title. The extent of the inconsistency between the approach here and in cases like *Pastion* is an open question. In *Pastion* the court dealt with Indigenous laws that had been written in a contemporary elections code and, while the Court made notable statements about the existence of Indigenous law, the disposition of the case relied not on the application of Indigenous law itself but on granting deference to Indigenous decision-makers. *Coastal GasLink* dealt with unwritten customary law and the court was asked to give that

[47] *Alexander v Roseau River Anishinabe First Nation Custom Council*, 2019 FC 124 (CanLII) at para 18; *Henry v. Roseau River Anishinabe First Nation Government*, 2017 FC 1038 (CanLII) at paras 7-11; *Gamblin v Norway House Cree Nation Band Council*, 2012 FC 1536 at paragraph 34; *Mclean v Tallcree First Nation*, 2018 FC 962 at paragraph 10; *Whalen v. Fort McMurray No. 468 First Nation*, 2019 FC 732 (CanLII), [2019] 4 FCR 217 at paras 31-40; *Clark v. Abegweit First Nation Band Council*, 2019 FC 721 (CanLII), at para 79; *Potts v Alexis Nakota Sioux Nation*, 2019 FC 1121 (CanLII) at para 41. [double check that these are all elections cases]

[48] In *Potts v Alexis Nakota Sioux Nation*, 2019 FC 1121at para 41.

[49] *Coastal GasLink Pipeline Ltd. v Huson*, 2019 BCSC 2264 at para 127. See also *Alderville First Nation v Canada,* 2014 FC 747 para 40.

[50] *Ibid* at para 129.

law priority over state law. While the tenor of the cases is certainly distinct, the facts also lent themselves to distinct approaches and, of the two, *Coastal GasLink* is the "hard case."

The approach, then, has been inconsistent. At the Supreme Court of Canada, the existence of Indigenous law has been noted, and it has been held to be the basis for, and provide the substantive content of, s.35 rights. The federal court has affirmed the existence and relevance of Indigenous law. Yet, *Coastal Gaslink* puts plainly an important limitation, arguing that while Indigenous law may well *exist,* the courts cannot apply it. While this is arguably a misstatement, it also reveals something important. Canadian law has tended to accept the existence of Indigenous law while confining its applicability in several ways. While it has frequently been said that Indigenous law is part of Canadian law, the notion that it is constitutive of Canadian law has not been followed through in a meaningful way. Where important work remains to be done is in allowing Indigenous legal orders to shape Canadian legality: to allow shared law to truly be mutually constituted. To draw on the framework used in the introduction, this foregrounds the need for Canadian courts to move from a framework of deferral to one of reciprocal elucidation.

This brings us back to the statement from the Supreme Court in *Delgamuukw* that I highlighted at the outset: the common law ought to develop to reflect Indigenous governance and the practice of colonial and Indigenous actors. One reason these types of statements, despite their generative potential, have not transformed the law to the extent possible is a limited reading of the history and a limited interrogation of how legal spaces were constituted by a plurality of legal and normative orders. What was *de facto* practice? In answering such questions, courts have looked to the past through a certain lens, which has constrained what they see as possible in the present. While they have recognized Indigenous customary law and that Indigenous peoples were law-governed, they have not recognized in a meaningful way the extent to which shared structures of governance were negotiated. They have rarely interrogated how practices of pluralism and legal hybridity structured legal spaces in which Crown sovereign authority was but one of many types of law and authority that were put into practice.[51] When the courts have tried to shape the common law to reflect "aboriginal systems of governance", they have underestimated how those systems were constitutive of legal spaces and social realities. While the Supreme Court has gone so far as to say that s.35 Aboriginal rights are shaped by the interaction of the Crown and Indigenous

[51] The Restoule decision is an example that departs from this: *Restoule v Canada (Attorney-General),* 2018 ONSC 7701.

peoples, in practice what this means is that activities that the Crown permitted, usually hunting and fishing, will now be given protection as Aboriginal rights.

In a prescriptive sense, a present-oriented legal history can inform the development of the common law by providing comprehensive analysis of the legal-historical context courts engage, helping courts do what they have said they are trying to do: develop the common law to reflect *de facto* practices and Indigenous systems of governance. It also points toward reassessment of foundational concepts that support elements of the doctrine that have proved particularly constraining. The legal pluralism explored here illustrates that a legitimate conception of sovereignty must be subject to ongoing negotiation as parties re-work their legal and constitutional relations. Constitutional practices and notions of authority, sovereignty, and law are revealed through close examinations of how legal spaces are constituted by plural and hybrid legal orders. The substantive content of the Indigenous and intersocietal law that survived the British assertion of sovereignty and was incorporated into the Canadian constitutional order after confederation is not reducible to limited hunting or fishing rights. The version of absolute Crown sovereignty outlined in chapter 1 was never more than a legal rhetoric, one at odds with practices of sovereign association that constituted the shared legal spaces of Mi'kma'ki/ Wulstukwik /Acadie/Nova Scotia. The version of sovereignty that underpins Canada's constitutional order, therefore, shaped, and was shaped by, the plural legal and normative orders of the peoples who were brought into new forms of political association.[52]

The substantive content of s.35 rights, if it is to be shaped in a meaningful way by Indigenous modes of governance and de facto practices of intersocietal law, cannot be limited to a recognition of discrete practices that those forms of law and governance permitted; rather, it must reflect the mutually intelligible shared practices of constitutional association through which political authority was subject to ongoing negotiation. The very structure of Canadian constitutional law needs to be based on a foundation that reflects negotiated and customary forms of intersocietal law: that is, sovereignty itself needs to be conceptualized in terms of this shared constitutional order. Recognizing this can help courts to develop the doctrine to be responsive to Indigenous law and to facilitate the development of negotiated forms of constitutional association.

[52] See e.g. James Tully, *Public Philosophy in a New Key, Vol. I: Democracy and Civic Freedom* (Cambridge: Cambridge University Press, 2008) at 221-288.

They can do so by more equitably distributing bargaining power between the Crown and Indigenous parties to motivate negotiated outcomes. Such outcomes are more difficult to achieve when one party is told from the outset that they can override the will of the other.

b) Practices of Negotiated Constitutionalism

The insights of a present-oriented legal historical approach can help judicial doctrine develop so that it can facilitate negotiated forms of constitutional association and a more robust recognition of Indigenous and intersocietal laws as constitutive of Canadian law. This final section makes some provisional remarks about the types of practices that might emerge from those negotiations considering the insights gleaned from the pluralism of the 17th and 18th centuries in Mi'kma'ki/ Wulstukwik. How, in other words, might practices of decentralized federalism and constitutionalism that reflect not only limited delegated forms of authority, but shared construction of orders of shared and exclusive jurisdiction, the terms of which are subject to ongoing negotiation through agonistic practices, be developed or strengthened in the present? What types of institutions and practices of federal association might emerge where the law facilitates a more balanced negotiation of constitutional norms and association?

Of existing institutions and practices, there are two important categories: those in which Indigenous peoples work through state mediated avenues, and those practices of jurisdiction that are based on inherent jurisdiction and are undertaken to the exclusion of state law.[53] Examples of the first type include negotiated agreements such as modern treaties, self-government agreements, reconciliation agreements, or other forms of negotiated jurisdictional arrangements. Examples of the second type include tribal parks, non-state modes of dispute resolution, traditional forms of governance, language reclamation, and a variety of land-based practices and exercises of jurisdiction and authority. All these practices and institutions ought to be considered as constitutive of the uniquely Canadian form of federalism. There is a small but important literature concerning Indigenous peoples and federalism in Canada.[54] Something this literature has rarely engaged,

[53] I canvassed these practices as practices of federalism in Robert Hamilton, "Indigenous Peoples and Interstitial Federalism in Canada" (2019) 24:1 Rev Const Stud 43.

[54] Jean Leclair, "Socrates, Odysseus, and Federalism" (2013) 18:1 Rev Const Stud 1; Francis Abele and Michael Prince, "Alternative Futures: Aboriginal Peoples and Canadian Federalism" in Herman Bakvis & Grace Skogstad, eds, *Canadian Federalism: Performance, Effectiveness, and Legitimacy* (Don Mills, Ontario: Oxford University Press, 2002) 220; Kiera Ladner & Michael McCrossan, "The Road Not Taken: Aboriginal Rights after the Re-Imagining of the Canadian Constitutional Order," in James Kelly & Christopher Manfredi, eds, *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (Vancouver, British Columbia: UBC Press, 2009) 273;

however, is the need for the basis of the federal association itself to be mutually constituted, or the need for legal spaces differentially constituted by a diverse range of laws and notions of sovereign association that reflect that. By understanding the practices outlined above as processes of shared governance and mutual association, we can see how they can form the basis for generative forms of constitutionalism that can better mediate the disputes between the Crown and Indigenous peoples that continue across the country.

iii) Sipekne'katik Agency and Jurisdiction in the Maritime Fishery

In the fall of 2020, Mi'kmaw fishermen were violently attacked by non-Indigenous fisherman, with gear, vehicles, property, and live lobster destroyed.[55] Mi'kmaw fishermen from the Sipekne'katik First Nation had been fishing under the auspices of the Sipekne'katik moderate livelihood fishery - a small-scale commercial fishery licenced by the Sipekne'katik First Nation - an activity and form of regulation they understand as having been recognized as a treaty right in the *Marshall* decision twenty years earlier.[56] The Crown disputes this interpretation, arguing that the Supreme Court's decision, while recognizing a commercial fishing right under the treaty, permits Crown regulation of the exercise of that right and does not require the Crown to recognize the Sipekne'katik licensing regime or the catch limits and fishing seasons the regime establishes. This is precisely the same dispute that occurred at the Esgenoôpetitj (Burnt Church) First Nation immediately following the first *Marshall* decision. The inability to find a way to implement the treaty rights recognized in *Marshall* led directly to conflict on the water in Esgenoôpeti at the turn of the century, the Supreme Court's rather remarkable clarification of *Marshall* in the second *Marshall* decision, and the violent fall of 2020 two decades later. This type of colonial violence is

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Martin Papillon, "Canadian Federalism and the Emerging Mosaic of Aboriginal Multilevel Governance" in Herman Bakvis & Grace Skogstad, eds, *Canadian Federalism: Performance, Effectiveness, and Legitimacy*, 2nd ed (Don Mills, Ontario: Oxford University Press, 2008) 291. Sari Graben, "The Nisga'a Final Agreement: Negotiating Federalism" (2007) 6:2 Indigenous LJ 63. Richard Stacey, "The Dilemma of Indigenous Self- Government in Canada: Indigenous Rights and Canadian Federalism" (2018) 46:4 Federal L Rev 669. Ian Peach & Merrilee Rasmussen, "Federalism and the First Nations: Making Space for First Nations' Self-Determination in the Federal Inherent Right Policy" (2005) 31:1 Commonwealth L Bull 3; Alan Pratt, "Federalism in the Era of Aboriginal Self-Government" in David Hawkes, ed, *Aboriginal Peoples and Government Responsibility: Exploring Federal and Provincial Roles* (Montreal-Kingston: McGill-Queen's University Press, 1989) at 19; Jean Leclair, "Federal Constitutionalism and Aboriginal Difference" (2006) 31:2 Queen's LJ 521.

[55] See e.g. David Lau, "Mobs are attacking Indigenous fisheries in Nova Scotia, here's what's going on" Oct. 19, 2020, Global News Online. https://globalnews.ca/news/7403001/nova-scotia-lobster-explained/

[56] *R v Marshall (No. 1), supra* note 24.

not new. By the late 18th century, the Mi'kmaq complained that settlers were violently impeding their access to resources.[57] Nor is the attempt to protect Mi'kmaw resource use with reference to the Peace and Friendship treaties a recent development. In *Syliboy* Judge Patterson responded to Grand Chief Gabriel Syliboy's argument that he had a treaty protected hunting right by noting in passing that "Every now and then for a number of years one has heard that our Indians were making these claims."[58] Indeed, there is a record of such claims stretching from the years immediately following the treaty signing to the present day. In addition to claims made in 1749, when Mi'kmaw chiefs argued that Halifax had been founded in violation of treaty promises, for example, Mi'kmaw petitions concerning treaty rights were written in 1794, 1825, 1849, and 1853.[59] Gabriel Sylliboy was born in 1874 and advanced his claim in court in 1928. Claims based on the treaties, then, have been made consistently since at least 1749. These 270 years of claims are important context for the remarks of Sipekne'katik Chief Mike Sack in 2021:

> We're going to continue to fish our own season, a treaty-rights based fishing season, and we'll determine what our season is going to be and how we're going to fish and everything around that. We have a treaty right, and that's what we're going off of. You know, they're trying to loop everything into the Marshall II decision that gives them [the Department of Fisheries and Oceans] a say in what we do, and they completely don't have any say in it.[60]

The nature of the dispute is absolutely clear. The Mi'kmaq of Sipekne'katik assert the right not only to fish and to sell their catch to obtain a moderate livelihood – which all agree was recognized in *Marshall* – they assert that the treaty protects their authority to regulate and manage their own fishery. The treaty protects not only access to a resource, but the authority to determine and regulate the parameters of that access. The Crown rejects this position, on the basis that so long as the Mi'kmaq have access to a moderate livelihood fishery, the Crown can regulate the parameters of that fishery. In this case, providing the Mi'kmaq access to the existing commercial fishery is considered sufficient. The language of *Marshall I & II* is important here, both of which held that:

> Catch limits that could reasonably be expected to produce a moderate livelihood for individual Mi'kmaq families at present-day standards can be established by regulation and enforced without violating the treaty right. In that case, the

[57] L.F.S. Upton, *Micmacs and Colonists: Indian-White Relations in the Maritimes, 1713 – 1867* (Vancouver: UBC Press, 1979) at 53.
[58] *Syliboy*, *supra* note 1 at 307.
[59] Wicken, *The Colonization of Mi'kmaw Memory and History, supra* note 2 at 87.
[60] "Sipekne'katik chief says he won't play by Ottawa's rules for Mi'kmaw fishery" CBC As it Happens March 4, 2021.

> regulations would accommodate the treaty right. Such regulations would not constitute an infringement that would have to be justified under the Badger standard.[61]

One presumes this would form the basis for the legal advice provided to the minister of the Department of Fisheries and Oceans before she announced in the spring of 2021 that future Mi'kmaw fishing will be regulated, and federal fishing seasons enforced.[62]

The argument that has been developed in this work can help focus an analysis of this situation in two ways. First, the matter of legal doctrine. Treaty interpretation has not historically interfaced directly with the doctrine of continuity. While the recognition of Indigenous political agency in treaty cases is important, it remains latent and not explicitly theorized. The principles of treaty interpretation emphasize that treaty terms must be interpreted in a way that best gives effect to the common intention of the parties at the time the treaty was signed.[63] The right to a commercial fishery in *Marshall,* for example, was based on Binnie J.'s conclusion that both the Mi'kmaq and British intended that the treaty protected a right to trade and a correlative right to access the resources that were to be traded. The limitation on the right – that it be limited in extent to trade required to acquire a "moderate livelihood" – was also said to be derived from the common intention of the parties, the modern articulation of the desire to obtain "necessaries" through trade.[64] The conclusion in this case also requires that we believe that it was the common intention of the parties that the Mi'kmaq ability to access resources would be subject to Crown regulation and that their descendants would forever be precluded from drawing more than a moderate livelihood through the trade of natural resources. The "open ended accumulation of wealth", to use the Court's phrase, would be reserved for those non-Indigenous peoples under Crown regulation and not available to Mi'kmaq signatories. These latter conclusions are nowhere made explicit in the decision, but they are the unavoidable given the Court's decision. They are also highly dubious.

The analysis in this work can assist here by providing additional context to the consideration of the common intention of the parties. *Restoule,* discussed above, provides some guidance on how this might work, holding explicitly that Indigenous law should be considered

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[61] *R v Marshall (No. 1), supra* note 24 at para 61, *Marshall #2, supra* note 24 at para 37.
[62] Fisheries officers will enforce the rules if Mi'kmaq fish out of season, says minister CBC As It Happens https://www.cbc.ca/radio/asithappens/as-it-happens-the-tuesday-edition-1.5942485/fisheries-officers-will-enforce-the-rules-if-mi-kmaq-fish-out-of-season-says-minister-1.5942494
[63] *Marshall (No. 1), supra* note 24.
[64] *Ibid.*

when trying to ascertain the common intention of the parties. Thus, while Binne J. did seek to contextualize his analysis in *Marshall* by going beyond the written words of the treaty and considering the historical context in which the treaty was signed, a re-invigorated common intention of the parties analysis ought to explicitly consider the law of the Indigenous signatories in ascertaining their intention. Understanding how that law structured social relations, constituted legal spaces and territories, and how it interacted with other bodies of law can add much needed context to the inquiry of what the parties intended upon entering the treaty.

The second way the analysis here can be of use is to help in the process of envisioning different possibilities by challenging present concepts and ideas that seem natural, inevitable, and universal, showing the present to be a contingent configuration and the past as holding other models to draw from. As outlined in earlier chapters, the physical geographies, the lands and waters, that are within the borders of the present-day Maritime provinces have been structured as legal spaces in a variety of shifting ways. For much of its history the region's territorial configurations have been constituted by a plurality of legal orders, some aspects of which have facilitated pluralism, some of which have undermined it. This illustrates that fixed territorial jurisdiction based on a single authoritative sovereign voice extending evenly throughout well-defined borders is not a natural and inevitable arrangement. It is a picture that has never adequately captured the reality of the legal orders and forms of political association that prevailed in the region. This understanding is relevant to two actors in particular, the Crown and the courts. The Crown must relinquish the notion that the recognition of sub state legal orders is inimical to its own jurisdiction and territorial claims. An understanding of sovereign authority as porous and diffuse, as structuring territory differently in different circumstances, and as applying in partial and varied forms to different subjects and subject matters can assist in that. Sovereignty can be understood as something other than the unilateral right to command and obedience. Sovereignty and legal pluralism can, and do, co-exist. There are significant moves in that direction in varieties of negotiated agreements that have begun to proliferate. Too often, though, the Crown has only done the minimum required of it by the courts. On this front, in addition to the more fine-grained doctrinal issues noted above, with a more nuanced understanding of the generative possibilities that inhere in diverse forms of federal association the courts can send the parties to the negotiating table without the concern that recognizing plural jurisdictions will destabilize the social and constitutional order.

A final note is the importance of international law. On April 30, 2021, the committee on the elimination of racial discrimination sent a letter to Canada asking that it address concerns that the federal government may not have done enough to prevent violence against Mi'kmaw fishermen and requesting "the State party to provide details on the status of the treaties concluded between 1760 and 1761and the implementation of Mi'kmaq fishing rights under such treaties." Additionally, Chief Mike Sack requested UN peacekeepers be present to protect Mi'kmaw fishers in the coming season.[65] In these ways, overlapping plural orders can be mobilized (in this case drawing on international law to support Mi'kmaw law against the imposition of state law), the strategic and instrumental use of law, and the way that Indigenous and international law are pressuring the state order. Applied to the specifics of this dispute, what this suggests is the need to developed areas of shared and exclusive jurisdiction in relation to the commercial fishery. The Crown must relinquish claims to unilateral regulatory authority and be prepared to negotiate not only greater access to the existing commercial fishery for Mi'kmaw fishers, but to share decision-making power. Courts can facilitate this by providing more substantive articulations of the Aboriginal and Treaty rights of the Indigenous peoples of the region, articulations that reflect nuanced understandings of the history of law and authority in the region and reflect the legal pluralism that has always existed there.

[65] Cara McKenna, "Indigenous chief to request UN peacekeepers to prevent lobster fight boiling over" The Guardian, April 29, 2021.

Conclusion

In 1604, a French boat sailed into the Annapolis Basin. It was not the first European arrival in Mi'kma'ki. European explores, fishers, and traders had been present for a century. But 1604 marks an important symbolic point, with the first sustained attempt at French settlement in the region. Of course, the French did not arrive to empty or uninhabited lands – they were greeted on the water as they arrived by Mi'kmaq who sailed European shallops with moose painted on the sails and who spoke a pidgin-Basque trading language. A significant Mi'kmaw village sat near the site where the French would settle.[1] These early settlers arrived in Mi'kma'ki, the home of the Mi'kmaq, and met a people who had been trading and interacting with Europeans for many decades. The French were brought into the existing systems of law and diplomacy, developing close relations with the Mi'kmaq near their settlements, the men who attempted to live through the winter often going to live among Mi'kmaw families.[2]

Over the next two centuries, the legal landscapes would change dramatically as various internal and transnational legal regimes impacted the region. By 1763 the process of re-ordering the region as a British territory began to show tangible results.[3] While British law had first begun to fade into the region with the grant of the entire region to Sir William Alexander in 1621, the process of bringing the imagined entity of Nova Scotia into being as a territorial jurisdiction did not begin in earnest until after 1713. By the signing of the last Peace and Friendship Treaty in 1779, Acadie, Mi'kma'ki, and Wulstukwik had been significantly diminished: the territorial reach of Acadian and Indigenous legal orders had been substantially reduced. Many of the physical spaces in the region were structured predominantly as spaces of British legality. Yet, what this work has tried to show is that, through all of these changes, an absolute sovereign authority and single system of law operating through fixed territorial boundaries was never an adequate way to explain the legal and political practices in the region. The 17th and 18th centuries show how partial and halting legal authority can be, subject to constant resistance, negotiation, and re-interpretation. Where non-dominant legalities are supressed, they operate in cracks and interstices to resist

[1] Faragher, John Mack. *A Great and Noble Scheme: The Tragic Story of the Expulsion of the French Acadians From Their American Homeland* (New York: W.W. Norton, 2005) at 6.
[2] *Ibid.*
[3] Jeffers Lennox, *Homelands and Empires: Indigenous Spaces, Imperial Fictions, and Competition for Territory in Northeastern North America, 1690-1763* (Toronto: University of Toronto Press, 2017) at 253

hegemonic power. The layered and partial forms of authority and jurisdiction, the plural and hybrid forms of law, that shaped the legal geographies of the region and the relations within and between its distinct political communities serve as illustrative examples. The central aims of this work were to describe these many entanglements with a view to considering how legal spaces in the region were constituted by divergent and distinct legalities and to suggest ways this may impact the present.

For much of Canada's history, the state response to Indigenous legal orders and the legal pluralism they embody has best been characterized as denial.[4] The denial of Mi'kmaq agency, legal traditions, and political capacity in the *Syliboy* decision is illustrative: the Mi'kmaq are not peoples; the treaties are not law; the treaties are not *treaties*. Beginning in the latter half of the 20th century, the state halting moved to a process of deferral. Indigenous law and jurisdiction were increasingly recognized, though rarely given meaningful effect. The British Columbia Supreme Court captured this position clearly in the *Costal GasLink* decision, holding that "While Wet'suwet'en customary laws clearly exist on their own independent footing, they are not recognized as being an effectual part of Canadian law."[5] The revitalization and resurgence of Indigenous legal orders and a shift to the language of self-determination, however, have increasingly pushed the state to an era of translation or reciprocal elucidation, moving beyond mere deferral to a process of mutual transformation through the negotiation of new forms of association, recognition, and engagement. The lingering legal spaces of Indigenous law, compromised by colonialism but not eliminated, are becoming more visible and tangible, combining with new languages of engagement to press demands against the state and carve out room for Indigenous self-determination.[6]

This work has explored where Canadian law can adapt to make space for the development of self-determining Indigenous political communities within a renewed jurisgenerative constitutional framework. Two key pillars of this, I have argued, are the revision of judicial

[4] See Tobias Berger, "Denial, Deferral, Translation: Dynamics of Entangling and Disentangling State and Non-State law in Postcolonial Spaces" in Nico Krisch, ed, *Entangled Legalities Beyond the State* (Cambridge: Cambridge University Press, 2021) [*forthcoming*].
[5] *Coastal GasLink Pipeline Ltd. v Huson*, 2019 BCSC 2264 at para 127.
[6] On "lingering law" see Franz von Benda-Beckmann and Keebet von Benda Beckman, "Places that come and go: a Legal Anthropological Perspective on the Temporalities of Space in Plural Legal Orders" in Irus Braverman, Nicholas Blomley, David Delany, and Alexandre Kedar, *The Expanding Spaces of Law: A Timely Legal Geography* (Stanford: Stanford University Press, 2014).

doctrine and the articulation and development of new visions of federal and constitutional association. In both cases, a nuanced conception of how law worked in the pre-confederation era can provide guidance. Understanding the legal pluralism that characterized the era, the diffuse and partial forms of law and authority that prevailed, and the limited extent to which bounded territorial jurisdictions under the control of a single sovereign authority functioned as the dominant form of political association can show how concepts with problematically imperial genealogies rooted in civilizational hierarchies have continued to shape legal discourses and how law has retroactively applied contemporary understandings of those same concepts in a way that obscures the past and minimizes the role and agency of Indigenous peoples in shaping Canada's inherited constitutional principles. This work examined the legal history of Mi'kma'ki/ Wulstukwik/ Acadie/ Nova Scotia in the 17th and 18th centuries as an example of this form of analysis. This region is an ideal site for this form of analysis because of the complex interaction of numerous legal orders and distinct political communities over several centuries and because of the pressing contemporary issues in the region that prevailing legal and political frameworks have failed to resolve.

Our moment demands re-imagined political forms that reflect an equality of peoples. Judicial doctrine can assist in this by shedding colonial presuppositions that continue to constrain the development of genuinely generative doctrine that can guide the Crown and Indigenous peoples to negotiated solutions in mutually acceptable forms of constitutional association. Aboriginal rights doctrine already recognizes a role for Indigenous legal orders in two important ways: through an articulation of Aboriginal rights that conceives of them as shaped through the interaction and reconciliation of diverse Crown and Indigenous legal orders and through the doctrine of continuity, which recognizes that Indigenous legal orders survived the Crown assertion of sovereignty. In both instances, a nuanced understanding of the ways that multiple legal orders shaped the practices of people and peoples in the pre-confederation era can help turn these openings in the doctrine into genuinely open and deliberative spaces of intersocietal engagement.

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