

Article

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How to Read Aboriginal Legal Texts From Upper Canada

MARK D. WALTERS

In the 1996 case of *R. v. Van der Peet*, Chief Justice Antonio Lamer, writing for a majority of the Supreme Court of Canada, held that the basis of aboriginal rights in Canadian constitutional law is the “traditional laws acknowledged by and the traditional customs observed by” aboriginal peoples.¹ To be “traditional,” he said, the laws and customs must have been “handed down” from aboriginal “ancestors” or “passed down” from “pre-existing” aboriginal cultures. What did these customs and cultures have to “pre-exist” in order to be traditional? Lamer’s answer is clear: they must be shown to have “existed prior to the arrival of Europeans in North America.” He conceded that their origins therefore lay in times during which no written records were produced, but he insisted that this fact was not necessarily a problem. Pre-contact aboriginal customs may be identified from European accounts of aboriginal societies produced on or just after contact, and from aboriginal oral histories. “[T]he Aboriginal historical tradition”, he observed a year later in the case of *Delgamuukw v. British Columbia*, “is an oral one, involving legends, stories and accounts handed down through the generations in oral form.” And so, he concluded, if judges take seriously evidence of aboriginal oral traditions and histories, they will be able to adjudicate aboriginal-rights claims in a fair and just way.²

There was a time when judges refused to recognize aboriginal laws. Times have changed. As Lamer’s comments confirm, not only do Canadian judges now acknowledge that aboriginal laws existed in the past, but they say that such laws may have legal relevance today. Still, the current judicial idea of aboriginal law is a very narrow one. Judges think aboriginal laws are ancient, customary, and oral in their origins, nature and methods of transmission; and

1 Research for this article was assisted by a grant and the Jules and Gabrielle Léger Fellowship awarded by the Social Sciences and Humanities Research Council of Canada. I would also like to thank James Carson, Norman Shields, and James Paxton for comments on an earlier draft.

2 *R. v. Van der Peet*, [1996] 2 S.C.R. 507, at paras. 40 and 60-61; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 85 (quoting from *Report of the Royal Commission on Aboriginal Peoples* (1996), volume 1 (*Looking Forward, Looking Back*), 33. In this article I have, for the most part, placed all references relevant to each paragraph in one footnote at the end of the paragraph.

they insist that these *ancient, customary, and oral* laws must have remained largely untainted by European influences if they are to be enforced today. According to the test established by the Court in *Van der Peet* for aboriginal rights under the Constitution, aboriginal customs or traditions must not only pre-date European contact but must be integral to distinctive aboriginal cultures.³

Of course, there is good reason to think that aboriginal laws were customary and oral prior to European contact, and that many First Nations retain at least some of these customary legal traditions today. However, the topic that I wish to examine in this paper is the interpretive challenge associated with aboriginal laws that do not appear to fit this idealized judicial notion of what aboriginal laws are or were. How should we read aboriginal laws created by and for aboriginal communities that were *written* in form, that appeared to be *legislative* rather than customary in nature, and that seemed to address the *post-contact* colonial realities of aboriginal peoples?

In order to address this question, I will examine a particular example of aboriginal written law. In 1830 the chiefs and council of the Mississaugas of the Credit River near Toronto enacted a written legal instrument that contained constitutional, criminal, and property laws for their village. This instrument is not the only example of aboriginal written law from Upper Canada, but it is the most comprehensive and it offers a stark contrast to the idealized conception of “aboriginal law” found in recent judicial decisions. In this analysis, I will not offer any definitive answers about how to read this or other examples of aboriginal written law. Instead, I will suggest that aboriginal written laws may be read in a number of competing ways that depend upon the reader’s perspectives and objectives. I will argue that if such pre-interpretive factors are acknowledged openly, competing interpretations of aboriginal legal texts produced after European contact may offer complementary and important insights into a variety of historical, anthropological, political, and legal questions relating to aboriginal peoples in Canada.

This paper begins with a brief look at the Credit River Mississauga people and their laws, and then moves on to explore four different ways of reading the written legal instrument they enacted in 1830, which have been labeled “legal-historical,” “indigenist,” “ethnohistorical,” and “legal-constitutional.”

3 See *Van der Peet*, [1996] 2 S.C.R. 507. Colonial judges occasionally recognized aboriginal customary law, e.g., *Connolly v. Woolrich and Johnson* (1867), 17 R.J.R.Q. 75 (Que.S.C.) (Cree marriage customs), but many judges did not, e.g., *Do dem Sheldon v. Ramsay* (1852), 9 U.C.Q.B. 105, at 123 (Upper Canada Chief Justice Sir John Beverley Robinson stated that the “common law is not part savage and part civilized”); *Wi Parata v. Bishop of Wellington* (1877), 3 N.Z. Jur. (N.S.) 72 (S.C.), at 77-78 (Maori were “primitive barbarians” with no laws or customs susceptible to judicial enforcement); *MacDonald v. Levy* (1833), 1 Legge 39 (Vic. S.C.), at 45 (the “wandering tribes” of Australia were “without laws”); *Cooper v. Stuart* (1889), 14 App. Cas. 286 (P.C.), at 291 (Australia was “without settled inhabitants or settled law”).

The Mississaugas and their traditional laws

There are a number of Mississauga communities in Ontario today that have Indian band status, reserves, and limited powers of self-government under Canada's *Indian Act*. As "aboriginal peoples" these communities also enjoy constitutionally-protected "aboriginal and treaty rights," which, as mentioned above, the courts have interpreted as including traditional aboriginal laws and customs that pre-date European contact and are integral to distinctive aboriginal cultures. The Credit River Mississaugas now occupy the New Credit Indian reserve near Hagersville, Ontario. Like other Mississaugas in Ontario, they form a branch of the Ojibway people whose territories were, at the time of European contact, in the upper Great Lakes region. The Ojibways refer to themselves as *Anishinaabeg* – the "first or true people." At the time of contact the Anishinaabeg consisted of autonomous village bands each of which represented a patrilineal and exogamous clan with an animal name or "totem". The name "Ojibway" or "*Outchipoué*" was likely the Crane clan totem whose members lived at the falls between Lakes Superior and Huron, or the "Sault." The Jesuit missionaries who first arrived at the Sault in 1642 called these peoples the *Saulteaux* and referred to neighbouring Anishinaabe villagers by their totemic names, such as Noquet (Bear), Maramég (Catfish), Amikouai (Beaver), Ouasouarini (Fish), and Mississauga, which may have meant Eagle. Over time, the name Ojibway was extended to embrace all of these groups. It is still unclear, however, whether "Mississauga" referred to a single totemic group, the Eagle clan, or whether it referred to a group of several Anishinaabe clans that congregated at particular fisheries.⁴

In the late seventeenth century, Anishinaabe groups moved south and east, taking possession of what is now southern Ontario. The groups occupying the north shores of Lakes Ontario and Erie were referred to as Mississaugas, while the groups occupying lands nearer to Lake Huron were referred to as Ojibways or Chippewas. The Mississaugas of the Toronto area were among the many nations of the Great Lakes region to enter "Covenant Chain" treaties with the

4 Reserves and reserve band government are governed by the *Indian Act*, R.S.C. 1985, c. I-6. "[E]xisting aboriginal and treaty rights" are constitutionally entrenched by section 35(1) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), c. 11. For pre-contact social organization of the Anishinaabeg, see Harold Hickerson, *The Chippewa and Their Neighbours: A Study in Ethnohistory* (Toronto: Holt, Rinehart & Winston, Inc., 1970), 38-50; Charles A. Bishop, "The Question of Ojibwa Clans" in *Actes du vingtième congrès des Algonquistes*, ed. William Cowan (Ottawa: Carleton University, 1989), 43-61; Theresa M. Schenck, "Identifying the Ojibwa" in *Actes du vingt-cinquième congrès des Algonquistes*, ed. William Cowan (Ottawa: Carleton University, 1994), 395-405; Daniel G. Cude, "Identifying the Ojibway of Northern Lake Superior and the Boundary Water Region 1650-1750" in *Actes du trente-deuxième congrès des Algonquistes*, ed. John D. Nichols (Winnipeg: University of Manitoba, 2001), 74-99.

Crown in the early 1760s after the British conquest of New France. In the late eighteenth and early nineteenth centuries, the Mississaugas entered into a series of land surrender treaties that opened their territories to settlers. By an 1806 treaty the Mississaugas ceded the lands between Toronto and Burlington Bay on Lake Ontario to the Crown, reserving for their own use a number of fisheries as well as lands at the Credit River. In 1826, under the guidance of Kahkewa-quonaby, or Peter Jones, the Mississaugas established a permanent village at the Credit River. The village thrived for about twenty years, but pressures from the adjacent city of Toronto led to the decision in 1847 to move the community to its present location.⁵

Before considering the written laws adopted for the Credit River village, it is necessary to refer to Anishinaabe “legal” traditions of the sort now favoured by Canadian judges – i.e., ancient, pre-contact, customary laws. This is not an easy task. Even if there were space to engage in a full discussion of Anishinaabe traditional laws and customs, there are complex evidentiary, methodological, and cultural hurdles that would need to be cleared before the account could be said to be complete or accurate. These are, of course, the same hurdles that confront judges and lawyers today in identifying the traditional aboriginal laws and customs that are said to underlie aboriginal rights in Canadian constitutional law. Accounts by French observers of Anishinaabe society on or just after first contact in the mid-seventeenth century are (unlike French accounts of Huron society from the same time) vague about the social structure and systems of governance found among the Anishinaabeg. And almost immediately these communities began to confront the effects of contact: smallpox epidemics, the European fur trade, and increased warfare between aboriginal groups in the Great Lakes region led to significant social upheaval, displacement and re-configuration. By the time Anishinaabe writers like William Warren, George Copway and Peter Jones began recording the traditions and customs of their peoples in the mid-nineteenth century, the Anishinaabeg had already endured two centuries of cultural and political dislocation and accommodation, and questions may be raised about the extent to which the oral traditions that these writers discussed were informed by post-contact experiences. In the twentieth century, anthropologists, ethnohistorians, and Anishinaabe elders have offered

5 For an overview of Mississauga migration, see Donald B. Smith, *Sacred Feathers: The Reverend Peter Jones (Kahkewaquonaby) and the Mississauga Indians* (Toronto: University of Toronto Press, 1987), 17-33. For the covenant-chain treaties, see records of treaties at Detroit, 1761 and Niagara, 1764, in *The Papers of Sir William Johnson*, ed. J. Sullivan (Albany: State University of New York, 1921-65), vol. 3, 471-78, 491, and vol. 11, 278-307. For the 1806 treaty, see Canada, *Indian Treaties and Surrenders* (Ottawa: Queen’s Printer, 1891), vol. 1, 23, 34-37. On the Credit River reserve, see Mark D. Walters, “‘According to the Old Customs of Our Nation’: Aboriginal Self-Government on the Credit River Mississauga Reserve, 1826-1847,” *Ottawa Law Review* 30/1 (1998-99): 1, at 17-21, 43-44.

very different accounts of Anishinaabe traditions and customs, dividing, for example, on such fundamental points as whether or not the Anishinaabeg had a clan system prior to European contact.⁶

What follows, nevertheless, will attempt to describe six principal features of Anishinaabe traditional law and governance – each of which, of course, is the subject of competing schools of thought. The first feature worth emphasizing is that Anishinaabe social structure and customary norms were closely related to Anishinaabe conceptions of the natural and spiritual worlds and Anishinaabe methods of resource use. The Anishinaabeg followed a seasonal pattern of settlement. Local bands of one-hundred to five-hundred people congregated in villages near productive fisheries during spring, summer, and early autumn. During late autumn and winter they broke into family hunting groups and travelled inland to family hunting grounds. They regarded the earth, trees, rocks, waters, sky, and animals to have souls, and, in some cases, to be infused by spirits or *manitous*. Many of their customary norms regulated the manner in which they communicated with these spirits by fasting and dreaming, and how proper respect was to be shown for them through ceremonies, singing, drumming, dancing and present giving. Great efforts were made to maintain the spiritual strength and balance of family lineages and local communities, and those individuals having special access to the dream-spirit world were especially valued as leaders and healers.⁷

Second, Anishnaabe systems of governance were non-hierarchical and Anishnaabe laws were non-coercive. In general, Anishinaabe political identities

6 For effects of contact on Algonquian nations of upper Great Lakes, see Richard White, *The Middle Ground: Indians, Empires, and Republics in the Great Lakes Region, 1650-1815* (Cambridge: Cambridge University Press, 1991). For Anishinaabe nineteenth-century writers, see George Copway (Kah-Ge-Ga-Gah-Bowh), *The Traditional History and Characteristic Sketches of the Ojibway Nation* (London: Charles Gilpin, 1850); Warren Warren, *History of the Ojibways based upon Traditions and Oral Statements* (Minneapolis: Ross & Haines, Inc., 1957) [written in the 1850s]; Peter Jones (Kah-ke-wa-quo-na-by), *History of the Ojebway Indians; with Especial References to their Conversion to Christianity* (London: A.W. Bennett, 1861). For a review of varying approaches of anthropologists and ethnohistorians see Bishop, "The Question of Ojibwa Clans," 43-61; for the perspective of an Anishinaabe elder, see Edward Benton-Banai, *The Mishomis Book: The Voice of the Ojibway* (St. Paul, MN: Red School House, 1988), 74-82.

7 Diamond Jenness, *The Ojibwa Indians of Parry Island, Their Social and Religious Life* (Ottawa: National Museum of Canada; Anthropological Series, no. 17, bulletin no. 78, 1935), 13-14, 18-59; Frank G. Speck, "The Family Hunting Band as the Basis of Algonkian Social Organization," *American Anthropologist* N.S. 17/2 (April-June 1915): 289-305; Bruce Trigger and Gordon Day, "Southern Algonquian Middlemen: Algonquin, Nipissing, and Ottawa, 1550-1780" in *Aboriginal Ontario: Historical Perspectives on the First Nations*, eds. Edward S. Rogers and Donald B. Smith (Toronto: Dundurn Press, 1994), 64-77; Michael Angel, *Preserving the Sacred: Historical Perspectives on the Ojibwa Midewiwin* (Winnipeg: University of Manitoba Press, 2002), 3-7, 13, 20-30; Basil Johnston, *The Manitous: The Spiritual World of the Ojibway* (New York: HarperCollins, 1996).

were inseparable from the complex set of overlapping, and sometimes competing, social and spiritual identities that defined their communities. The Anishinaabe nation was not a nation-state. Allegiances were multiple, layered, and shifting; political authority was diffused and fragmented. Individual liberty was unconstrained by coercive laws or institutions, and co-ordinated political action was contingent upon coalitions and alliances negotiated between family lineages, clans, villages, and nations. In forming these coalitions, groups were motivated as much by spiritual as economic or security concerns. The spiritual strength of a group depended upon the giving of gifts of tobacco, seashell beads, and other sacred objects, both to spirits and to other peoples. Between groups, present-giving secured influence and gave rise to obligations of reciprocity that were deemed essential for co-ordinating action and for the spiritual health of communities. One of the institutions through which the relatively autonomous Anishinaabe villages expressed a common political identity was the Feast of the Dead: by reciprocally lamenting each other's dead through gift-giving, Anishinaabe villages, and indeed bands from neighbouring nations like the Nipissings and Ottawas, maintained peace and loose alliances or confederacies.⁸

Third, local Anishinaabe villages or bands were likely patrilineal and exogamous kindred groups, or clans, each represented by an animal *dodem* or totem. The clan system regulated family life: clan members were, in spiritual and legal terms at least, siblings and so inter-clan marriage was prohibited. Children belonged to their father's clan and they retained their clan identities upon marriage. As a result, even if villages were single patrilineal clans, each village-clan would have contained spouses from other village-clans. Some Anishinaabe communities – including, perhaps, the Mississaugas – may have contained more than one patrilineage prior to contact; however, the effects of disease, war and the fur trade after contact seem to have led to a general mixing of clans and the rise of multi-clan communities. Some scholars insist that it was only once local Anishnaabe groups began settling together after contact that the clan system arose.⁹

Fourth, the Anishinaabeg acknowledged chiefs, or *ogimaag*, who met in council with elders to decide upon political, social and spiritual affairs within and between villages. Some anthropologists studying northern Anishinaabe communities argue that a formal office of chief was not part of their traditional customs, and that their leaders were selected on an ad hoc basis to carry out specific tasks.

8 Ruth Landes, *Ojibwa Sociology* (New York: Columbia University Press, 1937), 2-3; Jones, *History of the Ojebways*, 108-109; Copway, *Traditional History*, 144; Harold Hickerson, "The Feast of the Dead among the seventeenth-century Algonkians of the Upper Great Lakes," *American Anthropologist* 62/1 (February 1960): 81-107.

9 See Hickerson, *The Chippewa and Their Neighbours*; Bishop, "The Question of Ojibwa Clans;" Schenck, "Identifying the Ojibwa;" and Cude, "Identifying the Ojibway of Northern Lake Superior."

Nineteenth-century Anishinaabe writers like Warren and Jones present a very different picture. Anishinaabe peoples had, they said, civil and war chiefs, and the civil chiefs held formal offices that were hereditary within particular family lineages with succession by the son or another male relative of a deceased chief subject to confirmation by family and clan elders. Both authors suggested, in ambiguous ways, a connection between chiefs and clans. Wrote Warren, clan divisions were the “principal ingredient” in the traditional Ojibway “system of governmental polity,” each clan having its own chiefs. In his chapter on “Councils,” Jones stated that the people of each Anishinaabe “tribe” had their own territorial district and were “governed by their own chiefs” and that their government was “patriarchal,” the chiefs being “heads or fathers of their respective tribes” with authority extending only to their tribe’s members. The chiefs from each tribe then met in a national Anishinaabe general council. Buried in a subsequent chapter on “Amusements, etc.,” Jones explained that by “tribes” he meant totemic “clans.” He also observed that although the Mississaugas initially constituted the Eagle clan, the various Mississauga bands along the north shore of Lake Ontario, including his own Credit River band, had by then come to include “remnants” of almost all Anishinaabe clans. An important question, then, is this: once multi-clan villages came into existence did the principle that chiefs were “fathers” of clan units whose authority extended only to that unit continue to govern? Neither Warren nor Jones offered a direct answer to this question. However, European observations about Great Lakes nations generally suggest that the clan system of government did remain in place among multi-clan villages during the eighteenth century, and that (therefore) the councils of multi-clan villages consisted of the chiefs and elders of each of the village’s clan segments.¹⁰

This picture of village governance resembles the highly formal system of clan government that Anishinaabe elder Edward Benton-Banai has recently described. According to Benton-Banai’s account of Anishinaabe oral history,

10 See Warren, *History of the Ojibways*, 135; and Jones, *History of the Ojibway Indians*, 107-108, 104, 138-139. For European observations on multi-clan villages, see P.F. de Charlevoix *Journal of a Voyage to North-America, Together with an Account of the Customs, Characters, Religion, Manners and Traditions of the Original Inhabitants* (London: R & J Dodsley, 1761), vol. II, 21-22 (“Several nations have each of them three principle families or tribes [i.e., clans] ... These tribes are mixed, without being confounded, each of them having a distinct chief in every village: and in such affairs as concern the whole nation, these chiefs assemble to deliberate upon it. Every tribe bears the name of some animal”) and Sir W. Johnson to the Lords of Trade, 8 October 1764, in *Documents Relative to the Colonial History of the State of New York*, ed. E.B. O’Callaghan (Albany, N.Y.: Weed, Parsons, & Co., 1856-1861), vol. 7, 657 (“The Northern Indians have, some three Tribes, such as the Bear, Wolf and Turtle, some of the Nations have six or seven; to each of which are several Sachems, who tho’ they may reside in one Village, are pretty equal, and interfere only with those of their own Tribe; and tho’ sometimes one may preside over those of every Tribe in each Nation, yet ... this depends upon his merit, and the number of Warriors under his influence, which are seldom more, than his own relations”).

the Anishinaabe had a national council prior to European contact that was composed of the chiefs from each of seven clans. The Loon, Bear, and Bird chiefs sat on one side of the council fire, and the Crane, Marten, and Deer chiefs sat on the other side; the Fish chiefs sat in between to mediate discussions. The Loon and Crane chiefs were leaders of their respective sides, and the Bear chiefs were responsible for order and security. Decisions required the consent of all chiefs. According to Benton-Banai, this national model would have been, at least in theory, replicated at the village level amongst the clan segments living at particular localities.¹¹

The fifth feature of Anishinaabe legal tradition to note is that the content of general norms that guided day-to-day behaviour between individuals, their communities and the spirit-world were articulated, explored, extended, restricted, and expounded through the development of their oral traditions — in large part stories told by elders. Many of these norms were illustrated through stories about Nanabozho, or Nanabush, also known as the Trickster, a complex character whose human and superhuman features provided a vehicle for subtle commentaries upon the human condition. The Trickster could be either noble exemplar or humorous buffoon. In the stories about his interactions with animal-spirits, he struggled with this duality that defined his character, and from these stories emerged basic moral and spiritual teachings that guided the Anishinaabeg in their relations with one another and their environment. These oral traditions were, as John Borrows suggests, somewhat like the Anglo-Canadian common law: from on-going narratives about specific factual problems emerged norms of a general nature that suited the needs and aspirations of the community. While there may not have been what legal theorist H.L.A. Hart called “secondary rules” that clearly separated these norms into “legal” rules on the one hand and “moral,” “religious,” and “social” rules on the other, the basic customary norms important to social unity and coordination within their communities could be identified.¹²

Violations of some norms constituted what we would now call criminal offences. However, murder, assault, and theft appear to have been dealt with in the same manner as other political or social problems requiring collective action: the chiefs and elders from the affected families or clans met in council to resolve the dispute, usually through gift giving. In absence of reconciliation between families and clans, the victim’s relations could punish the offender directly.¹³

11 Benton-Banai, *Mishomis Book*. Benton-Banai explained the application of the clan model of governance within the context of multi-clan villages during an oral presentation that I attended at the Chippewas of Sarnia reserve, 24 April 1996.

12 Angel, *Preserving the Sacred*, 23-25; John Borrows, “With or Without You: First Nations Law (in Canada),” *McGill Law Journal* 41/3 (June 1996): 629; H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), 77-117.

13 Jenness, *Ojibwa Indians of Parry Island*, 3-4; Jones, *History of the Ojebway Indians*, 109.

The sixth and final principle of Anishinaabe legal tradition to be noted relates to property and territory. Each village-clan held its own well-defined territory, and other village-clans required permission to cross or use that territory or its fisheries. Within village-clans, subdivisions of land were likely temporary: the village-clan chiefs and elders would meet in council in the fall to decide upon which regions each family hunting group would use during the winter hunt. Although it has been suggested that a family's right to a particular hunting ground was permanent, it was more likely the case that rights of use were fluid and varied from year to year. Of course, all Anishinaabe uses of the land and resources were subject to observance of customary norms regarding respect for the manitous whose spirits animated the world around them.¹⁴

Mississauga written laws

By the 1820s, the Toronto-area Mississaugas were in desperate shape: the economic and spiritual basis of their hunting culture had been severely undermined by surrounding settlements and the community was reported to have been reduced by disease, malnutrition and alcoholism to a “degraded,” “wandering” state of “destitution.” However, their prospects changed dramatically in the mid-1820s, largely through the efforts of Peter Jones. Jones was the son of a Mississauga woman and a provincial official. He was raised primarily within the Mississauga community, but during his teenage years he went to live with his father near the Grand River Six Nations. During these years Jones seemed to have been influenced by Christian Mohawk leaders who insisted that Indian communities needed to adopt aspects of settler culture – including religion and agricultural practices – in order to survive. Jones eventually converted to Methodism, became a preacher, and dedicated himself to transforming his own Mississauga band into an agrarian, Christian community. He gathered members of the band onto the Credit River reserve in 1826, and with government and missionary assistance a “handsome village” was constructed and lands were cleared for planting. Jones’ efforts coincided with a significant shift in British Indian policy in the 1820s from treating Indians as military allies to “reclaiming them from a state of barbarism” and encouraging them to “shake off the rude habits of savage life, and to embrace Christianity and civilization.” Almost immediately the Credit River village became a model for Indian reserves under this new policy. For his part, Jones appeared to embrace the “civilization” project wholeheartedly, lobbying against opponents like Lieutenant Governor Sir Francis Bond Head who thought Indians were incapable of civilization. Still, serious

14 Charles A. Bishop, “Northern Ojibwa Emergence: The Migration” in *Papers of the Thirty-Third Algonquian Conference*, ed. H.C. Wolfart (Winnipeg: University of Manitoba, 2002), 13-109, esp. at 37, 95; Hickerson, “Feast of the Dead,” 85; Speck, “The Family Hunting Band.”

questions remain about Jones' motives. Did he equate "civilization" with full cultural and political assimilation? Or, did he regard "civilization" as a vehicle for rebuilding distinctive aboriginal identities and polities, a tool for helping aboriginal nations to cope, as nations, with the hard realities of colonialism and imperialism? These sorts of questions raise issues of interpretation not unlike those that arise from reading the written laws adopted by the Mississauga people for their Credit River village.¹⁵

As the new community was being established, Jones consulted with other Methodist missionaries about "how to regulate" affairs within the village. Perhaps their advice helped shape the code of written laws that he later drafted. Jones became a Mississauga chief in early 1829, and in April of 1830 the code that he drafted, entitled "By Laws and Regulations for the Indian Village at the Credit," was enacted into law by the Mississauga chiefs and council. The code set out a constitutional structure for reserve government, substantive rules for the apprehension, trial and punishment of criminal offenders, and rules on land and natural resources. The code referred to ancient Mississauga customs, but it also appeared to depart from traditional customary laws in significant ways.¹⁶

Under the title "Government," the first article of the Credit River code provided:

According to our ancient customs, the Indians of this village, shall be governed by Chiefs, at present three, one of whom shall be called the Head Chief or Keche-Ookemah, who shall have the supreme authority. It shall be his duty

15 On the degraded state of the band, see Rev. James Magrath, "Report of the State of the Indians on the River Credit, Township of Toronto, Upper Canada," March 1828, in House of Commons, *Imperial Blue Books on Affairs Relating to Canada. Reports, Returns, and other Papers, Presented to the Imperial House of Parliament of Great Britain and Ireland Relating to Canada*, 1834, vol. 5, no. 617 at 42, and Copway, *Traditional History*, 185. On Jones, see Smith, *Sacred Feathers*, 1-9, 43-51. On the building of the village, see Peter Jones, *Life and Journals of Kaw-Ke-Wa-Quo-Na-By: (Rev. Peter Jones,) Wesleyan Missionary* (Toronto: Anson Green, 1860), 190. On the development of the civilization policy, see Sir G. Murray, Secretary of State for the Colonies, to Sir J. Kempt, Adm. Can., 25 January 1830, in *Imperial Blue Book*, 1834, at 88, and Maj. Gen. H.C. Darling to Lord Dalhousie, Gov. Can., "Report upon the exact state of the Indian Department," 24 July 1828, in *Imperial Blue Book*, 1834, at 27. An example of Jones' support for the civilization project is at "Report on the Affairs of the Indians in Canada", 22 January 1844, Sec III, Pt. I (excerpt of a letter in which he advocates residential schools to end the "old habits" and the "half-civilized state" of Indians). Sections I and II of this report are printed in *Journals of the Legislative Assembly of Canada* (1845), Appendix EEE; Section III printed in *Journals of the Legislative Assembly of Canada* (1847), Appendix T.

16 On consultations with missionaries, see Jones, *Life and Journals*, 66. On Jones' election as chief, see *Ibid.*, 193. The "By Laws and Regulations for the Indian Village at the Credit", 23 April 1830, are found in the National Archives of Canada [hereafter NA] RG 10 Vol. 46, 23976-23983 [Also printed in Elizabeth Graham, *Medicine Man to Missionary: Missionaries as Agents of Change among the Indians of Southern Ontario, 1784-1867* (Toronto: Peter Martin, 1975), App. III, 107-110.] On authorship of the laws, see Graham, *Medicine Man*, 63.

to preside in Councils —to see that the Laws are duly executed and observed — and to call councils when he deems it necessary, or when he is requested to do so by three or more resident householders. He is in all cases to govern according to law, and in no case to enforce any Regulation till it regularly becomes a law by receiving the sanction of the Council.

Rules governing the selection of chiefs were found in Article 3: “According to the old customs of our nation the Chiefs shall be chosen by a majority of our people, and shall retain their office during life.” Public notice was to be given at least one month before “the council” met for the purpose of selecting a chief. The chiefs were to be assisted by “a Mezhenahway or secretary” who was to keep the “publick accounts” and to “transcribe and keep the laws and regulations made by the councils.”

If, as has been suggested above, ancient Mississauga customary law was based upon a clan system of governance, then chieftainships would have been hereditary within family lineages and each clan segment within the village should have selected their own chiefs from these families. However, the code makes no mention of clans, and the selection of chiefs appears instead to be based upon a general democratic election. What, then, should we make of the code’s reference to “old” and “ancient” customs? Perhaps these were references to the state of customs in 1830 and the pre-contact clan system had, by then, already disappeared. Or, perhaps the written law codified rules that really did represent ancient, pre-contact customs but the clan system of governance never existed in the first place. Or, perhaps the 1830 code had legal effect in conjunction with unwritten rules regarding the clan system that remained in force implicitly, so that, for example, the only candidates for chief that would have stood for election pursuant to the written laws were the hereditary clan chiefs that had already been selected by customary law. The relationship between traditional and written law is hardly straightforward.

Articles 6 to 9 under the Government title identified certain judicial functions of chiefs. Article 6 provided: “The Chiefs shall act as judges in all trials for debt, theft, drunkenness etc. or other offences against the laws and customs of our nation.” When the chiefs acted in this “judicial capacity” the head chief was to “preside” but “the sentence” was to be determined by “a majority of voices.” In such a “trial” either of the “parties” could request the chiefs to “cause a jury of six men to be called;” otherwise the chiefs were empowered to “decide the cause alone.” There were to be two sheriff-like officers, “one Keche tah koonewa weneneh, and one tahkoonewaweneneence,” whose duty it was “to keep the peace, and to execute the writs, executions and summonses issued by the chief.” The chiefs were to “hold a council or court ... for the trial of offences committed against the laws and regulations of this village” four times a year, on the first Wednesday in March, June, September, and December.

Under the second title, “Laws Relating to Various Offences,” the code dealt with criminal matters and included the following provisions: any “Indian inhabitant convicted of stealing” was to “restore fourfold” unless the chiefs thought a lesser amount was sufficient; repeat offenders were to be “punished at the discretion of the Chiefs and Council;” “[a]ny one assaulting or beating another” was to be fined at the chiefs’ discretion; and persons guilty of “bearing false witness, injuring a neighbour’s property by fire, by throwing down his fences, killing or wounding his cattle or offences of the like kind” were to be punished by fine or by banishment as determined by “the chiefs and council.” The Mississauga council later enacted further legislation on criminal law matters. In particular, a measure was enacted in response to “bad conduct” by “young people and children” empowering the chiefs and several named individuals “to punish them whenever they deserve it by whipping”. Another legislative measure created the office of village “Guardian” who was “authorized to take into custody and bring before the chiefs and council” anyone “strouling about the Village in an unlawful or suspicious manner after dark.”¹⁷

The Credit River written laws on criminal matters therefore appear, at first glance, considerably different from traditional methods of dispute resolution. There are, of course, no references to stories about the Trickster. But perhaps more importantly, the written rules seem to be wholly inconsistent with the assumption that violations of basic norms regulating social conduct were matters for families and clans to be resolved through reciprocal gift-giving. Consensual problem solving among extended families seemed to have been replaced by the holding of trials and the exercise by chiefs of coercive judicial powers. These reforms suggest that the Mississaugas had adopted a fundamentally different conception of “law” than the one that informed their traditional laws and customs.

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

17 The later two enactments are found at Minutes of Credit River Mississauga Councils (1834-47), Vol. II, NA, RG10, vol. 1011, 34 (6 June 1836) and 107-108 (18 August 1840).

This brief allusion to “old customs” notwithstanding, the written provisions that establish the legislature appear to deviate from the customary clan system of governance in significant ways. Under the Credit River code, law-making was apparently based upon majoritarian principles of democracy that were quite unlike the principle of consensus that underpinned the clan-system of governance, according to which each clan segment or extended family had to consent to measures before they became law.

Under the fourth title, “Occasional Councils,” a body having executive functions was created. Such “occasional councils” were to consist of “at least one chief and ten or more house holders.” They had “no power to make or repeal laws” but were empowered to “regulate all such things relating to the general improvement and welfare, as are not otherwise expressly provided for by law.” Occasional councils also had a judicial role: they could “in certain cases in conjunction with the chiefs fix the degree of punishment to be inflicted on offenders.” Again, no reference to clans was made, nor was there a requirement that all affected extended families, or clan segments, be represented on the occasional council.

In a separate set of provisions under the “Occasional Councils” title, the code contained detailed provisions concerning land and resource use the implementation of which were “subject to the control of the occasional councils.” Article 1 of this part stated: “All our lands, timber, and fishery shall be held as publick property, and no person shall be allowed to sell, lease or give any part of the lands, timber or fishery, unless granted by the council for the general benefit of our people.” The subsequent articles provided additional detail: “our people” were free to fish and cut timber for personal use “upon any part of the Reserve;” no one was to possess land without the chiefs’ “permission;” lands “allotted” to families were to be “possessed by them and their descendents forever;” unless they failed to make improvements on them within three years; and possessors of land could, “with the advice of the chiefs,” exchange their lots and sell their improvements to one another. Finally, under the last title, “Regulations Concerning the Fishery,” fishing was prohibited in the River Credit on Saturday or Sunday nights “during the fall run of salmon,” and no one was to give permission to any “unauthorized person” to fish “unless it be thought expedient at a future council.”

The various written rules regarding lands and natural resources do at least resonate with the customary norms regarding territory discussed above: there is an assumption that land and resources were communally held and allocated by chiefs and council to families for particular purposes. The written laws also can be seen to refine that general approach in response to new conditions and needs encountered upon settlement within the reserve; in this respect, one can see a move toward individualized property rights. However, missing from these provisions on lands and resources, and indeed from the entire code, is any

reference to the spiritual values – the need to respect the manitous of the spirit world – that permeated all aspects Anishinaabe traditional laws and customs (instead there is a reference to the “Sabbath”). The written laws seem to suggest that the Mississaugas had undergone, or least were in the process of undergoing, a period of profound cultural change.

Subsequent records of the Credit River chiefs and councils between 1830 and 1847 show that the Mississaugas exercised significant powers of self-government pursuant to the 1830 code. In 1842, Jones testified before the Bagot Commission inquiry into Indian affairs in Canada that provincial magistrates “will not act in Indian cases” and that instead “[t]he Indians have established a code of several Rules & Regulations among themselves,” a copy of which the Indian Department held. The Mississauga legal and governmental system existed as a functioning legal order and its existence was no secret to provincial officials whose capital was located in the adjacent city of Toronto. It is important to emphasize that neither the local colonial legislature nor the imperial Parliament in London attempted to place Indian reserve law and government upon any legislative foundation. It was not until 1869 that the Canadian Parliament enacted legislation that recognized reserve band governments and delegated to them certain by-law making powers.¹⁸

Four ways to read aboriginal written laws

There are many theories about how law should be interpreted. Lawyers refer to various competing canons of legislative construction, ranging from literal to purposive interpretative approaches. Legal theorists present competing arguments about what these approaches to legal interpretation involve – whether, for example, judges find or create legal meanings when they read legal texts, whether interpretation can ever be objective, unbiased, or apolitical; whether legal interpretation merely reinforces relations of power between privileged and marginalized communities; whether the meaning of legal texts can change over time; and so on. As a social institution, law is integrally related to other social phenomena, but it also aspires to at least some degree of conceptual autonomy or separateness from the forces of politics and morality and personal interest that can affect the process of adjudication and the administration of justice – at least “law” in the Western-European tradition does. Reading old legal

18 See in general Walters, “According to the Old Customs of Our Nation.” For Jones’ testimony see: Testimony of Chief Peter Jones, Minutes of the Proceedings of the Commissioners (Rawson, Davidson, and Hepburn), 13 October 1842, NA, RG10, vol. 720, 768046-51. A copy of the By-Laws and Regulations is found in the Indian Department Deputy Superintendent General’s office correspondence file for 1830: NA, RG10, vol. 46, 23976-83. For the first general legislative recognition of Indian reserve band government, see *An Act for the gradual enfranchisement of Indians* (1869), 32 & 33 Vict., c. 6 (Can.), s. 12.

texts produced by and for aboriginal communities during a colonial regime presents the reader with all of these run-of-the-mill interpretive questions, but it also presents many others – or perhaps it presents certain ever-present problems of legal interpretation in particularly extreme forms. The four ways of reading aboriginal written laws presented here are not meant to be exhaustive. However, by beginning to consider interpretive distinctions of this sort, I think we can begin to understand more fully the role of law within aboriginal communities, and between aboriginal and non-aboriginal communities, both historically and today.

Legal-historical readings

The first way of reading the Credit River laws is a “legal-historical” reading that considers what these laws mean for our understanding of Canadian constitutional and legal history at a general level. The standard non-native construction of Canadian constitutional and legal history has, until very recently, ignored the reality that aboriginal communities within the midst of the colonies that became the Dominion of Canada exercised powers of self-government and had laws of their own, and that these laws changed over time in response to changing social conditions. The standard view was informed by theories of legal positivism according to which the past and present reality of “law” was found by looking to positive statements made by legislatures and courts about the state of the “law.” The standard view was also Euro-centric in that the only positive legal statements that mattered were those of British and French colonizers. From this positivist-colonialist perspective, the relevant constitutional statements for Upper Canada were those of the imperial Parliament vesting a local legislature with power “to make laws for the peace, welfare, and good government” of the province, the statements of the local legislature introducing the “laws of England” and establishing superior courts with jurisdiction “throughout this province,” and the statements of colonial courts to the effect that the local legislature “represents all the people in this province” and that Indians could not be recognized “as separate and independent nation[s], governed by laws of their own” while “situated within the limits of this province.”¹⁹

However, the positivist-colonialist interpretation of Canadian constitutional history is upset by consideration of the Credit River laws and other

19 For the old-school constitutional history see for example W.R. Riddell, *The Bar and The Courts of the Province of Upper Canada, or Ontario* (Toronto: Osgoode Hall, 1928). For legislative statements: *Constitutional Act*, 1791, 31 Geo. III, c. 31, s. 2; *An act to introduce English law*, 1792, 32 Geo. III, c. 1, s. 2 and *An act to establish a superior court of civil and criminal jurisdiction*, 1794, 34 Geo. III, c. 2, s. 1. For judicial statements see *M’Nab v. Bidwell and Baldwin* (1830), Draper 144 (U.C.K.B.), per Robinson C.J. at 151-152 and *Doe d. Sheldon v. Ramsey* (1852), 9 U.C.Q.B. 105, per Burns J. at 133-134.

examples of aboriginal self-government. The Mississauga legal system was not expressly supported or authorized by imperial or colonial legislation; it had no positive legal footing, so to speak, within the external imperial or colonial legal order. It was, on the contrary, a manifestation of purely inherent or internal powers of self-government. The old-school historian of the Canadian constitution must either say that this example of aboriginal self-government was unsanctioned and unauthorized by the external legal order and was therefore illegitimate and unlawful, or that historian must jettison strict adherence to the positivist-colonialist premises of the old school and begin to re-conceive the Canadian constitution – and therefore Canadian constitutional history – as embracing much more than positive-colonial laws.

This latter “legal-historical” reading of the Credit River Mississauga laws is not only much more interesting, it is legally and historically more sound. From time to time, positive-colonial law *did* make ambiguous references to aboriginal laws and governments. For example, an 1829 Upper Canada statute provided that anyone hunting or fishing within the Mississauga reserves “against the will of the said Mississaga people, or without the consent of three or more of their principal men or chiefs” was guilty of an offence and could be arrested by “one of the principal men” and, if convicted by a justice of the peace, the offender’s equipment could be “held and taken to be public property of the said Indian tribe [and disposed of] at the discretion of their principal men or chiefs for the public benefit of the said tribe.”²⁰ This statute was premised upon the assumption that the Mississaugas had a lawful, pre-existing government composed of “chiefs and principal men,” but it did not purport to create or define the office of “chief” or invest that office with delegated legislative or administrative powers over natives on the reserve. The statute makes sense only if we assume that Mississauga customary laws and governments were an implicit and legitimate component of the constitutional order already. The statute represents an invitation to legal historians to look beyond the statute books and case reports, to leave the confines of the law library, and to look at more obscure sources of Canadian constitutional law found in archives and oral histories. The written aboriginal laws that one might discover, like the Credit River “By Laws and Regulations,” are, from this perspective, as significant to Upper Canadian constitutional law as the Constitutional Act (1791) that created the colonial entity known as Upper Canada. Such written aboriginal laws could form the basis for radical reinterpretations of Canadian constitutional history. Of course, the value of these written aboriginal laws lies not in the fact that they were written but in the fact that they existed – but it cannot be denied that the fact that they were written makes it much easier to show that they did exist.

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

Indigenist readings

The “legal-historical” reading suggested above rejects the narrow positivist-colonialist premises of old-school Canadian constitutional history. But one might argue that, even so, it is still a reading of aboriginal texts that is limited by non-native legal and historical methodologies. It expands our notions of the “Constitution” to include aboriginal laws and systems of governance, but once evidence of those laws and systems, written and unwritten, are found it proceeds to treat them as just other sources of “law” to be incorporated within what is ultimately a non-native idea of what the Canadian constitution is, or was. Indeed, it might be said that this tendency is particularly strong in relation to written aboriginal legal texts like the Credit River code that appear to adopt so many features of non-native legalism. What is needed, it might be said, is an interpretive approach in which the aboriginal perspective is not simply acknowledged but is actually privileged. What is needed, one might say, is an *indigenist* reading of legal history.

Indigenist theories of interpretation are based upon general theories of post-colonialism and anti-colonialism. What makes an interpretive analysis “indigenist” is the placing of indigenous concerns and worldviews at the centre of the analysis so that interpretation proceeds on the basis of indigenous perspectives and purposes. The premise of indigenist theory is that no interpretation can be culturally neutral, and non-native academic analyses that purport to be neutral or objective are in fact Euro-centric. The goal of indigenist interpretation, then, is to “decolonize cognitive imperialism” so as to permit truly indigenous constructions of history and identity to emerge and to destabilize standard Euro-centric constructions. The result, it is said, is that Euro-centric tendencies toward linear, scientific, and individualistic perspectives on the human condition are replaced by indigenous values that are premised upon holistic approaches to communities and time, the importance of kinship and spirituality, and the centrality of local experience and oral tradition.²¹

21 Marrie Battiste and James [Sa’ke’j] Youngblood Henderson, *Protecting Indigenous Knowledge and Heritage: A Global Challenge* (Saskatoon: Purich, 2000), 13 (refers to the need to “decolonize cognitive imperialism”). See in general Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (Don Mills, ON: Oxford University Press, 1999), xxiv (refers to the “theoretical and philosophical elements” of an “indigenous” perspective) and 26 (refers to “indigenist” approaches to state and governance); Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (London: Zed Books, 1999), 39; G.J. Sefa Dei, B.L. Hall, D. Goldin Rosenberg, eds., *Indigenous Knowledges in Global Contexts* (Toronto: University of Toronto Press, 2000), 7; Augie Fleras, “Politicising Indigeneity: Ethno-politics in White Setter Dominions” in *Indigenous Peoples’ Rights in Australia, Canada, & New Zealand*, ed. Paul Havemann (Auckland: Oxford University Press, 1999), 187-197, 219-223; Ronald Niezen, *The Origins of Indigenism: Human Rights and the Politics of Identity* (Berkeley: University of California Press, 2003).

An indigenist reading of aboriginal legal history would presumably use oral traditions concerning customary laws and systems of governance as the interpretive lens through which the written record is considered.²² But it would do more than that. Ethnohistorians also claim to read written documents in light of oral traditions, but they would, perhaps, deny offering indigenist interpretations. There are several critical differences between indigenist and ethnohistorical interpretive approaches. First, indigenist interpretation gives expression to “the indigenous voice” and is premised upon “the right to speak for oneself and one’s people.”²³ An internal and engaged rather than external and detached perspective is assumed. Second, to acquire the “Indigenous perspective” that is necessary for indigenist analysis one must not only engage in “extended conversations” with elders from the relevant group, but one must accept their teachings and accept the responsibility of “knowing” the traditions by living according to those traditions; one must, for example, accept peoples’ kinship with other living creatures and with the spirit world.²⁴ Third, indigenist constructions of history are acts of resistance against the legacies of colonialism, and, as such, usually involve the recovery and reinvigoration of oral traditions that have been suppressed or devalued.²⁵ In this respect, however, it is important to emphasize that indigenist theory rejects the assumption held, at least at one time, by Euro-centric anthropologists that so-called primitive and tribal cultures were unchanging and homogenous and that any evidence of change was therefore the result of European contact and represented the “demise of Indigenous consciousness.”²⁶ Indigenist interpretation considers history in a forward-looking and political way, but it also claims that non-native histories are forward-looking and political in their own way as well.

The Credit River code appears to depart from Anishinaabe legal traditions and customs in significant ways. It is written not oral; it is legislative not customary; it appears to ignore the clan system of government in favour of majoritarian democracy; it appears to give chiefs and public institutions coercive authority over people; and it appears to reject native spirituality in favour

22 See in general A.C. Wilson, “Power of the Spoken Word: Native Oral Traditions in American Indian History,” in *Rethinking American Indian History*, ed. D.L. Fixico (Albuquerque: University of New Mexico Press, 1997), 101-116, C. Martin, “The Metaphysics of Writing Indian-White History” in *The American Indian and the Problem of History*, ed. C. Martin (Oxford: Oxford University Press, 1987), 27-34, and Robert A. Williams, Jr., *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600-1800* (London: Routledge, 1999).

23 Elizabeth Cook-Lynn, “How Scholarship Defames the Native Voice...and Why,” *Wicazo Sa Review* 15/2 (Fall 2000): 79, at 80.

24 Battiste and Henderson, *Protecting Indigenous Knowledge*, 41.

25 Dei et al, *Indigenous Knowledges*, 12; Niezen, *The Origins of Indigenism*, 12-13.

26 Battiste and Henderson, *Protecting Indigenous Knowledge*, 32-33.

of Christianity. As a non-aboriginal person who has not participated in the generation of indigenous oral traditions and histories, I am unqualified to give an indigenist reading of aboriginal written laws like the Credit River code. I will, however, suggest two alternative readings that indigenist theory could produce. It is assumed that an indigenist reading would place Anishinaabe oral traditions about customary law – perhaps the views of an Anishinaabe elder like Edward Benton-Banai – front and centre, and treat deviations from the traditional model of governance with suspicion and scepticism. One reading, then, might interpret the lawgiver Peter Jones as a cultural sell-out or colonial pawn who betrayed native traditions to further colonialist ideals. This reading might also assert that Mississauga traditionalists must have resisted the legal reforms Jones initiated and kept alive indigenous traditions in spite of Jones's efforts to introduce a European-like legal system. However, another indigenist reading of the Credit River code is possible. It might be argued that the Credit River code is a text of cultural survival, a statement of aboriginal independence and sovereignty. The code's references to "old" and "ancient" customs would, from this perspective, overshadow its use of alien legal concepts. Indeed, the code might be read as a mere written supplement to a much more powerful set of legal norms located in the traditional customary system that, it would be argued, continued in a modified way to guide behaviour under new reserve conditions. Indigenist theory does not dictate any particular reading of documents like the Credit River code, but it does require that indigenous culture and values animate whatever reading is given. And ultimately, the indigenist reader of Mississauga laws would, perhaps, defer to the values and views of Mississauga elders themselves as expressed today.

Ethnohistorical readings

The conclusions implicit in the two indigenist readings of aboriginal legal history suggested above – that native traditional law continued to exist either in competition or in partnership with native written laws – could also be reached through ethnohistorical methods. The path taken to reach these conclusions would, however, be quite different.

The goals of ethnohistory are essentially those of orthodox, non-native history: to provide explanations of the past that meet standards of objectivity and detached critical reflection appropriate for social science scholarship.²⁷ Indeed, the unique *ethnohistorical* method arises from the realization by historians that claims to objectivity about the histories of indigenous peoples are impossible so long as reliance is placed upon European written sources alone; the solution

27 Bruce Trigger, "Ethnohistory: The Unfinished Edifice," *Ethnohistory* 33/3 (Summer 1986): 253, at 263; see also, J. Axtell, "The Ethnohistory of Native America" in *Rethinking American Indian History*, 11-27.

is a multidisciplinary approach in which the written record is read in conjunction with anthropological, ethnological, linguistic, and archaeological work, as well as, where appropriate, native oral traditions and histories.²⁸ Despite the importance placed upon oral traditions, however, ethnohistorical method remains, says Bruce Trigger, “scientific” in its orientation; as a result, native oral traditions and histories produced in one historical period are not given much if any weight in relation to the events of prior historical periods unless they are corroborated by other historical evidence in some way.²⁹ In particular, purely mythical and spiritual components of oral histories, while acknowledged as meaningful for native communities, do not add any value or weight to the traditions for purposes of ethnohistorical analysis. The ethnohistorical technique of “cultural upstreaming,” whereby one starts with the customs and traditions of living native informants and then traces those customs and traditions back through the historical record,³⁰ could be employed by an indigenist historian to great effect. But as an *ethnohistorical* technique, upstreaming is, says W.N. Fenton, “governed by the principle of reciprocal illumination” – the oral history assists in understanding the written record, and vice versa, rather than providing a wholly independent source of historical evidence (as it might for an indigenist).³¹ Indeed, some ethnohistorians caution against overuse of upstreaming because it may overemphasise continuity in relation to native cultures that were undergoing radical change.³² Assertions of cultural continuity are particularly suspect for ethnohistorians when they are made by “political” advocates arguing for the revival of traditions.³³ Whereas indigenist theory takes an internal and engaged attitude toward oral traditions and histories, ethnohistorians purport to take an external and detached attitude. Of course, indigenist theorists would say that this purported detachment is nothing but a façade that hides Euro-centric methods and perspectives.

Despite differences with indigenist approaches, the ethnohistorical approach to aboriginal written laws would still seek to interpret those laws in light of aboriginal traditional and customary laws. Written laws like the Credit

28 Trigger, “Unfinished Edifice,” 263. Also Bruce Trigger, “Ethnohistory: Problems and Prospects,” *Ethnohistory* 29/1 (Winter 1982): 1, at 3; and R. Thorton, “Institutional and Intellectual Histories of Native American Studies,” in *Studying Native America: Problems and Prospects*, ed. R. Thorton (Madison: University of Wisconsin Press, 1998), 79, at 93.

29 Trigger, “Problems and Prospects,” 6-7.

30 William N. Fenton, *The Great Law and the Longhouse: A Political History of the Iroquois Confederacy* (Norman: University of Oklahoma Press, 1998), 19.

31 William N. Fenton, “Structure, Continuity, and Change” in *The History and Culture of Iroquois Diplomacy*, eds. F. Jennings, W.N. Fenton, M.A. Druke, and D.R. Miller (Syracuse: Syracuse University Press, 1985), 3.

32 White, *Middle Ground*, xiv.

33 Trigger, “Problems and Prospects,” 8; see also, Richard White “Using the Past: History and Native American Studies” in *Studying Native America*, 236.

River code would, at very least, be important ethnohistorical evidence of cultural change. Indeed, tracing the evolution of internal native legal traditions in response to colonialism is an under-studied but critically important aspect of aboriginal ethnohistory in Canada. I presume, however, that a good ethno-legal-history would treat the massive legal reforms introduced by the Credit River code with at least some degree of initial scepticism. The ethnohistorian would want to know, for example, whether the Mississauga customary norms and traditions could have been so quickly and easily dispensed with through one legislative act. He or she might regard the code's reference to "ancient custom" as an invitation to read the written law within a larger context of traditional law. These are issues that indigenist interpretations would presumably focus upon as well. Ethnohistorians and indigenists seem to be interested in many of the same questions, though their answers appear to be reached through quite different methods.

Legal-constitutional readings

A fourth way of considering aboriginal written laws is from the perspective of lawyers and judges today confronting aboriginal-rights claims under the Constitution. What would such a "legal-constitutional" reading of aboriginal written laws produced in colonial times be like?

Judges are probably most at home with the "legal-historical" methodology outlined above – which, after all, involves doing what judges appear to do all the time, namely, re-interpreting traditional sources of Canadian constitutional law in light of changing political and social conditions. Indeed, the "legal-historical" re-interpretation of Canadian constitutional history forced by the example of the Credit River code may be relevant to "legal-constitutional" re-interpretations of constitutional history. The recent case of *Campbell v. British Columbia*³⁴ provides an example.

In this case, Gordon Campbell, then leader of the opposition in British Columbia and now provincial premier, sought a declaration that the 1998 Nisga'a Treaty was unconstitutional because it acknowledges Nisga'a legislative powers that trump both federal and provincial legislative powers in certain areas; he argued that these Nisga'a powers of self-government are inconsistent with the exhaustive distribution of legislative power between federal and provincial legislatures by sections 91 and 92 of the *Constitution Act, 1867* (formerly *British North America Act* or *B.N.A. Act*) and so the treaty required a constitutional amendment before it could take legal effect. The B.C. Supreme Court rejected this argument and upheld the validity of the treaty. Mr. Justice Williamson held that "a limited right to self-government, or a limited degree of

34 *Campbell v. British Columbia* [2000] B.C. J. No. 1524.

legislative power, remained with Aboriginal peoples after the assertion of [British] sovereignty and after Confederation,” and this aboriginal power formed and still forms part of the “unwritten” principles of the Canadian Constitution.³⁵ In other words, the distribution of legislative power by sections 91 and 92 in 1867 did not exhaust legislative power in Canada and did not extinguish aboriginal legislative powers; these powers remained in place and so their recognition in a modern treaty does not require constitutional amendment.

Williamson characterized this conclusion as an historical one based on the status of aboriginal self-government in 1867, but he did not offer very much historical evidence to support his argument. At one level, evidence of the sort required by legal historians on this point would be unnecessary since the legal interpretation of constitutional instruments today must cohere with the normative backdrop of Canadian legal principles existing today, and courts have long acknowledged that the constitution is a “living tree,” the meaning of which evolves incrementally to match the fundamental moral and political aspirations of the Canadians it presently serves.³⁶ A judge can say that, as a matter of *law*, the *BNA Act, 1867* did not extinguish aboriginal self-government even if a legal historian might say that, as a matter of legal *history*, no one thought that that was the case in 1867. However, “legal-constitutional” readings of history can be more persuasive if they converge with “legal-historical” readings.³⁷ And in this respect the Credit River example is useful, for once it is clear that, as a matter of legal *history*, aboriginal communities *did* exercise inherent legislative powers for their communities even after they settled onto reserves in the midst of colonial Canada, then the sort of re-interpretation of Canadian constitutional history advanced, as a matter of *law*, in the *Campbell* case becomes much stronger. It is stronger both as a “legal-historical” reading and as a “legal-constitutional” reading.

But this use of the Credit River example is not unproblematic. As noted at the outset, the Supreme Court of Canada has defined aboriginal rights narrowly to embrace only those pre-contact customs, traditions and practices that are integral to distinctive aboriginal societies. Depending upon which indigenist or ethnohistorical reading of the Credit River code one adopts, it may be that the Mississaugan legal system was simply too “un-native” to fit the idealized judicial notion of aboriginal laws as ancient, customary and oral. The example of written aboriginal laws like the Credit River code therefore assists in developing lines of criticism against the prevailing “legal-constitutional” version of

35 *Ibid.*, at paras. 86 and 81.

36 *Edwards v. Canada* (A.G.), [1930] A.C. 124 (P.C.), per Sankey L.C. at 136.

37 Mark D. Walters, “Towards a ‘Taxonomy’ for the Common Law: Legal History and the Recognition of Aboriginal Customary Law” in *Law, History, Colonialism: The Reach of Empire*, eds. Cathy Colborne and Diane Kirkby (Manchester: Manchester University Press, 2001), 125-139.

aboriginal law as necessarily ancient, customary and oral. European contact and colonization forced aboriginal communities to adapt to radically novel social conditions, and some communities, like the Credit River Mississauga, exercised ancient powers of self-government to reform customary laws in response to these novel conditions by enacting new laws; these legal reforms assisted national and cultural survival, and any theory of aboriginal rights that insists upon proof of continued adherence to ancient, customary and oral laws penalizes aboriginal communities for responding to colonization by such legal reforms and therefore seems unjust.

So long as judges insist upon proof of continued adherence to traditional aboriginal laws, one can expect that lawyers will seek out historians (both indigenist and ethnohistorians) who focus their energies upon producing constructions of history that prove or disprove this requisite continuity. “Legal-constitutional” interpretations of aboriginal legal history may therefore drive “legal-historical,” “indigenist,” and “ethnohistorical” research agendas. In assessing historical evidence, however, judges perform a task unlike that of the professional historian. One could imagine a judge facing expert testimony from two parties, one of which presents an indigenist reading that asserts continuity between traditional laws and written laws and another that asserts an ethnohistorical reading that denies this continuity. These contests of historical views are never authoritatively resolved in the academic world; but in the context of constitutional adjudication a winner must be declared. In the process of declaring a winner in this “legal-constitutional” interpretive dimension, the judge cannot disregard the evidence of oral traditions and histories that animate indigenist interpretations as easily as some ethnohistorians might. The Supreme Court of Canada has held that oral histories and traditions must be “placed on an equal footing” with other types of historical evidence, including historical documents, and must be considered not merely as “confirmatory” of corroborating evidence but must be given “independent weight.”³⁸ Judges are not required to adopt indigenist readings, of course, but they must take those readings seriously.

In the end, one can be forgiven for thinking that Canadian judges have jumped into the midst of historical and cultural debates that they would have been better off avoiding. Neither indigenist nor ethnohistorical theories view aboriginal cultures, laws, and customs in the static way that Canadian judges do. Both theories explore native cultural dynamism, though from different perspectives. And both theories would, I think, reject as impractical and undesirable the search for certain core cultural activities that can be traced back over the centuries to a period of aboriginal cultural purity insulated from European influence. No matter which reading of the Credit River laws one

38 *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at paras. 86 and 98.

adopts, the example of these laws confirm that the judicial notion of aboriginal law as pre-contact, customary, and oral in origins and nature is deeply problematic as a foundation for modern aboriginal rights.

The legal-historical, indigenist, ethnohistorical, and legal-constitutional perspectives do not exhaust the ways in which aboriginal law can be interpreted. They may produce very similar or very different conclusions about aboriginal legal texts written under the colonial conditions of nineteenth-century Upper Canada. Because each approach sets criteria of validity in interpretation that are somewhat unique, there is no reason to think that the conclusions they produce will always be consistent. However, a careful consideration of the reasons why different readings of aboriginal law are different provides an excellent basis for exploring the role of law within aboriginal communities historically and today.