Centre for International
Governance Innovation

Canada in International Law at 150 and Beyond | Paper No. 4 — January 2018

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CIGI Masthead

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About the Series

Marking 150 years since Confederation provides an opportunity for Canadian international law practitioners and scholars to reflect on Canada's past, present and future in international law and governance. "Canada in International Law at 150 and Beyond/Canada et droit international : 150 ans d'histoire et perspectives d'avenir" is a series of essays, written in the official language chosen by the authors, that provides a critical perspective on Canada's past and present in international law, surveys the challenges that lie before us and offers renewed focus for Canada's pursuit of global justice and the rule of law.

Topics explored in this series include the history and practice of international law (including sources of international law, Indigenous treaties, international treaty diplomacy, subnational treaty making, domestic reception of international law and Parliament's role in international law), as well as Canada's role in international law, governance and innovation in the broad fields of international economic, environmental and intellectual property law. Topics with an economic law focus include international trade, dispute settlement, international taxation and private international law. Environmental law topics include the international climate change regime and international treaties on chemicals and waste, transboundary water governance and the law of the sea. Intellectual property law topics explore the development of international IP protection and the integration of IP law into the body of international trade law. Finally, the series presents Canadian perspectives on developments in international human rights and humanitarian law, including judicial implementation of these obligations, international labour law, business and human rights, international criminal law, war crimes, and international legal issues related to child soldiers. This series allows a reflection on Canada's role in the community of nations and its potential to advance the progressive development of global rule of law.

"Canada in International Law at 150 and Beyond/Canada et droit international : 150 ans d'histoire et perspectives d'avenir" demonstrates the pivotal role that Canada has played in the development of international law and signals the essential contributions it is poised to make in the future. The project leaders are Oonagh Fitzgerald, director of the International Law Research Program at the Centre for International Governance Innovation (CIGI); Valerie Hughes, CIGI senior fellow, adjunct assistant professor of law at Queen's University and former director at the World Trade Organization; and Mark Jewett, CIGI senior fellow, counsel to the law firm Bennett Jones, and former general counsel and corporate secretary of the Bank of Canada. The series will be published as a book entitled *Reflections on Canada's Past, Present and Future in International Law/Réflexions sur le passé, le présent et l'avenir du Canada en matière de droit international* in spring 2018.

About the International Law Research Program

The International Law Research Program (ILRP) at CIGI is an integrated multidisciplinary research program that provides leading academics, government and private sector legal experts, as well as students from Canada and abroad, with the opportunity to contribute to advancements in international law.

The ILRP strives to be the world's leading international law research program, with recognized impact on how international law is brought to bear on significant global issues. The program's mission is to connect knowledge, policy and practice to build the international law framework — the globalized rule of law — to support international governance of the future. Its founding belief is that better international governance, including a strengthened international law framework, can improve the lives of people everywhere, increase prosperity, ensure global sustainability, address inequality, safeguard human rights and promote a more secure world.

The ILRP focuses on the areas of international law that are most important to global innovation, prosperity and sustainability: international economic law, international intellectual property law and international environmental law. In its research, the ILRP is attentive to the emerging interactions among international and transnational law, Indigenous law and constitutional law.

About the Author

Robert Hamilton is an assistant professor at the University of Calgary Faculty of Law. He teaches property law, Aboriginal law, and legal research and writing. His research focuses on Aboriginal land rights and treaty rights in Canada's Maritime provinces. His work engages law, legal history, Indigenous legal traditions and theoretical perspectives on law and history. Robert has worked on research projects with the National Consortium on Indigenous Economic Development, the Centre for Indigenous Conservation and Development Alternatives, and the Confederation Debates Project. He has also worked with First Nations on land claims and self-government issues. Robert has published on Aboriginal land and treaty rights in the Maritime provinces and broader issues in Aboriginal law and has presented his research at numerous academic conferences. Robert holds a B.A. in philosophy from St. Thomas University, a J.D. from the University of New Brunswick Law School and an LL.M. from Osgoode Hall Law School. He is a Ph.D. candidate at the University of Victoria Faculty of Law.

Introduction

The Penobscot, Passamaquoddy, Wolastoqiyk and Mi'kmaq, four nations of the Wabanaki Confederacy, are represented in beads in the shape of four wigwams on a wampum belt. The belt is edged in white, representing peaceful relations. In the centre is a pipe symbolizing the ceremonies of peace that joined the nations in alliance. This legal document, copies of which were kept in the council house of each nation, recorded the origin and constitutional structure of the Wabanaki Confederacy.[1] Like other Indigenous confederacies of the seventeenth and eighteenth centuries, the Wabanaki Confederacy was constituted and maintained through transnational practices of Indigenous law. These practices of transnational law are central to Canada's inherited legal traditions. Despite this, the importance of Indigenous legal traditions is often minimized in narratives about the history of "law" in Canada. Histories of domestic "Canadian" law and international law often fail to fully dispense with Eurocentric concepts of law and history, which interpret Indigenous law, if at all, as localized customary practices. It is often overlooked that for much of the post-contact history of present-day Canada, the majority of the land's inhabitants were subjects not of Canadian, British or "international" law, but of Indigenous law. The early colonial period was characterized by a deep legal pluralism, a pluralism that informs the approach this paper takes to the history of international law in Canada.

This paper investigates the historical relationship between international law and the Canadian state by focusing on how distinct systems of international — or transnational — law worked alongside each other in the Maritime provinces in the eighteenth century. It does so by providing a descriptive analysis of the multiple transnational legal regimes that overlapped in relationships of tension and accommodation in the eighteenth century Maritime region. The search for a single "international law" obscures the historical reality that in the pre-Confederation period, multiple systems and practices of transnational law were in use. The history of international law in Canada, therefore, must be considered in light of the post-Confederation shift away from a legally pluralistic sphere to one dominated by a unilaterally imposed model of "universal" international law. To illustrate this, the paper is divided into three sections, each of which examines a system of transnational law: inter-Indigenous, inter-European and Indigenous-European. The final section presents a brief sketch of how this legal pluralism was nearly erased with the conceptual shift to a universal international law.

Inter-Indigenous Transnational Law

Inter-Indigenous transnational law refers to those practices and structures of law that grew out of and regulated relations between Indigenous nations. Transnational law refers to legal relations *between* political communities. It is distinct from domestic law, which regulates behaviour within a political community.[2] Three Indigenous nations occupied Mi'kma'ki/Wulstukwik — the present-day Maritime provinces — in the eighteenth century: the Mi'kmaq, the Wolastoqiyik and the Passamaquoddy. Their relationships with each other and with other Indigenous nations reveal structures and practices of transnational law. The transnational legal structure that has received the most attention from historians is the Wabanaki Confederacy.[3] The confederacy included the Mi'kmaq, Wolastokiyik, Penobscot and Passamaquoddy, whose territory covered the whole of the Maritime provinces, the Gaspé Peninsula and parts of New England.[4]

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[1] This description from anthropologist Frank Speck is based on Penobscot oral history and a reproduction of a belt Speck had made, according to memory of a Penobscot elder: Frank Speck, "The Eastern Algonkian Wabanaki Confederacy" (1915), 17:3 Am Anthropologist 492 at 500–01.

[2] On the use of the term "transnational law," see David Armitage, *Foundations of Modern International Thought* (Cambridge, MA: Cambridge University Press, 2013) at 6, 18, 42–45. In the Indigenous context specifically, "transnational" has been used to describe Indigenous law by James [Sákéj] Youngblood Henderson, "Mi'kmaw Tenure in Atlantic Canada" (1995), 18:2 Dal LJ 196 [Henderson, "Mi'kmaw Tenure"] at 238; and in James [Sákéj] Youngblood Henderson, "First Nations' Legal Inheritances in Canada: The Mi'kmaq Model" (1996), 23 Man LJ 1 [Henderson, "Mi'kmaq Model"] at 24–25.

[3] A note on terminology. The term "Wabanaki," roughly translated as "people of the dawn," is employed in uneven ways throughout the literature. John G. Reid, for example, uses the term in reference to "the Saco to the Penobscot Rivers" and identifies the Wulstukwiuk and Mi'kmaq separately: John G Reid, *Essays on Northeastern North America: Seventeenth and Eighteenth Centuries* (Toronto: University of Toronto Press, 2008) at 238, n 6. When referring to the Wabanaki Confederacy, the term is applied more broadly to include the Indigenous nations of the Maritime provinces: William C Wicken, *Mi'kmaq Treaties on Trial: History, Land, and Donald Marshall Jr.* (Toronto: University of Toronto Press, 2002) [Wicken, *Mi'kmaq Treaties*] at 80; Henderson, "Mi'kmaw Tenure", *supra* note 2 at 239; Harald EL Prins, *The Mi'kmaq: Resistance, Accommodation, and Cultural Survival* (Orlando: Harcourt Brace, 1996) at 117–19.

The precise origins of the confederacy are uncertain. Anthropologist Frank Speck recorded Penobscot oral history, dating it to the late seventeenth century. As recorded by Speck, the confederacy was formed to counter British imperial aims, the expansion of the New England colonies and Iroquoian aggression.[5] The Iroquois (the Mohawk, in particular) often raided the Wabanaki peoples.[6] Facing increasing losses from these raids, however, and with wars on other fronts to deal with, the Iroquois sought peace. To this end, the parties sought the counsel of the Ottawa. Following lengthy deliberations, an alliance was formed between the Wabanaki and the "Mohawk of Caughnawaga and Oka, together with other neighboring tribes whose fortunes were in different ways linked with those of the principals."[7] On this view, the Wabanaki Confederacy came into being as part of the creation of a broader structure of alliance: "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."[8]

Others argue that the confederacy predated the alliance with the Iroquois. Sákéj Henderson, for example, draws on Mi'kmaq history to argue that the confederacy existed at the time of European arrival.[9] Speck himself admits that Wabanaki alliances predated the Iroquoian alliance. The outstanding question then is whether the pre-existing alliances were the Wabanaki Confederacy as such, or whether the events recounted to Speck were indeed the beginning of a new political structure that developed in tandem with a Wabanaki-Iroquois alliance. This is not an issue that needs to be resolved for the purposes of this paper. It is the existence of these transnational structures of alliance and their functioning according to practices of Indigenous law that is of importance for the present inquiry.[10]

The Wabanaki Confederacy was similar in constitution to other North American Indigenous confederacies such as the Iroquois, Creek and Delaware confederacies.[11] In all of these cases, pressures created by the arrival of Europeans and contests between the British and French in North America seem to have incentivized inter-Indigenous alliance.[12] Similar to European transnational law, inter-Indigenous forms developed in response to shifts in economic, social and political circumstances.

Law governed the relationship between the Wabanaki and the broader Iroquoian alliance, as well their internal relations. Specific legal formalities — protocols and ceremonies, for example — were appropriate in each sphere. Speck refers to the alliance with the Iroquois as the "international aspect" of the Wabanaki Confederacy, while considering the relations between the members of the confederacy as intra-national in some sense.[13] While this distinction draws attention to two distinct functions of the confederacy, the autonomous status of the Wabanaki nations within their "internal" structure of alliance suggest that the confederacy itself, and not only the relationship of the confederacy to other nations, should be considered an example of transnational Indigenous law.

The Ottawa, due in part to having been sought out to mediate the dispute between the Wabanaki and Mohawk, were at the head of the "international" confederacy. The chief of the Ottawa determined that the council house would be built, and the council fire kept, at Caughnawaga (Kahnawake). Wampum belts detailing the history of the council and alliance, as well as its ongoing business, were kept at the council house. The procedures and protocols established by the Ottawa, which drew on Iroquoian models, required delegates from each of the nations to come to the council fire every three years. Messengers carrying wampum belts would announce the coming meetings, which began with festivities that could last several weeks. Wampum belts were sent out following council meetings, carrying news to the member nations. Each nation kept these belts in their nation's council house, with the originals remaining in the central house. The council fire was the central symbol of the alliance structure, and the Mohawk were the protectors of the Caughnawaga fire.[14] These legal protocols and procedures were fundamental to the ongoing functioning of the alliance, analogous, for example, to the many customary and positive laws that govern the functioning of Canada's Parliament.

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[4] Henderson, "Mi'kmaw Tenure", *supra* note 2 at 239; Wicken, *Mi'kmaq Treaties*, *supra* note 3 at 40; Prins, *supra* note 3 at 117–19.

[5] Speck, *supra* note 1 at 495.

[6] *Ibid*.

[7] *Ibid*.

[8] *Ibid*.

[9] Henderson, "Mi'kmaw Tenure", *supra* note 2 at 239.

[10] *Ibid* at 239–40.

[11] Speck, *supra* note 1 at 492.

[12] Kenneth M Morrison, *The Embattled Northeast: The Elusive Ideal of Alliance in Abenaki-Euramerican Relations* (Berkeley, California: University of California Press, 1984) at 6.

[13] Speck, *supra* note 1 at 495.

In its internal structures, the Wabanaki Confederacy shared many organizational and procedural elements with the Iroquoian model, including the central fire as an organizing principle and the use of wampum to communicate between member nations and record important matters. Demonstrating the close nature of the Wabanaki alliance, when a chief passed away in one nation, members of each of the other nations were invited to multi-day grieving ceremonies, after which they all participated in choosing a new chief. The Wabanaki also had a pact of mutual protection and were often allied against a common enemy.[15] In King Philip's War and Dummer's War, the confederacy fought against the British.[16] The latter conflict was brought to an end with the treaty agreements of 1725–1726, although in the 1740s hostilities were resumed. Following the British-French Treaty of Aix-en-Chapelle in 1748, the Wabanaki Confederacy convened "at the Penobscot village of Panawamskek and agreed to make peace with New England."[17] Many Mi'kmaq, however, refused to participate in 1749 treaty negotiations, possibly out of anger that Halifax had been founded earlier that year without their permission.[18] The Mi'kmaq believed that the British had agreed in the treaty of 1725–1726 to seek their consent before making any new settlements in their territory. Halifax was founded in breach of treaty promises.

During the American Revolution, the Wabanaki again took a shared position. Penobscot Chief Joseph Orono declared his support for the Americans in June 1775, a decision that Harald Prins has convincingly argued would almost certainly have been made in consultation with Wabanaki allies, given the frequent meetings of the confederacy in that period.[19] A year later, in the Treaty of Watertown, both the Wolastoqiyik and the Mi'kmaq declared their support for the United States. The Wolastoqiyik again declared their support in 1778, demanding the British and all their subjects leave the Saint John River Valley and declaring that "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 [*sic*] is right & the old English wrong."[20]

While there is ambiguity regarding the founding date, the end (or dissolution) dates of the Wabanaki Confederacy are somewhat better known, with the Mohawk alliances dissolving with the Penobscot in 1862, the Passamaquoddy in about 1870 and the Mi'kmaq in 1872.[21] There are two notable things about these dates. First, the fact that individual members of the Wabanaki Confederacy ended their alliance with a mutual partner at different times is illustrative of the nature of these alliances. The confederacy structure of the Wabanaki Confederacy was a flexible structure of voluntary associations that could accommodate the autonomy of member nations.[22] Second, most of these dates are post-Confederation. While imperial and colonial governments were negotiating new structures of law and governance to reshape their respective roles and authorities in the colonial world, Indigenous nations within those same territories were using transnational structures of inter-Indigenous law. It is notable in this light that, beginning in 1978, the Wabanaki Confederacy has seen a resurgence. That year, delegates from the Mi'kmaq, Passamaquoddy and Penobscot met under the formal banner of the confederacy for the first time in a century.[23] A meeting of the confederacy was hosted by the Wolastokiyik in 2013 in their traditional territory and, in 2015, the Wabanaki Confederacy Conference was held in Vermont.[24] In the late nineteenth and early twenty-first centuries, practices of transnational Indigenous law can be seen alongside other forms of transnational and domestic law.

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[14] *Ibid* at 495–96.

[15] *Ibid* at 498–502.

[16] John Grenier, *The Far Reaches of Empire: War in Nova Scotia, 1710–1760* (Norman: University of Oklahoma Press, 2008) at 53.

[17] Prins, *supra* note 3 at 144.

[18] Ruth Holmes Whitehead, *The Old Man Told Us: Excerpts From Micmac History 1500–1950* (Halifax: Nimbus, 1991) at 114; Wicken, "Mi'kmaq Treaties", *supra* note 3 at 173–80.

[19] Prins, *supra* note 3 at 156.

[20] "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, reprinted in WD Hamilton and WA Spray, eds, *Source Materials Relating to the New Brunswick Indian* (Fredericton: Hamray, 1977) at 50–51.

[21] Speck, *supra* note 1 at 498; Prins, *supra* note 3 at 212.

[22] Henderson, "Mi'kmaq Model", *supra* note 2.

The existence of practices and structures of transnational law should not be taken as suggesting that relationships were always harmonious. Factions within individual nations and within the broader alliance differed on many issues, in particular whether to ally with one or the other European colonizing power.[25] Decisions to treat with the British in 1693, 1725 and 1749 each met with varied reactions from within Wabanaki nations, as did the question of whether to side with the French or remain neutral during Queen Anne's War.[26] In considering these instances of dissent within the confederacy, it is notable that the constitutional structure of the alliance was not disrupted. The constitutional structure of the confederacy accommodated the autonomy of its members. As Henderson writes, "these constitutions conventionally defined the centre of their shared traditions. It was a centre dedicated to a shared vision and a bridge among component tribes. Their customary constitutions were attempts to maintain a world of right and wrong, of just and unjust, of proper and improper conduct."[27] An important part of this was recognizing the autonomy of individual actors within the shared set of norms and conventions that governed their behaviour. The Wabanaki Confederacy was a structure of alliance that bound together discrete Indigenous nations in a constitutional framework. It is, therefore, one example of how transnational inter-Indigenous law functioned from the seventeenth to nineteenth centuries in the Maritime region.

Inter-European Law

Inter-European transnational law was conceived of as the "law of nations" until well into the nineteenth century when the concept of "international law" emerged.[28] Before Jeremy Bentham's positivism and nomenclature took hold, there were two elements of inter-European transnational law: principles derived primarily from natural law, which formed the foundation of the law of nations, and a body of negotiated treaty law.[29] Each of these elements impacted the peoples of the Maritime region.

The "discovery" of the Americas required the development of legal arguments concerning both the rights of European powers engaged in colonizing and the status of the Indigenous peoples inhabiting the continent. French and British powers operating in the Maritime provinces in the eighteenth century were engaged in an increasingly global competition for imperial supremacy and had lengthy legal inheritances to draw on in crafting legal tools to meet the demands of their new ventures. Natural law provided valuable resources in this regard.[30] Franciscus de Victoria, for example, drew on Thomas Aquinas in crafting natural law justifications for waging "just" war on Indigenous Americans.[31] Justifications for the medieval crusades, where Pope Innocent III had considered the conditions under which Christians might "legitimately dispossess pagan peoples," were ripe for redeployment.[32] These justifications were shaped by ideological inheritances from Rome.[33] Roman law concepts of *imperium* and *dominium* distinguished between rights to property (ownership) and political power through and over territory (sovereignty), shaping later legal conceptions of colonial lands.[34] The question for European thinkers was how to justify the acquisition of both *imperium* and *dominium* in the "New World." Natural law and Roman civil law traditions provided a common legal language for addressing these issues to transnational European audiences.[35] These legal, historical, political and philosophical arguments, which would later come to be called the "Doctrine of Discovery," justified colonial appropriation on the basis of discovery and some minimal form or indicia of possession.[36] Colonial promoters crafted legal arguments justifying overseas activity, which were submitted to the Crown for consideration and were then given expression in particular legal instruments, such as patents and charters, by which individuals were granted the legal authority to colonize.

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[23] Prins, *supra* note 3 at 212.

[24] Miles Howe, "Rebuilding the Wabanaki Confederacy" (Halifax: Halifax Media Co-op, 2012), online: <http://halifax.mediacoop.ca/story/rebuilding-wabanaki-confederacy/12494>.

[25] Morrison, *supra* note 12 at 5, 173–75.

[26] Prins, *supra* note 3 at 129, 138–39.

[27] Henderson, "Mi'kmaq Model", *supra* note 2 at 7.

[28] MW Janis, "Jeremy Bentham and the Fashioning of 'International Law'" (1984) 78:2 Am J Intl L 405.

[29] Bentham criticized William Blackstone's reliance on precisely this two-part definition. In Bentham view's, Blackstone failed in not sufficiently distinguishing between the law of nations and natural law, and in construing natural law *as law*, a characterization Blackstone elsewhere took issue with himself. See Janis, *ibid* at 406.

[30] See e.g. MD Vattel, *The Law of Nations; or Principles of the Law of Nature; Applied to the Conduct and Affairs of Nations and Sovereigns* (Northampton: S & E Butler, 1805, first published 1758).

[31] Franciscus de Victoria, *De Indis Et de Ivre Belli Reflectiones*, in Ernest Nys, ed, translated by John Pawley (Washington, DC: Carnegie Institution, 1917, first published 1534) at 120–29.

Where these European claims conflicted, the second type of transnational law, negotiated treaties, were used to settle disputes. The first such treaty to impact the Maritime provinces was the Treaty of St Germain-en-Laye, signed in 1632, under which the colony of Acadia, along with Quebec and Cape Breton, were "returned" to France.[37] In 1667, the Treaty of Breda formally ended the second Anglo-Dutch war, with the French securing British recognition of their claims in French Guiana and Acadia.[38] Breda introduced a notable development as the first inter-European treaty to deal explicitly with the status of imperial subjects in Acadie/Nova Scotia. Article 11 stated that those individuals in the ceded territory who wished to remain English subjects had one year to remove themselves from the territory.[39]

Imperial "possessions" in the region would continue to frequently change hands. Port Royal fell again to the British in 1690, only for French interests to be recognized again under the Treaty of Ryswick in 1697.[40] Port Royal was again sacked by the British in 1710. Although the attack was planned and executed as a colony-building project, the context of French-British hostility was set within the war of Spanish Succession. Of the many treaties signed at Utrecht in April 1713, the Treaty of Peace between the English and French would be of the greatest consequence for peoples in North America. Unlike in the previous treaties concerning the region, this time "Acadie" was not returned to the French.

To Indigenous peoples and the Acadians beyond "cannon shot" of the fort at the recently renamed Annapolis Royal, the immediate impact of the capture of the fort and the formal cession at Utrecht was minimal.[41] 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 trade hands between European powers. As such, historians have deemed 1713 as the time when Nova Scotia was "acquired."[42] 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.[43] The current legal and territorial conception of "Nova Scotia" is constructed with Utrecht as its starting point.

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[32] Robert A Williams Jr, *The American Indian in Western Legal Thought: Discourses on Conquest* (Oxford, UK: Oxford University Press, 1990) at 44.

[33] Anthony Pagden, *Lords of all the World: Ideologies of Empire in Spain, Britain and France c. 1500–c. 1800* (New Haven, CT: Yale University Press, 1995) at 11.

[34] Ken MacMillan, *Sovereignty and Possession in the English New World: The Legal Foundations of Empire 1576–1640* (Cambridge, UK: Cambridge University Press, 2006) at 6.

[35] Pagden, *supra* note 33 at 90–93; MacMillan, *supra* note 34 at 13.

[36] Robert J Miller, Jacinta Ruru, Larissa Behrendt & Tracey Lindberg, eds, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford, UK: Oxford University Press, 2010); on practices indicating indicia of possession, see Patricia Seed, *Ceremonies of Possession in Europe's Conquest of the New World: 1492–1640* (Cambridge, UK: Cambridge University Press, 1995).

[37] NES Griffiths, "1600–1650: Fish, Fur, and Folk" in Phillip A Buckner & John G Reid, eds, *The Atlantic Region to Confederation: A History* (Toronto: University of Toronto Press, 1994) 40 at 57.

[38] Shavana Musa, "The Peace of Breda (1667)" (Oxford, UK: Oxford Public International Law), online: <opil.ouplaw.com/page/peace-of-breda>; Andrew Hill Clark, *Acadia: The Geography of Early Nova Scotia to 1760* (Madison: University of Wisconsin Press, 1968) at 107.

[39] Reprinted in Francis Gardiner Davenport, ed, *European Treaties Bearing on the History of the United States and Its Dependencies, Volume 2: 1650–1697* (Washington, DC: Carnegie Institute, 1917) at 140.

[40] *Ibid* at 351–52.

[41] Bill Wicken, "26 August 1726: A Case Study in Mi'kmaq-New England Relations in the Early 18th Century" (1993) 23:1 Acadiensis 5.

[42] See e.g. LFS Upton, *Micmacs and Colonists: Indian-White Relations in the Maritimes, 1713–1867* (Vancouver, BC: University of British Columbia Press, 1979).

[43] *R v Marshall*, 2001 NSPC 2.

Imperial boundaries and legal subjecthood are two issues dealt with in Utrecht with historical and contemporary relevance. During negotiations, it was primarily the Atlantic fisheries that held the negotiator's attention.[44] The precise borders of the region were of lesser concern. It appears the French "had come to see Acadia, not as a bounded province, but as a defensive frontier…across which France and Great Britain confronted each other."[45] Within this frontier zone, the French hoped to limit the British to peninsular Nova Scotia, while the British considered Acadie/Nova Scotia to include all of present day New Brunswick and the Gaspé Peninsula. The negotiators could agree only that the British acquired Acadia by its *ancien limites*.[46] The determination of those boundaries was left to commissioners appointed to the task. Those commissioners never met, and the boundary issue remained unresolved. While the British and French considered it settled that peninsular Nova Scotia was under British sovereignty and Île Royale and Île Saint-Jean were French "possessions," what would later become New Brunswick remained under dispute until the Treaty of Paris, 1763.

The Breda provision concerning the status of imperial subjects would show up again in Utrecht. While the provision was not new, its impact was. Article 14 provided that French settlers who wished to remain French subjects had one year to relocate to "French" territory. Those who stayed would become British subjects and were promised that their existing property rights would be recognized and their freedom to worship would be respected to the same extent as in Britain.[47] In a nominal sense, Acadians were given the ability to choose their imperial allegiance and legal status.[48] Many Acadians remained through the grace period yet refused for many years to take an oath of allegiance. By the time they took a qualified oath, most in the 1720s and early 1730s, British officials had become sufficiently suspicious of their loyalty that schemes to remove them from the province were discussed more frequently.[49] The systematic ethnic cleansing through which the Acadians were expelled from the colony, known as the "Grand Derangement," was a consequence, in part, of the contest over legal subjecthood beginning with Utrecht.

Unlike previous inter-European treaties dealing with the Maritime provinces, Utrecht also spoke to the legal status of Indigenous peoples, although it refused them even the limited choice granted the Acadians. Under article 15, the legal status of Indigenous peoples of the territories under consideration, vast lands including parts of present-day Ontario, Quebec, the Maritime provinces, Newfoundland and New England, was determined by French and British negotiators at subsequent meetings. The imperial affiliation of the Indigenous nations was to be determined unilaterally by negotiators.[50] These negotiations never took place, and the status (under European law) of Indigenous peoples was not settled. Inter-European treaty law would touch the region again in 1748 when the British returned the French fort at Louisbourg, captured in 1745 in the North American theatre of the War of Austrian Succession. This effectively returned imperial affairs in the region to the status quo following Utrecht.[51]

Following the Seven Years War, the Treaty of Paris, 1763 would substantially recalibrate imperial interests in America.[52] Under article IV of the Treaty of Paris, 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." The 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 legal interests surrendered were seemingly as broad as the territory they covered, with the British acquiring "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," ceded "in the most ample manner and form, without restriction."[53] This brought to an end French territorial claims in the Maritime region.

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[44] Dale Miquelon, "Envisioning the French Empire: Utrecht, 1711–1713" (2001) 24:4 French Historical Studies 353 at 357.

[45] *Ibid* at 363.

[46] *Ibid*.

[47] Davenport, *supra* note 39 at 204, 213.

[48] Geoffrey Plank, *An Unsettled Conquest: The British Campaign Against the Peoples of Acadia* (Philadelphia, PA: University of Pennsylvania Press, 2001) at 71.

[49] Elizabeth Mancke, "Imperial Transitions" in John G Reid, Maurice Basque, Elizabeth Mancke, Barry Moody, Geoffrey Plank & William Wicken, *The 'Conquest' of Acadia, 1710: Imperial, Colonial, and Aboriginal Constructions* (Toronto, ON: University of Toronto Press, 2004) 178.

[50] Plank, *supra* note 48 at 71.

[51] Reprinted in Francis Gardiner Davenport & Charles Oscar Paullin, eds, *European Treaties Bearing on the History of the United States and Its Dependencies Volume 4: 1716–1815* (Washington, DC: Carnegie Institute, 1934) at 76.

[52] See Colin G Calloway, *The Scratch of a Pen: 1763 and the Transformation of North America* (New York: Oxford University Press, 2006).

In the Maritime provinces of the eighteenth century, the two strands of transnational European law outlined above can be seen working together. The passing from one monarch to another of the absolute sovereignty over the whole of the region was made possible by a shared set of assumptions regarding the rights of the Indigenous peoples of the region and the superiority of European law. This laid the groundwork that would eventually lead to the development of modern international law.[54] The body of transnational law examined here, however, existed in tension with other structures and practices of transnational law that eschewed the unilateral imposition of European authority in favour of a multilateral approach.

Indigenous-European Law

Trade began soon after Europeans arrived on North American shores. Jacques Cartier wrote on his 1534 voyage of meeting people already anxious to trade for European goods.[55] With trade came the development of intersocietal protocols governing relations between the parties — that is, a nascent body of intersocietal law. 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."[56] Prior to the treaty relationship, and later alongside it, intersocietal norms developed. Through these norms, Indigenous peoples incorporated the few Europeans in the region into broader structures of Indigenous law.[57] A more exhaustive study would have to look not only to treaty law, but to customary intersocietal law that grew out of the practices of Indigenous-trader and Indigenous-settler relations in the two centuries before the British began formally treating with the Indigenous nations in the Maritime provinces.

The focus of this section, however, is the eighteenth century Peace and Friendship Treaties between the Wabanaki and the British. Despite British pretenses to ownership rights in North America on the basis of discovery, in practice they acknowledged the need to acquire land by cession or purchase before settling it.[58] While claiming *imperium,* they recognized an Indigenous *dominium* that had to be cleared to open lands for settlement. The treaty relationship that developed in response, however, was not a limited set of agreements resolving localized disputes or acquiring cessions of land; rather, it structured constitutional relationships and practices that would define the relative rights and obligations of the parties and structure their sovereign authority and autonomy in relation to each other.[59] The treaty relationship was the basis of an intersocietal constitutional structure that accommodated a plurality of legal practices and the autonomy of political actors. Henderson thus refers to the treaty relationship as "an innovative strategy of treaty federalism."[60]

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[53] Davenport & Paullin, *supra* note 51 at 204.

[54] Anthony Pagden, "Law, Colonization, Legitimation, and the European Background" in M Grossberg & C Tomlins, eds, *The Cambridge History of Law in America Volume 1: Early America (1580–1815)* (New York City: Cambridge University Press, 2008) 1.

[55] 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.

[56] Stephen J Augustine, "Negotiating for Survival" in Marie Battiste, ed, *Living Treaties: Narrating Mi'kmaw Treaty Relations* (Sydney: Cape Breton University Press, 2016) at 19.

[57] Henderson, "Mi'kmaw Tenure", *supra* note 2 at 240.

[58] See e.g. Stuart Banner, *How the Indians Lost Their Land: Law and Power on the Frontier* (Cambridge, MA: Harvard University Press, 2005).

The Peace and Friendship Treaties, the most prominent of which are those of 1725–1726, 1749, 1752, 1760–1761 and 1778, should be understood as representing an ongoing relationship rather than isolated agreements. The meaning of the treaties is not found exclusively in the text but in the broader context of relationship itself.[61] In this light, the treaty of 1725–1726 deserves particular attention. This treaty carries forward important provisions concerning land use and settlement, drawing on treaty-making practices in New England, and is explicitly renewed in the later eighteenth century treaties. The written part of the 1725–1726 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.[62] These two documents are the written record of the rights and obligations assumed by each of the parties to the treaties. The way the treaties structure intersocietal law can be seen clearly in three subject matters that are prominent in the text: land use and settlement, civil and criminal jurisdiction, and questions of sovereignty, submission and friendship.

The 1725 treaty was negotiated and signed in the context of the three-year "Dummer's War" between the British and the Wabanaki Confederacy. The conflict, the first to come to open warfare between the British and Wabanaki during a period of French and British peace, was sparked by British settlement that the Abenaki argued had taken place without their consent.[63] Wabanaki allies were also concerned, and the nations were joined together against the expansion of New England settlement.[64] Land and the contours of future settlement were therefore central to the treaty negotiations.

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."[65] Read within the context of treaty making at the time and the contests over land and settlement that sparked the war preceding the treaty, this was one of two clauses structuring the legal framework governing land use and settlement in the region.[66] In the first part of clause 3, the Wabanaki agreed that the existing settlements in the Maritime provinces — the fort at Annapolis Royal and the fishing settlement at Canso — would not be disturbed. By the second part of the clause, any settlement beyond those two would have to occur "lawfully." The phrase "lawfully to be made" is not defined in the treaty. As William Wicken has argued, however, a contextualized reading of the treaty terms leads to the conclusion that "lawfully" here should be understood to mean purchased or otherwise ceded.[67] This reading accords with the Mi'kmaq oral history, which understands the treaty as creating a framework for a negotiated sharing of the lands, wherein the Wabanaki granted the British the right to settle in reserved parts of the region, requiring their consent be obtained before settlement proceeded elsewhere.[68]

The second clause concerning land use came in the Reciprocal Promises, where the Crown agreed that "the said Indians shall not be Molested in their Persons, Hunting Fishing and Shooting & planting on their planting Grounds nor in any other of their Lawfull occasions." In agreeing to a non-molestation clause regarding hunting, fishing and planting grounds, the Crown representatives assumed an obligation to respect Wabanaki land use for those activities. The inclusion of hunting is particularly notable, as territory within Wabanaki societies was divided in part on the basis of hunting groups. Indigenous treaty partners would have conceived of the protection of hunting against the backdrop of their own cultural contexts, where hunting was inextricably bound to hunting territories, the use of which was governed by Indigenous laws. The agreement that the Crown would not molest the Wabanaki in the act of hunting therefore takes on added significance. Together, the two clauses above, representing the undertaking of rights and obligations from each party, structured the framework for future land use in the region.

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[59] Henderson, "Mi'kmaq Model", *supra* note 2 at 5.

[60] *Ibid*.

[61] Henderson, "Mi'kmaw Tenure", *supra* note 2; Mark D Walters, "Brightening the Covenant Chain: Aboriginal Treaty Meanings in Law and History after Marshall" (2001) 24:2 Dal LJ 75.

[62] Wicken, "Mi'kmaq Treaties", *supra* note 3 at 87.

[63] *Ibid*.

[64] *Ibid*.

[65] Bruce D Clark, Micmac Grand Council & Lisa Patterson, *The Mi'kmaq Treaty Handbook* (Truro, NS: Native Communications Society of Nova Scotia, 1987) [Clark, "Mi'kmaq Treaty Handbook"] at 19–20.

[66] Lands were not ceded in the peace and friendship treaties: *R v Simon,* [1985] 2 SCR 387 at 50; *R v Marshall (No. 1),* [1999] 3 SCR 456 at para 21 [*Marshall #1*]; *R v Marshall*, 2003 NSCA 105 at 99; *R v Isaac,* [1975] NSJ 412 at 57.

[67] Wicken, "Mi'kmaq Treaties", *supra* note 3. This argument has also been made in Henderson, "Mi'kmaw Tenure", *supra* note 2 and in Robert Hamilton, "After Tsilhqot'in Nation: The Aboriginal Title Question in Canada's Maritime Provinces" (2016) 67 UNB LJ 58 at 77–82.

[68] See e.g. Joe B Marshall & Jamie Battiste, "Treaty Advocacy and Treaty Imperative Through Mi'kmaw Leadership: Remembering with Joe B. Marshall" in Battiste, *supra* note 56 at 145.

The treaties also included clauses regarding criminal jurisdiction. The Articles of Peace and Agreement of the 1726 treaty include three such clauses. 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.[69] 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. The second reads: "That 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." Here the Wabanaki agreed to submit disagreements between themselves and settlers to the English courts for resolution. Under a third clause, the Wabanaki agreed to assist the British in enforcing their own laws, agreeing that "the Indians shall not help to convey away any Soldiers belonging to His Majesty's forts, but on the contrary shall bring back any soldier they shall find endeavoring to run away."

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."[70] These provisions were echoed in article 8 of the 1752 treaty: "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."[71] 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.[72] In the resulting structures and practices of intersocietal 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."[73]

A third important subject matter of the treaties revolves around notions of sovereignty, submission and friendship. A central concern of the British, upon entering into negotiations in 1725, was to have the cessions made by the French in the Treaty of Utrecht recognized by the Wabanaki.[74] The Articles of Peace and Agreements addressed this 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,

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[69] *Ibid*. See also Clark, "Mi'kmaq Treaty Handbook", *supra* note 65 at 19–20.

[70] Clark, "Mi'kmaq Treaty Handbook", *supra* note 65 at 19–20.

[71] Indigenous and Northern Affairs Canada, *Treaty Texts—1752 Peace and Friendship Treaty Between His Majesty the King and the Jean Baptiste* Cope (2016), online: <www.aadnc-aandc.gc.ca/eng/1100100029040/1100100029041>.

[72] Henderson, "Mi'kmaq Model", *supra* note 2 at 18.

[73] *Ibid* at 19.

[74] Wicken, "Mi'kmaq Treaties", *supra* note 3 at 74.

> 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.[75]

The British understood that inter-European legal agreements had little purchase on the ground absent buy-in from Wabanaki nations. This clause is of considerable ongoing importance, in particular what the "submission" discussed here portends.

It is important to recall that the written documents are not the whole treaty agreement, but a representation provided by one of the parties in a language with which the other is largely unfamiliar. This was expressed by former Mi'kmaq Grand Chief Alexander Denny, who "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."[76] The Supreme Court of Canada has concurred, holding that the treaties were made in oral terms, which must take precedence over the written terms penned after the agreement was reached.[77] The clause on submission must be read with this in mind. It also should 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."[78] From a British perspective, alliance and the recognition of their claim to the "ancient limits" of Acadia (the border dispute with the French still being underway) were paramount.[79] "Submission" and "friendship" must be understood in this light.

According to the Mi'kmaw understanding of the treaties, the "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."[80] The British tended to view the submission as a recognition of abstract, yet absolute, legal sovereignty. The Wabanaki accepted existing European settlements and that following Utrecht it would be the British, not the French, with whom they would negotiate possible future settlements.[81] 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."[82] The slight qualification in the submission clause reveals the source of some confusion. It reads: "to make our Submission to His Said Majesty in as Ample a Manner as wee have formerly done to the Most Christian King." This is telling because, regardless of how the British may have viewed the French relationship with the Wabanaki, there was never a submission made to the French Crown and the Wabanaki did not consider themselves French subjects. What the clause did do, however, was create "a direct relationship between the Mi'kmaq and the British king."[83] That the British were treating their relationship with the Wabanaki more as transnational than domestic can be seen both by the direct relationship with the monarch and with the desire to have the Wabanaki recognize the Treaty of Utrecht. Here, the British in a sense incorporated the Wabanaki into the inter-European treaty system as a party whose acquiescence was required to give the treaty terms legitimacy.

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 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."[84] 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 the governors' 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."[85] 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 to "cultivate and maintain a strict Friendship and good correspondence with the Indians, Inhabiting within Our said Province of New Brunswick."[86]

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[75] Clark, "Mi'kmaq Treaty Handbook", *supra* note 65 at 19–20.

[76] James (Sákéj) Youngblood Henderson, "Alexander Denny and the Treaty Imperative" in Battiste, *supra* note 56 [Henderson, "Alexander Denny"] at 101; Wicken, "Mi'kmaq Treaties", *supra* note 3 at 94.

[77] R v Marshall, [1999] 3 SCR 456 at paras 12–14.

[78] Wicken, "Mi'kmaq Treaties", *supra* note 3 at 87.

[79] *Ibid* at 109, 101.

[80] Henderson, "Alexander Denny", *supra* note 76 at 102.

[81] Wicken, "Mi'kmaq Treaties", *supra* note 3 at 109.

[82] Marie Battiste, "Resilience and Resolution: Mi'kmaw Education and Treaty Implementation" in Battiste, *supra* note 56 at 4.

[83] Wicken, "Mi'kmaq Treaties", *supra* note 3 at 110.

[84] Indigenous and Northern Affairs Canada, *supra* note 71.

Notions of friendship, which indicated alliance, mutual protection and the sharing of land, cast the treaty relationship not in the light of an unqualified submission to an absolute sovereign, but as the structuring of a bilateral relationship wherein rights and obligations flowed to and from both parties. As Henderson explains, 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."[87] This structure of transnational law existed alongside inter-Indigenous and inter-European systems, as outlined above.

Conclusion: From Laws to Law

Throughout the eighteenth century, three forms of transnational law were being used in the Maritime provinces. From this legally pluralistic sphere, one form of international law came to dominate. The identification of the precise legal mechanisms and policies that facilitated this shift would require a work of its own. The limited aim of this final section is to point to the logics that supported an erasure of the legal pluralism described above. While there were several transnational legal orders in use in the Maritime provinces in the eighteenth century, one of those had the seeds within it to erase the others. Inter-European transnational law had at its foundations several ideological constructs that supported legal doctrines that in turn facilitated European imperialism. Notions of European superiority and absolute Crown sovereignty shaped a law of nations that allowed for war to be waged on non-Christian peoples, abrogated the legal systems of non-Europeans and justified the dispossession of Indigenous lands on the basis of their perceived savagery. Agriculturalist justification for property ownership and doctrines of discovery justified European "planting" in the "New World."

The sovereign nation-state was still a nascent concept and in colonial spheres sovereignty existed only in partial and attenuated forms.[88] Nonetheless, a vision of state sovereignty as extending evenly through well-defined boundaries came to be applied in a manner that sought to erase competing legal orders. This vision of Westphalian sovereignty never prevailed in practice in the way it was imagined.[89] De jure sovereignty of European law has always, to varying degrees, failed to represent the de facto circumstances. Yet, notions of empire and sovereignty inherited from the ancient world informed the law of nations that laid the groundwork for contemporary international law in which state sovereignty is a prerequisite. European "international" law came to prioritize the Westphalian state and territorial sovereignty as prerequisites for legal participation.[90] In this sense, sovereignty and international law are co-constitutive.[91] The effect of this was to domesticate not only Indigenous legal traditions, but also robust bodies of transnational law working between Indigenous nations and Indigenous peoples and European nations. As Joshua Nichols examines in this collection, in the Canadian context this meant construing the treaties with Indigenous nations as not being "international" in scope, relying instead on the language of *sui generis* to justify bringing them within the Canadian legal order. Doctrines of *terra nullius* and discovery, along with notions of absolute Crown sovereignty, would reduce the competing forms of transnational law to domestic curiosities.

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[85] Henderson, "The Mi'kmaq Model", *supra* note 2 at 8.

[86] Provincial Archives of New Brunswick, "1784 Royal Instructions to Thomas Carleton", online: <http://archives.gnb.ca/exhibits/forthavoc/html/Royal-Instructions.aspx?culture=en-CA>.

[87] Henderson, "The Mi'kmaq Model", *supra* note 2 at 8.

[88] See e.g. Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400–1900* (Cambridge, MA: Cambridge University Press, 2009).

[89] Stephen Krasner, *Sovereignty: Organized Hypocrisy* (Princeton, NJ: Princeton University Press, 1999) at 6, 42.

The preamble to the British North America Act, 1867, states that the dominion of Canada will have a "Constitution similar in Principle to that of the United Kingdom."[92] That is, an unwritten constitution built on longstanding legal practices and principles. What the descriptions of the three bodies of transnational law provided above illustrate is that the constitutional structure Canada inherited did not include only a Eurocentric "international law," but a plurality of practices and principles of transnational law used by the various nations occupying the space the new dominion claimed as its own.

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[90] Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (Cambridge, MA: Cambridge University Press, 2012) at 61.

[91] Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge, MA: Cambridge University Press, 2007).

[92] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5 [*British North America Act*].

ON CANADA'S PAST, PRESENT AND FUTURE
IN INTERNATIONAL LAW

REFLECTIONS

RÉFLEXIONS

SUR LE PASSÉ, LE PRÉSENT ET L'AVENIR DU CANADA
EN MATIÈRE DE DROIT INTERNATIONAL

Oonagh E. Fitzgerald, Valerie Hughes and Mark Jewett,
Editors

Marking 150 years since Confederation provides an opportunity for Canadian international law practitioners and scholars to reflect on Canada's rich history in international law and governance, where we find ourselves today in the community of nations, and how we might help shape a future in which Canada's rules-based and progressive approach to international law gains ascendancy. These essays, each written in the official language chosen by the authors, provide a critical perspective on Canada's past and present in international law, survey the challenges that lie before us and offer renewed focus for Canada's pursuit of global justice and the rule of law.

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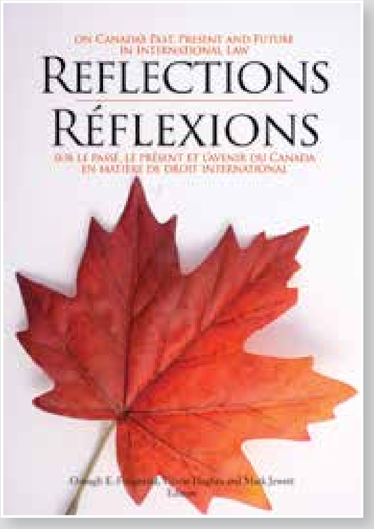

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