

MOHEGAN INDIANSV. CONNECTICUT (1705-1773) AND THE LEGAL STATUS OF ABORIGINAL CUSTOMARY LAWS AND GOVERNMENT IN BRITISH NORTH AMERICA[©]

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This article examines the eighteenth century case of *Mohegan Indians v. Connecticut* in order to determine its significance for arguments about the legal status of Aboriginal customary law and government in British North America. The article concludes that the *Mohegan* case confirms that in certain circumstances native nations on reserved lands in British colonies were subject, not to colonial jurisdictions established for settlers, but to their own traditional customs and institutions. It also concludes that the case is less clear than some recent commentators have suggested about whether British law recognized such nations as having rights of sovereignty.

Cet article examine l'arrêt du dix-huitième siècle de *Mohegan Indians c. Connecticut* dans le but de déterminer sa signification pour le débat concernant le statut légal du droit coutumier et du gouvernement autochtones en Amérique du Nord britannique. L'article conclut que l'arrêt *Mohegan* affirme que, dans certaines circonstances, les nations autochtones qui occupaient des réserves dans les colonies britanniques étaient soumises, non pas aux juridictions coloniales établies pour les colons, mais à leurs coutumes et institutions traditionnelles. Il conclut aussi que l'arrêt est moins clair à l'égard de la reconnaissance en droit britannique des droits à la souveraineté de ces nations que certains commentateurs récents n'ont suggéré.

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I. INTRODUCTION

Did the highest court in the British empire recognize in the eighteenth century that native nations residing on reserved lands within North American colonies enjoyed rights of sovereignty? An increasing number of commentators and advocates argue that this question ought to be answered in the affirmative, and in support of this argument the 1772-73 decision of the Privy Council in *Mohegan Indians v. Connecticut*¹ is cited. If accepted, this conclusion would revolutionize the traditional understanding of Aboriginal legal status in Canada. It would represent British judicial authority for a proposition that American courts have long accepted but which Canadian courts have been reluctant to acknowledge—that Crown and native sovereignty might have co-existed in British North American colonies from the British legal perspective.² Indeed, if this interpretation of the *Mohegan* case is accepted, it would

¹ *Mohegan Indians, by their Guardians. The Governor and Company of Connecticut (1705-73)* [hereinafter *Mohegan*]. This case, and its several judgments, are unreported. Part of the lands in issue in the case have been the subject of modern litigation: *Mohegan Tribe v. Connecticut*, 483 F. Supp. 597 (D. Conn. 1980), aff'd 638 F.2d 612 (2d Cir. 1980), cert. denied 452 U.S. 968, on re., 528 F. Supp. 1359 (D. Conn. 1982).

² For American judicial interpretations of British-Indian policy, see, for example, *Goodell v. Jackson*, 20 Johns. 486 (N.Y. 1823) [hereinafter *Goodell*]; *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823) [hereinafter *Johnson*]; and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) [hereinafter *Worcester*]. For differences in American and Canadian law on tribal sovereignty, see generally M.D. Mason, "Canadian and United States Approaches to Indian Sovereignty" (1983) 21 Osgoode Hall L.J. 422.

become an important component of the normative context informing the interpretation of the vague constitutional guarantee of “existing aboriginal and treaty rights” found in section 35(1) of the *Constitution Act, 1982*.³ In this manner, it might lend support to the argument that the present Canadian Constitution recognizes implicitly, and something which the failed Charlottetown Accord of 1992 recognized expressly—an “inherent right of Aboriginal self-government.”⁴ *Mohegan* is, potentially, a very important case indeed.

Notwithstanding their potential significance, the judgments rendered in the *Mohegan* case remain largely unexamined. J.H. Smith provided a detailed summary of the case,⁵ but he was concerned more with the history of the proceedings than with their legal significance. Because he did not quote the judgments at length, it is not clear whether his statement that the Mohegan nation was “juristically regarded as sovereign”⁶ was the conclusion of a judge or his interpretation of a judge’s conclusion. Other commentators have cited an interim ruling from the case in support of the proposition that the Privy Council recognized “tribal sovereignty”⁷ or “Indian sovereignty”⁸ without detailed analysis of how this ruling was affected by later judgments on

³ Being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

⁴ For the argument that s. 35(1) may include an inherent right of Aboriginal self-government, see generally Canada, Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government and the Constitution* (Ottawa: Supply & Services Canada, 1993) (Co-chairs R. Dussault and G. Erasmus). The Charlottetown Accord—which was defeated in a national referendum held 26 October 1992—existed as two versions of the same basic document: see *Consensus Report on the Constitution: Charlottetown, 28 August 1992* (Ottawa: Supply & Services Canada, 1992) and *Draft Legal Text* (Ottawa: 9 October 1992).

⁵ J.H. Smith, *Appeals to the Privy Council from the American Plantations* (New York: Columbia University Press, 1950), c. 7. Other references to the case are found in J.W. De Forest, *History of the Indians of Connecticut from the Earliest Known Period to 1850* (Hartford: Wm. Jas. Hamersley, 1852) at 303-46; G.A. Washburne, *Imperial Control of the Administration of Justice in the Thirteen American Colonies, 1684-1776* (New York: Columbia University Press, 1923) at 103-06; and Sir W. Holdsworth, *A History of English Law* vol. 11 (London: Methuen, 1926) at 99.

⁶ Smith, *supra* note 5 at 442.

⁷ R.L. Barsh & J. Henderson, *The Road: Indian Tribes and Political Liberty* (Berkeley: University of California Press, 1980) at 32.

⁸ Submission of the Union of British Columbia Indian Chiefs, Indian Association of Alberta and the Four Nations Confederacy to Canada, House of Commons, Special Committee on Indian Self-Government, “Memorandum of Law,” in *Proceedings and Submissions of the Special Committee* vol. 20A (Ottawa: Queen’s Printer, 1983) at 18-19.

the merits.⁹ The result is an incomplete and potentially misleading understanding of the full legal significance of the case.

In this article, *Mohegan* will be examined so that its relevance to arguments about the legal status of Aboriginal nations can be fully assessed. It will be argued that the case does not support the conclusion that native nations on reserved lands within British colonies were, from the perspective of *British* law, sovereign in the international sense. However, the case does confirm that British law recognized that such nations were, in certain circumstances at least, governed internally by systems of Aboriginal customary law and government which were independent from the local legal systems of the colonies in which they were located. Whether nations in these circumstances enjoyed some sort of non-international, sovereign status—whether, in other words, “tribal” or “Indian” sovereignty existed in lands over which Britain claimed to be territorially sovereign—is a question on which the *Mohegan* case is less clear than some commentators have suggested. As will be seen, the case may be interpreted as consistent with the continuity of Aboriginal customary laws and governments as quasi-sovereign systems within British colonial territories, or it may be interpreted as consistent with the continuity of Aboriginal customary laws and governments as forming systems which constituted components of the British imperial order—systems which, therefore, were subject to and derived legal legitimacy from British imperial sovereignty.

To place the discussion of the *Mohegan* case in context, Part II examines some of the general legal principles governing British-Indian relations of the seventeenth and eighteenth centuries. Part III then examines the courts established to hear the *Mohegan* case and the various judgments they rendered. Although the *Mohegan* case involved a land dispute and is therefore important to the question of the legal status of Aboriginal title to land, this discussion focuses upon the significance of the case to arguments about the constitutional status of Aboriginal law and government.

⁹ Examples of advocates relying upon this interim ruling include M. Battiste, “Submission on behalf of the Grand Council of the Mikmaq Nation,” in S. Clark, *The Mi'kmaq and Criminal Justice in Nova Scotia: Research Study* vol. 3 (Halifax: N.S. Royal Commission on the Donald Marshall Jr., Prosecution, 1989) at 85-86; and B.A. Clark, *Native Liberty, Crown Sovereignty: The Existing Aboriginal Right of Self-Government in Canada* (Montreal; Kingston: McGill-Queen's University Press, 1990) at 39-45. Clark also relied on the *Mohegan* case in his arguments as counsel in *British Columbia (A.G.) v. Mount Currie Indian Band* (1991), [1992] 1 C.N.L.R. 70 at 76 (B.C.S.C.); and in *R. v. Williams* (1993), [1994] 3 C.N.L.R. 173 at 175 (B.C.S.C.). Clark represented native peoples involved at the 1995 Gustafsen Lake standoff in British Columbia and used the *Mohegan* case to argue that Canadian courts had no jurisdiction over the dispute. See, for example, *The [Toronto] Globe and Mail* (13 November 1995) A4.

II. GENERAL LEGAL CONTEXT: DISTINGUISHING BETWEEN IMPERIAL, COLONIAL, AND NATIVE LAW

It is beyond the scope of this article to develop a detailed legal interpretation of British-Indian relations of the seventeenth and eighteenth centuries. It is important, however, to identify some basic terms and principles. It will be helpful in particular to articulate a distinction between “imperial” and “colonial” law. From at least the early seventeenth century, English courts recognized a distinct body of legal principles governing imperial, as opposed to municipal, matters. The concept of “municipal law” was expressly acknowledged, as was the idea that England and its imperial possessions were governed internally by “several and distinct municipal laws.”¹⁰ While England itself was governed internally by English municipal law, its various colonial possessions were governed internally by various systems of what may be labelled “colonial municipal law.” In fact, colonial law often incorporated those parts of English law that were applicable to local conditions.

Legal principles governing the relationship between existing components and the assertion of sovereignty over new components of the empire were also developed. Because these principles governed the constitution of the empire as a whole they may be called principles of “imperial law.”¹¹ There were both legislative and non-legislative sources of imperial law. Legislative sources included statutes of the English (later British) Parliament¹² and, in certain cases, instruments issued under the royal prerogative and passed under either the Great Seal (like proclamations, orders-in-council, commissions, and letters patent)¹³ or the royal sign manual and signet (like royal instructions to colonial

¹⁰ *Calvin's Case* (1608), 7 Co. Rep. 1a at 19b. (Ex. Chamb.) [hereinafter *Calvin*]. See also W. Blackstone, *Commentaries on the Laws of England* vol. 1 (Oxford: Clarendon Press, 1765-69) [hereinafter *Bl. Comm.*] at 63 and 109.

¹¹ This label was not initially used by courts, perhaps because it was traditionally associated with “papal” and “civil” law: see *Bl. Comm.*, *supra* note 10 at 80 (“papal or imperial laws”); and *East-India Co. v. Sandys* (1683-85), 10 St. Tr. 371 at 523 (K.B.) [hereinafter *East-India*] (“imperial or civil law”). In *Process into Wales* (1668-74), Vaugh. 395 at 418 (C.P.) [hereinafter *Wales*], the expression “law in dominions” was used to describe the laws relating to Britain’s empire.

¹² For Parliament’s declaration of its authority to legislate for colonies, see *An Act for the Better Securing the Dependency of his Majesty's Dominion in America upon the Crown and Parliament of Great Britain* (G.B.), 6 Geo. III, c. 12; and see generally *Bl. Comm.*, *supra* note 10, vol. 1 at 109.

¹³ See *Campbell v. Hall* (1774), Lofft 655 at 741-42 (K.B.) [hereinafter *Campbell*]; *Bl. Comm.*, *supra* note 10 at 108; and J. Chitty, *A Treatise on the Law of the Prerogatives of the Crown and the Relative Duties and Rights of the Subject* (London: Butterworth, 1820) at 34.

governors).¹⁴ Non-legislative principles of imperial law were derived by courts from examining ancient and contemporary Crown usage and practice, and by reference to the law of nations, or *jus gentium*. Thus, in *Calvin*, which addressed the question of England's constitutional relationship with Scotland, counsel argued that the "*jus gentium*" governed the question, there being "no precedent for it in the law."¹⁵ In response, Ellesmere L.C. concluded that because the issue at bar did not transcend Crown sovereignty the "common-law can and ought to rule;" however, he continued, the common law "extends itself to ... the universall lawe of nations."¹⁶ Ellesmere L.C. therefore relied upon neither municipal nor international law, but a body of non-legislative principles governing relations between nations within the empire—principles which may be labelled "imperial common law."

By the late seventeenth century, British imperial common law began to distinguish between two types of colonies: those acquired by conquest and/or cession from foreign peoples and those acquired by the discovery and occupation—or settlement—of uninhabited territories. In settled territories, British settlers were considered to have carried with them relevant parts of English municipal law which formed the basis of the colonial law by which they would be governed.¹⁷ The Crown (or Parliament) then established the necessary local common-law courts and representative legislatures to give that colonial legal system an institutional framework. Aside from this constitutive function, however, the Crown had no right to legislate for the colony; settlers were protected from the royal prerogative by principles of English law as their "birthright."¹⁸ In conquered/ceded territories, the Crown did have the right to legislate without Parliament; it could therefore establish new laws for the conquered nation through an instrument of prerogative

¹⁴ See *Bl. Comm.*, *supra* note 10; Chitty, *supra* note 13; Sir K. Roberts-Wray, *Commonwealth and Colonial Law* (London: Stevens, 1966) at 146-47; and D.B. Swinfen, "Legal Status of Royal Instructions" (1968) 13 *Jurid. Rev.* 21 at 38-39.

¹⁵ *Supra* note 10, cited to 2 *St. Tr.* 559 at 563.

¹⁶ *Ibid.* at 669. Compare *East-India*, *supra* note 11 at 523 and 529 (K.B.): in determining the rights of the Crown over English subjects trading with "infidel" nations abroad, Jefferies C.J. observed that "the common and statute laws of this realm are too strait and narrow" to govern, and, in such cases, courts had to "take notice of the law of nations," which, having been "received and used in England time out of mind, may be properly said to be laws of England."

¹⁷ *Blankard v. Galdy* (1693), 2 *Salk.* 411, 4 *Mod.* 215 (K.B.) [hereinafter *Blankard*] (the texts of the two reports are slightly different); *Dutton v. Howell* (1693), *Show.* 24 (per counsel) at 31 (H.L.) [hereinafter *Dutton*]; *Anon.* (1722), 2 *P. Wms.* 75 (P.C.) [hereinafter *Anon#1*]; *Roberdeau v. Rous* (1738), 1 *Atk.* 543 (Ch.) [hereinafter *Roberdeau*]; and *Bl. Comm.*, *supra* note 10 at 106-07.

¹⁸ *Dutton*, *supra* note 17 at 31-32; and *Anon#1*, *supra* note 17.

legislation.¹⁹ However, until such prerogative legislation was enacted, British courts presumed that the existing laws and institutions of the local people continued in force at common law insofar as they had not already been abrogated by act of state, were not inconsistent with subjection to British sovereignty (thus, local law remained in force “excepting in point of sovereignty”),²⁰ and were not contrary to British conceptions of justice and humanity (local law could not be “*malum in se*”).²¹ By this common-law “principle of continuity,”²² previously foreign legal systems were incorporated within the imperial constitutional order: the existing local legal system became one of the municipal legal systems of the empire parallel to the internal systems of England and England’s other imperial possessions but subject to and deriving legitimacy from the over-arching imperial constitution.

Where English colonies were established in conquered/ceded territories where local laws were unsuitable for English settlers, a degree of legal pluralism in the newly acquired territory was often acknowledged. Relevant parts of English law were usually introduced as the colonial municipal law of the settlers²³ but, with respect to local laws and peoples, three general results were possible: local law might be abrogated and local peoples subjected to the same colonial law as settlers;²⁴ elements of local law might remain in force as part of the local colonial system (much as particular customs were recognized by the

¹⁹ *Calvin*, *supra* note 10 at 17b; *Witron v. Blany* (1674), 3 Keb. 401 at 402 (K.B.); *Anon #1*, *supra* note 17 at 75-76; and *Campbell*, *supra* note 13 at 741-42.

²⁰ *Wales*, *supra* note 11 at 400.

²¹ See generally *supra* note 19. See also *Case of Tanistry* (1608), Davis 28 at 30 (Ir. K.B.) [hereinafter *Tanistry*]; *Craw v. Ramsey* (1669), Vaugh 274 at 278 (C.P.) [hereinafter *Craw*]; *Dawes v. Painter* (1674), 1 Freem. 175 at 176 (C.P.); *Dutton*, *supra* note 17 at 31; *Blankard*, *supra* note 17, cited to 4 Mod. 215 at 225-26.

²² It is also called the “doctrine of continuity” in B. Slattery, *Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title* & Studies in Aboriginal Rights, No. 2 (Saskatoon: University of Saskatchewan Native Law Centre, 1983) at 1.

²³ See *Blankard*, *supra* note 17, cited to 4 Mod. 215 (per counsel) at 224; and the comments of C. Pratt & C. Yorke in G. Chalmers, *Opinions of Eminent Lawyers, on Various Points of English Jurisprudence, Chiefly Concerning the Colonies, Fisheries, and Commerce of Great Britain* (London: Reed & Hunter, 1814) vol. 1 at 195 (in territories “acquired by treaty” in India, English subjects settling as distinct “colonies” therein “carr[ie]d] with them” English law for their internal governance).

²⁴ Thus, the first British governor of Quebec, James Murray, interpreted the introduction of English law under the *Royal Proclamation, 1763* (G.B.), reprinted in R.S.C. 1985, App. II, No. 1, as an abrogation of the existing local French colonial law—an interpretation which was later repudiated by the imperial ministry: see generally *Stuart v. Bowman* (1851), 2 L.C. Rep. 369 (S.C.), rev’d (1853), 3 L.C. Rep. 309 (Q.B.); and *Wilcox v. Wilcox* (1857), 8 L.C. Rep. 34 (Q.B.).

English municipal common law in England);²⁵ or, finally, local law together with its institutions might remain in force as a distinct system under imperial law independent from the local colonial legal system introduced for settlers.²⁶

With these general terms and principles in mind, it is now possible to consider briefly the legal status of Aboriginal law and government in British North America in the seventeenth and eighteenth centuries. One approach to the examination of this issue is to consider whether the imperial common-law principle of continuity can be applied to British-Indian relations to explain the legal status of Aboriginal customary legal systems. There are several reasons why the application of the principle of continuity may be regarded as problematic in this context. First, there is the “celebrated question”²⁷ of whether America was acquired by European states by discovery/occupation or by conquest/cession. English settlers arrived in North America armed with royal letters patent by which the Crown purported to grant expansive rights of territory and government without having first gained the territory by conquest or cession from native inhabitants—suggesting, perhaps, that Britain regarded its American colonies as settled colonies.²⁸ If so, then (it may be argued) there were from the British

²⁵ On particular customs, see generally *Bl. Comm.*, *supra* note 10 at 76-78. On the continuity of local indigenous customs after the legislative introduction of English law into a territory see, for example, *Anon.* (1579), 3 Dyer 363b at 363b (C.P.) (continuity of local Welsh custom not abrogated by (G.B.), 27 Hen. VIII, c. 26, which introduced English law into Wales because it was “agreeable to some customs in England,” and because English law was “to be ministered in like form as in this realm”). See also *Tanistry*, *supra* note 21 at 40; and *Blankard*, *supra* note 17, cited to 4 Mod. 215 at 225 (local laws continued until English law was introduced, but “even then some of their old customs may remain”).

²⁶ This was, arguably, the situation in India, in that it was said that native peoples “living under their own laws” were “under the authority of the British Legislature” but were nonetheless “considered, to many purposes, as a separate nation under a different government” than that of the “English colonies” established in their midst: *In re Justices of Bombay* (1829), 1 Knapp 1 (per counsel) at 31-32 (P.C.) [hereinafter *Justices of Bombay*]. See also *Freeman v. Fairlie* (1828), 1 Moo. Ind. App. 305 (Ch.). British courts had territorial jurisdiction over the presidency towns of Calcutta, Madras, and Bombay, applying English law to Europeans and Muslim or Hindu law to natives. Outside these towns, however, settlement by Europeans was restricted and *mofussil* or native courts, the origins of which were “long antecedent to the British conquests in India,” administered local law and custom to native inhabitants (albeit under the supervision of the East India Company): see *Justices of Bombay* and Sir C.P. Ilbert, *The Government of India, Being a Digest of the Statute Law Relating Thereto* 2d ed. (Oxford: Clarendon Press, 1905) at 39-59, 490-94, 511, and 514-15.

²⁷ E. Vattel, *Law of Nations: or Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns* J. Chitty, ed. (London: Sweet, 1834), vol. 1, c. 18, § 209 at 100.

²⁸ For colonial charters, see F.N. Thorpe, *Federal and State Constitutions, Colonial Charters And Other Organic Laws of the States, Territories and Colonies* vols. 1-7 (Washington: Government Printing Office, 1909). For a discussion of the effect of charters on Aboriginal rights, see B.

legal perspective no Aboriginal laws capable of recognition under the principle of continuity.

Although this interpretation of imperial law is consistent with some nineteenth century judicial opinions relating to New Zealand and Australia,²⁹ it is not consistent with constitutional development in seventeenth and eighteenth century British North America. From the perspective of at least certain British observers and officials, discovery gave Britain at most a right of “pre-emption”—an exclusive right as amongst European states of acquiring sovereignty over native peoples and lands by conquest or cession.³⁰ That native peoples were not automatically considered within British sovereignty upon discovery was reflected in colonial statute law. Statutes characterized Aboriginal nations as occupying a wide range of constitutional positions. Thus, friendly Indian nations were described as being at “peace” or in “amity”

Slattery, *The Land Rights of Indigenous Canadian Peoples, As Affected by the Crown's Acquisition of Their Territory*(D.Phil. Thesis, Oxford University, 1979) at 100-10; G. Lester, *The Territorial Rights of the Inuit of the Canadian Northwest Territories* vols. 1-2 (D.Jur. Thesis, York University, 1981) at 370-74, 402-04, and 616-19; and P.G. McHugh, *The Aboriginal Rights of the New Zealand Maori at Common Law* (Ph.D. Thesis, Cambridge University, 1987) at 30-33.

²⁹ See, for example, *Wi Parata v. Bishop of Wellington*(1877), 3 N.Z. Jur. (N.S.) 72 (S.C.); *Cooper v. Stuart* (1889), 14 App. Cas. 286 at 291 (P.C.); *MacDonald v. Levy* (1833), 1 Legge 39 (N.S.W.S.C.); *R. v. Jack Congo Murrell*(1836), 1 Legge 72 (N.S.W.S.C.); *Milirrpum v. Nabalco Pty. Ltd.* (1971), 17 F.L.R. 141 (N.T.S.C.); and see generally Australia, Law Reform Commission, *The Recognition of Aboriginal Customary Law* Rep. No. 31, vol. 1 (Canberra: Australian Government Publishing Service, 1986) at §§ 64-66. This approach has since been partly overturned: see *Mabo v. Queensland*(1992), 107 A.L.R. 1 (High Ct.).

³⁰ For a detailed summary of the pre-emption theory by Sir W. Johnson, Superintendent of the imperial Indian Department, see Letter of W. Johnson to J.T. Kempe, Att. Gen. N.Y. (7 September 1765) in J. Sullivan, ed., *The Papers of Sir William Johnson* vol. 11 (Albany: State University of New York, 1921-65) at 923-27 [hereinafter *JP*]. See also S. Smith, *The History of the Colony of Nova-Caesaria, or New Jersey* reprint (Trenton: William Sharp, 1765) at 7-8.

with,³¹ “tributary” to,³² “allied” to,³³ under the “protection” of,³⁴ or “subjected” to,³⁵ particular colonial governments. Members of these nations were either subjects of the Crown³⁶ or alien friends.³⁷ Other Indian nations were described as “strange,” “foreign,” or “remote,”³⁸ or

³¹ *An act lycensing trading with Indians* 1677 in W.W. Hening, ed., *The Statutes at Large Being a Collection of all the Laws of Virginia* vol. 2 (New York: W. & G. Bartow, 1821-23) at 410 [hereinafter *VSt.*] (settlers allowed to trade with Indians “in amity and friendship with us”); *An act for the better Improving a Good Correspondence with the Indians* 1705-06 in *The Statutes at Large of Pennsylvania from 1682 to 1801* vol. 2 (Harrisburg: Pennsylvania State Printer, 1896-1976) at 229 [hereinafter *PSt.*] (settlers not to harm Indians “being at peace with us”); *An act for Preventing ... Incursions of the Indians at Enmity with the Inhabitants of this Colony* 1755 in *VSt.*, vol. 6 at 551 (unlawful to kill “any Indian in alliance, peace and friendship with His Majesty”).

³² *An act for prevention of misunderstanding between the tributary Indians, and other Her Majesty’s subjects of this colony* 1705 in *VSt.*, *supra* note 31, vol. 3 at 464.

³³ *An act for Preventing Abuses in the Indian Trade.*, 1757-58 in *PSt.*, *supra* note 31, vol. 5 at 320 (regulations designed to “induce ... distant nations to seek our alliance, [and] withdraw themselves from the French”).

³⁴ *Act 1*, 1656 in *VSt.*, *supra* note 31, vol. 1 at 415 (“no Indians that are in our protection [are to] be killed”).

³⁵ *An act for regulating the trade with the Eastern Indians* 1713-14 in *The Acts and Resolves, Public and Private of the Province of Massachusetts Bay* vol. 1 (Boston: Wright & Potter, 1869) at 725 [hereinafter *MAR*] (Indians who “lately submitted themselves, anew recognized their subjection and obedience to the Crown”).

³⁶ *Rhode Island Act* 1677 in “Body of Laws ... (1663-1705),” microfilm copy in W.S. Jenkins, ed., *Records of the States of the United States of America: A Microfilm Compilation* (Washington: Library of Congress, 1949) R.I. B.1(1) at 52-53 [hereinafter *Jenkins*] (“barbarians amongst whom we are Cast” are “ye King’s Subjects”); *An Act for the more Effectual Well-ordering of the Indians* 1717 in *Acts and Laws, of His Majesties English Colony of Connecticut in New-England in America* (London: Timothy Green, 1730) at 230 (Indians are subject to the law as “other His Majesties Subjects”); and *An act for prevention of misunderstanding between the tributary Indians, and other Her Majesty’s subjects of this colony* 1705 in *VSt.*, *supra* note 31, vol. 3 at 464.

³⁷ Although the term “alien friend” was not used, it may be inferred from those statutes which distinguish between subjects and native friends: *An Act for the Better Improving a Good Correspondence with the Indians* 1705-6 in *PSt.*, *supra* note 31, vol. 2 at 229 (“friendship” between Crown’s “subjects and the native Indians”); and *An act to prevent private persons from purchasing lands from the Indians* 1758 in H. Marbury & W. Crawford, eds., *Digest of the Laws of the State of Georgia, From its Settlement as a British Province, in 1755, To the Session of the General Assembly in 1800, Inclusive* (Savannah: Woolhooper & Stebbins, 1802) at 257 (“good correspondence between his majesty’s subjects and the several nations of Indians in amity with the said province”).

³⁸ *An act prohibiting the entertainment of Indians* 1663 in *VSt.*, *supra* note 31, vol. 2 at 185 (contact prohibited with “remote nations”); *An act concerning the Northerne Indians* 1663 in *VSt.*, vol. 2 at 193 (“tributary” Indians to treat “strange Indians” as “enemies”); *An Act Prohibiting trade with Indians*, 1692 in “Laws of Maryland; Liber W.H. & L. Laws, 1640 to 1692” in *Jenkins*, *supra* note 36, Md. B.1(1) at 144 [hereinafter “Laws of Maryland”] (prohibited trade with “forreign and unknown Indians”).

as “enemies.”³⁹ As for the legal mechanism by which a nation shifted from the category of alien/enemy to that of subject/ally, certain statutes recognized what others seem to imply: the establishment of peace or friendship, the creation of a tributary relationship, or the submission to British sovereignty, were objectives achieved through the consent of native nations (sometimes after hostilities) by *treaty*.⁴⁰

In short, colonial statutes were premised upon the assumption that, whatever rights Britain acquired by discovery and occupation and asserted under royal charter, they did not include rights of sovereignty over native peoples. There is some judicial support for this interpretation of imperial law. The Court of Common Pleas in *Craw* concluded that courts often needed to refer to the appropriate “treaty” to determine if a previously foreign people had been made subjects of the Crown; it then observed that “[t]he like may now happen of Virginia, Surenam, or other places, part of which are in the King’s liegeance, part not.”⁴¹ That native peoples were not subject to British sovereignty without conquest or treaty was consistent with the conclusions of several other judges and commentators of the eighteenth century.⁴²

Even if it is accepted that native peoples and customs were foreign to the imperial constitution upon British discovery and settlement of North America and that conquest or treaty was required prior to their incorporation within the imperial order, it may be argued that native customary laws and governments were not of the sort that the common law would have acknowledged after conquest or treaty. For

³⁹ *An act for the Continuance of peace* 1669 in “Laws of Maryland,” *supra* note 38 at 34 (the “ancient Inhabitants of this Province” to be protected from “their Neighbour Nations our Enemys”); *An act for appointing a Militia* 1764 in *A Collection of all the Acts of Assembly of the Province of North-Carolina, Now in Force and Use* vol. 2 (Newbern: James Davis, 1765) at 309 [hereinafter *N. Carolina*] (killing “any Enemy Indian of what Nation soever” declared lawful).

⁴⁰ *An act for confirmation of the Articles of Peace made with the Indians* 1666 in “Laws of Maryland,” *supra* note 38 at 30 (“Articles of Peace” with nations to “be Inviolably kept and preserved”); *An Act for the Better Improving a Good Correspondence with the Indians* 1705-06 in *PST.*, *supra* note 31, vol. 2 at 229 (governor to negotiate “treaties” for “peace and welfare”); *Act I*, 1646 in *VSt.*, *supra* note 31, vol. 1 at 323 (enacted treaty in which King Necotowance acknowledged “to hold his kingdome from the King’s Ma’tie of England”); and *An Act for Regulating the Trade with the Eastern Indians* 1713 in *The Acts and Resolves Public and Private of the Province of Massachusetts Bay* (Boston: Wright & Potter, 1869) vol. 1 at 725 (Indians “submitted themselves, and recognized their subjection and obedience to the Crown”).

⁴¹ *Craw*, *supra* note 21 at 288.

⁴² See *Smith v. Brown* (1705/6), 2 Salk. 666 (K.B.) (Holt C.J. concluded that Virginia had been “conquered”); and *Bl. Comm.*, *supra* note 10, vol. 1 at 107-08 (Blackstone concluded that North American territories were obtained “by right of conquest and driving out the natives ... or by treaties”).

example, a judge might have refused to acknowledge the continuity of Aboriginal laws because they were infidel laws, or because they were not laws but mere tribal customs, or because they were barbaric and unreasonable, or “*mala in se*.”

With respect to the first objection, Coke C.J. concluded in 1608 that the laws of infidel nations ceased *ipso facto* upon their conquest.⁴³ However, this proposition was rejected by Holt C.J. in 1693.⁴⁴ The second objection presents more of a problem because it was common for British officials of the eighteenth century to observe that natives, because of their tribal character, had “no law.”⁴⁵ This conclusion, if accepted at face value, obviously frustrates the argument that Aboriginal laws were capable of recognition at common law. However, the assertion that natives had no law was said to be “understood in a Limited Sense” for it was recognized that they had “Customs & usages that am[oun]t thereto.”⁴⁶ Indeed, Europeans were forced by political necessity to develop at least a rudimentary understanding of these customs and usages; they came to appreciate, for example, the importance of the social ordering of nations into clan units, the idea of common rights to land, the personal as opposed to territorial jurisdiction of clan chiefs over disputes, the importance of reconciling parties to disputes through ceremonies of condolence at which presents were exchanged, the aversion to curtailment of individual liberties by coercive institutions, and the complicated principles of hereditary succession and election governing the selection of clan chiefs.⁴⁷ These customs bore at

⁴³ Calvin, *supra* note 10 at 17b. See also *Witrong supra* note 19 at 402.

⁴⁴ See *Blankard, supra* note 17, cited to 2 Salk. 411.

⁴⁵ Letter of Lt. Gov. W. Bull, S. Carolina to Board of Trade (24 December 1764) in Colonial Office Records, Public Record Office (Kew), London, England 323/20 at 76-68 [hereinafter *PRO CO*] (natives “have no Law but their will”); Letter of Gov. Hunter, N.Y. to Earl Dartmouth (14 March 1713) in C. Headlam, ed., *Calendar of State Papers, Colonial Series, Americas and West Indies* (London: H.M. Stationer’s Office, 1880-1969) at (1712-14) #295 [hereinafter *CSP*] (natives in “state of nature,” and “free from all rules”); Letter of Gov. G. Johnstone, W. Florida to Board of Trade (3 January 1765) in *PRO CO*, 323/20 at 84-85 (“Constitution of the Indian Governments ... founded on the admiration of Heroick fame” not “Coercive Laws”); and generally T. Pownall, *The Administration of the Colonies* (London: J. Walter, 1765) at 157-58.

⁴⁶ Letter of G. Johnson, Indian Department Superintendent to A. Lee (28 March 1772) in *JP, supra* note 30, vol. 12 at 950-53.

⁴⁷ Indian Department Superintendent, Sir W. Johnson had a detailed understanding of the relationship between the institution of chieftainship and the ordering of Aboriginal nations into clans: see Letter of W. Johnson to Board of Trade (8 October 1764) in E.B. O’Callaghan, ed., *Documents Relative to the Colonial History of the State of New York*, vol. 7 (Albany: Weed, Parsons, 1856-61) at 663 [hereinafter *DRCHSNY*]; of Aboriginal customs relating to dispute resolution: see Letter of Gen. T. Gage to Lord Dartmouth, Sec. of St. (7 April 1773) in C.E. Carter, ed.,

least some resemblance to ancient customs in Europe; for example, they may be compared to the ordering of the Gaelic Irish into kindred units, or *septs*, the Irish custom regarding the payment of the *ericfine* to crime victims, the lack of coercive sanctions under Irish *Brehon* law, and the custom of *tanistry* by which Irish *sept* chiefs were selected by a combination of hereditary right and election.⁴⁸ The Irish example is particularly significant, for it was the continuity of these customs, after the English conquest of Ireland and before the introduction of English municipal law, which seventeenth century courts cited as an early precedent for the principle of continuity.⁴⁹ In short, the customary and tribal nature of Aboriginal law and government was not, in itself, a bar to their common-law continuity.

The last ground upon which a judge might have refused to recognize the continuity of Aboriginal law is that it was “*malum in se.*” In response, the example of Anglo-Irish constitutional history may again be cited; it confirms that the standard of reasonableness against which customs were measured at *imperial* common law was not as strict as that which governed the recognition of customs at *municipal* common law. Thus, while the tribal elements of Irish law (for example, common rights in land controlled by *sept* chiefs) may have been regarded as “barbarous”

Correspondence of General Thomas Gage with Secretaries of State, 1763-1775, vol. 1 (New Haven: Yale University Press, 1931-33) at 347-48; and of the allocation of land rights between nations, clans, and families: see Letter of W. Johnson to Board of Trade (30 October 1764) *DRCHSNY*, vol. 7 at 670-72. For general European accounts of Huron/Iroquois law and government, see, for example, J. de Brébeuf, “Relation of the Hurons” (1636) in R.G. Thwaites, ed., *The Jesuit Relations and Allied Documents*, vol. 10 (Cleveland: Burrows Bros., 1896-1901) at 211-63; J. Lafitau, *Moeurs des Sauvages Américains, Comparees aux Moeurs des Premiers Temps* (Paris: Charles Estienne Hochereau, 1724); and C. Colden, *The History of the Five Indian Nations of Canada* (London: Osborne, 1747).

⁴⁸ See *Le Resolution Des Justices Touchant Le Irish Custome de Gavelkind* (1606), Davis 49 at 49 (Ir. K.B.) [hereinafter *Gavelkind*] (every “Irish sept ou lineage” had “un chiefe” who, under the Irish custom of gavelkind, reapportioned all sept land amongst members upon the death of a possessor; and *Tanistry*, *supra* note 21 at 34-35 (chief was “officer per vie tantum” who, “per le custome de tanistry,” was the most dignified elder of a lineage according to “le opinion de multitude” as determined “per election”. See also E. Spenser, *A View of the State of Ireland, As it was in the Reign of Elizabeth* (Dublin: L. Flin & A. Watts, 1613) at 55-56 (“every Chief of a Sept” has “much command over their Kindred”; members “choose” the “elder in that Kindred or Sept” to be chief, and at 7 (by *Brehon* law, the *Brehon* judge will “compound between the Murderer, and the Friends of the Party murdered” and arrange “a Recompense” or “*Eriach*”). See generally Sir H. Maine, *Lectures on the Early History of Institution* (London: John Murray, 1875) at 33-50; F. Seebohm, *Tribal Custom in Anglo-Saxon Law* (London: Longmans, Green, 1911) at 73-77; L. Ginnell, *The Brehon Laws: A Legal Handbook* (London: Fisher Unwin, 1894); and F. Kelly, *A Guide to Early Irish Law* (Dublin: Dublin Inst. for Advanced Studies, 1988).

⁴⁹ *Blankard*, *supra* note 17.

and void at municipal English common law,⁵⁰ seventeenth century courts and sixteenth century statutes recognized that, prior to the legislative introduction of English municipal law into Ireland, and after that introduction but prior to the inclusion of Irish land within the “shire ground” of English “colonies,” Irish law had remained in force amongst the native Irish.⁵¹

To summarize, there are legal grounds upon which to argue that the imperial common-law principle of continuity could have been applied to Aboriginal customs in British North America. Even so, it may be said that this entire approach is ahistorical—that, as a matter of *historical fact*, Aboriginal customary law and government were not recognized at common law. Indeed, it must be acknowledged that no *reported* judicial opinions of the seventeenth or eighteenth centuries recognized and applied Aboriginal customary law. However, it might be possible to argue that the continuity of such customs at common law could be inferred from statute law. For example, in 1764, the imperial ministry drafted a bill to be enacted by Parliament which acknowledged (and in some areas amended) the existing “Government” and “Civil Constitution” of Aboriginal nations in British North America,⁵² suggesting perhaps that such governments and constitutions already had some status at common law. Although this bill was not enacted, reference to the local legislation of particular colonies confirms that the idea of acknowledging statutorily the continuity of existing Aboriginal customary laws and governments was far from novel. For example, Virginia had entered into treaties with “Indian Kings & Queens” which acknowledged their “Dependency on” and “Subjection to” the English Crown, but which also secured to “each Indian King & Queene ... Power

⁵⁰ *Gavelkind*, *supra* note 48 at 49 (*sept* chief powers over distribution of land are “unreasonable” and void at common law); *Tanistry*, *supra* note 21 at 33-4 (custom of *tanistry* “unreasonable” and cause of “barbarisme” and therefore void as a rule of property descent at common law); and Sir J. Davis, *A Discoverie of the State of Ireland* (London: John Iaggard, 1613) at 118 [hereinafter *Discoverie*] (custom of *tanistry* based upon “Barbarisme and uncivility”).

⁵¹ See *Tanistry*, *supra* note 21 at 37-39; *Discoverie*, *supra* note 50 at 253-56; and *Blankard*, *supra* note 17. Within English “shire grounds,” the authority of *sept* chiefs was statutorily abrogated unless confirmed by letters patent, but in unorganized territories at least part of their authority continued in absence of letters patent: see *An Act for taking away captainships* (Ir.), 11 Eliz. I, c. 7; *An Act that the eldest of every Nation amongst the Irisherie shall bring in all the idle Persons of their Surname*, (Ir.), 11 Eliz. I, c. 4; and *The Statutes at Large, passed in the Parliaments held in Ireland, 1310-1786*, vol. 1 (Dublin: George Grierson, 1786).

⁵² Letter of Board of Trade to Sir W. Johnson (10 July 1764) in *PRO CO*, *supra* note 45, 324/17 at 409, enclosing “Plan of 1764” (see especially §§ 18 and 19).

to Govern their own People.”⁵³ These treaty texts were not enacted by statute, but statute law was premised upon the tributary status which they created. By imposing obligations upon “Indian kings and queens tributary” to the colony without identifying them or the details of their constitutional relationship to the colony,⁵⁴ statutes not only made reference to treaties necessary, but implicitly confirmed the continuity of Aboriginal customs governing matters upon which treaties were silent, like the identity of native chiefs and the internal laws of native nations.⁵⁵ The statutes of Maryland also recognized tributary arrangements with native “government[s]”⁵⁶ without identifying the customary laws under which those governments were formed and regulated.

Although certain colonies subjected native peoples to colonial law by statute,⁵⁷ other colonies enacted statutes which were premised

⁵³ “Articles of Peace” (29 May 1677) in W. L. Grant & J. Munro, eds., *Acts of the Privy Council of England, Colonial Series, 1613-1783* vol. 1 (London: H.M. Stationer’s Office, 1909-12) at 733-37.

⁵⁴ See, for example, *An act concerning the Northerne Indians* §663 in *VStr.*, *supra* note 31, vol. 2 at 193 (“king of Potomack” to assist in apprehension of criminals and was prohibited from holding council “with any strange nation”); *An act concerning Indians* §665 in *VStr.*, vol. 2 at 218-19 (tributary kings to “bring in” to colonial authorities natives alleged to have murdered neighbouring settlers, or else their nation would be “answerable” for the offence); *An act for prevention of misunderstandings between the tributary Indians* §705 in *VStr.*, vol. 3 at 464 (tributary kings to inform officials about approaching “strange Indians” and prohibited from alienating lands to anyone outside “their own nation”); and *An act ffor destroying Wolves* §669 in *VStr.*, vol. 2 at 245 (tributary nations to kill certain number of wolves annually).

⁵⁵ Where this was not the case, statutes expressly provided an alternative: see *Act I*, 1646 in *VStr.*, *supra* note 31, vol. 1 at 323 (successors to King Necotowance “appointed or confirmed by the King’s Governours”); and *An act concerning Indians* (1665) in *VStr.*, vol. 2 at 218-19 (certain nation did “not have power within themselves to elect or constitute their owne *Werowance* or chiefe commander”).

⁵⁶ See *An act for the continuance of peace with ... Indians in Choptanke River* §669 in *Laws of Maryland*, *supra* note 38 at 34 (land granted to “Ababes Hatsawago and Toquassimo and the people under their government or charge and their heirs for ever,” to be held for annual rent of six beaver skins); and *An act for ascertaining the bounds ... of the Nanticoke Indians* §698 in *A Complete Body of the Laws of Maryland* (Annapolis: Thomas Reading, 1700) at 47.

⁵⁷ In Massachusetts, natives resident in “Indian Plantations” were subjected to colonial law: *Indians*, 1649, s. 9 in W.H. Whitmore, ed., *Colonial Laws of Massachusetts. Reprinted from the Edition of 1660, with the Supplements to 1672* (Boston: City Council, 1889) at 43; and *An Act for the Better Rule and government of the Indians* §693-94 in *MAR*, *supra* note 35, vol. 1 at 150. See also, generally, J. Noble, ed., *Records of the Court of Assistants of the Colony of the Massachusetts Bay, 1630-1692*, vol. 1 (Boston: County of Suffolk, 1901) at 21, 52-54, and 295; J.H. Smith, ed., *Colonial Justice in Western Massachusetts (1639-1702): The Pyncheon Court Records* (Cambridge: Harvard University Press, 1961) at 85-86 and 123; J.W. Springer, “American Indians and the Law of Real Property in Colonial New England” (1986), 30 *Am. J. Leg. His.* 25 at 47-48; Y. Kawashima, “Jurisdiction of the Colonial Courts over the Indians in Massachusetts, 1630-1763” (1969) 42 *New Eng. Q.* 532; Y. Kawashima, “Forced Conformity: Puritan Criminal Justice and Indians” (1977) 25 *U. Kan. L. Rev.* 361; and Y. Kawashima, *Puritan Justice and the Indian: White Man’s Law in*

upon the assumption that the extension of colonial law, or other special laws, over native nations was contingent upon treaty. Thus, a 1684 Pennsylvania statute authorized the governor and council to “treat with some of the Chief[s] of the Indians” on the issue of excessive liquor consumption in the hope that they would “Submitt to have the Laws of this government executed upon them when they shall any wise transgress them, equally with other inhabitants.”⁵⁸ While most colonies expressly included native people within the protection of colonial law when criminal acts were committed by settlers against their persons or property,⁵⁹ when natives were accused of offending against settlers many colonies recognized a continuity of native jurisdiction over the offender. Statutes attributed collective responsibility to the nation for offences committed by its individual members, imposing upon the “Sachem,” “Chiefe” or “King” the obligation of providing compensation to settlers.⁶⁰ The nation’s jurisdiction over the actual offender was

Massachusetts, 1630-1763 (Middleton: Wesleyan University Press, 1986) at 21-40.

⁵⁸ *Penn. Act*, 1684 in *PST.*, *supra* note 31, vol. 1 at 165. Compare *An Act Against Selling Rum ... To the Indians*, 1701 in *PST.*, vol. 1 at 168 (“kings of the Indian nations” requested restrictions on liquor in native “towns”); *An act for regulating Indian Affairs*, 1757 in S. Nevill, ed., *The Acts of the General Assembly of the Province of New-Jersey*, vol. 1 (Woodbridge, N.J.: James Parker, 1761) at 125 (provisions enacted concerning sale of liquor, debts, and sale of land which had been agreed to “at a Treaty” between “this Government, and the *Indians* inhabiting within the same”); and *New Jersey Act*, 1668 in A. Leaming & J. Spicer, eds., *The Grants, Concessions, And Original Constitutions of the Province of New-Jersey* (Philadelphia: W. Bradford, 1758) at 88 (officials “to treat with the Indians” on issue of “all differences or trespasses past or to come”).

⁵⁹ See *Duke of York’s Laws* 1664 in *PST.*, *supra* note 31 at 94 (injuries “done to The Indians” to be remedied by courts “as if the Cause had been betwixt Christian & Christian”); *An Act for Better Improving a Good Correspondence with the Indians*, 1705-06 in *PST.*, vol. 2 at 229 (those killing or assaulting “Indians inhabiting in this province” are “subject to the same penalties and punishments as he should or ought to be if the same had been done to a natural-born subject of England”); *An act for restraining Indians* 1715 in [North Carolina], “Collection of fifty-seven laws, 1715” at 179 in Jenkins, *supra* note 36, N.C. B.1(1) [hereinafter “fifty-seven laws”] (settlers assaulting Indians to pay same compensation “as he should or ought to have done had the offence been committed to an Englishman”); *An Act for ascertaining the Bounds of ... the Tuskerora Indians* 1748 in *N. Carolina*, *supra* note 39, vol. 2 at 273, regarding damage to Indian crops by settlers’ livestock, “Indians shall and may enjoy the Benefit of the Laws in that Case made and provided, in the same Manner as the White People do or can”); and *An Act for the Well-ordering of the Indians* 1715 in *Acts and Laws, of His Majesties Colony of Connecticut in New England* (New London: Timothy Green, 1715) at 55-56 [hereinafter *Acts of Connecticut*] (settlers damaging Indian livestock subject to colonial judicial jurisdiction).

⁶⁰ “Code of 1650,” microfilm copy in Jenkins, *supra* note 36, Conn. B.1(1) at 28 (every “Company of Indians ... near any English Plantations” to “Declare who is their Sachem or Cheife” who was responsible for trespasses committed by members of his nation); *Concerning Indians*, 1661-62, in *VStr.*, *supra* note 31, vol. 2 at 138 and 141 (settlers could “addresse themselves” directly to the “King” of the nation to which the offender belonged for a “remedy” for “any injuries” sustained); and *Act I*, 1656 in *VStr.*, vol. 1 at 415 (if a settler could establish by the testimony of two other settlers that a native committed a “trespasse or harme” then “satisfaction” was due from the “King

therefore implicitly (and in one case explicitly)⁶¹ recognized. In light of this express statutory provision for settler claims against natives, the statutory silence on native disputes *inter se* suggests that native jurisdiction and customs relating to internal native disputes were also implicitly recognized. In at least one colony, a native jurisdiction over internal native crimes concurrent with colonial jurisdiction was expressly acknowledged.⁶²

To summarize, British judicial opinion and colonial statutory law of the seventeenth and eighteenth centuries are consistent with the conclusion that native nations in North America had sufficient elements of sovereignty to enter into treaties of peace, alliance, and submission. With respect to the fate of native law and government after the commencement of a treaty relationship, colonial statute law is consistent with the conclusion that, from the perspective of British law, these laws had some legal force as part of distinct legal systems with at least some degree of independence from the local colonial legal systems introduced for settlers. Significantly, statute law relied upon but did not create the institution of native chieftainship; it imposed certain statutory duties on chiefs which related to settler-native concerns, but did not delegate to them powers over native peoples. The statutes therefore imply that native chiefs, and the customary laws defining their relationship to native communities, derived British legal authority from some source other than statutory law. It may be argued, then, that Aboriginal customary law had some status at common law.

The precise character of that common-law status is, of course, open to interpretation. It may be argued that colonial statute law is consistent with the application of the imperial common-law principle of

or great man” of the offender’s nation). Compare *An Act for restraining Indians* 1715 in “fifty-seven laws,” *supra* note 59 at 179 (native defendants, in cases of trespass or debt, were to be tried before the colonial Commissioner for Indian Affairs sitting with “the Ruler or Headman of the Town to which such Indian Delinquent may belong”).

⁶¹ “The Concessions and Agreements of the Proprietors Freeholders and Inhabitants of the Province of West New-Jersey, in America,” in Jenkins, *supra* note 36, N.J. B.1(1) (the “Sachem” of the nation to which an Indian offender belonged was to pay “Satisfaction” to the victim, and colonial officials were “to perswade the natives” to use a particular “way of Tryall” (a jury of six natives and six settlers) when they prosecuted the suspected offender).

⁶² *Book of the General Laws For the People within the Jurisdiction of Connecticut* (Cambridge: Samuel Green, 1673) at 34. See also *Acts of Connecticut*, 1715 *supra* note 59 at 55-58: “the Natives about us, notwithstanding all counsel and Advice (to the contrary) given them by the Authority here” continued to commit violence upon each other “and take no course that such justice be executed upon such Malefactors.” Therefore, whenever one native person should murder another “within this Colony, and upon the English land,” the offender was to suffer death, and “if the Indians do not Execution upon such Murtherers or Murtherer,” the accused would be susceptible to the jurisdiction of colonial courts.

continuity, as it was traditionally understood, to native customary law and government such that native nations became components of the imperial order and native laws and institutions continued in force “excepting in point of sovereignty”⁶³—that is, as British laws deriving legal authority from the imperial constitution. Because the traditional application of the principle of continuity serves to include native customs and government under British law and sovereignty, it may be labelled the *inclusive* theory of continuity. In contrast to the inclusive theory of continuity, it may be argued, as American courts and jurists have done, that although the principle of continuity applied to British (and later American)-Indian relations,⁶⁴ it provided not only that conquest/cession did not, by itself, affect native law and government, but that conquest/cession did not “by itself affect the internal *sovereignty* of the tribe”⁶⁵—that, regardless of the express terms of treaties with Britain, native nations remained, in a sense, foreign nations, and native laws remained foreign laws cognizable in British (or American) courts only under principles of private international law.⁶⁶ This application of the principle of continuity recognizes Aboriginal nations as having a non-international sovereign status and leaves native customs and government excluded from British (or American) law and sovereignty. Such an

⁶³ *Wales*, *supra* note 11 at 400.

⁶⁴ For the clearest invocation of the principle of continuity, see N. Margold, “Int. Dept. Sol., 25 Oct. 1934” in U.S. Dept. of Interior, *Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs, 1917-1974* vol. 1 (Washington: Government Printing Office, 1974) at 448; and F. Cohen, *Handbook of Federal Indian Law* (Washington: Department of the Interior, 1945) at 122, who conclude that the status of native law was governed by “the general principle that ‘[i]t is only by positive enactments, even in the case of conquered and subdued nations, that their laws are changed by the conqueror.’” Both sources are quoting *Wall v. Williamson*, 8 Ala. 48 (1845) at 51.

⁶⁵ Margold, *supra* note 64 at 449 [emphasis added].

⁶⁶ American courts concluded that because natives were “fierce savages,” the law which “in general” regulated “relations between the conqueror and conquered” (by which the conquered were usually incorporated within the conqueror’s constitutional system) “was incapable of application,” and a “new and different” rule was applied which provided that natives remained foreign nations under their own laws, the application of which could not be challenged in a British or American court: see *Johnson*, *supra* note 2 at 589-91 and 593-94; and *Worcester* *supra* note 2 at 581. Although some treaty texts stated that natives became British subjects, these treaties did not have that effect, and native communities with treaty relations with Britain remained “sovereign communities”: see *Goodell*, *supra* note 2 at 498-502; and *Worcester* at 546-47 and 555. Although native nations were not foreign states in the international sense (*Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831)), Indians were considered to be aliens (*State v. Ross*, 7 Yerger 74 (Tenn. Ct. Err. & App. 1834); *Elk v. Wilkins*, 112 U.S. 643 (1884)) and native customs were applied as other foreign laws were, pursuant to conflicts of law principles (*Holland v. Pack*, 1 Peck 151 (Tenn. Ct. Err. & App. 1823); *Morgan v. M’Ghee*, 5 Humphreys 13 (Tenn. Ct. Err. & App. 1844)).

interpretation may therefore be said to manifest an *exclusive* theory of continuity.

Whichever interpretation of the common-law principle of continuity is preferred, the application of the principle to British-Indian relations of the seventeenth and eighteenth centuries remains susceptible to the charge of ahistoricism. Would a court have made the above-noted inferences from colonial statute law? Would a British court of the time have applied the principle of continuity in its traditional form, or would it have agreed with subsequent American interpretations of the British-Indian relationship? Clearly, what is missing from this discussion is judicial support and clarification. Rather than speculating about what a British court might have done at the time, it would be useful indeed to cite a British judgment that recognized and applied native customary laws relating Aboriginal government and, in so doing, articulated some theory of imperial constitutional law which explained the relationship between imperial, colonial, and native systems of law and government. The rest of this article examines the extent to which *Mohegan* serves these functions.

III. *MOHEGAN INDIANS V. CONNECTICUT* (1705-1773)

A. *Overview of the Dispute and Proceedings*

The *Mohegan* case involved a land dispute. The dispute was summarized by Marshall C.J. of the United States Supreme Court in *Johnson*:

The controversy between the colony of Connecticut and the Mohegan Indians, depended on the nature and extent of a grant [of land] made by those Indians, to the colony; on the nature and extent of the reservations made by the Indians in their several deeds and treaties, which were alleged to be recognized by the legitimate authority, and on the violation by the colony of rights thus reserved and secured.⁶⁷

Upon arriving on the Connecticut coast in the 1630s, English settlers treated with the “Sovereign Head, or Heads”⁶⁸ of the Mohegan nation. In 1640, the Mohegan *sachem* Uncas ceded to them all Mohegan lands except a reserve of farms and hunting grounds.⁶⁹ In 1659, the Mohegan conveyed their reserved lands to Major John Mason (later deputy

⁶⁷ *Johnson*, *supra* note 2 at 598.

⁶⁸ “Defence of Governor and Company” (1738) in *JP*, *supra* note 30, vol. 11 at 428.

⁶⁹ “Deed of 28 September 1640” in *PRO CO*, *supra* note 45, 5/1269 at 90.

governor) and his heirs “as their Protector and Guardian In Trust for the whole Mohegan Tribe.”⁷⁰ In 1660, Mason transferred this land to the colonial government in return for its undertaking that, when opening it to settlement, the government would leave sufficient lands to the Indians for their farms. The Mohegan claimed this transfer was invalid because they had not been privy to it, and for the next century they and Mason’s heirs would argue that Mason’s heirs held the reserved lands in trust for Mohegan use.⁷¹

In 1662, the settlers of Connecticut were incorporated by royal charter into “a Body Politique & Corporate” with legislative, executive, and judicial powers.⁷² The boundaries of Connecticut established by charter included the reserved, or trust, lands claimed by the Mohegan.⁷³ The colony therefore argued that, whatever doubt might have existed before the charter as to land titles, after the charter the reserved lands were “vested in the Govr and Company in full and Absolute Property and Right in Law.”⁷⁴ But despite the inclusion of Mohegan lands within the chartered limits of Connecticut, the colony continued to treat with the Mohegan as a separate nation with land rights. In 1681, the parties entered into a treaty that not only appeared to acknowledge ongoing Mohegan rights in the disputed land, but also implied that the colonial legal regime did not extend over the Mohegan: the colony promised to administer “Equal Justice” to them “as our own people” if they “before hand declared their Subjection to our Laws.”⁷⁵

In 1687, the colony, by legislation and orders in council, began granting the disputed reserved land to townships.⁷⁶ In 1704, the Mohegan, through their English “guardians” (the Masons), petitioned the Crown, arguing that these acts violated “Treaties” and were

⁷⁰ *Case of the Appellants [Mohegan]*(c. 1751), Treasury Solicitor Records, Public Record Office (Chancery Lane), London, England, 11/1006, f. 3888 at 2 [hereinafter *PRO TS*]. See “Deed of 15 August 1659” in *PRO CO*, *supra* note 45, 5/1269 at 91.

⁷¹ *PRO TS*, *supra* note 70 at 2.

⁷² “Connecticut Charter” (10 May 1662) in *Collections of the Connecticut Historical Society* vol. 1 (Hartford: Connecticut Historical Society, 1907) at 52 [hereinafter *Collections*].

⁷³ “A Map of ye Mohegan Sachims Hereditary Country” (1 August 1705) in Map Collection, Public Record Office (Kew), London, England.

⁷⁴ “Defence of the Govr & Company” in *Governour & Company of Connecticut & Mohegan Indians by their Guardians; Certifyed Copy of Book of Proceedings, before Commissrs. of Review, 1743* in *PRO CO*, *supra* note 45, 5/1272 at 119 [hereinafter *Book of Proceeding*].

⁷⁵ “Articles of Agreement ...” (18 May 1681) in *PRO CO*, *supra* note 45, 5/1269 at 93-94.

⁷⁶ *PRO TS*, *supra* note 70 at 7; and *Book of Proceedings supra* note 74 at 123-24.

therefore “illegal.”⁷⁷ The Crown commissioned the governor and council of Massachusetts to hear and determine the dispute. In 1705, this tribunal decided in favour of the Indians. The colony appealed the 1705 decision and, in 1706, the appellate committee of the Privy Council granted a Commission of Review. This Commission never met and a new Commission of Review was established in 1737. The second Commission of Review overturned the 1705 decision in 1738, but because of alleged irregularities the Crown set aside its decision and created yet another Commission of Review. This new Commission of Review overturned the 1705 decision in 1743. The Mohegan Indians appealed this decision to the Privy Council which, in 1772, without written reasons, reported to the Crown that the decision of the 1743 Commission of Review be affirmed; the Crown confirmed the Privy Council’s report in 1773.

With this overview of the case, it is now possible to consider the nature of the tribunal created to hear and determine the Mohegan claims and the various judgments rendered.

B. *The 1704 Dudley Commission*

The Mohegan complaints against Connecticut were referred to the Attorney General, Sir Edward Northey, who, in February 1704, informed the Board of Trade that the Crown “may lawfully erect a Court within that Colony” with authority to “command” the colonial government “not to oppress those Indians ... notwithstanding the Act made [by the colonial legislature] ... to dispossess them, which I am of opinion was illegal and void.”⁷⁸ In March 1704, the Board of Trade recommended to the Queen that Northey’s advice be followed.⁷⁹ It also recommended that because the Mohegan “have not the use of money” the cost of the proceedings be assumed by the Crown; this measure would “gratify such Indians as are under your Majesty’s Dominion.”⁸⁰ The Crown accepted these recommendations, and in April 1704 issued a Commission under the great seal to Governor Dudley of Massachusetts

⁷⁷ *PRO TS*, *supra* note 70 at 8-9; see also *CSP*, *supra* note 45, (1702-03) at #1353 and (1704-05) at #11.

⁷⁸ Letter of Sir E. Northey, Att. Gen. to Board of Trade (29 February 1704) in *CSP*, *supra* note 45, (1704-05) at #146.

⁷⁹ See Letter of Board of Trade to the Queen (9 March 1704) in *ibid.* (1704-05) at #171 [hereinafter Queen].

⁸⁰ *Ibid.*

and his council empowering them to form a tribunal to determine the Mohegan complaints.⁸¹

The Royal Commission to Dudley stated that “in several Treaties” the Mohegan were recognized to have “reserved Lands” and that “the Governmt. of Connecticut have passed an Act or Order in their General Court or Assembly by which they have taken away from the said Indians that small Tract of Lands which those Indians have reserved to themselves.”⁸² The tribunal was ordered to summon both the governor and company of Connecticut and the chief *sachems* of the Mohegan nation, “take Examinations upon Oath or otherwise,” and, “having hear’d both parties ... to determine [the matter] according to Justice and Equity, and to restore the said Indians to their Settlements in case they be unjustly dispossessed.”⁸³ The Commission’s ruling was to have legal force without Crown approval, although a right of appeal to “Our Privy Council” was provided.⁸⁴

As for the constitutional status of the Mohegan, the Commission was vague. It stated that the Mohegan were “Proprietors” of land “in our Colony of Connecticut”⁸⁵ and, indeed, the Commission was premised upon the idea that the Crown could judicially bind the Mohegan nation in relation to those lands. In this respect, the Commission was consistent with the Board of Trade’s earlier observation that the Mohegan were “under ... [her] Majesty’s Dominion.”⁸⁶ On the other hand, the Commission expressly recognized the authority of the “Principal Sachems” of the nation, and observed that the nation had “cultivated a firm friendship by League with Our said Subjects of Connecticut, and have always assisted them when they have been attacked by their Enemies.”⁸⁷ In this respect, the Commission is consistent with the idea that the Mohegan were allies and not subjects.

⁸¹ See Letter of Commission to J. Dudley, Gov. Mass. & others (3 April 1704) in *PROCO, supra* note 45, 324/29 at 280-83 [hereinafter *Dudley Commission*].

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ Queen, *supra* note 79.

⁸⁷ *Dudley Commission supra* note 81.

C. *Constitutional Character and Legality of the Imperial Tribunal*

From the 1704 Commission, it is difficult to say precisely what sort of tribunal was created. Three possibilities may be suggested. First, the tribunal may have been analogous to an international arbitral tribunal, and thus was to apply the law of nations on the assumption that the Mohegan nation was a foreign, sovereign state; second, it may have been analogous to a local colonial court, and thus was to apply rules of local Connecticut law and equity as if determining a local dispute between two residents of the colony; or, third, it may have been an imperial court which was to apply imperial law on the assumption that the dispute was between two parallel components of the British imperial order.

Before considering which of these three possibilities is most accurate, two characteristics of the tribunal must be emphasized. First, the tribunal's judicial powers did not derive from Parliamentary statute but from a Royal Commission issued by the Crown acting under the royal prerogative alone. Second, the tribunal was intended to be a court of law and not merely a Royal Commission of enquiry. It must have been a court of law because it was empowered to set aside colonial statutes that violated Mohegan treaty rights. Although in relation to other colonies the Crown reserved to itself the right to disallow colonial statutes for reasons of policy, no such right was reserved in Connecticut's charter; its statutes were "not repealable by the Crown"⁸⁸ and could not be set aside (unless by Parliament) except by judicial process for some reason of law (like, for example, the *ultra vires* rule).

That the tribunal was created under the prerogative but was to have the authority to make orders having legal force in the colony notwithstanding conflicting colonial statutes suggests that the tribunal was not an international court applying rules of international law. Although the Crown might, pursuant to the royal prerogative over foreign affairs, agree with a foreign, sovereign state to create a tribunal with powers to make rulings on international legal rights, that agreement, or treaty, as well as the findings of that tribunal, would remain matters of international law which, according to British constitutional law, could not have domestic legal force without enabling statutory enactment.⁸⁹ In short, the power conferred by the Crown on

⁸⁸ Letter of Board of Trade to House of Lords (13 June 1733) in *CSP*, *supra* note 45, (1734-35) at #20.

⁸⁹ See generally *Nabob of Carnatic v. East-India Co.* (1793), 2 Ves. Jun. 56 (Ch.).

the tribunal of making orders effective in British law precludes the conclusion that it was an international court.

However, if the tribunal was of the second sort—that is, a court empowered to determine a local dispute between two colonial residents—then it would have been unconstitutional. As a general rule of English law, the Crown was prohibited from establishing or exercising under the royal prerogative alone judicial authorities which derogated from the established jurisdictions of common-law courts;⁹⁰ indeed, the judicial powers that the Crown's Privy Council had traditionally enjoyed were almost fully denied or abolished by statute in the seventeenth century.⁹¹ Where legal disputes arose in colonies having local courts, those courts had exclusive original jurisdiction,⁹² although a remnant of the ancient judicial powers of the Crown remained and appeals from these colonial courts lay to the Privy Council's "committee for hearing appeals from the plantations" (later constituted by statute as the Judicial Committee of the Privy Council).⁹³ Aside from these general principles of constitutional law, the Crown's creation of a special court to address matters properly within the jurisdiction of local Connecticut courts would have infringed upon the colony's rights of jurisdiction granted by the 1662 charter—indeed, it was on this ground that the colonial government objected to the tribunal's powers to "Judicially Determine" the Mohegan complaints.⁹⁴

In short, the only ground upon which the Crown, acting under the prerogative alone, could give a tribunal judicial authority to make legally binding orders in the colony which had the effect of setting aside existing colonial statutes is if it is assumed that the dispute was between two parallel components of the empire and the tribunal was an *imperial* court applying *imperial* law. Although the original judicial jurisdiction of the Crown-in-council was, by the early seventeenth century, very narrow, it was acknowledged that it included the authority to determine disputes between two colonial governments.⁹⁵ This jurisdiction of the Crown was

⁹⁰ See *Case of Commissioners of Enquiry* (1608), 12 Co. Rep. 31; and E. Cambell, "The Royal Prerogative to Create Colonial Courts" (1964) 4 Sydney L. Rev. 343 at 348-50.

⁹¹ See, for example, *An Act for the regulating of the Privy Council, and for taking away the court commonly called the Star Chamber (Habeas Corpus)* (G.B.), 16 Car. I, c. 10; *A repeal of a branch of a statute primo Elizabethae, concerning comissioners for causes ecclesiastic* (G.B.), 16 Car. I, c. 11; and *Bill of Rights* (G.B.), 1 W. & M., sess. 2, c. 2, s. 1(3).

⁹² See *Roberdeau* *supra* note 17.

⁹³ See *Judicial Committee Act* (G.B.), 3 & 4 Will. IV, c. 41.

⁹⁴ "Protestation" (24 August 1705) in *PRO CO*, *supra* note 45, 5/1272 at 48-49.

⁹⁵ See *Penn v. Baltimore* (1750), 1 Ves. Sen. 444 at 446 (Ch.) [hereinafter *Baltimore*].

not unique to inter-colonial disputes. In articulating the rule in *Penn v. Baltimore*, Lord Hardwicke drew upon general principles of imperial law relating to the Crown's jurisdiction over disputes between other political units of the empire, citing in particular its jurisdiction over disputes between two Welsh lordships marcher.⁹⁶ Like colonies, lordships marcher had jurisdiction over disputes arising "between private parties."⁹⁷ But, where the dispute was between two lordships marcher, the Crown-in-council had, "by the common law" (according to Hale), original jurisdiction and could resolve the dispute "by special commission."⁹⁸ The reason for the rule was simple: it was "repugnant to demand justice of him whose jurisdiction is questioned," and therefore "for want of a Superiour" the parties "had recourse unto the King their Supream Lord."⁹⁹ In short, the Crown had an inherent power as sovereign of the empire to manage relations and determine disputes between components of the empire. This head of the royal prerogative may be labelled the "intra-imperial relations prerogative."

Because the intra-imperial relations prerogative derived from general principles described by Hale as "common law," it could presumably extend to authority over disputes between other units of the empire, including those between colonies and Indian nations. Indeed, an imperial tribunal had been created in 1664 to hear and determine both disputes between the New England colonies and disputes between the colonies and the "Natives of those Countryes."¹⁰⁰ The Royal Commissions and instructions surrounding the creation of this tribunal addressed the same constitutional concerns that would be raised in the *Mohegan* case. In granting jurisdiction to the tribunal, the Crown instructed that cases involving "any particular right between party & party" were to be left to the "usuall proceedings" of the local colonial courts.¹⁰¹ However, disputes between settlers and native nations did not

⁹⁶ *Ibid.*

⁹⁷ *Ibid.* See also Sir J. Dodridge, *The History of the Ancient and Moderne Estate of The Principality of Wales, Duchy of Cornwall, and Earldome of Chester* (London: Tho. Harper, 1630) at 38.

⁹⁸ D.E.C. Yale, ed., *Sir M. Hale's The Prerogatives of the King* 92 (London: Publications of the Seldon Society, 1976) at 28; see also Dodridge, *supra* note 97 at 38; and *Wales*, *supra* note 11 at 403-04.

⁹⁹ *Wales*, *supra* note 11 at 404; and Dodridge, *supra* note 97 at 38. See also *Baltimore*, *supra* note 95 at 447.

¹⁰⁰ "Comission for New England" (23 April 1664) in *PRO CO*, *supra* note 45, 324/1 at 205.

¹⁰¹ "Instructions to ye Comissrs to visite ye Colony of ye Massachusetts ..." (1664) in *PRO CO*, *supra* note 45, 324/1 at 232.

fall within this category. The tribunal was empowered to “take effectuall course” to ensure that “Treatyes or Contracts” made with native “Kings” were “punctually performed,” and that “full reparation and satisfaction” was paid for breaches.¹⁰² Also, the tribunal was instructed to determine whether the native *sachems* at Narragansett Bay had submitted to the king as “his Subjts,” and if they had to inform them that it was empowered “to dow them justice” in relation to “any injuryes done to them” by settlers.¹⁰³ Royal instructions reassured Connecticut that in creating a tribunal to hear native complaints the king would “not suffer to be violated in ye least degree” any of its “Libertyes and privileges” granted by the 1662 charter.¹⁰⁴ In short, the Narragansett natives, having submitted to the Crown, must have been considered a component of the empire; but, since they were a distinct component, legal disputes between them and the colonists were subject to the original jurisdiction of the imperial Crown by virtue of the intra-imperial relations prerogative.

The analogy between inter-colony or inter-lordship marcher disputes and colonial/native disputes is obvious where the native nation resided beyond the colony’s boundaries, but less obvious where the nation was located within colonial boundaries. The 1664 Royal Commissions made no distinction between natives living within or outside colonial boundaries (although the Narragansetts were outside Connecticut’s charter boundaries).¹⁰⁵ The matter became of central concern in the *Mohegan* case because imperial jurisdiction was invoked in relation to a native nation located within colonial boundaries. The argument “that ye Suit was in effect like one between 2 colonies” was opposed by Connecticut throughout the proceedings for this reason.¹⁰⁶

Although a strict analogy to inter-colonial disputes did not apply, the Mohegan nation may nevertheless have been considered to have had sufficient independence from the colonial legal regime to allow the invocation of the intra-imperial relations prerogative. This possibility

¹⁰² *Ibid.* at 230-31.

¹⁰³ “Instructions to Our Commrs for ye Visitacon of Our Colony of Connecticut” (c. 1664) in *PRO CO*, *supra* note 45, 324/1 at 240.

¹⁰⁴ “Instructions to ye Govor & Council of Connecticutt” (23 April 1664) in *PRO CO*, *supra* note 45, 324/1 at 245.

¹⁰⁵ See F. Jennings, *The Invasion of America: Indians, Colonialism and the Cant of Conquest* (London: Norton, 1976), pt. 2; and J.W. Springer, “American Indians and the Law of Real Property in Colonial New England” (1986) 30 *Amer. J. of Leg. His.* 25 at 34.

¹⁰⁶ Letter of R. Jackson, Conn. London agent to W. Pitkin, Gov. Conn. (6 February 1767) in *Collections*, *supra* note 72, vol. 19 at 68-69.

appears to have informed an opinion in 1751 by Attorney General Sir Dudley Ryder and Solicitor General William Murray (later Lord Mansfield, Chief Justice of the King's Bench). Their immediate concern was the legality of an imperial tribunal created to determine a dispute between the colony of New Jersey and a group of landholders who claimed title under purchases made from Indian nations. Ryder and Murray initially concluded that there were no precedents of imperial Commissions issuing to determine "matters of Private Property between the Subjects," matters which were "only proper for the Conusance of the Ordinary Courts of Justice."¹⁰⁷ However, they were asked to reconsider this opinion in light of the 1704 Commission issued in the *Mohegan* case. Upon considering this Commission, they concluded that there was a material difference between the two cases: the New Jersey dispute involved "the Rights & possession of Lands disputed between his Majesty's Subjects of that Government, to whom his Majestys Courts there ought to be & are open," whereas the Commissions issued in the *Mohegan* case "were for determining disputes between the Whole Province of Connecticut & the body of Mohegan Indians between whom there is no common Court of Justice there."¹⁰⁸ The location of the Mohegan within the colony was apparently not considered relevant; instead, the legality of the imperial Crown's jurisdiction was contingent upon the finding that there was a dispute between two political units neither of which had judicial jurisdiction over the other. To summarize, the examination of the constitutional character of the tribunal created to determine the Mohegan complaint reveals much about the constitutional status of the Mohegan nation.

D. *The 1705 Judgment*

For the reasons mentioned above, Connecticut entered a plea to jurisdiction at the tribunal's first sitting and then refused to participate further.¹⁰⁹ According to Governor Dudley, the colony also submitted that Oweneco (who had succeeded Uncas) was "no Sachem or Gov[ernor]" of the Mohegan, and therefore lacked authority to

¹⁰⁷ "Report of the Attorney & Sollr. Genl ... into the Cause of the Rise Progress and Continuance of Comotions in New Jersey" (14 August 1751) in Privy Council Records, Public Records Office (Chancery Lane), London, England, 1/49 at bundle 41 [hereinafter *PRO PC*].

¹⁰⁸ See Letter of D. Ryder, Att. Gen. N.J. and W. Murray, Sol. Gen. N.J. to Mr. Sharpe (17 August 1751) in *PRO PC*, *supra* note 107, 1/49 at bundle 41.

¹⁰⁹ See "Protestation" (24 August 1705) in *PRO CO*, *supra* note 45, 5/1272 at 48-49.

represent the Indians.¹¹⁰ Although the court did not address the constitutional argument of the colony in its judgment, Dudley informed the Board of Trade that, in his opinion, if the Crown could not grant a Commission to hear “so apparent a breach between that Government and a Tribe of independent [*Indians*],” then “that Corporation must be [beyond] all challenge.”¹¹¹ Dudley also stated that the colony’s challenge to the “government” of Oweneco over his nation was not sustainable because the colony’s own records demonstrated that it had considered him to be the proper *sachem*.¹¹²

The Dudley tribunal delivered its judgment in 1705, stating:

[T]he Court confirms the justice of the Mohegans’ case & complaint. The Court determine[s] (1) that Owaneco is the true Sachem of the Mohegan Indians (2) that he & his ancestors have always been loyal to the Crown of England (3) and that the Government of Connecticut have by several treaties acknowledged them to have lands of their own etc. (4) the Mohegan Indians have had an undoubted right to a very large tract of land within that Colony.¹¹³

It went on to hold that, by the treaties, the reserved lands constituted both “trust” lands held by Mason and his heirs for Mohegan use and “sequestered” lands, which were trust lands deeded back to the Mohegan with a limitation against alienation. It observed that the colonial government “approved of Major Mason’s being Guardian of the Mohegans” and had “directed” in 1692 that remaining Mohegan “reserved” lands not be alienated without the consent of Mason or his heirs.¹¹⁴ The court then stated that, “[c]ontrary to these reservations & treaties,” the colony had granted reserved lands to settlers; thus, the judgment concluded: “[t]he Court are unanimously of opinion that they [the Mohegans] ought to be restored to the said lands.”¹¹⁵

The 1705 judgment was not explicit about the constitutional status of the Mohegan nation. Although it observed that Mohegan chiefs had been “loyal to the Crown,” it did not indicate whether that loyalty was manifested by alliance or subjection. However, the court’s conclusions, first, that the Mohegan nation’s territory constituted

¹¹⁰ Letter of J. Dudley, Gov. Mass. to Board of Trade (1 November 1705) in *CSP, supra* note 45, (1704-05) at #1422.

¹¹¹ *Ibid.* [emphasis in original].

¹¹² *Ibid.*

¹¹³ “Proceedings of the Court of Enquiry & determination of the Complaint of the Mohegan Indians” (3 November 1705) in *CSP, supra* note 45, (1704-05) at #1312.

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

reserved lands within colonial boundaries which were either held in trust by individual Englishmen or held under deed granted by those individuals and, second, that the Mohegan right to alienate their territory was subject to restrictions imposed by the colonial government, seem inconsistent with the idea that the court viewed the Mohegan nation, while resident within its reserved lands, as occupying the position of an internationally sovereign state. Indeed, there is nothing in the judgment that contradicts the Board of Trade's earlier conclusion that the Mohegan were "under ... [her] Majesty's Dominion."¹¹⁶ However, as Dudley's extra-judicial comments suggest, the ground for the court's rejecting the colony's constitutional challenge to the Commission must have been that the Mohegan were, in some degree at least, "independent" from local colonial jurisdictions. In short, the judgment seems predicated upon the view that the Mohegan nation was an independent constitutional unit within the British empire. If so, in declaring Owaneco to be "true Sachem" and in upholding treaty rights against colonial law, the court may be said to have applied "imperial" law. There is nothing in the judgment that expressly confirms or denies the idea that the Mohegan nation retained elements of "Indian" or "tribal" sovereignty.

E. *The 1706 Privy Council Appeal*

The colony appealed the 1705 judgment, and in 1706 both parties submitted arguments before the Privy Council's committee for hearing appeals from the plantations. Among the seven members of the appellate committee were Holt and Trevor C.JJ. of the King's Bench and Common Pleas respectively.¹¹⁷ The colony again argued that the creation of an imperial court to determine land titles within the colony was an illegal infringement of the 1662 charter.¹¹⁸ In making this argument it had to establish that the Mohegan nation was subject to the jurisdiction of colonial courts, an argument undermined by its practice, evidenced by the 1681 treaty, of "treating with them as independent."¹¹⁹

¹¹⁶ *Supra* note 79.

¹¹⁷ Smith, *supra* note 5 at 427, n. 59.

¹¹⁸ *Ibid.* at 427.

¹¹⁹ Letter of Sir H. Ashurst, Conn. London Agent to Governor & Council of Connecticut (21 May 1706) in *The Winthrop Papers* Collections of the Massachusetts Historical Society, 6th series, vol. V (Boston: University Press, 1888) at 324.

In its report the Appellate Committee of the Privy Council stated:

Their Lordps. have fully heard the Parties concerned by their Council Learned upon the matter of the said appeal ... [and] Agree humbly to Report their Opinion that ... it Appearing the Mohegan Indians are a Nation with whom frequent Treatys have been made, the Proper way of Determining the aforesaid Differences, is by Her Matys Royall Commission; Their Lordps. are further humbly of Opinion that a Commission of Review ... be Expedited at Her Matys Charge.¹²⁰

In upholding the Crown's right to create a special court under the prerogative to determine the Mohegan complaint, the Privy Council's report established two basic propositions of imperial constitutional law: (a) treaties entered into between a colony and an Indian nation were relevant to the determination of the legal status of the Indian nation and the legal powers of the colonial government, such that (b) where a colony had, by treaty, recognized the independent character of an Indian nation, its constitutional authority to exercise judicial jurisdiction over that nation was limited and it was open to the imperial Crown to intervene without infringing upon the colony's rights of judicature. However, the report did not indicate whether the treaty was an absolute bar to colonial jurisdiction, such that the nation could claim exemption as a matter of right, or whether the colony's authority over the nation was limited only in those instances where the imperial Crown had decided, as a matter of discretion, to intervene.

Similarly, the report was ambiguous about the legal character of the Mohegan "Nation." Although Smith's summary stated that the Privy Council held that the treaties made with the Mohegan "revealed that the Mohegans were a sovereign nation,"¹²¹ the Privy Council did not use the word "sovereign" and there is nothing in the report which precludes the conclusion that the Mohegan nation was a component of the imperial order. If the Mohegan nation was not, to some degree at least, incorporated within the empire, why would "the Proper way of Determining the aforesaid Differences" have been "by Her Matys Royall Commission?" It has been argued elsewhere that unless the Privy Council concluded that the Mohegan were "sovereign," the establishment of the Dudley Commission by the Crown would have violated the general rule that rights between subjects could only be

¹²⁰ "Report of the Committee for hearing of Appeals from the Plantations touching ye Mohegan Indians Lands" (21 May 1706) in *PRO PC*, *supra* note 107, 2/81 at 204-205.

¹²¹ Smith, *supra* note 5 at 427-28.

determined by common-law courts.¹²² This conclusion, however, ignores the inherent jurisdiction of the Crown under the intra-imperial relations prerogative to determine disputes between components of the empire “by special commission.”¹²³ In short, the Privy Council report may be interpreted as consistent with the assumption that the Mohegan people were a national unit under the Crown’s imperial sovereignty, and that the “Treatys” with the colony were in the nature of agreements between distinct units of the imperial constitutional order.

In response to these points, it may be argued that while there is nothing in the Privy Council decision that precludes the idea that the Mohegan were incorporated within the imperial order, there is also nothing in it that precludes the idea that they were, to some degree at least, sovereign. Thus, it may be argued that the Mohegan decision to seek out and submit to the Crown’s judicial jurisdiction in this one case was not inconsistent with, but rather was the exercise of, sovereign rights. Further, it may be said that, if the plain meanings of the words “Nation” and “Treatys” inform the interpretation of the report, then the report must be interpreted in the way suggested by Smith—as judicial recognition of Mohegan sovereign status.

To summarize, the 1706 Privy Council decision confirms that the Mohegan nation was independent from the colonial system in Connecticut, but is unclear on whether the Mohegan nation was sovereign and whether it was subject to or independent from imperial Crown sovereignty.

F. *The 1738 Commission of Review*

1. Arguments and evidence

The 1706 Commission of Review, though appointed, never sat, and a second Commission of Review—consisting of the Governor of Rhode Island, and of Rhode Island and New York council members—was created in 1737.¹²⁴ During the intervening years the colony recognized Ben Uncas, a descendant of the original Uncas, as chief *sachem* and obtained from him a signed release from all Mohegan

¹²² Campbell, *supra* note 90 at 357-58.

¹²³ *Supra* note 98.

¹²⁴ Smith, *supra* note 5 at 428-30.

claims.¹²⁵ The Mohegan refused to recognize this act, and at the commencement of the 1738 hearing argued that John Uncas, another descendant of the first Uncas, was rightful *sachem*. The court therefore proceeded to determine which person was *sachem*.¹²⁶ To this end, it accepted written and oral evidence from witnesses.¹²⁷

Affidavits submitted to the court reveal two types of argument corresponding to the two main features of Aboriginal constitutional custom—election and hereditary succession.¹²⁸ The affidavits supporting Ben Uncas emphasized the ceremony at which he was purportedly elected. One witness stated, “I was there Present at the Time when he was Invested with the Sachemship with Much Pomp Expressions of Joys And by the Universall Consensus of all the Mohegan Indians.”¹²⁹ The affidavits supporting John Uncas emphasized rules of succession. One witness, purporting to be acquainted with Mohegan “Customs,” traced the descent of the sachemship through several generations and argued that this succession of the office within the Uncas lineage revealed a custom upon which “a Right to the Sachemship” could be established.¹³⁰

The majority declared Ben Uncas to be the lawful *sachem* of the Mohegan Indians. The two New York council members dissented, stating to the Board of Trade, “it came out that by the constitution of the tribe the sachemship was hereditary and that John Uncas was *sachem de jure*,” and although Ben Uncas had been “*sachem de facto*” he had been “deposed by the tribe.”¹³¹ Suspecting bias on the part of the Rhode Island members of the court, the New York commissioners withdrew from the proceedings.¹³² The Rhode Island commissioners proceeded to hear the merits of the case, finding for the colony.

¹²⁵ *Ibid.* at 429; and *Case of the Appellant*, *supra* note 70 at 16.

¹²⁶ “Proceedings of the 1738 Commission of Review” in *PRO CO*, *supra* note 45, 5/1269, T 17 at 68a.

¹²⁷ *Ibid.* at 68a-69b.

¹²⁸ See *supra* note 47.

¹²⁹ “Affidavit of Johnathan Wickwine” (30 May 1738) in *PRO CO*, *supra* note 45, 5/1269 at 112a.

¹³⁰ “Affidavit of John Waterman” (30 May 1738) in *PRO CO*, *supra* note 45, 5/1269 at 116.

¹³¹ Letter of P. Cortlandt & D. Horsmanden to Board of Trade (20 November 1738) in *CSP*, *supra* note 45, (1738) at #508.

¹³² *Ibid.*

2. The 1738 judgment

The court explained its decision on the Mohegan sachemship in this way:

We find, by the Evidence of Sundry indifferent Persons of good Credit, yt. Ben Uncas is ye present Chief Sachem of the Moheegan Indians, and yt. he has been Solemnly Installed into yt. Office According to the Indian Method, & yt. ye Sd. Ben Uncas is ye Eldest Son of his Father Major Ben Uncas his predecessor, and yt. He was appointed to Succeed his Sd. Father by an Agreement made between his Father & the Tribe Anno 1723, which Agreement is ye first Plan or Modell of Governmt. yt. we Can discover to have been Among sd. Tribe; and we also find yt. Ben Uncas, & his Father Major Ben Uncas, have, at all Times Since their Respective Installments, been acknowledged by ye Government of ye Colony of Connecticut to be ye true & Rightfull Sachems of sd. Tribe.¹³³

The court then proceeded to consider the relevant deeds and treaties, accepting the colony's interpretation of their legal implications. It also observed that the 1662 charter granted to the corporation "*all ye Lands* in sd. Colony," and that any reserved lands remaining in the possession of the Mohegan were "secured to ye sd. Chief Sachem and Mohegan Indians by the Colony" as their "Property."¹³⁴ It therefore overruled the 1705 judgment.

Like the 1705 judgment, the 1738 decision, although vague, revealed a certain conception of Mohegan constitutional status. Its conclusion that Mohegan lands were, by charter, within the colony of Connecticut and held from the corporation implies that the Mohegan did not possess all the attributes of a sovereign state. However, it clearly held the Mohegan nation to have had a "Governmt" distinct from that of the colony in which it was located. It may therefore be argued that, despite differences in opinion on the merits of the case, the 1738 and 1705 courts both seemed to regard the Mohegan nation as an independent unit within the imperial order.

The significance of the 1738 judgment to arguments about the status of Aboriginal customary law in British North America—which has been overlooked by subsequent courts and commentators—derives from the fact that it represents very clearly the recognition and application of Aboriginal customary law relating to Aboriginal government by a British court of the eighteenth century. In this respect, it supports the view that arguments about the common-law status of Aboriginal customary law

¹³³ "Judgment of 1738 Commission of Review" (5 June 1738) in *PRO CO, supra* note 45, 5/1269, T 17 at 72a.

¹³⁴ *Ibid.* at 72b and 73a.

are not ahistorical: British judges of the time *were* prepared to acknowledge the continuity of Aboriginal customary law and government in British colonies. Even if the court was biased, its judgment was justified by reference to legal arguments: the relevant part of native customary law was introduced as evidence and was applied (although perhaps incorrectly) by the court. The court recognized both elements of constitutional custom common to tribal societies: hereditary succession (in this case patrilineal—Ben Uncas was “Eldest Son” of his predecessor) and election (reference was made to “an Agreement” with “the Tribe”). From the evidence on Mohegan custom, the commissioners identified an “Indian Method” relating to the succession of chieftainship; they identified a Mohegan “Plan or Modell of Governmt”—that is, they identified (according to the dissenting commissioners) “the constitution of the tribe.”

Unfortunately, the court was not altogether clear about the doctrinal foundation upon which its recognition of Aboriginal custom was based. Was it applying the law of a foreign nation under conflicts of law principles? Or, was it applying the internal laws of a distinct component of the British empire? Given the court’s conclusion that the Mohegan nation’s territory was within Connecticut’s boundaries and that its rights to that territory were “secured” by the colonial government, the latter interpretation is perhaps more plausible. If the Mohegan nation was a component of the imperial constitutional order, the court may be said to have applied customary law which had been incorporated into imperial law under the common-law principle of continuity. In this respect, the 1738 judgment supplies one of the missing components to the argument made in Part II, above, that Aboriginal customary law and government was recognized at imperial common law.

G. *The 1743 Commission of Review*

Arguing that Ben Uncas was not their “Lawfull or right Sachem,” a segment of the Mohegan nation petitioned for a re-hearing.¹³⁵ In a further petition by their guardians, John and Samuel Mason, it was asserted that the Mohegan had elements of both sovereignty and subjecthood. The continuity of Mohegan sovereignty was reconciled with the Crown’s assertion of judicial jurisdiction over the dispute by the Masons’ insistence that the 1705 judgment represented,

¹³⁵ “Petition of June 1739” in *PRO CO*, *supra* note 45, 5/1269, T 16 at 62a.

“in Effect,” a “New Treaty.”¹³⁶ However, the petition went on to acknowledge that the Mohegan *sachem* was “your Majys most Obedt. & faithfull Vassal” and that he had commanded his people “to be ever under the Allegiance & Governmt. of the Queen’s Crown of England.”¹³⁷ Thus, submission to the imperial Crown, but not the colonial government, was acknowledged.

On Board of Trade’s recommendation, the Crown set aside the 1738 judgment and a new Commission of Review was established. The Royal Commission creating the 1743 Commission of Review is significant for its treatment of that part of the 1738 judgment which applied Aboriginal customary law to determine Mohegan sachemship. The Crown stated that the tribunal had “Declared one Ben Uncas to be Chief Sachem of the Sd Indians (whose Right the Sd. Lords Commissioners for Trade did not think themselves Competent Judges),” and it then proceeded to instruct the new tribunal to summon, among other persons, the “Chief Sachem of the Mohegan Indians.”¹³⁸ In other words, the Crown recognized that the question of sachemship was part of the dispute which the tribunal was to resolve—it impliedly confirmed, then, that native customary law on sachemship was (at least in this case) justiciable in a British imperial tribunal.

Ultimately, the 1743 Commission of Review did not decide upon the matter because the colony withdrew its objection to the court’s hearing testimony or argument from John Uncas.¹³⁹ While Mohegan customary law thereupon ceased to be of concern, the constitutional status of the nation and the constitutionality of the commissions creating the various courts again became relevant. This time a third party—“tenants” who had been granted interests by the colony in the lands in controversy—entered a plea to jurisdiction, arguing that a juryless court could not make an order affecting their land titles.¹⁴⁰ Counsel for the Indians demurred. An interim ruling was therefore rendered upon the question of the Commission’s constitutionality insofar as it affected the property rights of private persons within the colony. It is this interim ruling which has recently been cited as support

¹³⁶ “Petition of J. Mason & S. Mason in behalf of the Chief Sachem & also of the tribe of the Mohegan Indians, August 1739” in *PRO CO*, *supra* note 45, 5/1269, T 16 at 59a-59b.

¹³⁷ *Ibid.*

¹³⁸ “Commission to Governor and Council of New York” (8 January 1743) in *PRO CO*, *supra* note 45, 5/1272 at 6-11.

¹³⁹ *Book of Proceedings* *supra* note 74 at 130.

¹⁴⁰ *Ibid.* at 192.

for the proposition that Aboriginal nations were “sovereign” in British law,¹⁴¹ and therefore it deserves close attention.

1. 1743 interim ruling on jurisdiction

The majority overruled the plea to jurisdiction, and two commissioners, Daniel Horsmanden for the majority and Cadwallader Colden in dissent, wrote opinions. In his reasons, Horsmanden stated:

The Indians though Living amongst the Kings Subjects in these Countries, are a Separate and Distinct People from them, they are treated with as Such, they have a Polity of their own, they make Peace and War with any Nation of Indians when they think fit, without controul from the English.

It is apparent the Crown looks upon them not as Subjects, but as a Distinct People; for they are mentioned as Such throughout Queen Ann’s, and his Present Majesty’s Commissions by which we now Sit.

And ’tis as plain in my Conception, that the Crown looks upon the Indians as having the Property of the Soil of these Countries; and that their Lands are not by his Majesty’s Grant of particular Limits of them for a Colony, thereby Impropriated in his Subjects, ’till they have made fair and Honest Purchases of the Natives.

So that from hence I draw this consequence, that a Matter of Property in Lands in Dispute between the Indians a Distinct People (for no Act has been Shewn whereby they became Subjects) and the English Subjects, cannot be Determined by the Laws of our Land, but by a Law Equal to both Parties, which is the Law of Nature and Nations; and upon this foundation, as I take it, these Commissions have most properly Issued.¹⁴²

Thus, Horsmanden appeared to have concluded that the Mohegan nation was a sovereign nation independent of both colonial and imperial orders—indeed, he seemed to indicate that Mohegan lands remained outside Connecticut’s “Limits” until ceded to the colonial corporation. Under these circumstances, the Crown had authority to erect a special court to apply the law of nations in the determination of a dispute between the nation and the colony, notwithstanding the powers of judicature granted to the colony in 1662. In his view, unless this court could order restitution of lands if it found for the Indians, it would be unable to provide a remedy; therefore, although the tenants were not expressly mentioned in the Commission, the court’s jurisdiction over them was “a Matter Incident to the Cause.”¹⁴³

¹⁴¹ See Barsh & Henderson, *supra* note 7; “Memorandum of Law,” *supra* note 8; and Clark, *supra* note 9.

¹⁴² *Book of Proceedings* *supra* note 74 at 192.

¹⁴³ *Ibid.*

Colden commenced his dissenting opinion by expressing a contrary view of native constitutional status:

I can in no manner consider the Mohegan Indians as a Separate or Sovereign State, or that Either Ben Uncas, or John Uncas are in any Sense Sovereign Princes; Such a Position in this Country where the state and Condition of Indians are Known to every Body, would be Exposing Majesty and Sovereignty to Ridicule; It might be of Dangerous Consequence, and not to be Suffered in any of his Majesty's Courts, Could I imagine it could have any Influence on the Minds of the People who heard it advanced; Both Ben Uncas and John Uncas and every one of the Mohegan Nation are born under the allegiance to the Crown of Great Brittain.

Notwithstanding of this I hope no Man can think I do these Indians any Injury in the Present Case before the Court, when I allow them to be Subjects of Great Brittain, Enjoying the Benefit and Protection of the English Law, and all the Priviledges of British Subjects.¹⁴⁴

He then concluded that because the proceedings were in “Subversion of the Common Law” the Commission had to be narrowly construed and jurisdiction could not be extended over any parties “other than the Govr & Company of Connecticut, or the Sachem and Tribe of the Mohegan Indians” who had been expressly named.¹⁴⁵

Horsmanden's reasons are clearly significant to the general question of Aboriginal legal status in North America. In assessing the degree of significance, however, it is important to determine whether other judges—either those on the Commission of Review or those at the appellate level—concurred with them. In this respect, serious questions arise as to whether other judges accepted Horsmanden's opinions about the constitutional status of native peoples. The other members of the majority on the plea to jurisdiction, commissioners Cortlandt, Rodman, and Morris, did not indicate whether or not they endorsed Horsmanden's reasons for rejecting the tenants' plea. Horsmanden's reasons really contained two propositions: (a) the Mohegan people constituted a sovereign state; and (b) that because the Commission empowered the tribunal to order restitution of the disputed lands it therefore conferred, as an “Incident to the Cause,” jurisdiction over people claiming rights to those lands even if they were not mentioned in the Commission. If (b) is regarded as the *ratio decidendi* of the ruling and (a) is regarded as mere *obiter dicta* then it may be argued that the other commissioners in the majority did not necessarily accept (a). The ambiguity surrounding the position taken by the other commissioners is increased by the manner in which the court's decision and Horsmanden's

¹⁴⁴ *Ibid.* at 193.

¹⁴⁵ *Ibid.* at 193-94.

reasons were entered onto the record. The record stated that “[t]he Court were of Opinion that the Said Plea to Jurisdiction Should be Overruled. And in favour of Said Opinion Mr. Commissr. Horsmanden Offer’d his Reasons in Writing and Desired them to be Enter’d on the Minutes as follows.”¹⁴⁶ This may be contrasted with the manner in which the judgment on the merits was later recorded: “M. Colden, Mr. Cortlandt and Mr. Rodman having Concur’d in Opinion upon the Merits of this Cause, and Drawn up the Same in writing, ‘twas Read in Court as followth.”¹⁴⁷ The inference may therefore be drawn from the record that the other commissioners did not necessarily concur in Horsmanden’s reasons for rejecting the plea to jurisdiction.

Of course, this interpretation of the interim ruling may be criticized for being an overly literal reading of the record: the context of the ruling suggests that, had the commissioners disagreed with Horsmanden’s reasons, they would have written concurring reasons expressing an alternative rationale for rejecting the tenants’ plea—for example, they might have limited their reasons to proposition (b) above. Because they chose not to do so, it may be inferred that they agreed with propositions (a) and (b).

If the interim ruling could be considered in isolation, this would no doubt represent the best interpretation of its legal import. However, Horsmanden’s reasons, as part of an interim ruling, cannot be viewed in isolation; they must be interpreted in light of the court’s final judgment of the merits of the case, and, as will be seen, the final judgment is inconsistent with many of Horsmanden’s ideas. It is for this reason that the arguably tenuous suggestion that the commissioners in the majority on the tenants’ plea to jurisdiction did not necessarily agree with Horsmanden’s views on Mohegan sovereignty must be considered; in light of the position that the various commissioners took on the final judgment on the merits, that suggestion acquires a certain explanatory force.

2. 1743 judgment on the merits

The majority, comprising President Colden and commissioners Cortlandt and Rodman, issued its judgment on the merits on 16 August 1743. The reasons for judgment began by reviewing the constitutional history of the colony of Connecticut, starting with the formation of a

¹⁴⁶ *Ibid.* at 192.

¹⁴⁷ *Ibid.* at 209.

government by settlers in 1638. The majority concluded that the 1640 Uncas “Deed” transferring Mohegan land to the colony was legally valid, as was the 1659 “Deed” by which the Mohegan “did Convey to Majr. John Mason all the Lands belonging to them.”¹⁴⁸ It then concluded that, in 1660, Mason did “yield up and Release” to the colonial government “Whatever Right he had to the Mohegan’s Lands, on Condition that the Indians should at all Times thereafter be provided with a Sufficient Quantity of Land to Plant on;” this release was confirmed by Uncas in a 1661 “Deed.”¹⁴⁹ The court then observed that, in 1662, the Crown, by letters patent, incorporated the settlers as the Governor and Company of Connecticut, “[a]nd did Grant to the Said Govr. and Company a Large Tract of Land in America Including all the Mohegan Lands, or Lands in Controversy, whereby all the said Mohegan Lands were Vested in the Said Govr and Company *in full and Absolute Property and Right in Law.*”¹⁵⁰ The court reconciled this conclusion with the 1681 treaty, which, as seen, acknowledged that the Mohegan nation had both an independent character and land rights, by denying the legal necessity for the treaty:

[T]he Said Governmt. might well accept of Such Quitclaim on the conditions agreed to by the Said Treaty [of 1681] without any Impeachment to their former Right, more Especially if it be Considered that one of the Parties to the Treaty were Indians a Barbarous People, not then Subject to the Regular Course of any Law, easily misled by misapprehensions, and as easily Provoked to violent mischeivous Actions and that Considering the [earlier] Grants of these Lands had probably been Obtained upon Considerations of Small Value to the English, and that the Lands then were of much greater Value ... the Said Governmt of Connecticut might out of Equitable and Gratefull Considerations towards the Said Indians Covenant with them as in the Said Treaty.¹⁵¹

In the end, the court concluded that the Mohegan “had no Right remaining in them to any of the Lands in Controversy, besides an Equitable Right to a Quantity of Land Sufficient for their Subsistence by Planting;” in its view, this obligation in equity (which derived from the agreement between Mason and the colonial government in 1660) had been fulfilled, and therefore the 1705 judgment had to be overturned.¹⁵² Said the court, “no Act or Thing appears” which shows that the colonial government “had Taken from the Said Indians, or from their Sachem

¹⁴⁸ *Ibid.* at 210.

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.* at 211 [emphasis in original].

¹⁵¹ *Ibid.* at 212-13.

¹⁵² *Ibid.*

any Tract or Tracts of lands to which the Said Indians or their Sachem had any Right by Reservation or otherwise either in Law or Equity.”¹⁵³

Throughout the judgment, the court referred to law, equity, rights, and title without expressly indicating from which system of law these juridical concepts derived. Was the judgment on the merits consistent with Horsmanden’s earlier interim opinion that the law of nations governed the dispute? The court’s observation that treaties were necessary in part because the Mohegan were not “Subject to the Regular Course of any Law” confirms that the Mohegan were not governed—at least in a *de facto* sense—by local colonial law. And, it may be argued, although the court found against the Mohegan, its primary reason for doing so was its conclusion that the Mohegan had ceded their lands by deed, a conclusion which could have been reached through the application of the law of nations.

The difficulty with this interpretation of the judgment is the court’s treatment of the 1662 royal charter. The court’s conclusion that the Crown could, by letters patent, deprive the Mohegan of whatever “Right remaining” in the lands they had in 1662 and unilaterally grant those lands “*in full and Absolute Property and Right in Law*” to the colonial corporation suggests that the court was not applying (as Horsmanden had wanted) “a Law Equal to both Parties, which is the Law of Nature and Nations.”¹⁵⁴ The assertion of such extraordinary prerogative powers in the Crown is consistent with the conclusion that the court was applying British imperial, and not international, law.

The inference that British law was applied is supported by the fact that Colden, who on the earlier interim plea had concluded that “English” law governed, concurred in the judgment, and that Horsmanden, who had earlier concluded that the “law of nations” governed, dissented. In his dissenting reasons, Horsmanden interpreted the majority’s conclusion that the Mohegan were not subject to any regular course of law as meaning not subject to any law “[t]hat the English were acquainted with,” that instead they “were a Law unto themselves” under “their constitution.”¹⁵⁵ As for the merits of the claim, Horsmanden disagreed with the majority’s interpretation of the treaties, deeds, and charter, arguing that the Mohegan had not surrendered title to or jurisdiction over their lands, but had only recognized the colony’s

¹⁵³ *Ibid.* at 213. The 1743 judgment was considered in *Mohegan Tribev. State of Connecticut* (D. Conn. 1982), *supra* note 1 at 1369-70.

¹⁵⁴ *Supra* note 142 [emphasis added].

¹⁵⁵ *PRO CO*, *supra* note 45, 5/1060 at 119b and 109b.

exclusive right to purchase the land and its right, prior to purchase, to govern settlers (but not natives) therein.¹⁵⁶ Consistent with his interim ruling, he applied “a Law Equal to both Parties” and concluded that the Crown could not, by charter, unilaterally make unceded Mohegan lands “part of the Colony.”¹⁵⁷ In other words, Horsmanden viewed the Mohegan territory as being outside the colony’s boundaries, a conclusion which was consistent with the implication of his earlier interim reasons that the Mohegan nation was sovereign in the international sense.

To summarize, the commissioners in majority applied imperial law while those in minority applied the law of nations. Apparently those commissioners who had agreed with Horsmanden that the interim plea to jurisdiction be rejected, yet sided against Horsmanden on the final judgment, either had not endorsed Horsmanden’s opinion on the interim ruling that the law of nations governed or had changed their minds on this point.

It must be emphasized that although the final judgment is inconsistent with Horsmanden’s interim opinion that the law of nations governed the determination of the dispute, it is not necessarily inconsistent with his opinion that the Mohegan nation was, in some sense at least, a sovereign entity. Because the majority rejected Horsmanden’s conclusion that Mohegan territory lay beyond Connecticut’s geographical borders, it must be concluded that it also rejected Horsmanden’s view that the Mohegan nation was a fully sovereign state in the international sense. However, there is nothing about the majority opinion on the merits (other than the fact that Colden concurred in it) that is inconsistent with the idea that the Mohegan nation was an internally sovereign community which sought a judicial ruling from a British court that it had British legal rights to certain lands within British territory. The denial of British legal rights to the Mohegan nation, and thus of land under British law, is not necessarily the denial of the proposition that they had, in other respects, some non-territorial elements of sovereignty. In short, it may be argued that the ambiguities of the final judgment should be resolved by reference to those aspects of Horsmanden’s interim opinion which are not clearly denied by the final judgment. This argument is supported (perhaps) by the fact that two commissioners in the majority on the final judgment, Cortlandt and Rodman, also sided with Horsmanden in

¹⁵⁶ *Ibid.* at 105b-119b. For Morris’s dissenting reasons, see *ibid.*, 5/1272 at 214-15.

¹⁵⁷ *Ibid.* at 105b.

rejecting the interim plea and, in so doing, made no effort to distance themselves from his interim reasons.

H. The 1772 Privy Council Appeal

The Mohegan Indians appealed the 1743 decision to the Privy Council. The appeal did not begin until 1770 and a decision was not issued until 1772.¹⁵⁸ Without reasons, the Privy Council stated that the “Judgment or Decree of the said Commissioners of Review of 16th August 1743 should be Affirmed.”¹⁵⁹ Several commentators have argued that the Privy Council’s 1772 decision affirmed Horsmanden’s opinions on the constitutional status of Indian nations rendered after the plea to jurisdiction.¹⁶⁰ This argument must be carefully considered.

The Appellate Committee of the Privy Council affirmed the 1743 judgment of 16 August 1772. The interim ruling on the plea to jurisdiction had been rendered earlier and was not part of this judgment.¹⁶¹ However, it might be argued that, by affirming the final judgment, the interim ruling was implicitly affirmed. Such an argument is presented by Clark, who says that the “Privy Council in effect accepted the view of Commissioner Horsmanden” that Indian nations were “juristically sovereign.”¹⁶² Clark’s argument, however, is premised upon the mistaken conclusion that the issue decided in the interim ruling was the legality of the Commission in relation to the main parties to the dispute, that consequently Horsmanden’s interim opinion was a condition precedent to the tribunal’s rendering a final judgment on the merits of the case, and that (therefore) the final judgment could not be affirmed without affirming the decision made on the interim ruling.¹⁶³ In fact, the judgment on the merits was not contingent upon the outcome of the plea to jurisdiction and it would not have been legally inconsistent for the Privy Council to have expressed approval for both the majority decision on the merits *and* Colden’s minority opinion on the plea to jurisdiction. As seen from his interim reasons, Colden did not

¹⁵⁸ Smith, *supra* note 5 at 437-38.

¹⁵⁹ “Report of 19 December 1772” in *PRO PC*, *supra* note 107, 2/116 at 513-515, *aff’d* “Order in Council” (15 January 1773) in *PRO PC*, 2/117 at 10.

¹⁶⁰ See commentators listed *supra* note 141.

¹⁶¹ Smith, *supra* note 5 at 434-35.

¹⁶² Clark, *supra* note 9 at 45.

¹⁶³ *Ibid.* at 39-45.

deny the jurisdiction of the commissioners over the main parties to the dispute but did deny their jurisdiction over third parties not expressly mentioned in the instrument from which the commissioners derived their judicial powers. Had Colden's interim opinion been accepted by the majority of the commissioners, the tribunal would still have gone on to consider the merits of the Mohegan's claim against the colony; the effect of the interim ruling would have been merely to restrict the tribunal's ability to order restitution of lands in the possession of third parties in the event that, after considering the merits of the case, they accepted the Mohegan claim.

In short, it cannot be said that the Privy Council *necessarily* adopted Horsmanden's opinions on the plea to jurisdiction. At best, it might be said that, because the Privy Council did not distance itself from these opinions, it must not have disagreed with them. But even this argument cannot be accepted without qualification; it must be concluded that the Privy Council, by expressly confirming the final judgment, impliedly rejected the interim opinions of Horsmanden insofar as they conflicted with the final judgment. As seen above, the final judgment rejected Horsmanden's conclusion that the Mohegan nation was a sovereign entity, the territories of which lay outside the Connecticut's boundaries. Instead, it concluded that although the Mohegan were "not then Subject" to local municipal law, their lands had been included within the colony and their rights to these lands—if they had not already been ceded by treaty—had been extinguished according to British (imperial) law by royal charter.

Of course, it is possible to read the interim and final judgments together so as to conclude that the Mohegan were an internally sovereign people whose claim to certain land rights within the colony under British law was denied; and, it is possible to argue that if the Privy Council was opposed to this interpretation it would have made the effort to deny expressly that its confirmation of the final judgment was to be read in that light. In response to this argument, it must be stated that it involves considerable speculation. Although certain inferences may be drawn from the fact that commissioners Cortlandt and Rodman agreed with Horsmanden in rejecting the plea to jurisdiction but did not distance themselves from his interim reasons, the same inferences cannot be made from the Privy Council's position. There is no legally compelling reason to think it preferred Horsmanden's interim reasons over Colden's. In short, it is simply not clear that the Privy Council made any conclusion about the constitutional status of the Mohegan nation. Indeed, because it did not need to side with one theory of Mohegan status or another in order to decide the appeal, it is probably

best to conclude—given the general rule that courts do not articulate legal principles unless required to do so for the purpose of deciding the case at bar—that, by its silence on the issue, the Privy Council intended to leave the question open to be decided in a case in which the matter was properly before the court. In short, if *Mohegan* is to be cited for the Privy Council’s recognition of Aboriginal sovereignty, it is upon the Privy Council decision of 1706, not that of 1772, that emphasis should be placed.

IV. *MOHEGAN INDIANS* V. *CONNECTICUT* SUMMARIZED

In considering the legal significance of *Mohegan*, it is perhaps best to begin by summarizing the uncontroversial aspects of the case. The *Mohegan* case clearly confirms three important points about British-Indian legal relations in the eighteenth century. First, native nations on reserved lands within colonial boundaries were not necessarily subject to colonial municipal law but might retain an independent status; second, courts, in determining whether natives were subject to municipal law, considered local Crown practice, in particular treaties entered into between local officials and native nations; and third, in those cases where treaties indicated that natives were not subject to local colonial law, their own customary laws, including those relating to government, continued in force and were justiciable in British imperial courts. The British judicial recognition and application of Aboriginal customary laws relating to government, and the recognition that Aboriginal governments might be independent of local governments of the colonies in which they were located are, in themselves, very significant conclusions which have been overlooked by British and Canadian courts in the past. Even if the complicating factor of *sovereignty* is left out of the equation, *Mohegan* should be regarded as a landmark case informing the legal interpretation of British-Indian relations of the eighteenth century. As such, it should also be regarded as forming part of the normative context influencing the modern interpretation of “existing Aboriginal and treaty rights” in section 35(1) of the *Constitution Act, 1982*;¹⁶⁴ in this respect, it is consistent with the proposition that native peoples had an “inherent right of Aboriginal self-government.”

The more controversial aspects of the case relate to how it affects arguments about Aboriginal sovereignty. While *Mohegan* clearly supported the three above-noted conclusions, it does not clearly

¹⁶⁴ *Supra* note 3.

recognize or deny rights of Aboriginal sovereignty; it does not clearly support either the inclusive or the exclusive theories of continuity as defined in Part II, above. On the one hand, it is difficult to see how *Mohegan* supports the view that nations on reserved lands within colonial boundaries were, from the perspective of British law, internationally sovereign states. On the other hand, the case is certainly consistent with the view that the Mohegan nation had elements of internal, or local, sovereignty. But while this latter interpretation of the case is possible, it is not necessary; the analysis of the judgments rendered in *Mohegan* establishes that the case cannot be cited as *unequivocal* judicial support for Aboriginal rights of internal sovereignty. The legal concept of “sovereignty” carries with it far too much theoretical complexity to allow it to be read, without at least some qualification, into either the reasons for the judgment on the merits or the Privy Council’s confirmation of that judgment, especially when it is considered that the judges did not use the word “sovereignty” and the language they did use is open to other competing interpretations of Aboriginal legal status.

A balanced interpretation of the *Mohegan* case is therefore limited to stating that it represents judicial recognition of Aboriginal customary laws and government in reserved lands located within colonial boundaries, and that the resulting Aboriginal system was independent, in at least some degree, from local colonial governments and courts. While this judicial recognition is consistent with the conclusion that Aboriginal nations in such circumstances enjoyed non-territorial, or internal, sovereign status, it is also consistent with the argument made in Part II, above, that Aboriginal customary law and government continued in force under British sovereignty as a matter of *imperial* common law pursuant to the principle of continuity. Whether these two interpretations are consistent with each other—that is, whether Aboriginal sovereignty could exist, as a matter of British law, under British sovereignty—is a question that raises difficult questions of British constitutional theory which must be addressed elsewhere. However, for the moment, it can be concluded that whichever interpretation of *Mohegan* is accepted, its significance to both the historical and modern understandings of the legal status of Canada’s First Nations should no longer be overlooked.