

“The bond of friendship between you & us...”: Writing a History of Aboriginal Law in Canada

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On August 20, 1796, a group of Mississaugas canoed from their village near the Credit River to York, the capital of the new colony of Upper Canada, to sell salmon. At their encampment that evening a scuffle broke out between them and a soldier from the Queen’s Rangers, and a Mississauga chief named Wabakanine was seriously injured. The next day Wabakanine was taken back to the Credit River, where he died. The soldier, Charles McCuen, was promptly arrested and charged with murder. In his defence, he claimed that the Mississaugas had taken one dollar and some rum from him, and that Wabakanine was drunk and had injured himself by falling. However, government officials appeared to accept the Mississaugas’ account of the incident, which was that McCuen had given Wabakanine’s sister the dollar and rum in an attempt to lure her away from the camp, and when Wabakanine intervened the soldier struck him.¹

At one time, legal historians would have considered cases like this one by focusing upon the court record, which in this case simply states that McCuen was brought before a grand jury, with William Dummer Powell J. presiding, in Newark (Niagara-on-the-Lake) on December 17, 1796, for the murder of Wabakanine, and that no true bill was found and he was released without trial.² There being no interesting legal arguments or reasons on file, legal historians in this mould – let us call them court-centric legal historians – would have passed over this case quickly, perhaps pausing only to add it to their list of similarly brief and fragmentary accounts of cases in which settlers or soldiers were prosecuted for crimes against native people in colonial Canada. Thus, under this approach, McCuen’s case would join others (such as, for example, the case Walter Robinson and Malcolm Fraser who were tried and acquitted at Kingston before William Osgoode C.J. for the murder of an “Indian of the name of Snake” in 1792³) as evidence that colonial authorities did at least try to protect aboriginal peoples through the criminal justice system at this time.

Of course, few historians, even court-centric ones, are content merely to compile lists; most legal historians seek to contextualize their accounts of law’s past. Our hypothetical court-centric legal historian would thus move from the list of cases involving aboriginal peoples to more reflective accounts of larger issues, like what the cases reveal about the rule of law and aboriginal peoples in colonial settings, and to this end would construct a contextual narrative around the cases. Looking at

¹ McCuen’s (or McKewen’s) argument is summarized at Court of King’s Bench Criminal Filings, OA RG 22 – 138, File The King vs. Charles McCuen, 1795-96. For the government’s view, see P. Russell, Adm. Govt. Upp. Can., to J.G. Simcoe, Lt. Gov. Upp. Can., 28 September 1796, in E.A. Cruikshank & A.F. Hunter (eds.), *The Correspondence of the Honourable Peter Russell with Allied Documents Relating to his Administration of the Government of Upper Canada During the Official Term of Lieut.-Governor J.G. Simcoe while on Leave of Absence* (Toronto: Ontario Historical Society, 1932-36), I, 49-50 [hereafter referred to as *Russell Papers*].

² Minute Books of the Court of Oyer and Terminer and General Gaol Delivery, Ontario Archives RG 22 – 135 (MS 530, Reel 1, p 33).

³ Minute Books of the Court of Oyer and Terminer Court of Oyer and Terminer and General Gaol Delivery, Ontario Archives RG 22- 135 (MS 530 Reel 1, p. 5).

Wabakanine's case, then, our court-centric historian might be interested in the following bits of contextual information.

First of all, there is a contemporary account of the aftermath of Wabakanine's death that might be helpful for the narrative, at least insofar as it adds some colour to the simple statement of facts found in the court record:

Wompakanou, had been killed, it appeared by a white man. ... The remaining chiefs immediately assembled their warriors, and marched down to Niagara, to make a formal complaint to the British government. To appease their resentment the commanding officer of the garrison distributed presents amongst them to a large amount and amongst other things they were allowed no small portion of rum and provisions, upon which the tribe feasted according to custom ...⁴

Second, it might be worth considering the reaction of Peter Russell, who was administering the government of Upper Canada in the lieutenant governor's absence, to Wabakanine's death. Russell feared the Mississaugas might join with other Chippewa groups to avenge their chief, and so he met them in council to avert hostilities, giving them yet more presents.⁵ Here the court-centric historian would find material relevant to the larger themes of equality before the law and the rule of law, for we find Russell reassuring the Mississaugas that had he himself been killed "no other steps could have been taken by the ... officers of Justice than those which have been taken to discover the murderer of Wapeconine", while also reminding them that "by our Laws" the suspected murderer could not be punished until tried and convicted "by his Country". Russell went on to say, in a passage that might be confusing for our historian, the following:

Children

I have been told that Colonel Johnson gave you a great Belt which was to be the bond of friendship between you & us. I hope you have ever found us kind to you in consequence, we have a regard for you & wish to have you amongst us. I was very sorry to hear that you saw that belt received a cut by that unfortunate accident [their chief's death].

I do assure you it has received neither cut nor bruise which we will not endeavour to heal by our kindness. And to confirm our former friendship I give you this string

Delivers Wampum ...

Here is colour, certainly, but perhaps a bit too much colour—too many peculiar metaphors and protocols—for our court-centric legal historian. It might be thought that this is the stuff of *ethnohistory*, not *legal* history. Still, let us assume that our particular historian is a broad-minded as well as court-centred one, and concludes that there is something relevant here showing a connection between the court case and treaty relations generally.

More promising, perhaps, is a third piece of information about the fallout from the death of Wabakanine. Several years after the incident the government sought to purchase the traditional

⁴ Isaac Weld, *Travels through the states of North America, and the provinces of Upper and Lower Canada, during the years 1795, 1796, and 1797* (London: Printed for John Stockdale, 1799), II, 84-85.

⁵ Minutes of a Council with the Mississaugas, Niagara, 26 September 1796, *Russell Papers*, I, 44-5.

territories of Credit River Mississaugas along the north shore of Lake Ontario, lands that were described by the colonial executive council as “Tracts of Indian Territory intervening to obstruct the Course of Justice” between York and settlements further west, but Joseph Brant, the influential and controversial Mohawk leader, had advised the Mississaugas to hold out for “an exorbitant price” and the Mississaugas followed Brant’s word because they regarded him “as their Head since the Death of their principal Chief Wabakanyne ...”⁶ This fact might be used to relate the case to larger issues of political intrigue of the day.

We can collect these and similar facts and weave a narrative around Wabakanine’s case illustrating its importance to our understanding of broader themes concerning colonial politics, culture and legality in Canada. If our court-centric historian performed this task well, we might even decide to drop the “court-centric” label, for what would emerge would be a rich account of the relationship between what colonial courts did in relation to aboriginal peoples and surrounding social forces and political values important to our sense of law’s role in shaping our collective identities over time.

I want to suggest, however, that whatever we call this genre of legal history, it is marked by a very particular legal perspective, one in which the *law* that is the subject of historical analysis is the law of the colonizer, and information that I have called ‘contextual’ is only relevant insofar as it helps us better to understand *that* law. Legal histories of aboriginal-settler relations in this genre are becoming ever more sophisticated and effective in showing law as an instrument of power in colonial societies. But there are other legal histories relating to indigenous peoples in Canada that can be—and are being—written. To illustrate this point, it will be helpful to look again at the so-called ‘contextual’ information surrounding the Wabakanine story and treat it not as context but as evidence of other ‘laws’ with legal histories of their own.

First, Wabakanine’s death had a profound impact upon the internal system of law and governance of the Credit River Mississaugas. Only a crisis could have prompted an Algonquian-speaking Anishnaabeg community like the Mississaugas to adopt an Iroquoian-speaking Haudenosaunee leader like Brant as their chief. What was the character of Mississauga law at this time? How was it different from the law of the Haudenosaunee and other aboriginal groups in the region? How did the character of these systems of law and government evolve in response to the challenges of colonialism? The legal history of Canada is, in part, the history of internal legal developments within aboriginal societies. This is, we may say, *aboriginal* legal history in the proper sense. Aboriginal legal history in this sense may be, in some aboriginal communities, a cherished part of oral histories and oral traditions; it may also be the subject of written accounts by aboriginal authors (see, for example, the history written by another Credit River Mississauga chief, Peter Jones⁷); it is certainly the focus of scholarly study by anthropologists, ethnologists and ethnohistorians, and has been for some time; and, finally, it should be the concern of historians of law.

Second, as we have seen, Wabakanine’s death led to a council between the (acting) colonial governor and the Mississaugas at which references were made to previous engagements symbolized by a “great Belt”. Here we find evidence of some sort of shared normative order to which both peoples involved could appeal as a standard for proper behaviour. Indeed, the great belt referred to was “the great belt of the *Covenant Chain*”, an elaborate wampum belt that Sir William Johnson, the British

⁶ Peter Russell to Lord Portland, Secretary of State, 21 March 1798, National Archives (U.K.), CO 42/322, ff. 119-120.

⁷ Peter Jones (Kah-ke-wa-quo-na-by), *History of the Ojebway Indians; with Especial References to their Conversion to Christianity* (London: A.W. Bennett, 1861).

superintendent for Indian affairs, gave to aboriginal nations gathered at a large treaty council at Niagara in the summer of 1764.⁸ But what was the Covenant Chain? Only once we have some sense of internal aboriginal legal history can we begin to answer this question, for anthropologists and ethnohistorians tell us that relationships like the Covenant Chain are unintelligible unless interpreted through the lens of aboriginal custom and tradition. The shared normative order symbolized by the Covenant Chain was, we may say, itself a constitutional or legal order—and as such an integral part of Canadian legal history. When he met with the Mississaugas after Wabakanine's death, Russell was not just being polite or politic. He was, rather, participating in what was by then an ancient customary legal order forged through inter-cultural accommodation and the exchange of wampum and presents. The council minutes provide more than just colour and context for an analysis of what colonial courts did in this case. They are instead a manifestation of a parallel legal order in which conflict between distinctive peoples in colonial Canada was addressed through customary forms that borrowed heavily from aboriginal legal tradition. The history of this shared normative order is also a central part of the legal history of Canada.

We can, I think, see these three genres of legal history in relation to aboriginal peoples in Canada as phases in the history of ideas. The development of a sophisticated and contextualized history of colonial law as an instrument of power in relation to indigenous societies leads naturally to inquiries into the internal legal histories of these indigenous societies, which in turn permits a proper understanding of the inter-cultural legal norms that emerged to accommodate indigenous-settler differences. But insights drawn from the appreciation of inter-cultural law may challenge approaches taken to the history of colonial law as instrument of oppression, for as it turns out not all colonial judges were ignorant of treaty relationships and their potential legal significance, and so possibilities emerge for reconsidering colonial law as both instrument of colonial oppression *and* site of native resistance, and hence as inchoate expression of moral value. We may say, then, that as legal historians increasingly turn their attention to internal aboriginal legal histories and inter-cultural legal histories, they will also be forced to reconsider and revise their views about colonial legal histories, and a fourth kind of legal history will emerge: the history of the legal history of aboriginal peoples in Canada. There are multiple legal histories about the distinctive peoples within this country, and they must be told and re-told, written and re-written, by each generation, if our distinctive identities are to be defined and celebrated with a shared sense of respect.

⁸ "Conference with Indians", Niagara, July 9-August 14, 1764, in J. Sullivan, (ed.), *The Papers of Sir William Johnson* (Albany: State University of New York, 1921-65), XI, 309-310.