

Resurrecting the Peace:
Separate Justice and the Invention of Legal Tradition
in the Kahnawake Mohawk Nation

by

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Abstract

The intensification of Canadian amerindian self-determination movements, combined with the recent publication of a series of government reports detailing the mistreatment of amerindians in the Canadian criminal legal system, has placed the creation of separate, amerindian criminal legal systems at the centre of many self-determination campaigns. As alternatives to involvement in the Canadian legal system, many of these proposed alternative structures purport to embody a return to traditional modes of dispute resolution which are offered as both rationale and blueprint for their modern counterparts.

Focusing upon proposals for a separate, traditional legal system offered by two groups within the Kahnawake Mohawk Nation of Quebec, the dissertation juxtaposes these proposals with the traditions of dispute resolution extant in the period of initial contact between Iroquois and European. The early traditional lifestyle of the Kahnawake Mohawks is examined, as is the chronicle of contact and acculturation which eroded their original traditional structures. Replete with gaps, the documented history and "legal traditions" of these Mohawks are revealed to differ significantly from those histories postulated by the competing factions, each of which adopts a history which reinforces both its own position on "legal traditions" and in

the proposed "post-internal colonial" context. To the degree that these histories and the "traditions" they legitimate and empower are consciously manufactured, their legitimacy in the eyes of Kahnawake people and the Canadian state is diminished. Concentrating upon what appears to be a consciously manufactured, rather than genuine, link between the "old" and "new" traditions, the proposed traditional legal systems are examined through Hobsbawm's theory of the invention of tradition. This examination leads to the conclusion that, while these "traditional systems" and their supporting histories do contain some invented elements and may thus be criticised as invented rather than genuine, such invention need not constitute a fatal compromise to the integrity of the modern traditional legal form nor to the self-determination aspirations of their proponents.

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My thanks and love go first to those who, throughout the course of an education which was, at best, a bittersweet experience, so often seemed to fall into second place: Kevin, Taylor and Rachel. In my darkest moments, I continued only for you, that we could have the life we wanted together, and that I might make you proud of me. You have always the biggest and best part of my heart, and my gratitude for keeping me sane in a process that often seemed insane.

My most sincere niaweh must be expressed also to the People of Kahnawake, who accepted me into their lives and homes, and trusted me with their traditions and histories; I hope that this work will be of some value to you in your pursuit of justice. Among you are friends, mentors and teachers, and the most important things I learned in this process, I learned from you.

Thank you to Simon Roberts for his supervision, and to Pam Hodges for keeping things moving and for her support.

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Table of Dates

The following tables contains significant dates in the history of the Kahnawake Mohawks, most notably in terms of the development of the "Indian Act Court" and the rise of the separate justice competition in the community. Where events included are drawn directly from the historical discussion contained in part 5 of the thesis, no reference for the information is given; events which were felt to be worth noting, but are not dealt with in the text, are fully referenced.

* * * * *

1400-1600	Confederation of Five Iroquois Nations
1608	Champlain establishes Quebec settlement in New France, to the north of the Mohawk Nation
1615	Dutch establish colony of New Netherland on eastern border of Mohawk Nation
1647	Jesuits obtain grant of lands at Saint Francoise Xavier du Pres in New France; Iroquois settlement at Kentake will be established here in 1667
1649	Jesuits enter Iroquoia
1664	British defeat Dutch, claim New Netherland for England, rename it "New York"
1667	First Mohawk relocation to Kentake
1675	Intendant Duchesneau visits Kentake and secures Jesuits new lands to east of Kentake; priests and some amerindians relocate there in 1676
	Mohawk population at Kentake reaches 400 persons, or roughly 20-30% of the total population of Mohawks resident in Iroquoia
1676	Population pressures at Kentake motivate second Mohawk relocation, this time to the first settlement to be called "Kahnawake", known as "Saint Xavier du

Sault" to the Jesuits.

- 1682 Mild smallpox epidemic hits Kahnawake
- 1683 Liquor begins to flow into Kahnawake
- 1689 King William's War declared between France and England; Iroquois ally with English against French.
- All residents of Kahnawake save the men are removed to Montreal following outbreak of war between French and Iroquois
- 1690 Jesuits and Mohawks leave Montreal to reside at third settlement at Kahnawakon
- 1692 Mohawks strike peace terms with French; Onondaga, Cayuga and Seneca, still at war with French, attack Kahnawakon
- 1693 French attack Mohawk villages in New York with aid from Kahnawake warriors
- 1696 Pressures of Iroquois raids, rising population and exhaustion of land and firewood induce fourth migration of Mohawks, this time to Kanatakwenke
- Treaty of Rhyswick between French and English returns all conquests made during King William's War
- 1701 A general peace is struck between the French and the Iroquois at Montreal
- 1702 England declares war on France; Queen Anne's War opens in North America
- 1713 Queen Anne's War concludes under terms of Treaty of Utrecht
- 1716 Exhaustion of soils and firewood prompt final migration to site of modern Kahnawake
- 1719 Final settlement fully in place at Kahnawake
- 1722 Mohawks protest French intentions to establish a garrison in their community; a report in 1754 records that such a fortification had been erected in

Kahnawake, although the precise date of this event is uncertain

Tuscarora Nation "adopted" into the Five Nations Iroquois Confederacy, resulting in new name of Six Nations Iroquois Confederacy

- 1730 Number of "Christian savages" at Kahnawake estimated at 1200
- 1744 French and British renew hostilities, King William's War opens in the British North American colonies
- Records indicate a Kahnawake alliance with the French, which was articulated only minimally in practice
- 1744 Kahnawake affirms an alliance with New York, while also speaking of alliance with French
- 1748 Treaty of Aix-la-Chapelle ends King William's War
- 1754 Kahnawake renews alliance with New York
- 1756 Britain declares war on France, initiating Seven Year's War
- Kahnawake vacillates on question of alliance; ultimately align with English and assist in transport of British troops in final raid on Montreal
- 1760 New France falls to the British
- First references to "Seven Nations of Canada", a northern amerindian confederacy centred upon Kahnawake, appear in historical documents
- 1762 British Military Council at Montreal declares Mohawks at Kahnawake to "be put in possession of their lands at the Sault..."; "fee simple" ownership to reside in the Crown
- 1763 Treaty of Paris ends Seven Year's War; France cedes all North American possessions to England, except the islands of St. Pierre and Miquelon off Newfoundland, and New Orleans
- Royal Proclamation establishes terms of British rule in Canada, imposes British criminal law on Mohawks at Kahnawake and generally.

- 1764 Civil government established in Canada
- 1774 Quebec Act passed in British Parliament, established French civil law and British Criminal law in Quebec
- 1775 American Revolutionary War initiated in clashes between British troops and colonial militia at Lexington and Concorde, Massachusettes
- 1777 Documentary evidence suggests unification of Seven Nations of Canada and Six Nations Iroquois Confederacy
- 1779 Few Kahnawake warriors participate in Revolutionary War, those who do fight with British
- 1783 Treaty of Paris ends Revolutionary War
- 1783-84 Iroquois assistance to British not acknowledged in Treaty of Paris; Frederick Haldimand remedies through grant of land at Brantford, Ontario, to those New York Iroquois wishing to relocate
- 1794 Jay's Treaty signed between Britain and the United States
- 1812 United States Congress declares war on Britain, initiates War of 1812 in North America.
Kahnawake warriors fight for Canada, against United States
- 1814 Treaty of Ghent ends War of 1812; Iroquois aid again forgotten by British; conclusion of colonial contests for North America renders importance of amerindians as allies a nullity
New era of "British Indian Policy" in Canada emerges; alliance irrelevant, financial retrenchment of "Indian Affairs", opening lands for British settlement and "civilizing" amerindian people, paramount
- 1820 "Civilization" policy firmly in place; Indian Department attempts to commute presents once given to encourage alliance, to Kahnawake Mohawks into money payments; Kahnawake resists
Liquor becomes a problematic presence in Kahnawake

- 1868 An Act providing for the organisation of the Department of the Secretary of State of Canada, and for the Management of Indian and Ordnance Lands¹ is passed; Secretary of State is made Superintendent of Indian Affairs for Canada and is given "control and management of the lands and property of the Indians...". The Act also defines "Indian" and may be viewed as the first of the series of "Indian Acts" in Canada.
- Under s.39, provision is made whereby: "The Governor may, from time to time, appoint officers and agents to carry out this Act, and any Orders in Council made under it, which officers and agents shall be paid in such manner and at such rates as the Governor in Council may direct". At a local level, this provision translated into the placement of federal officers known as "Indian agents" in reservation communities, whose primary duties involved ensuring federal Indian policies were implemented and followed in those communities.
- 1867 British North America Act passed by British Parliament receives Royal Assent on 29 March.
- 1869 An Act for the Gradual Enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria, Chapter 42² is passed; provides for "elective system" of government by Indian "bands", enfranchisement, etc.
- 1871 Annual Report of the resident Indian Agent in Kahnawake notes most Mohawks have abandoned traditional subsistence pursuits in favour of work in performing arts, river rafters/navigation, bridge erection, bead and craftwork
- 1873 Department of the Interior created, responsibility for Indian affairs transferred here.
- 1874 Amendments to laws respecting Indians defines laws restricting use of liquor among Indians and

¹ S.C. 1868, c.42

² S.C. 1869, 32-33 Vict.

provides for arrest and imprisonment of "drunk Indians", specifies also that Indians may act as "competent witnesses" at a criminal trial

- 1876 First formal "Indian Act" passed: The Indian Act, 1876³; consolidates earlier legislation into a single Act creating regulations touching virtually every aspect of amerindian life; amended via An Act to Amend the Indian Act, 1876⁴, one year later
- 1880 The Indian Act, 1880⁵, passed, contains and expands upon earlier acts; "half-breeds" who can trace "Indian blood" through paternal descent, who have been resident at Kahnawake for twenty years, are confirmed in their "possession and right of residence" and to possess no more "tribal rights and usages than others of the band enjoy"
- 1881 An Act to further amend "The Indian Act, 1880"⁶, passed; by virtue of s.12, all Indian agents become "ex officio" Justices of the Peace for the purposes of the Act
- 1882 The Indian Department initiates the sub-division of the Mohawks' reserved lands into fifty-acre lots, which are to be offered to individual Mohawks as incentives to accept enfranchisement.
- Records show only a single Mohawk accepts the offer
- 1884 Agents' powers as of 1881 expanded through An Act to further amend "The Indian Act, 1880"⁷, and through The Indian Advancement Act, 1884⁸, both passed in this year.

³ S.C. 1876, c.18, 39 Vict.

⁴ S.C. 1879, c.34, 42 Vict.

⁵ S.C. 1880, c.28, 43 Vict.

⁶ S.C. 1881, c.17, 44 Vict.

⁷ S.C. 1884, c.27, 47 Vict.

⁸ S.C. 1884, c.28, 47 Vict.

- 1886 The Indian Act⁹ is passed, incorporates and expands earlier acts; Indian agent Justices given jurisdiction over violations of the Act regardless of where they occur
- 1888 Resident agent's report on Kahnawake Mohawks notes "the rarity of serious crime and growth of general prosperity among them"
- Reports emerging from Kahnawake indicate strong local desire to be brought under the terms of the Indian Advancement Act
- 1888-1889 Series of seven petitions sent from Kahnawake to Ottawa requesting application of the Advancement Act to the community
- 1889 5 March, an order-in-council brings "the Iroquois Band of Caughnawaga [Kahnawake]" under the terms of the Indian Advancement Act; Kahnawake obtains elective system of government
- 1890 Agents-cum-Justices obtain jurisdiction over "morals" offenses defined within An Act respecting offences against Public Morals and Public Conveniences, by virtue of s.9 of An Act to further amend "The Indian Act".¹⁰
- 1894-95 Powers of Justices established in 1890 confirmed in An Act to further amend "The Indian Act"¹¹, and An Act to further amend "The Indian Act".¹²
- 1906 Indian Act¹³ acknowledges jurisdiction of "any recorder, police magistrate or stipendiary magistrate" appointed to power in "any city or town" will have jurisdiction to hear offences under the Indian Act

⁹ R.S.C. 1886, c.43.

¹⁰ S.C. 1890, c.29.

¹¹ S.C. 1894, c.32, s.8.

¹² S.C. 1895, c.35

¹³ R.S.C. 1906, c.81.

- 1914 Canada enters World War I when Britain declares war on Germany; Canadian amerindians protected from conscription in this war, which concludes with the Armistice, in 1918
- 1924 Resident agent at Kahnawake describes activities of a traditionalist faction consisting of "assumed chiefs" with only a "small clan of supporters", who "systematically opposed every single effort that anybody has done to better their condition...Their speeches were to return to their former state before the whites came."¹⁴
- 1927 Indian Act¹⁵ passed; elaboration of specific jurisdiction under s.152 marks direct predecessor of modern s.107.
- 1928 Indian Department observes that, rather than "advancing" them as the 1885 Act had intended, the "Iroquois of Caughnawaga" are engaging in a general "reversion to paganism" which threatened the functioning of the band council.¹⁶
- 1931 British Parliament passes Statute of Westminster, establishing complete legislative equality between British and Canadian Parliaments and acknowledging Canadian independence from Britain
- 1934 Two "traditionalist" councillors defect from band council to form an alternative political association which they entitle the "Square Deal Party".¹⁷ According to the agent of the day, The aim of this association, was at the beginning, to make a pression [sic] at Ottawa on behalf of the return of the old system of Clans, for the

¹⁴ Canada. Department of Indian Affairs and Northern Development. File #373/3-1(vol.1) 1924-1966 Band Management - General - Montreal District.

¹⁵ 1927, c.98.

¹⁶ NAC RG 10, vol.7565, file 4005-1C.

¹⁷ There is some suggestion that this was the successor of another similar party, referred to as the "Caughnawaga Indian Progressive Party, about which no other information is extant beyond slim references to it in records and letters originating in Kahnawake and passing between the federal Indian Agent and the Department of Indian Affairs; see NAC RG 10, vol.7995, file 1/24-2-21.

governing of the Reserve, instead of the present mode of election. They wanted to elect Life Chiefs instead of holding elections every year and their object was rejection of the Indian Act.¹⁸

Primary records indicate an intensification of factionalism and rejection of the Indian Act in Kahnawake. Specifically, the records note "A press despatch, dated October 28th, states that Mounted Police had to be called to this Reserve because of the threat of angry Indians to hinder the construction of a home for the Indian Agent. According to a communication from the Caughnawaga Reserve, the Indians wish their tribal rights restored under Treaty. They contend that their elective representatives have no authority, but that, in reality, the Agent decides what request shall be sent to your department"¹⁹

- 1938 In July four men write to the then-Governor General of Canada, Lord Dunsmuir, informing him that they ceased to follow the "Indian Act - meaning the electoral form of government".²⁰ In its place they determined to follow the "Government of the Six Nations Confederacy, the Longhouse"
- 1939 Canada declares war on Germany
- 1943 Mohawks protest mandatory conscription for World War II, at least one man arrested, tried and imprisoned for failure to report, making him one among an apparent many whom the Agent reported "... have received and ignored their calls [and] have been arrested and taken to Courts, where they have been sentenced".²¹

¹⁸ NAC RG 10, vol.7995, file 1/24-1-21.

¹⁹ Ibid.

²⁰ Ibid.

²¹ Ibid. Letter to the Secretary, Indian Affairs Branch, Ottawa, from Frs. Brisebois, Indian Agent, Caughnawaga, February 11, 1943.

Fire completely destroys the Indian Agency Building in the Community, "with a complete loss of all Agency files, record books and plans".²² As the practice has not yet developed of keeping copies of Agency paperwork at the Indian Affairs Offices in Ottawa, much important primary information about the community for much of the period of the Department's administration of it is lost

- 1951 First major revision of the 1927 Indian Act takes place; Indian agent Justices receive current s.107 jurisdiction; specification that only "Indian agents" may be appointed as justices for purposes of the Act removed, replaced with "persons"
- 1952 Band Council resolution appoints a Mohawk police constable²³
- 1955 Passage of Saint Lawrence Seaway Act²⁴ focuses Kahnawake's attention on protesting appropriation of reservation lands for building of the Seaway; this protest will not be answered until 1973, at which time compensation for the lands taken is finally made by the federal government.²⁵
- 1956 Kahnawake elects a "traditionalist" slate to the band council²⁶

²² Ibid., p.18.

²³ Ottawa. Department of Indian and Northern Affairs. File #373/3-6-1(vol.1) 1945-1946 Band Council Resolutions - Montreal District. Letter to the Indian Affairs Branch from Frs. Brisbois, Acting Regional Supervisor, Caughnawaga, 13 April 1955.

²⁴ R.S.C. 1952, c.242.

²⁵ Ottawa. Department of Indian Affairs and Northern Development, File #373/3-1(vol.1) March 1970 - May 1985, Grants to Bands - Caughnawaga Band - Caughnawaga District.

²⁶ Ottawa. Department of Indian and Northern Affairs. File #373/3-5(vol.4) July 1956-June 1965, Elections - general - Montreal District. Letter from F. Brisbois, Supt., Indian Agency, to The Indian Affairs Branch, Dept. of Citizenship and Immigration, Ottawa, Ontario.

- 1957 The council endeavours to move Kahnawake's protest of the Seaway to the United Nations; records do not confirm the outcome of these efforts
- 1964 Controversy over band council-controlled policing incites incident of factionalist violence between "traditionalists" and "conservatives"²⁷
- 1969 Band council obtains control over policing in Kahnawake²⁸; overtake duties of Royal Canadian Mounted Police in the community sometime after 1974 (records are silent on precise date)
- 1972 Band council assumes control over band membership
- 1973 "Traditionalists" evict "non-Indians" from Kahnawake; "riot" erupts when band council police attempt to thwart traditionalist actions
- 1974 Band council of Kahnawake "borrows" services of Mohawk Justice of the Peace from Akwesasne appointed under s.107 of the 1951 Indian Act to hold an informal s.107 Court in Kahnawake as needed
- 1977 Services of Akwesasne Justice made official through band council resolution
- 1981 Mohawk Council places a "moratorium" on all "mixed marriages" and the adoption of non-Indians by Mohawks, promising to withhold benefits and rights defined under the Indian Act as part of band membership to those ignoring the moratorium
- 1982 Constitution Act proclaimed by Queen Elizabeth II, includes Canadian Charter of Rights and Freedoms

²⁷ Ottawa. Department of Indian Affairs and Northern Development, File #373/3-6(1957), Minutes of Council - General - Montreal District, Letter from T. Horn.

²⁸ Ottawa. Department of Indian and Northern Affairs, File #373/3-1(vol.1), March 1970 - May 1965. Grants to Bands - Caughnawaga Band - Caughnawaga District. Band Council Resolution #22/68-69.

- 1985 Akwesasne Justice retires; Mohawk Council of Kahnawake creates "Justice Committee" to spearhead creation of s.107 Court in the community
- 31 January - Two Justices appointed under s.107 of the 1951 Indian Act to serve community of Kahnawake, establishes the modern "Court of Kahnawake"
- 1986 Council uses membership by-laws to restrict voting rights in council elections
- 1987 Dominant traditionalist faction formally organizes for promotion of "traditionalist" agenda in the community, establishes "Nation Office" to act as its secretariat
- "Ryan Deer Arson Case" resolved by "traditionalist" group
- 1988 Conclusion of Arson Case and reaching of resolution impels band council police to contact Canadian Crown Prosecutor, who issues warrants for those committing the acts; warrants remain outstanding at closure of research process
- "Traditionalists" "evict" alleged drug dealers from Kahnawake Territory following their refusal to respond to warnings to desist in their behaviour
- "Traditionalists" constitute their own "Justice Committee" to spearhead the revitalization of "traditional dispute resolution" in the community in the form of the "Longhouse Justice System"

The existence of past injustice and the continued memory of that injustice raises the question of the rectification of injustices. For if past injustice has shaped the structure of a society's present arrangements for holding property in various ways - or analogously if it is held that past injustice has shaped the structure of a society's arrangements for founding its sovereignty - the question arises as to what now, if anything, ought to be done to rectify those injustices. What kind of criminal blame and what obligations do the performers of past injustice have towards those whose position is worse than it would have been had the injustice not been perpetrated? How far back must you go in taking account of the memory of past injustice, in wiping clean the historical record of illegitimate acts?

Paul Connerton, How Societies Remember
(Cambridge: Cambridge University Press,
1989, p.9-10).

1. Introduction

Eight miles southwest of the predominantly francophone city of Montreal in Quebec, Canada, lies a federal "Indian reservation"²⁹ which constitutes one of the last strongholds of the *Kanienkehaka*, or "People of the Flint".³⁰ The land is called Kahnawake, and the Kanienkehaka are better known outside its boundaries as "Mohawks", a name given to them many generations ago by their traditional Algonquin enemies, who referred to them in battle as "man-eaters".³¹ The Mohawks have occupied their

²⁹ "Indian reservations" are defined in the Canadian Indian Act (R.S.C. 1985, c.I-5) as lands the legal title to which is vested in the Crown, and which are set aside for the use and benefit of amerindian people who are members of a "band". The Act further defines a band as a body of amerindians whose names are included on a "band list" maintained by the federal government and who have been declared by the Governor in Council to comprise a band for purposes of the Indian Act. The federal government, through the Department of Indian Affairs and Northern Development, holds both monies and lands (the "reservation") for the common use and benefit of the band.

³⁰ The latter is the most approximate translation of the term "Kanienkehaka" from their mother tongue to English.

³¹ Charges of cannibalism are notorious among many First Nations, and are often of questionable veracity. In his The Man-Eating Myth: Anthropology and Anthropophagy, Arens addresses himself directly to the question of ritual cannibalism in warfare and torture among the Iroquois, challenging the position taken by Tuck in his 1974 publication "The Iroquois Confederacy" [(in New World Archaeology, ed, E.B.W. Zubrow et al (San Francisco: W.H. Freeman and Co., 1974), pp.190-200] and questioning apparently "hearsay" evidence of the Jesuit Missionaries contained in their journals and letters (R.G. Thwaites, ed. & trans., The Jesuit Relations and Allied Documents. Travels and Explorations of the Jesuit Missionaries in New France, 1610-1791; the Original French,

present site at Kahnawake since 1716, whence concluded their almost half-century trek away from the lands they had historically occupied in the Mohawk Valley of today's northern New York state, where they had become known as the easternmost nation of the historic "Six Nations Iroquois Confederacy".³²

Latin and Italian Texts, with English Translations and Notes, 73 vols. (Cleveland: The Burrows Brothers; reprinted, New York: Pageant, 1959). These sources suggest a habit of ritual cannibalism in battle and in torture; in the former case, eating the flesh of an especially powerful foe was felt to transfer some of the loser's strength to the victim; in the case of torture, it would seem it was intended most often to horrify the victim, rather than for any particular benefit to the spirit of those practising it. Arens is essentially correct in his charges of Jesuit hearsay, and although I am not an archaeologist and hesitate to impugn too quickly Tuck's work in historic Iroquoia, Aren's criticisms make good sense, and thus I would urge my own readers and students to be cautious about accepting too quickly charges of cannibalism among the "Mohawks" and their Iroquois brethren. On charges of cannibalism, see W. Arens, (New York: Oxford University Press, 1979), pp.127-129.

³² According to Iroquois lore, the Mohawks were both instigators and significant members of the historic confederation of five northeastern American Iroquoian peoples, the Seneca, Cayuga, Onondaga, Onieda and Mohawk, which is believed to have transpired sometime in the period "A.D. 1400 or slightly before to 1600 or slightly before" [Elizabeth Tooker, "The League of the Iroquois: Its History, Politics and Ritual", in Northeast, vol.15, Handbook of North American Indians, vol. ed. Bruce G. Trigger (Washington: Smithsonian Institute, 1978), p.420]. In 1722 the Tuscarora nation was added to the confederation, resulting in the amendment of their original nomenclature to the "Six Nations Confederacy". Also called the "League of the Iroquois" or the "Haudenosaunee" ("People of the Longhouse"), the Confederacy was formed not only as an essentially defensive alliance against common enemies, but was intended to curtail the confederates' rapid and internecine warfare with each other; at its apogee in the seventeenth century, it assumed a remarkable prominence in colonial machinations over the trade in furs as well as in matters of land and alliance, and has been said to have held for a time the balance of power between the French and British struggle for northeastern America. The role of the Mohawks in the Confederacy and in the colonial struggles for northeastern America will be revealed in part 5 as it is relevant to an understanding of the chronicle of Kahnawake.

The Mohawks' departure from their historic homeland was precipitated by nearly a century of contact with the Europeans, whose struggle to control the "new world" of northeastern America had been well-underway for nearly a century. That contact was, at best, paradoxical for the Mohawks, as it was for many of their brethren of other amerindian nations. For while the French, Dutch and British newcomers brought a trade and technologies which greatly eased some aspects of the amerindians' traditional subsistence, these carriers of iron axes and arquebuses were also the conduits of crippling disease, alcohol and challenges to the traditional order of things that proved devastating for many indigenous societies. Among the most compelling of those challenges were the French Jesuits and their religion, and it was the "Black Robes'" proselytizing and the resulting factionalism which induced many Mohawks to relocate north to "Kentake", the first of five villages sites that would culminate in the modern community at Kahnawake.

In the opinion of their descendants, the Mohawks who moved north to Kentake were settling in lands within the confines of their traditional territories, and they carried with them to that place all the rights and powers of citizens of a free and sovereign nation.³³ While the French "Indian policy" of the

³³ A. Brian Deer, The Lands of the Iroquois, the Kanienkehaka, and the Kahnawakehronon: A Preliminary Report (Kahnawake: Kahnawake Development Research Program, March 1985). This position would seem to be supported by some of the earliest reports on the amerindians within New France, including Antonio de Ulloa, A Voyage to South America: Describing at Large the Spanish Cities, Towns, Provinces &c., on that Extensive Continent: Undertaken...by Don George Juan,

time was at best ad hoc, emerging in a series of brief instructions across a range of documents rather than in a single, well-reasoned and comprehensive statement³⁴, certain elements were manifest. Two of the most salient policy positions of the French were a rejection of aboriginal rights to lands within the colony's boundaries and the vulnerability - at least in theory - of amerindians to French criminal laws. Thus as early as 1664, the Sovereign Council at Quebec had declared that "the Indians be subjected to punishment for murder and rape as prescribed by the laws and ordinances of France"³⁵, a jurisdiction which was expanded in three years later to include French laws and punishments in regard to "murder, rape, theft,

and Don Antonio de Ulloa..., trans. John Adams, 4th ed. (London: J. Stockdale, 1806), pp.376-377; as well as in later references to their rights made by Mohawk people and recorded by their missionaries in The Jesuit Relations and Allied Documents. Travels and Explorations of the Jesuit Missionaries in New France, 1610-1791; the Original French, Latin and Italian Texts, with English Translations and Notes, ed. and trans., Reuben Gold Thwaites, 73 vols.(Cleveland: The Burrows Brothers; reprinted, New York: Pageant, 1959). It should be noted that there exists some question of whether the lands on which the mission settlements were located fell with Mohawk territories, as opposed to that of the Algonquin peoples, or whether longstanding inter-tribal warfare between these peoples had rendered the region a "no-man's land" which could not be actively claimed by either amerindian group (personal communication with B.G. Trigger, October 1989).

³⁴ This observation is supported by Patricia Olive Dickason, "Louisburg and the Indians: A Study in Imperial Race Relations, 1713-1760" 6 History and Archaeology (1976), pp.17-41; and W. J. Eccles, The Canadian Frontier, 1534-1760 (Toronto: Holt, Rinehart and Winston, 1969).

³⁵ New France, Conseil superieur de Quebec, Jugements et deliberations du Conseil Souverain de la Nouvelle-France, 7 vols (Quebec: A Cote, 1885-91), vol.2, pp.174-175, 21 avril 1664; see also, vol.1 throughout.

drunkenness and other crimes".³⁶ There would thus seem little question that the Mohawks and French who came together at Kentake shared a rather significant, if unstated, misapprehension about the status of the lands they occupied: Each felt they maintained full and free rights to that land and to the administration of their lives - and that of the "foreigners" with whom they co-habitated - by the laws and customs of their country.

Because they simply failed to acknowledge any aboriginal title, the French did not feel it necessary to approach the amerindians in their midst and negotiate matters of title and rights to land.³⁷ This omission arguably saved them from land-related conflicts, as it may well have been the case that, for those amerindians who actively contemplated the matter, the French failure to discuss land rights was misconstrued as an implicit acknowledgement that the lands belonged to the

³⁶ See New France, Edits, ordonnances royales, declarations et arrêts du Conseil d'état du roi concernant le Canada, 3 vols. (Quebec: Frechette, 1854-56) vol.3, p.70, 11 mai 1676; see also, generally, vol. 1; New France, Conseil supérieur de Québec, Jugements et délibérations du Conseil Souverain de la Nouvelle-France, 7 vols (Quebec: A Cote, 1885-91), for example, vol.2; see also, vol.1 throughout; W. J. Eccles, The Canadian Frontier, 1534-1760; Ulloa, A Voyage to South America..., *ibid.*; Dickason, "Louisburg and the Indians...", pp.25-27; Jan Grabowski, "Crime and Punishment: Sault-St-Louis, Lac Des Deux Montagnes and French Justice 1713-1735, unpublished paper (Montreal: University of Montreal, February 1992), pp.1-3.

³⁷ Marc Lescarbot, The History of New France, 3 vols. (Toronto: The Champlain Society, 1907), vol.1, pp.16-17; Peter A. Cummings and Neil H. Mickenberg, eds., Native Rights in Canada (2nd ed.) (Toronto: General Publishing Company Limited, 1980), pp.76-79; William J. Eccles, France in America (New York: Harper and Row, 1972), pp.2-3, 18.

indigenous peoples already inhabiting them. It is possible, too, that the aboriginal concept of usufruct would not have been incompatible with the appearance of others "using" their lands, despite the reality that such use, in the minds of the French, equated with occupation and settlement and, therefore, the exercise of an exclusive French right to those lands.

If acting upon their perceived rights to amerindian lands posed little initial difficulty for the French at Kentake and the later settlements, they would meet with much greater challenges in regard to the activation of their criminal law jurisdiction there. At the time of the Mohawk relocation to Kentake in the region of New France, the "Contume de Paris", the King's "Ordonnance Civile" of 1667 and, after 1670, "La Grande Ordonnance Criminelle"³⁸ were administered by a three-tier legal system consisting of the lowest seigniorial courts, followed by the royal courts at Montreal, Quebec and Trois Rivieres, and the highest court of the Sovereign Council. The question of whether the crimes of amerindians could be tried in these courts and punished in French prisons was important not only in terms of the day-to-day administration of the colony, but for its sovereignty as well. Quite simply, if the amerindians could be actively placed under the authority of French law, it would confirm the sovereignty of New France;

³⁸ "Recueil general des anciennes lois francais depuis l'an 420 jusqu'a la revolution de 1789", vol.XVIII (Paris, 1929); William J. Eccles, France in America (New York: Harper and Row, 1972), pp.72-73.

should the indigenes avoid that burden, and answer only to their own codes, they would demonstrate their own freedom and sovereignty and, in so doing, could not help but compromise that of the French colony.³⁹

Viewing the situation in retrospect, it would appear that the Mohawks at Kentake and the later settlements were, in fact, remarkably successful in thwarting the free demonstration of a full French criminal legal authority within their settlements⁴⁰, although it must be qualified that there are limited historical records surviving to inform how disputes were handled in the absence of French laws. Their successful evasion of the latter was firmly grounded in the dependency of the colony on its amerindian residents as military allies and trading partners. New France could hardly risk alienating such important friendships through an overly enthusiastic enforcement of their laws on people who would neither have understood them in principle nor tolerated them in practice. The result of these

³⁹ W.J. Eccles, The Canadian Frontier, 1534-1760 (New York: Holt, Rinehart and Winston, 1969), p.77.

⁴⁰ See for example, those cases documented in the Archives Nationales du Quebec a Montreal, Archives judiciaires (hereafter, ANOM, AJPD), Places detachees, 8-9 November, 1723, 06-M,T 1-1/106; Interrogatoire de Ignace Goyentanonguan, sauvage Iroquois de nation, de la mission de Sault-au-recollet, accuse d'avoir blasse en etant yvre un sauvage Abenakis, 06-M, T1-1/98, 8 juin 1720; ANOM, AJPD, 06 M, T1-1/120, 5 mai 1730; ANOM, AJPD, 06 M,T1-1/106, 9 nov. 1723. See Jan Grabowski, "Crime and Punishment: Sault-St-Louis, Lac Des Deux Montagnes and French Justice 1713-1735" (unpublished paper, Montreal: Universite de Montreal, February 1992) for a full discussion of the unfolding of "intra- and inter-nation crimes in the New France in the region of the French mission settlements.

political pressures was the creation of a "special status"⁴¹ for the Mohawks of the northern settlements which endowed them with a sort of "diplomatic immunity" in regard to French criminal laws.⁴² Thus the Mohawks were able to maintain a significant degree of autonomy in the resolution of criminal legal disputes and, if the aforementioned argument holds, in so-doing implicitly articulated an ongoing assertion of an enduring sovereignty within the boundaries of New France.⁴³

The unique position of the northern Mohawks would persist up to, and arguably even for a time following, the fall of the colony of New France to the British in 1760. At the moment of the British conquest of the French colony, war continued to rage in Europe between the French and the British, and thus the long-term status of the colony was uncertain. Owing to this reality, the British post-conquest administration in New France closely resembled its former French counterpart and was designed to create as little disruption as possible until matters were resolved in Europe.⁴⁴ When that resolution transpired in 1763, and it was determined that Canada would remain in British

⁴¹ The term is Dickason's, in "Louisburg and the Indians...", p.27.

⁴² Eccles, The Canadian Frontier..., p.78.

⁴³ Eccles, The Canadian Frontier, 1534-1760; Ulloa, A Voyage to South America..., pp.376-377; Dickason, "Louisburg and the Indians..."; Dickason, Canada's First Nations: A History of the Founding Peoples from Earliest Times (Toronto: McClelland and Stewart, 1992), pp.344-345; Grabowski, "Crime and Punishment...".

⁴⁴ Eccles, "The British Conquest", in The Ordeal of New France (Montreal: The Canadian Broadcasting Corporation, 1966), p.139.

possession, the Royal Proclamation of the same year activated British criminal law throughout its new territories, which were now deemed the property of the British Crown:

And We have also given Power to the said Governors, with the consent of our Said Councils, and the Representatives of the People so to be summoned as aforesaid, to make, constitute, and ordain Laws, Statutes, and Ordinances for the Public Peace, Welfare, and good Government of the People and Inhabitants thereof, as near as may be agreeable to the Laws of England, and under such Regulations and Restrictions as are used in other Colonies; and in the mean Time, and until such Assemblies can be called as aforesaid, all Persons Inhabiting in or resorting to our Said Colonies may confide in our Royal Proclamation for the Enjoyment of the Benefit of the Laws of England; and for which Purpose We have given the Power under our Great Seal to the Governors of our Said Colonies respectively to erect and constitute, with the Advice of our said Councils respectively, Courts of Judicature and public Justice within our Said Colonies for hearing and determining all Causes, as well Criminal as Civil, according to Law and Equity, and as near as may be agreeable to the Laws of England... And we do further expressly enjoin and require all Officers whatever, as well Military as those Employed in the Management and Direction of Indian Affairs, within the Territories reserved for the use of the said Indians, to seize and apprehend all Persons whatever, who standing charged with Treason, Misprisons of Treason, Murders, or other Felonies or Misdemeanors, shall fly from Justice and take Refuge in the said Territory, and to send them under a proper guard to the Colony where the Crime was committed of which they stand accused, in order to take their Trial for the same.⁴⁵

Thus despite the failure of the French to deal with an aboriginal title which the conquerers would appear to have accepted in principle, the Proclamation acknowledged not only the British right of conquest to Kahnawake's lands, but to the

⁴⁵ The Royal Proclamation of 7 October, 1763, reprinted in R.S.C., 1970, Appendices, pp.127-129.

activation of a British criminal law jurisdiction over its Mohawk inhabitants as well - a jurisdiction which was confirmed in 1774 through the Quebec Act.⁴⁶

It was through the much-later British North America Act, passed in 1867, that the articulation of that criminal law jurisdiction obtained its current form of a "shared" responsibility between the federal government of Canada and the individual provinces. By that Act, now enshrined within the Constitution Act, 1867⁴⁷, criminal law is primarily a federal responsibility defined under s.91(27) of the Constitution Act, 1867, wherein the federal government obtains the primary legislative responsibility for criminal law and procedure. This jurisdiction is further expanded in s.91(28) of the same Act to include powers over the creation and regulation of penitentiaries, by the s.96 powers over the appointment of judges to the superior courts of the provinces, and by the s.101 power over the creation of additional courts to administer the laws of Canada.

The 1867 legislation also accorded the provinces a major authority in the area of criminal justice administration by virtue of the powers implicit in s.92(14) of the Constitution

⁴⁶ 14 Geo. III, cap.83. See also, Jack Stagg, "Anglo-Indian Relations in North America to 1763 and an Analysis of the Royal Proclamation of 7 October 1763." (Ottawa: Department of Indian Affairs and Northern Development, Research Branch, 1981).

⁴⁷ British North America Act, 1867, 30-31 Vict., c.3 (U.K.), as amended and incorporated as the Constitution Act, 1867, by Schedule 'B' of the Canada Act, 1982 1982, c.11 (U.K.).

Act, 1867, which confer the provinces authority over the constitution and maintenance of civil and criminal courts, and the administration of justice in the provinces. These powers are additionally underscored by the Act's conferral of rights in relation to the creation and regulation of provincial gaols via s.92(6), and the ability to enforce provincial "quasi-criminal" laws via s.92(15). As discussion later in this thesis will reveal, this federal-provincial split in powers is less-than clear or perfect, and leaves little, if any, room for the incorporation of "traditions" other than those western legal ones which lie at the core of the Canadian administration of criminal justice.

The historic growth and evolution of the British and Canadian criminal law jurisdiction within Kahnawake was only one part of a larger state policy of "civilization" which held at its heart the goal of eradicating all amerindian traditional culture and institutions and replacing these with putatively more "civilized" European practices and institutions. Continuing the precedent of "frenchification" set by the French regime in Canada⁴⁸, a crucial element of the drive to civilize and

⁴⁸ See: Cornelius J. Jaenen, "The Frenchification and Evangelization of Amerindians in Seventeenth Century New France", 35 Canadian Catholic Historical Association Session (1968):57-71. The essence of the policy was the transformation of amerindians into French citizens in culture, language, habits and dress, through tutelage by missionaries and direct example by having French settlers and amerindian people living together in the mission settlements. The policy is discussed in detail, as it relates to Kahnawake and its "cultural transformation", in part 5 of this thesis.

assimilate Mohawks - and all other aboriginal people - into Canadian society, was the erosion of the traditional practices and philosophies which supported amerindian identities both as individuals and as nations, and which protected them against the cultural onslaught and legislated acculturation implicit in the civilization policy.

Intimately bound up with the campaign to expunge aboriginal traditions was the debunking of the aboriginal histories which existed in symbiosis with those traditions and the denial of Mohawk and other histories as chronicles of empowered and equal peoples possessing rich and sophisticated cultural traditions. Stated another way, at the essence of the efforts to "de-Indianize" the Mohawks was, quite simply, the theft of their history as a nation.

The "organized forgetting"⁴⁹ which the colonial and Canadian states have imposed on the Mohawk people at Kahnawake has engendered a modern obsession with what has been lost, and inspired a movement toward reconstruction of their history and traditional culture and institutions in a "cultural renaissance" whose primary aim is the empowerment of the people toward the eventual achievement of full self-determination in Kahnawake. One of the focal points of the reconstruction is "traditional dispute resolution" and its translation into a modern criminal law system which will replace the western legal traditions

⁴⁹ The term belongs to Connerton, in his How Societies Remember, p.14.

inherent in the current Canadian criminal law jurisdiction in the community, which many Mohawks assert are antithetical to their own traditions of dispute resolution.

The study whose method and outcome are described and analyzed in the pages which follow focused upon the "traditional" criminal legal structures currently proposed for activation within Kahnawake by the most dominant factions within the community, and attempted to trace their traditional content in an historical "upstreaming" to the earliest records of those dispute resolution structures indigenous to the historic Iroquois people. The resulting juxtaposition of the "original" traditions and those manifest today in the proposed "traditional" justice systems", suggest strongly that the "traditions" which proponents of the structures argue inhere in both the structures and their historic counterparts may in reality share few characteristics, and the history which is said to link them may be more factitious than real. Insofar as the case for "separate justice"⁵⁰ in Kahnawake turns upon its "traditional-ness" and its concomitant distance from the western

⁵⁰ The term "separate justice" is a significant part of the vocabulary of aboriginal self-determination in Canada at the present time. In the same fashion that "self-determination" means different things to different groups, "separate justice" may involve a range of alternatives and adaptations to the dominant, Canadian criminal legal system. Among these are "elder consultations" to influence the sentencing process in Canadian trials involving aboriginal persons, plans to establish Canadian-style summary courts on reservations, and more ambitious plans, such as that at Kahnawake, to create criminal "courts" based on amerindian tradition and which are entirely separate from the dominant structure.

legal traditions inherent in the Canadian criminal law system - a distance which putatively affords a "traditional" system both a greater relevance to, and "fit" within, the Mohawk community - the question of whether the "tradition" in the proposed systems is somehow ingenuine is important as its answers threaten to impact greatly upon both the systems' credibility as "traditional" institutions and the viability of tradition-based arguments supporting their creation.

The symbiosis which exists within Kahnawake between the differing conceptions of "traditional dispute resolution" and the histories which support them is suggestive of the importance of history in the recreation or "invention" of tradition, and renders the dissertation as much a work in legal history as one of legal anthropology. Thus what follows an introduction to the Mohawk society at Kahnawake and an elaboration of the method and aims of the study, is a brief ethnographic account of historic Mohawk society and culture, and the modes of resolving disputes which had become sufficiently serious to threaten the public peace and demand public attention. In this regard, as will be elaborated in detail in the discussion of method, the study was upon how public, rather than private, disputes were resolved, as it is only these conflicts which appear historically to have attracted the attention of the "original traditional" structures approximated in their modern counterparts, and it is also such disputes which would constitute the "law-jobs" of an active "traditional court" in contemporary Kahnawake.

Linking the documentation and analysis of the historic "legal traditions" and the modern extant and proposed structures in Kahnawake is an elaboration of the chronicle of the community and the alterations to its "traditional culture" over time. Owing to the limited focus of the surviving records on "public dispute resolution traditions", an overall picture of long term cultural change, innovation and erosion in tradition is created which is suggestive of the degree of variation in Mohawk traditional culture generally, and traditions of public dispute resolution particularly. This history creates a context for analysis of the question of the endurance of "legal tradition" in Kahnawake, and whether that "tradition" can be seen in the way the extant and proposed "traditional" structures resolve serious disputes within the community. It is here that the question of invention of tradition is addressed both in terms of its impact on the traditional integrity of the structures as well as on those "tradition-based" arguments for their realization.

2. The Mohawk Iroquois and the Community of Kahnawake:

A Demographic and Political Outline

To those for whom this dissertation marks their first acquaintance with the "Mohawk Nation at Kahnawake", there may be some surprise in the discovery that this "nation" is more akin in magnitude to a rather modest town or borough. According to

the local "Kahnawake Economic Development Authority", which is the keeper of vital statistics for the reservation territory, as of 1993 the Mohawk population residing within the reservation's borders sat at an unprecedented high of 6,407 people⁵¹, to which a further complement of 1,231⁵² Mohawks residing "off-reserve" may be added, comprising a total Kahnawake Mohawk population of 7638. Situated on a landbase of approximately 13,232 acres - or approximately two acres for each of its citizens - the physical modesty of this community would seem rather out of proportion to its more radical members' aspirations of nationhood; it would also seem of questionable adequacy to support the economic and political realities which must accompany such autonomy.

Setting to one side for later analysis the pragmatic considerations which arise from its status as a relatively small percentage of the less than three percent of the Canadian population who qualify as "aboriginals", there would seem to be little question that Kahnawake's noises in the direction of nationhood place it rather firmly in the position of the mouse that roared. That being said, however, it is neither a mouse or a roar that are easily ignored. It was, after all, the community of Kahnawake and her sister community of Kahnésatake which together in 1990 brought the attention of the world - and no

⁵¹ A combined total, in 1993, of 3,302 women and 3,104 men, reflecting an annual increase in the populace of 1.28% since 1975 (Kahnawake Economic Development Authority, personal communication to J. Dickson-Gilmore, 16 November 1993, pp.1,3.)

⁵² Ibid., p.1.

small measure of embarrassment - to Canada over the question of Mohawk rights to a traditional burial ground at Oka, Quebec.⁵³

It may be further argued that it is also rather questionable whether a country which is comprised of precisely such mice, albeit of varying proportions, is in a position to disregard the chorus of roars which is currently lead by the well-publicized dreams of nationhood of the province of Quebec, which surrounds the Mohawk Territory at Kahnawake. In this regard it may be ventured that in a country where provinces continually assert departure from, and dissolution of, the Canadian federation as a means to healing their local woes, it is perhaps not surprising that amerindian communities such as that at Kahnawake, who are significantly marginalized within that country and who manifest a genuine belief in their enduring

⁵³ The incident stemmed from the decision of the municipality of Oka, which lies adjacent to Kahnawake, to expand a local golf course onto a Mohawk cemetery. When the amerindians' repeated requests for consultation and consideration were ignored, they barricaded the main construction road and refused to obey injunctions to remove the barriers. The mayor ordered in the Quebec Provincial Police force, and the resulting violent confrontation led to the death of a police officer and a six month armed stand-off between police and the communities of Kahnawake and Kahnawake, who barricaded their community in support of their brethren at Oka. In the end, Canada sent in her armed forces against the Mohawk activists, and although the Kahnawake people would negotiate a peaceful end to their protest, the removal of the barricades at Kahnawake was bloody and brutal for many of the Mohawks, whose title to the disputed land remains in question. Those who do not recollect the event despite the remarkable international media coverage of Oka may wish to consult Craig MacLaine and Michael Baxendale, The Land is Our Land: The Mohawk Revolt at Oka (Montreal: Optimum Publishing, 1990); or Geoffrey York and Loreen Pindera, People of the Pines: The Warriors and the Legacy of Oka [Toronto: Little, Brown and Compnay (Canada) Ltd., 1992].

sovereignty, are equally quick to pronounce divorce as the best means to improve their marriage to Canada. Insofar as such a separation, especially by a group as minuscule in size as Kahnawake, would arguably be much more attractive in principle than it would be in practice, such harsh realities do not appear to have impeded it from becoming the mantra of Canadian politics in the twentieth century.

The disproportionality of Kahnawake's population and landbase to its assertions of sovereignty, while surprising, are therefore not inconsistent with either the overall political trends in Canada or Kahnawake's own chronicle of assertions of right. Admittedly, when the latter first emerged in the seventeenth century, the Mohawks and their brethren in the Iroquois Confederacy had a distinct numerical and territorial advantage over the British and French, and thus the prima facie logic of their opinions of rights and sovereignty was perhaps more obvious. In the eyes of the Mohawks of Kahnawake, however, the reduction of their numbers and landbase should not equate with a parallel reduction in the promises made or treaties struck with the now predominant newcomers, despite the latter's equivocation on the matter. To the Mohawks, their rights of sovereignty and independence are not conditional on their population and land base, despite the fact that these latter elements have the potential to be decisive in the ability of Kahnawake to achieve a sustainable self-determination, both in its institutional structures and beyond.

There is probably little doubt that the realization of their dreams of nationhood would reduce the quality of life currently enjoyed by the residents of Kahnawake, which compares quite favourably with that of most middle-class Canadian suburbs outside its borders. As the product of one of those suburbs, and having cut my anthropological teeth on the example of the average reservation within Canada, whose inhabitants experience a desperate and devastating social, political and economic marginality⁵⁴, I was surprised and impressed by the affluence which greeted me upon my first visit to Kahnawake in the autumn of 1987.

Driving from Montreal across the Honore-Mercier Bridge, one of many that traverses the Saint Lawrence River and which would lead us down into Kahnawake (see Figure 1), I was struck by the landscape of the community. In the growing gloom of that cloudy October day, the spire of the nearly 300 year-old Catholic Church rose almost from the waters of the Saint Lawrence River, marking the centre of the village proper and defying those who would deny its role in Kahnawake's origins. As we left the highway that continues across the reservation to link the city of Montreal with the suburb of Chateauguay, we entered into a clean and well-maintained community consisting of homes ranging from modest bungalows to quite spectacular larger residences, some sporting swimming pools in their yards and two or more cars

⁵⁴ An excellent elaboration of the "average" reservation experience is offered in Heather Robertson, Reservations are for Indians (Toronto: James Lorimer and Company, 1970).

in their driveways. The homes lined paved roadways, none of which were named or numbered. The only exception to this rule

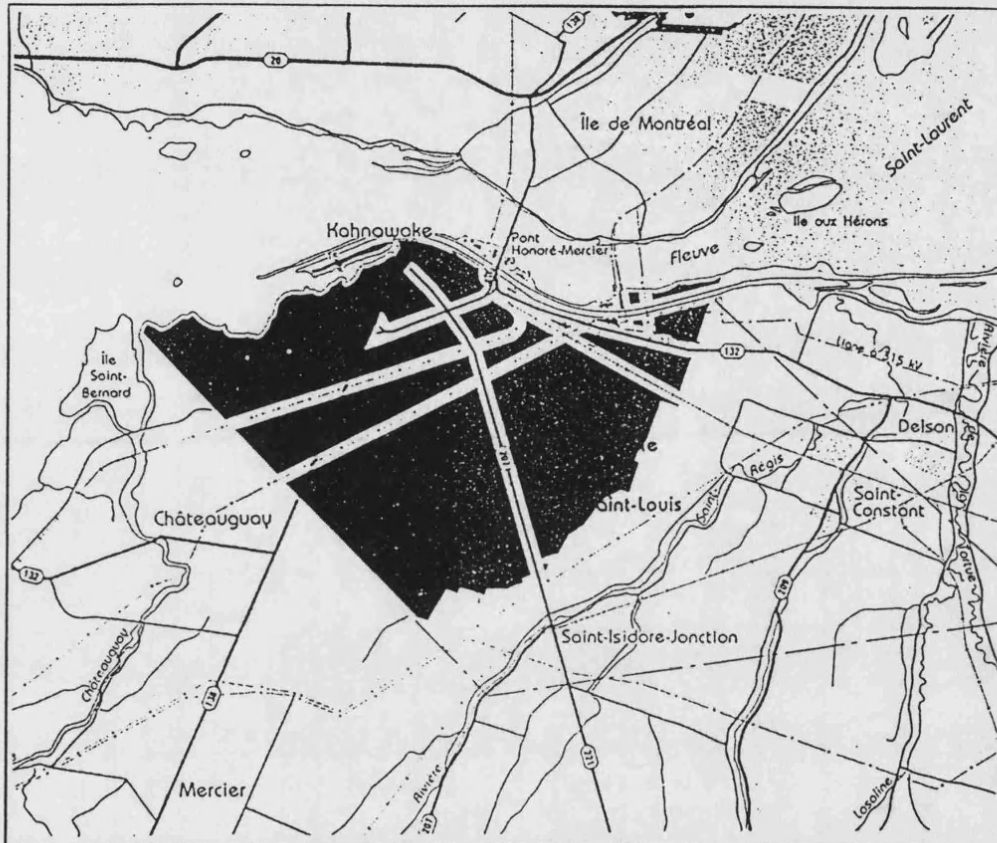


Figure 1 Modern Kahnawake, map produced by the Service de la cartographie, Énergie et Ressources, based on a survey from the Service du cadastre, Gouvernement du Québec, 1986.

was a single, well-traversed road which was marked by a souvenir of Brooklyn, clearly pilfered from its original post in that New York borough, which dubbed it "157th St". As I was to discover, this lack of labelling of the maze of Kahnawake's thoroughfares would prove to be a great challenge to visitors and newcomers to the community, and I considered that I had truly "arrived" when

my hosts ceased to say to me, as I headed out the door on my latest expedition, "you sure you know where you're going?"

If Joanne Rappaport is correct, and homes are "the most tangible repositories of historical information"⁵⁵, then the importance of history and tradition to the Mohawks of Kahnawake, and more specifically to my host family, was immediately apparent. While in its broad outline the home resembled a very respectable middle-class Canadian dwelling, and was furnished in a similar style, the aboriginality of its residents was apparent in the "aboriginal accoutrements" found throughout. Immediately inside the front entryway were two "Hadouii", or corn masks of the secret medicine societies such as the False Face Society⁵⁶, once directed to the protection against witchcraft and illness, but which now seem equally as important as symbols of "Mohawkness". The walls of the main eating area off the kitchen were decorated with a turtle rattle and drum, and paintings in the living and dining rooms were of bears, symbolizing my host family's matrilineal membership in the bear clan. It is worth noting also that, later in my relationship with this family, the senior woman, whom I shall call Jankanque, informed me with some excitement that her home would soon be decorated with her clan symbol. This practice, which recalls the historic practice of

⁵⁵ Joanne Rappaport, The Politics of Memory. Native Historical Interpretation in the Colombian Andes (Cambridge: Cambridge University Press, 1990), p.155.

⁵⁶ See: William N. Fenton, "Masked Medicine Societies of the Iroquois", Annual Report of the Smithsonian for 1940 (Washington: the Smithsonian Institute, 1940), pp.397-430.

hanging clan totems over the entryway of longhouses⁵⁷, was very much a traditional one, and it is, I believe, toward an outward appearance of her family's traditional-ness, that Jankanque had a large medallion-shaped painting of a bear affixed to the chimney of her home.

While many of the more superficial of the trappings of Jankanque's home were apparently intended to contrast with its "Canadian-ness" and act as visible reinforcements of her family's Mohawk culture and the importance of Mohawk tradition to them, it is interesting to note that the language that carried that culture was largely absent from the home. In this regard Jankanque's family was no different from many in Kahnawake, where for over three hundred years English has been gaining priority as the peoples' first language. And although there is a significant proportion of the senior citizenry which is fluent in both Mohawk and English, the majority of the young people and their parents have only a smattering of the language - if any at all. Thus the community has been active over the past decade in reclaiming the Mohawk language, and it is now possible for Mohawk children to be educated almost entirely within the community in Mohawk-controlled schools with Mohawk-defined curricula, including one pre-school, three grade schools and one high school, all of which offer Mohawk language classes or Mohawk immersion programs.

⁵⁷ The "longhouse" was the most conspicuous aspect of Mohawk material culture in the historic context. It is described and discussed in detail at pp.68-101.

The sense of history implicit in the blending of symbols of Mohawk culture with the trappings of modern "Canadian living" was also seen in the conduct of life within the household. "Traditional" meals of steak and Iroquois cornbread, and corn soup were common, as were discussions of local factionalist politics and "tradition" around the supper table. While there can be little doubt that many of those conversations were intended to educate me, they were also illuminative of the nature of the historical knowledge in the community, especially insofar as Jankanque's husband appeared to be people considered to have significant knowledge of tradition and traditionalism in Kahnawake. For while there can be little doubt that my rocste - friends - and hosts were invaluable sources of information and insight into their community and its culture, I also found a quite unselfconscious tendency - which would prove to be far from unique to them - to patch gaps in their knowledge with bits and pieces of information gleaned from the history books; sources which were often of questionable accuracy and replete with pejorative stereotypes of "fierce" and "bloodthirsty" Mohawk warriors.

A somewhat humorous example of this "misdirected patching" of cultural knowledge occurred during an evening meal with Jankanque's husband and her young daughter, then aged five years. My husband had come to visit me in Kahnawake and had been welcomed into Jankanque's home. As we ate our dinner of corn soup prepared by Jankanque's husband, her daughter, whom I shall

call Cian⁵⁸, raised her fully-laden spoon to her mouth, glared evilly and with more than a hint of fun at my husband, and declared "you're in my soup, and I'm going to eat you up!" At this exclamation Jankanque's husband roared with laughter, and declared Cian to be a "good Mohawk, eating up the white man". The reference to cannibalism, a feature of Iroquois warfare which has yet to be documented to a degree satisfactory to its detractors and yet is a constant feature in popular histories of the "fierce Mohawks", revealed not only how uneven was the knowledge of historic Mohawk culture and history among my hosts; but suggested also how those who are the targets of such historical propagandizing can turn its perpetrators' intentions back upon their sources. In so doing, the targeted group translates what were intended to be essentially negative messages about their culture and its people into sources of identity and even pride, thereby taking back some of the power which pejorative acts can steal away from those at whom they are directed.

If the modern Mohawk culture at Kahnawake seems somewhat diluted with Canadian content, there is also a conspicuous loss of historic Mohawk subsistence patterns of slash and burn horticulture and hunting and gathering. Modern horticulture is limited to small gardens for personal use, and most contemporary Mohawks appear to prefer livelihoods and careers little different from those characteristic of any Canadian community of

⁵⁸ Mohawk for "child".

a similar size. Thus within its boundaries Kahnawake can boast a total of 220 different, locally-owned business enterprises, including gasoline and automotive repair stations, taxi services and video stores, bakeries and grocery stores, as well as construction and carpentry services.⁵⁹ This entrepreneurial sector is complemented by a well-developed "professional class" in the community, including doctors, lawyers and, yes, "Indian Chiefs", as well as engineers, at least one university professor, two Olympic medallists, a handful of well-recognized artists and musicians, and an internationally recognized symphony conductor.

The business and professional core of the community is buttressed by a wide range of locally-administered public services, including water filtration and quality, sanitation and sewage treatment, land management and allotment, as well as a range of services in relation to health and safety, roads and recreation, and economic development.⁶⁰ The single largest local employer in the Kahnawake is the local hospital which offers a range of services, including all basic medical as well as dental, opthamalic and pharmaceutical services, occupational therapy and in- and out-patient care. In addition to the preceding, the local government also administers community social control through its policing agency, the Kahnawake Peacekeepers, and a summary jurisdiction court created under the

⁵⁹ Kahnawake Economic Development Authority, p.2.

⁶⁰ Kahnawake Economic Development Authority, p.3.

auspices of the federal government's umbrella "Indian legislation", the Indian Act.⁶¹

The "Indian Act Court" in Kahnawake, known locally as the "Court of Kahnawake", is one of only three established in Canada under the provisions of s.107 of the current Indian Act.⁶² And although the history of Kahnawake contained in part 5 of this thesis will reveal that some manner of "Justice of the Peace Court" has existed in the community since as early as 1881, it was not until nearly a century later that a Mohawk person assumed the role of Justice of the Peace for the purposes of the jurisdiction outlined in s.107, which reads:

The Governor in Council may appoint persons to be, for the purposes of this Act, justices of the peace and those persons have and may exercise the powers and authority of two justices of the peace with regard to

(a) offences under this Act, and

(b) any offence against the provisions of the Criminal Code relating to cruelty to animals, common assault, breaking and entering and vagrancy, where the offence is committed by an Indian or relates to the person or property of an Indian.⁶³

The preceding jurisdiction was introduced into Kahnawake in 1974, when the Mohawk Council of Kahnawake "borrowed" the

⁶¹ R.S.C. 1985, c.I-5. The "social control" apparatus extant in Kahnawake via the authority of the Indian Act will be discussed in detail in parts 6.1.

⁶² Those others being located at Akwesasne, a Mohawk reservation whose territory lies in Ontario, Quebec, Canada as well as partially in Upper New York State, in the United States, and at Pointe Bleu reservation in northern Quebec, Canada.

⁶³ The Indian Act, R.S.C. 1985, cI-5, s.107.

services of the Mohawk Justice of the Peace from the neighbouring community of Akwesasne to hear summary level criminal disputes occurring in Kahnawake. Although there are some reports that he began administering an "unstructured" s.107 court in Kahnawake as early as 1974, the practice did not become official until three years later.⁶⁴ On 7 April 1977, a resolution passed by the Mohawk Council of Kahnawake recognised and authorised the Akwesasne justice "to perform duties and hear court cases as a Justice of the Peace for the Caughnawaga [Kahnawake] Reserve".⁶⁵ Under this resolution the Justice maintained "office hours" at the Kahnawake Mohawk Council offices twice a week, at which times he was available to swear informations, hold "show cause" hearings "as needed" and a full court one evening per week. He was assisted in his duties by a full-time court clerk retained by the council, and a privately secured attorney from the nearby city of Montreal who acted as prosecutor. Bailiffs and the Kahnawake policing agency were

⁶⁴ Interview with J. Sharrow, Justice of the Peace, Akwesasne Mohawk Nation, in Joint Canada-Saskatchewan-Federation of Saskatchewan Indian Nations Studies of Certain Aspects of the Justice System as They Relate to Indians in Saskatchewan, Working Papers prepared for the Working Group in Justices of the Peace/Peacemaker, Appendix C; Interview with P. Mayo, Justice Coordinator, Kahnawake Mohawk Nation, 25 September 1989, field notes in researcher's possession; Institutions of Mohawk Government: An Overview. It should be noted that the Mohawk Council's consolidation of by-laws which was current at the time of the research does not include any reference to the by-law of 7 April 1977, which extended Justice Sharrow's services to this community.

⁶⁵ Interview with John Sharrow, Justice of the Peace, Akwesasne Mohawk Nation, *ibid.*

available to enforce the court's decisions, which were handed down in either English or Mohawk. Unfortunately, proceedings of the court were not kept as a matter of course, and few detailed records of its work remain.⁶⁶

In the wake of the retirement of the Akwesasne Justice in 1985, the Mohawk Council moved to secure the services of a s.107 Court for Kahnawake, and struck a "Justice Committee" whose primary function was to aid the Council in this regard.⁶⁷ The result of their efforts was the appointment of two Kahnawake Mohawks, Samuel Kirby and Michael Diabo, as Justices of the Peace for purposes of the Indian Act on 31 January, 1985.⁶⁸ This moment signalled the creation of a "structured and formalized court" in Kahnawake, which persists to the present day.

The modern Court of Kahnawake holds an average of two sessions per week, as dictated by need and case load⁶⁹, and

⁶⁶ Interview with P. Mayo, Justice Coordinator, Kahnawake Mohawk Nation, 25 September 1989, *ibid*.

⁶⁷ This Committee is described in detail at pages 382-387 of this thesis.

⁶⁸ Justice of the Peace Appointment: Michael Julian Diabo, Esquire, 31 January 1985, By Order of the Privy Council, P.C.1985-281; Justice of the Peace Appointment: Samuel Philip Kirby, Esquire, 31 January 1985, By Order of the Privy Council, P.C.1985-280.

⁶⁹ *Ibid.*; Interview with P. Mayo, Justice Coordinator, Justice Committee, 25 September 1989; interview with P. Schneider, prosecutor, Court of Kahnawake, 30 November 1989. See also, Institutions of Mohawk Government: An Overview, p.13, this document specifies that the court holds one session per week, but does not deny the possibility of more sittings as needed. Neither the Constitution or the Mandate contain any statement concerning the frequency of court sessions (The Justice System of Kahnawake; Administrative Directive No.AD-03, "Justice Committee Mandate", 7

administers the cases before it through the procedure outlined in the Canadian Criminal Code under Part XXVII relating to summary conviction criminal courts.⁷⁰ With limited exceptions, those cases fall within the offences enumerated under s.107(b) of the current Indian Act, as well as those "offences under the act" referred to under s.107(a), which include any offences specifically created in the legislation as well as infractions of the by-laws which the Council may pass by virtue of its authority under s.88 of the Act. These "law-jobs", which are described in detail at pages 382-387 of this thesis, are done in a building set aside solely for the Court of Kahnawake, and which also provides permanent office space for the assorted court personnel, including two full-time clerks and the Justice Coordinator, as well as rooms which may be used by defence counsel and the prosecution, and the Justice(s) themselves.

These rooms cluster around the courtroom, which in its physical arrangement differs little from summary jurisdiction court rooms in many Canadian jurisdictions. It is not a large room, but provides what appears to be sufficient space for spectators in its rear half, as well as an elevated bench front and centre at which sits the Justice, and which is bordered on either side by tables claimed as defense or prosecution territory. Defendants in the court are entitled to be

October 1985).

⁷⁰ An Act Respecting the Criminal Law, R.S.C. 1985, chap.C-46, Part XXVII.



represented by a lawyer, and "outside lawyers" do plead regularly in court, representing both Mohawk and non-Mohawk defendants. A court clerk occupies a smaller table to one side of the bench, and as transcriptions are not kept unless requested and paid for by the defendant, there is no regular appearance of a court reporter in the Court of Kahnawake.⁷¹ This tends to mean also that there are limited and often only incomplete records maintained of the daily functioning of the Court, a reality which, as the methodological discussion which follows will reveal, greatly limits the ability to speak authoritatively about the long-term s.107 Court's administration of justice in Kahnawake.

Since as early as 1987 the dominant traditionalist faction in Kahnawake has begun to question and challenge the Mohawk Council and its Court as the primary agencies of "dispute resolution" in the community. As will be seen in the specific chronicle of this faction below and in part 6, this defiance has emerged not only in a direct competition over policing the community, but has been animated as well in the "traditional" resolution of disputes between community members, leading to the faction's articulation of an alternative "traditional justice system" in the community. This system will be administered from one of the two "longhouses" which dot the landscape and which

⁷¹ Field notes in researcher's possession; interview with P. Schneider, prosecutor, Court of Kahnawake, 30 November 1989; see also: interview with John Sharrow, Justice of the Peace, Akwesasne Mohawk Nation.

admittedly bear an only fleeting resemblance to their historic counterparts indigenous to the Iroquoian peoples of the American northeast - a criticism which some Mohawks also argue applies to the traditionalists' putatively "traditional justice system".

The longhouses sit apart from the "village" and business core of Kahnawake, across the highway and the railroad tracks, in a more pristine part of the reservation. These buildings constitute the heart of the traditionalist community and a visible reminder of the factionalism that dominates the politics of development and self-determination within Kahnawake; politics which divide the community between "conservatives" and "traditionalists" as deeply and cleanly as the highway and railway tracks separate the longhouses from the village and the offices of the Indian Act-defined "Mohawk Council of Kahnawake".

2.1 Factionalism and Internal Politics in Kahnawake

Setting aside briefly the task of defining what it means to be "traditional" or "conservative" in Kahnawake, I think it important to specify what is being discussed under the rubric of this term "factionalism". According to researchers Siegel and Beals, group interaction as described by the term "factionalism" refers to a social context whose dominant characteristic is "overt, (unresolved) unregulated conflict which interferes with

the achievement of the goals of the group".⁷² They view this conflict as manifesting two possible twists, as either *schismatic* or *pervasive* factionalism. By Siegel and Beals' definition, schismatic factionalism occurs between well-defined and cohesive sub-groups; it is the result of a partial breakdown of the mechanisms which would normally serve to bind the subunits together and resolve any differences which arise between them. Factionalism of the pervasive variety is characterised not only by conflict between the subunits, but also within those units, which results from a partial failure in resolving inter-personal conflict generally.⁷³

In either form, factionalism manifests three essential characteristics which distinguish it from "normal" conflict among groups. First, the affected population is both aware of the presence of factionalism and of its divisive effects - factionalism by its very nature requires the conscious involvement of two or more groups in verbal and/or physical aggression against each other. Second, the interaction of factional sub-units of a society, as opposed to that of non-factionalist groups, does not conform to the expectations of the society and thus is not amenable to amelioration through the usual or common means of reconciling inter-group differences. As a result, factionalism is not always satisfactorily resolved or

⁷² Siegel and Beals, "Conflict and Factionalist Dispute", p.108-109; also, Siegel and Beals, "Pervasive Factionalism", *ibid.*

⁷³ *Ibid.*, "Conflict and Factionalist Dispute", pp.108-109.

regulated and will therefore tend to intensify and interfere to an increasing extent with the ability of the group as a whole to achieve its goals. Finally, Siegel and Beals ^{do not} inform that all types of factionalism manifest a common underlying motivation toward the re-establishment of the co-operative venture. In other words, factionalism is a disagreement over the means to be employed, not the end to which they are directed - the value of group unity or cohesiveness is never questioned.⁷⁴

Even a relatively brief experience in the community leaves little doubt that it is apparent to many residents of Kahnawake, as well as to outsiders, that the sort of inter-group dissonance described by Siegel and Beals as "pervasive factionalism" is present among the populace of this Mohawk Nation community. When I asked informants their opinions about the state of internal relations within the community, I received a common confirmation that all three of Siegel and Beals' indicators of factionalism were alive and well in Kahnawake. Thus it was observed that not only did persons across a range of social groups recognise the presence of factionalism and its negative impact, but these same persons were also able to identify, among others, at least two salient and competing factions, as well as levels of dissent within them.⁷⁵ And while they were generally at a loss as to

⁷⁴ Ibid.

⁷⁵ Interview with K. Deer, Coordinator, Mohawk Nation Office, Kahnawake, 11 September; interviews with Grand Chief J. Norton, Mohawk Council of Kahnawake, 24 October, 1989 & 27 November 1989; interview with P. Delaronde, 8 November 1989; interview with D. Rice, Councillor, Mohawk Council of Kahnawake, 8 November 1989;

how such rifts might be mended, virtually all were in agreement concerning the importance of finding some way to return social cohesion and the "cooperative venture" to Kahnawake.⁷⁶

Although all Kahnawake Mohawks consulted agreed about the presence and negative effects of this type of factionalism in Kahnawake, it must be noted that some among them also rejected the terms used to describe their community's internal politics. As framed by one man,

...a lot of people do not like the way anthropologists talk about "factionalism." One observation is that "factionalism" is a term applied to indigenous peoples, but not to Europeans. In other words, what goes on in the House of Commons in Canada and England is "civilized", but when there is a difference of opinion in Indian country, it's called "factionalism." It's not a useful label.⁷⁷

Resolving the issue of the perception of political or pejorative content in accepted academic terminology in this context required the striking of a middle-ground between demonstrating an appropriate degree of respect for the subject community, and the importance of using established academic terminology for communicating what is essentially a piece of academic work to a predominantly academic audience. With regard to reconciling the difficulties attached by some to the term "factionalism", it should be noted that those who coined the

interview with P. Mayo, Justice Coordinator, Court of Kahnawake, 25 September 1989; interview with A.B. Deer, 24 November 1989. All notes and/or cassette tapes in researcher's possession.

⁷⁶ Ibid.

⁷⁷ Personal communication from A.B. Deer, 16 May 1989.

term "pervasive factionalism" certainly did not intend to restrict its use to aboriginal communities⁷⁸, nor would it appear that such a restriction is evident in practice. That being said, it may be further argued that the challenge laid to the word has less to do with its meaning or what it refers to, than how it is used in the research. In the case of Kahnawake, the term "fits" with the circumstances it is intended to depict and does so in a manner which is not in relief to the politics of other communities, whether aboriginal or non-aboriginal, creating an implicitly negative cross-cultural comparison. At the same time, it is an accepted academic term whose usage assists in creating a picture of the subject community in the minds of its academic audience; as a result, and not intending any disrespect to those in Kahnawake who dislike the term, I have chosen to refer to those elements of the community's internal relations which may be accurately defined as "factionalist", by that term.

Factionalism has been a continuous and conspicuous aspect of the Mohawks' documented history since the seventeenth century, when the first detailed descriptions of internal

⁷⁸ Siegel and Beals, "Pervasive Factionalism", p.394; at this place the researchers state that: "The word "factionalism" describes at least three different kinds of conflict. It may refer to conflicts between parties or interest groups which are permanently or periodically resolved through votes, arbitration, or some other means. Examples of such party factionalism might include conflict between political parties, football teams, intermarrying kinship groups (potlach [sic]), sodalities (Lumpwoods and Foxes), or moieties (Creek). Factionalism may also refer to conflict between cohesive subgroups within the larger group often leading to the dissolution of the group."

politics emerged from the pens of the Jesuit Missionaries residing in the Mohawk 'cantons'. Among these initial reports are those contained within the Relations⁷⁹ of the Jesuit Father Issac Jogues, whose first observations of the Kanienkehaka included the presence of "captive churches" of adopted Hurons among the Mohawks, who welcomed the priest as a source of support not only for the practice of the faith⁸⁰, but as against those others in the villages who harboured suspicions against Catholicism and the French faithkeepers, and who lobbied for their expulsion. Among the latter were a number of Hurons who, like their converted countrymen, had been absorbed into Mohawk clans⁸¹ after the Iroquois dispersal of their nation, but who were quite contrary in their perceptions of the Jesuits. These refugees recalled only too clearly the social and political problems the priests had earlier created in the Huron Nation, and countered the converts' tales of the white God and afterlife with their own stories of the Black Robes' sorcery.⁸²

⁷⁹ Reuben Gold Thwaites, ed.. The Jesuit Relations and Allied Documents. Travel and Explorations of the Jesuit Missionaries in New France, 1620-1791; the Original French, Latin and Italian Texts, with English Translations and Notes, 73 vols. (Cleveland: The Burrows Brothers; reprinted, New York: Pageant, 1959). Hereinafter, JR, followed by volume number and pages of text referenced.

⁸⁰ JR 51, p.159; JR 41, p.133.

⁸¹ Three exogamic clans characterized historic Mohawk society, including the Turtle, Bear and Wolf (Tooker, "The League of the Iroquois...", p.426). More will be said about these extended family groups and their role in Mohawk society later in this section as well as in part 4.

⁸² JR 43, pp.307-317.

While it seems logical that this simple dichotomy of "pagans" and "converts" was complicated by a plethora of other groups and individuals holding differing attitudes toward the priests, the Jesuits recorded what impacted most upon them and their work. Thus Jogues, like his precursors and most of his successors, tended in his Relations to paint internal dynamics primarily in terms of religion, and more specifically in terms of a converted - unconverted dichotomy which divided Mohawk society into those "savage" unconverted Mohawks and their "noble, progressive" converted opposites.⁸³ This necessarily fostered an impression, which was picked up and passed on by some later scholars, that the simple duality of "progressive" (read "converted") versus "conservative" (read "pagan" or unconverted) elements in amerindian spiritual and political life was a characteristic of Mohawk life in the cantons as well as in the northern settlements, including Kahnawake.⁸⁴ This tendency is confirmed in a number of very good researches on the subject of seventeenth century Mohawk politics, which admit the difficulty in defining actual membership of the competing groups, but nonetheless characterize those groupings as of essentially two varieties. An example of such a characterization may be seen in the following passage dealing with internal striations in the early seventeenth century:

⁸³ Ibid.

⁸⁴ This dichotomisation has been acknowledged and criticised by some researchers, including Lewis, "Reservation Leadership and the Progressive-Traditional Dichotomy...", pp.140-142.

[I]t seems safe to assume that in many respects the two sets of factions mirrored each other: headmen without close ties to missionaries emerged as traditionalist leaders; anti-Christian adoptees provided a core of support; kinship ties contributed additional followers.⁸⁵

What must be made clear here is the reality that such a duality was, in fact, one significant part of internal politics both within the cantons and in the northern settlements, but it was not the sole dynamic defining internal relations. For although it necessarily mars the neatness of the dichotomy between "converts and pagans", or "progressives" and "conservatives", it would be less than correct to assume that these two subgroups accounted in their membership for the entire population of a given Mohawk community. It is doubtful that such a clean division as this really existed and it seems important to acknowledge the possibility, indeed the probability, reflected in the Jesuits' own statements about the constituent population of the "Mohawk missions"⁸⁶, of at least some opinion in the cantons and northern settlements which resided with neither camp. These 'others' may have held views which, politically, reflected a middle ground between the two larger pockets of opinion or, in some cases, a general reluctance to become visibly involved in village politics. Still others may have been ambivalent, moving between different groups depending

⁸⁵ Daniel K. Richter, "Iroquois versus Iroquois: Jesuit Missionaries and Christianity in Village Politics, 1642-1686", 32(1) Ethnohistory (1985):11.

⁸⁶ JR 61, p.53.

upon the issue of the moment and the degree of congruence between their opinion and that of a particular faction.

Moving into the more recent context, such a general dichotomy may be seen to persist, but has become defined less in terms of religion than politics⁸⁷; it has also witnessed a shift in meaning of the terms "conservative" and "progressive". Historically, the latter term was given by Europeans, whether Jesuits or Indian Department officials, to those amerindians who embraced acculturation, and who were thus deemed to be progressing toward the acquisition of a more "civilized" lifestyle. The term was thus used in contrast to the Mohawks' more reluctant brethren, who were commonly viewed as "conservatives" owing to their clinging to the "old ways" and unwillingness to accept changes which the colonizers believed to be inevitable. It is thus intriguing to note that, whereas conservatism was once equated with a traditional lifestyle, and progressives were those who accepted the changes implicit in colonialization, as they are used today in Kahnawake the terms seem to have switched meanings. In the words of one Mohawk,

The term 'traditionalists' and 'progressives' needs rethinking and renaming. In our community, it would appear that the "traditionalists" are actually the progressive ones, moving forward with old beliefs into the 20th [sic] century; and it would seem that the "progressives" are actually the conservative ones,

⁸⁷ Personal communication with A. Brian Deer, 16 May, 1989. A necessary qualification upon this statement resides in the reality that, for the traditionalists of the Longhouse, there is no separation of church and state, thus their understanding of internal competition in Kahnawake may be defined almost equally by both of these aspects.

trying to preserve their position within the Canadian mainstream...⁸⁸

And while it is worth noting that all such labels are imbued with political content in Kahnawake, there does seem to be some accuracy to this observation. As will be seen in the elaboration of the dominant factions in Kahnawake, although these groups have in common the promotion of self-determination, a central characteristic of the conservatives appears to be a desire not to endanger a status quo which, although imperfect, may be better than the imagined alternatives. Inasmuch as the traditional faction has as its primary adversary that status quo and the local structures and institutions which perpetuate it, their "progressive-ness" is radically different in both its contents and goals from that of the "progressives" who preceded them.

Documenting the following or membership of individual factions as a means of determining their relative positions within Kahnawake's political hierarchy proved to be a significant challenge, largely because few people seem willing to admit publicly to such membership. There is a tendency to avoid openly public displays of allegiance whenever possible, and an individual embarking upon a piece of research which is perceived as potentially informing of a faction's membership will tend to receive any of a number of highly variant combinations of three general responses to their inquiries:

⁸⁸ Personal communication from A.B. Deer to J. Dickson-Gilmore, October 1989.

Polite but outright rejection of the survey, equivocation, or, most commonly, answers which politely conform to the respondent's estimation of the political persuasion of the researcher, and which may bear little relation to the actual position of the respondent.⁸⁹

Thus as noted earlier, inasmuch as all individuals consulted agreed upon the presence of contesting subgroups and ideologies within the populace, documentation of numbers or personalities supporting a given perspective was agreed to be impossible beyond the ascription of a few very vocal and active individuals to each subgroup.⁹⁰ There is, of course, some question as to whether such "head-counting" is necessary to achieving a reasonable understanding of the dominant factions and their interactions within the community. It is true that estimates of the number of followers or participants a particular faction attracts can inform of its place in the overall political hierarchy, and therefore possibly of its share of power or influence within the community. However, in the view of at least one modern Kahnawake Mohawk who has witnessed not only the dynamics of internal politics in the community, but also of efforts to pin them down, "head-counts" may be both impossible to achieve with accuracy and potentially highly

⁸⁹ Interview with A.B. Deer, 24 November, 1989.

⁹⁰ Interview with A.B. Deer, 24 November 1989, field notes in researcher's possession.

problematic for the community.⁹¹

The reality of the risks inherent in documentation of support for a particular political faction or perspective in Kahnawake are suggested by the example of what might be called the "bingo controversy". The "Mohawk Super Bingo" was an initiative of the dominant traditional faction which I was informed obtained most of its monetary support from within the community itself. The economic development implicit in the bingo hall, and the prestige that might be anticipated to accrue to the faction controlling it, made it a keen site of competition between the dominant traditionalist and conservative factions. One manifestation of that competition emerged in the form of demands to know from whence the traditionalist faction was securing its funding for the project. Subsequent requests for publication of the shareholders list were denied on a number of grounds, including the unofficial, non-public rationale that the shareholders included individuals who in public stood with husbands or wives in opposition to the initiative. It might be expected that the release of such information as that implicit in the shareholders' list could have drastic and serious consequences for familial and social relations in Kahnawake. From the point of view of inquiries into "factionalism", the spectre of the shareholders' list served primarily to reinforce a pre-existing tendency for individuals to disguise their

⁹¹ See: Interview with A.B. Deer, 24 November, 1989; field notes of conversations with C. and J. Deom, 2-4 October, 1989.

political perspectives in accordance with the nature of the subject under discussion, the persons participating in the discussion, and suspicions as to those persons' respective political persuasions.

The impediments to a "head-count" approach to documenting factionalist behaviour within Kahnawake are profound and thus discussions of such behaviour here will focus primarily upon description of the dominant groups in terms of their level of organization, articulation and activism, and less in terms of precise membership totals, although it is possible to estimate degrees of support based upon impressions offered or drawn within the community. In this regard, the discussion which follows below does not differ from other research into internal dynamics and factionalism, much of which seems to eschew "head-counting" in favour of description and discussion of the impact of the visible groups within the research setting.⁹²

⁹² Voget, "Acculturation at Caughnawaga", pp.220-224; Henry Torres Trueba, "Nuhuat Factionalism", Ethnology 12(4) (1973):463-474; Jack A. Frisch, "Factionalism, Pan-Indianism, Tribalism, and the Contemporary Political Behaviour of the St. Regis Mohawks", Man in the Northeast 2(1971), pp.75-81; Robert F. Berkhofer, Jr., "Faith and Factionalism Among the Senecas: Theory and Ethnohistory", Ethnohistory 12(1965), pp.99-112. Sally A. Weaver attempts an approximate head-count of group membership in her "Schismatic Factional Behaviour Among the Grand River Iroquois (under threat of federal administrative termination)", paper read at the Central States Anthropological Conference, Indiana, University of Bloomington, April, 1970. See also some additional unpublished work on Iroquois communities, including: Alex F. Ricciardelli, Factionalism at Oneida, an Iroquois Indian Community, unpublished doctoral dissertation, Department of Anthropology, University of Pennsylvania, 1961; Thomas S. Abler, Factional Dispute and Party Conflict in the Political System of the Seneca Nation (1845-1895): An Ethnohistorical Analysis, unpublished doctoral dissertation, Department of Anthropology, University of

Prior to elaborating on the apparent contents of the dominant factions' political persuasions it is important to outline those qualifications which apply to the discussion of factionalism in Kahnawake. First, although the tendency of two dominant, competing political groups persists in the present tense, it is important to continue to resist the temptation to define internal relations among the Mohawks at Kahnawake in terms of the spurious dichotomization which has characterized much factionalism research to date.⁹³ As in the past, there remains in the community a significant percentage of the population who may prefer an alternative political profile to that offered by the dominant factions or to remain as far out of the visible realm of community politics as possible; further complicating the picture are those Mohawks who, depending upon the issue of the moment, vacillate between factions depending upon which offers the greatest congruence to their position on that issue at that time. In this regard the "traditionalists" and "conservatives" must not be viewed as inclusive of the entire population of Kahnawake; the possibility of individuals who, whether consciously or unconsciously, remain ambiguously aligned or out of visible internal politics in Kahnawake, must be acknowledged.

It should be recognised also that the movements of

Toronto, 1969.

⁹³ See Fred Voget, "Acculturation at Caughnawaga: A Note on the Native-modified Group", American Anthropologist, 53(1951), p.220.

individuals between the dominant factions need not necessarily be inferred as indicating an attitude of opportunism or indecision regarding political activities within Kahnawake. For while it is impossible to say that there are no opportunists or persons of vacillating affiliations within the community, it may be ventured that for at least some Kahnawake Mohawks, movement between competing factions and opinions reflects a highly complex political consciousness which must constantly strive to maintain a balance between wide and possibly contradictory factors and influences. In this regard, it is further noteworthy that the freedom to differ and even to contradict is an important aspect of Iroquois traditional culture, and thus should not be taken as an unprecedented or unusual aspect of the Kahnawake community.

A final qualification on the description of factionalism in Kahnawake concerns the visible membership of the dominant factions. My experience with these factions suggests strongly that each of them should be understood as typified by a high degree of political organisation at the core and the presence of a relatively constant, conspicuous membership at the periphery which is enhanced or diminished by the very fluid, apparently inconstantly aligned population noted above. Thus each faction may be seen as "headed" by a small cabal of its most strongly committed members, around whom cluster a less high-profile, but relatively constant support group whose commitment to the factions' dominant philosophy fades as one approaches its edges,

where support waxes and wanes depending on the politics of the moment.

Given the degrees of commitment evident in the "layering" of the factions, I must specify also that my descriptions of the essence of these groups' "conservatism" or "traditionalism" is based upon the core of the factions and the philosophies and practices which appeared to be the most salient, common attributes of that nucleus. Thus it is possible that not all members of a particular group share all elements of the "conservatism" or "traditionalism" articulated by their group's core. In this regard the political positions described below might best be seen as variations on the notion of "ideal types": insofar as some Mohawks may be seen as closely approximating the political ideals espoused by a faction's core membership, there are many others who are variously distanced from those ideals and who therefore may be understood to only approach those practices and philosophies prominent at their faction's core.

(i) The Mohawk Council and the "Conservative" Faction
in Kahnawake Politics

The preceding qualifications noted, it is my impression that in modern Kahnawake, those Mohawks who may be defined as "conservative" are those who are seen to participate in and

actively support the Mohawk Council⁹⁴, its institutions and its policies. The Mohawk Council is a form of local government defined by the Canadian Department of Indian Affairs, which first found its way into Kahnawake in 1889.⁹⁵ Although its form and content have altered in the more than a century it has existed at Kahnawake, certain elements have persisted, most notably the practice of election of the councillors and, as will be seen in the part 5.3 of this thesis, the controversy that surrounds them. At the present time, however, the Mohawk Council consists of a Grand Chief and eleven councillors, who are elected by a plurality of votes from a single, all-encompassing electoral district and who serve two-year terms.⁹⁶

Determining the degree of community support for the Council is a difficult task. One indicator might be the number of votes cast in the most recent Mohawk Council elections, but this

⁹⁴ The Council, which owes its existence as the "official" (read: recognized by the federal Department of Indian Affairs and Northern Development) government of Kahnawake, is defined under the current Canadian Indian Act (R.S.C. 1985, c.I-6) and consists of a Grand Chief and eleven councillors, who are elected by a plurality of votes from a single, all-encompassing electoral district and who serve two-year terms [Mohawk Council of Kahnawake, Institutions of Mohawk Government in Kahnawake: An Overview (Kahnawake: Mohawk Council of Kahnawake, June 1989), p.3].

⁹⁵ Canada. Department of Indian Affairs and Northern Development. File #E 4218-D6(vol.1), 1/1980-10/1980 Council Elections - Montreal District, "Order-in-Council, P.C. 466, Privy Council, Canada, Government House, Ottawa. Tuesday 5th day of March 1889. More will be said on the intrusion into Kahnawake of Canadian structures in part 4.6 of this dissertation.

⁹⁶ Institutions of Mohawk Government in Kahnawake: An Overview, p.5. The present configuration of the council is defined within the terms of the current Indian Act (R.S.C., 1985, cI-5).

cannot be considered entirely accurate, as those who vote do so for a variety of reasons, not all of which may be assumed to stem from a loyalty to Indian Act processes. Subscription to Mohawk Council services is equally unsatisfying as a measure of support, as it is this Council which administers most of the federal government monies and programs, and which presides over the granting of "reservation" lands to prospective home-builders or owners. Residents desiring access to any of these things have little choice but to manoeuvre through Council's bureaucracy. That being said, it is my impression that, although precise numbers of "Council-supporters" are elusive, this faction is apparently sufficiently large to perpetuate the council system and confer it with a reasonable appearance of legitimacy in the community and outside it.

My observations of the Council, its functions and those who actively support it, suggest strongly that these "conservative" Mohawks have as a primary quality an overarching concern with the maintenance of a reasonably, if not wholly satisfactory status quo, the value of which is measured in almost purely pragmatic ways. Conservatism in this context is very much a philosophy of "don't try to fix what isn't broken". The activism it thus tends to yield is very much a moderate one whose forms and processes are largely defined by those in a position to break things, namely the larger Canadian government and Indian Affairs bureaucracy. For conservatives, for example, the fact that the "Mohawk government" of Kahnawake was replaced in 1889

with a band council designed by the Indian Department is significant, but is perhaps less so than the fact that the council persists, appears to work, and does not constitute an unduly negative influence on its supporters' quality of life. And while it is possible, indeed probable, that there exist varying measures of support for the Council among the conservative population in Kahnawake, my observations of factionalism in the community did not reveal the presence of other conservative factions which oppose the Council or offer any alternative conservative form of local government. Thus when the term "conservative" is used in this dissertation, it is intended to refer to that proportion of the population of Kahnawake which is visibly and actively supportive of the Mohawk Council, and which manifests at its core the elements of a conservative ideology outlined above.

(ii) The "Longhouse" and "Traditionalism" in Kahnawake Politics

Understanding what is included under the label of "traditional" or "traditionalism" in Kahnawake is a far more complex task than is decoding its most salient opponent, the conservatives. As will be seen in the chronicle of Kahnawake contained in part 5 of this dissertation, the modern history of the community has virtually always had as a salient attribute one or more "traditionalist" or "longhouse" factions. The degree of actual continuity between these and the modern manifestations

of traditionalism is obscure at best, and hence the discussion which follows attempts only to describe the three apparent traditionalist factions as these existed at the time the research project was underway in Kahnawake, specifically in the period 1988-1990.

On the basis of observations made over that time period, it may be ventured that to be "traditional" in Kahnawake appears to involve, at a minimum, a rejection of Indian Act structures and processes in the community - most notably the Mohawk Council - as well as the Canadian paternalism which these are held to represent. In place of the rejected infrastructure, traditional people propose - albeit in varying degrees of sophistication and detail - the resurrection of "traditional ways", most notably those traditional forms of government and local administration believed to have characterized the historic Mohawk Nation. Here the talk is of the traditionalism that is implicit in being "longhouse", and the return to Kahnawake of "longhouse government".

Efforts to decipher what is implicit in the term "longhouse government" has as a necessary prerequisite elucidation of the pervasive label of "longhouse" - a nomenclature which has been, and continues to be, used to refer variously to the primary Iroquoian architectural form, a variety of political factions and traditionalist philosophies, as well as a form of local government.

The longhouse as the primary Iroquoian architectural form:

Historically it is likely that the term "longhouse" first emerged in reference to the essential architectural form of Iroquois society and a highly conspicuous aspect of Iroquoian material culture, the multifamily longhouse. The longhouse is believed to have been in evidence as a dwelling house and place for the conduct of spiritual and secular affairs as early as 1000 A.D., with an evolution beyond these purposes to that of granary following the advancement of horticulture to the point of surplus production after 1070, which would have necessitated the provision of depositories.⁹⁷

As a residential unit, the longhouse was a rectangular building with entrances at either end. An average longhouse was 25 feet wide, and was divided lengthwise along either side into a series of single family apartments, each of which added an average of 25 feet to the total length of the house. The apartments were separated by a central aisle that ran the length of the longhouse, and which was punctuated by a series of, in most cases, between three to five cooking fires which were shared between each set of opposing apartments and the nuclear families of five or six persons who inhabited them. As these

⁹⁷ James A. Tuck, "Northern Iroquoian Prehistory", in Northeast, vol.15, Handbook of North American Indians, vol. ed., Bruce G. Trigger (Washington: Smithsonian Institute, 1978), p.322-333.

families grew, most commonly through marriage, additional apartments could be added to the whole. Houses of 200 feet in length were apparently not uncommon among the Mohawks, suggesting that between 40-48 persons might have resided within a single structure.⁹⁸

Each of the nuclear families in a given longhouse were united by their descent from a common female ancestor and together formed a "clan". Longhouses were synonymous with the household or maternal lineage and clan, and were usually identified with its totem. Thus in Mohawk communities, longhouses were identified with by a Turtle, Bear or Wolf, these representing the three clans of Mohawk society.

One or more clans constituted a moiety and acted together as if their memberships were siblings. Most Iroquoian communities had two such moieties in a system of dual organization⁹⁹, and their functions were essentially ceremonial, as each side would act reciprocally in condoling and burying each others' dead, in playing games and performing rituals. As will be seen below, the clans and moieties also played a role in the government of each community and nation, as well as in the councils of the Confederacy itself.¹⁰⁰

⁹⁸ Fenton, "Northern Iroquoian Culture Patterns", p.303.

⁹⁹ See Notes and Queries in Anthropology (New York: Routledge, n.d.), pp.92-93.

¹⁰⁰ William N. Fenton, "Northern Iroquoian Culture Patterns", in Northeast, vol. 15, Handbook of North American Indians, B.G. Trigger, vol. ed. (Washington: Smithsonian Institute, 1978), p.310.

Longhouses were also built as ceremonial halls, as storage facilities for the surplus products of the Mohawk's agricultural pursuits, or as containment for captured beasts being fattened before slaughter. When serving these non-residential purposes, the longhouse was gutted of all internal structures, save support posts and beams, leaving a maximum meeting or storage space.

When the five Iroquois nations, the Seneca, Cayuga, Onondaga, Onieda and Mohawk united sometime in the period roughly bordered by the years A.D. 1400 to A.D. 1600¹⁰¹, they referred to their confederacy through the metaphor of the longhouse.¹⁰² The analogy was apt in a number of ways, most notably in terms of the longhouse's physical characteristic of horizontal, side-by-side arrangement of individual family compartments. This latter characteristic leant itself nicely to the geographical configuration of the five confederated nations, which lay with borders touching on the southern shores of Lake Ontario and the Saint Lawrence River (see Figure 3, page 214), in an arrangement analogous to that of the individual maternal families of each Iroquois clan in the longhouse; hence the metaphor "the people of the longhouse" - in the Mohawk tongue, "Haudenosaunee" - was applied when the five nations united in a single "family". And in the same fashion that additional apartments were added to a longhouse when the maternal family

¹⁰¹ Tooker, "The League of the Iroquois...", p.420.

¹⁰² Fenton, "Northern Iroquoian Culture Patterns", p.320.

grew, the Tuscarora nation was "added" to the Confederacy in 1722, thereby "extending the rafters" of the confederate longhouse from the original five to "Six Nations".

Longhouse as political nomenclature:

As was noted in the opening moments of this section, "traditionalist" or "traditional" people in Kahnawake tend to refer most commonly to their particular political persuasion as being "longhouse", "Haudenosaunee", or "People of the longhouse". Which permutation of the label is used appears to be a rather capricious thing, dictated by personal preferences of the orator, the politics of the moment, or which term will evoke the most powerful message; variety in the preferences does not appear to correspond with differing traditionalist factions or philosophies, as all traditionalists encountered over the course of the research referred to themselves most commonly as "longhouse", but were not loath to enlist the other terms on occasion. As a result, in order to understand what is included under the rubric of "being longhouse", it is necessary to consider each of the factions individually.

(i) Longhouse Faction 1:

It is perhaps easiest to initiate the discussion by dealing quickly with those two smaller "longhouses" which local lore

informs are in reality factions of the largest traditionalist faction - break-away groups which consist of only a handful of members and which do not appear to possess much credibility as "traditionalists" in the community. Of these two, the first has no physical longhouse structure which may act as the seat of its "traditional authority", and no apparent organized membership beyond the single person claiming its existence. In this context, being "longhouse" or "traditional" has no animation beyond the level of discourse; there does not appear to be any well-developed notion of "longhouse government" or related "traditional" structures, nor is there are clear articulations of the goals or strategies of this faction in regard to self-determination or the resurrection of "traditional" ways. At base, it would appear that it is the language associated with a "traditional" philosophy which is paramount here, thus this "faction" seems to be little more than the chosen rhetoric of the community eccentric, rather than a faction in the sense it is defined above. Neither of the dominant conservative or traditionalist factions in Kahnawake appear to take this man or his brand of "traditionalism" seriously. Indeed, it appears that the only persons who have occasionally viewed this "longhouse" as a source of "traditional authority" are affiliated with outside media, who may be searching for an interesting or humorous "spin" to a story on Kahnawake.

(ii) Longhouse Faction 2:

The second break-away longhouse reportedly managed to construct its own physical longhouse structure, but is as starved for membership as its previously described counterpart. It is reportedly the product of a philosophical conflict between two men originally participating in the dominant longhouse faction and the core group of that faction, who broke away to initiate their own longhouse group and whose efforts have met with little apparent community support. This may be largely due to a subsequent disagreement which caused the two men to part company, leading one man to carry on and initiate construction of his own longhouse, while the other seems to have simply faded out of traditionalist politics. Like the traditionalist faction outlined above, this "group of one" does not appear to possess any sophisticated plan for "longhouse government" or the resurrection of a traditionalist, self-determining Mohawk Nation.

It is possible that this longhouse is the sole residue of the revitalizationist movement of the "Handsome Lake religion"¹⁰³ in the community, as it is believed that this may

¹⁰³ Interview with A.B. Deer, 24 November, 1992. The Handsome Lake religion is based upon a set of beliefs enumerated within the "Code of Handsome Lake", the contents and title of which are derived from the prophet of the faith, a Seneca named Handsome Lake. Over the period 1779-1815, Handsome Lake was the recipient of a series of visions which he passed on to his people, and which ultimately became enshrined as the Longhouse religion. In its final form, the religion "specifically rejected alcohol, witchcraft, sexual promiscuity, the medicine societies, and the traditional

have formed the foundation of both the original and later splits. The exit of these "Handsome Lakers" would have been made necessary by the rejection of Handsome Lake's teachings by the dominant longhouse faction, which they argue have impoverished Iroquois tradition to the level of cultism.¹⁰⁴ As with the previously elaborated "eccentric" traditionalist faction, this break-away longhouse faction offers no true competition of any variety to the dominant longhouse group, insofar as it is less a true faction than the articulation of an individual predilection in regard to "tradition".

(iii) Longhouse Faction 3 - The Dominant Longhouse:

The third or "dominant" longhouse is the largest of the three groups and is by far the most well-organized and respected of the traditionalist factions; it also appears to be responsible for most, if not all, "traditional" activity and activism in the community. Within this group, to be "longhouse" is to work to revitalize the traditional culture inherent in the heydays of the historic Haudenosaunee in the seventeenth century, and to promote the sovereignty and nation-to-nation diplomacy practised by the Mohawk nation of that juncture.

power of the mother-in-law in the matrilineage. The Code of Handsome Lake also indicated that the Iroquois man should start to farm to provide for his nuclear family in the style of the White Man...", Van Horn, "The Revitalization Movement of Handsome Lake" (n.c.), pp.10-11.

¹⁰⁴ Interview with A.B. Deer, *ibid.*

Central to this program of cultural renaissance in Kahnawake is the resurrection of what is termed "longhouse government", and the revitalization of the traditional form of decision-making which was practised by the Iroquois at the time of their confederation.

Consistent with those historic "traditions" of government, this faction should, ideally, be lead by nine "sachems", three representing each of the Mohawk clans, who with the "clan mothers" and the "war chief" comprise the essence of "longhouse government" and offer "traditional leadership" to the community. This leadership is administered at the grass-roots level by the secretariat to the Longhouse, known as the "Mohawk Nation Office". It is interesting to note that this office, which traditionalist authorities in Kahnawake consistently impressed upon me is secondary to the Longhouse and acts only upon authority delegated from the Sachems and clan mothers, nonetheless appears to have preceded the appointment of these authorities.

The Nation Office became a part of traditionalist politics in Kahnawake in 1987, in the first efforts of a loosely-organized traditionalist community to assign some overt, bureaucratic structure to their faction. In a meeting of the people at the Cookhouse on 26 May 1987, it was agreed by the traditionalists that they would:

1. establish facilities to operate a secretariat with the intent of re-establishing the full functions of Nationhood.
2. Take direction from the People of the Longhouse

through established procedures.

3. Ensure statements, written and spoken, issued from the Office be with the view of creating understanding among the People of the Six Nations and other native groups, reflecting the aims of the Great Law.

4. Cultivate and maintain a Nation to Nation relationship with other governments.

5. Maintain at the highest level of credulity [sic] and integrity the Mohawk Nation.

6. Maintain the philosophies and principles of the Great Law and endeavour to apply them in todays [sic] reality.¹⁰⁵

The Nation Office was to be the primary means by which the traditionalists in Kahnawake would met their desired ends, and with its establishment in office space on the main street of the village proper, the dominant longhouse asserted an immediate and high-profile presence in the Kahnawake political landscape. It would maintain this presence, detailed in parts 5 and 6 of this thesis, until its closure in 1994 in a state of fiscal crisis which, when ameliorated, will permit it to re-open. Although the office is now closed, it was an active and lively part of Kahnawake traditionalist politics during the period under study, and it is therefore important to describe its form and functions as they existed at that time. It is important to note also that, although its secretariat is currently out of commission, the longhouse and its "traditional authority" persists and has not diminished in its desire, if not its efforts, to realize self-determination and separate justice in Kahnawake.

Comprised of traditionalist people who both volunteered and worked for pay, the Nation office was headed by a Co-ordinator,

¹⁰⁵ Mohawk Nation Office, Mandates, Activities and Guidelines (Kahnawake, 26 May 1987).

under whom fell the heads of the various "committees" and the "warriors", the latter designation including all men of the faction, who by virtue of gender are automatically considered to be warriors.¹⁰⁶ Prior to its closure, the Office maintained a series of committees involved in a range of matters, including the development of economic self-determination under the rubric of the "Trade and Commerce Committee", the "Justice Committee, which was my primary contact in the office and which was responsible for the promotion of "separate justice" and the aforementioned "Longhouse Justice System". There were also the "Women's" and "Men's" Committees, as well as a Land Committee directed to deal with land claims and orchestrate efforts to "reclaim" unceded traditional territories¹⁰⁷, and a series of relatively ad hoc committees which were struck to deal with specific projects or issues as these arise.

Because the committees tended to emerge suddenly and manifest highly variant lifespans, it was almost impossible to determine absolutely which or how many committees were active in

¹⁰⁶ This is a term which manifests layers of meaning; in my efforts to define a "warrior", people of Kahnawake commonly offered on of the three constructions of the term. At one level, a warrior is said to be any Mohawk man, who is a warrior simply by virtue of ethnicity and gender; a second definition of warrior is any man officially aligning himself with a "Warrior Society" - a sort of "traditionalist men's club", which may or may not engage in overtly traditionalist activities. Finally, while the preceding definitions involve a measure of external attribution of the label, a third construction of "warrior" is simply any man who adopts the self-designation, notwithstanding his activities within the community.

¹⁰⁷ For a detailed description of one such reclamation project, see Gail H. Landsman, Sovereignty and Symbol: Indian-White Conflict at Ganienkeh (Albuquerque: University of New Mexico Press, 1988).

which areas at any given moment. Owing also at least in part to the rather mercurial nature of politics in the structures of this faction as well as the efforts of its membership to preserve some semblance of a traditional egalitarianism, these structures prove remarkably resistant to efforts to rationalize their forms and functions in bureaucratic or hierarchical terms. There is little in the way of a well-organized, easily-articulated hierarchy within this faction's institutions: policies and committees tend to arise in a rather haphazard fashion and often in a reactive context of crisis, rather than in a proactive effort to anticipate and forestall crises. Standing outside the group and viewing its structures tends to produce an impression that the whole may indeed have a life - albeit a somewhat precarious one - outside the sum of its often loosely-related and ephemeral parts, and external efforts to impose some coherent order on that whole run the risk of misrepresenting the situation.

Although I was able to detect a degree of hierarchy in the general attitudes held by these traditionalists toward such offices as that of Coordinator or War Chief, I cannot say whether the deference shown was more a function of the office or the individuals occupying them at the time of my research. I can say with some certainty that most of the members of this faction as it existed at that time would reject strongly any notion that "hierarchy" was implicit in the arrangement of the Nation Office. In some respects at least - most notably those of

process and decision-making - they may be substantially correct in their rejection of the notion of hierarchy, inasmuch as all people may speak to deliberations in the longhouse government and all decisions require the seal of unanimity. At the same time, however, my own observation of the order of things in the Nation Office suggest that there were clearly some people in the faction who were more prominent than others, and who through their work and commitment to its politics and philosophy achieved positions of significant influence and power in the day-to-day functioning of the Office and the orchestration of its activities. One such person was a clan mother whom I will call Kai'o¹⁰⁸.

From the moment of my arrival in Kahnawake, Kai'o was the person to whom I was consistently directed and redirected in my efforts to track the activities of this longhouse faction, contact sachems or attend longhouse government council sessions.

¹⁰⁸ A Mohawk word meaning "hard face", a person with a hard face is one who might be described as pushing their way into a range of matters and groups, often without any invitation, where their tenacity and determination tend to move them into positions of significant influence, if not outright leadership. Inasmuch as they tend to be intrusive and not adverse to bruising a few toes in the process, these people inspire both grudging respect and dislike. The woman of whom I am speaking here was prominent in the Nation Office, having acted as its Co-ordinator for a time, and the longhouse government, and while many people admitted that she was sometimes troublesome and relationships with her were fractious, they also credited her with keeping important issues alive and ensuring that actions were actually taken, rather than only talked about. It is this woman who, in the present era of the defunct Nation Office, has "single-handedly" revived the office's Trade and Commerce Committee in an effort to encourage economic development in the community (personal communication with C. Deom, 7 February 1995).

She was directly involved in both the longhouse government as a clan mother, and the work of the "Nation Office" as coordinator of the office and in many of the committees active under its auspices. Her importance in the traditionalist community acknowledged, it may be suggested that even Kai'o's powers were non-hierarchical inasmuch, as observed above, it was not the offices which she occupied which gave the power, but rather her own innate qualities which empowered the offices. In this sense, it was not, for example, the fact that she was a clan mother that gave her power, but rather her own unique and potent blend of charisma, determination and - more often than not - ability to intimidate, that enabled her to influence policy and practice in the directions she favoured most. Thus "power" in this context was not one which obtained not from her position in the traditionalist secretariat and community, but it resided instead in those personal qualities which enabled her to assume such offices in the first place.

The concentric rings which describe the order of things in the Nation Office revolve around the person of the co-ordinator, who was the administrative centerpoint of the office and whose duties in that place were essentially those of "co-ordinating" the volunteers and workers to achieve the directives of the sachems and clan mothers. Thus the coordinator would attend deliberations by the sachems in the longhouse and receive their direct instructions, which he would then delegate to the appropriate persons in the Nation Office, reporting back to the

sachems when their instructions had been implemented. It is interesting to note that this position was not gender-biased, and was held at various times by Kai'o as well as by a man who now produces and edits the Kahnawake newspaper, The Eastern Door.

Around the coordinator clustered the "intelligentsia" of the office, including the researchers and speech-writers, as well as those whose primary task was "public relations" and the presentation of the "traditionalist" side of things to Canada through the "outside" media. It is perhaps in this context that the sophistication of this faction becomes most evident, as they waged a remarkably well-orchestrated campaign of "public relations" to educate and inform outsiders about events in Kahnawake. Central to this campaign was the policy of responding in writing or by telephone to negative or particularly pejorative editorials or letters in Montreal newspapers, as well as the purchase of large sections of those papers wherein "the People of Canada" were informed of Mohawk - read traditionalist - positions on a range of topical matters.¹⁰⁹

Outside the ring of the intelligentsia were those committees mentioned above, which are in turn engulfed by the

¹⁰⁹ An example of the public relations exercises undertaken by the Nation Office included the publication of a full-page ad entitled "Greetings to the People of Canada", in The Montreal Gazette, 25 February 1989, in which the Nation Office (acting under the pen name "Haudenosaunee, Mohawk Nation Kahnawake Branch") attempted to respond to the public controversy generated outside its borders when the traditionalist community forcibly evicted two alleged drug dealers from Kahnawake. The eviction story is described at pages 99-101 of this thesis.

warriors and those visible and active supporters of this longhouse faction who volunteer for, and participate in the activities of, the Nation Office and longhouse government. It should be noted that these delineations of persons and roles in the office and its longhouse government are not mutually exclusive and, as was the case with Kai'o, it is possible for people to participate and act in more than one capacity in this faction. As well, the concentric rings in Figure 3 which represent the personnel and functions of the Nation Office, taken together with the longhouse government, are also synonymous with the focal point of this traditionalist faction, and from its edges outward cluster those people within Kahnawake who are supportive of this traditionalist faction, that support diminishing the further away from the core one progresses.

It is interesting to note that the longhouse from which the Nation Office is reported to take its direction did not obtain a tangible presence in Kahnawake until nearly a year after the organization of this traditionalist faction in the Nation Office; a precedence in origin which often seemed echoed in the relative prominence of the two bodies in community politics and activism. For although the Nation Office conferred upon all its activities the seal of traditional authority implicit in an acknowledgement that it was acting on the direction of the sachems, it was the Office which occupied the front line in political battles and causes, and whose presence was, on occasion, sufficiently high profile to render the longhouse an

almost silent partner - the example of the traditionalists' eviction of alleged drug dealers, outlined below, is an apposite example. Notwithstanding this impression, however, I was consistently reminded that it is the longhouse which empowered and directed the Nation Office, and which is the more important traditionalist institution. Given the reported outliving of the office by the longhouse and its officers, it may be the case that appearances were, indeed, in this case, deceiving.

The animation of the longhouse through the appointment of sachems, clan mothers and a war chief, occurred in 1988 in response to a federal police raid on two small businesses in Kahnawake, which the Canadian authorities believed were selling contraband cigarettes that the Mohawks had "smuggled" into Canada from the United States without payment of duties. The traditionalist Mohawks targeted by the raids were merely the most prominent exponents and practitioners of a relatively widespread Mohawk perception that the right to avoid importation fees and taxes stemmed from promises regarding "free passage of personal goods" made to the Mohawks by the British in amendments to the Jay Treaty.¹¹⁰ With regard to the cigarette trade, those promises were articulated in the purchase of massive quantities of much cheaper cigarettes in Mohawk reservations "on the American side" of the Canada-United States border and their

¹¹⁰ The Treaty of Amity, Commerce and Navigation, between Great Britain and the United States of America, 19th November 1794: 8 Stat. 116, 18 Stat. (2d) 269, 2 Miller 245, 1 Malloy 590, 12 Bevans 13.

resale to Canadians on the Canada side, minus any duties that would be applied to these products were they to pass through Canadian customs. In order to avoid custom agents who, along with the Canadian government, did not share the Mohawks' interpretation of their border rights, the cigarettes were "smuggled" across the Saint Lawrence river between a number of points along the U.S. and Canadian sides of the border.

For their part, the government of Canada considered the Jay Treaty abrogated by the War of 1812 and, while the United States has passed enabling legislation recognizing the rights of aboriginal people to cross the Canada-United States border with their personal goods and effects duty free, there has been no action taken in Canada to acknowledge the Treaty's statement of free-passage rights for aboriginal people. Within Canada, the law on the matter was stated by the Supreme Court in 1956 in the decision in *Louis Francis v. The Queen*¹¹¹, where it was held that no provisions contained within the Jay Treaty or the 1951 Indian Act had the effect of delivering aboriginal people living in Canada from the necessity of paying duties on goods imported into Canada from the United States.¹¹² Acting on this position

¹¹¹ 3 Dominion Law Reports (2d) (1956):641-652.

¹¹² On the relevant treaties and their interpretations, see: John Leslie, "The Treaty of Amity, Commerce and Navigation, 1794-1796, The Jay Treaty" (Ottawa: Treaties and Historical Research Centre Research Branch, Corporate Policy, Department of Indian and Northern Affairs Canada, December 1979); Elizabeth C. Duran and James Duran Jr., "Indian Rights in the Jay Treaty", 6(1) Indian Historian (1983):33-37; R.F. Salisbury, "Indians and the Canada - U.S. Border", unpublished paper, Programme in the Anthropology of Development, McGill University, Montreal, Quebec, 1977; Paul

in 1988, the federal government launched a police raid on two Kahnawake "cigarette shops", one of which was owned and operated by a prominent and elderly traditionalist woman.

The traditionalist community, outraged by the raid and the assault on what they perceived to be Kahnawake's enduring treaty rights and sovereignty, were motivated in the aftermath to organize a clear source of "traditional authority" in Kahnawake which could offer leadership and organized responses to similar events in the future. In a meeting held by the traditionalist community, worthy persons were nominated and appointed by unanimous consent to the nine offices of "acting" sachems, three to represent each of the Turtle, Bear and Wolf clans, as well as "acting" clan mothers and an "acting" war chief, the latter being charged with directing the activities of the warriors.

It is difficult to be entirely certain why these positions are prefixed with the term "acting", especially as no one commonly enlists it when referring to the "officers" of this traditionalist faction, a practice which is repeated in this thesis. That being said, the odd title may have something to do with the reality that none of the persons occupying these offices were "condoled" into them in accordance with traditional

Williams, LLB., legal opinion concerning the importation of cigarettes into Canada by Mohawk People, undated, unpublished paper in researcher's possession. See also Robert S. Allen, His Majesty's Indian Allies: British Policy in the Defence of Canada, 1774-1815 (Toronto: Dundurn Press, 1992):252).

Iroquois practices for installing sachems.¹¹³ The failure to condole has been variously attributed to a general inertia, as well as to the fact that there is some lack of clarity regarding the status of vacant positions as a result of a period of "cavalier condoling" in the early twentieth century which

¹¹³ The "condolence" is a ceremony by which the senior matrons of a clan would formally install their male candidate for a hereditary sachemship into that office. Upon the sachem's acceptance of the position, the entire community would join in his inauguration through the ritual of the condolence by which the name and office of the deceased sachem would be "requickened" and given to the successor. In its entirety in practice, the condolence was actually a series of smaller rites, beginning with a small preliminary council which occurred "At the Wood's Edge". This council was really a sort of greeting, whereby the moiety opposite to the clan which had suffered the death of a sachem would gather at a small fire struck a short distance away from the ceremonial longhouse, to give notice of their arrival and send greetings to the grieving clan. These "clear-minded tribes" then marched toward the longhouse, where the other clans had gathered, chanting the names of the fifty original sachems of the Confederacy. This recitation would be repeated in the longhouse, where the "Laws of the Confederacy" were also repeated, which were further followed by each moiety reciting the "Requickening Address", which was named for its symbolic power to restore life and assuage the grief of the mourning clan. It was through this latter ritual that the office of the deceased chief was "requickened" and the incumbent "raised up" to fulfil it. The entire ceremony, which lasted a full day, was ended in characteristic fashion, with a feast. At the conclusion of the cumulative rituals of the condolence, the new sachem became a full-fledged member of the local government and - subject to certain qualifications on his tenure - would remain so until his voluntary resignation or death. On the condolence, see: Horatio Hale, "A Lawgiver of the Stone Age", Proceedings of the American Association for the Advancement of Science 30 (1881), p.335; William N. Fenton, "An Iroquois Condolence Council for Installing Cayuga Chiefs in 1945", Journal of the Washington Academy of Sciences 36 (1946), pp.110-127; Hale, The Iroquois Book of Rites, pp.117-139; "The Constitution of the Five Nations", pp.110-113; Tooker, "The League of the Iroquois", p.437-441. It seems clear that such a death was not necessarily prerequisite to practising the condolence in the case of the lesser office of "Merit Chief", as such offices were created for a specific individual at the time of their appointment and evaporated upon their death.

resulted in replicated titles and redundant sachemships across Iroquois communities.¹¹⁴ It is also suggested that, because the positions were filled quickly in a context of crisis, condolence has been withheld until the officials prove themselves worthy of their position. Still others suggest that they are less "acting" leaders than "sub-chiefs", making them a grade lower than condoled headmen, but nonetheless leaders.¹¹⁵

Despite the grey area in traditionalist leadership implicit in the preceding controversy over whether the leaders were "acting" or more permanent - and possibly genuine - than this prefix implies, it is clear that by the conclusion of 1988, the traditionalist community in Kahnawake had assumed a prominent and concrete presence in the community through the fulfilling of those "traditional offices" of clan mothers, sachems and war chief, and the support of the "longhouse government" which those offices together populated through the secretariat of the "Nation Office". In this articulation of leadership the largest traditionalist faction now possessed a degree of animation equivalent to that of the Mohawk Council, and offered a direct

¹¹⁴ Interview with A.B. Deer, 24 November 1989.

¹¹⁵ There was, at the time of the field study, only a single formally condoled sachem within Kahnawake. This man had, however, ceased to involve himself with any traditionalist group in Kahnawake; admitting that he should be "de-horned", a primary informant notes that they simply "haven't got around to it". As a result of the paucity of condoled representatives within the community, Kahnawake is represented at the Confederacy level through condoled Mohawk sachems from other Mohawk communities, most notably Akwesasne and Kahnesatake (Interview with A. Brian Deer, 24 November 1992).

"traditional" alternative to that latter institution for the governance of Kahnawake. From this point, then, factionalist politics in the community had two clear and directly oppositional components: a Mohawk Council versus a Longhouse and Nation Office. And within less than a decade, each of these competitors would produce "Justice Committees"¹¹⁶ which would occupy the frontlines of the struggle to control the administration of justice in a future, self-determining Kahnawake.

At the time of the research, the dominant longhouse in Kahnawake gave direction to the Nation Office on the basis of policies and positions decided through the "traditional" councils held in the larger and newer of the two longhouses built by this faction; the smaller and older of which is the site of the less formal "Peoples' Meetings", which are held on an "as-needed" basis to determine community input on traditionalist policy.¹¹⁷ The sachems' councils, which are open to all Kahnawakehronon¹¹⁸, are the essence of "Longhouse

¹¹⁶ The emergence and position of each of these committees is detailed in part 5 of this thesis, most notably at pp.382-387, 422.

¹¹⁷ One such meeting was held on the issue of "traditional justice", at which I was asked to speak about my research and its aims, and to discuss the prognosis for realization of a "separate justice system" in Kahnawake. The meeting, which took place on a Tuesday evening, was well-attended by both men and women, as well as both most of the core group of this longhouse faction.

¹¹⁸ This is a Mohawk term the closest approximate English translation of which is "people of the place above the rapids"; it is the term which Mohawk people at Kahnawake use when they wish to refer to themselves in their mother tongue.

government", although it must be admitted that it is not entirely clear precisely what that term means in practice, as opposed to political principle.

My own efforts to gain access to a council to witness its processes in action constituted one of my more interesting interactions with the traditionalist faction which had invited me into the community, and an introduction to the politics of researching that community and its institutions. According to some of the traditional people, invitations to observe councils became uncommon following the abuse of the privilege by prior researchers in Kahnawake. On one notable occasion, I was informed, an anthropologist who was invited to attend a council on the condition that he not tape-record its proceedings was discovered later to not only have recorded the council session, but to have published elements of it which the participants would have preferred to have remained confidential. This incident constituted a severe blow to the trust which this traditional faction had granted to this researcher and those who would come later, and it is possible that it is the recollection of this betrayal that doomed my own invitation to a council session.

Shortly after my arrival in Kahnawake I expressed an interest in attending a council at the longhouse, and was informed by a Kai'o my request would be relayed to the "sachems" who comprised the council. A few days later it was agreed that I could attend the next council, but as I attempted to obtain

details of the time and date (place being a foregone conclusion), I met with few concrete results: those whom I consulted, and who might have been expected to have the answers I needed, pleaded ignorance; the woman who had relayed the request and the resulting invitation was suddenly very difficult to reach by telephone or in person. Finally a message was relayed to me by a member of my host family that the council would transpire on an evening the following week. Confident in this information, I carried on about my business and, on the day of the council, made a casual inquiry about the precise time it would begin. I was greeted with shock from Kai'o: the council had already taken place, and they always last from dawn to dusk, did I not know that from my study of Iroquoian traditions? Remarking that my ignorance would explain my absence, I was informed that I should not expect any further invitations to councils at the longhouse.

This incident made me curious about the degree to which the original invitation was genuine, and led to a conclusion that the mix-up in details might very well have constituted a particularly clever way to appear open to scrutiny while actually closing ranks. It may have been the case that, in the wake of the earlier researcher, I needed to prove myself ethically; it is also possible that the thwarting of the council attendance was a way to test my commitment to my research: would I simply withdraw, or would I come back for more? I chose the latter path, and although I have not, to this day, been

successful in attending a formal council, shortly after the incident I was "formally presented" to the traditional community in the longhouse in a ceremony of greeting which I will discuss later in the delineation of my methodology; I was also invited to attend some "peoples' meetings" and to participate in non-confidential discussions there.

Thus although I cannot confirm with my own observations what transpires in the local longhouse councils which appear to comprise the essence of "Traditional" or "Longhouse government" in Kahnawake, I was informed that the process attempts to replicate the traditional mode of decision-making of the historic Iroquois councils, known as "deliberations over the fire". Ideally, such deliberations take place within a longhouse and involve the full nine chiefs, three representing each of the three Mohawk clans, the Turtle, Bear and Wolf. On one side of the house sits the Wolf clan, who call the Turtles their siblings and with them comprise one moiety; opposite to them is the Bear clan, which constitute the other moiety and refer to the Turtle and Wolf people as cousins. The Bear and Wolf leaders face each other over a council fire tended by the Turtle clan leaders, who sit at one end and, in their capacity as "Wellkeepers", call the other clans to council, raise the matters to be deliberated and generally oversee the process of deliberation.¹¹⁹

¹¹⁹ Barbara Kawnehe Barnes, Traditional Teachings (Cornwall Island, Ontario: North American Indian Travelling College, 1984), p.37.

"Deliberations over the fire" begin when the Wellkeepers introduce a matter for consideration by passing it, first, to the Wolf clan leaders, who will consider the matter among themselves, referring any requests for clarification or additional information back to the Turtle clan leaders, who return the replies to the Wolves. When the latter have reached a consensus on the issues and have agreed upon a preferred course of action, they pass these "over the fire" to the Turtles, who will take the Wolf clan leaders' position under consideration. If they are in agreement with the Wolves, the Turtles will initiate a similar exchange with the Bear clan leaders. When the matter has been passed over the fire to all three clans, and agreement has been reached, the Turtles will announce the decision to the people. In those cases where a mutually-acceptable conclusion cannot be reached, the council fire will be covered with ashes, signifying the right of all clans to act independently of each other.¹²⁰

Implied within the preceding elaboration of the longhouse government process of deliberations over the fire is a prominence of the sachems which is probably more illusory than real. For although there is certainly a prestige which is associated with the achievement of a sachemship, in fact the powers and rights implicit in this office are well-fettered by the clan mothers, who by right of tradition "own" the hereditary sachemships of each clan and who maintain full rights to both

¹²⁰ Ibid.

appoint and dismiss their occupants. Thus if one were to attempt to arrange longhouse government in a "quasi-bureaucratic" form, that form would place the clan mothers at its apogee, and the sachems, most notably those Turtle clan leaders who act as the Wellkeepers, and the "War Chief", would reside at a level immediately below the matrons.

The office of War Chief is also determined by the clan mothers, and is filled by a man who, in an ideal sense, is the "leader" of the "warriors". Described by one traditionalist woman as the "side-kick" of the clan mothers, the war chief is the "conduit into the men's realm", through which information is exchanged between the senior women and the men; it is also through the work of the war chief that many of the clan mothers' ideas and directives are achieved. In this regard the war chief has been likened to a "sapper", who "digs away at the sachems and the men until they come around to the women's ideas".¹²¹

My observations of, and interactions with, the women of this faction moved me strongly to the conclusion that the putative prominence they derive from the historic principle of the matrilineage and the "ideal" of the clan mother in the longhouse is indeed realized in practice. This is rather remarkable given the fact that the matrilineage is now virtually dead, the Canadian government imposing a system of patrilineal descent and inheritance with the 1869 Indian Act, and few modern

¹²¹ This illumination on the role of the War Chief was offered by C. Deom, in a personal communication of 7 February 1995.

Mohawks can state with authority their historic clan affiliation. It is worth mentioning here that the blurred edges (which penetrate almost to the centre) of the clan system in Kahnawake may prove problematic for the establishment of "longhouse government", insofar as this is based upon the dual organisation of the clans and the sachemships which are derived from those clans and designated by their senior women. It is possible even now to sense hints of superiority between those who seem quite certain of their clan affiliation, wherein one clan is deemed more prestigious than another; one can only imagine the distance which might separate these people from those who lack any remembrance of clan affiliation. Given the centrality of the clan system to the longhouse at virtually every level at which the term is used, the absence of clans in a significant percentage of the population would seem likely to cause problems, especially for the activation of longhouse government, as those lacking a clan membership could be excluded from eligibility for a hereditary sachemship. It is also possible to envisage that "clan snobbery", if taken to an extreme, could alienate "clan-less" Mohawks from revitalized traditional institutions. This is arguably one of the "policy" issues which the dominant traditionalist faction will need to consider in the formulation of its policies for the resurrection of longhouse government and the "sale" of that resurrection to the people of Kahnawake.

Notwithstanding the modern obscurity of the matrilineage

and the clan system, it is still the women who appear to be responsible for most of the faction's grassroots activism. In the Nation Office, for example, women were consistent and vocal participants across all the committees, and were active attendants at the Peoples' Meetings held in the cookhouse. A few women were especially conspicuous in this regard, and often appeared, in my opinion, to be the driving force behind most of this faction's activism - the aforementioned Kai'o being among them. Still other women were less prominent in their actions, but nonetheless were tireless in their promotion of the "traditionalist cause". One of these women, who seemed to be a low-profile, but highly important "backroom boy" in the Nation Office, emerged as one of the primary proponents of the activism at Oka - a protest which, it must be remembered, was inspired and lead almost single-handedly by one Mohawk woman.

Although it is important to be aware of the fissures in the traditionalist population in Kahnawake as they inform of the overall political climate of the community, it is upon the dominant longhouse faction which attention is focused here. Thus it should be noted that, when references are made in this thesis to "the longhouse" or the "traditional" or "traditionalist" people in Kahnawake, what is being spoken of is the largest longhouse faction and that associated with the Nation Office and a return to "longhouse government" as detailed above. It is also this faction that is responsible for the "Longhouse Justice System" and which is the central competitor to the Mohawk

Council for control of the institutions and future of a self-determining Kahnawake.

The nature of the competition between the dominant longhouse faction and the conservative faction which clusters around the Mohawk Council continues a trend in evidence in the Mohawk Valley of the seventeenth century of internecine struggle between those Mohawks favouring tradition and those who prefer other, essentially "non-Mohawk" ways of doing things. As will be seen in the chronicle of Kahnawake which traces these internal struggles and the "traditions" which are at their core, the conservative-traditionalist factionalism has a violent and profound impact on the realization of even the most commonly-accepted goals of the community.

One such goal which is illuminating of the nature of the competition between the conservative Council faction and that of the longhouse emerged in 1989, as persons across a range of political persuasions began to voice increasing concerns about drug use among Kahnawake's youth, and a common belief that the primary source of the drugs were two Mohawks residing in the community. Both the Council and the leaders of the longhouse faction appeared united in the desire to stop the flow of drugs into Kahnawake from this source, however, the Mohawk Council's policing agency, the "Peacekeepers", as well as "outside" Royal Canadian Mounted Police, consistently voiced their unwillingness to act upon what they perceived to be inadequate grounds for search or arrest of the alleged dealers. As dissatisfaction with

the Peacekeepers' inaction grew, it spread by association to the Mohawk Council with whom those police were necessarily associated. At the same time, the acting sachems and clan mothers began to take action through the Nation Office and warriors; the War Chief was sent to the alleged dealers on three separate occasions to convey to them the three traditional warnings offered to community deviants to curb undesirable social actions.¹²² When the two chose to ignore the warnings, the traditional leaders took action: Lead by the War Chief, a number of clan mothers, elders and warriors, accompanied by a crowd comprised of a reported three hundred persons many of whom were known as supporters of the Mohawk Council, moved against the alleged dealers and forcibly evicted them from Kahnawake Territory.¹²³ While there were certainly a few persons both

¹²² The "three warning system" was something of which people in Kahnawake seem to speak a great deal, yet also seemed uncertain of its origins in historic traditional culture. I outline the system in detail in part 3.1 of the thesis, at pp.148-150, and my explorations of the concept suggest strongly that it is, in this context, an "invented" or "grafted tradition".

¹²³ This description of the events which have become known as "the evictions" is based upon discussions of it with informants in the researchers' field community of Kahnawake, it is also informed by the following. Kuitenbrouwer, Peter. "Kick drug dealers out of Kahnawake, mothers urge", The Montreal Gazette, 12 January 1989; Haudenosaunee, Mohawk Nation Kahnawake Branch, "Greetings to the People of Canada" (newspaper ad), The Montreal Gazette, 25 February 1989; "Warrior Society launches campaign to rid Kahnawake of drug dealers", The Montreal Gazette, 24 February 1989; "Mohawks evict 'convicted' pair", The Montreal Gazette, 13 April 1989; "Does story or Ad tell truth?", letter to the editor, The Montreal Gazette, 19 April 1989; "Have no pity for Johnson, Lahache", letter to the editor, Le Soleil, 23 April 1989; "Send Drug Dealers to Reserve", letter to the editor, The Montreal Gazette, 24 April 1989; "Kahnawake Woman ejected for 3rd time", The Montreal Gazette, 25 April 1989; "Mohawk 'war' on drugs. Reserve outcast faces lifetime

within and outside Kahnawake who decried the act as a flagrant and reprehensible violation of the alleged dealers' fundamental constitutional rights, there seems little question that the majority of the community supported the traditionalists' action. There is also little doubt that this action, and the support it mustered for the Nation Office and longhouse government, constituted a significant blow to the reputation and authority of the Mohawk Council in the community.

The chronicle of Kahnawake contained within this dissertation establishes clearly the enduring rivalry between conservatives and traditionalists within this Mohawk community. As one element in that factionalism, the current competition to control and shape "separate justice" is an especially keen site of the struggle, and one which is intimately intertwined with Kahnawake's current traditional renaissance. To the degree that this renaissance is less a revival than a reconstruction of both history and tradition, the contest to define separate justice is also a contest over traditional knowledge - who possesses it and who does not, and who may thus legitimately dictate the future of "traditional law" in this Mohawk territory.

ban", Montreal Daily News, 26 April 1989; "We'll make our own drug laws - Kahnawake Mohawks", The Montreal Gazette, 26 April 1989; "Stop studying and take Action", letter to the editor, The Montreal Gazette, 1 May 1989; "Public Notice", Kahnawake 1989.

3. The Aims and Method of the Research

The research project was the result of a period of correspondence which I had enjoyed with one of the researchers of the Nation Office, who had been working in the area of traditional law and had contacted me in the summer of 1986 concerning some prior research I had done in this area. Our interactions led to an invitation for me to visit Kahnawake in the fall of 1988, to meet with the Justice Committee of the Nation Office, to discuss the possibility of working together on the "reclamation" and study of "Mohawk law". Thus it was that only a few weeks after I arrived in London, England from Canada, to take up my doctoral studies in Law at the London School of Economics and Political Science, I found myself on a plane back to my country of origin.

The meetings which occupied most of my time in that first visit to Kahnawake included not only the members of the Justice Committee, but also some of the elders and clan mothers of the traditionalist community. Our discussions of the Mohawks' research interests and needs, and my previous work and current interests in the area of "traditional legal systems", prompted an agreement that I would conduct for them, with their full support, an investigation into "traditional Iroquois justice and dispute resolution...in the area of criminal justice", which would support the longhouse and Nation Offices' activation of a "traditional justice system for general acceptance in

Kahnawake".¹²⁴ The aim of the research was thus one containing a potentially significant practical as well as pedagogical influence: The reclamation of Kahnawake's historic traditions and their incorporation into a "traditional criminal justice system" which was to be an active part of the community's larger drive for self-determination.

The research was thus what might best be termed, in Rappaport's¹²⁵ words, an "ethnographically-informed" history of the Kahnawake Mohawks, whose central task was unearthing the traditions of dispute resolution inherent in, and evolving or adapting over, that history. The method which I used to approach this end was a sort of "historical upstreaming", which began in the modern community of Kahnawake with an effort to assess the form and content of the extant traditions of "Iroquois justice and dispute resolution" alive among these modern Mohawks, and then progressed "upstream" through the various primary and secondary reports documenting their past to the earliest reported descriptions of those traditions. This approach enabled me not only to get an immediate sense of the status of "tradition" and the context of the separate justice movement in Kahnawake, but was also suggestive of the degree of continuity in those traditions over time - something which I discovered

¹²⁴ Personal communication from Brian Deer, for The Justice Committee, Mohawk Nation - Kahnawake Branch, 6 December 1988.

¹²⁵ Joanne Rappaport, The Politics of Memory. Native Historical Interpretation in the Colombian Andes (Cambridge: Cambridge University Press, 1990), p.xii.

quite early in my research was of utmost importance to the Kahnawakehronon involved with the revitalization of "traditional justice".

At the outset it is important to acknowledge, as did the traditionalist Mohawks with whom the original research focus was developed, that a fundamental impetus for the study resided in the Mohawks' paucity of knowledge of "traditional criminal justice" in particular, and of the longterm chronicle of Kahnawake in general - a reality which nonetheless did not prevent the people from speaking in apparently authoritative terms about either of those things or how they informed the traditionalists' proposed "Longhouse Justice System". Yet as I proceeded with my efforts to peel back the layers of time which had buried Kahnawake's traditions and distanced them from the reservoir of the people's contemporary knowledges, it became increasingly clear that what the Mohawks apparently *thought* were their "legal" traditions - at least as these had been articulated in the "Longhouse Justice System" - bore little resemblance to the putative reality of those traditions as indicated in the historical records. I began to suspect that, in regard both to the traditions and their historical context, I was seeing more of what the Mohawks consulted perceived their past and its institutions *should have been* than what those things appeared to have been in actual terms.¹²⁶ This perception

¹²⁶ The notion that any history exists in a sort of limbo between those events which it appears actually did occur and the perceptions of them in retrospect, which are inevitably to varying

was, of course, bound up with both my own and my Mohawk informants' competing ideas of proper historical interpretation and whose versions of the past, and the recollections and mythologies which are central to it, more closely approximate the "truth"; this is a matter to which I will return shortly.

It was in these first twinges of awareness of an increasingly apparent disjunction between the traditions of justice and dispute resolution of the past and their recreation in the present that I found the germ of the research question that became central in the dissertation. As noted above, it was clear from the outset that the Mohawks with whom I consulted about their history and traditions actually knew very little about either of these things, and that the research we were to complete together was intended to ameliorate that ignorance. Yet in spite of - or perhaps in many ways as a result of - this "silence" in Kahnawake's collective memory, virtually all those Mohawks involved in the design and implementation of the "traditional" Longhouse Justice System and who were consulted about its form, expressed a *belief that it replicated, at its essence, their ancestors' historic traditions of dispute resolution and perpetuated the pith of those traditions, which persisted even to the present tense.* And even as my researches threatened to throw into question the connection and

degrees revisionist - and revisionist in the direction of supporting modern needs or political agendas, is discussed in detail in both Connerton, How Societies Remember, and in Rappaport, The Politics of Memory.

"traditional integrity" of the "modern traditions" by revealing the distance between those traditions, both past and present, that span would be closed by suggestions that what was at work here was some natural evolution or adaptation in the traditions, rather than a conscious and contemporary reconstruction. As my discussions in this vein progressed, it became clear that, for the traditionalist Mohawks with whom I spoke, perceptions of the integrity and viability of the modern traditional juridical form depended upon the establishment of a natural continuity between it and its putatively pristine, pre-contact counterpart. Inasmuch as an acknowledgement of reconstruction or "invention" of that tradition was tantamount to the severing of the historical thread between the past, present and future - "living traditions not needing to be invented"¹²⁷ - and therefore also of the moral tie which bound these junctures and which justified both pragmatically and philosophically the traditionalists' efforts to requicken traditional dispute resolution in the modern moment, it was imperative that the possibility of "invention" was denied.

The competition between evolution or adaptation and the historical continuity which these sorts of changes implied, and the "invention of tradition" which pointed to a quite contrary discontinuity in history and traditional culture, prompted me to compare and contrast the "original" and modern traditions

¹²⁷ Eric Hobsbawm and Terence Ranger, eds., The Invention of Tradition, (Cambridge: Cambridge University Press, 1983), p.7.

through an analysis of the apparently manufactured connection between them, and the implications this connection could possess for the validity of the modern traditions. This lead to a focus in the research which may be stated more formally as follows: My analysis and juxtaposition of the "traditional" dispute resolution mechanisms of the early post-contact Mohawk Nation and those putatively "traditional" dispute resolution mechanisms either active, or proposed for activation, in the modern Mohawk Nation at Kahnawake reveals minimal commonalities between these two "traditions". Does this disjunction, coupled with the modern promotion of an apparently spurious historical connection between these "traditions", render the modern "tradition" invented, and therefore in some way, non-traditional? Furthermore, if the proposed system is deemed to be comprised of invented traditions, and is therefore non-traditional, what are the implications for separate systems in the community if the centrality of tradition is both a rationale and the blueprint for that system?

3.1 History and Tradition in De-Colonization

The notion that traditions and histories might be invented is hardly a new one. Turning first to the question of history, the question of "invention" and the competition of legitimacy between oral and written chronicles - or between "History" and "mythology", has been analyzed in a range of important

researches which remind us not only of the reality of differing legitimacies, but of the fragility of history and memory generally.¹²⁸ The history of a group, like the history of an individual, consists essentially of the collective memories of the group of their shared past, as well as the individual pasts of each of its membership. It makes a sort of basic sense, then, that insofar as any group is composed of individuals, and each individual will experience a history in the group which is to some degree unique, that individual versions of and perspectives on group history will vary in accordance with each person's own unique experience. It is also probably a truism that individuals will tend to see that history in terms of the present and may relate to the past in terms of how it influences their position in the present tense. In this regard, as Rappaport and Connerton in their studies of memory remind us, all pasts are lived in the present, and versions of them, whether competing or complementary, must be understood in those terms.¹²⁹ Thus one should qualify any historian's words, whether of mouth or a

¹²⁸ See, for example, Paul Connerton, How Societies Remember (Cambridge: Cambridge University Press, 1989); Rappaport, The Politics of Memory; Raphael Samuel and Paul Thompson, eds., The Myths We Live By (London: Routledge, 1990); David Lowenthal, The Past is a Foreign Country (Cambridge: Cambridge University Press, 1985). On the importance of including different historical "records" and voices in research, and understanding their context and the messages of the medium, see Elizabeth Tonkin, Narrating Our Pasts (Cambridge: Cambridge University Press, 1992); Joel Sherzer and Anthony C. Woodbury, eds., Native American Discourse. Poetics and rhetoric (Cambridge: Cambridge University Press, 1987).

¹²⁹ Paul Connerton, How Societies Remember (Cambridge: Cambridge University Press, 1989); Rappaport, "Introduction: Interpreting the Past", in The Politics of Memory, pp.1-29.

written text, with a consideration of how a particular image of the past relates to the position of the speaker at the moment of writing or speaking, for not only is all memory an "exercise in selective amnesia" where both what is remembered and forgotten are important, but it is also significant how and for what ends memories are preserved.¹³⁰

Thus for example, in the case of the present research, it must be remembered that the search for Kahnawake's history - or histories - transpired within a context of a "rights climate" wherein both traditionalists and conservatives, albeit to varying degrees, rejected the "imposed law" of the Canadian state in favour of the promotion of a Mohawk-defined self-determination. Central to the promotion of rights of self-determination is a rejection of the structures and paternalism of the Indian Act, including the Mohawk Council system, by both traditionalists, who would replace it with "longhouse government", and the Mohawk Council itself, whose councillors seem to view the system as a transitional step in a larger movement toward truly "Mohawk" institutions.¹³¹ The moral element in this "throwing off of the yoke of paternalism" resides in the assumption, both implicit and explicit, that the band council system of government was historically imposed on

¹³⁰ Raphael Samuel and Paul Thompson, The Myths We Live By (Cambridge: Cambridge University Press, 1990), p.7; see also, David Lowenthal, The Past is a Foreign Country (Cambridge: Cambridge University Press, 1985), p.231.

¹³¹ Interview with Grand Chief J. Norton, Mohawk Council of Kahnawake, 24 October 1989.

the "sovereign" community without their consent and in place of the pre-existing "traditional" government. It was thus perhaps not surprising, given the importance of this historical "fact" to the prosperity of notions of enduring sovereignty and the concomitant rights of self-determination and separate justice, that no Mohawks consulted over the course of the research mentioned that the council system was, according to previously confidential primary reports unearthed in the present research, *invited* into Kahnawake in 1889 by the Mohawks themselves! What's more intriguing, given the modern belief in imposition, is the primary documents' evidence that the community was so enthusiastic about the elective system, that a series of seven petitions were sent to Indian Department authorities requesting that Kahnawake be allowed to begin holding elections prior to the passage of legislation legally empowering them to do so!¹³² It is perhaps not surprising that a history intended to fuel and empower a community to self-determination would slough off memories suggestive of a degree of complicity by their elders in the very processes which lead to the modern Mohawks' state of disempowerment. Such "convenient" forgetting, which after a few generations may become a quite genuine loss, might be seen as

¹³² Canada. Department of Indian Affairs and Northern Development. File #E 4218-D6(vol.2, 11/1980-11/1983, Council Elections - Montreal District, "Letter from A. Brousseau, Agent, to the Superintendent General of Indian Affairs, Caughnawaga [Kahnawake] 16 January 1889"; see also, Canada. Department of Indian Affairs and Northern Development. File #E4218-D6(vol.1), 1/1980-10/1980 Council Elections - Montreal District, "Order-in-council, Privy Council, Canada, Government House, Ottawa, Tuesday 5th day of March 1889".

crucial to rights movements such as that underway in contemporary Kahnawake, wherein much Mohawk activism is powered by a righteous indignation concerning historic victimizations perpetrated by the state on the Mohawks, who seek nothing more than their rightful restitution for those wrongs. How the "new" information will be incorporated - if at all - into Kahnawake's popular local history remains to be seen: will knowledge of past complicity in the introduction of imposed law endanger larger assumptions of imposition and the moral foundation of the current rights movement? Or, perhaps more likely, current "histories" will simply be adapted to account for the new "old" information, perhaps with an assertion that the pro-council faction of the previous century was a somehow "less-Mohawk" one than those who reject its actions in the present moment, and who are merely "using" the council system to undermine that system, leading to its eventual replacement by a "traditional government". In this way the contradiction between the past and the politics of the present which it must justify can be reduced and the new information used to further legitimize modern activism, as contemporary Mohawks may be characterized as more committed to the "old ways" - and therefore more "traditional" and more "Mohawk" - than those misguided, more acculturated Mohawks of the past who invited council government into the community.

A second example of "revisionist history" is worth mentioning here, involving as it does the subject of traditional

dispute resolution and its "recreation" in a modern traditional justice system within Kahnawake. As I moved through the community speaking to Mohawks about their traditional ways of resolving disputes, I found an interesting trend in the responses of the dominant conservative and traditionalist factions. In the same way that the preceding gap in local historical knowledge was filled with "facts" supportive of the politics of self-determination within Kahnawake, similar silences in the memory of traditions of dispute resolution were filled with details consistent with the informant's present political position in relation to the ongoing struggle for control of criminal justice in Kahnawake. Thus members of the Mohawk Council, who with relative consistency rejected the legitimacy and viability of the traditionalist "Longhouse Justice System", asserted confidently that "We had no real law in the past"¹³³, while traditionalists were able to articulate, often in quite detailed and compelling ways, how disputes were resolved in that past.¹³⁴ In this case, the paucity of historical knowledge in both of the dominant factions permitted each to project into "The Past" events or phenomenon which reinforced their position in the present tense: the Mohawk Council Chief who rejected the Longhouse Justice System

¹³³ Interview with J. Norton, 24 November 1989.

¹³⁴ See, for example, the portrayal of "traditional law" in the work of C. Deom, "Traditional Courts and Conflict with the s.107 Indian Act courts at Kahnawake" (Faculty of Law Term Essay, Montreal: McGill University, 1988).

"legitimated" that rejection by asserting an historical precedent of an absence of traditional law, while the traditionalist proponents of the system validated their system by asserting an historical precedent of a rich and intricate traditional dispute resolution process.

It was thus consistently reinforced throughout the search for the Kahnawakehronons' historic traditions of dispute resolution that history does not float above those who make, record or recall it, a natural and untouched artefact of lives lived over time. Rather, history is subject to the stresses and strains not only of the moment, but also of those that exist at the time the past is deemed important and worth recovering - or recreating. In the latter context, history not only informs of the past, but also - and possibly more - of the present, inasmuch as it is often used, as was seen above in the two examples from Kahnawake, to legitimate a present social order or the move toward a preferred order in the future.¹³⁵ Thus I found in Kahnawake the same sort of historical activity which Rappaport found in her analysis of history and tradition among the Paez Indians of the Colombian Andes, and which may indeed be understood, in this North American age of de-colonization and the activism of self-determination and nationalism with which it is intertwined, as a pan-Indian characteristic in which

indigenous peoples are...revalidating their own historical knowledge as an arm against their subordinate position in society. For them, history is

¹³⁵ Connerton, How Societies Remember, p.3.

a source of knowledge of how they were first subjugated and of information about their legal rights, the beginnings of a new definition of themselves as a people, a model upon which to base new national structures.¹³⁶

To the degree that the search for historical knowledge and its validation are caught up in the factionalist competition that so often overshadows nationalist movements, however, the people themselves may be as much in pursuit of a history to cherish as they are of "a past worth condemning".¹³⁷ In the struggle to control the future of a nation, the significant events of its past may be the most common prisoners taken.

Internal conflicts over "what really happened" in the past and how those events serve to empower or usurp competing groups' history-based agendas inevitably give rise to questions of veracity and truthfulness in historical records. In societies whose earliest moments were characterized by a lack of literacy, where records and ceremonials were retained and transmitted orally, the competition often becomes one of oral tradition versus written record - of "myth" versus "document" - and the contests of veracity which find their roots in those differences and a trend, now questioned, of elevation of the written over the spoken word in historical researches. To understand the source of this spurious superiority, it is worth digressing briefly to contrast with our literate culture those

¹³⁶ Rappaport, The Politics of Memory, p.1.

¹³⁷ Frederick Nietzsche, The Use and Abuse of History (Indianapolis: Bobbs-Merrill, 1957), p.160.

characteristics which make orality so different.

Probably the most profound distinction between literacy and orality is literacy's assignment of some form of visual representation to words which previously existed only as sounds. In the non-literate context, words possess no ocular counterpart; there is no means by which the spoken word can be removed from the realm of oratory to the putatively more durable medium of inscription. Thoughts and ideas exist only in the potential of individuals to articulate them or, once spoken, in the memories of the parties to the communication. There can be no more permanent record of any interaction because there is no concrete means of committing the word-sounds to a permanent, written form. There is nothing *outside* the speaker or the listening audience which would permit the separation of the sounds from their origin: no alphabetic or phonetic script which might represent the spoken word in a text or list. In the absence of such capabilities, the persistence of words and the message(s) they convey are contingent upon their communication with others.¹³⁸

¹³⁸ Walter J. Ong, Orality and Literacy. The Technologizing of the Word (New York: Methuen and Company, 1982), p.34; see also, Jack Goody, "Introduction", in Literacy in Traditional Societies, Jack Goody, ed. (Cambridge: Cambridge University Press, 1968); Jack Goody and Ian Watt, "The Consequences of Literacy", in Literacy in Traditional Societies; Maurice Bloch, "The past and the present in the present", 12 Man (1977), pp.278-292; on the oral tradition and oral history, see Jan Vansina, Oral Tradition (Harmandsworth: Penguin Books, 1973); Brian Stock, The Implications of Literacy: Written Language and Models of Interpretation in the Eleventh and Twelfth Centuries (Princeton: Princeton University Press, 1982); Sylvia Scribner and Michael Cole, The Psychology of Literacy (Cambridge, Massachusetts: Harvard University Press, 1981)

This is especially true in the elaboration of protracted thoughts. Were an early thinker confronted with a particularly complex problem to resolve, it is highly unlikely that they would be able to resolve the challenge without the benefit of their fellows. The would-be problem-solver in the non-literate context is not permitted the luxury of making written notes concerning the progression of their thoughts. The only receptacle of potential solutions is the mind. In the case of a relatively simple question, the individual might with relative ease recall the two or three steps enlisted in approaching a solution. In the more complicated cases, however, involving many more steps, it would be a tall order indeed for one person to retain all the intricacies of a given outcome, and even more problematic would be the articulation of those processes to others after the fact. Any prolonged thought thus required the input of others; "an interlocutor is virtually essential: It is hard to talk to yourself for hours on end"¹³⁹ - and even harder to retain what was said if you can. Thus in the complete absence of writing which characterized non-literate societies, the growth of complex ideas is clearly contingent upon their effective communication to others.

This dependency upon an audience for the preservation of oral utterances placed important provisos on the content, transmission, and preservation of ideas and important events. Conversation and oration required *something more* to ensure the

¹³⁹ Ong, Orality and Literacy, p.34.

retention of their contents. To be intrinsically memorable is insufficient: Memorable thoughts must also be memorably expressed. This expression gives prominence to turns of phrase and patterns of thought which would promote memory. Thus the non-literate thinker thinks and speaks in

heavily rhythmic, balanced patterns, in repetitions or antitheses, in alliterations and assonances, in epithetic and other formulary expressions, in standard thematic settings, in proverbs which are constantly heard by everyone so that they come to mind readily and which are themselves patterned for retention and recall. . . Serious thought is intertwined with memory systems. Mnemonic needs determine even syntax.¹⁴⁰

So-expressed, thoughts become intimately intertwined with the narrative of the commentator and thus with the commentator herself. There is no separation of the speaker and the spoken; non-literate cultures do not possess the necessary tools to structure knowledge at a distance from live experience, to separate past from present.¹⁴¹ In a similar vein, there is a far closer connection between individual word-sounds and the objects they represent.¹⁴² Subsequent to the onset of literacy, the link between symbol and referent is punctuated with the written form of the word-sound. This disjunction intensifies as the word-sound is increasingly identified with its chirographic symbols, rather than the original object. The sounds which once represented, for example, "tree" now reflect the symbols "t",

¹⁴⁰ Ibid.

¹⁴¹ Ibid., p. 42.

¹⁴² Jack Goody and Ian Watt, "The Consequences of Literacy", in Literacy in Traditional Societies, pp. 30-31.

"r", and "e", not the actual article complete with barked trunk, branches and leaves. In the absence of literacy, the sounds represented the tree itself, not tree as a collection of markings, and as the direct product of the living person's ability to articulate those sounds were closely related to their source.

Thus, in the non-literate culture, all erudition, historic or otherwise, is closely associated with the present, living society and the needs and experiences of those who comprise it. Words are dynamic; they convey not only the postulations and preferences of individuals, they are part of the living being itself. Co-existent with this dynamism is the tendency of oral cultures to do away with or modify myths and recollections which carry information no longer relevant to the group. Items of history or culture are maintained only insofar as they conform to or complement the present state of affairs. An interesting example of the oral culture's automatic adjustment of historical "records" is offered by Goody and Watt in their consideration of "The Consequences of Literacy", and concerns the state of Gonja in Northern Ghana:

[T]he founder of their state, Ndewura Jakpa . . . conquered the indigenous inhabitants of the area and enthroned himself as chief of state and his sons as rulers of its territorial divisions . . . When the details of the story were first recorded at the turn of the present century, Jakpa was said to have begotten seven sons, this corresponding to the number of divisions whose heads were eligible for supreme office by virtue of their descent from the founder of the particular chiefdom. But at the same time the British arrived, two of the seven divisions disappeared, one being deliberately incorporated into

a neighbouring division . . . and another because of some boundary changes introduced by the British administration. Sixty years later, when the myths of the state were again recorded, Jakpa was credited with only five sons and no mention was made of the founders of the two divisions which had since disappeared from the political map.¹⁴³

Because the present tense required Jakpa to have two less sons than he started out with, the legend of Gonja's beginnings was amended accordingly. When the British challenged the later records with the earlier ones which included the two lost sons, the people of Gonja saw no great problem: Those aspects of the earlier records which contradicted the present ones did not speak to the greater accuracy of either of the documents, rather these reflected what was true once but is no longer. Those aspects of the past which conflict with the present are not incorrect, but simply irrelevant. Had the Gonja's genealogy never been committed to the written word, no such contradiction could have occurred; without prior records to consult, the accuracy or inaccuracy of the present genealogy could not be determined. The oral historian adapts history to fit the context of her oratory; conflicts and contradictions, when these emerge, are simply omitted. Unnecessary information clutters the mind; the non-literate person has enough to remember without cluttering the mind with knowledge for knowledge's sake alone.

With the introduction of literacy, the transitoriness¹⁴⁴

¹⁴³ Ibid., p. 33

¹⁴⁴ Goody, "Introduction", in Literacy in Traditional Societies, p. 1.

characterizing oral communication is greatly reduced. It becomes possible to separate the speaker from the spoken word, to commit word-sounds to a text or list using visual referents of words. The implications of words' newly acquired permanence are profound. In the first place, as was elaborated above, writing introduces a new dimension into the relationship between words and their referents. When words existed as sounds only, they manifested a mystical component; words were closely associated with the individual who spoke them and that person's power to do so. With the removal of word-sounds into the silence of the text, much of that mystical component is lost. Words become objective, losing much of the subjective quality they held as appendages of the speaker, and hence less connected with the peculiarities of person, place and time:

"As long as the legendary and doctrinal aspects of the cultural tradition are mediated orally, they are kept in relative harmony with each other and the present needs of society in two ways: through the unconscious operations of memory and through the adjustment of the reciter's terms and attitudes to those of the audience before him/her".¹⁴⁵

When moments of culture or history are frozen within a text, they no longer react to their audience, rather their audience reacts to them. Texts must be read as they are written; it is not possible to alter the original document to suit whatever sorts of changes may arise in the context of its reading. A "text cannot discard, absorb, or transmute its contents", it is able only to reflect the state of things at the

¹⁴⁵ Goody and Watt, "The Consequences of Literacy", p. 44.

time of its composition.¹⁴⁶ Because of this, the consistency between past and present promoted by oral transmission of anecdotes is lost; it becomes possible to distinguish between ancestors and their possibly disparate traditions and the current situation. The past is thus set apart from the present, a separation facilitated by the realization of any number of previously unanticipated contradictions between these periods. The emergence of disparities between what they are *told* and what they *read* inspires an unprecedented cynicism on behalf of the newly-literate population. The ready-made lifestyle perpetuated by orality is rejected as early thinkers are increasingly moved to a conscious, comparative and critical disposition toward their former view of the world. For the newly literate population, then, history becomes intimately politicized.

The dependency of oral histories upon memory, replete with all the fragility of that capacity, and the reality of their mutability, encourages an assumption by the intensively literate historian or social scientist that written records are somehow more reliable and comprehensible in both form and content. However, it is dangerous to assign too great an "objectivity" to either record, or to disregard the importance of context and medium for deciphering messages. First to the issue of veracity. At the most fundamental level, and as may be seen in the outline of orality offered above, historical "truth" may mean different things in different contexts - where the British in Gonga

¹⁴⁶ Ibid., p. 67.

measured the veracity of the genealogy in terms of its consistency over time, the indigenous residents of Gongga measured its veracity at the present moment. In this light the proper question is not "whose version of history is true", but rather what can we learn about a culture's relationship to its history by the ways it retains and animates it? Stated another way by Rappaport, if a written text can tell us about history, why do we disregard the speaker and context of an oral record as informing of history? It should not be - and now increasingly is not, thanks to the work of Rappaport, Connerton, Lowenthal and others - a question of whether written or oral records are superior sources, but rather how these records, and their media and keepers, can be used in concert to create as full and compelling a history as possible. As will be seen in the discussion of method which follows below, it was through such a combination of oral and written histories which I hoped to access the "traditional dispute resolution" processes of the Kahnawakehronon and their Mohawk ancestors, and understand the articulations of these in the present tense.

In the same sense that histories may be revised or recreated in retrospect to reinforce a particular social or political agenda in the present or a preferred design for the future, records may be - indeed, inevitably almost always are - biased at the moment of their commitment to the record. Admittedly, the mutability of primarily oral records may render the endurance of an incipient political colouring to a spoken

report limited at best, as subsequent speakers may add emphases of their own; however, inasmuch as written records lack such changeableness and tend to be assumed to possess a greater measure of truthfulness than their oral counterparts, the original author's bias or interests must always be considered as important corollaries on a document's content. Thus in the same way that a modern oral recitation of a "myth" or genealogy must be filtered for possible influences of the speaker¹⁴⁷, so must contemporary documents, whose writers have long since gone to dust, be approached with caution. To the degree that all records have a human origin, their contents must be understood in terms of the very human capacities which may inform or influence them, whether the source of the record stands before us or lived centuries prior to the moment of the research. This reality will be returned to in the discussion of the written documents informing of Kahnawake's history, which follows below.

In my attempts to uncover the traditional dispute resolution processes indigenous to the Kahnawake Mohawks and their historic Iroquoian brethren, however, I found that I was faced less often with the need to interpret a continuous historical record of those traditions in their various forms over time, than attempting to understand competing histories which resulted from the Mohawks' efforts to fill the many "gaps" in historical records informing of Kahnawake's chronicle.

¹⁴⁷ Laura Nader, "A Genealogical Charter" 22(2) Africa (1952), pp.301-315.

Returning to the query stated at the outset, the discovery of these histories left me not only in the position of having to determine which was more likely to be "true" when all records and versions of history and myth were combined, but it seemed important also to determine to what degree I was dealing with a conscious "invention" of history and tradition - and to determine to what degree that invention was, in terms beyond the purely academic, problematic.

My efforts to assess the reality and implications of "historical gaps" and "invention" in my pursuit of Mohawk traditions of dispute resolution were assisted by the insights of Connerton, Rappaport, Lowenthal into the notion of "history", discussed above, as well as by the similar experiences in this regard of those "Africanists" engaged in the study of decolonization and the "invention of tradition" in Africa.¹⁴⁸

¹⁴⁸ See, for example: Simon Roberts, "The Tswana Polity and 'Tswana Law and Custom' Reconsidered", 12(1) Journal of Southern African Studies (1985):75-87; Simon Roberts, "The Survival of the Traditional Tswana Courts in the National Legal System of Botswana", 16(2) Journal of African Law (1972):103-127; Simon Roberts, "Introduction: Some Notes on Customary law", 28(1&2) Journal of African Law (1984):1-5; Simon Roberts and John L. Comaroff, Rules and Processes: The Cultural Logic of Dispute in an African Context (London: 1981); Peter Fitzpatrick, "Traditionalism and Traditional Law", 28(1&2) Journal of African Law (1984):20-27; Boaventura de Sousa Santos, "From Customary Law to Popular Justice", 28(1&2) Journal of African Law (1984):90-98; Franz von Benda Beckman, "Law out of Context: A Comment on the Creation of Traditional Law Discussion", 28(1&2) Journal of African Law (1984):28-33; Antony Allott, "Customary Law: It's Place and Meaning in Contemporary African Legal Systems", 9(2) Journal of African Law (1965):82-85; Antony Allott, "What is to be Done with African Customary Law? The experience of problems and reforms in anglophone Africa from 1950", 28(1&2) Journal of African Law (1984):56-71; D.W. Arnott, "Councils and Courts Among the Tiv - Traditional Concepts and Alien Institutions in a Non-Moslem Tribe of Northern

From these latter researches I was to discover that, according to Roberts¹⁴⁹, the perception of a disjunction between the present and its pre-colonial counterpart is a significant element of much legal anthropological scholarship focusing upon the African context; an emphasis which is in many cases accompanied by assertions that a primary artefact of such historical disruptions is the creation of a "customary" or "traditional" law which is really neither of these things in their true sense as replications of the "original articles". Recalling Connerton and Rappaport, Roberts notes that much of the research acknowledges that these types of law are in many cases quite recent recreations or even "inventions" which are important elements of ideological movements which aim to reinforce a particular post-colonial power structure. In this light there seems not only something implicitly fallacious about the assignment of the labels "customary" or "traditional" to these types of law, but something surreptitious as well, which is directed somehow to mask the actual agenda of their proponents. This very cynical view of the post-colonial world

Nigeria", 2(1) Journal of African Law (1958):19-25; Francis G. Snyder, "Colonialism and the Legal Form: The Creation of Customary Law in Senegal", 19 Journal of Legal Pluralism (1981):49-89; Francis G. Snyder, "Customary Law and the Economy", 28(1&2) Journal of African Law (1984):34-43; Martin Chanock, "Neo-Traditionalism and the Customary Law in Malawi", 16 African Legal Studies (1978):80-91; Martin Chanock, Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia (Cambridge: Cambridge University Press, 1985).

¹⁴⁹ Roberts, "The Tswana Polity and "Tswana Law and Custom" Reconsidered", p.75.

may be seen to balance earlier, rather naive and sometimes romanticist portrayals of the law in this context; portrayals which, like that promoted by the traditionalist Kahnawakehronon, depict a remarkably robust, phoenix-like traditional or customary law which lay historically always in the wings just beyond the reach of the colonial onslaught, awaiting re-emergence in a post-colonial setting.¹⁵⁰

As Roberts has observed, more accurate visions of the post-colonial "traditional" legal world occupy places between these two extremes of cynicism and romanticism.¹⁵¹ Here, and as will be seen to be the case with regard to the proposed traditional legal system in modern Kahnawake, it is revealed that the "neo-traditions" which are often the products of modern indigenous self-determination movements involve at the same moment resurrection and invention, pretence and probity. It becomes clear as well in the case of Kahnawake, that while distance from the putatively original traditional legal forms may appear to vary, virtually all claims to "tradition" - and to the histories which contextualize and empower them - involve a political dimension which is inescapable insofar as the campaign to revise traditional legal processes is one part of a larger nationalist self-determination movement within the Mohawk Nation. In this light, "traditional law" is as much an offshoot of the "ideology

¹⁵⁰ Ibid.

¹⁵¹ Ibid; Simon Roberts, "Introduction: Some Notes on "African Customary Law", pp.4-5.

of colonial domination" as Snyder asserts was the case with customary law in Africa, but not with a view to reinterpreting "African legal forms in terms of European legal categories", but rather with a goal of throwing off those categories and reasserting "traditional" or "customary" ones with a putatively greater historical and cultural integrity.¹⁵² That this goal has emerged in various permutations depending upon the legal forms under examination and the faction of the self-determination movement with which they are connected, is illuminative of the complicated configurations of politics, ideology and agency which inform "tradition" and "history" in modern Kahnawake's drive to assert self-determination through separate justice. Emerging from within this complex context, it is not surprising to discover that resurrected traditions and revisionist histories are never simply that nor pure fabrications and that they involve rather more than either of these overly-simplistic explanations suggests.

While this is not the context in which to explore in detail the wealth of research and literature emerging from the study of customary law in colonial and post-colonial Africa, and although I must confess that I am far from an "authority" in the African materials, it nonetheless seems apposite to digress for a moment from the thesis' North American aboriginal focus to consider briefly some of the important points of intersection and distinction between these two colonial contexts and the

¹⁵² Snyder, "Customary Law and the Economy", pp.35-36.

manifestations of customary or traditional law in them both.

At the outset, it must be stated that, while much of the discussion in the African context enlists the term "customary law", in Canada the very limited consideration of the subject has been guided almost without exception by the term "traditional law", and has been concerned more with process than with laws per se.¹⁵³ Thus it is that the Mohawks, for example, view as the first step in taking control of the administration of justice to their people the creation of a dispute resolution structure and its establishment within the reservation territory. To the degree that it is difficult to activate such a structure in the absence of some reasonably clear notion of the laws that structure is to administer, the task of creating a "traditional" legal structure cannot be severed too cleanly from the creation of "traditional laws". Nonetheless, the Mohawks, like many of their aboriginal counterparts throughout

¹⁵³ One of the few instances in which the term "customary law" appears in the research is in a now rather dated document by Doug Kane entitled, "Customary Law: A Preliminary Assessment of the Arguments for the Recognition and an Identification of Possible ways for Defining the Term" (Working Paper prepared for the Joint Canada-Saskatchewan-Federation of Saskatchewan Indian Nations Studies of Certain Aspects of the Justice System as the Relate to Indian People in Saskatchewan, vol.III, April 1984). Inasmuch as the term "Customary Law" appears to refer to those primarily oral rules which governed life in the pre- and early post-colonial societies of East Africa (see, for example, Snyder, "Customary Law and the Economy", pp.35-36; Snyder, "Colonialism and Legal Form", p.49; Chanock, "Neo-Traditionalism and the Customary Law in Malawi", pp.84-85; Roberts, "Introduction: Some Notes on "African Customary Law"", pp.2-3), the term "traditional law", as this appears to be most commonly used in the Canadian context, is little different and may be distinct only insofar as it may on some occasions include a reference to a dispute resolution process as well as the laws themselves.

Canada, view the creation of a system as primary, perhaps owing to the political imperative of articulating self-determination first through the establishment of "traditional" institutions premised upon enduring aboriginal rights. For this reason any discussion of the laws which the proposed traditional system might administer has been set aside for future consideration. It may further be noted that, while the preceding distinctions exist between "customary law" as this has been discussed and debated in the research consulted here, and "traditional law" as this is emerging in Canada, there are those, such as Benda-Beckman, who seem to suggest that the terms may be used interchangeably or possess the same referents in the African context.¹⁵⁴

It should also be noted that the study of the form and content of "customary law" in colonial and post-colonial settings in relation to the movement toward autonomous, amerindian legal systems is not well-developed in the Canadian context.¹⁵⁵ Indeed, there is little if any direct examination of

¹⁵⁴ Franz von Benda-Beckman, "Law out of Context: A Comment on the Creation of Traditional Law Discussion", p.28.

¹⁵⁵ There is a remarkable absence of research dealing with the question of precisely what, or whose, traditions will form the basis of traditional legal systems in autonomous or semi-autonomous native american nations within Canada. Even those which use the term "customary law" do not seem to do so in the same sense as the African literature (see, for example: Kane, "Customary Law: A Preliminary Assessment of the Arguments for the Recognition and an Identification of Possible Ways of Defining the Term"). Nor does the question of tradition in separate justice systems which appears primary in the minds of many Canadian aboriginal people seem to have been seized upon by more than a few academics for study. Rather, the latter seem to have been preoccupied with questions of

the matter. Possible explanations for the apparent lack of scholarship in this area would seem to reside not only with important differences between the two colonial contexts, but also with the very recent and rather distinct emergence of the question of "traditional" law and legal systems among Canadian amerindian nations like the Mohawks at Kahnawake.

Thus it must be stressed that, while there are similarities or intersections between the British colonial enterprises and post-colonial offsprings in Canada and Africa, these may be seen to some degree to be balanced by the differences between these two colonial contexts. Thus even if the focus is limited to the twentieth century and to a comparison between the "Indian policies" active in the province of Quebec (which surrounds the Mohawks' territory at Kahnawake) in Canada and in British East Africa in that epoch, one finds juxtaposed the policies of "civilization, protection and assimilation" and Lugard's "Indirect Rule", respectively. The former policies, which were designed more for the aboriginal nations of the Canadian northwest than those nations of central Canada such as the Mohawks, but upon whom they were imposed nonetheless, were grounded upon notions of an absolute British cultural

how the dominant system might be modified to accommodate amerindian needs and aspirations (see, for example: Rick H. Hemmington, "Jurisdiction of Future Tribal Courts in Canada: Learning from the American Experience", 2 Canadian Native Law Reporter (1988), pp.1-50), with little consideration of the question of the creation of separate systems in their true sense. It is only very recently that the subject of separate "traditional" legal structures has begun to be pursued as a serious area of study.

superiority and directed to the complete annihilation of amerindian cultures and their wholesale replacement with a British or Canadian one. Amerindian cultures, seen as backward and pagan, were considered antithetical to the mainstream Canadian "civilization" into which aboriginal people were to be assimilated, and approaches to their eradication were often violent and brutish.¹⁵⁶

And while Lugard's approach may have been no less imbued with notions of cultural superiority, and its precise implementation varied across the various colonial states, one consistent feature of "indirect rule" sets it dramatically apart from the Canadian policies: While the latter openly rejected any notion of value or utility to indigenous traditional structures

¹⁵⁶ See: John L. Tobias, "'Protection, Civilization, Assimilation': An Outline of Canada's Indian Policy", in Ian A. L. Getty and Antoine S. Lussier, eds., As Long as the Sun Shines and Water Flows: A Reader in Canadian Native Studies (Vancouver: University of British Columbia Press, 1983), pp.39-56; Patricia Olive Dickason, Canada's First Nations: A History of Founding Peoples from Earliest Times (Toronto: McClelland and Stewart, 1992); John F. Leslie, "Commissions of Inquiry into Indian Affairs in the Canadas, 1828-1858: Evolving a Corporate Memory for the Indian Department", unpublished Master's thesis, Carleton University, Ottawa, 1984; John F. Leslie and Ron McGuire, "The Historical Development of the Indian Act, 2nd ed., (Ottawa: Indian and Northern Affairs Canada, December 1979); John S. Milloy, "The Era of Civilization: British Policy for the Indians of Canada, 1830-1860, D.Phil. Thesis, Oxford University, 1978 (this work, and that of Leslie on the Commissions of Inquiry, are included here for the historical perspective they lend to an understanding of Canadian "Indian policy" in the twentieth century); J. R. Miller, Skyscrapers Hide the Heavens. A History of Indian-White Relations in Canada (Toronto: University of Toronto Press, 1989); Robert J. Surtees, "The Development of an Indian Reserve Policy in Canada", 61 Ontario History (1969), pp.87-98; C. H. Torok, "The Canadian Indian Reserves", 4(1) Indian Historian (1968), pp.15-23; L. F. S. Upton, "The Origins of Canadian Indian Policy", 8(4) Journal of Canadian Studies (1973), n.p.

to either amerindian or Englishman, and therefore sought their complete eradication, the former recognized a measure of intrinsic worth in the traditional structures, even if that worth lay at least in part in the degree to which they could be utilized to further British control and direction of the colonial process.¹⁵⁷ Thus it was that in colonial settings such as Nigeria, indigenous political structures were to be left as much as possible intact, as these were deemed to offer the best means by which the indigenous Africans could "develop in a constitutional manner from their own past, guided and restrained by the traditions and sanctions which they have inherited", toward a better future.¹⁵⁸ That this development often entailed significant digressions from "tradition" and the aboriginal "past" is important, and is a matter which will be returned to below. It is worth noting, however, that while Lugard's policy initially permitted its aboriginal recipients in many contexts to retain their traditional leaders in modified but nonetheless clearly traditional roles, a diametrically opposed situation arose in Canada. Here, for example, following the rise from 1869 of policies promoting "Band Council" government¹⁵⁹ and

¹⁵⁷ James F. Read, "Patterns of Indirect Rule in East Africa", in H.F. Morris and James F. Read, Indirect Rule and the Search for Justice: Essays in East African Legal History (Oxford: Clarendon Press, 1972), pp.253-286. See also, H. F. Morris, "The Framework of Indirect Rule in East Africa", *ibid.*, pp.3-40.

¹⁵⁸ Morris, "The Framework of Indirect Rule in East Africa", p.3.

¹⁵⁹ This is discussed in the early chronicle of Kahnawake, contained in part 5 of this thesis.

empowering Indian Department officials to impose that mode of administration on any "deserving" amerindian group without their permission, aboriginal groups who chose to elect their traditional leaders into the new Council positions found those leaders rapidly unseated and, in one case following their repeated re-election, incarcerated in Canadian gaols.¹⁶⁰ If Lugard's policy in British East Africa has been likened to an "iron fist in a velvet glove", it seems very much the case that in Canada, the gloves were off when it came to imposing the colonial will on amerindian people.

These two colonial policies or approaches, despite their differing starting points, nonetheless appear to have led their recipients to the same end of cultural attrition and an often apparently rather significantly ambivalent appreciation of their own traditions. It seems logical that this dovetailing of histories resulted in large measure from the indication that, despite the distinctions in underlying philosophies, the ground-level manifestations of those philosophies were remarkably similar. Indeed, the indirect rule philosophy, as described by Fitzpatrick, would seem to have contained many of the same essential practices as the much more direct approach of "civilization, protection and assimilation" in Canada:

The tribe and chiefs were created to secure colonial government and to secure ethnic division in the classic strategy of divide and rule. To these ends, although not always with such blunt purposes as my

¹⁶⁰ Tobias, "'Protection, Civilization, Assimilation'", p.46; Dickason, Canada's First Nations, pp,259-260.

summary account suggests, the colonist created reserves and other enforced settlements; restricted mobility beyond the tribal area; required a continuing attachment to that area in indenture, vagrancy and pass laws; confined people to the amount of land deemed adequate for agricultural subsistence; prohibited wide-ranging hunting and gathering; appropriated so-called waste and vacant land; and, in varying forms, erected systems of so-called indirect rule"¹⁶¹

In this brief synopsis the student of Canadian aboriginal history will recognize many of the essential elements of "Indian policy" in Canada, including the creation of reservations whereupon aboriginal people were often forcibly settled following what have proven in many cases to be the fraudulent cession of their traditional territories to the Canadian state; the practice of sub-dividing those reserves to encourage the adoption of non-communal patterns of ownership and the requirement that those individual plots be farmed or given over to those who would farm them; and finally the practice of providing passes to reservation residents and powers to local government agents to charge criminally and process amerindians for such petty acts as vagrancy.¹⁶²

With regard to the matter of administering justice to aboriginal peoples within aboriginal territories, the same configuration of similarities and disparities emerges. Without

¹⁶¹ Fitzpatrick, "Traditionalism and Traditional Law", p.23.

¹⁶² See Dickason, pp.247-256; 284-286. Some of the manifestations of Canadian "Indian Policy" will be discussed in the body of the thesis in part 5, most notably in terms of their implications for the Mohawk people at Kahnawake.

entering into a full elaboration of the role of "Native Courts" in British East Africa and the institutional arrangements within which these bodies emerged, it is possible to engage in a brief but illuminating comparison of these and their closest Canadian counterpart, the "Indian Act Court". As a point of departure, it may be observed that while the Native Courts were apparently intended as an important and integral part of the administrative structure of indirect rule and, as such, they incorporated an often unique blend of the indigenous traditional and British legal concepts into what have been termed "neo-traditions"; the Indian Act courts were always significantly less than this, with regard to both form and content.¹⁶³

Thus, for example, the Native Courts began as "customary tribunals" headed by the chief, administering "customary law" to the local population under the supervision of the district officer.¹⁶⁴ In contrast, the Indian Act court finds its roots in 1881¹⁶⁵ with the awarding to the local Indian agent the powers of a Justice of the Peace¹⁶⁶ to administer an initially

¹⁶³ H.F. Morris, "Native Courts: a Corner-Stone of Indirect Rule", in Morris and Read, Indirect Rule and the Search for Justice, p.131.

¹⁶⁴ Ibid., pp.132-134.

¹⁶⁵ An Act to Amend "The Indian Act, 1880", S.C. 1881, c.17 (44 Vict.), s.12.

¹⁶⁶ While the district officers in the African context were *ex officio* magistrates of the district courts, like the Indian agent they were unlikely to have any formal legal training; unlike the Indian agent, however, they were not the primary vehicles of the administration of justice in the local context, despite their supervisory position over the customary tribunals and Native Courts

expanding range of Canadian laws relating essentially to matters of morality and petty criminality.¹⁶⁷ In this context there was no question of incorporating traditional or customary laws or sanctions into the court's business or of permitting local aboriginal people the power to administer justice; indeed, it was not until the 1950 amendments to the Act that it became possible for an aboriginal person to act as a Justice for purposes of this court.¹⁶⁸ And in a distant echo of the importance ascribed to the Native Courts, it is clear from history that the Indian Act courts were intended primarily as a line-level means of local control of minor deviants; any significant social problems were to be dealt with in the larger Canadian court system, an approach consistent with the drive to civilize and assimilate the Canadian aboriginal population.

It is important to note also that, while Morris suggests that the Native Courts were "accepted as such by the bulk of the population"¹⁶⁹, in the chronicle of the administration of

(Morris, *ibid.*, p.132).

¹⁶⁷ See: Bradford Morse, "A Unique Court: S.107 Indian Act Justices of the Peace", 5 Canadian Legal Aid Bulletin (1982), pp.131-150; D. Akman, "Justices of the Peace under Section 107 of the Indian Act", Working Paper prepared for the Joint Canada-Saskatchewan-Federation of Saskatchewan Indian Nations Studies of Certain Aspects of the Justice System as They Relate to Indians in Saskatchewan, the Working Group on Justices of the Peace/Peacemaker, vol.III, April 1985, pp.5-7.

¹⁶⁸ A.C. Hamilton and C.M. Sinclair, The Justice System and Aboriginal People Report of the Aboriginal Justice Inquiry of Manitoba, 2 vols. (Manitoba: Queen's Printer, 1991), p.305-306.

¹⁶⁹ Morris, "Native Courts: A Corner-Stone of Indirect Rule", p.133.

justice in Kahnawake in the late nineteenth and early twentieth century, it appears that the Indian Act Court in its earliest manifestations had a support which was more implicit than explicit.¹⁷⁰ In part this early lack of support for the court may be attributed to the lack of popularity of some of the agents in the community, a situation which obviously had ramifications for perceptions of the justice the agents administered. This is perhaps not unlike the dynamic which existed between the reputation of the chief and that of his court in the early chief's court or customary tribunals in the early days of indirect rule in British East Africa.¹⁷¹

Like the larger policies which guided them, these two courts, which originated within quite disparate philosophical approaches to administering justice to the indigenous peoples of the colonies, seem to have led to ends which are to some degree quite similar: Courts far removed from the traditional or customary law of the people they were to serve and which practise a very British legal process and laws. This ultimate evolution was, in the East African context, considered a natural part of the integration of the Native Courts into the general court system after 1950, a process which was interrupted by independence.¹⁷² In the Canadian setting, any evolution of the

¹⁷⁰ The Indian Act Court in Kahnawake will be discussed in detail in pp.351-410 of this dissertation.

¹⁷¹ Morris, "Native Courts: A Corner-Stone of Indirect Rule", p.133.

¹⁷² Morris, p.135-137.

Indian Act courts seems to have been arrested as of the last major revision of the Act in 1950, and the expansion or development of the few courts of this type is currently halted by a moratorium on the appointment of Justices under the Indian Act.

That the former colonies of British East Africa continue their search for traditional law as independent nations obviously sets them apart from the aboriginal peoples of Canada, who remain locked within a situation of internal colonialism. For the Mohawks of Kahnawake, as with other aboriginal people within Canada, there has been no breaking away from the colonial state and, given this, the discussion of aboriginal people assuming control over the administration of justice to their people in any form, whether traditional, neo-traditional, or non-traditional, must take place within parameters other than those of newly independent states assuming institutional control over their own affairs. The nature and confines of those parameters will be discussed in detail in the final moments of this dissertation, as the prognosis of separate justice in Kahnawake comes into focus.

The discourse concerning the nature of the "tradition" in proposed "traditional legal systems", while of a much more recent vintage in Canada than in East Africa, is likely to encounter many of the same challenges. If one focuses upon the situation in Kahnawake, it appears that much of the talk about "traditional dispute resolution" and the histories which are

promoted by the dominant factions to either support or discredit it, all come down to the same common denominator; thus where one encounters more often "historical might- or should-have beens" when modern Mohawks talk about their past, all too often one finds, as did Chanock in Malawi, that

the statements which were (and still are) made about [customary law] are not so much statements about what the law was in the past as claims about what it ought to have been in the past and should be in the present. The question which faces us, then, is not "Are these statements true about the period of which they are being made?" but "Why is there the need to present the past in this particular way?"¹⁷³

For the present research, Chanock's question might be more aptly phrased as "why is there the need to *reinvent* the past - and possibly also its traditions - in this particular way? And what are the implications of that invention?"

The importance of history in questions of tradition and its invention resides in the tendency of those who are doing the inventing to enlist history as a legitimator both of their actions and of the "neo-traditions" themselves. Indeed, so important is history in the process of invention of tradition that it frequently becomes the actual symbol of the struggle - hence the competition in Kahnawake between the dominant factions over whose versions of the past and its traditions are accurate and, from this, whose notions of the past will define the future of a self-determining Mohawk Nation at Kahnawake.

If one is to talk about the invention of histories or

¹⁷³ "Neo-Traditionalism and Customary Law in Malawi", 16 African Law Studies (1978), p.84.

traditions, that talk must necessarily turn to the discussion of invention by the British historian Eric Hobsbawm in the aptly titled work, The Invention of Tradition.¹⁷⁴ Hobsbawm gives us a convenient recipe for determining whether a history or tradition might be invented, but he does not address the question, which is of crucial importance in the realm of separate justice movements in Canada, of *whether invention really matters*. If I do not give too much away at this early moment, I would suggest - and I confess that I anticipated things might go this way from the first moments of the research - that my own sympathies lay with the view of invention offered by Samuel and Thompson in their consideration of The Myths We Live By, that all too often what the historians and the competing factions in the struggle for history and tradition might tend to see as "invention" is less this than "a very old tradition reused in a new context".¹⁷⁵ Or, as I was to ultimately conclude with regard to "Longhouse Justice" in Kahnawake - a combining of "very old tradition[s]...in a new context". But to offer conclusions now is certainly premature; let us then look first to Hobsbawm's recipe for invented traditions, thereby suggesting, as did Faraday of Tyndall¹⁷⁶, "what it is we are to look for". From

¹⁷⁴ Eric Hobsbawm, "Introduction", in The Invention of Tradition, eds., Eric Hobsbawm and Terence Ranger (Cambridge: Cambridge University Press, 1983), pp.1-16.

¹⁷⁵ Samuel and Thompson, The Myths We Live By, p.14._

¹⁷⁶ See Huntingdon Cairns, Legal Philosophy from Plato to Hegel (Baltimore: Johns Hopkins Press, 1959), p.1.

there, I shall outline the method of how I went about the search.

The Invention of Tradition, edited by Eric Hobsbawm and Terence Ranger, contains analyses of incidents of "invented traditions" in Europe as well as in colonial Africa¹⁷⁷ and Victorian India¹⁷⁸, the common threads of which have been drawn together and examined in Hobsbawm's introduction, from whence arises the aforementioned inventory of characteristics which may reveal an invented tradition. It must be noted that, to the degree that the concept is derived from essentially European or European-influenced examples, there may be some question of the propriety of applying it to non-European societies. Consideration to such cautions having been duly given, a certain comfort can be taken from the construction of this concept in what might best be analogized as a recipe suggesting the presence of certain categories of ingredients in an invented tradition, without specifying what those might actually consist of or the form the final product might take. Thus one is provided with general categories of things to look for, as opposed to specific instances of those categories as they exist in the culture in which the theory originates.

It is Hobsbawm's observation that the phenomenon of invention of tradition is one which is very much linked with the

¹⁷⁷ Terence Ranger, "The Invention of Tradition in Colonial Africa", *ibid.*, pp.211-262.

¹⁷⁸ Bernard S. Cohn, "Representing Authority in Victorian India", *ibid.*, pp.165-210.

rise of that "comparatively recent historical innovation", the 'nation', and those things which tend to accompany it, such as nationalism, national symbols, and national histories. It is certainly the case that Kahnawake is caught up in a "traditionalist-nationalist" movement and, as was discussed earlier, the creation - or recreation - of a history of the Mohawk Nation and of "traditional institutions". The activism which is synonymous with that movement has also lead to its fair share of national symbols, including the red "warrior flag" which is emblazoned with the profile of a warrior's head in full, traditional battle-dress, at its centre. And those Mohawks seen in the "uniform" of that activism, the olive-green army fatigues, are immediately understood as active members of that movement - hence the uniform becomes a symbol of the cohesion of the traditionalist-nationalist movement and the "battle" for self-determination, as well as a statement of "Mohawk nationalism". According to Hobsbawm, to the degree that these latter creations are intended to foster a sense of a nation as well as to emphasize certain aspects of it as opposed to others, they are invariably deliberate and innovative exercises in social engineering. As such, they are also often bound up with invented traditions not only of social movements, but of institutions as well.¹⁷⁹ This reality is echoed clearly in the three most common forms assumed by invented traditions since the Industrial Revolution, which are designed variously to (a)

¹⁷⁹ Hobsbawm, Introduction, p.13.

establish or symbolize social cohesion or the membership of groups, real or artificial communities; (b) establish or legitimate institutions, status or relations of authority, or (c) to socialize, to inculcate beliefs, value systems and conventions of behaviour.¹⁸⁰

It is those invented traditions included by Hobsbawm in his second category that concern us most here, most notably those attempting to establish and legitimate institutions of traditional law, although it may be ventured that these institutions aim to the same ends as 'invented' traditions in his other categories, namely, social cohesion and the socialization of the people in particular conventions of behaviour. As well, it should be noted that invented institutions may be seen as very much a part of traditionalist movements, which Hobsbawm himself views as potentially, if not inevitably, bound up with the manufacture of invented traditions for which the goals of social cohesion and socialization are paramount.¹⁸¹ In this way it is possible to see some overlap between the different types of invented traditions.

Notwithstanding which of the three categories of 'invented traditions' is the issue, it seems important that such traditions be distinguished less from 'old' traditions than from custom. According to Hobsbawm, all traditions emphasize the imposition of fixed and formalized practices which have as their

¹⁸⁰ Ibid., p.9.

¹⁸¹ Ibid., p.7.

object the establishment of invariance.¹⁸² That such invariance is essentially at odds with the ongoing mutability of traditional societies, however, creates a need for 'something else' which can ensure that traditions stay in step with social change without compromising their place or role in that society. Custom is that something else, and it dominates "so-called traditional societies" by cloaking traditions with a veneer that both changes and responds to change, but always in a manner which is compatible with prior tradition. This latter requirement in itself imposes an often substantial degree of limitation upon the direction and degree of change possible in custom, as changes which fly in the face of precedent are unlikely to obtain the sanction of history.¹⁸³ Thus, in Hobsbawm's own words, custom functions both as the "motor and flywheel" in traditional societies, acting both as that which changes and that which guides and forms change. By this construction what separates traditions from custom is not only the degree of invariance each permits, but the separate, albeit complementary roles played by custom and tradition. As framed by Hobsbawm within a legal analogy appropriate for present discussion:

Custom is what judges do; 'tradition' (in this instance invented tradition) is the wig, robe and other formal paraphernalia and ritualized practices

¹⁸² Ibid., p.2.

¹⁸³ Ibid.

surrounding their substantial action.¹⁸⁴

Applying Hobsbawm's analogy to indigenous 'traditional law' inspires memories of another, older controversy, albeit one which has come to be increasingly viewed as essentially misdirected and redundant. Here the debate is whether custom is law, and it may be argued that, even if one rejects any strict equation of the two, a case could be made that custom must be at least a form of law, and legal systems must have their customs. Insofar as many famed anthropologists have been unable to identify either the judges or the law within many non-European societies, these have often been held as manifesting 'only' custom, never law. While this is not the place to retread this tired debate, it should be stated that, for purposes here, there is no question that the Iroquoian peoples had a criminal law, one which prohibited certain behaviours and provided mechanisms for responding to their commission. Extending Hobsbawm's analogy to the context of Mohawk proposals for separate, "traditional" justice systems, it is this law which would form the basis of the jurisdiction administered through the traditions of those systems. Whether these traditions are invented ones, and the implications which might flow from a determination on that question, requires consideration of what separates these from other, putatively non-invented traditions.

To truly understand the distinctions between invented traditions and their supposedly more genuine counterparts, it is

¹⁸⁴ Ibid., p.3.

perhaps best to consider differences in their origins. 'Real' traditions, steeped as they are in the dim reaches of an antiquity which also shrouds their origins, may be traced in their gentle progression to the modern day, but would necessarily resist attempts to specify their point of conception. The origins of these 'real' traditions are thus often wrapped in myth or traditions of their own, and this arguably adds to the lustre of their legitimacy.

Invented traditions have no such illustrious or mysterious beginning, although their inventors may attempt to create one through linking the 'new' tradition with a particular period of the nation's history. That time need not be a distant one, "stretching back into the assumed mists of time"¹⁸⁵; rather, from the point of view of the inventors, what seems more important than the length of the history is its suitability for legitimating the invented tradition. Where a particular epoch of history can be made to define, rationalize and legitimize an invented tradition, continuity between it and the invented tradition will be established, notwithstanding whether such a link is either genuine or natural. That the connection between the tradition and its past is largely factitious necessarily taints the authenticity of the tradition, insofar as antiquity would seem to be the defining quality of an 'old' or 'real' tradition. Given the latter, it seems logical to suggest that more permanent invented traditions could acquire both a noble

¹⁸⁵ Ibid.

birth and history in retrospect, as a necessary by-product of their own time-earned legitimacy.

Precisely because of their 'newness', invented traditions tend not to have a past of their own, but rather are inserted into the past shared by the 'old' traditions in an attempt to appropriate both the authenticity of those older traditions and the longevity which is their hallmark. This past is crucial to the invented traditions, especially as these are most commonly responses to novel situations, and thereby will tend toward novelty themselves. The more novel an invented tradition is, the more necessary it is to link it with the past of those who are to receive it, to establish it as having some predecessor or precedent within a period of "suitable" history.¹⁸⁶ By revealing or, as is more often the case, fabricating ties with a historical moment with especial power for the people, novelty becomes less novel. By establishing continuity between, for example, a modern invented traditional structure and the now-forgotten 'way things were done before', the invented tradition is no longer invented, but becomes potentially more genuine than even those traditions which have been ongoing and which have adapted to changed circumstances over time. By this logic, in the current context of the traditional renaissance characterizing Kahnawake, so-called 'invented traditions' which could be linked with the pre-colonial or pre-contact past of the community could be viewed as 'more amerindian' than those which

¹⁸⁶ Ibid., p.1.

have endured and adapted to internal colonialism, which become in some way tainted by comparison.

In fact, Hobsbawm implies that the potential for invention of tradition is probably greatest in a historical context such as that experienced by amerindian nations like Kahnawake, wherein

a rapid transformation of society weakens or destroys social patterns for which 'old' traditions had been designed, producing new ones to which they were not applicable, or when such old traditions and their institutional carriers and promulgators no longer prove sufficiently adaptable and flexible or are *otherwise eliminated* (my emphasis).¹⁸⁷

Few students of the history of amerindian peoples within Canada are unaware of the impact of the British and, more significantly, Canadian regimes on amerindian traditions. The active and persistent work of the Canadian government to eradicate aboriginal cultures and traditions clearly aimed to "otherwise eliminate" those traditions which were not lost or significantly 'anglicized' in response to the many 'novel situations' imposed upon aboriginal nations after contact, but particularly after 1760. The break in continuity of tradition caused by internal colonialism is undisputed, and is evidenced further in the fact of the rise of 'traditionalist' groups within amerindian communities like Kahnawake directed to the defence or revival of traditions. According to Hobsbawm, these groups in themselves constitute evidence of a break in or with tradition, as such a disjunction is a necessary precondition for

¹⁸⁷ Ibid., p.4.

the rise of a group trying to revitalize traditions. In his words: "Where the old ways are alive, traditions need neither be revived or invented".¹⁸⁸

But is this always the case? Hobsbawm himself warns students of invented tradition against making unfounded assumptions about the status of 'old' traditions or traditional societies characterized by "rapid social transformation". Notably, he says, one must not assume that the production of invented traditions within such societies occurs simply because "older forms of community and authority structure, and consequently the traditions associated with them, were unadaptable or unviable", and "'new' traditions simply resulted from the inability to use or adapt old ones".¹⁸⁹ The relationship between old and invented traditions, and between these and the societies they regulate, is not so simplistic. Often invented traditions will make use of "ancient materials" or will graft a new tradition onto an old one, perhaps by "borrowing from the well-supplied warehouses of official ritual, symbolism and moral exhortation".¹⁹⁰ To the degree that 'new' traditions borrow from, or are based upon and incorporate, old ones, it may be argued that their tenuous existence as 'invented' is somehow diminished.

An intriguing example of one such "grafted tradition" in

¹⁸⁸ Ibid., p.7.

¹⁸⁹ Ibid., p.5.

¹⁹⁰ Ibid., p.6.

Kahnawake is that of the previously mentioned "three-warning system", enlisted by the traditionalists in their eviction of two alleged drug dealers from the community in 1988.¹⁹¹ At numerous times in my association with the traditionalist community at Kahnawake, I was informed of an historic "tradition" whereby deviants in the community would be approached on three occasions by a senior person of their clan, ideally a clan mother, and warned to cease in the proscribed behaviour on pain of dismissal from the community. Should the person ignore those warnings, the tradition dictated, they could rightfully be banished from the village or nation.

What is most intriguing about this "tradition" is that I was unable to find any primary written or oral record of it in practice prior to the incident related above! There did not appear to be any surviving documentation of this mode of social control, and the only secondary recollection of a three-warning system I encountered was contained within the "transcription" of the Constitution of the Five Nations, also known as the *Kaianerakowa* or "Great Law of Peace", compiled by Arthur C. Parker for the New York State Museum Bulletin of 1916.¹⁹² In his rendering of the constitution, article or "wampum" 19 outlines the three warning system and reveals that this was, in fact, a means for impeaching errant or intractable sachems. No mention

¹⁹¹ As described at pages 99-101 of this thesis.

¹⁹² Arthur C. Parker, "The Constitution of the Five Nations or the Iroquois Book of the Great Law", 184 New York State Museum Bulletin, April 1 (1916).

of a similar process for use among the citizenry is made, nor does there appear to be any means by which it might be translated into this context. Yet at some unknown point, by some unrecorded process - possibly one of "invention" or "conscious adaptation" of the original tradition as this appears in the constitution - the three warning system was removed into its modern permutation. In its present form, the three-warning system is clearly one of those "responses to novel situations which take the form of reference to old situations", but it might also with equal credibility be seen as simply an adaptation of an old tradition, and then, perhaps, somewhat less an invented tradition than might be supposed.

If we turn to the question of "longhouse justice", a similar query will arise, notably, whether or to what degree the proposed "traditional" justice system constitutes an invention or adaptation of tradition, and the implications of the possibility of invention for the activation of such a system within modern Kahnawake. In answering this question, consideration must be given to the degree to which invention endangers tradition and, from this, one potential response to the challenge of legitimacy threatening Mohawk and other amerindian proposals for separate justice within Canada.

3.2 Researching History and Traditional Dispute Resolution in Kahnawake

The research project which I was to undertake with the Mohawks of Kahnawake was one which very much had its origins in the present-day community and the factionalist competition over the control of the separate justice movement, and the ultimate control over the administration of criminal justice to the people of Kahnawake. At the time of the research, the primary protagonists in this competition were the conservative faction as represented by the Mohawk Council of Kahnawake and its "Indian Act court", and the dominant traditionalist longhouse, its Nation Office and the "Longhouse Justice System", which it proposed as an alternative to the Indian Act court and the "Canadian" criminal law jurisdiction which it represented in Kahnawake. I was contacted by the Justice Committee of the Nation Office to work with them on a course of research which was very much a part of the factionalist competition over separate justice, insofar as it was intended that I would gather a maximum of information about "traditional Iroquois justice and dispute resolution" in relation to the acts of "murder, theft and arson".¹⁹³ For the traditionalists, the primary potential benefit of the research would be the generation of knowledge

¹⁹³ Personal communication from Brian Deer, for The Justice Committee, Mohawk Nation - Kahnawake Branch, 6 December 1988.

which would legitimate the "traditional-ness" of their "traditional justice system" and, as a result, its propriety as the source of criminal justice in the community.

The method by which I was to acquire "traditional law" data was essentially ethnohistorical; I was to begin by looking at how acts of murder, theft and arson were responded to in the modern Mohawk society at Kahnawake and then proceed "upstream" into the community's history to the earliest recorded incidents of the relevant traditions. I was thus to be lead in my historical upstreaming by looking for incidents of these particular acts and how they were redressed; I was thus not looking for a particular process, "legal system" or "law", but rather how these things were revealed historically by the incidents which moved them into action. In this way, the records permitting, it would be possible to gauge shifts in modes of responses to these acts over time, thereby gaining some understanding not only of the traditional responses and their mutability over time, but also of the degree to which some consistent thread of an enduring tradition of "Mohawk Law" in these regards could be seem to have persisted over time. This was, of course, the ideal version of how we had hoped things might proceed; it also proved to be one far removed from the reality both of the conduct of the research and what its findings suggest about the endurance of tradition in Kahnawake generally.

The ethnohistorical approach known as "upstreaming" is the

brainchild of William N. Fenton, the "Father of Iroquoian studies", who perfected it over a series of researches into Iroquoian culture history.¹⁹⁴ Broadly speaking, this method is one which originates with the ethnographic present in research, and then proceeds into the subject population's history, drawing upon a wide and variant range of ethnohistorical and historical sources in an effort to establish and understand fundamental cultural patterns over time. It is a profoundly interdisciplinary approach, and in the case of the present research it was adopted to address one of the central problems of Iroquoian studies as stated by Fenton, namely: "the use of basic historical sources to rewrite Iroquois history to show the changes in Iroquois culture which have occurred during 400 years of white contact".¹⁹⁵ In this project, the aim was to "rewrite" the "legal history" of the Mohawks and document the changes in that history and its traditions over time. As I was to discover, so little has been written or recorded about this aspect of Iroquoian culture history that the term "re-write" barely fits, and my work with the Kahnawakehronon would be more in the nature of a first attempt to document traditions of "Mohawk Law". I was

¹⁹⁴ Fred W. Voget, "Anthropological Theory and Iroquois Ethnography: 1850-1970", in Extending the Rafters. Interdisciplinary Approaches to Iroquoian Studies, Michael K. Foster, Jack Campisi, Marianne Mithun, eds. (Albany: State University of New York Press, 1984), pp.343-358. Fenton outlines his approach in "Problems Arising from the Historic Northeastern Position of the Iroquois", 100 Smithsonian Miscellaneous Collections (1940):159-251.

¹⁹⁵ Problems Arising from the Historic Northeastern Position of the Iroquois, pp.165-166.

also to come to realize that, in the absence of historical knowledge, societies suffering such a lack may tend to extrapolate from or manipulate what is known about the past to meet the historical exigencies of the present.

My journey upstream proved to be a difficult one, and the stream was revealed to have many cataracts which could not be overcome; had I heeded the advice of those who had attempted the documentation of "traditional law" in North American indigenous societies before me, I might have abandoned the trip as too perilous for a mere student and too parsimonious of information to be of value per se. But I did not, and in so doing ignored the council of such greats as Max Gluckman, who offered the most compelling warning in his 1965 work Politics, Law and Ritual in Tribal Society:

Students of these societies labour under the difficulty that the colonizing powers have suppressed indigenous modes of self-help and have made unnecessary full dependence on the pressure by 'public opinion' and cross-linkages toward settlement. Hence the cases upon which anthropologists have to rely are often partial records from the past by contemporary untrained observers or the recollections of disputes by aged informants. They do not give full details, and they are particularly weak on the concatenation of social relationships which influenced the course of events.¹⁹⁶

A decade prior to this, Hoebel, in his analysis of The Law of Primitive Man, advised students of Cheyenne legal traditions that "there is little gain in spending more than the briefest time in search for verbalized norms [of Cheyenne law]", whether

¹⁹⁶ Max Gluckman, Politics, Law and Ritual in Tribal Society (Chicago: Aldine Publishing, 1965), p.173.

the research is dealing with a "living culture" or is "reaching back into the past".¹⁹⁷ Asserting that the such a search must always start with the same source - "competent informants" - he perhaps did not anticipate that little more than a decade after uttering this statement, Gluckman would lament the limitations of such sources of information in North America and, that a mere three decades after that, groups such as the Kahnawake Mohawks would be unable to produce a single elder recollecting cases resolved by traditional means alone, much less the norms that guided them.

It was, in fact, this absence of "competent informants" which was one of my first discoveries in Kahnawake, although it should not have been a surprising one. From the earliest moments of my work with the Mohawks associated with the Justice Committee, there had been little effort to disguise the fact that one of their hopes for the research was the production of a much-needed culture history in Kahnawake which could fill a glaring gap in local lore; a gap created in large measure by the colonial forces referred to by Gluckman and which, as the history of Kahnawake contained herein will reveal, were responsible for eroding far more than traditions of dispute resolution. The history which the research has produced is not contained in its entirety in this text, as it was not, as a whole, directly relevant to the research question; only those

¹⁹⁷ Cambridge, Massachusetts: Harvard University Press (1954), pp.40-41.

elements which contribute to either an appreciation of Kahnawake culture history or the political context of the separate justice movement are included.

The starting point for my historical upstreaming, then, was to be upon determining how the focal acts of murder, theft and arson were addressed in modern Kahnawake. This necessarily meant that my focus in this context was upon what are essentially "crimes", or in this case, what I prefer to refer to as "public level disputes". My choice of the latter term originates in a range of factors. One of these is the preference for the term "dispute" by the traditionalists, who link it with the "dispute resolution" which they feel is the province of their proposed system. In our discussions of language in this context, I was informed that the term was chosen because, in the opinion of the traditionalists who commented on the matter, it more accurately reflected the essence of the traditional processes it was believed to represent: Justice among the historic Mohawk was not a matter of adjudication by persons sitting in judgement, rather it was a result of the community working together to resolve the pain and damage which were the result of a crime or delict. The aim was not to determine guilt and assign sentence, but to accept responsibility as a community and work to restore as much as possible the pre-dispute status quo.¹⁹⁸ Whether this rather

¹⁹⁸ This perception is detailed in the paper by the Justice Committee's researcher, C. Deom, entitled "Traditional Courts and Conflict with the s.107 Indian Act Court at Kahnawake" (Faculty of Law Term Essay, Montreal: McGill University, 1988). It is interesting to note the use of the term "court" in this paper's

wistful recollection of the situation is, in fact, accurate, when contrasted with the traditions of feud indigenous to the historic moment captures the essence of the research question, and will be returned to later in this dissertation.

My own reluctance to categorize the three acts which were to guide my search for "traditional dispute resolution" as "crimes" resided in my own assumptions and cultural baggage surrounding the term, which accords "crimes" and their redress a formalised public dimension which, while it may characterize modern, acculturated Kahnawake, is arguably quite absent in its historic past. For if one may understand a "crime" as a thing which offends not just against an individual but also against a society as a whole - if crime is that which, recalling the historic common law notion, offends the "King's peace" - the reality that historic Mohawk society lacked kings whose peace might be disturbed undermines a fundamental element of a "crime" as we understand it.

Does this mean that the sorts of deviance which we understand as crime did not exist among the historic Mohawks? Of course not, even a society of saints has its sins and its

title, as this is one which was vehemently rejected by the Committee and was even recognized as inaccurate by the researcher a very short time after the completion of the essay. This is an indication of the rapid, ongoing change which accompanies articulations of rights in Canadian aboriginal self-determination movements, wherein views of the past, how it is spoken of, understood and construed in the present tense can alter as amerindians engage in an evolving perception and articulation of rights through the acquisition of increasing knowledge of their own histories.

sinners, and the Mohawks, like most of us, had their share of both. Where they differed was in their understanding of these wrongs as essentially individual matters which may be resolved by individual victims. As I was to discover in my pursuit of "traditional" responses to "murder, theft and arson" in historic Mohawk society, the results of which are detailed and analyzed in part 4.1, there appeared to be little intrusion of the body public, whether in practical or philosophical terms, in the definition or resolution of harms resulting from these acts. Rather, like many of the societies which bordered them, including the Cherokees, Cheyennes, Hurons and others, acts such as killing, wounding, theft, adultery, failure to pay debts and witchcraft were essentially viewed as private delicts - as "crimes as against the person" upon whom the burden of prevention and redress lay with the victim.¹⁹⁹ The "system", if indeed one may use that term, was fundamentally one of self-help and force - as both the primary proactive and reactive deterrents. There were no crimes, police, courts or prisons as

¹⁹⁹ A.R. Radcliffe-Brown, Structure and Function in Primitive Society. Essays and Addresses (New York: The Free Press, 1952), p.214; E. Adamson Hoebel, The Cheyennes. Indians of the Great Plains (New York: Holt, Rinehart and Winston, 1960), pp.55-61; Hoebel, The Law of Primitive Man, pp.127-176; Hoebel and K.N. Llewellyn, The Cheyenne Way (Norman: University of Oklahoma Press, 1941); John Phillip Reid, A Law of Blood. The Primitive Law of the Cherokee Nation (New York: New York University Press, 1970); John H. Provinse, "The Underlying Sanctions of Plains Indian Culture", in Social Anthropology of North American Tribes, Fred Eggan, ed. (Chicago: University of Chicago Press), pp.341-374; John C. Ewers, "Blackfoot Raiding for Horses and Scalps", in Law and Warfare. Studies in the Anthropology of Conflict, Paul Bohannan, ed. (Garden City: Natural History Press, 1967), pp.327-344.

we understand these things, and yet historic Mohawk society was not a Hobbesian quagmire of debilitating anarchy, there were controls on behaviour and mechanisms for redressing those who burst those controls. Whether those things can be seen in the modern "traditions" implicit in how the extant criminal legal systems respond to murder, theft and arson in modern Kahnawake will become apparent in the course of the dissertation.

And yet although it would be wrong to characterize the role of the public in the Kahnawakehronons' "traditional dispute resolution" as of the same type as modern western systems of criminal jurisprudence, I believe it is not entirely correct to assert the complete absence of a public dimension, albeit one defined very much by the individual. For in Mohawk society, like that of the Cherokees who share many of the same Iroquoian traits, definitions of "individuals" were made very much in terms of the larger extended family unit of which they were a part, namely, their "clan". All members of Mohawk society, including those non-Mohawks by birth who obtained Mohawk nationality following their adoption by Mohawk families, were members of the Turtle, Bear or Wolf clans, and it is difficult to determine where personal identity or definition ended and clan identity or membership began. Indeed, so "fused" were clan²⁰⁰ members that acts of individuals were always reflective

²⁰⁰ The clan-individual relationship will become clear in its implications for dispute resolution in part 4.1 of this thesis; at this point it is perhaps worth noting that others have also found the clearest elucidation of this "fusion" in North American aboriginal societies. Oberg, for example, in his study of the

upon their extended family group, and that group were not uncommonly expected to "bail out" members who engaged in deviance. Thus, as will be seen in part 4.1, if a member of the Wolf clan killed a member of the Bear clan, should the Bears prove amenable to the Wolves' offers of restitution, all Wolves would participate in the payment, not only the killer, and thus one person's act could greatly inconvenience the whole. Should the Bears reject the compensation, they were entitled to take the life of any of the Wolves in "blood revenge", and thus someone other than the killer might well pay the ultimate cost of his or her anger or carelessness. As will be seen in part 4.1, the weight of the clan on an individual's shoulders was not insignificant, and contributed greatly to limiting the amount of careless or deviant behaviour within "face-to-face" Iroquoian communities.

Whereas not all acts of injury or deviance attracted the attention of the clan for restitution or redress - for example, the killing of a sorcerer "caught in the act" did not require compensation to his clan nor produce a blood revenge right²⁰¹ -

Tlingt, observed that "In matters of crime and punishment, the relation of the individual and the clan comes out clearly. Theoretically, crime against the individual did not exist. The loss of an individual by murder, the loss of property by theft, or shame brought to a member of the clan were clan losses and the clan demanded an equal in revenge (Kalervo Oberg, "Crime and Punishment in Tlingt Society, 36 American Anthropologist (n.s.) (1934), p.146. As will be seen in the discussion of Iroquoian blood revenge, there is some question whether the revenge exacted was, in fact, equal.

²⁰¹ Unfortunately, there is little to suggest what sort of evidentiary requirements or standards came to play in such cases. One doubts that such requirements were minor, given the sanctions

it may be argued that those acts which did attract such attention necessarily maintained a degree of public involvement in their redress, insofar as individuals were fused with their clans, and the clans constituted the body public. Since any inter-clan dispute required the involvement in theory at least of two clans, all such disputes inspired the involvement of a majority of the local population -- arguably a larger percentage of the population was thus *touched directly* by such acts than in our modern Canadian society, leading to a much larger direct public participation in the response to those acts. It is in this regard that I feel it acceptable to refer to the response to murder, theft and arson in the historic "traditional" context as "*public level dispute resolution*", for there was, indeed, a "public" dimension.

And yet some further argument may be poised against the degree to which the term fits in the present tense and the modern, Canadian criminal law jurisdiction in Kahnawake. In the current context, acts of murder and arson fall under the federal

associated with wrongful killings, which might also have encouraged those assuming the burden of doing away with sorcerers to be quite certain of the guilt of the impugned individual before levying punishment. While appreciating the "peace in the feud" and the power of the threat of feud in limiting wrongful and/or intentional killings, the "loophole" rendering witches vulnerable seems a rather convenient one for those committed to destroying their enemies. Again, I am constrained in this point of view by the strong psychocultural and structural elements of Iroquoian society, which suggest that any killing was probably fraught with dangers for the killer and his or her clan, and that these pressures, as well as the face-to-face nature of Iroquoian communities, probably created a situation in which only a notorious witch might be killed and his or her killer protected by the "sorcery loophole".

criminal jurisdiction of the more serious "indictable" level offences, while theft is divided as either indictable or "summary" depending on the value of what has been stolen.²⁰² As "classic crimes", there may be some question whether these acts really involve what may be generally understood as "dispute resolution"; although they necessarily involve the "public" in the sense that, in western legal tradition, "crimes" tend to be understood as those acts which offend the state through the public, as well as the public interest, which are in turn "defended" by police and courts.²⁰³

I think that, even in those cases where there seems only to be adjudication by a court and sentence, there is still a dimension of dispute resolution taking place. It seems to me, and I would like to suspect that Gluckman might agree with me - that while a crime may itself be defined as a dispute, it is the crime which also, when it is brought into the public realm for resolution, leads to the dispute - an act of theft, formally acknowledged and processed, leads at a minimum to a dispute over ownership of the coveted article and, within the courts, whether the act of taking legally constituted "theft" and, if yes, over responsibility for the act and the appropriate consequences following a determination of responsibility. What is a trial, if not a dispute over whether a particular legal rule was broken,

²⁰² On the nature of indictable and summary jurisdictions, see, Gerald Gall, The Canadian Legal System (Toronto: Carswell, 1990), pp.147-164.

²⁰³ Gall, p.25.

the presence of absence of guilt for the breakage and/or, where guilt is determined, the consequences which ought to flow from this? As Gluckman maintains in his lecture "The Peace in the Feud":

Often, difficulties in dispute arise not over what is the appropriate legal or moral rule, but over how the rule applies in particular circumstances. This is true even in most disputes in our highly developed legal system. In effect, both parties may claim to be in the right, and agreement has to be reached on which is in the right and how far he is in the right.²⁰⁴

That the victim, in a court system, may be represented by a prosecutor who engages in the dispute on behalf of the victim and the state's in arguing over the applicability of a rule and the resulting consequences with the counsel of the defendant, the identity of the players does not alter the fact that what they are doing, at a very fundamental level, is *disputing*: Disputing what and who is wrong and who must make what sort of amends for that wrongdoing. For this reason it seems to me that, even when one is speaking of the "crimes" of murder, theft and arson in modern Kahnawake, rather than the personal delicts of murder, theft and arson in the historic context, it is still correct to refer to what follows detection of an offence and the offender as "disputing". That in each juncture the public is to some degree involved in the process, whether directly through clans in historic disputing or indirectly through the symbol of prosecution and punishment in the modern setting, further makes

²⁰⁴ Gluckman, "The Peace in the Feud", in Custom and Conflict in Africa (Oxford: Basil Blackwell, 1963), p.9.

proper the assignment of the prefix "public" to the disputing taking place. Whether what this disputing leads to is, in practical terms, a "resolution" is arguably defined primarily by the eyes of the beholders. It is, in fact, the criticism that modern judgement rarely "resolves" which has been one of the motivating factors behind the move toward separate justice in Kahnawake; of course, whether blood revenge - especially when it lead to feuding - or compensation lead to a more common perception of a conflict "resolved" may be equally questionable, and is a matter which will be returned to in part 4.1.

Thus although one may question the degree of resolution which is involved in what I have referred to as "public dispute resolution", I nonetheless feel it is permissible to enlist the term here. That being said, however, it must be admitted that, in defining their focus as upon "murder, theft and arson", the Justice Committee effectively directed an emphasis upon acts which currently cannot legally be adjudicated or mediated by extant or proposed legal structures in Kahnawake. As will be recalled from the outline of the structure and jurisdiction of the s.107 Indian Act Court in Kahnawake contained in the demographic profile of the community at pp.46-50, this court embodies a highly circumscribed jurisdiction which has been expanded informally only very slightly beyond the letter of s.107, and certainly not to the point of dealing with the acts emphasized here, save some very minor acts of theft. As a result of this focus, it was impossible to determine how the Court of

Kahnawake might deal with such acts, as any acts of murder, indictable theft or arson *must be removed outside the community to a Court of Criminal jurisdiction sufficient to adjudicate upon such matters.* The Court of Kahnawake simply does not possess the jurisdiction to act in such cases.

The only context in which such acts have been publicly resolved in Kahnawake is in the "Ryan Deer Arson Case" detailed at pages 423-425, wherein an incipient "Longhouse Justice System" resolved disputes involving acts of theft and arson. In this light it may be argued that the selection of these acts and murder as the foci of the study was inherently political. In researching the traditional mechanisms pertaining to resolving acts of theft and arson, it may be argued that the longhouse hoped to legitimate after the fact the dispute resolution it had administered in the Ryan Deer case - provided, of course that the research in fact confirmed the "assumptions" about Iroquoian dispute resolution traditions implicit in the construction of the nascent system and the processes it animated. Further political considerations intruded in the addition of murder to the foci of very serious, indictable level crimes. The emphasis on these most serious criminal acts and the incorporation of "traditional" means for responding to them in the traditionalists' justice system is intended as a political statement - by administering an "indictable-level" jurisdiction, the traditionalists' justice system would be parallel to the highest level of criminal jurisdiction in Canada and would thus

reflect the traditionalists' perception of an enduring "nation-to-nation" status with Canada.

There is, of course, some question of the degree to which a modern "traditional justice system" would engage in "dispute resolution" of such serious crimes as homicide or theft, which data in local police and court statistics reveal appear only infrequently in Kahnawake (see Appendix A). Data tracking the caseload or "lawjobs" performed by the current Justice of the Peace Court in Kahnawake suggest that the bulk of their activity occurs in the realm of such victimless crimes as minor traffic violations, which may not often lead to a dispute over responsibility or liability as defined above.

Yet the question arises of the perception of "victimless" crimes in Kahnawake, and it is my suspicion that a significant proportion of the community would deny the validity of the term in favour of a view that any crime diminishes the community, and thus victimizes everyone. An example of the Kahnawakehronons' attitude toward so-called victimless crimes is found in their response to what has been defined as a classic victimless crime, namely, drug abuse. As indicated earlier in the example of the eviction of two alleged drug dealers from Kahnawake in 1988, it would seem that this classic victimless crime is seen in quite an opposite light in Kahnawake - indeed, at least 300 Mohawks clearly felt some victimization implicit in the alleged dealers' acts, and that feeling lead to the expelling of those perpetrating the victimization. In terms of the light this

incident sheds upon the attitude toward victimless crimes in Kahnawake, if it doesn't stretch the argument too far, I would suggest that very few crimes are seen to lack victims in this community, where centuries of assault from the outside make those inside highly sensitive to victimizations from within.

The Traditionalists' preference for the term "dispute resolution" was also an effort to avoid any confusion of what the Longhouse and Nation Office were trying to achieve through separate justice, with the long-established precedent of "tribal courts" in the United States.²⁰⁵ These bodies, whose sole nod in the direction of "aboriginality" is in the conduct of the proceedings in aboriginal languages in some contexts, but which in virtually all elements of procedure and practice replicate the adversarial processes and emphasis on guilt and punishment endemic to the dominant state systems, are far less "tribal" than they are "courts", and are thus a precedent which the traditionalist Mohawks at Kahnawake are determined to avoid.

From the traditionalists' point of view, the term "dispute resolution" was thus intended to reflect the distance between perceived Mohawk "legal traditions" central to the pursuit of separate justice, and the intensively adversarial criminal legal systems characteristic of the Canadian, American and some amerindian nations surrounding Kahnawake. It seems likely too,

²⁰⁵ See, for example: Samuel J. Brakel, American Indian Tribal Courts. The Costs of Separate Justice (Chicago: American Bar Foundation, 1978); Vine Deloria, Jr., Clifford M. Lytle, American Indians, American Justice (Austin: The University of Texas Press, 1983).

that implicit in this choice of terms was an interest in making clear the aspiration of the traditionalists that acts which were once private and addressed by the clans of victims and offenders - acts which included murder and theft - but which the British and Canadian criminal legal systems appropriate and cast in terms of the state and offender, would, in the proposed traditional system, once again be placed in the hands of the parties directly affected by them. Removing the state from the equation and emphasising mediation and resolution of the harm caused by an offence rather than determining guilt and punishing an offender was felt to more accurately reflect perceived traditional philosophies for responding to deviance. Again, whether the "tradition" which the term is intended to reflect is real or manufactured is questionable, and will be attended to later in this work.

If the preference among the traditionalists for the term "dispute resolution" was thus grounded more in what they thought "traditional criminal justice" should have been and would become in the revitalized traditional justice system in Kahnawake than what later discussions will reveal it actually was, the basis for the application of the term "system" to the structure of Longhouse Justice was no less political or problematic. For as will be seen in the articulation of that "system" later in the thesis, it is difficult to reconcile the fluid, often only loosely-structured processes implicit in the Longhouse Justice System, with the "rigorous, logically ordered and complete array

of juristic propositions and normative rules" implied within the term "system".²⁰⁶ The Longhouse Justice system, as will be seen, is really none of those things, and the choice to apply the term to the proposed traditionalist dispute resolution structure is, once again, primarily political, and resides in the traditionalists' belief that, as a sovereign nation, Kahnawake is entitled to a full-blown "legal system" parallel to the Canadian criminal legal system. Whether simply labelling a "system" as such can make it so is doubtful, however, and risks isolating much of the juridical self-determination campaign in Kahnawake at the level of rhetoric alone.

How one might transfer an historic tradition of an essentially private law of self-help into a modern, public "criminal justice system" wherein the same processes or principles implicit in the historic context are paramount is difficult to envision, especially when one contrasts the societies of the eras characterized by self-help and those manifesting criminal justice systems. And yet it is precisely such a leap which is implicit in the longhouse and Justice Committee's belief that the processes for responding to murder, theft and arson would define a public system of "criminal justice". Was it simply the case that these traditionalists were unaware that they had no equivalent to the modern western legal concept of these acts as wrongs against society, founded on the

²⁰⁶ Ian Hamnett, Chieftainship and Legitimacy. An anthropological study of executive law in Lesotho (London: Routledge and Kegan Paul, 1975), p.9.

notion of the common law concept of the "king's peace"? Was the gap in their knowledge of the past, and of the traditions which animated it, being filled with an assumption of what was, based upon what was needed in the present and wanted in the future: historic traditions which would be simply reanimated in the present in a justice system which would serve a self-determining Mohawk community at Kahnawake? Even in these first formative moments of the research I wondered: Was I witnessing an "invention" of a traditional past of "Mohawk criminal law", or simply the natural process of speculation based upon an ignorance of that past?

The method which lead me to a perception of disjunction between "original" and modern traditions began as an effort to access and combine the widest possible range of oral and written historical documents, thereby enhancing the potential for compiling as full a "history of tradition" of the Kahnawake Mohawks as possible. It thus consisted of two primary foci, including (1) a series of brief, intermittent visits to "the field" to determine the responses to the focal acts in the modern legal system extant in Kahnawake, and to attempt to access any remaining oral records of traditional responses to them, both as principles and practices; and (2) the gathering and analysis of those primary and secondary written historical records which could inform of the chronicle of traditional criminal justice among the Kahnawakehronon.

(i) Accessing "oral history" and the search
for legal traditions in contemporary Kahnawake

At the outset, the nature of my time in the community was dictated in large measure by what I perceived to be the essential motivations for spending time living among the Kahnawake Mohawks and learning about their criminal legal traditions, and which were inextricably intertwined with the goals of the research project as defined by the Nation Office's Justice Committee and myself. As discussed above, the longhouse had directed the committee from the outset that the primary goal of the research was, for the traditionalist community, the gathering of a maximum of information about "traditional Iroquois justice and dispute resolution...in the area of criminal justice"; an aim which was to be reached by focusing upon records and recollections describing their ancestors' historic responses to acts of murder, theft and arson.²⁰⁷ The resulting illumination shed upon processes of "traditional justice and dispute resolution" by the study of these offences would form the basis of a criminal justice system which would serve the Mohawk community at Kahnawake; a system which had been extant in the community in an admittedly loose form since 1987, when it had "resolved" one significant dispute involving acts of

²⁰⁷ Personal communication from Brian Deer, for The Justice Committee, Mohawk Nation - Kahnawake Branch, 6 December 1988.

theft and arson.²⁰⁸ These primary research directions would become significantly modified in practice due in no small part to the politics and factionalism which pervade almost all aspects of Kahnawake and Mohawk life, elements over which I had little or no control.

I became aware of the political dynamics which would prove to be an inextricable aspect both of the pursuit of separate justice in Kahnawake, and the research of tradition and history which were to animate it, over the course of my "field experience" there. As was noted at the start of this part, my approach to study in Kahnawake was determined primarily by the focus of the project on documenting Iroquois traditions of dispute resolution in relation to criminal justice, most notably in regards to such offences as homicide, theft and arson. This translated into a search in the field which, ideally, would have had me observing the resolution of such acts as these occurred in Kahnawake over the course of the research. This ideal could not be realized in the case of the Indian Act Court, of course, since, as noted above, they have no jurisdiction to hear such offences. Had this not been the case, and the court had encompassed such a jurisdiction, it would have made no difference since no acts of murder, arson or indictable theft occurred in the community in the duration of my relationship with Kahnawake. As a result, I was unable to observe and relate

²⁰⁸ The "Ryan Deer Arson Case" is outlined and examined in detail in pages 425-427 of this thesis.

any efforts to redress such acts in the community in this study; what I did do, however, is attempt to gain entrance to the daily routine of the Court of Kahnawake in an effort to assess this as a "Mohawk" institution manifesting thereby some unique "Mohawk content" - which was the position of the Mohawk Council at the time of the study. The results of my efforts are detailed below.

The central focus of the study upon acts of murder, theft and arson removed from that focus any attention to the subject of how private individuals resolved the petty quarrels and differences which arise in the course of the diurnal routine; this was not a study of such self-help in any but the historic context, as it is only in that juncture that the focal acts were considered to be private ones. In the modern context, as outlined above, the acts of murder, theft and arson are defined as crimes - as essentially "public acts" with public consequences - and are handled by formalized public processes of police and courts. Indeed, it is in this sense of their resolution through a formal criminal justice system that these acts held importance for the traditionalists assisting in shaping the project - their interest was only in public responses to these acts, as it is only in this context that they could articulate the important political message of separate justice and self-determination, namely: the articulation of a "traditional criminal justice system".

Given the preceding emphasis, I did not approach my researches in Kahnawake in the classic anthropological sense of

establishing a long-term period of residence in the community whereby I might "learn what it is like to live as a Mohawk"²⁰⁹, for such was not the focus of the study. It was my belief that the satisfaction of the research question by this portion of the research process was best facilitated by two primary directions of inquiry in the field: (1) an examination of public dispute resolution in Kahnawake - ideally in response to the focal acts, but otherwise through the observation of the Court of Kahnawake and the "Longhouse justice System". Unfortunately, since no such acts were revealed to have occurred in Kahnawake in the entire time of my research with the Mohawks nor were processed through either forum, this aspect of the research was ultimately left unsatisfied. Given this, the best approximation of this vein of inquiry was through the attempted observation of the Indian Act Court in regard to the other, lesser offences which occupied its sessions and which are detailed in Appendix A, and the gathering of second-hand descriptions of the Longhouse Justice System in action as it has not mediated another dispute since the Ryan Deer Arson Case, pending the outcome of this research. Direction (2) aimed at gathering a maximum of local knowledge of "dispute resolution tradition" from those persons in the field who might be expected to possess traditional knowledge.

Fulfilling these directions translated into a series of short visits to Kahnawake, one week in October of 1988, one week

²⁰⁹ Personal communication with Simon Roberts, London School of Economics and Political Science, London, England, June 1988.

in February and a further 14 weeks from September to mid-December of 1989, and three weeks in August-September of 1990, during which I lived with a traditionalist family and sought out persons active in the pursuit of separate justice in Kahnawake, whether conservative or traditionalist, as well as those perceived as knowledgeable of tradition and history by the community, to learn about tradition, history and traditional justice in Kahnawake. It was also in these visits that I attempted to access the Court of Kahnawake and its records, in an effort to gain an appreciation of the manner in which public level disputes were currently administered in Kahnawake. As the discussions which follow will reveal, this time in the field would prove to be bittersweet - it earned me some of the most valued friendships and poignant insights of my career, but also visited upon me some disappointments from which my research could only moderately recover.

My efforts to make contact with traditional authorities in Kahnawake proved to be an intriguing and time-consuming task, wherein I attempted to determine by consultation across a range of persons in the community who among them should be consulted about "traditional justice" and the extant and proposed legal systems in Kahnawake. The importance of certain persons was evident from the outset, including the Grand Chief of the Mohawk Council²¹⁰, the Justice Coordinator appointed by the Council²¹¹

²¹⁰ Interviews with J. Norton, 24 October 1989; 27 November 1989.

and those central actors in the administration of the s.107 Indian Act court, including the Justice of the Peace²¹², the prosecutor²¹³ and the court researcher²¹⁴. From those associated with the Nation Office, it was evident that the Coordinator was an important source²¹⁵, as was the Justice Committee, two members of which spent significant time with me and were invaluable sources of knowledge about the politics and social life of Kahnawake.²¹⁶ With the exception of the Mohawk Council's Justice Coordinator and the Coordinator of the Nation Office, to whom I was directed by a number of individuals owing to their general reputations as persons trusted by "both sides" whose recommendations and referrals, if given, would "open a number of doors for me" in the community, the remaining informants were persons whom a range of individuals, both those named above and others casually consulted, consistently reported as good authorities on Mohawk culture and traditions. These people included three elders²¹⁷, and an individual who became my

²¹¹ Interview with P. Mayo, 25 September 1989.

²¹² Interview with M. Diabo, 23 October 1989.

²¹³ Interview with P. Schneider, 30 November 1989.

²¹⁴ Interview with M. Montour, 28 October 1989.

²¹⁵ Interview with K. Deer, 11 September 1989.

²¹⁶ Namely, Kanatase and C. Deom (researcher to the Committee), see specifics of interviews and written contributions below.

²¹⁷ Interviews with P. Delaronde, 8 November 1989; F. Natawe, 10 November 1989; L. Hall, 24 October 1989.

primary informant and a sort of "Mohawk mentor" for the study²¹⁸. I also spoke to those members both of the Mohawk Council²¹⁹ and the Nation Office and Longhouse²²⁰ who were willing to be consulted, as well as informally to some non-visibly affiliated persons within Kahnawake, to obtain their thoughts on the extant and proposed legal systems for the community.

The "listing" of informants above may create an illusion of rigidity in the research structure which was belied in its actual practice. For although I was relatively structured in my approach to those "interviewees" such as the Grand Chief of the Council and the Coordinator of the Nation Office, whose official positions in their factions' respective bureaucracies demanded the making of formal appointments and a more structured interview-type process, much of my knowledge of tradition and the administration of justice in Kahnawake was gained over what at the time seemed like endless cups of coffee and more food than I would care to admit to consuming. Often these casual encounters - which Mohawk hospitality dictated always involved feeding guests - generated more "real" information about what

²¹⁸ Interviews with A.B. Deer: 22 September 1989; 26 September 1989; 1 October 1989; 24 November 1989.

²¹⁹ Interviews with D. Rice, Mohawk Councillor, 2 November 1989; Arnold Goodleaf, Mohawk Councillor, 27 November 1989.

²²⁰ Interviews with Kanatase, 20 September 1989; 6 November 1989; 9 November 1989; also, on-going conversations with C. Deom and J. Deom, members of the traditionalist community and hosts to the researcher during the field visit.

was actually going on in the community than the more structured meetings with chiefs or councillors. Perhaps this was due to the more relaxed context, which made people more willing to talk, or perhaps it was a result of the less obvious interests and agendas of my more casual contacts.

Even in my meetings with "officials" in the field, I made a clear choice to adopt an informal, relatively open-ended format in "interviewing" informants in the field. Some of the first people I spoke to about interviews and questions, among them my host family, advised me that I would have little luck with a rigid, highly structured interview style based upon a written questionnaire, citing the failings of "surveys" which had been attempted and failed in the community long before I had arrived. Their advice was well-taken and, indeed, given that the purpose of my time and talks with Kahnawakehronon were intended to gain their perceptions and impressions about those justice-related matters outlined above, a series of close-ended questions seemed inappropriate as these would necessarily have imposed limitations on what could be spoken about. As a result, when I approached a structured meeting, such as those with the Grand Chief of the Mohawk Council, I went armed with an outline detailing the topics or subjects which I would aim to cover consistently across all interviews, and general notes suggesting the shaping or wording of questions; notwithstanding these, my tendency was still toward letting the person with whom I was meeting, and the context which emerged around each meeting,

determine the shape and direction of our discussions. With a single exception, I taped all my conversations on audio cassettes, thereby limiting the potential for interruptions implicit in simultaneous transcription of interviews. This format proved quite satisfactory with all persons save the elders. With regard to the latter, I simply introduced myself and my research interests, and then merely sat and listened to the elders speak. To do otherwise, to interrupt or press, would have constituted a profound breach of local etiquette and very possibly ended the interviews and limited the potential for future contacts.

I have to confess that all too often my efforts to access knowledge met with significant resistance - resistance which I was not always able to overcome. Factionalism and stresses within Kahnawake raised suspicions about the purpose of both the research and, in some contexts, my presence in the community. For although the I was in a superior position in many respects since I had been invited into the community, rather than required to gain entry and access independent of local assistance, invitations by one faction necessarily raised the suspicions of the others. In regard to the latter in particular, in the first days of the field research, there was concern by some members of the conservative Mohawk Council and their supporters that I was a "longhouse spy", suspicions which were echoed by some of the traditionalist people associated with the Nation Office and Longhouse, who were concerned that I might be

a "government spy". These perceptions created difficulties in accessing information from individuals in both of these two very competitive groups, and I was only able to overcome them to a limited degree. Indeed, perhaps the only rumour I was ever able to entirely overcome was the one which framed me as the nanny who had come from England to care for the children of my host family, while the mother attended university in Montreal! And while it was easy to laugh at this particular example of the suspicions which surrounded my visits in Kahnawake, there can be no doubt that these were influential in determining both what I did and did not learn in the field, and what data would always be held beyond my reach.

Perhaps my status as a "stranger" which, incidentally, did abate over time, would have disappeared entirely had I been able to extend my time in the field in Kahnawake, and some information, initially withheld, would have been forthcoming. Where the information actually did exist - and as will be revealed below in regard to the Court of Kahnawake, I misunderstood from the outset just how little information was available there - more time would undoubtedly have ameliorated my difficulties substantially. The one caveat on this supposition is the apparent fact that, when it came to discussions of tradition", most Mohawks consulted were quite anxious to display the breadth of their knowledge and therefore enhance their reputation as "authorities". There were, unfortunately, also some qualifications on the nature of this

information, which I quickly learned was more likely to have originated in a history book than in an enduring oral tradition, handed down from generation to generation. Thus if it was the "original" traditions of the northeastern Iroquois that were of most concern here, I was to be disappointed in my search for any orally-retained record of those traditions. In fact, I was to discover that, beyond a span of at most two generations, there was remarkably little oral history of any degree surviving in the community - in this regard the colonialists' theft of Kahnawake's history has been quite successful.

A further significant disappointment of the visits to the field was my failure to obtain access to detailed information about those who come before the Court of Kahnawake, the nature of their criminal level disputes and precise data regarding the outcome and rationale for the Court's decisions in particular cases. In the early moments of the research, I felt that the best means by which to obtain that information were twofold: First, I would endeavour to access the limited court records, hoping to discover relatively full and robust detailings of individual cases, deliberations upon them and the resulting decisions. In essence, I was seeking a "Court's eye view" of the administration of criminal justice in Kahnawake; a view which I hoped would offer some illumination on the law-jobs done by the court and whether the Court's activity's could be said to be informed by Mohawk legal traditions. This "paper chase" and its results were to be augmented by observation of the Court in

action, wherein the actual workings of the Court could be assessed and analyzed, and the presence or absence of "Mohawk legal tradition" could be determined. I had hoped that my "Court-watching" would contribute to a sense of the conduct of the limited criminal legal jurisdiction in Kahnawake and the interactions of the Court and the people, their acceptance of it and its "imposed law", as a means to assessing the social and political climate contributing to the apparent dissatisfaction of some of the people of Kahnawake with the Court and the resulting search for alternatives.

From almost the first moment I arrived in Kahnawake, I had encountered very profound resistance from the Mohawk Council and its Court personnel to my efforts to obtain access either to the records or the Court which I believed produced and maintained them. In an effort to obtain access to the records, I first attempted to obtain meetings with various members of the Mohawk Council's Justice Committee, most notably its Coordinator, as well as members of the Council who seemed likely to possess the requisite authority to grant me access to the records.

Underlying this approach was, of course, an assumption that this Court, like its counterparts outside Kahnawake, did in fact retain the services of a Court Reporter on a regular basis and maintain the resulting documentation within a pre-existing bureaucratic framework of Court support services. As I was to later discover, that assumption was quite mistaken; as I was to chastise myself later, I should never have made such an

assumption given the reality among most Band Council bureaucracies in Canada of a rather relaxed attitude toward paperwork generally - an affliction which I was to learn upon perusing Indian Affairs records in Ottawa, most of which originate with the Band Councils, affected the Mohawk Council in a very significant manner. However, at this early point in the field experience, I had not yet delved sufficiently deeply into the Indian Affairs records to reveal the folly of my assumptions and force a shift in my research focus from one of access to Court records to whether those records even existed.

The initial response to my requests for meetings with the "targeted" informants constituted one of my first and most intimate introductions to internal politics in Kahnawake. I had decided that I would endeavour to meet in person with those relevant members of the Court and/or Council initially to introduce myself and the nature of my research project, and to attempt to establish, however incipient and rudimentary, some measure of personal relationship and trust with the various Councillors and Court personnel. I would attend each meeting armed with a carefully composed letter requesting access to the Court's records as well as a photocopy of the letter of support for the project penned by my supervisor and provided early in the field experience, intending to deliver the letter at the conclusion of the first meeting, if the atmosphere seemed right, or withhold the letter until a second or later meeting if things had not gone well.

This approach, while rather greedy of the limited time I was able to spend in Kahnawake, seemed warranted by a number of factors, including the importance among many amerindian peoples in Canada of face-to-face interactions. It seemed necessitated also by the legacy the few other researchers preceding me to Kahnawake had left in their wake, which was largely one of distrust of "white researchers", and especially of anthropologists. Suspicion of the latter seemed to cross factions: among those supportive of or retired from the Council, an important point of local lore was the story of an anthropologist who had been granted permission to a meeting between the Council and the community over a then-rather controversial subject concerning development on the reservation territory - a rare opportunity for an outsider and a non-band member, who are technically barred from access to such meetings. Reports revealed that the researcher had attended the meeting with a hidden tape recorder and had later divulged much of the meetings contents, which were apparently quite nasty and vociferous, in his research report. Many among the Councillors and those attending the meeting were highly dismayed by this action, which they viewed as a personal betrayal and a warning well-taken should other researchers make similar requests in the future.

The traditionalist community had experienced a remarkably similar situation, when a detailed ethnographic outline of a Longhouse ceremony emerged in print following the admission of

an anthropologist to the ceremony, despite his clear and cogent promises to keep his observations confidential. It is interesting to note that so profound was the bitterness of this memory among the contemporary Longhouse, that I was informed by a researcher to the Justice Committee that one of my greatest strengths in working in the community would be the fact that I was not an anthropologist! Such a rare event for one trained in a field whose primary protagonists even Shakespeare wished killed, to suddenly have that status elevated to the point of an advantage!

It is important to digress briefly here to acknowledge that it was not only with the Mohawk Council and the Court of Kahnawake that I encountered difficulties in negotiating access to information. For although as a rule the researchers and personnel of the Nation Office were extremely helpful and generous with both their time and materials, it is worth noting, first, that this magnanimity was undoubtedly linked in no small way to the fact that it was they who had invited me into the community and who had input into the shaping of the project itself from a very early stage in its development. These factors may be suggested as significant in equipping the traditionalist community with a somewhat higher degree of confidence in me and my work than might be found among their Mohawk Council counterparts. That being said, there were still those among the traditionalists who feared I had been placed in the community as a "government spy", and that fear, coupled with the

aforementioned "researcher legacy", translated into my being barred from most meetings at the "cookhouse" (the informal longhouse where most traditionalist community meetings are held), and from the Longhouse itself save for my formal introduction to the community²²¹ and a few social occasions.

The most intriguing incident in my experiences in research with the Nation Office concerned the very exciting moment when the elders agreed that I might be admitted to a formal council, at which the elders of the three Mohawk clans would debate matters of local and Longhouse significance "over the fire", a process described at pages 235-238 of this thesis. This invitation was a highly significant moment in my brief field experience, as I felt it signified the measure of my acceptance into the traditionalist fold. I had no idea, at that time, just how accurate my impression was in that regard, as I was given, on two occasions, a time and location of the council which proved to be wrong, and which were later denied as having been given to me at all. This intriguing approach to me as a researcher, of both signifying acceptance through the granting of an invitation to a council, and then nullifying the signal by an apparent confusion, permitted the traditionalists to reveal

²²¹ At a council held in the longhouse in which all three clans were represented and which was quite well-attended, I was formally introduced to the traditionalist community by the Coordinator of the Nation Office and the senior woman of my host family. Following the brief speech of introduction, I stood with my host family and was greeted - and returned greetings - in Mohawk with each person attending the council. Following this occasion, I was told that I was now accepted formally into the community, and would no longer be seen as a stranger in their midst.

the precariousness of my situation and constituted an important message on the fickle nature of the field. Over time, I believe the traditionalists have come to accept me more, as have some of the Mohawk Council's supporters, as it has been suggested to me by some persons active in the opposing factions in Kahnawake that I have become one of the few people to actually "cross the lines" and maintain positive personal relationships with people in both - and neither - faction.

Returning now to the matter of my interactions with the Mohawk Council and the researcher history in the community, it may be ventured that it should have come as little surprise that my requests for meetings with Councillors and Court personnel should have met initially with rejections and equivocation. Two examples may assist the reader in understanding my position. It had seemed logical to me that I must seek support for my inquiries into the Court and its records with the Grand Chief of the Mohawk Council, who had not only the authority to open both doors and files to me, but also to greatly influence the direction of the Council's pursuit of a more "traditional" criminal legal system in the community. This authority stemmed less from the technical authority of his position as the head of the Mohawk Council, than from his remarkable lifespan as Grand Chief, which was unprecedented in Kahnawake's recent history. Of my initial three efforts to obtain meetings with the Grand Chief, two were denied due to time constraints or previous commitments, the third was granted, only to be cancelled the

morning of the scheduled meeting. There would be three such cancellations, with the result that I was able to meet with the Chief on only two occasions. And while the yield of those meetings were rich in rhetoric and pronouncements about "legal tradition", which the Chief believed was nonexistent in the historic context - "We had no law" - but could nonetheless be replicated in a modern "traditional" justice system of their design²²², they proved unhelpful in assisting me to gain access to the Court or its records. For that assistance, I was directed to the Justice Coordinator who directed me to the Court's prosecutor, who refused to see me until very late in my research schedule. It was at that meeting that I received confirmation of my growing suspicion that there may not be detailed Court records to consult, as the prosecutor informed me that no systematic records existed nor did any transcripts, which were kept only on the request and payment of the defendant. The sole records were somewhat piecemeal, and contained only records of pleas and decisions, without records of statements of judgement or arguments or, in many cases, any information about the sentence imposed! Having finally admitted the state of the records, the prosecutor then informed me, as is detailed below, that I would not be granted access to such delicate, personal information owing to a "community culture" which holds as a priority the confidentiality of information concerning cases

²²² Interview with Grand Chief J. Norton, Mohawk Council of Kahnawake, 24 October 1989.

which come before the court.²²³ This explanation, which constituted the only moment among many in which denial of access was accompanied by a clear explanation, seemed to be based less on a cultural argument than a community one. At its essence, the position was apparently no more complex than an observation that Kahnawake is a small community where there exists a great deal of familiarity across individuals and groups, and the prosecutor stated his confidence that it was unlikely that any given study or piece of research could discuss particular cases and maintain the anonymity of the participants. My own impression was that the prosecutor's paternalism toward the court and its records had less to do with preserving the anonymity of its clientele than reinforcing his own power position in the court bureaucracy - something which my elaboration of his role in court, contained in part 6 of the thesis, will reveal was substantial and not always appropriate.

While preservation of the rights of individuals in so-public a context as that of published research is important, it may also be ventured that little transpires in the community or its court which remains, at an informal level, terribly confidential for terribly long. Gossip has long been a valued sanction in the Mohawk behavioral-control repertoire, and it is no less alive and well in Kahnawake; many people in the community advised me of its presence and power as a social

²²³ Interview with P. Schneider, prosecutor, Court of Kahnawake, 30 November 1989.

control mechanism in the community²²⁴ and, as will be remembered from my earlier reports of the gossip which arose in relation to my presence in the community as either a spy or an English nanny, was something which I experienced firsthand. From my own, albeit brief, observations of the situation in Kahnawake, I would suggest that little transpires in the court which goes unnoticed by the community, and protection of official records can be seen to offer only minimal preservation of confidentiality.

The result of all of this was the perpetuation of my efforts to obtain at least minimal Court data by post through correspondence with the Justice Coordinator. After a series of letters unanswered, I finally received a response which stated that my request would be directed to the Grand Chief (the same individual who had earlier referred me to the Justice Coordinator as the essential authority in the matter of the Court's records), and that (another) letter of support from my supervisor would be required. The latter obtained and passed on to the Coordinator, I received from her the statistics contained in appendices A and B of this dissertation, which had been gleaned from those records at the direction of the Coordinator, with the blessing of the Grand Chief, by a secretary to the Court. The data detail only the charge and outcome of each case, a limitation dictated by what I understand are the limitations of the records themselves, for the period spanning 1986-1989,

²²⁴ Field notes in researcher's possession, Kahnawake, 1989.

and 1991-1993. They are discussed in detail in part 6 of the thesis, in a discussion of the law-jobs of the Court.

When I began to suspect that detailed records of the workings of the Court of Kahnawake would not be forthcoming from within the community, I attempted to gain access to the very limited holdings relevant to the modern administration of justice in Kahnawake maintained by the Public Archives in Ottawa. There proved to be very few holdings in this regard, and I was required to request access to them through the processes established under current "freedom of information" legislation. The documents which I received some time after making this application proved to be of absolutely no value in understanding the current juridical climate in Kahnawake, as their much of their contents had been "inked over" - censored - in order to protect the privacy of the Mohawks named in the records. It was clear my difficulties in securing any documentary evidence of the functioning of the Court of Kahnawake would not be alleviated through recourse to the Archives.

My efforts to gain a full and free access to the Court in session itself also met with some difficulties. As was the case with the strategy for accessing the Court's records, I felt it was important, as a stranger and non-Mohawk, to obtain the permission of the Court before I embarked upon its observation. This dispensation, like that in relation to the records, was also quite long in coming, such that I was able to sit in the Court for only a limited number of its sessions. What I observed

about its form and functions is described below, and it is worth noting here that I saw little in the nature of what may be termed the "resolution" of criminal level disputes, nor were any acts of "homicide" or "arson", and only seven acts of minor theft, adjudicated in the span of the research and the court statistics.

In my limited period of access to the court, I observed only a single case which involved summary level criminal activity, and that involved the sentencing of two Mohawk youths for acts of mischief and petty theft. The trial portion of their cases preceded my entrance to the Court, and thus I knew only that they were found guilty; what is perhaps more interesting, and which speaks of the "community input" cited by Justice Diabo, is the involvement of both the Justice's personal knowledge of the defendants and the parents' input into the conditions of the sentence - this despite the fact that the youths did not qualify as juveniles and thus the familial involvement in the case may be seen as somewhat unusual. Both the Justice's impressions of the boys as troubled, but not overly troublesome and therefore unlikely recidivists, and his assessments of their supportive families and those families' apparent willingness to accept a portion of the responsibility for preventing the young men's recidivism, figured prominently in the sentence of a fine and community service work handed down to the boys. Of course, inasmuch as it may be argued that most courts consider the context in which a sentence must be served

before imposing it, and familial and similar social factors may be prominent elements in imposing a relevant sentence and maximizing the potential for its successful completion, this generalization of responsibility is probably not uniquely Mohawk, nor is the inclusion of "local knowledge" of the case of its circumstances, where such is available to the bench in a particular case.²²⁵ Beyond this "public-level dispute", the law-jobs done by the Court were essentially those arising from the disputation of traffic citations and very minor disturbances of the local peace, a trend which was noted above.

So what, you are quite justified in asking, in the midst of all these disappointments in the field, did I gain from the time I spent in Kahnawake between 1988 and 1990? Perhaps most

²²⁵ I acted as Clerk to the Chief Territorial Justice of the Yukon Territorial Court for a period of three months in the autumn of 1983 as part of my undergraduate training in criminology, and was in Court on an almost daily basis, observing and critiquing the territory's "Justice of the Peace Training Program" in terms of its graduates' performance on the bench. In this context and especially that of the Young Offenders' Court, which deals with the crimes of juveniles and is presided over by a Territorial Justice, I repeatedly observed the efforts of the bench to determine familial and community support for the sentences it handed down, these factors seen as paramount to the potential for success of efforts to rehabilitate defendants found guilty in criminal cases. Inasmuch as the Yukon is a place of limited population and, in terms of Canadian culture, has a unique local and territorial culture, it is not unlike Kahnawake: In both places the court tends to act with a fair sense of connection to the people it serves and the disputes it administers, taking the knowledge implicit in that connection into consideration in the decisions it makes and the sentences it confers. In this light, I find it difficult to see Diabo's "community flavour" as uniquely Mohawk or "traditional" in the sense in which tradition is described at pages ___ - ___ of the dissertation. It may be further challenged whether this practice is evidence of some "humanistic" quality peculiar to the Mohawks of Kahnawake.

importantly, and as will be seen in part 6, I was able to acquire an understanding of the political context of separate justice in Kahnawake, and the machinations over tradition which are a central commodity in that context. I did learn what it was that the traditionalists were speaking of when they referred to "traditional dispute resolution" or "traditional law", although I was unable to obtain any clarification of the same concepts when used by members of the Mohawk Council, who seemed to be playing "catch-up" with the traditionalists in the promotion of separate justice, arguing that the Indian Act Court was informed by Mohawk tradition and was merely a stepping stone to an autonomous justice system in Kahnawake.

I was also able to gain insights into the endurance of local traditional knowledge and history in Kahnawake, and to observe in action their campaign to recover these things, of which my research was one aspect. Other examples of this reclamation included the "survival school", described above in the demographic profile of the community, "Mohawk immersion" courses, and the encouragement of such "traditional" gatherings as "pow-wows", wherein aboriginal people from a range of nations gather to share cultural experiences such as dancing, craftworks and political talk. These insights combined with my growing knowledge of the community itself, obtained both through direct observation and the kind tutelage of my host family - both nuclear and extended - to inform of the social matrix of which a "traditional justice system" would be an important part, and

which would necessarily inform its viability and legitimacy. These are matters which I deal with in part 6.3 when consideration of some of the policy and pragmatic considerations in the activation of separate justice is offered.

Because of the paucity of local, oral history in the community, most of my research "upstream" toward the discovery of Mohawk Iroquois historic traditions of dispute resolution was grounded within the substantial written records, both primary and secondary, informing of the history and traditional culture of the Mohawk people. It is to a brief outline of the nature and depth of those sources that I turn now.

(ii) Primary and Secondary Literature on Iroquoian Traditions of Dispute Resolution and the History and Culture of Kahnawake

Because of their position on the geographical cutting edge of the post-seventeenth century colonial endeavour in Northeastern America, there exists a relative wealth of primary records chronicling the Mohawk Nation and the Six Nations Iroquois Confederacy of which they were and are a significant aspect. These materials have fed the development of a plethora of secondary works on the Iroquois and Mohawks, and thus I was fortunate to have at my disposal a substantial body of both primary and secondary written materials detailing a range of matters relevant to the Mohawk people, both past and present.

While the preceding materials were unquestionably helpful in compiling a general culture and political history of the Kahnawake Mohawks, as will be seen in the section which follows this one, I was to be quite disappointed with the quality of the contemporary, primary reports of public dispute resolution in regard to the focal acts. Nearing the completion of my "upstreaming", and becoming increasingly concerned about the paucity of direct reports of "Mohawk Law" in the primary materials, I consulted a number of well-known historians working in the area of the Iroquois and criminal justice.²²⁶ These authorities informed me that there exists a significant gap in the records and research pertaining both to the workings of "traditional legal mechanisms" among the historic Iroquoian peoples and to the administration of criminal justice among the "domiciliated" Iroquois in New France, of whom the Mohawks at Kahnawake were one of the more notable examples. The only notable exceptions to this are the Huron records of the Jesuit Relations and Allied Documents. These reports, although detailing these processes among a nation apart from the Mohawk, are generalizable to the Mohawks owing to the great similarities these peoples shared, not only in the Iroquoian family of

²²⁶ Including: William Eccles, Professor Emeritus, Department of History, University of Toronto, Toronto, Ontario; Jan Grabowsky, Professor of History, University of Ottawa, Ottawa, Canada; Bruce G. Trigger, Professor of Anthropology, McGill University, Montreal, Quebec, Canada; Jack Little, Professor of History, Simon Fraser University, Burnaby, British Columbia; Robert Allen, Chief, Treaties and Historical Research Branch, Department of Indian and Northern Affairs, Government of Canada, Hull, Quebec, Canada.

languages, but in many common social, cultural and political traits as well. These similarities outweigh the differences and permit generalisations across these nations, notwithstanding the reluctance of some modern Iroquois to accept these realities of cultural parity.²²⁷

It is thus the Relations which provide the most detailed descriptions of, and are the central source of primary reports on, Iroquoian dispute resolution and legal procedure in the earliest post-contact juncture; they are also the essential source in compiling a more general history of "mission communities" like Kahnawake. Given their importance, it is important that those who would consult them bear in mind that, like their secular counterparts, the missionaries' reports must be used with caution given their biases and limitations. Much of the bias originates in the priest's peculiar blend of genuine but paternalistic concern for "savage souls", and a cultural arrogance which, while it permitted a certain fascination with, and even grudging respect for, some aspects of the indigenous culture and lifestyle, in no way equated that culture with putatively superior French ways. This ambivalence is apparent throughout the Relations, wherein aspects of amerindian culture are described with some detail, but are often cast in tones of inferiority or "savagery". In many cases, the traditions of nations and the actions of "pagans" are described essentially in

²²⁷ Personal communication with B.G. Trigger, Professor of Anthropology, McGill University, Montreal, Quebec, 18 April 1990.

relief to the teachings of the priests and the conduct of converts, in an effort to convince readers of the priests' good works and the overall success of the missions.²²⁸ Once sifted of these biases, however, and used with care, the Relations, as the works of keenly observant men who lived with and participated, however grudgingly, in Iroquoian culture, contain a wealth of rich ethnographic information on the Mohawks in general and Kahnawake in particular. And while additional limited information on "law and order" in nineteenth and twentieth century Kahnawake is located within the Indian Affairs files, the proposals and publications of the Mohawk Council and Nation Office and the limited records of the Indian Act court at Kahnawake, these records, combined with the earlier primary documentation contained within the Relations, may be seen to constitute the sole sources of primary information on "Mohawk Law", past or present.

Noteworthy secondary works which contain descriptions of "Iroquoian law" include Lewis Henry Morgan's famous treatise League of the Ho-De-No-Sau-Nee, or Iroquois²²⁹ (1851), Horatio Hale's Iroquois Book of Rites²³⁰ (1883), Reid's analysis of the blood feud as practised among the Cherokee²³¹, and the only work

²²⁸ Richter, "Iroquois versus Iroquois", p.1.

²²⁹ 3 Books (Rochester, New York: Sage, 1851; reprinted, New York: Corinth Books, 1962).

²³⁰ Philadelphia: D.G. Brinton, 1883.

²³¹ Reid, A Law of Blood.

by a Iroquois on juridical matters, Newell's Crime and Justice Among the Iroquois Nations.²³² The latter text, rather an idealised rendition of the subject, draws heavily upon Morgan, as well as upon what must be qualified as the author's personal, rather well-acclulturated views of responses to deviance among the Iroquois. In this context Newell's work has some similarity with Morgan, whose outlines of traditional Iroquoian responses to deviance and delicts are premised almost entirely upon the evidence of a single Seneca Iroquois whose own experiences with acculturation suggest a certain "recycling" or at least "rethinking" of early post-confederacy traditions. Notwithstanding their flaws, however, the preceding works, when used carefully together with especial emphasis upon the Relations, can create a relatively clear and cogent representation of the subject.

These secondary works are complemented by the few modern studies or analyses of "Mohawk law" authored both by Kahnawake²³³ and other Mohawks²³⁴ and, in one case, the Nation Office's non-Mohawk legal counsel.²³⁵ Historical information on

²³² See note 113, supra.

²³³ Christine Deom, "Traditional Courts and Conflict with the s.107 Indian Act Court at Kahnawake" (Faculty of Law Term Essay, Montreal: McGill University, 1988); A.B. Deer, "Notes on Haudenosaunee Justice" (unpublished paper, Kahnawake Mohawk Nation Office, 1988).

²³⁴ Akwesasne Band Council, "Haudenosaunee Justice System" (unpublished paper, Akwesasne Band Council, undated).

²³⁵ Mark David, "Two Systems for One Nation?" 6(4) Tribune Jiuve (1989): 16-19.

the interaction of "traditional law" in relation to criminal matters and colonial or Canadian criminal laws and legal systems may be gained from a few published historical sources, such as Van Laer's Minutes of the Courts of Albany, Rensselaerwyck and Schenectady, 1668-1685²³⁶, as well as such unpublished papers as Grabowski's "Crime and Punishment: Sault-St-Louis, Lac des deux-montagnes and French Justice, 1713-1735", or Deom's "Traditional Courts and Conflict with the s.107 Indian Act Court at Kahnawake".

Beyond these primary materials and limited secondary sources, there exists no further elaboration or analysis of "Iroquois law", nor has any other research of which I am aware attempted to draw together all the available information into a single analysis of "Mohawk Iroquois law", past and present. In this contribution, as well as the presentation of the only comprehensive chronicle of Kahnawake and the analysis of "tradition" in regard to modern "traditional legal systems" within amerindian nations within Canada, it is my hope that the dissertation can make a truly unique overall contribution to the field of amerindian legal and Iroquoian studies.

Primary materials on matters outside "traditional dispute resolution", which contributed to the more general chronicle of the Kahnawake Mohawks, were gathered from a variety of settings, depending upon the period of Iroquois history to which they were relevant. The earliest primary materials, including those

²³⁶ Albany, 1926-1932 (n.c.).

published collections of Documents Relating to New Netherland, 1624-1626²³⁷, Documents Relative to the Colonial History of the State of New York²³⁸, The Documentary History of the State of New York²³⁹, The Papers of Sir William Johnson²⁴⁰, and the aforementioned, crucially important Jesuit Relations and Allied Documents, were accessed at the British Museum, London. Also at the latter location were the unpublished primary materials contained in the Haldimand Papers, while still other individual documents of significance were located at the Public Records Office in Kew, England.

The New York Public Library in Manhattan, New York, was the setting for consulting the Peter Schulyer Papers²⁴¹, as well as the microfilm collection of primary historical materials relevant to the Iroquois, compiled by a distinguished team of Iroquoianists and entitled Iroquois Indians: A Documentary

²³⁷ A.J.F. Van Laer, ed., Documents Relating to New Netherland, 1624-1626, in the Henry E. Huntingdon Library (San Marino, California: The Henry E. Huntingdon Library and Art Gallery, 1924).

²³⁸ Edmund B. O'Callaghan, ed., Documents Relative to the Colonial History of the State of New York; procured in Holland, England and France, by John R. Brodhead, 15 vols. (Albany: Weed, Parsons, 1853-1887).

²³⁹ Edmund B. O'Callaghan, ed., The Documentary History of the State of New York, 4 vols. (Albany: Weed, Parsons, 1849-1851).

²⁴⁰ Sir William Johnson, The Papers of Sir William Johnson, eds., James Sullivan et al., 14 vols. (Albany: University of the State of New York, 1921-1965).

²⁴¹ Manhattan, New York. New York Public Library. Peter Schulyer Papers.

History.²⁴²

The Kanienkehaka Raotitiohkwa Cultural Centre in Kahnawake, Quebec, provided those published collections of primary documents of The Voyages of Jacques Cartier,²⁴³ The Works of Samuel de Champlain²⁴⁴, as well as a variety of secondary and unpublished materials specific to the Mohawks and the Mohawks of Kahnawake. Within Canada the single most significant sources of unpublished, primary materials were the National Archives of Canada and the Department of Indian and Northern Affairs Treaties and Historical Research Centre, both located in Ottawa, Ontario. The National Archives were consulted for records and materials relevant to the Mohawks of Kahnawake contained within Record Groups 10 (Records Relating to Indian Affairs) and 8 (Military Records), as well as Manuscript Groups 11 and 21, and the French Records, series C11A and B.

These primary materials contributed to a chronicle of the role of the Iroquois Confederacy and the Mohawk Nation in the colonial competition, whether classic or internal, for northeastern America spanning the period from the middle sixteenth century to well into the twentieth, with a definite

²⁴² See: Iroquois Indians: A Documentary History. Guide to the Microfilm Collection (Woodbridge, Connecticut: Research Publications, 1984).

²⁴³ Jacques Cartier, The Voyages of Jacques Cartier [1894], ed. and trans., Henry P. Biggar, 6 vols. (Ottawa: Publications of the Public Archives of Canada, 1924).

²⁴⁴ Samuel de Champlain, The Works of Samuel de Champlain [1626], ed. and trans., Henry P. Biggar, 6 vols. (Toronto: The Champlain Society, 1922-1936).

emphasis on the seventeenth and eighteenth centuries. Because the focus of the newcomers was limited primarily to the development of trade and the striking of military alliances, much of the early reports emerging from colonial offices and officials or the military are limited in their insights on Iroquoian culture and traditions to matters relevant to these foci. As a result, such records tend to concentrate more upon events occurring around the northern Mohawk communities than on those taking place within them, and tend to include only that information which was deemed important to the writer at the time.

Recalling the concerns about recorded histories discussed previously in regard to "History and Decolonization" at pages 107-150, it should also be noted that the reports, dairies and letters of interest here must not be perceived as somehow "objective" sources. Such records are no more immune from influence by the interests of their composers than are their oral counterparts, and researchers do well to fetter their reading with the possibility that in many cases primary reports reflect not only what a given actor saw (or thought he/she saw), but wished those reading his or her records to see as well. A good example of the difficulties associated with written records arises in the context of Sir William Johnson's jottings on the amerindian confederacy known as the "Seven Nations of Canada".²⁴⁵ In correspondence with a noted Canadian authority on

²⁴⁵ This confederacy is discussed in part 4 of this work.

the colonial period, the issue was raised that, insofar as Johnson's position and reputation in colonial and Imperial circles depended directly upon his success in marshalling the good will and military assistance of the Mohawks, he had strong incentive to exaggerate both his own and Mohawk stature on the colonial front²⁴⁶; a possibility which must be read into most, if not all, of his reports on the Mohawks and their northern brethren at Kahnawake. The caution in relation to Johnson's records is easily generalised beyond them, dictating the need to be aware not only of the narrow focus of many colonial records, but also of the importance of sifting for the possible biases and interests of their authors. Possible confusions between recorded perceptions and "what was really going on" require that all such records be approached with caution, both in receiving and analyzing their contents and with respect for their limitations.

With regard to documenting what was happening within the northern Mohawk communities, and especially Kahnawake and her predecessors after 1667, the single most important source of historical information, both general and legal, remains that of the letters, journals and reports of the Jesuit missionaries who were the only Europeans to reside within both the Mohawk Valley cantons and the successive northern settlements, and who

²⁴⁶ Personal Communication with W. J. Eccles, Professor Emeritus, Department of History, University of Toronto, 30 November 1991.

involved themselves intimately with Mohawk culture and society.²⁴⁷ That being said, however, even this source is inadequate in contributing to an understanding of the conduct of dispute resolution in Kahnawake over time; that it is less parsimonious of information relevant to a more general culture history is helpful, and permits some comment on apparent alterations in that aspect of Mohawk history over time. Thus it is that for much of this period of Kahnawake's past, we confront the gap mourned by Gluckman and noted by the historians and Iroquoianists I consulted, and it is possible only to infer possible changes in Mohawk traditional culture from the limited contents of the Relations.

The situation improves somewhat as the chronicle of Kahnawake moves into the nineteenth and twentieth centuries, and here the most important sources of primary information on the community were the "Annual Reports" and files of the Department of Indian and Northern Affairs. It was in the Department's "Annual reports" (1864-1920) and the previously non-public files of "Band Council minutes", "elections" and "Band Management" originating within Kahnawake and spanning the period 1889-1991, that the most significant information for the modern history of Kahnawake was found.²⁴⁸ Here I encountered significant

²⁴⁷ R.G. Thwaites, ed., The Jesuit Relations and Allied Documents. Travels and Explorations of the Jesuit Missionaries in New France, 1660-1791.

²⁴⁸ These 37 previously confidential files of the Department of Indian and Northern Affairs were formally screened for release to and use by the researcher by a senior member of the Treaties and

information on "life on the ground" in the community on a daily basis, including most notably fascinating insights on the persistence of an historic conservative-traditionalist struggle as late as 1991 and perceptions of Mohawk history and tradition maintained within those factions. These primary sources and the insights they contain are that much more important given the absolute absence of any secondary historical works on the community in the twentieth century, which adds an important element of originality to the historical component of the dissertation.

These primary materials, both published and unpublished, were complemented by a wide range of secondary materials on the history, culture and politics of the Iroquois and Mohawk people. Of significance in rounding out the documentary histories of the historic seventeenth and eighteenth centuries were the works of Francis Jennings on the Iroquois Confederacy²⁴⁹ and William Fenton's prolific researches on Iroquois culture history²⁵⁰,

Historical Research Branch, Department of Indian and Northern Affairs, Ottawa.

²⁴⁹ Including, The Invasion of America: Indians, Colonialism and the Cant of Conquest (New York: W.W. Norton and Co., 1975; The Ambiguous Iroquois Empire: The Covenant Chain Confederation of Indian Tribes with the English Colonies (New York: W.W. Norton and Co., 1984); Empire of Fortune: Crowns, Colonies and Tribes in the Seven Years War in America (New York: W.W. Norton and Co., 1988); Francis Jennings, William N. Fenton, Mary A. Druke, David R. Miller, eds., The History and Culture of Iroquois Diplomacy: An Interdisciplinary Guide to the Treaties of the Six Nations and their League (Syracuse: Syracuse University Press, 1985).

²⁵⁰ Including, "Long-Term Trends of Change Among the Iroquois", in Proceedings of the 1957 Annual Spring Meeting of the American Ethnological Society (1957):160-174; "The Iroquois in History", in

while Jaenen's analyses of amerindian relations with the French and, more notably, their missionaries²⁵¹, and Richter²⁵² and Ronda²⁵³ on "pagan" versus convert competition, were of significant value in contextualizing the mission experience as detailed in the Relations. Fenton's work was equally helpful in detailing Iroquois culture, as was the Smithsonian Institution's Handbook of North American Indians, vol.15, "Northeast"²⁵⁴, most notably in Elisabeth Tooker's "The League of the Iroquois: Its History, Politics and Ritual"²⁵⁵ and Fenton and Tooker's

North American Indians in Historical Perspective, eds., Eleanor Burke Leacock and Nancy Oestriech Lurie (New York: Random House, 1971):129-168); "Problems Arising from the Historic Northeast Position of the Iroquois", 100 Smithsonian Miscellaneous Collections (1940):159-251; "Iroquoian Culture History: A General Evaluation", Bureau of American Ethnology Bulletin (1961):271-277; "The Lore of the Longhouse: Myth, Ritual and Red Power", 48(3) Anthropological Quarterly (1975):131-147; "Seth Newhouse's Traditional History and Constitution of the Iroquois Confederacy", 93(20 Proceedings of the American Association Philosophical Society (1949):141-158.

²⁵¹ Including, "The French Relationship with the Amerindians", paper presented at the IV Convegno Internazionale dell'Associazione Italiana de Studi Canadesi, Universita di Messina, Messina, 1981; "The Frenchification and Evangelization of the Amerindian in Seventeenth Century New France" 35 Canadian Catholic Historical Association (1968):57-71; "Amerindian Views of French Culture in the Seventeenth Century", LV Canadian Historical Review (1974):261-291; "Amerindian Responses to French Missionary Intrusion, 1611-1760: A Categorization", in Religion/Culture: Comparative Canadian Studies (Ottawa: Association for Canadian Studies, 1985).

²⁵² "Iroquois versus Iroquois".

²⁵³ "We are Well as We Are": An Indian Critique of Seventeenth Century Christian Missions", 34 William and Mary Quarterly (1977):66-82.

²⁵⁴ Bruce G. Trigger, ed., Northeast, vol.15, Handbook of North American Indians (Washington: Smithsonian Institute, 1978).

²⁵⁵ Ibid., pp.418-441.

"Mohawk"²⁵⁶ as well as a number of older works, including those of J.N.B. Hewitt²⁵⁷, Arthur C. Parker²⁵⁸ and Anthony F. C. Wallace.²⁵⁹

Secondary materials specific to the community of Kahnawake were limited in quantity and, in many cases, in quality as well. They may be generally categorised as "popular", "academic" or "political", and were both published and unpublished, as well as authored both by Mohawks and non-Mohawks.

Within the "popular" stream are those works contained within magazines or non-academic books, including the earliest, published in 1886 by George Augustus Salas, entitled "Cuagnawagha" [sic].²⁶⁰ Two additional books on the northern Mohawk community authored by Jesuits resident in the community offer primarily historical outlines of Kahnawake, however, given

²⁵⁶ Ibid., pp.466-480.

²⁵⁷ Including: "Some Exotic Aspects of the League of the Iroquois", 19 International Congress of Americanists (1917):322-326; "A Constitutional League of Peace in the Stone Age of America", Annual Report of the Smithsonian Institution (1918):527-545; "Legend of the Founding of the Iroquois League", 5 American Anthropologist (1894):61-67.

²⁵⁸ Including: "The Constitution of the Five Nations or the Iroquois Book of the Great Law", 184 New York State Museum Bulletin (1916); "The Peace Policy of the Iroquois", 40 Southern Workman (1911); "The Code of Handsome Lake", in Parker on the Iroquois, ed., William N. Fenton (Syracuse: Syracuse University Press, 1968:20-143.

²⁵⁹ Including: The Death and Rebirth of the Seneca (New York: Alfred A. Knopf, Publishers, 1970); "The Dekanawideh Myth Analyzed as a Record of a Revitalization Movement", 5(2) Ethnohistory (1958):118-130.

²⁶⁰ In Under the Sun: Essays mainly Written in Hot Countries (London: Vizetaelly and Co., 1886).

their authorship and the biases evident throughout the texts, they must be used with caution in academic studies. The first of the two emerged in 1922 under the title Historic Caughnawaga²⁶¹, while the second is of the more recent vintage of 1976.²⁶² This latter work contains little in the way of history, favouring instead essentially religious anecdotes originating in the earliest portions of Kahnawake's nearly three hundred year chronicle. Articles on "Caughnawaga" are also found in the Canadian Geographic magazines for 1935²⁶³ and 1986²⁶⁴, while another Canadian publication, Beaver, contains a brief elaboration of "The Caughnawagas" published in 1963.²⁶⁵ While these popular sources are interesting, for the most part they offer little to academic researches on the community.

Secondary academic sources included a small number of largely historical unpublished dissertations²⁶⁶, theses²⁶⁷ and

²⁶¹ E.J. Devine, S.J. Historic Caughnawaga (Montreal: Messenger Press, 1922).

²⁶² Henri Bechard, The Original Caughnawaga Indians (Montreal: International Publishers' Representatives, Canada:1976).

²⁶³ M.A. Peck, 'Caughnawaga', 10 Canadian Geographic (1935):92-100.

²⁶⁴ Janice Hamilton, "Caughnawaga Perseveres: Forging a Renewed Mohawk Nation in the Shadow of Montreal", 106(5) Canadian Geographic (1986):36-45.

²⁶⁵ Fred Bruemmer, "The Caughnawagas", 296 Beaver (1963):4-11.

²⁶⁶ Including: David S. Blanchard, "Patterns of Tradition and Change: The Recreation of Iroquois Culture at Kahnawake" (unpublished PhD. dissertation, University of Chicago, 1982). It should be noted that no direct information or quotations are taken from this work, as it not only contained some observations which are at best fanciful (i.e., the equation of High Steel workers'

papers²⁶⁸, as well as a limited number of papers emerging from the Treaties and Historical Research Branch of the Department of Indian and Northern Affairs.²⁶⁹ Appositely placed here is one unpublished paper authored by a Kahnawake Mohawk in the community itself, which pertains essentially to matters of

tool belts as phallic symbols, supported only by the workers' tendency not to permit their children to play with them), but evidenced such an overwhelming number of mistakes in referencing and citation that the bulk of the information it contains must be rejected outright, save where the reader is able to obtain corroboration elsewhere. It may also be noted here that Blanchard also authored the Kahnawake Survival School's historical text, which has been found to manifest many of the same defects as his doctoral dissertation [7 Generations: A History of the Kanienkehaka (Kahnawake: Kahnawake Survival School, 1980)] Other, superior doctoral works include Gretchen L. Green, "A New People in an Age of War: The Kahnawake Iroquois, 1667-1760" (unpublished PhD. dissertation, College of William and Mary, 1991). Also available to the researcher was an unpublished paper by the same author, entitled "Between Autonomy and Dependence: Kahnawake-French Relations, 1701-1760".

²⁶⁷ Such as Thomas R. Agan, "The Caughnawaga Indians and their Influence on English-Indian Relations to 1763" (unpublished M.A. thesis, University of New Hampshire, 1965).

²⁶⁸ Including: J. Stanley Kennedy, "Unrest in the Religious Life of the Indians Living on the Caughnawaga Reserve During the Year, 1946" (Department of Psychology Term Essay, McGill University, undated); Matthew Noah Tuchow, "The Mohawks of Brooklyn: A History of the Caughnawaga Community" (History Department senior essay, Yale University, 1983); Wayne White, "The Caughnawaga Indians 1920-1940" (Department of History Term Essay, Concordia University, 1979).

²⁶⁹ Including: Canada. Indian and Northern Affairs. "The Impact of the American Revolution (1775-1781)" (Ottawa: Treaties and Historical Research Branch, undated); D.L.S. Taggart, "Caughnawaga Indian Reserve: Report, General and Final" (Ottawa: Indian Affairs and Northern Development, 1948); Canada. Indian and Northern Affairs. "Land Title at Caughnawaga" (Ottawa: Treaties and Historical Research Branch, 1970).

land.²⁷⁰ The few published academic works focusing on Kahnawake dealt with "acculturation"²⁷¹ and "revitalization movements"²⁷², religion²⁷³, history²⁷⁴, and culture.²⁷⁵

Those published and unpublished works which fall under the classification of "political" writings include statements of position by the Nation Office, Mohawk Council or individual Mohawk people on a variety of matters. Many of these sources, especially those originating from within the Haudenosaunee and/or Nation Office²⁷⁶, as well as the Mohawk Council²⁷⁷,

²⁷⁰ A.B. Deer, "The Lands of the Iroquois, the Kanienkehaka, and the Kahnawakehronon: A Preliminary Report" (Kahnawake: Kahnawake Development Research Program, March 1985).

²⁷¹ Morris Freilich, "Cultural Persistence Among the Modern Iroquois", 53 Anthropos (1958):473-484; Fred Voget, "Acculturation at Caughnawaga", pp.220-213; Fred Voget, "Kinship Changes at Caughnawaga" 55(3) American Anthropologist (1953):385-394.

²⁷² Susan Koessler Postal, "Hoax Nativism at Caughnawaga: A Control Case for the Theory of Revitalization", 4(3) Ethnology (1965):251-265.

²⁷³ David S. Blanchard, "...To the Other Side of the Sky: Catholicism at Kahnawake, 1607-1700", 24 Anthropologica (1982):77-102.

²⁷⁴ A.B. Deer, "Kahnawake: A Brief History", 6(4) Tribune Juive (1989):14-15; Anna Dill Gamble, "Col. James Smith and the Caughnawaga Indians", 29(1) Records of the American Catholic Historical Society (1938):1-26; Edward P. Hamilton, "Unrest at Caughnawaga, or, the Lady Fur Traders of Sault St. Louis", 11 Bulletin of the Fort Ticonderoga Museum (1986):36-45.

²⁷⁵ M.R. Harrington, "Da-Ra-Sa-Kwa.- A Caughnawaga Legend", 19 Journal of American Folklore (1906):127-129.

²⁷⁶ Such as: Haudenosaunee, "The Sovereignty Position of the Kanienkehaka (Mohawk Nation), Kahnawake Territory of the Haudenosaunee Six Nations Iroquois Confederacy" (Kahnawake: Mohawk Nation Office Archives, September 1987); Haudenosaunee, "A Position of Sovereignty", 6(4) Tribune Juive (1989):6-10.

detail the "sovereignty position" of the Mohawk people. These statements are informative of the political context within which assertions toward juridical self-determination are developed and articulated within Kahnawake; they may be further illuminative of the nature of factionalist competition, most notably of the conservative-traditionalist variety, within the community.

Taken together, these sources created a chronicle of Kahnawake and her culture history which suggests a community moving increasingly away from the traditions in evidence in the early post-contact context, as these are revealed by the records. That there are many gaps in these sources is unquestioned, and these affect not only the resulting story of Kahnawake but also the degree to which it is possible to trace the alterations or endurance of traditional culture in general, and "traditional dispute resolution" in particular. Although the records thus restrict our ability to speak with complete certainty on the evolution of tradition over time, it is both possible and important to draw together the various histories offered by these sources into one which not only elucidates the current drive for separate justice in Kahnawake and returns to the Mohawks that history which colonialization has taken from them. That this history is incomplete is unfortunate, but this

²⁷⁷ Mohawk Council of Kahnawake, "Mohawk People of Kahnawake's Counter-Position on the Canadian Constitution" (Kahnawake: Mohawk Council of Kahnawake, Office of the Council of the Chiefs, 27 November 1981); Mohawk Council of Kahnawake, "Position on Mohawk Indian Government and the Indian Act Made by the Mohawks of Kahnawake in 1979 and 1980" (Kahnawake: Mohawk Council of Kahnawake, Office of the Council of the Chiefs, undated).

does not remove its importance as a source of identity and empowerment for the Mohawk people at Kahnawake. And to the degree that the gaps in local knowledge which predated the research may be filled by its results, it becomes possible to assess the degree to which the histories and traditions which animate the drive for separate justice are in some sense invented, and in turn to analyze the implications of invention for the realization of an autonomous "traditional dispute resolution" structure for the Mohawks at Kahnawake.

4. The Ways of the People of the Flint: Culture, Politics and Subsistence Within the Historic Mohawk Nation

While there has long been a debate concerning the location of the development of Mohawk culture, and whether this development occurred "in situ" within the traditional territories of the Mohawk people in the region of modern Upper New York State, or was carried with the people into that place²⁷⁸, the nation appears to have been resident in its traditional territories as early as 1000 A.D. Its boundaries,

²⁷⁸ An excellent summary of the relevant theories is contained within Bruce G. Trigger, "Hochelaga: History and Ethnohistory", in Cartier's Hochelaga and the Dawson Site, eds., James F. Pendergast and Bruce G. Trigger (Montreal: McGill-Queen's University Press, 1972), pp.40-93. See also, James A. Tuck, "Northern Iroquoian Prehistory", in Northeast, vol.15, Handbook of North American Indians, vol. ed., Bruce G. Trigger (Washington: Smithsonian Institute, 1978), p.322-333.

like those other confederated Iroquois Nations with whom the Mohawks collectively defined "Iroquoia", were held and marked by the sites of principle villages and hunting regions. And although villages were undoubtedly relocated and international boundaries fluctuated with warfare, relatively stable boundaries were essentially in place by the initiation of the seventeenth century. Indeed, it is likely that even prior to that time, an incipient silhouette of Iroquoia and the Mohawk Nation was probably discernible which at least approximated the outline presented in figure 2, below.

Within this territory it appears that the Mohawk Iroquois had a long-established economy defined by the pursuits of hunter-gatherers and fishermen, and that it was not until around 1070 A.D. that horticulture began to be practised in earnest.²⁷⁹ Corn was probably the first crop cultivated, followed later by beans and squash, all of which are believed to have entered the northeast from the west or south.²⁸⁰ These activities probably influenced the Mohawks' eventual settlement into semi-permanent villages, which were relocated as necessary to accommodate soil exhaustion in the gardens and reductions in local supplies of

²⁷⁹ Tuck, "Northern Iroquoian Prehistory", p.325.

²⁸⁰ Ibid.

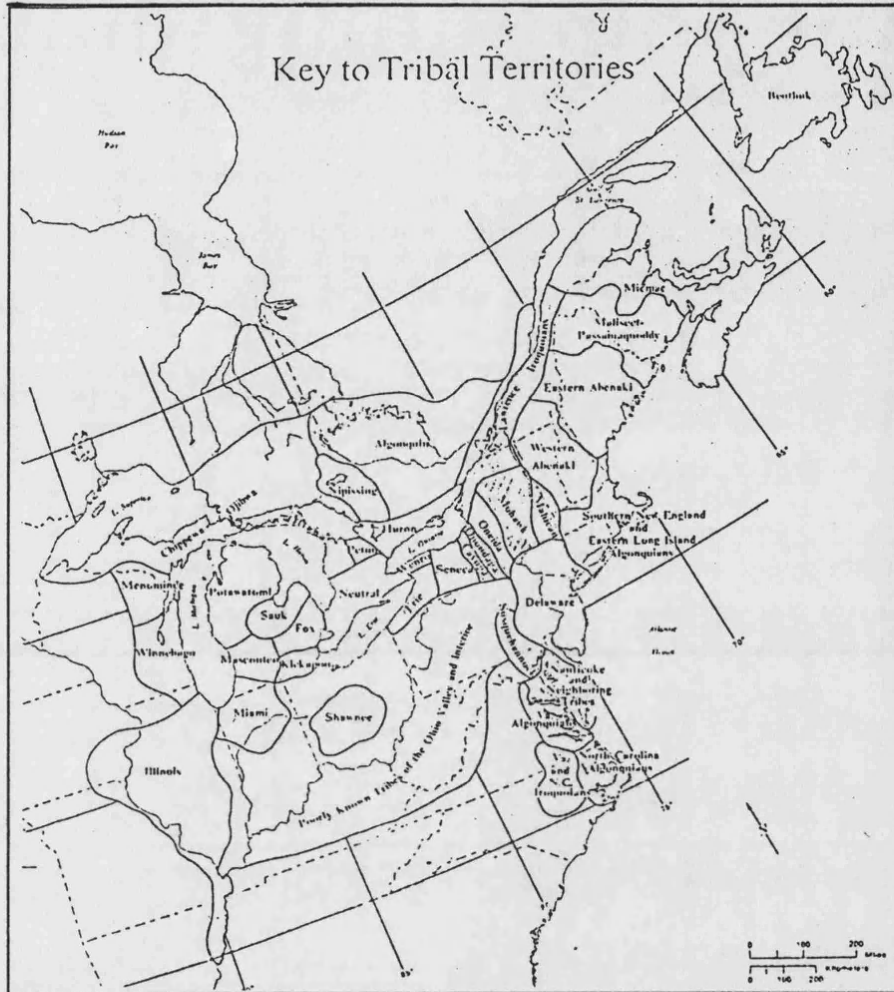


Figure 2 Diagram of Tribal Territories (reproduced from Trigger, vol.ed., Northeast, Handbook of North American Indians, p.ix.

firewood or game. Additional changes of residence were undoubtedly caused by the fracturing of communities due to internal tensions²⁸¹, or by the selection of inadequate or inappropriate village sites.²⁸² Such movements were estimated

²⁸¹ William N. Fenton, "Locality as a Basic Factor in the Development of Iroquois Social Structure", Bureau of American Ethnology Bulletin 149 (1940), p.42.

²⁸² Poor soil was a factor which rapidly rendered a site inappropriate. It was the cause of moves, for example, of the Kahnawake Mohawks from their first "Canadian" village site at

to have occurred at random intervals of between eight and fifty years over distances which were rarely over five miles.²⁸³

With the advent of semi-permanent villages came the development of routines among the inhabitants. The various responsibilities of subsistence evolved along gender lines such that all activities emanating from agriculture, gathering, or maintenance of the household fell to the women, while the men were chiefly involved in the hunt.²⁸⁴ All labours came to be synchronized over a yearly calendar of four seasons²⁸⁵, which was punctuated with a calendric round of ceremonies designed to

Kentake to the second site located at Kahnawake, see, JR 61, p.241; JR 67, p.25; Devine, Historic Caughnawaga, p.39.

²⁸³ JR 11, p.7; JR 67, p.25; JR 19, p.133. Also: Elisabeth Tooker, "Three Aspects of Northern Iroquoian Culture Change", Pennsylvania Archaeologist 30 (1960), p.67; Martha Champion Randle, "Iroquois Women, Then and Now", Bureau of American Ethnology Bulletin 149 (1951), p.173. Randle proposes a less frequent schedule of moves, estimating these as occurring every 15-20 years. William A. Starna, "Mohawk Iroquois Populations: A Revision", Ethnohistory 27 (1980), p.378; Starna bases his estimate upon predominantly archaeological evidence, which he states discredits relocation estimates emphasising a 15-20 year cycle in favour of much less frequent moves. With regard to the Mohawks, Starna believes village sites were occupied for as long as fifty years. It is likely that the frequency of relocations altered over time, and different historical junctures may have been characterised by different patterns of movement owing to changes in environmental conditions.

²⁸⁴ JR 14, p.235; JR 15, p.155; JR 5, p.133; Johannes Megapolensis, Jr., A Short Sketch of the Mohawk Indians of New Netherland, Their Land, Stature, Dress, Manners, and Magistrates, Written in the Year 1644. John R. Broadhead, trans., New York Historical Society Collections, Series 2, 3(1) (1857), p.155.

²⁸⁵ JR 5, p.133; JR 69, pp.99-101; Megapolensis, p.158; Mary Rowell Carse, "The Mohawk Iroquois", Archaeological Society of Connecticut Bulletin 23 (1949), p.21.

give thanks for successful harvests or seasons.²⁸⁶

Winter was the time of the hunt²⁸⁷ and thus a period of great activity for the Mohawk community. Groups of men would repair to the forest followed by the women, who would establish temporary camps where they would receive the products of the men's labours and prepare the carcasses for transportation back to the village.²⁸⁸ Although the actual contribution made to the subsistence by the hunt was secondary to that of agriculture, the hunt appears to have held an inordinately prominent place in the Iroquois world view. Fenton believes its prestige arose in large measure from the dangers associated with the vast unknown regions of the forests, and the potential for supernatural encounters believed to reside in their depths.²⁸⁹ These qualities added an allure to hunting which was absent from most other subsistence routines, making it an exciting and, in his view, masculine pursuit.

The arrival of spring heralded a more varied set of tasks than the previous season, for this was the time when the maple sap would begin to run and the passenger pigeon would come to roost, and the people harvested as much of both as could be

²⁸⁶ Fenton, "The Iroquois in History", p.135.

²⁸⁷ JR 16, p.45; JR 18, p.167; JR 23, pp.315-317; JR 24, p.111, JR 69, p.99.

²⁸⁸ Carse, "The Mohawk Iroquois", pp.18-19; Morgan, League of the Iroquois, pp.345-348.

²⁸⁹ Fenton, "Masked Medicine Societies of the Iroquois", Annual Report of the Smithsonian Institution (1940), p.419.

taken, so that some might be stored for future use.²⁹⁰ As the forests and valleys came to life with the promise of another summer, the women would begin their ongoing task of gathering the roots, berries, nuts and greens which not only enhanced the diet,²⁹¹ but held medicinal qualities as well.²⁹² They would continue this chore over the tending of the fields, which was begun when "the white oak leaves [were] the size of a squirrel's foot".²⁹³ This was the moment when the toil of the women began in earnest.

Radiating out from the village like the spokes of a wheel, the gardens were the province of the women and the central supports of Mohawk subsistence. The men might assist in the clearing of new plots or as needed at harvest, but that would mark an effective end to their participation in agricultural pursuits.²⁹⁴ The women tended the fields in a program of slash

²⁹⁰ Carse, "The Mohawk Iroquois", p.19 (maple sap); William N. Fenton, "Northern Iroquoian Culture Patterns", in Northeast, p.301 (passenger pigeons).

²⁹¹ Carse, *ibid.*, p.19.

²⁹² Marcel Rioux, "Ethnology - Some medical beliefs and practices of the contemporary Iroquois Longhouses of the Six Nations Reserve", Journal of the Washington Academy of Sciences 41, (1951), p.152-158; Jack Weatherford, "The Indian Healer", in Indian Givers: How the Indians of the Americas Transformed the World (New York: Crown Publishers, 1988), pp.182-183.

²⁹³ Fenton, "Northern Iroquoian Culture Patterns", p.301; JR 23, p.317.

²⁹⁴ JR 15, p.155; Joseph Francoise Lafitau, Customs of the North American Indians Compared with the Customs of Primitive Times, William N. Fenton and Elisabeth Tooker, trans. and eds., vol.2 [Toronto: The Champlain Society, 1974 (vol.1); 1977 (vol.2)], p.70.

and burn horticulture which produced the primary crops of corn, beans and squash, enshrined in Iroquois spirituality as the "three sister providers"²⁹⁵ of their people's existence.²⁹⁶ Working together in each other's gardens, each woman evolved a proprietary relationship toward her particular field as well as the tools used to work them.²⁹⁷ Not that this control meant a great deal in practical terms; to the Iroquois, ownership equated simply with use and, at that time, the things the women used in their labours were far from scarce: land was plentiful and gardening implements were usually no more complicated than a simple wooden hoe or stick.²⁹⁸

Toward the end of the summer season, prior to the ripening of the crops and the demands of the harvest, groups of men and women would depart to commonly held waterways to fish. These large cooperative efforts were conducted in much the same

²⁹⁵ Nicholas Perrot, "Memoires on the Manners, Customs and Religion of the Savages of North America", in The Indian Tribes of the Upper Mississippi Valley and Region of the Great Lakes, ed. and trans., Emma H. Blair (Cleveland: Arthur H. Clark, 1911), p.102; Martha Champion Randle, "Iroquois Women: Then and Now", Bureau of American Ethnology Bulletin 149 (1951), p.172; Fenton, "Northern Iroquoian Culture Patterns", p.299.

²⁹⁶ Lafitau, Customs of the American Indians, I, pp.66-67; A.A. Goldenweiser, "Functions of Women in Iroquois Society", American Anthropologist (n.s.) 17, (1915), p.376; Randle, *ibid.*, p.172.

²⁹⁷ Lafitau, *ibid.*; Elisabeth Tooker, "Women in Iroquois Society", in Extending the Rafters: Interdisciplinary Approaches to Iroquoian Studies, eds., Michael K. Foster, Jack Campisi, and Marianne Mithun (Albany: State Univ. of New York Press, 1984), pp.114-117.

²⁹⁸ George S. Snyderman, "Concepts of Land Ownership Among the Iroquois and their Neighbours", Bureau of American Ethnology Bulletin 149, (n.d), p.16.

fashion as the winter hunting expeditions; the men would cast weighted nets into the bays and streams, retrieve their catch and pass it on to the women to clean and dry.²⁹⁹ For the women this was simply a variation on the smaller-scale fishing they did almost year round, using weirs and small bone hooks and line to catch eels and round fish in waters near the village.

Returning to their communities toward the close of summer, the people began preparing for one of the busiest junctures in the Iroquois calendar. Autumn was preoccupied with the all-important job of harvesting and storing the crops, and in as much as this endeavour was crucial to the physical survival of the group, it demanded the exertions of virtually every capable body in the village.

Subsequent to a great feast celebrating the harvest, any surplus foodstuffs would be placed in storage for later use. Originally, these granaries consisted of pits into which any excess yield was placed and covered with grasses and tree boughs³⁰⁰; later, however, it appears that surplus food was stored in the classic Iroquoian structure, the longhouse. As will be recalled from descriptions of the physical structure of the longhouse in part 2.1, this building was in evidence as a dwelling house as early as 1000 A.D., and its evolution beyond this purpose to that of granary was probably rather late, at least as late as the advancement of horticulture which would

²⁹⁹ Megapolensis, "A Short Sketch", p.158; JR 41, pp.203-204.

³⁰⁰ Megapolensis, *ibid.*

have necessitated the provision of depositories.

It is believed that until as late as 1000 A.D., the common Iroquois residential unit consisted of a few multi-family longhouses clustered together without pallisading near a source of fresh water. Shortly after A.D. 1000 and up to 1300, this pattern underwent drastic change; the people began to move away from their riverine home sites to higher ground and hilltops.³⁰¹ Here new longhouses were built, and there tended to be many more of them in a single community with hearty pallisading the rule.³⁰² This shift from relatively open farming and fishing settlements to architecture and locations clearly designed for defensibility has been the source of much speculation. What seems to be the most persuasive explanation focuses upon the rampant warfare which Iroquois tradition and contemporary research indicate occupied much of the period from 1000 A.D. until sometime between 1400 and 1600 A.D.³⁰³

The precise source of this belligerence is uncertain, but it seems likely that the move to semi-permanent villages exacerbated elements already extant in Iroquois culture, encouraging conditions favourable to warfare. Most notable among these was the constant threat of the blood feud. This process constitutes one of the earliest means of which detailed

³⁰¹ Tuck, "Northern Iroquoian Prehistory", p.326.

³⁰² JR 11, p.7; Arthur C. Parker, "The Origins of the Iroquois as Suggested by their Archaeology", pp.490-492.

³⁰³ Tuck, "Northern Iroquoian Prehistory", p.326.

knowledge exists concerning Iroquoian processes for the resolution of disputes arising from physical insult or injury. Founded fundamentally upon the profoundly punitive juridical philosophy of "an-eye-for-an eye", the process of blood revenge permitted members of the clan, village or nation of the victim to take the life of a member of the killer's clan (village or nation) in reparation for the killing of one of their kin. Unlike such North American amerindian societies as the Cherokee³⁰⁴ and Commanche³⁰⁵, however, in which blood revenge was limited to one life for one life, and did not trigger a retaliatory right of killing, there is no record of such a limitation characterising Iroquoian "legal culture". Thus it is that, among the historic Five Nations, a right of blood revenge acted upon did little to end the bloodshed, as it could easily inflate a right of blood revenge into a debilitating and internecine blood feud which might persist between clans for years, until one or the other made compensation or offered up one of their kin whose death they would agree not to avenge. This element of Iroquoian legal culture is discussed and analyzed in detail in the next section, at this time, however, it is introduced briefly as one of those "extant elements" of Iroquoian society which are believed to have contributed to the

³⁰⁴ John Phillip Reid, A Law of Blood. The Primitive Law of the Cherokee Nation (New York: New York University Press, 1970), pp.78-81.

³⁰⁵ E. Adamson Hoebel, The Law of Primitive Man. A Study in Comparative Legal Dynamics (Cambridge, Massachusettes: Harvard University Press, 1967), pp.139-141.

rampant warfare which characterized much of the period from 1000 A.D. until sometime between 1400 and 1600 A.D.³⁰⁶

The possibility of the blood feud at this time was probably accompanied by skirmishes over rights to land or subsistence areas which undoubtedly characterised the establishment of the Iroquois nations in their traditional territories. In this general vein Witthoft and Kinsey³⁰⁷ offer an interesting theory. In the context of permanent settlement and the concomitant rise in the importance of agriculture was a diminution in the status of the hunt, and therefore of men, in Iroquois society. This "obsolescence" led to a heightened incidence of warfare as this became the salient route to social status for men. By this scenario Iroquois males went from hunters of meat to hunters of men, resulting in pervasive blood feud and warfare throughout Iroquoia.³⁰⁸

Whatever its motivations, in the timespan punctuating A.D. 1300 - 1400, Iroquoia was characterised by widespread internecine warfare which drove the people from their intimate, accessible villages near common waterways to much larger hilltop villages whose architecture suggests a fear of enemies on all sides. Iroquois tradition verifies the constancy of threat, and informs that sometime in the period from "A.D. 1400 or slightly

³⁰⁶ Tuck, "Northern Iroquoian Prehistory", p.326.

³⁰⁷ John Witthoft and W. Fred Kinsey, eds., Susquehannock Miscellany (Harrisburg: Pennsylvania Historical and Museum Collection, 1959), p.33.

³⁰⁸ Ibid.

before to 1600 or slightly before"³⁰⁹, the fighting reached the point where it threatened the wholesale annihilation of the Iroquois people. Recognising the gravity of the situation, the five Iroquois nations, the Mohawk, Onieda, Onondaga, Cayuga and Seneca, came together under the initiative of the Mohawks to negotiate the terms of confederation. The result was the "Kaianerakowa", or "Great Law of Peace", and it has provided the context for one of the most enduring amerindian confederacies of the "new world".

As it has been articulated in the twentieth century, the Peace is described as a complex entity, and for purposes here may be understood as consisting of two essential components or "layers". The first was a substratum which held the defining principles - the spirit of the Iroquois Great Law - upon which the five confederated Iroquois Nations would base their government and international relations.³¹⁰ From this

³⁰⁹ Tooker, "The League of the Iroquois", p.420.

³¹⁰ According to Wallace, the philosophical foundation of the Peace was summarised in three broad doctrines, each of which was divided into two parts or branches. The first of these components carried a message under the banner of "Gaiwoh" or "Righteousness", which was directed to establishing the principle that the Five Nations be just nations, both in the administration of their respective memberships as well as in the realm of international relations. Only by practising true justice, the Peace charged, would the maintenance of tranquillity in Iroquoia be possible. Essential to this serenity was "Skenon", the physical and mental health of the Iroquois people, which the second part of the Peace emphasized as necessary preconditions to the rational interaction of individuals and states. The third arm of the Peace, "Gashashenshaa" or "Power", provided the means by which its other components were to be attained. Split into the two branches of the authority of law and custom and religion, this final element justified the use of force in ensuring the realisation of justice

philosophical base sprang the second layer of the Peace, which detailed in roughly 176 articles or "wampums" constitutional matters ranging from the mechanics of the process of confederation through to the appointment, tenure, and jurisdiction of government officials, and included specific instructions relating to inter- and intra-Confederacy relations.³¹¹

Once united the terms of the Peace, it fell to the Five Nations to spread its message to alien populations beyond Iroquoia. This did not imply a simple act of communication; nations offered the wisdom of the Peace were expected to accept it and join the Iroquois Confederacy - or rather, be absorbed into it. No outside nation was ever attached to the Five Nations as an equal and, while they might be permitted to retain their own system of government, they had no vote at the Confederate Council.³¹² Annexed populations were always, at best, inferior

on grounds that such was the will of the "Holder of the Heavens". "Justice", as one of the core values implicit throughout the spirit of the Great Law, was felt to be realizable only through the guidance of the Law, and therefore only within the context of Confederacy. Paul A. W. Wallace, The White Roots of Peace (Pennsylvania: University of Pennsylvania Press, 1946), pp.13-14.

³¹¹ The traditions of the formation of the Confederacy are varied and sometimes inconsistent. Paul A.W. Wallace has consolidated the available traditions into one volume The White Roots of Peace, which offers the best summation of the story. Much of the discussion which follows draws upon Wallace (Pennsylvania: University of Pennsylvania Press, 1946).

³¹² Allen W. Trelease, Indian Affairs in Colonial New York; The Seventeenth Century (Ithaca, New York: Cornell University Press, 1960), p.22; Anthony F.C. Wallace, "The Tuscaroras: Sixth Nation of the Iroquois Confederacy", Proceedings of the American

or tributary to the Iroquois. The substandard status allotted immigrant states was due in large measure to the assumption of tribal superiority which underpinned the Confederacy and the Peace: the Iroquois were "Ongwe-oweh" the "true" or "original men"³¹³, and the simple fact of the Peace adequately demonstrated their natural entitlement to lead all other peoples. Should those people reject the Iroquois' overtures - and many did - they brought upon themselves a declaration of war sanctioned in the Peace's third principle of "Gashasdenshaa" or "Power".³¹⁴ By this doctrine the Iroquois received a divine right to use military force to induce unwilling nations into the way of justice enshrined in the Peace. The Iroquois were on a self-declared mission from God, and those resisting it were conquered and absorbed as a whole, or slaughtered down to a few

Philosophical Society, 93 (1949), p.160; James Lynch, "The Iroquois Confederacy, and the Adoption and Administration of Non-Iroquoian Individuals and Groups Prior to 1756", Man in the Northeast 30 (1985), pp.90-97.

³¹³ J.N.B. Hewitt, "The Meaning of En-kwe-hen-we", American Anthropologist 1 (1888), pp.323-324. Hewitt argues that the translation offered by Schoolcraft (Notes on the Iroquois, p.47) connoting elements of racial or tribal superiority to the term is incorrect; in Hewitt's view, the term simply means "natural, normal man, without reference to native qualities or tribal characteristics" (p.324). While this may have been the case at some earlier point in time, the "tribal superiority complex" (Trelease, Indian Affairs in Colonial New York, p.21) which underpinned the policies of the Confederacy also very probably added a dimension of cultural supereminence to the nomenclature by which the Iroquois knew themselves. Megapolensis supports this postulate, when he reported in 1644 that the Mohawks had "naturally a great opinion of themselves; they say, Ihy Othkon, ("I am the Devil"), by which they mean that they are superior folk" (A Short Sketch, p.157).

³¹⁴ Hale, The Iroquois Book of Rites, pp.92-96.

survivors who were adopted into pre-existing Iroquois clans.³¹⁵

It is within this context of war as a means to the Peace that the Iroquois confederation has been critically assessed as a defensive alliance for promotion of the Confederacy's dreams of conquest, rather than an altruistically motivated design for world peace. To the degree that universal amity was among the motivations impelling the Five Nations' mission, it was pacifism in the interests of the Iroquois and on their terms. In the minds of the "Ongwe Oweh", extension of world peace was synonymous with extension of Iroquoia and Confederacy government - at a concomitant cost in independence and self-determination to the absorbed nations. As framed by Trelease:

The basic objective of the League appears to have been peace - peace, that is, between the warring Iroquois so that they might better take up the hatchet against their common enemies. This objective once attained, it was but a short step to the proposition that all tribes who refused to enter the Iroquois orbit were ipso facto enemies. What began as a defensive alliance became, if not a positive instrument of conquest, at least a covering device for aggression of the bloodiest variety.³¹⁶

The Peace as an instrument of conquest was accompanied by the Peace in its capacity as a constitutional document establishing a governmental system both of individual nations and the Confederacy as a whole. One tradition states that it was the Mohawk Nation's conception of state which was influential in

³¹⁵ Lynch, The Iroquois Confederacy, and the Adoption and Administration of Non-Iroquoian Individuals and Groups Prior to 1756, pp.83-99.

³¹⁶ Trelease, Indian Affairs in Colonial New York, p.19.

structuring the government of the Confederacy, yet given the ever-changing nature of those traditions and a lack of any documentation informing of pre-confederacy government, it is difficult to determine precisely what such a statement implies. In the absence of a "baseline" of earlier governmental forms against which modern traditions can be measured, it is impossible to determine conclusively the degree to which the current traditional constitution is composed of pre-confederation governmental forms as opposed to modern principles and structures of government.³¹⁷

The "cosmology" of their confederation notes that, at the time of their original union, each of the Five Nations were

³¹⁷ Most secondary analyses of these traditions are equally unhelpful, and tend to gloss over the issue. Morgan, in his Ancient Society, suggests that Pre-Confederacy government was "personal government" wherein each "tribe" or nation was administered by a council composed of elected representatives of each nations' "gentes" or clans. This clan council was "a permanent feature of the social system, holding the ultimate authority over the tribe", but always on democratic principles and consistent with the wishes of the people. The degree of consistency of this form of governance, as described by Morgan, with that created by the Confederacy both supports and detracts from his position. It is diminished inasmuch as he and his informants may have been projecting onto Iroquois prehistory that which was present only in post-confederation Iroquois culture, for want of information or traditions to the contrary. That said, it makes a certain degree of intuitive sense that the Iroquois would have made use of structures already present in the Five Nations in designing the Confederate state, to ease its acceptance and adoption by the people. Morgan adds to this support his own conclusion that "the office of sachem and chief was universally elective among the tribes north of Mexico; with sufficient evidence, as to the other parts of the continent, to leave no doubt of the universality of the rule" (Lewis Henry Morgan, Ancient Society [1877] (Tucson, Arizona: Univ. of Arizona Press, 1985), p.114. Tooker (below) conveys clearly that, since Morgan wrote his famous treatise, a good deal of doubt has entered into discussions of clans, and therefore necessarily into dialogues concerning their role in governance.

directed to select a certain number of their "purest and wisest men who shall be rulers".³¹⁸ The number of sachems allotted to each nation appears to have been as much a product of direct negotiation as of chance: Thadodaho, the intransigent chief of the Onondagas, was the most difficult of the sachems to win over to the idea of confederation, and demanded the highest representation on the Confederate Council for his nation as a precondition to their membership.³¹⁹ He was granted this, and his nation was made "Firekeepers" of the Confederacy, thus their principal village became the scene of Confederate Councils and the Onondagas their administrators. Morgan suggested that making Onondaga the "federal capital" of the Five Nations was a consequence of the Onondagas' central position in the geography of the Five Nations rather than Thadodaho's hard bargaining, and he was probably substantially correct.³²⁰ Thus the Firekeepers were given 14 sachemships, while the Mohawks and Oneidas received nine each, the Cayugas ten and the Senecas eight chiefs.³²¹ In practice, the differences in numbers of sachemships was irrelevant, since all decisions of the Council

³¹⁸ "The Constitution of the Five Nations", p.29.

³¹⁹ Wallace, The White Roots of Peace, p.23-25, 29; Hale, The Iroquois Book of Rights, pp.27-28.

³²⁰ Morgan, League of the Ho-De-No-Sau-Nee, book I, p.66.

³²¹ Morgan, book I, p.63; Morgan, Ancient Society, p.129; Hale, Iroquois Book of Rites, p.39; Hewitt, "Legend of the Founding of the Iroquois League", p.145.

were subject to the requirement of unanimity.³²² The Firekeepers apparently had special powers of veto³²³, as did the Mohawks as "Heads of the Confederacy"³²⁴, but it is doubtful that these meant a great deal more in practice than the other nations' powers of disallowance. Titles and posturing aside, an objection was an objection, and had the same impact regardless of who made it.

These fifty officials formed the first Confederate Council, which was responsible primarily for the maintenance of coherent relations with external powers and nations. Within the Confederacy, each nation was governed with relative autonomy from its fellows by a Nation Council consisting of the same sachems who represented that nation at the higher, confederate congress.³²⁵ The sachemships came to be denoted by the names of the first incumbents and were made part of the property and inheritance controlled by the women.³²⁶

The women exercised their rights through the institution of the clan, an exogamous configuration of nuclear and extended family members who traced their descent from a common maternal

³²² Morgan, The League of the Ho-De-No-Sau-Nee, pp.62-63; John D. Hurley, Children or Brethren: Aboriginal Rights in Colonial Iroquoia (unpublished PhD. dissertation, Univ. of Cambridge, 1985), p.40; Tooker, "The League of the Iroquois", p.422.

³²³ "The Constitution of the Five Nations", article 8.

³²⁴ Ibid., article 6.

³²⁵ Morgan, League of the Ho-De-No-Sau-Nee, p.69.

³²⁶ "The Constitution of the Five Nations", article 17.

ancestor.³²⁷ From this progenitor flowed all rights of property, succession, and inheritance through the female line, including the hereditary sachemships. These titles truly belonged to the women and were, in a sense, only loaned to the men: upon the loss of a sachem, the title reverted to the possession of the senior matron of the sachem's clan, who would then gather with the family's notable or respected clan mothers to determine an appropriate successor among their sons.³²⁸ In some cases they would be unable to fix upon one of their own clan suitable to lead, and in such cases they might "lend" the office to another clan where a better qualified man could be found. Where this occurred, the loaned office resided in the other clan only for the lifetime of the leader, after which it reverted back to its clan of origin.

Subsequent to making their selection, the women would present their proposed incumbent to the Nation and Confederate councils who might, but in fact rarely did, reject the candidate.³²⁹ Upon the sachem's acceptance of the position, the entire community would join in his inauguration through the

³²⁷ Fenton, "Locality as a Basic Factor in the Development of Iroquois Social Structure", pp.45-46; Snyderman, Behind the Tree of Peace, pp.11-12; A.A. Goldenweiser, "The Clan and Maternal Family of the Iroquois League", American Anthropologist new ser., 15 (1913), pp.696-697; Elisabeth Tooker, "Clans and Moieties in North America", pp.357-376.

³²⁸ "The Constitution of the Five Nations", article 32.

³²⁹ Horatio Hale, "A Lawgiver of the Stone Age", Proceedings of the American Association for the Advancement of Science 30 (1881), p.335.

ritual of the condolence³³⁰ by which the name and office of the deceased sachem would be "requickened" and given to the successor.³³¹

In its entirety in practice, the condolence was actually a series of smaller rites, beginning with a small preliminary council which occurred "At the Wood's Edge". This council was really a sort of greeting, whereby the moiety opposite to the clan which had suffered the death of a sachem would gather at a small fire struck a short distance away from the ceremonial longhouse, to give notice of their arrival and send greetings to the grieving clan. These "clear-minded tribes"³³² then marched toward the longhouse, where the other clans had gathered, chanting the names of the fifty original sachems of the Confederacy. This recitation would be repeated in the longhouse, where the "Laws of the Confederacy" were also repeated, which were further followed by each moiety reciting the "Requickening Address", which was named for its symbolic power to restore life and assuage the grief of the mourning clan. It was through this

³³⁰ William N. Fenton, "An Iroquois Condolence Council for Installing Cayuga Chiefs in 1945", Journal of the Washington Academy of Sciences 36 (1946), pp.110-127; Hale, The Iroquois Book of Rites, pp.117-139; "The Constitution of the Five Nations", pp.110-113.

³³¹ Tooker, "The League of the Iroquois", p.437-441. It seems clear that such a death was not necessarily prerequisite to practising the condolence in the case of the lesser office of "Merit Chief", as such offices were created for a specific individual at the time of their appointment and evaporated upon their death.

³³² Ibid., p.439.

latter ritual that the office of the deceased chief was "requickened" and the incumbent "raised up" to fulfil it. The entire ceremony, which lasted a full day, was ended in characteristic fashion, with a feast.³³³ At the conclusion of the cumulative rituals of the condolence, the new sachem became a full-fledged member of the local government and - subject to certain qualifications on his tenure - would remain so until his voluntary resignation or death.³³⁴

Death was not the only means by which a sachem could be forced to vacate his office, however, and it is here that the aforementioned qualifications enter the scene. At the foundation of all Iroquoian civil institutions lay the fundamental premises of reasonableness and social responsibility.³³⁵ When a sachem was appointed, the senior clanswomen would formally instruct him on the implications of this foundation, and admonish him that, should he ever be seen to be acting outside it, he would be given three chances to change his course. These opportunities would come in the form of three warnings from his clanswomen which, if unheeded, would lead to the sachem's impeachment.³³⁶ The latter would be accomplished by the arrival of the women or

³³³ Ibid., p.440.

³³⁴ "The Constitution of the Five Nations", article 22 (resignation of Sachems).

³³⁵ See, Jessie Bernard, "Political Organization Among North American Indians", The American Journal of Sociology (n.d.) p.297; Lafitau, Customs of the North American Indians, book I, pp.299-300.

³³⁶ "The Constitution of the Five Nations", article 19.

their appointed representative before the disfavoured sachem, where they would remove from his head the ceremonial horns of office.³³⁷ Such an impeachment was a source of profound disgrace not only for the deposed sachem, but for the clan mothers as well, as it reflected upon their own abilities to select leaders wisely.

When in council the fifty confederate sachems, their advisors and assistants convened at Onondaga in the central longhouse which was like a great hall, entered through doorways on either end and bisected by a fire which burned brightly during their meetings. The physical arrangement of the councillors and political process they maintained was apparently designed by the Mohawks at the time of the formation of the Confederacy, and was defined by the clan and its sister system of moieties. At this highest level, the Mohawk and Seneca sachems comprised one moiety, acting as the "older" or "elder" brothers to their opposing moiety of "younger brothers" composed of the representatives of the Cayugas and Oneidas.³³⁸ These metaphorical siblings positioned themselves along either wall of the council longhouse, facing each other "over the fire" which was tended by the Onondaga Firekeepers. The latter were also members of the elder brother moiety, but their role as mediators - "Firekeepers" - of the council process, placed them at one end

³³⁷ "The Deer Horns Emblem of Power", *ibid.*, pp.91-92.

³³⁸ Tooker, "The League of the Iroquois: Its History, Politics, and Ritual", pp.428-429.

of the Longhouse. From this position the Onondagas called the other nations to council, raised the matters to be deliberated and generally oversaw the process of deliberation.³³⁹

The council process was initiated when the Firekeepers passed an item of business to the elder brothers for their consideration; the Mohawks would discuss it among themselves and then refer the matter and their conclusions to the Senecas, who would debate them, possibly revising and returning their suggestions back to the Mohawks. This exchange would continue until the elder brothers reached a consensus, at which time the Mohawks passed their moiety's opinion over the fire to the younger brothers. The Cayuga and Oneida were then given an opportunity to ponder their opposites' opinion, and initiate an exchange like that previously occurring among their elder brothers. If the younger brothers agreed with Mohawk and Seneca positions, the Mohawks passed the concerted decision to the Onondagas, who could accept the outcome or, upon demonstrating that it contravened established custom or offended public policy, refer it back to the house for reconsideration.³⁴⁰ If, after extensive negotiations it became apparent that consonance was impossible, the Onondagas could suggest a possible resolution or, this and all efforts at conciliation being fruitless, the Council fire would be covered with ashes, leaving

³³⁹ Barbara Kawnehe Barnes, Traditional Teachings (Cornwall Island, Ontario: North American Indian Travelling College, 1984), p.37.

³⁴⁰ Barnes, p.34.

the issue undetermined.³⁴¹

The process of government at the level of the Nation councils was not greatly different from that at the Confederacy council. Within the Mohawk Nation the nine representatives of the Turtle, Bear and Wolf clans met in a council longhouse like that at Onondaga and adopted a similar type of seating plan and deliberation process. On one side of the house sat the Wolf clan, who called the Turtles their siblings and with them comprised one moiety; opposite to them was the Bear clan, which constituted the other moiety and referred to the Turtle and Wolf people as cousins. The Bear and Wolf leaders faced each other over a council fire tended by the Turtle clan leaders, who sat at one end and acted as "Wellkeepers", performing the same functions as the Firekeepers at the Confederate Council level.³⁴² The procedure of deliberations over the Nation Council fire was structured along the same lines as that characterising the Confederate Council, articulated above.³⁴³

The nature of the subject matter found at the National

³⁴¹ "The Constitution of Five Nations", articles 9, 10, 11, 12; Morgan, League of the Ho-De-No-Sau-Nee, p.113.

³⁴² Barnes, Traditional Teachings, p.34. In their capacity as mediators of their Nation Council, however, the Turtle clan were known as the "Wellkeepers", rather than Firekeepers. The reason for this distinction is unclear, and the differences between the two offices at these levels seem to be negligible, if any. The term "Wellkeeper" was given to the researcher by modern Kahnawake Mohawks, and to this point has not been encountered in either primary or secondary literature on the Nation Council. Notwithstanding this, it is the preferred terminology of the people, and this choice must be respected here.

³⁴³ "The Constitution of the Five Nations", article 5.

versus the Confederate Councils was often quite distinct. As was alluded to earlier in this discussion, the Confederate Council was essentially the administrative arm of a military alliance. It pulled together leaders from each of the Five Nations into a single body whose primary responsibility was the presentation of a united and coherent front to external powers. In this sense, the council was foremost an instrument of Five Nations foreign policy. However, to maintain such a front and policy required unity and coherence in relations between the constituent nations, and this was often lacking.³⁴⁴ Its absence was caused in large measure by a fundamental tension in the design of the Peace: while the confederacy was to unite the Five Nations, each of those nations retained a full and unfettered right of independent action which extended down to each member of their respective populations. At the level of the individual, this often gave rise to the warfare discussed earlier in the context of the blood feud; between nations it fostered equally volatile relations as independent national policies diverged and conflicted. The ties of the Confederacy were of the type that bound, but they also often chafed and pinched.

It was when those ties were strained to the breaking point that the wisdom of the League's architects in preserving the clan network as the basis of the political system became most apparent. For although the number of clans ingenerate to each

³⁴⁴ Jennings, Ambiguous Iroquois Empire, pp.105-108; George T. Hunt, The Wars of the Iroquois: A Study in Intertribal Trade Relations, pp.8-9, 160.

nation varied across Iroquoia, the three Mohawk and Oneida clans of the Turtles, Bears and Wolves were present across all the Five Nations.³⁴⁵ This fact, combined with the exogamic imperative of the Iroquoian clan, meant that each of these extended families was related to at least one other in a network of kin relationships which transcended national boundaries and created an important supplement to the confederates' political links. When, in the seventeenth and eighteenth centuries, the individual actions of nations disrupted Confederacy policy and threatened the Iroquoian union, it was these family ties alone which preserved the Confederate web; an intricate network of blood links that bound the people together and, when added to their dependency upon their fellows for allies in trade and war, acted as a significant constraint on the escalation of conflict. And if such ties were significant in reducing external conflict between neighbors within the confederacy, they were no less influential in the context of internal squabbles and delicts: as will be revealed below, the same sorts of ties of blood and mutual interest also functioned to constrain conflict and violence within individual Iroquoian communities.

³⁴⁵ Fenton, "Locality as a Basic Factor in the Development of Iroquois Social Structure", p.47.

4.1 Revenge and Restitution: Traditional Dispute Resolution Among the Historic Iroquoian Peoples

...it seems to me that, in view of the perfect understanding that reigns among them, I am right in maintaining that they are not without laws...³⁴⁶

As outlined above in regard to the records and literature informing researches on Iroquoian traditions of dispute resolution, the most important single source is the Jesuit Relations and their descriptions of these traditions among the Huron Iroquois. It is an unfortunate reality that the priests appear to have lost interest in the conduct of social control following their very detailed descriptions of this among the Hurons, and the Relations do not inform of similar Mohawk processes among this nation, which was "missionized" much later than their Huron brethren to the north. Owing to the shared cultural and linguistic characteristics of the Hurons and Mohawks, however, it is possible to generalize the Iroquoian cultural traits which these nations shared to contribute to an understanding of the processes of Iroquoian dispute resolution traditions. This contribution can be combined and carefully qualified with those records and observations of Iroquois and Mohawk "law" contained in some colonial records as well as in some early secondary works on the Iroquois. Significant among the early secondary works is Hale's Iroquois Book of Rites,

³⁴⁶ JR 10, p.215.

which makes very brief mention of the relationship between responses to killing, and the more substantial handling of the subject in Lewis Henry Morgan's League of the Ho-De-No-Sau-Nee, or Iroquois.

These nascent writings, mentioned earlier in this dissertation, may be further qualified by more recent secondary discussions such as Reid's analysis of the blood feud as practised among the Algonkian-Iroquoian Cherokee people³⁴⁷, and the only work by a Mohawk Iroquois on juridical matters, Newell's Crime and Justice Among the Iroquois Nations. While both Newell and Morgan's works suffer from the same tendencies toward rather idealised renditions of the subject, owing to their reliance upon highly acculturated informants whose recollections suggest a certain "recycling" or at least "rethinking" of early post-confederacy traditions, these works, when used carefully together with especial emphasis upon the Relations, can create a relatively clear and cogent representation of the subject.

Of the three focal delicts or disputes, only two, murder and theft, receive substantial attention in the Relations and supporting works; arson is never mentioned, and must thus be eliminated from the description of traditional dispute resolution. Compensating to some degree for the lack of data on arson, however, is attention in the records to the additional conflicts of adultery and witchcraft, both of which, while

³⁴⁷ Reid, A Law of Blood.

probably unlikely as acts which would fall within the jurisdiction of a modern, "traditional" criminal justice system, nonetheless offer important insights into the "social control culture" of the historic Iroquoians.

Prior to embarking upon the description of the reactions to murder, theft, adultery or witchcraft among the Iroquoians, it is necessary to digress for a moment to consider briefly the nature of "law" here, and whether those deviant acts described below might be understood as prohibited by law or custom, or whether, in fact, the distinction really matters. The question of whether preliterate cultures such as the historic Mohawk were guided in their daily lives by law or custom has been debated ad nauseum, and arguably with little practical importance or outcome; it is not a debate which I believe is useful further engaged here. It is my opinion, based upon the enduring records describing Iroquoian and Mohawk society, that controls on behaviour did exist, as did commonly-understood and well-defined avenues of redress in those cases where the proactive controls failed. In this regard, the earliest Jesuit observers of Huron social control in action informed that "they punish murderers, thieves, traitors, and Sorcerers [sic]" and believed, on the basis of these observations, that they "are not without laws".³⁴⁸ Whether those "laws" would meet any of the semantic depictions of these offered in the anthropological treatises on the subject is questionable, but need not concern us here. For

³⁴⁸ JR 10, p.215.

our purposes it is sufficient to establish, on the basis of the evidence described and analyzed below, that the Iroquoian peoples had clear processes for deterring and responding to deviance in their communities; whether these might survive transportation into the modern context of the Mohawk Nation and a "traditional justice system" is another matter, and one which will be returned to later in this dissertation.

Thus regardless of whether or not one is comfortable referring to Iroquoian social control as a matter of law or of something else, it seems to have been effective enough in practice, prompting Morgan to comment that "crimes and misdemeanours were so infrequent under their social system, that the Iroquois can scarcely be said to have had a criminal code."³⁴⁹ And although it must be admitted that the Jesuit Relations evidence somewhat greater vacillation on this subject³⁵⁰, they, too assert a relative absence of serious crime in Iroquoian country. To what might such a pacific existence be attributed? My impression turns Morgan on his head, and argues that it is not so little "crime" which rendered their "criminal code" to a minimum, rather, it is my opinion that so effective was that ghost of a "code" and its linkages with the social system of historic Iroquois society, that it served as a remarkably compelling deterrent to socially destructive behaviour. At the centre of that code lay the constant threat of

³⁴⁹ League of the Ho-De-No-Sau-Nee, II, p.330.

³⁵⁰ JR 38, p.265; JR 35, p.125.

the blood feud, and the persistent undertone of violence which it infused into an intricate network of social relationships crucial to the survival of both the individual and group.

(i) The Feud in Iroquoian Social Control

To understand the pressure of the feud on Iroquoian social relations it is necessary to appreciate the network of relationships in which a given Iroquoian person participated on a daily basis. As was observed above, Mohawk society was comprised of three clans, the Turtles, Bears and Wolves, and every citizen of the nation was a member of one of these extended family units, whether by virtue of birth or adoption. Clans were exogamic, meaning that no marriage between members of the same clan was permitted³⁵¹, thus although the clans were theoretically distinct groups, any given nuclear family contained members of two clans: that of the father, and that of the wife and her children, whose clan membership, lineage and rights of inheritance were received through their mother. At the level of the extended family, all three clans might be expected to be represented, given the exogamic imperative and a residence

³⁵¹ The exogamic imperative seems to have waned significantly in contemporary Kahnawake, a reduction which may perhaps be understood as an offshoot of the erosion in the clan system generally. Thus one woman with whom I developed a very close relationship informed me that both she and her husband were bear clan members, and that although this once would have been a very serious breach of social custom, today "nobody much worries about such things."

pattern in which husbands moved into the longhouse of his wife's clan. In any given longhouse, therefore, members of all three clans would be required to live together in relative harmony, assist each other in the pursuit of subsistence, child-rearing and that multitude of daily tasks implicit in orchestrating the prosperity and security of a large family grouping.

With regard to the matter of social control, the relationship of the individual and the clan comes clearly into relief. As Oberg has observed in regard to the clan-based and highly stratified Tlingt society of the northwest coast of North America, there was almost a fusion between the individual and his or her clan, and for purposes of social action and personal behaviour, the actions of a single member of the clan were viewed essentially as actions of the group. Thus it may be said that

Theoretically, crime against an individual did not exist. The loss of an individual by murder, the loss of property by theft, or shame brought to a member of the clan, were clan losses and the clan demanded an equivalent in revenge.³⁵²

While the preceding statement may state the case a bit too strongly for the Iroquoian peoples, there can be no question that the acts - or failure to act - of one reflected upon, and could possess great consequences for, the many. The case of an inter-clan killing is here apposite.

According to the Jesuit Relation of 1636, responsibility for a death fell not just upon the killer, but upon his or her

³⁵² Oberg, "Crime and Punishment in Tlingt Society", p.146.

entire clan, village, or nation, depending upon whether the involved parties crossed familial, community or national boundaries. At the inter-clan level, the resolution process involved an intricate interplay of rights and responsibilities whereby the offended family was given two options. First, on the basis that all members of the offender's clan were equally responsible to reimburse the victim's family for their loss, anyone of them could be killed in vengeance for the original murder. It is interesting to note that, unlike the Tlingt and Cherokee, the contemporary primary or later secondary reports of Iroquoian "blood revenge" do not specify the presence of controls on the magnitude of the retaliation; and whereas Tlingt revenge appeared to specify clearly how many might be killed in an act of blood revenge³⁵³, and the Cherokee knew that there could be "one retaliation and this was the end of the affair"³⁵⁴, such controls appear to have been absent among the Iroquoians. Here, the right of blood revenge asserted had the effect of transforming the victims into offenders, and transferred their original right of blood vengeance to the clan responsible for the first murder.³⁵⁵ This could lead to yet another retaliatory killing and another, and so on, setting in motion the destructive give and take of a full-blown blood feud,

³⁵³ Oberg, "Crime and Punishment in Tlingt Society", pp.146-147.

³⁵⁴ John Phillip Reid, A Law of Blood. The Primitive Law of the Cherokee Nation (New York: New York University Press, 1970), p.78.

³⁵⁵ JR 10, p.221.

which might persist for years among the clans involved.

As was noted above in relation to the historical curiosity of the internecine tribal warfare which is believed to have ravaged Iroquoia in the period A.D. 1000 to sometime in the period A.D. 1400-1600, the absence of controls on blood revenge may well go some distance in deciphering that curiosity. As Hale noted in his The Iroquois Book of Rites,

The wars among the Indian tribes arise almost always from individual murders. The killing of a tribesman by members of another community concerns his whole people. If satisfaction is not promptly made, war follows, as a matter of course.³⁵⁶

Reid notes that a similar state of affairs characterised the Cherokee nation, and that efforts to avoid inter-tribal killings were necessitated by the reality that the equivalent of the clan blood feud here was, quite simply, war.³⁵⁷

The entire chronicle of the Iroquois Confederacy reveals that these Iroquoians were among the most belligerent and externally hostile of North American First Nations. As noted above, there is some reason to believe that it was mutually-debilitating intertribal feuding among the Five Nations which motivated their unification, and which nonetheless served only to reduce, not eliminate, warfare among the Five Nations, even as it encouraged a more efficient means of assault of outside

³⁵⁶ Hale, The Iroquois Book of Rites, p.68; Hale's assertion is supported in the Relations at JR 2, p.73; JR 10, pp.219, 225; JR 25, p.49, and JR 38, p.287.

³⁵⁷ Reid, A Law of Blood, pp.153-155.

nations.³⁵⁸ And yet this external belligerence contrasts with the internal peace which contemporary observers of early Iroquoian society report was characteristic of the individual communities in which they resided, and in which constant contacts would seem to render the possibility of conflict most pronounced. If the Iroquoian peoples were so fundamentally warlike, how is it that their "face-to-face" communities manifested such an absence of violence?

The answer lies in the constant threat of the blood feud and the interrelationships across individuals and clans in Iroquoian society. The exogamic imperative of Mohawk Iroquoian society meant that when a bear clan member killed a wolf clan member, there was no "pure" bear or wolf clan unit which could push without restraint for compensation through blood. For living among the bears were wolf clan members, and the opposite also held true. As a result, in any given extended family group there were members who had relations and affections in both the clans involved in the killing - indeed, it is possible that a wolf-clan man might be killed by a man of the same clan and village as the victim's wife, and thus her enthusiasm for vengeance might be expected to be limited. Her connections of filial affection might also be expected to be underscored with the reality that she and her clan must continue to live among, unite in external warfare with, and marry members of the offending clan, thus some compromise other than "a life for a

³⁵⁸ See Trelease, Indian Affairs in Colonial New York.

life" is encouraged. As noted by Gluckman in his classic analysis of "The Peace in the Feud":

The loyalty of agnates to one another, so strongly enforced by custom, conflicts with their customary allegiances to other groups and persons. Some members of each warring group have an interest in bringing about a settlement of quarrels... Underlying these customary divisions...is the constant pressure of common residence. For common residence implies a necessity to co-operate in maintaining peace and that peace involves some negotiation of law and morality. It also implies mutual tolerance.³⁵⁹

It was the anthropologist Evans-Pritchard who was the first to record the interplay of social relationships and blood revenge, in this case among the Nilotic Nuer people.³⁶⁰ In his analysis, Evans-Pritchard demonstrated that "law is relative to the structural distance between persons and has not the same force in different sets of relations".³⁶¹ By this rationale, those who maintain the most intimate of ties, such as that of a nuclear family, will also experience the greatest consistent potential for conflict and, given their intimacy and interdependence, the greatest consistent motivation to resolve those conflicts peacefully and avoid enduring enmity within the group. Stated another way, Evans-Pritchard observed that the more intimate or "face-to-face" a society, the "more varied and intimate their general social ties, and the stronger therefore

³⁵⁹ Max Gluckman, "The Peace in the Feud", in Custom and Conflict in Africa (Oxford: Basil Blackwell, 1963), p.14.

³⁶⁰ E.E. Evans-Pritchard, The Nuer. A Description of the modes of livelihood and political institutions of a Nilotic people (Oxford: The Clarendon Press, 1940).

³⁶¹ The Nuer, p.191.

its sentiment of unity" and the greater its resistance to shattering this by pressing a right of blood revenge.³⁶² The logical extension of this argument then holds that as relationships and dependencies grow more distant, so too does the pressure to resolve conflicts peacefully - fighting with neighbours and relatives is quite a different endeavour from fighting with strangers.

If it is the interweaving of agnatic ties and their division and intersection by pressures of mutual dependence and common local residence which serve to mitigate feuding, the apparent contradiction between the absence of feuding in those smaller, face-to-face Iroquoian communities and their consistently increasing inter-village and tribal enmity is resolved. For if feuding was the source of much warfare among Five Nations, its presence at this level of tribal relationships can be explained by Evans-Pritchard's conclusion that feuds "can only persist between those tribal sections which are near enough to each other for the maintenance of actively hostile relations and far enough from each other for these relations not to inhibit essential social contacts of a more peaceable kind."³⁶³ Thus one may envisage an Iroquoian social climate characterised by peaceful relations which are maximized within the clan and village, and which diminish with the distance between socially-interacting or connected villages or nations, peace returning as

³⁶² Ibid., p.142.

³⁶³ Ibid., p.159.

between peoples which have no contact or connection, and in which the potential for conflict and the necessity of maintaining productive measures for ameliorating it are absent. As Barton has framed the matter in relation to the Ifugaó,

The tie of propinquity... is of two kinds: *positive*, which allies a man with his fellows in proportion to their nearness; and *negative*, which intensifies the accursedness of his own or his neighbour's enemies in proportion to their remoteness.³⁶⁴

If the conclusions of Evans-Pritchard and Gluckman can thus be generalized to the Iroquoian peoples, the absence of serious crime" in Iroquoian settlements, a category which must have included acts of killing or murder, was not, as Morgan believed, an indication of the near-absence of a "criminal code". Rather, it offers evidence of the great success of that code - the code of blood revenge - which was everywhere more beneficial in the threat than in practice. Thus as with the Nuer, so with the Iroquoians, the "fear of incurring a blood feud is, in fact, the most important legal sanction within a tribe, and the main guarantee of an individual's life and property".³⁶⁵ This conclusion is underscored by Reid in his analysis of the Iroquois' southern Cherokee brethren, where he refers to the "law of blood" as

a law of prevention and a law of termination, but not a law of violence. It was rather, like all law, a law of peace: a law which imposed upon society a degree of peace by the very fact that men knew that if

³⁶⁴ R.F. Barton, The Half Way Sun: Life Among the Headhunters of the Philippines (New York, 1930), p.106.

³⁶⁵ Ibid., p.155.

controversy were carried too far, organized and certain violence would follow in its wake...³⁶⁶

Blood revenge and feuding among the Iroquoians was further encouraged into a state of stasis by the existence of an alternative, highly-structured process of gift-giving, which could compensate for the taking of a life.³⁶⁷ As described by Morgan, the resolution for an act of murder fell essentially within the jurisdiction of the clan. When it became apparent that an inter-clan killing had occurred, all interested members of the clans of the victim and offender would meet in separate councils to determine an understanding of the circumstances of the death and possible modes of responding to the act. The clan of the accused would pressure him or her to confess and make atonement for their crime and, if successful, would send a messenger to the clan of the victim who would offer to them a strip of white wampum. This token was not intended as a form of restitution for the death, but rather as a symbol of the killer's confession, regret and apology.³⁶⁸ If the victim's clan accepted the wampum, they "forever obliterated and wiped out the memory of the transaction"; rejection of the gift usually led to the flight of the murderer, as this signified the intention of the family to act upon their right of blood revenge against the killer's clan. To this end they would appoint one relative who

³⁶⁶ A Law of Blood, p.92.

³⁶⁷ JR 22, p.291.

³⁶⁸ Morgan, II, p.331.

"resolved never to rest until life had answered for life".³⁶⁹ Such vengeance could also transpire when the gift arrived too late to restrain the departure of the executioner.

This system of "blood payment" is described quite differently and in far more detail in the Jesuit Relations. As portrayed in these reports, following the detection of the death of one of its members at the hands of another, the clan of the victim would approach the clan of the murderer and demand restitution by a specific number and type of presents, the quantity and value of which were pro-rated with the importance of the deceased person. Among the Huron Iroquois, the basic rate for death of a man was thirty presents and for a woman, forty; women being of greater value as populators of earth.³⁷⁰ These amounts would increase proportionally with the significance of the victim to the clan as a provider, leader and so on.³⁷¹ Although the Relations do not mention Morgan's "white wampum", they do inform that each gift had a symbolic utility, such as drying the tears of the bereaved or removing "all bitterness and desire for vengeance"³⁷². These presents were delivered to the family of the victim in a meeting of the involved clans; their

³⁶⁹ Ibid., p.332.

³⁷⁰ JR 33, pp.243-245.

³⁷¹ JR 10, p.217; JR 13, p.15: In a case of reparations for a wrongful killing, "...the fine was moderate, because the dead person and his relatives were obscure people and of very little account."

³⁷² Ibid., pp.215-225; JR 19, p.269.

acceptance of this compensation, which was often the result of extensive and protracted negotiations³⁷³, removed the victimised clan's right to avenge the death and ended the matter.

Although provision of the gifts was entirely voluntary, the Relations inform that

those who are willing bring publicly what they wish to contribute, and they seem to vie with one another in proportion as their wealth, and the desire for glory or for appearing solicitous for the public weal, animate them on such occasions.³⁷⁴

This is not to say, however, that there were not times when a murderer's clan was unwilling or unable to meet the costs of reparations for a killing. In such circumstances, they could abandon the offender to the vengeance of the injured clan with a promise that no blood revenge would be taken for his or her death, or they could effect a similar compensation through appointing one of their own membership to do the killing, guaranteeing an absence of revenge.³⁷⁵ Either of these courses were common where the person responsible for the dispute was either incorrigible or unvalued, and not considered worth the cost of reparations to the bereaved clan.³⁷⁶

The Relations of 1647-48³⁷⁷ and of 1653³⁷⁸ contain detailed

³⁷³ Ibid., p.221.

³⁷⁴ Ibid., p.221.

³⁷⁵ See, for example, JR 8, p.123.

³⁷⁶ JR 10, pp.121-123.

³⁷⁷ JR 33, pp.229-249.

³⁷⁸ JR 38, pp.273-287.

reports of the process of compensation for a murder which transpired across "national boundaries", wherein a small party of Hurons attacked and killed a French manservant of one of the Jesuit missionaries. It was soon discovered that the murder was the work of two men who had been "employed" by "six Captains, belonging to three different villages" of the Hurons, and thus the entire nation was liable to the French for the death.³⁷⁹ Although it is conceivable that such an "international" incident might easily have incited feud-based warfare, this case is an excellent example of the degree to which revenge is complicated by the network of ties between parties to an offence. The reality in this case was that the French and Huron maintained extremely important economic ties of trade as well as those of military alliance; French traders also lived among Huron families as husbands and fathers, and Hurons among the French as wives and mothers. It is clear that here we see the mitigating force of social relationships on rights of blood revenge.

Following the detection of the crime, a council was called, consisting of the Sachems or "Captains" of all the principal villages, at which it was decided that reparations "should be made [to the priests] in the name of the whole country for the murder that had been committed".³⁸⁰ Having reached this decision, the Jesuits were called to a "general meeting" of the "Captains" where, following an extensive speech of apology and

³⁷⁹ JR 33, pp.229-231.

³⁸⁰ Ibid., p.233.

regret, the Huron speaker accepted a bundle of small sticks from the Jesuits, indicating the number of presents they expected to receive in compensation.³⁸¹ These were then distributed among the headmen of the various villages, who went away to gather the gifts, which were given to the Jesuits at a later council. The processes and symbolism which characterised that council and the reparations are worth quoting at length, for insights they offer not only of the formality of the processes, but of the potential for deterrence implicit in so costly a means of responding to wrongful deaths:

When the day designated for the ceremony had arrived, crowds flocked to it from all parts. The meeting was held outside our house.

In the evening, four Captains were deputed by the general council to come and speak to me; two were Christians, and two infidels. They presented themselves at the door. Here not a word is said, nor a thing done, except by presents; these are formalities that must be strictly observed, and without which no business can be considered as properly transacted.

The first present of those Captains was given in order that the door might be opened to them; a second present that they might be permitted to enter. We could have exacted as many presents as there are doors to be passed before reaching the place where I awaited them.

When they had entered, they commenced to speak to me by means of a present which they call "the wiping away of tears." "We wipe away thy tears by this gift," they said to me, "so that thy sight may be no longer dim when thou castest thine eyes on this country that committed the murder." Then came the present that they call "a beverage." "This," they said, "is to restore thy voice which thou hast lost, so that it may speak kindly." A third present was to calm the agitated mind; a fourth, to soothe the feelings of a justly irritated heart. Most of these gifts consist of porcelain beads, of shells, and of other things that

³⁸¹ JR 33, pp.235; 239-241.

here constitute the riches of the country, but which in France would be considered very poor.

Then there followed nine other presents, to erect a sepulchre for the deceased,- for each gift has its name: four presents, for the four columns that are to support the sepulchre; four others, for the crosspieces on which the bed of the deceased is to rest; and a ninth present, to serve as a bolster.

After that eight Captains, from the eight nations that constitute the Huron country, brought each a present for the eight principle bones in the frame of the human body, - the feet, the thighs, the arms.

Here their custom compelled me to speak, and to give a present of about three thousand porcelain beads,- telling them that this was to make their land level, so that it might receive them more gently when they should be overthrown by the violence of the reproaches that I was to address to them for having committed so foul a murder.

On the following day, they erected a kind of stage in a public place; on this they suspended fifty presents, which are the principle part of the reparation and which bear that name. What precedes and what follows are only accessories....

Those to whom reparation is made carefully examine all those presents and reject such as do not please them; these have to be replaced by others which satisfy them.

That is not all. The body for which a sepulchre is erected must not lie naked therein; it must be clothed from head to foot,- that is to say, as many presents must be given as there are articles of clothing required to dress it, according to its condition. To that end they gave three presents that bear only the names of the things they represent,- a shirt, a doublet, trunk-hose, shoes, and a hat; and an arquebus, powder, and lead.

After that, it was necessary to draw out from the wound the hatchet with which the blow had been struck,- that is, they gave a present bearing that name. As many presents are needed as there have been blows received by the deceased, to close all the wounds.

Then came three other presents,- the first, to close the earth, which had gaped in horror at the crime; a second, to trample it down; and, thereupon, it is customary for all the young men, and even for the oldest, to commence dancing, to manifest their joy that the earth no longer yawns to swallow them in its womb. The third present is for the purpose of throwing a stone upon it, so that the abyss may be more inviolably closed, and may not reopen.

After that, they gave seven other presents,- the first, to restore the voice of our Missionaries; the second to exhort our servants not to turn their arms against the murderer, but rather against the Hiroquois, the enemies of the country; the third, to appease Monsieur the Governor when he should hear of the murder; the fourth, to rekindle the fire that we always kept to warm passers-by; the fifth, to reopen the door of our hospice to our Christians; the sixth to replace in the water the boat in which they cross the river when they come to visit us; the seventh, to replace the paddle in the hands of a young boy, who has charge of that ferry. We could have exacted two other similar presents to rebuild our house, erect again our Church, and to set up again four large Crosses, which stand at the four corners of our enclosure. But we contented ourselves with those.

Finally, they concluded the whole with three presents given by three principal Captains of the country, to calm our minds, and to beg us to love those people always. All the presents that they gave amounted to about a hundred.

We also gave some, in return, to all the eight nations individually, to strengthen our alliance with them; to the whole country in common, to exhort them to remain united together, that they might, with the French, better resist their enemies... Finally, we ended with a present which assured them that Monsieur the Governor and all the French of Quebec, of Montreal and of three Rivers, would have nothing but love for them, and would forget the murder, since they had made reparations for it.³⁸²

It is interesting to note the number and value of the presents given in the above case. For the young French servant, the Huron headmen gave approximately 95-100 presents to the Jesuits, an astonishing number when one considers that the basic value for a Huron man was thirty presents, and that a servant was probably roughly equivalent to a slave in terms of Huron social value. There are two possible explanations for this substantial compensation. First, the servant was essentially a

³⁸² JR 33, pp.241-249.

stranger, that is, a non-Huron, and as such the taking of his life constituted a potential threat to international relations. As framed in the Relation of 1647-48,

For a stranger, still more [presents] are exacted; because they say that otherwise murders would be too frequent, trade would be interrupted, and wars would too easily arise between different nations.³⁸³

The status of the deceased as a stranger was undoubtedly diminished by his status as a member of the French colony, and thus a member of a nation with whom the Hurons maintained the important network of ties outlined above. As well, in addition to those more personal ties of intermarriage and residence, we see here the importance of international concerns in the process of reparations, wherein the "Captains" and the Jesuits exchanged gifts clearly representing a renewal of alliance and friendship. Thus presents were given to encourage the French to turn their arms against the Five Nations "Hiroquois", to "appease Monsieur the Governor", and to "rekindle the fire" which symbolised the welcome and friendship between the French and Huron. On the evidence of at least this case, then, it might be suggested as a second explanation that, in the context of inter-village or nation killings, restitution gave equal or greater regard to the nature of the links between the victim and offender's nation, as to the importance of the victim to the bereaved nation. In this light, the process of traditional dispute resolution was as much one of international as of criminal law.

³⁸³ JR 33, p.245.

Although the records and secondary reports are relatively clear on the handling of disputes which transcended family, village or national boundaries, there is a lack of documentation of how delicts occurring within clans were resolved. It seems likely, however, based upon the analyses of Evans-Pritchard, Gluckman, Reid and others, that the acute nature of social relations, affections, dependencies, as well as the fact of mutual, common residence, meant that the pressure to "behave well" and to smooth over injuries when family members behaved badly was significant.³⁸⁴ From this, it may be suggested that

³⁸⁴ On the principle of the feud and its mitigation in practice, see: E. Adamson Hoebel, The Cheyennes. Indians of the Great Plains (New York: Holt, Rinehart and Winston, 1978); Hoebel, The Law of Primitive Man, especially his analyses of the Eskimo at pp.67-99; the Ifugao at pp.100-126; the Commanche, Kiowas and Cheyenne at pp.127-176; the Tobrianders at pp.177-210; and the Ashanti at pp.211-256; also on the Tobriand Islanders, see Bronislaw Malinowski, Crime and Custom in Savage Society (London: Routledge and Kegan Paul Ltd., 1926), pp.118-119; A.R. Radcliffe-Brown, Structure and Function in Primitive Society (New York: The Free Press, 1952), pp.215-216; John H. Provinse, "The Underlying Sanctions of Plains Indian Culture", in Social Anthropology of North American Tribes, Fred H. Eggan, ed. (Chicago: The University of Chicago Press, 1937), pp.341-376, esp.367-370; Rafael Karsten, "Blood revenge among the Jibaro Indians of Eastern Ecuador", in Law and Warfare. Studies in the Anthropology of Conflict, Paul Bohannan, ed. (Garden City: The Natural History Press, 1967), pp.303-326; also, John C. Ewers, "Blackfoot Raiding for Scalps and Horses", in Law and Warfare, pp.327-344; and Margaret Hasluck, "The Albanian Blood Feud", in Law and Warfare, pp.381-408; Paul Bohannan, Justice and Judgement among the Tiv (London: Oxford University Press, 1957), pp.137-146; G.S. Snell, Nandi Customary Law (London: MacMillan and Co. Ltd., 1954), pp.62-66; Laura Nader and Duane Metzger, "Conflict Resolution in Two Mexican Communities", 65 American Anthropologist (1963), pp.584-592; R.F. Fortune, "Law and Force in Papuan Society", 49 American Anthropologist, n.s. (1947), pp.244-259; Oberg, "Crime and Punishment in Tlingt Society"; Keith F. Otterbein and Charlotte Swanson Otterbein, "An Eye for an Eye, A Tooth for a Tooth: A Cross-Cultural Study of Feuding", 67 American Anthropologist (1965), pp.1470-1482.

intra-familial disputes were handled quietly and speedily within the family itself.³⁸⁵ This hypothesis would seem to find some support in the right of families to appoint one of their membership to deal with kin who proved to be recalcitrant offenders, as well as in the more diffuse interplay of responsibilities between the individual and the clan. These imposed certain liabilities upon individuals in relation to other clans and their memberships, liabilities which extended within the clans and which also carried certain rights. Thus while an entire family might be made to account externally for the indiscretions of single members, it may be suggested that they also could call those members to account within the clan.

If the consistent threat of blood revenge and feuding, and the centrality of social ties, acted to suppress acts of murder within Iroquoian communities, it may be also be suggested that these factors further mitigated the force with which individuals reacted to other types of wrong-doing, such as theft or adultery; in fact, of the focal delicts, it would appear that sorcery was the only offence which was open to redress by killing and which the records assert did not incite a right of blood revenge among the witch's kin.

³⁸⁵ This also seems to be the position advanced by those modern Kahnawake Mohawks pressed about the issue, i.e., personal communication with D. Dionne, Acting Clan Mother, Kahnawake, 9 April 1992.

(ii) Responses to Witchcraft in Iroquoian Society

Witchcraft was among the most serious delict in Iroquoian society, potentially even more so than murder, although the two were often linked, especially in the case of suspicious deaths. Morgan relates that "witchcraft was punishable by death", either by anyone stumbling upon a witch engaged in their craft, or by appointed executioners subsequent to the verification of a charge of witchcraft before a council.³⁸⁶ Few details of the council are given, save that such was called and the witch was

arraigned before it, in the presence of the accuser. A full confession, with a promise of amendment, secured a discharge. But if the accusation was denied, witnesses were called and examined concerning the circumstances of the case; if they established the charge to the satisfaction of the council, which they rarely failed to do, condemnation followed, with a sentence of death. The witch was then delivered over to such executioners as volunteered for the purpose, and by them was led away to punishment. After the decision of the council, the relatives of the witch gave him up to his doom without a murmur.³⁸⁷

As may be expected given his reliance on Morgan, Newell concurs with Morgan's reports, asserting that "witchcraft, of all crimes, concerned the Indians most."³⁸⁸

This concern is apparent in the Relations, which contain quite substantial descriptions of this crime and its answer upon detection. It is interesting to note that reports in Morgan and Newell concerning the potential for acquittal following

³⁸⁶ Morgan, II, p.330.

³⁸⁷ Ibid., pp.330-331.

³⁸⁸ Crime and Justice Among the Iroquois Nations, p.48.

confession and renunciation of sorcery are conspicuously absent in the Relations' original records. Here, the most common theme is one of the immediate despatch of sorcerers, with little ceremony and even less possibility of a council hearing:

This whole country...is not lacking in wicked men, who, from motives of envy or vengeance, or from other cause, poison or bewitch and, in short, put to death sooner or later those they wish to injure. When such people are caught, they are put to death on the spot, without any form of trial, and there is no disturbance about it.³⁸⁹

Those exacting punishment for sorcery reportedly had little to fear in terms of retaliation for the killing, notwithstanding whether the execution crossed clan, or possibly village, boundaries:

They also punish Sorcerers severely...and this punishment is authorized by the consent of the whole Country, so that whoever takes them in the act has full right to cleave their skulls and rid the world of them, without fear of being called to account, or obliged to give any satisfaction for it.³⁹⁰

That witchcraft among the Iroquoians was a "capital crime" is not unique, and a similar social right to kill sorcerers without fear of invoking blood revenge is documented among Malinowski's Tobriand Islanders³⁹¹ and others. Insights implicit in those reports, as well as those points of intersection between the nineteenth century recollections of Morgan's Seneca

³⁸⁹ JR 8, p.123; see also, JR 19, pp.85-87; JR 30, p.21; JR 39, p.135.

³⁹⁰ JR 10, p.223.

³⁹¹ Crime and Custom in Savage Society, pp.85-99; Hoebel, The Law of Primitive Man, pp.204-205.

informant and the contemporary reports of the Jesuit Relations, foster an impression that witches could be killed with relative impunity among the Iroquoians; the standard of proof prerequisite to fulfilling that sentence residing either in catching the witch "in the act" of casting spells or, according to Morgan, through the formal council process described above.

I believe there is some reason to be sceptical of Morgan's report of councils in determining the presence or absence of sorcery, given two weaknesses implicit in it. First, it seems odd that the council could, following a witch's "full confession" and promise of amendment", secure a discharge. If witchcraft was considered sufficiently serious to impel execution of witches - and all reports here confirm this fact - one wonders how admitting sorcery and promising not to do it any more could so-diminish the harm of those acts which motivated the calling of the council, to enable the admitted-witch to walk away physically unscathed. It seems dubious that an admission of sorcery, with or without a "promise of amendment", could pardon an individual admitting perpetration of one of the most reviled acts in Iroquoian society. As well, one is left unsatisfied by Morgan's reports insofar as no mention is made of what might transpire should a supposedly rehabilitated witch be later found in a state of recidivism - would death then result? Or would another council be called? And what of yet another confession and promise of good behaviour - would such be accepted, or would execution now be inevitable? This element of Morgan's report, in

my opinion, contradicts the primary themes of "Iroquoian criminal justice", wherein compensation is king and the ultimate sanction a constant threat.

A second weakness in Morgan's description of the Iroquoian response to sorcery pertains to the absence of any mention of compensation by the witch for damage caused by his or her acts. Given the centrality of compensation in securing escape from death in the case of that other Iroquoian capital crime, murder, it seems somehow incongruous that harm caused by a witch could go unaddressed or recompensed. This query is underscored if one envisions a case scenario in which, for example, members of the bear clan caught a wolf clan member engaging in magic harmful to the bear clan. While the social connections between these groups, if sufficiently intimate, might motivate some form of redress other than killing the witch, logical consistency would suggest that the response might be expected to include compensation for the harm in the same fashion and by the same sorts of processes as in cases of murder. That Morgan's "councils" neither replicate those other councils (which, admittedly, may be a function of his informant's temporal distance from the historic councils described by the Jesuits) nor involve any mention of compensation dictates an attitude of scepticism toward his reports.

The weaknesses of the secondary reports regarding sorcery thus limit our observations about traditional responses to witchcraft to those supported by the Relation's primary reports.

On the basis of the descriptions found there, it seems safe to conclude that sorcerers could be killed without fear of inciting rights of blood revenge among the witch's clan, where proof of wrongdoing has been established through capture of the witch "in the act". It is unfortunate that the Relations do not detail how, in the absence of impartial eyewitnesses, those killing a sorcerer under such conditions might establish the necessary proof to the family of the deceased, should they challenge the killing. These reports also arguably fail to account for dimensions of human nature in allegations of sorcery - the question of whether an individual hatred might fester to the point where an accusation of witchcraft could be seen as a route to removing the source of one's enmity here comes to mind. In the absence of evidence responding to such queries, tentative answers are best formulated consistent with the arguments advanced above concerning the deterrent effects of the network of social ties and the omnipresent threat of blood feud. In light of these pressures, it seems likely that any act of killing might be approached with significant caution by those contemplating the act. In this regard, one might expect significant reluctance to colour intentions toward killing a possible witch; in a similar tone, it would also seem probable that the average Iroquois might be expected to view absenting themselves from the community, and contact with the disfavoured, as preferable to embarking on a rash act which might result in highly negative consequences for their entire clan.

The above caveats having been duly noted, it may be said in conclusion that the apparent Iroquoian tradition that sorcerers could be killed with relative impunity suggests the horror with which this crime and its perpetrators were viewed, and may have comprised the only exception to the general social ethic and right of blood revenge in cases of inter-clan or inter-nation killings.

(iii) Responses to Acts of Adultery Among the Iroquois

Reactions to acts of adultery among the Iroquoians suggest that infidelity was taken seriously, but that penalties paid by adulterers varied. Although both Morgan and Newell assert that adultery, while rare, was a crime only when committed by women and, owing to this, women were the only ones punished for breaches of fidelity, the Relations' contemporary reports present grounds for questioning this position. As described by his Seneca informant, Morgan relates that "ancient custom" dictated the calling of a council following the detection of adultery, which then "passed upon the question, and if the charge was sustained, they ordered [the woman] to be publicly whipped by persons appointed for the purpose".³⁹² Although not commenting upon the role of a council in administering punishment for this crime, Newell appears to support Morgan's reports. This Iroquois author offers nothing further on the

³⁹² Morgan, II, p.331.

response to adultery among his people than to reinforce its rarity and attribute its infrequency to the ease of divorce and the social acceptance of serial marriages.³⁹³

Bearing in mind that Morgan relies upon well-acclulturated Seneca evidence only, and Newell apparently relies upon Morgan and his own, well-acclulturated Mohawk reports, the Relations suggest a quite different approach to the question of infidelity. Reports emerging from the Huron missions suggest that women were held especially culpable in regard to adultery and unfaithful wives could face corporal punishments such as having their noses cut off³⁹⁴, possibly to visibly associate her with a crime deemed of some significance among her people. While this might imply that only errant wives were punished in cases of adultery, other reports inform that

Few divorces occur among them and (as I believe) little adultery. If a wife should so far forget herself, I do not believe that it would be less than a matter of life and death to the two adulterers.³⁹⁵

Unlike Morgan's reports, the Relations do not mention the holding of "councils" to deal with adulterers.

Although the evidence is slim, to what might we attribute the apparent inconsistency in responding to adultery, save that it appears to have been deemed sufficiently consistently problematic to invite some form of social sanction? If we take

³⁹³ Crime and Justice among the Iroquois Nations, pp.71-73.

³⁹⁴ JR 58, p.99.

³⁹⁵ JR 3, p.103.

into consideration those elements which appear to be common across other preliterate societies in redressing adultery, it seems that how such marital difficulties were resolved was, as much in preliterate as in modern societies, a consequence of the intermingling of a range of emotions and influences, most notably those of, and acting upon, the offended party. Thus prior analyses of preliterate adulterers suggest that the chosen avenue of redress depended upon such variables as the particular attitude of the offended spouse, and the social group, to the offense and the offenders, the degree to which a given response could negatively affect the clan and clan interrelationships, and the presence of larger social controls which restrict the available avenues of redress by the offended party, notably, the practice of blood revenge.

At the outset, it may be noted that analyses of responses to acts of infidelity among preliterate peoples suggest strongly that these were viewed as essentially private matters whose redress was largely a matter for the cuckold. Those reports of reactions to adultery with which I am familiar appear to support the Iroquoian position that the act was problematic and demanded redress only in the case of a betrayed husband, for whom the act is quite fundamentally a challenge to his status in the community. This is certainly the case among the Eskimo, where permission for extra-marital relations was reported as common and thus adultery was usually a question not of infidelity *per se* but rather of whether permission had been granted for it. In

this far northern society, Hoebel reports that "intercourse...taken without consent can only be viewed as a challenge to [the husband's] position as a man"³⁹⁶ and that the offending party might be challenged to a "song-duel" or assaulted outright. Ignoring the act seems to have been uncommon; some reaction was imperative as inaction meant a loss of face which was of no small consequence in such an intimate, "face-to-face" society as that of the Eskimo, where personal security was intimately tied to the perception of the individual's capacity to redress victimizations.

A similar situation prevailed among the historic Commanche; some reaction was imperative by the jilted husband, whose first goal was usually an effort to secure pecuniary damages in the most important currency of the time: horses. Should this not be forthcoming, or the husband so-injured by the act that it was not requested or likely to be accepted, he had recourse to physical force. Insofar as acting on that right might incite a situation of blood revenge, Hoebel reports that restitution was the commonly preferred route to redressing infidelity, and most wrongdoers eventually paid up.³⁹⁷

Similar avenues of redress were available to aggrieved husbands among the Tlingt, and included the right of infliction

³⁹⁶ The Law of Primitive Man, pp.82-83.

³⁹⁷ See: E. Adamson Hoebel, The Political Organization and Law-Ways of the Commanche Indians 4 Contributions from the Santa Fe Laboratory of Anthropology (1940), pp.49-59; also; The Law of Primitive Man, pp.134-137.

of physical force and death upon the interloper or one of his clan. Among the Tlingt, whose society was defined by a series of exogamic clans and a readily apparent social hierarchy, there does not appear to have been any penalty for intra-clan infidelities, as these acts were not perceived as bringing shame to its membership. Acts of adultery occurring between members of different clans were another matter altogether, and when it transpired between a woman and a man who *was not a member of the husband's clan*, was reportedly punishable by death, both persons being killed by the husband.³⁹⁸ Commutation of the death penalty might lie in cases where the husband was "fond of his wife" and willing to forgive her - for a price. In such cases the wife's clan could offer the husband property to clear his honour. Such a remedy did not lie in those cases where adultery crossed class lines. For example, in a case where a man of low rank consorted with a married woman of high rank, the woman's clansmen were entitled to kill two of her lover's clansmen possessing a rank intermediate to that of the adulterers, to demonstrate their insult and demand for vengeance. Following these killings, the man's clan was expected to offer yet another of their membership, in this case with a class position equal to the woman, for death; failure to do so could incite a blood feud. Were the third man handed over willingly, the woman's clan would in turn offer property in compensation for the two killed

³⁹⁸ Oberg, "Crime and Punishment in Tlingt Society", p.148.

initially.³⁹⁹

Given the apparent consistencies across the historic Iroquoian and those preliterate cultures discussed above in responding to adultery, it seems apposite to question, once again, Morgan's report that councils were historically called to mediate in such matters of the heart. Inasmuch as this delict seems to be a personal one whose choice of redress lies essentially with the cuckold, the role of a council would seem redundant. In the complete absence of any mention of a council in the contemporary reports, this redundancy would seem to be even more probable. Notwithstanding this, however, it may be the case that, where husbands proved recalcitrant in accepting compensation or ordering punishment - something which seems unlikely given the pressures of family relationships noted in the preceding paragraph - one might envision a situation where a council of some sort might be struck to move the estranged spouses to resolve their differences. Again, however, the absence of clear evidence of such a response to infidelity renders it questionable.

Taken together, the preceding reports would seem to support a tentative conclusion that, while clear rights and processes for addressing acts of adultery existed in most preliterate societies, including that of the historic Iroquoians, the consequences ensuing from a detected infidelity were intimately intertwined with personal considerations determined by the

³⁹⁹ Ibid., p.149.

relationship of the spouses and the degree of offence taken by the husband or wife from the act. The possibility that penalties ranged from compensation to corporal or even, but probably only very rarely, capital punishment, is explained to some degree by the fact that adultery was essentially a matter of the heart, and the heart is a fickle and often unpredictable thing. That being said, it seems likely that, among the Iroquoian peoples, adultery was frowned upon as it could destabilize the nuclear family and the clan, and thereby threaten the peace of the longhouse and, possibly, the village. And as with responses to other delicts, redressing the pains caused by illicit liaisons was necessarily intertwined with the fact that such offences involved the most intimate element of the face-to-face society, the nuclear family, and thereby was characterised by the strongest pressures to resolve the matter peacefully. This reality undoubtedly mitigated the theory of the rights of offended parties (noted by the Jesuits to include corporal and possibly capital punishment) in practice.

(iv) Responses to Theft Among the Iroquoians

Theft, as briefly described by Morgan, was "scarcely known among them" prior to the "commencement of their intercourse with the whites"⁴⁰⁰, and the essence of his comments on the handling of this offence seem very much situated in an acculturated

⁴⁰⁰ Morgan, II, p.333.

context. Reiterating its rarity in the period in which he wrote, Morgan informs that "the lash of public indignation, the severest punishment known to the red man, was the only penalty attached to this dereliction from the path of integrity."⁴⁰¹ Newell offers little more on the issue of the response to theft, quoting Morgan extensively and noting that it is "so well known that Indians did not practice theft originally" that there is little to say on the subject.⁴⁰²

Again, the Relations offer a somewhat different view of the response to theft among the Iroquoians. In almost direct contradiction to the evidence of the nineteenth and twentieth century Iroquois contained within Morgan and Newell, the Jesuits' records decry a constant habit of theft among their indigenous hosts, perpetrated by a significant, but not entirely intractable, population of thieves whose actions were not "tolerated".⁴⁰³ It is, of course, impossible to determine whether the Jesuits' understanding of what constituted theft, or a high degree of thievery, corresponded with similar understandings held by the Iroquoians, and thus it is impossible to be certain about the magnitude of this crime within the Iroquoian nations.

The apparent contradiction between these reports, and between the extremes of little or rampant thievery among the

⁴⁰¹ Ibid., pp.333-334.

⁴⁰² Crime and Justice Among the Iroquois Nations, pp.68-69.

⁴⁰³ JR 10, p.223.

historic Iroquoians, may be illuminated somewhat by analyses of this form of deviance among other preliterate cultures. Hoebel informs us that theft was unknown among the historic Cheyenne, theft "has never been a troublesome matter, for a person receives as a gift anything he asks for, and those who are well off are always giving to their less fortunate fellows".⁴⁰⁴ Although this approach might be supportive of positive social relations in the group, one wonders - and Hoebel fails to illuminate - how a constant beggar might be responded to, or what course might follow the request of a disliked kinsmen for a treasured possession. Of course, insofar as both the beggar and the reluctant gift-giver must function with a social matrix and customs which direct proper behaviour, and which might restrict begging and offer significant social rewards to those who are generous even to the less-favoured, some controls on responses to theft seem to be present. It is notable too, that by 1850, "borrowing" of horses had become sufficiently bothersome that a "new rule" was made, whereby stolen goods could be forcibly recollected and the thief whipped for his wrongdoing.⁴⁰⁵

Malinowski notes that the Tobrianders maintained two separate categories of theft, that of unlawful appropriation of objects of personal use, implements and valuables, and that of

⁴⁰⁴ The Cheyennes. Indians of the Great Plains, pp.59-60.

⁴⁰⁵ Karl N. Llewellyn, and E. Adamson Hoebel, The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence (Oklahoma: University of Oklahoma Pres, 1941), pp.127-128.

theft of food.⁴⁰⁶ Informing that theft of valuables was considered a "nuisance" and theft of food disgraceful, as it constituted an admission that one is without food and such was one of the greatest disgraces imaginable in Tobriand society, the only penalty accruing to a thief was shame and ridicule.⁴⁰⁷ Of course, inasmuch as reputation was a highly important commodity and one which determined social position and access to prestige and power in the community, reduction of the individual in the eyes of his or her fellows might be suggested to be a rather compelling deterrent. It would certainly seem to be the case among the Tobrianders, as Malinowski notes that "all cases of theft brought to my notice were perpetrated by feeble-minded people, social outcasts or minors".⁴⁰⁸

Among the Nuer, Evans-Pritchard observes that theft *per se* does not exist, insofar as the taking of another's possessions - usually cattle - is always viewed by the perpetrator as simply taking what is owed him.⁴⁰⁹ In this context, therefore, the question is not whether property has been taken, but whether the taker is correct in assuming a debt and whether he should have taken the particular animals he took.⁴¹⁰ Bearing in mind the persistent threat of feud and the network of interdependencies

⁴⁰⁶ Crime and Custom in Savage Society, p.117-188.

⁴⁰⁷ *Ibid.*, p.118.

⁴⁰⁸ *Ibid.*

⁴⁰⁹ The Nuer, p.165.

⁴¹⁰ *Ibid.*

and relationships in which the parties to a dispute over a debt are influenced in seeking resolution of their differences, Evans-Pritchard detailed two potential responses to "theft" within a village: First, the victim or debtor, as the case may be, may resist the taking of his cattle, but he must only do so if he can be reasonably certain public opinion is on his side. Second, he may take his case to the "leopard-skin chief" who, with the elders of the village, will hear all parties and then withdraw to discuss the matter and reach a decision; the disputants accept the verdict and the chief may, if the owner of taken animals can afford it, be compensated for his intervention.⁴¹¹

In his Relations of 1636 and 1637, the Jesuit Father Le Jeune speaks of the characteristic response to theft among the Huron Iroquois, generally and in terms of particular cases. In the former context, the Jesuit makes clear that Morgan's "lash of public indignation" often carried much more of a sting than his statement implies:

If you find any one possessed of anything that belongs to you, you can in good conscience play the despoiled King and take what is yours, and besides leave him as naked as your hand. If he is fishing, you can take from him his Canoe, his nets, his fish, his robe, all he has; it is true that on such an occasion the strongest gains the day, - still, such is the custom of the Country, and it certainly holds some to their duty."⁴¹²

This right of personal retaliation of the victim of a theft was

⁴¹¹ Ibid., pp.162-163.

⁴¹² JR 10, p.223; Le Jeune's Relation, 1636.

evidenced in the priest's reports of the case of 'the wretched son-in-law', contained within Le Jeune's 1637 Relation:

This wretch, who was not less thievish than cruel, having one day chosen his time, robbed his father-in-law, and carried his booty to his mother's house in another village. Nevertheless, he could not conceal his game so well that suspicion did not rest upon him, - with the result that, according to the custom of the country, this father-in-law, using to good advantage his right of reprisal, went and pillaged his [son-in-law's] cabin, taking all he had and hardly leaving the inmates enough with which to cover themselves.⁴¹³

The "custom of the country" which outlined rights of response to theft seems to have been reasonably well-defined and to have involved a clear series of processes, albeit not involving the organisation of a council. Bressani, in his Relation of 1652-53, concurs with prior reports of the rights of the victim to despoil the thief and his cohabitants in retaliation and for compensation, but goes further, distinguishing between items found rather than stolen, as well as between thieves and those who are in possession of stolen items unknowingly, having obtained or purchased them from the thief.⁴¹⁴ These distinctions would seem to imply some cognizance among the Huron Iroquois of the necessity of a "guilty mind" in the crime of theft, and an unwillingness to punish as severely, if at all, those lacking such *mens rea*. Thus Bressani relates:

...they have established that, first, if a thing, lost or dropped, even though it should be but three paces away, be taken, by any one whomsoever, this is not theft, - that it is only so when an object is taken

⁴¹³ JR 13, pp.11-13.

⁴¹⁴ JR 38, p.271-273.

from cabins or huts; secondly, that the one from whom anything has been stolen, on recognizing it in the hands of another...must not suddenly seize it, but must question him, - for instance "Who gave you that javelin?" If the other makes no answer, he is deemed convicted of theft; if he say that he has received it as a gift, or bought it of some one, he must tell the name of him who gave or sold it to him. Then the other goes to find the seller, and puts the same question to him; and, if this one name to him another, he goes to find him and continues until he finds one who has it from nobody. In this, and in similar things, they display great sincerity, - never naming an innocent man; while the guilty one, through his silence, confesses himself the culprit.⁴¹⁵

There are reported as well isolated incidents of more severe reactions to theft. In one early Relation from the Huron country, a Jesuit relates the story of a "girl that stole, who was at once killed without any inquiry, but it was by her own brother."⁴¹⁶ The severity of the sanction levied against this thief, coupled with its incongruity with the common mode of response to theft detailed in the majority of Relations, suggests that this case may have had unusual aspects which went either unnoticed or unreported by the priest. While it is impossible to be certain, it may be ventured that this thief fell within that incorrigible class of deviants whose greatest risk of sanction originated within their own clan. A family member who persistently engaged in criminality was both

⁴¹⁵ Ibid., p.271. Bressani goes further to relate these processes as they functioned in the case of an elderly woman's loss of a "collar of certain beads made of sea shells", in which the woman having found the collar, while entitled to keep it, "unless she wishes to be thought unmannerly, litigious, and avaricious, should give back the pouch, and content herself with some civility or gratuity, which the other owes her" (p.273).

⁴¹⁶ JR 8, p.123.

expensive and troublesome, and tradition and social responsibility entitled the clan to orchestrate the criminal's demise at the hands of a relative. This 'sib right' removed not only a source of trouble for the entire clan, but eliminated as well the potential for blood revenge engendered should an outsider attempt to do away with the problem. The combination of the possibility that the girl was a recidivist and the fact that her brother acted as her executioner support such an interpretation, however it should be noted that this response to theft was in all probability an aberrant or at least infrequent one that did not constitute a significant challenge to the "right of reprisal", discussed above.

If one takes together the evidences of responses to theft, it seems that, notwithstanding the variety of societies discussed, once again it is the influence of social relationships and the importance of the individual within these that defines both how or whether the taking of goods is perceived as wrong, and what consequences might flow from that perception. In the case of the Cheyenne and the Tobrianders, the social consequences and potential damage to reputation implicit in either thieving or responding inappropriately to thieves greatly mitigated the incidence of the act and, therefore, the nature of sanctions which might rise in response to it. The same might also be said of the fractious Nuer, for whom the omnipresent threat of feud and the importance of public opinion were important influences in determining whether the taking of

cattle was a legitimate attempt to draw attention to, and exact payment for, a debt owed the taker or, where no debt was found, the taking was wrongful and the cattle must be returned.

The response to theft among the historic Huron people appears to have been quite highly developed and complex, and yet was still very much a function of social considerations. There were clear and apparently well-established means for defining whether, in fact, possession of questioned goods was wrongful and the result of theft, and clear remedies lay for the victim who could prove an act of theft. And while it may be less apparent to some readers where the threat of the feud and the importance of social connections enter this "law", it may be argued that the great care which surrounded the detection of, and reaction to, this delict implies just how keenly those larger influences were felt. Here I would suggest that the detailed process for determining theft, as well as the distinctions between "taking" and simply "finding", suggest the degree of care which was taken to ensure that one's fellows were not wrongly accused, as a wrongful accusation could not only damage the social relations within the village, but might be postulated as a potential source of blood feud where the wrongly accused were the victims of an assault on their person and possessions.

Summarizing the responses to disputes or wrongdoing in cases of murder, sorcery, adultery and theft among the Iroquoians thus reinforces the position first stated by Evans-

Pritchard, and observed in action by many others following this, that "traditional criminal law" among these peoples was very much a function of the primacy of maintaining pacific and supportive social relations within communities. In this regard two factors were definitive, namely, the consistent threat of blood revenge and feuding, which acted both as a proactive deterrent of deviance as well as a control on reactive deterrent forms and processes, and the importance of the clan in the definition of Iroquoian society and social control within it. From this observation, the question which necessarily comes to light in regard to the resurrection of "traditional dispute resolution" in Kahnawake is how these historic processes might have been preserved or altered over time, and whether some germ of these original "traditions" can be seen in modern Kahnawake juridical institutions. More than this, perhaps, one wonders whether, even if evidence of an enduring tradition can be documented, how might the force of the feud and the interests and importance of the clan be replicated in a modern Iroquoian society where the feud would seem an unlikely and impracticable legal form, and the clan system is essentially dead. It would seem that, in such a case, an "invention" of a more appropriate legal tradition is not only inevitable, but imperative. And if the latter proves true, is a "legitimate" traditional system possible?

The answer to this question can be aided by exploring the culture history of the Kahnawake Mohawks in search of an

endurance or alteration of these original customs - as Llewellyn and Hoebel found in the case of the Cheyenne law of theft - as evolution, according to Hobsbawm, can lead to a somehow more legitimate modern "tradition" than "invention". Thus we turn now to such a culture history among the Mohawks, and to the task of tracing the evolution of their dispute resolution mechanisms overtime. From this, an analysis of the proposed "'traditional" system will be conducted, both in terms of the degree of invention which may or may not be present, the implications of that invention, and whether invention and the distance from "tradition" which it implies and reflects, is sufficient to eliminate the practical possibility of a truly "traditional" justice system within Kahnawake.

5. Tracing the Chronicle of Kahnawake and Mohawk Traditions of Public-Level Dispute Resolution, 1608-1990

5.1 Strangers in Our Midst: The Iroquois and the Newcomers, 1608-1760

The modern community of Kahnawake finds its origins in the Mohawk Valley of the seventeenth century and the remarkable

social, cultural and population devastation which had been visited upon the Kanienkehaka following the arrival of French, Dutch and British in northeastern America. The first augurs of the costs of colonial contact came in the form of the French explorer Samuel de Champlain and the establishment of his fragile settlement at Quebec in 1608. Acting under a mandate to "manage the colony, to explore, to maintain alliances with the Indians and to forge new ones"⁴¹⁷, Champlain penetrated the wilderness around Quebec, striking trade and military alliances with the Iroquoian and Algonquin nations on its borders, and involving the French in a series of Huron and Montagnais raids against their traditional Mohawk enemies to the south. In so doing he laid the seal on an intensive historical enmity between the French and Mohawk nations which would never be entirely resolved.⁴¹⁸

The struggles over commerce, religion and land which developed between these two nations stand in stark contrast to the far more pacific association which arose between the Mohawks and the short-lived Dutch colony at Fort Orange, established on the Hudson River in 1615, a mere six years after the entrenchment of the French at Quebec. Unlike the French, the

⁴¹⁷ Bruce G. Trigger, "Champlain judged by his Indian Policy: A different view of early Canadian history", 13 Anthropologica, p.87.

⁴¹⁸ Samuel de Champlain, The Works of Samuel de Champlain [1626], ed. and trans., Henry P. Biggar, 6 vols. (Toronto: The Champlain Society, 1922-1936) (hereinafter, Works), pp.128-130; 94-107.

Netherlanders were interested only in promoting the trade in furs with their aboriginal neighbours, and endeavoured to remain out of their indigenous partner's politics. They struck only those treaties and alliances which were necessary for the peaceful pursuit of their interests and traded willingly with all comers to Fort Orange, the majority of whom were Mohawks.⁴¹⁹ For their part, the aboriginal nations with whom the Netherlanders traded appear to have been reasonably content with such a purely commercial association, and their contentment was revealed in the establishment of New Netherland without the baptism of famine or amerindian war.

This situation was altered little initially when the British defeated the New Netherlanders in 1664 and assumed control of their post at Fort Orange⁴²⁰, which remained

⁴¹⁹ The Dutch maintained a strict policy of noninvolvement in amerindian conflicts. They digressed from their pacifist policies only once, when the Mohawks attacked the Dutch's Mahican allies in 1624. Notwithstanding the Mahican's superior armaments, the Hudson river people were greatly outnumbered by the Mohawks and turned to the Dutch at Fort Orange for assistance. The latter materialised in a small party of gunners, who proved to be of little help in the face of the Mohawk onslaught - the Mahicans were routed and three of the Dutchmen met grisly deaths in the flames of Mohawk victory fires. Thus blooded, the Dutch immediately withdrew from the front and sent a Company trader to the Mohawks to smooth over the incident and reconfirm the New Netherland policy of strict neutrality in amerindian affairs. See: JR 29, pp.114-115; Trelease, Indian Affairs in Colonial New York, p.47; J.F. Jameson, ed., Narratives of New Netherland, 1609-1664 (New York: Charles Scribner's Sons, 1909), pp.84-85.

⁴²⁰ Jennings, Ambiguous Iroquois Empire, pp.130; Cadwallader Colden, The History of the Five Indian Nations Depending upon the Province of New York in America [1727], 2 vols. (Ithaca, New York: Cornell University Press, 1958), I, p.18. The Dutch colony would manage a brief resurrection in 1673-1674, but with few, if any, practical implications for the Mohawks or the British and their

predominantly Dutch. In terms of the colonial endeavour in the american northeast, however, the Dutch and English manifested few similarities, and it was not long before the Mohawks, as the principle traders at the Hudson river post, soon found themselves tangled within French-British politics and the wars over trade and territory which accompanied them. When these conflicts were added to the Mohawk's pre-existing traditional enmities and intertribal battles over control of the trade⁴²¹, the result was a remarkable depopulation which could be remedied only slightly through the adoption of prisoners of war into the extant clan system.⁴²²

An exacerbation of intertribal warfare through the addition of trade and colony-related battles was not the only cost visited upon the Mohawks in the post-contact period, nor was it among the first price to be paid for the coveted goods brought by the Europeans and their trade. Although it is impossible to know precisely from which source and direction the first foreign diseases found their way into the Mohawk country, small pox had raged through lands north of the Mohawk Nation and killed

colony of New York (Jennings, *ibid.*, p.137; Jennings et al, eds. The History and Culture of Iroquois Diplomacy, p.160).

⁴²¹ Hunt, The Wars of the Iroquois, chapter 3; Trelease, Indian Affairs in Colonial New York, chapters 5-7.

⁴²² Lynch, "The Iroquois Confederacy, and the Adoption and Administration of Non-Iroquoian Individuals and Groups Prior to 1756," pp.83-99.

hundreds of Hurons⁴²³, and as French-allied Hurons and Iroquois clashed in raids on the Saint Lawrence river, prisoners taken into the heart of the Mohawk country carried with them the deadly European diseases originally brought to Huronia by French traders and priests. Small pox slithered through the Five Nations country like a beaten dog looking to bite, and when it had claimed between fifty and seventy percent of the estimated Mohawk pre-contact population⁴²⁴, it moved on to the Susquehannock nation to the south. By the third decade of the seventeenth century, owing primarily to the extensive penetration of the Mohawk nation by French Jesuits and traders, most eastern Iroquois communities had experienced at least one, and in most cases several, epidemics of small pox and other European diseases.⁴²⁵ The catastrophe was enormous and devastating, and many of the communities never really recovered.

The same traders who had brought foreign disease to Indian country carried another sort of affliction, and it swept through the Mohawk territory with a vengeance and consequences which were in many ways as disastrous as the epidemics. The

⁴²³ JR 19, p.79, also at pp. 15, 171, 185, 197; see also JR 8, pp.89, 207; JR 18, pp.189-191; JR 47, pp.193, 205; JR 53, pp.69-75, 93-95; 123-125.

⁴²⁴ William A. Starna, "Mohawk Iroquois Populations: A Revision", Ethnology, 27(4) (1980), p.376.

⁴²⁵ Starna, *ibid.*; William N. Fenton and Elisabeth Tooker, "Mohawk", in Northeast, vol. 15, Handbook of North American Indians, ed., Bruce G. Trigger (Washington: Smithsonian Institute, 1978), p.468; T. J. Brassler, "Early Indian-European Contacts", in Northeast, *ibid.*, p.83; Jennings, The Invasion of America, pp.21-31.

affliction was alcohol, and it is possible that the Mohawks gained their first taste of this, too, through their Saint Lawrence marauding. However, after the establishment of the Dutch colony in the northeast and the concentration of the Mohawk trade at Fort Orange, the majority of alcohol in the Mohawk Valley undoubtedly originated from that source.⁴²⁶ As the destruction of the Hurons by smallpox and fevers was echoed among the Mohawks, so was the destruction and violence caused by drunkenness in Huronia repeated in eastern Iroquoia. Francoise Le Mercier, one of the first Jesuits to live among the Mohawks as other than their prisoner, documented the ravaging of that nation - and his mission there - by the drunkenness and brandy.⁴²⁷ Citing an undue affection for intoxication as the primary hindrance to the establishment of the faith among the Mohawks, or "Agnie", he noted that drunkenness

is so common here, and causes such disorders, that it seems sometimes as if all the people of the village had become insane, so great is the license they allow themselves when they are under the influence of liquor. Firebrands have been thrown at our heads, and our papers set on fire; our chapel has been broken into; we have been often threatened with death; and during the three or four days while these disorders last, - and they take place very often, - we have to suffer a thousand acts of insolence without complaint, without eating, and without repose. Meanwhile, these furious creatures overthrow everything they come to and even massacre one another, without sparing either relatives or friends, compatriots or strangers. These acts sometimes go to such an excess that the place

⁴²⁶ See, for example, Jean R. Murray, "The Early Fur Trade in New France and New Netherland", 19 Canadian Historical Review (1938), p.375.

⁴²⁷ JR 51, p.217.

seems no longer tenable; but we shall leave it only with our lives.⁴²⁸

As the depopulation and social ills caused by the European invasion intensified, the Mohawks' reliance upon the trade increased to troubling proportions. To participate effectively in the trade, a hunter had to devote himself full time to a priority of hunting of animals for fur rather than flesh, a shift of focus which was accompanied by a concomitant increase in emphasis upon the women's agricultural pursuits as the essential source of sustenance. Certainly pelts could be traded for food stuffs from the posts, but the reality of that situation was that the posts were often short of food themselves, and any number of brandy-traders and thugs were waiting to intercept the hunters and their harvest of furs before they reached the posts.⁴²⁹ The inevitable consequence was that only a limited amount of fur made it to the legitimate traders, and even less was exchanged for food. The resulting dependence upon the trade and the women's agriculture made the people vulnerable: when the small pox and fevers struck, few men went to harvest furs to trade for food and even fewer women went to work in the fields. Famine thus followed disease, adding another dimension to the escalating crisis within the Mohawk nation.⁴³⁰

⁴²⁸ Ibid.

⁴²⁹ JR 67, p.43.

⁴³⁰ JR 49, p.139; Jennings, Ambiguous Iroquois Empire, pp.128-

It was into this context of a Mohawk Nation battling massive depopulation and sociopolitical confusion from war, illness and famine, that the French Jesuit missionaries arrived, adding to the extant social and cultural crises those of religion as well. Their arrival had been anticipated by the "Christian Hurons" and Montagnais⁴³¹ who had been adopted into the Mohawk Nation following the Iroquois' defeat of the Huron Confederacy in 1649.⁴³² Accompanied into the cantons by their "pagan" peers, the adoptees imported a bitter and desperate factionalism which had previously contributed greatly to the social problems and ultimate downfall of their homeland to the north. As converts spoke of the powerful religion of the French, "pagan" adoptees warned the Iroquois of the disease and famines brought by the sorcery of the Jesuits, referred to by the aboriginals by the "Black Robes" which were their most dominant feature.⁴³³

One of the most compelling of the examples offered by the unconverted of the witchcraft practised by the priests concerned

⁴³¹ JR 51, p.159; JR 41, p.133.

⁴³² JR 33, p.69, 255; JR 40, p.223; JR 52, p.55.

⁴³³ JR 43, pp.307-317; this relation contains Jesuit reports of the campaigning against the French faith which was underway in the Cayuga Nation when the missionaries arrived there in 1657: "The aversion to the Faith and to our persons that the Hurons had excited in the minds of the natives of the country, by leading them to believe that we carried disease and misfortune into every region that we entered, caused us to be received with a rather cold welcome." As Hurons and Montagnais were adopted throughout all Five Nations, it is not unlikely that such a welcome awaited Jesuits entering the Mohawk Nation as well.

their often over-zealous efforts to baptise the ill and dying. Believing that those who died without the salvation of a christian baptism would be relegated to the eternal fires of hell, and facing a refusal of the rite by most Iroquoians while in a healthy or only moderately ill state, the Jesuits would wait until the sick were simply too ill to articulate their rejection of the sacrament, with the result that baptism was usually the companion of an imminent death. This unfortunate coincidence led many Iroquoians to the logical but unfortunate conclusion that the strange religion of the Black Robes was a form of witchcraft which they were using to murder Iroquois people.⁴³⁴ Such suspicions were made worse by the apparent concurrence of the arrival of the priests and the onset of epidemics, and their frequent, unknowing violations of Iroquois social conventions. Among the latter was the priests' habit of locking the doors of their houses, a glaring breach of Iroquoian etiquette which was construed as hiding the witchcraft practised therein⁴³⁵, and which was added to baptism as strong evidence of their sorcery.

Nurtured by the adoptees' intrigues and conflicts, Mohawk communities were quick to manifest the social and political symptoms of the Jesuit presence. Immediately upon the priests' arrival, they were greeted by the converted adoptees whose prior

⁴³⁴ Baptism: JR 11, p.163; JR 48, p.123; JR 49, p.105, 113; JR 64, pp.164-165; Richter, *ibid.*, pp.5-8.

⁴³⁵ Witchcraft: JR 12, p.87, 237; JR 15, pp.32-33, 45-47; JR 16, p.39, 125.

arrival in the cantons had made some members of their adoptive clans amenable at least to listening to what the Black Robes had to say.⁴³⁶ These people had witnessed the destruction of their nation and country by forces which the Shamans were proving unable to counter, and they were attracted to the Jesuits not for any value intrinsic to the Catholic religion⁴³⁷, but by the possibility that their shamanistic powers might succeed where the traditional spiritualists had failed. The periphery of this audience was characterised by those merely curious about the faith as well as those who, while they had little concern with Catholicism, were drawn to the priests by their campaign to rid the cantons of liquor. Virtually all of these Mohawks had one common aim for coming to hear the Black Robes: they looked to the priests to resurrect the Mohawk Nation from disease, drunkenness, and defeat at the hands of their enemies.⁴³⁸

On the first count the priests had little success, repeating their practice of deathbed baptisms which had garnered them the reputation among the Hurons as sorcerers, and in the process spreading epidemics that went from bad to worse. They had little better effect in controlling drunkenness, as they and their followers frequently fell victim to the intoxicated rages of "pagans". And although the wars became so debilitating that

⁴³⁶ JR 51, p.159.

⁴³⁷ Jaenen, "Amerindian Responses to French Missionary Intrusion, 1611-1760", pp.182-197.

⁴³⁸ Richter, "Iroquois versus Iroquois", pp.6-7.

at least one village permitted a missionary to erect a great cross in its centre in order to bolster the warriors with its powers⁴³⁹, the priests had as little control over the outcome of battles as they did over the many other social problems they were expected to remedy. As their more conspicuous failures mounted and the Mohawks' national downturn continued, those who had believed the Hurons' tales of the Black Robes' sorcery became increasingly convinced that the current situation was the result of a combination of Jesuit sorcery and the anger of the Gods and their Shamans at the turning away from tradition. Many among this group became bitterly and violently opposed to the priests and their converts. On one such occasion, a convert faced

[o]ne of his relatives who could not endure that he should become a Christian, [and who,] having purposely become half intoxicated, threw himself upon him; he snatched away the rosary and the crucifix Assendasse wore suspended from his neck, and threatened to kill him if he would not renounce all those things.⁴⁴⁰

Shamans, while they may not have encouraged the violence, certainly encouraged their traditional followers to pressure converted relatives and friends to turn against the French faith, as such conversions threatened not only the traditional status quo, but also the Shaman's prominent place within it. Jesuits were no less reluctant to pit their converts against the "pagans", and they forbade converts to participate in

⁴³⁹ JR 53, pp.159-161.

⁴⁴⁰ JR 59, p.239.

traditional rituals, many of which had more to do with group unity and social cohesion than religion per se.⁴⁴¹ At the same time, the converts were pressed by the priests to actively proselytise those among their social circles who remained faithful to tradition. As these pressures mounted, a vicious and often violent factionalism was added to the ravages of constant warfare, famine and epidemics, making the Mohawks' principal villages increasingly uninhabitable.⁴⁴²

(i) North to Kentake: The First Relocation, 1667

In a bid to escape the perils of life in the Mohawk Valley, some among the Mohawks opted for the classically Iroquoian practise of avoiding conflict by exiting from its site, and began to drift away from their traditional territories in search of more hospitable environment. They found such a place in 1667

⁴⁴¹ JR 59, p.33; JR 60, p.191; JR 24, pp.24-25.

⁴⁴² JR 55, pp.61-63; JR 60, pp.192-193; Richter, *ibid.*, pp.10-

at the site of the Jesuit seignury⁴⁴³ and mission settlement of "Saint Francoise Xavier du Pres" in New France, which occupied lands on the southern shore of the Saint Lawrence River,

a quarter of a league beyond a prairie called la Magdelaine, opposite the islands which are near the island of Montreal.⁴⁴⁴

The lands at La Prairie had been conferred upon the Society of Jesus in 1647 by the Sieur de Lauzon, a royal councillor in the Parliament of Bordeaux, who had set only one condition on his grant: the land must be used for the temporal and spiritual benefit of the indigenous inhabitants. The lack of conditions set on the grant suggest that the seignury of La Prairie, and the later, more western seignury of Sault Saint Louis, were not seigneuries in the pure sense of the term. They contained none of the most common clauses pertaining to division and settlement

⁴⁴³ Seigneuries were tracts of land granted to "seigniors" who were the actual possessors, and who were responsible for clearing and settling the seignury. They delegated the latter tasks to "censitaires" or "habitants" upon applications therefrom, in return for rights of settlement and a portion of the harvests, etc. See Marcel Trudel, The Seigniorial Regime, Canadian Historical Association Booklets No.6 (Ottawa, 1967), and W.B. Munroe, The Seigniorial System in Canada (Cambridge: Harvard University Press, 1907).

⁴⁴⁴ Concession du le avril, 1647, faite par le Sieur de Lauzon aux reverends Peres Jesuites, de deux lieues de terre le long du fleuve St-Laurent, du cote du sud, a commencer depuis l'Ile Ste-Helene jusqu'a un quart de lieue au-dela nd'une prairie dite la Madelaine, vis-a-vis les isles qui sont proche du Sault de l'Ile de Montreal, espace qui continent environ deux lieues le long de la dite riviere St-Laurent, sur quartre lieues de profounder dans le terres, tirant vers le Sud. Registre d'Intendance, Nos 2 a 9, folio 125; confirmed by Louis XIV at St. Germaine en-Laye, 12 March 1668. See Canada. Department of Indian and Northern Affairs. Treaty and Property Rights. Land Title at Caughnawaga (Ottawa: Department of Indian and Northern Affairs, May 1970), appendix A.

normally characterising seigneuries⁴⁴⁵; a distinction which was further elaborated by the prohibition on French settlers keeping cattle or "public houses" within the Jesuits' grant, which would likely have made settlement on the lands at La Prairie rather difficult for the priests to sell to the Canadians.⁴⁴⁶ The grants also contained a further, vital aspect: should the Jesuits or the Iroquois choose to abandon La Prairie, provision was made for reversion of the granted lands to the Crown "tout defriches" - that is, free and clear of any claim upon it by the missionaries.⁴⁴⁷ Notwithstanding these distinctions, the Jesuits construed the grant as equivalent to one making them seigniors, and as soon as possible after the 1647 grant they began dividing up the land for sale or rent to French settlers and for the settlement of the "converted" aboriginal community.⁴⁴⁸

⁴⁴⁵ For example, the undertaking to make grants to "censitaires", who would in turn promise to settle "habitants" on the grants, was one of the central aspects of any seigneur's duties. The Jesuit seigneury grant did not carry this condition which, if unfulfilled by other seigniors, led to orders to withdraw from the seigneury. As well, any French settlers moving into the lands of the grant were forbidden either from keeping cattle or setting up businesses, which effectively removed much of the inducement to reside there. See: Edits et Ordonnances Royales, 1854, vol.I, p.105; Gage Concession, Land Title at Caughnawaga, appendix E.

⁴⁴⁶ "First grant to the Society of Jesus, by Louis XIV, King of France, for the benefit of the Iroquois - Dated Fontainebleau, France, 29th May, 1680", in Indian Treaties and Surrenders, 1680-1890, p.288.

⁴⁴⁷ Ibid.

⁴⁴⁸ JR 51, p.149; Blanchard, 7 Generations: A History of the Kanienkehaka, p.164.

As will be recalled from the opening moments of this thesis, at the time of the Mohawk relocation to Kentake in the region of New France, the fledgling French colony directed the behaviours of its settlers through the laws and regulations contained within the "Contume de Paris", the King's "Ordonnance Civile" of 1667 and, after 1670, "La Grande Ordonnance Criminelle".⁴⁴⁹ These laws and the disputes they defined were administered by a three-tier legal system consisting of the lowest seigniorial courts, followed by the royal courts at Montreal, Quebec and Trois Rivieres, and the highest court of the Sovereign Council. In theory, at least, the Mohawks who relocated were vulnerable both to these codes and the French courts, and enduring French documents reveal that pains had been taken to establish clearly their answerability in regard to specific, serious offences. As declared by the Sovereign Council at Quebec in 1664, the latter included a specification that "the Indians [were] subject to punishment for murder and rape as prescribed by the laws and ordinances of France"⁴⁵⁰; three years later this jurisdiction was expanded to include French laws and punishments in regard to "murder, rape, theft, drunkenness and

⁴⁴⁹ "Recueil general des anciennes lois francais depuis l'an 420 jusqu'a la revolution de 1789", vol.XVIII (Paris, 1929); William J. Eccles, France in America (New York: Harper and Row,1972), pp.72-73.

⁴⁵⁰ New France, Conseil superieur de Quebec, Jugements et deliberations du Conseil Souverain de la Nouvelle-France, 7 vols (Quebec: A Cote, 1885-91), vol.2, pp.174-175, 21 avril 1664; see also, vol.1 throughout.

other crimes".⁴⁵¹ Although the earlier-cited gap in the historical records is pronounced and limits generalization of the preceding information, it would seem clear that the Mohawks and others remained vulnerable to these and later regulations, dealing with the trade and control of the trade in brandy, until the fall of New France in 1760; the degree to which that vulnerability was realized in practice, however, is less uncertain and appears to have been quite limited.

The preceding arrogation of a criminal law jurisdiction over the Mohawks at Kentake would seem to suggest that here and, potentially, at the later settlements, these Iroquoians had effectively lost control of the administration of justice to their people in their community, and delicts and disputes were all handled by French processes rather than Iroquoian ones. However, there is sufficient reason to be sceptical of such an impression. In the first place, there is nothing in the Jesuits' reports emerging within the community which confirms such a loss of jurisdiction in practice. For although the Relations offer sporadic reports on acts of violence and intoxication within

⁴⁵¹ See New France, Edits, ordonnances royaux, declarations et arrêts du Conseil d'état du roi concernant le Canada, 3 vols. (Quebec: Frechette, 1854-56) vol.3, p.70, 11 mai 1676; see also, generally, vol. 1; New France, Conseil supérieur de Québec, Jugements et délibérations du Conseil Souverain de la Nouvelle-France, 7 vols (Quebec: A Cote, 1885-91), for example, vol.2; see also, vol.1 throughout; W. J. Eccles, The Canadian Frontier, 1534-1760; Ulloa, A Voyage to South America..., *ibid.*; Dickason, "Louisburg and the Indians...", pp.25-27; Jan Grabowski, "Crime and Punishment: Sault-St-Louis, Lac Des Deux Montagnes and French Justice 1713-1735, unpublished paper (Montreal: University of Montreal, February 1992), pp.1-3.

Kentake and its later permutations, there is nothing offered concerning how or to whom those conflicts were directed for resolution. Thus one may surmise that disputes occurring within Kentake were handled essentially informally and, where the disputants were Mohawks, by the Mohawks themselves; while criminal level disputes among French settlers at Saint Françoise Xavier du Pres may have been taken to outside, French authorities at Montreal. It may be further suggested that the reality over the course of the development of the Mohawk community to 1760 and its consistently escalating population suggest that their sheer numbers and importance as French military allies would have made the French reluctant to endanger the Mohawks' good will by imposing French laws where these were neither needed nor desired.

Such a reluctance is supported by Grabowski in his documentation of the trial of a "domiciliated" Huron charged with the rape of a French woman in 1664:

The verdict of the 1664 rape trial was itself a mockery of the judicial procedure. Huron, Nipissing, Algonquin and Iroquois chiefs were summoned to Quebec, to listen to the Council's displeasure at the natives' reluctance to surrender the wanted criminal. Instead of compliance, the Council received a list of Indian grievances. The chiefs stated that the French laws were not known to their people, that while murder was supposed to be a capital crime, they were unaware that the same applied to rape. Finally they demanded that [the defendant] be pardoned. Behind this request was a thinly disguised threat, that failure to do so could jeopardize an "old friendship" between the "allies" and the French. Granting the pardon, the governor extracted in return a vague promise that his allies

would thereafter abide by French laws.⁴⁵²

Thus while there seems some evidence to infer that the politics of the day created a context favourable to the preservation by practise of Iroquoian methods of resolution of serious criminal delicts, there is no evidence indicating what form those practises may have taken at the time. The absence of reports of internal resolution of disputes in relation to such acts as adultery, theft, witchcraft or murder, discussed earlier, in the northern communities after 1664 is problematic, but also suggestive. It may be the case that the absence of such information indicates not that no such resolutions occurred, but that, if they did occur, it was outside the view of the Jesuits, who, as in the case of the condolence, might be expected to have recorded such intriguing elements of local ethnography had they been exposed to them. That such reports are conspicuously absent is problematic, creating a context where it is possible only to infer possibilities, rather than confirm practises, about the handling of criminal disputes in the northern Mohawk settlements until the eighteenth century.

Returning to the matter of the Mohawks' relocation to Kentake, what is most intriguing about their migration to the north is that they would choose to relocate each time upon land held and administered by the Jesuits as seigneuries, rather than remaining upon lands less questionable in their title. For

⁴⁵² Jugements et deliberations du Conseil Souverain, proces-verbal, 21 avril 1664, vol.2, pp.174-175; Grabowski, "Crime and Punishment...", pp.6-7.

inasmuch as the Mohawks may not have shared the Jesuits' opinions of rightful ownership to the lands, there can be no doubt that, in the eyes of New France, all the successive Mohawk settlements resided on lands which belonged to France. This position was held notwithstanding the reality that the French presence in Canada was predated by earlier, aboriginal residents who, by the international law of the day, may be said to have maintained rights to it, and in direct contradiction of a 15th century Papal edict granting most of the "new world" to Spain and Portugal. In an effort to manoeuvre around these inconveniences, the French chose a higher moral ground: they asserted that their presence in that world was not grounded upon the base motivations of colonial glory or profit, but was impelled by their duty as a good Catholic nation to spread the "true religion" to "pagan" peoples. Saved by this divine mission from the application of lesser laws, the aboriginal lands which fell into their hands were viewed as no more than the rightful fringe benefits of such a higher calling.⁴⁵³ This "fact" left apparently unspoken to the Mohawks, they could not have known that, in the minds of at least some Europeans, the gradual movement to Kahnawake was more in the nature of an immigration beyond, than a migration within, Mohawk territory.

Yet if we assume that the Mohawks either were unaware or

⁴⁵³ Marc Lescarbot, The History of New France, 3 vols. (Toronto: The Champlain Society, 1907), vol.1, pp.16-17; Peter A. Cummings and Neil H. Mickenberg, eds., Native Rights in Canada (2nd ed.) (Toronto: General Publishing Company Limited, 1980), pp.76-79.

unconcerned about the French arrogations of title, this does not entirely explain why the eastern Iroquois chose to relocate to any of the five "mission" sites along the Saint Lawrence culminating in modern Kahnawake. Some illumination in this regard may be seen in the fact that each of the sites lay upon the Saint Lawrence River, the trading "superhighway" of the seventeenth century, and were in close proximity to the French trading post at Montreal. From Kentake and its successors, an ambitious Mohawk could intercept the valuable fur cargoes of northern aboriginal nations heading for Montreal or Quebec, and divert these to the better market at Albany, resulting in a tidy profit without the effort required to harvest peltries at their source.⁴⁵⁴ Even for those who chose to do their own hunting, the northern settlements offered an excellent vantage point from which to pressure both the British at Albany and Canadians for better prices or goods, by jumping back and forth between the two markets. Clearly, for those Mohawks who wished to access both the English trade at New York and the French trade at Montreal, northern relocation was a most auspicious development.⁴⁵⁵

The location of missions within or nearby the village sites seems to have acted as an additional inducement to eastern Iroquois relocation, inasmuch as these "mission settlements"

⁴⁵⁴ Murray, "The Early Fur Trade in New France and New Netherland", p.369, 375-376.

⁴⁵⁵ Blanchard, "To the Other Side of the Sky", pp.88-89.

constituted contexts in which the Mohawk could escape the ravages of alcohol and, for those converting to Catholicism, practise their new-found religion free from "pagan" persecution. The Relations are clear on the issue of alcohol - it had decimated the social relations of more than a few amerindian communities⁴⁵⁶, and the Mohawks in particular seem to have been anxious to be rid of the noxious drink.⁴⁵⁷ Their reaction to strong drink was due in large measure to the reality that it was liquor which loosened the normally strict social conventions constraining Iroquois behaviour, freeing those resentful of the converts' disdain for tradition and thereby contributing greatly to their persecution.⁴⁵⁸ The resulting social disruption induced more than a few Mohawks, both converts and "pagans" as well as those caught between these groups, to seek the sanctuary offered by the northern villages.⁴⁵⁹

⁴⁵⁶ JR 51, p.217; JR 53, p.241; JR 58, p.83; JR 62, pp.67-71, 183.

⁴⁵⁷ JR 60, p.101.

⁴⁵⁸ JR 51, pp.125, 129; JR 53, p.257: "When our Savages have received an injury from anyone, they get half-drunk and do with impunity all that passion suggests to them". On the pressure exerted upon "pagans" by converts, see JR 51, p.231; JR 58, p.61; Richter, "Iroquois versus Iroquois", pp.9-10.

⁴⁵⁹ Liquor was banned at all Jesuit missions, and it was this prohibition which the priests recorded as responsible for drawing Iroquois from the cantons; see JR 61, p.239: "...the fame of this excellent regulation having gone abroad through all the villages of the Iroquois, the effect has been that in large numbers they leave their own country, in which the excesses which drink causes are horrible; so that, in order to free themselves from them, they come and settle down in this territory, in which, As they say, there is no drinking. It is this which has populated this mission with Iroquois, who are continually flocking to it from all nations,

At Kentake and each of the later villages locations, it was the intention of the French colonial authorities that the amerindians and French settlers should live together in a sort of "social laboratory" in which the aboriginals would be slowly weaned of their culture and traditions and transformed into French settlers. This program of "francization"⁴⁶⁰ or "frenchification"⁴⁶¹, conceived by Champlain⁴⁶², would remain the fundamental expression of the French approach to amerindian relations until the downfall of the colony to the British in 1760.⁴⁶³ Its defining premise was rooted in Champlain's first impressions of northeastern indigenous peoples as "savages" in need of civilizing⁴⁶⁴, a goal which could be best achieved by encouraging them to adopt a French way of life and thinking - in essence, to "francize" them. Francization, if successful, would

especially that of agnie [Mohawk]". See also, JR 51, p.217; JR 63, p.131; p.169: "All those that come from the Iroquois come, as it were, to flee the fury of the drunkards and enemies of prayer".

⁴⁶⁰ George F.G. Stanley, "The Policy of Francization as applied to the Indians during the Ancien Regime", 3 Revue D'Historique de L'Ameriqu Francaise 1950:333-348.

⁴⁶¹ Cornelius J. Jaenen, "The Frenchification and Evangelization of Amerindians in Seventeenth Century New France", 35 Canadian Catholic Historical Association Session 1968:57-71.

⁴⁶² The earliest hints of this policy are contained in Voyages of Samuel de Champlain, Charles Pomeroy Otis, ed. & trans., (Boston: The Prince Society, 1878; reprinted: New York: Burt Franklin), p.190.

⁴⁶³ Stanley, *ibid.*, Jaenen, *ibid.*, Trigger, "Champlain Judged by His Indian Policy", pp.90-91.

⁴⁶⁴ Champlain, Works 1, pp.110-117.

lead to a Quebec populated with people who spoke French, practised French culture and guarded French interests, all without the risks and costs associated with depopulating France through emigration.

Central to the religious and secular administration of the French and Indian villages therefore, was the erosion of Mohawk, and other amerindian, social, political and legal traditions. While there is limited direct record of the precise progress of that erosion, it is clear that such social cultural elements as serial monogamy and dream fulfilment were absolutely prohibited.⁴⁶⁵ It is further evident that, at the first two villages, the construction of government by hereditary sachemships representing each clan, and installation by the ceremony of the condolence, were conspicuously absent. Thus at Kentake is witnessed an apparent shift from "traditional" government by sachems appointed by senior clan matrons to an appointment by acclamation or, in the terms of the resident Jesuit missionary of the time, "election":

[the community] having then agreed together, in the summer of the current year, to accept forever the settlement of La Prairie, they resolved to elect two christians - one for government and war, the other to watch over the observance of christianity and religion... Then having assembled, they all with one consent chose the two who in fact have the most merit and capacity for the exercise of these two offices. The election took place by majority of votes, as other transactions are settled among the iroquois - among whom the chiefs indeed speak, but they take their word

⁴⁶⁵ JR 6, p.329; JR 9, pp.203-205; JR 33, p.51; JR 46, p.173, 187; JR 58, p.77; JR 61, p.239; JR 62, p.53.

from the elders of their village.⁴⁶⁶

This process of "election" apparently persisted in the second village site of Kahnawake, a name it shares with the present village, after 1676, when it was determined that the indigenous government should be expanded from two chiefs to three⁴⁶⁷, owing to a rise in the aboriginal population at Kahnawake.

The changes to the "political process" among the Iroquoian inhabitants of the northern villages evidenced in the preceding excerpt raise a number of important questions, most notably in the description of what appears to be an alteration in the traditional mode of appointing and installing sachems. Of course, insofar as the Relations do not mention government at Kentake in this degree of detail prior 1671, it is impossible determine whether this change was a gradual or relatively sudden one; for the same reason one is limited to comparing the above description with the traditions of government in place in Iroquoia prior to 1667, discussed earlier in this part.

Such a comparison initially yields some question about Charlevoix's use of the term "election". For while this is probably not the best term to describe the most common traditional Iroquois means of resolving issues, it becomes apparent that there is a parallel which can be drawn between the election of these two chiefs at Kentake and the process of filling the lesser offices of "Pine Tree" or "Merit Chiefs" in

⁴⁶⁶ JR 63, p.49.

⁴⁶⁷ JR 63, pp.179-181.

the Mohawk Valley.

The Pine Tree chieftainships were positions of merit awarded to individuals who demonstrated superior skills in the hunt, warfare or oratory, and whose peers agreed were deserving of a position which formalized their pre-existing influence in the community. In this light, Charlevoix's observation that the Iroquois of Kentake "all with one consent chose the two who in fact have the most merit and capacity for the exercise of these two offices" is suggestive. Assuming that the two awarded the offices were, in fact, those of the "most merit and capacity" in the minds of Iroquois and not solely in the eyes of the Jesuits - bearing in mind that these groups may not share the same ideas of the most important qualifications necessary to fill the positions -it may be ventured that the chiefs at Kentake assumed their titles in a manner similar to, or at least not clearly in contradiction of, the traditional means of appointing secondary chieftains. What suggests a greater deviation from tradition, however, is the apparent absence of one of the most important elements of the ascension of any Iroquois to the position either of Pine Tree chief or Hereditary Sachem, namely, the ceremony of the condolence.

As will be recalled from the earlier ethnographic discussions, the value of the condolence in preserving and passing on the incidents of Iroquois political traditions is obvious, insofar as the ceremony involved a full recitation of the founding and laws of the Confederacy, as well as an

immediate education in the traditions of appointing sachems and the unifying experience of the feast. It would be remarkable indeed if such a ceremony had occurred at Kentake and had gone either unnoticed or unreported by Charlevoix; in the former case, owing to the length and intricacy of the ceremony, and in the latter given the general preoccupation of the Relations with ethnography. The rich harvest of information on the traditions of the Iroquois implicit in the condolence would, one tends to believe, have been difficult to resist including in a journal or letter, notwithstanding the contradiction its practice at the "catholicised" settlement would have made to Charlevoix's other statements about the conviction to Catholicism, and its concomitant rejection of "paganism", among the Iroquois of Kentake.⁴⁶⁸ For while the success of the Jesuits' North American missions was emphasised in the Relations as an encouragement to readers back in France to allocate funds to support the missions, there was an equal - and possibly greater - preoccupation in France with the "savages" and their rituals which was recognised to attract a reading public hungry for the vicarious adventure of the colonies contained in the journals. It seems unlikely that Charlevoix would have gone against popular demand and failed to describe so crucial and spectacular a ceremony, if such took place, out of a concern over statements this may make about the success of his mission. It therefore seems apposite to conclude that the condolence as it then was or

⁴⁶⁸ Ibid.

as it has apparently survived to the present, did not characterise the "elections" at Kentake.

So what, then, might one make of that part of Charlevoix's description of the construction of Iroquois government at Kentake which states that the election was determined in a fashion consistent with the manner in which "other transactions are settled by the Iroquois"? With the possible exception of a few "coureur de bois" or "bushlopers", the Jesuits were, at this time, probably the most knowledgeable men in the colonies concerning the Iroquois. This does not mean, of course, that they did not filter that knowledge through their own cultural arrogance and assumptions, or that they correctly interpreted all that they saw first hand in their communities of residence. However, in regard to Charlevoix's comment noted above concerning the Iroquois practice of settling issues with a majority of votes, one might assume that this was simply a case where European political terminology was used to describe a process which, to a European of that time, would probably have looked very much like an election, namely, the determination of issues by consensus. This would seem to suggest that, in fact, traditions of consensus did play a role in the appointment of Iroquois leadership at Kentake, even if the condolence apparently did not. What is curious, however, and will probably remain unclarified, is how the Iroquois at Kentake officially installed their leaders in the absence of a condolence. Had Charlevoix recorded such an installation - assuming such

occurred - important insights regarding the evolution of this aspect of Iroquois political tradition would have been gained.

(ii) The Second Relocation: The First Village Called
Kahnawake, 1676

The Mohawks abandoned their village at Kentake in 1676 owing to the intrusion of liquor and the exhaustion of the limited good soil and firewood within close proximity to the community.⁴⁶⁹ The shortage of good ground for growing was exacerbated by the rapidly growing population, which by 1672 had grown beyond all expectations to a point where twenty-two different nations were represented there, with Mohawks constituting the majority.⁴⁷⁰ The community had swelled to the bursting point, and both Jesuits and Mohawks recognised the need to move beyond the conclusion of the first migration.

The second site to which the Mohawks removed resided upon lands secured for the Jesuits by the French Intendant Duchesneau. The Intendant had visited the village of Kentake in 1675 and, viewing the overcrowded conditions and social problems

⁴⁶⁹ JR 60, p.275; JR 61,p.241.

⁴⁷⁰ Chauchetiere's Narrative informs that "in less than seven years the warriors of Anie [Mohawk] have become more numerous at Montreal than they are in their own country", JR 63, p.179; Devine, Historic Caughnawaga, p.27.

caused by its proximity to Montreal, sympathised with the priests and their plight, and promised to aid them. He returned to Montreal and secured for the Jesuits a tract of land where the Iroquois at Kentake might be better able to continue their northern lifestyle free from the problems then plaguing Kentake. The land Duchesneau promised the priests was composed of roughly two leagues of Saint Lawrence River shoreline laying to Kentake's east within the La Prairie seigneurie on a point of land formed by the Portage and Saint Lawrence rivers, adjacent to a patch of rapids known as Sault Saint Louis.⁴⁷¹

The Jesuits named their newly granted lands "Saint Xavier du Sault", in recognition of its location at the rapids, and in 1676 they and a few of the Iroquois departed Kentake to lay the foundations for the new residence.⁴⁷² This latest settlement would be the first which the northern Mohawks would call "Kahnawake"; a name which they would give also to their final destination, and which would endure to the present tense.

It was at Kahnawake that the aforementioned alteration to

⁴⁷¹ "First Grant to the Society of Jesus...29th May 1680", in Indian Treaties and Surrenders, 1680-1890, p.288; Stanley, "The First Indian Reserves in Canada, p.199.

⁴⁷² JR 60, pp.275; JR 61, p.241.

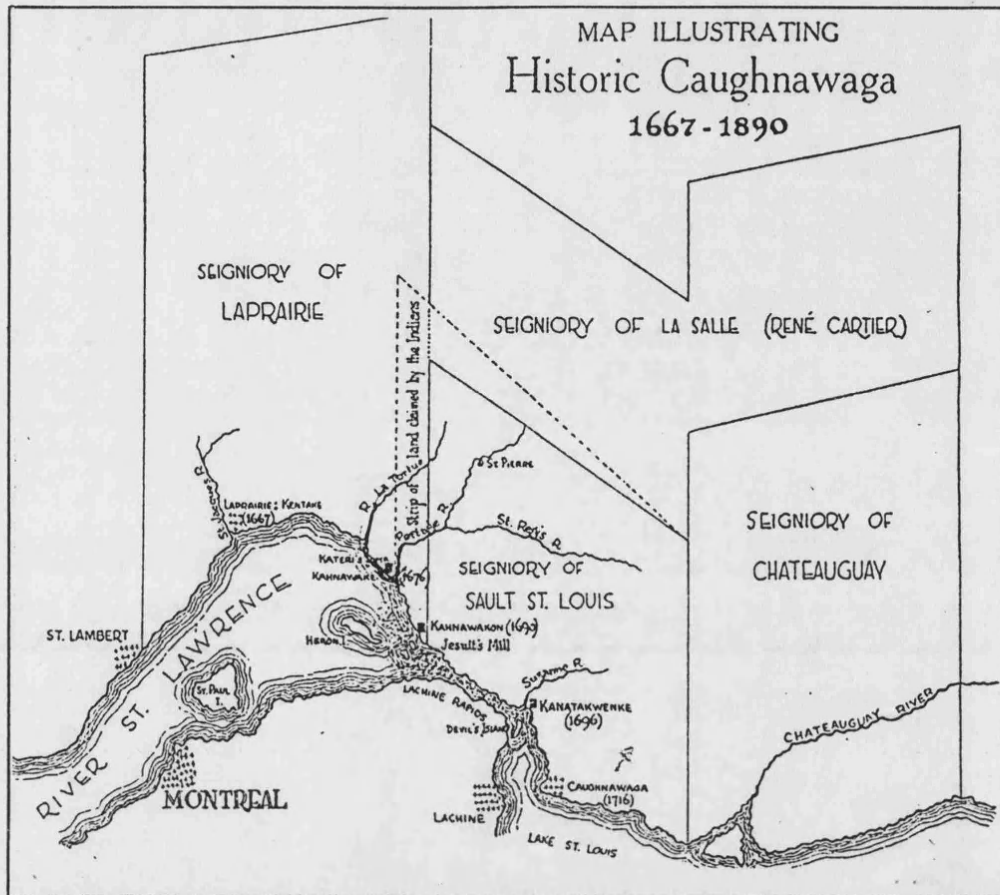


Figure 3 Successive Mission Settlements of Kahnawake (Reproduced from Devine, Historic Caughnawaga, unpaginated).

Iroquoian political processes was affected, wherein the "Kentake system" of indigenous government by two chiefs was expanded to include a third chief, but it does not appear that either this alteration initiated unprecedented changes in lifestyle at the new location.⁴⁷³ Maintenance of a "christian lifestyle" and execution of prohibitions on the importation or consumption of liquor remained the central stuff of the indigenous government⁴⁷⁴, and continued to attract Mohawks from the Five

⁴⁷³ JR 60, p.274; JR 62, p.241.

⁴⁷⁴ JR 61, p.239.

Nations cantons. Such were these migrations that the resident Jesuit Chauchetiere, witnessing the frequency and magnitude of the Mohawk influx, was prompted to remark that "in two or three years, all the aniez [Mohawks] will be in this place".⁴⁷⁵ His prediction, while perhaps somewhat premature, was certainly not off the mark, and it is estimated that in Kahnawake in 1676 the Mohawk population was at least 400, roughly 20-30 percent of the Mohawk population in Iroquoia, and was on the rise.⁴⁷⁶

The new village at the Sault held abundant promise of a better life. At the most fundamental level, the soils granted by Duchesneau were fresh and unturned and scattered with abundant firewood, all of which ensured an ease in the pursuit of traditional subsistence. As well, the absence of non-Mohawk settlers and traders meant the indigenous converts would have priority both in spiritual and secular affairs, and the greater distance of this settlement from the temptations of Montreal promised a much-needed relief from the illicit trade in liquor.

For a time, the benefits of Kahnawake were realised, and life there replicated in a more pacific context the basic order of things which had existed at its predecessor.⁴⁷⁷ Chauchetiere informs that cabins were erected, and that each contained at least two families, suggesting that some form of the traditional

⁴⁷⁵ JR 62, p.169.

⁴⁷⁶ NYCD 3, p.394; NYCD 4, p.907; Gunther Michelson, "Iroquois Population Statistics", Man in the Northeast 14 (1977), pp.3-17.

⁴⁷⁷ Devine, Historic Caughnawaga, p.44.

multifamily dwelling, reminiscent of the traditional longhouse, remained common.⁴⁷⁸ In the same context the Jesuit speaks of the building of a chapel, and of the fresh and fertile fields surrounding the village which served as both garden and pasture. By 1682, despite a brief and relatively mild brush with smallpox⁴⁷⁹, the community of Kahnawake was apparently thriving, and included

a large farm, on which we keep our oxen, cows, and poultry, and gather corn for our subsistence...Some savages get their land plowed and harvest french [sic] wheat instead of indian corn...but as this sort of grain costs them too much in labor, their usual occupation is to plow the soil in order to plant indian corn in it. The men hunt, in order to obtain a provision of meat; the women go off to the forests, to obtain supplies of wood...⁴⁸⁰

The keeping of domestic animals by the Iroquois at Kahnawake suggests the incorporation of a new aspect to their subsistence pursuits as these had existed in the Mohawk Valley. While the odd animal captured while young might have been maintained in a modified longhouse until it reached a age apposite for slaughter, this was an exception, rather than the rule, in the cantons, and thus the presence of domesticated animals at Kahnawake may be seen as a new development in Iroquois subsistence. It may be argued that it survived incorporation into the subsistence routine somewhat better than French wheat, which was tried and rejected in what was probably

⁴⁷⁸ JR 62, p.173.

⁴⁷⁹ JR 63, p.205.

⁴⁸⁰ JR 62, p.169.

a long process of Iroquois trial and error concerning French traits and technologies.

The state of the settlement at Kahnawake as described by Chauchetiere in 1682 was a highpoint for the second "Mohawk mission"; but there were clouds gathering on the horizon which threatened increasingly to rain on the Jesuits' parade. They came from Montreal, in the form of traders plying their illicit trade in liquor, and from the south and west as New France and the Five Nations drew ever closer to the opening of yet another crisis in international relations. By 1683, liquor began to flow into the community⁴⁸¹ and French-Iroquois relations to the west had been reduced to the point of war⁴⁸²; once again, the residents of Kahnawake found themselves haunted once again by the same demons of war and vice which had driven them from their cantons and their first northern home, and which increasingly threatened to render Kahnawake uninhabitable.⁴⁸³

As hostilities between the French and the Iroquois intensified, the Mohawks of Kahnawake found themselves increasingly drawn into the fray. Following a decision to ally themselves with New France, the Kahnawake warriors accompanied

⁴⁸¹ JR 63, p.227.

⁴⁸² JR 62, pp.151-155, 159-161; Relations of the Discoveries and Explorations of Cavalier de la Salle from 1679 to 1682: The Official Narrative, Melville B. Andersen, trans. (Chicago: The Caxton Club, 1901, pp.17-83; La Sieur, The Makers of Canada: Count Frontenac, pp.144-145, 193-213; Richard Aquila, The Iroquois Restoration: Iroquois Diplomacy on the Colonial Frontier, 1701-1754 (Detroit: Wayne State University Press, 1983, pp.43-44.

⁴⁸³ JR 63, p.227.

the French on a series of spectacularly successful raids on the Mohawk cantons to the south.⁴⁸⁴ As the southern Mohawks responded in kind, the community of Kahnawake became a popular target and in 1689 all but the warriors were evacuated to the safety of the walls of Montreal.⁴⁸⁵ They would never return to their first Kahnawake, which the wars had transformed from mission to bastion.

One year behind the walls of Montreal was all the Jesuits and the more devout Mohawks could tolerate. According to Devine,

Owing to their intercourse with the whites and the lack of mission discipline during their stay at Montreal, they had lost much of their religious fervor, and they could no longer be recognized either for their morals or their piety...⁴⁸⁶

A new village site would have to be found; one which had the amenities of the early Kahnawake settlement, but which was out of the French and Iroquois line of fire. It was thus resolved to relocate further up the Saint Lawrence River on a strip of land which lay just beyond the western border of the La Prairie seigneurie. In 1690, the Jesuits and the Mohawks of Kahnawake began to move out of Montreal and to Kahnawakon, at the "heart of the rapids".

⁴⁸⁴ JR 63, p.243; NYCD 3, p.294, "Dongan's report to Lords of Trade"; NYCD 4, p.907, "Sadeganaktie's speech, 21 July, 1701"; Trelease, Indian Affairs in Colonial New York, pp.251-253.

⁴⁸⁵ Devine, pp.90-91.

⁴⁸⁶ Devine, p.91.

(iii) Upstream to Kahnawakon: The Third Relocation, 1690

Hopes that the new location would remove the northern Mohawks from involvement in the French-Iroquois hostilities were quickly dashed. The Kahnawake-French alliance and their victories against the southern Mohawks were a source of extreme hostility to the latter, whose warrior-losses were approaching nearly 40 percent.⁴⁸⁷ Their military position becoming increasingly untenable, the southern Mohawks sued for peace with the French⁴⁸⁸, and desisted in their prior harassment of Kahnawakon, which was taken up by the still-warring Onondaga, Cayuga and Seneca. These allied nations attacked the mission and settlement once in 1692 and harassed hunting parties shortly thereafter.⁴⁸⁹

Although these forays did not amount to much, Kahnawakon's position was becoming increasingly difficult, owing not only to the varying attitudes toward it held by the individual Five Nations, but to the massive post-peace influx of refugees from the Mohawk cantons as well. The village had a limited occupancy, and the pressure on its lodgings caused by the influx of refugees and warfare had taken a significant and obvious

⁴⁸⁷ Michelson, *The Iroquois Republic*, p. 109. ⁴⁸⁸ Colden, *History of the Five Indian Nations*, p. 91-92.

⁴⁸⁸ JR 64, pp.109-113; JR 54, p.89; JR 53, p.155; Colden, *History of the Five Indian Nations*, p.91-92.

⁴⁸⁹ Devine, *Historic Caughnawaga*, pp.110-111.

⁴⁹⁰ NYCD 4, p.648; Devine, p.127.

been intended to sustain so high a population as that now resident at the settlement, and they were near the point of exhaustion; even if the soil and crops could have been stretched to meet the rapidly escalating needs of the community, efficient agrarianism was hampered by the constant threat of attack from marauders from Iroquoia.⁴⁹¹ In 1696 these pressures forced the people of Kahnawakon to relocate once again, this time further upriver to a site contained within the seigneurie of Sault Saint Louis granted to the Jesuits in 1680 by Louis XIV.⁴⁹² This removal, to a settlement the Mohawks dubbed "Kanatakwenke", would be the penultimate one for the northern Mohawk community.

(iv) The Penultimate Move: To Kanatakwenke, 1696

During the early years at the new settlement the Mohawks replicated as best as possible the order of things which had persisted at Kahnawake prior to their removal into Montreal. Cabins were erected sufficient to hold the relocated residents as well as the recent refugees from Iroquoia, and the community fell with relative celerity into its former farming and subsistence routines.⁴⁹³ This return to normality was encouraged by the resolution of the French and British conflict

⁴⁹¹ Devine, *ibid.*

⁴⁹² "First Grant to the Society of Jesus...29 May 1680, in Indian Treaties and Surrenders, 1680-1890, p.288.

⁴⁹³ Devine, pp.129-130.

one year after the relocation to the latest Saint Lawrence village site in 1697⁴⁹⁴, and the echo of this peace among their amerindian allies four years later in the peace of 1701.⁴⁹⁵ As the pathways between the cantons and the northern Mohawk settlements were cleared of the threat implicit in travelling them in the prior time of war, visits of relatives to Kanatakwenke and of northern Mohawks to the cantons became a regular pastime, and a defining characteristic of this fourth settlement.⁴⁹⁶

The pacific existence of Kanatawenke was shattered in 1702, when war erupted once again between France and Britain. Although the southern Mohawks were determined to remain neutral in this campaign⁴⁹⁷, the Mohawks at Kanatawenke found themselves increasingly drawn into the conflict as French allies. Their import in this regard, while amounting to little in actual battle-time, appears to have maintained a mitigating pressure on the colony's activation of its criminal jurisdiction on them. For although the Relations and other original, contemporary reports fail to inform of the nature of resolution of criminal level disputes between Mohawks within Kahnawake, Kahnawakon or

⁴⁹⁴ Jennings, Ambiguous Iroquois Empire, pp.207-208; Trelease, Indian Affairs in Colonial New York, pp.322-323.

⁴⁹⁵ Trelease, Indian Affairs in Colonial New York, pp.361-363; Wallace, *ibid.*

⁴⁹⁶ *Ibid.*, p.131.

⁴⁹⁷ Jennings et al, The History and Culture of Iroquois Diplomacy, p.166.

Kanatakwenke, there is some record of how the few reported French-Mohawk crimes occurring outside the village's boundaries were resolved.

In those few cases, recorded in the relevant French records⁴⁹⁸, an incident of assault perpetrated on a French settler from Montreal by three Kanatakwenke men suggests that Iroquoian traditions of restitution won out over French processes and sanctions. In this case, despite the near-critical nature of the injuries to the victim, the criminal investigation of the incident was abandoned and the victim received as his sole compensation for his injuries thirty beaver skins. According to Grabowski, the response to this case was shaped almost entirely by the French governor's concern with maintaining good relations with the colony's Kanatakwenke allies.⁴⁹⁹

The preceding case would seem to suggest that historic traditions of dispute resolution rooted in compensation and restitution for criminal wrongs had indeed persisted among the "mission Indians", and its actualization in crimes crossing national boundaries not only speaks of the reluctance of the French to enforce a French jurisdiction even where they arguably

⁴⁹⁸ Archives Nationales du Quebec a Montreal, Archives judiciaires (hereafter, ANOM, AJPD), Places detachees, 8-9 November, 1723, 06-M,T 1-1/106; Interrogatoire de Ignace Goyentanonguan, sauvage Iroquois de nation, de la mission de Sault-au-recollet, accuse d'avoir blasse en etant yvre un sauvage Abenakis, 06-M, T1-1/98, 8 juin 1720; ANOM, AJPD, 06 M, T1-1/120, 5 mai 1730; ANOM, AJPD, 06 M, T1-1/106, 9 nov. 1723.

⁴⁹⁹ Grabowski, pp.9-12.

had some right to do so, but implies strongly that restitution might have remained the norm in intra-Mohawk criminal level disputes. Again, unfortunately, internal reports are lacking in this regard, and thus one is left to surmise from surrounding practise what might have been transpiring in law and order politics within the northern Mohawk settlement.

The preceding incidents notwithstanding, life at Kanatakwenke was remarkably pacific for the duration of the Mohawks' residence there. By 1716, however, the fields around the community were exhausted, as were local supplies of firewood, and the residents were once again in a position to consider relocation.⁵⁰⁰ Agreement was reached upon a site "two leagues farther up the river St. Lawrence, on the same side as that on which [Kanatakwenke then was]."⁵⁰¹

(v) The Final Migration: To Kahnawake, 1716

The first steps toward relocation of the Kanatakwenke community to the agreed-upon site were taken by a few Mohawks and the missionaries in 1716. In the autumn of that year they removed to Kahnawake to begin preparations to receive the relocated population, and preceded to erect "large new cabins" and mark the places for the Church and missionaries' residence.

⁵⁰⁰ JR 67, p.25.

⁵⁰¹ Ibid.

By 1719 these buildings were in place⁵⁰², and those Mohawks wishing to relocate to the new village had done so, although attracting some of them to Kahnawake seems to have been a bit of a challenge.

One of the central qualities of Kanatakwenke during the peace which preceded its abandonment was the exchange of visitors between that settlement and the cantons. These visits, notably by Kahnawake people to the south, were welcomed by the Mohawks and the missionaries, albeit for different reasons, and by the priests for only a very short time. As far as the interests of the Jesuits were concerned, the improving of relations between the Kanatakwenke Mohawks and the cantons which they had once welcomed as conducive to conversion⁵⁰³, was evolving in quite a different and distressing direction: Rather than enticing "pagan" relatives of the cantons to the north, the new freedom appeared to be having the opposite effect, as the edges of their "flock" increasingly took wing to the Mohawk Valley. It was, in part, fear of this attrition that induced the missionaries to petition Quebec for funds to enable the relocation to Kahnawake:

This missionary came down to Quebec to ascertain whether any funds had been ordered for that purpose [relocation], and informed Monsieur Begon that the english with whom these savages frequently go to

⁵⁰² Devine, pp.180-181.

⁵⁰³ JR 56, p.21; JR 57, pp.105-111; JR 58, pp.207-211. Robert J. Surtees, "The Iroquois in Canada", in The History and Culture of Iroquois Diplomacy, Jennings et al (eds.) (Syracuse: Syracuse University Press, 1985), p.69.

trade, and the Iroquois of the five nations attached to the english, have done all they could this year, either by presents or by threats to attract all the savages of the Sault to them, and that the only way to retain them is to grant them the change they ask for...⁵⁰⁴

The change granted, things seemed little better for the Jesuits.

The Relation of 1722 records that

Great difficulty was experienced in collecting the Savages in this new village, as two-thirds of them wished to go settle farther away, and closer to England...⁵⁰⁵

At least some of the difficulty attracting the Mohawks to the new settlement originated in Quebec's intention to fortify Kahnawake and station a garrison there.⁵⁰⁶ Both Jesuit and Mohawks reacted strongly against the latter plan. Pallisading was a traditional concept and one which had become an almost constant characteristic of the northern villages, but the location of French soldiers within the community was greatly resisted by the Mohawks, who threatened defection to the south should a garrison be established in their village. The Kahnawake peoples' position in regard to the garrison, recorded in the Relation of 1722, emphasised that

there are none in any of the other villages of our brothers, and we are not in a condition any worse than they. Nevertheless, it is desired to place one among us again, because we are the most attached to the French, and have sustained the most cruel wars in their defense, - both against our own brothers and the

⁵⁰⁴ JR 67, p.25.

⁵⁰⁵ Ibid., p.77.

⁵⁰⁶ Ibid., p.81.

English, from whom we receive naught but kindness...⁵⁰⁷

The Jesuits were clear on the overtones of this position, arguing that

If a garrison is stationed there against the Savage's will, he will depart and give himself up to the English on the first occasion that he has for being dissatisfied; or he will go away to his own country, among the Iroquois.⁵⁰⁸

That fear notwithstanding, the climate of colonial relations at this time was apparently such that the French felt compelled to press for a compromise favourable to them.⁵⁰⁹ In the end, as chronicled in a report on Indian Affairs by the French official Boisherbert, a garrison was built, albeit on conditions set by the Kahnawake Mohawks, and even in times of war it appears only a small number of soldiers were stationed there:

⁵⁰⁷ JR 67, p.75.

⁵⁰⁸ Ibid., p.77.

⁵⁰⁹ The French had long considered the missions as a first line of defence against a possible English attack, and attempted to influence the locations of the missions as much as possible. This is clear from a letter from the Intendant Duquesne, dated 31 September, 1754, to M. de Machault, wherein the Intendant remarks on the increasing numbers of Mohawks coming north and a new settlement proposed at Lake St. Francis: "...the Mohawks have agreed with these thirty families to go and settle their village at this place, whither a missionary will accompany them; this change, which costs the King only the erection of a saw-mill, that will furnish abundantly wherewith to build the cabins, becomes very advantageous to the Colony, in as far as it will be easy, in time of war, to be informed of all that might occur in the direction of Caoueguen; besides, La Presentation, and this new village on Lake St. Francis, the Sault St. Louis [Kahnawake] and the Lake of Two Mountains, will form a barrier which will protect the government of Montreal against all incursions, because in that weak quarter, the troops that might be sent thither, will always be supported by these Indians", NYCD 10, Paris Documents X, p.267, "M. Duquesne to M. de Machault, Quebec, 31 September, 1754".

M. de Valterie, a brave captain and a worthy, quiet man, has had the command at Saut St. Louis [Kahnawake], with a resident officer under him. It is the largest village of our domiciled Indians, and inhabited by Iroquois. One officer only is left in the other posts, the deputies having been withdrawn in consequence of the scarcity of officers among us. The Indians at that post had some difficulty in receiving that little garrison of twenty soldiers, owing to divers bad reasons that were alleged, into which certain secrets entered. They live quietly there at present, only on condition that the General will withdraw that garrison as soon as peace shall be concluded...⁵¹⁰

It is apparent from both the Relations and colonial documents that the Mohawks' reluctance to admit a garrison to Kahnawake -and Quebec's commitment to wearing it down - had less to do with the need to defend the mission and settlement from warfare than with the more immediate exigency of protecting the French fur trade. Over the course of the garrison debate, word came down from Quebec that the soldiers were intended not only as additional security, but to keep a check on those Mohawks moving between Kahnawake and Albany whom Quebec believed were diverting furs intended for the French trade to New York posts.⁵¹¹ Their suspicion of Kahnawake was encouraged by the hard realities of the northeastern colonial economics: Albany

⁵¹⁰ NYCD 10, Paris Documents IX, p.86, "Report of M. Boisherbert on Indian Affairs, Expeditions against the Indians", November, 1747. Also on the garrison at Kahnawake, see *ibid.*, p.96, "Abstract...of a Journal of the most interesting occurrences in the Colony...1746"; *ibid.*, Paris Documents X, p.143, "Journal of whatever occurred of interest at Quebec in regard to the operations of the war... since...1747".

⁵¹¹ See Jean Lunn, "The Illegal Fur Trade out of New France, 1713-60", Canadian Historical Association Report of the Annual Meeting, 1939, pp.61-76.

offered superior trade goods⁵¹², most notably the coveted English stroud⁵¹³, and were willing to pay higher prices⁵¹⁴, while Canada contained more and better peltries, for which lower prices and lesser quality goods were offered.⁵¹⁵ An accommodation was presupposed by the desire of both Mohawks and Canadians for English goods, the greed of the traders, and the complicity of everyone from amerindian to Intendant and

⁵¹² Lunn, The Illegal Fur Trade out of New France, 1713-60, p.63; see also NYCD 9, p.957; National Archives of Canada, Ottawa (hereinafter, NAC), French Records Serie B, vol.35(3), p.328, Memoire du Roy a Vaudreuil et Begon, June 25, 1713.

⁵¹³ NAC French Records Series C11A, vol.34, pp.7-8, Vaudreuil et Begon au Ministre, Quebec, Nov.15, 1713; *ibid.*, vol.35, p.462, Memoire, Begon, Quebec, Nov.3, 1715; *ibid.*, vol.125 (1), pp.439-440, S. de Lanouillier, Sept.14, 1715; NYCD 5, London Documents XXII, p.687, "Of the Trade of New York, by C. Colden, Surveyor General of the Province".

⁵¹⁴ NAC French Records Series C11A, vol.34, p.292, Vaudreuil et Begon au Ministre, Sept.20, 1714; NYCD 5, London Documents XXIII, p.733, "A Memorial concerning the Fur Trade of the Province of New York...by Cadwallader Colden, Surveyor General of the said Province, November 10, 1724": "The Merchants of New York allow our Indian Traders double the Price for Beaver that the French Company allow their Indian Traders...it plainly follows that our Indian Traders could undersell the French Traders, tho they were to give as great a Price for European Goods as the French do, & did transport them at as great Charge because of the double price they have for their furs in New York - But as our Indian Traders not only have a double Price for their Indian Goods but likewise buy the Goods they sell to the Indians at Half the Price the French Indian Traders do - The French Traders must be ruined by carrying on this trade in competition with the English of New York..." NYCD 7, London Documents XXXIII, p.6, "Governor Hardy to the Lords of Trade, Fort George, New York, 16 January 1756".

⁵¹⁵ Peter Wraxall, An Abridgement of the Indian Affairs contained in four folio volumes transacted in the colony of New York from the year 1678 to the year 1751, Charles Howard McIlwain, ed., Harvard Historical Studies, vol.xxi (Cambridge: Harvard University Press, 1915; reprinted, New York: Benjamin Blom, 1968), pp.lxi-lxxxi; Lunn, "The Illegal Fur Trade out of New France, 1713-60", pp.66-67.

Governor.⁵¹⁶

Although the Sovereign Council at Quebec attempted through numerous restrictions and ordonnances to thwart the trade, they proved remarkably impotent in doing so.⁵¹⁷ It is probable that

⁵¹⁶ Re Involvement of French and British officials, soldiers and merchants, see: NAC French Records Series C11A, vol.34, pp.547-8, "Precis de...memoire presente a...Pontchartrain...par Dauteuil"; NYCD 9 Paris Documents II, p.214-215, "Memoire to...the Marquis de Seignelay..."; *ibid.*, p.224, "Ordinances against Emigration from Canada to the British Colonies, Versailles, 19 April, 1684"; *ibid.*, p.65, "M. Talon to the King; on the means of recovering the profit of the Beaver Trade which passes to the English and Dutch, Quebec, 10 October 1670"; *ibid.*, p.159-160, "Memoire of M. Du Chesneau on Irregular Trade in Canada", Quebec, 13 November, 1681; *ibid.*, Paris Documents VIII, p.1071, "M. de Beauharnois to Count de Maurepas". Also, Lunn, "The Illegal Fur Trade out of New France, 1713-60", p.61, 68-70; Devine, Historic Caughnawaga, pp.207-208; Leopold Lamontagne, "Jacques de La Doussiniere et d'Ambault, Dictionary of Canadian Biography, vol.1, p.289; Devine, Historic Caughnawaga, pp.235-240; Hamilton, "Unrest at Caughnawaga", pp.155-160).

⁵¹⁷ The earliest of the controls resided in the system of granting trade monopolies, whereby a single company became the only legitimate recipient of peltries. Later, however, as this restriction proved inadequate to stay the tide of French furs south, the prohibitions became many and varied. Initially, these extraordinary measures focused on the amerindian trade, and attempted to end the loss of beaver to Albany by reproducing in French mills the English strouds which the Mohawks appeared unwilling to live without (NAC French Records Series C11A, vol.97, p.139, "La Jonquiere au Ministre, Quebec, Oct.19, 1751). This policy failed, and led to the importing of original strouds to Montreal, but this effort suffered from the same problems of expense already characterising the majority of French goods (NYCD 5, p.728-30, "Memorial, Colden to Burnet, Nov.10, 1724"). Still later controls attempted to block the trade routes taken by the Mohawks between Montreal and Albany, but these two were largely ineffective in halting or even significantly reducing the trade, as those who manned these efforts were also often implicated in the trade. Officers stationed at posts situated along the most common routes of the illicit trade were criticised for their failure to execute their duties (NAC French Record Series C11A, vol.64, p.73, Hoquart a la Compagnie des Indes, Quebec, Oct.25, 1735) as were their counterparts in New York (Wraxall, Abridgement of Indian Affairs, p.xlvii), although their presence seems to have been intended more for military than commercial purposes.

a certain lack of enthusiasm in halting the trade was due not only to the numerous hands in the illicit trade pot, but to importance to the French of remaining on good terms with the Kahnawake Mohawks. The ongoing fear that Kahnawake allies might defect to the English or return to the cantons was never far from French minds, and the northern Mohawks and their missionaries arguably did little to discourage it. The reality at this time of a Kahnawake Mohawk population of nearly 1200⁵¹⁸, and the very high probability that a majority of that number were involved in the Montreal-Albany trade⁵¹⁹, suggests that this may have been one of those key areas in which Mohawks influences on French policy were sufficient to greatly alter its application in practice. This is apparent in regard to both the final relocation and the issue of stationing a garrison at Kahnawake, and it was no less a factor in the French authorities' handling of what they deemed to be an illicit trade.⁵²⁰

⁵¹⁸ JR 68, p.231.

⁵¹⁹ The records indicate that many of the northern Mohawks were in fact involved in the trade, an example of the magnitude of that involvement is found in NYCD 6, London Documents XXX, p.714, in a letter from Clinton to the Lords of Trade, New York, July 17, 1751, wherein he reports that one cargo of illegal beaver was transported by two hundred "domiciled Indians."

⁵²⁰ JR 67, p.25, p.75-77, regarding the garrison; that the controls were softened somewhat when applied to "Caughnawagas" is suggested by Hocquart's communication to the "Minstre de Marine" (NAC French Records Series C11A, pp.148-149), in which he cautioned about offending the Indians of the mission, and in the passage of Caughnawagas and their contraband cargo at Fort Oswego secured by their threat to settle again with their kin in the Mohawk Valley. See also NYCD 6, p.714, "Clinton to the Lords of Trade, New York,

French resolve in this regard was echoed in both intentions and success in regard to the activation of French criminal laws within Kahnawake. For although records originating within Kahnawake are once again silent concerning the internal handling of crimes and delicts, three external cases involving Mohawks accused of crimes against French settlers suggest a very real Kahnawake Mohawk autonomy with regard to the influence of French criminal laws on their people.

The first case occurred in 1719 and involved the alleged murder of the two-year old son of a LaPrairie settler. This case never came to trial, possibly because Kahnawake refused to turn the accused over to French authorities, citing a French brandy trader as the culprit, and Grabowski suggests that a traditional penalty of restitution to the victim's family was the probable outcome.⁵²¹ A second case in 1720 involving a Kahnawake Mohawk accused of murder resulted in the execution of the defendant, but only because the murderer was surrendered to French authorities who apparently acted with Mohawk consent in applying the capital punishment. It is interesting to note that the Council of the Regency approved the execution in this case, but directed the governor to remember that in future cases of this type, the consent of the amerindians for the chosen sanction was

July 17, 1751".

⁵²¹ See: ANQM, AJPD 06-M, T1-1/95, 23-25 fev, 1729; Grabowski, Crime and Punishment: Sault-St-Louis, Lac Des Deux-Montagnes and French Justice 1713-1735, pp.12-13.

imperative.⁵²²

In a 1722 case, also involving murder, the conclusion is documented in greater detail and suggests the endurance of some attributes of the traditional restitution process. In this case, "several" Iroquois from Kahnawake were linked with the death of one man and the grievous injury of his son-in-law.⁵²³ One of the accused being apprehended and taken into custody, it appeared that this might have become an occasion in which French processes would prevail; however, two days after the killing, a deputation from Kahnawake met with the governor and justice officials, offering a gift of wampum and a request for a pardon for the accused. The gift of wampum and promises from the Mohawks to assist the family of the victim were accepted by the governor, who reportedly granted the pardon in full knowledge that to do otherwise could incite their Iroquois allies to defect to the English.⁵²⁴

The importance of that alliance and the Kahnawake warriors to the French was increasingly thrown into relief after 1744,

⁵²² Ibid., p.14; ANQM, AJPD, 15 aout 1722, 06-M,T, 1-1/102; Grabowski notes that the relevant trial documents were not preserved, the case is mentioned, however, in *Manuscrits relatifs a l'Histoire de la Nouvelle-France*, 3e serie, vol.7, p.451, Vaudreuil au Ministre, 7 novemebre 1720; Archives du Seminaire de Saint-Sulpice a Montreal (ASSSM) Fonds Faillon L581, 14 juin 1721, also: C11A and C118 1720-21.

⁵²³ Le proces-verbal de descente par nous faite a la requaste du procureur du Roy en ca siege sur les Cotteaux St-Pierre, en la maison du deffunt Honore Dasny. Francoise Marie Daoust, Conseiller du Roy et son Lieutenant General Civil et Criminel, 15 aout 1722, ANQM, AJPD, 06-M, T1-1/102.

⁵²⁴ Ibid; see Grabowski, Crime and Punishment..., pp.14-15.

with the outbreak of the renewed French-British hostilities which would lead to the Seven Years War and the fall of New France in northeastern America. It was in those contests that the precarity of the Kahnawake alliance was made patently clear to the French, who found themselves unable to depend upon an often fickle Iroquois fighting force. While some warriors did accompany the French on raids to the south⁵²⁵, still others tended to be more enthusiastic about being recruited and outfitted for battles than for actually fighting them.⁵²⁶ Kahnawake warriors were believed to accompany the French and ready themselves for a battle, only to slip away at the final moment⁵²⁷, or warn the enemy - especially if they included Six Nations Mohawks - of the approaching French force.⁵²⁸ The French, who from the outset had suspicions regarding the fidelity of Kahnawake warriors, believed the inconstant nature

⁵²⁵ NYCD 10, Paris Documents IX, pp.32-35, "Abstract of the different movements at Montreal, on occasion of war, from the month of December, 1745, to the month of August, 1746." This abstract records a total of 18 separate incidents where "Iroquois belonging to the Sault" apparently participated raids against the English, either as the sole Indian allies or with others; similar records for the year 1747-1748 appear in NYCD 10, Paris Documents IX, pp.153-155, 159, 160, 165-166, 169, "Occurrences in Canada during the year 1747-48." All reveal clearly that some Kahnawake warriors did fight with the French in both King George's War and the Seven Years' War.

⁵²⁶ NYCD 10, Paris Documents IX, p.167.

⁵²⁷ NYCD 10, Paris Documents XI, pp.317-318, "Baron de Dieskau to Count d'Argenson".

⁵²⁸ NYCD 10, Paris Documents IX, p.102, "Abstract in the form of a Journal of the most interesting occurrences in the colony...since the departure of the ships in November, 1746".

of their allies resided in a

secret understanding between the Five Nations and our domiciliated Iroquois, to allow the whites to fight each other without interfering with them on either side...⁵²⁹

This "understanding", coupled with the Kahnawake-New York friendship confirmed in 1744 and 1754⁵³⁰, did little to bolster the morale of French Generals who fell victim to it in King Georges' War. For while their "children at Sault Saint Louis" continued to speak of the 1744 alliance with the French, they also continued to vacillate painfully when it came to actualising that alliance on the battlefield. In French eyes, the Kahnawake alliance was growing dangerous to depend upon and impossible to predict; in the afterglow of victories achieved without Kahnawake's assistance, the French General Montcalm confronted the sachems and informed them that the French did not need the help of Kahnawake warriors.⁵³¹

⁵²⁹ NYCD 10, Paris Documents IX, p.94, "Abstract in the form of a Journal of the most interesting occurrences in the Colony, in reference to military movements, and of various intelligences received, since the departure of the ships in November, 1746"; also, *ibid*, p.87, "Report of M. Boisherbert on Indian Affairs, November 1747": I think I have stated that they serve us badly ever since the Red Skins made a treaty some years ago not to kill one another, and to let the whites act against each other, we have a certitude that they have favoured the parties of our enemies who attacked us, without putting themselves in the trouble of defending us..."

⁵³⁰ "Extract of a letter from Massachusettes Governor Shirley to Pennsylvania Governor Morris", 21 October 1754, Historical Society of Pennsylvania, Pennsylvania Mss., Official Correspondence, vol.516, in Newberry Library Microfilm Collection.

⁵³¹ NYCD 10, Paris Documents XIV, pp.805-806, "Speeches of the Iroquois, Nepissings, Algonkins, Abenakis and Mississagues, 30th July 1758".

History reveals that the general spoke too soon, as his defeat of the English at Carillon was followed by a rapid and debilitating reversal of French fortunes. Between August 1758 and September 1759, the English rallied and took control of all French forts and possessions except Montreal, which was protected by the Lachine Rapids.⁵³² It was in these final moments, as the probable victors became apparent, that the Kahnawake Mohawks made clear which alliance they intended to support. After nearly two decades of playing the French against the British, the Kahnawake Mohawks confirmed their fidelity to the British and responded to the English General Amhearst's requests for a much-needed guide through the treacherous rapids above Kahnawake. They delivered the General and his small force to Montreal, which surrendered without a fight on 7 September 1760. This moment signalled the end of the French regime in Canada, and the beginning of a new epoch in the history of the Kahnawake Mohawks as they slipped under British rule.

⁵³² Eccles, "Seven Years' War", p.1681; Jennings, Empire of Fortune, pp.405-425.

5.2 The Fall of New France and the Establishment of British Rule in Canada

From 8 September to August 10, 1763, the British governed French Canada through a system of martial law which has been described by some modern commentators as tempered by a significant measure of "moderation" and "disinterest".⁵³³ Unlike the harsh regimes which one might expect under military rule, the early British administration of Canada was unmarked by any radical alteration of the per-conquest, French-defined status quo. Thus administration of criminal justice, while now administered in part by British officers with the assistance of a French attorney-general and French clerks and assistants, remained an issue of the application of the codes of the French regime; indeed, cases were recorded in which English subjects acting in the post-conquest courts were required to do so in French, for "such was the language of the country".⁵³⁴

This situation altered in 1763 with the passage of the *Royal Proclamation*, which introduced English civil and criminal law into the conquered territory; although the application of the English civil code would be removed and replaced with the

⁵³³ Mason Wade, The French Canadians, 1760-1945 (Toronto: MacMillan, 1956), pp.49-50; see also, D.N. Sprague and J.L. Findlay, The Structure of Canadian History, 2nd. ed. (Scarborough: Prentice-Hall Ltd., 1984), pp.64-67.

⁵³⁴ Press Information Bureau, vol. I:100, as cited in Wade, The French Canadians, p.51.

French "civil code" in 1774 through the Quebec Act.⁵³⁵ By this act all future disputes involving property and civil rights were to be determined in accordance with the "Laws and Customs of Canada", the old French civil law, although the Crown retained the right to grant lands in free and common socage rather than in fief, and wills could be made according to English law if so desired. Notwithstanding these changes, the entirety of the English criminal law was to be applied in the conquered territory to the exclusion of the French criminal law.⁵³⁶ A council of between seventeen and twenty-four members was charged with the power to legislate for the "peace, welfare and good governance" of the region, and its ordinances were to be approved by the governor and the Crown. In relation to ensuring the "peace", the council was restricted in the construction of its ordinances by the disallowance of punishments greater than fines or short terms of imprisonment, which could not be legislated without the seal of royal assent.⁵³⁷

Although there is, as noted earlier, a distinct "gap" in the records concerning how the post-conquest changes to the governance of French Canada affected such settlements as that at Kahnawake, some tentative conclusions about the effects of the changes upon the administration of criminal justice in Kahnawake may be offered. The imposition of a British criminal law

⁵³⁵ Quebec Act 1774 (Can.), c.83.

⁵³⁶ Canada. House of Commons Debates, 1944, 23 Nov., 6522-3.

⁵³⁷ Wade, The French Canadians, p.64.

jurisdiction upon the conquered territories through the Proclamation of 1763 necessarily imposed this law also upon Kahnawake, as the lands which it occupied were held by the conquerors to be part of the French "possessions" won in the Seven Years war which lead to the fall of Quebec. That this arrogation of conquest of lands which the amerindian inhabitants never ceded to, or were purchased by, the French, was at best questionable in the international law of the day is clear; as the specific consideration of the land question at Kahnawake, outlined below, will reveal, however, it resulted to little in practical terms benefitting the Kahnawakehronon. Notwithstanding this issue, then, there can be little question that the criminal laws of British Canada, and the courts that administered them, now possessed a legal jurisdiction over Kahnawake and its Mohawk population; unfortunately, there is little indication in the early records indicating whether the English were more successful than the French in actually activating that jurisdiction. This latter ambiguity does not alter the historical fact, however, that after 1763 the Mohawks at Kahnawake theoretically fell within a British criminal law jurisdiction which, as the chronicle below details, was augmented over time by virtue of the specific attendance to the matter of criminal justice by the "Indian Acts".

The matter of land at Kahnawake had been a pressing one for some time prior to the fall of New France to the British. At the moment of the loss of their King's colony in Canada, the

Jesuits held two seigneuries along the Saint Lawrence River, including Laprairie de la Magdelaine, granted in 1647⁵³⁸, and the seigneury of Sault Saint Louis, granted in 1680.⁵³⁹ Despite the fact that these holdings were not classic seigneuries, nor the Jesuits classic seigniors, the priests had from the outset related to the granted lands in the manner of owner to property, and had enjoyed to the fullest the concomitant rights to dispose of that property as they chose, irrespective of the wishes of the Kahnawake people or the restrictions on the grants. Much of that disposal came in the form of sales or rentals of plots of granted lands to French farmers, whom the priests felt made better use of the land and secured more and better crops. Such alienations were clearly in violation of the terms of the land grants, which from the outset "prohibit and forbid" French settlers in the seigneuries from using the land for farming or business purposes; they were also a clear betrayal of the grants' express limitations on the use of the lands for the benefit of "said Iroquois".⁵⁴⁰

From the perspective of ownership, a further significant qualification on the land grants confirmed the crown's right of reversion in the case of Jesuit abandonment of successive

⁵³⁸ See: Land Title at Caughnawaga, appendix A.

⁵³⁹ "First Grant to the Society of Jesus, by Louis XIV, King Of France, for benefit of the Iroquois - Dated Fontainbleau, France, 29th May, 1680", in Land Title at Caughnawaga, appendices B (French) and C (English).

⁵⁴⁰ Ibid.

village sites at the Sault. Within a year of the final relocation of the Mohawks to their present village site in 1716, the Jesuits sought to confirm their arrogations of title to the prior mission sites through a petition to the French Governor Vaudreuil. This effort to circumvent the wishes of the Crown in regard to the Iroquois' seigneuries was as successful as their earlier, ongoing avoidance of the restrictions on French settlement of the seigneuries: Considering improvements made to the lands by the "missions", the governor ruled that it would be an injustice to deprive the priests of any part of their seignery simply because they had chosen to live in another part of it, and the two land grants contained in the 1680 deed were united into a single seignery under the priests. It is clear that the Jesuits had effectively taken seigniorial rights which the Crown had purposely chosen to withhold from them, and they continued to act on them notwithstanding the increasing anxiety of the Kahnawake Mohawks concerning the erosion of what they viewed as their northern land base.⁵⁴¹

Much of the northern Mohawks' concern over their territory was undoubtedly linked with the growing pressure on those lands created by the rapid influx of Mohawks and others who fled north

⁵⁴¹ "Copie du Jugement prononce par le General Gage en date du 22 Mars 1762", with translation, in Land Title at Caughnawaga, appendix E. Gage's decision notes the opinion of a Kahnawake Mohawk on the Jesuit's land dealings, "that if matters are not promptly set right, they should soon see themselves obliged to give up their own fields to withdraw with their families to the woods, considering they do not any longer find there enough land to afford a means of living" [p.1 (French), p.2 (English translation)].

hoping to escape the wars and land frauds characterising Iroquoia and the Ohio Valley; a pressure which juxtaposed uncomfortably with the fact of increasing French settlement of those lands let or sold by the Jesuits. Clearly these alienations were in direct contravention of the 1680 deed, and yet the Mohawks' consistent voicing of their concerns to successive French governors met with little apparent response.⁵⁴²

Anticipating the possibility of a better reaction after the fall of Canada to the British, the people of Kahnawake in 1762 approached the Military Council at Montreal for a clarification of their rights to the "mission lands". At the foundation of the Mohawks' petition was the issue of title to the Sault. They argued to General Gage, the head of the Military Council, that the lands containing their villages and the missions belonged to the Kahnawake Mohawks by right of a grant from the French King, a right which had been confirmed in the Articles of Capitulation of Canada to the British, and which the Jesuits continued to ignore by making sales and grants to French settlers.⁵⁴³ The Jesuits, of course, denied the Mohawks' allegations, but Gage found in Kahnawake's favour. In a decision dated 22 March 1762,

⁵⁴² Gage confirms in his decision that "the Indians having always revived their rights before every Governor, and that dispute never having been judicially settled by the Governor or any Court of Justice..." Ibid., p.302.

⁵⁴³ Ibid., pp.298-299; N.E. Gilchrist, "Seignior Rents - Caughnawaga", unpublished paper, Ottawa: Documentary Research, 9 June 1964, p.1.

the Military Council ruled that the lands in question were granted "with the sole intention of settling there Iroquois and other Indians", and that the Jesuits had been mistaken when they viewed the grants as conveying upon them the rights of "Temporal Lords of the said Lands".⁵⁴⁴ And while those concessions made by the Jesuits to non-amerindians prior to 8 September 1760 were confirmed, all later grants were negated, as were any temporal rights believed to be held by the Jesuits.⁵⁴⁵ In conclusion the Council ordered that

the said Indians of the Sault be put in possession of and do enjoy peaceably for themselves and their heirs and other Indians who would like to join them, the whole land and revenue which the said concessions can produce.⁵⁴⁶

This decision, while laying to rest some questions, failed to satisfy others, and the issue of the proper boundaries of the original seigniorial grant and the identity of the proper grantee of the disputed strip noted earlier continued to be debated until 1830.⁵⁴⁷ In practical terms, however, these later disputes were of little impact on the issue of title to the Sault: In defining their rights to the Kahnawake lands as emanating from a French grant, the Mohawks implicitly denied the

⁵⁴⁴ "Copie du Jugement...", p.301.

⁵⁴⁵ Ibid, pp.301-303.

⁵⁴⁶ Ibid., p.303. It is worth noting that this decision was recognized by Quebec courts in at least two later cases relating to the cutting and taking of timber off Kahnawake land. See *Commissioner of Indian Lands for Lower Canada v. Payant Dit St. Onge, Payant Dit St. Onge v. On8anoron*, (1856) 8 R.J.R.Q. 29.

⁵⁴⁷ Land Title at Caughnawaga, p.6.

possibility of an enduring aboriginal title, and in 1762 the new government of Canada withdrew management of the Mohawk settlement at Kahnawake from the Jesuits, securing in the process the right of fee simple ownership to the Sault lands, which were from this time retained by the Crown for the 'benefit of the Indians'.⁵⁴⁸

Notwithstanding this, the Mohawks of Kahnawake have consistently failed to acknowledge either Canada or her colonial predecessors' claims to their community's landbase, asserting that Mohawk rights to this portion of their traditional territories have never been ceded by treaty or conquest.⁵⁴⁹ Whether this largely philosophical position can amount to a great deal in practice seems unlikely, insofar as the "might" to accompany assertions of right would certainly seem to fall more generously on the side of the Canadian state, who have twice previously denied Kahnawake's efforts to resolve their land position through both specific and comprehensive land claim procedures.⁵⁵⁰

⁵⁴⁸ Canada and its Provinces, vol.4, p.717.

⁵⁴⁹ Mohawk Nation Office, "Land Title at Caughnawaga: Treaty and Property Rights, May 1970" (Kahnawake: Mohawk Nation Office Archives, 1970); A. Brian Deer, "The Lands of the Iroquois".

⁵⁵⁰ Current Canadian federal government policy dealing with aboriginal claims to lands is divided into two types: (1) *comprehensive claims* which are based on aboriginal peoples' traditional use and occupancy of the land and which are potentially quite broad in scope; they cover lands not previously covered by treaty and may include as part of a claims settlement provisions for aboriginal self-government. It should be noted, however, that it is not necessary for a self-government agreement to be accompanied by a land claim, although it may be argued that

Returning to the early post-conquest context, the sparse contemporary accounts of life in Kahnawake in the years surrounding the fall of Canada, being preoccupied with the wars, refer to "Caughnawaga" primarily within that context. The few exceptions are limited to the letters and writings of Father Nau, who was resident in the village by 1735. According to the missionary, in 1730 the "number of christian savages" residing at the settlement was "nearly twelve hundred", and it seems likely that this number increased subsequent to the ravages of the Seven Years war, as it had in the wake of earlier hostilities.⁵⁵¹ He paints a picture wherein farming and the conduct of war were the primary occupations of the Mohawks at the Sault:

Our Iroquois, like all the other Savage tribes, with the exception of the Sioux, are sedentary...They raise horse, pigs, poultry and other domestic animals as do our own people. The men leave us about the end of september, each taking his own road to The hunting-grounds of the deer and beaver, nor do they return to the village before the month of february. Others go on

governmental control over a geographical area consisting of lands which that government does not control may be more illusory than real. (2) *Specific claims* arise from the alleged nonfulfillment of Indian treaties or the federal government's maladministration of lands and other assets held "for the benefit of the Indians", defined under the Indian Act or other formal agreements. Following the research and determination of wrongdoing or breach in lawful obligation, the band submitting a specific claim may be entitled to compensation for the demonstrated wrongdoing. Additional information on the claims processes may be found in a series of federal government publications, including most notably: Comprehensive Land Claims Policy (Ottawa: Minister of Indian Affairs and Northern Development, 1987); Outstanding Business, A Native Claims Policy (Ottawa: Minister of Indian Affairs and Northern Development, 1972).

⁵⁵¹ JR 68, p.231.

the war-path...Indeed, the Iroquois of Sault St. Louis are looked upon as the most Warlike of all the american tribes...⁵⁵²

While it is difficult to draw definite conclusions from Nau's rather sparse descriptions, a few general observations about Kahnawake at this time may be permitted. It appears that the conduct of agriculture at the settlement had expanded beyond the basic maize crop culture present at Kanatakwenke to include the harvesting of wild ginseng and the raising of domestic animals⁵⁵³, but this does not appear to have altered the traditional perennial calendar which divided the year in terms of the hunt and agriculture. Men hunted from early autumn until mid-spring, as appears was the custom of pre-Confederacy times and, although the cycle of horticulture is not specifically mentioned, one may assume that the growing period occupied much of the remaining calendar year. Insofar as this almanac of subsistence activities had originally interacted with a ceremonial calendar, one wonders whether and what aspects of the latter calendar remained. Unfortunately, Nau sheds little light on such questions, preferring to emphasize instead the devotion of the converts at the mission⁵⁵⁴; as a result it is impossible

⁵⁵² Ibid., p.275.

⁵⁵³ Insofar as it was the inadequacy of the soil for growing "Indian corn" which had in part prompted the move to the final mission location, and the reality that as late as 1840 smaller scale agriculture persisted, with some modern Kahnawake people remembering the harvesting and preparation of the corn into flour. On the harvesting of ginseng, see Lafitau, Customs of the American Indians Compared with the Customs of Primitive Times(1724).

⁵⁵⁴ JR 68, p.271.

to make definite statements about the interaction of subsistence and traditional Iroquois ceremonial during this time.

The man's role as a warrior also seems to have persisted to this period, as is made clear both by Nau's comments and colonial reports concerning the involvement of Kahnawake warriors in both the Seven Years' War and King George's War, which preceded it. The fact of similar, later participation in the American Revolution and the War of 1812 further confirms retention of basic warrior rights and forms, with one important additional quality: The Kahnawake warriors fought within the context of a new confederacy, known from the records as the "Seven Nations of Canada".⁵⁵⁵

⁵⁵⁵ It is difficult to assign a lifespan to the Seven Nations, references to it appear in the historical records as early as 1760 and fade away after 1800. Blanchard (7 Generations, p.279) discusses a treaty between the Seven Nations and the United States which was signed on 31 May 1796. Unfortunately, he fails to offer any documentation concerning his source for this treaty and thus, while it is important to mention it here, it is equally important to recognise the absence of any verifying documentation of the treaty and to accept Blanchard's discussion with appropriate caution. Another more credible document of uncertain vintage, but possibly originating in 1760, records a meeting between the Six Nations and Seven Nations with the British Superintendent of the "Northern Indians", Sir William Johnson (NAC RG 10, vol.1827-1828, pp.116-119; unfortunately this record is incomplete, it is dated in the Newberry Library's chronology as preceding the 1762 reference found in the Claus papers, below) (It should be briefly noted here that in 1722 the Five Nations "adopted" the Tuscarora nation, hence the revised nomenclature. On the addition of the sixth nation to the Confederacy, see Douglas W. Boyce, "As the Wind Scatters the Smoke": The Tuscaroras in the Eighteenth Century", in Beyond the Covenant Chain: The Iroquois and Their Neighbors in Indian North America, 1600-1800, eds., Daniel K. Richter and James H. Merrell (Syracuse: Syracuse University Press, 1987), p.156; Wallace, "The Tuscaroras: Sixth Nation of the Iroquois Confederacy".). In his own papers, Johnson retained records of later exchanges between the two confederacies which establish that the Seven Nations consisted of "the Cagnawageys, Caneghsadarundax, Skaghquanes, Swegachies, St.

While the early relationship of the Seven Nations to the Six Nations is uncertain, it appears that initially the two confederacies were distinct entities which were allied with the French and English, respectively⁵⁵⁶. However, in 1762 the Six Nations apparently sent "belts" to Kahnawake, the "principal village" of the Seven Nations⁵⁵⁷, to request of the northern communities that they join the Six Nations in a single confederacy⁵⁵⁸, and a reference in 1777 suggests strongly that the two did, in fact, unite; this same reference also implies the possibility that the Seven Nations may have existed prior to 1760:

That there were two Confederacies of Indians in the Northern District is very true, vizt. the Iroquois or Six Nations... and the Seven Nations in the province

Francis, 3 River Indians, and Hurons near Quebec"(Wm Johnson Papers, vol.10, p.792). See also: Thomas Stone, "Legal Mobilization and Legal Penetration: The Department of Indian Affairs and the Canadian Party at St. Regis, 1876-1918", 22(4) Ethnohistory 1975, p.379; author unknown, "History of the Government of the St. Regis Mohawk Indian Tribe" (Kahnawake: Mohawk Nation Office Archives, n.d.), pp.1-2; see also, Lawrence Ostola, "The Seven Nations of Canada and the American Revolution, 1774-1783", M.A. Thesis, Universite de Montreal, 1988.

⁵⁵⁶ Robert S. Allen, His Majesty's Indian Allies: British Policy in the Defence of Canada, 1714-1815 (Toronto: Dundern Press, 1992), pp.30-32; 45-46.

⁵⁵⁷ British Library, London, Haldimand Papers (hereinafter, Haldimand Papers), Mss. Doc. 2/799, "Proceedings of a council with Chiefs of the Seven Nations at Canada and the Six Nations, cc, 10-198 August, 1778". At this council, which took place at Montreal, 2 sachems from Onondaga state, on the issue of alliance, that "this Brethren does not require much deliberation, it is your business Brother of Caughnawaga, to answer for the rest, as you are the principal Village of Canada".

⁵⁵⁸ NAC, Manuscripts Division, Claus Papers, MG 19, ser.f1, vol.1, pp.68-69, in Newberry Library Microfilm collection.

of Quebec... These two Confederacies however have since the conquest of Canada united themselves, and act in concert in all matters of importance, and the appointment of Officers will not make them change their plan.⁵⁵⁹

The possibility of the cooperation of the two confederacies in the American Revolution is further bolstered by the assertion in 1770 of the "Caghnawagees" to the British that they would "have their eyes on the Council Fire of the Six Nations at Onondaga"⁵⁶⁰, which has been interpreted as signifying that Kahnawake had determined to follow the Confederacy's lead in future endeavours.⁵⁶¹ In the end, which was preceded by their courting by Rebel-allied Oneidas⁵⁶² as well as by British-allied Onondagas⁵⁶³, the official position of Kahnawake appears to have been the usual non-position, whereby some warriors fought with the Rebels and some with "his Majesty".⁵⁶⁴ There were also those

⁵⁵⁹ Col. Claus to Secretary Knox, 1 March 1777, quoted in A. Brian Deer, The Lands of the Iroquois, the Kanienkehaka, and the Kahnawakehronon: A Preliminary Report (Kahnawake: Kahnawake Development Research Program, March 1985), p.83.

⁵⁶⁰ NYCD 8, London Documents XLII, p.240, "Proceedings of Sir William Johnson with the Indians, July 1770".

⁵⁶¹ Deer, "Lands of the Kanienkehaka", p.86.

⁵⁶² Haldimand Papers, Add. Mss.21, p.699, "Letter to Captain Alexander Fraser from Captain Edward Foy, about conferences at St. Regis and Caughnawaga, February - April, 1777".

⁵⁶³ Ibid., Mss. Doc. 21, p.779.

⁵⁶⁴ Ibid., Mss. Doc 21, p.771, "Letter to Frederick Haldimand from John Campbell, about council at Caughnawaga, January 1779, dated 1 February 1779"; Mss. Doc 21, p.699, "Letter to Captain Alexander Fraser from Captain Edward Foy about conferences at Caughnawaga, February - April, 1777, dated 7 April 1777"; Mss. Doc. 21, p.779, "Proceedings of a council with the Chiefs of the Seven Nations at Canada and the Six Nations, ca. 10-18 August 1778, dated

who preferred not to fight at all, prompting the British officer John Campbell to remark in 1779 that

There is still Remaining about 100 Warriors Between the Lake and Caughnawaga who seem to be more disposed, for going to hunt, Beaver & Deer [sic] than going to war. Especially those of Caughniwage...⁵⁶⁵

In retrospect it can be seen that, of those Kahnawake warriors who did fight, the majority appear to have battled in the English interest, while the Rebel sympathizers were forced out of the northern settlement to become known in Canada as the "fugitive Caughnawagas".⁵⁶⁶

The conclusion of the American Revolution has been thoroughly chronicled: British forces surrendered in October of 1781, and the Treaty of Paris, signed two years later, formally

14-15 August, 1778"; *ibid.*, "Hears of a Speech to the Indians of the Seven Villages of Canada, in answer to their speeches given in council, 14-15 August 1778"; see also, *ibid.*, Add. Mss. 21, p.777; *ibid.*, Add. Mss. 21, p.733 (esp. "Letter to John Campbell from Frederick Haldimand, about Council at Canadasaga, late May 1779, dated 8 April 1779", in which Haldimand cautions Campbell about "traitorous behavior" of the Oneida, who, with the assistance of the "fugitive Caughnawagas", try to induce the Six Nations to take up the Rebel cause); *ibid.*, Add. Mss. 21, p.774 (esp. Letter to Captain Robert Matthews from Daniel Claus, about secret conferences at Caughnawaga, ca. July 1778, dated 17 January 1782", mentions "three different channels" of intelligence between the Rebels in Canada and to the south, and of which "the first or principal one was Caghnawagey, which was carried on by two fugitive rebel Indians of that place...")

⁵⁶⁵ Haldimand Papers, Mss. Doc 21, p.771, "Letter to Captain Robert Matthews from John Campbell about councils at St. Regis, Long Sault, and Carleton Island, late September, 1779, 27 September 1779".

⁵⁶⁶ *Ibid.*, Add. Mss.21, p.779, "Frederick Haldimand's response to a Speech addressed to him at a conference at Niagara by deputies of Six Nations, Indians of Oquaga (Oka?) and Delawares on Susquehanna... late May 1779", mss. dated 2 April 1779.

recognised the United States of America.⁵⁶⁷ This treaty failed to acknowledge the assistance given either side by the Six Nations or "domiciliated" Iroquois at Kahnawake, and shortly after its signing the majority of Iroquois people departed their traditional territories in Iroquoia for the north or west. Many followed the Mohawk leader Joseph Brant to a tract of lands in southern Ontario granted to them by Frederick Haldimand subsequent to their omission in the 1783 treaty, in recognition of their support for Canada in the war.⁵⁶⁸ Of those Mohawks who chose not to follow Brant, the remaining majority settled at lands promised to them at Deseronto (also known as Tyendinaga) or other, pre-established northern settlements like Kahnawake.⁵⁶⁹

Although the Americans and the British appeared to have settled their quarrels, there was one more colonial war to be fought. It was declared by the United States on Britain, and therefore upon Canada, on 18 June 1812, at the height of the Napoleonic conflict in Europe, and is recorded in history as the War of 1812.⁵⁷⁰ While there is some controversy among historians as to the practical importance of this war in the

⁵⁶⁷ Allen, His Majesty's Indian Allies, pp.55-56.

⁵⁶⁸ Sally M. Weaver, "Six Nations of the Grand River, Ontario", in Northeast, pp.525-536.

⁵⁶⁹ Fenton and Tooker, "Mohawk", in Northeast, p.476.

⁵⁷⁰ Allen, His Majesty's Indian Allies, p.123.

larger context of Canadian history⁵⁷¹, there seems little doubt that the role of amerindian warriors was a significant factor in the fighting.⁵⁷² That being said, despite the estimated total of 670 Akwesasne and Kahnawake warriors the British believed willing to fight with them in this conflict⁵⁷³, the men of Kahnawake appear to have fought in only one campaign, and that one in defence of their own lands against an American force under Colonel Robert Purdy. They expelled the colonel and his men with little effort.⁵⁷⁴ Their allegiance would again be substantially forgotten in the Treaty of Ghent which ended the war on Christmas Eve of 1814, as they and the Six Nations had been overlooked in the Treaty of Paris.⁵⁷⁵

⁵⁷¹ Personal communication with R.S. Allen, 24 April 1994.

⁵⁷² Allen, *ibid.*, pp.121-122.

⁵⁷³ *Ibid.*, p.122.

⁵⁷⁴ Blanchard, Seven Generations, pp.306-308; Devine, Historic Caughnawaga, pp.324-325.

⁵⁷⁵ Jennings et al, The History and Culture of Iroquois Diplomacy, p.200; Tooker, "The League of the Iroquois", p.435; Allen, His Majesty's Indian Allies, pp.168-169; see also, George F.G. Stanley, "The Six Nations and the American Revolution", Ontario History, (n.d.), pp.217-232.

5.3 Changing Perspectives and Altering Principles: British

Indian Policy 1814-1889

The conclusion of the War of 1812 was a significant moment for the Kahnawake Mohawks, as it signalled the conclusion of the colonial contests for Canada and in so doing rendered the Mohawks and other amerindians' prior import as allies a nullity. Thus whereas the essence of British "Indian policy" to this time had centred upon the promotion of friendship of its aboriginal allies, after 1814, that policy began to shift toward a foci on the encouragement of "civilization" of the "savages" toward their ultimate assimilation into the anglocanadian mainstream.

Although it was assumed that the eastern amerindian population, by virtue of a longer history with the "white man", had obtained a greater measure of familiarity with a "civilized" lifestyle than their western counterparts, the overall policy of "civilization" was nonetheless applied to such groups as the Mohawks at Kahnawake. In this way the British "Indian policy" in Canada differed little from its French colonial counterpart: the Mohawks of Kahnawake were expected to abandon "traditional" pursuits and pastimes and assume a European lifestyle; the only shift here was that the lifestyle they were to assume in British Canada was an anglophone, rather than francophone one.

If the essence of the French and British approach to the amerindians in their midst was the same, so too was the basic

order of things in Kahnawake following the changing of the French administration of Canada to a British one, and the formal articulation of Canada's "Indian policy" after 1820. Mohawk concerns over the shrinking landbase of Kahnawake persisted, and the ongoing efforts of the new department to reduce or translate the annual presents into simple monetary payments was a further source of disquietude. These presents, intended originally as a means of encouraging amerindian friendship with their colonial benefactors, were felt by the latter to be an unnecessary and expensive residuum of the prior colonial policy based upon the cultivation of the now irrelevant goal of alliance. Thus as part of a fundamental policy concern with financial retrenchment, it was felt that the aboriginal population could be "weaned" and some monetary savings achieved, if a simple money payment could replace the presents. However, like many of their brethren, the Kahnawake Mohawks resisted the commutation of their presents, not only because of their symbolic value, but because of the more pragmatic consideration that many of their number depended upon the blankets, guns, ammunition, housewares for their very survival.⁵⁷⁶ Should money payments be made in lieu of these

⁵⁷⁶ Although there seems to have been some dependency upon the presents among the Kahnawake Mohawks, the actual extent of that reliance is uncertain. For while hunting and trapping are reported to have been the primary occupations in the first moments of the nineteenth century, as the Mohawks ventured into the second half of that juncture, the economy seems to have become quite diversified. Of the consistently increasing population of 1650, by 1871 only a small number appear to have persisted in farming, while others were employed as rafters on the Saint Lawrence river, performers in the "wild west shows" of that era, or as craftspeople and vendors of traditional crafts. Subsequent annual reports impress that the

things, many Mohawks worried that the payments would be put to "improper use", most notably in the form of the purchase of alcohol and "spiritus liquors". Their anxiety would seem to have been well-founded, as Devine suggests that alcohol had made a strong and destructive appearance in the village up to this time, a situation which could only have been made worse with the provision of further funds to expend on liquor.⁵⁷⁷

The cogency of the petitions of the leaders of Kahnawake and others, united with more general pressures then weighing upon the department, led to a retention of the extant form of the annual presents. And while it is difficult to assess the accuracy of Devine's impressions regarding alcohol in Kahnawake, the 1888 report of the resident representative of the Canadian Indian Department, the "Indian Agent"⁵⁷⁸ who was responsible for

diversification continued to the point where, today, farming is limited primarily to the cultivation of personal gardens. It is also clear that, by the first years of the twentieth century, many men of Kahnawake had begun their now-famous work in the steel industry, primarily in erecting bridges, while still others were employed in machine and wire works, in logging on the Saint Lawrence and in the manufacture of snowshoes, lacrosse sticks and beadwork (Annual Report 1871, p.58; *ibid.*, 1882, "Report of the Superintendent General of Indian Affairs", p.xxxiv; Devine, pp.409-410; Annual Report, 1903, "Part I - Reports of the Superintendents and Agents, Quebec", p.48).

⁵⁷⁷ *Ibid.*, pp.350-353.

⁵⁷⁸ Under the authority of An Act providing for the organisation of the Department of the Secretary of State of Canada, and for the management of Indian and ordnance lands, S.C. 1868, c.42. (31 Vict.), s.39, provision was made whereby: "The Governor may, from time to time, appoint officers and agents to carry out this Act, and any Orders in Council made under it, which officers and agents shall be paid in such manner and at such rates as the Governor in Council may direct". At a local level, this provision translated into the placement of federal officers known as "Indian agents" in

the line-level implementation of federal "Indian policy", informs that the presence of liquor in the community in that year was greatly diminished, citing the presence of "but a few cases" of intoxication.⁵⁷⁹ This trend appears from subsequent reports to have continued until the early 1900's, at which time alcohol appears to have made new inroads into the community, especially among the young men. It is interesting to note that, while liquor was formerly commonly accompanied by increased socially-deviant and unacceptable behaviour, in this later context, the Agents at Kahnawake consistently report that "the rarity of serious crime and growth of general prosperity are in themselves proof that [liquor] has no extended hold on them."⁵⁸⁰

Under the English criminal law jurisdiction which had been activated in Kahnawake through the Proclamation of 1763, amerindian people like the Kahnawakehronon had been policed by military or federal police, and any charges against them were heard in "outside courts" of criminal jurisdiction in Quebec; they were also vulnerable to serving sentences of imprisonment

reservation communities, whose primary duties involved ensuring federal Indian policies were implemented and followed in those communities.

⁵⁷⁹ Canada. Department of Indian Affairs. Annual Report, 1888, p.23.

⁵⁸⁰ Ibid., Annual Report, 1902, "Report of the Deputy Superintendent General", p.xxvi; *ibid.*, Annual Report, 1897, "Report of the Deputy Superintendent General", p.xxiv.

in Canadian goals.⁵⁸¹. This jurisdiction is clearly illustrated in the 1874 Act to amend certain laws respecting Indians⁵⁸², wherein provision is made for the arrest by a "constable" of any "Indian whom he may find in a state of intoxication", who may then be incarcerated until sober, at which time he or she would be brought before "any Judge, Stipendiary Magistrate or Justice of the Peace". Conviction of an amerindian for being found intoxicated was punishable by not more than a month in prison. Similar specific statements of the aboriginal vulnerability to Canadian laws, processes and penalties are found in the 1876 Indian Act in relation to the application of penalties against Indian trespassers⁵⁸³, the rights of Indians to "sue for debts due to them"⁵⁸⁴, the giving of testimony by "non-christian Indians"⁵⁸⁵, and the possession of intoxicants.⁵⁸⁶ This

⁵⁸¹ See An Act providing for the organisation of the Department of the Secretary of State of Canada, and for the management of Indian and ordnance lands, S.C. 1868, c.42. (31 Vict.), s.5.

⁵⁸² An Act to amend certain Laws respecting Indians, and to extend certain laws relating to matters connected with Indians to the Provinces of Manitoba and British Columbia. S.C. 1874, c.21. (37 Vict), s.4. See also ss.2-6, which detail the procedures for obtaining the spoken and written evidence of Indian people as witnesses to offences appearing before "any Court, Judge, Stipendiary Magistrate, Coroner, or Justice of the Peace". Please note that copies of all relevant legislation in regard to the evolution of the Indian Act Court in Kahnawake are contained in Appendix A, and are organized in their proper temporal sequence.

⁵⁸³ An Act to amend and consolidate the laws respecting Indians. S.C. 1876, c.18 (39 Vict.), s.16-21.

⁵⁸⁴ Ibid., s.67.

⁵⁸⁵ Ibid., ss.74-78.

⁵⁸⁶ Ibid., ss.79-82.

jurisdiction was underscored in 1879 in An Act to Amend "The Indian Act, 1876"⁵⁸⁷, and in The Indian Act, 1880.⁵⁸⁸ Of most importance in the latter Act was the provision enabling the Governor in Council to introduce an elective system of local government into "any band of Indians"⁵⁸⁹, who could in turn, "subject to confirmation by the Governor in Council, [make] rules and regulations" for a range of matters, including the "repression of intemperance and profligacy".⁵⁹⁰ These rules and regulations were enforceable in the breach by punishments of fine, imprisonment or both, as ordered by a "Justice of the Peace" within a summary trial.⁵⁹¹

While this jurisdiction of an elected council would seem to imply the presence of a certain measure of power and authority among "Indian notables" within reservation communities following the elective system, the proviso of the Governor's approval of "rules and regulations" should not be underestimated. This approval could be, and often was, withheld from council's initiatives, and thus any perception of local indigenous power in relation to the minor social control jurisdiction outlined in the 1880 Act must be tempered with the reality that only those

⁵⁸⁷ S.C. 1879, c.34 (42 Vict.), s.16.

⁵⁸⁸ S.C. 1880, c.28. (43 Vict.), ss.24-34, 63, 65-67, 74, 80, etc.

⁵⁸⁹ Ibid., s.72.

⁵⁹⁰ Ibid., s.74(4).

⁵⁹¹ Ibid., s.74(11).

rules obtaining that approval obtained the force of law.

It should also be noted that it was only infrequently that early councils had as members "Indian notables". Rather, as evidence of the situation from Kahnawake's neighbour community of Akwesasne implies, those who were "notable" in the eyes of the community were rarely so in the eyes of the Indian Department. Thus it was that when the Akwesasne Mohawks elected their traditional sachems to the offices of councillors in 1889 formal council elections, the Department threw out the election results and demanded a second vote be held. When the initial results were replicated on the subsequent ballot, the elected traditionalists were arrested and incarcerated, thereby ensuring a more "acceptable" result in a third ballot.⁵⁹² There can be little question that the putative "self-government" which the Act of the day supported through the council system was much more illusory than real, and even the illusion was generated and controlled by the Canadian state.

In 1881, the apparent activation of a criminal law jurisdiction upon aboriginal people received its first permanent articulation within their reservation communities. In that year, by virtue of an amendment to the 1880 Indian Act, the powers of "a Justice of the Peace or Stipendiary Magistrate" were infused into the office of Indian agent, effectively creating a summary level Justice of the Peace court in Kahnawake and all other

⁵⁹² A full elaboration of the troubles at Akwesasne may be found in Dickason, Canada's First Nations, pp.320-321.

reservations wherein an agent resided.⁵⁹³ Within this incipient jurisdiction the agents-cum-justices were empowered only to hear offences as defined under the Indian Act of the day, which included such matters as those outlined and created under s.74 of the 1880 Act, as noted above. And although the modern Justice of the Peace court differs from this early court in both powers and jurisdiction, it seems clear that the empowerment of agents as Justices in 1881 was the first instance of such a court in Kahnawake.

The powers of the local Justice of the Peace remained essentially unchanged for the next three years. In that time, as one of its first formal efforts to nudge the Mohawks of Kahnawake closer to a British definition of an "advanced civilization", the Indian Department in 1882 initiated the subdivision of the Mohawks' reserved lands into fifty-acre lots.⁵⁹⁴ These parcels of land were then to be offered to individual Mohawks as incentives to accept enfranchisement, which was considered to be the hallmark of a civilized existence. It is difficult to assess the reception given this development within the community, save that more general records indicate that a single Mohawk, Elias Hill, possibly of Kahnawake, took advantage of the provisions to obtain land and the vote. That being said,

⁵⁹³ An Act to further amend "The Indian Act, 1880". S.C. 1882, c.30 (45 Vict.).

⁵⁹⁴ Canada. Department of Indian Affairs. Annual Report, 1882, "Report of the Superintendent General of Indian Affairs", p.xxxiv-xxxv.

the Annual Report of the day is suggestive, noting that the Deputy Minister of the department, upon visiting Kahnawake in the summer of that year, found "matters in a generally very satisfactory condition", something which one suspects would not have been the case had great opposition to the survey and subdivision of the community's landbase existed.⁵⁹⁵

Two years after the initiation of the subdivision of Kahnawake, the federal government passed the Indian Advancement Act⁵⁹⁶ as part of its enhanced civilization program. Directed essentially at the more "advanced" amerindian nations residing in what was then Canada East, this legislation permitted Indian Agents to nominate those "bands" deemed "sufficiently advanced in civilization and intelligence to have the provisions of the Act applied to them".⁵⁹⁷ Successful nomination would enable the community to be divided into as many as six electoral districts, containing relatively equal numbers of "male Indians" who would then be permitted to cast votes for the election of a council which would obtain a limited by-law power within the boundaries

⁵⁹⁵ Ibid., p.xxxiv.

⁵⁹⁶ "An Act for conferring certain privileges on the more Advanced Bands of the Indians of Canada, with a view to training them for the exercise of municipal powers", Statutes of Canada 1884, c.38. (47 Vict.). Hereinafter referred to as The Indian Advancement Act.

⁵⁹⁷ NAC RG10, B.S., Vol.3815, file 56883, "Vankoughnet to Indian Supts. and Agents in Ontario, Quebec, Prince Edward Island, New Brunswick, Nova Scotia, Manitoba, British Columbia, 16 Jan. 1885"; RG10, vol.2283, file 56883, vol.1, "copy of Vankoughnet's circular, 16 Jan. 1885; RG10, LB, vol.4500, p.731, "Vankoughnet to Listed Agents and Supts., 16 Jan. 1885."

of the reserve. Included among the councils' jurisdiction were such matters as the right of specification of the religious domination of teachers on the reserve (save for those "catholic minorities" who were guaranteed a separate school by the Act), as well as control over trespass, buildings, "water courses" and so on. Perhaps most significant for purposes here are provisions permitting the council to develop and pass by-laws for "the repression of intemperance and profligacy" and for the "imposition of penalties and enforcement thereof", of any "infraction of or disobedience to any by-law, rule or regulation made under [the] act committed by any Indian on the reserve".⁵⁹⁸ Such penalties, never to exceed fifty dollars in fines or 30 days imprisonment, were to be imposed in the "usual summary way" before the resident Justice of the Peace.⁵⁹⁹

In the same year the jurisdiction of the resident Justice were expanded to entitle the agents to hear at any place or time any breach of the Indian Act, regardless of whether it occurred in Kahnawake or whether the person committing it was an "Indian" as defined in the Act.⁶⁰⁰ Among the infractions included within that authority was the misdemeanour of encouraging Indians to "make any request or demand of any agent or servant of the

⁵⁹⁸ The Indian Advancement Act, 1884; see also, An Act to further amend "The Indian Act, 1880", S.C. 1884, c.27 (47 Vict.), s.2.

⁵⁹⁹ Ibid.

⁶⁰⁰ An Act to further amend "The Indian Act, 1880", S.C. 1884, c.27 (47 Vict.) ss.22 and 23.

government in a riotous, disorderly or threatening manner, or in a manner calculated to cause a breach of the peace".⁶⁰¹ This provision, while most certainly directed to keeping the peace within amerindian communities like Kahnawake, was probably also intended as a possible source of leverage against any amerindians protesting too vociferously the application of the policy of civilization to their communities, and it is apparent that in at least one case the provision had to be used against Kahnawake Mohawks. In that situation, the resident agent was required to request the assistance of the Royal Canadian Mounted Police to stifle a Mohawk protest against the construction of the resident's home within the reservation territory and the erosion of Kahnawake's "treaty rights":

A press despatch, dated October 28th, states that Mounted Police had to be called to this Reserve because of the threat of angry Indians to hinder the construction of a home for the Indian Agent. According to a communication from the Caughnawaga Reserve, the Indians wish their tribal rights restored under Treaty.⁶⁰²

The 1884 amendments were further altered in 1886 to include the authority to hear any other matter which might affect Indians⁶⁰³, a power which was removed from 1886 to 1890⁶⁰⁴, only

⁶⁰¹ Ibid.

⁶⁰² Canada. Department of Indian Affairs and Northern Development. File #373/3-1(vol.1) 1924-1966, Band Management - General - Montreal District.

⁶⁰³ An Act to further amend "The Indian Act, 1880", S.C. 1884, c.27 (47 Vict.) ss.22 and 23.

⁶⁰⁴ The Indian Act, R.S.C. 1886, c.43, s.117.

to be reaffirmed in principle by the addition of jurisdiction in 1890 over those 'morals' offences defined in An Act respecting Offences against Public Morals and Public Conveniences.⁶⁰⁵ When this Act was repealed in 1892 with the passage of Canada's first comprehensive criminal statute, Indian agents' powers were saved essentially intact and outlined in amendments to the Indian Act made in 1894⁶⁰⁶ and 1895.⁶⁰⁷ By these alterations and additions, the agents secured the right to hear violations of certain provisions of the 1892 Criminal Code, without any limitations arising from whether the offender was amerindian or non-amerindian or, if the former, a resident of the reserved territory comprising the agent's jurisdiction.⁶⁰⁸

Among the Code provisions over which the agents were given authority were some which clearly replicated the powers held in relation to the 1890 "Public Morals" statute, such as prohibitions on the prostitution of "unenfranchised Indian

⁶⁰⁵ An Act to further amend "The Indian Act", Chapter Forty-three of the Revised Statutes, S.C. 1890, c.29, s.9. By virtue of s.117 of this Act, every Indian agent was made "ex officio a justice of the peace" and was given the power of "two justices of the peace, with jurisdiction wheresoever any violation of the provisions of this Act occurs, and in all cases of infraction, by Indians, of any of the provisions of chapter one hundred and fifty-seven of the Revised Statutes intituled [sic] "An Act respecting Offences against Public Morals and Public Conveniences", or wheresoever it is considered by him most conducive to the ends of justice that any violation aforesaid shall be tried" (original emphasis).

⁶⁰⁶ An act to further amend "The Indian Act", S.C. 1894, c.32, s.8.

⁶⁰⁷ An Act to further amend the Indian Act, S.C. 1895, c.35.

⁶⁰⁸ Ibid., s.7.

women". Others went well beyond this, toward the preservation of the original legislative intention of the agents as line-level facilitators of the implementation of Indian policy and the coerced acculturation of aboriginal people which lay at its core. In this regard the civil servants were granted jurisdiction over s.98 of the Criminal Code⁶⁰⁹, which elevated the original 1884 Indian Act misdemeanour of 'stirring up' Indians to disorderly or threatening requests of an agent, or to 'do any act calculated to cause a breach of the peace', to the level of an indictable offence carrying a sentence of imprisonment.⁶¹⁰ The agents also received powers in relation to Part XV of the 1892 Code, which defined an extremely broad vagrancy provision derived from the 1886 morality statute. It is difficult to diminish the apparent intention of these newly-acquired powers to limit aboriginal resistance to government policy ends, whether by restricting their rights of protest or coercing a "proper" lifestyle through the threat of the vagrancy provisions.

⁶⁰⁹ R.S.C., c.43, s.111.

⁶¹⁰ Criminal Code 1892, R.S.C., c.43, s.111; see also Akman, "Justices of the Peace under Section 107 of the Indian Act, p.7.

5.4 Kahnawake "Advances": Acculturation and Opposition,
1889-1974

Although the department had little apparent luck with its efforts to "civilize" Kahnawake through the offer of land for enfranchisement or the coercion of "civilization" through the local court, it fared far better with its Advancement Act. Correspondence emerging from the desk of the Superintendent General of Indian Affairs of the time states that

in January 1888 the Indian Agent at Caughnawaga informed the Dept. [sic] that at a numerously attended meeting of the Iroquois Indians of Caughnawaga, it was unanimously decided to petition the S[uperintendent] G[eneral] of I[ndian] A[ffairs] to apply the provisions of the Act 47 Vic. Cap. 28, being the "Indian Advancement Act", to their Band and Reserve.⁶¹¹

So enthusiastic was the Kahnawake Mohawks' apparent response to the possibility of coming under this legislation that, upon discovering that inclusion under its terms would require the better part of a year, they sent a series of seven petitions to the resident Agent requesting the right to "elect chiefs to act as such until the Indian Advancement Act is made applicable to their tribe".⁶¹² While the outcome of those petitions is

⁶¹¹ Canada. Department of Indian Affairs and Northern Development. File #E4218-D6 (vol.2) 11/1980-11/1983, Council Elections - Montreal District, "memorandum of the Superintendent General of Indian Affairs, 31 January 1889".

⁶¹² Ibid., "Letter from A. Brousseau, Agent, to the Superintendent General of Indian Affairs, Caughnawaga 16 January 1889".

unclear, it is known that the reserved lands at Kahnawake were subsequently divided into six sections which formed the electoral districts as required in the Act. Shortly thereafter, on 5 March, 1889, an order-in-council brought the "Iroquois Band of Caughnawaga" under the Indian Advancement Act, stating:

And Whereas the Superintendent General of Indian Affairs reports that the Iroquois Band of Caughnawaga is composed of a most intelligent class of Indians, well advanced in civilization, and is therefore well fitted for the application of the said Act to it.

His Excellency the Governor General in Council in pursuance of the powers vested in him by the said Indian Advancement Act, being Chapter 44 of the Revised Statutes of Canada, has been pleased that the Indian Advancement Act shall apply to the Iroquois Indians of Caughnawaga, and the same is hereby applied to the said Indians accordingly.⁶¹³

By virtue of their placement under this Act, the Mohawks of Kahnawake not only obtained an elective system of government and the powers to pass and enforce by-laws which accompanied this, but were also committed to hold elections for council every year. This provision set the electoral system at Kahnawake apart from that characterising its neighbors in the "older provinces", including Ontario, Quebec, New Brunswick, Nova Scotia and Prince Edward Island. With the exception of three other bands in Ontario, the band council governments which were uniformly imposed upon the amerindian peoples in those provinces through a general order-in-council in 1895 specified that elections

⁶¹³ Canada. Department of Indian Affairs and Northern Development. File #E 4218-D6(vol.1), 1/1980-10/1980 Council Elections - Montreal District, "Order-in-council, P.C. 466, Privy Council, Canada, Government House, Ottawa. Tuesday 5th day of March 1889".

would be held every three years.⁶¹⁴ Some time later, in 1952, Kahnawake would be brought under the terms of an amended Indian Act and would begin to hold elections every two years.⁶¹⁵

The apparent enthusiasm for, and subsequent inclusion under, the terms of the Advancement Act was not shared equally by all Mohawks, and thus should not be seen as constituting a wholesale abandonment of traditional ways nor the possibility of the resurrection of those putatively replaced by the elected band council system. As early as 1924 one witnesses the rise of a group described by the resident Agent in Kahnawake as "assumed chiefs" with only a "small clan of supporters". In a letter penned to the then-Superintendent General of Indian Affairs by the Agent and dated 15 May 1924, he asserts that

the above-mentioned clan has systematically opposed every single effort that anybody has done to better their condition. At the last election of Councillors they all came out to vote against the six progressive candidates whose program was precisely the advancement of the Caughnawaga Indian Reserve. They all spoke against improvement as such... Their speeches were to return to their former state before the whites came.⁶¹⁶

The rise of groups of "traditionalists" who stood in opposition to the elected band council on almost every issue in local

⁶¹⁴ Ibid., "System of Election or Appointment of Chiefs and Councillors in the various Provinces, Ottawa, Feb.4, 1911".

⁶¹⁵ Canada. Department of Indian Affairs and Northern Development. File #373/3-5(vol.4) July 1966 - March 1973. Elections - General - Caughnawaga District.

⁶¹⁶ Canada. Department of Indian Affairs and Northern Development. File #373/3-1(vol.1) 1924-1966 Band Management - General - Montreal District.

government politics was soon a defining element of Kahnawake, leading to the split of the elected council in 1934⁶¹⁷, and the rise of overt inter-factionalist competition for community support on a range of matters thereafter. In at least some respects these internal fissures were little different from the factionalism which had arisen over spiritual and cultural matters in the Mohawk Valley prior to 1667, and they may be seen to have preserved that "tradition" of internal dissent which would long be a defining attribute of Kahnawake and its predecessors.

One of the most revealing of these community splits emerged between over the decades spanning 1950-1972, as the Canadian and United States governments proceeded with the development of the Saint Lawrence Seaway. Contemplation of the construction of the canal, whose main area of construction focused upon a 182 mile stretch between Montreal and Lake Ontario, and specifically upon a total of 1855 acres of Kahnawake land, had been ongoing between Canada and the United States since as early as 1932. However, the United States had consistently expressed concerns over the project and had rejected Canada's treaty overtures until 1954, when it became apparent that Canada was determined to proceed even in the absence of American approval of the project.⁶¹⁸

⁶¹⁷ NAC RG 10, vol.7995, file 1/24-2-21.

⁶¹⁸ David S. Blanchard, "Introduction", in Kahnawake and the Seaway: A Select Portfolio of Photographs from the Public Archives of Canada (Kahnawake: Kanienkehaka Raotitiohkwa Cultural Center,

Within one year of obtaining American complicity in the project, the Canadian government, acting under the joint authority of the Saint Lawrence Seaway Act⁶¹⁹ and the Expropriation Act as well as an Order-in-Council⁶²⁰ dated 16 September 1955, began the process of expropriating 1260 acres of Kahnawake land. Refusing to surrender the acreage until the Canadian government and the Saint Lawrence Seaway Authority agreed to negotiate satisfactory compensation rates as well as resolve Band Council concerns about a range of matters, including compensation for expropriated "band land" in addition to individually-held territory, reversion of unused expropriated lands and preservation of certain beach and routes of access potentially affected by the Seaway⁶²¹, the people of Kahnawake, the Government and the Seaway Authority entered into a protracted stand-off over the Seaway project. And while it appears that a significant percentage of individual Mohawks whose lands fell within the expropriation area complied with the orders and accepted compensation, the position of the council(s) over time as well as the community generally was one of opposition to the project and the land seizures it entailed.

Historic Kahnawake Series 4, 1981), pp.3-4.

⁶¹⁹ R.S.C. 1952, Ch.242.

⁶²⁰ P.C. 1955-1416.

⁶²¹ Ottawa. Department of Indian and Northern Affairs. File # 373/3-6 (vol.3) 1946-57, Minutes of Council - General - Caughnawaga. Minutes of Council of 9 July 1955. See also Omar S. Ghobashy, "Compensation", The Caughnawaga Indians and the St. Lawrence Seaway (New York: Devin-Adair, 1961), pp.80-83.

The essence of the Mohawks' resistance may be extrapolated from a protracted series of letters and petitions to the Department from the band council.⁶²² The latter seems to have developed into an especially keen site of the struggle, as supporters of the band council and traditionalists, as well as those who, for purposes of this issue, aligned themselves with either camp in accordance with their own interests, sought to gain control of the council as the only "officially sanctioned" voice of dissent within Kahnawake.

The records originating within the council inform that they began actively discussing the matter of the Seaway and the expropriations as early as December of 1954⁶²³ and that the topic became a regular subject of discussion at Council meetings from that point forward. Although the remaining documents are silent on the particular actions taken to convey the concerns

⁶²² See, for example: Ottawa. Department of Indian and Northern Affairs. Ibid., Minutes of January Meeting, 16 January 1956; *ibid.*, Minutes of May Meeting, 15 May 1956; *ibid.*, Minutes of Special Meeting, 18 June 1956; *ibid.*, Letter from Frs. Brisbois, Superintendent to Indian Affairs Branch, Department of Citizenship and Immigration, re Resolution #376, 22 March 1957; *ibid.*, Letter from Frs. Brisbois, Superintendent to Indian Affairs Branch, Department of Citizenship and Immigration, re Resolution #351, 22 January 1957; File #373/3-5(vol.4) July 56-June 65, Elections - General - Montreal District. Letter from Matthew Lazare, Chief Councillor, Caughnawaga Indians, to Mr. Dag Hammerskjold, Secretary General, United Nations, New York, 21 December 1959; File #373/3-5(vol.4) July '56 - June '65, Elections - General - Montreal District, Confidential Memorandum to the Deputy Minister, Indian Affairs Bureau, Department of Citizenship and Immigration, Ottawa, 22 July 1960;

⁶²³ Ottawa. Department of Indian Affairs and Northern Development. File #373/3-6(vol.3) 1946-57, Minutes of Council - General - Caughnawaga. Minutes of December Meeting, Dec. 11, 1954, Caughnawaga Indian Reserve.

arising from these discussions to the Department or the Seaway Authority, there was apparently for a short time some discussion of sending a deputation from the Council to Ottawa for this purpose after February 1955.⁶²⁴

Whether this meeting ever actually materialized is uncertain, but what is less certain is the apparently growing dissatisfaction of the majority of the voting public in Kahnawake with the actions of the Council in relation to the Seaway protest. In the Council elections of 4 July, 1956, the community unseated eight of the incumbent councillors, a result noted by the resident agent as residing in a common dissatisfaction with the Council which outweighed the differences between normally opposed conservative and traditionalist subgroups within the community:

The campaign appears to have been made on the grounds that the former Council was too cooperative with the Government in the matter pertaining to the Seaway and also that the interest of the Band in general was not safe in their hands more particularly regarding enfranchisement. Leaders of different dissident groups joined hands to defeat the former Council.⁶²⁵

The replacement Council lost little time in acting upon its mandate to enhance the community's previous levels of resistance to the Seaway and the expropriations. In what appears to be the

⁶²⁴ Ibid., Minutes of a February meeting Feb. 19, 1955. Caughnawaga Indians.

⁶²⁵ Ottawa. Department of Indian and Northern Affairs. File #373/3-5(vol.4) July 1956 - June 1965, Elections - General - Montreal District. Letter from F. Brisbois, Supt., Indian Agency, to The Indian Affairs Branch, Dept., of Citizenship and Immigration, Ottawa, Ont., Re: Election of Indian Council, Caughnawaga, Que., 5 July 1956.

first resolution passed by them, the new Council resolved, on behalf of the people of Kahnawake:

1. To forward a protest in the strongest terms to the Government of Canada and the Department of Indian Affairs at the violation of it's [sic] ancient rights to the possession of its land at Caughnawaga through the location and manner of construction of the St. Lawrence Seaway Authority and does hereby demand that all such construction and expropriation shall cease until a full discussion has been held with the new Council and proper agreement drawn up for the protection of it's [sic] rights;

2. To request the Governor-General-in-Council, as representing Her Most Excellent Majesty, to refer immediately to the Supreme Court of Canada the question whether under the St. Lawrence Seaway Authority Act and other statutes the treaty rights of the Caughnawaga Band, derived from sacred treaties and proclamations from the French and English Kings, can be abrogated and destroyed in this arbitrary manner;

3. To request the Government of Canada to Appoint a Royal Commission to investigate the whole position of the Band, in light of the St. Lawrence Seaway developments and to plan for the future welfare and preservation of the Indians on the said Reservation.

After a vote was taken 11 (eleven) Councillors were in favour. 1 (One) abstained.⁶²⁶

The nature and substance of the resolutions available to the researcher originating within the tenure of the 1956-62 Council would seem to suggest that those of a traditionalist persuasion dominated the Council, their conservative counterparts being largely unseated in the 1956 election. This traditionalist bent to the 1956-62 Council is indicated in its

⁶²⁶ Ottawa. Department of Indian and Northern Affairs. File #373/3-6(vol.3) 1946-57, Minutes of Council - General - Caughnawaga. Band Council Resolution No.317, 13 July 1956.

rejection of the Indian Act⁶²⁷ and its consistent assertions of enduring sovereignty and a "nation-to-nation" association with Canada⁶²⁸, as well as the ongoing efforts to induce the Department to recognize those qualities as preserved in "valid Indian Treaties and Proclamations".⁶²⁹ These typically traditionalist perspectives, combined with Departmental references to the unseated Councillors as "progressives"⁶³⁰, suggest strongly that the political struggle over the Seaway and the expropriations was manifested in terms of the predominant and increasingly historic conservative-traditionalist split.

While the legality of the resolution quoted above and a similar resolution, also dated 13 July 1956, are uncertain given the absence of signatures of the majority of the Councillors, their activist stance is an enduring, and often intensifying, theme of resolutions passed over the course of the three two-year terms served by this "traditionalist Council". It may be

⁶²⁷ Ottawa, Department of Indian Affairs and Northern Development. File #373/3-6(vol.3) 1946-57, Minutes of Council - General - Caughnawaga. Band Council Resolution #360, 14 January 1957.

⁶²⁸ See, for example: Ottawa. Department of Indian and Northern Affairs. File #373/3-6(vol.3) 1946-57, Minutes of Council - General - Caughnawaga. Band Council Resolution No.353, 14 January 1957; *ibid.*, Band Council Resolution No.354, 14 January 1957; *ibid.*, Band Council Resolution No.370, 11 February 1957.

⁶²⁹ Ottawa. Department of Indian Affairs and Northern Development. File #373/3-6(vol.3) 1946-57, Minutes of Council - General - Caughnawaga. Band Council Resolution #317, 13 July 1956.

⁶³⁰ This is a term which is historically consistently revealed as referring to those Mohawks demonstrating an at least apparent acceptance of both the Band Council system and the involvement of the Department in charting the future course of Kahnawake

noted, however, that the majority of these later resolutions are equally insecure as, despite a common comment on their faces declaring their contents "unanimously approved", they were in no case accompanied by signatures of all twelve Councillors.

Notwithstanding questions regarding their legality and the dubious probability that any of these resolutions were subsequently approved by the Minister, they and the Council responsible for them seem to have generated more than a little consternation for the Department. Within months of its election, the Superintendent was moved to remark that "there is a concerted effort by the newly elected members of the Council, to go against everything that was done previous to its election" and "by its actions [it] is determined to embarrass the former administration, also the Branch and this Office".⁶³¹ By the end of the activist Council's second two-year term, the Director of Indian Affairs observed in a memorandum to the Deputy Minister that the Council "consistently refused to co-operate with the Branch, even when non-co-operation caused hardship to the members of the Band".⁶³² As will be seen below, although this Council's actions would seem to have been a source of some discomfort for some Mohawks at Kahnawake, their thrice-

⁶³¹ Ibid., Letter from Frs. Brisbois, Superintendent, to the Indian Affairs Branch, Department of Citizenship and Immigration, Ottawa, 17 September 1956.

⁶³² Ottawa. Department of Indian and Northern Affairs. File #373/3-5(vol.4) July 1956 - June 1965, Elections - General - Montreal District. Confidential Memorandum from H.M. Jones, Director, Indian Affairs, to the Deputy Minister, Department of Citizenship and Immigration, Ottawa, 22 July 1960.

successful re-election would seem to suggest that a majority of the active electorate did not view that discomfit as out of proportion to the benefits achieved by the Council.

While the enduring presence of a minority of "conservative Councillors" on the 1956-1962 Council suggests that not all Kahnawake Mohawks agreed with the activism practised by the Council, it is likely that some of the Council's actions were instrumental in alienating some of its supporters as well. Although it appears that it went unapproved by the Minister and therefore was of no practical consequence, it is doubtful that a Resolution passed and signed by nine of the twelve Councillors in February of 1957 denying the acquisition of future plots of land to those Mohawks settling with the Seaway Authority met with the approval of those subject to expropriation.⁶³³ Similar estimations of disapproval may be inferred from resolutions passed suspending construction of "sewerage" and water wells to service those properties not directly involved in, but whose services were necessarily affected by, the Seaway project⁶³⁴, as well as protesting the presence of provincial highways in Kahnawake providing direct links between Montreal and its

⁶³³ Ottawa. Department of Indian Affairs and Northern Development. File #373/3-6(vol.3.) 1946-1957. Minutes of Council - General - Caughnawaga. Band Council Resolution #373, 11 February 1957.

⁶³⁴ Ibid., Band Council Resolution #351, 8 December 1956.

surrounding suburbs.⁶³⁵ That these resolutions were essentially ignored by the Department and had no practical impact on the projects or objects they were designed to protest is significant⁶³⁶, but unlikely to have mitigated the controversy they may be expected to have generated within Kahnawake.

A concrete example of the consternation caused within the community over some of the Council's actions in protest of the Seaway is evidenced in the controversy surrounding the Council's determination to take their protest to the United Nations. Following the passage of two resolutions declaring and informing all citizens of Kahnawake that the Council "will endeavour to bring before the United Nations, at our earliest convenience, our sad plight"⁶³⁷, the then-Chief Councillor of the Band Council apparently initiated a campaign to raise \$72,000.00 as "the price of admission for the Caughnawaga Tribe to the United Nations."⁶³⁸ The woman reporting this situation to the

⁶³⁵ Ottawa. Department of Indian Affairs and Northern Development. File #373/3-6(vol.3), 1946-1957, Minutes of Council - General - Caughnawaga. Band Council Resolution #355, 14 January 1957.

⁶³⁶ Ibid., Letter from Frs. Brisbois, Superintendent, to the Indian Affairs Branch, Department of Citizenship and Immigration, Ottawa, Re: Resolution #351, 22 January 1957; Ibid., Letter from Frs. Brisbois, Superintendent, to the Indian Affairs Branch, Department of Citizenship and Immigration, Ottawa, Re: Resolution #355, 23 January 1957.

⁶³⁷ Ibid., Band Council Resolution #357, 14 January 1957; *ibid.*, Band Council Resolution #356, 14 January 1957.

⁶³⁸ Ottawa. Department of Indian Affairs and Northern Development. File #373/3-5(vol.4) July 1956 - June 1965, Elections - General - Montreal District. Memo to the Minister, unsigned, 12 July 1960.

Department expressed not only her concern about the ability of the Mohawks to raise such funds, but requested the intervention of the Department to end the campaign and the tenure of the Band Council. Citing a "parchment commission by which Sir James Kempt, Governor of the Canadas in 1830, appointed an Indian to be a chief over a tribe", and which she perceived afforded the government power to appoint "chiefs", the informant requested that the Department impeach the present Council and replace it with an appointed one.⁶³⁹ While the Department appears to have agreed that the Council had "not been managing the affairs of the Band in a desirable manner", they declined to intervene, specifying that "the situation at Caughnawaga is regrettable but it is really a housecleaning job for the Indians themselves."⁶⁴⁰ This position does not appear to have ended the controversy, as the Council continued to solicit funds which some Mohawks at least seem willingly to have paid, while others persisted in protesting the campaign, seeking Departmental intervention.⁶⁴¹

Whether the Council succeeded in their efforts to take

⁶³⁹ Ibid.

⁶⁴⁰ Ibid., Confidential Memorandum to the Deputy Minister, Department of Citizenship and Immigration, from the Director, Indian Affairs, Ottawa, 22 July 1960.

⁶⁴¹ Ibid., Memorandum from F. Brisbois, Superintendent, Caughnawaga Indian Agency, to Chief, Reserves and Trusts, Department of Citizenship and Immigration, 2 August 1960; *ibid.*, Letter from Ellen L. Fairclough to Howard C. Green, P.C., M.P., Secretary of State for External Affairs, Ottawa, 15 August 1960; *ibid.*, Memorandum to the Deputy Minister from H.M. Jones, Department of Citizenship and Immigration, 15 August 1960; *ibid.*, Letter from R.L. Boulanger, Regional Supervisor of Indian Agencies to Superintendent, Caughnawaga, 16 September 1960.

their case to the United Nations is unclear from the primary documents available to the researcher, it may be confirmed, however, that in the long run this effort, and those others directed to halting the expropriations, failed. The Council responsible for those actions met with its own failure as well, falling in the 1962 Band Council elections.⁶⁴² The Seaway had by then become an unavoidable reality, although the Mohawks of Kahnawake would wait until 1973 for full financial compensation for the expropriated lands.⁶⁴³

It is primarily in regard to these matters of financial compensation for and return of unused expropriated lands that the issue of the Seaway was raised in Council meetings for the duration of the 1960's and the early 1970's. And whereas the Seaway had initially formed the catalyst for an exacerbation of band council-traditionalist competition, it would seem to be the case that not long after the rise of the Seaway controversy, the latter was dwarfed by the internecine factionalism to which it had originally contributed. Thus it appears that, following the

⁶⁴² Ottawa. Department of Indian Affairs and Northern Development, File #373/3-5(vol.4) July 1956 - June 1965, Elections - General - Montreal District. Letter from Mrs. L. McComber to Col. H. M. Jones, Director General Indian Affairs, Ottawa.

⁶⁴³ Ottawa. Department of Indian Affairs and Northern Development, File #373/3-1(vol.1) March 1970 - May 1985, Grants to Bands - Caughnawaga Band - Caughnawaga District. "Seaway Authority Pays Indians for lost lands", Clipping, Ottawa Citizen, Department of Indian Affairs and Northern Development, Office of the Public Information Officer, 31 January 1970; Ottawa. Department of Indian Affairs and Northern Development, File #373/3-1(vol.1) August 1966 - February 1974, Band Management - General - Montreal District. Caughnawaga Band Council Bulletin, November 1973, p.4.

1960's, it was less the case that certain ongoing controversies became vehicles for the articulation of council-traditionalist factionalism, than that an ongoing factionalism came to colour virtually all notable social and political issues. This internecine competition also came increasingly to involve the council and its increasingly active and aggressive adversary, the "Longhouse", the first hints of which are contained in the records of 1964.⁶⁴⁴ Within two years the friction between one representative of the "Caughnawaga Defence Committee", also referred to in departmental records as the Longhouse, and the council had extended as far as an incident of physical violence resulting in the laying of criminal charges against that individual.⁶⁴⁵ The issue which impelled this confrontation is not specified in the relevant records, but it is likely that it was one of the two which appear to have been points of controversy generally between these subgroups within the decade of the 1960's, including council elections⁶⁴⁶ and the proposal

⁶⁴⁴ Ottawa. Department of Indian Affairs and Northern Development, File #373/3-1(vol.1) 1924 - 1966, Band Management - General - Montreal District. Letter from Andrew T. Delisle, Grand Chief, Caughnawaga Mohawk Council, to Whom it May Concern, 26 October 1964.

⁶⁴⁵ Ottawa. Department of Indian Affairs and Northern Development, File #373/3-6(1957) Minutes of Council - General - Montreal District. Memorandum from R.L. Boulanger, Regional Director of Indian Affairs, to Quebec Regional Office, re Band Council Meetings, 15 March 1966; *ibid.*, Letter from T. Horn, Caughnawaga, to Hon. Arthur Laing, Minister, Indian and Northern Affairs, Ottawa, 3 June 1966.

⁶⁴⁶ Ottawa. Department of Indian Affairs and Northern Development, File #373/3-5(vol.5) November 1967 - June 1965, Elections - General - Montreal District. Letter from T. Horn,

for establishment of a band council controlled police force within Kahnawake.⁶⁴⁷

The proposal for council-controlled policing in Kahnawake emerged in the mid-1960's as part of a larger program which was initiated by the Mohawk Council toward greater independent self-government within the community, which persists to the present tense. The program was intended to garner the council local control over a number of matters then administered by the Department, including housing, roads, water and sewage, recreation, welfare, economic development, lands and estates, and health and youth guidance.⁶⁴⁸ Successful control over these services would then permit the department to withdraw from the community, providing the council with an unprecedented degree of local administrative control.⁶⁴⁹

Caughnawaga Defence Committee, to Mr. R.F. Battle, Indian Affairs Branch, Ottawa, 22 April 1966; *ibid.*, Letter from T. Horn, Caughnawaga Defence Committee, to Mr. J.W. Churchman, Acting Director, Indian Affairs Branch, Ottawa, 20 May 1966; *ibid.*, Memorandum (not sent) from Director of Administration to Assistant Deputy Minister (Indian Affairs) re Electoral Officer - Caughnawaga, 30 May 1966; *ibid.*, Letter from T. Horn, Caughnawaga Defence Committee, to Mr. J.W. Churchman, Acting Director, Indian Affairs Branch, Ottawa, 4 June 1966; *ibid.*, Letter from J.W. Churchman, Acting Director of Indian Affairs, to Mr. R.F. Battle, re: Election Appeal - Caughnawaga Band, 17 August 1966.

⁶⁴⁷ *Ibid.*, Letter from T. Horn, Caughnawaga, to The Elected Council, Caughnawaga, 13 June 1965.

⁶⁴⁸ Ottawa. Department of Indian and Northern Affairs. File #373/3-1(vol.3) August 1961 - February 1974, Band Management - General - Montreal District. Mohawk Council Resolution #97/67-68, 9 March 1968.

⁶⁴⁹ Ottawa. Department of Indian Affairs and Northern Development. File #373/3-1(vol.1) 1924 - 1966, Band Management - General - Montreal District. Memorandum from R.L. Boulanger,

Concerns of the "Caughnawaga Defence Committee" over the issue of policing in the community seem to have arisen primarily in regard to funding. These fears found voice in a June 1965 letter to the council from one of the Committee's primary spokespeople, which stated that

We have been informed by you that the police intend to arrest and fine people in order to obtain enough money to pay their salaries. I have never heard of a police force in my life organized on the basis of what they get depends on how much punishment and fines they are able to hand out. Would you please inform me if this is correct if this statement was made in grave error?⁶⁵⁰

There is no record of a reply made to the correspondent in regard to this query or another inquiring of the legal authority under which the council intended to assume control over policing services within Kahnawake. However, it may be noted that when band council controlled policing became a reality in the community in 1969⁶⁵¹, it was apparently funded through a tripartite arrangement between the council and the federal and

Regional Supervisor, Quebec Regional Office, to Indian Affairs Branch, Ottawa, re Caughnawaga Band Budget, 27 April 1965, p.3.

⁶⁵⁰ Ottawa. Department of Indian Affairs and Northern Development, File #373/3-5 November 1967 - June 1965. Elections - General - Montreal District. Letter from F. Horn to the Elected Council, Caughnawaga, P.Q., 13 June 1965.

⁶⁵¹ Ottawa. Department of Indian and Northern Affairs, File #373/3-1(vol.1) March 1970 - May 1965. Grants to Bands - Caughnawaga Band - Caughnawaga District. Band Council Resolution #22/68-69; *ibid.*, Message to F.J. Jette, Superintendent i/c, Caughnawaga Indian Dist., Caughnawaga, Quebec, from Head, Trust Section, Social Affairs, Department of Indian Affairs and Northern Development, 14 November 1969.

provincial governments.⁶⁵²

The initiation of a council-controlled policing program did not, however, lead to the immediate departure of the Royal Canadian Mounted Police (R.C.M.P.) from their detachment in Kahnawake. In fact, it would appear that the council was less than enthusiastic about the federal forces' departure, notwithstanding the presence of their own security service. Within three years of the creation of the band council police force, the R.C.M.P. were still present in the community in the person of a single officer. The approval of his transfer in 1972 prompted the council to contact the Indian Affairs Department to protest the officer's transfer and request that he be allowed to remain in Kahnawake.⁶⁵³ And while the records available to the researcher are silent on the departmental response to this request, it is clear that the R.C.M.P. did ultimately remove themselves from the community, and today the primary policing

⁶⁵² Ottawa. Department of Indian Affairs and Northern Development, File #373/3-6(1957), Minutes of Council - General - Montreal District. Letter from J.W. Churchman, Director of Indian Affairs, to Chief Andrew T. Delisle, Caughnawaga, Quebec, 9 May 1968; *ibid.*, Memorandum from D.A. Webster, A/Chief, Social Programs Division, to A.G. Leslie, re Policing - Caughnawaga, 26 September, 1968; *ibid.*, Letter from F.J. Jette, Superintendent i/c, to Andrew Delisle, Caughnawaga, Quebec., 28 October 1968; *ibid.*, Letter from J.J. LeVert, Acting Regional Director of Indian Affairs, Quebec Regional Office, to Indian Affairs Branch, Ottawa, re Request for grant - Caughnawaga Band Council, 6 November 1968.

⁶⁵³ Ottawa. Department of Indian Affairs and Northern Development, File #373/3-1(vol.3) August 1966 - February 1974. Band Management - General - Montreal District. Letter from John Ciacca, Assistant Deputy Minister, Indian and Eskimo Affairs, to R.L. Boulanger, Esq., Regional Director, Indian and Eskimo Affairs, Quebec, 15 May 1972.

body within Kahnawake are the Mohawk Council administered and controlled "Peacekeepers".

6. Kahnawake Takes Control: Factionalism, the "Indian Act" Court and the Rise of Separate Justice Competition in Kahnawake, 1974-1994

6.1 The Juridical Status Quo: The Mohawk Council and the the Rise of the "Indian Act Court" in Kahnawake, 1974-1994

Despite some piecemeal alterations to the Indian Act in 1906⁶⁵⁴ and 1927⁶⁵⁵, there had been little or no change to the status of the Indian agent's powers as a Justice of the Peace on reserve since the last significant revisions in 1884. The first major rethinking of the Indian Act generally, and the Indian Act Court specifically, transpired in 1951. In that year, the jurisdiction of the agents' courts was expanded to include powers to hear such matters as the robbing of Indian graves as well as those arising under the Criminal Code in relation to cruelty to animals, common assault, and breaking and entering.⁶⁵⁶ Detracting from this enhanced authority was the loss of jurisdiction over Code offences against morality

⁶⁵⁴ Indian Act, R.S.C. 1906, c.81.

⁶⁵⁵ Indian Act, R.S.C. 1927, c.98.

⁶⁵⁶ The Indian Act, S.C. 1951, c.29, ss.105 and 106.

committed by registered Indians, and the restriction of provisions concerning the incitement of Indians to 'riotous behaviour' to on-reserve populations.⁶⁵⁷ This latter provision was repealed in 1956, as were those relating to the robbing of Indian graves, marking a new trend toward reductions in the authority of justices appointed under the Indian Act.

The year 1951 also witnessed the first alterations in the eligibility requirements for those wishing to pursue the office of Justice of the Peace under the Indian Act. Prior to this time, Indian agents were the only persons considered for such appointments, a reality offering further evidence not only of the underlying rationale for the office, but of its tenuous relationship to the conduct of "Indian justice", rather than "Canadian justice", in Amerindian contexts. Under the combined authority of ss.105-106 of the 1951 Act, the enabling provisions were altered from specifying "every Indian agent" to be a justice⁶⁵⁸, to a specification that the "Governor in Council" could appoint "persons" to be justices for purposes of the Act.⁶⁵⁹

While at least th little in regard to the rights of amerindian people of the time to work towards control of the administration

⁶⁵⁷ Ibid., see also Akman, "Justices of the Peace under Section 107 of the Indian Act", p.9.; Jackson, "Locking up Natives in Canada...", p.36; The Justice System and Aboriginal People: Report of the Aboriginal Justice Inquiry of Manitoba, 2 vols. (Manitoba: Queen's Printer, 1991), vol.1, pp.302-303.

⁶⁵⁸ Indian Act, R.S.C. 1927, c.98, ss.152.

⁶⁵⁹ The Indian Act, S.C. 1951, c.29, ss.105.

of justice in their communities: It did not change the status of those agents already appointed as justices⁶⁶⁰ and, as Indians were not yet defined as "persons" under the Act⁶⁶¹, they remained barred from holding this office.⁶⁶² These changes constituted the last to date pertaining to the current section 107 Indian Act courts, the present provisions preserving the situation as it stood in 1951.

Although Kahnawake had a "Justice of the Peace Court" in the person of the resident agent acting as a Justice since the first such appointment in 1881, it was not until 1974 that this Canadian court assumed any real Mohawk dimensions. In that year the Mohawk Council of Kahnawake "borrowed" the services of the Mohawk Justice of the Peace resident in Akwesasne, who had been appointed and holding court in that community under the auspices of s.107 the 1951 Indian Act. As will be recalled from the outline of the current Court of Kahnawake contained at pages 45-50 of this thesis, the authority the Justice obtained under this section of the Act included a jurisdiction wherein:

The Governor in Council may appoint persons to be, for the purposes of this Act, justices of the peace and those persons have and may exercise the powers and authority of two justices of the peace with regard to

(a) offences under this Act, and

⁶⁶⁰ Ibid., s.106.

⁶⁶¹ The Justice System and Aboriginal People, p.305.

⁶⁶² The Justice System and Aboriginal People, pp.305-306; Akman, "Justices of the Peace under Section 107 of the Indian Act", p.9; Jackson, p.36.

(b) any offence against the provisions of the Criminal Code relating to cruelty to animals, common assault, breaking and entering and vagrancy, where the offence is committed by an Indian or relates to the person or property of an Indian.⁶⁶³

Under this authority, the Justice apparently began holding an informal, "unstructured" court in Kahnawake in 1974, and continued to do so for the next three years.⁶⁶⁴ This practice did not become official until 7 April 1977, however, when the Mohawk Council of Kahnawake lent official local sanction to the nascent "Court of Kahnawake" through a council resolution which recognised and authorised the Akwesasne justice "to perform duties and hear court cases as a Justice of the Peace for the Caughnawaga [Kahnawake] Reserve".⁶⁶⁵ Under this resolution the Justice maintained "office hours" at the Kahnawake Mohawk Council offices twice a week, at which times he was available to swear informations, hold "show cause" hearings as needed, and a full court one evening per week. He was assisted in his duties

⁶⁶³ The Indian Act, R.S.C. 1985, cI-5, s.107.

⁶⁶⁴ Interview with J. Sharrow, Justice of the Peace, Akwesasne Mohawk Nation, in Joint Canada-Saskatchewan-Federation of Saskatchewan Indian Nations Studies of Certain Aspects of the Justice System as They Relate to Indians in Saskatchewan, Working Papers prepared for the Working Group in Justices of the Peace/Peacemaker, Appendix C; Interview with P. Mayo, Justice Coordinator, Kahnawake Mohawk Nation, 25 September 1989, field notes in researcher's possession; Institutions of Mohawk Government: An Overview. It should be noted that the Mohawk Council's consolidation of by-laws which was current at the time of the research does not include any reference to the by-law of 7 April 1977, which extended Justice Sharrow's services to this community.

⁶⁶⁵ Interview with John Sharrow, Justice of the Peace, Akwesasne Mohawk Nation, *ibid.*

by a full-time court clerk retained by the council, and a privately secured attorney from the nearby city of Montreal who acted as prosecutor. Bailiffs and the Kahnawake policing agency were available to enforce the court's decisions, which were handed down in either English or Mohawk. Unfortunately, proceedings of the court were not kept as a matter of course, and few detailed records of its work remain.⁶⁶⁶

The retirement of the Akwesasne Justice in 1985 left a vacuum in justice services within Kahnawake and prompted the community "to [reassert] its control over the administration of justice within the territory by formally establishing a Justice Committee" in October of the same year.⁶⁶⁷ Apparently intended to oversee matters of public safety and peace and order in Kahnawake, the committee was established through a Mohawk Council Resolution⁶⁶⁸ which specified its mandate, and which was further expanded through a document entitled The Constitution of the Justice System and the Justice Committee of Kahnawake.⁶⁶⁹

⁶⁶⁶ Interview with P. Mayo, Justice Coordinator, Kahnawake Mohawk Nation, 25 September 1989.

⁶⁶⁷ Mohawk Council of Kahnawake, Institutions of Mohawk Government in Kahnawake: An Overview (Kahnawake: Mohawk Council of Kahnawake, 1989), p.11.

⁶⁶⁸ Administrative Directive No.AD-03, "Justice Committee Mandate", 7 October 1985; see also: "Memorandum" to Chiefs in Council from Kenneth Kane, Justice Chairman, 15 October, 1985; "Draft: Justice Committee Mandate", Mohawk Council of Kahnawake, 21 October 1986.

⁶⁶⁹ Mohawk Council of Kahnawake, Office Consolidation of By-Laws and Mohawk Law (Kahnawake: undated). "The Constitution of the Justice System and The Justice System of Kahnawake" may be referred to by its short title, given in s.1 of the Constitution, as "The

This latter document, which is of uncertain vintage but would seem logically connected with the events of 1985-86, specifies the composition, functions, principles and objectives of the Committee, which exists at the sufferance of the Mohawk Council and, along with the Peacekeeper and the current Court of Kahnawake, comprise its "Justice bureaucracy".

According to the combined Mandate and Constitution, the Justice Committee of Kahnawake is to be comprised of Mohawks from the community who are nominated and appointed by groups active in justice or justice-related areas along the following lines,

(2) members of the Mohawk Council of Kahnawake, (1) member of the Court of Kahnawake, (1) member of the Kahnawake Peacekeepers, (1) member of the Conservation Officers group, (1) member of the Kahnawake Fire Brigade and (1) member of Social Family Services.⁶⁷⁰

This membership is led by a "Director" or "Justice Coordinator" who presides over the monthly meetings and orchestrates much of the Committee's activities and who, with one "representative of the community at large", brings the total Committee membership to nine persons.⁶⁷¹ Although there is no specified process regarding the selection of the community representative, all other members of the Committee are required to be nominated by their respective groups and, if appointed, may sit for a minimum

Justice System of Kahnawake".

⁶⁷⁰ Ibid.

⁶⁷¹ Ibid.; see also, Institutions of Mohawk Government: An Overview, p.11.

of one or a maximum of two one-year terms.⁶⁷² Criteria for appointment and membership are specified in the Constitution, and include such qualities as "maturity" and "freedom from corruption" through drug use or excessive consumption of alcohol, or of recent or serious involvement in criminality.⁶⁷³ Those who are successful in their bid for membership on the Committee become part of a body which is at all times accountable to the Mohawk Council of Kahnawake and, ideally, to the community of Kahnawake which the Council believes it represents.⁶⁷⁴

The Constitution appears to divide the functions of the Committee between the philosophical and the pragmatic. Among the latter are those of a directly administrative nature, including such fiscal matters as overseeing budgets for the various groups and agencies represented on the Committee, and management of personnel in those groups and within the various components of

⁶⁷² The Justice System of Kahnawake, sect.4.

⁶⁷³ This latter requirement is detailed as involving freedom from any conviction for an indictable criminal act in the past five years or at any time of "murder or any other similar abhorrent offence". In addition to this and the preceding characteristics outlined in this paragraph, the successful candidate must evidence a genuine interest in the promotion of a "Justice System which is fair and equitable to all community members of the Territories and which will preserve Mohawk culture", and be able and willing to live by "Mohawk Law". More will be said on these particular qualities later in this part ("The Justice System of Kahnawake", *ibid.*, s.3, pp.2-3).

⁶⁷⁴ Institutions of Mohawk Government: An Overview, p.12.

the justice bureaucracy.⁶⁷⁵ In addition to these duties, the Committee also appears to have some influence in regards to those "legislative" functions of its umbrella authority, the Mohawk Council. In this capacity the Committee

acts in an advisory, consultative, and research support capacity and may recommend to Council changes in MCK [Mohawk Council of Kahnawake] by-laws, rules, or regulations. The community has directed the committee to make recommendations pertaining to the revision of older Indian Act by-laws, with the aim of making them relevant to the community's current needs. It may also make recommendations on any matter pertaining to the administration of justice in Kahnawake.⁶⁷⁶

Related to this law-shaping role is a larger task which seems as much a philosophical as practical one. This task resides in the form of three duties which are defined within the Constitution's statement of the Committee's responsibility and which merit mention here, referring as they do to an undefined commodity known as "Mohawk Law". In sections 7(e), (f) and (l), the Constitution directs the Committee to see, first, to the "drafting and revision of Mohawk Law", second, to the "recording of Mohawk Law and their amendments or their repeal and including judicial interpretation of these laws", and finally, to "the restitution, penalties and punishment for the contravention of Mohawk Law".⁶⁷⁷ While at least some aspects of these tasks would

⁶⁷⁵ Administrative Directive No.AD-03, "Justice Committee Mandate", 7 October 1985, p.2. A full statement of the mandate may be found in Appendix A.

⁶⁷⁶ Institutions of Mohawk Government: An Overview, p.12.

⁶⁷⁷ The Justice System of Kahnawake, pp.3-4.

seem better left to the court than the Committee, it may be argued that either body could have some difficulty in fulfilling them, insofar as nothing in the Constitution or the Mandate offer any insights into what is considered to be "Mohawk Law". While it may seem logical that much of this commodity would be defined within by-laws, it is impossible to be certain, whether generally or from consideration of the by-laws themselves. And while one might hope for some insights into the term from the Constitution's statements of principles and objectives, there is little forthcoming. Rather, the phrase reappears, still undefined, with some frequency throughout the Constitution, directing the Committee toward "the promotion and observance of Mohawk Law", and the upholding and dissemination of "the Mohawk way of life".⁶⁷⁸

Thus while it is impossible to determine from the enabling documents what precisely is involved in the movement toward the preceding goals, it would seem that a central aspect of the Committee's efforts in this regard resides in the creation and promotion of a s.107 Indian Act court in Kahnawake. Thus it was that as one of their first tasks, the Committee oversaw the appointment of two Kahnawake Mohawks, Samuel Kirby and Michael Diabo, as Justices of the Peace for purposes of the Indian Act on 31 January, 1985.⁶⁷⁹ This moment signalled the creation of a

⁶⁷⁸ Ibid., pp.1-2.

⁶⁷⁹ Justice of the Peace Appointment: Michael Julian Diabo, Esquire, 31 January 1985, By Order of the Privy Council, P.C.1985-281; Justice of the Peace Appointment: Samuel Philip Kirby,

"structured and formalized court" in Kahnawake; a court which, in the minds of the Mohawk Council of Kahnawake and its Justice Committee, "integrates European structures into a framework established by Mohawk tradition."⁶⁸⁰ As will be seen, there is little foundation to this assertion, as even the most modest scrutiny of the s.107 Indian Act court in Kahnawake reveals that it is almost purely a creature of an anglocanadian legal tradition, rather than any peculiarly Mohawk one. In this regard it is interesting to note the comment of Justice Diabo on "Mohawk tradition" in his court, wherein he confesses that

In our system here, I guess we're really just on the verge of a tribal court, of introducing tradition. I think that, at this point, all we have is the community ingredient, the knowledge that the judicial system has of its clientele; it knows the people, it knows the situations, and it has a humanistic value to it. We're a humanistic people, and that's really the only claim to tradition that we have at this time.⁶⁸¹

Scrutiny of the court in session tends to support this Justice's observations. At the time of the field research, the Court of Kahnawake, which in its nascent, unstructured form under the Akwesasne Justice met weekly, was holding as many as

Esquire, 31 January 1985, By Order of the Privy Council, P.C.1985-280. Mohawk Council of Kahnawake, Institutions of Mohawk Government in Kahnawake: An Overview (Kahnawake: Mohawk Council of Kahnawake, 1989), p.11.

⁶⁸⁰ Institutions of Mohawk Government in Kahnawake: An Overview, pp.10, 13.

⁶⁸¹ Interview with M. Diabo, Justice of the Peace, Court of Kahnawake, 23 October 1989; taped interview in researcher's possession.

two sessions per week, as dictated by need and case load.⁶⁸² court was then, and continues to be, held in a building set aside solely for the Court of Kahnawake, and which was reported, rather ironically, to once have housed the Kahnawake Indian agent.⁶⁸³ It now provides permanent office space for the assorted court personnel, including two full-time clerks and the Justice Coordinator, as well as rooms which may be used by defence counsel and the prosecution, and the Justice(s) themselves.

These rooms cluster around the courtroom, which in its physical arrangement differs little from summary jurisdiction court rooms in many Canadian jurisdictions. It is not a large room, but provides what appears to be sufficient space for spectators in its rear half, as well as an elevated bench front and center at which sits the Justice, and which is bordered on either side by tables claimed as defense or prosecution territory. Defendants in the court are entitled to be represented by a lawyer, and "outside lawyers" do plead regularly in court, representing both Mohawk and non-Mohawk

⁶⁸² Ibid.; Interview with P. Mayo, Justice Coordinator, Justice Committee, 25 September 1989; interview with P. Schneider, prosecutor, Court of Kahnawake, 30 November 1989. See also, Institutions of Mohawk Government: An Overview, p.13, this document specifies that the court holds one session per week, but does not deny the possibility of more sittings as needed. Neither the Constitution or the Mandate contain any statement concerning the frequency of court sessions (The Justice System of Kahnawake; Administrative Directive No.AD-03, "Justice Committee Mandate", 7 October 1985).

⁶⁸³ Interview with Peggy Mayo, Justice Coordinator, Justice Committee, Kahnawake, 25 September 1989.

defendants. A court clerk occupies a smaller table to one side of the bench, and as transcriptions are not kept unless requested and paid for by the defendant, there is no regular appearance of a court reporter in the Court of Kahnawake.⁶⁸⁴

Process within the Court of Kahnawake is also strongly reminiscent of that encountered in summary jurisdiction courts outside the community, and tends to closely follow the "European framework" established in the Canadian Criminal Code under Part XXVII relating to summary conviction courts.⁶⁸⁵ "Traditional" input into the proceedings appears derived far more from Anglo-Canadian legal traditions than those of the Mohawk, a reality which is arguably due in one part to the high degree to which the court has institutionalised the Canadian framework, and in another to the sometimes rather overbearing presence of the court's prosecutor. This latter official, a private lawyer from Montreal who is retained by the court as prosecutor and whose fees are paid by the Mohawk Council, at times appears to be in control of the hearings.⁶⁸⁶ The accuracy of this appearance may

⁶⁸⁴ Field notes in researcher's possession; interview with P. Schneider, prosecutor, Court of Kahnawake, 30 November 1989; see also: interview with John Sharrow, Justice of the Peace, Akwesasne Mohawk Nation.

⁶⁸⁵ An Act Respecting the Criminal Law, R.S.C. 1985, chap.C-46, Part XXVII.

⁶⁸⁶ Field Notes in Researcher's possession. This same observation was made in regard to Justice Sharrow's court, which also tended to suffer in appearance due to the sometimes overbearing input of the prosecutor, who not only attempted to control proceedings but often the decisions of the often lesser-skilled Justice as well. See: Joint Canada-Saskatchewan-Federation of Saskatchewan Indian Nations Studies of Certain Aspects of the

be challenged, of course, but his substantial input into the proceedings cannot be denied, as he seems to act in an advisory capacity, both solicited and unsolicited, to the Justice while the court is in session, and it is his legal firm which is responsible for training new justices.⁶⁸⁷ While this appearance could be damaging to the court's reputation in the eyes of its constituency, it does not seem to be unduly so, insofar as those coming before this court, like defendants in many contexts, tend to support as valid a court which decides in their favour while rejecting that which goes against them. Thus the role of the prosecutor, when considered against larger concerns within the community pertaining to issues of sovereignty and rights to juridical self-determination, is often far down the list of criticisms maintained by those who reject the Indian Act court structure. In this regard, the prosecutor alleges that much of the traditionalist position against the Court of Kahnawake has less to do with matters of sovereignty than with "personal and political" concerns about traditionalist people, notably the "warriors" associated with the Nation Office, being tried in the court.⁶⁸⁸ While there may be some truth to this notion, it should be acknowledged that "traditional people" reportedly do come before the court and do not seem consistently unwilling to

Justice System...", Appendix C, p.3.

⁶⁸⁷ Interview with P. Schneider, prosecutor, Court of Kahnawake, 30 November 1989.

⁶⁸⁸ Interview with P. Schneider..., *ibid.*

accept its decisions.⁶⁸⁹

What is perhaps most important about the events of 1974-1977 and the rise of the Indian Act Court in Kahnawake is that they appeared to have placed the administration of justice in the Mohawk territory at Kahnawake back into the hands of Mohawk people, who had not "officially" possessed such a capacity since the first French arrogation of criminal jurisdiction in 1664.⁶⁹⁰ Of course, given the apparent failure of the Mohawks to practice "traditional dispute resolution" in any significant conspicuous way since the onset of the British criminal jurisdiction in 1763, and the silence in the early French records on this point, it would seem that the arrival of the Akwesasne Justice was, in reality, an augmentation of local juridical power. That being said, it was a pretty minor one, based upon a highly restricted jurisdictional base. In this regard it is notable that, from the almost unlimited original territorial jurisdiction held by the Indian agent-Justices over any offence involving an Indian or his property, the few modern justices⁶⁹¹ active within the

⁶⁸⁹ Interview with M. Diabo, Justice of the Peace, Court of Kahnawake, 23 October 1989: "We have prosecuted people that are of traditional Longhouse belief. We've been successful. We've treated them the same as anyone else and it worked. Some we found guilty, some we acquitted."

⁶⁹⁰ New France, Conseil superieur de Quebec, Jugements et deliberations du Conseil Souverain de la Nouvelle-France, 7 vols (Quebec: A Cote, 1885-91), vol.2, pp.174-175, 21 avril 1664; see also, vol.1 throughout.

⁶⁹¹ To date only three courts have been established under the auspices of s.107, including one at Pointe Bleu, Quebec, and those at Kahnawake and its sister Mohawk community at Akwesasne, in Cornwall, Ontario. The s.107 court at Akwesasne was the first of

current Indian Act court authority find themselves apparently limited to an authority over the three categories of offences enumerated in s.107 of the present Indian Act, including offences under the Act, violations of by-laws passed by the Mohawk Council of Kahnawake under the auspices of s.81 of the Act, and those summary criminal offences listed in s.107(b).⁶⁹²

Notwithstanding these theoretical limitations, according to its primary personnel the Court of Kahnawake continually tests the boundaries of this authority and has, to date, been successful in expanding it. An example of this, according to Justice Diabo, concerns the jurisdiction over common assault which, since the amendment of this Criminal Code offence to a more general category of assault⁶⁹³, has been construed by the Court of Kahnawake as a route to asserting jurisdiction over "more serious forms of assault, sexual assault, that sort of

its kind in Canada, created with the federal appointment of an Akwesasne Mohawk, John Sharrow, as a justice of the peace for purposes of the Act in the autumn of 1972 (Interview with Mr. John Sharrow, Justice of the Peace, Akwesasne Mohawk Nation, Appendix C, in "Joint Canada-Saskatchewan-Federation of Saskatchewan Indian Nations Studies of Certain Aspects of the Justice System...", p.1; interview with Peggy Mayo, Justice Coordinator, Kahnawake Mohawk Nation, 25 September 1989, field notes in researcher's possession).

⁶⁹² Including cruelty to animals, common assault, break and enter and vagrancy, where the offence is committed by an Indian or relates to the person or property of an Indian, see: The Indian Act, R.S.C. 1985, c.I-5, s.107(b).

⁶⁹³ An Act Respecting the Criminal Law, R.S.C. 1985, chap.C-46, s.265(1) - (2). S.256(2) provides that "this section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault."

thing".⁶⁹⁴ Activation of this enhanced jurisdiction is revealed in the court statistics for the period spanning July 1986 through December 1989. In that juncture, the limited statistical data on the court's activities inform that a total of 26 cases of "assault/obstruct Officer" and 39 cases of "assaulting individual" were adjudicated by the court.⁶⁹⁵ Unfortunately, owing to the broad nature of the categories for which statistics are taken and the absence of more detailed information from court records, it is difficult to determine to what degree those 65 cases actually moved beyond the original s.107(b) jurisdiction.

Statistics kept by the Peacekeepers, the current policing arm of the Mohawk Council, over the years 1987, 1988 and 1989 suggest the possibility that the court may have dealt with some cases of sexual assault, as the Peacekeepers themselves recorded 11 incidents of this offence.⁶⁹⁶ These statistics also suggest a presence of equally serious forms of assault occurring within the community in that period which may have come before the court of Kahnawake, including 412 cases of "assault" and 34 incidents of "assaulting a Peace Officer". Owing to the manner

⁶⁹⁴ Interview with M. Diabo, Justice of the Peace, Court of Kahnawake, 23 October 1989.

⁶⁹⁵ Court of Kahnawake Statistics, July 1986 - December 1989, provided by P. Mayo, Justice Coordinator, Justice Committee, 26 April 1990.

⁶⁹⁶ Kahnawake Peacekeeper Statistics, Fiscal Years of 1987, 1988 and 1989; provided by P. Mayo, Justice Coordinator, Justice Committee, Kahnawake, 18 April 1990.

in which this data is recorded, it is impossible to determine whether these are incidents which led to the laying of a charge or were resolved informally and proceeded no further in the system, and there is little in the court statistics which link the Peacekeepers' numbers with those of the court. Thus a range of possibilities suggest themselves. It may be the case that a number of the Peacekeepers' recorded incidents of these offences led to the laying of an information and a subsequent appearance in court, with the result that, of the Peacekeepers' totals, some cases may have been dismissed or charges dropped, some may have led to acquittals, and the few recorded in the court statistics are those for which a trial was held and a finding or entry of a plea of guilty was recorded.⁶⁹⁷

Although it is impossible to be certain given the superficial nature of the numbers, insofar as no cases were transferred out of the court's jurisdiction until 1990, the handling of at least those 65 cases of assault and assaulting a peace officer included in the court statistics by the s.107

⁶⁹⁷ See Appendix A: "Court of Kahnawake Statistics, July 1986 - December 1989"; also Appendix B: "Peacekeeper Statistics, July 1986 - December 1989". It will be noted in regard to the statistics contained in Appendix A, that the only cases included here are those resulting in the entry of a finding or plea of guilty. While it may be assumed that this form of record necessarily excludes any number of cases where such an outcome was not recorded, it is impossible to further research this assumption, as it is understood that this is the only manner in which statistics are kept for the period under study (personal communication from P. Mayo, Justice Coordinator, 26 April, 1990).

court would seem confirmed.⁶⁹⁸ However, the degree to which these cases constitute a true expansion of jurisdiction is unclear. Inasmuch as the handling of "assault" and "assaulting a Peace Officer" may be seen as a movement beyond the precise letter of the s.107(b) jurisdiction over "common assault", the reality that these categories of offences may be proceeded with summarily or by indictment suggests that the decision of the prosecutor may be primary in determining the degree of extension of court authority in regard to such offences. Thus those cases where such matters are dealt with summarily would not, in themselves, constitute too great an expansion of jurisdiction as they would remain within the summary criminal jurisdiction of the Court of Kahnawake, if not within the letter of that jurisdiction as specified in s.107(b). Prosecution of any of this category of offences via indictment would offer a more profound indication of enhanced jurisdiction and, although the statistics do not confirm such an indication, evidence of court personnel suggests that just such an enhancement of jurisdiction may have occurred in the past. Thus Justice Diabo speaks of dealing with more serious matters and of the support forthcoming from other members of the court for such an enhanced jurisdiction:

We've begun to expand our jurisdiction. We've just recently done some cases that are indictable offences... We have to be careful that the prosecution system and the defence system...is sort of comfortable

⁶⁹⁸ Personal Communication from P. Mayo, Justice Coordinator, Justice Committee, 26 April 1990.

with the idea that we're doing this, and so far everyone...has accepted it...They feel that they are getting a decent shake... The defence is well-aware that in some of the cases our jurisdiction is questionable. They never call us on it, in fact, if given a choice to hold a trial here or in the Quebec system, they would opt to hold it here...We'll push our jurisdiction as far as somebody says ouch or stop. I think that's the only way we can do it.⁶⁹⁹

Despite the apparent expansion and potential for expansion implicit in the construction of the Court of Kahnawake's current jurisdiction, the very limited statistics kept by the Court suggest strongly that, with the exception of two potentially more serious offences of "impaired driving" and "assault"⁷⁰⁰, the bulk of its law-jobs concern essentially minor matters. Thus in the period between July 1987 and December 1989, the Court of Kahnawake heard a total of 369 cases, including 146 between July 1987-June 1988, 140 between July 1988-June 1989, and 83 between July 1989-December 1989. Of these, six offences comprise the most frequent business of the court, including in diminishing

⁶⁹⁹ Interview with M. Diabo, Justice of the Peace, Court of Kahnawake, 23 October 1989.

⁷⁰⁰ Because the statistics maintained by the Court do not contain details of the cases adjudicated therein, it is impossible to determine whether the acts of assault leading to a charge and hearing before the Court involved what might be suggested to be serious harm or criminality, especially as one must assume that they were only sufficiently serious to motivate a summary-level charge and adjudication. The same might be said of the cases of impaired driving, but as this is an offence which appears to be increasingly viewed as a serious matter notwithstanding whether the impairment actually lead to a tangible level of social harm (i.e., an automobile accident), this may be viewed as the most serious offence administered by the Court of Kahnawake. Again, however, the caution must be stated that, in the absence of any information regarding the facts of the cases before the Court, it is impossible to assess their prima facie degree of harm.

order: "Impaired Driving" (142 cases); "disturbing the peace" (51 cases); "assaulting individual" (39 cases); "Breathalyzer Refusal" (32 cases); assaulting or obstructing a peace officer (26 cases); and "trespassing" (17 cases). The remaining 62 cases are scattered across a range of 20 offences which include "mischief" (8 cases); "theft" (7 cases); "Breach of Probation orders" (7 cases); "property damage" (5 cases); "Bail confiscation" (5 cases); "selling intoxicants" (5 cases); "dangerous driving" (4 cases) and "resisting arrest" (4 cases); beyond these offences none have an individual frequency of more than 3 incidents over the period of July 1987- December 1989, and thus cannot be said to constitute regular court business.⁷⁰¹ Data was not forthcoming on the nature of the sanctions imposed in these cases, although Justice Diabo emphasises that his decisions tend to favour restitution over retributive penalties.⁷⁰² That being said, the Mohawk Council maintains a contract with the Bordeaux and Tanguay correctional institutions in Quebec for those cases leading to a sentence of incarceration, and depends entirely on court-generated funds to

⁷⁰¹ These remaining offences include: "break and enter" (1 case); "escape custody" (1 case); violation of "dog regulations" (2 cases); "intimidation" (1 case); "Judgement of restitution to K.P.K." (1 case); "leaveing [sic] scene of accident" (3 cases); "illegal dumping" (2 cases); "discharge of firearm" (1 case); "taking vehicle without consent" (1 case); "imprudent action" (1 case); "use and/or handle of firearm" (1 case). Court of Kahnawake Statistics, July 1986 - December 1989, provided by P. Mayo, Justice Coordinator, Justice Committee, 26 April 1990.

⁷⁰² Interview with M. Diabo, Justice of the Peace, Court of Kahnawake, 23 October 1989.

support the court, which suggests a heavy reliance on fines.⁷⁰³

Should the Court of Kahnawake be interested in actively expanding the previously enumerated s.107 jurisdiction and caseload, it would be best advised to look to the potential implicit in s.107(a). Within this latter authority the court may adjudicate in regard to any by-laws passed by the Band Council under s.81 of the Act, which outlines potential areas of by-law authority residing in the Mohawk Council of Kahnawake. While some of the stuff defined within this section pertains to such vapid concerns as weed control and the regulation of bee-keeping and poultry raising, these exist alongside more potentially far-reaching authority over "the observance of law and order"⁷⁰⁴ and "the prevention of disorderly conduct and nuisances".⁷⁰⁵ Acting under the auspices of such authority, it is possible that an ambitious band council could assume control over a range of more serious matters than those outlined in s.107(b), provided two factors favour their efforts. At a minimum, any by-laws passed under the s.81 authority are required to be consistent with the overall Act and its regulations, a condition of uncertain meaning which acquires a ticklish aspect from the major potential obstacle to any band council by-law: namely, the power of the Minister of Indian Affairs or the Minister's delegate to disallow any by-law for reasons which are not required to be

⁷⁰³ Morse, "A Unique Court".

⁷⁰⁴ Ibid., s.81(1)(c).

⁷⁰⁵ Ibid., s.81(1)(d).

disclosed to the involved Council.⁷⁰⁶ The authority of the Minister in this regard would seem to create an imperative of Ministerial blessing on by-laws which may not be forthcoming if he or she perceives the by-law as moving beyond whatever limits are personally or policy-defined as best left to authorities outside the reserves. And although the recent history of the modern Department of Indian and Northern Affairs suggests a general reluctance on behalf of these officials to disallow by-laws, this does not diminish their formal right to do so, nor does it mean that such a right would not be invoked to limit amerindian assumptions of federal or provincial criminal or quasi-criminal law jurisdictions. This is a matter which will be returned to in the analysis of potential impediments to the separate justice movement in Kahnawake, later in this section.

Alterations to the subject-matter of a s.107 court through an aggressive pursuit of expanded by-laws could extend the powers of the court, but only within the confines of the reservation in which it is situated. This is due largely to two realities. First, in regard to by-laws falling within the court's authority under s.107(a), these have been held to be of

⁷⁰⁶ The Indian Act 1951, c.29, s.82(2). It should be noted that by virtue of the Federal Court decision in *Twinn v. Canada (Minister of Indian Affairs and Northern Development)*, [1988] 1 Canadian Native Law Reporter 159, there is no requirement that a notice of disallowance be sent to the Band, nor is the Minister required to give reasons for the disallowance. In addition, it is not necessary that the Minister personally disallow the by-law, a disallowance by a delegate of the Minister is sufficient.

no effect outside the confines of the reserve⁷⁰⁷ and thus it seems highly unlikely that an expansion of the court's jurisdiction over offences could ever equate with a similar enhancement of its territorial jurisdiction. Secondly, although there is some potential authority over those s.107(b) offences occurring outside the reservation boundaries where the offender is an Indian or the offence relates to an Indian or his/her person or property, this is greatly limited by a provincial court jurisdiction over those offences which exists parallel to those characterising the s.107 jurisdiction, and which may be expected to hear such disputes where they occur off-reserve within the provincial court jurisdiction. This provincial authority may apply equally to those "offences" other than by-laws which arise under the Act.

A further potential qualification upon an expanded s.107 Court jurisdiction may lie in the authority of Justices appointed by the Governor in Council under the Act, which has been the subject of some debate. The controversy centres upon the intention of Parliament in regard to the jurisdiction of the justices appointed under the Act, arising essentially from the statement in the preamble apparently distinguishing between the "two justice" authority conferred in regard to those stated offences in subsections (a) and (b), and any other jurisdiction which might arise in other contexts of the act. Although the

⁷⁰⁷ *R. v. Sam*, [1986] 1 Canadian Native Law Reporter 129 (British Columbia Provincial Court); see also, *R. v. Baker*, [1983] 4 Canadian Native Law Reporter 73 (British Columbia County Court).

matter has yet to be the subject of judicial interpretation, the most credible current perspective of the "two justices" power relies upon a plain reading of the section and holds that a s.107 justice will, for purposes of those misdeeds defined in the section, have and may exercise the powers of two justices of the peace, creating a jurisdiction equivalent to that of a provincial court judge in regard to those specific offences. By this view, the section creates an authority exclusively limited to those offences outlined in s.107(a) and (b).⁷⁰⁸

The alternative, "two-tier" interpretation of this section has received only minimal support, and is based upon a perception that the preamble to the section enables the addition to the preceding jurisdiction of a second level of authority which grants the appointed person the powers of a single justice in reference to any other matters arising under the Indian Act which would not involve "offences arising under the Act." Varying justifications have been offered for this more expansive view, the most credible of which asserts that Parliament merely wished to make clear that a s.107 justice incorporated two different types of functions: those of a provincially-appointed justice of the peace in relation to criminal matters such as the issuing of warrants, the receiving of informations and so on, as well as those of a magistrate or provincial court judge to conduct trials in relation to those matters enumerated in the

⁷⁰⁸ Akman, "Justices of the Peace under Section 107 of the Indian Act", p.21, 24-25.

Act. By this rationale justices appointed by the provincial government would have a concurrent jurisdiction to those appointed federally under s.107, which, it may be argued, undermines the necessity of s.107 appointments by offering provincial authorities the option of making such appointments under the Indian Act or provincial enabling legislation; the viability of such an option necessarily assuming that provinces would be willing to confer upon "reservation justices" the additional powers implicit in the provincially-defined office. Be that as it may, it would appear that

the rationale for this perception of s.107 is simply that Parliament wished to make the two different functions clear as it did involve an expansion of authority over the first forerunner of s.107. In doing so, it used legislative language which was still in common usage when this present section was rewritten basically in its present form in 1951.⁷⁰⁹

It should be noted also that this position has been debated as stretching beyond credible limits the wording of s.107 and ignoring a historical precedent within the section's precursors which incorporated the same essential wording from as early as 1894, and which created a context in which it would be difficult to "identify those instances in which a justice with the power of a single justice would be required for the administration of the purposes of the Act".⁷¹⁰

There has been little judicial consideration in regard to other aspects of this court as well. Although an initiative was

⁷⁰⁹ Ibid.

⁷¹⁰ Ibid.

begun in Kahnawake in 1989-90 by the Nation Office to challenge the validity of the s.107 court, it was abandoned due to the rise of other, more immediately pressing concerns, and thus the issue remains unconsidered in higher courts. As the courts themselves have not been challenged, neither has the validity of the appointments of the justices who administer them, who have also been assumed to have jurisdiction over non-Indians who violate terms of the Indian Act within the reservation's boundaries. And although the structure of such courts is unstated in the Act, Superior Courts have held that s.107 courts must follow the requisite procedural and technical requirements of general criminal law, and that persons coming before the court have all rights of due process and natural justice principles. Such rights have been taken to include those of legal representation before the justice as well as a right to appeal decisions of the court to Superior Courts of the Province.⁷¹¹

According to the Mohawk Council of Kahnawake, the modern s.107 Court described above "integrates European structures into a framework established by Mohawk tradition", and reflects "the will of the people of Kahnawake that the justice system represent the embodiment of traditional structures and values".⁷¹² This statement, contained within the Mohawk

⁷¹¹ "Joint Canada-Saskatchewan-Federation of Saskatchewan Indian Nations Studies of Certain Aspects of the Justice System...", p.6.

⁷¹² Institutions of Mohawk Government in Kahnawake. An Overview, p.10.

Council's most recent publication describing "Institutions of Mohawk Government in Kahnawake", is an intriguing one given the apparent reality of the "justice system" and the laws it administers as these appear to exist in modern Kahnawake. On the basis of what the enduring records inform of "Mohawk tradition" and "traditional structures and values", as indicated in part 4.2 in relation to the focal acts of murder, theft, witchcraft and adultery, the s.107 Court and the laws it administers seem quite distanced from the apparent historic Iroquoian processes of dispute resolution. Indeed, the Court of Kahnawake, which exists at the sufferance of Canadian legislation, administers a jurisdiction over Canadian laws or those by-laws passed by the Council (which is empowered to do so by Canadian legislation), through a process defined by the Canadian Criminal Code, would seem to manifest little apparent "traditional" content - a reality which is acknowledged even by one of the Court's own justices.⁷¹³ Indeed, observations of the Court in session, as well as the appreciation of its jurisdiction and process outlined above, suggest strongly that the structure is little more than an "indigenized"⁷¹⁴ Canadian court; that its distinction from a similar court outside Kahnawake is limited to its probably unique s.107 jurisdictional limitations and the

⁷¹³ Interview with M. Diabo, Justice of the Peace, Court of Kahnawake, 23 October 1989.

⁷¹⁴ Paul Haveman, "The Indigenization of Social Control in Canada", paper presented at the XIth International Congress of Anthropological and Ethnological Sciences. Vancouver, Canada, 19-23 August 1983.

reality that its personal - with the exception of the prosecutor - are all Mohawks. As Haveman noted in his original explication of the notion of indigenization, however, it is difficult to see how simply replacing "white" personnel with amerindian personnel can alter its forms or functions in any significant or tangible way.⁷¹⁵ Once again the observations of Justice Diabo are apposite, and may be repeated briefly here: "at this point, all we have is the community ingredient, the knowledge that the judicial system has of its clientele; it knows the people, it knows the situations, and it has a humanistic value to it. We're a humanistic people, and that's really the only claim to tradition that we have at this time."⁷¹⁶

Yet despite this apparent absence of "Mohawk tradition" and the assertion by the Grand Chief of the Council that the historic Mohawks had nothing like law or a legal system⁷¹⁷ which might be expected to inform the Court of Kahnawake, the Council states that:

The ideals of justice among the people of Kahnawake are based on a belief in the age-old traditions of the Great Law. This law has been the basis of social and legal interaction between members of the Six Nations Confederacy on an individual and national level since the beginning of time. Family, nation, and Confederacy are joined in the Iroquois system of adjudication. Based on the principles of mediation, negotiation, and restitution, this model bound the Confederacy together

⁷¹⁵ Ibid.

⁷¹⁶ Interview with M. Diabo, Justice of the Peace, Court of Kahnawake, 23 October 1989; taped interview in researcher's possession.

⁷¹⁷ Interview with J. Norton, 24 November 1989.

for centuries before Europeans were exposed to the Iroquois....Five hundred years of contact with European civilization and the attempted imposition of European values upon a society which has retained its traditional values and structures produced a formalized system adept at maintaining law and order, yet quite divorced from the traditional values of the Mohawk people. Recent efforts at integrating Mohawk concepts of justice have brought the Kahnawake justice system closer to reasserting the application of Mohawk law in the Territory.⁷¹⁸

The preceding quote is fascinating, not only for its sophistication as propaganda, but also on at least two counts in regard to its revisionism of Mohawk history and the "Iroquois system of adjudication". With regard to the former, this excerpt reveals the degree of distance of its authors from the apparent facts of their "history of contact with European civilization", including the reality that it is of a duration of rather under 500 years - although the current fashion in amerindian circles in North America is to attribute the moment of first contact to the arrival of Columbus, notwithstanding the fact that, in this case, his arrival was on a shore an effective world away from the historic Mohawk nation. There is, also, some question as to the degree to which the confederation of the Iroquois Nations predated the arrival of the Europeans, as this union is believed to have transpired sometime between A.D. 1400 and 1600⁷¹⁹, a chronology which, even by Columbus' terms, would not render the Confederacy's birth "centuries" prior to contact. There would seem also to be some degree of historical delusion implicit in

⁷¹⁸ Institutions of Mohawk Government., p.10.

⁷¹⁹ Tooker, "The League of the Iroquois...", p.

the claims of "imposition" of "European ideals" in regard to the rise of the s.107 Court and Band Council government in Kahnawake, both of which the history of the community contained herein revealed were "imposed" at the request, or through the direct action, of the Mohawk community.

Although the preceding points may seem of minimal significance, they are notable primarily for the indications of the degree to which the Council appears to be "filling" gaps in its knowledge of Kahnawake's history not only with information not contained within that chronicle - the dating of contact from the arrival of Columbus being perhaps the most obvious of this patching - but with "facts" designed to further their own political position and agenda. Thus, as was noted earlier, at pages 97-101 of this thesis, the Council seems unaware of the reality that the very fact of their existence denies the totality of "imposed" structures, insofar as the council system was invited into Kahnawake by Mohawk people in 1889; it may also be the case that, if they are aware of this historical "fact", they have preferred not to acknowledge it given the degree to which it could undermine their legitimacy in the community and their presentation as the agents of change whereby Kahnawake will be moved toward truly "Mohawk" future.⁷²⁰

The Council's statements in regard to "Mohawk law" are perhaps more revealing of their tendency toward revisionist

⁷²⁰ Interview with Grand Chief J. Norton, Mohawk Council of Kahnawake, 24 October 1989.

history. For although they may be to some degree correct in their assertions of that "law" as based upon notions of mediation, negotiation and restitution, these observations stand in direct contradiction with the statements by the Grand Chief and some of his Councillors that "We had no real law in the past".⁷²¹ Insofar as the latter claims were made to me in my capacity as a researcher whom the Chief and Councillors associated with the Nation Office, and the "Longhouse Justice System" which they viewed as standing in direct competition with their s.107 Court, and which relied for its legitimacy, form and content upon my research establishing clearly a precedent of "real law" in that past, is notable. Of additional note is their later reconsideration of these claims of an absence of "law", and the amendment of those claims into a reality of a "Mohawk law" in Kahnawake's past which might be best brought into the present through the Council's s.107 Court structure and their efforts toward "reasserting the application of Mohawk law in the Territory".

The explicit contradiction between these two positions betrays the one element which was absolutely consistent across them, namely: the political exigencies of the moment of speaking which, in order to reinforce the Council's position and legitimacy in the eyes of their immediate audience, required that the "past" and "Mohawk law" be cast in very specific, and

⁷²¹ Interview with J. Norton, 24 November 1989; interview with Davis Rice...; interview with Peggy Mayo....

very contradictory tones. When that audience was a researcher believed to be aligned with the Council's primary nemesis in local politics and whose own "separate justice" campaign hinged upon the documentation of a very specific Mohawk legal history, such was deemed to be absent; when the audience was the people of Kahnawake, whom the Council appeared to believe might best be won over to their campaign toward the "reassertion" of Mohawk law through the rhetoric of imposition and the putative endurance of Mohawk tradition, the Council demonstrated little ambiguity in its claim of a very clear "Mohawk law" in historic Kahnawake. In fact, more than this, the Council asserted, in the complete absence of any documentation or historical fact to support it, that these "traditional values and structures" have persisted to the present tense and are exhibited in the "framework of tradition" which surrounds and informs "Kahnawake's legal system". That such a framework as we understand it, based upon the explication of "Mohawk law" contained within part 4.1 of this thesis, is conspicuously absent over the community's documented history and in the s.107 Court which is the centerpin of "Kahnawake's legal system", flies in the face of the Council's statements, and reveals the extent to which, as Rappaport and others warned, modern politics can do what even God himself cannot: Alter the past and render it consistent with, and supportive of, a preferred present and future.

Inasmuch as the Council has yet to articulate to any degree

the form which their "reapplication of Mohawk law" in Kahnawake might assume, it is impossible to determine whether their revision of Mohawk history will be echoed in the "traditional" structures which they argue have endured and which might be suggested as the cradle within which a separate justice system, defined by the Council, might grow and develop within the community. That being said, it is clear that those "traditions", as evidenced in part 4.1 of this thesis, do not appear to have "endured", nor may it be convincingly said that they characterize the "framework established by Mohawk tradition" into which the s.107 Court is argued to have been received. As articulated by the Council, then, the future of "Mohawk law" is both undefined and uncertain, and might, on this basis, be suggested as likely to contain revision and, from this, at least a measure of invention. Indeed, one might dare to imagine that, in the Council's failure to articulate a clear design for its future "reapplication of Mohawk law" in Kahnawake, the Council is creating its own "gaps" which it will fill at a later date, as the politics of the struggle over separate justice in Kahnawake progress and dictate. By failing to leave a record of what its future of "Mohawk law" will look like, the Council removes the possibility of a past which can haunt them, and creates instead a past which they can define to suit the needs of a future moment.

6.2 Challenging the Status Quo: The Longhouse and the
Intensification of Factionalist Competition
in Kahnawake 1960-1994

The present competition for control of the administration justice and "traditional law" is arguably merely one of the most recent manifestations of the ongoing factionalism which has characterized Mohawk communities from the earliest documented times. In this present incarnation, the struggles over justice services appear to have emerged as part of an intensified factionalism which arose as an offshoot of the band council's drive for enhanced local powers of self-government after 1960. For although the rise of "traditionalist" groups in opposition to the band council had, by that time, been a conspicuous element of Kahnawake politics for nearly a half-century, it was when those politics coalesced around the very controversial issues of "band membership" and "law and order" that the factionalism became especially intense and debilitating for the modern community.

Control over defining what criteria an individual had to possess to qualify as an "Indian" for purposes of the Indian Act and any benefits or obligations implicit in the Act had always been a power retained by the Department of Indian Affairs, the same authority responsible for defining the qualities necessary for membership within particular Indian bands. However, implicit

in the rise of the current climate of rights and self-determination, criticism of the practice of "white governments" determining who or what attributes qualified as "Indian", and legal challenges over such definitions, the federal government initiated a policy of permitting band councils to assume the function of determining what qualifications were required for membership in their band.

These were not minor powers, as they carried with them the ability to define individuals as members of the band and therefore their concomitant rights of residence within the bounds of the reservation territory as well as their rights to vote in council elections or partake of services administered by the council. It is not surprising that a campaign for control over such matters would inspire controversy, and such was a primary consequence of the council's efforts in this direction within Kahnawake.

The Mohawk Council of Kahnawake obtained control over the maintenance and determination of membership in the "Caughnawaga Band"⁷²² on 1 December 1972⁷²³, and immediately initiated the

⁷²² Ottawa. Department of Indian and Northern Affairs, File #373/3-1(vol.3) August 1966 - February 1974. Band Management - General - Montreal District. Letter from H.H. Chapman, Chief, Membership Division, to District Supervisor, Montreal Indian District, re Transfer of Membership Functions to the Caughnawaga Band, 30 August 1972; *ibid.*, Letter from L.J.J. Bourassa, Interim Supervisor, Community Affairs, to Chief Ronald Kirby, Caughnawaga Band Council, Quebec, 12 September 1972; *ibid.*, Letter from H.H. Chapman, Chief, Membership Division, to District Supervisor, Montreal Indian District, re Transfer of Membership to the Iroquois of the Caughnawaga Band, 28 November 1972.

controversial process of defining criteria for memberships in the Band, initiating a practice which has remained problematic even to the present day, most notably in terms of its relationship to residency rights within Kahnawake. It was over the matter of residency that the Council and an initially unnamed "militant group", later identified as the "Longhouse", clashed within a year of the Council's assumption of control over membership. The degree to which the events of that year are bound up in the acquisition of control over membership is unclear, but some measure of link may perhaps be inferred from the connection between band membership, "Indian status" and rights of residence within the reservation territory. From letters and reports originating both within the Department of Indian Affairs and Northern Development and the Band Council for the year 1973, it appears that, at the same moment the Council was assessing individual rights of residence within Kahnawake, the "militant group" was embarking on a similar project of its own. Drawing up a list of "non-Indians" resident within Kahnawake, the latter group determined that any such persons not departing the community by 18 September 1973 would be removed, using physical force, if necessary.⁷²⁴ While the Band Council

⁷²³ Ibid., Letter from H.H. Chapman, Chief, Membership Division, to District Supervisor, Montreal Indian District, re Transfer of Membership to the Iroquois of the Caughnawaga Band, 28 November 1972.

⁷²⁴ Ottawa. Department of Indian Affairs and Northern Development, File #373/3-1(vol.3) August 1966 - February 1974. Band Management - General - Montreal District. Letter from S.A. Roberts, Development Officer, Band Management Division, to J. Bennett,

agreed in principle with the group regarding the eviction of trespassers, they preferred to do so by means of passing by-laws restricting the use of buildings and dwelling houses on the reserve.⁷²⁵ As well, there seems to have been some concern within the Council's superiors at the Department of Indian Affairs and Northern Development not only whether all the putative "trespassers" did, in fact, legally qualify as such, but that the entire eviction controversy stemmed from "a power struggle taking place which is a local matter and in the long run must be settled locally".⁷²⁶

The struggle erupted into outright confrontation on 15 October 1973. On that date, the Longhouse apparently attempted to forcibly evict some of those it defined as "non-Indians", causing property damage and attracting the attention of the local police. The latter proved unable to deal with the ensuing "riot" and resigned en masse, leading to their replacement shortly thereafter with an entirely new contingent of officers. The melee is recorded by the Band Council in its "Bulletin" of November of that year, in terms which convey clearly the nature of the "power struggle" noted above:

Before the onset of violence that occurred, the Band Council had made honest attempts to negotiate for a satisfactory settlement with the Longhouse chiefs on the problem of non-Indian residents on this reserve.

Indian and Northern Affairs, re Caughnawaga Indian Reserve, 12 September 1973.

⁷²⁵ Ibid., p.1.

⁷²⁶ Ibid., p.2.

By-laws were drawn up and passed for this specific purpose. Communications broke down because of the stubbornness on the part of some Longhouse chiefs, and it became increasingly evident that no matter what the Band Council did, these people had already resolved to take matters into their own hands, even to the point of summoning A.I.M. [American Indian Movement] infiltrators to carry out their threats of physical action (violence). The circumstances [sic] speak for themselves. This was a revolution against the Band Council that you democratically elected. It was a revolution against your rights.⁷²⁷

The controversy led to the arrest and prosecution by outside authorities both of some Longhouse members as well as the arrest and later release of some apparently unaffiliated people who were characterised by the Council as uninvolved, but too close to the action.⁷²⁸ It apparently did little to weaken either the longhouse or the competition between the traditionalist people it represented and the conservative Band Council, as reports that the "Warriors" would be "acting up in the near future" emerged from the Council within less than seven months after the eviction conflict.⁷²⁹

As the struggle to control membership in the band persisted into the 1980's it assumed increasingly draconian and, in some cases, unsavoury proportions. An early example of this is

⁷²⁷ Ibid., Caughnawaga Band Council Bulletin, November 1973, p.1.

⁷²⁸ Ibid.; Ottawa. Department of Indian and Northern Affairs, File #373/3-1(vol.3) February 1974 - August 1975. Band Management - General - Montreal District. Caughnawaga Band Council Bulletin, April, 1974, p.1.

⁷²⁹ Ottawa. Department of Indian and Northern Affairs, File #373/3-1(vol.3) February 1974 - August 1975. Band Management - General - Montreal District. Caughnawaga Band Council Bulletin, April, 1974, ibid.

contained in a statement issued by the Council in 1981, in which a moratorium was placed upon all "mixed marriages" and the adoption of non-Indians by Kahnawake Mohawks. The statement read, in part, that:

As of that date [22 May 1982], any Indian man or woman who marries a non-Indian man or woman is not eligible for any of the following benefits that are derived from Kahnawake[:]...

- Band number
- Residency (to live in Kahnawake)
- Land allotment
- Housing assistance - loan or repair
- Welfare - in Kahnawake only
- Education - in Kahnawake only
- Voting privileges - in Kahnawake only
- Burial
- Medicines - in Kahnawake only
- Tax privileges - in Kahnawake only⁷³⁰

The moratorium was expanded and complemented in 1984 with the passage of the Council's "Mohawk Citizenship Law", which specified who could qualify as a "Mohawk" for purposes of the aforementioned rights and services within the community.⁷³¹ Article 3 of the law specified the following definitions as foils on rights and access to services within Kahnawake:

Mohawk - any person, male or female, whose name appears on the present band and reinstatement lists and whose blood quantum is 50% and more shall comprise the Kahnawake Mohawk Registry.

Non-Indian - any person, male or female, whose name

⁷³⁰ Ottawa. Department of Indian Affairs and Northern Development, File #E4200-070(vol.1) 1975 - 30/6/88 Band Management - Mohawks of Kahnawake. Summary prepared for the Minister of Indian Affairs, re Actions of the Mohawk Council of Kahnawake, Annex C: Mohawk Council of Kahnawake Moratorium.

⁷³¹ Ottawa. Department of Indian Affairs and Northern Development, File #E4218-070(vol.1) 1/86-3/88. Council Elections - Kahnawake Band. Mohawk Citizenship Law, undated.

does not appear on the present band and reinstatement lists and whose blood quantum is less than 50%.⁷³²

The combination of the moratorium and the citizenship law, intended to limit the rights of "non-Indians" resident or seeking residence and rights in Kahnawake, seems also to have trod firmly on more than a few Mohawks' rights as well. Thus the rules for membership in the "Caughnawaga band" were enlisted to deny residence rights to divorced or widowed Mohawk women, once married to non-Indians, wishing to return to live in the community, while some Mohawk land-holders found themselves restricted from leasing privately-held lands to non-Indians.⁷³³ And if these actions did, in some way, preserve the "Onkwehonwe" lineage in the community, their expansion in 1986 in reference to electoral rights and processes within Kahnawake seem to have been no less effective in preserving the tenure of the incumbent Council.

Ratified at a public meeting of rather slim attendance, the right to vote in local elections was linked clearly with membership and citizenship as a Kahnawake Mohawk. In that context, the Council obtained approval for its specification of the local franchise as limited to anyone "18 years of age and over"... "who is presently on the Band List and the Mohawk

⁷³² Ibid., p.2.

⁷³³ Ottawa. Department of Indian Affairs and Northern Development, File #E4200-070(vol.1) 1975 - 30/6/88. Band Management - Mohawks of Kahnawake. Summary prepared for the Minister of Indian Affairs, re Actions of the Mohawk Council of Kahnawake, Annex C: Mohawk Council of Kahnawake Moratorium., p.2.

Registry...excluding those persons who are non-Indian by birth and those persons who are affected by the Kahnawake Mohawk Citizenship Law.⁷³⁴ Inasmuch as the Council now determined both membership and citizenship, and therefore whose names appeared on "Band Lists and the Mohawk Registry", the connection of those capacities with voting rights might have been expected to generate more than a little controversy; an expectation was realized almost immediately.

Following the 1986 Council elections which extended the terms of office of ten of the eleven prior Councillors as well as the Grand Chief, an appeal of the results of the election was filed with the Department almost immediately, on grounds that eligible voters - many of whom were apparently members of the council-opposed dominant traditionalist faction - had been denied their rights to vote.⁷³⁵ According to one report, of the 1,266 persons who attended the polls to cast their votes, an estimated 475 were turned away as the Council had denied their entitlement to Indian status, and therefore band membership and

⁷³⁴ Ottawa. Department of Indian and Northern Affairs, File #E4218070(vol.1) 1/86 - 3/88. Council Elections - Kahnawake Band. Letter from Davis Rice, Chief, Mohawk Council of Kahnawake, to Mr. Gaetan Pilon, Lands, Revenues and Estates, Department of Indian and Northern Affairs, 18 March 1987.

⁷³⁵ Ottawa. Department of Indian Affairs and Northern Development, File #E4218-2-070(vol.3) 4/87 - 6/88. Council Elections - Appeals - Caughnawaga Band. Letter and materials from R.B. Kohls, Director General, Lands, Revenues and Trusts (Operations), to R.A. Hodgkinson, Director, Statutory Requirements, re Kahnawake Band Election Appeal.

concomitant voting rights.⁷³⁶ When asked to investigate the election, the Department apparently met with complete non-cooperation by the Council, who adopted the classic traditionalist position that Kahnawake internal affairs were matters for Mohawks alone, and not subject to either the scrutiny or approval of outside agencies or governments.⁷³⁷ In respect of this position, the Council refused to release any information concerning the election, in the same fashion that it had failed to report the results of the 1986 voting to the Department, which had apparently heard of the results from local newspaper reports.⁷³⁸

Faced with Council stone-walling as well as its own ambivalence on how best to deal with what it suspected could qualify as an "illegal" electoral process⁷³⁹, the Department chose to ignore the appeal.⁷⁴⁰ In place of pursuing it, the

⁷³⁶ Ibid., "Norton re-elected Grand Chief, 475 denied right to vote", Chateauguay Sun, undated; "Caughnawaga council vote illegal says Indian refused right to vote", The Montreal Gazette, undated.

⁷³⁷ Ottawa. Department of Indian Affairs and Northern Development, File #E4218-2-070(vol.3) 4/87 - 6/88. Council Elections - Appeals - Caughnawaga Band. Briefing for the Acting Deputy Minister, topic: Kahnawake Band election appeal, 27 August 1987.

⁷³⁸ Ottawa. Department of Indian Affairs and Northern Development, File #E4218-070(vol.1) 1/86-3/88. Council Elections - Kahnawake Band. Letter from Bill McKnight to Warren Allmand, P.C.M.P., Ottawa, 5 November 1987.

⁷³⁹ Ibid., p.1-2.

⁷⁴⁰ Ottawa. Department of Indian Affairs and Northern Development, File #E4218-070(vol.1) 1/86-3/88. Council Elections - Kahnawake Band. Briefing for the Deputy Minister, topic: Kahnawake Band of Indians, 19 September 1988, p.2.

Department chose instead to encourage the Council to either formally revert to a "customary" means of selecting chiefs, a status which the 1986 election would have been hard-pressed to establish, or bring their procedures back into line with Indian Act election processes.⁷⁴¹ Once again, in a fashion normally that of the Longhouse, the Council asserted its rights to move beyond the provisions of the Act and not to be subject to Departmental interference in that regard.⁷⁴² No progress on the matter appears to have been achieved, and the controversy of 1986 was replicated in the elections of 1988 to the point of precisely the same appeal being lodged by precisely the same appellant⁷⁴³, with no greater reaction from the Department in the aftermath.

If the election controversies generated little in the way of concrete reactions from the federal government, it would appear they had quite the opposite effect upon the response of the traditionalist community. For although it is impossible to be certain, given the inconsistencies of local lore on the subject, it would appear that those controversies, possibly added to the council's increasing control over courts and policing⁷⁴⁴ in Kahnawake, constituted the catalyst for a

⁷⁴¹ Ibid., p.2.

⁷⁴² Ibid.

⁷⁴³ Ibid.

⁷⁴⁴ In the summer of 1979, the Council had dismissed all members of the local police force owing to the officer's refusal to comply with Council directions to close down two quarries then operating

significant change in the "traditionalist opposition" after 1987. In that year, the largest traditionalist body attempted to organize itself in a single "Longhouse" for purposes of providing "traditional leadership" to the community. As will be recalled from the description of the dominant longhouse faction in part 2.1 at pages 77-101 of this thesis, the eye of the traditionalist storm arose in the form of the "Nation Office" which was the result of a "Peoples' Meeting" in held in the Longhouse on 26 May 1987. At that meeting, it was determined

on the reservation territory; a refusal premised upon the officer's asserted primary loyalty to the Department of Indian Affairs, rather than the council. This action left Kahnawake without its own police force, a situation which the Council rectified shortly after the dismissals by appointing an entirely new police force, which it called "Peacekeepers". Asserting that this force constituted the sole legitimate policing body within the territory, the Council directed them to practise all normal police operations within the reservation boundaries. This the Peacekeepers did; however, as the Council failed to swear in the officers under the relevant Quebec legislation, the Peacekeepers did not, in the minds of the provincial or federal authorities, qualify legally as "peace officers". As a result, their activities did not have the sanction of Canadian or Quebec law - a status which did not trouble the Council, which felt it did not need outside approval of its police force. What the Council did need, however, was funding for the Peacekeeper program, which originated with the federal government, but which was withheld on grounds that the officers constituted an "unrecognised police force". In practice this withholding of funds meant little, as the Council continued to pay the officers for the fiscal year of 1979, incurring a deficit for which the Minister of Indian Affairs then directed his officials to "find a way in which to reimburse...while at the same time ensuring that this was not setting a precedent". Little more is encountered in Departmental files on the matter of policing after 1980, but the persistence of the Peacekeepers and their determination of "peace officer" status under case law [see: R. v. Norton (1982), unreported], seems to have essentially settled the requisite controversies (see: Ottawa. Department of Indian and Northern Affairs, File #E4200-070(vol.1) 1975 - 30/6/88. Band Management - Mohawks of Kahnawake. Letter, accompanied by "summary of events", from Paul Tellier to the Minister, Indian and Northern Affairs, 5 April 1982, p.2.1-2.2.

that this secretariat of the dominant longhouse would:

1. Establish facilities to operate a secretariat with the intent of re-establishing the full functions of Nationhood.
2. Take direction from the People of the Longhouse through established procedures.
3. Ensure statements, written and spoken, issued from the Office be with the view of creating understanding among the People of the Six Nations and other native groups, reflecting the main aims of the Great Law.
4. Cultivate and maintain a Nation to Nation relationship with other governments.
5. Maintain at the highest level of credulity and integrity the Mohawk Nation.
6. Maintain the philosophies and principles of the Great Law and endeavour to apply them in todays [sic] reality.⁷⁴⁵

With the organization of the Longhouse in this fashion came a higher traditionalist profile in Kahnawake, complete with conveniently placed office space on the village's main street, and a visible reminder of the challenge posed by the traditionalist community to the leadership of the band council. And although the challenge would be issued in regard to most of the council's most important areas of authority, for purposes here the most significant affronts were those against the Mohawk Council's position as the essential source of law and order in the community. Of these, the Nation Office's striking of a "Justice Committee" in 1988, as a direct defial of the parallel committee maintained by the Council, was an act of significant report.

The first Longhouse arrogation in the area of law and order

⁷⁴⁵ Mohawk Nation Office, Mandates, Activities and Guidelines (Kahnawake, 26 May 1987), unpublished document in researcher's possession.

emerged in 1987 shortly after the formal establishment of it and the Nation Office. Three youths, all members of prominent traditionalist families, had been arrested and charged with acts of arson and theft committed while under the influence of alcohol, against victims apparently unaligned with the traditionalist community.⁷⁴⁶ Subsequent to their arrest, and in a direct challenge to the authority and jurisdiction of the band council, the s.107 Indian Act court and the larger Canadian criminal legal system of which it is a part, the three young men, accompanied by their immediate families, petitioned the Longhouse through their clan War Chief for the traditional resolution process to be enlisted in their case.

At a community gathering of the involved clans at the Longhouse in Kahnawake, a collective determination was reached which focused upon community responsibility, requiring the offenders to divulge fully and publicly their respective parts in the crimes and to accept responsibility for their actions. They were also directed to make a public apology to the community for their behaviour and to make restitution to the victims. For the acts of theft (packets of newspapers taken from the front steps of a local shop), the youths agreed to reimburse the victim for twice the value of the goods taken; monetary compensation was also agreed upon by the youths and the owner of vacant buildings damaged by their act of arson. In addition, the

⁷⁴⁶ Deom, "Traditional Justice...at Kahnawake, p.23; The Ryan Deer Arson Case 1987-88, case reports and materials in the researcher's possession.

offenders and their clans and victims agreed that the youths would, for a period of one year, (1) attend alcohol counselling at the local social services centre; (2) be prohibited from driving a motor vehicle between dusk and dawn, unless accompanied by a parent; and (3) become active in the local volunteer fire department. Because they had initially lied to the community in trying to hide their responsibility for the offences, each youth was given the first of the "traditional" three warnings, described earlier, exhaustion of which leads to banishment from the community.⁷⁴⁷

Although the case appeared to have been resolved to the satisfaction of both victims and offenders by the end of February 1988, the Peacekeeper police force at Kahnawake felt compelled to bring the matter to the attention of outside authorities. As a result of this action, warrants were issued by the Canadian Crown Attorney's office in Longueuil, Quebec and, at the time of the field study, remained outstanding. Should any of the three youths be stopped by Quebec Provincial Police outside the boundaries of Kahnawake, they could be arrested and held on the basis of outstanding warrants charging them with summary (theft) and indictable (arson) offences. While it is at least theoretically possible that the Peacekeepers, or the

⁷⁴⁷ "Resolution passed in the Longhouse at Kahnawake", 25 February 1988 (copy in researcher's possession); "Statement by the Longhouse of Resolutions Reached in the Ryan Deer Arson Case" (for distribution to local Band Council, Court of Kahnawake officials, and Peacekeepers, copy in researcher's possession), 22 February 1988.

provincial or federal police agencies could enter Kahnawake to act upon these warrants, at the time of the field study they had apparently not acted upon that authority. It should be noted here as well that the "arson case" was the only case to be mediated by the Longhouse to the point of the completion of the field survey and remains so, to the best of my current knowledge.

The second important development in the efforts of the Longhouse and Nation Office to establish a measure of authority in the context of law and order in Kahnawake came fast on the heels of the "arson case", and involved the eviction of the alleged drug dealers, described earlier in this thesis at pages 99-101. Recalling briefly that discussion, it will be remembered that for much of the early history of the Longhouse and Nation Office in Kahnawake, the community had been battling with the increasing intrusion of illicit drug use among their young people. Popular knowledge within Kahnawake suggested strongly that the primary source of the drugs lay within the community, with a Mohawk couple whom many persons had apparently witnessed engaged in the importation and sale of illicit drugs to Kahnawake youth. Despite the community's concerns and complaints, the Peacekeepers as well as outside police forces consistently voiced their unwillingness to act upon what they perceived to be inadequate grounds for search or arrest of the alleged dealers. The result was that the longhouse, through the warriors organized by the Nation Office, visited the alleged

dealers with the "traditional" three warnings which the alleged dealers ignored, and who were then forcibly evicted from the community by a "mob" of nearly 300 persons, led by the notables of the longhouse.⁷⁴⁸ While there were more than a few persons both within and outside Kahnawake who decried the act as a flagrant and reprehensible violation of the alleged dealers' fundamental constitutional rights, there seems little question that the majority of the community supported the Longhouse's action. There is also little doubt that this action, and the support it mustered for the Nation Office and Longhouse, constituted a significant blow to the position of the Mohawk Council in the community in regard to "justice issues".

As the Longhouse's profile in matters of justice grew within the community, it was agreed that a "Justice Committee" should be constructed with a view to articulating the

⁷⁴⁸ This description of the events which have become known as "the evictions" is based upon discussions of it with informants in the researchers' field community of Kahnawake, it is also informed by the following. Kuitenbrouwer, Peter. "Kick drug dealers out of Kahnawake, mothers urge", The Montreal Gazette, 12 January 1989; Haudenosaunee, Mohawk Nation Kahnawake Branch, "Greetings to the People of Canada" (newspaper ad), The Montreal Gazette, 25 February 1989; "Warrior Society launches campaign to rid Kahnawake of drug dealers", The Montreal Gazette, 24 February 1989; "Mohawks evict 'convicted' pair", The Montreal Gazette, 13 April 1989; "Does story or Ad tell truth?", letter to the editor, The Montreal Gazette, 19 April 1989; "Have no pity for Johnson, Lahache", letter to the editor, Le Soleil, 23 April 1989; "Send Drug Dealers to Reserve", letter to the editor, The Montreal Gazette, 24 April 1989; "Kahnawake Woman ejected for 3rd time", The Montreal Gazette, 25 April 1989; "Mohawk 'war' on drugs. Reserve outcast faces lifetime ban", Montreal Daily News, 26 April 1989; "We'll make our own drug laws - Kahnawake Mohawks", The Montreal Gazette, 26 April 1989; "Stop studying and take Action", letter to the editor, The Montreal Gazette, 1 May 1989; "Public Notice", Kahnawake 1989.

traditionalists' growing authority in a "traditional justice system".⁷⁴⁹ In some measure this interest in the establishment of a firm structure for administering criminal level disputes within the community arose from the concerns of some Mohawks, both traditionalists and others, over the essentially unstructured processes which had been enlisted in resolving the arson case of 1987-88.⁷⁵⁰ As one of their first tasks, the Committee set about researching "traditional dispute resolution" and articulating this in a model of a "traditional justice system" which would serve the community. The present study was part of the ongoing efforts to inform the nascent structure with documented "traditional" content.

The "Longhouse Justice System" in Kahnawake:

The traditionalist proponents of the "Longhouse Justice System" argue that their right to administer "Mohawk law" to the people of Kahnawake is premised upon their enduring sovereignty in that place as well as treaty promises made to the Mohawks by the British in the 1664 Albany Treaty. As will be recalled from the historical discussion in part 5, and will be raised again in the section following this one, the Canadian state rejects Kahnawake's notions of sovereignty, and has appears to have

⁷⁴⁹ Personal communication with C. Deom, researcher to the Justice Committee, 17 September 1989.

⁷⁵⁰ Ibid.; interview with M. Diabo, Justice of the Peace, Court of Kahnawake, 23 October 1989.

little more respect for the provisions of the Albany Treaty. That agreement, which was the primary vehicle by which the British of New York assumed the same effective role as their then-recently conquered Dutch predecessors of New Netherland, contained the following statement of criminal legal jurisdiction:

...if any English, Dutch or Indian (under the protection of the English) do any wrong, injury or violence to any of ye said [Iroquois] Princes, or their subjects, in any way whatsoever, if they complain to the Governor at New York or to the Officer in Chief at Albany, if the person so offending can be discovered, then that person shall suffer punishment and all due satisfaction shall be given, and the like shall be done for all other English Plantations. That if any Indians belonging to any of the [Iroquois] Sachims aforesaid, do any wrong, injury or damage to the English, Dutch, or Indians under the protection of the English, if complaint be made to ye Sachims, and the person be discovered who did the injury, then the person so offending shall be punished and all just satisfaction shall be given to any of his Majesty's subjects in any Colony or other English Plantation in America.⁷⁵¹

While the acknowledgement of jurisdiction contained within the treaty is important, what is easily as significant as this statement is its testimony that the Mohawks, even at this early date, had a pre-extant legal structure for resolving disputes which was apparently sufficiently developed for the British to recognise it for what it was and respect both its existence and jurisdiction. This is no minor matter given the tendency of many Europeans of this era, whether in their capacity as colonial officials or students of indigenous cultures encountered in the

⁷⁵¹ NYCD, London Documents II, p.68.

colonial process, to reject the possibilities that those cultures had such things as laws or legal systems. That the later Imperial regime in Canada, as well as its descendants, chose to ignore this prior acknowledgement and impose their own systems of law and legal processes cannot diminish the impact of the earlier statement, or the reality which it reflects. Thus it may be argued that those who oppose the revitalisation of traditional justice within Kahnawake on the basis there is no precedent of law or legal processes within the Mohawk Nation, either as their British ancestors knew these or which were recognisable as a "legal system", contradict their own historical precedent of recognition of precisely such laws and legal structures within the Mohawk Nation at least as early as 1664.

While some historians offer very compelling arguments linking the Albany Treaty and the preceding provisions with the ancient and very important series of treaties and agreements known collectively as the "Covenant Chain Confederation"⁷⁵² between the Iroquois and the Dutch and English colonies⁷⁵³, the

⁷⁵² For a detailed analysis of this series of treaties, the single best authority is Jennings, The Ambiguous Iroquois Empire.

⁷⁵³ Dr. Robert S. Allen (His Majesty's Indian Allies), has significant research experience with the Covenant Chain and suggests the possibility that the relationship which is enshrined in the oral tradition of the Two Row Wampum is in fact a restatement of the basic association articulated in the Covenant Chain. In this light, the Two Row and the 1664 Albany Treaty are simply the Mohawk and British signatories' preferred respective versions of that relationship. Personal communication with Dr. Allen, 11 June 1992.

primary Iroquois analogy for the treaty and the relationship it created is framed within the oral tradition of the "Two Row Wampum". This tradition places each nation in a separate canoe or ship and envisions them moving side-by-side down the river of life, together, but independent of each other. Each nation keeps distinct in its boat all its laws, traditions and cultures, and anyone preferring the institutions and way of life offered by the other boat is free to leap to it, but not to return to their original craft. A choice must be made and adhered to, as a person straddling the water with a foot in each craft can never truly belong in either canoe or their cultures.⁷⁵⁴ In the realm of a legal system, this provision of the treaty has been taken to mean generally that those living within a particular culture, having been raised within and shaped by that culture's laws and customs, should be tried for their wrongdoing within it, under laws and processes which they understand and which have relevance for them. Thus any "English, Dutch or Indian (under the protection of the English)" having committed an offence within the boundaries of the Mohawk Nation, whether against another newcomer or a Mohawk, would, upon being discovered, be returned to the English who would bear the responsibility for punishment and the making of "satisfaction" for the wrongful act. The same arrangement was agreed in regard to Mohawks found to have committed a criminal act within lands claimed by New

⁷⁵⁴ Christine Deom, "Traditional Justice and Conflict with the s.107 Indian Act Court System at Kahnawake", pp.5-6.

York: The Mohawk would be returned to the nation, which would ensure punishment of the offender and the making of satisfactory arrangements with the British to compensate for the act.⁷⁵⁵

It is upon the preceding foundation that the dominant traditionalist faction intends to establish their "traditional" justice system in Kahnawake. That system, in an ideal sense as described by researchers active on the Nation Office's Justice Committee at the time of the research, is said to value the restoration of harmony as much as possible between the parties to a dispute and, unlike the Canadian Justice system, rejects the intensively adversarial emphasis upon determination of the guilt of one party over another and the allocation of punishment. Acknowledging that the Canadian system has met with little success either in regard to satisfying victims or preventing future deviance by offenders, justice the Longhouse way assumes that by requiring and respecting the maximum involvement of both the disputants and their community in the resolution process and negotiation of restitution, it is more likely that justice will be both done and seen to be done.⁷⁵⁶

Like many other legal systems, the Longhouse Justice system is prefaced by a level of informal dispute resolution, wherein parties to a dispute attempt to resolve their differences amongst themselves or with the assistance of a mediator (see

⁷⁵⁵ No Author, Two Row Wampum, Mohawk Nation Office, n.d. (paper in author's possession).

⁷⁵⁶ Deom, "Traditional Justice...at Kahnawake".

figure 5).⁷⁵⁷ In Kahnawake, special emphasis would be placed upon disputants to ensure they have entirely exhausted all possibilities of informal resolution before invoking the system, as to do otherwise would breach an all-important ethic of social responsibility - an ethic which residence in the community reveals remains remarkably strong.⁷⁵⁸ If all attempts at informal resolution proved fruitless, either or both of the disputants would be free to bring their trouble to an elder, clan mother, or faithkeeper, who would either confirm that genuine efforts have been made at informal resolution or, where it is believed all avenues of compromise have not been explored, send the disputants away to reconsider their options and reach a possibly elder or other-mediated resolution.⁷⁵⁹

⁷⁵⁷ It has been suggested that a small network of formally trained mediators could be established within Kahnawake who could act both as an informal alternative to invoking the system as well as an accompaniment to the system, where the clan leaders conclude that mediation is a more appropriate course of response to a dispute than formal Longhouse deliberations. These mediators would also offer a form of interim assistance to disputants during "stays" in the process, a possibility discussed below. The possible role of mediators in the system was advanced by Kanatase in an interview with the researcher at the Mohawk Nation Office, Kahnawake, 20 September 1989.

⁷⁵⁸ This observation is based upon a period of residence in the community by the researcher in the autumn of 1989.

⁷⁵⁹ There is some controversy over whether, in fact, faithkeepers exist at Kahnawake. The researcher was given contradictory reports; a confident conclusion was once made that no such individuals exist in the community, only to be contradicted later by the same speaker when he referred to a particular person as a faithkeeper. However, as faithkeepers do appear to be part of the traditional population in other Mohawk Nation territories such as Akwesasne, and this system is hoped to be one which might ultimately serve the entire Mohawk Nation, faithkeepers have been included as one possible "first contact" between the people and

When it is no longer debatable that an informal resolution is impossible, the elder or leader to whom the dispute was originally brought would approach the Turtle clan leaders to ask them to consider whether the dispute is the appropriate stuff for inclusion in the Longhouse Justice system. The Turtle clan, as the Wellkeepers of the Mohawk Nation, are those who carry the responsibility for calling government councils and overseeing their content and proceedings, and they would perform the same function with the Longhouse Justice system. Thus, upon having a dispute brought to their attention and agreeing that it is deserving of consideration in the Longhouse, the Turtle clan leaders would arrange for a meeting of all the leaders of the Mohawk clans, including with the Turtle leaders those of the Bear and Wolf clans, in a community council to hear the dispute.

Once in council, the process followed would be that outlined within the Constitution of the Five Nations, which is commonly referred to as deliberations "over the fire".⁷⁶⁰ As will be recalled from discussions in the second part of this work, the term "over the fire" most probably derives from the structure of the council within the Longhouse, whereby leaders and members of the Bear and Wolf clans sit along either side wall, separated by a central fire burning between them; a fire which is tended by the Turtle clan leaders, who sit with their clan members toward one end of the Longhouse. As articulated in

their system.

⁷⁶⁰ Parker, "The Constitution of the Five Nations", pp.30-34.

the Constitution, the deliberations would be initiated by the Turtle clan sachems, who would introduce the matter to the council by deliberating it first among themselves, and then passing their conclusions "over the fire" to the Wolf clan for their consideration. The Wolves would in turn consider the Turtle clan's recommendations and, if they found fault with them or wished to alter them in any way, they would return their suggestions for change to the Turtles, who would have to reconsider and again refer their conclusions to the Wolf clan. This type of exchange would persist until the Turtle and Wolf clans agreed upon the best possible outcome, which the Turtles would then pass across the fire to the Bear clan, thereby initiating a further set of negotiations. When all clans finally reached an accord, the Turtle clan, having ensured that the outcome is consistent with the laws and principles of the Constitution of the Five Nations, described in detail at pages 225-228 of this dissertation, would return the council's decision to the people.⁷⁶¹

As a forum for hearing disputes and negotiating resolutions, the community council would involve not only the clan leaders, but the disputants and their speakers, if they wish to have someone speak for them, as well as any other interested parties. After hearing from the disputants, their witnesses and any other interested persons, the sachems of the three Mohawk clans would deliberate the matter in accordance

⁷⁶¹ Barnes, Traditional Teachings, p.34.

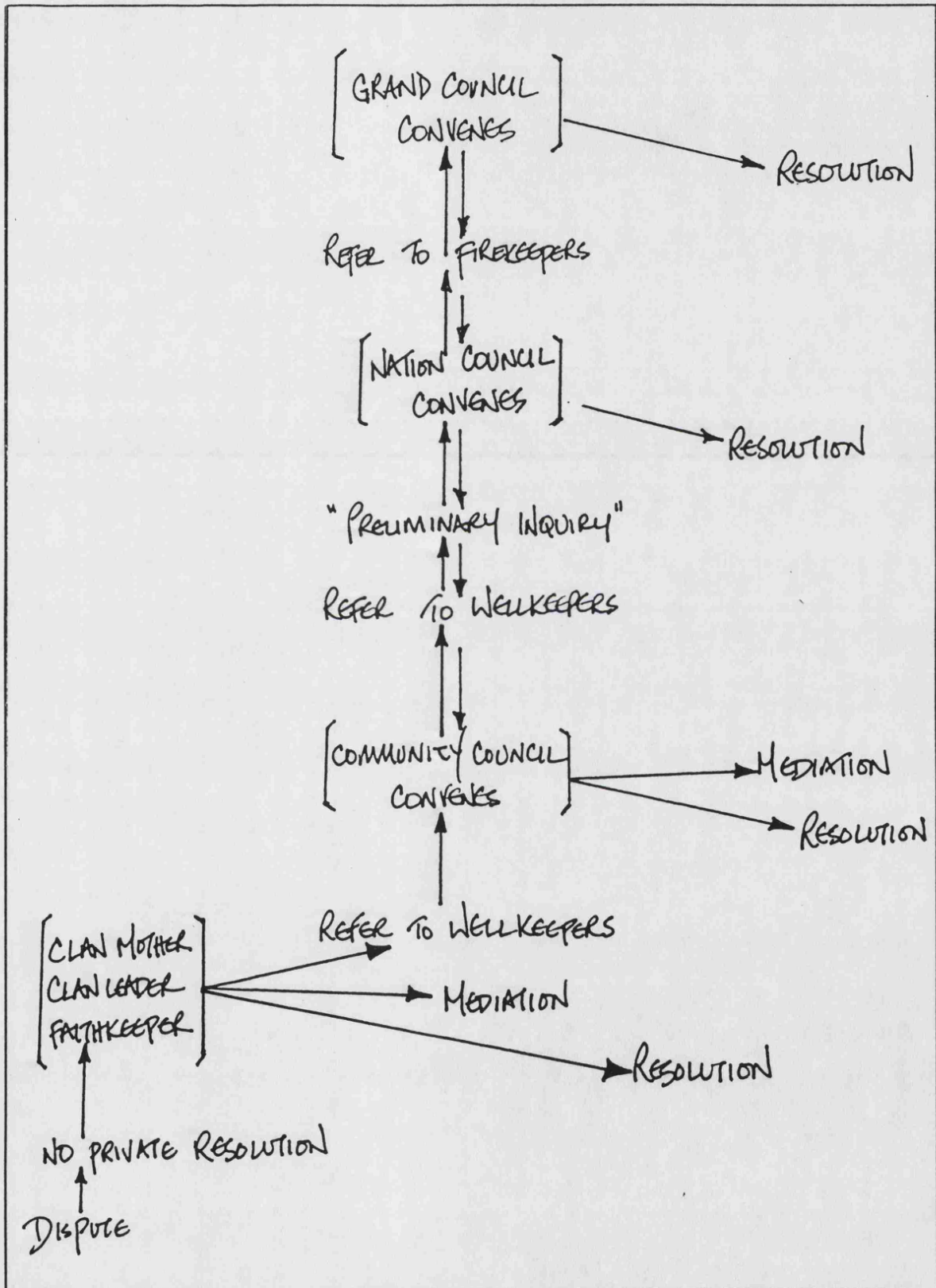


Figure 5 Longhouse Justice System, ca. 1989.

with the processes defined above, giving special attention to three matters: (1) the facts of the offence; (2) its nature/severity; and (3) possible resolutions.⁷⁶² When the clan leaders reached a concordance on the first two matters and what they agree constitutes a good and proper resolution, the disputants would be asked if they accept the leaders' view of the matter and their suggested reconciliation. If the disputants agree and accept the means of reparation, the council process is concluded, with the matter being ended with the satisfaction of all elements of the accepted resolution. Should the parties to a resolution prove unwilling to meet the principles of the outcome in practice, the weight of the "traditional" three warning system, discussed at pages 150-151 of this dissertation, may be brought to bear upon them until satisfaction is made or they are removed from the community.

Whether settled privately or within the Longhouse, the pivotal condition of resolution is the satisfaction of all parties regarding its equity and propriety. In this way the need for a separate appeals process is eliminated as it is implicit within the system: the Longhouse must remain in deliberations until the disputants and those community members in attendance are satisfied with the resolution. Where a consensus at the community level proves impossible, or where the dispute is too severe or the result of an ongoing pattern of incorrigibility in the offender, it would be elevated to the next tier in the

⁷⁶² Deom, 'Traditional Justice...at Kahnawake'.

system: The Mohawk Nation Council of Chiefs.

At this level, the earlier procedure of deliberations over the fire is repeated involving sachems from those communities within the Mohawk Nation who participate in the Longhouse Justice System, but with three important alterations. First, the deliberations would be preceded by what might best be termed a "preliminary investigation", wherein the chiefs would meet in a private audience with the clan leaders from the community council bringing the dispute, to hear the facts and determine whether the business warrants a meeting of the Nation Council, or is best returned to the community level. If the former is deemed appropriate, arrangement will then be made by the Wellkeepers to call the various clan leaders, the disputants and their witnesses to a council of the chiefs. Here, as at the previous level of the Community Council, the facts will again be presented and deliberated over the fire, with a view to reaching a resolution compatible with the needs of the involved parties and the community.

Where it becomes apparent that a satisfactory resolution is impossible even at the level of the national council, two options become available. If the council feels resolution is impeded by an absence of evidence or information material to a satisfactory outcome, the clan leaders may set the matter aside until additional evidence becomes available. It has been suggested that, where a dispute is set aside, the parties might be directed to participate in informal mediation to prevent

further alienation and hardship during the "stay of proceedings."⁷⁶³ Where the inability to resolve could not be attributed to such factors, application would be made by the Nation Council direct to Onondaga for the matter to be raised before a meeting of the Grand Council of the Haudenosaunee.

As the "court of last resort" among the members of the Mohawk Nation (and all others who ascribe to the Longhouse model), the Grand Council would incorporate all the powers and processes which precede it, as well as extraordinary authority to conclude disputes. Thus while it is empowered to set cases aside, as at the Nation level, or to conclude cases through consensus and resolution, a further option is open to the Grand Council through its right to determine and impose the best possible compromise.⁷⁶⁴ This would, one surmises, constitute an

⁷⁶³ Interview with Kanatase, Justice Committee, Mohawk Nation Office, 20 September, 1989.

⁷⁶⁴ This right of the Grand Council to impose a decision to which there is not "warrantable dissent" was reported to the researcher by various informants at Kahnawake, but a clear statement of such a right is not present in the Constitution (Parker, The Constitution of the Five Nations). The best possible approximations of such a power are found in articles 6 and 8. Article 6 instructs that it "shall be against the Great Binding Law to pass measures in the Confederate Council after the Mohawk Lords have protested against them"; while article 8 directs that "Every Onondaga Lord (or his deputy) must be present at every Confederate Council and must agree with the majority without unwarrantable dissent, so that a unanimous decision may be rendered". Both these sections appear to offer no more than a simple power of veto, which cannot be viewed as a true extraordinary power given the requirement of unanimity placed upon all Council determinations. Thus while it is difficult to determine the origins of the Grand Council's right to impose a decision, it may be the case that "warrantable dissent" is defined only as that which bars a proposed outcome and yet also provides an alternative to it. If this is not the case, and there exists no other similar provision for "imposed

extraordinary means of resolution to be used only in those cases where the failure to resolve is in some way due to unreasonableness on behalf of the parties, or where no additional evidence is anticipated as forthcoming, and the desirability of a return to normal group relations necessitates an imposed compromise.

In preliminary discussions regarding the activation of the Longhouse Justice System, a concern has been voiced that access to the Grand Council may be blocked owing to the predominantly revisionist, Handsome Lake orientation of the other members of the Confederacy sitting at Onondaga.⁷⁶⁵ While there may be some argument to be made that the differing life philosophies of the Mohawk Nation and the other Six Nations Sachems at Onondaga could render their interaction at Grand Councils difficult, it is less plausible that the Handsome Lakers could rightfully deny the Kahnawake Mohawks access to this highest forum. Such a block is denied by the reality that the Kahnawake's access to Onondaga stems not from the goodwill of the other members of the Confederacy, but from the constitutionally-defined and legitimate position of the Mohawks on this Council as both participants in the Confederacy decision-making process and as Heads of the League, as outlined in the Constitution of the Five

compromise", the powers of these sachems in a juridical context might have to be modified under article 16 (provision for amendment and law reform) in order to render them an effective supreme council.

⁷⁶⁵ Interview with A. Brian Deer, 24 November 1989.

Nations.⁷⁶⁶ This right is pre-existing and remains unchanged; its legal negation would be possible only through constitutional amendment, which would require the unanimous consent of all the Confederacy Sachems, Mohawks included, and would thus would not be easily secured.

That being said, the existence of a right and the ability to practice it may be two quite distinct issues, and while the Grand Council in theory may be unable to block the Mohawks' access to this highest forum, they may make the actual logistics of such access difficult. For example, if it is agreed that use of this forum as the final tier of a Longhouse Justice System would constitute a function apart from that normally performed by the Council, it may be necessary to secure Council approval of the new function. A practical desire by even one nation's sachem to deny this addition to the Council's duties could prove fatal to this aspect of the proposed system. Such a denial would be constitutionally valid, as it constitutes only a differing position on a single issue, not a rejection of the legitimacy of the sachems proposing it.

Given the possibility of such complications, it has been suggested that the Longhouse Justice System might consider alternatives to the Grand Council as its final forum, either as an interim measure until such a time as access to Onondaga can be confirmed, or permanently, should such access subsequently be proven not to be forthcoming. One possible temporary

⁷⁶⁶ "The Constitution of the Five Nations", article 6.

arrangement may be found in establishing the Nation Council as the final forum for resolving disputes, this would remove the need for a separate body and would confine the activities of the system within the Mohawk Nation. Should it become apparent that this situation is in some manner unsatisfactory, or that a more permanent final tribunal is needed, a further proposal advances the creation of an independent tribunal which could sit as a definitive level of resolution beyond the Nation Council. It has been proposed that this new tribunal could consist of sachems or leaders drawn from all Iroquois communities participating in the system, and could consist of an alternating leadership which would come together to resolve disputes as needed. The legality of such a forum could be achieved through community agreements reached at "Peoples' Meetings" to be held in all participating communities, or, depending upon the ultimate outcome of negotiations with the Grand Council, it may be possible to negotiate a Constitutional amendment which would further legitimate the final forum and which would remove the entire issue from the realm of the Grand Council.

6.3 "Longhouse Justice" and the Question of Invention of Tradition: Some Philosophical and Pragmatic Considerations.

The realization of "separate justice" in Kahnawake, whether by the Council's "reapplication of Mohawk Law in the Territory" or the establishment of the "Longhouse Justice System", is destined to confront a number of compelling impediments. Among these are those which are primarily pragmatic in nature, such as the distance between the people and their "traditions", or the apparent challenge to the Canadian rule of law implicit in the creation of a "third legal order" within the Canadian federation. These are matters which will be addressed below; prior to such a practical analysis, however, I would like to attempt to answer the question of the role of "invention of tradition" in the struggle for separate justice in Kahnawake. Given the absence of any significant development of the Mohawk Council's intentions in the direction of a future "reapplication of Mohawk law", I will direct the greater part of my analysis in this regard to the traditionalists' "Longhouse Justice System"; it is also in relation to this more fully-elaborated structure that the most complete analysis of the practical impediments to separate justice can transpire, thus the focus from this point forward will be primarily upon the traditionalists' efforts to "resurrect the Peace".

(i) "Tradition" and the Quest for Separate Justice in Kahnawake:
The Longhouse Justice System

The chronicle of Kahnawake presented to this point has demonstrated clearly that the various versions of history embraced by the dominant players in the struggle for a separate "traditional" justice system in the community are very much creatures of the present political climate of self-determination, "traditionalism" and factionalism among the Mohawks. Thus, as was demonstrated earlier, conservative Mohawks representing the Mohawk Council or the Court of Kahnawake postulated a history quite distinct from that of the traditionalists acting through the longhouse and Nation Office. In the context of the internal competition to control and define the future of social control and dispute resolution in the community, both of the dominant factions were revealed to be in possession of a history in which not only are "Mohawk Law" and "traditions of dispute resolution" extant, but these are also perceived as having endured to the present tense and in a form and manner of functioning which directly support the factions' respective designs for the "reapplication of Mohawk Law in [the Kahnawake] Territory". The question which necessarily arises from these observations is whether those "histories" and "traditions" are "invented" or the result of a less intentional and surreptitious process and, if invented, how such a status might impact upon the legitimacy of the proposed "traditional

justice systems" and their activation in the community.

At the outset it must be acknowledged that if the presence of a clear and fully documented chronicle linking historic and modern "traditions" is the sole means by which one might counter allegations of "invention", then my researches into Kahnawake's history cannot eliminate all doubts of the possibility of invention in the modern "tradition of dispute resolution" implicit in the Longhouse Justice System or the Council's "reapplication of Mohawk Law". This is so in the first instance because, as established clearly in the discussion of method earlier in this thesis, there are far too many "silences" in the records to permit any verification of the postulation of an "enduring tradition" of "Mohawk Law". And even if one chooses to focus upon those slim references in the primary reports which imply the possibility of an enduring "tradition" of an "underground longhouse government" in the community⁷⁶⁷, the lack of any specification of what is included within that term, as well as the limitations of the records, do not permit a conclusive statement that such a "tradition" has, in fact, persisted in Kahnawake. As well, my own understanding of the modern history of Kahnawake suggests that if such a "tradition" were extant in the community, it was sufficiently far "underground" that evidence of its practice in the community was

⁷⁶⁷ See, for example, NAC RG 10, vol. 7922, file 1/24-2-21; file 32-5, pt.6; vol.7656, file 4005-1C; vol. 7995, file 1/24-1-21). These records are supported by oral histories within Kahnawake (Researcher's field notes, 19 September 1989).

not visible to myself or to any of the elders or traditionalists consulted, who could not confirm its existence. Given the great pains to which these informants went to convince me of the endurance of "traditional culture" - as opposed to its recreation or resurrection - it would be odd indeed had they omitted to inform me of the sole example of such an endurance, had they been aware of it.

Setting aside for a moment the preceding possibility of a tenuous link with their "traditional" past, it is my belief that the conservative and traditionalist histories extant in Kahnawake asserting an endurance of "legal tradition" in regard to the focal acts (murder, theft, adultery and witchcraft) are fallacious - whether they are so intentionally or not, is another question. For notwithstanding the Court of Kahnawake's putative "framework of Mohawk Tradition" and "knowledge of the community", and the belief of the longhouse that "traditional justice" has persisted and lives in their Longhouse Justice System, the absence of any trace of those processes outlined and analyzed in part 4.1 in the modern court procedures of "dispute resolution" defies such assumptions. Modern Kahnawake is not a community marked by the remains of ransacked homes of alleged thieves, nor does the presence of any disfigured adulterous women suggest an endurance of the letter of the law of self-help evident in historic Iroquoia. My observations of, and reports emerging from within, Kahnawake suggest that thieves are reported to the police and taken to court, and adulterous

spouses may be divorced or dealt with in any of the innumerable ways directed by the heart in such circumstances, of which the aforementioned disfigurement does not seem to be one. Indeed, it would seem that the simple lack of knowledge of "traditional processes" would deny even a slim potential for their active endurance in the community.

That the putatively opposed conservative and traditionalist histories, and the past and present "traditions" which they legitimate, manifest both points of intersection and difference is symptomatic of the context of factionalist competition in which they exist, wherein most, if not all, Mohawks may be seen to share a common goal of self-determination and the enhanced local control over juridical and other institutions implicit in the realization of that goal, while at the same time engaging in a wasting, internecine competition over the best means by which to attain that control. Thus while a clear majority of Mohawks may be seen to agree that a return to "traditional" justice is a positive and mutually beneficial goal, there is significant disagreement whether that return is best facilitated by "longhouse justice" or the Mohawk Council's proposed "reapplication of Mohawk Law in the Territory", notwithstanding the fact that both proposals appear to share common assumptions about the restitutive and negotiative elements of "traditional law", as well as a more fundamental assumption of the importance of a return to that law, whatever the specifics of its various manifestations.

It is thus clear that "history", in all of its competing and varying manifestations in Kahnawake's internal struggles over "traditional law" and separate justice, is a crucial and highly politicized aspect of those struggles. That this should be the case is not surprising, as others, notably Rappaport⁷⁶⁸, Connerton⁷⁶⁹, Roberts⁷⁷⁰ and Channock⁷⁷¹ discovered in their own analyses that, albeit for varying ends and purposes, 'all pasts are very much lived in the present'. More than this, and my own work in Kahnawake stands in concert with these earlier works on this point, not only are the competing pasts *lived* in the present, but they are also *relived* and revised in order to support and legitimate different "presents", and the roles and aspirations of particular political actors in those "presents" and the futures to which they are directed. Where, as in Kahnawake, "tradition" is a central element of the modern political context as well as the preferred vehicle for securing and defining a future political order, "tradition" is prone to the same sorts of politicization and revision as the histories which inform and legitimate particular "traditional" structures or orders.

⁷⁶⁸ "Introduction: Interpreting the Past", in The Politics of Memory, pp.1-29.

⁷⁶⁹ How Societies Remember.

⁷⁷⁰ "The Tswana Law and Polity Reconsidered..."

⁷⁷¹ "Neo-traditionalism and Customary Law in Malawi", 16 African Law Studies (1978), pp.80-91.

Hobsbawm echoes the preceding conclusions in his assertion that history is clearly an important dimension in all tradition, but goes further than this when he argues that it is especially so for invented traditions, insofar as these are "responses to novel situations which take the form of reference to old situations".⁷⁷² Yet while this would seem obvious - most of us may be seen to position ourselves in the present in terms of the past journeys which have brought us to a particular place - it seems that something more than mere reference to the past is involved in the process of "invention". According to Hobsbawm, in the realm of "invented traditions", unlike that of their 'genuine' counterparts, the linkages between those modern "traditions" and the relevant era of the past are consciously manufactured and essentially factitious; they are the products of an inherently political choice to emphasize - or invent - a direct tie between a preferred "tradition" and a past which makes it real and which, by implication, enhances the authority of the author of the tie as a source of "traditional knowledge".

The chronicle of the struggle for separate justice in Kahnawake, and the "revisions" of history and "tradition" implicit in this, leaves little doubt that those revisions are, at least *partially*, both conscious and a consequence of the politics and factionalist competition of the moment. At the same time, however, they would appear also to be bound up in the rise of a "Mohawk nationalism" which is a significant, grassroots

⁷⁷² Hobsbawm, "The Invention of Tradition", p.2.

force behind the factions and the struggle over "tradition" in self-determination. This nationalism is apparent in the primary materials documenting factionalist conflict in Kahnawake and the entrance into these of assertions of the enduring sovereignty of the Mohawk Nation and appeals to the "Ongwe-Honwe" complex of earlier Iroquois history. Such a "healthy tribal superiority" has long been evident among the Mohawks generally, who were often referred to as possessing a rather healthy self-concept.⁷⁷³

It is, I believe, precisely just such a "nationalism" which motivated, in part, the shift in the Mohawk Council's position from a denial of "Mohawk Law" to the championship of this both as a traditional form which has persisted to the present tense and as a thing which may be animated in the s.107 Court. For inasmuch as their political competition with the longhouse motivated them, when faced with my questions, to deny the existence of a "Mohawk traditional law" as evidenced in the Longhouse Justice System, it appears that, when they sensed a

⁷⁷³ J.N.B. Hewitt, "The Meaning of En-kwe-hen-we", American Anthropologist 1 (1888), pp.323-324. Hewitt argues that the translation offered by Schoolcraft (Notes on the Iroquois, p.47) connoting elements of racial or tribal superiority to the term is incorrect; in Hewitt's view, the term simply means "natural, normal man, without reference to native qualities or tribal characteristics" (p.324). While this may have been the case at some earlier point in time, the "tribal superiority complex" (Trelease, Indian Affairs in Colonial New York, p.21) which underpinned the policies of the Confederacy also very probably added a dimension of cultural supereminence to the nomenclature by which the Iroquois knew themselves. Megapolensis supports this postulate, when he reported in 1644 that the Mohawks had "naturally a great opinion of themselves; they say, Ihy Othkon, ("I am the Devil"), by which they mean that they are superior folk" (A Short Sketch, p.157).

rise in "Mohawk pride" and a ground swelling of support for things "kaniенkehakaneha"⁷⁷⁴ and the longhouse, they were quick to revise their version of history to accommodate that pride and appropriate it to their benefit: In the realm of the administration of justice, this revision resulted in the Council finding an historic "Mohawk law" which persisted to the present and which was constructed within a larger history which could nurture and support that pride in the directions desired by the Council, namely the s.107 Court and their "reapplication of Mohawk Law". That this reconstruction of history and "traditional law" also, by implication, undermined the view of "tradition" implicit in the Longhouse Justice System and articulated by the traditionalists recalls Nietzsche's words quoted earlier in this thesis, that the search of a history to cherish has also, as a necessary artefact in factionalized contexts such as Kahnawake, the creation of "a past worth condemning".⁷⁷⁵

The complex interweaving of "Mohawk nationalism" and factionalism is thus apparent - nationalism both unites the people behind the larger goal of self-determination and, at the same time, divides them along the dominant factionalist lines.

6 ⁷⁷⁴ This term may be roughly translated as "in the way of the People of the Flint"; "things kaniенkehakaneha" would simply refer to the ways things were done in the time before the arrival of the Europeans, when the Mohawks, known in their own tongue as the Kaniенkehaka, lived in their ancestral territories and under their own customs and institutions.

⁷⁷⁵ Frederick Nietzsche, The Use and Abuse of History (Indianapolis: Bobbs-Merrill, 1957), p.160.

It is also in this blending of traditionalism and nationalism that we observe a further potentiality for the discovery of "invention" in Kahnawake's histories and "traditions", inasmuch as Hobsbawm asserts as a primary source of "invention" precisely such "traditionalist-nationalist" movements as that illustrated in the example above. In this regard it seems likely that, as a product of precisely such a "traditionalist-nationalist" movement, it may be ventured that the "traditions" implicit in the Longhouse Justice System or the "reapplication of Mohawk Law" are as likely to be invented as any of the 'new' traditions which impel or accompany the nationalist-traditionalist movement in Kahnawake, such as the invented traditions of the "Warrior Flag", or army fatigues as the uniform of activism.

On the basis of Hobsbawm's observations that "invented traditions" involve the manufacture of factitious historical connections encouraged by the politics of the present tense and most notably those of "traditionalist-nationalist" movements, there would seem to be little question that the "tradition" of Longhouse Justice is, indeed, an invented one. For in the same manner that the Mohawk Council "recreated" a history and a tradition of "Mohawk Law" which could reinforce their power position in the community and, ideally, garner support for the perpetuation of the juridical status quo as evidenced in the s.107 Court and its "reapplication of Mohawk Law"; the longhouse was no less guilty of "invention" in its support of the ideology of nationalism and of the presentation of its "justice system"

as a "tradition".

And yet one wonders whether this conclusion is as clear and unqualified as Hobsbawm's construction of "invented traditions" would suggest. For although history is crucial to both faction's present constructions of "traditional dispute resolution", and those constructions recall an "old situation" and attempt to establish a linkage between these things through histories which are replete with apparently factual errors and, in some cases, blatantly propagandist assumptions - i.e., the "endurance of 'Mohawk law'" and the "imposition" of Canadian law - I still hesitate to baptise these phenomena as indicating some pure form of invention. My hesitation arises not only from Hobsbawm's own cautions about doing so, but also from those implicit in the analyses of Rappaport, Connerton and, most notably, Lowenthal.

Turning first to Hobsbawm, two questions arise in relation to the matter of the putative connection between the two historical periods and the "traditions" therein which must be satisfied prior to establishing a fact of invention. There is, first, the question of the degree to which the histories which connect the historic and modern "traditions" are consciously manufactured or artificial; and second, the issue of whether that connection has been manufactured, like the modern traditions it links with the past, in an effort to "mask" what is actually happening both with regard to the modern

"traditions" and their place in the larger ideological movement.⁷⁷⁶

The issue of "masking" is a complicated one, for inasmuch as there is reason to believe that some informants had in mind a particular agenda and message when responding to my queries about "traditional dispute resolution", whether that consciousness included an awareness and intention of deception regarding their "recreation" of the past and history is questionable. This is so because, quite simply, with regard to the matters of "history" and "tradition", one cannot withhold information which one does not possess - although one may attempt to hide the lapse. And although the Grand Chief and some of his councillors made good use of their ignorance as a means for "creative re-writing" of history and tradition, at the same time the traditionalists seemed unconcerned about hiding their lack of knowledge in this regard. In fact, virtually all members of the traditionalist community consulted were quite open about their lack of knowledge of history and tradition, and at least one "elder" - the "traditional" source of knowledge and "oral history" in indigenous communities - confirmed that all his "traditional knowledge" was obtained from non-aboriginal authored texts.⁷⁷⁷ Such examples suggest that these informants were not concerned either with disguising or disclosing evidence

⁷⁷⁶ Roberts, "The Tswana Polity and "Tswana Law and Custom" Reconsidered", p.75.

⁷⁷⁷ Interview with L. Hall, Kahnawake, 24 October 1989.

of the discontinuity with a "traditional" past and its institutions - assuming, of course, that they realized that their ignorance of history and tradition revealed such a thing. In this regard, it may be the case among the informants consulted here that, where they did speak of the past, there was less a conscious and intentionally deceitful manipulation of appearances, than a tendency not to think too deeply about an assumed historical connection the presence of which may sometimes be obscured by the ambivalent attitudes of its proponents - notwithstanding the possibility that precisely such a deceitful appearance may be the result. It may also be suggested that, where "masking" did occur, it was not due to a conscious interest in promoting a particular historical connection than, in a sense similar to that suggested by Roberts with regard to "Tswana Law and Custom", an effort to justify the modern "traditional" legal form and its proponents' positions as authorities on "tradition".⁷⁷⁸

The essence of the issue above is simply a question of the "baseline" of historical and traditional knowledge in Kahnawake, for it would seem that the "conscious manufacture" of a "factitious" historical connection would require at least enough genuine knowledge of the "real" history to reveal the need for such manufacturing and guide the "editing" process. Yet it is my experience that the persons with whom I spoke who were active in

⁷⁷⁸ Roberts, "The Tswana Polity and 'Tswana Law and Custom' Reconsidered", p.80.

the struggle to reanimate "traditional law" in Kahnawake, were, for the most part, remarkably ignorant of their own history and as well of many of their historic traditions. It was, in fact, precisely such an ignorance which motivated the Justice Committee of the Nation Office to urge the inclusion of as much "historical research" in this project as possible. And it may be precisely such ignorance which encouraged the propagation and dissemination of the "factitious" histories, a process which was further encouraged by the political exigencies of the moment. And for those who would fasten on the latter element in the production of "revisionist" histories and raise a cry of invention, they would do well to remember the words of Raphael Samuel and Paul Thompson, which are supported by David Lowenthal, that all memory is an "exercise in selective amnesia" - something which, if it renders all histories fallacious, means we are all living in "presents" defined by essentially "invented" pasts.⁷⁷⁹ Cast in these terms, the Mohawks and their "pasts" are different from us and our histories only by degree; and if we do not condemn our own pasts for being "edited", how can we in all good conscience, condemn the Mohawks for the same crime? Taken to this extreme, fastening solely on the politics of remembering offers little illumination of the problem of

⁷⁷⁹ See: Raphael Samuel and Paul Thompson, The Myths We Live By (Cambridge: Cambridge University Press, 1990), p.7; see also, David Lowenthal, The Past is a Foreign Country (Cambridge: Cambridge University Press, 1985), p.231; Paul Connerton, How Societies Remember (Cambridge: Cambridge University Press, 1989); Rappaport, "Introduction: Interpreting the Past", in The Politics of Memory, pp.1-29.

"history" in Kahnawake.

However, if we return to the role of the paucity of historical information in Kahnawake among those who choose to speak about history, we can see that it is precisely such a combination of ignorance and modern pressures which permitted the Mohawk Council to assert a half-century of contact with the Europeans by jumping on a pan-Indian bandwagon viewing the arrival of Columbus as the incipience of contact generally, despite the reality that the Mohawks were a world away from Columbus' point of contact, and in reality probably only began to make significant, direct contact with Europeans after 1664-1669, with the entrenchment of the English at New York and the arrival of French Jesuit priests in Iroquoia, respectively. It is this combination which also enables the Nation Office and longhouse to assign a dimension of personal dispute resolution to their historic governing councils when, at the Nation and Confederacy levels at least, it is clear that such a function was not part of the Councils' routine activities, if at all.

Such examples, I believe, inspire further question as to whether what we are witnessing here is *invention*, or simply a sort of "misdirected patching" of a history replete with gaps, wherein the scarcity of knowledge available for the manufacture of patches has led to the incorporation of alien or incorrect traits or events in those pasts. In this regard, the process which has led to the apparently factitious histories is not a conscious process of invention directed to deceiving an audience

as to the true nature of their history and the "authority" of the "historians" on that chronicle and its "traditions" - although this may certainly be an unintentional result of a less surreptitious process - but rather it is the efforts of an intensively and, in some contexts, forcibly acculturated people to make sense of a history which is, in many places, senseless. It is, to borrow from Rappaport, an inherently political process whereby modern Mohawks seek to "revalidate their own historical knowledge" to both make sense of and ameliorate their subordinate position in society.⁷⁸⁰ That the histories which result are, by external standards of documentary evidence, incorrect, and in internal contexts often oppositional and essentially politicized, does not alter the fact that these are histories designed for local consumption and within a context of social and political pressures in which a "truthful" history based upon putatively "objective" documentation - something which discussion earlier in the thesis suggests may be a fallacy in its own right - is perhaps less important the need for a history which is a source of empowerment toward a more prosperous future. Rappaport's words are again apposite:

For them, history is a source of knowledge of how they were first subjugated and of information about their legal rights, the beginnings of a new definition of themselves as a people, a model upon which to base new national structures.⁷⁸¹

By this construction, the filling of historical gaps in the

⁷⁸⁰ Rappaport, The Politics of Memory, p.1.

⁷⁸¹ Ibid.

absence of materials to do the patching, can create a situation wherein "fact" may run a close second to politics, especially as there will be an absence of "facts" to contradict much of those histories based upon assumptions and modern political exigencies. Where the "what was" of history is unknown, the creation and propagation of "historical might have beens" is probably a natural and somewhat unconscious process implicit in the aforementioned need to "make sense" of the past. If such "patching" may be equated with invention, then the Mohawks' various histories are apparently, invented, and the connection between the historic traditions and those of the modern moment are necessarily artificial. The question then becomes, can we sever the "traditions" from the factitious histories which define and legitimate them and, if not, must the "traditions" also be deemed invented?

I am tempted to respond immediately in the affirmative, as the factitious materials which revised Mohawk histories are also those which underscore and legitimate longhouse justice and "Mohawk Law". And yet it seems that the issue may not be as simple as all that; that in the same sense that histories may be factitious without being entirely "invented", there may be some distinction between "traditions" which faced the pressures implicit in rapid social change, and which were subsequently worn away or weakened, and their invented counterparts. Although Hobsbawm is not entirely clear on the practical implications of such a distinction, it seems safe to make a preliminary

assumption that the alterations to tradition resulting from such change are of a different character than are those implicit in invented traditions. Stated another way, the former change because they are given little choice not to, and in the absence of historical records informing of the original "tradition", it would might be expected that modern descriptions of such "weakened" traditions might be "strengthened" through alterations or adaptations based upon historical assumptions or political needs - a process which is as likely to be unconscious as conscious. It is when it is more the latter than the former, when "traditions" are changed because of a conscious choice to make them somehow different from their predecessors, whether in response to the very real and different demands of the modern context (the novel situation?), or those of the traditionalist-nationalist movement itself, we may witness invention. And yet, although longhouse justice and "Mohawk Law" are clearly and necessarily different from their pre-contact counterparts as we understand these to have existed among the historic Mohawks, the problem is that, implicit within their proponents' assertions that these modern manifestations are not really different from their former counterparts is also an admission of difference; that inherent in the arguments that these modern processes incorporate genuine tradition, there is also an admission that they are invented, that is, consciously changed. Perhaps it is here that the key to understanding the factionalist competition over "traditional law" resides: Both factions now accept an

historic "tradition" of Mohawk law in terms of the principles of negotiation, mediation and restitution, where they disagree and find room and fuel for their internecine competition is over the form and degree of invention which is tolerable in the resurrection of that historic tradition. The disagreement then, is not over the principle of "traditional" law, but over its form and practice, all of which is further bound up in the larger political competitions between the traditionalists and the conservatives in Kahnawake.

If the essence of the struggle over separate justice in Kahnawake is then, a struggle over not over "tradition" per se, but rather over the degree of tolerable invention, both the s.107 Court and the Longhouse Justice System have significant "philosophical" obstacles to overcome. For inasmuch as the Council has only minimally developed its plans for the "reapplication of Mohawk Law in the Territory", there can be little doubt that their assertion that the Canadian-style Court exists within a "framework established by Mohawk tradition"⁷⁸², and that "the ideals of Mohawk justice...are compatible with the professed values of Western legal philosophy"⁷⁸³, when compared with what we know of these things from part 4.1, seem not only to have "invented" a "tradition" of "Mohawk Law", but to have taken that invention to the point where that law is simply Canadian, and not even one of their own Mohawk justices can find

⁷⁸² Institutions of Mohawk Government, p.10.

⁷⁸³ Ibid.

the "tradition" of which the Council speaks. Here the issue is not, then, whether the "tradition" implicit in the modern s.107 Court is acceptable to the people, but is rather whether they will continue to accept the fact and processes of the Court of Kahnawake and its "traditions" - whether western-legal or Mohawk - in the community. This they will probably continue to do, notwithstanding the traditionalist-nationalist fervor, given the relative comfort with the status quo apparent among most Kahnawakehronon other than the traditionalists - who also have been known to appear in that Court - seems likely; at least until a satisfactory alternative can be offered to the community.

The Longhouse Justice System has been offered as just such an alternative, but the degree to which it is, in fact, satisfactory or viable is uncertain. If we look first to the philosophical issue of invention, there is little question that it is to a degree invented, but probably much less so than the s.107 Court. As a product of the traditionalist-nationalist movement and what appears to be, if not outrightly factitious, then at least an unverifiable historical link between it and historic Mohawk "traditions" of dispute resolution, all the possibilities of invention implicit in these things apply to the Longhouse Justice System. More than this however, there can be little argument that the "traditional" Longhouse Justice System is different from the 'old' or 'original' traditions of dispute resolution characterizing historic Mohawk society, and that the

most salient of those differences are the result of a conscious recreation of tradition to meet the needs of modern society - and possibly to further those of the traditionalist-nationalist movement. Yet it all of this seems mitigated somehow by the reality that much of what renders the modern "tradition" distinct from the old ways is not the addition of foreign aspects, but rather the conscious decision to blend two 'old' traditions leading to the creation of a new one. This 'neo-tradition' of dispute resolution, when contrasted with the traditions of compensation and restitution, reveals a change in the structure of legal traditions, as opposed to a change in the traditional philosophies which underlay them, including those of individual, familial and communal responsibility and restitution. The mixing of these "traditional-legal" philosophies with an historic political process which, according to surviving contemporary records, has stayed remarkably true to its original form and has remained viable and in practice in different Iroquois contexts over time, certainly creates a neo-tradition of Mohawk dispute resolution but, as Hobsbawm himself notes, it is questionable whether this is a somehow non-traditional one.

The problem here is that, because the so-called "neo-tradition" of Longhouse justice is the result of a blending of an enduring 'old' tradition of political process and an equally old philosophy of dispute resolution, the system may be both invented and old. If one concentrates upon the structure of the

system, the process of deliberations over the fire, insofar as this is merely an extension of an enduring and 'old' tradition, the system is certainly a "tradition", but not an invented one. If this situation is superimposed on Hobsbawm's ~~earlier~~ quoted analogy of custom as what judges do, and "tradition" as the trappings in which they do it, then logical consistency suggests that the Longhouse structure should be viewed as the "tradition", and the philosophies of negotiation, restitution and compensation as part of the legal customs which the sachems would administer through that system. In this way, it may be argued that the Longhouse Justice System is not perhaps a purely invented tradition, but rather an example of a much older process, that of adaptation of tradition. Here, it can be said that adding the process of resolution of individual disputes to an ancient and widely-respected "tradition" of political decision-making - one which was already long familiar with dispute resolution between Iroquois nations - simply constitutes the addition of a new function to an old form, something which is quite different from inventing an entirely new tradition.

Thus we arrive at a paradox. Insofar as Longhouse Justice embodies both custom and 'genuine' "tradition" in its structure and function, it is not invented, yet its "newness" and its status as part of a traditionalist-nationalist movement toward Mohawk self-determination would seem to suggest a degree of invention, if only by association with that movement. As part of such a movement, the "neo-traditional" Longhouse Justice system

is certainly cast in a different light, but it would be stretching the point somewhat to say that using an old thing for a new or simply different end strikes a compromising blow at its very heart. In fact, insofar as the aged Constitution of the Five Nations⁷⁸⁴, and the 'nationalist' movement of Dekanawideh and Hiawatha which led to its creation⁷⁸⁵, constitute clear historical evidence of a tradition of "traditionalist-nationalist" activism and the use of activism to shape institutions as well as the future of the Mohawk people, it may be argued that there is also a clear and enduring precedent to the place of Longhouse Justice in such self-determination movements. That the people of Kahnawake have consistently engaged in such activism over the course of French and British colonialism, as well as of Canadian internal colonialism, and continue to do so to the present day, further diminishes the potential for a finding of pure invention within Longhouse Justice.

That being said, it is my belief that the Longhouse Justice System is, to a significant degree, an invented tradition, and one which is linked to the "past" by a history which is in many places factitious and uninformed. However, I would also argue that, when one sets the modern system against the historic Iroquoian "traditions of dispute resolution" documented in part

⁷⁸⁴ Parker, The Constitution of the Five Nations.

⁷⁸⁵ As recorded in: Wallace, Paul A. W. The White Roots of Peace (Philadelphia: University of Pennsylvania Press, 1946).

4.1 of this thesis, I do not see how the Mohawks might resurrect a "traditional justice system" in the absence of a rather significant measure of invention, which is precisely what has transpired in the case of the Longhouse Justice System and, albeit to a far greater degree, the s.107 Court. I doubt very much that the Mohawks would welcome a return to the "old ways" in regard to social control, a possibility which is, in any event, a practical impossibility. It is doubtful that anyone in Kahnawake would welcome a return to the "law of blood revenge", and it seems far easier, as noted earlier, to divorce adulterous spouses than to cut off their noses or despatch them.

To avoid a complete severance of the links of the modern system with these historic traditions, however, the longhouse (and, for that matter, the Mohawk Council) assert that its system replicates the principles of "traditional dispute resolution", namely, "negotiation, restitution and personal responsibility". The difficulty here is that the essential motivating forces behind these "principles" - the forces which impelled people to resolve their disputes or atone for their wrongful acts in historic Iroquoia - are no longer a part of Mohawk culture at Kahnawake, namely: the threat of the feud and the social imperatives implicit in the clan network. The reality in the historic context appears to have been one wherein people behaved "responsibly" because failure to do so, whether proactively in their daily existence or reactively following the detection or commission of a delict, could bring significant

harm both to their clan and themselves. Irresponsibility was discouraged by the consistent threat of blood revenge, and deviance as well as vengeance were further regulated and suppressed by the reluctance of individuals to endanger those extended and nuclear family ties which were crucial to their own happiness and security, as well as that of their village. One wonders what might motivate modern Mohawks to respect a "traditional" justice system in the absence of a lingering capital sanction and the face-to-face relations and responsibilities implicit in a robust clan network. Stated in its baldest form, the question is fundamentally one of whether "traditional law" can function in a context in which the "traditional" forces primarily responses for its successful functioning are absent. This is a fundamentally practical matter which leads into our consideration of practical challenges relevant to separate justice in Kahnawake generally, outlined below.

(ii) Practical Impediments and Policy Considerations in Relation to the "Resurrection of the Peace" in Kahnawake

It is doubtful that the absence of those "traditional pressures" which motivated historic Iroquoian peoples to live together peaceably would undermine their willingness to do so in modern Kahnawake, insofar as I doubt that the contemporary Kahnawakehronon are any less enamoured with maintaining a

pacific day-to-day existence than were their ancestors. Although the modern Kahnawakehronon's survival is not as clearly linked with good relations with family now as it was in the past, as a Mohawk who becomes estranged from his or her family might remove to Montreal or a surrounding suburb without incurring too dire consequences, it is my belief that husbands and wives still have an interest in getting along with each other and their in-laws, and, as Gluckman noted in regard to "primitive law", it is still possible for a wife to make a husband's life pretty miserable, (and my own gender compels me to offer a "vice-versa" here) and this continues to place informal constraints on behaviours. In the same way, most neighbors, I believe, want to share peaceful borders, and most citizens appreciate the presence of "law" for the predictability and consistency this inserts into their daily lives. Quite simply, whether the pressures are "traditional" or something else, I believe that most people will support those laws which facilitate a peaceful and predictable existence because they see it as in their best interests to do so.

A more fundamental problem with the erosion of the clan system in particular as a means of support for a "traditional" justice structure resides in the centrality of the clan network to the longhouse justice system in both form and function. The outline of longhouse justice presented in part 5.1 establishes clearly that access to, and dispute resolution within, the longhouse are clearly contingent upon clan membership and an individual's understanding both of that membership and the

persons of authority in their clan. The reality is that a very significant proportion of people in Kahnawake reportedly cannot state with certainty their clan membership, and one wonders whether, given this, those people could identify the "clan mothers, sachems or faithkeepers" in their clan. As these persons constitute the first points of contact between disputants and the system, one wonders how a clan-less Mohawk might gain access to this "traditional forum", or how someone residing on the margins or at the edges of their clan might be expected to know about these "first contacts". The latter is especially so in the case of those Mohawks who perhaps reside outside Kahnawake's boundaries, but who find themselves involved in a dispute inside the community and wish to resolve it through the longhouse; if such people are "out of the loop" of Kahnawake life and its "traditions", they may be just as estranged from "traditional dispute resolution" as from the Canadian criminal justice system - an affliction which may be equally problematic within the significantly acculturated Mohawk community at Kahnawake as well.

The question of access of a Mohawk living off reserve to the longhouse system raises two additional issues which must be overcome by the proponents of "traditional justice" in Kahnawake. The first of these concerns the matter of a potential jurisdiction of an amerindian separate justice system within a reservation territory. As was noted above with regard to the s.107 Indian Act extant in Kahnawake, this court has been held

to possess a jurisdiction equivalent to that of a provincial court judge for purposes of those acts outlined in s.107(a) and (b), where these are committed by an Indian person within the confines of the reservation; and while a theoretical jurisdiction may be seen to exist over "Indian persons" outside the reservation, this is a practical non-issue, as these individuals fall under the effective jurisdiction of the normal provincial courts, and thus their cases would be expected to be heard in such courts. The Indian Act Court has also been seen to have an effective jurisdiction over non-Indians while such persons are within the reservation's boundaries, and "Canadians" do appear with some frequency in the Court of Kahnawake, usually in regard to hearings over minor traffic offences. Thus, for practical purposes, the current jurisdictional situation in Kahnawake is characterised by a relatively limited jurisdiction over both Indians and non-Indians within the reservation, and although the Court of Kahnawake would seem to have effected a minimal expansion of the letter of that jurisdiction in relation to the offence of assault, it is unclear whether this moderate extension of the s.107(b) authority constitutes, in real terms, an expansion of the s.107 jurisdiction.

It is clear that, in their emphasis upon the focal act of "murder" in the research, the longhouse intends to activate a jurisdiction far beyond that currently effected by the Court of Kahnawake. Whether such a move will be either legal or tolerated by the dominant, Canadian system is difficult to say. There can

be little doubt that there is, at present, no formal legal authority for such an extension of jurisdiction, both in terms of the Indian Act and the limited case law emerging from the testing of the s.107 jurisdiction. As well, it seems unlikely that such an expansion of jurisdiction by the longhouse, if based upon a notion of enduring "sovereignty", would be expected to receive the respect of the Canadian state or its courts. For inasmuch as Mohawk sovereignty has been consistently asserted as a source of authority for self-determination and "traditional government" in Kahnawake, to the degree that this is inconsistent with Canadian sovereignty - or that putative one promoted by the province of Quebec - it is unlikely to obtain support. Furthermore, if that sovereignty is regarded as residing in a persisting Mohawk right to the lands which sustain Kahnawake, neither the province or Canada can be expected to respect it, given Canada's assumption of the fee simple title to Kahnawake's lands in 1762. Notwithstanding that arrogation, Canadian courts have determined that the aboriginal interest in "reserve lands" is not one of ownership, but is rather a "unique" one wherein although "Indians retain a legal right to occupy and possess" the lands, the ultimate title to those lands resides in the Crown.⁷⁸⁶ It is difficult to see how such a right

⁷⁸⁶ *St. Catharine's Milling and Lumber Company v. The Queen* [1889] 2 Canadian Native Law Reporter 541; see also *Guerin v. The Queen* 13 Dominion Law Reporter (4th) 321, which qualified the decision in the former case with the assertion that the nature of Indian title is not properly characterised as beneficial, nor as a personal, usufructory right; rather, in this case the Supreme Court of Canada held that aboriginal land title is a "unique interest

could be interpreted as supporting an enduring Mohawk "sovereignty", and thus it is doubtful that the Crown or the province might be induced to negotiate for separate justice on the basis of such an argument as that advanced by the traditionalists: namely, that their right to longhouse justice resides in their enduring sovereignty and rights to the lands at Kahnawake. That being said, inasmuch as the Crown's rights and the courts' interpretations of these may be seen to arise originally from the conquest of Canada by the British in 1760, and a relatively good argument can be made that the "French title" to Mohawk lands implicit in that event was one which did not exist in the international law of the day, there would seem to be sufficient room for a difference of legitimate opinion to motivate the relevant parties to come together to discuss the matter of land title at Kahnawake, and its implications for any persistence of sovereignty. It is unlikely that such discussions will transpire, however, since any acknowledgement of a potential enduring sovereignty undermines the duelling sovereignties asserted by both Canada and Quebec, and the strict letter of the law in regard to "Indian land title" does not, in itself, compel these governments to negotiate the land and sovereignty issue with Kahnawake.

The second issue raised by a consideration of the

which gave the Indians a legal right to occupy and possess the lands, although the ultimate title was in the Crown, which title was inalienable by the Indians, except by surrender to the Crown, and which imposed an [fiduciary] obligation on the Crown to deal with the lands on their behalf upon surrender" (p.323).

jurisdiction which might be exercised by a "traditional justice system" in Kahnawake concerns the degree to which non-Mohawks might be expected to fall under that authority. For although, as noted above, non-amerindians do appear in the modern Court of Kahnawake, their willingness to respect the Court in relation to the adjudication of such simple matters as disputed speeding tickets is one thing, while acknowledging and respecting a more expansive authority over serious criminal matters might be quite another matter altogether. For although aboriginal people in Canada have long been expected to live by the "alien laws" and structures of the criminal justice system in Canada and have done so with more than a minor negative impact⁷⁸⁷, it is unlikely that the Canadian majority would be willing to live by the opposite relationship while in "Indian country" such as Kahnawake.

It is also difficult to see where such a "third order" of criminal law authority in Canada might be composed given the current constitutional arrangement over the administration of justice in Canada. Thus it was that at a recent convention on "Aboriginal Peoples and Justice" held in Saskatchewan⁷⁸⁸, the Deputy Minister of Justice of the Canadian government revealed

⁷⁸⁷ An elaboration of this impact may be found in the reports of the Royal Commission on Aboriginal Peoples in Canada, including their Discussion Paper 2: Focusing the Dialogue (Public Hearings) (April 1993) and Toward Reconciliation. Overview of the Fourth Round (Public Hearings) (April 1994).

⁷⁸⁸ "Getting It Together Conference", The College of Law, University of Saskatchewan, Saskatoon, Saskatchewan, September 1993.

the "Federal Perspective" on aboriginal justice to be less that, than a concern about how a third order of law could be inserted into the current jurisdictional split in Canada⁷⁸⁹. As will be recalled from the brief reference made to the current organization of criminal law jurisdiction in Canada in the opening moments of this thesis, criminal law is primarily a federal responsibility defined under s.91(27) of the Constitution Act, 1867⁷⁹⁰, wherein the federal government obtains the primary legislative responsibility for criminal law and procedure. This jurisdiction is further expanded in s.91(28) of the same Act to include powers over the creation and regulation of penitentiaries, by s.96 powers over the appointment of judges to the superior courts of the provinces, and by the s.101 power over the creation of additional courts to administer the laws of Canada.

For their part, the provinces possess a major authority in the area of criminal justice administration by virtue of the powers implicit in s.92(14) of the Constitution Act, 1867 over the constitution and maintenance of civil and criminal courts and the administration of justice in the provinces; powers which are additionally underscored by the Act's conferral of rights in

⁷⁸⁹ John Tait, "The Federal Perspective on the Split in Jurisdiction", in Continuing Poundmaker and Riel's Quest. Presentations made at a Conference on Aboriginal Peoples and Justice, Richard Gosse, James Youngblood Henderson, and Roger Carter, eds. (Saskatchewan: Purich Publishing, 1994), pp.119-125.

⁷⁹⁰ British North America Act, 1867, 30-31 Vict., c.3 (U.K.), as amended and incorporated as the Constitution Act, 1867, by Schedule 'B' of the Canada Act, 1982 1982, c.11 (U.K.).

relation to the creation and regulation of provincial gaols via s.92(6), and the ability to enforce provincial "quasi-criminal" laws via s.92(15). The provincial competence in the apparently federal realm of the administration of justice was defined further in the *Di Iorio* Case, wherein not only was the "overlap" of federal and provincial jurisdiction in relation to criminal justice acknowledged by the Supreme Court of Canada, but the provincial powers in relation to the "administration of justice" were defined to include those in relation to the "court system...and prosecutions"⁷⁹¹ - matters over which both factions in Kahnawake would seem determined to assume control in their separate justice proposals.

Notwithstanding the position stated in *Di Iorio*, which is less favoured by the federal government than the provinces, the imprecise demarcation between the federal and provincial powers in regard to criminal justice persists. Yet despite this blurring of the edges, the respective powers have, over time, reached a reasonably comfortable arrangement wherein the most significant clashes are less over powers per se, than who is going to pay for their exercise.⁷⁹² Thus it has transpired, with only minimal concrete assistance from the courts, that the provinces are seen to possess some administrative jurisdiction over both criminal and "quasi-criminal law" and their

⁷⁹¹ *Di Iorio and Fontaine v. Warden of the Common Jail of Montreal*, (1976) 33 Canadian Criminal Cases (2d) 289.

⁷⁹² *Ibid.*, 120.

administration in the provincial courts, which must be seen to involve some rights over the matter of criminal procedure. Beyond this, the best that can be said - and was said by the Deputy Minister of Justice - is that the separation of powers implicit in sections 91(27) and 92(14) is unknown and "precise answers" are "evasive".⁷⁹³

From this it may be suggested that any aboriginal group wishing to assume powers over both the creation of criminal laws and the procedures, forums and persons responsible for their administration - all matters which the Kahnawake Mohawks, whether conservative or traditionalist, seem to view as an implicit part of their separate justice entitlement - must attempt to find a port of entry into the uncertain and largely undefined jurisdictional arrangement currently affecting criminal justice administration in this country. It is unlikely that the dominant powers-that-be will look with relish on sorting out the accommodation of a third order of government in a jurisdictional organization of powers which lacks "established and perceptible jurisdictional boundaries"⁷⁹⁴, and where it is unclear what must be taken from whom to give to another, and how the implications of that give and take might ultimately materialize. Federal and provincial governments in Canada have long made a practice of postponing indefinitely the resolution of many amerindian policy issues and questions of entitlement by

⁷⁹³ Ibid., p.119.

⁷⁹⁴ Ibid.

simply continually asserting that the responsibility in question lies not with the federal government, but with the provinces, and vice-versa. The most enduring illustration of this practice is that of the government of British Columbia, which successfully avoided dealing with the matter of land claims in that province from its entry into confederation until 1990, by continually asserting an absence of any constitutional authority over "Indians and lands reserved for Indians", granted to the federal government by the Constitution Act, 1867 under s.91(24), notwithstanding that virtually all aspects of those claims directly affected the province and many of its constitutional responsibilities to its residents, both amerindian and non-amerindian. That they are willing to negotiate on such matters marks a reversal in politics implicit in the election of a left-wing government, and their willingness to act on what they believe is a moral imperative to treat with aboriginal nations within British Columbia on the issues of land and self-government.

The challenge which First Nations such as the Kahnawakehronon will face in avoiding becoming caught in a counterproductive game of "policy-pig-in-the-middle", and obtaining a slice of the criminal law jurisdictional pie, is that it will be rather difficult to determine to whom they must go, and for what powers. The vague nature of the jurisdictional split is amenable to the translation of aboriginal justice into yet another "political football", especially if those non-

aboriginal governments perceive a negative reception to "aboriginal justice" among their respective constituents, which seems likely. In this regard, although the current Liberal Federal Government of Canada has yet to articulate its own policies and processes for negotiating the carefully regulated amerindian autonomy implicit in "self-government" - of which some measure of local social control is an important part - that government is also remarkably tight-lipped about what sorts of juridical autonomy it might support within self-government. Beyond its policy statements that it "will act on Aboriginal justice issues as a priority and will consider alternative justice systems for Aboriginal peoples"⁷⁹⁵, there is no detailed elaboration of what sorts of alternatives might be acceptable in practice in such contexts as Kahnawake, and an overall attitude of cautiously-fashioned ambiguity, such as that revealed above, is evidenced in the statements of the government's delegates.

This caution is perhaps understandable considering the nature of the official opposition which the Canadian people have sent to Ottawa to oppose many elements of the Liberal agenda, most notably that of negotiation of aboriginal claims and self-government. At the present time, that opposition consists primarily of "Reform Party" members predominantly representing the western provinces, who object to the concept of aboriginal rights on principle and thus reject any notion of negotiating

⁷⁹⁵ Creating Opportunity. The Liberal Plan for Canada (Ottawa: The Liberal Party of Canada, 1993), p.102.

and resolving claims and rights in practice, does not bode well for the potential of aboriginal groups to win the government over to the support of separate justice. As well, in Quebec, the election to the federal opposition of a remarkable representation of "separatists" who view as their primary mandate the removal of Quebec from the Canadian confederation, to the status of an independent nation, is no less problematic. Both in this context and at the provincial government level, which is also in the hands of separatists, the position of these francophone leaders is that the amerindians within their borders - Mohawks included - have no rights to "French land" and, implicit in this, no rights to self-determination upon that land save those implicit in amerindian absorption into the new Quebec nation.⁷⁹⁶

With regard to Mohawk aspirations to the development of a separate traditional justice system in Kahnawake, the apparent opposition of the separatist government of Quebec to self-determination generally is troubling, and mitigates against the potential for a successful negotiation of criminal justice powers, notwithstanding the federal Liberal government's stated willingness to "consider aboriginal justice systems for

⁷⁹⁶ See: l'Assemblee Nationale du Quebec, "Statement on Indian Policy" (Quebec, 1983) and its amendment by a "Resolution of 20 March 1985" (Quebec: l'Assemblee Nationale du Quebec, 20 March 1985); and "The Natives Say No", 108(9) Macleans (1995), pp.14-19, see esp., p.19.

Aboriginal peoples."⁷⁹⁷ "Quebeckers" have consistently voiced their concerns about "two systems of justice"⁷⁹⁸, and have asserted that amerindian laws must be compatible with those governing the rest of Canada⁷⁹⁹ - something it is uncertain "traditions" of "Mohawk Law" (as described and analyzed in part 4.1) could achieve to the satisfaction of their critics. At the same time, however, less overtly discouraging noises emerge from Quebec's Advisory Committee on the Administration of Justice in Native Communities, which assert that "mediation", "community justice systems" (an apparently undefined commodity) and "the [provincial] appointment of Aboriginal justices of the peace" are all viable options for amerindian communities in Quebec who wish to assume some control over the administration of criminal justice in their communities.⁸⁰⁰ Unfortunately, there is little in this position to offer hope to the proponents of longhouse justice, unless their system can be made to fit with the as-yet unclear definition of "community justice systems", something which I would venture to be unlikely, given the degree to which a system such as that of the Longhouse Justice System moves

⁷⁹⁷ Creating Opportunity, p.102.

⁷⁹⁸ Submission of the Quebec Police Officers' Association to the Royal Commission Aboriginal Peoples, Public Hearings - Second Round, 27 October - 10 December, 1992, 17-18 November, 1992.

⁷⁹⁹ Ibid.

⁸⁰⁰ Submission of Judge Jean-Charles Coutu, Head, Advisory Committee on the Administration of Justice in Native Communities, to the Royal Commission on Aboriginal Peoples, Public Hearings - Second Round, 1 November - 3 December, 1992; Montreal, Quebec.

beyond the tenor of the available options.

An additional impediment which will mitigate against the resurrection of the peace in Kahnawake is the uncertain legal position of the Mohawks in regard to their professed "right" to administer "traditional law" in their territory. As with the case of such a right as residing in an "enduring sovereignty" originating in a persisting Mohawk "title" to lands at Kahnawake, there is little reason to believe that a "right" of separate justice will be deemed to be part of those "existing aboriginal and treaty rights" currently acknowledged and, theoretically, protected in the Canadian Constitution under s.35. One of the most notable Canadian judicial interpretations of those rights, found in the *Sparrow* case, has distinguished between their "existence" and "exercise", asserting that unextinguished aboriginal rights may persist, but the legal onus is upon the aboriginal people claiming the right to prove its persistence and, having done so, the exercise of that right will be at the sufferance of, and is subordinate to, government legislation.⁸⁰¹ That being said, the very narrow rendering of aboriginal rights in this case has been mitigated to a limited degree by the Supreme Court's warning to governments that the extinguishment of existing aboriginal rights must be through a "clear and plainly stated intent", and the regulation of the exercise of enduring rights must be "justified" by the

⁸⁰¹ *The Queen v. Sparrow* (1990) Dominion Law Reports (4th) 385.

government imposing the regulation.⁸⁰²

Although the question of whether the Mohawks might retain an unextinguished aboriginal right to separate justice could easily form the subject of another dissertation, it is worth noting here that, despite the apparent acknowledgement of a Mohawk right to administer their own "justice" to their own people implicit in the 1664 Albany Treaty, noted above, I cannot see how they might add this putative right to those essentially subsistence-oriented ones which have already been enumerated under the Constitution.⁸⁰³

Two possibilities present themselves in regard to the preceding. First, the Mohawks could attempt to obtain legal recognition of the Albany Treaty acknowledgement as an "unextinguished" aboriginal right. The difficulty here is that, not only have Canadian courts proven themselves to be profoundly inadequate guardians of aboriginal rights, but it seems likely that an argument could be made that the "right" recognized in the 1664 treaty was effectively extinguished by the Proclamation of 1763, which imposed a British criminal law jurisdiction on the Mohawks at Kahnawake. And although a response to such an

⁸⁰² Sparrow, *ibid.*

⁸⁰³ These rights have been further defined in "tribe-specific" terms of those hunting, fishing, and gathering rights which were practised by aboriginal peoples for food, ceremony and social purposes, at the time of the passage of the Royal Proclamation in 1763; see: *The Queen v. Sparrow* (1990) Dominion Law Reports (4th) 385; Menno Boldt, "Justice", in Surviving as Indians. The Challenge of Self-Government (Toronto: University of Toronto Press, 1993), p.33.

argument could question whether the intention of the Crown toward that extinguishment was "clear and plainly stated", post-*Sparrow* decisions, such as the inherently pejorative and "anti-rights" decision of the Supreme Court of British Columbia in the *Delgamuuleu* case⁸⁰⁴, have suggested that such intention needn't be either terribly clear or plain, and aboriginal people face a significant, up-hill battle in disproving either. The likelihood for the reinforcement of such positions over time seems high, given the overall trend in Canada, noted above, to the dismissal of and contempt for, aboriginal rights.

Another improbable means by which the Mohawks at Kahnawake might in theory attempt to have a right of separate justice acknowledged and affirmed might once have resided in the potential outlined in s.35(3) of the Constitution, wherein "treaty rights" are seen to include "rights that now exist by way of land claims agreements or may be so acquired".⁸⁰⁵ The possibility presents itself herein that, by virtue of a self-government agreement whose terms arose in the context of a land claims agreement, the Kahnawakehronon might obtain constitutional recognition and support for a "traditional justice system" created through a land claims resolution. Unfortunately, one must adopt only a carefully controlled enthusiasm for this potentiality, insofar as the federal

⁸⁰⁴ *Delgamuuleu v. The Queen* (1991) 3 Western Weekly Reports

⁸⁰⁵ Constitution Act, 1982, s.35(3).

government has twice rejected Kahnawake's efforts to establish grounds for, and initiate negotiations in regard to, land claims at Kahnawake. And although the federal government is currently funding a project investigating the status of land rights and possible future claims in Kahnawake, the community's recent history of such claims directs a guarded optimism at best.

Perhaps more fundamentally problematic than the preceding, one wonders how the Mohawks at Kahnawake might document to the satisfaction of a Canadian court the "persistence" of their putative "right" of separate justice". This dissertation is, itself, a testimony to the silence of the relevant historical records and enduring documents - whether written or spoken - in this regard and, given this, it is difficult to see upon what authority *acceptable to a court of law* the Kahnawakehronon might draw to compile a convincing case of a persisting "right" of separate justice. Furthermore, if the courts view "persistence" as implicit in the continued and uninterrupted practise of an aboriginal right, the case of the Kahnawakehronon is that much further undermined.

That being said, the preceding "external impediments" to the realization of a resurrection of the Peace in Kahnawake are no less compelling than those internal ones, such as factionalism and the apparent erosion of "tradition" in the community. As was noted earlier in this section, the clan system and "traditional processes of government" are central to the design and functioning of the Longhouse Justice System, hence

their erosion may pose a significant barrier to the activation of the system. This potential barrier is evidenced not only in the fact of those "clan-less" Mohawks, but also in such factors as the apparent absence of condoled chiefs in Kahnawake who could represent the clans in the longhouse justice system, and therefore of persons who might act as sources of guidance and authority in the mediation of disputes. In this regard, it may be that a "clan reclamation" project may be a necessary prerequisite to attempted activation of the system, although I am unsure, given the silences in Kahnawake's past, as to how successful this might be; I also wonder whether it might be more problematic than beneficial, as it might serve only to reveal how eroded the exogamic imperative has become and, in the grip of the traditionalist-nationalist movement, whether such an effort might simply serve to divide an already politically-divided community even further. As noted earlier, there is already a level of "clan snobbery" in Kahnawake, and one wonders how this might evolve and further stratify the community should a reclamation project, which might be expected to implicitly elevate the importance of clan membership generally, serve only to isolate the "clan-less" and marginalize those whose modern relationships violate essentially ancient and largely irrelevant, but potentially symbolically significant, customary imperatives relevant to clan membership.

It may be further questioned whether the erosion of tradition and custom in Kahnawake has left untouched that

reservoir of knowledge necessary to establishing the relevance of longhouse justice to the people generally, and to those who would administer it specifically. If there are no sachems in Kahnawake today, are there people sufficiently cognizant of such processes as "deliberations over the fire" to conduct these in a "traditional justice" forum? Of course, it may be that those assuming such positions could be tutored in "Mohawk law" and "traditional dispute resolution" in the same fashion as those who populate and administer Canada's justice system must attend law schools, article and so on. In this regard, although there may be a genuine difficulty in finding "professors" of "traditional law" among the Mohawks, there should be no question that a need to be tutored in that law renders it somehow a less-than authentic "tradition"; for if that is so, then the fact that the common law tradition must be taught to Canadian law students must be seen to render the dominant system "untraditional" as well. In this regard, those Mohawks who regard themselves to be a "traditional people" will, of necessity, have to overcome the part of that perception which assumes that a "tradition" is something one is born into, rather than taught. For while we are all born into a culture, we cannot truly know it unless we have lived in it, and if some aspects of the Mohawk culture have been eroded as part of the lived-in culture, then the only recourse is to attempt to teach those aspects through a conscious process of re-education. If that fails, it may be that the people do not see that cultural

knowledge as important or necessary; if this should happen in regard to "Mohawk Law" and longhouse justice, then perhaps it is the will of the people that these things should not become a part of a future modern Mohawk culture.

An additional challenge facing the resurrection of "traditional dispute resolution" in Kahnawake concerns the process of creating respect among the people for "traditional law" and its processes and outcomes in the community. To some degree, of course, this question recalls that discussion above concerning why people choose to obey laws - simply because most of us wish to live peaceably in a peaceful community, and to the extent that the laws facilitate the realization of these social goals, we will respect them. Here, however, I am referring to a different kind of respect, the sort that makes a person found guilty respect the sentence of the court, as well as the court itself. In the former case it is often not so much the law which that person respects but, in Malinowski's terms, its teeth, which can bite. The guilty obey the sentence of the court because they are held by its teeth - the police and gaols. The Mohawks whom I consulted on this matter acknowledged that the concept of prison is a foreign one to Mohawk culture and, further, is one of their central conflicts with the dominant Canadian system. And yet at least one prominent traditionalist agreed that imprisonment might have to be a "last resort" response to intractable deviance in the community⁸⁰⁶ - certainly

⁸⁰⁶ Interview with K. Deer, 11 September 1989.

another degree of invention to be inserted into longhouse justice. This possible sanction was added to the weight levied against deviance by the "grafted tradition" of the three warning system, which might be used to banishment recalcitrant offenders, whether to the "outside" generally - which might be expected to be somewhat problematic - or to the aforementioned prison. Who might enforce such orders or deliver the warnings is unclear, although past experience would appear to establish a precedent that such work is the province of the "warriors" who, shortly after 1990, were observed to be working together with the Mohawk Council's Peacekeepers to police the reservation territory. It may thus be postulated that such a combined force might provide some of the bite of a future "traditional law" system, notwithstanding the fact that such would clearly constitute an "invented tradition" in the social control repertoire of the Mohawk people.

Whether respect might be forthcoming for the forum of the Longhouse Justice System itself is more difficult to determine, although providing it with the "teeth" described above might be expected to assist in this regard. I wonder, however, whether this respect might be sufficient to impel the willingness of disputants to work toward the ideal of mutual satisfaction necessary to a resolution within the Longhouse Justice System. The fact that such "reasonableness and social responsibility" are the heart of "Mohawk Law" may not be sufficient - one of the most compelling problems faced by the early Navajo Tribal Court

system was the tendency of Navajos to appeal its decisions to United States Appeal Courts, which were perceived as more lenient than the Navajo's own processes.⁸⁰⁷ Might the Longhouse Justice System meet with such difficulties? I expect it will, insofar as there may be insufficient local pressures to keep Mohawks dissatisfied with "traditional" processes from seeking some other form of resolution, such as an appeal to Canadian courts, an absence of which would require the assistance and support of the Canadian government, an eventuality which must be understood in the context created above surrounding the negotiation of a "third legal order" in Canada.

To some degree, the potential of the system to generate respect for its processes will be directly proportionate to the effectiveness and efficiency of its processes. In this regard attention is immediately directed to the ability of the system to meet the needs of the consumers of "Mohawk Law" with a reasonable degree of speed, something which is rather uncertain given the proponent's assertion that the longhouse will continue to deliberate a dispute until a "mutually-satisfactory" outcome is reached. Difficulties with the latter concept are analyzed below, however, at the present time, one potential difficulty with the system concerns those contexts in which the sachems should decide they require more evidence. As the outline the system currently stands, there does not appear to be any

⁸⁰⁷ Brakel, American Indian Tribal Courts. The Costs of Separate Justice.

provision for securing such evidence, nor does there appear to be any clear course of action should no additional information be forthcoming. In such a case, where no resolution is possible, "tradition" would seem to dictate that the "fire" must be covered with ashes, leaving the issue undetermined; such would hardly seem to be an acceptable outcome, either to the disputants or the community. In such a case, a recalcitrant offender would need only to ensure gaps in the evidence to secure an effective dismissal of his or her case; in any event, it might be argued that most cases in criminal courts are adjudicated in an absence of the full story of any crime, and in this regard the longhouse may be aiming for an impossible ideal: people caught up in a dispute cannot always be expected to offer all the facts, especially those which may move the case against them. In situations of conflict, the desire to return to peaceful relations may fall second to the desire to be right or, in line with the adversarial imperative extant in the "imposed Indian Act Court in Kahnawake, the desire to "win".

The potential for dissatisfaction - and disaster - within the longhouse's processes thus resides largely in the centrality of the disputants in the process, and their willingness to compromise, negotiate, and reach a mutually-acceptable resolution to their differences. Again, where such community-binding customs as the clan system and the realities of the harsh historic existence are absent, to what degree can human nature be relied upon to seek the most "reasonable solution"? It

must be borne in mind that even the historic "traditional" ideal appears to have been based upon a fundamental realization that men are often less than ideal in their behaviours: Men must be pushed to behave in a way which benefits more than just the individual - the historic Iroquoian was inhibited from stealing what he wanted from another because his whole family would suffer should his deviance be detected and traced to him, and when they suffered, by necessity so did he; the situation was that much more compelling in the case of murder - all might well suffer for the act of one, and if everyone suffered, so did the one. In the absence of such a compelling pressure to "do the right thing", one wonders whether longhouse justice will be possible. In attempting to resurrect an "ideal" of the old ways, the proponents of longhouse justice may have "invented" with their system an "ideal" of historic human nature which is no more a pure "traditional truth" than is longhouse justice. To the degree that the latter ideal is based upon this very central human one, the potential for the realization of the Longhouse Justice System may be only as great as is the potential of the "ideal" participant in that system.

The preceding are but a sampling of some of the issues which the traditionalists must resolve before activation of their system is possible. However, even if the preceding questions could be satisfactorily resolved, an arguably more significant issue remains unsettled: Why would the Mohawks support a "traditional" justice system and "Mohawk Law", when

their community, albeit under the direction of an "imposed" law, is already relatively peaceful and predictable in its social relations? I cannot answer this question, and I am not entirely satisfied that the majority of those Mohawk proponents of "traditional justice" are more likely to be able to do so. High-sounding justifications for separate justice based upon "enduring sovereignty" and the current climate of aboriginal rights and self-determination might very likely pale when the challenges of implementation appear on the horizon, whether they are those of the "external" type implicit in the Canadian "rule of law" and its negotiation with those governments, or the "internal" impediments of factionalism and imperfect, "invented traditions". And yet one wonders whether such impediments ought to be permitted to stand in the way of the negotiation and resurrection of the Peace in Kahnawake, which would seem to be, if not a technically legal obligation, is certainly a moral and ethical one. It is my opinion that this obligation must enable Canadians and their governments to move beyond the fears and anxieties which seem to characterize any discussion of aboriginal rights; unfortunately, it is also my opinion that the elevation implicit in acknowledgement of rights discussions to the level of ethics is insufficient to raise Canadian minds above those fears, thus the "rule of law" and the inadequacies of "invented tradition" stand as easy allies in the struggle by Canadians and their governments to ensure that the rules in Indian country continue essentially to be creatures of Canadian

law.

And yet this alliance cannot help but be an uneasy one, insofar as Canadians prefer to view themselves as accepting of difference and respectful of human rights - a position which, in the realm of aboriginal rights, is directly contradicted by the government representatives they elect and the legal decisions their courts produce, as described above. It is no less uncomfortable when one considers that the "invented" histories and "traditions" which underlie and define the proposed structures of "traditional justice" in Kahnawake are no different in these regards from their Canadian counterparts, which are no less "invented". With regard to the administration of criminal justice, and from the vantage point of non-aboriginal people, the fact that much of the formal accoutrements of Canadian and British justice (including the wigs, robe, and so on⁸⁰⁸) are invented traditions has not resulted in the razing of the system in an effort to make it 'more traditional'. For at the same moment that most Canadians would raise an eyebrow at any number of the more superficial of these traditions, they would also cling to them as contributing to an overall sense of legal cultural identity - notwithstanding the degree to which these might inform more of a British than Canadian culture, and may be themselves 'borrowed' or even 'invented' traditions. Seen in this light, for Canadians to deny

⁸⁰⁸ As Hobsbawm has already noted, "The Invention of Tradition",

the legitimacy of modern indigenous 'traditions' on the bases that they are the products of invention or in some similar way not truly "traditional" is at best, unfair, and at worst, hypocritical. To take that hypocrisy a step further and use 'untraditional-ness' as a bar to the existence of separate, tradition-based or traditional institutions is nothing more than internal colonialism at its most reprehensible. Notwithstanding this, the very real possibility that rejection of separate justice in amerindian nations may have more to do with a state unable to see beyond its own rule of law and nervous about any erosion of its monopoly on law-making and control of the legal system, suggests that concerns over the appearance of bias or hypocrisy fall as distant seconds among possible Canadian motivations for denying separate justice systems, whether traditional or not.

And yet it would seem that the reactions of Canada and the province of Quebec which surrounds Kahnawake, while significant, fall quite outside those internal considerations which may block the realisation of "traditional justice" in this Mohawk territory. These factors, which include the impediments created by internecine internal competition as well as the lack of a full articulation of the functions of the Longhouse Justice System and its relationship with the larger Canadian systems, beg resolution prior to activation of the Longhouse system. Failure to challenge and prevail over these internal impediments may quickly render those external considerations irrelevant, as

the movement toward activation of a Longhouse or other justice system within Kahnawake falls victim to the same internal struggles which, to use Siegel and Beals' terms⁸⁰⁹, consistently deny its participants the potential to achieve what all competing subgroups agree is a desired and positive end: the resurrection of the Peace, both in "law" and in social relations, in the Mohawk territory at Kahnawake.

There can be little doubt that the obstacles facing the Kahnawake Mohawks in their pursuit of a separate justice system are profound. Acculturation, distance from tradition and a lack of parity in power with those with whom the activation of the system must be in some measure debated or negotiated stand as powerful challenges to separate justice in Kahnawake; challenges the successful meeting of which will be plagued by persisting internecine internal divisions in the community. Whether the promoters of Mohawk legal traditions, invented or not, realize their goal of a separate system will remain to be seen. An equivocal historical record in the Kahnawake Territory of victories of the Mohawk way over those Canadian ones suggests to outsiders that underestimation of the Mohawks in doing things "kanienkehakaneha", "in the way of the People of the Flint", whether as means toward or as ends in themselves, is unwise. The Canadian state might be well-advised to accept this advice as well, and be prepared to meet the Mohawks in the middle to

⁸⁰⁹ Siegel and Beals, "Conflict and Factionalist Dispute", pp. 108-109.

discuss separate justice or, preferring to remain in their inherently conservative end, be prepared to face the crises of future summers in their efforts to contain a Kahnawake activism which history suggests will not be subdued; for that activism, in itself, is very much "kanienkehakaneha".

Appendix "A"

Relevant Sections of the Canadian "Indian Acts"
in Relation to the Historical Elaboration
of the s.107 Indian Act Court

S.C. 1881, c.17, cont'd.

Penalty for
contraven-
tion of such
regulations.

5. Any person who cuts, carries away or removes from any reserve or special reserve any hard or sugar-maple tree or sapling, or buys or otherwise acquires from any Indian or non-treaty Indian or other person, any hard or sugar-maple tree or sapling so cut, carried away or removed from any reserve or special reserve, contrary to any provisions or regulations made by the Governor in Council under this Act, is guilty of an offence, and is punishable upon summary conviction by fine not exceeding one hundred dollars, or by imprisonment for a period not exceeding three months, or by both fine and imprisonment.

Who may act
as a Justice,
or as two
Justices of
the Peace.

6. Any one Judge, Judge of Sessions of the Peace, Recorder, Police Magistrate, District Magistrate or Stipendiary Magistrate, sitting at a police court or other place appointed in that behalf, for the exercise of the duties of his office shall have full power to do alone whatever is authorized by "The Indian Act, 1880," to be done by a Justice of the Peace or by two Justices of the Peace.

43 V, c. 28.

Jurisdiction
in city or
town to give
jurisdiction
in surround-
ing county or
district.

7. Any Recorder, Police Magistrate or Stipendiary Magistrate, appointed for or having jurisdiction to act in any city or town shall, with respect to offences and matters under "The Indian Act, 1880," have and exercise jurisdiction over the whole county or union of counties or judicial district in which the city or town for which he has been appointed or in which he has jurisdiction, is situate.

Section 23 of
43 V, c. 28,
repealed.

8. Section twenty-three of "The Indian Act, 1880," is hereby repealed, and the following substituted therefor:—

see S.C. 1884,
c.27, s.21.

New section.

Removal of
persons or
Indians set-
tling, &c.,
illegally on
Indian re-
serves.

"23. If any person or Indian other than an Indian of the band, without the license of the Superintendent General (which license, however, he may at any time revoke) settles, resides, or hunts upon, or occupies, or uses, any such land or marsh; or settles, resides upon, or occupies any such roads or allowances for roads, on such reserve; or if any Indian is illegally in possession of any land in a reserve,—the Superintendent General, or such officer or person as he may thereunto depute and authorize, shall, on complaint made to him, and on proof of the fact to his satisfaction, issue his warrant, signed and sealed, directed to any literate person willing to act in the premises, commanding him forthwith to remove from the said land, or marsh, or roads or allowances for roads or land, every such person or Indian and his family, so settled, residing, or hunting upon, or occupying, or being illegally in possession of the same, or to notify such person or Indian to cease using as aforesaid the said lands, marshes, roads or allowances for roads; and such person shall accordingly remove or notify every such person or Indian, and for that purpose shall have the same powers as in the execution of criminal process; and the expenses incurred in any such removal or notification shall be borne by the party removed or notified, and may be recovered from him as the costs in any ordinary suit"

9. Section thirty of "*The Indian Act, 1880*," is hereby repealed, and the following substituted therefor:— Section 30 repealed.

"30. All sheriffs, gaolers or peace officers, to whom any such process is directed by the Superintendent General, or by any officer or person by him deputed as aforesaid, and all other persons to whom such process is directed with their consent, shall obey the same; and all other officers shall, upon reasonable requisition, assist in the execution thereof." New section. Sheriffs, &c. to assist in such removal.

10. Section ninety of the said Act is hereby amended by adding after the words, "or non-treaty Indian," in the ninth line thereof, the words, "or of any person, or upon any other part of the reserve or special reserve, or sells, exchanges with, barter, supplies or gives to any person on any reserve or special reserve, any kind of intoxicant—." Section 90 of 43 V., c. 28, amended.

11. Section ninety-one of "*The Indian Act, 1880*," is hereby amended by striking out of the eleventh line thereof the word "may," and inserting in lieu thereof the words, "or suspected to be upon any reserve or special reserve, may, upon a search warrant in that behalf being granted by any Judge, Stipendiary Magistrate or Justice of the Peace—." Section 91 of 43 V., c. 28, amended.

12. Every Indian Commissioner, Assistant Indian Commissioner, Indian Superintendent, Indian Inspector or Indian Agent shall be *ex officio* a Justice of the Peace for the purposes of this Act. Indian Commissioner, &c., to be *ex officio* Justices of the Peace.

13. In all cases in "*The Indian Act, 1880*," where it is provided that the conviction must take place on the evidence of one credible witness other than the informer or prosecutor, the informer or prosecutor shall nevertheless be allowed to give evidence. Informer may give evidence under 43 V., c. 28.

14. The Governor in Council may appoint an Assistant Indian Commissioner for Manitoba, Keewatin and the North-West Territories or an Assistant Indian Commissioner for Manitoba and Keewatin, and an Assistant Indian Commissioner for the North-West Territories, with such of the powers and duties of the Commissioner, and such other powers and duties as may be provided by Order in Council. Appointment of Assistant Indian Commissioners.

CHAP. 30

An Act to further amend "The Indian Act, 1880."

[Assented to 17th May, 1882.]

Preamble.

HER Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

1. The sixth sub-section of the second section of "*The Indian Act, 1880*" is hereby amended by striking out of the fourth line thereof the words "but which is unsurrendered," and inserting in lieu thereof the words "and which remains a portion of the said Reserve." Subs. 6 of s. 2, 43 V., c. 28 amended.

2. The twenty-seventh section of "*The Indian Act, 1880*" is hereby amended by striking out of the twelfth line thereof the word "Justice" and inserting in lieu thereof the words "any two Justices," and by striking out of the twenty-ninth line thereof the word "Justice" and inserting in lieu thereof the word "Justices." Sect. 27 amended.

3. Wherever, in "*The Indian Act, 1880*," or in the Act passed in the forty-fourth year of Her Majesty's reign, chaptered seventeen, amending the said Act,—or in this Act, power is given to any Stipendiary Magistrate or Police Magistrate to dispose of cases of infraction of the provisions of the said Acts brought before him, any Indian Agent shall have the same power as a Stipendiary Magistrate or a Police Magistrate has in respect to such cases. Indian Agent to have in certain cases powers of a magistrate. see S.C. 1884, c.27, s.23.

4. The seventy-eighth section of "*The Indian Act, 1880*" is hereby amended by adding thereto the following words: "But in any suit between Indians no appeal shall lie from an order made by any District Magistrate, Police Magistrate, Stipendiary Magistrate or two Justices of the Peace, when the sum adjudged does not exceed ten dollars." Sect. 78 of 42 V., c. 28 amended. see S.C. 1884, c.27, s.24.

5. The ninety-fourth section of "*The Indian Act, 1880*" is hereby amended by adding after the word "month" in the eleventh line thereof the words: "or to a fine of not less than five nor more than thirty dollars, or to both fine and imprisonment in the discretion of the convicting Judge, Stipendiary Magistrate or Justice of the Peace," and by adding after the word "days" in the nineteenth line the following words: "or to an additional fine of not less than three nor more than fifteen dollars, or to both fine and imprisonment at the discretion of the convicting Judge, Stipendiary Magistrate or Justice of the Peace." Sect. 94 amended. Penalties increased

6. The second section of the Act passed in the forty-fourth year of Her Majesty's reign, chaptered seventeen, intituled "*An Act to amend the Indian Act, 1880*" is hereby amended by adding after the word "conviction" in the fifth line thereof, the words: "before a Stipendiary Magistrate, Police Magistrate, or two Justices of the Peace." Sect. 2 of 44 V., c. 17 amended.

Section 8 of
44 V., c. 17,
repealed.

21. The eighth section of the Act forty-fourth Victoria, chapter seventeen, is hereby repealed, and the following is hereby substituted for section twenty-three of "*The Indian Act, 1880* :—"

New section
23 of Indian
Act.

Removal of
trespassers
and their
cattle.

23. If any person or Indian, other than an Indian of the band, without the license of the Superintendent General (which license, however, he may at any time revoke), settles, resides, or hunts upon, or occupies, or uses, or causes or permits any cattle or other animals, owned by him or in his charge, to trespass on any such land or marsh, or fishes in any marsh, river, stream or creek on or running through a reserve; or settles, resides upon, or occupies any such roads or allowances for roads, on such reserve; or if any Indian is illegally in possession of any land in a reserve,—the Superintendent General, or such officer or person as he thereunto deposes and authorizes, shall, on complaint made to him, and on proof of the fact to his satisfaction, issue his warrant, signed and sealed, directed to any literate person willing to act in the premises, commanding him forthwith to remove from the said land or marsh, or roads or allowances for roads, every such person or Indian and his family, so settled, residing or hunting upon or occupying or being illegally in possession of the same,—or to remove such cattle or other animals from such land or marsh,—or to cause such person or Indian to cease fishing in any marsh, river, stream or creek, as aforesaid,—or to notify such person or Indian to cease using as aforesaid the said lands, river, streams, creeks or marshes, roads or allowances for roads; and such person shall accordingly remove or notify every such person or Indian, or remove such cattle or other animals, or cause such person or Indian to cease fishing as aforesaid, and for that purpose shall have the same powers as in the execution of criminal process; and the expenses incurred in any such removal or notification shall be borne by the person removed or notified, or owning the cattle or other animals removed, or having them in charge, and may be recovered from him as the costs in any ordinary suit,—or if the trespasser is an Indian, such expenses may be deducted from his or her share or shares of annuity and interest money, if any such be due to him or her."

Warrant for
removal, or
notice to
remove.

Powers for
that purpose.

As to costs.

22. The twelfth section of the Act forty-fourth Victoria, chapter seventeen, is hereby amended by adding at the end thereof the words, "with jurisdiction wheresoever any contravention of the provisions of '*The Indian Act, 1880*,' occurs, or wheresoever it is considered by him most conducive to the ends of justice that any contravention aforesaid shall be tried."

Section 12 of
44 V., c. 17,
amended.

23. The third section of the Act forty-fifth Victoria, chapter thirty, is hereby amended by adding at the end thereof the words "or in any other matter affecting Indians, with jurisdiction wheresoever any contravention of the provisions of the said Acts occurs, or wheresoever it is considered by him most conducive to the ends of justice that the trial be held :"

Section 3 of
45 V., c. 30,
amended.

And such officer shall have the same powers in respect to infractions of this Act.

Powers under
this Act.

395,
s.6.

6. Section one hundred and fourteen of *The Indian Act* is hereby repealed and the following substituted therefor:—

Section 114 amended.

“**114.** Every Indian or other person who engages in, or assists in celebrating or encourages either directly or indirectly another to celebrate, any Indian festival, dance or other ceremony of which the giving away or paying or giving back of money, goods or articles of any sort forms a part, or is a feature, whether such gift of money, goods or articles takes place before, at, or after the celebration of the same, and every Indian or other person who engages or assists in any celebration or dance of which the wounding or mutilation of the dead or living body of any human being or animal forms a part or is a feature, is guilty of an indictable offence and is liable to imprisonment for a term not exceeding six months and not less than two months; but nothing in this section shall be construed to prevent the holding of any agricultural show or exhibition or the giving of prizes for exhibits thereat.”

Celebrating certain festivals, dances or ceremonies whereat presents are made or human or animal bodies are mutilated.

Indictable offence.

Proviso.

115. Any judge of a court, judge of sessions of the peace, recorder, police magistrate or stipendiary magistrate, shall have full power to do alone whatever is authorized by this Act to be done by a justice of the peace or by two justices of the peace. 44 V., c. 17, s. 6.

Who may act as a justice, or as two justices of the peace.

116. Any recorder, police magistrate or stipendiary magistrate, appointed for or having jurisdiction to act in any city or town shall, with respect to offences and matters under this Act, have and exercise jurisdiction over the whole county or union of counties or judicial district in which the city or town for which he has been appointed or in which he has jurisdiction is situate. 44 V., c. 17, s. 7.

Jurisdiction in city or town to give jurisdiction in surrounding country or district.

117. Every Indian agent shall be *ex officio* a justice of the peace for the purposes of this Act, and shall have the power and authority of two justices of the peace, with jurisdiction wheresoever any violation of the provisions of this Act occurs, or wheresoever it is considered by him most conducive to the ends of justice that any violation aforesaid shall be tried. 44 V., c. 17, s. 12;—45 V., c. 30, s. 3;—47 V., c. 27, ss. 22 and 23.

Indian Agent to be *ex officio* a justice of the peace.

1890,
s.9.

9. Section one hundred and seventeen of the said Act is hereby repealed, and the following substituted therefor:—

S. 117 repealed; new provision.

“**117.** Every Indian agent shall be *ex officio* a justice of the peace for the purposes of this Act, and shall have the power and authority of two justices of the peace, with jurisdiction wheresoever any violation of the provisions of this Act occurs, and in all cases of infraction, by Indians, of any of the provisions of chapter one hundred and fifty-seven of the Revised Statutes, intituled “*An Act respecting Offences against Public Morals and Public Convenience*,” or wheresoever it is considered by him most conducive to the ends of justice that any violation aforesaid shall be tried.”

Indian Agent to be *ex officio* a Justice of the Peace.

Powers.

8. The section substituted for section one hundred and seventeen of *The Indian Act* by section nine of chapter twenty-nine of the Statutes of 1890, is hereby repealed and the following substituted therefor:—

Section 117 amended and 1890, c. 29, s. 9. S.C. 1894, c.32, s.8.

“117. Every Indian agent shall, for all the purposes of this Act, or of any other Act respecting Indians, and with respect to any offence against the provisions thereof or against the provisions of section ninety-eight or section one hundred and ninety of *The Criminal Code*, 1892, and with respect to any offence by an Indian against any of the provisions of part XIII. of the said Code, be *ex officio* a justice of the peace, and have the power and authority of two justices of the peace, anywhere within the territorial limits of his jurisdiction as a justice, as defined in his appointment or otherwise defined by the Governor in Council, whether the Indian or Indians charged with or in any way concerned in or affected by the offence, matter or thing to be tried, investigated or dealt with, are or are not within his ordinary jurisdiction, charge or supervision as an Indian agent.

Indian agents to be *ex officio* justices of the peace.

Jurisdiction.

“2. In the North-west Territories and the provinces of Manitoba and British Columbia every Indian agent shall for all such purposes and with respect to any such offence be *ex officio* a justice of the peace and have the power and authority of two justices of the peace anywhere in the said Territories or provinces within which his agency is situated, whether or not the territorial limits of his jurisdiction as a justice, as defined in his appointment or otherwise defined as aforesaid, extend to the place where he may have occasion to act as such justice or to exercise such power or authority, and whether the Indians charged with or in any way concerned in or affected by the offence, matter or thing to be tried, investigated or otherwise dealt with, are or are not within his ordinary jurisdiction, charge or supervision as Indian agent.”

Special provision as to their jurisdiction in the N. W. Territories, Manitoba and British Columbia.

Section 117 further amended.

7. Section one hundred and seventeen of *The Indian Act* as enacted by section eight of chapter thirty-two of the Statutes of 1894, is hereby repealed, and in lieu thereof it is hereby enacted that every Indian agent shall, for all the purposes of *The Indian Act* or of any other Act respecting Indians, and with respect to any offence against the provisions thereof or against the provisions of section ninety-eight or section one hundred and ninety of *The Criminal Code*, 1892, and with respect to any offence by an Indian or non-treaty Indian against any of the provisions of parts XIII. and XV. of the said Code, be *ex officio* a justice of the peace, and have the power and authority of two justices of the peace, anywhere within the territorial limits of his jurisdiction as a justice, as defined in his appointment or otherwise defined by the Governor in Council, whether the Indian or non-treaty Indian charged with or in any way concerned in or affected by the offence, matter or thing to be tried, investigated or dealt with, is or is not within his ordinary jurisdiction, charge or supervision as an Indian agent.

S.C. 1895, c.35, s.7.

Indian agents to be *ex officio* justices of the peace.

Jurisdiction.

R.S.C. 1886, c.43, cont'd.

895,
s.7,

Special jurisdiction of Indian agents in the N.-W. Territories, Manitoba and British Columbia.

"2. In the North-west Territories and the provinces of Manitoba and British Columbia every Indian agent shall for all such purposes and with respect to any such offence be *ex officio* a justice of the peace and have the power and authority of two justices of the peace anywhere in the said territories or provinces, whether or not the territorial limits of his jurisdiction as a justice, as defined in his appointment or otherwise defined as aforesaid, extend to the place where he may have occasion to act as such justice or to exercise such power or authority, and whether the Indians charged with or in any way concerned in or affected by the offence, matter or thing to be tried, investigated or otherwise dealt with, are or are not within his ordinary jurisdiction, charge or supervision as Indian agent."

118. If any Indian is convicted of any crime punishable by imprisonment in a penitentiary or other place of confinement, the costs incurred in procuring such conviction, and in carrying out the various sentences recorded, may be defrayed by the Superintendent General, and paid out of any annuity or interest coming to such Indian, or to the band, as the case may be. 43 V., c. 28, s. 82 ;—47 V., c. 27, s. 12.

Indian undergoing imprisonment for crime not to receive share of annuity while imprisoned.

119. Whenever in this Act in which it is provided that the conviction shall take place on the evidence of one credible witness other than the informer or prosecutor, the informer or prosecutor shall, nevertheless, be allowed to give evidence. 44 V., c. 17, s. 13.

Informer may give evidence.

Evidence of unbelieving Indian may be received on his solemn affirmation.

120. Upon any inquest, or upon any inquiry into any matter involving a criminal charge, or upon the trial of any crime or offence whatsoever or by whomsoever committed, any court, judge, police or stipendiary magistrate, recorder, coroner, justice of the peace or Indian agent, may receive the evidence of any Indian or non-treaty Indian, who is destitute of the knowledge of God or of any fixed and clear belief in religion, or in a future state of rewards and punishments, without administering the usual form of oath to any such Indian or non-treaty Indian, as aforesaid, upon his solemn affirmation or declaration to tell the truth, the whole truth and nothing but the truth, or in such form as is approved by such court, judge, magistrate, recorder, coroner, justice of the peace or Indian agent, as most binding on the conscience of such Indian or non-treaty Indian. 43 V., c. 28, s. 85 ;—45 V., c. 30, s. 3, *part*.

Substance of evidence of Indian to be reduced to writing and signed by him and by judge, and interpreter.

121. In the case of any inquest, or upon any inquiry into any matter involving a criminal charge, or upon the trial of any crime or offence whatsoever, the substance of the evidence or information of any such Indian or non-treaty Indian, as aforesaid, shall be reduced to writing and signed by the Indian (by mark if necessary), giving the same, and verified by the signature or mark of the person acting as interpreter, if any, and by the signature of the judge, magistrate, recorder, coroner, justice of the peace, Indian agent or person before whom such evidence or information is given. 43 V., c. 28, s. 86 ;—45 V., c. 30, s. 3.

R.S.C. 1906, c.81, cont'd.

156. In any order, writ, warrant, summons and proceeding whatsoever made, issued or taken by the Superintendent General, or any officer or person by him deputed as aforesaid, or by any stipendiary magistrate, police magistrate, justice of the peace or Indian agent, it shall not be necessary to insert or express the name of the person or Indian summoned, arrested, distrained upon, imprisoned or otherwise proceeded against therein, except when the name of such person or Indian is truly given to or known by the Superintendent General, or such officer or person, or such stipendiary magistrate, police magistrate, justice of the peace or Indian agent.

Name of offender need not be entered in the warrant in certain cases.

2. If the name is not truly given to or known by him, he may name or describe the person or Indian by any part of the name of such person or Indian given to or known by him.

What description shall suffice.

3. If no part of the name is given to or known by him, he may describe the person or Indian proceeded against in any manner by which he may be identified.

Where name unknown.

4. All such proceedings containing or purporting to give the name or description of any such person or Indian, as aforesaid, shall *prima facie* be sufficient. R.S., c. 43, s. 28.

Prima facie sufficient.

157. All sheriffs, gaolers or peace officers, to whom any such process is directed by the Superintendent General, or by any officer or person by him deputed as aforesaid, or by any stipendiary magistrate, police magistrate, justice of the peace or Indian agent, and all other persons to whom such process is directed with their consent, shall obey the same; and all other officers shall, upon reasonable requisition so to do, assist in the execution thereof. R.S., c. 43, s. 29.

Execution of order of Superintendent General by sheriffs, gaolers, etc.

158. In all cases of encroachment upon, or of violation of trust respecting any special reserve, proceedings may be taken in the name of His Majesty, in any superior court, notwithstanding the legal title is not vested in His Majesty. R.S., c. 43, s. 36.

His Majesty's name to be used in certain cases.

Who may act as justice or two justices of the peace.

159. Any judge of a court, judge of sessions of the peace, recorder, police magistrate or stipendiary magistrate, shall have full power to do alone whatever is authorized by this Part to be done by a justice of the peace or by two justices of the peace. R.S., c. 43, s. 115.

Jurisdiction in city or town to give jurisdiction in surrounding county or district.

160. Any recorder, police magistrate or stipendiary magistrate, appointed for or having jurisdiction to act in any city or town shall, with respect to offences and matters under this Part, have and exercise jurisdiction over the whole county or union of counties or judicial district in which the city or town for which he has been appointed or in which he has jurisdiction is situate. R.S., c. 43, s. 116.

R.S.C. 1906, c.81, cont'd.

Indian agent
ex officio
justice of
the peace. **161.** Every Indian agent shall for all the purposes of this Act or of any other Act respecting Indians, and with respect to,—

(a) any offence against the provisions of this Act or any other Act respecting Indians; or,

(b) any offence against the provisions of the Criminal Code respecting the inciting of Indians to commit riotous acts; or,

(c) any offence by any Indian or non-treaty Indian against any of the provisions of those parts of the Criminal Code relating to vagrancy and offences against morality;

Jurisdiction. be *ex officio* a justice of the peace and have the power and authority of two justices of the peace, anywhere within the territorial limits of his jurisdiction as a justice, as defined in his appointment or otherwise defined by the Governor in Council, whether the Indian or non-treaty Indian charged with or in any way concerned in or affected by the offence, matter or thing to be tried, investigated or dealt with, is or is not within his ordinary jurisdiction, charge or supervision as an Indian agent. 58-59 V., c. 35, s. 7.

Special juris-
isdiction. **162.** In the provinces of Manitoba, British Columbia, Saskatchewan and Alberta, and in the Territories, every Indian agent shall, for all such purposes and with respect to any such offence, be *ex officio* a justice of the peace and have the power and authority of two justices of the peace, whether or not the territorial limits of his jurisdiction as a justice, as defined in his appointment or otherwise defined as aforesaid, extend to the place where he may have occasion to act as such justice or to exercise such power or authority, and whether the Indians charged with or in any way concerned in or affected by the offence, matter or thing, to be tried, investigated or otherwise dealt with, are or are not within his ordinary jurisdiction, charge or supervision as Indian agent. 58-59 V., c. 35, s. 7.

163. If any Indian is convicted of any crime punishable by imprisonment in a penitentiary or other place of confinement, the costs incurred in procuring such conviction, and in carrying out the various sentences recorded, may be defrayed by the Superintendent General, and paid out of any annuity or interest coming to such Indian, or to the band, as the case may be. R.S., c. 43, s. 118.

Indian im-
prisoned not
to receive an-
nuity while
imprisoned.

R.S.C. 1927, c.98, cont'd.

149. In all cases of encroachment upon, or of violation of trust respecting any special reserve, proceedings may be taken in the name of His Majesty, in any superior court, notwithstanding the legal title is not vested in His Majesty. R.S., c. 81, s. 158.

His Majesty's name to be used in certain cases.

150. Any judge of a court, judge of sessions of the peace, recorder, police magistrate or stipendiary magistrate, shall have full power to do alone whatever is authorized by this Part to be done by a justice of the peace or by two justices of the peace. R.S., c. 81, s. 159.

Who may act as justice or two justices of the peace.

151. Any recorder, police magistrate or stipendiary magistrate, appointed for or having jurisdiction to act in any city or town shall, with respect to offences and matters under this Part, have and exercise jurisdiction over the whole county or union of counties or judicial district in which the city or town for which he has been appointed or in which he has jurisdiction is situate. R.S., c. 81, s. 160.

Jurisdiction in city or town to give jurisdiction in surrounding county or district.

Indian agent *ex officio* justice of the peace.

152. Every Indian agent shall for all the purposes of this Act or of any other Act respecting Indians, and with respect to

- (a) any offence against the provisions of this Act or any other Act respecting Indians;
- (b) any offence against the provisions of the Criminal Code respecting the inciting of Indians to commit riotous acts; or
- (c) any offence by any Indian or non-treaty Indian against any of the provisions of those parts of the Criminal Code relating to vagrancy and offences against morality;

Jurisdiction. be *ex officio* a justice of the peace and have the power and authority of two justices of the peace, anywhere within the territorial limits of his jurisdiction as a justice, as defined in his appointment or otherwise defined by the Governor in Council, whether the Indian or non-treaty Indian charged with or in any way concerned in or affected by the offence, matter or thing to be tried, investigated or dealt with, is or is not within his ordinary jurisdiction, charge or supervision as an Indian agent. R.S., c. 81, s. 161.

Special jurisdiction.

153. In the provinces of Manitoba, British Columbia, Saskatchewan and Alberta, and in the Territories, every Indian agent shall, for all such purposes and with respect to any such offence, be *ex officio* a justice of the peace and have the power and authority of two justices of the peace, whether or not the territorial limits of his jurisdiction as a justice, as defined in his appointment or otherwise defined as aforesaid, extend to the place where he may have occasion to act as such justice or to exercise such power or authority, and whether the Indians charged with or in any way concerned in or affected by the offence, matter or thing, to be tried, investigated or otherwise dealt with, are or are not within his ordinary jurisdiction, charge or supervision as Indian agent. R.S., c. 81, s. 162.

Indian imprisoned not to receive annuity while imprisoned.

154. If any Indian is convicted of any crime punishable by imprisonment in a penitentiary or other place of confinement, the costs incurred in procuring such conviction, and in carrying out the various sentences recorded, may be defrayed by the Superintendent General, and paid out of any annuity or interest coming to such Indian, or to the band, as the case may be. R.S., c. 81, s. 163.

S.C. 1951, c.29, cont'd.

104. A police magistrate or a stipendiary magistrate shall have and may exercise, with respect to matters arising under this Act, jurisdiction over the whole county, union of counties or judicial district in which the city, town or other place for which he is appointed or in which he has jurisdiction under provincial laws is situated. Jurisdiction
of
magistrates.

Appointment
of justices.

105. The Governor in Council may appoint persons to be, for the purposes of this Act, justices of the peace and those persons shall have and may exercise the powers and authority of two justices of the peace with regard to

(a) offences under this Act,

R.S., c. 36.

(b) offences under the *Criminal Code* with respect to inciting Indians on reserves to commit riotous acts, and robbing of Indian graves, and

(c) any offence against the provisions of the *Criminal Code* relating to cruelty to animals, common assault, breaking and entering and vagrancy, where the offence is committed by an Indian or relates to the person or property of an Indian.

Indian agent
ex officio
a J.P.

106. Where, immediately prior to the coming into force of this Act, an Indian agent was *ex officio* a justice of the peace under the *Indian Act*, chapter ninety-eight of the Revised Statutes of Canada, 1927, he shall be deemed, for the purposes of this Act, to have been appointed under section one hundred and five, and he may exercise the powers and authority conferred by that section until his appointment is revoked by the Minister.

Commis-
sioners for
taking oaths

107. For the purposes of this Act or any matter relating to Indian affairs

(a) persons appointed by the Minister for the purpose,

(b) superintendents, and

(c) the Minister, Deputy Minister and the chief officer in charge of the branch of the Department relating to Indian affairs

are *ex officio* commissioners for the taking of oaths.

R.S.C. 1952, c.149, cont'd.

Appointment of justices. **105.** The Governor in Council may appoint persons to be, for the purposes of this Act, justices of the peace and those persons have and may exercise the powers and authority of two justices of the peace with regard to

- (a) offences under this Act,
- (b) offences under the *Criminal Code* with respect to inciting Indians on reserves to commit riotous acts, and robbing of Indian graves, and

25. Paragraph (b) of section 105 of the said Act is repealed.

S.C. 1956,
c.40, s.25.

- (c) any offence against the provisions of the *Criminal Code* relating to cruelty to animals, common assault, breaking and entering and vagrancy, where the offence is committed by an Indian or relates to the person or property of an Indian. 1951, c. 29, s. 105.

R.S.C. 1952,
c.149, s.105,
cont'd.

106. Where, immediately prior to the 4th day of September, 1951, an Indian agent was *ex officio* a justice of the peace under the *Indian Act*, chapter 98 of the Revised Statutes of Canada, 1927, he shall be deemed, for the purposes of this Act, to have been appointed under section 105, and he may exercise the powers and authority conferred by that section until his appointment is revoked by the Minister. 1951, c. 29, s. 106.

Indian agent
ex officio
a J.P.

107. For the purposes of this Act or any matter relating to Indian affairs

Commis-
sioners for
taking oaths.

- (a) persons appointed by the Minister for the purpose,
- (b) superintendents, and
- (c) the Minister, Deputy Minister and the chief officer in charge of the branch of the Department relating to Indian affairs

are *ex officio* commissioners for the taking of oaths. 1951, c. 29, s. 107.

ENFRANCHISEMENT.

108. (1) On the report of the Minister that an Indian has applied for enfranchisement and that in his opinion the Indian

Enfranchise-
ment of
Indian and
wife and
minor
children.

- (a) is of the full age of twenty-one years,
- (b) is capable of assuming the duties and responsibilities of citizenship, and
- (c) when enfranchised, will be capable of supporting himself and his dependants,

the Governor in Council may by order declare that the Indian and his wife and minor unmarried children are enfranchised.

(2) On the report of the Minister that an Indian woman married a person who is not an Indian, the Governor in Council may by order declare that the woman is enfranchised as of the date of her marriage.

Enfranchise-
ment of
married
women.

considers will best promote the purposes of the law under which the fine, penalty or forfeiture is imposed, or the administration of that law. R.S., c. 149, s. 102.

Description of
Indians in writs,
etc.

105. In any order, writ, warrant, summons or proceeding issued under this Act it is sufficient if the name of the person or Indian referred to therein is the name given to, or the name by which the person or Indian is known by, the person who issues the order, writ, warrant, summons or proceedings, and if no part of the name of the person is given to or known by the person issuing the order, writ, warrant, summons or proceedings, it is sufficient if the person or Indian is described in any manner by which he may be identified. R.S., c. 149, s. 103.

Jurisdiction of
magistrates

106. A police magistrate or a stipendiary magistrate has and may exercise, with respect to matters arising under this Act, jurisdiction over the whole county, union of counties or judicial district in which the city, town or other place for which he is appointed or in which he has jurisdiction under provincial laws is situated. R.S., c. 149, s. 104.

Appointment of
justices

107. The Governor in Council may appoint persons to be, for the purposes of this Act, justices of the peace and those persons have and may exercise the powers and authority of two justices of the peace with regard to

- (a) offences under this Act, and
- (b) any offence against the provisions of the *Criminal Code* relating to cruelty to animals, common assault, breaking and entering and vagrancy, where the offence is committed by an Indian or relates to the person or property of an Indian. R.S., c. 149, s. 105; 1956, c. 40, s. 25.

Commissioners
for taking oaths

108. For the purposes of this Act or any matter relating to Indian affairs

- (a) persons appointed by the Minister for the purpose,
 - (b) superintendents, and
 - (c) the Minister, Deputy Minister and the chief officer in charge of the branch of the Department relating to Indian affairs,
- are *ex officio* commissioners for the taking of oaths. R.S., c. 149, s. 107.

Appendix "B"

Court of Kahnawake Statistics

July 1986-December 1989

July '86 - June '87

July '87 - June '88

July '88 - June '89

74 Cases

146 Cases

140 Cases

83 Cases

	<u>'87 - '88</u>	<u>'88 - '89</u>	<u>'89 - '89</u>
/ Impaired Driving	46	62	34
Breathalyzer Refusal	16	12	4
Dangerous Driving	4	0	0
Peace Disturbance	27	16	8
Assaulting Individual	17	15	7
Property Damage	5	0	0
Trespassing	9	2	6
Break and Enter	1	0	0
Escape Custody	1	0	0
Assault/Obstruct Officer	9	12	5
Resisting Arrest	2	1	1
Dog Regulations	2	0	0
Selling Intoxicants	2	3	0
Intimidation	1	0	0
Judgement of Restitution to K.P.M.	1	0	0
Leaving Scene of Accident	1	2	0
Illegal Dumping	2	0	0
Theft	0	2	5
Discharge of Firearm	0	1	0
Taking Vehicle without Consent	0	1	0
Imprudent Action	0	1	0
Mischief	0	4	4
Possession of Narcotic	0	1	1
Use and/or handle of Firearm	0	1	0
Breach and Probation Orders	0	4	3
Ball Confiscation	0	0	5
	<hr/>	<hr/>	<hr/>
	74	140	83

Appendix "C"

Peacekeeper Statistics

July 1986-December 1989

Kahnawake PeaceKeeper Statistics
 Fiscal Years 1987, 1988, 1989
 Page Two

NATURE	1987	1988	1989	TOTAL
Sexual Assault	4	3	4	11
Summons/Subpoenas	165	190	488	843
Dog Bites	18	15	24	57
Family Disputes	42	64	66	172
Lost/Stolen Wallet	13	29	11	53
Fraud	3	1	11	15
Assist Soc. Serv.	1	8	10	19
Unpaid Taxi	7	5	7	19
Search Warrants	4	5	6	15
Counterfeit \$	0	9	2	11
Armed Robbery	6	3	1	10
Poss. Weapons	6	6	3	15
Disch. Firearm	9	13	11	33
Drugs	7	4	4	15
Tresspassing	6	7	15	28
Drowning	1	1	0	2
Indecent Expos.	0	2	0	2
Sale/Intoxicants	1	2	2	5
Accidents	540	583	618	1741
Fatal Accid.	4	6	10	20
Traffic Tickets	2747	2588	3225	8560
Ambulance Calls	228	230	227	685
Arson	3	7	3	13
Rec. Bodies	5	8	2	15
Log Entries	0	0	0	0
Disputes	9	12	27	48
Total	<u>3829</u>	<u>3801</u>	<u>4777</u>	<u>12407</u>
Grand Total	<u>5080</u>	<u>5361</u>	<u>6424</u>	<u>16865</u>

NATURE	1987	1988	1989
Assault	131	126	155
Assault P. Officer	4	12	18
Resist Arrest	8	12	11
Obstruct P. Officer	9	5	9
Impaired Driving	102	118	155
Refuse Breath Test	15	8	20
Peace Disturbance	40	38	57
Protect. Custody	40	35	50
Mischief	181	173	143
Property Damage	34	62	80
Illegal Dumping	10	9	10
Break & Entry	59	81	67
Theft	97	130	110
Rec. Property	9	19	10
Stolen Bikes	32	70	33
Rec. Stolen Bikes	63	104	56
Aband/Seize Veh.	150	177	261
Car Fire	22	27	6
House Fire	14	18	13
Threats	4	12	19
Harass. Phone Call	24	36	48
Missing Person	18	20	37
Warrants Exec.	99	131	140
Attempt. Suicide	5	10	11
Lost/Stolen Plate	38	42	49
Stolen Cars	12	15	19
Rec. Stolen Cars	12	38	24
Assist Police	19	32	36
Total	<u>1251</u>	<u>1560</u>	<u>1647</u>

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