# The DeLloyd Guth Visiting Lecture in Legal History: Writing Canadian Legal History: Origins\*

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## I. Introduction

In recent years I have been writing a legal history of Canada with two colleagues, Jim Phillips of the University of Toronto, and Blake Brown of St Mary's University in Halifax. We are planning to have the book come out in time for the 150th anniversary of Confederation in 2017. But Canada's legal history precedes Confederation by some centuries and includes the traditions of many First Nations as well as French, English, Scottish, and British inheritances. To throw out an impressive sounding number, we are dealing with half a millennium of Canadian legal history, from roughly 1500 to 2000.

How does one make sense of developments in Canada's legal past, stretching over such a long time span, and covering such a vast portion of the continent? To situate the project in space and time, consider that by the end of the seventeenth century, there were two English and two French colonies in northern North America, spreading from the continent's easternmost extremity at Cape Spear, Newfoundland to the western shore of Hudson's Bay, a distance of some 2500 km, and from the post at Churchill in the north to Fort Detroit, founded in 1701, to the south. French and English control

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over these areas was highly tenuous at the time - indeed, non-existent in vast parts of this area occupied by the First Nations. The European populations were very small (no more than 20,000 persons in all, about 16,000 of whom were in New France), but their engagement was nonetheless significant. In 1701, for example, the French had orchestrated the Great Peace of Montreal, an unprecedented colloquy attended by thirty First Nations stretching from the Great Lakes to the Gaspé and Maine, which essentially provided security for New France for the next fifty years by ensuring Iroquois neutrality.<sup>1</sup>

When compared to the British colonies that would become the United States, as a historian one can only envy their relative geographic compactness and the easily grasped east-to-west axis of their agricultural frontier. Early Canada, by contrast, had many frontiers, most of them non-agricultural, and featured various axes of movement along all points of the compass. But perhaps the most important axis of movement was not within the continent at all, but the transatlantic axis that connected Britain and France to their outposts on the North American continent. It is that axis that will be explored here, by considering the early constitutional law of Canada.

That constitutional law was of course wrapped up in imperial law, and the first vehicles of that law were the chartered enterprises through which early modern colonization was attempted. In all of the northern colonies of the seventeenth century that did not become part of the U.S. -Newfoundland, Rupert's Land, Acadia, and New France - company charters, proprietorships and royal commissions played a role in the colonizing process. just as they did in the colonies that became the United States.<sup>2</sup> However, these instruments have seldom been compared even to each other, much less to those of the more southerly colonies of the eastern seaboard. Nor has it been argued that these legal instruments played the key role assigned to them by U.S. historians in developing the constitutional consciousness of the thirteen colonies, leading ultimately to revolution and a decisive break with the mother country.3

Gilles Havard, The Great Peace of Montreal of 1701: French-Native Diplomacy in the Seventeenth Century, translated by Phyllis Aronoff & Howard Scott (Montreal: McGill-Queen's University Press, 2001).

<sup>2</sup> France referred to all the French possessions in including Acadia, but I will use it here to mean the colony in the St. Lawrence Valley (what contemporaries called Canada).

Christopher Tomlins, "Law's Empire: Chartering English Colonies on the American Mainland in the Seventeeth Century" in Diane Kirkby & Catherine Colborne, eds, Law,

In another paper in which I looked at these entities, I invoked the concept of a law of colonization, based on Christopher Tomlins' recent book Freedom Bound, 4 and compared the experience of chartered enterprises in the thirteen colonies with those of northern North America, principally with reference to the role of aboriginal peoples.<sup>5</sup> I concluded that very different demographics and resource endowments as between the agriculturallyoriented thirteen colonies and the trade-oriented northern North American colonies led to differently structured relationships with aboriginal peoples. This situation meant that the same instrument – the chartered enterprise or proprietorship – functioned quite differently in the two areas.

Here, I want to pick up a theme not fully explored in that paper: why ideas and structures of governance - constitutional law - developed so differently in northern North America compared to the thirteen colonies, when the initial legal instruments aimed at establishing those colonies were so similar, at least on the surface. It is trite to observe that the statutes structuring our constitution, the Constitution Acts 1867 and 1982, are and perhaps always will be British statutes, and that we are one of the very few developed countries to adopt a major constitutional reform in the late twentieth century without it being the main issue in an election campaign or the subject of a referendum. It is as if our constitution prior to 1982 was never truly ours. We had some input into it, and made it work as best we could, but it wasn't really produced by us. I want to argue that such has been the case for a very long time, that the roots of this state of affairs lie in the seventeenth century, and that they were only reinforced in subsequent periods.

While the constitutional law that I am going to discuss has long been superseded, the constitutional culture that it gave rise to shaped Canadian law, it will be argued, in fundamental ways. I will return to this theme at the end of this paper.

History, Colonialism: The Reach of Empire (Manchester: Manchester University Press, 2001).

Christopher Tomlins, Freedom Bound: Law, Labor, and Civil Identity in Colonizing English America, 1580-1865 (New York: Cambridge University Press, 2010) [Tomlins, Freedom Boundl.

Philip Girard, "Imperial Legacies: Chartered Enterprises in Northern British America" in Shaunnagh Dorsett & John McLaren, eds, Legal Histories of the British Empire: Laws, Engagements and Legacies (London: Routledge, forthcoming 2014).

A key instrument of the European legal repertoire during the early contact period was the chartered enterprise. I am going to use that term as a shorthand to cover a variety of legal forms from royal commissions to chartered companies to proprietorships. For my purposes the distinctions between these forms are not as important as what they share, which is that all of them are ways of extending European sovereignty in North America by means of delegated powers to private parties, thus insulating the Crown from direct financial risk. They were the instruments through which European states sought to exploit North America's resources, protect their investments, normalize their presence on the continent, and deal with each other and with native peoples, including sometimes via evangelization.

All of the charters had to set up governance structures of some kind, as the European monarchs did not yet have the financial or administrative resources that would allow them to rule directly through Crown agents. While recent scholarship no longer views these charters as the complete delegations of authority that used to be assumed, it is still the case that they delegated governing authority to private parties — adventurers in the language of the day — who were not themselves direct agents of the Crown, and whose accountability to the Crown was rather ill-defined. In the case of the thirteen colonies, this large delegation of authority created a socio-juridical space for the development of local identities oriented around the idea of chartered rights. These identities were powerfully reinforced by the idea of struggle against a common enemy, the aboriginal peoples. 8

I propose to look first at how these instruments shaped the experience of the thirteen colonies in the seventeenth century, then do the same for the four colonies that would go on to become part of Canada, and in my concluding section consider the impact of these differing experiences on the long-term legal and constitutional development of the two polities.

<sup>&</sup>lt;sup>6</sup> See generally Elizabeth Mancke, "Chartered Enterprises and the Evolution of the British Atlantic World" in Elizabeth Mancke & Carole Shammas, eds, *The Creation of the British Atlantic World* (Baltimore: Johns Hopkins University Press, 2005).

See especially Ken Macmillan, The Atlantic Imperial Constitution: Center and Periphery in the English Atlantic World (New York: Palgrave Macmillan, 2011).

<sup>8</sup> Tomlins, Freedom Bound, supra note 4 at c 3.

#### II. THE THIRTEEN COLONIES

In the thirteen colonies, attempts at settlement and governance took two main forms: corporations and proprietary colonies, which coexisted for some time until corporations fell out of favour after 1670.9 To describe them briefly, the corporate form provided for a governor and a local elected assembly, and usually included a clause that any locally made laws were not to be repugnant to the laws of England, as with the Virginia Company in 1612. Proprietary colonies such as Maryland, Carolina, New York, New Jersey and Pennsylvania were based on a quasi-feudal model where an inheritable overlordship was vested in a nobleman who could levy quitrents, convene a manorial court, and convey land by subinfeudation notwithstanding Quia Emptores, the statute of 1290 outlawing such practices. The only limitations on the proprietor's law-making power were the need to seek the approval of a dependent assembly of freemen and the repugnancy clause that we have already seen.

Both the corporate and the proprietary form proved to be unstable in different ways, but both ultimately led to the same place: more law-making power in the local population and less control by the Crown or its agents. In the case of the colonies founded as corporations, Mary Sarah Bilder argues in a recent review that,

the repeated failure of corporations for settlement and the development instead of self-authorized settlements with corporate governance practices created the perception that a government based on [such] practices could validate itself. 10

Virginia is a good example of this: the Virginia Company was dissolved in 1624 and Charles I proclaimed it a royal colony in 1625, with a governor appointed by him. But the assembly created under the old corporate charter continued to meet and pass laws, and finally the Crown had to recognize that the assembly could pass laws with the governor's assent as long as they were not repugnant to the laws of England. Bilder argues that the structure of governor, council, and assembly lost their association with the corporate form and "became instead [freestanding] symbols of self-governing authority and

<sup>9</sup> The following review relies largely on Mary Sarah Bilder, "English Settlement and Local Governance" in Michael Grossberg & Christopher Tomlins, eds. The Cambridge History of Law in America (New York: Cambridge University Press, 2011) vol 1 [Bilder, "English Settlement"]; and Tomlins, Freedom Bound, supra note 4.

Bilder, "English Settlement", supra note 9 at 74.

the foundation of American institutions."11 Thus Connecticut and Rhode Island kept their seventeenth-century corporate charters as their state constitutions after independence.

In the proprietary colonies the vast powers granted to the proprietor did not last long in the face of similar pressures for self-government. In fact the proprietors tended to face pressure from both top and bottom in the later seventeenth century: from the Crown which tried to resume some of the control it had delegated earlier in the century, and from the settlers, who assumed that they should have the right to govern themselves and were not content to be represented in a milguetoast assembly that was expected to rubber-stamp the proprietor's own legislative initiatives. By the end of the seventeenth century the assemblies had taken over lawmaking authority. subject only to the governor's veto and possible Crown disallowance. In some colonies the proprietor had a technical veto but it had declined rapidly in practical effect, just as the Crown's veto had declined in Britain itself.

What about supervision by the Crown? Prior to the restoration in 1660, the various charters made no formal provision for individual appeals or review of colonial laws. Private petitions to the king in council were the main way in which the Crown became seized of colonial matters. But in 1664, "the letters patent to the Duke of York for the first time explicitly reserved to the Crown the hearing of private appeals." <sup>12</sup> In 1676 the committee for trade and plantations (the Lords of Trade) was created out of the Privy Council, and it began both to hear private appeals from the colonies and to review colonial laws for conformity to the laws of England.

This form of control was more theoretical than real. After 1690, of some 8500 acts submitted for review, only some 5% were disallowed. And with regard to appeals, there were on average only two or three per year in the century before the Revolution. 13 In spite of the Crown's revocation and reissuance of numerous charters at the end of the seventeenth century, and the appearance of more formal control mechanisms over colonial law-making. the colonies were already effectively and robustly self-governing by the end of the century. Long before the American Revolution, the stage was set for a clash of wills between the mother country and those of its colonies that had

<sup>11</sup> Ibid.

<sup>12</sup> Ibid at 88.

Ibid at 89.

managed very largely to shape their own constitutions in practice even if they were still formally emanations of the British Crown.

#### III. THE FOUR COLONIES OF NORTHERN NORTH AMERICA

Let us turn now to the four colonies of northern North America: Rupert's Land, Newfoundland, Acadia and New France. All of them had seventeenth century charters of one kind or another. What was the experience with these? Newfoundland had a plethora of chartered settlements in the seventeenth century, which are not at all well known. They are examined in fascinating detail in Peter Pope's book, Fish into Wine, although it is much more concerned with social and economic history than legal history. 14 Skipping over some early chartered companies that did not succeed, we will go directly to Sir George Calvert's 1623 charter to the province of Avalon, covering most of what is today the Avalon Peninsula of Newfoundland. 15 Calvert was secretary of state to James I and was thus well placed to secure such a grant. James also made him an Irish peer, naming him the first Lord Baltimore, the name by which he is more commonly known today since he was later granted the province of Maryland.

Calvert was granted Avalon in a feudal tenure, "in Capite by Knights service," and was given the palatine jurisdiction of the Bishop of Durham, which is to say the most extensive jurisdiction granted to any subject next to the king himself. As Christopher Tomlins observes, in Britain itself this type of jurisdiction was limited to Ireland and to marchlands; it was "designed for remote and contested regions [so as to] allow authorities to exercise effective regional sovereignty." <sup>16</sup> Pursuant to this authority Calvert could appoint such judges and magistrates as he liked. Further, he was granted the power to make laws on any subject whatsoever, provided they were not contrary to reason or repugnant to the laws of England, "with the Advice, assent and approbacon of

<sup>14</sup> Peter Pope, Fish into Wine: The Newfoundland Plantation in the Seventeenth Century (Chapel Hill: University of North Carolina Press, 2005). Earlier scholarship is also helpful. See e.g. Gillian T Cell, English Enterprise in Newfoundland 1577-1660 (Toronto: University of Toronto Press, 1969); Gillian T Cell, ed, Newfoundland Discovered: English Attempts at Colonisation, 1610-1630 (London: Hakluyt Society, 1981).

The text of the charter can be found in Keith Matthews, Collection and Commentary on the Constitutional Laws of Seventeenth Century Newfoundland (St John's, NL: Memorial University of Newfoundland, 1975) at 39-63.

Tomlins, Freedom Bound, supra note 4 at 171.

the Freeholders of the said Province or the greater part of them," whom Calvert was to "lalssemble in such sort, and forme as to him shall seeme best." 17 And in case of urgent necessity, Calvert could dispense even with this approbation and make laws on his own as long as they were published. Clearly this assembly was to be largely dependent and not to interfere with the extensive powers granted to this feudal magnate, powers which even extended to "Takeing away Member or Life" if the "quality of the Offence" required it. 18

Calvert had a large manor house built for himself, his family and retinue at Ferryland harbour, the foundations of which still survive. 19 Calvert spent the winter of 1628-29 there and, after observing that winter did not lift until May, decided that was enough of that, and left to pursue his colonizing initiatives in the gentler climate of Chesapeake Bay.

It may be observed in passing that Calvert implemented an early experiment in religious pluralism in Avalon. Calvert was from an old Catholic family that had conformed to Anglicanism under pressure in the sixteenth century, and after he resigned as secretary of state he converted to Catholicism. He brought both Protestant and Catholic settlers to Ferryland and proclaimed a policy of religious toleration; as his manor house was the only structure in the settlement large enough for Sunday worship, services for Protestants were carried on in one part and for Catholics in another, much to the chagrin of the resident Anglican clergyman. The one house, two solitudes, plan would become a familiar motif in Canadian history.

Although Avalon had been granted to Calvert and his heirs "forever," in this case that proved to be only fourteen years. In 1637 the Privy Council declared that the Calvert's had "abandoned" Avalon and granted a new charter to Sir David Kirke.<sup>20</sup> The significance of Calvert's patent, is that, according to Christopher Tomlins, it became the model for future charters, making "palatine authority and institutions key features of the evolving design of North American colonization."21 But why, if that was so, did the Newfoundland experience turn out so differently from those of the more

<sup>17</sup> Matthews, supra note 15 at 46.

<sup>18</sup> Ibid at 47.

<sup>19</sup> extensive historical and archaeological information on Ferryland, <www.colonyofavalon.ca> (accessed 14 January 2013).

<sup>20</sup> The text can be found in Matthews, supra note 15 at 82-116.

<sup>21</sup> Tomlins, Freedom Bound, supra note 4 at 171.

southerly colonies? There, as we have seen, in spite of the awesome powers granted to the proprietaries and the dependent nature of the assemblies, in all cases the roles reversed over the course of the seventeenth century: the proprietor became essentially a constitutional monarch and the real power gravitated to the assembly. To understand why this did not happen in Newfoundland we must turn to David Kirke and his family, who were synonymous with governance on the island for the rest of the seventeenth century.

The Kirke patent expanded Calvert's territorial authority from Avalon to "that whole continent Island and Region ... commonly knowne by the name of Newfoundland," and named him the "true and absolute Lord and Proprietor" of it. 22 Like Calvert's patent it was granted in knight's service but unlike Calvert's, it did not grant palatine authority. Kirke was empowered to make laws with the assent of the freeholders and to appoint magistrates, but his authority was significantly limited in one very important respect. He was specifically prohibited from exercising any authority over the migrant fishers. and his patent forbade the "inhabitants" from taking up the best fishing places in advance of the arrival of the migrant ships. 23

The big story of seventeenth-century Newfoundland is the conflict between the migratory fishery, which had been prosecuted from the sixteenth century from the west country ports of England, and the nascent resident fishery that Calvert, Kirke and others were trying to create with their settlement plans. 24 The west country merchants were vehemently opposed to a resident fishery, and their voices did not go unheard at the Privy Council. It declared that the authority of magnates such as Calvert and Kirke did not extend to the migratory fishers, who were subject only to the king's direct rule. In 1634, between Calvert's departure and Kirke's arrival, the Privy Council promulgated the Western Charter, which vigorously protected the rights of the migrant fishers, and which Kirke had to accept as a fait accombli.25

<sup>22</sup> Matthews, supra note 15 at 85-86.

<sup>23</sup> Ibid at 88, 93. The prohibition was asserted and removed several times in the seventeenth century. Pope, supra note 14 at 194-95 follows the flip-flopping on this issue.

<sup>24</sup> Sean T Cadigan, Newfoundland and Labrador: A History (Toronto: University of Toronto Press, 2009).

<sup>25</sup> The text of the Charter can be found in Matthews, supra note 15 at 71-75.

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David Kirke moved into the Calverts' manor house and in fact exercised a manorial jurisdiction around Ferryland for some time, though unfortunately the records have not survived. <sup>26</sup> But the main reasons why Newfoundland did not follow the trajectory of the more southerly colonies are twofold: the population and the resource — too few people and too many cod. Population growth was too slow, such that no assembly of freeholders who might challenge Kirke as proprietor was ever called. The eastern shore of the Avalon Peninsula had about 1700 inhabitants in the 1670s. But growth was slow in large part because Newfoundland's main resource, cod, could be effectively exploited with a mobile, migratory labour force, unlike the agricultural colonies to the south. And although cod was a hugely valuable resource, the capital from its exploitation stayed in England, in the hands of those west country merchants, unlike the capital generated by American agriculture, much of which stayed in the colonies.

This slow growth left the colony vulnerable to metropolitan manoeuvrings as the strength of the west country lobby waxed and waned. In 1675, the Privy Council instructed the naval commodore Sir John Berry to remove all the permanent inhabitants of Newfoundland. On arrival, Berry formed the view that this was neither just nor practical, and ignored his orders. This did not stop the idea from being seriously mooted until the 1720s. After peninsular Nova Scotia was ceded to Britain by the Treaty of Utrecht in 1713, the British government seriously considered transferring all the inhabitants of Newfoundland to its new possession, where the land was much more propitious for agriculture. When that idea was scrapped, the British government finally decided to endow the island with a minimal year-round governmental infrastructure to supplement the system of seasonal

<sup>&</sup>lt;sup>26</sup> Pope, supra note 14 at 255-57.

<sup>&</sup>lt;sup>27</sup> Ibid at 194-95.

Jerry Bannister, *The Rule of the Admirals: Law, Custom, and Naval Government in Newfoundland,* 1699-1832 (Toronto: University of Toronto Press, 2003) at 42-43 asserts that "the mass deportation of English and Irish settlers [numbering some 3000 at that point] was never a feasible option." If the British were able to deport some 7000 Acadians from Nova Scotia in 1755, however, it is unclear why they could not remove less than half that number from Newfoundland to another British possession in 1720. Such a move may have been economically unwise (as was the deportation of the Acadians in the short term) but it was clearly possible.

naval governance that had grown up since the 1680s, appointing the first justices of the peace in 1720.29

The combined effect of slow population growth and the power of metropolitan merchants over the Newfoundland cod economy ensured that the main axis governing the colony's legal and political development was the Atlantic one, between London and St. John's or Ferryland. Jerry Bannister has recently argued that the system of naval governance found in Newfoundland in the eighteenth century was effective and suitable for local circumstances. That may well be; the main point being made here is that the colony's constitution, such as it was, depended on London and was not generated locally.

When we turn to the other seventeenth-century English colony, Rupert's Land, granted in 1670 to the Hudson's Bay Company (HBC), it is even more obvious that the likelihood of its charter serving as a locus for the development of an indigenous constitutional identity was very slim. Even though it is on the late end of the chartered enterprise model of colonization, in some ways the HBC looks backwards, to the earliest colonizing companies whose headquarters remained in London. As is well known, the main lawmaking power was given to the governor and an executive committee of the Company in London. The King purported to grant the entire territory of Rupert's Land to the Company in free and common socage, making them "absolute Lordes and Proprietors of the same Territory, lymittes and places aforesaid," echoing the language of the Kirke patent of 1637. 30 It seems clear that settlement as such was not envisaged; when the Company adopted a policy after 1684 that no Company man should bring his British wife or child to the shores of Hudson's Bay, 31 and when Company employees were obliged to return to Britain at the end of their contracts, it is difficult to see how any kind of settlement could get off the ground. Estimates are that by 1700 there were no more than 100 men overwintering on the Bay.

Bannister, ibid, explores the system of naval governance as it developed after King William's Act of 1699, but Pope, supra note 14 at 309-10, provides some evidence of its origins in the 1680s.

The Charter can be found in Charters, Statutes, Orders in Council etc. relating to the Hudson's Bay Company (London: Hudson's Bay Company, 1960).

<sup>31</sup> Heather Rollason Driscoll, "'A Most Important Chain of Connection': Marriage in the Hudson's Bay Company" in Theodore Binnema, Gerhard J Ens & RC Macleod, eds, From Rupert's Land to Canada (Edmonton: University of Alberta Press, 2001) at 81.

The HBC demonstrates the protean nature of the entities that could be created by royal charter. While first and foremost a commercial entity, it has also been described as a 'company-state', exercising a form of sovereignty over not just its own employees - mainly indentured servants - but over the "home guard Indians" who lived near the principal forts. 32 Unlike the Calvert and Kirke patents, however, which gave the freeholders of Avalon at least a notional share in the making of laws for the settlement, the HBC charter reserved a law-making power to the governor and committee in London, as we have seen, while granting to the Bayside governors only the "power to judge all persons belonging to the said Governor and Company or that shall live under them in all Causes whether Civil or Criminall according to the Lawes of this Kingdome."33 When settlement was undertaken in 1811 at the initiative of Lord Selkirk, it was not done pursuant to a new chartered entity. but under the aegis of the HBC, which had no experience with agricultural colonization and continued to rule from London through a resident governor. And we all know how that turned out.

When we turn to the French colonies, corporate enterprises modelled largely on English and Dutch examples also became the norm in the second quarter of the seventeenth century. This shift occurred after a period when the usual mode of extending sovereignty was to do so through commissioning a lieutenant with extensive powers of rule, as in Henri IV's commission to Pierre du Gua to Acadia in 1603. Du Gua was given the power to adopt such laws and ordinances as he saw fit, subject only to a repugnancy clause, with the advice of "gens prudens et capable", but there was no suggestion that these advisors should come from any kind of assembly. In 1627 the Crown chartered the Company of One Hundred Associates or Company of New France (CNF), which was given the entire territory of New France and Acadia as a seigneury, a permanent monopoly over the fur trade, and the responsibility of bringing 4000 colonists to New France in the fifteen years

Edward Kavanagh, "A Company with Sovereignty and Subjects of Its Own? The Case of the Hudson's Bay Company, 1670-1763" (2011) 26 CJLS 25.

See generally Hamar Foster, "Long Distance Justice: The Criminal Jurisdiction of Canadian Courts West of the Canadas" (1990) 34 Am J Legal Hist 1.

<sup>34</sup> H Biggar, The Early Trading Companies of New France (Toronto: University of Toronto Librarty, 1901).

The commission was published in Commissions du roy & de monseigneur l'Admiral, au Sieur de Monts, pour l'habitation és terres de Lacadie Canada, & autres endroits en la nouvelle France (Paris : [P Patisson], 1605).

after its incorporation.<sup>36</sup> Like the Hudson's Bay Company, the CNF retained its headquarters in France and acted locally through agents, though it also could and did create sub-seigneuries that provided a kind of local governance. Unlike the situation with the HBC, however, the French Crown continued to exercise a parallel authority over New France both directly and indirectly until it asked the company to surrender its charter in 1663 and assumed complete authority over the colony.

It is clear that the principal lines of governmental authority flowed from France across the Atlantic, such that it is difficult to speak of a domestic constitution, but it is worth noting two counter-examples, one in New France and one in Acadia. These examples show that the French in the New World were not incapable of, or uninterested in, participating in their own governance when the circumstances permitted. The first example relates to the reconfiguration of authority within the Company of New France in 1645. In that year the Company devolved its fur trade monopoly and most of its responsibilities on a body called the Communauté des Habitants that bears some affinity to what we would call a cooperative. This entity agreed to pay seigneurial dues in the amount of 1000 pounds worth of beaver skins annually, to maintain the colony's ecclesiastical, military and governmental establishments, and to bring out twenty settlers per year to New France. As noted by Helen Dewar, the Communauté was partly modelled on a similar institution in provincial France.<sup>37</sup> All heads of household, including widows, were entitled to belong, and

the communauté took charge of goods or property collectively owned, such as common pasture, maintained local order, managed the collection of various taxes owed to the Crown, and was responsible for the community's relationship with the seigneur.38

Elections were held in order to establish who would be in charge of the communauté, although in New France as in old France it tended to be local notables who dominated these elections and offices. While the Communauté des Habitants was a combination of communauté de ville, subsidiary trading

<sup>36</sup> The articles of incorporation are reproduced in Collection de manuscrits contenant lettres, mémoires, et autres documents historiques relatifs à la Nouvelle-France, vol I (Quebec: A Coté, 1883) at 62-70.

<sup>37</sup> "'Y establir nostre auctorité': Assertions of Imperial Sovereignty through Proprietorships and Chartered Companies in New France, 1598-1663" (PhD dissertation, University of Toronto, 2012).

<sup>38</sup> Ibid at 252-53.

company, and seigneurial sub-tenant, the striking thing about it is that it did bring the governance of New France to this side of the Atlantic for the middle decades of the seventeenth century, as only those resident in New France were eligible to be members. It was dissolved, however, with no apparent backlash, when the Crown took over direct responsibility for the colony in 1663. Again, the small population and dependence on a single resource made it difficult for the colony's inhabitants to chart their own destiny in the face of imperial designs.

The other example comes from Acadia. Early Acadia relied primarily on its seigneurs for governance, which was not implausible given the small number of inhabitants - several hundred at most. But in 1654 Major Robert Sedgwick of Boston captured Acadia, and England was in nominal control of the colony until 1670. Sedgwick granted the inhabitants freedom of religion and created an inhabitants' council to administer the colony more or less along the lines of the New England tradition of self-government. An English governor was appointed, but he lived in Boston and did not wish to trouble himself with local affairs. 39 When French officials returned in 1670 they were not pleased with the new tendency of self-government among the Acadians, with one governor observing that

the inhabitants were reluctant to obey orders without first having a full discussion among themselves, something he attributed to 'a certain English and Parliamentary inclination' which he thought came from the prolonged contact with New England. 40

With the return of the French, the Acadians tended to vote with their feet, to move further up the Bay of Fundy and away from areas under seigneurial and governmental control, where they could in essence govern themselves. But with virtually no immigration from France, their numbers still remained too small to truly subtract themselves from French authority and establish an indigenous constitution.

### IV. CONCLUSION

This review demonstrates that in spite of the use of similar legal instruments of colonization in northern and eastern North America, already by 1700 there had emerged two quite different sets of colonies: those that

Ibid at 68.

<sup>39</sup> John Mack Faragher, A Great and Noble Scheme: The Tragic Story of the Expulsion of the French Acadians from Their American Homeland (New York: WW Norton & Co, 2005) at 58-65.

were already self-governing in substance, and those for whom the real locus of authority was still in the metropole. This legal-political fault line tracks a geographic and resource fault line between essentially non-agricultural colonies dependent on external capital with slow population growth, and those agricultural colonies that grew rapidly and accumulated their own capital, favouring local autonomy. The ties of empire grew weaker and weaker as the generation of local capital allowed settlers to make their own decisions about how they wanted to organize their affairs.

Things did not stay forever in the seventeenth century mode of course. The colonies of British North America went on to achieve representative and then responsible government, and to obtain a relatively high degree of autonomy over their internal affairs. But responsible government was a political, as opposed to a legal, achievement. This is most evident in the fact that responsible government is almost entirely a matter of convention: our written constitution says almost nothing about it, leading to all kinds of confusion, as we found out in 2008 with the coalition fiasco. The formal constitutions of the pre-Confederation colonies remained either British statutes, as with the Acts of 1791 and 1840, or were contained in the governor's commissions as in the Maritimes and Newfoundland. After 1867 new provinces were provided with constitutions by federal statute, but even then an imperial act had to be passed in 1871 to confirm that the federal government had the power to pass the Manitoba Act<sup>42</sup> and to pass similar laws with respect to future provinces. And while most people have some idea that Canada has a constitution, they wouldn't know a provincial constitution if they tripped over it in the street. Outside, possibly, Quebec, the idea that provinces have constitutions, as opposed to simply a list of legislative powers, is simply not one that has ever taken root in Canada.

In other words, we got used to the idea that constitutions were somebody else's business. They were not things that we chose for ourselves or perhaps even should choose for ourselves. They were things that constitutional technicians of some kind would deal with if and when it became necessary to

A somewhat similar argument with regard to the development of political institutions in North America is made in Stephen Hornby, *British Atlantic, American Frontier: Spaces of Power in Early Modern British America* (Hanover: University of New England Press, 2005).

Manitoba Act, 1870 (An Act to amend and continue the Act 32-33 Victoria chapter 3; and to establish and provide for the Government of the Province of Manitoba, 1870, (33 Vict), c 3 (Can)).

do so. For a long time these people lived in Britain or France, then eventually they became our own politicians, lawyers and publicists, but remained oddly disconnected from the people. In the 1980 election, Trudeau was elected on a vague promise of constitutional reform, but nothing like what ultimately was produced in 1982. Newspaper opinion at this time was almost unanimously against the idea that there should be a referendum on the patriation package. The experience with referenda in Canada, said the editorial writers, had been negative and divisive, referencing those on conscription in the first and second world wars.<sup>43</sup>

This odd constitutional tradition of ours may go a long way to explaining, if not justifying, the famous deference of Canadians to authority. If our constitution does not really belong to us but to others, if we do not have the power to alter it by expressions of our sovereign will, then we just have to accept it. And the weakness of our constitutional tradition helps to explain the weakness of our rights tradition: it is no secret that Canada, in spite of a historic commitment to the idea of "British justice," long had a relatively weak culture of individual rights. He but that at least has had some positive spinoff in the end. A historically weak culture of individual rights has helped to create a constitutional culture where we are suspicious of absolute rights and more receptive to the balancing of rights, a model that is arguably more appropriate for highly interconnected and interdependent societies being rapidly reshaped by technological change. Balancing is not glamorous, but it is perhaps the most important legacy of the Canadian constitutional tradition to the modern world.

Philip Girard, "The Patriation Reference of 1981: Context, Impact, Legacy" in Stephen Patten & Lois Harder, eds, Patriation and its Aftermath (Vancouver: UBC Press, forthcoming 2014).

See generally Philip Girard, "Liberty, Order, and Pluralism: The Canadian Experience" in Jack P Greene, ed, Exclusionary Empire: English Liberty Overseas, 1600-1900 (New York: Cambridge University Press, 2010).