

# Joseph Brant vs. Peter Russell: A Re-examination of the Six Nations' Land Transactions in the Grand River Valley

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*Some historians have not sufficiently appreciated the importance of the legal context to understanding the Six Nations' dispute with the colonial Upper Canadian government over land transactions in the Grand River Valley. Viewed with an emphasis on the right of restricted use accorded Amerindians in the Proclamation of 1763, the historical appraisal of both major actors must be reconsidered. Peter Russell, faced with the threat posed by Six Nations' agitation for a clear title he could not provide, emerges not as the weak-willed administrator of earlier histories, but as a skilled negotiator who diffused a heated situation, reducing it to a bureaucratic exercise which ultimately ended in his favour. Joseph Brant's tenacious, if ill-informed, pursuit of an expanded title for the Six Nations renders suspect the allegations of corruption and embezzlement which have been levelled at him.*

*Des historiens n'ont pas tenu compte suffisamment de l'importance du contexte légal dans lequel s'inscrivait le conflit opposant les Six-Nations au gouvernement colonial du Haut-Canada sur les transactions dans la vallée de la rivière Grand pour comprendre cette dispute. Dans l'optique du droit à l'usage restreint consenti aux Amérindiens dans la Proclamation de 1763, il faut revoir l'évaluation historique que l'on a faite des deux grands acteurs. Devant la menace posée par l'agitation des Six-Nations pour l'obtention d'un titre clair qu'il ne pouvait leur accorder, Peter Russell apparaît non pas comme un administrateur mou, mais plutôt comme un négociateur habile ayant su neutraliser une situation délicate, la réduisant à une exercice bureaucratique qui tourna en sa faveur. La quête obstinée, bien que mal informée, de Joseph Brant pour l'obtention d'un titre élargi pour les Six-Nations rend suspectes les allégations de corruption et de malversation portées à son endroit.*

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SOME HISTORIANS HAVE NOT been kind in their treatment of Six Nations' Chief Joseph Brant and Upper Canada Administrator Peter Russell. Brant has been depicted as an opportunist who in 1797 extorted favourable changes in land policy from a vulnerable colonial administration.<sup>1</sup> It has also been suggested that he may have embezzled from the Six Nations for his own benefit.<sup>2</sup> Russell "has been blamed for everything up to and including the Rebellion of 1837",<sup>3</sup> even though he guided the province for only three years (1796–1799) and died in 1808. He has also been depicted as the weak, ineffectual leader of Upper Canada who yielded to Brant's intimidation tactics in 1797.<sup>4</sup> But the historiography of the dealings between Brant and Russell is based on a misconception of the legal context of their negotiations. Consequently, their actions have been misunderstood. Once the legal context is clarified, Russell emerges as a highly skilled negotiator and administrator who, largely through his own efforts and in difficult circumstances, ensured that imperial land policy was consistently observed. Brant emerges as the deceived innocent who did not appreciate the principles or subtleties of British law. Moreover, Brant's dedication to the Six Nations' land quest was so great as to prompt British and colonial officials to institute an elaborate scheme of espionage and conspiracy to undermine his authority and effectiveness as an Indian leader.

Brant's efforts to obtain for the Six Nations clear title to the Grand River lands they occupied involved many colonial and British officials, beginning in 1776 when Brant met with King George III in London. Between 1796 and 1798 Brant sought permission from Russell to sell six large blocks of Indian lands along the Grand River to white speculators. This sale was the climax of 20 years of struggle by Brant and the Six Nations to find a permanent home. Brant believed that confirmation of these sales by the colonial administration would amount to legal recognition of the Indians' right to sell lands, and therefore of their absolute ownership of other unsold tracts. Brant himself initially thought he had succeeded, but Russell structured the transactions in such a way that they did not amount to a ratification. This deception was not particularly underhanded, as it was the only sort of transaction permitted by British law and policy since at least 1763. Indeed, there was nothing unusual about it except in the eyes of Brant and those historians

1 Charles M. Johnston, "Joseph Brant, the Grand River Lands, and the Northwest Crisis", *Ontario History*, vol. 55, no. 4 (December 1963), pp. 267–282; Isabel Thompson Kelsay, *Joseph Brant, 1743–1807* (Syracuse: Syracuse University Press, 1984), p. 587; Peter A. Cumming and Neil H. Mickenberg, *Native Rights in Canada*, 2nd ed. (Toronto: General Publishing, 1972), p. 111.

2 Johnston, "Joseph Brant, the Grand River Lands, and the Northwest Crisis", p. 270.

3 Edith G. Firth, "The Administration of Peter Russell, 1796–1799", *Ontario History*, vol. 48 (1956), p. 178.

4 Johnston, "Joseph Brant, the Grand River Lands, and the Northwest Crisis", p. 281; Harvey Chalmers and Ethel Brant Monture, *Joseph Brant: Mohawk* (Toronto: Ryerson Press, 1955), pp. 300–315.

who have not carefully considered British law. British officials were in no hurry to explain to Brant that his tribes would never be allowed to own land, as one informant “thought it more advisable to damp his hopes by degrees, than at once to extinguish them”.<sup>5</sup> Indeed, when Brant died in 1807, he still hoped that the Six Nations would be given clear title to the Grand River lands they had been allowed to occupy in 1784.

A legal analysis helps resolve the ambiguities and inconsistencies which mar the current understanding of the Six Nations’ land transactions. That the existing historiography of the Six Nations’ lands is inadequate is widely conceded, with one observer writing, “The story of the dealings in Grand River lands is a murky one.”<sup>6</sup> The many historiographical errors which emerge should make two conclusions clear: first, the popular view of the Six Nations’ land transactions needs to be changed in light of these new legal facts; secondly, historical work generally stands to benefit from a stronger grasp, on the part of historians, of the law pertaining to the topics they study.

Other writers have noticed this legal vacuum in the work of Canadian historians. Donald J. Bourgeois writes, “The role of the courts in Canadian society is often misunderstood or ignored by Canadians in general and historians in particular.” He attributes this neglect of the legal system to the belief of non-lawyers that “legal language is archaic” and that “the concepts of law are beyond the comprehension and manipulation of ordinary people”. He believes historians must pay attention to law because “Law is at the root of any and all societies.”<sup>7</sup>

Bruce A. Clark notes that aboriginal historiography in Canada is overwhelmingly “practice” oriented.<sup>8</sup> Historians have reconstructed the “real world” of the past by examining political and administrative documents which were created at the time. There is an inherent problem with this approach: “Practice merely describes how and to what extent the law has been observed and respected in the field. The evidence as to whether the practice was either to ignore or to follow the strictures of the law cannot of itself be conclusive as to what the law is.” By emphasizing practice, historians “run the risk either of ignoring the law entirely or of confusing policy for law”. Historians have based their work on

5 Robt. Liston to Lord Grenville, April 4, 1798, in E. A. Cruikshank, ed., *The Correspondence of the Honourable Peter Russell* (Toronto: Ontario Historical Society, 1932–1935), vol. 2, p. 168. A. F. Hunter co-edited volume 2 of this set, which is hereafter referred to as *RP*, as an abbreviation for “Russell Papers”.

6 Bruce G. Wilson, “William Dickson”, *Dictionary of Canadian Biography*, vol. 7 (Toronto: University of Toronto Press, 1988), p. 250.

7 Donald J. Bourgeois, “The Six Nations: A Neglected Aspect of Canadian Legal History”, *Canadian Journal of Native Studies*, vol. 6, no. 2 (1986), p. 254.

8 Bruce A. Clark, *Indian Title in Canada* (Toronto, Calgary, Vancouver: Carswell, 1987), pp. 1–3.

authorities which have no legislative or juridical jurisdiction to make or to change the law. Not missionaries, fur traders, administrators of Indian affairs, or even the colonial governors had any inherent jurisdiction in that regard. Rather, the requisite jurisdiction at all material times has been vested in specific imperial authorities, latterly in the Dominion Parliament, in certain institutions duly made subordinate to these two and vested with their principals' delegated jurisdiction.<sup>9</sup>

Clark suggests that the legal sources which should be consulted include the Royal Commissions and Instructions to colonial governors, as well as proclamations and statutes. These sources all have relevance in a study of Brant, Russell, and the Six Nations' land transactions.

### **The Settling of the Six Nations in Upper Canada**

The Mohawk, Oneida, Onondaga, Cayuga, and Seneca Indians were independent Iroquois nations which in about 1459 formed a Confederacy called the Five Nations while living in the Finger Lakes region of New York State. In about 1715 the Tuscarora Indians joined the Confederacy to form the Six Nations.<sup>10</sup> When the American Revolutionary War began in 1775, most of the Confederacy sided with the British. Brant had travelled to London later that year and in 1776 received King George's oral assurance that the Six Nations' military support would be rewarded by the return of their lands after the war. Brant obtained a further assurance in Montreal from British General Frederick Haldimand that any property lost by the Six Nations during the war would be replaced by the King.<sup>11</sup> In 1783 when the war was lost, the British agreed in the Treaty of Paris to award the Finger Lakes lands to the Americans, causing the Six Nations to feel betrayed.<sup>12</sup> Brant then approached Haldimand, by now the Governor of Quebec, with a view to receiving compensatory land in Canada. King George authorized Haldimand to allot lands to the Six Nations for them to occupy.<sup>13</sup> To this end,

<sup>9</sup> *Ibid.*, p. 3.

<sup>10</sup> Mabel Dunham, *Grand River* (Toronto: McClelland & Stewart, 1945), pp. 3–5; Edward Marion Chadwick, *The People of the Longhouse* (Toronto: The Church of England Publishing Co., 1897), pp. 13–18. Some modern historians contest the accuracy of these dates, but most agree that the Five Nations Confederacy dates from the late fifteenth century and that the Tuscarora joined between 1715 and 1722.

<sup>11</sup> Helen Caister Robinson, *Joseph Brant: A Man for His People* (Toronto: Longmans, 1971), pp. 63, 95, 98. Sir Guy Carleton, who was the Governor of Quebec before the American Revolution, also promised the Six Nations "an equivalent piece of land somewhere if the British failed to win the war". See Chalmers and Monture, *Joseph Brant: Mohawk*, p. 8. Carleton later became Lord Dorchester.

<sup>12</sup> Gerald Craig, *Upper Canada: The Formative Years 1784–1841* (Toronto: McClelland & Stewart, 1963), p. 4. Apparently King George did not even ask the Americans for any special provision regarding Indian lands during treaty negotiations. See Chalmers and Monture, *Joseph Brant: Mohawk*, p. 28.

<sup>13</sup> Lord North to Haldimand, August 8, 1783, in Charles M. Johnston, *The Valley of the Six Nations* (Toronto: The Champlain Society, 1964), p. 42.

Haldimand arranged for the purchase of a large tract of land in Southern Ontario from the Mississauga Indians. On October 25, 1784, Haldimand conveyed a portion of this large tract to the Six Nations. Specifically, he permitted them “to take Possession of, & Settle upon” the land lying six miles on either side of the entire length of the Grand River.<sup>14</sup>

The wording Haldimand used was significant in that Brant would spend the rest of his life trying to have what was clearly a limited right of possession interpreted as a greater estate. At times Brant seems to have sought an unencumbered “fee simple” ownership, while at others he seems to have sought absolute sovereignty as a nation separate from Britain. Under King George’s Proclamation of 1763, however, Haldimand had no power to convey anything other than occupation rights to the Six Nations. The Proclamation specified that Indians could occupy land, but not own any, and that they could sell their right of occupation, but only to the Crown. It was this right of occupation, in effect, which the Mississauga Indians had sold to the Crown in 1784.

Thus, when the Six Nations settled in the Grand River valley, they were in theory able to remain there forever. The right of occupation given by Haldimand was indefinite in duration, but the Six Nations were soon motivated to sell portions of their land out of necessity. The large numbers of white settlers around the Six Nations had diminished the supply of game for hunting. The death of many Six Nations warriors during the Revolutionary War had left widows and children “destitute of any support”.<sup>15</sup> Further, the annual “bounty” of supplies delivered to the Six Nations by the Crown was not sufficient to meet their needs.<sup>16</sup>

The right to sell land was thus important to Brant, both for the cash it provided and for its implication that the Six Nations had all the rights of true landowners. But Brant never understood the terms of Haldimand’s licence, nor the effect of the 1763 Proclamation. Short of a revocation of the Proclamation, the Six Nations could never be sovereign in British North America, nor deal with land as if they owned it. Brant is not to be blamed for his lack of understanding, for British law was perplexing, and remains so for modern historians.

14 The full text of the Proclamation is reproduced in Adam Shortt and Arthur G. Doughty, eds., *Documents Relating to the Constitutional History of Canada 1759–1791* (Ottawa: S. E. Dawson, 1907), pp. 119–123.

15 Joseph Brant, quoted in E. A. Cruikshank, “The Reserve of the Six Nations on the Grand River and the Mennonite Purchase of Block No. 2”, *Waterloo Historical Society*, vol. 15 (1927), p. 312.

16 Reply of the Six Nations to His Excellency Governor Simcoe’s Speech, August 29, 1795, in E. A. Cruikshank, ed., *The Correspondence of Lieut. Governor John Graves Simcoe* (Toronto: Ontario Historical Society, 1923–1931), vol. 4, p. 87. Hereafter this set will be referred to as *SP*, as an abbreviation for “Simcoe Papers”.

### The Proclamation of 1763 and the Nature of Indian Title

It is true that the Supreme Court of Canada has in recent years been redefining the nature of aboriginal land title.<sup>17</sup> However, the fundamental principles specified in the 1763 Proclamation continue to be supreme. The most contentious legal issues today are whether the Proclamation negated any rights that aboriginals may have had before it was issued and whether aboriginals may have subsequently negotiated any further rights. In short, the Proclamation is still the focus of discussion, and the validity of any other bases for aboriginal land rights have only recently been “discovered” by the courts. As late as 1973, Justice Bora Laskin wrote, “This Proclamation was an Executive Order having the force and effect of an Act of Parliament and was described ... as the ‘Indian Bill of Rights’ ... its force as a statute is analogous to the status of Magna Carta. ... The Proclamation must be regarded as a fundamental document upon which any just determination of original rights rests.”<sup>18</sup> The Proclamation had constitutional status in British North America from the time it was issued in 1763.<sup>19</sup> The parts which deal with Indians have never been repealed, and their constitutional status was recognized and affirmed by Canada’s Constitution Act in 1982.<sup>20</sup> Current legal and political debates concerning other sources of native rights have no place in an exploration of native rights as they existed and were understood in the eighteenth century, however. The Proclamation was clearly supreme, and in most respects was reasonably clear in its meaning and effect.

The preamble to the Proclamation recognized that aboriginals living under the King’s protection “should not be molested or disturbed in the Possession of such Parts of our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them or any of them, as their Hunting Grounds”.<sup>21</sup> To that end, the Proclamation prohibited colonial

17 See, for example, the discussion of *Guerin v. R.* (1984) 2 S.C.R. 335, and *A.G. Ont. v. Bear Island Foundation* (1991) S.C.R. 570, in Robert A. Reiter, *The Law of Canadian Indian Treaties* (Edmonton: Juris Analytica Publishing, 1994).

18 *Calder v. A.G. of British Columbia* (1973) 34 D.L.R. (3d) 145 at 203, quoted in Bradford W. Morse, ed., *Aboriginal Peoples and the Law* (Ottawa: Carleton University Press, 1989), p. 155.

19 See the decision of Lord Denning in *R. v. Secretary of State for Foreign and Commonwealth Affairs* (1982) Q.B. 892, (1982) 2 All E.R. 118 (C.A.), excerpted in Joseph Eliot Magnet, *Constitutional Law of Canada*, 2nd ed. (Toronto: Carswell, 1985), vol. 1, p. 106.

20 Section 35 of the Constitution Act of 1982 entrenches the unrepealed portions of the 1763 Proclamation as a constitutional document. See the decision of Chief Justice Dickson in *Sparrow v. The Queen* (1980) S.C.R. 1075. Section 25 specifically refers to the 1763 Proclamation and directs that the Canadian Charter of Rights and Freedoms shall not be construed so as to derogate from the aboriginal rights recognized by the Proclamation.

21 Haldimand’s Proclamation is reproduced in Johnston, *The Valley of the Six Nations*, pp. 50–51; as Document No. 106 in *Indian Treaties and Surrenders*, vol. 1 (Ottawa: Brown Chamberlain, 1891), pp. 251–252 (facsimile edition reprinted by Coles Publishing Company, Toronto, 1971); and as Appendix B to *Isaac et al. v. Davey et al.* (1975) 5 O.R. (2d) 610 (Ont. C.A.) at 626.

officials from issuing land patents in respect of land reserved for natives. Southern Ontario was among the lands it designated for Indian occupancy.<sup>22</sup> The Proclamation further prohibited all British subjects from purchasing Indian lands or even occupying them. In the event that the Indians should wish to dispose of any lands, they were to be purchased in the name of the King by the relevant colonial governor, in accordance with any special instructions the King or governor “shall think proper or give for that purpose”.

Thus, according to the law of British North America, native title does not entail land ownership. The legal title, or fee simple, to the lands claimed by Britain belongs to the Crown, subject to a continuing right of occupation by any aboriginals who are on the lands.<sup>23</sup> This principle applied not only to British North America as it existed in 1763, but arguably to all lands in North America which Britain later claimed. (This issue does not affect a legal analysis of Southern Ontario, as it was clearly part of British North America in 1763, though not part of any colony.<sup>24</sup>) Fee simple ownership entails the right to sell or bequeath the subject lands freely, but native title cannot be alienated. It is a right specific to those aboriginals who originally occupied the lands, or who, like the Six Nations, were the party named in a licence from the Crown.<sup>25</sup> The only transfer permitted in law by the aboriginals is a sale to the holder of the fee simple. Such a transfer merges “the Indians’ beneficial use with the legal fee held by the Sovereignty”.<sup>26</sup> More importantly, the transfer extinguishes the natives’ rights, and the fee simple held by the Crown is now absolute. This clear title is necessary before the Crown can transfer the lands to any of its citizens. Simply stated, the policy codified in the Proclamation was as follows: from the time that newly claimed lands are incorporated into British North America, aboriginals on such lands hold only a right of occupancy; from the time of a transfer by these aboriginals to the Crown, they lose this right of occupancy.<sup>27</sup> It should be mentioned that, in law, this right of occupancy was

22 John D. Whyte and William R. Lederman, *Canadian Constitutional Law* (Toronto: Butterworths, 1975), p. 32. For a map of Indian lands, see Morse, *Aboriginal Peoples and the Law*, p. 55.

23 Neil H. Mickenberg, “Aboriginal Rights in Canada and the United States”, *Osgoode Hall Law Journal*, vol. 9, no. 1 (August 1971), p. 142.

24 Whyte and Lederman, *Canadian Constitutional Law*, p. 32.

25 The terms contained in the Proclamation of 1763 continued to apply to the Grand River lands even after these lands were surrendered to the Crown by the Mississauga and after Haldimand permitted the Six Nations to assume occupancy in 1784. Haldimand in effect created for the Six Nations a “granted reserve”, which is one of several categories of native-occupied lands described by Brian Slattery. Slattery notes that the Proclamation’s restrictions on the transfer of native lands applied to any and all lands that were reserved to natives, including granted reserves. He adds that “all forms of native lands are covered by one or other of the Proclamation’s provisions.” See Brian Slattery, “Understanding Aboriginal Rights”, *Canadian Bar Review*, vol. 66 (1987), pp. 727–783 at 771–773.

26 Mickenberg, “Aboriginal Rights in Canada and the United States”, p. 150.

27 The Supreme Court of Canada’s decision in *Guerin* in 1984 provides a qualification to this general

taken to include a right to use the resources of the lands being occupied, such a right being called one of “usufruct”. An Ontario court ruled in a case relating to the Six Nations’ lands that these lands “were reserved for the use of the Indians, as their hunting grounds, under the Sovereign’s protection and dominion. The Crown at all times held a substantial and paramount estate underlying the Indian title.”<sup>28</sup>

In any analysis of native land history, an understanding of the distinction in British law between occupancy and ownership is essential. Some historians, though, have not demonstrated a clear understanding of this distinction. For example, Robert J. Surtees asserts that the 1763 Proclamation “certainly recognized Aboriginal proprietorship”<sup>29</sup> of land, which it did not. Because title implies ownership,<sup>30</sup> he is equally misleading when he asserts that the Mohawk had “received a written title” for a certain tract of land.<sup>31</sup> He precisely reverses the respective land rights of natives and whites when he writes of the lands upon which several British forts were built: “The British met no difficulty in occupying these lands, as they had already purchased them from their Indian owners.”<sup>32</sup> Such misunderstandings of the nature of Indian title are not unknown even among lawyers. In 1973 an Ontario judge ruled that a 1793 “deed” to the Six Nations executed by Lieutenant Governor John Graves Simcoe was effective in passing title in fee simple. Of course, on appeal this decision was reversed, with the appellate judge ruling that the document was “in accord with and implemented the policy enunciated in the Proclamation of 1763”.<sup>33</sup>

The Proclamation’s terms were not novel, but merely codified existing legal principles and practices. The provisions concerning the legal effect of the “discovery” of Indian lands by European colonizers, for example, can be traced to sixteenth-century Spanish theological jurists.<sup>34</sup> The provisions

statement. Justice Dickson held that native title “gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown to deal with the land for the benefit of the surrendering Indians”. In this case, natives surrendered land to the Crown so that it could be leased to a third party. The court held that the Crown breached its fiduciary duty by leasing the land for lower rent than the natives had been told would be charged.

28 *Isaac et al. v. Davey et al.* (1973) 38 D.L.R. (3d) 23, (1973) 3 O.R. 677 (Ont. H.C.); reversed (1974) 51 D.L.R. (3d) 170, (1975) 5 O.R. (2d) 610 (Ont. C.A.). For a discussion of this case, see Bourgeois, “The Six Nations: A Neglected Aspect of Canadian Legal History”.

29 Robert J. Surtees, “Land Cessions, 1763–1830” in Edward S. Rogers and Donald B. Smith, eds., *Aboriginal Ontario: Historical Perspectives on the First Nations* (Toronto: Dundurn Press, 1994), p. 94.

30 See the definition of “title” in John Burke, ed., *Osborn’s Concise Law Dictionary*, 6th ed. (London: Sweet & Maxwell, 1976), p. 326.

31 Surtees, “Land Cessions”, p. 105.

32 *Ibid.*, p. 108.

33 *Isaac et al. v. Davey et al.*, see note 28.

34 Mickenberg, “Aboriginal Rights in Canada and the United States”, p. 122.

concerning the procedure by which natives could dispose of their interest in land was “the formalized culmination of more than a decade of British efforts and practices in dealing with the Indians”.<sup>35</sup> The legality of these provisions has been consistently upheld. In both Canada and the United States, “The principle that Indians could alienate their lands solely to the government (or to private individuals with government consent) has received the unquestioned approval of subsequent court decisions.”<sup>36</sup> Americans asserted that the Treaty of Paris transferred to them all of the rights that the British had enjoyed by virtue of the Proclamation with respect to land within their boundaries.<sup>37</sup> To understand fully the authority by which the 1763 Proclamation was issued and by which it endured in British North America, we must consider the structure of political institutions in the British Empire in the eighteenth century.

### **Political Powers within the British Empire**

While the separation of powers between state institutions in Britain was not straightforward, the general subordination of colonial institutions to imperial ones is clear. Even in the early twentieth century, Canada’s place in the Commonwealth was such that its Parliament was not sovereign.<sup>38</sup> In the seventeenth century, the King and his Privy Council had legislative and executive jurisdiction over colonial possessions. During the eighteenth century, the British Parliament claimed greater legislative control, though the transfer of power was slow and incomplete. The most important principle to bear in mind is that, from the eighteenth century onward, the British Parliament “was legislatively supreme over the King in his Privy Council, in any respect in which Parliament chose to exercise that supremacy”.<sup>39</sup> In short, the British Parliament eventually had “the right to make or unmake any law whatever”, both in Britain and in its colonies.<sup>40</sup> While Parliament could choose to define its legislative jurisdiction, it could not perform executive functions. These remained for the “Crown”, namely the King and his Privy Council until 1715, and after this date the King and his cabinet.<sup>41</sup>

The British Parliament had wrested legislative supremacy from the Crown by 1700. However, it chose not to legislate in respect to British North America until 1774.<sup>42</sup> Therefore, the King had the right to legislate for

35 *Ibid.*, p. 141.

36 *Ibid.*, p. 125.

37 See the speech of the Commissioners of the United States, July 31, 1793, *SP*, vol. 1, p. 408.

38 Walter S. Scott, *The Canadian Constitution* (London: Sweet & Maxwell, 1918), p. 1.

39 Whyte and Lederman, *Canadian Constitutional Law*, p. 29.

40 A. V. Dicey, *Law of the Constitution*, 9th ed. (London: Macmillan, 1956), p. 40.

41 Scott, *The Canadian Constitution*, p. 123.

42 Whyte and Lederman, *Canadian Constitutional Law*, pp. 29–30.

these lands, and King George III did so in 1763 by issuing his Proclamation. Proclamations are exercises of the royal prerogative, which is an exceptional power and privilege of the King.<sup>43</sup> The prerogative power is based on “the residue of arbitrary authority which at any given time is legally left in the hands of the Crown”.<sup>44</sup> The 1763 Proclamation contained a provision granting Quebec a representative assembly. The provision had the effect in constitutional law of preventing the King from ever again legislating in respect of Quebec.<sup>45</sup> This, ironically, left the British Parliament as the only institution capable of changing Quebec’s constitution, which was founded on the King’s own Proclamation. The Proclamation survived as the constitution of British North America until the Quebec Act was passed by the British Parliament in 1774. While the Act revoked some of the Proclamation’s provisions,<sup>46</sup> those relating to native issues remained unchanged.

The Quebec Act is significant in several respects. While the Proclamation had designated Southern Ontario as Indian territory, the Quebec Act incorporated this land into the colony of Quebec.<sup>47</sup> The Act announced the intention of the British Parliament to claim legislative supremacy over the colony. (Executive power remained, of course, in the King and his cabinet, which had issued the Royal Instructions to Haldimand empowering him to purchase the lands in the Grand River valley from the Mississaugas.) The Act provided Quebec with a governor and a council, but they had limited powers. For example, they had no power to legislate in respect of lands granted by the Crown in free and common socage (which is essentially fee simple), as Britain still held this power.<sup>48</sup>

Britain’s Constitutional Act of 1791 divided the colony of Quebec into Upper and Lower Canada and provided each with a legislative assembly.<sup>49</sup> Both were still far from sovereign. The British Parliament could specify that

43 The 1763 Proclamation was an order-in-council “enacted pursuant to the King’s executive power to legislate constitutions for newly-acquired territories and overseas dominions”. See Clark, *Indian Title in Canada*, p. 12. The Proclamation was definitely not “the first of many treaties in which Natives surrendered their rights to land in return for various kinds of compensation from the Canadian government”, as contended by Joseph Mensah in “Geography, Aboriginal Land Claims and Self-Government in Canada”, *International Journal of Canadian Studies*, vol. 12 (Fall 1995), p. 264. The document was a Proclamation, not a treaty; it was decreed, and not negotiated; it did not involve a surrender of land; and the “Canadian government” was neither a signatory to the document nor in fact in existence in 1763.

44 See the definitions of “proclamation” and “prerogative, royal” in Burke, *Osborn’s Concise Law Dictionary*, pp. 261 and 267.

45 Whyte and Lederman, *Canadian Constitutional Law*, p. 31.

46 *Ibid.*, p. 36.

47 *Ibid.*, p. 32.

48 Scott, *The Canadian Constitution*, p. 74.

49 Constitutional Act, 1791, 31 Geo. III, c. 31, s. 2 and 3, reprinted in Shortt and Doughty, *Documents Relating to the Constitutional History of Canada, 1759–1791*, p. 695.

any of its statutes were to be applied in Canada. Matters relating to British citizenship and the status of aliens in the colonies were also beyond colonial authority.<sup>50</sup> The King and his cabinet had veto powers over any colonial legislation, and the colonial governor was forbidden to give his assent to any legislation which “contained provisions previously disallowed by the King”. Further, the colonial governor’s discretion in giving assent to legislation was limited by any instructions he had received from the King.<sup>51</sup> This statute kept jurisdiction over Indian lands “beyond the reach of local governments”, and it was not until 1867 that Britain transferred this jurisdiction “to the newly created Parliament of the Dominion of Canada”.<sup>52</sup>

Thus, the colonies did not control much of their own affairs, and, though the British Parliament had much of the legislative power, cabinet still conducted and supervised much of what happened in Upper Canada. After 1715 cabinet was composed of leaders of the governing party. Cabinet ministers exercise Crown powers and are considered organs through which the power of the Crown flows. They direct the Privy Council to issue orders-in-council, which are “the formal expression of the royal or executive will”.<sup>53</sup> Up to 1782 the King had great control over his cabinet. The constitution allowed him “a free choice” as to who would be his ministers.<sup>54</sup> Once appointed,

Their hope of continuance in office depended on their acceptance of the King’s policy, or their skill in prevailing on him to accept their own, and on their value to him as instruments for bringing Parliament into line with the Crown. If they should fail in their duty or serviceableness to the King, he need not and did not hesitate to dismiss them if he could find others in their place.<sup>55</sup>

Some measures were taken to limit the King’s powers in 1782, but not much was achieved until 1832.<sup>56</sup> George III, who reigned from 1760 to

50 Whyte and Lederman, *Canadian Constitutional Law*, p. 41.

51 William Renwick Riddell, *The Life of John Graves Simcoe* (Toronto: McClelland & Stewart, 1926), pp. 104–105.

52 Clark, *Indian Title in Canada*, pp. 48–52. The legislature of pre-confederation Ontario did pass some legislation relating to natives, but these provisions merely administered “previously enacted imperial law regarding Indians and lands reserved for the Indians”. Lacking the necessary jurisdiction, pre-confederation Ontario “did not and could not purport to repeal that previously established imperial law”. Bruce Clark, *Native Liberty, Crown Sovereignty: The Existing Aboriginal Right of Self-Government in Canada* (Montreal and Kingston: McGill-Queen’s University Press, 1990), p. 138, and see also p. 208.

53 Scott, *The Canadian Constitution*, pp. 123, 79, 104.

54 David Lindsay Keir, *The Constitutional History of Modern Britain Since 1485*, 9th ed. (London: Adam & Charles Black, 1969), p. 317.

55 *Ibid.*

56 *Ibid.*, p. 373.

1820, “inaugurated his reign by dismissing a ministry of which he disapproved, and entered upon a career of building and destroying cabinets which continued even beyond” 1782.<sup>57</sup> Indeed, unlike George I and George II who immediately preceded him, George III “was prepared to concern himself with every department of government”. This was true even during the time that William Pitt the Younger was Prime Minister (1783–1801 and 1804–1806), when “George III continued in countless ways to rule as well as to reign”. These years were important, as they essentially cover the period during which Brant pressed authorities for absolute title to lands along the Grand River. George III exercised significant control through cabinet, which was unfortunate for Brant, because the King “gloried in the name of Briton” and would not have been inclined to compromise British sovereignty over lands in Upper Canada.<sup>58</sup>

The cabinet minister responsible for Upper Canada during Brant’s critical years was the Secretary of State, who was the Duke of Portland. He provided the Royal Instructions to Simcoe and Russell, sometimes prefacing his directions with the statement that he had “laid before the King” their letters seeking guidance.<sup>59</sup> His use of the word “King” rather than “Crown” or “cabinet” could mean that he actually consulted George III. If he did, there is reason to believe that Portland was not generally inclined to resist King George’s advice. Keir has written that Portland became Prime Minister of Britain after he “seemed to find that royal favour was the passport to success in the general election of 1807”.<sup>60</sup>

### **The Haldimand Transactions**

General Haldimand oversaw two transactions as part of his duties as Governor-in-Chief of Quebec. On May 22, 1784, land was purchased by the Crown from the Mississauga Indians, and on October 25, 1784, some of this land was transferred to the Six Nations. The remarkable differences between the two transactions have not always been appreciated by historians. Such an appreciation is necessary, though, since Brant’s lifelong goal was to have this conveyance to the Six Nations confirmed as an outright grant.

The sale by the Mississaugas was a surrender of any and all rights they had to the subject lands, as they “did grant, bargain, sell, alien, release and confirm unto His said Majesty” the lands in question for the sum of 1,180 pounds of currency.<sup>61</sup> The British “understood that they had extinguished the native title to the land and that the Crown had obtained full proprietary

<sup>57</sup> *Ibid.*, p. 318.

<sup>58</sup> *Ibid.*, pp. 337, 380.

<sup>59</sup> See, for example, Portland to Simcoe, March 3, 1796, *SP*, vol. 4, p. 206; Portland to Russell, November 5, 1798, *RP*, vol. 2, p. 300.

<sup>60</sup> Keir, *The Constitutional History of Modern Britain*, p. 380.

<sup>61</sup> Document No. 3 in *Indian Treaties and Surrenders*, vol. 1 (Ottawa: Brown Chamberlain, 1891), p. 5. Facsimile edition reprinted by Coles Publishing Company, Toronto, 1971.

rights”.<sup>62</sup> The exact nature of the Mississaugas’ legal rights was not characterized in the agreement. Thus, there was no explicit recognition or confirmation of any existing legal rights that were being sold. Instead, the document had the effect of a quit-claim deed, whereby all rights of any kind were relinquished.

By contrast, the transfer to the Six Nations was specific and narrowly construed. There was no mention of grants, sales, releases, or such other words suggesting a change in ownership, but merely an extension of permission to “take possession of and settle upon” the Grand River lands.<sup>63</sup> This was done in accordance with the principles in the 1763 Proclamation and with the explicit instructions Haldimand had received on the matter. Colonial governors frequently received Royal Instructions which were binding on them in their administration of the colony.<sup>64</sup> Haldimand had received such instructions through Lord North, permitting him to make offers to Indians desirous of “occupying any Lands which you may allot to them”.<sup>65</sup>

Thus, Haldimand was specifically instructed to do that which existing laws required him to do anyway. Any lands issued to the Six Nations could be for their occupation only, as he had no power to endow them with ownership rights. An 1830 report confirms this state of affairs: “It is hardly necessary to remark that an estate in fee simple in lands belonging to the crown could not be conveyed by Sir Frederick Haldimand’s mere licence of occupation under his seal. Letters patent under the Great Seal of England, or of the Province of Quebec, could alone have conferred such title.”<sup>66</sup>

Michael Simon ignores the applicable law and advocates a wildly pro-native interpretation of Haldimand’s licence. Simon asserts that “there is a great deal of validity in the claim of the Six Nations that the Haldimand Agreement” created a sovereign native state.<sup>67</sup> (He calls the document an “agreement” to promote his view of it as a nation-creating treaty, even though it was signed by only one party — Haldimand.) He infers that sovereignty was granted by virtue of the reference in the document to the Six Nations as “His Majesty’s faithfull Allies [*sic*]”, and not as British subjects. He reasons, by inference, that if the Six Nations were receiving land rights as something other than British subjects, the intent could only

62 Donald B. Smith, *Sacred Feathers* (Toronto: University of Toronto Press, 1987), p. 26.

63 Haldimand’s Proclamation, see note 21.

64 Riddell, *The Life of John Graves Simcoe*, pp. 103–105. The source of this obligation can be found in the Constitutional Act of 1791, as well as in the written commissions which gave colonial governors their powers.

65 Lord North to Haldimand, August 8, 1783, in Johnston, ed., *The Valley of the Six Nations*, p. 42.

66 “Report of the Executive Council on Indian Land Sales, May 14, 1830” in Johnston, *The Valley of the Six Nations*, p. 147.

67 Michael P. P. Simon, “The Haldimand Agreement: A Continuing Covenant”, *American Indian Culture and Research Journal*, vol. 7, no. 2 (1983), p. 48.

have been that they were to become a sovereign state. But Simon leaps to this sovereignty conclusion without considering that the 1763 Proclamation consistently distinguished between natives and British subjects. The Proclamation described natives as “the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection” and decreed that they were not sovereign, but were merely occupants on British lands. Further, as the 1763 Proclamation was part of the constitution of British North America, Haldimand had no power to overturn its provisions; his direction that the Six Nations were merely to take possession of the specified lands reflected the British policy regarding natives which was codified in the Proclamation.<sup>68</sup>

In short, the Haldimand grant was not in fact a grant, but merely a licence to occupy land. Even at that, it was the most that Haldimand had the power to provide. Brant believed he had been promised more, and began a lengthy but ultimately fruitless campaign to obtain a greater legal estate for the Six Nations.

### **Brant and Simcoe**

John Graves Simcoe became the first Lieutenant Governor of Upper Canada in 1791. His direct superior was the Governor of Quebec, who in 1791 was Lord Dorchester. Historians have generally thought well of Simcoe, though Harvey Chalmers and Ethel Brant Monture view him as “given to wishful thinking and blindness to realities” and assert that most of his projects failed. They add that he was an ineffectual military officer, “a vindictive little man”, and that he was severely reprimanded for “shifting nearly all decisions to Dorchester”.<sup>69</sup> More typical is the view that Simcoe was zealous, ambitious, and energetic.<sup>70</sup> Charles M. Johnston describes Simcoe as having “an almost inexhaustible store of imagination”,<sup>71</sup> and as being “imbued with ‘enthusiasms’ and anxious to make his mark as an imperial administrator”. Simcoe was more competent than his successor, “the much less commanding Peter Russell”, who, Johnston says, gave Brant the generous land rights that Simcoe had always refused.<sup>72</sup>

68 Simon also failed to recognize that it was the 1763 Proclamation that prevented the Six Nations from legally selling their lands to buyers other than the Crown. Simon incongruously asserts, “In regard to their right of alienation the major restriction on their freedom in this area is the Simcoe Patent” (“The Haldimand Agreement”, p. 48), which is clearly wrong. Simcoe’s document was not a patent; it was never executed by the Six Nations, and, even if it had been, it would merely have recognized the existing law as created by the 1763 Proclamation. See the decision of the Ontario Court of Appeal in *Isaac v. Davey*.

69 Chalmers and Monture, *Joseph Brant: Mohawk*, pp. 110–113.

70 S. R. Mealing, “John Graves Simcoe” in *Dictionary of Canadian Biography*, vol. 5 (Toronto: University of Toronto Press, 1983), pp. 754–759.

71 Johnston, *The Valley of the Six Nations*, p. xlv.

72 Charles M. Johnston, “The Six Nations in the Grand River Valley, 1784–1847” in Rogers and Smith, *Aboriginal Ontario*, pp. 172–173; Johnston, *The Valley of the Six Nations*, Introduction, p. L.

Joseph Brant was at most times the sole negotiator for the Six Nations. He had a good command of the English language and an appreciation for the value of land in monetary terms. In the years before Russell's arrival in Upper Canada in 1796, Brant dealt with many colonial officials on land matters, but his dealings with Governor Dorchester and Lieutenant Governor Simcoe were the most significant. The fact that Dorchester and Simcoe negotiated with Brant should not be taken as evidence that they had any legal power to alter the Six Nations' land rights. There was actually nothing that they could legally change, as the Proclamation was complete and supreme. The most they could do was implement it by purchasing land from natives, and even then they were obliged to follow any particular instructions given to them by the King. The mixed signals which they gave to the Six Nations during the negotiations evidence at best Dorchester's and Simcoe's misunderstanding of the law and of their own legal powers. At worst, their actions exhibit an intention to placate or deceive Brant with legally ineffective negotiations, promises, and documentation.

At times Simcoe and Dorchester showed a good knowledge of the law. A draft "deed" Simcoe offered to Brant in 1793 carefully allowed only for the Six Nations' possession and use of the lands, not for ownership.<sup>73</sup> Simcoe explained to Dorchester that the document provided only those rights which "the Laws of England admitted of".<sup>74</sup> (This is the deed which, as discussed earlier, an Ontario judge erroneously ruled was sufficient to convey title in fee simple.) Dorchester himself had declared in 1787 that a sale of land by the Six Nations to ten Loyalist families was illegal, as it violated the terms of the 1763 Proclamation. He even threatened "to drive the white men from the Grand River lands" which they purported to have purchased.<sup>75</sup>

Simcoe and Dorchester were also aware of another set of laws which precluded natives from owning land. Land ownership in Upper Canada was a right belonging to British subjects. Aliens could acquire British citizenship and therefore qualify to own land by taking an oath of allegiance to the British Crown.<sup>76</sup> Royal Instructions received by Dorchester on September 16, 1791, compelled him to withhold his assent to any legislation which gave land ownership rights to aliens. Simcoe, too, was bound by these instructions,<sup>77</sup> and he issued a Proclamation of his own on February 16, 1792, which required all prospective landowners to swear the following

73 "Simcoe's Patent of the Grand River Lands to the Six Nations, January 14, 1793" in Johnston, *The Valley of the Six Nations*, pp. 73-75. This document is reproduced in full in Appendix C to the decision of *Isaac v. Davey* (1975) 5 O.R. (2d) 610.

74 Simcoe to Dorchester, December 6, 1793, in Johnston, *The Valley of the Six Nations*, p. 75.

75 Robinson, *Joseph Brant*, pp. 156-157.

76 Craig, *Upper Canada*, p. 115.

77 Riddell, *The Life of John Graves Simcoe*, p. 104.

declaration in addition to the “usual oaths”: “I, A. B., do promise and declare that I will maintain and defend to the utmost of my power the authority of the King in His Parliament as the supreme Legislature of this Province.”<sup>78</sup> Aliens would not be allowed to hold land in the province of Canada until 1849.<sup>79</sup> These laws affected the Six Nations, who “regarded themselves as the allies, not the subjects, of the British King.”<sup>80</sup> As long as the Six Nations viewed themselves as a sovereign nation, they would “be considered as aliens,”<sup>81</sup> and would be subject to treaty law rather than domestic property law.<sup>82</sup> They would therefore not be able to own or transfer land, as they did not have this treaty right. Simcoe was aware of this law and correctly believed that it also precluded the possibility of the Six Nations even leasing their lands to others.<sup>83</sup>

Thus, the laws specific to natives precluded land ownership by the Six Nations, and so did the general laws applicable to all aliens. In both cases, only Britain had power to overturn the Royal Proclamation and the Royal Instructions which were the authority for these laws. No colonial administrator had these powers, yet Simcoe negotiated as if he did. Johnston writes of Simcoe’s refusal to permit the Six Nations to sell their land as his own decision, and one which he later “offered to review” on his own authority.<sup>84</sup> Mabel Dunham writes that Simcoe offered to “circumvent the law” which applied to native land matters and “grant certain concessions to the Indians.”<sup>85</sup> Such actions should not be relied upon as true indices of legal power. It is instructive to recall here the distinction Clark makes between law and practice, and the folly of some historians’ preoccupation with practice and disregard for law.

Simcoe also disregarded the law in another respect which some historians have missed. Johnston notes that Simcoe threatened to reduce the Six Nations’ reserve to half its size unless Brant accepted the draft “deed” of 1793. The document clearly stated that the Six Nations could not freely sell or lease their lands, and it was rejected by Brant. Johnston claims that Simcoe’s threat to reduce the size of the reserve came to nothing because his scheme “was frustrated by his departure from the colony in 1796.”<sup>86</sup>

78 Arthur J. Doughty and Duncan A. McArthur, *Documents Relating to the Constitutional History of Canada, 1791–1818* (Ottawa: C. H. Parlamee, 1914), pp. 60–61.

79 Lillian F. Gates, *Land Policies of Upper Canada* (Toronto: University of Toronto Press, 1968), p. 122.

80 Craig, *Upper Canada*, p. 5.

81 Attorney General John White to Peter Russell, September 26, 1796, *RP*, vol. 1, p. 46.

82 Justice W. D. Powell to Peter Russell, January 3, 1797, *RP*, vol. 1, p. 121.

83 See the speech of Joseph Brant at Newark on November 24, 1796, *RP*, vol. 1, p. 93.

84 Johnston, *The Valley of the Six Nations*, p. xlvi.

85 Dunham, *Grand River*, p. 76.

86 Charles M. Johnston, “An Outline of Early Settlement in the Grand River Valley”, *Ontario History*, vol. 54, no. 1 (March 1962), p. 52.

This is erroneous, as Simcoe could not legally have executed his threat for several reasons. First, he lacked the authority to deal unilaterally with Indian reserves by virtue of the paramount provisions in the 1763 Proclamation, which detailed the applicable surrender procedure. Secondly, he could not legally have altered the terms of Haldimand's occupancy licence which created the reserve since Haldimand had held an office superior to his own (which Dorchester occupied at this time).<sup>87</sup> Thirdly, as Clark contends, section 42 of the Constitutional Act of 1791 required that the colonial government obtain the prior approval of the British Parliament before it could legislate in respect of any Crown lands, including those occupied by natives.<sup>88</sup> Johnston made another legal error when he referred to the document which Simcoe wanted Brant to sign as a "patent", apparently unaware that it was not legal for Simcoe to issue a Crown land patent to Indians.<sup>89</sup>

Dorchester himself showed a poor understanding of the law in 1796 when he sent a draft deed to Simcoe for him to offer to Brant. It had been drafted by Dorchester's attorney-general, Jonathan Sewell, but Simcoe and his attorney-general, John White, rightly believed it to be illegal. The document appears to have been a "deed to uses", which was a complicated freehold estate. It was less than a fee simple, but greater than Haldimand's licence of occupation during the King's pleasure. In effect, the Six Nations would have held a 999-year lease of the Grand River lands, and special clauses were inserted which permitted the Six Nations to assign their rights to all or part of their lands directly to third parties, though the Crown was to be offered the lands first. The deed provided that any attempt to convey absolute title ("their interest in the soil") would prompt an immediate escheat of the lands to the Crown. Thus, the Six Nations would have been assured of their occupation of lands for 999 years, and they could have sold this right to others.<sup>90</sup> Simcoe told Brant, "it is unnecessary for me to observe

87 For a concise description of the hierarchy of relative powers of colonial officials and of the imperial institutions above them, see Clark, *Native Liberty, Crown Sovereignty*, pp. 58–61.

88 Clark, *Native Liberty, Crown Sovereignty*, p. 100.

89 It is easy to mistake this document for a patent. The document reads, "We have caused these our letters to be made patent and the great seal of our said Province to be hereunto affixed." However, a patent must be an unconditional grant from the Crown, and this document, on the contrary, places strict limitations on transfer rights. Also, it contains a statement that "the true intent and meaning of these presents [is] of securing to them the free and undisturbed possession" of the lands. This statement figured prominently in the appellate judge's reasoning in *Isaac v. Davey*. This document was not drafted in Britain, nor in accordance with specific instructions received from Britain. The first mention of the document in trans-Atlantic correspondence is in Simcoe's letter of September 20, 1793, to Secretary of State Henry Dundas (*SP*, vol. 2, p. 58). Simcoe reported to Dundas that the document had been drafted and offered to Brant, but was rejected. It is submitted that Simcoe intentionally made this document ambiguous in an attempt to delude Brant.

90 See John White to Peter Russell, September 26, 1796, *RP*, vol. 1, p. 46; Sewell to Dorchester, January 25, 1796, *SP*, vol. 4, p. 184; Cruikshank, "The Reserve of the Six Nations on the Grand River and the Mennonite Purchase of Block No. 2", pp. 313–317.

that a lease for nearly one thousand years, is full as valuable in the market as an absolute sale.’<sup>91</sup> In anticipation of being granted the right to sell, Brant had arranged to sell six large blocks of land to white speculators. These blocks entailed 350,000 acres of land, and block one alone later became the townships of North and South Dumfries.

The deed was illegal, as it breached the terms of the 1763 Proclamation, but this was not why it was never executed. Brant rejected it because he disapproved of the escheat clause<sup>92</sup> and of the mode ‘‘by which it is proposed they should hold the Lands given them by General Haldimand’’.<sup>93</sup> Brant sought something more akin to ownership than what was in effect a leasehold, though a lengthy one.<sup>94</sup> With a view to resolving the impasse, White suggested that the six blocks be surrendered by the Six Nations to the Crown, and that the Crown then reconvey the blocks to the purchasers found by Brant.<sup>95</sup> This arrangement would not have violated the Proclamation of 1763. This was where matters stood when Simcoe took a leave of absence from his post, and Peter Russell was appointed Administrator of Upper Canada. (Simcoe retained the Lieutenant-Governorship even during his leave of absence.<sup>96</sup>)

### **Brant and Russell**

Much has been written of the struggle between Brant and Russell concerning the sale of the six Grand River tracts, but some historians have not appreciated the intricacies of the law, the significance of the structure of the transaction, or the determination and wiliness of Russell. As a result, they have misinterpreted the effect of the transaction and underestimated Russell’s administrative competence. He diffused a powder-keg situation and reduced it to an extended bureaucratic exercise which ultimately ended in his favour. Brant approached the closing day — February 5, 1798 — with great anticipation, thinking he had assured his tribes of a steady annual income from the sale proceeds. He also thought the Six Nations were finally being recognized as the legal owners of land. He was wrong on both counts. More importantly, Russell had no power to convey the ownership rights that Brant sought. The real struggle was between Brant and Britain, though Brant never knew this. Even the position of Lieutenant Governor was merely an administrative post, at least as it concerned native land matters. Russell, like Simcoe and Dorchester, had no significant decision-making powers, nor was he at liberty to establish new policy in this regard.

91 Simcoe to Brant, March 2, 1796, *SP*, vol. 4, p. 206.

92 Kelsay, *Joseph Brant*, p. 566.

93 Dorchester to Portland, June 18, 1796, *SP*, vol. 4, p. 300.

94 Chalmers and Monture, *Joseph Brant: Mohawk*, p. 271.

95 White to Russell, September 26, 1796, *RP*, vol. 1, p. 46.

96 Edith G. Firth, ‘‘Peter Russell’’ in *Dictionary of Canadian Biography*, vol. 5, p. 732.

The historiography describes this episode as a battle of wills between Brant and Russell, rather than as an inevitable result of the King's Proclamation and of the British Parliament's continuing acceptance of the policy contained therein. This erroneous view is espoused in several works by Johnston, who decides that the land sales problem "was not solved by appeals to established policy", but instead by the strength of the personalities who "collided with Joseph Brant".<sup>97</sup> Russell has been characterized as a weak-willed, ineffectual man, and this perception seems to have coloured historians' view of him as a failure in his dealings with Brant. Too much emphasis has been placed on the fact he was "sixty-three years of age and subject to much ill health", and that he had by his own admission "little ambition".<sup>98</sup> Johnston, for example, writes that the tired and ailing Russell "was obviously deficient in those qualities normally demanded of a leader in a time of emergency". He adds that Russell received the administrator's appointment only because "personnel of vigour and genuine ability were in short supply and desperately needed elsewhere".<sup>99</sup> Isabel Thompson Kelsay adds that "Russell was not a decisive man, except as regards being indecisive".<sup>100</sup> Chalmers and Monture describe Russell as a peaceable, weak man.<sup>101</sup> Historians may have underestimated Russell also for class reasons. Russell "was the son of an improvident Irish army officer", and "his formal education consisted of boarding for four years with the Reverend Barton Parkinson", during which time Russell shared a bed with his first cousin.<sup>102</sup> Simcoe, on the other hand, had been educated at Eton, Oxford, and Lincoln's Inn, and his wife was "a considerable heiress".<sup>103</sup> Dorothy Reynolds Plaunt believes Russell became an easy scapegoat for contemporaries and historians because, unlike other lieutenant governors, he left no descendants to sanctify his name.<sup>104</sup>

Be all this as it may, Russell would prove himself a skilled administrator. He had previously held many positions of responsibility. For example, in 1795 he was the Speaker of the Upper Canada Legislative Council and chaired a committee which reported to council on land-related matters.<sup>105</sup> Further, he had a solid understanding of the law, befitting one who had sat as a judge on the Upper Canada Court of King's Bench in 1794. In this respect, he was miles ahead of Brant, who never understood that it was the

97 Johnston, *The Valley of the Six Nations*, p. xlv.

98 *RP*, vol. 1, p. iii.

99 Johnston, "Joseph Brant, the Grand River Lands, and the Northwest Crisis", pp. 281–282.

100 Kelsay, *Joseph Brant*, p. 569.

101 Chalmers and Monture, *Joseph Brant: Mohawk*, pp. 275, 343.

102 Firth, "Peter Russell", p. 729.

103 Mealing, "John Graves Simcoe", p. 755.

104 Dorothy Reynolds Plaunt, "The Honourable Peter Russell", *Canadian Historical Review*, vol. 20 (1939), p. 271.

105 Chalmers and Monture, *Joseph Brant: Mohawk*, pp. 275–276; Cruikshank, *SP*, vol. 5, p. 182.

King and his Proclamation that stood between the Six Nations and their land. Brant said that the Six Nations had “great Consolation and confidence in the King’s Care and Affection for Us ... but we are sorry to conceive that we have too much reason to complain of the administration of his Government here, so far as it respects the Territory of the five Nations.”<sup>106</sup> (The Iroquois Confederacy was referred to both as the Five Nations and the Six Nations.) Justice William Powell noted that Brant believed “that private and personal views more obstructed the wish of the Indians, in this business, than regard to the King’s prerogative.”<sup>107</sup> Chalmers and Monture rightly assert that “British policy rather than a Canadian cabal was responsible for the invisible barrier against the Indians.” They astutely observe that Brant did not know “that the man behind the Punch and Judy show was neither Russell nor Simcoe but the Duke of Portland”.<sup>108</sup>

Russell had a tough time right from the start of his administration in 1796. Upon taking office, he found that copies of all of Simcoe’s correspondence had been removed.<sup>109</sup> He thus had no record of the current state of those matters over which he was now responsible. Further, he was isolated at York, while the other provincial officials were comfortably settled at Niagara. Many soldiers had been reassigned elsewhere, “leaving the province much exposed to hostilities from Indians, who were unquestionably discontented”. His own executive council would not cooperate with him, as the younger members “were jealous of his authority”. High-ranking officials such as Attorney-General White and Judge Powell “put every obstacle in the way to prevent Russell from carrying out his duty as Simcoe’s temporary successor”.<sup>110</sup> Russell complained that Chief Justice Osgoode “has endeavoured to thwart me on many occasions and frequently forgets the respect he owes to my present station”.<sup>111</sup> And it would take months for letters Russell sent to London for instructions to sail back across the Atlantic answered.

In brief, the historiography of this period asserts that Brant became increasingly impatient with Russell’s delay in ratifying the block sales. Meanwhile, rumours spread of a planned attack by France and Spain against British North America. Brant threatened to support the invaders unless his land claims were satisfied. Using a threat to march into York with 300 warriors, Brant extorted a declaration from the Upper Canada executive

106 Joseph Brant to Robert Liston, December 29, 1797, *RP*, vol. 2, pp. 169–170.

107 Johnston, *The Valley of the Six Nations*, p. 90.

108 Chalmers and Monture, *Joseph Brant: Mohawk*, p. 295.

109 According to Chalmers and Monture, Simcoe took all his correspondence with him to England and was thus lying when he told Portland he had given Russell “every document that might assist him in the execution of his office”. Simcoe also ignored most of Russell’s letters seeking guidance. *Joseph Brant: Mohawk*, pp. 276–277.

110 Plaunt, “The Honourable Peter Russell”, p. 271.

111 Russell to Simcoe, September 13, 1797, *RP*, vol. 1, p. 279.

council that the block sales would be confirmed and “virtually coerced Russell into accepting the terms which Simcoe had always refused to sanction”.<sup>112</sup> As a beaten man, “There was nothing for Russell to do but to give in.”<sup>113</sup> Other historians seem to have realized that colonial authorities could not legally effect the transfer without British approval. However, these historians erroneously believe that “the British government had sanctioned Brant’s sale of lands in the upper Grand River valley which they, on this occasion, acknowledged the Six Nations had the right to sell.”<sup>114</sup> The legal subtleties of Brant’s and Russell’s negotiations prove this was not the case.

Simcoe had left matters in chaos, and Russell was understandably “much distressed how to act with respect to the land on the Grand River claimed by the Six Nations”, as he wrote in September of 1796.<sup>115</sup> Russell astutely perceived legal impediments to the block sale ratification that Simcoe and other officials had missed. He pointed out to his own attorney-general that Royal Instructions forbade the granting of more than 1,200 acres of land to any individual.<sup>116</sup> (Each of the six blocks was vastly larger than this.) Further, he knew he was required by the Constitutional Act of 1791 to create a clergy reserve from a portion of the lands being sold,<sup>117</sup> but that the Six Nations would “not allow of any Reserve whatsoever being taken from those Lands”.<sup>118</sup> He also reasoned that, since the King had directed Haldimand to allow the Six Nations to occupy the Grand River lands, therefore the King’s consent would be required before that right could be withdrawn. In Russell’s words, “I do not judge any alienation of the lands so granted to be valid without the consent of the King who gave them.”<sup>119</sup> The fact that the first set of buyers proposed by Brant included several aliens (Americans) further complicated matters.<sup>120</sup> As he had received no instructions whatever as to how to proceed, Russell sought “to evade signing the deeds required until I may receive an answer from the Secretary of State to my letter on this very delicate business”.<sup>121</sup> Russell would succeed in this evasion for 18 months, during which time Brant’s impatience would be surpassed only by Britain’s procrastination in dealing with the issue.

112 Johnston, “Joseph Brant, the Grand River Lands and the Northwest Crisis”, p. 275.

113 Kelsay, *Joseph Brant*, p. 587.

114 E. Reginald Good, “Mississauga-Mennonite Relations in the Upper Grand River Valley”, *Ontario History*, vol. 87, no. 2 (June 1995), p. 163.

115 Russell to Simcoe, September 22, 1796, *RP*, vol. 1, p. 40.

116 White to Russell, September 26, 1796, *RP*, vol. 1, p. 46.

117 No Crown grant of land was valid unless one-seventh of the tract was allotted for the benefit of the Protestant clergy. See section 36 of the Constitutional Act, 1791, reprinted in Shortt and Doughty, *Documents Relating to the Constitutional History of Canada, 1759–1791*, pp. 703–704.

118 Russell to Portland, January 28, 1797, *RP*, vol. 1, p. 134.

119 *Ibid.*, p. 135.

120 Chalmers and Monture, *Joseph Brant: Mohawk*, p. 278.

121 Russell to Simcoe, September 22, 1796, *RP*, vol. 1, p. 40.

Brant had good reason to be impatient. Simcoe had assured Brant upon assuming the Lieutenant Governorship that “the granting to them [the Six Nations] thus Title Deeds would be among the first Objects of my attention when I should arrive in Upper Canada.”<sup>122</sup> During his tenure, however, Simcoe never gave Brant the fee simple title as he had promised. Even if he had the will, he lacked the legal power to do so. After Brant rejected Simcoe’s possessory-rights “deed” in 1793, Simcoe resolved, “In respect to the Lands on the Grand River, I shall still do my utmost to procrastinate any decision on them.”<sup>123</sup>

Having received no instructions during all of 1796, Russell again wrote to London in January 1797. His distress had only increased in the four months since his last request for instructions. Brant had threatened in November 1796 to withdraw the Six Nations’ support for the King in view of the apparent unwillingness to grant the Six Nations clear title. Russell’s own officials did not advise him of this fact for two months. London had remained incommunicado, and Russell hoped Simcoe would return from his leave “very soon”. However, in the face of this adversity which he outlined in his letter, Russell displayed responsibility as an administrator and a sound grasp of the law. Russell wrote that, in spite of the agreement Simcoe had apparently made with Brant, Russell would suspend negotiations “until I could receive His Majesty’s Commands”. He saw “so many difficult Questions of Policy — Law — humanity & Justice”, that he was reluctant to proceed even if an agreement had been reached. As for the law, Russell explained:

The Instrument given to the Six Nations by Sir F. Haldimand clearly permits them only to live on this Land, they and their posterity for ever; consequently the Property as well as the sovereignty of it still remains in the King, and I humbly conceive it would be no less than a breach of my Oath to confirm the Power which the five Nations claim of transferring this right to others until [*sic*] I shall receive His Majesty’s Permission to do so.<sup>124</sup>

Britain would decide in March 1797 that the proposed sales would not be allowed, but rather the Crown might purchase the lands for the sale price which the Six Nations had already negotiated with their prospective purchasers. Though eagerly awaited by Russell, the letter conveying this news was not received until July, by which time Brant had decided he had waited long enough for Russell to act. On June 23, 1797, Brant confronted Russell at York and demanded action. Russell called a special meeting of his execu-

122 Simcoe to Dorchester, December 6, 1793, *SP*, vol. 2, p. 114.

123 Simcoe to Dorchester, March 3, 1794, *SP*, vol. 2, p. 174.

124 *RP*, vol. 1, pp. 131–136.

tive council to decide the matter on June 29.<sup>125</sup> Council buckled completely, citing the threat of invasion by the French and Spanish and the rising hostilities of the Indians. It directed Russell not to wait for Royal Instructions and to permit the Six Nations to dispose of their lands “in any manner that they may think proper”.<sup>126</sup>

Russell himself remained resolute. He reported to Brant that the sales would proceed only after the Six Nations surrendered the lands to the Crown and the purchasers had sworn the oaths of allegiance and the declarations required by law.<sup>127</sup> Shortly after Brant refused these terms, Russell received the Royal Instructions which were written in March, directing him to convey particulars of the sale terms so that the Crown might match them. Russell believed that his council should review their decision in light of this development, so he convened a second meeting on July 16, 1797. Council decided that, in view of the current state of emergency, there was no “indispensable Duty literally to obey” the new Royal Instructions.<sup>128</sup> It also advised Russell to remove at once the conditions he had attached on his own initiative to the proposed sales and to comply with the wishes of the Six Nations.

A weak man would have conceded at this point, but not Russell. He knew that his council’s advice could not “sanction any Disobedience of the Royal Pleasure after it had been communicated to me”.<sup>129</sup> He also supposed that the council’s decision to ignore the Royal Instructions was based on legal advice given by Chief Justice Osgoode, who Russell believed was determined to undermine him.<sup>130</sup> Russell saw that his was a “dangerous dilemma”, seemingly having to choose between “Disobedience of His Majesty’s Commands or an Indian war”.<sup>131</sup> Through his cunning, Russell avoided both.

In a meeting with Brant on July 21, 1797, Russell again ignored the advice of his council and explained to Brant that his earlier offer of a surrender of the lands followed by a reconveyance to the proposed purchasers was not an objectionable arrangement. Russell then said that, as good an offer as it was, he was no longer at liberty to offer it to the Six Nations, as the receipt of the Royal Instructions now bound him to the new terms. Russell explained that the King would perhaps match the price that the proposed block purchasers had agreed to pay. Such an arrangement should be preferred by the Six Nations, Russell argued, over a private sale as a Crown contract had far more security.

125 *RP*, vol. 1, p. x.

126 Minutes of the Executive Council, *RP*, vol. 1, pp. 198–200.

127 *RP*, vol. 1, p. xi.

128 Minutes of the Executive Council, July 16, 1797, *RP*, vol. 1, pp. 215–216.

129 Russell to Portland, July 21, 1797, *RP*, vol. 1, p. 222.

130 Russell to Simcoe, September 13, 1797, *RP*, vol. 1, pp. 278–280.

131 Russell to Prescott, July 17, 1797, in Johnston, *The Valley of the Six Nations*, p. 89.

Brant rejected this offer, saying that the Six Nations “were a free and independent Nation” and that they could sell their lands as they saw fit. As they had arranged the six sales on the understanding that Simcoe would confirm them, “it was now impossible to satisfy the Purchasers in any other way.” Brant rose to leave, and Russell saw that nothing less than his agreement to confirm the sales would satisfy Brant. He could not allow the negotiations to fail, or “every subsequent defection of the Indians might be imputed to my not following the advice of the Council.” Russell then said he was willing to make good on his original offer to confirm the sales, and would do so provided the conditions concerning a prior surrender and purchasers’ oaths were retained. To Russell’s delight, “This Speech operated like a Charm”, and the crisis was averted.<sup>132</sup> Of course the conditions attached to the “confirmation” kept the whole transaction within the guidelines of the 1763 Proclamation. The Six Nations were not being permitted to sell lands directly to third parties, and therefore were not in fact having their right to sell recognized or their past sales confirmed. It was the appearance of a confirmation which satisfied (or fooled) Brant. Russell was likely trying to create this appearance when he began the negotiations with his explanation as to why the Six Nations should have had no objection to his original offer.

Russell had technically deviated from the Royal Instructions he had received in July, but that breach was forgiven. The Duke of Portland, who represented the King on this matter, lamented the situation in which Russell found himself. Portland was pleased with another provision that Russell had negotiated with Brant, that no future land sales would be allowed without the King’s permission.<sup>133</sup> Russell was careful not to complete the transaction until he had received Portland’s approval, thus ensuring the propriety of his actions.<sup>134</sup> It is therefore erroneous for Johnston to assert that “The beleaguered Russell, lacking instructions from home ... was finally forced to confirm the sale of the tracts in question.”<sup>135</sup> So, too, is it erroneous for Simon to assert that Brant’s land transactions “were officially recognized by Simcoe’s successor” and that such recognition constituted proof that the Six Nations now had the legal right to sell their lands to buyers other than the Crown.<sup>136</sup>

Brant never understood the significance of his agreement with Russell, largely because he did not understand the law established by the Proclamation of 1763. He desired that the Six Nations should hold their lands “as an absolute and indefeasible [*sic*] Estate”, yet he was agreeable to terms that

132 Russell to Portland, July 21, 1797, *RP*, vol. 1, pp. 218–222.

133 Portland to Russell, November 4, 1797, *RP*, vol. 2, p. 3.

134 Russell to Simcoe, September 13, 1797, *RP*, vol. 1, p. 279.

135 Johnston, “An Outline of Early Settlement in the Grand River Valley”, p. 53.

136 Simon, “The Haldimand Agreement”, p. 48.

were inconsistent with such absolute title. He agreed that none of their property would be sold without the King's assent, as he and his followers were "willing and desirous that it ever continue to be as it has been with the Sales we have heretofore treated for, that is to say they to surrender to the Crown, and the Crown allocate [*sic*] to Purchasers, whereby they necessarily become subjects".<sup>137</sup> In Brant's mind, such surrenders involved the passing of land from one sovereign state (the Six Nations) to another (Britain), but in actuality the transaction was in accordance with the British law governing relations between Indian occupants and the British sovereign. Thus, it is specious for Johnston to assert that Russell had agreed to unfavourable terms which Simcoe had "always refused",<sup>138</sup> and that Russell had deviated from established British policy because of his inferiority to Simcoe as an administrator.

British officials were in no hurry to clear up Brant's obvious misunderstanding. This was true even of Robert Liston, the British Ambassador to the United States, whom Brant trusted and to whom he poured out his soul. Johnston claims that Liston intervened on Brant's behalf during the block sales negotiations, and that it was due to such highly placed assistance that Brant prevailed.<sup>139</sup> As will be discussed later, Liston was in fact spying on Brant, and he offered this worthless advice to Brant while fully aware of the Six Nations' land ownership aspirations: "That you should surrender to the Crown, and that the Crown should alienate to purchasers by which means they become subjects, appears to me to be a very proper mode of conducting the transaction, and I flatter myself that it will obtain the approbation of the King's government at home."<sup>140</sup> Liston was only toying with Brant for his own amusement when he "flattered himself" that the King's government would approve of the structure of the transactions. Of course it would!

On January 15, 1798, Brant executed the surrender of the six blocks to the Crown on behalf of the Six Nations who had previously given him a written power of attorney for this purpose. The surrender was especially thorough, as the Six Nations and their posterity did "fully, freely and absolutely surrender, relinquish and quit claim to all and singular the right, title, property, possession and interest, which the said Nations, they or either of them now have, might or could have had to such parts of the said lands".<sup>141</sup> On February 5, 1798, the Crown then issued the land patent to the six purchasers specified by the Six Nations.<sup>142</sup> Russell wanted the tran-

137 Brant to Robert Liston, December 29, 1797, *RP*, vol. 2, p. 170.

138 Johnston, "Joseph Brant, the Grand River Lands, and the Northwest Crisis", p. 275.

139 Johnston, "The Six Nations in the Grand River Valley, 1784-1847", p. 173.

140 Liston to Brant, April 3, 1798, *RP*, vol. 2, p. 171.

141 Document no. 9 in *Indian Treaties and Surrenders*, vol. 1, p. 24.

142 Document no. 10 in *Indian Treaties and Surrenders*, vol. 1, pp. 25-27.

sactions “done in as public manner as possible, That my Conduct in this business may stand justified to His Maj’y and the posterity of these people forever”.<sup>143</sup> Russell had sent a “secret and confidential” letter to D. W. Smith, who was the Surveyor General of Upper Canada and one of three white trustees appointed by the Six Nations to receive the sale proceeds. Russell instructed him not to issue any official surveys to Brant until the surrender was executed, as he wished to ensure that Brant did not use them to represent himself as the owner in the interim. Russell also explained to Smith:

The Instrument of Surrender is proposed to be a record to posterity that this has been a transaction of the Six Nations own seeking and Solicitation, by which they have of their own free motion renounced and relinquished in their own names and that of their Children for ever such a Part of His Majesty’s gracious Bounty to them. You will be pleased to look upon this communication as entirely confidential.<sup>144</sup>

The law requires trustees to share all relevant facts within their knowledge with their principals, who in this case were the Six Nations. Thus, it was a conflict of interest for Smith to abide by the terms of Russell’s confidential letter. Another of the trustees was a white lawyer named Alexander Stewart, who was married to Brant’s niece.<sup>145</sup> He charged Brant “exorbitant” sums for legal advice which apparently did little to clear up Brant’s legal misunderstandings.<sup>146</sup>

The Six Nations were forbidden to receive the sale proceeds directly, and they were required to appoint non-natives as their trustees.<sup>147</sup> The trustees were supposed to invest and manage the proceeds and to provide the Six Nations with an annual sum (an annuity) for their support. After a short time, Stewart died and Smith left Upper Canada, leaving only one of the three trustees in charge. This was the superintendent of Indian Affairs, Col. William Claus, who was a most unfortunate choice by Brant. Claus did not in fact pay the annuities as required, and the Six Nations essentially lacked the legal status to obtain a court order compelling him to do so.<sup>148</sup> Brant knew by 1806 that Claus was the Six Nations’ “implacable enemy”, but his request to replace Claus with a new trustee was not granted by the government.<sup>149</sup> Thus, the financial security that Brant thought he had arranged

143 Johnston, *The Valley of the Six Nations*, p. 103; *RP*, vol. 2, p. 90.

144 Russell to D. W. Smith, October 10, 1797, *RP*, vol. 1, p. 300.

145 Dunham, *Grand River*, p. 77.

146 Kelsay, *Joseph Brant*, pp. 570–571, 588–589.

147 *Ibid.*, p. 592.

148 Dunham, *Grand River*, p. 78; Report of the Executive Council on Indian Land Sales, May 14, 1830, in Johnston, *The Valley of the Six Nations*, p. 146; Gates, *Land Policies of Upper Canada*, p. 49.

149 Chalmers and Monture, *Joseph Brant: Mohawk*, pp. 358, 362.

did not in fact result. Further, Brant's aggressive behaviour during 1797 prompted British and colonial officials to escalate the "divide and conquer" policy they had been using against the Six Nations. Russell would figure prominently in this scheme, which employed espionage and conspiracy to undermine Brant and natives generally. Brant's commitment to the Six Nations was so great as to cause officials to rely less on placation and deferral, and more on active sabotage.

### **Espionage, Conspiracy, and Britain's "Divide and Conquer" Policy**

Brant was perceived as a threat by Britain for several reasons. Beyond his quest for native sovereignty over the lands they occupied, Brant was also trying to unify Indians of all tribes, the better to ensure their survival. He was especially keen to foster close ties with the Mississauga Indians, and in fact was appointed by them in 1798 to negotiate their land sales with the Crown.<sup>150</sup> Though he did not fully understand the law, Brant had a good appreciation for the money value of land, and colonial officials resented his wise advice to the Mississauga in this regard.<sup>151</sup> Britain sought to undermine Brant, divide the tribes, and render them dependent on British charity for their survival.<sup>152</sup> A vast network of conspirators was organized to implement this plan.

Brant had been a unifying force among North American Indians since shortly after the American Revolution. In 1786, when Americans and natives were fighting over frontier lands, Brant sought a united confederacy of all tribes. He knew that "the Indians could hope to retain possession of their lands only if all the tribes were united in an organization strong enough to command the respect of the white man."<sup>153</sup> Colonial officials were determined to undermine Brant even before his confrontation with Russell. Simcoe had sought "to continue the jealousy & seperation [*sic*] of the Six Nations (& particularly of the Mohawks conducted by Brant & the Land-jobbers) from the Chippewas".<sup>154</sup> (The Mississauga were viewed by colonial officials as a tribe within the Chippewas.<sup>155</sup>) In 1795 Simcoe suggested to Dorchester changes in native policy that would "prevent

150 Russell to Prescott, June 15, 1798, *RP*, vol. 2, p. 185. See also the speech of Wabanip, May 17, 1798, in *RP*, vol. 2, p. 187.

151 Gates, *Land Policies of Upper Canada*, p. 50.

152 The use of the divide and conquer strategy against the Six Nations has been noted by Smith, *Sacred Feathers*, p. 29. A fuller account of the implementation of this and other strategies against the Mississauga is found in Leo A. Johnson, "The Mississauga: Lake Ontario Land Surrender of 1805", *Ontario History*, vol. 82, no. 3 (September 1990), pp. 233–253.

153 Robinson, *Joseph Brant*, pp. 118–121.

154 Simcoe to John King, September 7, 1797, *RP*, vol. 1, p. 274.

155 Russell himself included the Mississauga among the Chippewas, writing: "Captain Claus informs me that the five Nations and the Chippewas are at present on the most friendly footing with each other — particularly the Messissague [*sic*] Tribe, who have thrown themselves in a manner under the direction of Captain Joseph Brant." Russell to Portland, March 21, 1798, *RP*, vol. 2, p. 122.

improper influence and dependence on their Chiefs, and particularly on Brant'''.<sup>156</sup>

In September 1797 Simcoe, though now in England, suggested a further change. He proposed that the Mississauga should not receive their annual bounty at the "head of the lake" (near present-day Dundas) where the Six Nations received theirs, but rather at York. This would "prevent them Falling into the hands of Brant'''.<sup>157</sup> He also advised that a separate administrative district be set up to deal with Mississauga matters, and that Lieutenant James Givens of the Queen's Rangers be appointed as the agent in charge of it. Russell was shortly thereafter instructed by Portland to implement these changes, as part of a general plan

of fomenting the jealousy which subsists between them and the Six Nations, and of preventing, as far as possible, any junction or good understanding taking place between those two Tribes ... keep the Indian Nations separate and unconnected with one another, as by that means they will be rendered in proportion more dependent on the King's government.<sup>158</sup>

After hearing of the confrontation between Brant and Russell, Portland again advised Russell of

the necessity of the most zealous and strict attention to every possible means of preventing connections or confederations from taking place between the several Nations, and that the rendering them dependent on your government, and keeping them as separate and distinct as possible from each other, should be laid down by you as a system, from which, on no account, you should ever depart.<sup>159</sup>

Portland advised Russell and Liston, in a "most secret" letter, of the response they should give if Brant "should be desirous of coming to England" to discuss with British officials the future of the Six Nations' land holdings. Both were instructed not to discourage Brant's departure, but to assure him that they themselves would give effect to whatever the King's personal representatives should decide.<sup>160</sup> Such a statement was intended to deceive Brant into thinking that Britain was actually contemplating a change in native policy, which was not the case.

156 Simcoe to Dorchester, March 9, 1795, in Doughty and McArthur, *Documents Relating to the Constitutional History of Canada, 1791-1818*, p. 181.

157 Simcoe to John King, September 7, 1797, *RP*, vol. 1, p. 274.

158 Portland to Russell, September 11, 1797, *RP*, vol. 1, pp. 277-278.

159 Portland to Russell, November 4, 1797, *RP*, vol. 2, p. 3.

160 Portland to Russell, June 7, 1798, *RP*, vol. 2, pp. 166-167.

Russell implemented Portland's plan and placed Givens in charge of the new district within which the Mississauga would receive their bounty.<sup>161</sup> Acting on Portland's instructions to "temporize" with Brant, Russell did an admirable job of seeming favourably disposed to him, claiming "I had never been actuated in my transactions with the Five Nations by any other Motive than a sincere wish to serve and oblige them ... I beg you to be assured that the Interests of the Five Nations have a true and faithful friend in me."<sup>162</sup> Russell repeated to Brant what Portland had instructed him to say on the matter of Brant's going to England. He also explained that the change in the Mississaugas' bounty site was done for reasons of "OEconomical management [*sic*]" and for the Indians' convenience, "at which they should undoubtedly rejoice".<sup>163</sup>

Liston followed his orders regarding the matter of Brant's trip to England and wrote, "I beg you will rest assured of my inclination to serve you to the utmost of my power."<sup>164</sup> The next day, Liston reported to British foreign secretary Lord Grenville rumours he had heard of the Six Nations planning for war, and concluded "every movement on the part of Brant, at the present moment, must naturally give rise to suspicion."<sup>165</sup>

Givens, too, performed his prearranged function. He ignored Brant's efforts to act as agent in the sale of Mississauga lands.<sup>166</sup> He chastised the Mississauga for attending a Six Nations' council meeting, told them Brant was "drunken and Ignorant", and warned them that contact with his council might incur the displeasure of the King or his government.<sup>167</sup> He was used by Russell to find out certain facts "merely in the course of conversation" and to "collect all the intelligence" he could.<sup>168</sup> Russell told him to tell Brant that "you have often heard me speak in the most friendly terms of him." Leo Johnson has also written of Givens's role as a spy within a colonial strategy of duplicity against the Mississauga.<sup>169</sup>

Other officials were also involved in the web of intrigue. For example, Sir John Johnson was told to follow a specific course of conduct which would convince Brant "that your attachment to the Interest of the Indians is as firm as ever, and that neither he nor any of the Indian tribes have the smallest reason to suspect the contrary".<sup>170</sup> William Claus, the super-

161 Russell to Portland, March 21, 1798, *RP*, vol. 2, pp. 122–123.

162 Russell to Brant, September 28, 1798, *RP*, vol. 2, p. 270.

163 Russell to Brant, September 28, 1798, *RP*, vol. 2, p. 271.

164 Liston to Brant, April 3, 1798, *RP*, vol. 2, p. 171.

165 Liston to Grenville, April 4, 1798, *RP*, vol. 2, p. 168.

166 Brant to Givens, July 6 and 24, 1798, *RP*, vol. 2, p. 233.

167 Givens to Brant, July 30, 1798, *RP*, vol. 2, pp. 234–235.

168 Russell to Givens, September 28, 1798, *RP*, vol. 2, p. 271.

169 Johnson, "The Mississauga: Lake Ontario Land Surrender of 1805", pp. 241, 243. Johnson also describes the role Russell played in deceiving and undermining Brant.

170 Military Secretary James Green to Sir John Johnson, September 13, 1798, *RP*, vol. 2, p. 259.

intendent for the Six Nations' district, was instructed by Russell "to do everything in his power (without exposing the object of this Policy to Suspicion) to foment any existing Jealousy between the Chippewas & the Six Nations".<sup>171</sup> Claus would have been a particularly effective spy, as he knew the natives' language, exhibited a "kindly attitude" toward them, and was initially trusted by them.<sup>172</sup> He would later work "hand in glove with the speculators" who bought the Six Nations' lands by never pressing them for payment.<sup>173</sup>

The strategy used by Britain was not novel, as American officials had earlier been instructed to break up any Indian confederations within their borders<sup>174</sup> and to foster jealousy between the tribes.<sup>175</sup> The British plan was not lost on the Six Nations. They suspected that the change in the Mississauga bounty site was done "with an intent to disunite us",<sup>176</sup> and Brant knew he was being slandered by Givens for the same reason.<sup>177</sup> Still, the British goal of native dependency would ultimately be realized, as natives became wards of the state by the mid-nineteenth century.<sup>178</sup> The various remnant lands held by the Six Nations were conveyed to the Crown, and the current Six Nations reserve was created and designated exclusively for their use.<sup>179</sup>

The details of this conspiracy show how poor the relations were between the Six Nations and Britain, especially after 1797. There were no "good faith" negotiations, but rather only concerted attempts to undermine and delude Brant. The British never intended to convey clear title or sovereignty to the Six Nations, and authorities did not want Brant to come to Britain to haggle with them. The only battle of wills that might have mattered was that between Brant and the British Parliament, but Brant did not know this.

Just as Russell should not be viewed as weak-willed, neither should Brant be viewed as a failure. His efforts to obtain clear title were practically doomed, as he had to work in hopeless circumstances. Brant almost always acted alone in his dealings with numerous officials. He had been born in a far different culture, had to rely on dubious legal advice from a white

Chalmers and Monture write that while "Colonel Butler was notorious for his uncanny ability to deceive Indians ... he was a mere child compared to Sir John Johnson" (*Joseph Brant: Mohawk*, p. 23).

171 Russell to Portland, March 21, 1798, in *RP*, vol. 2, p. 122.

172 Morse, *Aboriginal Peoples and the Law*, pp. 254–255.

173 Dunham, *Grand River*, p. 78.

174 Chalmers and Monture, *Joseph Brant: Mohawk*, p. 98.

175 Brant to Rev. Samuel Kirkland, March 8, 1791, *SP*, vol. 5, p. 3.

176 Speech of Joseph Brant, *RP*, vol. 2, p. 307.

177 Brant to Givens, August 3, 1798, *RP*, vol. 2, p. 235.

178 G. F. G. Stanley, "The Indian Background of Canadian History", *Canadian Historical Association* (1952), p. 19.

179 Sally Weaver, "The Iroquois: The Consolidation of the Grand River Reserve in the Mid-Nineteenth Century, 1847–1875" in Rogers and Smith, *Aboriginal Ontario*, p. 183.

lawyer, was betrayed by his own trustee, was spied upon and sabotaged by those professing to be his friends, and above all he had no law or policy in his favour.

Brant pressed officials for enhanced land rights for decades, literally until he died.<sup>180</sup> Succeeding in this endeavour was Brant's goal, but his motivation was "the present situation of the Indians and my own feelings" and his realization that his interests and those of the Six Nations were "inseparable". Brant said in 1793, "If I do not succeed I shall have the satisfaction to reflect that I have done everything I could and time will show whether I was right or not."<sup>181</sup> Such determination and dedication to the Six Nations should not be sullied by suspect allegations of graft.<sup>182</sup> The widespread, clandestine network of contacts which Britain organized is further evidence that Brant did not sacrifice the interests of the Six Nations. The communications between Russell and other officials make clear that Brant was not viewed as a malleable chief seeking personal gain. If that had been the case, bribery would have been an easier course of action for the British. Brant, though, was not susceptible to bribery, having rejected in 1792 a valuable offer from the American government in exchange for his support. Next to the Six Nations, Brant was loyal to Britain, and even Simcoe admitted in 1795 that Brant was faithful to the King.<sup>183</sup>

## Conclusion

The 1763 Proclamation codified a policy which governed all native land

180 In 1806 and 1807 Brant tried to obtain from Lieutenant Governor Francis Gore confirmation of the original Haldimand conveyance. Brant was too ill to go to England himself, so he asked the Duke of Northumberland to plead the Six Nations' case in London. See Chalmers and Monture, *Joseph Brant: Mohawk*, p. 357; William L. Stone, *Life of Joseph Brant: Thayendanegea* (Buffalo: Phinney & Co., 1851), p. 429.

181 Brant to Simcoe, July 28, 1793, *SP*, vol. 1, p. 403.

182 Kelsay, Robinson, Stone, and Chalmers and Monture all dismiss the allegations of impropriety that contemporaries in the Indian Department and some Indians levelled against Brant. They note that the accusers "generally had their own axes to grind" and that an official report discrediting Brant had resulted from a bogus Indian council that had been "designed and instigated" by William Claus. A subsequent Six Nations' investigation exonerated Brant after he presented his records for inspection. Claus, who was the trustee managing the Six Nations' funds, kept his records secret. Requests made to him for information by the Executive Committee on Indian land sales went unanswered, and the council had "no account up to Col. Claus' death of how he stood with the Indians". Johnston, on the other hand, leaves open the possibility of Brant's corruption. He explores without judgement the proposition that Brant arranged the Six Nations' land sales "to make a large personal profit through expediting a lucrative transaction" and other matters relating to Brant's integrity. See Kelsay, *Joseph Brant*, p. 589; Robinson, *Joseph Brant*, pp. 159–164; Stone, *Life of Joseph Brant*, pp. 414–426; Chalmers and Monture, *Joseph Brant: Mohawk*, pp. 345–356; "Report of the Executive Committee on Indian Land Sales, May 14, 1830" in Johnston, *Valley of the Six Nations*, pp. 144–146; Johnston, "Joseph Brant, the Grand River Lands, and the Northwest Crisis", pp. 270–275.

183 Chalmers and Monture, *Joseph Brant: Mohawk*, p. 175; Simcoe to Dorchester, October 9, 1795, *SP*, vol. 4, p. 102.

claims in British North America. Haldimand's licence of occupancy to the Six Nations reflected this policy, and neither Simcoe nor Russell ever executed an agreement which purported to place native land rights on any stronger footing. Brant tried to force Russell to breach this policy, not knowing that Russell lacked the legal power to do so. Instead, Russell ignored his executive council's directions and spared himself discipline from the King for disobedience. He placated Brant and ensured that British policy was observed. Russell played an integral part in a widespread British conspiracy that undermined Brant's leadership and his efforts to gain greater land rights for the Six Nations before he died in 1807. Both Russell and Brant deserve more credit than historians such as Johnston have accorded them. Russell was hardly ineffectual, while Brant was dedicated to the Six Nations and probably far more loyal to the King than he ought to have been. Brant acknowledged this himself in 1797:

Hitherto no insinuations bribes or dangers could cause me to swerve in my attachment to His Majesty or cease from pursuing his Interests which I looked as connected with that of the Indians, and never could be persuaded that at any time he would deceive us. What I most lament is that my sincere attachment has ruined the Interests of my Nation.<sup>184</sup>

The portrait of Brant which emerges from this study lends support to Barbara Graymont's insightful comments:

Brant was a noble figure who dedicated his whole life to the advancement of his people and who struggled to maintain their freedom and sovereignty. His major failure was his inability to understand the nature of British imperialism and to comprehend the fact that the British would not permit two sovereignties to exist in Upper Canada.<sup>185</sup>

The evidence presented here adds weight to the claims of two historians who have objected to the majority view of Russell. Plaunt notes the many tasks that Russell undertook and the "remarkable efficiency" of his efforts, and concludes that he was among the "most praiseworthy administrators" of Upper Canada.<sup>186</sup> Edith G. Firth views Russell as conscientious, honest, and practical, and concludes after listing his many accomplishments that he was "an excellent if unspectacular administrator".<sup>187</sup> Unlike Johnston, both Plaunt and Firth believe Russell handled the Six Nations crisis well,

184 Brant to Sir John Johnson, December 10, 1797, in Johnston, *The Valley of the Six Nations*, p. 94.

185 Barbara Graymont, "Thayendanegea" in *Dictionary of Canadian Biography*, vol. 5, p. 811.

186 Plaunt, "The Honourable Peter Russell", p. 258.

187 Firth, "The Administration of Peter Russell, 1796-1799", p. 181.

even though neither of them appears to have appreciated Russell's success in keeping the transaction within the policy of the Proclamation. The positive view of Russell's handling of the crisis is only enhanced by an understanding of the legal considerations.

The fact that Russell, as a mere colonial official, did not hold ultimate legislative or executive powers during his dealings with Brant does not much diminish Russell's achievement. Though Russell had no authority to grant or recognize the Six Nations' sovereignty, had he done so anyway, it would have been a political embarrassment for Britain. It would also have left the crisis unresolved, and perhaps even caused natives to be more hostile at such time as they learned that their documentation was ineffective. Further, the resulting chain of invalid land titles would have caused havoc both for the government and for the parties to all subsequent transactions. Once again, as Firth and Plaunt note, Russell found a practical solution to a challenging problem.

The actions of the monarchy and the British Parliament have received too little scrutiny by historians of the Six Nations' land quest, and their motives have not been examined. Instead, most historians have trivialized the tale by emphasizing the supposed personalities of Simcoe, Russell, and Brant. Some, like Johnston, dramatized the block sale saga of 1797 but were oblivious to the legal effect of the documentation, which ultimately reflected British policy. These historians have created the myth that colonial officials were masters of their colonies, when in fact such officials held subordinate positions within the legal and political structure of the empire. A lack of attention to the applicable law has led to the creation of a misleading historiography. Some historians have shared the same delusions Brant did about the law. They, too, have not appreciated the distribution of powers within the empire or the jurisdiction of officials and institutions within the political structure.

Some might criticize the argument advanced here as one-sided, as unfairly ignoring the effect of the Six Nations' law and policy as it related to their land transactions. However, the Six Nations' law and policy were irrelevant under the concept of sovereignty which exists in international law. The law that applies in a place is the law of the society which controls that place. Control can be exercised *de facto* (actual control) or expressed *de jure* (by declaration). In either case, the Six Nations were not sovereign in the Grand River Valley. They occupied land which had been previously claimed by Britain and which had been surrendered to Britain by the Mississauga before the Six Nations' arrival. The Six Nations' occupancy was based on expressed terms which recognized British authority. In the daily conduct of affairs, the Six Nations acknowledged their subordination to the Indian Department, and they sought the approval of the Department and other colonial officials on matters of importance. There was no unequivocal declaration of independence given to the world by the Six Nations of their status as a nation. There was no defence of their borders to the exclusion of

all others. Unlike the Americans, the Six Nations did not repudiate British authority. In short, the Six Nations were not “the supreme authority in an independent political society”, which defines sovereignty.<sup>188</sup>

188 Burke, *Osborn's Concise Law Dictionary*, p. 308.