

CANADA
PROVINCE OF NOVA SCOTIA

54-425985
54-426314
54-426315

IL

HER MAJESTY THE QUEEN

VERSUS

DONALD JOHN MARSHALL, JR.

DECISION

HEARD BEFORE: The Honourable Judge John D. Embree

DECISION RENDERED: June 27, 1996

COUNSEL: Michael A. Pare and Ian C. MacRae, for the Crown
 Bruce H. Wildsmith, Q.C. and Eric Zscheile, for the Defendant

1

EMBREE, P.C.J.:

The Defendant is charged that he:

...on or about the 24th day of August, 1993 at or near Pomquet Harbour, in the County of Antigonish, in the Province of Nova Scotia did:

1. fish for or catch and retain fish (eels) without being authorized to do so under the authority of a license issued pursuant to Maritime Provinces Fishery Regulations, the Fishery (General) Regulations, or the Aboriginal Communal Fishing Licenses Regulations, contrary to section 4(1)(a) of the Maritime Provinces Fishery Regulations, made pursuant to the Fisheries Act, R.S.C., 1985, c.F-14, as amended, and did thereby commit an offence contrary to section 78(a) of the said Fisheries Act;

2. fish during the close time for eels with eel nets, which nets were not dip nets, in the waters of Pomquet Harbour covered by Item 2 of Schedule III of the Maritime Provinces Fishery Regulations, contrary to section 20 of the said Regulations, and did thereby commit an offence under section 78(a) of the Fisheries Act;

3. sell or offer to sell eels which had not been caught and retained under the authority of a licence issued for the purpose of commercial fishing or such other licence as provided for in section 35(2) of the Fishery (General) Regulations, thereby contravening Section 35(2) of the said Regulations, and did thereby commit an offence contrary to s. 78(a) of the Fisheries Act.

At issue here is whether the Defendant, being a status Mi'kmaq Indian, has a right, under treaty, to fish and sell fish and, as a consequence, whether he should be acquitted on these charges.

I have included relevant legislative provisions in Appendix I which forms part of this judgment. (See p. 46.)

Summary of Facts and Submissions

The actions of the Defendant on August 24th, 1993, in relation to the three counts before me, are not in dispute. An Agreed Statement of Facts was filed with the Court. In that Agreed Statement, the Crown and Defence:

...for the purposes of this case only, agree that the following statement of facts shall be taken as true, provided each party shall be at liberty to supplement but not contradict these facts by other relevant evidence.

1. On August 24, 1993, at around 10 o'clock in the morning, the Defendant Donald John Marshall ("Marshall") and another person fished for eels by means of fyke nets, a type of fixed net, from a small outboard motor boat in Pomquet Harbour, County of Antigonish, Province of Nova Scotia. For part of the morning Marshall pulled the nets and emptied the eels into the boat while the other person operated the outboard motor, and for part of the morning the other person pulled the nets and emptied the eels into the boat while Marshall ran the outboard motor. Marshall and the other person transferred the eels from the boat to a holding pen.

2. Marshall is an aboriginal person, being a status Mi'kmaq Indian registered under the provisions of the Indian Act (Canada), and is a member of the Membertou Band. The Membertou Band is an Indian band under the Indian Act (Canada), whose Reserve Lands are situate at or near Sydney, Nova Scotia.

3. At about 1:10 P.M. on the 24th of August, 1993, and at or near Pomquet Harbour Marshall and another person brought their eels from the holding pens ashore at the location where they kept their boats. This location is situate on lands which are part of the Afton Indian Reserve, at Antigonish County. Marshall helped weigh and load his eels onto a truck belonging to South Shore Trading Company Limited ("South Shore") of Port Elgin, New Brunswick. South Shore is engaged in the purchase and sale of fish. Marshall sold 463 pounds of his eels to South Shore at \$1.70 per pound.

4. Marshall had on previous occasions in the same year sold eels to South Shore.

5. Marshall did not at any time hold a license (within the meaning of S. 4(1)(a) of the Maritime Province Fishery Regulations and S. 35(2) of the Fishery (General) Regulations) with respect to fishing for or selling eels from Pomquet Harbour.

6. August 24, 1993, was within closed times (within the meaning S. 20 of the Maritime Provinces Fishery Regulations) for fishing eels at Pomquet Harbour.

Lengthy oral and written submissions have been made by the Crown and Defence setting out their positions and arguments on the issues as they see them and it is those full submissions to which I have referred when assessing the merits

of the arguments placed before me. However, at this point I will attempt to briefly summarize the positions put forward by the Crown and Defence on the principal issues arising in this case.

It is submitted, on behalf of the Defendant, that a series of treaties entered into between the British and the Mi'kmaq of Nova Scotia in 1760 and 1761 are the operative treaties for determining the relevant rights of the Defendant in this case. It is submitted that the Treaties of 1760-61 possess a trade clause which gives the Defendant the right to fish and to sell the fish. These treaties should be read in the context of a chain of treaties from 1725 to 1779. That context, along with certain subsequent events which clarify the 1760-61 Treaty promise respecting trade, confirms the understanding that the Mi'kmaq had free liberty to trade, without restriction. The Mi'kmaq did not agree in the 1760-61 Treaties or otherwise that their rights to fish and sell fish were subject to unilateral regulation by the Crown. However, whether the Mi'kmaq agreed through the Treaties of 1760-61 to be regulated in their fishing and trading activities or not, the legal test and analysis to be applied by this Court is the same and the regulation of the Defendant's fishing and trading activities that the Crown seeks to apply here must be justified by the Crown. I am referred to *Sparrow v. R.*, [1990] 1 S.C.R. 1075 and other judgments that have interpreted and applied Section 35(1) of the Constitution Act, 1982.

As just stated, part of the Defence submission here is that the Defendant has, under treaty, the right to fish and the right to sell the fish. For the purposes of this case, those words "the right to fish and the right to sell the fish" are meant to be read together. This is not a case about "the right to fish", standing alone.

This is the position taken by the Crown. The operative treaties for defining the treaty relationship between the Mi'kmaq and the Crown are the series of treaties

entered into in Nova Scotia in 1760-61. Those treaties do not grant any commercial fishing rights to the Mi'kmaq. If the Court determines that there is an implied right to commercial fishing in these treaties, then that right was subject to regulation *ab initio*. Any commercial fishing right conveyed by these treaties to the Mi'kmaq is not infringed by the regulations here because the Crown's ability to regulate is inherent in any right that was conveyed. Further, if the Court concludes that a treaty right to a commercial fishery by the Mi'kmaq exists, that right is subject to the Crown's right to regulate the fishery and the Crown does not have to justify such regulation. Section 35(1) of the Constitution Act, 1982 does nothing to change any of this.

Section 35(1), Constitution Act, 1982

Section 35(1) of the Constitution Act, 1982 is found in the Part entitled "Rights of the Aboriginal Peoples of Canada" and states:

35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

That section constitutionally protects those aboriginal and treaty rights that were in existence when the Constitution Act, 1982 came into effect. The Supreme Court of Canada in *Sparrow*, *supra*, at p. 1108, points to a "general guiding principle for s. 35(1)" which is that:

The Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trustlike, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.

6
In my view, those words apply equally to any rights conveyed by treaty (Fitzsimmons v. British Columbia)

The burden of demonstrating the existence of a treaty right, protected under Section 35(1), rests with the Defendant. Likewise, the Defendant bears the burden of proving that there has been a *prima facie* infringement of that right. The Crown bears the burden of justifying any such infringement of the treaty right.

The Trial

The trial in this matter has taken forty days, spread out over the last nineteen months. The transcript of the testimony and argument spans more than 5800 pages. Copies of over four hundred documents were tendered. I want to thank Counsel for the professional and courteous manner in which they conducted themselves during the course of this trial and for the thorough and effective presentation of their respective cases.

I heard testimony from three witnesses. The Crown called Stephen Everett Patterson, a Professor of History at the University of New Brunswick as its only witness. John Graham Reid, a Professor of History at St. Mary's University and William Craig Wicken, a researcher/historian with the Aboriginal Title Project both testified in the case for the Defence. (The Aboriginal Title Project is a joint project of the Union of Nova Scotia Indians and the Confederacy of Mainland Mi'kmaqs. As a result of that employment, William Wicken received a research associateship at the Gorsebrook Research Institute at St. Mary's University.) All three witnesses have earned a Ph.D. degree and two are Professors. Counsel addressed these witnesses as "Professor" Patterson, "Dr." Reid and "Dr." Wicken so I will refer to these witnesses in the same manner as both counsel have.

Professor Patterson was ruled to be an expert witness, capable of expressing his opinion as an historian on the subjects of British Colonial administration in

North America, British Colonial development in North America, British Colonial Indian policy including British-Indian relations (treaty and otherwise) in Colonial New England and Nova Scotia. The term "Colonial" was defined by Professor Patterson as the time frame commencing with the first British settlements in Virginia in 1607 and extending to 1776 in the case of New England and 1867 in terms of Nova Scotia.

Dr. Reid was also found to be an expert historian. He was ruled capable of giving opinion evidence in relation to northeastern North America in the 17th and 18th centuries on the topics of British, Scottish and French Imperial relations with the colonies, colonization of the area by Europeans, the native peoples inhabiting this area and the relationships between the Europeans and the native peoples. He was also qualified as an expert in the translation of French into English and the interpretation of documents found originally in the French language.

Dr. Wicken was declared to be an expert ethno-historian. He testified at length explaining ethno-history but it can be summarized as a combination of anthropology and history and utilizing the approaches of both these disciplines to study the interaction between culturally diverse peoples over time. His expertise was found to cover Northeastern North America in the years from 1500 to 1800 as well as that time frame referred to as the immediate pre-contact period. "Contact" refers to contact between Europeans and North American natives which is generally accepted to have first occurred around the year 1500. Dr. Wicken defined the immediate pre-contact period as commencing up to 900 years before 1950. Within these parameters, Dr. Wicken was ruled capable of giving opinion evidence as an ethno-historian on the subjects of native peoples, the relationship of native peoples with Europeans, colonization by Europeans and the imperial relations between European nations and their colonies. Dr. Wicken was also found qualified to

provide English translation for, and interpretation of, 17th and 18th century French documents.

From the outset of this trial, Crown and Defence counsel understood and acknowledged that the Defendant bears the burden of demonstrating the existence of any treaty right on which he may wish to rely. It has been the Defendant's position throughout that he has a treaty right to fish and sell fish as he did here. At the commencement of the trial, Defence counsel submitted that the Defendant would be relying on the Treaty of 1752 as authority for his claim to a treaty right to fish and sell fish. Defence counsel also expressed his intention to present evidence in support of a claim to an aboriginal right to engage in the trading of fish. The Defence had informed the Crown of its position prior to the trial.

The Crown elected to call Professor Patterson as part of its case. It was the Crown's submission throughout that the operative treaties for determining any relevant fishing rights of the Defendant were the Treaties of 1760-61. Professor Patterson's testimony included extensive testimony about the numerous treaties entered into between the British and the Mi'kmaq and Maliseet in the Maritime Provinces between 1725 and 1779, along with the historical context and his opinions of the historical context, throughout this period.

At the opening of the case for the Defence, the Defendant abandoned his reliance on the Treaty of 1752 and any aboriginal rights to engage in trade which he had earlier claimed. Defence counsel requested that I make any determination of the Defendant's rights in this case on the basis of the 1760-61 Treaties. The Defence suggested that those treaties provided the Defendant with the necessary rights to engage in the fishing and selling of fish that he was engaged in here.

The principle focus of Dr. Reid's testimony was the relationship between the

British and the aboriginal peoples of the Massachusetts Bay colony (now present day New England) during the 17th and early 18th centuries. His testimony concentrated on those peoples native to the area of present day Maine encompassed by the Penobscot and Saco Rivers who are called the Abenaki, and their relationship, both treaty-making and otherwise, with the British during the period of 1690 to 1725. In Dr. Reid's opinion, the treaty-making relationship between the Mi'kmaq and the British in Nova Scotia and New Brunswick during the 18th century was "an outgrowth from or a continuation of..." the earlier British-Abenaki relationship and that it would not be possible to have a fully accurate understanding of the Mi'kmaq-British treaty-making process without understanding the British-Abenaki relationship that preceded it.

Dr. Wicken's testimony focused on the Mi'kmaq people and their relationship, treaty-making and otherwise, with the British in the 18th century. His testimony also dealt with broader issues of aboriginal society in northeastern North America and with aspects of Mi'kmaq society before and after the 18th century.

In determining that these three witnesses qualified as experts, capable of giving opinion evidence, I followed the legal considerations set forth in *R. v. Abbey*, [1982] 2 S.C.R. 24, *R. v. Lavallee*, [1990] 1 S.C.R. 852 and *R. v. Mohan*, [1994] 2 S.C.R. 9. Each of these witnesses provided various opinions based on historical facts, documents presented in evidence and information which each acquired in the course of acting within his area of expertise. The testimony of an expert witness is to be assessed by me like that of any other witness. I can accept all of the witness' testimony, part of it or none of it. It is for me to assess the weight to be given to any opinions expressed. In assessing the weight any witness' opinions deserve, I would, of course, include among my considerations the extent or degree of the witness' qualifications and the factual bases of any opinions.

A large number of documentary exhibits are before me here. All of them are copies. Those copies fall into various categories. Some are photocopies of originals; some are photocopies taken from microfiche; some are typescript copies created by, or on behalf of, the witnesses before me; some are in printed form and taken from published sources; some have been translated into English by a witness in this matter or another person; some may fall into a category which I have not described. I accept as reliable all of the copies and translations of the historical documents tendered as exhibits before me, to the extent that each is complete and legible. (By using the word reliable, I mean that I am satisfied as to the sufficient accuracy of the copy or the translation as the case may be. I am not saying, at this stage, that the original of any of these documents is reliable for any purpose. This is particularly true for those small number of documents where variations occur between different "copies" of, allegedly, the same original document.) All the documentary exhibits are admissible and properly before me.

Review of Historical Background

The evidence reveals that the British entered into treaties with Mi'kmaq villages throughout Nova Scotia during 1760 and 1761. The Defendant here submits that these are the operative treaties for determining his rights in the circumstances of this case.

A lot of evidence was presented to me by both the Crown and Defence dealing with the history of Nova Scotia and New England in the 17th and 18th centuries as it relates to the Mi'kmaq, the Abenaki, the British and the French, their cultures, their actions and their interactions. I will not be making specific comments on much of that evidence, although I have considered all of it. A lot of the documents and testimony was presented to help place the particular historical

events and actions of greater significance here in their proper context. Before considering and interpreting the treaties and treaty provisions being relied on here, I am going to review, at some length, relevant aspects of the history and events that pre-dated and post-dated the Treaties of 1760 and 1761.

The first contact between Mi'kmaq and Europeans occurred in the very early years of the 16th century. At this time, the territory inhabited by the Mi'kmaq included all of present day Nova Scotia, Prince Edward Island, the Eastern Coast of New Brunswick up to the area of the Restigouche River, the Magdalene Islands, Ste. Pierre-Miquelon and possibly the south coast of Newfoundland.

Traditionally, communication in Mi'kmaq society has only been oral. No written records of Mi'kmaq history have ever been located. One has to look to archeology, anthropology, written records of Europeans who have had contact with the Mi'kmaq, the oral history and folklore of the Mi'kmaq, and other sources to study Mi'kmaq history.

At first contact, the Mi'kmaq were a hunting, fishing and gathering people. They lived in villages along the coast for most of the year and moved inland during the harsher periods of winter. They settled mostly along river systems.

There were vast differences between Mi'kmaq society and culture and that of the Europeans who came to these shores. Generally, traditional Mi'kmaq society functioned consensually and in a non-coercive nature. European notions of government, sovereignty and authority are not part of this model. Usually, among the leaders of a Mi'kmaq village would be a "Sakamow" whom historians also refer to as a "Chief". A Sakamow was an individual who, through inheritance or achievement, had gained influence within the village. A Sakamow did not have the ability to demand acceptance of his decisions. However, because of his influence,

his word was more likely to carry weight in the consensual decision-making process of the community. (The history of treaty-making between the Mi'kmaq and the British offers us one illustration of how the political framework of Mi'kmaq society operated.)

The earliest European visitors here were fishermen who came to the Grand Banks and stopped along the coastline of the present day Maritime Provinces at any number of possible locations. With this contact, came early forms of trading and by 1534, when Jacques Cartier landed in the Bay de Chaleurs in New Brunswick, at least some Mi'kmaq were used to seeing and trading with Europeans.

Approximately a hundred years passed before any real efforts were made by Europeans at establishing permanent settlements in what was then called Acadia. The French made two efforts to settle at Port Royal early in the 17th century and French exploration of the coast resulted in the establishment of some very small trading posts, principally in the area from Cape Sable to Port Royal. A Scottish settlement was established at Port Royal in 1629 and surrendered back to the French in 1632.

In 1654 British from Massachusetts destroyed Port Royal and the British began establishing trading posts. However, control of Acadia again returned to France by treaty in 1667. A more stable relationship began to form between the French and the Mi'kmaq thereafter.

By the second half of the 17th century there are unmistakable signs that contact with Europeans and their presence in Nova Scotia was having an impact on the life and affairs of the Mi'kmaq. European diseases had already had a dramatic impact, although not to the devastating extent that they did in some other North American aboriginal societies. The development and entrenchment of trade between the Mi'kmaq and the French and British definitely made an impact on

Mi'kmaq life. Pursuing the fur trade meant the Mi'kmaq had to acquire more furs than they would normally utilize for themselves. In exchange for furs, the Mi'kmaq received, among other things, tools and weapons produced by European technology. The introduction of firearms to the Mi'kmaq created the need for powder and shot. Trade also brought liquor and associated concerns about its use in the trading process. The establishment of French settlements brought priests who introduced Christianity to the Mi'kmaq. Efforts by the French to make the Mi'kmaq allies in any disputes with the British resulted in some Mi'kmaq settlements being established close to French communities.

As the 17th century progressed, the French Acadian population of the Annapolis Valley expanded and additional settlements arose at Chignecto (near Amherst), on the Minas Basin, at Cobequid (Truro) and Piziquid (Windsor). By the early 18th century, the Acadian population numbered approximately 2000. A small, transitory European population existed on the Atlantic coast from Cape Sable northeastward to Chezzetcook.

England and France were at war between 1701 and 1713. The Treaty of Utrecht in 1713, ceded Acadia, according to its "ancient boundaries", to the British and this became Nova Scotia and a Royal Colony. That left the French on Isle Royale (Cape Breton) and Isle St. Jean (Prince Edward Island). It was at this point that the French constructed their fortress at Louisbourg.

The British thereafter maintained their headquarters at Annapolis Royal until 1749. The British population at Annapolis Royal probably didn't exceed 350 during this period and most of those were soldiers. The British also had a small garrison at Canso between 1720 and 1744 when it was destroyed by the French. Canso became the principal landing area for New England fishermen who would come ashore to dry their catch. As many as 1100 could be found in the area of

Canso during the early 1730's. The total, permanent, British population of Nova Scotia before the founding of Halifax was less than 1000.

As a hunting, fishing and gathering people, the Mi'kmaq population was spread out and scattered through their territory in the pre-contact period. Dr. Wicken discussed in his testimony population estimates for the Mi'kmaq in the immediate pre-contact period. He concluded that a population estimate of 10,000 was the more reasonable of the suggestions considered. The accuracy of this is difficult to assess.

In the 17th and early 18th centuries, there were approximately 16 major Mi'kmaq villages in Nova Scotia and New Brunswick, Dr. Wicken concluded. Nevertheless, he considered it very difficult to evaluate the Mi'kmaq population in the mid 18th century. Professor Patterson expressed the view that the total aboriginal population in the region by 1750 was, at most, 3000. That estimate was made up of 2000 Mi'kmaq and 1000 Maliseet and Passamaquoddy. Other evidence before me suggests that those figures do constitute a reasonably accurate estimate.

Evidence was presented about the treaty-making process engaged in by the British in Massachusetts Bay with the Abenaki of northern New England commencing in the 1690's. Significant treaties were entered into in 1693, 1699, 1701, 1713 and 1717. In the early 1690's, the Abenaki were allied with the French. The treaty in 1693 and the renewal in 1699 were attempts at ending periods of open warfare between the British and the Abenaki. Hostilities continued, intermittently, leading up to the agreement in 1713. In addition to achieving peace, trade was also a significant concern to both sides and is included in discussions and the treaties themselves. The British were intent on using trade as a means of securing peace when their ability to control the situation, militarily, was

questionable.

With Nova Scotia becoming a British colony in 1713, officials from Nova Scotia were involved in some treaty discussions in New England. The Mi'kmaq were allies of the Abenaki and would have been aware of the state of affairs existing in New England between the Abenaki and the British.

Relations between the British and the Abenaki in the Massachusetts Bay colony again deteriorated in the early 1720's. In 1721, many Abenaki leaders declared all previous treaties with the British null and void.

The history of treaty-making between the British and the Mi'kmaq in Nova Scotia commences in the 1720's. Hostilities between the Mi'kmaq and the British were occurring in Nova Scotia at this time. The Mi'kmaq had seized several ships off the coast and Lieutenant Governor Doucette had imprisoned some Mi'kmaqs from the Annapolis Royal area. There appears in a Massachusetts paper, the New England Courant of December 31, 1722 - January 7, 1723, a published report of a "Declaration of War" against the Mi'kmaq issued by Governor Phillips at Canso on August 1st, 1722. The Declaration proclaims the Mi'kmaq to be "enemies to His Majesty King George...". Immediately following this in the same edition of the Courant is the text of a peace treaty between the British and certain Mi'kmaq dignitaries, purportedly signed at Annapolis Royal on November 12, 1722. The Declaration had made mention of earlier acts of submission and promises of friendship entered into in the summer of 1722. No other record of these documents exists and, as far as can be determined, this 1722 Treaty was never forwarded to the usual authorities in London, England.

The first treaty between the British in Nova Scotia and the Mi'kmaq, of which we have a reliable copy, was entered into as a result of discussions in 1725 and 1726. Treaty discussions were held in Boston in December, 1725. Major Paul

Mascarene was appointed by the Lieutenant Governor of Nova Scotia to act as his representative. Representatives of Massachusetts Bay and New Hampshire represented the British in New England and aboriginal participants included delegates from the Abenaki, the Maliseet and the Mi'kmaq. Agreements were reached which were to be subsequently ratified by the appropriate signatories at a later date in both Massachusetts Bay and Nova Scotia. The Articles of Submission and Agreement made at Boston on December 15, 1725, affecting the Maliseet and the Mi'kmaq, which were ratified at Annapolis Royal on June 4th, 1726 are enclosed with this decision as Appendix II. (See p. 49.) The ratification forms Appendix III. (See p. 51.) The signatories on this ratification represent most known Mi'kmaq villages, including one from Cape Breton, even though Cape Breton was still under French control. Further ratifications of this treaty occurred with more representatives of the Maliseet at Annapolis Royal in May and September of 1728.

It appears that the path of negotiation taken by the British in New England with the aboriginal groups there diverged from that taken in Nova Scotia after 1725.

There were still intermittent hostilities between the Mi'kmaq and the British in Nova Scotia after the 1726 Treaty through the early 1740s. The extent of those hostilities is not clear and there are some materials missing from the archival record for this period. It is clear that the French, from their base in Cape Breton, were using their best efforts to discourage peace between the Mi'kmaq and the British. They continued to give gifts to foster their relationship with the Mi'kmaq as best they could. The British, too, recognized the benefits of bestowing gifts and did so whenever London could be persuaded to expend the necessary funds.

The British were still not experienced at dealing with the Mi'kmaq and

frequently used Acadian "deputies" as intermediaries. The Acadians and the Mi'kmaq, generally, had a friendly relationship and the Mi'kmaq would have acquired considerable knowledge from the Acadians about Europeans and their customs.

Meetings and conferences were held over this period between the British and the Mi'kmaq and the terms of the 1726 Treaty were pointed to by both sides in certain circumstances where disputes needed to be settled.

The Mi'kmaq were constantly engaged in trade during this period with the French, the British and with any vessels that happened along the coast. New England traders were among those frequently dealing with the Mi'kmaq.

The War of the Austrian Succession embroiled England and France in more conflict with each other between 1744 and 1748. In 1745, a British expeditionary force from New England captured Louisbourg and the British were consequently in control of Cape Breton until it was given back to the French in 1748 by the Treaty of Aix-la-Chapelle. During this period, the Mi'kmaq of Nova Scotia were largely sympathetic to the French and offered substantial assistance.

The return of Louisbourg to the French caused the British to have certain security concerns for their colonies in northeastern North America. As a consequence, in 1749, Halifax was founded when General and Governor Edward Cornwallis arrived there with troupes and 2400 settlers. Halifax immediately became the new capital of Nova Scotia. This was the beginning of the extensive British settlement of the Province.

The official end of hostilities between France and England in 1748 did not bring to a close hostilities between the Mi'kmaq and British in Nova Scotia. By the fall of 1749, various attacks on British subjects prompted the new Governor to issue a Proclamation authorizing the military and all British subjects to kill or

capture any Mi'kmaq found, and offering a reward. However, representatives of the Maliseet and the Sagamow of the Chignecto Mi'kmaq did come to Halifax in the summer of 1749 to renew the Treaty of 1726. A further renewal ceremony was held with a larger representation of the Maliseet at the mouth of the Saint John River on September 4, 1749.

Professor Patterson describes what followed in the years immediately after the Proclamation of 1749 as a British-Mi'kmaq war. The British believed that French missionaries were contributing to the unrest with the Mi'kmaq. While small in number, it is clear that the missionaries were travelling throughout Nova Scotia and that they could, and did, on special religious occasions, assemble three to five hundred Mi'kmaq together in one spot to listen to their teachings.

After several months without hostilities in late 1751 and early 1752, Governor Cornwallis revoked his 1749 Proclamation and prohibited any aggression against the Mi'kmaq. Cornwallis was succeeded as Governor of Nova Scotia by Peregrine Thomas Hopson in 1752.

After some discussions in the autumn, a Treaty of Peace and Friendship was entered into by the British with the Shubenacadie Mi'kmaq on November 22, 1752. The Sakamow of the Shubenacadie Mi'kmaq was Jean Baptiste Cope and he signed the treaty along with three other Mi'kmaq. A copy of the treaty is attached as Appendix IV. (See p. 54.) This treaty has been the subject of other litigation, most notably *R. v. Simon*, [1985] 2 S.C.R. 387. Among other things, this treaty renews and confirms the earlier treaty ratified at Annapolis Royal in June, 1726.

The Shubenacadie Mi'kmaq were a group consisting of approximately ninety persons living along the Eastern Shore in Nova Scotia in 1752. The British knew that this was one treaty with a small village of Mi'kmaq but hoped that it would have the effect of bringing other Mi'kmaq groups forward to renew and ratify the

peace. Cope had undertaken to propose this to other Sakamows.

From the British perspective, the 1752 Treaty did not have the desired affect. The British began to realize that other Mi'kmaq would not be coming forward to enter agreements of peace and friendship and they saw that this brief period of peace was collapsing. Other hostilities between the British and the Mi'kmaq occurred such that by July, 1753, Governor Hopson was referring to "...the almost continual war we have with the Indians...".

It appears that some groups of Mi'kmaq, notably those in Cape Breton, were upset that Cope entered into his treaty with the British and indeed it seems that Cope himself participated in an attack on British citizens travelling in a sloop to the Eastern Shore in 1753.

The British, at this time, considered that they had only barely enough troops to protect the civilian population. They considered that the French were the real instigators of these hostilities with the Mi'kmaq.

By the mid 1750's, the French Acadian population, of Nova Scotia, was approaching 15,000. The European (mostly French) population of Isle Royale was over 4000 and of Isle St. Jean was over 2000 in that same period. In 1753, over 1400 German settlers landed at Lunenburg.

While Great Britain and France were not at war after the Treaty of Aix-la-Chapelle in 1748, there was a dispute between the two about the location of (or the existence of) a border between what the French still considered to be their territory and what the British considered was rightfully theirs and part of Nova Scotia. This apparently stems from the words used in the Treaty of Utrecht in 1713 which gave to Great Britain "...all Nova Scotia or Acadia, with its ancient boundaries...". The French were arguing that Acadia, according to its ancient boundaries was a much

more confined space than the British thought and, to put it simply, that present day New Brunswick was still French territory. A boundary commission sat for five years and did not resolve the issue before a military resolution occurred. The French established a fort at the Isthmus of Chignecto which they named Beausejour. The British responded by establishing Fort Lawrence nearby.

War broke out again in 1754 between France and Britain (at least in North America) and the British sent additional troops to Nova Scotia. The British attacked Fort Beausejour and, after a battle, the Fort was surrendered by the French in June, 1755. (A broader conflict, the Seven Years War, from 1756-63 continued to embroil Britain and France.)

The British perceived the Acadian population as being allied with and assisting the French and the Mi'kmaq. 1755 saw the beginning of the expulsion of the Acadians from Nova Scotia.

While at least two groups of Mi'kmaq approached the British between 1753 and 1755 expressing intentions of peace and the British appear to have still been interested in pursuing such peaceful relations, events surrounding the latest war with France overtook everything else in Nova Scotia and 1755-58 brought a period of renewed hostilities. Governor Lawrence, who took over from Governor Hopson in the fall of 1753, issued a Proclamation on May 14, 1756 authorizing the killing and capturing of Mi'kmaq throughout Nova Scotia and offering rewards.

Intermittent skirmishes between British settlers and troops on the one side and Mi'kmaq and remaining Acadians on the other continued to occur with losses being suffered on both sides. Substantial quantities of food were being supplied to the Mi'kmaq from Louisbourg and the French were relying on Mi'kmaq assistance in almost every aspect of their military plans including scouting and reconnaissance, and guarding the Cape Breton coast line.

Louisbourg was attacked and taken by the British in June, 1758. The British had a much superior force and overwhelmed the French. While Mi'kmaq were present on the side of the French, their role and numbers do not appear to have been significant.

The fall of Louisbourg brought an end to the French presence in the region. Cape Breton and Isle St. Jean were surrendered by the French to the British. Even after the fall of Louisbourg, some Mi'kmaq continued hostilities with the British into 1759.

The British continued their pursuit of the French in North America. In 1759, Quebec was captured by the British and in the summer of 1760, Montreal fell.

From 1713 until 1758, Nova Scotia was governed by a Governor (and a Lieutenant Governor if the Governor did not reside in the Colony) and a Council appointed by him with authority to advise him. The Governor and Council made the laws and, after 1719, had authority to treat with aboriginal peoples. In 1758, Nova Scotia added a Legislature to its governing process. The Legislature, thereafter, made the laws which were then sent to the Council and then the Governor for approval. From there, any laws were sent to London for approval by the King. They were valid in the interim but could be disallowed if the King so ordered. The Governor, retained the authority to negotiate treaties with the aboriginals after 1758 and approval by the Legislature of such treaties was not necessary.

During 1760 and 1761, various representatives of the Maliseet and Mi'kmaq came to Halifax and entered into treaties with the British Governor or Lieutenant Governor. The first treaty, dated February 23, 1760, was with the Maliseet and Passamaquoddy. It is included here as Appendix V. (See p. 57.) This treaty contains and confirms the Articles of Submission and Agreement entered into in

Boston in 1725 and the subsequent articles entered into in Halifax in 1749 and ratified later that year at the mouth of the Saint John River. It also acknowledges that those previous articles had been violated. By this treaty, the Maliseet agreed to "traffic and barter and exchange commodities" only at government truckhouses unless given permission to trade at some other place. The Governor in Council and the Maliseet Sakamows had, the week before, agreed to a valuation of various animal skins for the purpose of trading at truckhouses. A truckhouse was subsequently established at the mouth of the Saint John River for trade with the Maliseet.

On February 29, 1760, Paul Laurent, Sakamow of the Mi'kmaq at LaHave and Michel Augustine, Sakamow of the Mi'kmaq at Richibouctou appeared before the Governor and Council to conclude a treaty of peace. The treaty made with the Maliseet earlier that month was communicated to them. They expressed satisfaction with it and declared that all of the Mi'kmaq would be prepared to make peace on those conditions. The British realized that it would be difficult to arrange for all of the Mi'kmaq representatives to attend at Halifax at one time and therefore it was resolved to present a separate treaty to each Sakamow as he arrived. It was anticipated that a general treaty would be made and a signing ceremony for all would be held at Fort Cumberland on a later occasion. There is no indication that this ever happened.

Paul Laurent entered into a treaty, on behalf of the LaHave village, on March 10th, 1760. Michel Augustine and Claude Rene (Sakamow of the Shubenacadie and Musquodoboit Mi'kmaq) entered treaties at the same time. The treaty signed by Paul Laurent is included here as Appendix VI. (See p. 62.) By the end of 1761, it seems that all Mi'kmaq in Nova Scotia had entered into separate but similar treaties. Copies of some of those treaties have not been located and there may be

minor variations between some existing treaties because of errors made in transcribing copies. Nevertheless, I am satisfied that all of these Mi'kmaq treaties were materially the same.

The Mi'kmaq treaties, as written and signed, do not renew, or even make mention of, any previous treaties. Each one of the Mi'kmaq treaties contains a trade clause wherein each Mi'kmaq signatory agrees on behalf of his village as follows:

"And I do further engage that we will not traffick, barter or exchange any commodities in any manner but with such persons or the managers of such truck houses as shall be appointed or established by His Majesty's Governor at [insert location of closest truck house] or elsewhere in Nova Scotia or Accadia."

I am convinced that the price list for the truck houses negotiated with the Maliseet and Passamaquody was accepted by all as applicable to the trade clause in the Mi'kmaq treaties.

On March 21st, 1760, the Nova Scotia House of Assembly, the Governor and Council passed into law "An Act to Prevent Any Private Trade or Commerce with the Indians" which said in part:

Whereas Articles of peace have been concluded by and between His Excellency the Governor in (sic) behalf of His Majesty and the Indian Delegates from the Tribes of St. John's River, Passamaquodie in the Bay of Fundi and part of the Tribes of the Mickmacks, whereby said Tribes have obliged themselves not to trade with any person or persons whatsoever but such as shall be appointed Truck masters or Licenced for that purpose by the Governor

Lt Governor or Commander in Chief of the province for the time being.

And for the better and more effectual carrying on a Trade and Commerce with the said Indians according to the said Articles: and to prevent private persons from carrying on any separate Trade Commerce or Dealings whatsoever with the said Indians. *IL*

Be it Enacted by His Excellency the Governor Council and assembly, and by the authority of the same it is hereby Enacted that from and after the 21st day of May 1760, no person or persons whatsoever other than such as shall be appointed Truckmasters by His Excellency the Governor Lt Governor or other Commander in Chief for the time being; or persons Licenced by them or Either, of them for that purpose, shall, or may presume by themselves or any others for them directly or indirectly to buy, sell, Truck, Barter, Exchange, Give or receive in Gift, any kind of Provisions, Goods or Merchandize whatsoever, to or from any of the aforesd Indians, or to or from any person or persons in their name or for their account on the penalty of forfeiting the sum of Fifty pounds Stirling for each and every offence and also the Commodities so clandestinely [sic] bought or Barter'd for."

This Bill was to be in force for a period of two years but a further Act of the Assembly, passed in September of 1760, removed the two year limitation and made the earlier Act "perpetual". The Board of Trade in London was not pleased with

the passage of these Acts because they were considered to create an improper restraint of trade and caused an unreasonable expense to be levied on the treasury.

In July, 1761, the King ordered the repeal of these Acts, as he had the power to do.

A system of truckhouses did exist, as envisaged by these treaties and the legislation, and it continued to function for a short time after the Acts were repealed. Six truckhouses were set up. Three remained open for approximately a year and were closed in 1761 and the remaining three were closed in the spring of 1762. The Nova Scotia Government lost a substantial sum of money from the operation of these truckhouses.

The Government of Nova Scotia, in the early 1760's, understood the importance of trade as a means of helping to maintain peaceful relations with the Mi'kmaq. Upon the dissolution of the truckhouse system, the Government sought to create a system of licensed traders who would be the ones permitted to trade with the Mi'kmaq. It was hoped that this would eliminate the possibility of the Mi'kmaq becoming victims of unscrupulous traders over whom the Government had no control.

There is evidence that licenses were issued to traders over the next twenty years or so. Security had to be posted to obtain such a license and in 1770 there is evidence that the amount required was 1,000 pounds.

Governor Lawrence died on October 19, 1760. He was succeeded by Governor Ellis but Ellis never came to Nova Scotia. The Governor's duties in Nova Scotia were performed by Lieutenant Governor Jonathan Belcher who had been President of the Council and Chief Justice of Nova Scotia. Governor Ellis was succeeded in 1763 by Governor Wilmot at which point Belcher reverted to his two previous positions.

After the Treaty of Paris in 1763 and the Royal Proclamation of 1763, Isle Royale and Isle St. Jean came under the jurisdiction of the Government of Nova Scotia, which by that time also included present day New Brunswick.

Under a "Plan for the Future Management of Indian Affairs" released by the British Board of Trade in 1764, the British Colonies in North America were divided into two districts for the "better regulation" of "trade and commerce with the several Tribes of Indians in North America, under the Protection of His Majesty". The Mi'kmaq and Maliseet of Nova Scotia fell within the Northern District. Both the Northern and the Southern Districts had a superintendent with various deputies.

The last treaty of any apparent relevance to the issues here was entered into at Windsor, Nova Scotia on September 22, 1779. It is included here as Appendix VII. (See p. 64.) This was a treaty between all of the Mi'kmaq villages in what is now New Brunswick and the British as represented by Michael Francklin who was Superintendent of Indian Affairs for Nova Scotia (as a deputy of the Superintendent of Indian Affairs for the Northern District). This treaty arose out of certain shifts in loyalties by groups of Mi'kmaq and Maliseet to the American side during the American Revolution. In 1779, one village of Mi'kmaq in the Miramichi region openly became rebels against the British. A British vessel, the "Viper" was sent to the Miramichi and some of the Mi'kmaq involved were arrested. Thereafter, this treaty was entered into renewing the peace. This is, probably, the last formal treaty entered into by the Mi'kmaq with British authorities in Nova Scotia or New Brunswick. (There were agreements concerning land and the granting of land subsequent to 1779).

Legal, Historical and Factual Analysis

All of the evidence here satisfies me that the agreements referred to as "treaties" entered into in 1760 and 1761 in Nova Scotia between prominent officials of the Government of Nova Scotia and various representatives of the Mi'kmaq people, are valid treaties in law. The Supreme Court of Canada has noted that a treaty with a Canadian aboriginal group is a unique agreement; it is an agreement *sui generis* which is neither created nor terminated according to the rules of international law. The Treaties of 1760-61, and the surrounding circumstances and events, demonstrate the existence of an intention to create obligations, the presence of mutually binding obligations and the necessary degree of solemnity. [R. v. Sioui, [1990] 1 S.C.R. 1025 at p. 1044.] These treaties were entered into, on the British side by Governor Lawrence, in some cases, and by Lieutenant Governor Belcher (or possibly by Belcher in his capacity as President of the Council). The Mi'kmaq representatives at the treaty ceremonies appear all to have been Sakamows and they would have had and did have, the authority to enter such treaties. Each side recognized the authority of the other representatives to enter these treaties.

These treaties were entered into for the benefit of both the British and the Mi'kmaq. The treaties were to achieve and maintain peace as well as provide a mechanism for trade. Dispute resolution was also addressed.

The submissions of the Crown and the Defendant here are based on the premise that these 1760-61 Treaties are valid treaties. The Defendant relies on these treaties, taken in their proper context, as the source of rights which he submits entitles him to an acquittal. The Crown, throughout, has considered these treaties as the operative ones for determining the extent of the Defendant's rights. The principal issues in this case revolve around determining the contents of the

treaties and the meaning and interpretation of certain provisions.

Certain principles of interpretation have to be kept in mind when considering treaties made with the aboriginal peoples of Canada. Some of those principles, as gleaned from recent case law, were reviewed by Cory J., speaking for the majority in *Badger v. R.* (unreported), File No. 23603, April 3, 1996 (S.C.C.) at pp.11-12.

There he says, in part:

First, it must be remembered that a treaty represents an exchange of solemn promises between the Crown and the various Indian nations. It is an agreement whose nature is sacred. See *R. v. Sioui*, [1990] 1 S.C.R. 1025, at p. 1063; *Simon v. The Queen*, [1985] 2 S.C.R. 387, at p. 401. Second, the honour of the Crown is always at stake in its dealing with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. It is always assumed that the Crown intends to fulfil its promises. No appearance of "sharp dealing" will be sanctioned. See *Sparrow*, supra, at pp. 1107-08 and 1114; *R. v. Taylor* (1981), 34 O.R. (2d) 360 (Ont. C.A.), at p. 367. Third, any ambiguities or doubtful expressions in the wording of the treaty or document must be resolved in favour of the Indians. A corollary to this principle is that any limitations which restrict the rights of Indians, under treaties must be narrowly construed. See *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 36; *Simon*, supra, at p. 402; *Sioui*, supra, at p. 1035; and *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, at pp. 142-43..."

Later in *Badger* (p. 17), Mr. Justice Cory reviews "the applicable interpretive principles" that "must be borne in mind" in that case. They are stated in light of the facts and issues there, but many of the same issues (plus others) are present before me. He states:

Treaties and statutes relating to Indians should be liberally construed and any uncertainties, ambiguities or doubtful expressions should be resolved in favour of the Indians. In addition, when considering a treaty, a court must take into account the context in which the treaties were negotiated, concluded and committed to writing. These treaties, as written documents, recorded an agreement that had already been reached orally and they did not always record the full extent of the oral agreement: see Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (1980), at pp. 338-42; Sioui, *supra*, at p. 1068; Report of the Aboriginal Justice Inquiry of Manitoba (1991); Jean Friesen, *Grant Me Wherewith To Make My Living* (1985). The treaties were drafted in English by representatives of the Canadian government who, it should be assumed, were familiar with common law doctrines. Yet, the treaties were not translated in written form into the languages (here Cree and Dene) of the various Indian nations who were signatories. Even if they had been, it is unlikely that the Indians, who had a history of communicating only orally, would have understood them any differently. As a result, it is well settled that the words in the treaty must not be interpreted in their strict technical sense nor subjected to rigid

modern rules of construction. Rather, they must be interpreted in the sense that they would naturally have been understood by the Indians at the time of the signing....

Cory J. in *Badger*, *supra*, refers to *Taylor* (see excerpt from pp. 11-12) which is also cited as *R. v. Taylor and Williams* (1981), 62 C.C.C. (2d) 227. That judgment was previously referred to by the Supreme Court of Canada in *R. v. Sioui*, *supra*. There, Lamer, J. (as he then was), for the Court, describes in his own words some factors considered by the Court of Appeal in *Taylor and Williams* as being relevant to an analysis of the historical background when attempting to interpret a treaty. Those factors were (*Sioui*, *supra*, at p. 1045):

1. continuous exercise of a right in the past and at present,
2. the reasons why the Crown made a commitment,
3. the situation prevailing at the time the document was signed,
4. evidence of relations of mutual respect and esteem between the negotiators, and
5. the subsequent conduct of the parties.

In interpreting the Treaties of 1760-61 (i.e. determining their contents and meaning), I have examined everything that could be considered as providing the "context" within which the treaties were created.

One of the crucial aspects, when looking at the context of these treaties, is the vast cultural and linguistic differences between the Mi'kmaq and the British. Relevant issues of Mi'kmaq custom and language which were commented on in the evidence and submissions, and which I have considered, include the following.

1. The consensual and non-coercive nature of Mi'kmaq society and, consequently, the possible inability of the Mi'kmaq to understand such words and concepts as "subject", "submission", "allegiance" and "dominion".

2. The importance of oral communication and the absence of any history of written language. As a result, the Mi'kmaq placed great significance on what was said and therefore language translation and understanding were significant issues. L

3. The Mi'kmaq approach to their relationships with other peoples. This approach required acts of friendship and good will at regular intervals to maintain friendly relations. As well, the status of any relationship at a given point in time reflected everything that had gone on in the past between the two. (The latter is significant, in part, because it has been urged upon me that the Mi'kmaq would naturally have considered all of the treaties, discussions and promises with the British prior to the 1760-61 Treaties as part of a continuous chain that included those treaties.)

On the British side, they possessed a language that was both written and spoken. It was and is British cultural tradition to place great importance on written documents as establishing a record of events and agreements. British officials were experienced at negotiating and drafting treaties. The written version of the 1760-61 treaties was composed and recorded by British officials. Any interpreter utilized was probably employed by the British. (Father Maillard was employed by the British as interpreter at some, and perhaps most, of the treaty signings and ceremonies in 1760 and 1761. He was a French priest with a long history of close contact with the Mi'kmaq and that raises additional issues about his actions as an interpreter, all of which I have considered.)

Another major component of the treaties' context is, obviously, the historical

background. Some of that historical background I have set out in this decision. However, there are some features of it that I consider to be particularly pertinent.

1. The 1760-61 treaties were the culmination of more than a decade of intermittent hostilities between the British and the Mi'kmaq. Hostilities with the French were also prevalent in Nova Scotia throughout the 1750's, and the Mi'kmaq were constantly allied with the French against the British.

2. The use of firearms for hunting had an important impact on Mi'kmaq society. The Mi'kmaq remained dependant on others for gun powder and the primary sources of that were the French, Acadians and the British.

3. The French frequently supplied the Mi'kmaq with food and European trade goods. By the mid-18th century, the Mi'kmaq were accustomed to, and in some cases relied on, receiving various European trade goods.

4. The defeat of the French and their withdrawal from Nova Scotia left the Mi'kmaq to co-exist with the British without the presence of their former ally and supplier. Much of the Acadian population had also been expelled or displaced by 1760.

5. The British had been victorious over the French in Nova Scotia and they were in the process of conquering all of New France. They had cause to be more confident than ever before in the strength of their position in Nova Scotia.

6. The British wanted peace and a safe environment for their current and future settlers. Despite their recent victories, they did not feel completely secure in Nova Scotia.

It is my opinion that this combination of factors contributed greatly to the atmosphere in which the Treaties of 1760-61 were entered into. The Mi'kmaq had

lost their major ally and supplier. Their ability to carry on effective hostilities against the British was substantially reduced. The Mi'kmaq would have perceived the British to be in a superior military position in the Province. At least as importantly, their justification for continuing hostilities against the British largely disappeared when the French departed. The Mi'kmaq also needed a new supplier of European goods and the British had become the primary potential source of those goods.

With the full benefit of the cultural and historical context, I now need to address the following questions. What did the Mi'kmaq and the British agree to and intend to agree to in the Treaties of 1760 and 1761? Directly related to that are the questions of Mi'kmaq understanding of these treaties' contents. Did they understand and agree to all of the written portions of the treaties before me? Were there other statements or promises made orally which the Mi'kmaq considered were part of these treaties and which have an impact on their meaning? Did the Mi'kmaq consider that previous treaties were renewed by and combined with the 1760-61 Treaties? Are there any other aspects of the historical record, whether referred to me by Counsel for the defendant or otherwise, which reflect on the contents or the proper understanding of the contents of these treaties?

When assessing the ability of the Mi'kmaq and the British to communicate effectively with each other and reach a common understanding the following things should not be overlooked. By 1760, the Mi'kmaq had been dealing with Europeans in many different ways, including trade, for over 250 years. Permanent European settlements had existed in Nova Scotia and New England for over 150 years. The British and the Abenaki had been negotiating treaties and agreements together for 70 years. The British had been in control of present-day mainland Nova Scotia for almost 50 years and had previously negotiated treaties of peace and friendship with

both the Mi'kmaq and the Maliseet. There had been significant, close, friendly contact and co-existence between the Mi'kmaq and the French and Acadians for over 100 years. (The relationship with the French included instruction in, and attempted conversion to, Christianity.) A struggle, lasting more than 50 years, with intermittent warfare, had been waged between France and Britain for supremacy in and over the lands occupied by the Mi'kmaq.

In the Nova Scotia of 1760, the Mi'kmaq and their Sakamows would have appreciated and understood the position that the British were in and what their objectives were. The Mi'kmaq would have acquired that knowledge in several ways. Most directly, they had the history of their own relationship with the British in Nova Scotia over the last 50 years. They also had the benefit of their dealings, and the Abenaki dealings, with the British in Massachusetts Bay going back into the 1600's. The Mi'kmaq also had a long and close relationship with the French, another European power, who had their own plans for Acadia and New France.

The British wanted their King to be King over all of the land and territory where the Mi'kmaq lived and beyond. The British expected that their King would be the King of everyone who lived in Nova Scotia. By 1760, the Mi'kmaq would have been under no misunderstanding about that.

The general intent of the 1760-61 Treaties would also not have been the subject of any misunderstanding by the Mi'kmaq because of language or translation problems. I am satisfied that the Mi'kmaq community had members who could communicate in French. So did the British. They could communicate directly with each other. Before entering into treaties with the Mi'kmaq beginning in March of 1760, the British entered their treaties with the Maliseet and Passamaquoddy. Those negotiations were in French and the treaty signed on February 23, 1760 was in

English and French. Both the Maliseet and Passamaquoddy had members who could communicate in French. Knowledge of those treaties would quickly have come to the Mi'kmaq. Among the first group of Mi'kmaq Sakamows to sign treaties with the British in March, 1760 was Paul Laurent from LaHave. He was a respected Sakamow and he spoke English. He was one of the principal spokesmen for the Mi'kmaq with the British during the latter half of the 1750's.

It is fundamental to the Treaties of 1760 and 1761 that they are peace treaties, that they acknowledge the jurisdiction of the British King over Nova Scotia, that any quarrels or misunderstandings between the Mi'kmaq and the British will be redressed according to British laws and that trade with the Mi'kmaq will be carried out in accordance with the terms in the trade clause. Those subjects are at the heart of the treaties. Every Mi'kmaq Sakamow or his representative came to Halifax in 1760 and 1761 and entered into these treaties. That process took over 18 months. There was no misunderstanding or lack of agreement between the British and the Mi'kmaq about the essential ingredients of these treaties as they appear in written form before me.

It is my conclusion that the Treaties of 1760-61 include the written versions of those treaties entered in evidence. I also have to consider whether that constitutes the entire extent of those treaties. Given the oral nature of Mi'kmaq society, I have to consider whether there were any promises or commitments made by the British which were not included in the written treaties and which should be considered as part of the treaties.

Governor Lawrence and the Council met with representatives of the Maliseet and Passamaquoddy at Halifax on February 11th, 1760, twelve days before the treaty with them was signed. (The British referred to the Maliseet as the St. John's, or the St. John's River, Indians.) Likewise, Paul Laurent and Michel Augustine met

with the Governor and Council on February 29th, 1760 and then signed their treaties on March 10th. Minutes of both those Council meetings were before me in evidence. The treaty entered into between the British and the Maliseet and Passamaquoddy is in conformance with the earlier discussions between the parties. The understanding conveyed to the Mi'kmaq deserves further comment.

The Treaty of 1760 with the Maliseet and Passamaquoddy renews and confirms the Articles of Submission and Agreement made at Boston in December, 1725 and the subsequent ratification of those terms in 1749 (both in Halifax and at the Saint John River). It clearly states what the parties are intending to renew and confirm by quoting the previous documents verbatim. The 1760 Treaty also includes additional terms.

At the February 29th meeting with the Governor and Council, the minutes reflect that the following exchange occurred with Paul Laurent and Michel Augustine:

"His Excellency then Ordered the Several Articles of the Treaty made with the Indians of St. John's River and Passamaquoddy to be Communicated to the said Paul Laurent and Michel Augustine who expressed their satisfaction therewith, and declar'd that all the Tribe of the Mickmacks would be glad to make peace upon the same Conditions."

Ten days later, Laurent and Augustine entered into their respective treaties. Those treaties make no mention of earlier treaties or the renewal of earlier treaties. In light of that, I have to determine the significance of what took place at the February 29th meeting. Should the conversation noted in the minutes have any

effect on how I interpret the Mi'kmaq treaties? Did that conversation have an impact on the ultimate understanding Laurent and Augustine had about the contents of the treaties they entered into?

Professor Patterson suggests in his testimony that the omission of any reference to earlier treaties or the renewal of earlier treaties in the Mi'kmaq Treaties of 1760-61 was intentional. In his opinion, the British in 1760 wished to treat with the Mi'kmaq *de novo* and these treaties do not renew any earlier treaties.

Dr. Reid and Dr. Wicken both testified that the Mi'kmaq, by virtue of their own treaty-making tradition, and Laurent and Augustine in particular, because of the reading of the Maliseet and Passamaquoddy Treaty to them, would have believed that the earlier treaties were part and parcel of what they were agreeing to in these new treaties. The opinion was expressed that that was also the British view based on correspondence from Governor Lawrence to the Board of Trade in May of 1760 where he states:

"At the same time two Deputies of the tribes of St. John's River and Passamaquoddy Indians came here to ask for Peace which I concluded with them, and in a few days afterwards made a Peace on the same terms, with the Tribes of Richbuctou, Musquadaboit and LaHave, who sent their Chiefs here for that purpose."

It is my conclusion that the 1760-61 Mi'kmaq Treaties did not renew earlier treaties. That is consistent with the treaties themselves and is confirmed by the manner in which they were viewed and acted on thereafter.

I am also satisfied there would not have been any misunderstanding by Laurent and Augustine over the contents of the treaty they were signing because of the exchange they had at the February 29th meeting. Paul Laurent spoke

English and would have understood the terms of the treaty he and the other two Sakamows signed on March 10th. He would also have recognized the different wording and format in the Maliseet and Passamaquody Treaty. (So would Michel Augustine, either because he was told by Laurent, or because Laurent's presence would have insured the integrity of any interpreter's translation.)

The Malliseet and Passamaquody Treaty reproduces completely the 1725 Articles and the 1749 renewals, including preambles and those signing each document. That is the principal reason why the wording and format of that treaty is different. Beyond that, the contents of these treaties are essentially the same. Every term in the 1725 Articles quoted in the Maliseet and Passamaquody treaty is in the Mi'kmaq Treaty. Of the new clauses in both treaties (i.e. ones not found in the 1725 Articles), only one clause is found in the Mi'kmaq Treaty and not in the other (i.e., a requirement to report any designs against the King's subjects by his enemies). The trade clause in the Mi'kmaq Treaties is worded somewhat differently, but its thrust is the same. If anything, the trade clause in the Mi'kmaq Treaties provided more flexibility and options for the Mi'kmaq.

In my view, the treaties entered into by Laurent and Augustine on March 10, 1760, did "make peace upon the same conditions" as the Maliseet and Passamaquody, and Governor Lawrence's characterization of the treaties to the Board of Trade as being "on the same terms" can't be quarrelled with.

The Mi'kmaq would have developed an understanding of European written communication and the significance placed on it. More particularly, the Mi'kmaq did learn to appreciate the importance of the written word in treaty-making and the value of having a copy of a treaty as proof of what was agreed to.

Michel Augustine remained an influential Mi'kmaq Sakamow for many years. He kept a copy of his 1760 Treaty and presented it to the commander of the sloop "Viper" in 1779 and it was used as a model for a treaty signed with the new Sakamow of the Miramichi Mi'kmaq whose previous Sakamow had been in rebellion against the British.

Once the Maliseet and Passamaquoddy Treaty and the first three Mi'kmaq treaties were entered into, with Sakamows who came from different regions of Nova Scotia, I do not accept that other Sakamows would have entered their treaties with any different understanding of the contents. Any attempt by the British or an interpreter (i.e., Father Maillard) to obscure the true nature of what the written treaties contained, or interpret them differently, would be detected, if not instantly, then within a short time, and there is no evidence of this. Moreover, the British did not want to or need to conceal what they were seeking.

The written treaties with the Mi'kmaq in 1760 and 1761 which are before me contain, and fairly represent, all the promises made and all the terms and conditions mutually agreed to.

Having verified the actual contents of the Mi'kmaq Treaties of 1760 and 1761, I now refer to the trade clause, common to all. To re-state, that trade clause says:

"And I do further engage that we will not traffick, barter or exchange any commodities in any manner but with such persons or the managers of such truckhouses as shall be appointed or established by His Majesty's Governor at [truckhouse location closest to the village in question] or elsewhere in Nova Scotia or Accadia."

It is submitted on behalf of the Defendant that this clause, considered in the appropriate historical context, gives the Mi'kmaq, and in particular the Defendant, the right to fish and the right to sell fish. Do these treaties convey such a right?

The Mi'kmaq of the 18th century lived and obtained their food by hunting, fishing and gathering. It is clear that the British in Nova Scotia in 1760 would have understood that. The Mi'kmaq had been trading (primarily furs, but generally whatever their hunting, fishing and gathering produced) with Europeans for approximately 250 years before 1760. The price list negotiated to establish the values of certain skins and feathers that would be traded at the truckhouses illustrates some of the items that, it was anticipated, would be traded for the various commodities in the truckhouses. That was not an exclusive list. All three witnesses who testified concluded that fish might be among the items that the Mi'kmaq would bring to trade at the truckhouses. (That fish might be fresh or dried.)

I accept as inherent in these treaties that the British recognized and accepted the existing Mi'kmaq way of life. Moreover, it's my conclusion that the British would have wanted the Mi'kmaq to continue their hunting, fishing and gathering lifestyle. The British did not want the Mi'kmaq to become a long-term burden on the public treasury although they did seem prepared to tolerate certain losses in their trade with the Mi'kmaq for the purpose of securing and maintaining their friendship and discouraging their future trade with the French. I am satisfied that this trade clause in the 1760-61 Treaties gave the Mi'kmaq the right to bring the products of their hunting, fishing and gathering to a truckhouse to trade.

As I stated earlier, the truckhouses envisaged by these treaties did not last

past 1762. They were replaced by a system of licensed traders who were authorized to trade with the Mi'kmaq. These licensed traders were the appointed persons with whom the Mi'kmaq could trade as they agreed in the trade clause. The system of licensed traders died out by the 1780's.

So what does this trade clause mean? What significance did it have after the demise of the truckhouses and the licensed traders, and what significance does it have today?

In answering those questions it is helpful to remember that the British and the Mi'kmaq had both concluded in 1760 that trading with each other at government truckhouses possessed certain benefits. The Mi'kmaq needed European goods and those goods could be obtained at advantageous rates from government truckhouses. The British desired a friendly and harmonious relationship with the Mi'kmaq and they believed that this relationship could be, in part, secured and maintained through trade.

The trade clause created a new vehicle for the conduct of British-Mi'kmaq trade. It also created, supposedly, the only vehicle for British-Mi'kmaq trade. Under the trade clause the Mi'kmaq agreed not to trade in any manner except with "such persons... as shall be appointed... by His Majesty's Governor" or with "the managers at such truckhouses as shall be... established by His Majesty's Governor".

There is little direct evidence before me as to the affect of this trade clause on Mi'kmaq trading practises. However, truckhouses and licensed traders would have been the principal sources of supplies like shot, gun powder, metal tools, clothing, cloth, blankets and many other things. Therefore, I believe the impact is obvious. Some confirmation of this exists in documents before me. There is evidence of Mi'kmaq complaints to British officials about the lack of European goods available to them and the British responded by promising that a trader would

be provided for them to trade with. There is also a clause to that effect in the 1779 Treaty signed at Windsor. As well, there is evidence from which I conclude that the licenses to trade were viewed as valuable and there must have been a reason for that. The Mi'kmaq wanted to trade with, and were trading with, licensed traders.

The opinion was offered in Defence evidence that this trade clause was not interpreted as limiting with whom the Mi'kmaq could trade, only as limiting, from the British side, who could trade with the Mi'kmaq. I don't accept that. However, it doesn't matter to this case whether the Mi'kmaq considered this trade clause gave them the option of trading at truckhouses and with licensed traders, or whether they considered that the trade clause required that they trade only in that manner.

The Mi'kmaq were able and experienced traders long before 1760. They continued trading after the truckhouses and the licensed traders disappeared. But once they did disappear, did the Mi'kmaq possess, from the Treaties of 1760 and 1761, any treaty rights relating to trade beyond the rights they would otherwise have possessed? Is there anything stated in the trade clause or meant by the trade clause, explicitly or implicitly, that conveys any trading right to the Mi'kmaq beyond the context of the truckhouses and licensed traders?

I keep in mind here, as I have throughout, all the principles of interpretation set down by the Supreme Court of Canada that I referred to earlier. Among those are that this trade clause, and the whole treaty, should be liberally construed and any uncertainties, ambiguities or doubtful expressions resolved in favour of the Mi'kmaq. The words of the treaty must be interpreted in the sense that they would naturally have been understood by the Mi'kmaq at the time of signing.

In my opinion, the significance to both the Mi'kmaq and the British of the trade clause in their Treaties of 1760 and 1761 is rooted in the circumstances that

existed at that time. It was a pre-requisite to the Mi'kmaq being able to trade under the terms of the trade clause that the British provide truckhouses or appoint persons to trade with. When the British stopped doing that, the requirement (or if I had taken the Defence view, the option) to trade with truckhouses or licensed traders disappeared. The trade clause says nothing about that eventuality and it is my view that no further trade right arises from the trade clause.

Any trafficking, bartering or exchanging of commodities which the Mi'kmaq practiced after the demise of the truckhouses and the system of licensed traders was not derived from any right conveyed by the 1760-61 Treaties, with the exception of the right to apply for redress of any quarrel or misunderstanding according to applicable British laws.

The Defendant claims that the 1760-61 Treaties provide him with a right to fish and sell the fish. The burden is on him to establish the existence of such a right in these treaties, by using the principles of interpretation to which I have referred. He has not met that burden. The interpretation offered on behalf of the Defendant of the trade clause and the treaties, placed in the historical context which is suggested as the appropriate one, is not one that I accept. I cannot conclude that it was the common intention of the parties that these treaties convey such a right.

Mr. Justice Lamer, speaking for the Court in *R. v. Sioui*, *supra*, at p. 1069 states:

"Even a generous interpretation of the document, such as Bisson, J. A.'s interpretation, must be realistic and reflect the intention of both parties, not just that of the Hurons. The Court must choose from among the various possible interpretations of the common intention the one which best

reconciles the Hurons' interests and those of the conqueror."

The British did not intend to convey, and would not have conveyed, the right which the Defendant claims as a treaty right. Mi'kmaq concerns in 1760 were very focused and immediate. Conveying the right which the Defendant here claims from this trade clause is not even among the "various possible interpretations of the common intention" of the Mi'kmaq and the British.

The Defendant has specifically put forward the Treaties of 1760 and 1761 as the source of any rights applicable to the charges he faces. While I am clearly asked to consider those treaties, and to do so in their proper historical context, it is also clear that the only source of rights I am asked to consider are those treaties. In the written submissions, Counsel for the Defendant states that:

Other sources of rights, such as the concept of aboriginal rights, the treaty of 1752, the treaty of 1725-26 and Belcher's Proclamation of 1762 need not be formally adjudicated upon.... If the rights in question cannot be found in the treaties of 1760-61, the Defence submits that the case should be disposed of without prejudice to other possible sources of Mi'kmaq rights."

I concur. If the Defendant is not putting forward, and thus is not effectively presenting, a particular source for alleged rights, it would not be appropriate or necessary for me to rule on that source. My comments and findings here should be interpreted accordingly.

Conclusion

I am satisfied that the Treaties of 1760 and 1761 between the Governor (or

other official) of the British Colony of Nova Scotia and the Mi'kmaq are valid treaties. They were entered into, on behalf of the Mi'kmaq, by Sakamows of all the known villages at that time. Those treaties apply to all Mi'kmaq in Nova Scotia today and were applicable to the Defendant on August 24, 1993 at Pomquet Harbour, Antigonish County.

The Defendant has claimed that the 1760-61 Treaties provide him with a right to fish and sell fish as he was doing here. The Defendant bears the burden of establishing that. He has not met that burden. Rather, I have concluded that these treaties do not convey such a right. The legislative regime under which these charges are brought is applicable to the Defendant.

The agreed statement of facts here supplies evidence of the Defendant's actions in relation to all of the elements of the offences charged. Based on the admitted facts, the Crown has established the guilt of the Defendant on all three charges beyond a reasonable doubt.

I find the Defendant guilty as charged on all three counts.

DATED at Antigonish in the County of Antigonish, Province of Nova Scotia,
this 27th day of June, A.D., 1996.



John D. Embree
Judge of the Provincial Court
Province of Nova Scotia

**REGULATIONS RESPECTING FISHING IN
THE PROVINCES OF NOVA SCOTIA
NEW BRUNSWICK AND PRINCE EDWARD ISLAND
AND IN ADJACENT TIDAL WATERS**

Short Title

1. These Regulations may be cited as the Maritime Provinces Fishery Regulations.

PART I

GENERAL

Licensing and Registration

4. (1) Subject to subsections (2) to (5), no person shall fish for or catch and retain any fish unless

(a) the person is authorized to do so under the authority of a licence issued under these Regulations, the Fishery (General) Regulations or the Aboriginal Communal Fishing Licences Regulations;

(b) the person holds a fisher's registration card; and

(c) where a vessel is used in fishing, a vessel registration card has been issued in respect of that vessel.

(2) A person may retain

(a) shad incidentally caught with gaspereau fishing gear operated under the authority of a license;

(b) striped bass incidentally caught with any fishing gear operated under the authority of a license; and

(c) tomcod incidentally caught with smelt fishing gear operated under the authority of a licence.

(3) Subsection (1) does not apply in respect of

(a) recreational fishing by angling or with set lines;

(b) recreational fishing for clams or mussels by hand or with hand-held tools;

- (c) recreational fishing for eels, smelt or tomcod with spears in tidal water;
- (d) recreational fishing for smelt with dip nets;
- (e) recreational fishing for gaspereau with dip nets in waters other than
 - (i) the inland and tidal waters of Prince Edward Island, and
 - (ii) the inland waters of the Miramichi River and the Saint John River;
- (f) fishing for oysters in a leased oyster area; or
- (g) fishing for minnows with minnow traps or dip nets.

(4) Paragraphs (1)(b) and (c) do not apply in respect of fishing under the authority of a recreational fishing licence or a licence issued under the Aboriginal Communal Fishing Licences Regulations.

(5) Paragraph (1)(c) does not apply in respect of fishing for oysters in a public oyster-fishing area in the inland or tidal waters of Prince Edward Island.

Gear Restrictions

20. No person shall fish for any species of fish in the waters set out in column I of an item of Schedule III by a method set out in column II of that item during the close time set out in column III of that item.

REGULATIONS RESPECTING FISHING AND FISH HABITAT IN GENERAL AND THE PAYMENT OF PENALTY AND FORFEITURE PROCEEDS UNDER THE FISHERIES ACT

Short Title

1. These regulations may be cited as the **Fishery (General) Regulations**.

Sale of Fish

35. (1) This section does not apply in respect of marine mammals.
- (2) Subject to subsection (3), no person shall buy, sell, trade, barter or offer to buy, sell, trade or barter any fish unless it was caught and retained under the authority of a licence issued for the purpose of commercial fishing, a licence issued under Part VII, a licence issued under the Aboriginal Communal Fishing

Licences Regulations in which the Minister has authorized the sale of fish or an Excess Salmon to Spawning Requirement Licence issued under the Pacific Fishery Regulations, 1993.

FISHERIES ACT

R.S.C., 1985, c. F-14

Offence and Punishment

78. Except as otherwise provided in this Act, every person who contravenes this Act or the regulations is guilty of

(a) an offence punishable on summary conviction and liable, for a first offence, to a fine not exceeding one hundred thousand dollars and, for any subsequent offence, to a fine not exceeding one hundred thousand dollars or to imprisonment for a term not exceeding one year, or to both; or

(b) an indictable offence and liable, for a first offence, to a fine not exceeding five hundred thousand dollars and, for any subsequent offence, to a fine not exceeding five hundred thousand dollars or to imprisonment for a term not exceeding two years, or to both.

ARTICLES OF SUBMISSION AND AGREEMENT made at Boston, in New England, by Sanguaaram alias Loron Arexus, Francois Xavier and Meganumbe, delegates from Penobscott, Naridgwack, St. Johns, Cape Sables and other tribes inhabiting within His Majesty's territories of Nova Scotia or New England.

Whereas His Majesty King George by concession of the Most Christian King, made at the Treaty of Utrecht, is become the rightful possessor of the Province of Nova Scotia or Acadia according to its ancient boundaries: We, the said Sanguaaram alias Loron Arexus, Francois Xavier and Meganumbe, delegates from the said tribes of Penobscott, Naridgwack, St. Johns, Cape Sables and other tribes inhabiting within His Majesty's said territories of Nova Scotia or Acadia and New England, do, in the name and behalf of the said tribes we represent, acknowledge His said Majesty King George's jurisdiction and dominion over the territories of the said Province of Nova Scotia or Accadia, and make our submission to His said Majesty in as ample a manner as we have formerly done to the most Christian King.

And we further promise on behalf of the said tribes we represent that the Indians shall not molest any of His Majesty's subjects or their dependants in their settlements already made or lawfully to be made, or in their carrying on their traffick and other affairs within the said Province.

That if there happens any robbery or outrage committed by any of the Indians, the tribe or tribes they belong to shall cause satisfaction and restitution to be made to the parties injured.

That the Indians shall not help to convey away any soldiers belonging to His Majesty's forts, but on the contrary shall bring back any soldier they shall find endeavouring to run away.

That in case of any misunderstanding, quarrel or injury between the English and the Indians no private revenge shall be taken, but application shall be made for redress according to His Majesty's laws.

That if the Indians have made any prisoners belonging to the Government of Nova Scotia or Acadia during the course of the war they shall be released at or before the ratification of this treaty.

That this treaty shall be ratified at Annapolis Royal

Dated at the Council Chamber in Boston in New England, this fifteenth day of December, Anno Domini one thousand seven hundred and twenty five, Annoq. Regni Regis Georgii, Magna Britannia, & c., Duodecimo.

Signed, sealed and delivered in
presence of the Great and
General Court or Assembly of the
Province of the Massachusetts Bay

Sanguaaram (totem) alias Loran
(L.S.)
Arexes (totem) (L.S.)
Francois Xavier (L.S.)
Maganumbe (totem) (L.S.)

Articles of Peace and Agreement, signed by Indians at Annapolis Royal,
June 4, 1726.
Source: CO 217/38

Whereas By Artcles of Peace & Agreement Made & Concluded upon at Boston in New England the Fifteenth Day of December One thousand seven hundred & Twenty ffive by our Delegates and Representatives, Sanguarum (alias) Laurence Alexds, Francois Xavier and Meguanumbe as Appears by the Instruments there signed Sealed & Exchanged in the Presence of the Great and General Court or Assembly of the Massachusetts Bay, by our said Delegates in Behalf of us the Indians of Penobscut Norrigewock St. John's Cape Sables and the other Indian tribes belonging to and Inhabiting in This his Majestie of Great Britains Territories of Nova Scotia & New England, And by Maj^r Paul Mascarene Commissioner from this said Province in Behalfe of his Majestie, By which Agreement it being Required that the said Articles should be Ratified here at his Majesties fort of Annapolis Royall, We the Chiefs & Representatives of the said Indians with full Power & Authority, by an Unanimous Consent and Desire of the said Indian Tribes are come in Compliance with the Articles stipulated by our Delegates as aforesaid, and doe in Obedience Thereunto Solemnly Confirme & Ratify the same and in Testimony thereof with hearts full of Sincerity we have signed & seal'd the following Articles being Conforme to what was Required by the said Maj^r Paul Mascarene and Promised to be Performed by our said Delegates.

Whereas His Majestie King George, by the Concession of the most Christian King made at the Treaty of Utrecht is become the rightfull Possessor of the Province of Nova Scotia or Accadia According to its Antient Boundarys, we the said Chiefs & Representatives of the Penobscut, Norrigewock St. Johns Cape Sable & the other Indian Tribes belonging to & inhabiting within this his Majesties Province of Nova Scotia or Accadia & New England, Doe for ourselves and the said Tribes we Represent Acknowledge his said Majesties King George's Jurisdiction and Dominion Over the Territories of the said Province of Nova Scotia or Accadia & make our Submission to his said Majestie in as ample a manner as we have formerly done to the most Christian King.

And we further promise in Behalfe of our selves and our said Tribes, That the Indians shall not mollest any of his Majesties subjects in Their settlements already made or Lawfully to be made or in carrying on their Trade and other Affaires within the said Province.

That if there appears any Robbery or Outrage Committed by any of our Indians, The Tribe or Tribes they belong to shall Cause Satisfaction to be made to the Parties Injured.

That the Indians shall not help to Convey away any Soldiers belonging to his Majestys forts but on the Contrary shall bring back any Soldier they shall finde Endeavouring to run away.

That In case of any misunderstanding Quarrel or Injury Between the English & the Indians, no private Revenge shall be taken, but Application shall be made for Redress According to this Majesties Laws.

That if there be any English Prisoners amongst any of our aforesaid Tribes, We faithfully promise that the said prisoners shall be released & Carefully Conducted & Delivered to this Government or that of New England.

That in Testimony of our sincerity we have for ourselves and in behalf of all & Singular our said Indian Tribes Conforme to what was stipulated by our Delegates at Boston as aforesaid, This day Solemnly Confirm and Ratifie Each and every one of the aforegoing Artcles, which shall be Punctually Observed & Duly Performed by Each and all of us the said Indians, In Witness Whereof we have before the Lieut Governour John Doucett & Council for this his majesties said Province and the Deputees of the ffrench Inhabitants of said province hereunto set our hands and Seals at Annapolis Royall this fourth day of June One thousand seven hundred and Twenty six and In the Twelfth year of his Majesties Reigne.

Joseph Pimoit of St John Chief

[et al. including Paul Tecumart and John Baptist, identified as Chief Cape Sables; John Baptist and Tomas Oultine, chiefs Chubenacady; Antoine Egligish, Chief La Heve; John Qilalette, chief Minis.]

Articles of Peace and Agreement, signed by Indians at Annapolis Royal,
June 4, 1726 (group 2).
Source: OO 217/4

[Text same as document 5 (a) signed by other Indians as follows:]

Chief of Cape Sables	John Baptist
Cape Sables	Mathew Muse
This River	Joseph Medochet
Pantiquet	Jacque Pommeroit
This River	Petit Jarmain
Cape Sables	Pierre Pimett
Minis	Auhin Rimquaret
Pantiquet	Tomis Pommeroit
This River	Etien Chegan
Cape Sables	Rany Nacktaban
of this River	Pier Minchacett
of DO	Baptist Toma
Cape Sables	Jura Pimett
of this River	Francois Germain
Pantiquet	Francois Xavier
Passammaquody	Noell Stompet

APPENDIX IV
Treaty or
Articles of Peace and Friendship
Renewed

between

His Excellency Peregrine Thomas Hopson Esquire Captain General and Governor in Chief in and over His Majesty's Province of Nova Scotia or Accadie. Vice Admiral of the same and Colonel⁴ of One of His Majesty's Regiments of Foot, and His Majesty's Council on behalf of His Majesty.

and

Major Jean Baptiste Cope chief Sachem of the X X X Tribe of Mick Mack Indians, Inhabiting the Eastern Coast of the said Province and Andrew Hadley Martin, Gabriel Martin and Francis Jeremiah members and Delegates of the said Tribe for themselves and their said Tribe their heirs and the heirs of their heirs forever. Begun, made and concluded in the manner form and Tenor following vizt.

1. It is agreed that the Articles of Submission and Agreement made at Boston in New England by the Delegates of the Penobscot Norridgwoik and St. Johns Indians in the year 1725 Ratified and confirmed by all the Nova Scotia Tribes at Annapolis Royal in the Month of June 1726 and lately Renewed with Governor Cornwallis at Halifax and Ratified at St. Johns River, now read over Explained and Interpreted shall be and are hereby from this time forward renewed, reiterated and forever confirmed by them and their Tribe and the said Indians for themselves and their Tribe and their Heirs aforesaid do make and renew the same Solemn Submissions and promises for the strict observance of all the Articles therein Contained as at any time heretofore hath been done.
2. That all Transaction during the late War shall on both sides be burried in Oblivion with the Hatchet, And that the said Indians shall have all favour, Friendship and Protection shewn them from this His Majesty's Government.
3. That the said Tribe shall use their utmost endeavours to bring in the other Indians to Renew and Ratify this Peace and shall discover and make herein any attempts or designs of any other Indians or any Enemy whatever against His Majesty's Subjects within this Province so soon as they shall know thereof and shall also hinder and Obstruct the same to the utmost of their power, and on the other hand if any of the Indians refusing to ratify this Peace shall make War upon the Tribe who have now confirmed the same; they shall upon Application have such aid and Assistance from the Government for their Defence, as the case may require.

4. It is agreed that the said Tribe of Indians shall not be hindered from, but have free liberty of Hunting and Fishing as usual and that if they shall think a Truckhouse needfull at the River Chibenaccadie or any other place of their resort, they shall have the same built and proper Merchandize lodged therein, to be exchanged for what the Indians shall have to dispose of, and that in the mean time the said Indians shall have free liberty to bring for Sale to Halifax or any other Settlement within this Province, Skins, feathers, fowl, fish or any other thing they shall have to sell, where they shall have liberty to dispose thereof to the best Advantage.
5. That a Quantity of bread, flour, and such other Provisions as can be procured, necessary for the Familys, and proportionable to the number of the said Indians shall be given them half yearly for the time to come; and the same regard shall be had to the other Tribes that shall hereafter Agree to renew and Ratify the Peace upon the Terms and Conditions now Stipulated.
6. That to Cherish a good harmony and mutual Correspondance between the said Indians and this Government His Excellency Peregrine Thomas Hopson Esqr. Capt. General and Governor in Chief in and over his Majesty's Province of Nova Scotia or Accadie, Vice Admiral of the same and Colonel of one of His Majesty's Regiments of Foot, hereby promises on the part of His Majesty, that the said Indians shall upon the first day of October Yearly, so long as they shall Continue in Friendship, Receive Presents of Blankets, Tobacco, some Powder and Shott and the said Indians promise once every Year, upon the said first of October, to come by themselves or their Delegates and Receive the said Presents and Renew their Friendship and Submissions.
7. That the Indians shall use their best Endeavours to save the lives and goods of any People Shipwrecked on this Coast where they resort and shall Conduct the People saved to Halifax with their Goods, and a Reward adequate to the Salvadge shall be given them.
8. That all Disputes whatsoever that may happen to arise between the Indians now at Peace, and others His Majesty's Subjects in this Province shall be tryed in His Majesty's Court of Civil Judicature, where the Indians shall have the same benefit, advantage and Priviledges as any others of His Majesty's Subjects.

In Faith and Testimony whereof the Great Seal of the Province is hereunto Appended, and the Partys to these Presents have hereunto interchangeably set their Hands in the Council Chamber at Halifax this 22nd day of Nov. 1752 in the 26th Year of His Majesty's Reign.

P. T. Hopson

Jean Baptiste (his mark) Cope

Chas. Lawrence

Andrew Hadley (his mark) Martin

Benj. Green

Francois (his mark) Jeremie

Jno. Salusbury

Gabriel (his mark) Martin

Willm. Steele

Jno. Collier

APPENDIX V

Treaty of Peace and Friendship concluded with the Delegates of the St. Johns and Passamaquoddy Tribes of Indians at Halifax, February 1760.

Whereas Articles of Submission and Agreement were made and concluded at Boston in New England in the Year of our Lord 1725 by Sanguacram alias Loron Thexus Francois Xavier and Meganumbe. Delegates from the Tribes of Penobscott Naridgwalk, St. Johns and other tribes inhabiting His Majesty's Territories of Nova Scotia and New England. in manner and form following Vize.

Articles of Submission and Agreement at Boston in New England by Sanguacram als Loron Thexus Francois Xavier and Meganumbe Delegates from the Tribes of Penobscott Naridgwalk St. Johns Cape Sable and other Tribes of the Indians inhabiting within His Majesty's Territories of Nova Scotia and New England.

Whereas His Majesty King George by the Concession of the most Christian King made at the Treaty of Utrecht is become the Rightfull possessor of the Province of Nova Scotia or Accadie according to its ancient Boundaries We the said Sanguacram als Loron Thexus Francois Xavier and Meganumbe Delegates from the said Tribes of Penobscott Naridgwalk St. Johns, Cape Sables and other Tribes inhabiting within his Majesty's said Territories of Nova Scotia or Accadie and New England Do in the Name and behalf of the said Tribes we represent acknowledge his Said Majesty King Georges Jurisdiction and Dominion over the Territories of said Province of Nova Scotia or Accadie and make our Submission to his Said Majesty in as ample a manner as We have formerly done to the Most Christian King.

And we further promise in behalf of the said Tribes we represent that the Indians shall not molest any of His Majesty's Subjects or their Dependants in their Settlements already or lawfully to be made or in their carrying on their Trade and other affairs within said Province.

That if there happens any Robbery, or outrage Committed by any of the Indians the Tribe or Tribes they belong to shall cause Satisfaction and Restitution to be made to the Parties injured.

That the Indians shall not help to convey away any Soldiers belonging to His Majesty's Forts, but on the contrary shall bring back any soldier they shall find endeavouring to run away.

That. In case of any misunderstanding Quarrell or Injury between the English and the Indians no private Revenge shall be taken but application shall be made for Redress according to his Majesty's laws.

That if the Indians have made any Prisoners belonging to the Government of Nova Scotia or Accadie during the course of the War they shall be released at or before the Ratification of this Treaty.

That this Treaty shall be Ratified at Annapolis Royal.

Dated at the Council Chamber at Boston in New England this fifteenth day of December An Dom. one thousand Seven hundred and twenty five Annog R.R. Georgy Mag Britan and Duodecimo.

Which Articles of Submission and Agreement were renewed and confirmed at Halifax in Nova Scotia in the Year of Our Lord 1749 by Joannes Pedousaghugh Chief of the Tribe of Chignecto Indians and Francois Aroudorvish, Simon Sactarvino and Jean Baptiste Maddouanhook. Deputies from the Chiefs of the St. Johns Indians in manner and form following Vizm.

I Johannes Pedousaghugh Chief of the Tribe of Chignecto Indians for myself and in behalf of my Tribe my Heirs and their Heirs for ever and We Francois Aurodorvish, Simon Sactarvino and Jean Baptiste Maadouanhook Deputies from the Chiefs of the St. Johns Indians and Invested by them with full powers for that purpose Do in the most solemn manner renew the above Articles of Agreement and Submission and every Article thereof with His Excellency Edward Cornwallis Esq Captain General and Governor in Chief in and over His Majestys Province of Nova Scotia or Accadie Vice Admiral of the Same Colonel in His Majestys Service and one of his bed Chamber In Witness whereof I the said Johannes Pedousaghugh have Subscribed this Treaty and affixed by Seal and We the said Francois Aurodorvisah Simon Sactarvino and Jean Baptiste Maddouanhook in behalf of the Chiefs of the Indian Tribes we Represent have Subscribed and affixed our Seals to the Same and engage that the said Chiefs shall Ratifie this Treaty at St. Johns. Done in Chibucto Harbour the fifteenth of August One Thousand Seven hundred and forty nine.

In Presence of P. Hopson, Mascarence, Robt Ellison, Ian T. Mercer, Chas Lawrence, Edn How, Edm. Gorham, Benj. Green, John Salusbury, Hugh Davidson, William Steele (Members of the Council for Nova Scotia)

Johannes Pedousaghsigh

Francois Arodorvish

Simon Sactarvino

Jean Bap.t Maddouanhook

And the same was according Ratified at St. Johns in manner and form following Vize.

The Articles of Peace on the other Side Concluded at Chibucto to the fifteenth of August One Thousand Seven hundred and forty nine with His Excellency Edward Cornwallis Esq. r Cap. t Gen. Gov. r & Commander in Chief of His Majesty's Province of Nova Scotia or Accadie and Signed by our Deputies having been communicated to Us by Edward How Esq. r One of His Majestys Council for Said province. and faithfully Interpreted to Us by Madam DeBelliste Inhabitant of this River nominated by Us for that purpose We the Chiefs and Captains of the River St. John and places adjacent do for ourselves and Our different Tribes Confirm and Ratify the same to all Intents and purposes.

Given under our Hands at the River St. Johns the fourth day of September One Thousand Seven hundred and forty nine In presence of the under written Witnesses

Michell	Narragonis Chief
Nicola	Neguin Capt
Francois	De Xavier Archibano Marquillie
Pierre	Alexander Marquillie
Augustin	Meyacvet. Maitre Chef de Riv St. Jean
Francois	Maranyarvet. Maitre Lerure D.
Rene	Neguin
Neptune	Pierre Paul Chief of Pasnequody
Luafin	Papanlouet
Francois	Germain Capt
Pierre	Bennoit Capt
Francois	Drino Capt
Rene	file D'ambroise Capt

Ed. d Hon. One of His Majesty's Council
 Nath Dennial
 John Beare
 Joseph Winniett
 John Wonn
 Rob McKoun
 Matt Winniett
 John Phillipps

And Whereas the said Articles of Submission and Agreement, so made and concluded, renewed, confirmed, and ratified have notwithstanding, been since violated contrary to the good Faith therein engaged for the constant and strict Observation and performance thereof and to the Allegiance due from the said Tribes to His Majesty Our Sovereign Lord King George We Mitchel Neptune Chief of the Tribe of Indians of Passamaquody, and Ballomy Glode Captain in the Tribe of Indians of St. John's River Delegates from the said Tribes and

by them fully authorised and impowered to make and conclude with His Excellency Chas Lawrence Esq. & His Majesty's Captain General and Governor in Chief of the Province of Nova Scotia or Accadie in behalf of His Majestys Government of the Said Province a Treaty for the renewal and future firm Establishment of Peace and Amity between the said Tribes of Passamaquoddy and St. Johns River Indians and his Majesty's other subjects and to renew the Acknowledgment of the Allegiance of the said Tribes and their engagements to a perfect and constant Submission and Obedience to His Majesty King George the Second his Heirs and Successors Do accordingly in the name and behalf of the said Tribes of Passamaquoddy and St. Johns hereby renew and Confirm the aforesaid Articles of Submission and Agreement, and every part thereof and do solemnly promise and engage that the same shall for ever hereafter be strictly observed and performed.

And We the said Mitchel Neptune and Ballomy Glode, for ourselves and in the name and behalf of the said Tribes of Passamaquoddy and St. Johns Indians Do respectively further promise and engage that no person or persons belonging to the said Tribes shall at any time hereafter aid or Assist any of the Enemies of His most Sacred Majesty King George the Second or of his Heirs and Successors nor shall hold any Correspondence or Commerce with any such His Majestys Enemies in any way or manner whatsoever and that, for the more effectually preventing any such Correspondence and Commerce with any of His Majestys Enemies the said Tribes shall at all times hereafter Traffic and barter and exchange Commodities with the Managers of such Truckhouses as shall be established for that purpose by his Majesty's Governors of this Province at Fort Frederick or elsewhere within the Said Province and at no other place without permission from His Majestys Government of the said Province. And We do in like manner further promise and engage that for the more effectually securing and due performance of this Treaty and every part thereof a certain Number, which shall not be less than Three from each of the aforesaid Tribes, shall from and after the Ratification hereof constantly reside in Fort Frederick at St. Johns or at such other place or places within the Province as shall be appointed for that purpose by His Majestys Governors of the said Province as Hostages, which Hostages shall be exchanged for a like Number of others of the said Tribes when requested.

And We do further promise and engage that this Treaty and every part thereof shall be ratified by the Chiefs and Captains and other principal persons of the said Tribes for themselves and in behalf of their Tribes at Fort Frederick aforesaid on or before the 20th of May next.

In Faith and Testimony whereof We have Signed these Presents and caused the Seal of the Province to be hereunto affixed, And the said Michel Neptune and Ballomy Glode have hereunto put their Marks

and Seals in the Council Chamber at Halifax in Nova Scotia
Twenty third Day of February in the Year of our Lord One Thousand
Seven hundred and sixty and in the Thirty third Year of His
Majesty's Reign.

A true Copy.

By His Excellency's Comm

Rich.d Bulkeley, Sec.y

APPENDIX VI

1760

Treaty of Peace and Friendship concluded by the Governor and Commander in chief of Nova Scotia with Paul Laurent Chief of the LaHave tribe of Indians - at Halifax - Authenticated copy - ... having signature of Governor Laurence -... and in the - holograph of Richard Bulkeley Esquire - his Secretary

Five folio pages -".

Treaty of Peace and Friendship concluded by H.E.C.L. Esq. Govr and Comr. in Chief in and over his Majesty's Province of Nova Scotia or Accadia with Paul Laurent chief of the LaHave tribe of Indians at Halifax in the Province of N.S. or Acadia.

I, Paul Laurent do for myself and the tribe of LaHave Indians of which I am Chief do acknowledge the jurisdiction and Dominion of His Majesty George the Second over the Territories of Nova Scotia or Accadia and we do make submission to His Majesty in the most perfect, ample and solemn manner.

And I do promise for myself and my tribe that I nor they shall not molest any of His Majesty's subjects or their dependents, in their settlements already made or to be hereafter made or in carrying on their Commerce or in any thing whatever within the Province of His said Majesty in any thing whatever within the Province of His said Majesty or elsewhere and if any insult, robbery or outrage shall happen to be committed by any of my tribe satisfaction and restitution shall be made to the person or persons injured.

That neither I nor any of my tribe shall in any manner entice any of his said Majesty's troops or soldiers to desert, nor in any manner assist in conveying them away but on the contrary will do our utmost endeavours to bring them back to the Company, Regiment, Fort or Garrison to which they shall belong.

That if any Quarrel or Misunderstanding shall happen between myself and the English or between them and any of my tribe, neither I, nor they shall take any private satisfaction or Revenge, but we will apply for redress according to the Laws established in His said Majesty's Dominions.

That all English prisoners made by myself or my tribe shall be sett at Liberty and that we will use our utmost endeavours to prevail on the other tribes to do the same, if any prisoners shall happen to be in their hands.

And I do further promise for myself and my tribe that we will not either directly nor indirectly assist any of the enemies of

His most sacred Majesty King George the Second, his heirs or Successors, nor hold any manner of Commerce traffick nor intercourse with them, but on the contrary will as much as may be in our power discover and make known to His Majesty's Governor, any all designs which may be formed or contrived against His Majesty's subjects. And I do further engage that we will not traffick, barter or Exchange any Commodities in any manner but with such persons or the managers of such Truck houses as shall be appointed or Established by His Majesty's Governor at Lunenburg or Elsewhere in Nova Scotia or Accadia.

And for the more effectual security of the due performance of this Treaty and every part thereof I do promise and Engage that a certain number of persons of my tribe which shall not be less in number than two prisoners shall on or before September next reside as Hostages at Lunenburg or at such other place or places in this Province of Nova Scotia or Accadia as shall be appointed for that purpose by His Majesty's Governor of said Province which Hostages shall be exchanged for a like number of my tribe when requested.

And all these foregoing articles and every one of them made with His Excellency C. L., His Majesty's Governor I do promise for myself and on of sd part - behalf of my tribe that we will most strictly keep and observe in the most solemn manner.

In witness whereof I have hereunto putt my mark and seal at Halifax in Nova Scotia this day of March one thousand

Paul Laurent

I do accept and agree to all the articles of the forgoing treaty in Faith and Testimony whereof I have signed these present I have caused my seal to be hereunto affixed this day of march in the 33 year of His Majesty's Reign and in the year of Our lord - 1760 .

Chas Lawrence

By his Excellency's Command
Richard Bulkeley - Secty

Papers Relating to Nova Scotia 1720-1791
Collection of the Rev. Andrew Brown DD

Treaty of 1779 with Micmac residing between Cape Tormentine and Bay de Chaleurs, Windsor, Sept. 22, 1779, C.O. 217/54, pp. 221-23.

Whereas in May and July last a number of Indians at the Instigation of the King's disaffected Subjects did Plunder and Rob Mr. John Cort and several other of the English Inhabitants at Mirimichy of the principal part of their Effects in which transaction, we the undersigned Indians had no concern, but nevertheless do blame ourselves, for not having exerted our Abilitys more Effectually than we did to prevent it, being now greatly distressed and at a loss for the necessary supply to keep us from the Inclemency of the approaching winter and to enable us to subsist our familys, And Whereas Captain Augustus Hervey Commander of His Majestys Sloop Viper did in July last (to prevent further Mischeif) Seize upon in Mirimichy River) Sixteen of the said Indians one of which was killed, three released and Twelve of the most atrocious have been carried to Quebec, to be dealt with, as His Majesty's Government of this Province, shall in future Direct, which measure we hope will tend to restore peace and good Order in that Neighbourhood

Be it known to all men, that we John Julien, Chief, Antoine Arneau Captain, Francis Julien and Thomas Demagonishe councillors of Mirimichy, and also Representatives of, and Authorized by, the Indians of Pogmousche and Restigousche, Augustine Michel Chief, Louis Augustine Cobaise, Francis Joseph Arimph Captains, Antoinnes, and Guiaume Gabelier Councillors of Richebouctou, and Thomas Tanas Son and XXX Representative of the Chief of Jedyac, do for ourselves and in behalf of the several Tribes of Mickmack Indians beforementioned and all others residing between Cape Tormentine and the Bay De Chaleurs in the Gulf of St. Lawrence inclusive, Solemnly Promise and Enga[ge] to and with Michael Francklin Esqr. the Kings Superindendant of Indian Affairs in Nova Scotia

That we will behave Quietly and Peaceably towards all his Majesty King George's good Subjects treating them

upon every Occasion in an honest friendly and Brotherly manner

That we will at the Hazard of our Lives defend and Protect to the utmost of our power, the Traders and Inhabitants and their Merchandize and Effects who are or may be settled on the Rivers Bays and Sea Coasts within the forementioned Distri[ct] against all the Enemys of His Majesty King George whether French, Rebels of Indians.

That we will whenever it shall be required apprehend and deliver into the Hands of the said Mr Francklin, to be dealt with according to his Deserts, any Indian or other person who shall attempt to Disturb the Peace and Tranquillity of the said District.

That we will not hold any correspondance or Intercourse with John Allen, or any other Rebell or Enemy to King George, let his Nation or Country be what it will

That we will use our best Endeavours to prevail with all other our Mickmack Brethren throughout the other parts of the Province, to come into the like measures with us for their several Districts

And we do also by these presents for ourselves, and in behalf of our several constituents hereby Renew, Ratify and confirm all former Treatys, entered into by us, or any of us, or them heretofore with the late Governor Lawrence, and others His Majesty King Georges Governors, who have succeeded him in the Command of this Province.

In Consideration of the true XXX performance of the foregoing Articles, on the part of the Indians, the said Mr. Francklin as the Kings Superindendant of Indian Affairs doth hereby Promise in behalf of XX Government

That the said Indians and their Constituents shall remain in the Districts beforementioned Quiet and Free from any molestation of any of His Majestys Troops or other his good Subjects in their Hunting and Fishing

That immediate measures shall be taken to cause Traders to supply them with ammunition Clothing and other necessary Stores in exchange for their Furrs and other Commodities. In Witness whereof we the abovementioned have Interchangeabl[y] set our hands and Seals at Windsor in Nova Scotia this Twenty second day of September 1779

[The names and marks of these persons follow: John Julien, Francis Julien, Antoine Ameau, Thomas Demagonische, all "of Mirimichy and acting for Pogmo[uche] and Restigousche"; Augustine Michel, Frانس. Joseph Arimph, Augustine Cobaise, Antoinnes, Guiaume Gabelier, all "of Richebouctou"; Thomas Tanas, "son and Representative of the Chief of Jedyiec"; and Michl. Francklin, "Superintendant of Indian Affairs in the Province of Nova Scotia"]

[Five witnesses are listed in the left hand margin, three of whom are identified as British officers of the 84th regiment, and two of whom as justices of the peace.]

[The document is attested "A true copy" by Michael Francklin, Superintendant of Indian Affairs in Nova Scotia; a clerk's note indicates that it was enclosed in Mr. Francklin's letter of 26 Sept. 1779]

