A MODERN TREATY IN THE MARITIMES: IS IT TIME?[1]

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Abstract

This speech was intended to share my experiences as an Indigenous lawyer in New Brunswick. It includes my work with the Union of New Brunswick Indians in research on treaty rights. It is a personal reflection of experiences defending Indigenous persons in the exercise of their treaty rights in the courts in New Brunswick and the Supreme Court of Canada. It is a nutshell of the various interactions of those involved in politics, federal and provincial government representatives, and law enforcement agencies in the 1970s and 1980s. It advocates for the implementation of rights within the *United Nations Declaration on the Rights of Indigenous Peoples* (2007) and the *Truth and Reconciliation Commission: Calls to Action* (2015). It concludes that this is not the time for a modern treaty in New Brunswick.

Résumé

Ce discours avait pour but de partager mes expériences en tant que juriste autochtone au Nouveau-Brunswick. Il inclut mon travail avec l'Union des Indiens du Nouveau-Brunswick dans la recherche sur les droits issus de traités. Il s'agit d'une réflexion personnelle sur les expériences de défense des personnes autochtones dans l'exercice de leurs droits issus de traités devant les tribunaux du Nouveau-Brunswick et la Cour suprême du Canada. Il s'agit d'un résumé des diverses interactions entre les personnes impliquées dans la politique, les représentants des gouvernements fédéral et provincial et les organismes chargés de l'application de la loi dans les années 1970 à 1988. Il plaide pour la mise en œuvre des droits énoncés dans la Déclaration des Nations Unies sur les droits des peuples autochtones (2007) et dans les 94 appels à l'action de la Commission de vérité et de réconciliation (2015). Il conclut que ce n'est pas le moment de conclure un traité moderne au Nouveau-Brunswick.

Introduction

I want to share with you of the unique experiences I lived during my earlier career as a lawyer representing Indigenous clients in the justice system in New Brunswick. I was the first Indigenous person to attend and graduate from UNB law school in 1971. It was never my desire to be a lawyer because I knew very little about the system of justice, how laws were made, the role of the courts, and administration of justice. My original intent in attending university was for my love of math and science. I graduated from Saint Francis Xavier University in 1968 with a math major in a Bachelor of Science program. In the summer of 1967, I was an exchange student in Germany where I spent two months to learn to speak their language. I studied German as a language because of my desire to do graduate studies in Germany. I did

[1] Closing keynote talk at the *Rough Waters: The Legacy of the Marshall Decisions Workshop*, Mount Allison University, April 15, 2023.

learn to speak the language. I travelled for one month visiting cities in Germany, the Netherlands, Belgium, and Luxembourg, and spent a week in the walled city of Berlin. I met students from different countries at the youth hostels and learned so much of their cultures and interests. The cultural shock I witnessed on the social values that summer raised a consciousness within me to have more concerns with my people and very little on math and science.

When I returned home in late August, I had no desire to return to university to continue my studies in math and science. However, my oldest brother convinced me to return to university to complete my studies. I struggled in my last year. I tried to switch to a Bachelor of Arts program, but it would involve two more years of study. I did complete my math major because I had great marks for the first three years at St. FX.

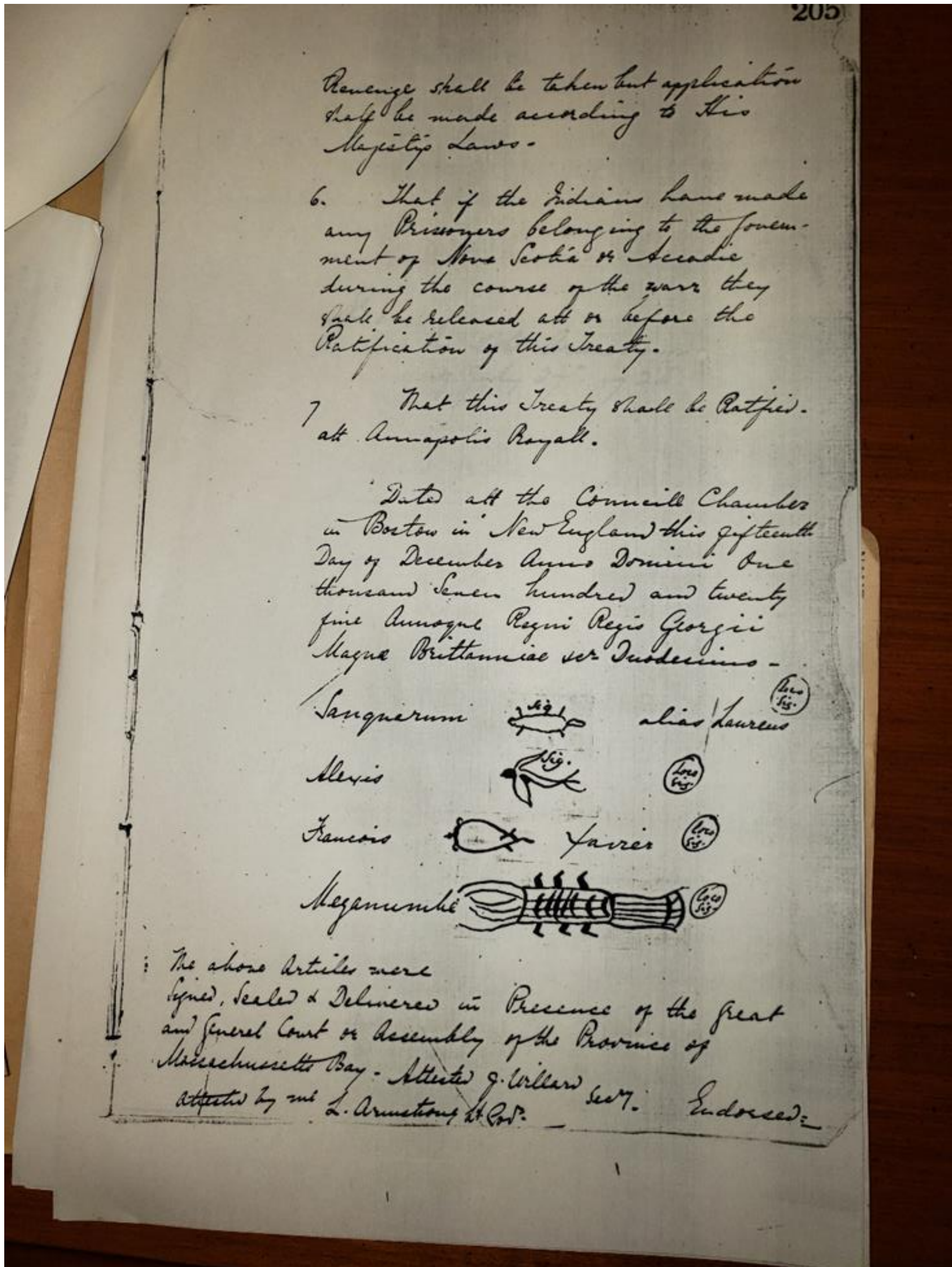
I returned home after graduation in May 1968 and did not know what I wanted to do for work. Another brother of mine, who was the chief of our reserve, the Tobique First Nation, suggested that I should teach at the local high school where the students from my community attended. I met with the principal and the superintendent, and we agreed that I would be teaching math and science. I registered at UNB summer school for a temporary teacher's licence and took four courses. This program was designed for three summers and at the end, I would receive my education degree. My classes were finished, and I returned home to meet with the superintendent and the principal to sign a contract. Unfortunately, there were philosophical differences. They did not want me to teach at the local high school and suggested that I go at another school where students from my community did not attend. I had never before been subject to racism. I was shocked and returned to summer school to complete my exams. I walked by the UNB law school and inquired about the possibility of studying law. Thank goodness, my application was accepted and began a career in law that continues to this day.

I finished my first-year law at UNB law school in 1969 and was involved in a research project which resulted in the publication, *Native Rights in Canada*.[2] I was the only Indigenous law student involved in the study. Naturally, I was assigned the responsibility of finding the Maritime treaties, land claims, and the contact of the Spaniards with the Indigenous peoples of the Americas. I have been involved with the Peace and Friendship Treaties since the summer of 1969. It was very difficult to find these treaties reproduced in Appendix III of the book. These were not all the Peace and Friendship Treaties that were in existence in the Maritimes at that time.

When you look at the Indigenous signatures of the Peace and Friendship Treaties 1725, as shown in Figure 1, it is signed with these very interesting depictions of animals, which likely designated the clans that they represented. They could not even make an X or write in English like the rest of the treaty. These are the Indigenous peoples who signed these treaties, nation-to-nation with the British. It is only nations that can sign treaties under international law. You and I cannot sign treaties. We can sign a contract, or we can sign an agreement, but neither is a treaty. A treaty can only be signed between nations.

The Peace and Friendship Treaty of 1725 was renewed in 1726 in Halifax, and other subsequent Peace and Friendship Treaties (1749, 1752, 1760, 1761, 1778, 1779) referred to the Treaty of 1725, which recognized what was always there: Indigenous aboriginal way of life—hunting, fishing, trapping, and gathering.

[2] Indian-Eskimo Association, *Native Rights in Canada* (Toronto, 1970).



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Revenge shall be taken but application shall be made according to His Majesty's Laws.

6. That if the Indians have made any Prisoners belonging to the Government of Nova Scotia or Acadie during the course of the warr they shall be released att or before the Ratification of this Treaty.

7 That this Treaty shall be Ratified att Annapolis Royall.

Dated att the Councill Chamber in Boston in New England this fifteenth Day of December Anno Domini One thousand Seven hundred and twenty five Annoque Regni Regis Georgii Magnae Brittanniae &c Duodecimo –

Sauguaaram [sig] alias Laurens (Loco Sig.)

Alexis [sig] (Loco Sig.)

Francois [sig] Xavier (Loco Sig.)

Meganumbe [sig] (Loco Sig.)

The above Articles were Signed, Sealed & Delivered in Presence of the Great and General Court or Assembly of the Province of Massachusetts Bay – Attested J. Willard Secry.

Attested by me L. Armstrong Lt Govr. Endorsed –

Figure 1. Photo by the author of the Peace and Friendship Treaty, 1725.

My Experiences with the Criminal Justice System

To understand the position of Indigenous people in this province, I must give you some background of what I experienced in New Brunswick. I cannot speak for Nova Scotia or Prince Edward Island or even the Mi'kmaq in this district, but I can share my experiences with you.

I finished law school at the University of New Brunswick in 1971, I articled and eventually got admitted in the fall of 1971 to practice law. I had been representing a lot of our people from my own community for criminal offences. I called that the revolving door syndrome. You get drunk on Friday night or Saturday night, get into a fight, have a hearing in court on Monday morning, plead guilty, and pay a fine.

Down the road, it happens again. The judge said, "Have you not learned your lesson? This time, instead of $50 fine, it'll be $100. Next time it will be more." I got to see the criminal justice system in a different way by representing our people and seeing the weaknesses of the correctional system. There was no legal aid back then. The lawyer I was articling with told me "to represent your people," which probably fulfilled part of my mom's desire for me to come back and help our people. Maybe not that way she thought, but that's what I did.

I was invited by a representative of Waterloo Lutheran University (now Martin Luther University College, federated with Wilfrid Laurier University) to study for a master's degree in social work. My wife and I decided for me to accept to study social work in Ontario for two years. I wanted to pursue this degree because I found out in that short time I practised criminal law, that probation officers would not come to our reserve. They were afraid. I remember asking them, "How are you going to prepare a pre-sentence report if you do not go to the community?" They said, "We are afraid somebody will beat us up." I said, "Well, if you're looking for trouble, you can get beat up anywhere. You can get beat up in Saint John and in lots of other communities!" I told them, "No, you're okay, do not worry, nobody's going to bother you in our community."

The study of social work at the university required courses for four months followed by a field placement for four months. My first field placement was at the Guelph Correctional Centre, with a population of eight hundred inmates from across Ontario who would be sent there with a sentence of two years less a day. Approximately 10 per cent of the population would be Indigenous or "guests," as I called them. The facility was very dilapidated like the penitentiary in Dorchester. The placement social worker told me to go in there and try to help these guys. They came from all over Ontario. I agreed to go in there. I told them that I was there to help them. They would say, "Good, when can we get out?"

I did not dare tell these guys that I was a lawyer, because they would say, "Well, my lawyer was no good, the judge was no good and the police picked on us." That's all I heard inside the institution. There was no justice for them. It was difficult for them to face up to the fact why they were there. I realized that in that institution there was no rehabilitation. They were warehoused to get them off the street for whatever time was necessary. The public were protected, the crime rate slowed down a little bit until they get out, and then there was recidivism. There was a lack of our people involved in the kind of important work that needed to be done inside these institutions.

I quickly learned that it was the guards that controlled the institution, not the social workers or the psychiatrists. Because if the guards could get an inmate to misbehave, that person was shipped out to another institution. It was kind of a strange system that existed there.

I returned to New Brunswick in 1974 and worked on a land claim for my community and eventually for the Union of New Brunswick Indians. I did research on treaty and aboriginal rights building on what I had learned in 1969. I was a full-time lawyer who was Indigenous, and suddenly I became a lawyer to a lot of our people in this province. I got all kinds of clients. Why? Because legal aid would not pay for the defence of our people. Legal aid lawyers would not defend our people when they wanted to exercise their hunting, fishing, and trapping rights. That's not within the confines and conditions of that part of the legal system.

I ended up doing research, writing opinions, and defending our people from Campbellton, Saint John, Moncton, Woodstock, Perth-Andover, Miramichi, Edmundston, St. Stephen, Richibucto Neguac, Tracadie, Bathurst, and wherever our people got in trouble. They never had a lawyer because they could not afford one. When I walked into the courtrooms, they would say, "Oh, geez, there is this Indian, is he any good as a lawyer?" So, I would walk with my client into the courtroom, where half of those present would be non-native, the other would be native; "We better see if this guy is any good." That was the atmosphere of what happened in New Brunswick in the provincial courts where I appeared to represent our people.

I got several acquittals, and the peace officer told me once, "You are not doing your people any good." I asked him, "What do you mean?" He replied, "Well, you know, they are going to get in trouble again." The RCMP officer told me, "It's bad enough we sent these Indians to go to university, but secondly, some of them go to law school, and now they are beating us at our own game." They were very angry and upset. I could see the racism and the prejudice in their voices and in their personalities.

I told the officer that "If you were not so inept with your note making, all I must do is create a doubt based on your testimony, and the judge is going to find a client not guilty. That's how it works. You know it and I know it. So, thank you very much for the compliment." I did not make too many friends with that kind of a message, but I had to try to restore the dignity and peace for those I represented.

And so, what happened? The chiefs told me, "Listen, we have too many criminals in our communities. We hired you to fight for our treaty and aboriginal rights and we want you to concentrate on that." So, reluctantly, I had to stop defending our people in criminal and family courts, and in some civil cases as well, to concentrate on land claims and treaty and aboriginal rights.

The Struggle for Recognition of Treaty Rights in the Courts

I was aware of other decisions on treaty and aboriginal rights and title from my research experiences in 1969 and subsequent court cases in Canada. I had read a case entitled *Regina v White and Bob* (1964), where Justice Norris of the BC Court of Appeal had this to say:

> The question is, in my respectful opinion, to be resolved not by the application of rigid rules of construction without regard to the circumstances existing when the document was completed nor by the tests of modern-day draftsmanship. In determining what the intention of Parliament was at the time of the enactment of s. 87 [now s. 88] of the Indian Act, Parliament is to be taken to have had in mind the common understanding of the parties to the document at the time it was executed. In the section "Treaty" is not a word of art and in my respectful opinion, it embraces all such engagements made by persons in authority as may be brought within the term "the word of the white man" the sanctity of which was,

> at the time of British exploration and settlement, the most important means of obtaining the goodwill and cooperation of the native tribes and ensuring that the colonists would be protected from death and destruction. On such assurance the Indians relied.[3]

I was very aware of this definition and its subsequent affirmation by the Supreme Court of Canada in 1966.[4]

The Treaties of 1725, 1749, 1752, 1778, and 1779 were ones I used in defending the rights of our people who exercised their right to hunt, fish, and trap in several court cases in New Brunswick.

I want to refer to the jurisprudence before 1982 as court decisions were made in New Brunswick and the Supreme Court of Canada. There were two major challenges that had to be proven before the courts. The two issues we had to prove through evidence was (1) the validity of the treaties and (2) the genealogy required of Indigenous defendants as required by the decision of *R v Syliboy*.[5]

The Gregory Paul Case (1980)[6]

The atmosphere in New Brunswick at the time was very disconcerting because when our people would say, "We want to exercise our treaty rights, we have the right to hunt and fish and trap," people would say, "What are they talking about?"

Gregory Paul called our office in the spring of 1976. He was from Red Bank or Metepenagiag First Nation, and he had trapped a beaver, skinned it, and was on his way to sell his beaver pelt to a non-Indigenous fur buyer near Miramichi. He stopped for a cup of coffee en route. He stopped there and the game warden approached and asked him,

> "Hey Gregory, what have you got in the back of your truck here?"
>
> "Beaver pelt."
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> "What are you going to do with that?" the warden asked.
>
> "I am going to sell it to a fur dealer," Gregory replied.
>
> "But do you have a permit to transfer that beaver pelt from there and sell it to a fur dealer?" the warden persisted.
>
> Gregory Paul responded, "Well, according to the great Nicholas, I've got treaty rights."

So, I got a call from Gregory, and he told me, "OK, I just got charged." I said, "OK," as we were waiting for a test case. You know, you cannot make up these cases: you cannot compel people to go and hunt and get caught, and we will defend you. That would be counselling or, at worst, obstruction of justice. I told him, "OK, Gregory, we will defend you. It will cost you nothing. This must be what's called a test case. We are going to lose at the provincial court level. We may lose at the next level, which is county

[3] *Regina v White and Bob*, (1964), CanLII 452 (BC CA), 50 DLR (2nd) 613, p. 232.

[4] *Regina v White and Bob,* (1965), CanLII 643 (SCC), 52 DLR (2nd) 481.

[5] *R v Syliboy,* (1928) 50 CCC. 389.

[6] *Regina v Gregory Paul*, 54 CCC (2nd) 506.

court, and we may even lose at the Court of Appeal of New Brunswick"—because I had known about the pair of decisions of Francis and Simon.[7]

We heard what John Simon shared earlier in this Workshop that they lost because of the 1928 *Syliboy* case, in which the grand chief of the Mi'kmaq, at the time from Membertou, was caught again with pelts and charged and convicted. The county court judge said that the Treaty of 1752 was not valid: it had been terminated by outbreak of hostilities that took place in Halifax. Secondly, that it was made with the mainland Mi'kmaq, given that Jean Baptiste Cope was Grand Chief at that time. And now you're here in Cape Breton, you cannot trace yourself back to the Treaty of 1752 because at the time, Cape Breton was under French control. You cannot bring that treaty right here. Justice Patterson ruled that that the Treaty of 1752 was not valid and that Grand Chief Sylliboy could not trace himself back genealogically to the benefit of the Treaty of 1752.

I knew this in New Brunswick. I convinced the Crown prosecutor to have a test case in this province. You and I will go down in infamy in legal law, or whatever, one of us wins, the other one loses. We agreed to a statement of facts that Gregory Paul was a Mi'kmaq from under the federal *Indian Act*. The Treaties of 1725, 1752, and 1779, which the Mi'kmaq signed, all guaranteed hunting rights. We added Belcher's Proclamation of 1761. The idea was that one of them was going to stick in the mind of a judge. We agreed that Gregory Paul did not have a permit as required under the *Game Act* of New Brunswick.

We lost at the provincial court level, with the judge saying that "Indians were no different than anybody else. Why should you have any special benefits?" I knew we were going to lose. I filed an appeal to the county court. The county court judge would not hear the case and wanted to send it directly to the Court of Appeal. In his thinking, whether we won or lost in his court, we were going to appeal. This was true because that was our intent.

I appealed to the Court of Appeal and the case was argued in October 1978. This is what took place. I was the appellant and got to argue ahead of time. Right away, the Chief Justice of New Brunswick stated, "Mr. Nicholas, how do we know as a Court that Gregory Paul is a descendant of those who signed the treaties that you are putting into your evidence? You know the old Martin Francis case and all of it was the decision of this Court of Appeal." I said, "What? Well, my Lord, for one thing, we had a statement of the facts and it's signed." The Chief Justice stated, "There's nothing in the file here." What happened with the signed document from provincial court, county court, and Court of Appeal that went missing? What happened to it? I don't think it will ever be solved. I had a copy that had not been signed. Crown Prosecutor Fred Ferguson had a signed copy and gave it to the registrar to make a copy. The judges took a recess. After the recess, the Chief Justice never asked me another question. We moved to the arguments. I got up to argue. Mr. Ferguson argued, and I had a rebuttal.

A year later, in 1979, I received a letter from the registrar of the Court of Appeal indicating that the judges could not decide. They needed more information. It is very unusual for this to happen. The Crown prosecutor, Fred Ferguson, and I got together, and we gathered more documentation and gave it to the registrar of the Court of Appeal. The Court of Appeal in July of 1980 ruled that Gregory Paul was not guilty because of the Treaty of 1779. The fact was that the province could not regulate what he had trapped from his community and what he could do with it off the reserve because of section 88 of the federal

[7] See *Francis v The Queen*, (1956) SCR 618 and *R v Simon* (1958), 124 C.C.C. 110.

Indian Act as a defence. It stated that if you have a treaty right and it conflicts with a provincial law, then the treaty right will prevail. The highest court of New Brunswick agreed with us.

Now, let me provide more details of the decision reported in *Regina v Paul* by the Court of Appeal of New Brunswick on July 18, 1980.[8] Mr. Gregory Paul was charged under section 72(2) of the *Game Act*, RSNB 1973 which provided that "Every person who has in his possession the undressed skin or fur of any beaver, unless he is authorized under section 2 is guilty of an offence."[9]

It was tried at the provincial court with an agreed statement of facts, and he was found guilty. The facts were reproduced in the Court of Appeal as follows:

> The appellant is a registered Indian under the *Indian Act*, RSC 1970, c. I-6, that he trapped the beaver on the Red Bank Indian Reserve, that he was found in possession of the undressed beaver skin outside the limits of the Red Bank Indian Reserve, that he had no licence or permit for possession of the beaver skin under s. 2 of the *Game Act* and that it was the appellant's intention to sell the beaver skin to a fur dealer and while driving around in his vehicle a game warden stopped him and found the beaver skin.[10]

The defence was based on section 88 of the *Indian Act,* which read:

> Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that those laws make provision for any matter for which provision is made by or under this Act.[11]

The Court of Appeal ruled on the Treaty of 1779 which provided that the "said Indians and their Constituents shall remain in the Districts before mentioned Quiet and Free from any molestation of any of His majesty's troops or his good Subjects in their Hunting and Fishing."[12]

Chief Justice Hughes referred to the *White and Bob* decision and interpreted the clause in the Treaty of 1779 as follows:

> It is obvious that the term cannot be construed as a grant of the right to hunt and fish but, giving the term the most liberal interpretation it is possible to bear, it could and probably should, in the circumstances, be interpreted as a recognition of a pre-existing right which the Indians exercised from time immemorial and consequently may be treated as a confirmation of that right free from molestation by British troops and subjects.

[8] *Regina v Gregory Paul*, 54 CCC (2nd) 506.

[9] *Ibid.*, 507.

[10] *Ibid.*, 508.

[11] *Ibid.*

[12] *Ibid.*, 511.

> …If an Indian had a treaty right to trap a beaver it certainly would be implied that he had a right to possession of it. To hold otherwise would defeat the treaty right by requiring the Indian to obtain a trapper's licence authority of s. 2 of the Game Act.
>
> I would allow the appeal and set aside the conviction.[13]

This historic and important decision of the Court of Appeal was not appealed by the province to the Supreme Court of Canada.

Hatfield's Reversal

I want to go back a little bit to 1970 when Richard Hatfield was elected as Progressive Conservative premier of New Brunswick. The chiefs of New Brunswick had a major meeting in the Madawaska First Nation area, and they challenged Hatfield. They asked him, "Mr. Premier, what are you going to do about treaty rights in New Brunswick?" Hatfield's background was as a lawyer and a politician. His response was that if you could prove to me that there was a valid treaty in New Brunswick, and the court recognized it, he will be the first one in New Brunswick to jump up and say, "Hey guess what? You've got treaty rights. Guess what? They're valid."

We had to wait ninety days before the province could apply for leave to the Supreme Court of Canada to see if they would hear the case. We won in New Brunswick. I was hoping that it would go to the Supreme Court of Canada, not for notoriety, but because I thought that the chief justice of the New Brunswick Court of Appeal misinterpreted part of the Treaty of 1779.

Ninety days later, the prosecutor called and informed me that the province was not going to appeal the decision. It was a victory. It happened that ten days later we met with Premier Hatfield in Fredericton. We gathered in the cabinet room in the Centennial Building in Fredericton. Chief Albert Levi from Elsipogtog asked me to let him take the lead on this part of the agenda since he was present in Edmundston in 1970. I had to write all information for the chiefs to make their presentations. We were in cabinet chambers with Hatfield and several of his ministers. Chief Levi said, "Mr. Premier, I want to remind you what happened in 1970 in Edmundston. Here's what we asked you, and you said you're prepared to stand up. Okay, we've got a decision of the highest court in the province of New Brunswick, recognizing a treaty right, recognizing that Gregory Paul is not guilty against provincial law. Now, what do you want to tell the public of New Brunswick?" We were waiting with anticipation like you are right now.

Hatfield said, "That's only one Indian." I thought that Chief Levi would smack him in the mouth. Hatfield must have thought that with all the good legal advice he had, that it was a concession, that Paul was a descendant. What Hatfield and the government did not know was that we were gathering more evidence at the same time. The persons who helped me in doing the research were Darrell Paul and Joseph Knockwood.[14] It was Joe Knockwood who introduced me to an expert from the Université de Moncton Acadian archives, Stephen White. We got hold of some French birth records from the Catholic Church on Kingsclear First Nation and gave them to Stephen. With this important record, he told us, "I can trace all your people back to the 1600s." I asked him, "Steve, are you prepared to come to court and be an expert witness on that part of the treaty?" He agreed and I got to call him to validate the treaty and benefits for

[13] *Ibid.*, 513.

[14] Joseph Knockwood passed away on December 27, 2023.

the descendants. This is how we beat the province of New Brunswick. We established the genealogy that was required.

Impact of the Decisions of Gregory Paul and Matthew Simon

We did away with those two things that the *Syliboy* decision hung over our heads from 1928. First, that of showing the treaties are still valid; and, second, we could trace our lineage back to them to finally win the case. But, when you win a case like that, you make enemies. Just like Donald Marshall Jr. did in 1999. It shocked people. What do you mean treaties? I have always said, if the government can keep the public ignorant, not knowing what the aboriginal and treaty rights of Indigenous peoples are, they have them convinced that such rights do not exist. We convinced our people that we had these rights. We fought hard and tough. We lost more than we won, but we wanted big wins. During the 1980s, there were three of us, Bruce Wildsmith from Nova Scotia, Paul Williams, another lawyer in Ontario, and I would team up together and we would ask ourselves how are we going to handle these cases that are coming up on Indigenous rights?

Bruce invited me, "Graydon, if you're winning in New Brunswick on the treaties and these other things, do you want to join us in the appeal to the Supreme Court of Canada on the Simon decision? Do you want to make an intervention?" I said that I would be honoured.

When you get permission to make an intervention to speak or attend, you are given fifteen minutes. That's all because you are not the main counsel on the issue about Matthew Simon. Can you trace yourself back to 1752? Is the Treaty of 1752 valid? You have historians on both sides of the issue. The justices of the Supreme Court are going to decide to uphold the previous decision by the Court of Appeal of Nova Scotia or decide to acquit the appellant, Mr. Matthew Simon. This is significant because if you look at the Simon case, that's the very first time that the Supreme Court of Canada ever laid eyes on a Peace and Friendship Treaty. There were other cases from us in New Brunswick I appealed after losing a decision on fishing rights from the Court of Appeal of New Brunswick. There is no statutory right to have a case heard in the Supreme Court of Canada from decisions of the Courts of Appeal in the provinces. There are three members of the justices of the Supreme Court that will hear your request to have a leave to appeal to the full court. If their decision is no, it ends your appeal. If the answer is yes, then the Supreme Court will hear your appeal.

The decisions of rights under treaties were already decided by the Supreme Court of Canada on the numbered treaties from Ontario, Western Canada, and the Northwest Territories. The provisions and promises contained in those treaties are unique and important to the Indigenous peoples who are covered by them. The Peace and Friendship Treaties are different, unique, and important for Indigenous peoples in the Maritimes.

Bruce, thankfully, got permission for the three members of the Supreme Court to examine the Peace and Friendship Treaties. I backed him up on the genealogy part. The Mi'kmaq in Nova Scotia did not have the records that we had in New Brunswick. But in the *Simon* decision, Chief Justice Dickson said he's a Mi'kmaw and that satisfies us that he is a beneficiary of this Treaty of 1752 because Mi'kmaq did not keep records. It was up to the government to keep these records. Why should we deny him a benefit under this treaty if the question of his identity is there and then the other part of the treaty being valid? There were historians saying, no, the treaty was no longer valid and other historians who testified, yes, the treaty was still valid. The chief justice stated how is a judge going to decide when historian experts

disagreed on what they read? They read the same documentation. One says one thing and the other one says a different thing. Justice Dickson said that the Treaty of 1752 was valid and applied to Mr. Simon. Chief Justice Dickson also said that treaty never conceded land. This was a very prominent and important paragraph in that decision.

This was a very important decision of Chief Justice Dickson of the Supreme Court of Canada and reported in *R v Simon* (1985).[15] His comments on the earlier decision of *R v Syliboy* (1928) were as follows:

> It should be noted that the language used by Patterson J. illustrated in this passage reflects the biases and prejudices of another era in our history. Such language is no longer acceptable in Canadian law and indeed is inconsistent with a growing sensitivity to native rights in Canada. With regard to the substance of Patterson J.'s words…his conclusions on capacity are not convincing.[16]

The *Simon* case focused on the Treaty of 1752 and specifically on Article 4 which read,

> It is agreed that the said Tribe of Indians shall not be hindered from, but have free liberty of Hunting & Fishing as usual: and that if they shall think a Truckhouse needful 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.[17]

Chief Justice Dickson summarized his findings:

> 1. The Treaty of 1752 was validly created by competent parties.
> 2. The Treaty contains a right to hunt which covers the activities engaged in by the appellant.
> 3. The Treaty was not terminated by subsequent hostilities in 1753. Nor has it been demonstrated that the right to hunt protected by the Treaty has been extinguished.
> 4. The appellant is a Micmac Indian covered by the Treaty.
> 5. The Treaty of 1752 is a "treaty" within the meaning of s. 88 of the Indian Act.
> 6. By virtue of s. 88 of the Indian Act, the appellant is exempt from prosecution under s. 150(1) of the Lands and Forests Act.
> 7. In light of these conclusions, it is not necessary to answer the constitutional question raised in this appeal.
>
> I would, therefore, allow the appeal, quash the convictions of the appellant and enter verdicts of acquittal on both charges.[18]

[15] *R v Simon*, (1985) 2 SCR 387.

[16] *Ibid., para* 21.

[17] *Ibid., para* 6.

[18] *Ibid., paras* 68–9.

These two decisions of *Regina v Paul*, 54 CCC (2nd) 506 and *R v Simon*, (1985) 2 SCR 387 did not involve section 35(1) of the *Constitution Act*, 1982 which reads, "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."[19]

The Supreme Court of Canada in the decision of *R v Marshall* (1999)[20] ruled that the Treaty of 1760 was valid and applied to the appellant, Donald Marshall Jr., who was acquitted. This is the topic of this conference.

What are Modern Treaties?

Section 35(3) of the *Constitution Act,* 1982, states, "For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired."[21]

The *Calder et al. v Attorney-General of British Columbia* (1973) case was decided by the Supreme Court of Canada, which resulted in the recognition of aboriginal title.[22] The response of the government was to create two land claims policies. The Comprehensive Claims Policy (1973 and 1986)

> set out how the government planned to negotiate and settle Aboriginal rights and title claims (also known as comprehensive land claims or *"modern treaties"*) with Aboriginal people. The policy, which outlines Canada's approach to the negotiation of comprehensive land claims or treaties with Aboriginal groups and provincial/territorial governments, was clarified with the publication of *In All Fairness: A Native Claims Policy—Comprehensive Claims* (1981) and reaffirmed in 1986, with the Comprehensive Land Claims Policy (1986).[23]

There have been many land claim agreements that have been negotiated. The government of Canada has published the report *Implementation of Modern Treaties and Self-Government Agreements* in 2019.[24] This booklet indicated that since 1975, there were twenty-five modern treaties that have come into effect. It also stated that

> These sophisticated agreements are typically tripartite, including Indigenous organizations or nations, the Crown, and provincial/territorial governments as signatories. They provide clarity and predictability with respect to land and resource rights, ownership and management. These rights are defined in them are constitutionally protected. Modern treaties are uniquely Canadian and are reconciliation in action. They provide a path for the future by creating new relationships within the Canadian federation while balancing the interests of indigenous peoples with those of a broader society. Modern treaties promote

[19] Canada, Constitution Acts 1867 to 1982, https://laws-lois.justice.gc.ca/eng/const/.

[20] *R v Marshall*, [1999] 3 SCR 456.

[21] Canada, *Constitution Acts*.

[22] See *Calder et al. v Attorney-General of British Columbia*, (1973) SCR 313.

[23] Government of Canada, Renewing the Comprehensive Land Claims Policy: Towards a Framework for Addressing Section 35 Aboriginal Rights, September 2014, https://www.rcaanc-cirnac.gc.ca/eng/1408631807053/1544123449934.

[24] See Government of Canada, "Implementation of Modern Treaties and Self-Government Agreements," Provisional Annual Report: July 2015–March 2018, 2019, https://www.rcaanc-cirnac.gc.ca/eng/1573225148041/1573225175098.

> strong and sustainable Indigenous communities while advancing national socio-economic objectives that benefit all Canadians.
>
> Before 2000, modern treaties were negotiated in the form of comprehensive land claims settlement agreements—only a few modern treaty partners negotiated self-government agreements separately. After 2000, all modern treaties included provisions for self-government.[25]

The *Nisga'a* final agreement was not completed until August 1998, and the *Calder* case was decided in 1973. The complexities and duration of negotiations and time are arduous.

The Need for Title Recognition

This background is important. I want to provide it for you because as we are struggling in this extension of the newness of the *Marshall* decision and talking about modern treaties. I just want to read to you one of the things that, you know, when you are a law student doing research, and especially if you do not go into this area and all of this stuff is new. The decision of *Regina v White and Bob*, (1965), involved an incident that happened on Vancouver Island where these two Indigenous guys went hunting.[26] Now, these individuals were subject to what they called the Douglas Treaties. The Douglas Treaty that was signed covered the area where these two individuals, White and Bob, came from had a clause permitting hunting for deer or elk omitted. It was supposed to be in there, but it was omitted.

I want to repeat my earlier quote of Judge Norris of the British Columbia Court of Appeal in his decision which was on the definition of a treaty. It is significant:

> The question is, in my respectful opinion, to be resolved not by the application of rigid rules of construction without regard to the circumstances existing when the document was completed nor by the tests of modern-day draftsmanship. In determining what the intention of Parliament was at the time of the enactment of s. 87 [now s. 88] of the Indian Act, Parliament is to be taken to have had in mind the common understanding of the parties to the document at the time it was executed. In the section "Treaty" is not a word of art and in my respectful opinion, it embraces all such engagements made by persons in authority as may be brought within the term "the word of the white man" the sanctity of which was, at the time of British exploration and settlement, the most important means of obtaining the goodwill and cooperation of the native tribes and ensuring that the colonists would be protected from death and destruction. On such assurance the Indians relied.[27]

It is not often a person knows that quote. I read it in the summer of 1969 and began to do my advocacy in 1974. I relied on it. The judiciary in New Brunswick heard me time and again argue about the significance of the treaties that were signed in 1725. The issue of whether it is nation-to-nation is still being debated. And why do I say it is nation-to-nation? The United States Supreme Court's decision in 1832 in *Worcester v Georgia (1832)* dealt with the Cherokee treaties that the United States government had signed. Chief Justice Marshall said that "the words 'treaty' and 'nation' are words of our own language.…We have

[25] *Ibid.*, 4.

[26] See *Regina v White and Bob*, (1965), 50 DLR (2nd) 613.

[27] *Ibid.*, 232.

applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense."[28]

I have been trying to introduce this language into the courts. Why? I was involved in the political process of the National Indian Brotherhood, which was called NIB, around 1978. The federal cabinet through Prime Minister Pierre Trudeau agreed to have joint NIB-Cabinet committee meetings. We met with different cabinet ministers. I was assigned a file on justice. There were two of us who were Indigenous lawyers and met with Mark Lalonde, who was the minister of justice at the time and the lieutenant for Trudeau in Quebec. We met with Lalonde about this issue of Indigenous sovereignty and nationhood. He said that both were non-starters because of the political climate in Quebec. He did not want to hear anything about sovereignty or nationhood from anybody representing the Indigenous community. In June 1969, the government of Prime Minister Pierre Elliott Trudeau introduced the White Paper Policy, which was intended to terminate the federal constitutional responsibility of Indians and transfer the relationship to the provinces and territories. Two months later in a speech Trudeau gave in Vancouver, he stated that

> We will recognize treaty rights—we will recognize forms of contract which have been made with the Indian people by the Crown. And we will try to bring justice in that area. And this will mean that perhaps the treaties shouldn't go on forever. It's inconceivable I think that in a given society, one section of the society have a treaty with the other sections of the society. We must be all equal under the laws and we must not sign treaties amongst ourselves and many of these treaties indeed would have less and less significance in the future anyhow.[29]

On the issue of aboriginal rights, he said,

> Our answer may not be the right one and may not be one which is accepted but it will be up to all of you people to make your minds up and to choose for or against it and discuss it with the Indians. Our answer is no. We can't recognize aboriginal rights because no society can be built on historical "might-have-beens."[30]

Both Trudeau and Lalonde had brilliant minds, went to best law schools in Quebec, but they were not taught anything about Indigenous issues. So, after the *Calder* decision by the Supreme Court of Canada in 1973, Trudeau finally said, "I guess there is such a thing as aboriginal title. We better do something about it." So, the comprehensive claims process has now evolved into modern-day treaties.

The title of my talk is "A Modern Treaty in the Maritimes: Is It Time?" And why do I ask this question? Because when you look at the documentation of modern treaties in federal government publications, it mentions the Nisga'a Land Treaty, it mentions Nunavut, and it mentions the James Bay Treaty. All of them resulted because of negotiations on aboriginal title.

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[28] *Worcester v Georgia*, 31 (6Pet) U.S. 515 (1832), U.S. Supreme Court, page 31, U.S. 519.

[29] Pierre Elliott Trudeau, "Remarks on Indian Aboriginal and Treaty Rights." Speech given August 8, 1969, in Vancouver, https://iportal.usask.ca/record/18228.

[30] *Ibid.*

Trying to settle the question of aboriginal title in New Brunswick will take some time. It will require the views of government to be considered. It will involve Indigenous governments and it will involve the federal government. That's what a modern treaty is. It is a settlement on aboriginal title.

The federal government has asserted that these modern-day treaties result in their concept of self-government. Self-government is a glorified municipal government; it is controlled by the government; it is not self-determination. Jane McMillan spoke the other day about JR (Donald Marshall Jr.). I got to know his dad, Grand Chief Donald Marshall Sr., and JR as well. I was involved in the political movement that took place in the Maritimes among our Mi'kmaq and Wolastoqiyik communities. We would talk about the issues of self-determination versus self-government in the international perspective.

On to the International Arena

Before the Marshall inquiry began, we were meeting in Millbrook First Nation, Nova Scotia, in 1982, and Grand Chief Donald Marshall took me aside. He told me, "Graydon, I want you to go to Geneva, Switzerland, and find out what's going on." I had no clue what was going on in Geneva at that time. And, like a fool—and now I regret how I responded to him—I said, "Grand Chief, thank you very much, but it's the Chiefs of New Brunswick that pay for my salary and not the Union of Nova Scotia Indians and the Grand Chief." This was an insult to him.

After lunch, the chiefs of New Brunswick got together with me and told me, "You are going to go to Geneva. Don't you ever talk to our Grand Chief that way because he comes from the traditional ways." I made plans go to Geneva to participate in matters and needed an NGO to sponsor me. The Working Group started in 1978, in which Indigenous peoples around the world would gather at the United Nations to discuss what was developing in their country in terms of policies, challenges, and standards.

The only NGO I was aware of was the International Indian Treaty Council in New York for Native Americans. I knew Mr. Bill Means and I asked him, "Is there any way you can represent or sponsor me to go inside the conference in Geneva so I can speak?" He said, "No problem, we could do that." I needed these credentials to be able to make a presentation. I received them and I prepared a great big paper. I was only allowed eight minutes to speak, for a full week, because there were Indigenous and Non-Indigenous speakers from around the world, from governments and other NGOs. I started making my presentation and suddenly, I heard the chairperson inform me, "Mr. Nicholas, your time's up, your time's up." If you don't stop speaking, they click the button that turns off the recording. That was my experience of making a representation in the international level.

But I got intrigued because I started meeting Indigenous people from around the world. The same struggles from Australia, New Zealand, Papa New Guinea, South and Central America, the United States, Scandinavian countries, and the Circumpolar Conference. I started to make connections with what was developing at the international level. This was the genesis of the *United Nations Declaration on the Right of the Indigenous Peoples*. I was able to return to Geneva in 1984, 1987, and 1988 until I just got too tired. But it was there that the notion of self-determination was so deeply ingrained in me because we are nations. What nation tells another nation how to run its government? If we sign these documents called treaties, nation-to-nation, then those two nations must sit down together and resolve things. And if you study those Peace and Friendship Treaties, you'll see there is a resolution clause in every one. If there is a dispute, then let us come together and settle things. It does not say that treaty is terminated. Let's work things out. Every treaty in the world is like that.

How many times did Germany get defeated? How many times did France get defeated? How many times did other countries around the world get defeated? It did not terminate their existence. You worked out the relationships to say, How do we continue to relate to one another? This is a concept that is foreign in Canada because we're not taught that in our law schools. We were not taught that in our history. We were not taught that in political science. We were not taught that anywhere. This is the challenge. That is why I ask the question Is it time? Do our people in our communities, our leaders and other people believe in self-determination? Are our leaders so taken with the self-government that the federal government wants to implement? Are our leaders caught up in the regime under the federal *Indian Act*, which has limited authority and is not the concept of self-determination?

The concept of self-determination under the *United Nations Declaration on the Rights of Indigenous Peoples* states that we have the right to self-determination. We have the right to determine our political and economic status, and our total character. We have a right to a nationality, we have a right to our own justice system, and we have all the rights promulgated in the other human rights instruments of the United Nations. Each time I teach a course at university, the first two major documents I give to students are the *Truth and Reconciliation Commission: Calls to Action* and the *United Nations Declaration on the Rights of Indigenous Peoples.*[31] I want them to go beyond what I was taught, and what the dreams and the visions that should be for my Indigenous brothers, sisters, and our communities.

When the conference on Working Group on Indigenous Populations started in Geneva in 1977, they used the word "population." Population is not a people. The term "peoples" in the international language denotes nationhood. That's why the *United Nations Declaration on the Rights of Indigenous Peoples* is so important. Governments are trying to say, Well, it's not quite this, because they do not want to recognize Indigenous people as nations. They don't even believe what their representatives signed, let alone what the intent was back in 1725 when the treaty process began. So we are arguing with these concepts. I am not sure when we will be ready in New Brunswick to sign any kind of modern-day treaty with this current provincial government. It is not often that I get involved in that kind of sphere because I am out of the political scene now.

Challenges to Change

From 1991 to 2014, I was in a cone of silence, because I was a provincial court judge and lieutenant-governor as a representative of Her Majesty. In either of these capacities, I could not say anything political. I had to swallow my tongue.

I was not allowed to preside over a treaty or aboriginal rights cases in provincial court of New Brunswick during my eighteen and a half years as a judge. Crown prosecutors who represented the attorney general always asked me to recuse myself. So, there's the decision in my heart and mind that has never been written. Why would the Department of Justice say that I could not be fair? Was it because of the hard legal fights I had as a lawyer back in the 1970s and 1980s? Were their thoughts "Uh oh, well, if we go up against him, we are not going to win"? Yet, the protocol for judges is that if you have been involved in a corporation or some other interests, then after a four-year period you can hear cases and

[31] See Truth and Reconciliation Commission of Canada, "Calls to Action," 2015, https://www2.gov.bc.ca/assets/gov/british-columbians-our-governments/indigenous-people/aboriginal-peoples-documents/calls_to_action_english2.pdf; United Nations, *United Nations Declaration on the Rights of Indigenous Peoples,* September 13, 2007. https://www.un.org/development/desa/indigenous-peoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf.

make decisions. What was interesting was that the lawyers that I fought against as Crown prosecutors or agents for the federal government, and who were appointed as judges, were allowed to hear the cases. There was no requirement that they had to wait four years. You can see that if the justice system itself is so afraid of what Indigenous knowledge is, that influences and affects the political structure of New Brunswick. What changes are possible and what are we going to do?

Prime Minister Harper recommended to the governor general that I be appointed lieutenant-governor of New Brunswick in September 2009. He called the *United Nations Declaration on the Rights of Indigenous Peoples* an aspirational document. In other words, it is of no force and effect. However, self-determination is not only in that United Nations declaration but in other UN instruments as well. Canada has signed those other instruments, but nobody is paying attention to those.

I guess what I am trying to do is to encourage you to look at that information. What are their meanings? My good friend Patrick Augustine and I spoke, and I asked him, “Patrick, in the Migmaw language, what is the word for dominion? What is the term for subjugation?” All these things are nice and well written in these documents and treaties, but who wrote them? It was in English. If our people understood them, why did they sign with unique symbols? How do we know the interpreter who was there did not side with the government? Because they would have had notions from their own countries—that was the intent of the British.

These are the challenges we face. I remember reading in the Treaty of Utrecht 1713, which was signed by the French and the British in which France gave to the British all of Nova Scotia or Acadia with all its ancient boundaries. It has always been a mystery to me of how France acquired these traditional lands from the Mi’kmaq, Wolastoqiyik, and Peskotomuhkati Nations. Why did they never ask the aboriginal people of the Maritimes, that one country in Europe could transfer what they had supposedly over here to another power? The same principle would apply when the Treaty of Paris was signed in 1763. These two historic European treaties ignored the Indigenous reality. This should not have happened. Indigenous history and Indigenous knowledge were and are present. There must be a challenge to what took place and the history that has been written with the involvement of Indigenous nations.

The content of *Implementation of Modern Treaties and Self-Government,* issued by the federal government in 2000, must be reviewed and changed because the federal government is controlling what the agenda is. It does not have any Indigenous input. The government is trying to negotiate from a position of power with those in poverty and it will remain that way. And if these documents are presented to the courts, who has educated the judiciary? I mean, I have sat with many justices in my career of over eighteen years. I do not want to make any startling statements, but I can tell you that 80 per cent of the judges I associated with did not know a darn thing about Indigenous rights because they were never taught and educated of these rights in law schools they attended. They were educated in universities, and nobody ever spoke to them about Indigenous rights. Those of you that teach at universities, and several of you are here, I would urge you to read the *Truth and Reconciliation Commission: Calls to Action* and the *United Nations Declaration on the Rights of Indigenous Peoples* when you teach your students.

The ninety-four calls to action asks the judicial system in Canada to reject the doctrine of discovery and the concept of *terra nullius*. The law schools and law societies are required to teach the students and the lawyers to be aware of these developments.

On Quebec

I just want to share with you one more modern thing. What is happening now in Quebec? The government of Quebec wants to introduce legislation dealing with Indigenous languages in the province, and we know there is only one official language in Quebec, which is French.

The students from Listuguj First Nation in Quebec attend school in Campbellton, New Brunswick. In Quebec, they are not allowed to teach their children English or Migmaw. But there's a struggle going on in Quebec right now when judicial leaders state that Quebec should not write any legislation until you in fact consult with Indigenous peoples. What did the premier say? He said, "We are the ones who make the law." It is the government of Quebec that does not want the transfer of responsibility for children from provincial institutions to Indigenous institutions because somehow it is affecting their sovereign right.

I am not sure how many of you have ever heard of a thing called Joyce's Principle. It was named after an Indigenous woman who got humiliated in a hospital in Quebec in 2020. She was ridiculed actually, and thank goodness she recorded the treatment she got from the medical establishment before she died. In Quebec, they want to introduce Joyce's Principle so that Indigenous people, if they go to the health centres in Quebec, will be treated with humanity and dignity. Quebec said, "No." Why? I cannot answer that. I'm not a citizen of Quebec, but I know what racism is because I have faced it in my career from 1991 to 2009 as a provincial court judge. When I shared that with Tom Isaac, one of my former students, at coffee break, he said, "I didn't know that." It is something that I do not often share in public. But it did happen. Why do we not have more Indigenous judges in this province, across Canada, right up to the Supreme Court of Canada? We now have one justice, Justice O'Bonsawin, which is great. We need more Indigenous justices in the Supreme Court of Canada.

A Modern Treaty in the Maritimes: Is It Time?

I will stop here and leave you with my comments, and let you answer this question, "A Modern Treaty in the Maritimes: Is It Time?" That is the name of my talk. Unless it is based on international law, unless it is based on the *United Nations Declaration on the Rights of Indigenous Peoples,* unless it fulfills the *Truth and Reconciliation Commission: Calls to Action*, it will not be done.

So, thank you very much, I really appreciate speaking with you. Thank you for listening.

To comment on this article, please write to editorjnbs@stu.ca. Veuillez transmettre vos commentaires sur cet article à editorjnbs@stu.ca.

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