"UNDER THE SAME LAWS AND FOR THE SAME RIGHTS AND LIBERTIES" — TERRITORY, LAW, AND RECONCILIATION UNDER THE 1760–1761 TREATIES

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Abstract

The "land acknowledgments" that have become fashionable in Maritime institutions in recent years reflect an ideology of historical grievance, suggesting that non-native presence on "unceded" native territory is unlawful. Are they defensible? This paper argues that a better understanding of our colonial past is required. The Peace and Friendship Treaties of 1760–1761 reflect laudable and inspiring achievements. Native people were to be equals, "under the same laws and for the same rights and liberties." Land ownership was reconciled; the "Territories of Nova Scotia or Accadia" were ceded to the Crown and the treaties contemplated both non-native settlement and protection of discrete native lands. Aboriginal title in the Maritimes is distinctive under treaties that govern native title "under the same laws" as non-native title.

Résumé

Les « reconnaissances de terres » qui sont devenues à la mode dans les institutions maritimes au cours des dernières années reflètent une idéologie de griefs historiques, suggérant que la présence non autochtone sur un territoire autochtone "non cédé" est illégale. Sont-elles défendables ? Cet article affirme qu'une meilleure compréhension de notre passé colonial est nécessaire. Les traités de paix et d'amitié de 1760–61 reflètent des réalisations louables et inspirantes. Les autochtones devaient être égaux, « sous les mêmes lois et pour les mêmes droits et libertés ». La propriété foncière est conciliée ; les « territoires de la Nouvelle-Écosse ou de l'Acadie » sont cédés à la Couronne et les traités envisagent à la fois la colonisation non autochtone et la protection de terres autochtones distinctes. Le titre autochtone dans les Maritimes est distinct en vertu des traités qui régissent le titre autochtone « selon les mêmes lois » que le titre non autochtone.

Introduction

In recent years, it has become commonplace for gatherings in the Maritime provinces to begin proceedings with a "land acknowledgement." The statements are not entirely consistent in their language or form, but they generally suggest that the particular event or activity is taking place on the "unceded territory" of aboriginal people. The land acknowledgement for Mount Allison University, in Sackville, New Brunswick, for example, is as follows:

> We would like to acknowledge that we are located within the territory of Mi'kma'ki, the unceded, ancestral territory of the Mi'kmaq. Our relationship and our privilege to live on this territory was agreed upon in the Peace and Friendship Treaties of 1752. Because of

> this treaty relationship it is to be acknowledged that we are all Treaty people and have a responsibility to protect this territory.[1]

This is a strange incantation. Land acknowledgements such as this arrived, without precedent, into the Canadian cultural landscape of the early twenty-first century. They bear the hallmarks of a Christian prayer, evangelically recited to an assembled mass and vaguely suggesting sin and atonement. Unfortunately, Mount Allison's land acknowledgement is woefully inaccurate. There is only evidence of one Treaty of 1752 and that treaty had nothing to do with the area that is now known as Sackville, New Brunswick. It was a short-lived treaty with the Shubenacadie Mi'kmaq Band which, in 1752, was located at Jeddore, near Musquodoboit Harbour in present-day Nova Scotia. The treaty was repudiated by the Band's chief shortly after it was executed; it was never renewed and is irrelevant to present-day native treaty rights.[2] More concerning, and divisive, Mount Allison's land acknowledgement suggests that non-native occupation of "unceded" territory is unlawful or illegitimate.

Land acknowledgements have arisen in the context of worrisome cultural division that is fragmenting North American society. They are not unrelated to an intolerant ideology, currently fashionable in Canadian institutions but rooted in the American experience, which emphasizes racial difference and historical grievance, and dangerously promotes race as a principle of social organization. It is now commonplace that the early history of this country should be dismissed and denigrated for an abhorrent "settler colonialism." "Settler" villains in this imitative ideology, equate to Marxist "bourgeoisie." Many modern ills are automatically attributed to the allegedly "colonialist" failures of prior generations. Modern prescriptions for those ills are commonly presented as intended to reverse or address "colonialist" legacies. It is the popular diagnosis for problems in this country's aboriginal communities.

There is, as well, a legal context for the land acknowledgements. In the forty years since the amendments to our Constitution in 1982, our courts have attempted to elaborate the aboriginal and treaty rights, including aboriginal title, which are "recognized and affirmed" in s. 35. In doing so, the courts have characterized their efforts as intended to promote "reconciliation" between aboriginal peoples and non-indigenous Canadians. In this effort, the courts have frequently resorted to the historic past to define aboriginal rights and chart future legal relations. Unfortunately, lawyers and judges are not very good historians. Courts and judicial procedures were never designed to examine the historic past, and they are not particularly good at it. The result, on the east coast, has been less than convincing.[3]

The decision of the Supreme Court of Canada in the *Marshall*[4] case is an unfortunate example. It resulted in violence between aboriginal and non-aboriginal communities (Burnt Church (1999), St.

[1] This land acknowledgement is found at the bottom of the main landing page of the Mount Allison University web site. See https://www.mta.ca.

[2] See *Queen v Drew* 2003 NLSCTD 105 at paras 728–730, 1031–1033; "The Mi'kmaq signatory, Major Jean Baptiste Cope, staged a violent demonstration of his repudiation of the treaty. I note the subsequent treaties of 1761–62 did not renew this treaty and I am satisfied it was repudiated by the subsequent hostilities" (para 1033). In *R v Marshall* [1999] 3 SCR 456, Binnie J. noted that evidence of the termination of the Treaty of 1752, due to subsequent hostilities, caused the accused to abandon reliance on that treaty (para 16).

[3] The criticisms in this article of decisions of the Supreme Court of Canada are advanced with complete respect for both that Court and its judges. In the post-1982 era of the *Charter* and s. 35, judicial decisions often reflect more than the outcome of a particular case; they reflect who we are and where we have come from as a nation, and they warrant careful scrutiny and evaluation.

[4] *R v Marshall* [1999] 3 SCR 456.

Mary's Bay (1999, 2020)), and two decades of confusion and division over native "treaty rights." The Court's decision in *Tsilhqot'in Nation v British Columbia*[5] respecting aboriginal title has led to extraordinary aboriginal title claims on the east coast.[6] Land acknowledgements tend to legitimize sweeping land claims. If the goal of s. 35 is "reconciliation," none of this is particularly conciliatory.

This article attempts to inform the legal discussion of aboriginal rights in this region. It criticizes "unceded territory" acknowledgements as ill-informed. It does not endorse the wholesale denigration of our "colonial" past. It suggests, rather, that in the Peace and Friendship Treaties of 1760–61 there are laudable, inspiring achievements and principles that can and should inform a reconciliation between aboriginal and non-aboriginal peoples in the present day. In particular, it suggests that 250 years ago those treaties expressed principles of reconciliation with respect to territory, land and law, that warrant not only recognition and affirmation, but celebration. Those historic achievements have been overlooked in the judicial development of the principles governing aboriginal title on the east coast.

Central to the discussion below is a unique document: the only document recording a 1760–61 Treaty ceremony. This article seeks to give that record the prominence it deserves. It is extremely unfortunate that the document has been ignored by the courts. It has also been omitted by the activist academics who write in this field and who need to be reminded that "there are methodological problems in disregarding historical records simply because they don't fit a preconceived idea of what 'should' have happened."[7]

"Under the Same Laws and for the Same Rights and Liberties…"

It is profoundly unfortunate that for nearly 250 years after they were signed, the 1760–61 Treaties of Peace and Friendship between native peoples in *Accadia*[8] and British officials representing the Crown were largely forgotten or ignored. Prior to the *Marshall* decision, for example, not one Nova Scotia case thoroughly discussed those treaties.[9] In New Brunswick, the track record was somewhat better, but none of the cases addressed the historical background to the treaties with the thoroughness of more recent cases.[10]

When the Supreme Court of Canada undertook to examine the appeal of Donald Marshall Jr., there was no "library" of lower court judicial decisions that reviewed the relevant historical documents and law, and that it could turn to for guidance. The provisions of the Treaties of 1760–61 had not been

[5] *Tsilhqot'in Nation v British Columbia* 2014 SCC 44.

[6] February 15, 2023, public statement of eight New Brunswick Mi'kmaq communities, represented by Mi'gmawe'l Tpulu'taqnn Inc claims aboriginal title to most of New Brunswick; *Sock & Francis on behalf of Elsipogtog First Nation v The Queen* MC-745-2016, claim for approximately 30% of New Brunswick; *Wolastoqey Nation et al v The Province of New Brunswick et al* FC-322-2021, claim to approximately 60% of New Brunswick.

[7] This quotation is from an entirely different context: tenth-century British history. The problem is not confined to discussions of Nova Scotia in the eighteenth century. Thomas Williams, *Viking Britain, a History* (London: William Collins, 2017), 285.

[8] *Accadia* and *Nova Scotia* are the words used in the treaties to refer to much of what we would describe today as the Maritime provinces.

[9] Indeed, the Treaties of 1760–61 were hardly mentioned. Some courts discussed other treaties, particularly the Treaty of 1752; in *R v Syliboy* [1929] DLR 307 the Court's comments are appalling.

[10] See, for example, *Queen v Drew*, a 376-page decision. After the mid-1970s, New Brunswick courts were hearing arguments respecting, particularly, the Maliseet (Wolastoqey) Treaty of 1725; see, for example, *R v Nicholas* 1978 22 NBR (2d) 285.

analyzed by lawyers or courts. Historians had hardly mentioned them.[11] That should have sounded the alarm bells. It should have suggested that Justice Binnie (and the judges who endorsed his decision) proceed cautiously. Unfortunately, the Court's decision is marked by activism rather than caution, and in consequence it contains many serious mistakes.[12]

One of the most unfortunate oversights in Justice Binnie's decision was his failure to make anything but passing reference to the record of the "Governor's Farm" Treaty Ceremony of June 25, 1761. Justice Binnie said that examining Nova Scotia's historic past was to look "through a glass, darkly."[13] It is true that the historical record is incomplete. Documents are missing. There are many gaps in our understanding. Yet that is all the more reason why Justice Binnie should have carefully examined this record. Donald Marshall Jr., after all, was a Cape Breton Mi'kmaq claiming treaty rights under the 1761 Cape Breton Peace and Friendship Treaty. The Governor's Farm record documents the 1761 Peace and Friendship Treaty ceremony of the Cape Breton Mi'kmaq. As such, the document was highly relevant to the issue before the Court. More than that, as Justice Binnie himself noted, the treaties were "essentially 'adhesions' by different Mi'kmaq communities to identical terms"[14] and the Governor's Farm Treaty record is the most comprehensive and detailed record of any of the 1760–61 treaty signing ceremonies. It is unique. It sheds a brilliant light on the intentions of those treaties, and what it says resonates across the intervening two and a half centuries. It is attached as an appendix to this article so readers can examine it for themselves.[15]

The document describes a treaty signing ceremony in Halifax, at the Governor's Farm, a site near the present-day provincial courthouse on Spring Garden Road. Four Mi'kmaq bands, three of which were from present-day New Brunswick, were represented at that treaty ceremony. "Mr President" Belcher spoke "on behalf of His Majesty." His background is vitally important. Jonathan Belcher was a lawyer who had been educated at Harvard College and had practised law in London. In 1754 he was appointed as both Nova Scotia's first chief justice and a member of the Executive Council. At the death of Governor Charles Lawrence in October 1760, Belcher administered the province for the next year. The Commissioned Governor, Henry Ellis, never came to Nova Scotia in that time so that, "the province was Belcher's to run." Belcher was officially appointed lieutenant governor in November 1761.[16] The Governor's Farm document refers to him as "President of His Majesty's Council and Commander in Chief of this Province." What he said at the treaty ceremony carries not only the weight of the leading representative of the Crown in Nova Scotia, but the legal insight of a trained lawyer and judge. One might reasonably suggest that the starting point for a modern legal academic or judge, in seeking a legal

[11] This is not to say that the Court in *Marshall* did not reference case-law discussing treaties. It did so. But it had no guidance whatever from lower courts respecting the treaty at issue in the case.

[12] A detailed critique of the majority analysis is found in Alex M. Cameron, *Power Without Law: The Supreme Court of Canada, the Marshall Decisions, and the Failure of Judicial Activism* (Montreal: McGill-Queen's University Press, 2009).

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

[14] *Ibid.*, paras 5, 26. The treaties typically involved native chiefs entering into terms with British military officers; what Scanlan J. described as "treaties of submission": *R v Stephen Marshall* 2002 NSSC 57, para 13. Subsequent written treaties were executed at Halifax. It is beyond the scope of this article to canvass that history.

[15] *Ceremonials at Concluding a Peace [with Miramichi, Shediac, Pokemouche and Cape Breton districts of the Micmac], Halifax, June 25, 1761.* Source CO 217/18. The original is handwritten. For ease of reference, the Appendix reproduces the transcription tendered in evidence in *R v Stephen Marshall* 2001 NSPC 2.

[16] J.M. Beck, *Politics of Nova Scotia 1710–1896* (Tantallon: Four East Publications,1985), 27. See generally, "Jonathan Belcher," *Dictionary of Canadian Biography,* vol. 4, http://www.biographi.ca/en/bio/belcher_jonathan_4E.html.

understanding of the Treaties of 1760–61, would be the description of those treaties provided by Nova Scotia's first chief justice.

One cannot read the record of the treaty ceremony without forming the impression that it was an event of considerable significance. The "officers and principal inhabitants of Halifax" were present, including "Major General Bastide, the Right Honourable the Lord Colvill and Colonel Forster Commanding Officer of His Majesty's forces," and a detachment of soldiers. Tents were erected at the Farm and a "Pillar" where the treaties were "subscribed and sealed." There was "dancing and singing" and "Drinking His Majesty's Health under Three Vollies of Small Arms." After Belcher spoke, "the Indians were carried to the place prepared for burying the hatchets," and the hatchets were ceremonially buried, and the treaties signed. Then the Chief of the Cape Breton Band, Jeannot Pequidoualouet, spoke, "in the name of all those of whom we are Chiefs."[17] A French priest, Abbe Maillard, attended the ceremony as translator. He had lived among the Mi'kmaq since 1735, was fluent in their language, and was "a person of great influence" among them.[18] What was said bears careful scrutiny, and for its significance to be appreciated today, what was said at the treaty ceremony needs to be considered in its historical context.

Beginning in 1755, thousands of peaceful Acadian families were uprooted from their communities, their homes burned, and their cattle shot. They were herded onto ships and forcibly transported. The year 1761 was also decades before William Wilberforce's campaign to end the British slave trade. It was a decade before Lord Mansfield would rule that slavery was not lawful in England.[19] It was a time when the brutality of slavery and the slave trade was on full display in the English colonies to the south.

In 1761 a bloody, ferocious conflict involving all the usual horrors of war had only just ended in Nova Scotia.[20] No doubt the relevant clause of the treaties was drafted in the blunt terms in which it was written, with that violent background in mind:

> That if any Quarrel of 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.[21]

The treaties were concluded in a violent, war-torn age when tolerance was in short supply, and racial, religious, cultural, and other differences were commonly the basis for pejorative treatment. Yet despite that, British and native leaders concluded peace treaties whose intent was far more inspiring than the practical language of the treaty clause would suggest. The intent, expressed by President Belcher in his

[17] The Cape Breton chief is not named in the document, but other sources indicate he was Chief Jeannot Pequidoualouet.

[18] *Drew v Nfld* 2006 NLCA 53, para 117; "Pierre Maillard," *Dictionary of Canadian Biography*, vol. 3, http://www.biographi.ca/en/bio/maillard_pierre_3E.html.

[19] *Somerset v Stewart* 1772 98 ER 499.

[20] The Seven Years' War, also known as the French and Indian War, would be finally concluded in 1763 with the Treaty of Paris.

[21] This is the fifth clause of the written Treaties of 1760–61. An example of one of those treaties can be seen in the Appendix to this article. The written treaties were all essentially identical; *R v Marshall,* paras 5, 26. Excerpts from the written treaty set out in this article are taken from the treaty in the appendix. An example of a treaty with another Mi'kmaq band, having the same terms, is found in *R v Marshall*, para 5. The 1760 Treaty with the "St. Johns and Passamaquoddy Tribes", contains slight differences of language.

speech, was that natives and non-natives alike would henceforward live "under the same laws and for the same rights and liberties…in the wide and fruitful Field of English liberty…in full possession of English protection and Liberty." They were to be equals. These words stand as a laudable and remarkable achievement in the history of this country. Race was to be neither a preference nor a disadvantage. The laws would be the same for all. This idea was far ahead of its time. It constitutes an act of "reconciliation" that is instructive and inspiring to this day. The words should appear on the front page of any legal or historical text discussing aboriginal or equality rights in this country. They should be celebrated.

The language used by Belcher has implications for the *Marshall* decision. The language is difficult to square with Justice Binnie's reasoning. It is hard to see how there could be what Justice Binnie described as "special treaty protection"[22] for the right to "hunt, fish and gather" and trade for necessaries.[23] Such a treaty right was never expressed in the written language of the treaty, and no such thing is mentioned in the Governor's Farm speeches. Justice Binnie's reasoning was that the treaty term must be implied. But "special" treaty rights or protections involve rights unique to native people. That is clearly not what was intended. Belcher said explicitly that native rights would be *the same* as those of everyone else: "for the same rights and liberties." Justice Binnie did not mention, let alone grapple with this language in his decision. It is highly problematic for his analysis. The term he implied is inconsistent with what was explicitly stated by the first chief justice of Nova Scotia to be the intention of the treaties.

How unfortunate that the document, and its inspiring words, were ignored by the Supreme Court of Canada on the occasions the document was in evidence before that court. The judges missed an opportunity to inform themselves, inform their decisions, and inform—perhaps even inspire—the general public. It is even more unfortunate that this document, and these words, were forgotten for so long. In the not-too-distant past, native people in Canada were placed under a variety of unique legal disabilities simply because they were native.[24] Surely, even before the 1982 constitutionalization of equality rights, native people on the east coast could have legitimately objected that such constraints violated their treaties. They were to be "under the same laws," not subjected to different legal treatment. They were to have the *same* rights and liberties, not lesser. Admittedly, the treaties did not, before 1982, have the constitutional force they now enjoy under s. 35, and could be "overriden by competent legislation."[25] Still, they may have carried enough persuasive weight to inhibit the authors of discriminatory rules.

Territory and Land Under the Peace and Friendship Treaties, 1760–61

But what about land and territory? Are non-natives really situated on land that properly belongs to native people, as "land acknowledgements" suggest? Are they lawfully here? These questions are answered in the Peace and Friendship Treaties of 1760–1761, and the answers are clear and unambiguous. Simply put, the treaties were treaties of cession which authorized the settlement of *Accadia*. Non-native land ownership is lawful. Non-native landowners are not trespassers on native territory. The "land acknowledgements" are uninformed and misleading.

[22] *R v Marshall,* para 47, per Binnie J.

[23] *Ibid.,* para 4.

[24] Examples abound. See *The Queen v Drybones* [1970] SCR 282 (public conduct); Canada Elections Act RSC 1952, c.23 s. 14 (voting).

[25] *R v Marshall*, para 48.

All of this is evident from the very first two treaty clauses. In the first, the subscribing Chief, for his Band, "do[es] 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."

The second clause reads as follows: "And I do promise for myself and my tribe that I nor they shall not molest any of his Majesty's subjects or their dependants, 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 or elsewhere."

These two clauses of the treaty do a lot. They address native submission to the British Crown, they explicitly concede the Crown's "Dominion" over the territory of Accadia, and they expressly contemplate settlement.

Submission to the British Crown is unequivocal, "perfect, ample and solemn." This is reflected in the speech of Cape Breton Chief Pequidoualouet:

> As long as the sun and Moon shall endure…will I be your friend and Ally, submitting myself to the Laws of your Government, faithful and obedient to the Crown….Let him be happy and blessed during his whole reign over his Subjects. May he never have occasion to scruple calling us his Children, and may we always deserve at his hands the treatment of a Father.

President Belcher repeatedly refers to native people as "Fellow subjects." Native people, under the treaties, became British subjects. It has been suggested that the intent of the treaties was that native signatories and their successors would be dealt with in future, "nation to nation." Indeed, the Call for Participation inviting submissions to this journal asserts that the treaties established "an ongoing relationship between nations." It is difficult to read the speeches of the Cape Breton chief and Belcher and reasonably suggest any such thing. They are, rather, confirmation that the treaties intended native peoples to be British subjects, no different than any other British subjects.

Respecting settlement, the treaty language is clear and blunt. It expressly contemplates future settlement of the province by non-natives. It does not, on its face, constrain that settlement in any way. It is useful to consider this clause in its historical context. By 1760–61 there had already been substantial European settlement in Nova Scotia. Acadian farmers, before the expulsion, numbered some fiftenn thousand. Louisbourg was a town of 5,000–6,000 before its fall. Halifax had grown to a similar size after its foundation in 1749 and had been preceded by British settlements in Annapolis Royal and Canso. In the early 1750s, "Foreign Protestants" settled at Lunenburg. Some 7,000–8,000 New England "Planters" flooded into Nova Scotia after the Expulsion. Nova Scotia natives were familiar with Quebec City and Boston.

None of this is controversial and it is relevant context. By 1760–61, native peoples in Nova Scotia were well acquainted with what European settlement entailed. The treaties are clear that more such settlements would be "hereafter made." Nova Scotia, in this period, was, "a priority area for immediate and extensive settlement."[26] As Binnie J. remarked in *Marshall*, the treaties were designed to

[26] *R v Stephen Marshall* 2003 NSCA 105, at para 229, per Cromwell J.A. (as he then was).

facilitate "a wave of European Settlement."[27] Waves of refugees were to arrive very soon, with tens of thousands of Loyalists fleeing the American Revolution, and tens of thousands of highland Scots fleeing the callous inhumanity of the highland clearances.[28]

The treaty makes specific reference to "the Territories of Nova Scotia or Accadia." The Crown was to have "jurisdiction and dominion" over those territories. In his speech at the 1761 signing ceremony, Cape Breton Chief Pequidoualouet acknowledged British "Dominion" stating, "You are now Master here; such has been the will of God. He has given you the Dominion of those vast Countries."

Dominion is not a word that is used much anymore. It has fallen by the wayside. But there is little doubt about what it meant. It encompasses jurisdiction, sovereignty, lordship and ownership: "Ownership or right to property or perfect or complete property or ownership"; "Sovereignty or Lordship."[29] The word *Dominion*, however, did not contemplate ownership in the sense that the treaties effected an expropriation, vesting title to native lands in the Crown. Such an argument has no merit. It is important that the treaties refer to Dominion over "the *Territories* of Nova Scotia or Accadia." The reference is to "Territories" and not "land." That is significant. The law recognizes that there is a fundamental difference between the two. "Territory is the subject matter of the right of sovereignty." Property, on the other hand, is "the subject matter of the right of ownership."[30] Professor McNeil put it this way:

> It is essential to note the fundamental distinction between territorial sovereignty and title to land. The former is mainly a matter of jurisdiction, involving questions of international and constitutional law, whereas the latter is a matter of proprietary rights, which depend for the most part on the municipal law of property. Acquisition of one by the Crown would not necessarily involve acquisition of the other (p. 108)….Whether acquisition of sovereignty over a territory gave the Crown title to particular lands, or a lordship over them, would depend to a large extent on whether the lands were owned or occupied at the time.[31]

A construction suggesting that by using the word "Dominion" the treaties should be characterized as expropriating native lands is overreaching. Indeed, in *Simon v The Queen* Chief Justice Dickson said that "none of the Maritime Treaties of the eighteenth century cedes land."[32] While the comment is *obiter dicta,* the issue not having been before him, the point is largely accurate. The treaties confirmed British sovereignty over the territory of "Nova Scotia or Accadia." But it does not follow that the treaties gave to the British Crown rights of ownership of native lands that displaced native ownership of native lands.[33] While native land or property, as opposed to territory, is not mentioned in the treaty

[27] *R v Marshall,* para 21.

[28] A useful discussion of migration in the Maritime provinces in this period is found in Phillip A. Buckner and John G. Reid, *The Atlantic Region to Confederation: A History* (Toronto: University of Toronto Press, 1998), 125–183.

[29] Henry Campbell Black, *Black's Law Dictionary* (St. Paul, MN: West Publishing Co, 1951), 573.

[30] *Mabo v Queensland* (No. 2) (1992) 175 C.L.R. 1, 44 (High Court of Australia); John William Salmond, *Jurisprudence,* 7th ed. (London: Sweet & Maxwell,1924), 554.

[31] Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989), 133.

[32] *Simon v The Queen* [1985] 2 S.C.R. 387, para 50; see also *R v Marshall,* para 21, per Binnie J.

[33] Sovereignty vested the Crown with the "underlying title" to the land. See *Delgamuukw v British Columbia* [1997] 3 S.C.R. 1010, para 145. But that underlying title, alone, would not dispossess native inhabitants of their ownership of land. Native title became a burden on the Crown's underlying title in much the same way that non-native title burdens the Crown's underlying title; under the English common law theory of land tenures, land is held "of the King." A compelling refutation of

document, Belcher's speech at the 1761 Treaty signing ceremony seemed to allude to native lands. As Belcher stated, "The laws will be like a great Hedge about your Rights *and properties*, if any break this Hedge to hurt and injure you, the heavy weight of the Laws will fall upon them and punish their Disobedience" (emphasis added).

Surely these words mean what they say. Native properties would be protected by "the laws." That must have included the real property of native people. It would be a narrow, ungenerous, and dishonorable interpretation of the treaties to suggest that Belcher's assurance only extended to the personal possessions of native people.[34] Nothing in the passage suggests that his comments should be given such a restricted meaning.[35]

In all of this language,[36] an arrangement of reconciliation in the 1760–61 Treaties of Peace and Friendship becomes evident. Under the treaties, native people acknowledged and submitted to British sovereignty over the territory of Nova Scotia. Sovereignty over that territory was unequivocally vested in the Crown, and native people became subjects of the Crown. The treaties expressly provided for settlement of Nova Scotia. Sovereignty entitled the Crown to grant lands in furtherance of such settlement[37] and the treaties expressly provided that there would be no interference with such settlements.

At the same time, native people were not stripped of their lands within the territory of Accadia. While the treaty made no express reference to native lands, Belcher's comments assume that native properties were protected. Native peoples were, after all, to be British subjects, "under the same laws."

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the suggestion that British sovereignty alone extinguished aboriginal title is found in *Mabo v Queensland (No 2)*, para 28 and following. See also *R v Van der Peet* [1996] 2 SCR 507, para 264.

[34] *R v Marshall* confirms that native treaties must be liberally construed, per McLachlin J., para 78.

[35] An important caveat to this point warrants mention. The second clause of the treaties, quoted above, respecting settlement includes the native promise "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." The language of native treaties must be understood in the sense they would have had at the time; *R v Marshall,* para 78, per McLachlin J. Today, the word "molest" connotes sexual assault. In the seventeenth and eighteenth centuries, the word had a much broader meaning. It meant the troubling of a person in their possession of land; see, for example, *R v Stephen Marshall,* para 140, per Scanlan J. There are many examples. Accordingly, the second clause of the treaties appears to contemplate that native people would not interfere with the rights of non-natives in settled lands. The provision would seem to apply even where non-native settlement encroached on native lands, such as where encroachment resulted from an imperfect ascertainment of the "usual haunts" of native peoples. The attempted ascertainment and protection of native lands in the period after the treaties is a point that will be discussed below. In the St. John's and Passamaquoddy Treaty of 1760, the clause provides that settlers shall not be molested "in their settlements already or lawfully to be made." That language had its genesis in, and was carried forward from, an earlier treaty. In 1722 expanding British settlements on the Kennebec River in present-day Maine resulted in war with the Abenaki, and the Maliseet were drawn into the conflict that lasted until 1725; see William Wicken, *Mi'kmaq Treaties on Trial* (Toronto: University of Toronto Press, 2002), 71–87. A 1725 Treaty concluding the war includes a native promise not to molest settlers "in their settlements already made or lawfully to be made," and in using the word "lawfully," appears to have been intended to address the problem that gave rise to the conflict in Maine: irregular non-native settlements. See generally, Stephen E. Patterson, "Anatomy of a Treaty; Nova Scotia's First Native Treaty in Historical Context," *University of New Brunswick Law Journal* 48 (1999): 41–48.

[36] It is sometimes suggested that native peoples would not have understood the concepts described in the treaties. In *R v Marshall,* the trial judge rejected the suggestion stating, "The general intent of the 1760–61 Treaties would not have been the subject of any misunderstanding by the Mi'kmaq because of language or translation problems" (para 96).

[37] As sovereign owner of the public domain, the Crown could grant lands, and non-native title derived from those Crown grants; *Delgamuukw v British Columbia,* para 129, per Lamer C.J.

That would include laws governing real property. The *extent* of those properties was something that British authorities came to grapple with subsequent to the treaties.[38]

This analysis, it should be emphasized, is entirely consistent with the usual approach of British law. For example, when France ceded Nova Scotia to Britain under the Treaty of Utrecht in 1713, thousands of Acadian farmers then living in Nova Scotia did not forfeit their properties as a result of the change in sovereignty. It required legislation, in 1758, to vacate Acadian titles and enable settlement of those lands by New England planters.[39]

In the years following the treaties, as successive waves of migrants arrived to settle, British officials attempted to identify native lands, and set those lands aside for native people. It is well beyond the scope of this article to describe those efforts in detail, or to assess whether they were carried out consistently, but the following summary gives a flavour of that history in present-day Nova Scotia:

> From the latter part of the 18th century, and after, Colonial authorities in Nova Scotia were careful to ensure that lands claimed by natives were protected to them….The protection of these lands was one element of a two-part policy, to settle Nova Scotia by granting lands to settlers, and to "protect native peoples in their claims to specific lands."
>
> The lands that were reserved to the Mi'kmaq were "their usual haunts…such situations as they have been in the habit of frequenting, their "old resorts." "Various tracts of lands, principally in those parts of the Province where Indians chiefly resorted, were set aside for their benefit."…These lands were "very valuable." A Report of 1859 states that "In the Island of Cape Breton alone, twelve thousand acres of the most valuable land have been set apart."…
>
> A native claim to lands typically meant that the land would not be the subject of a grant to white settlers. Where grants were made, it was the understanding of policy-makers that those lands were not occupied or used by natives. Several examples are illustrative. In 1763 the Board of Trade recommended to the King that lands be granted to John de Stumpel "taking care that it shall not be upon any lands occupied by the Indians or used as their hunting grounds."…The policy of the 1764 "Plan of Future Management of Indian Affairs" included defining "the limits of the lands which it may be proper to properly reserve" to the Indians….Nova Scotia's Surveyor General made the point explicitly in 1815: "Orders have been given to all my Deputies in the different countries *not (on any account) to presume to admeasure and lay out any lands that might in any degree interfere with their claims or settlement."…*

[38] In Canada, native claims to aboriginal title often rely on the provisions of the *Royal Proclamation of 1763* which has been described as the "Magna Carta of Indian rights in North America"; *R v Secretary of State for Foreign and Commonwealth Affairs* [1982] 1 QB 892. The *Royal Proclamation* refers, for example, to "lands…which, not having been ceded to or purchased by us…are reserved to said Indians." In *R v Stephen Marshall,* both the Nova Scotia Court of Appeal and the Supreme Court of Canada rejected arguments that the *Royal Proclamation* reserved Nova Scotia to its native inhabitants. As they stated, "The text, the jurisprudence and historic policy all support the conclusion that the *Royal Proclamation* did not reserve the former colony of Nova Scotia to the Mi'kmaq"; *R v Marshall; R v Bernard* [2005] SCR 220, para 96, per McLachlin C.J.

[39] *An Act for the Quieting of Possessions to the Protestant Grantees of the Lands formerly occupied by the French Inhabitants, and for preventing vextious Actions relating to the same,* (1759) 33 George II c. 3.

> These lands…involved no mean measure; many thousands of acres….An 1854 Report on Reserves lists 24,241 acres set aside for 1056 natives. Another Report for 1867 lists 20,703 acres among 637 families. In addition, "in almost every County," natives had title to lands apart from those reserved for their use.
>
> The Indians' "usual haunts" which were set aside for them were typically coastal lands or on major inland waterways. This is roughly consistent with the abundant evidence, and findings, respecting places where the Mi'kmaq historically lived….The documents of the period commonly complain that the Mi'kmaq often vacated the lands set aside for them. "It is contrary to their natural disposition and long indulged itinerancy to expect that they will attach themselves to any one spot….One sees through all of these years this continuing concern that there are still natives who don't stay in one place. There's a lot of mobility and that continued to frustrate people who didn't understand it."[40]

The last paragraph in this passage points to the vexing problem that faced colonial administrators in the eighteenth and nineteenth centuries, and that confronts Canadian courts today; that problem, at bottom, is a clash of cultures. British, French, and other colonists from the "old world" arrived in North America from a European agrarian, industrializing society whose approach to land use was intensive and essentially sedentary. Many North American native peoples such as the Mi'kmaq were semi-nomadic hunter-gatherers whose approach to land use was largely itinerant. How does a legal system designed for the former encompass rights to land ownership of the latter? Pragmatic British colonial officials in present-day Nova Scotia attempted to ascertain and recognize as native-owned lands those that were places of "chief resort" or "usual haunts."

In sum, the Treaties of Peace and Friendship achieved, 250 years ago, a reconciliation with respect to land that accommodated both natives and non-natives. The treaties confirmed the Crown's sovereignty over the territory of Nova Scotia and confirmed the future settlement of the province. Sovereignty empowered the Crown to grant lands to enable settlement. At the same time, while native peoples forfeited sovereignty over their territory to the Crown, native lands were to be protected for them. In principle, the approach seems reasonable. In fact, it is entirely consistent with the general approach of British law. It was a fundamental common law principle that a change in sovereignty, by itself, did not affect the property rights of the native inhabitants. Provided that they could be ascertained, those rights continued.[41] The approach is also consistent with the Crown's obligation to deal honorably with native peoples. It does not reflect "sharp dealing." It reflects a reasonable effort to end a conflict, embrace native people as British subjects under British law, and foster British settlement of its newly acquired colony while attempting to protect what were understood to be native lands, to native people.

[40] Factum of the Attorney General of Nova Scotia, dated September 15, 2004 (p. 14) in the Supreme Court of Canada in *R v Marshall; R v Bernard* citations omitted; emphasis in the original. In New Brunswick, the pattern was similar. For example, in 1783, twenty thousand acres were set aside on the Miramichi, and by 1802, sixty-four square miles were set aside for native people at Buctouche, eighty square miles at Richibucto, and fifteen square miles at Tabusintac. The particular history of these lands and how they were identified, established, and, as the nineteenth century progressed, sometimes alienated or diminished, is complex and beyond the scope of this article.

[41] A useful discussion of property rights consequent upon changes in sovereignty is found in Brian Donovan, "Common Law Origins of Aboriginal Title to Land," *Manitoba Law Journal,* 29, no. 3 (2003): 298; and see *Mitchell v M.N.R* [2001] 1 S.C.R. 911: "A mere change in sovereignty is not to be presumed as meant to disturb rights of private owners" at para 144, citing *Amodu Tijani v Southern Nigeria (Secretary)* 1921 2 AC 399 at p. 407.

The reality is that under the Treaties of Peace and Friendship of 1760–61, native people in Nova Scotia did, in fact, *cede* territory. They conceded British sovereignty over the territory of Nova Scotia or "Accadia." Yet at the same time, native *lands* within that territory were not forfeited. The intention was that their properties would be protected under British law, like the properties of any other subjects. President Belcher said as much. His promise was followed by the efforts of colonial authorities in the post-treaty period to set aside for native people those lands that were their "chief resorts," their "usual haunts." In principle, all of that seems just, reasonable, and "conciliatory." The "land acknowledgment" acknowledges none of this.[42]

The Indigenous Perspective

S. 35 of the *Constitution Act, 1982, Part II,* is the "constitutional framework" for reconciling aboriginal presence pre-sovereignty with Canadian sovereignty.[43] It follows that achieving reconciliation involves understanding aboriginal rights "by reference to both aboriginal and common law perspectives."[44] It would hardly be conciliatory to assess aboriginal rights without regard to one or the other perspective. In *R v Marshall,* for example, Justice Binnie faulted the trial judge for "failing to give adequate weight to the concerns and perspectives of the Mi'kmaq people."[45] In this context, it is important to clarify what is meant by aboriginal perspectives.

The quest mandated by the Supreme Court of Canada in considering aboriginal rights, is historical. Aboriginal title is assessed at the "date of sovereignty," which, in the Maritime provinces, is in the eighteenth century.[46] Aboriginal rights are assessed as at the date of contact, which in the Maritime provinces is sometime in the early 1500s.[47] Treaty rights in the Maritime provinces involve examining treaties that date to the 1760s.[48] Assessing all of these for relevant aboriginal perspectives encounters the obvious problem that native peoples on the east coast did not make written records; they did not "hold the pen."[49] Oral histories of aboriginal societies are often their "only record of their past."[50] Still, the assessment can involve a variety of inquiries, including aboriginal oral tradition, records of aboriginal oral traditions, understandings or insights, and modern-day comment by aboriginal authors.

It is beyond argument, in respect of an understanding of the Treaties of 1760–61, that a high value should be placed on an aboriginal perspective that is contemporaneous with or close in time to the treaties. In *Marshall,* as noted, Justice Binnie admonished the trial judge for failing to give adequate weight to the aboriginal perspective. Strange, then, that his decision ignores it as well. The speech of

[42] Whether land acknowledgments, properly crafted, can usefully promote reconciliation, and if so, how they should be phrased, is beyond the scope of this article.

[43] *Newfoundland and Labrador (Attorney General) v Uashaunnuat* 2020 SCC 4, para 21.

[44] *Delgamuukw v British Columbia*, para 112.

[45] *R v Marshall,* para 19.

[46] In present-day mainland Nova Scotia, 1713; *R v Marshall* 2001 NSPC 2, para 126. In present-day New Brunswick, 1759; *R v Bernard* 2003 NBCA 55, para 61.

[47] *R v Van der Peet,* para 44.

[48] A few local treaties were concluded later, during the era of the American Revolution.

[49] *R v Marshall,* para 19, per Binnie J.

[50] *Delgamuukw v British Columbia*, para 84.

Chief Pequidoualouet is a contemporaneous written record of the native perspective of the treaty.[51] It is unique in explicitly recording the native perspective of a 1760–61 treaty. Justice Binnie does not mention it. If he had, he would likely have discerned one of the major mistakes in his decision.

Chief Pequidoualouet stated explicitly that his intention was "to yield ourselves up to you without requiring any Terms on our part." Justice Binnie's reasoning largely hinged on a document dated February 11, 1760, describing discussions between the Maliseet and Passamaquoddy chiefs and the British governor, prior to their executing a treaty.[52] Justice Binnie described this document as reflecting a native "demand." The document reads as follows:

> His excellency then demanded of them, Whether they were directed by their Tribes, to propose any other particulars to be Treated upon at this time. To which they replied that their Tribes had not directed them to propose any thing further than that there might be a Truckhouse established for the furnishing them with necessaries, in Exchange for their Peltry.[53]

Justice Binnie described this as a "positive Mi'kmaq trade demand"[54] and he built the treaty right to hunt, fish, and gather to trade for necessaries around this supposed demand. He said it was not, "consistent to conclude that the Lieutenant Governor, seeking in good faith to address the *trade demands of the Mi'kmaq*, accepted *the Mi'kmaq suggestion of a trading facility* while denying any treaty protection to Mi'kmaq access to things to be traded" (emphasis added).[55]

But Justice Binnie's description of a Mi'kmaq "trade demand" does not square with Chief Pequidoualouet's statement that the intention was "to yield ourselves up to you without requiring any terms." Had Justice Binnie considered this aboriginal perspective, he might have treaded more carefully in examining the relevant documents. He missed the document, in evidence before him, showing that the February 11, 1760, record which he relied upon so heavily does not reveal a native demand at all. Quite the contrary, it reflects a British proposal. In November 1759, well before the discussions on February 11, the authorities in Halifax were advised that Maliseet chiefs had arrived at Fort Frederick, at the mouth of the Saint John river, to "take the oath of Allegiance." The authorities ordered a British officer at Fort Frederick, Colonel Arbuthnot, to direct the Maliseet and Passamaquoddy Chiefs to come to Halifax, as follows: "The [Executive Council]…advised that Colonel Arbuthnot should be directed to give them encouragement to come to Halifax, where they may be sure of having a favourable reception, *and an opportunity of extending their trade, by the establishment of Truckhouses amongst them"* (emphasis added).[56] It is clear from this document that truckhouses were not a native demand or

[51] One historian has suggested that Chief Pequidoualouet's speech should not be taken at face value, as an accurate reflection of the aboriginal perspective, because Father Maillard must have been "duplicitous" in his translation; see *The Queen v Drew,* para 767. The point is mere speculation, unsupported by evidence.

[52] Justice Binnie does not convincingly explain how these discussions with the Wolastoqey (Maliseet) Bands of the Saint John River in present-day New Brunswick could have impacted a treaty made eighteen months later with the Cape Breton Mi'kmaq band, some hundreds of miles away; see Cameron, *Power Without Law,* 105–111.

[53] *R v Marshall,* para 29.

[54] *Ibid.,* para 52; and see para 19, "The Mi'kmaq raised the subject of trade concessions."

[55] *Ibid.*, para 52.

[56] *R v Marshall* [1996] NSJ no 246, Exhibits, Document D-104.

suggestion. They were a British proposal. The aboriginal perspective of the treaty reveals a fundamental mistake in the majority reasoning in the *Marshall* case.

There is a note of caution to be sounded with respect to oral histories, illustrated by the evidence in *R v Stephen Marshall.* That case involved an aboriginal land claim to Nova Scotia. In support of the claim, the defendants led evidence from a Mi'kmaq elder. His evidence related to a Mi'kmaq wampum belt, dating to the early 1600s and said to be lost, whose symbols, according to oral tradition, described a Mi'kmaq view of Nova Scotia relevant to the land claim. Investigations by the Crown revealed that the Wampum belt in fact originated in Quebec, dated to the early 1800s, and, as the trial judge concluded, "had nothing to do with Nova Scotia or the Mi'kmaq."[57] The evidence was not manufactured. The elder had testified in good faith and believed what he said. The trial judge noted that inaccuracy in aboriginal memory can result from a "feedback effect," according to which ideas generated outside a given culture are adopted by the culture.[58] In neither *R v Stephen Marshall* nor *R v Bernard*—which involved aboriginal land and treaty claims in Nova Scotia and New Brunswick, respectively—was evidence of native oral tradition sufficiently relevant or persuasive to merit more than passing judicial reference. Indeed, a respected Mi'kmaq elder testified in *R v Stephen Marshall* that there is no oral history of the 1760–61 Treaties.[59]

Finally, the aboriginal perspective of modern-day authors, aboriginal and non-aboriginal, warrants mention. These perspectives are different in kind from those described above. To the extent that they are simply discussions of legal arguments and historic documents, they do not necessarily have the same insight as aboriginal oral history, and they should be assessed on their merits. An exhaustive review of the vast outpouring of literature discussing the Treaties of 1760–61 is not possible here. That said, academic writings reflect an unfortunate tendency to omit or abridge reference to the Governor's Farm document and the relevant language of the treaties, and to ignore adverse judicial findings.[60]

Indigenous Title and Territory on the East Coast

The foregoing discussion reveals a reconciliation in the Treaties of Peace and Friendship and their aftermath that modern land acknowledgments ignore. As such, it is legitimate to ask why it is that now, 260 years after native people in "Accadia" ceded their territory under the Peace and Friendship Treaties, native claims to vast territories are afoot in New Brunswick. The answer seems to lie in a

[57] *R v Marshall* 2001 NSPC 2, para 60.

[58] *Ibid.*, para 62.

[59] Transcript of evidence, December 9, 1999, p. 4691.

[60] William Wicken, an historian frequently called by Mi'kmaq litigants to testify respecting the treaties devotes an entire chapter in *Mi'kmaq Treaties on Trial* (Toronto: University of Toronto Press, 2002) to the 1760–61 Treaties, without any mention of or reference to the Governor's Farm document. John Reid, another historian frequently called by Mi'kmaq litigants to testify, states that neither the Mi'kmaq or Wulstukwiuk "made a formal surrender of territory" (p. 87–88), without any reference to the language of the treaties (Reid, "Empire, the Maritime Colonies and the Supplanting of Mi'kma'ki/Wulstukwik, 1789–1820," *Acadiensis* 38, no. 2 [Summer/Autumn 2009]: 78–97). James [sakeji] Youngblood Henderson makes only limited reference (pp. 257–58) to the Governor's Farm document (James [sakeji] Youngblood Henderson, "Mikmaw Tenure in Atlantic Canada," *Dalhousie Law Journal* 18, no. 2 [1995]: 196–294). Robert Hamilton, in "After Tsilhqot'in Nation: The Aboriginal Title Question in Canada's Maritime Provinces" (*UNB Law Journal* 67 [2016]: 58–108), discusses aboriginal title claims without reference to the Governor's Farm document, and advances an interpretation of the 1760–61 Mi'kmaq Treaties' involving adoption of earlier treaties that has been rejected by the courts: *R v Marshall,* per Embree J., para 105; *R v Bernard,* 2000 NBJ No 138, para 75; *The Queen v Drew,* para 1027.

combination of judicial inattention to the legal concept of "territory," inattention to the unique treaty history on the east coast, and unfortunate reasoning that purports to apply aboriginal law developed in the entirely different historical context of British Columbia.

Calder

While courts in this country had, historically, recognized aboriginal title, it was not clear whether, after over a century of provincial development on mainland British Columbia, aboriginal title continued to exist. In the 1973 case of *R v Calder*,[61] the Supreme Court of Canada addressed that issue. The case involved a claim to aboriginal title to a thousand square miles around the Nass River Valley in British Columbia. In reasons written by Justice Judson, three of the judges held that governments had "exercised complete dominion over the lands in question, adverse to any right of occupancy" of native peoples.[62] In his view, aboriginal title had been extinguished. Three others, led by Justice Hall, held that Indian title was a legal right that existed until specifically extinguished, and no legislation in British Columbia had ever specifically extinguished native title.[63] The Court was split, and Pidgeon J., writing separately, did not address the point that divided the others. He voted with Justice Judson on a procedural point. But while Justice Hall's reasons were not in the majority, his reasoning has endured, and his reasons are preferable. The common law has always guarded property ownership against encroachments by the state. Specific legislative authority—like Nova Scotia's early statute preventing Acadian victims of the Expulsion from reclaiming their lands—is required to dispossess citizens of their lands. There is no reason why that principle should not have application to lands held by native people. But the case left unanswered questions. In particular, there was no discussion of the merit of the claim to a thousand square miles.

Delgamuukw

The next significant decision to consider aboriginal title in depth was another case from mainland British Columbia, in 1997. In *Delgamuukw v British Columbia,*[64] the Gitksan and Wet'suwet'en peoples claimed aboriginal title over 58,000 square kilometres.

In *Delgamuukw,* the Supreme Court of Canada dealt for the first time with how to define the "extent" of aboriginal title lands (although strictly speaking, the court's discussion was *obiter* as the matter was sent back to trial on points of evidence). The courts below had diverged dramatically on the question. The trial judge held that aboriginal title extended only to village sites and the immediately surrounding areas.[65] Some of the judges in the British Columbia Court of Appeal agreed with him.[66] In dissent, Lambert J.A. said that the plaintiff bands had aboriginal title throughout the territory they claimed.

At the Supreme Court of Canada, Chief Justice Lamer, writing for two other judges, described aboriginal title as arising from the historic occupation and possession of native lands "before the

[61] *Calder v Attorney General of British Columbia* [1973] SCR 313.

[62] *Ibid.*, 344, per Judson J.

[63] *Ibid.,* 402, 404, per Hall J.

[64] *Delgamuukw v British Columbia.*

[65] *Delgamuukw v British Columbia* (1991) 79 DLR (4th) 185.

[66] *Delgamuukw v British Columbia* (1993) 104 DLR (4th) 470, per MacFarlane J.A, Taggart J.A., Wallace J.A.

assertion of British sovereignty."[67] In examining the extent of aboriginal title, Lamer C.J. drew heavily from Professor Kent McNeil's *Common Law Aboriginal Title.* He agreed with McNeil that "at common law, the fact of physical occupancy is proof of possession at law, which in turn will ground title to the land."[68] Then, in an extremely important passage, he said, "Physical occupation may be established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources: see McNeil *Common Law Aboriginal Title*, at pp 201–202."[69]

To understand the thrust of Chief Justice Lamer's reasoning, it is important to understand what Professor McNeil said at pages 201–202, and compare it to what Chief Justice Lamer did *not* say:

> Indigenous groups…would have been in occupation of land on which they had built more or permanent dwellings and other structures, and of any enclosed or cultivated fields. Definite tracts over which they herded domestic animals, and lands to which they resorted on a regular basis to hunt, fish, or collect the natural products of the earth, should be included as well, particularly if other individuals or groups were generally excluded therefrom. *Probably even outlying areas that were visited occasionally, and regarded as being under their exclusive control, would also be occupied by them in much the same way as the waste of a manor would be occupied by the lord, though he might seldom go there.* (emphasis added)[70]

Clearly Chief Justice Lamer agreed with Professor McNeil's analysis that lands on which dwellings were constructed, cultivated and enclosed fields, and "definite tracts" of regularly used lands could qualify as lands held under aboriginal title. But Chief Justice Lamer *did not* cite or approve of McNeil's comment (noted in italics above) that "outlying areas that were visited occasionally" would also constitute title lands. So Chief Justice Lamer's analysis in *Delgamuukw* contemplated a reasonably limited extent of aboriginal title. That analysis does not encourage expansive aboriginal title claims to substantial territories, including outlying areas that were visited only occasionally. It is of some note that *regular use of definite tracts* is, for all practical purposes, very similar to *places of chief resort* or *usual haunts. Chief resort* contemplates regularity, and *haunts* or *places of…resort* contemplate particular tracts. Two centuries ago, "colonial" administrators in Nova Scotia devised a test for aboriginal title hardly different than that developed in modern times by our finest judges.

The Court in *Delgamuukw* did not unanimously endorse Chief Justice Lamer's approach. Justice LaForest, writing for himself and L'Heureux-Dube J., used much broader language to describe aboriginal title lands, including using the language of "territory":

[67] *Delgamuukw v British Columbia* (1997), para 114. Defining aboriginal title as comprising those lands that were occupied at that date may be theoretically sound, but it is hardly practicable. For example, it has been accepted that on mainland Nova Scotia the date of sovereignty is 1713; *R v Stephen Marshall,* para 28. Chief Justice Lamer himself acknowledged that it would be "next to impossible" to prove title in the distant past (para 152); his discussion of "continuity" (para 152 and following) appears to have been intended to address that problem.

[68] *Delgamuukw v British Columbia* (1997), para 149.

[69] *Ibid.*, para 149.

[70] McNeil, *Common Law Aboriginal Title,* 201–202.

> The general boundaries of the occupied territory should be identified. I recognize, however, that when dealing with vast tracts of territory, it may be impossible to identify geographical limits with scientific precision.[71]
>
> Aboriginal occupancy refers not only to the presence of aboriginal peoples in villages or permanently settled areas. Rather, the use of adjacent lands and even remote territories to pursue a traditional mode of life is also related to the notion of occupancy.[72]

Unhelpfully, Justice McLachlin (as she then was), in a one-sentence judgment, said she concurred with Chief Justice Lamer but was in substantial agreement with Justice LaForest.[73] In the result, Chief Justice Lamer's analysis can be said to have carried the day, but not without a lingering question as to the extent of aboriginal title lands.

R v Marshall; *R v Bernard*

The Supreme Court of Canada would provide a more definitive answer in another case, *R v Marshall; R v Bernard.*[74] In these cases, one from Nova Scotia and the other from New Brunswick, the issue was whether the accused were guilty of unlawful logging on Crown lands. The accused had entered Crown lands on several scattered sites in Nova Scotia and one in New Brunswick in the northwest Miramichi, and harvested timber. Their defence was to claim aboriginal title.[75] They claimed title to much of New Brunswick and all of Nova Scotia.

The trial judges rejected their claims. The Courts of Appeal in each province disagreed with the trial judges, and substituted different tests for aboriginal title which Chief Justice McLachlin characterized as "looser."[76] Daigle J.A. at the New Brunswick Court of Appeal said that native title had been proved over the entire "traditional Mi'kmaq territory" of the northwest Miramichi watershed, a vast area of northern New Brunswick.[77] Both cases were appealed to the Supreme Court of Canada, and were heard together.

This was the first time that the issue of the *extent* of native title was squarely before that Court. Chief Justice McLachlin wrote for the majority. She followed Lamer C.J.'s reasoning in *Delgamuukw*, explicitly agreeing that occupation sufficient to constitute aboriginal title could be shown by "construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land."[78] She was more explicit respecting occasional use than Chief Justice Lamer had been in *Delgamuukw:* "to say that title flows from occasional entry and use is inconsistent" with earlier cases.[79] She said that "typically" seasonal hunting and fishing in a particular area "will translate to a hunting or

[71] *Delgamuukw v British Columbia,* para 195.

[72] *Ibid.*, para 199.

[73] *Ibid.*, para 209.

[74] See note 38. The author was counsel for Nova Scotia in the appeals of the case.

[75] The accused also claimed treaty rights to log, under the 1760–61 Treaties. That claim was denied.

[76] *R v Marshall; R v Bernard,* paras 41, 44.

[77] *R v Marshall; R v Bernard* (2003) 262 NBR (2d) 1, para 127.

[78] *R v Marshall;R v Bernard* (2005), paras 56, 66.

[79] *Ibid.*, para 59.

fishing right."[80] It followed that "not every nomadic passage or use will ground title to land," although whether nomadic or semi-nomadic peoples could claim aboriginal title would depend on the evidence. She reiterated the test of "regular use of definite tracts."[81]

Chief Justice McLachlin said that the trial judges in both cases properly required proof of "sufficiently regular and exclusive use of the cutting sites." The evidence did not support such use. In Nova Scotia, Mi'kmaq people "probably" had aboriginal title near certain bays and rivers (the trial judge identified nine such areas), but not to the entire mainland: "There just weren't enough people for that." There was no evidence of any use, "let alone regular use," of the cutting sites.[82] Similarly, in New Brunswick, it could not be said that the cutting site at issue was used on a regular basis. Any hunting and fishing there "would have been occasional at best," and "occasional visits to an area did not establish title."[83]

It was clear from Chief Justice McLachlin's decision in *R v Stephen Marshall; R v Bernard* that the test for aboriginal title was regular use of definite tracts of land. Occasional use was not enough. It was also clear from these cases that native claims to ownership of vast expanses of Nova Scotia and New Brunswick were dismissed by our country's highest court.

Tsilhqot'in

R v Marshall; R v Bernard seemed to provide clear guidance to the question of the extent of the lands that aboriginal peoples could claim to own. Then the Supreme Court of Canada rendered its decision in the British Columbia case of *Tsilhqot'in Nation v British Columbia*[84] and left the test for aboriginal title in disarray. *Tsilhqot'in* involved a title claim in south central British Columbia. The trial judge held that the claimants were entitled to some 1,900 square kilometres. The Court of Appeal rejected the claim on the basis that aboriginal title was site-specific rather than territorial.[85] The Supreme Court of Canada reversed the Court of Appeal and held the band had aboriginal title.

In the case, the court threw over its own decision in *Stephen Marshall; Bernard* and opened the doors to aboriginal land claims far beyond what would be encompassed by "regular use of definite tracts." Now the test was "regular use of territories."[86] Chief Justice McLachlin, who wrote both decisions, defended her expansion of the test for aboriginal title in *Tsilhquot'in* by saying that *R v Marshall; R v Bernard* "did not reject a territorial approach" to aboriginal title.[87] That is a generous characterization of her reasoning in the case. It is hard to square the clear endorsement of "regular use of definite tracts"[88] in *R v Marshall; R v Bernard* with the statement in *Tsilhqot'in* that "a consistent presence on parts of the land…[is] not essential to establishing occupation."[89] It is also very hard to square Chief Justice Lamer's *rejection* in *Delgamuukw* (and Chief Justice McLachlan's own rejection in

[80] *Ibid.*, para 58.

[81] *Ibid.*, paras 66, 77.

[82] *Ibid.*, paras 72, 79.

[83] *Ibid.,* paras 81, 74.

[84] *Tsilhqot'in Nation v British Columbia.*

[85] *Tsilhqot'in Nation v British Columbia* 2012 BCCA 285.

[86] *Tsilhqot'in Nation v British Columbia* (2014), para 42.

[87] *Ibid.*, para 43.

[88] *R v Marshall;R v Bernard* (2005), para 66.

[89] *Tsilhqot'in Nation v British Columbia* (2014), para 38.

R v Marshall; R v Bernard) of the suggestion that aboriginal title encompassed "outlying areas that were occasionally visited" with Chief Justice McLachlan's statement in *Tsilhqot'in* that "consistent presence" is "not essential" to establish occupation. How is it that a "presence" must be "regular" (*Delgamuukw, R v Marshall; R v Bernard*) without, at the same time, having to be "consistent" (*Tsilhqot'in)*? It defies reason to suggest that aboriginal title may be established by an inconsistent presence but cannot be established through occasional presence.

Treaties, Territory, and Aboriginal Title "Out East"

In *Calder,* no particular exception was taken to the use of the word "territory" in describing native claims in British Columbia. In *Delgamuukw,* Justice Laforest discussed "vast tracts of territory." In *R v Bernard*, Daigle J.A. referred to Mi'kmaq aboriginal title over the "traditional Mi'kmaq territory" of the northwest Miramichi watershed. In *Tsilhqot'in,* Chief Justice McLachlin reworked the test for aboriginal title: "regular use of territories."

This is an unfortunate use of language. It is not the language of ownership. It is the language of sovereignty. As described earlier, in its seminal decision on aboriginal title, the High Court of Australia took care to note that "territory is the subject matter of the right of sovereignty."[90] Our Court has not been so careful. Using the word "territory" in the context of aboriginal title claims confuses the issue. It merges two separate ideas: aboriginal *sovereignty* over traditional territory and aboriginal *title.* In doing so, it obscures the essence of the aboriginal title inquiry. That inquiry must divorce the question of what territory a band might have been sovereign over from the question of what lands were occupied to the extent necessary to constitute aboriginal title. Use of the word *territory* suggests a necessarily expansive answer to the question being addressed—the extent of an aboriginal people's landholdings.

In *Delgamuukw,* Chief Justice Lamer discussed sovereignty in a cursory way. He referenced the date of sovereignty, but only for the purpose of describing the date for assessing aboriginal occupation of claimed lands. He acknowledged that the date of sovereignty was when the Crown gained "underlying title" over the land in question, and in respect to which aboriginal title is a "burden." This discussion is consistent with the Crown's acquisition of sovereignty over territory. But he made no distinction between aboriginal sovereignty over territory and aboriginal title claims, and neither did Chief Justice McLachlin in *Tsilhqot'in*.

Both those cases were British Columbia decisions. Whatever the case in British Columbia, in "Accadia" the word *territory* has a legal character and context. The treaties are clear that sovereignty over the "vast Countries," the "Territories of Nova Scotia or *Accadia"* was vested in the Crown, and native people became subjects of the Crown. Territorial sovereignty entitled the Crown to deal with that territory, including granting lands to non-natives; indeed, the treaties explicitly contemplated future non-native settlement, and were intended to pave the way for that settlement. What was left to native people was not territory. Subjects do not own territories. Rather, the discrete properties of native peoples were to be protected to them as subjects of the Crown, "under the same laws and for the same rights and liberties." Governor Belcher said that the law would be a "great hedge" around native "properties." He did not say that the law would be a great hedge around their "territory." In this context, judicial discussion from British Columbia respecting aboriginal territory would not seem properly applicable on the east coast.

[90] *Mabo v Queensland (No 2).*

In *Calder,* Justice Judson's argument that British Columbia had "exercised complete dominion" adverse to aboriginal occupation did not carry the day. No specific legislation extinguished native title. Neither was there any treaty.[91] In *Accadia,* native claims to territory meet with the express language of the Peace and Friendship Treaties.

It is not solely in respect of claims to territory that the Peace and Friendship Treaties of 1760–61 raise unique considerations for aboriginal title claims. Those treaties prompt more fundamental questions about the nature of aboriginal title on the east coast, and the application of British Columbia–made law in this region. Put simply, as a consequence of the Treaties of 1760–1761, aboriginal title in the Maritimes cannot be equated with aboriginal title in British Columbia. This should come as no surprise. The Supreme Court of Canada has stated clearly that aboriginal rights are not universal but depend upon the particular experience of an aboriginal group.[92]

It is a fundamental principle of English common law that the legal regime in force in a conquered colony continues in force after conquest, unless it is replaced.[93] The legal regime governing the titles of Nova Scotia's Acadians illustrates the point. Port Royal had been besieged and captured by British and New England troops in July 1710 and ceded by France to Britain under the Treaty of Utrecht, 1713. Acadian farmers in the province were, as described by successive governors, "exceeding litigious." For forty years until the Expulsion, disputes among Acadians involving their lands were heard and decided by the Executive Council, which acted as a General Court until regular courts were established at the founding of Halifax in 1749.[94] Without a trained judiciary, and without the authority of an Assembly (which was not elected until 1758) there was no "thorough imposition of English property law." The General Court at Annapolis rested its judgments "on a mixture of French customary law and English common law."[95] The application of French law "fulfill[ed] the guarantee to a conquered Christian people of its pre-conquest law."[96]

This contrasts sharply with the position of native people in Nova Scotia after the Treaties of 1760–1761. Native people agreed, under the Treaties, to adhere to "the Laws established in His said Majesty's Dominions." Native rights, including property rights, were to be governed by British law, "under the same laws." Chief Pequidoualouet said explicitly that he was submitting "to the laws of

[91] In *Tsilhqot'in Nation v British Columbia* (2014), Chief Justice McLachlin correctly noted, referencing *Calder*, that "Aboriginal land rights survived European settlement and remain valid to the present unless extinguished by treaty or otherwise" (para 10).

[92] *Van der Peet,* para 69.

[93] "The laws of a conquered colony continue in force, until they are altered by the conqueror"; *Campbell v Hall* 1774 1 Cowp 204. In *Calder,* Hall J. described *Campbell v Hall* as "authoritative throughout the Commonwealth" (p. 387).

[94] Beamish Murdoch, "On the Origin and Sources of the Law of Nova Scotia," *Dalhousie Law Journal* 8, no. 3 (1984): 197. And see Armstong to The Lords of Trade, November 16, 1731, cited in N.E.S. Griffiths, *From Migrant to Acadian, A North American Border People, 1604–1755* (Montreal: McGill-Queen's University Press, 2005), 322; Charles Lawrence to The Lords of Trade, December 5, 1753, https://archives.novascotia.ca/deportation/archives/?Number=ONEI&Page=206&Language=&Search=exceeding%20litigious. Griffiths notes that the Council "acknowledged title rights based upon French documents issued more than fifty years earlier" and "sought to understand what the French custom was." The result was that "the Council gained the trust of the Acadians in the settlement of disputes over land ownership" (p. 326).

[95] Griffiths, *From Migrant to Acadian*, 326.

[96] T.G. Barnes, "The Dayly Cry for Justice: The Juridical Failure of the Annapolis Royal Regime, 1713–1749," in *Essays on The History of Canadian Law,* Vol. 3, *Nova Scotia,* ed. P. Girard and J. Philips, ed. (Toronto: University of Toronto Press, 1990), 14, 27.

your government." This is no small point. It must be recalled that in the famous and enduring eighteenth-century decision of *Campbell v Hall,*[97] Chief Justice Mansfield described the articles of peace by which a country is ceded as "sacred and inviolable according to their true intent and meaning." As a consequence, the Maritime Treaties of 1760–61 set aboriginal title on the east coast on an entirely different footing compared to mainland British Columbia where aboriginal title was never subject to treaty.

The legal differences relevant to the law of aboriginal title that flow from application of the "sacred and inviolable" Treaties of 1760–61 are fundamental. They are apparent by reference to Chief Justice Lamer's analysis of aboriginal title in *Delgamuukw.* That analysis was a purely constitutional and common law analysis, without discussion of the impact of any treaty. He began his discussion of aboriginal title in British Columbia by contrasting the competing positions of the parties. Native claimants contended that aboriginal title was "tantamount to an inalienable fee simple, which confers on aboriginal peoples the right to use those lands as they choose." The Crown, in contrast, claimed aboriginal title was something less: the right to use land to "engage in activities which are aboriginal rights themselves."[98] Chief Justice Lamer said that aboriginal title was "somewhere in between these two positions."[99] He went on to outline the characteristics of aboriginal title, describing it as *sui generis,* inalienabile, saying that it cannot be put to uses that are "irreconcilable with the nature of the group's attachment" to land.[100]

All of these characteristics are important constraints on common law aboriginal title. But they are not consistent with the Treaties of 1760–61, under which native people were to enjoy "the same rights and liberties" as their fellow subjects. That treaty term was not only "sacrosanct" in eighteenth-century law; it now has constitutional force under s. 35.[101]

To be consistent with the treaties, native landholdings in the Maritimes cannot be *sui generis;* they are hardly different from a fee simple interest in land. Chief Justice Lamer's analysis in *Delgamuukw* was that aboriginal title is *sui generis*, "in the sense that its characteristics cannot be completely explained by reference either to the common law rules of real property or to the rules of property found in aboriginal legal systems."[102] But under the treaties, native rights are to be governed by British law.[103]

Neither can aboriginal title in the Maritime provinces be characterized as inalienable. The fee simple interest in land is inherently alienable.[104] No one has ever suggested that the titles of Acadian

[97] *Campbell v Hall.*

[98] *Delgamuukw v British Columbia* (1997), para 110.

[99] *Ibid.,* para 111.

[100] *Ibid.,* paras 112–118.

[101] Part II of the *Constitution Act, 1982,* describing *Rights of the Aboriginal Peoples of Canada,* provides in s. 35 (1) "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

[102] *Delgamuukw v British Columbia* (1997), para 112.

[103] This is not to suggest that an aboriginal perspective would be irrelevant to title claims on the east coast. The location and extent of any such title would be informed by pre-sovereignty aboriginal practices; see *Delgamuukw v British Columbia* (1997), para 149, *Tsilhqot'in Nation v British Columbia* (2014), paras 37–38.

[104] A valid critique of the inalienability principle in the Australian context is found in Shireen Morris, "Re-evaluating Mabo: The Case for Native Title Reform to remove Discrimination and Promote Economic Opportunity," *Land, Rights, Laws: Issues of Native Title* 5, no. 3 (June 2012): 1–13.

farmers which predated British sovereignty in 1710/1713 were somehow inalienable after 1713. Chief Justice Lamer suggested in *Delgamuukw* that inalienability was, in part, a function of "general policy" to "ensure that Indians are not dispossessed of their entitlements."[105] But such a policy constraint is inconsistent with the law of real property and inconsistent with the treaty settlement providing that British law would govern native rights.

Neither can "irreconcilability" be a principle governing aboriginal law in the Maritimes. In *Delgamuukw* Chief Justice Lamer said that "land subject to aboriginal title cannot be put to such uses as may be irreconcilable with the nature of the occupation of that land."[106] A fee simple is not subject to any such constraint.

To take a further example, since native peoples in *Accadia* were intended to be subjects of the Crown, "under the same laws," it follows that general laws of real property apply to native lands and land claims. That would include, for example, limitations legislation protecting non-native owners in possession of lands, for the requisite length of time, that might otherwise have been the subject of an aboriginal title claim.[107] Limitation legislation reflects the wise legislative policy of protecting the status quo from stale, historical grievances. That policy is a more balanced approach to reconciliation than a suggestion that current landholdings should be upset by allegations of ownership hundreds of years ago. Where, to use the eloquent language of Justice Brennan in the *Mabo* decision, "the tide of history has washed away"[108] native connection to land, it is historians and not courts who should adjudicate that past.

In sum, the Treaties of 1760–61 must be given their full effect. The law of aboriginal title developed in British Columbia has little relevance on the east coast, where such title, by treaty, is to be governed by "the Laws established in His said Majesty's Dominions."

Conclusion

Two and a half centuries ago, the Peace and Friendship Treaties of 1760–61 set out laudable principles of reconciliation respecting law, territory, and land. The treaties encompassed aboriginal people as British subjects, "under the same laws and for the same rights and liberties." In doing so they expressed an ideal that should be celebrated today. In vesting in the Crown sovereignty over "the Territories of Nova Scotia or *Accadia*," and facilitating non-native settlement, while attempting to preserve the property rights of native peoples—what later colonial administrators described as their "usual haunts"—the approach of the treaties was a practical and sensible solution to a difficult balancing of interests between aboriginal and non-aboriginal landholding. The principles enshrined in *Accadia's* historic treaties do not support sweeping aboriginal claims to territory on the east coast. These principles have been overlooked by the Supreme

[105] *Delgamuukw v British Columbia* (1997), para 129.

[106] *Ibid.,* para 128.

[107] This point is entirely consistent with the Supreme Court of Canada's decision in *Calder.* Justice Hall's reasons in *Calder* stand for the uncontroversial proposition that legislative authority is required to extinguish property rights. Limitations legislation is such legislative authority. There are other interesting and complex issues of inter-jurisdictional immunity relevant to this point that are beyond the scope of this article.

[108] *Mabo v Queensland (No 2),* 60. The point is not confined to native title. The operation of limitations legislation is a fundamental aspect of the common law of real property; present occupation of a sufficient nature and duration extinguishes the claim of a prior occupant.

Court of Canada in its development of the common law of aboriginal title in a mainland British Columbia context. Unlike British Columbia, aboriginal title on the east coast is properly regarded as title which, by treaty, is governed by the "same laws" as non-native title.

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Bibliography

Amodu Tijani v Southern Nigeria (Secretary) 1921 2 AC 399.

An Act for the Quieting of Possessions to the Protestant Grantees of the Lands formerly occupied by the French Inhabitants, and for preventing vextious Actions relating to the same, (1759) 33 George II c. 3.

"Armstong to The Lords of Trade." November 16, 1731. Quoted in N.E.S. Griffiths, *From Mi grant to Acadian, A North American Border People, 1604–1755.* (Montreal: McGill-Queen's University Press, 2005), 322.

Barnes, T.G. "The Dayly Cry for Justice: The Juridical Failure Of the Annapolis Royal Regime, 1713–1749." In *Essays on the History of Canadian Law*, vol. 3, *Nova Scotia,* edited by P. Girard and J. Philips, 10–41. Toronto: University of Toronto Press, 1990.

Beck, J. Murray. *Politics of Nova Scotia 1710–1896.* Tantallon: Four East Publications,1985.

Black, Henry Campbell. Black's Law Dictionary. St. Paul Minnesota: West Publishing Co, 1951.

Buckner Phillip A. and John G. Reid. *The Atlantic Region to Confederation: A History.* Toronto: University of Toronto Press, 1998.

Calder v Attorney General of British Columbia [1973] SCR 313.

Cameron, Alex M. *Power Without Law: The Supreme Court of Canada, the Marshall Decisions, and the Failure of Judicial Activism.* Montreal: McGill-Queen's University Press, 2009.

Campbell v Hall 1774 1 Cowp 204.

Canada Elections Act RSC 1952, c.23 s. 14.

Ceremonials at Concluding a Peace [with Miramichi, Shediac, Pokemouche and Cape Breton districts of the Micmac], Halifax, June 25, 1761. Source CO 217/18.

"Charles Lawrence to The Lords of Trade." December 5, 1753. https://archives.novascotia.ca/deportation/archives/?Number=ONEI&Page=206&Language=&Search=exceeding%20litigious.

Delgamuukw v British Columbia (1991) 79 DLR (4th) 185.

Delgamuukw v British Columbia (1993) 104 DLR (4th) 470.

Delgamuukw v British Columbia (1997) 3 S.C.R. 1010.

Donovan, Brian. "Common Law Origins of Aboriginal Title to Land." *Manitoba Law Journal*, 29, no. 3 (2003): 289–342.

Drew v Nfld 2006 NLCA 53.

Hamilton, Robert. "After Tsilhqot'in Nation: The Aboriginal Title Question in Canada's Maritime Provinces." *University of New Brunswick Law Journal* 67 (2016): 58–108.

"Jonathan Belcher." *Dictionary of Canadian Biography*, Vol. 4. http://www.biographi.ca/en/bio/belcher_jonathan_4E.html.

Mabo v Queensland (No 2) (1992) 175 C.L.R. 1, 44 (High Court of Australia).

McNeil, Kent. *Common Law Aboriginal Title.* Oxford: Clarendon Press, 1989.

Mitchell v M.N.R [2001] 1 S.C.R. 911.

Morris, Shireen. "Re-evaluating Mabo: The Case for Native Title Reform to Remove Discrimination and Promote Economic Opportunity." *Land, Rights, Laws: Issues of Native Title* 5, no. 3 (June 2012): 1–13.

Mount Allison University. "Welcome to Mount Allison." https://www.mta.ca.

Murdoch, Beamish. "On the Origin and Sources of the Law of Nova Scotia." *Dalhousie Law Journal* 8, no. 3 (1984): 185–197.

Newfoundland and Labrador (Attorney General) v Uashaunnuat 2020 SCC 4.

Patterson, Stephen E. "Anatomy of a Treaty; Nova Scotia's First Native Treaty in Historical Context." *University of New Brunswick Law Journal* 48 (1999): 41–64.

"Pierre Maillard." *Dictionary of Canadian Biography*, Vol. 3. http://www.biographi.ca/en/bio/maillard_pierre_3E.html.

Queen v Drew 2003 NLSCTD 105.

R v Bernard 2000 NBJ No 138.

R v Bernard 2003 NBCA 55.

R v Marshall [1999] 3 SCR 456.

R v Marshall 2001 NSPC 2.

R v Marshall; R v Bernard (2003) 262 NBR (2d) 1.

R v Marshall; R v Bernard (2005) SCR 220.

R v Nicholas 1978 22 NBR (2d) 285.

R v Secretary of State for Foreign and Commonwealth Affairs [1982] 1 QB 892.

R v Stephen Marshall 2001 NSPC 2.

R v Stephen Marshall 2002 NSSC 57.

R v Stephen Marshall 2003 NSCA 105.

R v Syliboy [1929] DLR 307.

R v Van der Peet [1996] 2 SCR 507.

Reid, John G. "Empire, the Maritime Colonies and the Supplanting of Mi'kma'ki/Wulstukwik, 1789–1820." *Acadiensis* 38, no. 2 (Summer/Autumn 2009): 78–97.

Salmond, John William. *Jurisprudence.* 7th ed. London: Sweet & Maxwell,1924.

Simon v The Queen [1985] 2 S.C.R. 387.

Sock & Francis on behalf of Elsipogtog First Nation v The Queen MC-745-2016.

Somerset v Stewart 1772 98 ER 499.

The Queen v Drybones [1970] SCR 282.

Tsilhqot'in Nation v British Columbia 2012 BCCA 285.

Tsilhqot'in Nation v British Columbia 2014 SCC 44.

Wicken, William. *Mi'kmaq Treaties on Trial.* Toronto: University of Toronto Press, 2002.

Williams, Thomas. *Viking Britain, a History.* London: William Collins, 2017.

Wolastoqey Nation et al v The Province of New Brunswick et al FC-322-2021.

Youngblood Henderson, James [sakeji]. "Mikmaw Tenure in Atlantic Canada." *Dalhousie Law Journal* 18, no. 2 (1995): 196–294.

Appendix

Note: Transcription using original punctuation, spelling, etc.

Ceremonials at Concluding a Peace [with Miramichi, Shediac, Pokemouche, and Cape Breton districts of the Micmac], Halifax, June 25, 1761
Source: CO 217/18.

Reference CO 217/18 - Treaty.

Ceremonials at Concluding a Peace with the several Districts of the general Mickmack Nation of Indians in His Majesty's Province of Nova Scotia, and a Copy of the Treaty. June 25, 1761

Halifax, Nova Scotia
25 June 1761

The following Treaties of Peace and Friendship were this Day concluded and Signed by the Honourable Jonathan Belcher Esquire President of His Majestys Council and Commander in Chief of this Province on behalf of His Majesty, And the Chiefs of the Tribes of the Mickmack Indians, called Merimichi, Jelick, Pogmouch and Cape Breton Tribes, on behalf of themselves and their people.

Treaty of Peace and Friendship concluded by the Honourable Jonathan Belcher Esq. President of His Majesty's Council and Commander in Chief in and over His Majesty's Province of Nova Scotia or Accadia etc with Claude Atonash Chief of the Jedaick Tribe of Indians at Halifax in the Province of Nova Scotia or Acadia.

I Claude Atonash for myself and the Tribe of Jedaick Indians of which I am Chief, Do acknowledge the jurisdiction and Dominion of his Majesty King George the Third, 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 Dependants in their Settlements already made or to be hereafter made, or in carrying on their Commerce, or in any thing whatever within this 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 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 betwixt 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 set 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 Third, 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 ill 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 Manager of such Truckhouses as shall be appointed or established by His majesty's Governor at Fort Cumberland or elsewhere in Nova Scotia or Acadia.

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 persons shall on or before the Thirtieth Day of September reside as Hostages at Fort Cumberland or at such other place or places in this Province of Nova Scotia or Acadia 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 the Honourable Jonathan Belcher Esquire President of His Majesty's Council and Commander in Chief of His Majesty's Province of Nova Scotia or Acadia, I do promise for myself and in behalf of my Tribe that we will most strictly keep and observe in the most solemn manner. In Witness whereof I have hereunto put my Mark at Halifax in Nova Scotia this Twenty fifth Day of June One Thousand Seven Hundred and Sixty one and in the First Year of His Majesty's Reign.

I do accept of, and Agree to, all the Articles of the foregoing Treaty. In Faith and Testimony whereof, I have Signed these presents, and have caused my Seal to be hereunto affixed this Twenty fifty Day of June in the First Year of His Majesty's Reign, and in the Year of our Lord One Thousand Seven Hundred and Sixty one.

Jonathan Belcher

By Order of the Commander in Chief Richard Bulkeley, Secretary

Signed in the Presence of Us the Members of His Majesty's Council

John Collier
Richard Bulkeley
Jps.. Gerrish
Alexander Grant

N.B.: Treaties of the above Tenor and Contents was signed by the Chief of each Tribe seperately.

The Ceremony observed upon this occasion was conducted in the following manner. The Honourable Hr. President Belcher assisted by His Majesty's Council, Major General Bastide, the Right Honourable the Lord Colvill and Colonel Forster Commanding Officer of His Majesty's Forces, and the

other Officers and principal Inhabitants of Halifax, Proceeded to the Governors Farm where proper Tents were erected, and the Chiefs of the Indians being called upon, His Honor Spoke to them as follows, the same being interpreted by Mr. Maillard.

"Brothers,

I receive you with the hand of Friendship and Protection, in the Name of the Great and Mighty Monarch King George the Third, Supreme Lord and proprietor of North America."

"I assure myself that you Submit yourselves to his allegiance with hearts of Duty and Gratitude, as to your merciful Conqueror, and with Faith never to be Shaken and deceived again by Delusions and boastings of our Enemies, over the power of the mighty Fleets and Armies of the August King of Great Britain."

"You see that this triumphant and Sacred King, can chastise the Insolence of the Invader of the Rights of his Crown and Subjects, and can drive back all his Arrows, and trample the power of His Enemies under the footstool of his Sublime and lofty Throne."

"As this Mighty King can chastise and Punish, so he has power to protect you and all his Subjects, against the Rage and Cruelties of the Oppresser."

"Protection and Allegiance are fastened together by Links, if a Link is broken the Chain will be loose."

"You must preserve this Chain entire on your part by fidelity and Obedience to the Great King George the Third, and then you will have the Security of his Royal Arm to defend you."

Then the Chiefs were conducted to a Pillar where the Treaties with each Tribe were to be Signed, and there the Commander in Chief went on with his Speech.

"I meet you now as His Majesty's graciously honored Servant in Goverment, and in his Royal Name to receive at this Pillar, your publick Vows of obedience to build a covenant of peace with you as upon the immovable Rock of Sincerity and Truth, to free you from the Chains of Bondage, and to place you in the wide and fruitful Field of English Liberty."

"In this Field you will reap Support for yourselves and your Children, all brotherly affection and Kindness as fellow Subjects, and the Fruits of your Industry free from the baneful needs of Fraud and Subtility."

"Your Traffick will be weighed and Settled in the Scale of Honesty, and Secured by severe punishment against any attempts to Change the just Ballance of that Scale."

"Your Religion will not be rooted out of this Field. Your Patriach will still feed and nourish you in this Soil as his Spiritual Children."

"The Laws will be like a great Hedge about your Rights and properties, if any break this Hedge to hurt and injure you, the heavy weight of the Laws will fall upon and punish their Disobedience."

"In behalf of us, now your Fellow Subjects, I must demand, that you Build a wall to secure our Rights from being troden down by the Feet of your people. That no provocation tempt the hand of Justice against you, and that the great Lenity of His Majesty in receiving you under the Cover of his Royal Wings in this desertion of you by your leader to the Field of Battle against the Rights of his Crown, when he Stipulated for himself and his people without any regard to you, may not be abused by new Injuries."

"You see the Christian Spirit of the Kings Government, not only in burying the memory of broken Faith, by some of your People, but in stretching out the Hand of Love and Assistance to you."

"Lenity despised may not be found any more by your submissions, and like razors set in oil with cut with the keener Edge."

At this period the Presents were delivered to each of the Chiefs, and then the Commander in Chief proceeded.

"In token of our Sincerity with you, I give you these pledges of brotherly affection and Love That you may Cloath yourselves with Truth towards us. as you do with these Garments. That you may exercise the Instruments of War to defend Us your Brethren against the Insults of any Injurious Oppressor, That your cause of War and Peace may be the same as ours under one mighty Chief and King, under the Same Laws and for the same Rights and Liberties."

The Indians were then carried to the place prepared for burying the Hatchet where he concluded his Speech.

"While you Blunt the Edge of these Arms and bury them in Symbol, that they shall never be used against us your fellow Subjects, you will resolve and promise to take them up, Sharpen and point them against our Common Enemies."

"In this Faith I again greet you with this hand of Friendship, as a Sign of putting you in full possession of English protection and Liberty, and now proceed to conclude this Memorial by these solemn Instruments to be preserved and transmitted by you with Charges to your Children's Children, never to break the Seals or Terms of this Covenant."

The Commander in Chief having finished his Speech, proceeded with the Chiefs to the pillar, where the Treaties were subscribed and Sealed. And upon their being delivered and the Hatchets buried the Chief of the Cape Breton Indians in name of the rest addressing himself as to His Britannick Majesty Spoke as follows: which was likewise interpreted by Mr. Maillard.

"My Lord and Father!

"We come here to assure you, in the name of all those of whom we are Chiefs, that the propositions which you have been pleased to cause to be sent to us in writing have been very acceptable tome and mv Brethren and that our Intentions were to yield ourselves up to you without requiring any Terms on our part."

"Our not doubting your Sincerity has chiefly been owing to your Charitable, mercifull and bountifull behaviour to the poor French wandering up and down the Sea Coasts and Woods without any

of the necessaries of Life; Certain it is that they, as well as we, must have wretchedly perished unless relieved by your humanity, for we were reduced to extremities more intollerable than Death itself."

"You are now Master here; such has been the will of God, He has given you the Dominion of those vast Countries, always crowning your Enterprises with Success. You were, before these Acquisitions, a very great People; but we now acknowledge you to be much more powerfull, tho' less Great, in the extensiveness of your possessions, than in the uprightness of your Heart, whereof you have given us undoubted and repeated proofs, Since the Reduction of Canada. You may be confident that the moderation and _enity wherewith we have been treated, has deeply imprinted in our Hearts a becoming Sense of gratitude. Those good and noble Sentiments of yours, towards us in our distressed and piteous Circumstances have emboldened us to come out of the Woods, our natural Shelter, from whence we had previously resolved not tostir, till the Establishment of Peace between both C r ow ns, whatever Hardships we might have suffered."

"Your Generous manner, Your good Heart, your propensity to Clemency, make us hope that no mention will ever be made of any Hostilities that have been committed by us against you and Yours. The Succours so seasonably given us in our greatest wants and necessities have been so often the Subject of our Thoughts that they have inspired us with the highest Sentiments of gratitude and Affection."

"We felt ourselves in consequence, forcibly drawn to Halifax to acquaint the Representative of the King, not only with the resolutions we had taken in his favour, arising from his kindness to us, but also to let him understand that the many proofs he has given us of the goodness of his Heart at a time and in a Conjuncture in which we could not hope for such favourable treatment have so intirely captivated Us that we have no longer a will of our own. His will is ours."

"You now, Sir, see us actually in your presence, dispose of us as you please. We account it our greatest misfortune that we should so long have neglected to embrace the opportunity of knowing vou so well as we now do. You may depend we do not flatter. We speak to you at this time according to the dictates of our Hearts. Since you are so good as to forget what is past we are happy in its being buried in Oblivion. Receive Us into your Arms; into them we cast ourselves as into a safe and Secure Asylum from whence we are resolved never to withdraw or depart."

"I swear, for myself, Brethern and People, by the Almighty God who sees all things, Hears all things, and who has in his power all things, visible and invisible, that I sincerely comply with all and each of the Articles that you have proposed to be kept inviolably on both Sides."

"As long as the Sun and Moon shall endure, as long as the Earth on which I dwell shall exist in the same State you this day see it, so long will I be your friend and Ally, submitting myself to the Laws of your Government, faithful and obedient to the Crown, Whether things in these Countries be restored to their former State or not; I again Swear by the Supreme Commander of Heaven and Earth, by the Sovereign disposer of all things that have life on Earth or in Heaven, that I will for ever continue in the Same Disposition of mind I at present am in."

"There is one thing, that binds me more strongly and firmly to you than I can possibly express and that is our indulging me in the free Exercise of the Religion in which I have been instructed from my Cradle."

"You confess and believe, as well as I, in Jesus Christ the eternal word of Almighty God. I own I long doubted whether you was of this Faith. I declare moreover that I did not believe you was baptised; I therefore am overwhelmed with great Sorrow and repentance that I have too long given a deaf ear to my Spiritual director touching that matter, for often has he told me to forbear imbruing my hands in the Blood of a people who were Christians as well as myself. But at present I know you much better than I did formerly, I therefore renounce all the ill Opinions that have been insinuated to me and my Brethren in times past against the Subjects of Great Britain."

"To conclude, in the presence of him to whom the most hidden thoughts of Men's Hearts are laid open; in your presence Governor,: for I conceive that I see in your person him who you represent. and from whom you derive your Authority as the Moon borrows her light from the Rays of the Sun:) and before all this noble Train who are round about you I bury this Hatchet as a Dead Body that is only fit to become rotten, looking upon it as unlawful and impossible for me to make use hereafter of this Instrument of my Hostilities against you."

"Let Him be happy and blessed for ever, the August person for the Sake of whom I make to Day this funeral! Great God, let him be happy and blessed during his whole reign over his Subjects. Mayhe never have occasion to scruple calling us his Children, and may we always deserve at his hands the Treatment of a Father."

"And Sir, we pray you most humbly, as you are instructed by George the third our King that you will be pleased to inform His Majesty as soon as possible of what you have this Day seen and heard from our People, whose Sentiments have now been declared unto the King by my mouth."

The Ceremony concluded with Dancing and Singing, after their manner upon Joyful occasions, and Drinking His Majesty's Health under Three Vollies of Small Arms.