

ANATOMY OF A TREATY: NOVA SCOTIA'S FIRST NATIVE TREATY IN HISTORICAL CONTEXT

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In 1998, the celebrated case of *R. v. Peter Paul*¹ made its way to the New Brunswick Court of Appeal where Mr. Peter Paul, a Mi'kmaq relying on aboriginal and treaty rights, lost his bid to harvest bird's eye maple logs on Crown land without a licence. Subsequently, the Supreme Court of Canada refused to hear an appeal. Governments and lumbering interests breathed a sigh of relief, but so too did a good many native people and their lawyers who recognized that no adequate evidentiary base had been established at the original trial, and that, despite decisions in favour of the defendant by Provincial Court Judge Frédéric Arsenault and Queen's Bench Judge John Turnbull, fundamental differences in the reasoning of the two, and questionable attempts by Judge Turnbull to fill gaps in the evidence with his own research, had muddied the waters so as to make it next to impossible for the Supreme Court to sort out the mess. It seemed clear that both native loggers and the Province of New Brunswick would find another occasion to test the law on this issue, where presumably both would attempt to correct the fundamental flaw in the *Peter Paul* case by providing the courts with adequate historical evidence.

This paper does not presume to predict what that evidence might be or argue the issue as a matter of law. But it could be useful for all concerned, as well as for anyone interested in the burgeoning field of aboriginal and treaty rights litigation, to know more about the original treaties made by the Province of Nova Scotia and the Mi'kmaq, Maliseet, and Passamaquoddy beginning early in the 18th century. The *Peter Paul* case revolved around a treaty signed in 1725, called by some the Dummer Treaty, a reference to the Lieutenant Governor of Massachusetts, William Dummer, under whose direction the treaty was negotiated in Boston. As a simple matter of common sense, we will not know whether this treaty has any relevance to the questions raised by native logging on crown land until we know what was agreed to at Boston, how much of the agreement had application in Nova Scotia, who among the natives of Nova Scotia were covered by the agreement, and whether the treaty survived the test of time as a valid treaty in the eyes of those who signed it. These are historical rather than legal questions, but by examining the historical meaning, context, and significance of Nova

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¹ *R. v. Peter Paul*, (1998) 158 D.L.R. (4th) 231, (1998) 124 C.C.C. (3d) 1, (1998) 196 N.B.R. (2d) 292.

Scotia's first treaty with native people, we may help both native litigators and the Crown determine whether the treaty is a matter worth contesting.

One might think that the answers to these questions are all matters of current knowledge among colonial history specialists, but such is not the case. There is no systematic historical analysis of the Treaty of 1725 in any of the literature, although several historians have approached the treaty from different directions, making positive contributions to our understanding. Olive Dickason has shown us how the close alliance of the Mi'kmaq with the French at Louisbourg complicated British treaty efforts.² Patricia Kennedy of the National Archives has written about the state of the archival record and of the complexity of sorting out the treaty documents.³ Andrea Bear Nicholas has shown us that the treaty negotiated in Boston came in two parts, one signed by natives and one by Nova Scotia's representative, Paul Mascarene, and that they must be viewed as reciprocal promises.⁴ William Wicken has raised questions about whom among the Mi'kmaq felt bound by the treaty, and he has written of the confusion that existed among Mi'kmaqs in the summer of 1726 as to whether there was a peace agreement or not.⁵ David Ghere has examined alleged problems of translation and possible discrepancies between what was negotiated at Boston and what was presented to the native delegates in written form for signing.⁶ While allegations of mistranslation were made by the Maine tribes, the questions Ghere raises are important enough for us to consider them in relation to Nova Scotia. All of this is to say that several fine historians have identified problems or limitations in our understanding of the Treaty of 1725, even though none has provided a comprehensive analysis.

Questions about the original coverage and long-term survival of the treaty remain the most nettlesome. Gary Gould and Alan J. Semple, assuming both comprehensive adherence and permanency, are among the few to build a substantial case in favour of today's native people on the basis of the 1725 treaty. In *Our Land the Maritimes*, they argue the case for aboriginal title to the land mass of the Maritime Provinces by relying heavily on the Dummer Treaty,⁷ a viewpoint that may have influenced Judge Turnbull

² Olive Dickason, *Louisbourg and the Indians: A Study in Imperial Race Relations, 1713-1760* (Ottawa, 1976), 78-9.

³ Patricia Kennedy, "Treaty Texts: When Can We Trust the Written Word?" *SSHARE/ERASSH* (Social sciences and aboriginal humanities research exchange), 3:1 (spring/summer 1995).

⁴ Andrea Bear Nicholas, "Mascarene's Treaty of 1725," (1994), 43 UNBLJ 3-18.

⁵ W.C. Wicken, "26 August 1726: A Case Study in Mi'kmaq-New England Relations in the 18th Century," *Acadiensis*, XXIII, no. 1 (Autumn, 1993), 5-22: 19.

⁶ David Ghere, "Mistranslations and Misinformation: Diplomacy on the Maine Frontier, 1725 to 1755," *American Indian Culture and Research Journal*, VIII (1984), 3-26.

⁷ Gary P. Gould and Alan J. Semple, *Our Land the Maritimes: the Basics of the Indian Claim in the Maritime Provinces of Canada* (Fredericton, 1980), 10, 130-31, 163-66.

in his decision in the Peter Paul case. In contrast, a paper presented by the Union of Nova Scotia Indians in 1992 says that the Mi'kmaq nation as a whole did not agree to the treaty.⁸ Olive Dickason appears to support the latter view: she claims that French officials at Louisbourg succeeded in preventing some Mi'kmaq from assenting to the treaty and encouraged those who did to disregard it. In her view, it was only the British who insisted on written treaties and their subsequent renewal, a viewpoint that was not shared by the Mi'kmaq in the eighteenth century.⁹ Wicken argues that subsequent acts of violence on the part of the Micmac were occasional, stemming from cultural misunderstandings rather than a rejection of the treaty, a view that conflicts with contemporary French sources.¹⁰ In all historical writing there is a need for interpretation; yet in treatments of the so-called Dummer treaty, there has been no adequate examination of the treaty itself to justify some of the conclusions that have been drawn. Importantly, there is available documentation that has not been scrutinized heretofore to establish with reasonable certainty the anatomy — the structure, components, and their function — of an important agreement.

All of the Nova Scotia treaties, which date conventionally to the years 1725 to 1779,¹¹ are distinctly different from treaties signed elsewhere in what became Canada. Where most Canadian treaties were signed in the nineteenth century, the Nova Scotia treaties were products of the eighteenth. Where most other treaties can be placed in the context of peace and amicable, if not always fair, negotiation, the Nova Scotia treaties were all signed after periods of hostility between the natives and the British. Many western treaties reflect British imperial policies established in 1763 or later, especially as it related to land; for the most part Nova Scotia treated with its aboriginals before this time, and in ways that reflected a less defined imperial policy and different assumptions about land entitlements. To complicate matters further, the first Nova Scotia treaty was negotiated in Boston, with no Nova Scotia aboriginals present, while a single Nova Scotia official, Paul Mascarene, negotiated with four Penobscot men who claimed to speak for all of the Indians of Maine and eastward, of whom the St. John River Indians (Maliseet) and Cape Sables (Mi'kmaq) were identified. All of these circumstances

⁸ Union of Nova Scotia Indians, "Treaty Federalism and the Covenant Chain," paper presented in Edmonton, Alberta, April 1992, at p. 2: "One Mi'kmaq District, Gespogoitg, also ratified this Treaty, although the Grand Council of the Mi'kmaq Nation as a whole did not at that time choose to enter into Treaty relations with the English."

⁹ Dickason, *Louisbourg and the Indians*, *supra*, note 2 at 79-80.

¹⁰ Wicken, "26 August 1726," *supra*, note 5 at 21-22; Memoir of the King [of France] to Messrs de Beauharnois and Dupuy, April 29, 1727, in E.B. O'Callaghan, ed., *Documents Relative to the Colonial History of New-York*, IX: *Paris Documents* (Albany, 1855), 989.

¹¹ For a sketch of the history of several of the treaties signed by the British with the natives of Nova Scotia, see R.O. MacFarlane, "British Indian Policy in Nova Scotia to 1760," *Canadian Historical Review*, XIX (1938), 154-67.

make it clear that we will learn little about Nova Scotia treaties by classifying them with other Canadian treaties. They are unique in the Canadian historical experience.

The other essential point to establish is that the Penobscot delegates, as they were called, did not make one treaty at Boston in December 1725, but several. While the term "treaty" sometimes refers only to the discussion that took place between natives and officials, more commonly we use the term today to refer to a specific agreement reached between two parties and committed to writing. The courts, moreover, expect that such agreements will have been entered into with a degree of ceremony and solemnity, and recorded either in a written treaty instrument or in adequate minutes or other equally reliable form.¹² If we use such a definition, then there were several such agreements reached in 1725: Massachusetts, New Hampshire and Nova Scotia acted as distinct jurisdictions in establishing terms with the natives who lived in each, and the terms were given separate expression in treaty instruments exchanged on the floor of the General Court (or legislature) of Massachusetts. The Penobscot delegates acted for others in all of these exchanges, but they had previously made it clear that they were facilitators of the process, and were making no final commitment for native groups who had not yet seen the instruments. That would come in the ratification stage, when all of the various native peoples had seen the relevant documents and heard and agreed to their contents. In any historically reasonable sense, the treaty instruments signed at Boston were not final and binding until seen and approved by the parties whose names were attached. Even if the Penobscot delegates had not qualified their assent in this manner, surely they were right to believe that both sides were entitled to know the terms that would bind them in future, before the agreement was finalized. These were contingent treaties, despite the fact that their wording did not make this clear. As worded, they anticipated the formal ratification that was to come, either at Casco Bay for the various Eastern Abenaki peoples in Maine, or at Annapolis for the Nova Scotia natives.

Of the several exchanges at Boston, only one involved Lieutenant Governor William Dummer of Massachusetts. Of utmost importance to the Penobscot delegates was the need to come to terms with Massachusetts, of which their homeland in Maine was then a part. Issues of immediate concern to the Penobscot were pressed throughout the negotiations and formed the core issues addressed in the treaty documents which the delegates exchanged with Dummer. Each side signed a separate document: the Penobscot made commitments in one while, in exchange, they received promises made by Dummer on behalf of Massachusetts, over his sole signature. These two instruments, taken together, constituted the delegates' treaty with Massachusetts. If any can be called "the Dummer Treaty," this was it. But, at the same assent ceremony, the Penobscot delegates made similar exchanges with Lieutenant Governor John Wentworth of New Hampshire and with Major Paul Mascarene representing Nova Scotia. The New

¹² *Simon v. The Queen*, [1985] 2 S.C.R. 387; *R. v. Sioui*, [1990] 1 S.C.R. 1025.

Hampshire documents were nearly identical to the Massachusetts, while the Nova Scotia documents were quite different. The Nova Scotia treaty has come lately to be called the "Mascarene" treaty.¹³

The important point here is this: the Dummer instruments applied only to Maine and Massachusetts, and were eventually ratified in two stages at Casco Bay in 1726 and 1727; the Mascarene instruments applied to Nova Scotia and were ratified at Annapolis in 1726 and 1728. The native ratifiers at Casco Bay were inhabitants of Maine, and the documents they ratified were their agreements with Dummer and Wentworth. They did not consider the Mascarene instruments dealing with Nova Scotia. The Mascarene instruments, for their part, were ratified at Annapolis, where the representatives of the Mi'kmaq, Maliseet and Passamaquoddy who traveled there to discuss them and to sign, saw only these documents. Nova Scotia natives did not agree to the Dummer and Wentworth instruments because they never saw them, and were never asked to ratify them. Years ago, Chief Justice Charles Hughes of the New Brunswick Court of Appeal ruled that Dummer's promises did not apply to New Brunswick natives,¹⁴ a point that Judge Turnbull overlooked in his decision in the *Peter Paul* case. Chief Justice Hughes was historically correct.

The meaning and significance of what was done at Boston and each of the ratifying places now require a closer look. Native treaties, as historians and courts agree, must be understood in context. Substantial contextual evidence was not examined at any level in the *Peter Paul* case. This is to say nothing of the internal problems with some of the sources which require careful professional explanation for the evidence not to be misinterpreted. The following paragraphs combine narrative with analysis in order to unravel the complications inherent in the historical record.

In the early seventeenth century, both England and France asserted sovereignty over parts of what are now the Maritime provinces and Maine, and they spent more than a hundred years contesting control of it. The French called it Acadie; the English, Nova Scotia. French sovereignty was dramatically reduced to Isle Royale (Cape Breton) and Isle St. Jean (Prince Edward Island) by the Treaty of Utrecht in 1713, and removed completely in the Treaty of Paris in 1763. As New Brunswick was not to be set off from Nova Scotia until 1784, it was Nova Scotia which dealt with the issue of establishing relations with the native people of the region, and it was Nova Scotia

¹³ For example, see Bear Nicholas, "Mascarene's Treaty of 1725," *supra*, note 4.

¹⁴ *R. v. Paul*, 30 N.B.R. (2d), 545-63: at p. 550. See also Chief Justice McNair's ruling in *Simon v. The Queen*, (1960), 43 M.P.R. 101-06.

which signed all of the treaties we now recognize, starting early in the 18th century and ending at the time of the American revolution.¹⁵

The Mi'kmaq, Maliseet and Passamaquoddy made up the small native population of Nova Scotia in the eighteenth century. By then disease and conflict had reduced their numbers substantially from the time of first contact with Europeans.¹⁶ Yet, despite these obvious problems, the native people of the region had at first welcomed the strangers and their metal implements, and had developed a vigorous trading relationship that contributed to sweeping changes in their way of life. They competed with each other for the favour of European traders, and eventually, consciously adopted a policy of alliance with France as a preferred trading partner, allowed French settlement amongst them, and accepted the attempts of French Catholic missionaries to convert them to Christianity and French cultural ways.¹⁷ The success of the latter can be exaggerated, but the point stands that much in the early relationship between natives and newcomers was a matter of choice, not coercion. The notion that the region's natives were simply victims of the onslaught of "civilization" or of a militarily or numerically superior force, is unhistorical. At least until the eighteenth century, natives had both the numerical and physical strength to resist European intrusion. They made reasoned choices about how to deal with their relationships, drawing on a tradition of self-reliance and self-governance in doing so.

At the same time, all choices had consequences, some not exactly as native leaders anticipated. The alliance with France brought them into conflict with the British,

¹⁵ From 1719 on, the Crown specifically instructed Nova Scotia's governors to treat with the Indians of the province, and only they or their appointees could do so. Leonard W. Labaree, *Royal Instructions to British Colonial Governors, 1670-1776*, 2 vols. (New York, 1967), II, 469

¹⁶ On the topic of Micmac populations, see Virginia P. Miller, "Aboriginal Micmac Population: A Review of the Evidence," (1976), 23 *Ethnohistory* 117-27.

¹⁷ Reuben Gold Thwaites, ed., *The Jesuit Relations and Allied Documents: Travels and Explorations of the Jesuit Missionaries in New France, 1610-1791*, 73 vols. (Cleveland, 1896-1901), III (1897), 69, 87-91; Chrestien Le Clercq, *New Relation of Gaspesia* [1691], (Toronto, 1910), 120, 151-58, 161-64, 276; Nicholas Denys, *The Description and Natural History of the Coasts of North America (Acadia)* [1672], translated and edited by William F. Ganong (Toronto, 1908), 187, 446-48; John Clarence Webster, *The Career of the Abbé Le Loutre in Nova Scotia with a Translation of his Autobiography* (Shediac, 1933), 33-34, 41. Useful secondary literature includes Bruce J. Bourque and Ruth Holmes Whitehead, "Tarrantines and the Introduction of European Trade Goods in the Gulf of Maine," *Ethnohistory*, XXXII, no. 4 (1985), 327-41; Micheline Dumont-Johnson, *Apôtres ou Agitateurs: La France missionnaire en Acadie* (Trois-Rivières, 1970); Stephen E. Patterson, "Indian-White Relations in Nova Scotia, 1749-61: A Study in Political Interaction," *Acadiensis*, XXIII, no. 1 (Fall 1993), 23-59. For a discussion of competition among native groups for control of French trade, see Daniel B. Thorp, "The Equals of the King: The Balance of Power in Early Acadia," *Acadiensis*, XXV, no. 2 (Spring 1996), 3-17.

especially during the numerous wars that punctuated the colonial period. Even when France and Britain were formally at peace, their Indian allies carried on occasional surrogate wars or frontier conflicts, largely in defense of territorial interests. One of these frontier wars took place in Nova Scotia and northern New England from 1722 to 1725; Mi'kmaq, Maliseet and Passamaquoddy actively participated with northern New England natives in war against British settlers and their colonial governments. New Englanders called it Dummer's War, but it had no distinctive name in Nova Scotia where, in most respects, it was a conflict that was separate and different from the fighting in New England. The Anglo-Indian war of the 1720s sprang from mixed motives. Land was the chief concern of the natives of northeastern New England, who viewed the steady advance of white settlers up their river valleys as both a threat and a betrayal of earlier agreements. Many of the northeastern tribes had already abandoned their traditional lands and moved to the St. Francis River of Quebec, where they were encouraged to settle by their French Jesuit priests.¹⁸ The concentration of eastern Abenaki Indians at Sillery and later St. François du Lac served French interests in several ways, not the least of which was their availability for scouting and raiding along the frontier between New England and New France. But there were still tribes in Maine who clung to their own territory, chief among whom were the Penobscot, their Kennebec allies to the west and their Maliseet and Passamaquoddy allies to the east, straddling the imprecise border between Maine and Nova Scotia. The native interest was in preserving their hunting and living space, while the French interest was in retaining an Indian buffer zone between themselves and the English. These dual interests, when protected, could scarcely be distinguished, at least by the British.¹⁹

The Mi'kmaq, on the other hand, operated on the fringe of this war, motivated by their own concerns. They too had already linked their fortunes with those of France, and they retained a close working relationship with Louisbourg (built in the 1720s) and with the French priests who served in various parts of Acadia. While the British had taken over Nova Scotia from France in 1713, their numbers were still sparse in the 1720s. The Mi'kmaq not only challenged the small British garrison at Annapolis but also harassed the fishing station at Canso, where New England fishermen working the fishing banks off Nova Scotia resorted for replenishing and repairs. Wind, tide, currents, and heavy weather brought these fishermen into contact with Mi'kmaqs all along the coasts; in 1722 alone Mi'kmaq sailors were able to capture as many as 20 to 25 English fishing vessels in the Bay of Fundy or off the outer coast from Cape Sable

¹⁸ Alfred Goldsworthy Bailey, *The Conflict of European and Eastern Algonkian Cultures* (Saint John, 1937 (1969 ed.)) 31.

¹⁹ See the discussion by Kenneth M. Morrison, *The Embattled Northeast: the Elusive Ideal of Alliance in Abenaki-Euramerican Relations* (Berkeley, Calif., 1984), 185-7. Ian K. Steele provides a brief account of the war, and places it in the larger context of British-native conflict in North America: *Warpaths: Invasions of North America* (New York and Oxford, 1994), 161-62.

to Canso.²⁰ New Englanders, therefore, easily lumped Mi'kmaqs in with their enemies, counted Mi'kmaq attacks on fishermen as among the atrocities of Dummer's War and viewed Nova Scotia officials as partners in trying to bring all natives of the region into a negotiated peace. In the fall of 1724, Nova Scotia's governing Council agreed to cooperate and, several months later, Massachusetts envoys spoke for all colonies in the region in urging a cease-fire and negotiations with Penobscot headmen, who seemed interested.²¹ Encouraged by the envoys, two Penobscot delegates traveled to Boston in July and engaged in preliminary discussions. Four Penobscots presented themselves in November for the formal negotiations that produced the treaties with Massachusetts, New Hampshire and Nova Scotia.

New England officials wanted peace treaties that would embrace all of the tribes with which they were in conflict, and they hoped that the Penobscot would serve as middlemen, speaking for the others in negotiations and using their network of couriers and their system of diplomacy to bring all of the others in. Their expectations were modeled on their relationship with the Iroquois. Commissioners from several British colonies regularly met with Iroquois chiefs at Albany, negotiated and presented gifts, and then relied on the Iroquois to treat with other native peoples through the famous diplomatic network of the Six Nations known as the Covenant Chain. In fact, in 1721, New England officials had asked the Iroquois to help them pacify the tribes of the northeast by pulling them within the Covenant Chain; the Mohawk tried but failed to overcome the historical enmity that separated them.²² In the end, even the threat of Iroquois reprisals against the northeastern tribes had failed to prevent war, or diminish

²⁰ See the valuable discussion of Mi'kmaq sailing skills by Olive Patricia Dickason, "La 'guerre navale' contre les Britanniques, 1713-1763," in Charles A. Martijn, ed., *Les Micmacs et la mer* (Quebec, 1986) 233-48.

²¹ R. Philipps, Journal of his Majesty's Vessel the William Augustus, [Sept. 1723]; Lt. Gov. Lawrence Armstrong to [Board of Trade], [1723]; Armstrong to Board of Trade, Dec. 2, 1725, CO 217/4 [microfilm copies of Colonial Office files used in Harriet Irving Library, University of New Brunswick, hereafter HIL] 259-61; 269-74; 314-5; Minutes, Nov. 3, 1724, in Archibald M. MacMechan, ed., *Nova Scotia Archives, III: Original Minutes of His Majesty's Council at Annapolis Royal, 1720-1739* (Halifax, 1908) 78-80; Lt. Gov. William Dummer to Col. Armstrong, Aug. 16, 1725, *Collections of the Maine Historical Society [CMeHS]*, 2d ser., 24 vols. (Portland, 1869-1916), X (1907) 321-3; Dickason, *Louisbourg and the Indians*, 76-8; Olive Patricia Dickason, *Canada's First Nations: A History of Founding Peoples from Earliest Times* (Toronto, 1992) 115-18.

²² National Archives of Canada [NAC], RG 10, Series II: Indian Records, vol. 1 (C1220) [mf at HIL], Meetings of the Commissioners of Indian Affairs in Albany, Jan. 7, 9, and 19; May 23, 29, and 30, 1723; *CMeHS*, 2d ser., XXIII (1916) 110-48, "Journal of Proceedings of Delegates of Six Nations," Oct. 10, 1722-June 4, 1723. For a discussion of the Covenant Chain, see Francis Jennings, "The Constitutional Evolution of the Covenant Chain," *Proceedings of the American Philosophical Society*, 115 (1971) 88-96; and *The Ambiguous Iroquois Empire: The Covenant Chain Confederation of Indian Tribes with English Colonies from its Beginning to the Lancaster Treaty of 1744* (New York, 1984).

the powerful motivations of territorial interest and encouragement from French civil and religious advisors.

When the Penobscot decided to seek a negotiated peace, however, they were perplexed by the expectations of New England officials. The Penobscot had neither the means nor the inclination to serve the English as the Iroquois did. Records of the treaty discussions, kept by New England clerks, reflect these differing perceptions, and must be read carefully. Where the New Englanders wanted the Penobscot to speak for all "eastern Indians" and reach agreements that would bind all, the Penobscot delegates made it clear that they spoke for themselves, could report what was said to the others, but in the end the others must judge for themselves. Negotiation was one thing, approval another. In a number of different ways, the Penobscot indicated that their approval was tentative; the ratification process alone would determine the extent to which the various native peoples would accept the agreements reached.

When two Penobscot negotiators came to Boston in July 1725, they had promises only from the Maliseet and Mi'kmaq and no other native people, beside the Penobscot themselves, that they would remain at peace during negotiations.²³ In their preliminary discussions with Lt. Gov. Dummer and the Massachusetts Council, they made clear that what they wanted at this stage was a cease-fire. If the New Englanders would agree to this, the Penobscots would acquaint Indians along the shore and promised not to be deterred by the French. They were confident that they could prevail on the other Indians, but made no claim that they already spoke for all: "When we have heard what you have to say, if we like it, we can prevail with the other Tribes. As to the Eastern Tribes [meaning the Maliseet and at least some Mi'kmaq], they are all agreed as one already."²⁴ Dummer answered with some bluster about his military ability to crush the Indians, but claimed that "we delight not in war," and would agree to a cessation of hostilities east of Kennebec River for forty days, during which time the Penobscots were to bring in the other Indians to treat for peace. Reflecting his hope that the Penobscot could speak for all of the Indians east of the Kennebec, Dummer asked their spokesmen whether the Norridgewock Indians (i.e., the Kennebec) were included in the cessation of arms, and the Penobscots answered that they were not. Somewhat baffled, Dummer asked for clarification. The Penobscots replied that "we promise for none but the Indians on our Land. We cannot pretend to promise for the Norridgewock Indians nor any other. They being dispersed up and down, & may do mischief." The British had trouble grasping the main point here, and they continued to do so. The Penobscots

²³ John Stoddard and John Wainwright to Lt. Gov. Wm. Dummer, New-Castle, June 28, 1725, *CMeHS*, 2d ser., X, 298-99.

²⁴ "Conferences had at the Council Chamber in Boston between the Honorable the Lieut Governor and Council, and Loron & Ahanquid (Indians sent from the Penobscot Tribe) Captain Jordan and Captain Joseph Bane being Interpreters," July 28-Aug. 2, 1725, RG 1, vol. 12, Public Archives of Nova Scotia [PANS].

presented themselves as messengers for the other natives, not as negotiators who could bind any people but their own. And at this stage, they needed time to reach the other groups to inform them that a cease-fire was in effect. In fact, it was to take several months for the Penobscots even to reach the stage where they felt they could negotiate with any hope that other natives would accept what they agreed to.

Four Penobscot negotiators came to Boston in November, a good deal more than forty days later, and with news that they had not heard yet from Abenaki in Canada. In agreeing to act for all of the other groups, they continued to draw the distinction between negotiating and ratifying, and the minutes recorded: "Whereas there are only Delegates of the Penobscot Tribe, It is agreed, That the Treaty at present concluded on shall be further Ratified & Confirmed in a Publick and Solemn Manner by the Chiefs of the several tribes at [blank] sometime in the Month of [blank]."²⁵ This point is important, because the subsequent treaties drafted in Boston refer to the four negotiators as "delegates from Penobscott, Naridgwack, St. Johns, Cape Sables and other tribes inhabiting within His Majesty's territories of Nova Scotia or New England,"²⁶ giving the impression that the negotiators committed the other natives, when in fact they did not. They met with commissioners from Massachusetts and New Hampshire for the first few days and agreed to terms which were incorporated into several different documents. The first two were with Massachusetts in one of which the natives acknowledged that they had been in hostilities and now wished to bury the hatchet, accept British sovereignty and settle land disputes; and in the other Dummer promised to recognize the Indians' right to hunt, fish, and plant on their own land. A similar reciprocal exchange of promises followed with the government of New Hampshire.

Then on December 2, Paul Mascarene was introduced to the conference. He had arrived from Nova Scotia with the mandate of the Lieutenant Governor of that province

²⁵ Minutes of Nov. 17, 1725. Of the several versions of the Boston negotiations, I recommend the transcript housed in the Public Archives of Nova Scotia, identified as RG 1, vol. 12, Transcripts from Papers of the Massachusetts Government relating to Nova Scotia . . . obtained from the Public Record Office in London, vol. 1, Record Commission 1884 & 1885. Another readable version is in CO 5/898, although it too appears to be a transcript. The published version of the conference, as transcribed by Baxter, is in *CMeHS*, 2nd ser., XXIII (1916), 189-202. This version, unfortunately, is incomplete and otherwise seriously flawed. None of the July-August negotiations appear here, nor any of the negotiations in December between Paul Mascarene and the Penobscot delegates. Moreover, Baxter made confusing errors in the order of the pages he copied.

²⁶ "The Submission and Agreement of the Delegates of the Eastern Indians," and the reciprocal promises made by William Dummer, signed and exchanged in the General Court of Massachusetts, Dec. 15, 1725, appear in RG 1, vol. 12, PANS, and CO 5/898. These files also include Dummer's letter to the secretary of state, Jan. 18, 1726. See also Wentworth's report to the New Hampshire legislature on Dec. 27, 1725: Nathaniel Bouton, ed., *Documents and Records Relating to the Province of New Hampshire*, IV (Manchester, 1870), 187-90.

to negotiate a treaty with the Indians, and he, too, drew up two separate reciprocal documents, one of which was called Articles of Submission and Agreement and the other a list of promises similar but not identical to those made by William Dummer. While Mascarene followed the Massachusetts model in broad outline, his documents made no references to disputes over what land was Indian and what was not, either within Nova Scotia or without. The wording clearly indicated that the two treaty instruments applied to Nova Scotia alone. Mascarene opened by explaining this: "Tell 'em as the circumstances of the Government of the Massachusetts and Nova Scotia are different so there will be several small Articles distinct from the Articles which they entered into with the Massachusetts."²⁷ The Articles of Submission and Agreement which the natives signed fell into two parts. The submission was effectively an oath of allegiance to the British Crown in which the Indians acknowledged King George as "the rightful possessor of the Province of Nova Scotia" by virtue of its cession by the King of France, accepted "King George's jurisdiction and dominion over the territories of the said province," and pledged their future loyalty in as perfect a manner as ever they had to the King of France. In the five articles that followed the submission, the natives were to agree not to "molest" British subjects "in their settlements already made or lawfully to be made," to make restitution for "any robbery or outrage committed by any of the Indians," to refuse help to British military deserters, to avoid private revenge by seeking redress "according to His Majesty's laws," and to release any prisoners they had taken during the recent war.²⁸ Like Dummer, Mascarene found the Penobscots unwilling to make concrete commitments for other natives. They declined comment on three of the proposed articles, replying: "We can say nothing to it at present; we act & do for the Indians of St. Johns & Cape Sables, but we cannot promise that the Penobscot will go to Annapolis. All that we have heard we shall make known to all the Tribes"²⁹ In other words, they were messengers, and the Maliseet and Mi'kmaq would judge for themselves on the particulars of the treaty and act accordingly.

In addition, as Dummer had done, Mascarene offered reciprocal promises to the natives in a separate document, using language appropriate to Nova Scotia's circumstances. He promised "all marks of Favour protection and Friendship;" freedom from molestation "in their persons, Hunting Fishing and Planting Grounds" as well as "in any other their Lawful occasions;" freedom to practice their Catholic religion; protection by His Majesty's laws "whereof the Indians shall have the Benefitt equall with His Majestys others Subjects;" rewards for returning runaway soldiers; and release of Indian prisoners at Annapolis at the time of ratification. These promises were predicated on assumptions stated in the preamble: the Indians' submission to King George, their acknowledgement of "His Majestys Just Title to the Province of Nova

²⁷ Conference minutes, Dec. 2, 1725, RG 1, vol. 12, PANS, and CO 5/898.

²⁸ Articles of Submission and Agreement with Paul Mascarene, Dec. 15, 1725, RG1, vol. 12, PANS, and CO 5/898.

²⁹ Conference minutes, Dec. 2, 1725, RG 1, vol. 12, PANS, and CO 5/898.

Scotia or Accadie,” and their promise to live peacefully with all the King’s subjects. Whether the Penobscot delegates understood the purport of “His Majestys Just Title” is debatable; what is not is the British intention. When it drew up its treaty expectations in November 1724, the Nova Scotia Council’s first demand was that the natives:

Shall Acknowledge That the Province of Nova Scotia (alias Accadia) to its Utmost Extent & Boundarys, With all its Rivers, Cricks, Bays & Islands &^{ca} thereunto belonging; Belongs & Appertains (not only by Conquest) but as Settled at the Treaty of Utricht, to the Crown of Great Britain: And that his Majestys King George and his Heirs and Successors are the Sole Owners & the only True & Lawfull Proprietors of the Same.³⁰

Mascarene’s choice of language was obviously much milder and less specific than that of the Council. Yet, whether it conveyed the British intention may in the end be a moot question, since the larger issue is whether Mascarene’s promises, and the two-part treaty itself, survived subsequent events.

While the Nova Scotia treaty documents (i.e., the Indians’ promises and Mascarene’s return promises) were particular to that jurisdiction, a word is in order to prevent confusion about the application of the first treaty signed in Boston, the Dummer treaty. Nova Scotia is mentioned in this treaty, but in ways that were meant to clarify the role of the Penobscot delegates in the treaty-making process rather than to extend the treaty’s provisions to the natives of Nova Scotia. The document assented to by the Penobscot delegates is entitled “The Submission and Agreement of the Delegates of the Eastern Indians.” This careful wording in itself indicates that it only partially accomplishes its larger purpose, which is to gain the acceptance of the treaty by all of the Eastern Indians, not just the delegates. Moreover, an opening “whereas” clause introduces the Penobscot negotiators as delegates of several tribes including the St. John’s and Cape Sable Indians of Nova Scotia, and indicates that all are willing to end hostilities with all of the colonial governments of the region, from New York to Nova Scotia. Such a clause is descriptive rather than prescriptive. It is followed by a submission of the delegates “unto his Most Excellent Majesty King George...in as full and ample manner as any of our Predecessors have heretofore done,” a qualification that had meaning for the Penobscot delegates who were covered by previous treaties, but was meaningless for Mi’kmaq who had never before agreed to submit, by treaty or otherwise. The remaining text of the treaty must also be read carefully, for it indicates what terms were meant to apply in each of Massachusetts, New Hampshire, and Nova Scotia. The largest section deals with Massachusetts, and is introduced thus: “And we do hereby Promise and Engage with the Honorable William Dummer Esq^r. as he is Lieutenant Governor & Comander in Chief of His Maj^{ties} Province of the Massachusetts Bay, & with the Governors or Comanders in Chief of the said Province for the time being.” Several paragraphs follow, which apply to the Indians’ relations with Massachusetts alone, confirmed by periodic references to “the said Province of the

³⁰ Nov. 3, 1724, MacMechan, ed., *Original Minutes of His Majesty’s Council*, 78-79.

Massachusetts Bay” and phrases such as “within His Majesties Province afores[ai]d.” While throughout these paragraphs the Penobscot delegates are referred to as delegates of many tribes besides their own, the last promise to Dummer is solely a promise on behalf of the Penobscot who, in the event that other tribes refuse to ratify the treaty or renew hostilities, will “joyn their Young men with the English in reducing them to reason.”

There then follows a single paragraph dealing with New Hampshire, phrased as a promise to “the Honorable John Wentworth Esqr. as he is Lieut^l. Governor & Comander in Chief of His Majesties Province of New Hampshire [etc.]” “We do understand and take it,” states this paragraph, “that the said government of New Hampshire, is also included and comprehended in all and every of the articles aforesaid, excepting that article respecting the regulating the trade with us.” In contrast, none of Dummer’s treaty was extended to Indians living in Nova Scotia. Rather, in a single short paragraph worded as the delegates’ engagement with Lawrence Armstrong, Lieutenant Governor of Nova Scotia, they promised that the peace there was to be based on “articles agreed on with Major Paul Mascarene, commissioned for that purpose; and further to be ratified as mentioned in the said articles.” The same clause required the Penobscot delegates to “promise and engage with the Hon. Lawrence Armstrong, Esq. Lieut. Governor and commander-in-chief of his Majesty’s province of Nova Scotia or Accadia, to live in peace with his Majesty’s good subjects and their dependents in that government.” In this way, Dummer’s treaty facilitated the ratification process by ensuring that the Penobscot delegates would act in good faith by informing natives in Nova Scotia of the terms and perhaps explaining them. But beyond this, Dummer’s treaty did not apply to Nova Scotia; the fact that it was not presented thereafter to Nova Scotia natives for their ratification confirms that it was never meant to.³¹

Nova Scotia’s treaties were those negotiated by Paul Mascarene in 1725 and ratified at Annapolis in 1726, and they differed from the Massachusetts treaties in important ways. For example, previous bad experience between private traders and natives led the Massachusetts government to believe that they must control trade in order to prevent cheating and hard feelings. The Dummer treaty stated:

That all trade and Commerce which hereafter may be allowed betwixt the English and Indians shall be under such management and Regulations as the Government of the Massachusetts Province shall direct.

There was no comparable clause in the Mascarene articles, for the reason that the Nova Scotia government did not have the resources to manage and regulate trade throughout its sparsely populated jurisdiction. Massachusetts, in contrast, had a legislature that had passed laws regulating native affairs since the 1630s, and specifically regulating native trade since the 1690s. Every treaty between Massachusetts and its natives required

³¹ Submission and Agreement of the Delegates of the Eastern Indians, Dec. 15, 1725, RG 1, vol. 12, PANS

native acceptance of government trade regulation, sometimes in the form of government-operated truckhouses, within the colony.³² Nova Scotia was not yet ready for anything this elaborate.

Another critical difference had to do with the way in which each colony dealt with land questions. The Penobscot, who lived in Maine on the frontier of territory claimed by Massachusetts, had a particular axe to grind with the government of Massachusetts, whose settlers were pushing up the river valleys of Maine. They made it clear in their meetings in Boston in November 1725 that their land questions must be resolved. In this, they had no intention of speaking for Mi'kmaq of Nova Scotia or of negotiating for any natives besides themselves. The Massachusetts treaty dealt with the intrusion of Massachusetts settlers into Maine in the following way (with emphasis added):

That His majesty's Subjects the English Shall and may peaceably and quietly enter upon and Improve and forever enjoy all and singular their Rights of God and FORMER SETTLEMENTS properties and possessions within the Eastern parts of the province of the Massachusetts Bay [etc.]... Saving unto the Penobscot, Naridgwalk and other Tribes WITHIN HIS MAJESTY'S PROVINCE AFORESAID and their natural Descendants respectively all their lands, Liberties and properties not by them convey'd or sold to or possessed by any of the English Subjects as aforesaid...

In contrast, Mascarene's Articles of Submission and Agreement dealt with the land question in Nova Scotia as follows:

And we further promise on behalf of the said tribes we represent that the Indians shall not molest any of his majesty's subjects or their dependants in their SETTLEMENTS ALREADY MADE OR LAWFULLY TO BE MADE, or in their carrying on their traffick and other affairs WITHIN THE SAID PROVINCE.

So provocative was the increasing pressure of settlement that Massachusetts established a commission to examine native claims in Maine, and to look into charges that settlers had no deeds or proof of purchase from natives for the land they occupied.³³ No such commission was established in Nova Scotia, nor did the treaty for that province contemplate doing so for the obvious reason that there was yet no English settlement pressure in the northern colony. The fact that Massachusetts and Nova Scotia dealt with questions such as commerce and land in different ways reflects both the looseness of imperial policy guidelines and the differences in their situations. All governors were instructed by the Crown to treat with native peoples, but they had considerable discretion in how they did so. They were expected to follow the advice of their

³² Legislation includes "An Act for the better rule and government of the Indians in their several places and plantations," Province Laws, 1693-94, ch. 17, *The Acts and Resolves Public and Private of the Province of the Massachusetts Bay*, I (Boston, 1869) 150-51. Among treaties with trade clauses, see "The renewed submission of the Eastern Indians, and Recognition of their Obedience to the Crown of England," Jan. 28, 1699, Massachusetts Archives, XXX, 439-42.

³³ *Journal of the House of Representatives of Massachusetts*, VI [1724-25] (Boston, 1925) 431-33.

councils, however, and in this case the councils of Massachusetts and of Nova Scotia had quite different agendas. In a word, local needs and circumstances always were to shape a governor's service to the Crown. As time would tell, Nova Scotia's relationship with natives was to reflect the Nova Scotia situation rather than follow the New England example.³⁴

Overall then, the Boston conference of 1725 drafted several treaties, embracing Massachusetts, New Hampshire, and Nova Scotia in separate documents, and settled on a ratification process which required representatives of the various tribes to go in the summer of 1726 either to Casco Bay in Maine or to Annapolis, where they would meet directly with governmental officials to ratify the treaties.³⁵ The ultimate test of whom, among the Indians, agreed to the treaties negotiated by the Penobscots lies in the ratification proceedings which took place at Annapolis and at Casco Bay in the spring and summer of 1726. The Casco Bay signing demonstrates the limits: only Penobscots showed up, and much time was spent discussing the failure of the Kennebec and other eastern Abenaki tribes, then in Canada, to appear. While Paul Mascarene of Nova Scotia attended this conference, it was only to urge native attendance at Annapolis for ratification of the Nova Scotia treaty. Only the Massachusetts and New Hampshire treaties were ratified at Casco-Bay, just as only the Nova Scotia treaty was offered for assent at Annapolis. The procedure reflected the separateness of the jurisdictions and the distinctly different terms that the natives in each were being asked to ratify.³⁶

As it turned out, the Annapolis signing was more successful than anticipated, as representatives of the Passamaquoddy and Maliseet appeared, and the Cape Sables and Mi'kmaq from several other bands ratified. However, in reconstructing events at Annapolis, we are confronted by anomalies in the record, requiring attention both to the process of ratification as well as to the substance of what was agreed. In part, the problem arises from the lack of detailed minutes of negotiations between Mi'kmaq and British at Annapolis in 1726. Mascarene's copies of the treaty instrument signed at Boston are in the Nova Scotia records, and were obviously available to officials at Annapolis. We also have several copies of ratified treaties signed at Annapolis, and brief minutes of the Council meeting of June 4, the official ratification date. But none of the extant materials indicates what any Mi'kmaq signer might have said, or even that

³⁴ Nova Scotia and Massachusetts had distinctly different histories, yet there were also powerful cultural and economic links between them. For a full discussion of Nova Scotia's colonial connections with Massachusetts, see George A. Rawlyk, *Nova Scotia's Massachusetts: A Study of Massachusetts-Nova Scotia Relations* (Montreal, 1973).

³⁵ Conference minutes, Dec. 2, 1725, RG 1, vol. 12, PANS. Treaty exchanges of Dec. 15, 1725 between the Indian delegates and representatives of Massachusetts, New Hampshire and Nova Scotia are described in *Journals of the House of Representatives of Massachusetts*, VI, 414-5. Documents exchanged between Mascarene and native delegates are in CO 217/38.

³⁶ Early American Imprints #2751, *The Conference with the Eastern Indians, at the Ratification of the Peace, held at Falmouth in Casco-Bay, in July and August, 1726* (Boston, 1726).

the documents prepared at Boston were actually discussed by the two parties at Annapolis before the signatures were affixed. This contrasts starkly with the records of the initial negotiations at Boston, which are extensive and detailed, and with the equally detailed minutes of the ratification that took place at Casco-Bay in August 1726.³⁷ In a word, the experienced New Englanders kept good records; Nova Scotia officials had much to learn in this respect.

One would perhaps not expect the Casco Bay minutes to tell us anything about what happened at Annapolis but, indirectly, they provide useful clues. Major Paul Mascarene, who had taken up residence in Boston, was present at Casco Bay, again representing Nova Scotia. Lieutenant Governor William Dummer referred to Mascarene and the Nova Scotia treaty as he addressed the group on August 6. "The Instrument that Major Mascarene gave you at the signing the Treaty in Behalf of the Government of Nova Scotia or L'Acadie, will be Ratified and Confirmed to any Persons you shall send on your behalf to the Governour at Annapolis-Royal." Note that he spoke in the future tense: "any Persons you shall send." Loron, the chief spokesman for the Penobscot, and one of the four delegates who negotiated the various instruments in Boston, did not reply immediately. But, near the end of the conference, on the afternoon of August 9, Loron revisited this matter:

Major Mascarene told us the Government of Annapolis would Ratify the Treaty if we would send any Persons there on our Behalf for that Purpose; we don't suppose he is now going to Annapolis, but when he arrives there, we would pray him to take Care that that Government would send a Vessel for us to go there to Ratify the Articles of the Treaty, because the Bay is too bigg for us to pass over in our Canoes.

Mascarene replied:

I shall write to the Governour, who is now at Canso, of your Desire, upon my arrival at Boston, and doubt not of His Compliance therewith, a few of you will be sufficient to carry the Instrument I gave you at Boston, to be Ratified by the Lieut. Governour or Commander in Chief, and I don't doubt but that those that come will be made very Welcome.

This exchange carries a clear meaning: as of August 9, 1726, no Penobscot had been to Annapolis to ratify the treaty agreed to at Boston.

Let us turn now to Annapolis and attempt to reconstruct events there. While the Council minutes we have for June 4 contain no details, we have several copies of Mascarene's treaty with the signatures or marks of seventy-seven native persons, some identified as chiefs, some as captains, and others with no title but many identified

³⁷ The Casco Bay Conference took place from July 16 to August 11, 1726. Within weeks of the conference, a Boston printer had printed the minutes and offered them for sale as a pamphlet, making them readily available to anyone who might want to know what had transpired. Early American Imprints #2751, *The Conference with the Eastern Indians, at the Ratification of the Peace, held at Falmouth in Casco-Bay, in July and August, 1726* (Boston, 1726).

according to their nation, band, or district.³⁸ There is representation from the Passamaquoddy, Maliseet, and some of the Mi'kmaq districts. The largest number, identified as "of this River," were Mi'kmaq from the Annapolis River valley, those closest to the British headquarters. Other Mi'kmaq were from Cape Sable, Shubenacadie, Minas, Chignecto, Richibuctou, Shediac, and a single person from Cape Breton, not identified as a chief. There is no name from Gulf shore villages such as Pictou or Antigonish, or from Miramichi or beyond, indicating that not all areas were represented. While chiefs and other headmen probably signed for their bands, there is no indication that others, including the one from Cape Breton, signed for anyone but themselves. Particularly interesting is the fact that three of the signers were from Pentagoet, the Penobscot village on Mount Desert Island in Maine. These Penobscot signers included a François Xavier, namesake of one of the negotiators of the treaty at Boston, if not the negotiator himself. The date on all surviving copies of the treaty ratified at Annapolis is given as June 4, 1726.

Something is obviously amiss. Documentary evidence suggests that those who were at Casco Bay knew nothing about a ratification at Annapolis that had supposedly taken place two months earlier. Moreover, Penobscot signatures appear on documents dated June 4 at Annapolis, yet on August 9 Penobscot leaders were asking for a ship to carry them to Annapolis for this purpose.

Before drawing conclusions, however, we should note other anomalies in the record-keeping of the time. In the summer of 1727, there was another treaty conference at Casco Bay, and the minutes of this conference were again officially recorded and subsequently published. The man in charge of the minutes was John Wainwright, clerk of the Council of Massachusetts, a person experienced in the way of business of the Great and General Court, the legislature of that province. After a few days' delay, the conference began on July 17. The minutes list all present: first the lieutenant-governors of Massachusetts and New Hampshire, Paul Mascarene from Nova Scotia, and all of the officials of their party, consisting largely of the Council of Massachusetts, and then the various headmen of several eastern Abenaki peoples: chiefs, captains, and councillors of the Norridgwalk, Arresaguntacook, Wowenock, and Penobscot. Fifty-five Abenaki are named, but the clerk made clear that there were others present who were not named.³⁹ It was an impressive list, and obviously a well attended conference. But one does not read very far into the minutes before realizing that only Norridgwalks and Wowenocks were present when the conference began. Late on the first day, the Arresaguntacook arrived and it was July 20, three full days later, before we find any reference to the Penobscot, whose spokesman, Loron, now made his first comments.

³⁸ Three separate copies of the treaty, with identical texts but different signatures, are found in C.O. 217/4 and C.O. 217/5. The document with the reciprocal promises made by John Doucett, following the text agreed to at Boston by Paul Mascarene, is also found here.

³⁹ Early American Imprints # 2885, "The Conference with the Eastern Indians at the further Ratification of the Peace, Held at Falmouth in Casco-Bay, in July 1727" (Boston, 1727).

In these first days, considerable business transpired. The Penobscot arrived only after all of the proceedings of the previous year had been reviewed, and the three nations who had not signed in 1726 had made their decision to become party to the treaty originally negotiated at Boston.

Anyone who has taken minutes of a meeting can relate to the record-keeping method here. Typically, secretaries list all of those who attend a meeting at the outset of the minutes. As new participants arrive, their names are added. The list at the top does not tell you who was there from the first. This is certainly the case with the journals of the legislature of provincial Massachusetts. All of the towns are listed, with the names of the representatives who attended the session, and the date affixed to this list is the opening day of the legislative session.⁴⁰ It is not an accurate list of those who were present from the beginning, and in fact, it is no indicator of how much time a given representative actually attended.

Such evidence might be considered circumstantial, but it makes sense of apparent contradictions in the more direct documentary evidence: the treaty ratified at Annapolis in 1726 was not ratified at a grand ceremony on June 4. It is probable that some local Mi'kmaq headmen were present on June 4, but unlikely that more than a handful of the 77 natives who eventually signed were present. We have minutes of the Nova Scotia Council meeting of May 31 reporting that on that day "the Chief of the Cape Sable Indians, and Others of Some of the Tribes of this province were...come to Ratifie the said Articles," and they were asked to come back on June 4. The minutes of that day ambiguously reported the presence of "the Indians with the Deputees of the Inhabitants of this River." Two Acadians were sworn in as interpreters and, in a brief ceremony, the treaty as received from Boston was read first in English, then in French, paragraph by paragraph, with a Mi'kmaq translation. The minutes report nothing said by any native person. "They [the Mi'kmaq] to each thereof Gave their Assent, and Signed Sealed and Delivered the Same to his Honour the Lt. Governor of Annapolis Royall." The reciprocal promises of the British were delivered "to the Chief of Said Indians," implying only one, presumably the chief of the Cape Sables mentioned in the May 31 minutes. The minutes report that as soon as the ceremony was completed, "the Governor gave then Orders That the Indian prisoners Should be released, And gave them an Entertainment and Sev[era]l presents as Tockens of His Majestys Protection."⁴¹

If we look at the Council minutes before and after June 4, we get a fuller picture of a process that was actually spread over a considerable time. Mascarene's treaty documents arrived at Annapolis from Boston at least two and a half months earlier and were read at a Council meeting on March 21. Council's first action was to send for the

⁴⁰ See, for example, the minutes for the opening day of the 1725 session, May 26, 1725, *Journals of the House of Representatives of Massachusetts*, VI, 215-16.

⁴¹ MacMechan, ed., *Original Minutes of His Majesty's Council*, 114 -17.

Acadian deputies in the Annapolis River valley “that they may Acquaint Such Indians as are in this River of said Peace being Concluded at Boston.” Then they expanded the process by informing Mi’kmaq bands at Minas, Cobequid, and Chignecto, again working through Acadian deputies there. British reliance on Acadian middlemen, long associated with the Mi’kmaq, ensured communication along a network that the British themselves only faintly understood, the probable reason why there were never any native charges of mistranslation as there were in Maine. Minutes after June 4 show that the process continued, but not smoothly. On June 23, Council learned that a number of Mi’kmaq from the Minas and Cobequid area had assembled to come to Annapolis but then dispersed “to wait for some Other Advice” when informed by “One Sheegau a Cape Sable Indian” that the governor would not treat with them “unless the Chiefs of every Tribe were all present together.” Council took immediate steps to inform them that this report was false and that if they would come to ratify, they would be received as friends. And again, on learning that Maliseet and Passamaquoddy headmen thought it dangerous to cross the Bay of Fundy in their canoes, the Council ordered a vessel to go across and pick them up at the mouth of the St. John River.⁴² This fuller context shows us that ratification was a long drawn out process, not something accomplished in a single day.

What this context makes clear is that the documents received from Paul Mascarene were redrafted and dated June 4 to correspond with the Council meeting when the first natives signed. The documents were then offered to Mi’kmaq, Maliseet, Passamaquoddy, and Penobscot headmen to sign as they became available. Ratification was spread over several weeks, perhaps months; it did not take place on one day. This explains why, two months after June 4, there was no knowledge at Casco Bay of a ratification at Annapolis. It would suggest that Penobscot and many other signatures under the date June 4 were added later. It would explain why during the summer of 1726, as W.C. Wicken has pointed out, Mi’kmaqs were uncertain whether they were covered by a treaty.⁴³ It would explain why there were several copies of the treaty documents, written in different hands, with different (and overlapping) signatures, rather than a single document signed by all who were present at one time, as we might expect.

Our interest should focus on three signed treaty copies sent to the Board of Trade in London under covers dated July 27, August 16, and November 24 — the first treaty with 16 names, the second with 64, and the third with 77 — suggesting (without considering any other evidence) that the process was spread out over several weeks. Each covering letter made clear that the treaty consisted of two parts (i.e., Amerindian

⁴² See Council minutes of March 21 and June 23, 1726, in *MacMechan, ed., Original Minutes of His Majesty's Council*, 110-11, 119-21.

⁴³ Wicken, “26 August 1726,” *Acadiensis*, XXIII, 19.

promises and government counter-promises), and both were enclosed in each case.⁴⁴ Lieutenant-Governor Lawrence Armstrong reported first from Canso, but he relied entirely on information sent to him from Annapolis and it is clear that he was not present at Annapolis on June 4 or in the three months thereafter.⁴⁵ John Doucett, Lieutenant-Governor of Annapolis, wrote the second letter to the Board of Trade, dated August 16, ten full weeks after the date on the treaty. The enclosed treaty was signed by 64 natives identified as Maliseet, Passamaquoddy and Mi'kmaq from the five villages closest to Annapolis.⁴⁶ It appears that the signatures of those from Richibuctou, Chignecto, Shediac, and Cape Breton all came later. In a July 27 letter, Lieutenant Governor Armstrong informed the Board of Trade that "in the middle of September next I shall meet a Considerable body of Indians at Annapolis Royall to Confirm the Peace." While there is no record of such a meeting, Armstrong wrote from Annapolis on November 24, enclosing the third copy of the treaty, showing the marks or signatures of 77 natives, including many of those reported earlier. It appears to be a clerk's consolidation of earlier signings, with signatures from Richibuctou, Chignecto, Shediac and Cape Breton added.⁴⁷ The existence of several documents rather than one may even suggest that not all of the Mi'kmaq who signed came to Annapolis. Rather, copies might have been carried about by British officials eager to get as many signatures as possible. Whatever the case, the process would have allowed time for widespread discussion of the treaty in the scattered villages of the Mi'kmaq people, in the traditional consensus-building manner of Mi'kmaq politics.⁴⁸

Apart from process, there is the matter of substance: what was agreed to at Annapolis, and how did it differ from what the eastern Abenaki agreed to at Casco Bay? At Annapolis, the first of what we now recognize as several meetings with native people took place on June 4, 1726. Lieutenant Governor John Doucett officiated in the absence of both Governor Armstrong and Mascarene, the latter of whom had never returned to Nova Scotia but wintered in Boston and then went to Casco Bay for the signing there.

⁴⁴ The documents discussed in this paragraph are found in the Lieutenant-Governors' reports to the Board of Trade, found in C.O. 217/4 and 5. Duplicates appear in the files of the Secretary of State, in C.O. 217/38. In the 1720s, colonial authorities reported both to the Board and to the Secretary of State in charge of colonies. Such letters from Nova Scotia contained substantially the same information; both included copies of the treaties.

⁴⁵ Armstrong to Board of Trade, Canso, July 27, 1726, C.O. 217/4, 346-53.

⁴⁶ John Doucett to Board of Trade, Aug. 16, 1726, C.O. 217/4, 316-18. The treaty follows at p. 320. Of the 64 names, at least 25 were Maliseet. The five Micmac bands or villages represented - Cape Sable, Shubenacadie (or Checebenacady), La Have, Minas (or Minis), and Annapolis River - represented fewer than half of the Micmac bands.

⁴⁷ Armstrong to Board of Trade, Annapolis, Nov. 24, 1726, C.O. 217/5, 1-3.

⁴⁸ W.C. Wicken writes about village councils and their role in consensus-building in "Treaty Making in the Eighteenth Century Northeast," a paper presented at the Conference on Early American History and Culture, University of Michigan, June 3, 1995.

The Mascarene Treaty was redrafted slightly at Annapolis to reflect the fact that Doucett, as Lieutenant Governor of Annapolis (a position subordinate to Lieutenant Governor Lawrence Armstrong) was in charge; a new preamble or "whereas" clause was added to explain that the treaty now being ratified was the same as the articles of submission and agreement originally negotiated at Boston, and then the Mascarene wording followed verbatim. Mascarene's reciprocal promises to the Indians were likewise redrafted at Annapolis over Doucett's name. In substance, however, the document was as Mascarene had first written it, consisting of several pledges to the Indians on behalf of the British crown, most notably the pledge that the Indians "shall not be molested in their persons, hunting, fishing and their planting on their planting ground, nor in any other their lawful occasions." The reciprocal promises bore Doucett's signature only; whether each chief received a copy, as the one chief did on June 4, is not reported. As documents, however, the two instruments were physically separate, and their subsequent histories were quite different for, while the Articles of Submission and Agreement were later to be renewed, Doucett's promises were never to be heard of again so far as the archival record discloses.⁴⁹ The ratification process in Nova Scotia was completed in 1728, when Maliseets from the upper St. John valley visited Annapolis specifically to sign the articles.⁵⁰

How effective were these treaties? Did both sides honour them, and did they retain their force beyond the 18th century? The evidence is substantial that neither the British or natives thought so. While there was no outright war until the 1740s, the British complained from time to time that natives were not abiding by the treaties. Moreover, it is clear that French officials at Louisbourg did not like them and, in fact, succeeded in keeping some Mi'kmaq from signing them and others who had signed from honoring them.⁵¹ When another colonial war did break out between Britain and France in 1744, Mi'kmaq and Maliseet quickly resumed their open support of France. Officials in Quebec ranked the Mi'kmaq first among all of their native allies in America, and official journals catalogued the numerous scouting, raiding, courier, and other activities of native warriors not only within traditional territory but as far west as the New York frontier. At one point, French officials considered urging the Maliseet to resettle in New France, as many eastern Abenaki had on the St. Francis River and, for a time, there was a so-called "Acadian village" of Nova Scotia natives near Quebec City.⁵² In 1744,

⁴⁹ C.O. 217/38 and C.O. 217/4. See also footnote 57.

⁵⁰ Ratification of May 13, 1728, in W. E. Daugherty, ed., *Maritime Indian Treaties in Historical Perspective* (Ottawa, 1983), 79; L. Armstrong to Secretary of State, Annapolis Royal, July 9, 1728, C.O. 217/38.

⁵¹ Dickason, *Louisbourg and the Indians*; W.C. Wicken, "Living Within the Imperial Vice: The Mi'kmaq and Acadians of La Have, 1690-1726," paper presented to the Canadian Historical Association, Kingston, June 1991, 28-29.

⁵² "Journal of Occurrences in Canada; 1746, 1747," E. B. O'Callaghan, ed., *Documents Relative to the Colonial History of New-York, X: Paris Documents* (Albany, N.Y., 1858), 89-132.

outraged by the participation of Mi'kmaq and Maliseet warriors in a French attack on Annapolis and by native attacks on New England ships and sailors, Massachusetts formally declared war on the Mi'kmaq and Maliseet. At the same time, they warned Penobscot and other Maine natives, whom they designated "friend Indians," to stay out of the territory of the "rebel Indians" lest they be mistaken for the latter.⁵³

The question remains, could treaty obligations survive when both sides acknowledged themselves to be in hostilities? The earlier comments of the Penobscots in 1725 may be useful in this respect. When they negotiated in Boston, they found that the British were eager to read the terms of old treaties to them and seek their renewal.

[Nov. 24, 1725] Indians. As you have read over to us several of the former Treatys with our Fore Fathers, we think it would be better to come wholly upon a new footing for all those former treatys have been broke, because they were not upon a good footing...⁵⁴

In other words, it was the British rather than the natives who looked for continuity in the treaty relationship; the natives believed that treaties broken were behind them, probably broken because they were "not upon a good footing." Olive Dickason supports this view. She writes:

The English insisted on their treaties, but also arranged for ratifications and confirmation of the main treaty to make sure that all the chiefs considered themselves included in its terms. Of the series with the "Eastern Indians" that followed the 1725 treaty, the texts make it evident that the English considered them all to be ratifications or confirmations of the first one. The Indians shared no such view and considered each new signing as a separate treaty. In this they were encouraged by the French, with whom they signed no treaties.⁵⁵

It appears that both Mi'kmaq and British agreed that the treaties of 1725-26 were terminated by subsequent hostilities. In 1749, following completion of the war with France (1744-48), the British offered to renew the treaties with the province's natives. The Maliseet and Passamaquoddy agreed, but only one band of the Mi'kmaq participated in the signing at Halifax and, within months, this band from Chignecto joined other Mi'kmaq in hostilities against British soldiers. British intelligence reports indicated that French Catholic missionaries were actively engaged in stirring up the Mi'kmaq to carry on hostilities against the British throughout the province, and these reports seemed confirmed by a letter from Cape Breton and Antigonish Mi'kmaq headmen, written down for them by Abbe Maillard of the Holy Family Mission at Chapel Island, in which the Mi'kmaq asserted that they "can make neither peace or alliance with you." Governor Cornwallis responded by issuing a proclamation calling for the destruction of the Mi'kmaq, and for several years hostilities were carried on

⁵³ *CmeHS*, 2d ser., XXIII (1916), 296-8, "Declaration of War," Boston, Oct. 19, 1744.

⁵⁴ "Conference with the Delegates of the Indian Tribes," RG 1, vol. 12, PANS.

⁵⁵ *Supra*, note 2 at 79.

between the British and the Mi'kmaq in what some officials termed "the Micmac War."⁵⁶ The courts may consider whether the treaties of 1725-26 somehow survived these hostilities in some legal sense, but there is nothing in the historical record to indicate that either the Mi'kmaq or the British thought so.

Hostilities aside, the treaties of 1725-26 were eventually superseded by the treaties signed by the British with the native groups of the province in 1760 and 1761. In the first of these, Maliseet and Passamaquoddy acknowledged that they had conducted hostilities contrary to their treaty promises. Never the less, they were now willing to renew those promises and, to ensure clarity, the 1760 treaty document quoted *verbatim* the terms agreed to at Boston, ratified at Annapolis in 1726, and renewed in 1749. As in 1749, there was no evident renewal of the Mascarene-Doucett promises to the natives nor was there mention of them in any of the minutes of negotiation or related documents.⁵⁷ The treaties signed in 1760-61 with each of the various Mi'kmaq bands in the province differed from this Maliseet-Passamaquoddy treaty in one fundamental respect: while terms offered the Mi'kmaq were similar in substance, they were not presented as a renewal of any earlier treaty, and the extant documentary evidence shows no reference to the proceedings of 1725-26. The Mi'kmaq treaties were treaties *de novo*, renewed subsequently in 1779, without reference to any previous treaty agreement between the Mi'kmaq and the British.⁵⁸

Taken together, hostilities and the subsequent treaties of 1760-61 terminated the treaty agreements signed in 1725 and 1726. One can rightly argue that there are ideas and specific phrases found in the original Boston agreement that form the basis of subsequent treaties, and in the case of the Maliseet and Passamaquoddy, there was a renewal in 1760 (revival would be a more historically descriptive term) of the submission and articles signed by representatives of their people at Annapolis in 1726. However, despite the use of earlier language and a similarity in the obligations assumed by the natives in all of the treaties, the treaties of 1760 and 1761 thereafter defined the legal and historical relationship between Nova Scotia and its native people. There is no

⁵⁶ Council Minutes, Aug. 13-14, Sept. 18, Oct. 1-2, 1749, RG 1, vol. 186, PANS; J. Murray Beck, "Edward Cornwallis," *Dictionary of Canadian Biography [DCB]*, IV (Toronto, 1979), 168-71; Micmacs to Cornwallis, [Sept. 22] 1749, CO 217/9, p. 116; Gérard Finn, "Jean-Louis Le Loutre," *DCB*, IV, p. 455; Le Loutre, *Autobiography*, 40-49; Patterson, "Indian-White Relations," 29-37.

⁵⁷ Council Minutes, Feb. 21, 22 and 29, RG 1, vol. 210, pp. 114, 115-16; draft treaty in MG 1, vol. 258, PANS, pp. 66-83; St. John's [Maliseet] and Passamaquoddy Treaty of Feb. 23, 1760, CO 217/18.

⁵⁸ Council Minutes, March 10, 1760, RG 1, vol. 210, p. 117-18; La Have treaty, March 10, 1761, Andrew Brown Manuscripts, #19071, PANS; "Ceremonials at Concluding a Peace," June 25, 1761, CO 217/18, pp. 276-84; Miramichi treaty, June 25, 1761, RG 1, vol. 165, PANS, pp. 162-65; Shediac treaty, June 25, 1761, HIL; Treaty of Sept. 26, 1779, with the Miramichi, Restigouche, Richibucto, and Shediac bands, CO 217/54, pp. 252-57.

historical basis for arguing that the treaties of 1725-26 “existed” in 1982, as required by section 35 (1) of the Constitution. There have been twentieth-century arguments to the effect that all of the Nova Scotia treaties with aboriginals together represent a “Covenant Chain”, implying that all treaties were linked and remain valid, but there is no historical evidence to support this claim, while the concept of a “Covenant Chain” itself — originally used to define the relationship established by the British with the Iroquois in the seventeenth century — is an unjustified misuse of the term.⁵⁹ Unless the courts can find a way to breathe new life into old treaties, the treaties of Boston and Annapolis are interesting as historical artifacts but they lack the evidentiary support they would need to be viewed as valid treaties today.

⁵⁹ Covenant Chain references appear mostly in recent materials prepared by the Union of Nova Scotia Indians, such as “Treaty Federalism and the Covenant Chain,” (1992). For references to the literature on the Iroquois Covenant Chain, see note 21.