

“HEARD IT FROM OUR GRANDFATHERS”: MI’KMAQ TREATY TRADITION AND THE SYLIBOY CASE OF 1928

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In 1928 the Grand Chief of the Mi’kmaq people, Gabriel Syliboy,¹ was found guilty of hunting muskrats out of season in Unamaki.² In delivering his decision, County Court Judge George G. Patterson ignored oral testimony provided by community members and stated that the *Treaty of 1752*, granting “free liberty of hunting and fishing as usual”, had not been “made with the Mick Mack Tribe as a whole but with a small body of that tribe living in the eastern part of Nova Scotia proper, with headquarters in and about Shubenacadie”.³ As Grand Chief Syliboy was not a member of this band, he was not covered by the Treaty’s provisions. Even if he had been, however, Judge Patterson stated that Syliboy would still have been found guilty because at the time the *Treaty of 1752* was signed the Mi’kmaq did not have the “status to enter into a treaty” as they were not then an independent power.

In approaching treaties signed with Mi’kmaq peoples, federal and provincial governments have ignored community perspectives and reinforced Judge Patterson’s viewpoint of treaty-making. Though treaty issues have been before the courts on numerous occasions over the past sixty years, scant attention has been focused on how the Mi’kmaq understood treaties both at their signing and afterward. A 1974 memorandum, for instance, sent by Nova Scotia’s deputy Attorney-General, to the president of the Union of Nova Scotia Indians noted that:

The law in Nova Scotia would appear to be basically summed up in the decision of *R. vs. Syliboy* (1929), 50 CCC 389, a decision of the County Court. In that particular case the court decided that the treaties referred to were not made between competent contracting parties and did not extend to the particular people in question.⁴

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¹The grand chief oversees the operation of the Grand Council, the traditional Mi’kmaq political structure of the seven Mi’kmaq districts in the Atlantic region. On Mi’kmaq political organization, see Virginia Miller, “Social and Political Complexity on the East Coast: The Micmac Case”, in R.J. Nash, ed., *The Evolution of Maritime Cultures on the Northeast and the Northwest Coasts of America*, (Vancouver: Simon Fraser University, 1983), pp. 43-47.

²Unamaki is the Mi’kmaq name for lands encompassing Cape Breton, the Madeleine Islands and the southern regions of Newfoundland. The offence occurred in Inverness County, Cape Breton.

³*R. v. Syliboy* (1928), 50 C.C.C. 889 at 390-391 [hereinafter *Syliboy*].

⁴Public Archives of Nova Scotia (PANS), RG 20, v. 885 #1, G.F. Coles to J. Knockwood, 9 August 1974.

As a result of Patterson's judgment, the Department of Indian Affairs refused to provide lawyers in cases where Mi'kmaq were charged with violations of provincial game laws, forcing communities to raise funds privately to pay legal expenses.⁵ Even when counsel was retained, clients were at times advised to plead guilty rather than enter treaty rights in defence.⁶

Government reliance on courts to determine policy has, by default, emphasized European-produced documentation for understanding both British and Mi'kmaq perspectives of the treaty-making process. Until 1985 this approach and Judge Patterson's decision guided federal and provincial understanding of 18th-century treaties between the Crown and the Mi'kmaq peoples. While in one sense natural when interpreting documents alleged to have legal significance, this approach has only a limited ability to convey how Mi'kmaq signatories and their descendants understood treaty relationships.⁷

In 1985 in *R. v. Simon*, the Supreme Court of Canada set Maritime treaty litigation on a fundamentally new course by concluding that the *Treaty of 1752* continued to have force in determining Mi'kmaq hunting rights. In delivering the Supreme Court's decision regarding whether the appellant was a direct descendent of those who had signed the treaty Chief Justice Dickson wrote:

The Micmacs did not keep written records. Micmac traditions are largely oral in nature. To impose an impossible burden of proof would, in effect, render nugatory any right to hunt that a present-day Micmac Indian would otherwise be entitled to invoke based on this Treaty.⁸

Government policy since *Simon* has contradicted the spirit of the decision by its unwillingness to integrate community viewpoints into its understanding of treaty relationships. In interpreting the Court's decision both federal and provincial governments continue to endorse Judge Patterson's view that the applicability of the *Treaty of 1752* was limited geographically and did not apply to all Maritime Mi'kmaq. As the Minister of Indian and Northern Affairs wrote in 1987:

With reference to the *Simon* decision, this case decided that the hunting provisions of the 1752 Treaty of Peace and Friendship still have application in Nova Scotia.

⁵Treaty and Aboriginal Rights Research Centre (TARR), Union of Nova Scotia Indians (UNSI) Collection, Ben Christmas Papers, 1930-1939, 92-1002-01-007, Chief John Maloney, 26 January 1934.

⁶For example, in early 1934 counsel for Gabriel Francis charged with killing deer during closed season decided not to enter treaties as a defense "upon learning of the Nova Scotia case". Public Archives of New Brunswick (PANB), RS 110, Game Law Violations, File 1934 - Victoria County, C.H. Elliot to H.H. Ritchie, 5 April 1934.

⁷W.C. Wicken, "The Mi'kmaq and Wuastukwiuk Treaties," 43 (1994) UNB Law Journal, at 241-53.

⁸[1985] 2 S.C.R. 397 at 408 [hereinafter *Simon*].

However, it is noted that the Supreme Court did not expressly conclude that the treaty is still in force outside reserves.⁹

Over the last twenty years elders from communities in Western and Northern Canada have testified in court cases regarding aboriginal and treaty rights. This testimony has focused principally on events dating from the late 19th and early 20th centuries.¹⁰ In contrast, with the exception of *R. v. Toney*¹¹, community testimony has not been a component of defence arguments in Maritime treaty cases. This is presumably because the relevant treaties were signed between 1725 and 1779, more than a century earlier than other treaties which have been litigated. In effect, the earlier time-frame of the Maritime treaties makes recovering community information much more difficult. The question may be raised, therefore, whether modern aboriginal perspectives on treaty relationships reflect an oral tradition or merely a strategic ploy adopted to meet current political objectives. The importance which this issue plays in judicial understanding of aboriginal societies is shown by the remarks of British Columbia Court of Appeal Justice Wallace in *R. v. Van Der Peet*.¹² In attempting to determine whether the Stolo peoples had commercial priority to the fishery, Wallace noted that the consequence of deciding in their favour would be to give constitutional protection to practices reflecting current aboriginal objectives rather than traditional aboriginal practices integral to the society, which he was unwilling to do.

A re-examination of the *Syliboy* case of 1928 provides a potential context for addressing this concern. While Judge Patterson's decision has now assumed an infamous character, his verbatim transcription of testimony by Mi'kmaq elders at the trial, later deposited at the Public Archives of Nova Scotia, provides a unique Mi'kmaq perspective of treaty relationships during the early 20th century. The testimony is important because of the identity of those testifying and the time when their views were recorded. Four of the six witnesses from the Mi'kmaq community were seventy years or older; thus their memories extended back into the mid-19th century. Their words reflect an oral tradition which had coalesced before the residential school system, centralization and the post-war boom precipitated significant alterations in Mi'kmaq society. Thus, their statements, in tandem with other materials, have the potential to be of genuine use in

⁹TARR, UNSI Collection, Box 01, 92-1003, William McKnight to Alexander Christmas, 23 December 1987. This view was reiterated two years later by McKnight's successor, Pierre Cadieux, to Alexander Christmas, 11 December 1989.

¹⁰Mary Ann Plychuk, "The Value of Aboriginal Records as Legal Evidence in Canada: An examination of Sources," *Archivaria* 32 (Summer 1991), 51-77. A recent exception was testimony offered in *R. v. Coté*, [1994] 3 C.N.L.R. 98 (Que. C.A.) at 103.

¹¹[1990] 3 C.N.L.R. 87 (N.S. Prov. Ct.).

¹²(1993) 83 C.C.C. (3d) 289 (B.C.C.A.).

understanding 18th-century treaties. Because of its potential significance, this source is transcribed at the end of this article.¹³

Judge Patterson's trial notes contain the condensed testimony of six residents of Unimaki. Besides Grand Chief Syliboy, the other witnesses were Joe Christmas (74 years old, and Grand Captain of the Grand Council), Andrew Alek from St. Peters (78), Andrew Bernard from North Sydney (78), and Francis Gould from Eskasoni (74). The youngest witnesses were the Grand Chief (52) and Ben Christmas, chief of the Mi'kmaq community at Sydney (in his early thirties).¹⁴ The Mi'kmaq witnesses testified that they had not previously been interfered with when hunting and fishing and thus were surprised at the charges. They attributed their previous freedom in harvesting to a treaty made with the English Crown many years ago. The fact that goods had been received annually from colonial and provincial governments by both the witnesses and their fathers was interpreted as testimony to the Treaty's continuing validity. Joe Christmas recalled "hearing that goods were given blankets under Treaty" while Grand Chief Syliboy remembered that "under Treaty get from Govt blankets and flour and some shoes and long coats ... From Mr. Boyd Indian Superintendent River Bourgoise When there is no game or hard months weather get order for \$10.00 for goods in store. In Spring get seeds." Francis Gould remembered his grandfather going to Sydney and getting gifts: "He told me he got these from the King. Under the Treaty. We Promised to keep Treaty and get these things in return." Ben Christmas was the only witness who provided details regarding 18th-century treaty signing ceremonies. He told the court that the *Treaty of 1752* was signed by two chiefs from Cape Breton, Andrew Hadley Martin, from Nyanza, and Gabriel Martin, from Eskasoni.

Believing that the government had no right to interfere with Mi'kmaq fishing or hunting, the community had assumed responsibility for the regulation of harvesting wildlife. Joe Christmas testified that when he was chief of the Mi'kmaq community at Sydney he had made himself:

familiar with traditional rights of tribe [and] made rules for people not to disturb other peoples rights. Told them they must not hunt when fur not fit but that they could at any other time. For example when muskrats had little ones must not kill them. When fur was fit they cd try and sell if they could hunt.

¹³PANS, RG 38, [Inverness Col], vol. 16:1916-1929, *King vs. Syliboy*. A transcript was first reported by Sak'ej Henderson and a version printed in R.H. Whitehead, *The Old Man Told Us: Excerpts from Micmac History, 1500-1900* (Halifax: Nimbus, 1991), pp. 327-330.

¹⁴The ages of Gabriel Syliboy and Ben Christmas were not recorded. The only Gabriel Syliboy appearing in the 1901 census of Whyccomagh, is 25 years old. National Archives of Canada (NAC), 1901 Federal Census, Nova Scotia, [hereafter 1901 census], Inverness County, Whyccomagh, p. 12, line 35.

Testimony at the trial emphasized the importance of parents and grandparents in conveying information to succeeding generations. Joe Christmas said, "Heard that according to treatys we had right to hunt and fish at any time. I cannot read. Heard it from our grand-fathers. Heard that King of England made Treaty with Micmacs with the whole tribe." Francis Gould emphasized what he had heard from his grandfather. Gabriel Syliboy said, "[s]ince I was boy heard that Indians got from King free hunting and fishing at all times."

Individuals who testified at the trial had matured in communities where hunting and fishing were important activities. The 1871 federal census, a time frame which corresponds roughly to the teenage years of four of the six witnesses, shows that 21% of all enumerated Mi'kmaq respondents in mainland Nova Scotia declared hunting as their principal occupation while another 29% stated that hunting and trapping constituted one of their activities.¹⁵ The census also reveals that the majority of families were living in temporary accommodations. Of the 224 recorded Mi'kmaq households, 154 or 68.8% were living in what enumerators termed shanties. Though it is not possible to define "shanty", it is reasonable to assume that most of these families were living in cabins or wigwams. These were conical structures made from slanting fir poles and covered with birchbark or with tar paper or canvas. Their use is noted by Silas Rand in 1850, Elsie Parsons in the 1920s and Clara Dennis in the early 1940s.¹⁶

According to the 1871 census, Mi'kmaq residents of Nova Scotia spoke principally Micmac within their communities. Though schools had been established in some areas, ability to read and write in English was uncommon. Among adults twenty years of age or older, 353 of 482 were unable to read English while 384 were unable to write.¹⁷ This was also true of the leadership. In 1879, for instance, Benjamin Christmas wrote to the Superintendent of Indian Affairs that "not one Micmac chief can write his own name in English."¹⁸

¹⁵Census figures were taken from the mainland counties. A total population of 1080 was enumerated with 257 individuals declaring an occupation.

¹⁶S.T. Rand, *A Short Statement of Facts Relating to the History, Manners, Customs, Language, and Literature of the Micmac Tribe of Indians in Nova Scotia and Prince Edward Island*, (Halifax: James Browne & Son 1850), p. 15; E.C. Parsons, "Micmac Notes: St. Ann's Mission on Chapel Island, Bras d'or Lakes, Cape Breton Island," *Journal of American Folklore* 39 (1926), p. 462; C. Dennis, *Cape Breton Over* (Toronto: Ryerson Press, 1942), p. 50.

¹⁷This does not mean that the remaining individuals could read or write English. In some cases, this information was not included in the enumerators' reports. However, in at least 31 cases, an individual was indicated as being unable to write but a similar mark was made showing they were unable to read.

¹⁸NAC, RG 10, v. 2077, file 11,404, Benjamin Christmas to Deputy Superintendent of Indian Affairs, 13 March 1879.

Thus, five of the six witnesses at Gabriel Syliboy's trial in 1928 had grown to maturity living, for the most part, separated from surrounding Euro-American communities. In this society, according to the 1871 census, fully two-thirds of all families lived in wigwams, temporary structures which could be easily dismantled and re-established elsewhere. Wigwams were necessary as household economies combined strategies which demanded mobility. Hunting, basketmaking, coopering and fishing all required that families move from one location to exploit a shifting resource base and to visit Euro-American settlements to sell wares and obtain needed supplies. Such patterns of exploitation and exchange had characterized Mi'kmaq society since at least the 17th century. Distinctiveness was reinforced further because few individuals could read or write English and Micmac was the principal community language.

An analysis of the 1901 federal census confirms the continuing importance of Micmac in inter-community discussions. The census shows that of the 709 enumerated Mi'kmaq born in 1883 or earlier, 75.7 percent could not read English while 79.1 percent could not write. 657 of the total, or 92.7 percent, declared Micmac as their mother tongue.¹⁹ For Unimaki, the residence of the six witnesses testifying in the Syliboy case, literacy figures in English were slighter lower. There, of the 307 enumerated Mi'kmaq born in 1883 or earlier, 79.5 percent were unable to read and 82.1 percent unable to write English. 299 of those enumerated declared Micmac as their mother tongue.²⁰

Based on this analysis of the 1871 and 1901 censuses and the trial record, one can conclude that the six witnesses in the 1928 trial spoke and thought in Micmac. Indeed, four of the six neither read nor wrote English. Thus, individual and community understanding of the past was guided principally by information provided orally by parents, grandparents and community elders.

Census data helps one understand the social and cultural context in which Mi'kmaq elders testified at the trial but needs to be supplemented with cultural data. In oral cultures, truths informing members about themselves and their identity must be constantly repeated or be lost.²¹ Because treaties established the general parameters of interrelationships with European settlers, they would have become an integral component of Mi'kmaq oral culture soon after their signing.

¹⁹The mother tongue of 27 individuals was not shown, 22 declared English as their first language and three French. Those declaring English or French as their mother tongue were concentrated in Halifax, Kings and Cumberland counties.

²⁰Enumerators did not show the first language of eight individuals.

²¹W.J. Ong, "Writing Is A Technology That Restructures Thought" in G. Baumann, ed., *The Written Word: Literacy in Transition*, (Oxford: Clarendon Press, 1986) 23 at 25.

The importance of this is suggested by Abenaki²² remarks made during negotiations at Fort Saint George in 1752 on the Penobscot River. Responding to the New England Commissioners' insistence that they read the 1749 treaty, the Abenaki speaker said that "there is no need of it; we remember it well."²³ As an oral society, the terms of each agreement were conveyed to future generations. As Samuel Penhallow wrote soon after the signing of the 1726 *Casco Bay Treaty*, the Abenakis had "no other record of conveying to posterity, but what they communicate from father to son, and so to the son's son".²⁴ Thus, an important component of treaty-signing was the presence of not only elders and sakamows but also of younger men who would eventually assume leadership positions. The *Annapolis 1726 Treaty* signed between the Mi'kmaq and representatives of the British Crown, for instance, included a significant number of younger men. Of those who can be identified, are five fathers and eight sons as well as two fathers and two sons-in-law. This represents 50% (seventeen of thirty-four) of those who can be identified.²⁵

Even at the time of signing treaty interpretations varied. This is illustrated by the statements of three Mi'kmaq men in early September 1726 commenting on the treaty signed at Annapolis Royal three months earlier.²⁶ In depositions made before a Boston justice of the peace the Mi'kmaq men reasoned that a peace had not been signed since relatives imprisoned by Massachusetts authorities had not been freed. Such variances in treaty understandings underline the importance of inter-community meetings which, either intentionally or not, ensured a common understanding of treaty relationships. In the post-treaty period, this is shown by the annual reading of original treaties and agreements at social and political congregations. One of the focal points for treaty renewal was Saint Anne's day, an annual celebration of the feast of Saint Anne by Mi'kmaq throughout the Atlantic region. Although the feast is celebrated in individual communities, many families gather at Chapel Island, Cape Breton, a central gathering point for the society for at least three hundred years.²⁷ Attending the gathering are the grand

²²Abenaki is a generic term used to describe culturally similar peoples living between the Saco and Penobscot rivers in present-day Maine, a group related closely to the Indians of the Maritimes.

²³"Treaty with the Eastern Indians at St. George's Fort, 1752" in *Collections of the Maine Historical Society*, First Series, vol. IV, (Portland: Maine Historical Society, 1856), p. 176.

²⁴*The History of the Wars of New England with the Eastern Indians or a Narrative of their Continual Perfidy and Cruelty ...*, rev.'ed., (Boston: J. Harper, 1859), p. 82.

²⁵Public Record Office, Colonial Office Series 217, v. 5, ff. 3-5; PANS, RG 1, v. 26, Register of Baptisms, Marriages and Burials at Annapolis Royal, 1702-1728.

²⁶W.C. Wicken, "26 August 1726: A Case Study in Mi'kmaq-New England Relations," *Acadiensis* XXIII, (Autumn, 1993), pp. 5-22.

²⁷For a discussion of Saint Anne's day, see Janet Elizabeth Chute, "Ceremony, Social Revitalization and Change: Micmac Leadership and the Annual Festival of St. Anne," in W. Cowan, ed., *Papers of the 23rd Algonquian Conference*, (Ottawa: Carleton University Press, 1992), pp. 45-61.

chief and captains of the Grand Council.²⁸ A visitor writing about the celebrations in 1903 noted that, “[d]uring their stay in the island the chief, assisted by the captains, holds a court in one of the larger tents for the settlement of any disputes that may have arisen. The treaties made in early days with other tribes, and the laws which govern their own, are exhibited.”²⁹ These treaties appear to have been read in front of the entire gathering. Similarly, during the 1930s, a treaty was shown to the writer Clara Dennis by Grand Chief Syliboy. Dennis recounts: “[t]he chief showed me, too, the old parchment treaty. ‘We get it from the King long ago to keep it and honour it and serve it and follow it,’ the old chief said. This treaty also is read and talked of at the council.”³⁰ And there is other evidence that up until at least the 1930s, treaty documents and other agreements made between the Mi’kmaq and British and French governments were kept by community leaders. For instance, in 1932 Father Pacifique wrote that:

in 1910 I saw myself in Cape Breton (in the hands of the Grand Chief at Escasoni) two certificates on 2 sheets relating to Jeannot Pejuidalouet and one signed by Desherbiers, 8th Nov 1750 appointing him Captain of the Indian troops and the other by Count de Raymond 10 Sept. 1751 written by Pichon app. him Chief. And this didn't seem to be a copy.³¹

These documents were, on occasion, lodged with the parish priest who sometimes took the material when transferred elsewhere.³² Treaty documents also included wampum which had been made to remember treaties signed among various aboriginal societies.³³

Medals or other articles given to the Mi’kmaq at the time treaties were negotiated became a tangible reminder that an individual had been a party to the agreement. For instance, in 1922 a Charlottetown reporter wrote that the fact that the Abegweit [PEI] Mi’kmaq had signed the Treaty of 1752 was evident: “from the Silver Medal of King George, which Chief Sark wears and which was handed down

²⁸Parsons *supra*, note 16, pp. 460-473.

²⁹C.W. Vernon, *Cape Breton Canada at the Beginning of the Twentieth Century: A Treatise of Natural Resources and Development* (Toronto: Nation Publishing Co., 1903), p. 98.

³⁰Dennis *supra*, note 16, p. 51.

³¹Halifax, Nova Scotia Museum (NSM), Harry Piers Papers, Printed File Matter, Father Pacifique, 16 Dec. 1932. Other references to documents within the Mi’kmaq during this period are in Whitehead, *supra* note 13 at pp. 299, 342. A document dating from 1779 was found in the possession of John Baptiste Jerome of Listiguj in 1948. Archives nationales de Québec à Rimouski (ANQR), Fonds Capucins, Article 14, L-9, “Lettre de Washington.”

³²ANQR, Fonds Capucins, Article 14, F-1, Dept. Affaires indiennes, Divers, D. C. Napier to Rev. Saint-malo, 5 Aug., 1840.

³³Archives de Séminaire de Québec, Université 305, no. 42B, “Collier d’amitié des chef Mohawks du Sault St. Louis aux Sauvages Mimack de Ristigouche.”

from his predecessor in office as Chiefs of the Micmacs of Prince Edward Island."³⁴

The importance of socialization in informing individuals regarding treaty relationships is suggested by letters contained in the files of Nova Scotia's Game Commissioner, J.A. Knight.³⁵ Beginning in 1912, provincial laws regarding the hunting, trapping and selling of game animals became increasingly restrictive. Within the Mi'kmaq community, this resulted in a number of individuals being charged for alleged game law violations. During this period, the Game Commissioner for Nova Scotia received enquiries from non-Mi'kmaq people living in Lower Truro, Guysborough, Yarmouth, and Oxford regarding whether local Mi'kmaq residents enjoyed special rights under "some of the old Indian treaties." Typical was Noble Creelman's letter from Lower Truro in 1922, complaining of Mi'kmaq men hunting moose out of season. Creelman wrote "I asked one of the Indians who I knew was killing moose on snow-shoes and he said there was no law for a Indian he could kill moose or deer any time."³⁶

Mi'kmaq living near Oxford believed that the *Treaty of 1752* would protect them from prosecution. In a 1921 letter T. M. Johnson of Oxford requested that the government send copies of an agreement signed at Halifax on 18 September 1752 to Chief John Stevens and Stephen Mitchel, adding:

These men are afraid of the Game laws, and do not want to be brought up in our courts and fined, for they say they cannot pay any fine and would have to be locked up. so they think if they have a copy of this agreement so that they can show it to an officer of the law that they are allright.³⁷

Other correspondence shows that the Mi'kmaq understood 18th century treaties to exempt them from government regulation. This is suggested in a 1922 letter from Yarmouth lawyer R.S. McKay to the Deputy Attorney-General asking:

[W]hat rights [do] the Micmac Indians have in regard to the use of woods and streams and the right of camping and taking wood and other things along the shores of the Rivers. Being at a loss to answer this question, I thought you might be in possession of some information contained in some of the old Indian treaties.³⁸

According to the Mi'kmaq, treaty rights accorded community members free access to the fisheries. In 1927 Ward Fisher, Chief Inspector of the Eastern

³⁴"Agreement Between the British and Micmacs", *The Patriot* (18 April 1922).

³⁵The office of Game Commissioner was established by legislation in 1896, but the earliest files date from 1921.

³⁶PANS, RG 20/821, File Cr 23 Creelman to Knight, 14 March 1922.

³⁷PANS, RG 20/823, #2, M. Johnson to A.S. Barnstead, 8 November 1921.

³⁸PANS, RG 20/823, # 67, McKay to Mathers, 17 May 1922.

Fisheries Division of the federal Department of Marine and Fisheries, wrote that three or four time over the previous seven years he had been told that the *Treaty of 1752* had continuing applicability in determining Mi'kmaq access to the fisheries. This was done:

once by a Mi'kmaq Chief at Alberton, P.E.I., as the Island Indians were neglected in the Treaty, and also by the Indians of the reserve opposite Whycocomagh, Inverness County, and the Indians of Shelburne and Musquodoboit. In these instances the Indians showed me copies of the Treaty of 1752, and claimed the rights given in the Treaty.³⁹

Thus, before the *Syliboy* prosecution in 1928, Mi'kmaq claims regarding treaty rights were understood quite widely by non-aboriginal communities in the Maritimes. An article appearing in the *Antigonish Casket* in 1922, for instance, reported that the Mi'kmaq "tribe has always maintained that under the terms of a treaty entered into by the Micmacs and the governor in council in 1752 the Indians were not to be interfered with in hunting and fishing whenever the need arose."⁴⁰ Such a statement suggests that, at least for local people, discussions regarding the treaties was not a new topic of debate.

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Testimony by Mi'kmaq elders at the *Syliboy* trial in July 1928 reveals community understanding of 18th-century treaty relationships made with the British Crown. These agreements were remembered within the community and transmitted orally from one generation to the next. This was possible since from the time of the treaties' signings, these communities remained economically and culturally independent from surrounding Euro-American settlements. Treaty relationships were remembered collectively each year at Saint Anne's day, ensuring a relatively uniform understanding of previous agreements with government agencies. With the passage of more restrictive game laws during the early 20th century, Mi'kmaq communities throughout Nova Scotia, not just in Cape Breton, argued that 18th-century treaties afforded them liberty to hunt and to fish. This viewpoint received its most forceful presentation during the trial of Gabriel Syliboy.

What is more difficult to understand is to what degree, if any, oral statements made to the Mi'kmaq during negotiations of the 18th-century treaties became a part of their treaty understanding. While we know that original copies of documents were kept by community leaders, we do not know whether either their memory, or the materials they possessed, encompassed different words and phrases than are contained in extant treaty documents found in the archives. Indeed, this remains an elusive and difficult issue to resolve. By combining post-

³⁹NSM, Harry Piers Papers, Printed Matter File, Ward Fisher to W.L. Hall, 10 February 1927.

⁴⁰*The [Antigonish] Casket* (9 November 1922) 12.

treaty oral perspectives with extant European documentation, however, there is at least the possibility of enlarging understanding of what was said and what was understood at treaty discussions between Mi'kmaq sakamows and representatives of the Crown in the mid-18th century.

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The Document

After being convicted of hunting muskrat out of season in magistrate court, Gabriel Syliboy's appeal was heard before County Court Judge Patterson at Port Hood, Cape Breton on 4 July 1928. No record has been found regarding the prosecution's case. What does remain is a summary, presumably made by Patterson himself, of testimony offered by the defence. These notes are reproduced below. The transcription printed here is somewhat more exact than that found in Ruth Holmes Whitehead *The Old Man Told Us*. A few words left undeciphered in that text are rendered here. There still remain three undeciphered words which appear in the text below as [??].

The text as printed here includes the errors made by the judge in transcribing testimony. These have been marked by entering the text that the judge wrote and crossed out and overstriking that text, so that where the judge wrote 'Fit' and then crossed it out it appears in the text as '~~Fit~~'. These errors may be significant since at least five of the witnesses appear to have spoken in Micmac and had their words interpreted by John Gould. The judge's errors in transcription may illustrate difficulties that the court translator discovered in interpreting information from Micmac to English.

King

&

Port Hood CB July/28

Sylyboy

Mr. MacLennan KC for prosecution

Mr. Joseph MacDonald & Mr. Colin Mackenzie for defense

It is admitted that appeal has been duly perfected.

The evidence taken below is admitted by consent with leave to either side to supplements.

The prosecution having no further evidence to offer at this stage deft begins Joe Christmas called (John Gould sworn as interpreter)

Sworn: Exd by Mr. Mackenzie: Live at Sydney, Nova Scotia. Am 74 years of age. Chief of Micmacs Sydney Band North Sydney Band. Ass't Deputy Chief to Grand Chief Grand Chief then John Denys. He is dead now.⁴¹ Accused is Grand Chief now. When Chief I had to make rules for tribe. Made myself familiar with traditional rights of tribe. While I was chief made rules for people not to disturb other people's rights. Told them they must not hunt when fur not fit, but that they could at any other time. For example, when muskrats had little ones, must not kill them. ~~Fit~~ When fur was fit, they cd. dry and sell it, they could hunt. I am a Micmac and was chief for six years. Became chief in 1909. Heard that according to treaty we had right to hunt & fish at any time. I cannot read. Heard it from our grandfathers. Heard that King of England made treaty with Micmacs With the whole tribe. (Objected to) Remember hearing that goods were given blankets under Treaty (Objected to) About 65 years. In the fall before Christmas. Big coats and old fashioned guns & powder horns also. And some hide to make moccasins. And some food. In the spring potatoes & beans and corn for seed. Tobacco too. And some spears for spearing eels. Where people had little farms they got oats. These goods distributed every six months. Where people hunting they were supplied with powder shot & guns. My grandfather got word from Halifax some 62 or 63 years ago and his brother. They and another man went to Halifax. One Campbell was member and sent for us. Looking to get school for Micmac children. After two years got school. They were representing Cape Breton Micmacs. Gov't at Halifax at same time surveyed all Indian Reservations. They had been surveyed before but white people were interfering and that was one of reasons for going to Halifax. They got new survey. From my earliest recollections no one ever interfered with our rights to hunt and fish at any time. About 65 years ago with my father when got goods to distribute. At that time only one Indian agent in Cape Breton. Old Judge Dodd's father. Goods obtained from him. Dodds told people goods came from Government.

Xd Mr. MacLennan: Living in Sydney since in 1875. Previous to that in Escasconi County of Cape breton. Never lived at Whycomagh. I did not hunt.

⁴¹John Denny was Grand Chief from 1887 until his death in 1918. New Brunswick Museum (NBM) Ganong Scrapbooks, N.B. Indians, Setanceoi Migmaoi Sulnaltijitj, no. 376, August 1918, Rimouski.

Never killed a muskrat a fox or deer. No knowledge of hunting or trapping. Never saw my people hunting. Have seen them coming from woods. I did Indian work making baskets & handles tubs etc.⁴² When I was a boy used to fish around shore.

Reexd Mr. Mackenzie: Have seen few my people coming in with fur animals. Know they went hunting and trapping.

Gabriel Sylyboy called: Sworn: Exd. Mr. MacDonald: Accused. Live at Whycocomagh on Indian Reservation there. I am Grand Chief Micmacs of Nova Scotia. All Nova Scotia as well as Cape Breton. Start to go trapping on Halloween. For last 34 years. Get few muskrats then. Get Did not kill fox. Found fox dead in an old snare. Killed the muskrats whose pelts were found. Some of them on very day they were found. Am a Micmac Indian of Nova Scotia tribe. Never interfered with in my hunting before. Heard of some Indians on other side of Truro being interfered with a year ago. Since I was boy heard that Indians got from King free hunting and fishing at all times. Still believe Treaty good. When officer took pelts I told him I had treaty. He sd he knew nothing about that. I sd let me go and I'll show you copy of treaty. I sd If I wanted to I cd prevent him taking furs but as he didn't know about Treaty I wd let him take furs. Under Treaty get from Gov't blankets and flour and some shoes & long coats. Still get them. Haven't got any for a year. From Mr. Boyd Indian Superintendent River Bourgoise⁴³ When there is no game in hard months [??] get order for \$10.00 for goods in store. In Spring get seeds. Gov't put up & maintain schools on every reservation. Putting up Home at Shubenacadie. All by virtue of Treaty. In Treaty promised to teach us. Did not know nor believe I was breaking any law in taking muskrats when I did.

XD Mr. MacLennan: Grand chief elected for life. Have about six subchiefs under me. I am a sort of king among Indians. Had been hunting four days at Askillou⁴⁴ before skins taken. Killed 14 all told Meat good. Skin will dry on stretcher in a half a day. Indians honest & lawabiding since Treaty. Don't know who set snare in which fox taken. Too early for fox. ~~Skin~~ Fur of fox no good but fur of muskrat ~~no~~ good. Took fox out of snare and threw it on one side. Old man with me skinned it. Skin with muskrats in my tent. ~~Saw~~ Found fox second day I was trapping. Indians Reservation on South bounded by land of Donald Allan Mcguire. Runs a mile & a half back. Includes Indian Island Southern boundary of Reservation about 16 or 20 miles from where I was hunting. Told officer that I

⁴²This was a fairly common form of employment of Mi'kmaq men during the nineteenth and early twentieth centuries. For example, of the 211 individuals declaring an occupation in the 1901 census, fifty-four said they were coopers.

⁴³A.J. Boyd was appointed superintendent of Indian affairs in Nova Scotia on 14 May 1907. NAC, RG 10, v. 3183, file 454,854, 2 September 1914.

⁴⁴Askillon in Inverness County, Cape Breton, Whitehead, *supra*, note 14, p. 329. That Mi'kmaq had been trapping in the region is confirmed in a 1924 letter from game warden J.A. Edwards of Cleveland, Richmond County. PANS, RG 20, v. 827, # 40, Edwards to Knight, 4 Dec. 1924.

had treaty with King and that I had right to furs. Have not got furs back. Never killed a kitten⁴⁵ yet. Killed these with gun. Setting dead falls too.

Rexd R. MacDonald: Used every bit of flesh of muskrat for food.

Andrew Alek called: Sworn: Exd. Mr. Mackenzie: Live on Indian Reserve near St. Peters.⁴⁶ Born there & lived there all my life. I am 78 years old. Mostly fishing. All kinds of fish. Am a Micmac. Micmacs had right to fish all they cd. eat or sell at all seasons of year. Remember getting gifts from Govt. When I was 10 years old father had a team. No one else had a team. At first when 5. Sydney for blankets. Father & mother & each child got blanket. Went with my father to Sydney for blankets. Got them from Dodd. Knew him when I saw him. Got coats as well and hide for moccasins. And flour Indian meal gun powder shot. In Spring wd. get seed. Potatoes oats corn and turnip. Nobody ever interfered with our fishing and hunting.

Xd. Mr. MacLennan: No school on reservation when I was a boy. Am not a hunter. Have often seen others go hunting.

Andrew Bernard called: Sworn Exd. Mr MacDonald: Am 78 years of age. Born at Nyanza, Victoria Co. on Indian Reservation.⁴⁷ Bro't up at Little Bras d'Or. About 20 Indian [??] live there. Then moved to reservation at North Sydney. Father Francis Bernard.⁴⁸ He was a chief Captain a sub Chief of Indians Micmacs in Cape Breton. Am a Micmac. Remained at North Sydney 40 or so years. For 14 years of that time trimmed coal. About 21 years ago returned to Reservation at Whycomagh. Farming. Received aid from Mr. Boyd Indian Agent and Father MacLennan of Glendale also Agent. Receive \$8.00 a month not cash but order for goods. Remember my father receiving flour coats gun powder & shots fish spears. From Mr. Dodd in Sydney. Old man Dodd of all. After his death from Dr. Cameron Indian Agent at Christmas Id. Micmacs can fish or shoot any thing they want all year round. Father told me that. Got right from King.

Francis Gould called: Sworn: Exd. Mr MacKenzie: Live at Eskasoni. 74 years of age. Remember my grandfather going to Sydney & getting blankets long coat corn (3 bushels) gun powder flour sometimes seed corn beads for moccasins, He ~~used to~~ told me he got these from the King. Under the Treaty. We promised to keep Treaty & got these things in return. That is what my grandfather told me.

⁴⁵A baby muskrat, Whitehead, *supra*, note 14, p. 329.

⁴⁶Chapel Island, Richmond County, Cape Breton.

⁴⁷Wagmatcook, one mile west of Nyanza on the St. Patrick's Channel.

⁴⁸There was never an officially designated reserve at North Sydney. Bernard's usage of the term or at least how the word he used in micmac was translated into "reservation" is suggestive. From at least 1880, federal officials had been trying to convince the Mi'kmaq living in the region to relocate to Eskasoni. Mi'kmaq living there had been displaced from their reserve at Middle River. NAC, RG 10, v. 2130, # 25,772, To Francis Bernard, 1880; Government of Canada, Sessional Papers, 1882, Department of Indian Affairs Annual Report, M. MacKenzie, 5 Oct. 1881, p. 33.

Mr MacDonald tenders original volume Nova Scotia Archives (1) Certified Copy of Treaty with Micmacs 1727⁴⁹ (2) pages 672 et seq more especially p. 682.⁵⁰

2nd vol. Nova Scotia Archives pp. 102, 106, 110, 113;⁵¹

3rd Vol. Nova Scotia Archives pp. 315, 316;⁵²

Vol. 8 Collections N.S. Hist. Soc pp. 17, 23, 33, 64, 65;⁵³

Vol. 21 Collections N.S. Hist. Soc. pp. 5⁵⁴

Proclamation of George III issued after Treaty of Paris confirming guaranties.⁵⁵ Received.

Ben E. Christmas called: Sworn. Exd. Mr Mackenzie: Live on new Indian Reserve Sydney. Chief of that band nearly six years. One two of chiefs whose signature appears on Treaty was Andrew Hadley Martin. He came from Nyanza Victoria Co. And Gabriel Martin. He came from Escasoni.⁵⁶ Indians believe Treaty still in force. Nothing ever pd. Indians for cancellation or revoking of treaty.

⁴⁹It is unclear to what treaty this citation refers. There are no known treaties signed between the Mi'kmaq and the British Crown in 1727, although a ratification among some Abenaki villages occurred at Casco Bay in July-August of that year. Since subsequent defence citations refer to the 1726 Annapolis Royal treaty, it is likely that it is to this treaty that the judge's notes refer.

⁵⁰This refers to T. Akins, *Selections from the Public Documents of Nova Scotia* (Halifax: Pub?, 1869). On pp. 672-674 appear the Nova Scotia Executive Council minutes for 16 Sept. 1752. These minutes contain the treaty proposals given to Jean Baptiste-Cope.

⁵¹*A Calender of Two Letter-Books and One Commission-Book in the Possession of the Government of Nova Scotia, 1713-1741* A.M. MacMechan, ed., (Halifax: Herald Printing House, 1900). Passages cited refer to recognition by colonial English government at Annapolis Royal that the treaty ratified by the Mi'kmaq in 1726 were still in force during the 1730s.

⁵²*Original Minutes of His Majesty's Council at Annapolis Royal, 1720-1739*, A.M. MacMechan, ed., (Halifax: McAlpine Publishing Col. Limited, 1908). For 1 April 1735, on p. 315 the following passage appears: "The Secretary acquainted the Board that he was ordered by the Lt. Govr of ye Province (who intends to go up the Bay of fundy) to summons them together & to lay before them for their Consideration Severall papers. Vizt....Copy of the peace Concluded with the Indians in order to be again renewed & Ratified." And on p. 316: "The Board having Considered the said Papers,.....were of Opinion that His Honr may Renew the peace with the Indians if he finds them Inclinable so to do."

⁵³T. Akins, *History of Halifax City*. The most pertinent passages occur on pp. 64-65 which discuss the treaties of 1760/61 signed first with the Maliseet and later with a number of Mi'kmaq villages.

⁵⁴H.C. Hart, "History of Canso, Guysborough County, N.S." *Collections of the Nova Scotia Historical Society*, v. 21 (Halifax: Nova Scotia Historical Society, 1927), pp. 1-34.

⁵⁵This refers to the Royal Proclamation of 7 October 1763. Among other things, the proclamation confirmed lands used by aboriginal people for hunting.

⁵⁶Refers to the 1752 treaty made between the British Crown and Jean-Baptiste Cope. Besides Cope, three other individuals signed the treaty: Andrew Hadley Martin, François Jeremie and Gabriel Martin. The only individual whose residence is given is Cope who lived at Shubenacadie. An original copy of the treaty bearing original signatures and totems of Mi'kmaq signatories has not been found. A printed copy of the treaty was published in 1753 by John Bushell. Copies of the printed version are in the New York Public Library and in the Rufus King Collection at the New York Historical Society.

Treaty never revoked so far as they are concerned. Still believe they have rights of hunting and fishing at all times.

Mr. Mackenzie: GPA and GBP Received [??] to objection - certified copy of treaty referred to be furnished. Defdt rests.