

**Discussion report on
the status of maritime Indian treaties**

prepared by Wayne E. Daugherty

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DISCUSSION REPORT ON THE STATUS OF MARITIME INDIAN TREATIES

Prepared by

Wayne E. Daugherty

Claims and Historical Research Centre

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STATUS OF MARITIME INDIAN TREATIES

The first treaty entered into by the colonial government of Nova Scotia and the Indians was that signed at Boston, Massachusetts Bay, in 1725, and ratified the following year at Annapolis Royal in Nova Scotia (Acadia). The treaty stemmed from a colonial Indian war which had raged in the early 1720s throughout Nova Scotia and also New England, where it was referred to colloquially as 'Dummer's War' after the governor of Massachusetts Bay.

In 1725, the Abenaki Confederacy (New England) under the leadership of the Penobscot tribe, after a series of military setbacks the previous year, responded to a peace overture from Massachusetts Bay.

The government of Nova Scotia, fearful that Massachusetts Bay would sign a separate peace leaving all the Indian combatants free to concentrate against their colony, requested that Nova Scotia be included in the treaty deliberations. On September 5, 1725, Lieutenant Governor Armstrong conveyed this concern to the Board of Trade:

I have also sent you my letter to the Lieutenant Governor of New England upon his information that the Indians towards the Eastern part of that Province were suing for peace with any instructions to Major Paul Mascarene and Hibbert Newton Esq. Members of this His Majesty's Council to Act as Commissioners, on behalf of this Province with some articles to be demanded of the Indians; that by a separate peace, we may not be left alone to the injury to their insults.¹

As a result of this initiative, Major Paul Mascarene of Annapolis Royal was dispatched to Boston to act as Nova Scotia's representative and treaty commissioner.

The treaty between Massachusetts Bay and the Abenaki Confederacy was signed on December 15, 1725 in the Council Chambers at Boston. The Indian signatories to the treaty were four sachems from the Penobscot tribe of the Abenaki Confederacy who purportedly represented all the warring Indian tribes in New England and the Nova Scotia (Acadia). Indeed, there is evidence to suggest (Baxter Papers) that the Penobscots were the only Indians from either the Nova Scotia or New England present at Boston for the treaty negotiations.

The opening paragraph of the treaty required the beneficiaries, defined as the "Penobscot, Maridgwalk, St. John, Cape Sables and other tribes inhabiting within His Majesty's Territories of New England and Nova Scotia" to enter into a general peace with Massachusetts, New Hampshire, Nova Scotia, New York, Connecticut and Rhode Island.²

The Indians who entered into a general peace with the aforementioned colonies were required to enter into terms with the Colony of Massachusetts Bay. It would appear from the nature of the terms agreed upon, in particular those regarding land and commerce, that these were directed at the Indians of the Abenaki Confederacy; the Penobscots and Kennebecs (Naridgwalks) being specifically mentioned. The terms did require, however, that the Indians conclude a separate agreement with Nova Scotia "according to the Articles agreed on with Major Paul Makarene commissioned for that purpose and further to be Ratified as mentioned in the

said Articles."³ This was done on the same day, December 15, 1725, in the Council Chamber at Boston.

Unlike most Indian Treaties in which a single document is attested to by both parties, the 1725 Nova Scotia treaty signed at Boston was comprised of two separate documents. In the first, the Indians defined as "the said tribes of Penobscot, Naridgwalk, St. Johns, Cape Sables and other tribes inhabiting within his Majesty's said territories of Nova Scotia or Accadia and New England", made their submission and acknowledged the jurisdiction of King George over Nova Scotia which, at that time, included most of present day New Brunswick.⁴ In addition, the Indian signators undertook the following obligations:

That the Indians shall not molest any of His Majesty's subjects or their dependants in their settlements already made or lawfully to be made, or in their carrying on their traffick and other affairs within the said Province.

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

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

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

That if the Indians have made any prisoners belonging to the Government of Nova Scotia or Acadia during the course of the war they shall be released at or before the ratification of this treaty.⁵

The document was signed by the four Penobscot sachems,

Sanquaarum alias Loron, Arexus, Francois Xavier and Meganumbe. The second document signed by Major Mascarene acknowledges the Indian obligations and recognition of British jurisdiction in Nova Scotia and undertakes the following key provisions towards them:

That the Indians shall not be molested in their Persons Hunting Fishing and Planting Grounds nor in any other their Lawful occasions by His Majestys Subjects or their Dependants nor in the Exercise of their Religion Provided the Missionaries residing amongst them have leave from the Governor or Commander in Chief of His Majestys Said Province of Nova Scotia or Accadia for so doing.

That if any Indians are injured by any of His Majestys aforesaid Subjects or their Dependants they shall have Satisfaction and Reparation made to them according to His Majestys Laws whereof the Indians shall have the Benefit equal with His Majestys other Subjects.⁶

These separate documents which state the terms contracted by both parties constitute the treaty. The terms were reiterated at a ratification ceremony held on June 4, 1726 at Annapolis Royal. The 1726 treaty was ratified by Micmac sachems from Cape Sable, the Annapolis River and Minas.⁷ In addition, three Penobscot sachems from Pantogoet on the Penobscot River as well as a sachem from the Passamaquoddy tribe also signed.⁸ Of the three Penobscot sachems, only one, Francois Xavier, had been present at the 1725 treaty signing in Boston. The Saint John River Indians (Malecites) ratified the Nova Scotia treaty on May 17, 1728 at Annapolis Royal.⁹ As Lieutenant Governor Doucett, the commander of the fort

at Annapolis Royal reported to the Board of Trade on August 4, 1726:

...I can acquaint for Your Lordship that several Indian Tribes have been at this Garrison to ratifie the peace with us-(Num. (1) is the instrument they have signed to this Government and Num. (2) is what I have signed to them on behalf of the Government...¹⁰

The Treaty of 1725 signed by Nova Scotia officials remained valid until the resumption of hostilities during King George's War (1744-1748). In 1749, the 1725 treaty was renewed with the Chignecto band of Micmacs as well as with the Malecites of the Saint John River. The renewal which took place at Halifax on August 15, 1749, focused only on those five obligations undertaken by the Indians in 1725. There is no mention of the commitment made by Major Mascarene on behalf of Nova Scotia in 1725. It is not clear from the historical record whether British officials considered their commitments to the Indians as no longer valid or whether by this time, they had forgotten them. The renewal of 1749 was signed by the chief of the Chignecto band as well as three Malecite representatives. The Malecites formally ratified the renewed treaty on September 4, 1749 at the River St. John.¹¹

On November 22, 1752, Nova Scotia officials entered into a treaty with the Shubenacadie Band of Micmac Indians. There is no indication in the historical record that this particular group

had signed any previous treaty with Nova Scotia. Nonetheless, the treaty stipulated:

...that the Articles of Submission and Agreement made at Boston in New England by the Delegates of the Penobscot Norridgwook and St. John's Indians in the year 1725 Ratified and Confirmed by all the Nova Scotia Tribes at Annapolis Royal in the Month of June 1726 and lately Renewed with Governor Cornwallis at Halifax and Ratified at St. John's River, now read over Explained and Interpreted shall be and are hereby from this time forward renewed, reiterated and forever Confirmed by them and their Tribe, and the said Indians for themselves and their Tribe and their Heirs aforesaid do make and renew the same Solemn Submissions and promises for the strict Observance of all the Articles therein Contained as at any time heretofore hath been done.¹²

In addition, new terms were struck which provided the Indians with "free liberty of Hunting and Fishing as usual; and a truckhouse (state operated trading post) on the Shubenacadie River, if they so desired. They were given the "free liberty" to sell their skins and feathers at any settlement. They were also to receive provisions of bread, flour and other unspecified commodities every six months and presents of blankets, tobacco, powder and shot every October as long as the treaty was maintained.¹³ The treaty further stated that in the event of disputes between the Indians and the colonists, these would be "tryed in His Majestys Court of Civil Judicature, where the Indians shall have the same benefit, Advantage and Privileges, as any others of His Majesty's Subjects."¹⁴ This was probably the most substantive treaty signed by any group of Micmacs. The Micmac treaty of November 1752 was terminated by renewed

hostilities six months after it had been signed. (see attached research report).

After the defeat of the French in North America in 1759, the Nova Scotia authorities entered into a number of treaties (see attached list) with the Micmac, Malecite and Passamaquoddy. The object of these treaties was to restore the peace. The tone of these treaties, while not exactly vindictive, was certainly more harsh than anything that had been signed previously between the British and the Indians. For example, the treaty signed with the Miramichi tribe obliged the Indians to recognize British "jurisdiction and dominion" in Nova Scotia; to refrain from molesting British subjects; to restrict their trade to official truckhouses; and to resolve any disputes "according to the Laws established in His Majesty's dominions."¹⁵ There was no quid pro quo on the part of the British.

The sole exception to this pattern of treaties was that signed in 1760 by the Saint John (Malecite) and Passamaquoddy tribes. The opening paragraph of the treaty states that "the said Articles of Submission and Agreement, so made and concluded, renewed, confirmed and ratified," had been broken.¹⁶ Presumably, this acknowledgement refers to the Treaty of 1725, although it is not specifically stated in the text of the renewal. The two tribes are then required "to renew and Confirm the aforesaid Articles of Submission and every part thereof and do solemnly promise and engage that the same shall forever hereafter be strictly observed and performed."¹⁷ This was the only instance of

an earlier treaty, that of 1725, being renewed during this period.

In 1779, the British made their final peace and friendship treaty with the Indians of the Nova Scotia. The treaty was negotiated following an attack by the Indians, probably at the instigation of American revolutionaries, on a trading post on the Miramichi River. The 1779 treaty included Micmac tribes from Miramichi, Pagumske, Restigushe, Richebouctou and Jediak as well as "all others residing between Cape Tormentine and the Bay de Chaleurs in the Gulf of St. Lawrence inclusive."¹⁸

The provisions of the 1779 treaty stated that the Indians would maintain the peace, protect the lives and property of the traders and other British inhabitants, and refrain from associating with the American rebels. In return for the observance of these conditions, the Crown promised:

That the said Indians and their Constituents shall remain in the Districts before mentioned Quiet and Free from any molestation of any His Majesty's troops or other of his good Subjects in their Hunting and Fishing.¹⁹

The Treaty of 1779 was never abrogated.

Of the eight Maritime Peace and Friendship Treaties located by the Claims and Historical Research Centre, Claims Research and Assessment Directorate, the only treaties with substantive terms which remain or may remain in force, are the Treaty of 1752 with the Micmac which provided "free liberty of hunting and fishing as usual"; the Treaty of 1779 also with the Micmac which states they may hunt and fish unmolested; and the Treaty of 1725, renewed in

1749 and 1760 by the Malecite and Passamaquoddy which stipulates that they will not be molested in their "Hunting Fishing and Planting grounds". These provisions could be considered to constitute recognition by the British that the Indians possessed usufructuary rights.

.Aboriginal Title

The MAWIW report has raised historical and legal questions whether the treaties in the Maritimes affected or indeed recognized aboriginal title. In the Treaty of 1725 negotiated by the Colony of Massachusetts Bay , there are two paragraphs that specially refer to land. They read as follows:

That His Majesty's Subjects the English Shall and may peaceably and quietly enter upon Improve and forever enjoy all and singular their rights of God and former Settlements properties and possessions within the Eastern parts of the said province of Massachusetts Bay Together with all Islands, inletts Shoars Beaches and Fishery within the same without any molestation or claims by us or any other Indian and be in no ways molested interrupted or disturbed therein.

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 conveyed or sold to or possessed by any of the English Subjects as aforesaid. As also the privilege of fishing, hunting, and fowling as formerly.²⁰

It is quite clear that these two sections dealt specifically with the Indians of the Abenaki Confederacy of which the Penobscots and Naridgwalks(Kennebecs) were mentioned by name. The terms were intended to restore the property of the colonists along the Kennebec and lower Penobscot river in eastern Maine which at that time was a province of Massachusetts Bay. The

Indians were not to interfere with the returning settlers or make claims against their lands. In return, the Massachusetts Bay Colony recognized Abenaki sovereignty (aboriginal title) to lands in Maine which they had not yet alienated to the English.

The two land-related clauses of this treaty were concerned only with the tribes which resided within the boundaries of Massachusetts Bay, or its province of Maine. In 1725, Nova Scotia was not an integral part of Massachusetts Bay; nor did Governor Dummer or the General Court (legislature) of Massachusetts Bay have jurisdiction over Nova Scotia. The terms negotiated by Massachusetts Bay and the Abenaki Confederacy regarding aboriginal title did not apply to lands in Nova Scotia.

The Treaty of 1725 negotiated by the Massachusetts Bay Colony, as noted above, did require the Penobscot tribe of the Abenaki Confederacy and the other Indians they purportedly represented to sign a separate agreement with Nova Scotia. According to the terms agreed to by Major Mascarene, the British undertook the following obligation:

That the Indians shall not be molested in their Persons Hunting, Fishing and Planting Grounds nor in any their Lawfull Occasions by His Majestys Subjects or their Dependants...²¹

The wording of this clause was altered slightly in the subsequent ratification by the Micmac, Penobscot and Passamaquoddy at Annapolis Royal in 1726 to read:

That the Indians shall not be molested in their persons hunting fishing or planting on their planting Ground, nor in any other Lawfull Occasions by His Majesties Subjects or their Dependants...²²

The legal question is whether this imprecise obligation by the British constituted a limited recognition of aboriginal title and a recognition of a usufructuary right to current "planting grounds" (small plots of land). The answer may lay in the instructions sent to Governor Richard Philips of Nova Scotia, dated June 19, 1719. There are two paragraphs, numbers 22 and 23 in Philips' instructions that relate to the Indians, and another, 24, concerning the granting of land in Nova Scotia. Paragraph 22 states:

And whereas we have judged it highly necessary for His Majestys Service that you should cultivate & maintain a strict friendship & good correspondence with the Indian Nations inhabiting within the precincts of Your Government that they may be reduced by Degrees, not only to be good Neighbours to His Majestys Subjects, but likewise themselves become good Subjects to His Majesty, we do therefore direct you upon your arrival in Nova Scotia to send for the several heads of the said Indian Nations or Clans and promise them Friendship and protection on His Majestys part. You will likewise bestow on them, as your discretion shall direct, such presents as you shall carry from hence.²³

The second paragraph, number 23, dealt with a scheme for intermarriage between settlers and Indians. People doing so were to receive 50 acres free of quit rent for 20 years.²⁴ These two paragraphs were included in all instructions to the governors until the late 1760s. It is evident that neither paragraph addressed the issue of aboriginal title though it is interesting to note that the British regarded the Indians as subjects.

The most salient paragraph, in Philips instructions, number 24, concerned the granting of land in Nova Scotia. This paragraph, states:

And whereas it will be of Advantage to His Majestys Service and highly Beneficial to the Trade of Great

Britain, that the said Province of Nova Scotia be peopled & settled as soon as conveniently may be; As an encouragement to all His Majestys good Subjects, that shall be disposed to settle themselves and their Families there; You are hereby directed to make grants of Such Lands in Fee Simple as are not already disposed of by His Majesty, to any person that shall apply to you for the Same; reserving nevertheless to his Majesty, his Heirs and Successors an Annual Rent of one shilling, or three pound of Hemp, clean, bright & water=rotted for every fifty Acres so granted, at the selection of the Grantee; the Said Rent to commence three years after the making the Grant, and not before;...²⁵

It is clear from Philips' instructions that the Crown wanted to settle Nova Scotia as soon as possible; and that Nova Scotia was to be a settlement colony. This is emphasized by the imperial instruction directing the governor to "make grants of Such Lands in Fee Simple as are not already disposed of by his Majesty." The British obviously considered the title to the lands of Nova Scotia as ceded by the Treaty of Utrecht in 1713 as belonging exclusively to the Crown.

In the terms of the 1725 treaty negotiated by Nova Scotia, in contrast to that signed by Massachusetts Bay, there is no reservation of land to the Indians nor recognition an Indian title. Such a formal recognition would have been incompatible with the instructions to Governor Philips and inconsistent with the British aim to settle the colony.

The terms of the 1725 Nova Scotia treaty apparently did recognize that the Indians inhabiting within the colony had a usufructuary or harvesting right to the land. The British realized that the Indians had a right to live and to be

self-sufficient, if for no other reason than to reduce the expense to the British in administering the colony. In order to be self-sufficient, the Indians would have to exercise their traditional means of subsistence. Thus the terms of the 1725 treaty were designed to protect the Indians from physical molestation (at the hands of incoming settlers) while following their traditional economic activities of hunting, fishing and planting; the latter activity being undertaken only by the Malecites who were a semi-agricultural people.

This apparent usufructuary motif was reiterated in the Treaty of 1752. Not only were the terms of the 1725 renewed, but the Indians (Shubenaccadie Band) were granted "free liberty of hunting and Fishing as usual." It is interesting, that in the Simon decision of 1985, the Supreme Court of Canada declared the Treaty of 1752 to be a "valid treaty with a right to hunt."²⁶ There was no indication by the Supreme Court that the 1752 treaty addressed aboriginal title.

The Peace and Friendship Treaties of the early 1760s did not deal with either the issue of usufructuary rights or aboriginal title. There is, however, historical evidence to show that the British apparently regarded the Indians as having some measure of usufructuary rights for which provision should be made. In 1764, for instance, Governor Wilmot was instructed to inform the Indians:

...with the fullest assurance of His Majesty's Resolution to leave them the free and full possession of whatever Lands shall be necessary for their hunting and convenient residence, with free liberty to resort

to any parts of the Sea Coast for the benefit of Fishing in like manner as his Majesty's other subjects.²⁷

Similarly, the 1779 treaty promised the signatory Micmac bands:

That the said Indians and their Constituents shall remain in the Districts before mentioned Quiet and Free from any molestation of any of His Majesty's Troops or other his good Subjects in their Hunting and Fishing.²⁸

In summation, the Indian treaties signed by Nova Scotia authorities in the eighteenth century did not recognize aboriginal title. They may, however, have recognized that the Indians possessed usufructuary rights to hunt, fish and, where applicable, to plant crops. If so, this recognition was extended with the explicit understanding that such aboriginal activities were conducted on lands to which the Crown held exclusive title. Three of the Peace and Friendship Treaties which remain or may remain in force could be considered to constitute recognition of usufructuary rights. The Treaty of 1752 declared to be valid by the Supreme Court of Canada in 1985; the Treaty of 1725 renewed by the Malecite in 1749, and again in 1760; and the Treaty of 1779 signed by the Micmac.

Footnotes

1. PAC, MG 11. A.16,p.103. Letter from Lieutenant Governor Armstrong to the Lords of Trade, 5 September 1725.
2. Peter A. Cumming and Neil H. Mickenberg, Native Rights in Canada, (Toronto: The Indian-Eskimo Association of Canada and General Publishing Co., Ltd., 1972), p.300.
3. Ibid., P.301.
- 4.PAC, CO.217/4, Articles of Submission and Agreement made at Boston in New England by Saguarum alias Laurens, Arexes. Francis Xavier and Meganumbe Delegates from the Tribes of Penobscott, Norrigewock, St. Johns, Cape Sables and other Tribes of Indians, Inhabiting within His Majesties Territories of Nova Scotia and New England, December 15, 1725. p.349.
5. Ibid.
6. PAC, CO.217/4, By Major Paul Mascarene one of the Council for His Majestys Province of Nova Scotia or Accadia and Commissioned by the Honourable Lawrence Armstrong Esqr. Lieutenant Governor and Commander in Chief of the Said Province for treating with the Indians engaged in the late Warr, December 15, 1725. P.348.
7. PAC, CO.217/4, Ratification of the Treaty of 1725 at Annapolis Royal, June 4, 1726. P.352.
8. Ibid.
9. Canada Indian Treaties and Surrenders, (Ottawa. Queen's Printer, 1891) Reprinted by Coles Publishing Company 1971, p.199.
10. PAC, CO.217/4, Dispatch to the Lords of Trade from Lieutenant-Governor Doucett. pp. 316-317.
11. Canada Indian Treaties and Surrenders. p.202.
12. Akins, Thomas B., Selections from the Public Documents of the Province of Nova Scotia. Halifax: Charles Annand. 1869. p. 683.
13. Ibid., p.684.
14. Ibid., p.685.
15. Ibid., Treaty of Peace and Friendship concluded by the Honourable JONATHAN BELCHER Esquire President of His Majesty's Council And Commander in Chief in and over His Majesty's Province of Nova Scotis or Acadia etc etc etc with JOSEPH SHABECHOLOUEST

of the Merimichi Tribe of Indians at Halifax in the Province of Nova Scotia or Acadia, June 25, 1761. pp.699-700.

16. Indian and Northern Affairs Canada, Claims and Historical Research Centre, Ottawa. Survey of Documents. Item X-99. Treaty of 1760.

17. Ibid.

18. Survey of Documents. Item X-92. Treaty of 1779.

19. Ibid.

20. Cumming and Mickenberg, Native Rights, p.301.

21. PAC, CO.217/4, p.348.

22. PAC, CO.217/4, P.351.

23. PAC, MG40, B13,pt.1, Instructions for Richard Philips Esqr. His Majesty's Govr. of Placentia in Newfoundland; And Captain General & Governor in Chief of the Province of Nova Scotia, or Accadia in America, June 19, 1719.

24. Ibid.

25. Ibid.

26. Her Majesty The Queen v. James Matthew Simon: Supreme Court of Canada, 1985. p.35.

27. PAC,CO.217/18, Instructions to Governor Wilmot of Nova Scotia from the Lords of Trade, March 6,1764.

28. Survey of Documents. Item X-92. Treaty of 1779.

MARITIME PEACE AND FRIENDSHIP INDIAN TREATIES

TREATY OF 1725(COLONY OF MASSACHUSETTS BAY)

* signed at Boston, December 15, 1725 between the Colony of Massachusetts Bay and the Penobscot tribe

*.general peace terms applied to the "Penobscot, Naridgwalk, St. John, Cape Sables and other tribes Inhabiting within His Majest's Territories of New England and Nova Scotia"...

* terms relating to aboriginal title and reservation of land applied only to Abenaki Indians inhabiting the Massachusetts Bay Colony or its'province of Maine

* treaty required Indians to make separate terms with Nova Scotia.

TREATY OF 1725(NOVA SCOTIA)

* signed in Boston, December 15, 1725 by Major Paul Mascarene and the Penobscots

* Indians recognize the jurisdiction and dominion of King George over Nova Scotia

* Indians promise not to molest British subjects in their settlements "already made or lawfully to be made"

* the Colony of Nova Scotia promises that the Indians shall not be molested in "Persons Hunting Fishing and Planting Grounds nor in the Exercise of their Religion"...

* the Indians shall have access to the Courts in the event of a quarrel or misunderstanding with the British

* the 1725 treaty was ratified at Annapolis Royal on June 26, 1726 by sachems from the Micmac, Penobscot and Passamaquoddy tribes

* the 1725 treaty was ratified by the Malecite on May 17, 1728 at Annapolis Royal.

TREATY OF 1749(NOVA SCOTIA)

* 1725 treaty renewed by the Micmac(Chignecto tribe) and the Malicite at Halifax on August 15, 1749

* renewal ratified by Malecite chiefs on September 4, 1749 at the River St. John.

* renewal focuses on the obligations agreed to by the Indians in 1725.

TREATY OF 1752 (NOVA SCOTIA)

* treaty signed between Micmac (Shubenacadie tribe) and Governor Hopson on November 22, 1752

* renewal of the Treaty of 1725

* Indians given "free liberty on Hunting and Fishing "...

* a promise of a truckhouse should the Indians want one

* freedom to sell their furs and other goods at any settlement

* provisions of bread, flour and other unspecified commodities every six months

* presents of blankets, tobacco, powder and shot every October so long as the treaty was maintained

* access to the courts in the event of a dispute with the British.

TREATY OF 1760 (NOVA SCOTIA)

* signed between Micmac (Richebuctou tribe) and Governor Lawrence on March 10, 1760

* Indians promise not to molest His Majesty's subjects

* Indians shall settle grievances in the courts and promise not to assist the enemies of the British

* Indians agree to trade only at truckhouse established at Fort Cumberland or elsewhere in Nova Scotia.

TREATY OF 1761 (NOVA SCOTIA)

* signed at Halifax, June 25, 1761 by the Micmac (Mirimichi, Jediak, Pogmouch and Cape Breton tribes)

* terms same as above.

TREATY OF 1760 (NOVA SCOTIA)

* signed between the Malecite and Passamaquoddy tribes and Richard Bulkely, Secretary of the Executive Council, on February 23, 1760 at Halifax

* 1725 treaty is renewed

- * Indians promise not to assist the enemies of the British
- * Indians agree to trade only at truckhouse to be established at Fort Frederick or elsewhere in Nova Scotia.

TREATY OF 1779 (NOVA SCOTIA)

- * signed by the Micmac (Mirimichi, Jediak, Richebouctou, Restigouche and Pagumske tribes) and Micheal Franklin, the King's Superintendent of Indian Affairs in Nova Scotia on September 22, 1779 at Windsor, Nova Scotia
- * Indians promise to maintain the peace and protect British lives and property from the enemies of His Majesty
- * Indians promise not to have any dealings with the American Revolutionaries
- * Indians promise to "Review, Ratify and Confirm all former Treaty, entered into by us, or any of us or these heretofore with the late Governor Lawrence
- * Nova Scotia agrees that "the said Indians and their Constituents shall remain in the Districts before mentioned Quiet and Free from any molestation of any of His Majesty's Troops or other his good Subjects in their Hunting and Fishing.

THE HISTORICAL ASPECTS OF THE ABROGATION OF THE TREATY OF 1752

The Treaty of 1752 was signed on November 22, 1752 between Governor P.T. Hopson of Nova Scotia and Major Jean Baptiste Cope, Chief of the Shubenacadie tribes of Micmac Indians. Less than six months later, the treaty was broken.

The first indication of trouble is contained in a letter from Governor Hopson to the Lords of Trade dated the 26 April 1753. In his letter, Hopson stated:

Since I closed my letter of Saturday last, two men belonging to this place arrived here in an Indian Canoe, with six Indian Scalps. I enclose your Lordships their Deposition, I have taken security for their appearance at the next General Court in case any complaint should come against them from the Indians, Mr. Salusbury who will be the bearer of this, was present at their examination - What turn this may take I can as yet form no Judgment.¹

According to the deposition of John Connor and James Grace, they, along with two companions, were sailing on the schooner Dunk when they were accosted and captured by the Indians near Torbay. The four were taken ashore by the Indians where two of them, Michael Hagerty and John Poor were killed and scalped. After a period of confinement, Connor and Grace, taking advantage of the absence of the Indian men, seized the Indian's weapons and killed a women and boy in whose charge they had been left. They then ambushed and killed four Indian men as they returned to the encampment. Connor and Grace scalped their six victims and made their escape to Halifax by canoe.² The two men may have scalped the Indians in order to collect the 10 guinea reward authorized previously by Governor Cornwallis for the capture or killing of any Micmac.

Shortly thereafter, the Indians led by Chief Cope retaliated by capturing a government supply ship and killing the crew with the exception of the Acadian interpreter. In his deposition, the interpreter, Anthony Casteel states that after the crew was killed, he was taken by the Indians to an

Acadian farm near Cobequid where Chief Cope kept his copy of the Peace Treaty. According to Casteel:

... they (the Indians) called for the articles of Peace, which the Deponent having begun to read to them, they snatched them out of his hands and afterwards threw them into the fire, telling him that was the way they made Peace with the English.³

Casteel's deposition also related the Indian version of events:

... here the Deponent met an old lame Indian who told him that two Englishmen, who killed two Indian men, three women and two children had been shipwrecked and starving on the Coast, and two of their people drowned, that the Indians had taken great care of them, promising to return them to their Friends, and treated them with great Confidence, till they traitorously took the advantage when the Indians were asleep to destroy them...⁴

It is, impossible from a perspective of 240 years to determine the veracity of these statements. The Indians never laid charges and Connor and Grace were never brought to trial. It is worth noting that Governor Hopson took measures to prepare for a trial, an action entirely consistent with the terms of the treaty.

Under Article 1 of the Treaty of 1752, it is stated that the Treaty of 1725 is "Renewed, Reiterated and Confirmed." One of the provisions of the latter treaty states:

That in case of any misunderstanding, quarrel or injury between the English and the Indians no private revenge shall be taken, but application shall be made for redress according to His Majesties law.⁵

Similarly, Article 8 of the Treaty of 1752 states:

That all disputes whatsoever that may happen to arise between the Indians now at Peace, and others His Majesty's Subjects in this Province shall be tryed in His Majesty's Courts of Civil Judicature, where the Indians

shall have the same benefit, Advantage and Privileges, as any others of His Majesty's Subjects.⁶

The Indians by taking their own revenge rather than seeking redress through the courts, broke the Treaty.

Nor can there be any doubt that the British considered the treaty to be broken. In a letter dated 3 June 1754, William Cotterell, the Secretary of the Executive Council of Nova Scotia, commenting upon a proposal by the Abbé Le Loutre; wrote in part:

However, Sir, when you answer his letter you may if you please acquaint him, that he cannot be ignorant that we are by no means the aggressors or in any way desirous to begin or continue a War with the Indians if they would demean themselves as they ought to do towards his Majesty's subjects; that far from having any objections to the proposal he makes, we did before assent to it, and even ratify it by a Treaty with Cope which has indeed since been broke through on their part, of which Transaction Mr. Le Loutre can probably give a better account than we.⁷

In 1985, the Supreme Court of Canada ruled in the Simon decision that the Treaty of 1752 was validly created by competent parties; that it was a 'Treaty' within the meaning of Section 88 of the Indian Act and contained a right to hunt; and that it had not been terminated by subsequent hostilities. With respect to termination the Court also stated:

It may be that under certain circumstances a treaty could be terminated by the breach of one of its fundamental provisions. It is not necessary to decide this issue in the case at bar since the evidentiary requirements for proving such a termination have not been met. Once it has been established that a valid treaty has been entered into, the party arguing for its termination bears the burden of proving the circumstances and events justifying termination. The inconclusive and conflicting evidence presented by the parties make it impossible for this Court to say with any certainty what happened on the eastern coast of Nova Scotia 233 years ago. As a result, the Court is unable to resolve this historical question. The

Crown has failed to prove that the Treaty of 1752 was terminated by subsequent hostilities.⁹

This Simon decision, however, should not affect the issue of a comprehensive land claim in Nova Scotia. The Treaty of 1752 did not contain any provisions dealing with either aboriginal title or lands.

Further to this point, in 1990, in the case of Johnson vs. Her Majesty the Queen, the Provincial Court of Nova Scotia reviewed the issue of termination. The Provincial Court Judge stated:

Mr. Justice Dickson explicitly did not decide the issue of termination, because the Crown did not meet the evidentiary burden to prove it was terminated. Nor was he satisfied the evidence of the Defence settled that the Treaty had not been terminated. In no other case was the issue raised, to my knowledge. I read the Dickson decision and the earlier decisions as not precluding or estopping a review of the issue, since it has not been adjudicated.

The issue of res judicata and estoppel were considered in the case of Angle v. Minister of National Revenue [1975] 2 S.C.R. 248. The requirements to invoke the doctrine of res judicata have not been met. The underlying issue of termination of the Treaty has not been determined. The defendant and the offences alleged are different than those in all previous cases to which I would be bound.

I am of the opinion I have the necessary jurisdiction to consider the issue of the termination of the 1752 Treaty.⁹

After investigating the circumstances with regard to the Treaty of 1752 and subsequent actions, the judge, Mr. Justice MacDougall found that:

The evidence adduced at this trial has convinced me the relationship between the parties to the 1752 Treaty had deteriorated to such a degree that the only conclusion is to find that the Treaty had been repudiated by both parties and terminated. There is no evidence from which

to conclude the 1752 Treaty was at any time reaffirmed, but only that it had been replaced.¹⁰

This, of course, was the ruling of a lower court. Until such time as the issue of termination is adjudicated in the Supreme Court of Canada, the Simon decision remains paramount.

Footnotes

1. Akins, Thomas B., Selections from the Public Documents of the Province of Nova Scotia. Halifax: Charles Annand, 1869. p.682.
2. Ibid., p.695.
3. Ibid., p.697.
4. Ibid.
5. PAC,CO.217/4, p,349.
6. Akins, Thomas, B. Selections from the Public Documents of the Province of Nova Scotia. pp.684-685.
7. Ibid., p.210.
8. Her Majesty The Queen v. James Matthew Simon: Supreme Court of Canada, 1985. p.35.
9. Her Majesty The Queen v. Stanley Gordon Johnson: In The Provincial Judge's Court, Antigonish, County of Antigonish, Nova Scotia, 1990. p.7.
10. Ibid., pp.16-17.