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**Maritime Indian treaties in historical perspective :
historical paper**

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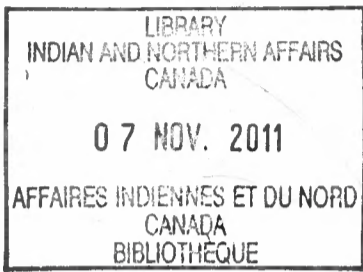
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MARITIME INDIAN TREATIES IN HISTORICAL PERSPECTIVE

1. The "ancient boundaries" of Acadia.

One of the most difficult aspects of a study involving Indian Treaties in Nova Scotia and New Brunswick is to first determine the "ancient boundaries" of this area, once known as Acadia. In 1865 Beamish Murdoch, a Nova Scotia lawyer, wrote a detailed three volume history of his province in which he gave the following description of Acadia's "ancient boundaries" in the seventeenth century.

"Acadie was then bounded on the North by the gulph of St. Lawrence, on the East by the Atlantic, on the south by the river Kennebec, and on the West by the province of Canada, its northern-most boundary being in Gaspé Bay. It extended from about 49 degrees to 48 degrees North Latitude, and between 60 degrees and 70 degrees West Longitude. It measured from East to West about 700 miles and from North to South about 275."¹



2. Possession of Acadia (1621-1713).

In the early seventeenth century (1621), Acadia was granted to Sir William Alexander by King James I of England (James VI of Scotland). The title deed was subsequently confirmed by a patent of Charles I on 12 July 1625.

In 1632, the Treaty of Saint Germain en Laye restored Acadia and Cape Breton to Louis XIII of France. Twenty-three years later the Treaty of Westminster (1655) once again gave provisional custody of Acadia to Britain. However, a commission was appointed to investigate French claims to St. John, Port Royal and Iahève. In the meantime, Cromwell granted a portion of Acadia to Sir Thomas Temple and William Crowne in 1657.

In 1667, the Treaty of Breda returned Acadia to France, only for her to loose possession once more in 1680. Having regained Acadia in 1682, the French king sent definite instructions to his new governor, Menneval, which were intended to guide his policies during his term as governor. Menneval had three priorities:

- 1) To extend his jurisdiction from the Gaspé to the Kennebec River.
- 2) To ensure the conversion of the Indians to Christianity.

1. Appendix A.

- 3) To deal honestly with the Indians in matters of trade.²

In 1690, Phips captured Port Royal and in 1691, Acadia was granted to Massachusetts as a dependency, by right of conquest.³ In the charter which William and Mary granted to Massachusetts, dated 7 October, 1691, it was stated that:

"... the territory called Accada, or Nova Scotia, is united and incorporated in the Province of the Massachusetts Bay in New England, 'and the patent grants' unto our good subjects the inhabitants of our said province or territory of the Massachusetts Bay, and their successors ... the lands and hereditaments lying and being in the country of territory commonly called Accada or Nova Scotia, and all those lands and hereditaments lying and extending between the said country or territory of Nova Scotia and the river Sagdehook, or any part thereof; and all lands, grounds, places, soils, woods and wood grounds, havens, ports, rivers, waters, and other hereditaments and premises whatsoever, lying within the said bounds or limits aforesaid, and every part and parcel thereof; and also all islands and islets lying within ten leagues directly opposite the main land within the said bounds; and all mines and minerals, as well royal mines of gold and silver, as other mines and minerals whatsoever in the said lands and premises, or any part thereof." 4

Massachusetts's jurisdiction over Acadia did not last long, for Article 7 of the Treaty of Ryswick signed on 25 September 1697, transferred Acadia to France. The European situation did not permit Acadia to remain too long in French possession. Following the War of the Spanish Succession, the Treaty of Utrecht (1713), returned Acadia to Britain, except for Cape Breton which was retained by France. In the previous year (1712), the French had begun the construction of Fort Louisbourg which was to have a great influence upon the subsequent history of the area.

From the mid 1680's the influence of the French missionaries among the Indians had steadily increased until these prelates held the allegiance of the Indian people. These missionaries, however, did not limit their activities to saving souls, but organized the Indians into a fifth column movement against British interests in North America. Consequently, in 1713, when Britain acquired

2. Murdoch, B. A History of Nova Scotia (vol. 1) p. 173.

3. I.B.I.D. p. 197.

4. I.B.I.D. p. 198.

title to Acadia, she was confronted with an explosive situation in which the Indians and French settlers were allied against her.

3. The Concept of an "aboriginal title" to the lands of Acadia.

As Beamish Murdoch stated in 1865:

"The idea that the Indian nations had territorial rights, did not occur to the French diplomatists until after the cession of Acadie to the British crown in 1713."⁵

It is interesting to note that according to Murdoch, the French priest Ralle, was the first to raise this notion in a letter to Governor Shute in 1717.

Colonel Shute had succeeded Dudley as governor of New England in 1716, and in August, 1717, he held a conference with the eastern Indians (the Canibas and Abenakis) at the island of Arrowsick. Father Ralle, a missionary from Narantsouak sent the governor a letter stating;

"... that the French king had never by any treaty, conceded to the English the lands of the Indians, and that he would protect them against every encroachment."⁶

The Indians at first opposed the claims of the English to any lands east of the Kennebec River, but in the end yielded, and confirmed the treaty of Portsmouth of 1713,^{*} admitting the right of the English to hold all their former settlements.

As Murdoch pointed out;

"The advantage of this was, that such an opinion being instilled into the minds of the Indians, their hostility to the English, whom they were thus induced to look upon as usurpers of their land, was kept constantly alive."⁷

It could be argued that the French missionaries, acting on orders from Quebec, were guilty of violating article 15 of the Treaty of Utrecht, when they engaged in arousing the Indians against the British. Article 15 had stipulated that:

"The Subjects of France inhabiting Canada, and others, shall hereafter give no Hindrance or

5. I.B.I.D. p. 352.

* Appendix J.

6. I.B.I.D. p. 350.

7. I.B.I.D. p. 352.

Molestation to the five Nations or Cantons of Indians, subject to the Dominion of Great Britain, nor to the other Natives of America, who are Friends to the same."

Article 12 of the Treaty of Utrecht gave Britain title to Acadia. Consequently, in the opinion of Chief Justice Jonathan Belcher, later Lieutenant-Governor of Nova Scotia:

"... no other Claim (to an aboriginal title) can be made by the Indians in this Province, either by Treaties or long possession (the Rule, by which the determination of their Claims is to be made by Virtue of this His Majesty's Instructions) since the French derived their Title from the Indians and the French ceded their Title to the English under the Treaty of Utrecht." 8

Belcher was quite correct in this pronouncement. The French never recognized the aboriginal title to the lands they conquered, for they regarded such title as lodged in the name of the French Sovereign, which at the time of the Treaty of Utrecht then passed to the British Sovereign. The British for their part through the prerogative powers of the Crown did not admit any form of title or land ownership to the Indian people other than that of a usufructuary right. In other words, the Indian title could exist only if the Crown chose to recognize it, it was completely within the Crown's powers to ignore Indian claims to such title if they chose to do so.

When the British acquired Acadia from the French, the Indian people, primarily Micmacs, were hostile to the British. With this state of affairs it was legitimate for the British Crown to choose to ignore any Indian claim to land title. Why should the British Crown recognize an enemy claim? Indeed to recognize the Indian title was politically impossible for it was being pressed by French clerics simply as a ploy to stir up the Indian population. Instead the British resorted to treaties of "peace and friendship" which did not involve recognition of land entitlement and conferred no continuing material benefits on the Indian people who signed these treaties. Here is a practical example of how the British Crown could deal with the claim of an Indian title. Since the initiative always rested with the Crown and its goodwill, the Indians of the Maritimes cut their own throats so to speak by backing the French in the struggle for North America. The French lost the struggle for the continent and as a result the Indians lost any hope of gathering lasting material benefits from the British through treaty.

8. Belcher to the Lords of Trade, 2 July 1762. Warman v. Francis, 43 M.P.R., p. 205. See also Appendix K.

4. Indian Unrest(1717 - 1725)

After 1717, the influence of the French remained strong in Acadia. France still held Cape Breton, and Louisbourg had grown in strength. In addition, the Acadians had refused to take an oath of allegiance to the British Crown and remained defiant as ever. The French priests' influence among the Indians increased as Quebec grew stronger and Louisbourg flourished. In August 1720, the Indians attacked and pillaged Canso.

By 1720 the British had begun their consolidation of Acadia by erecting new forts and taking possession of uncleared lands. The Indians on instigation from the priests demanded to know how the British could settle on their land. It was explained to them that the whole of Acadia had been ceded by the French king to Britain in 1713. When Governor Vaudreuil of Quebec was questioned by Indian messengers from the Maritimes, he denied that the Indian title had been dealt with by the Treaty of Utrecht. The situation became so acute that the Governor of Massachusetts had to summon a council of the eastern chiefs to hear their greivances. At this meeting, the chiefs denied the right of the French king to dispose of their land. In the absence of the French prelates, the Indians seemed to loose most of their hostility and when the meeting ended, Indians fears had greatly diminished.

When Governor Vaudreuil learned of this development, he despatched Father La Chasse to the Maritimes to ensure that the tribes would remain loyal to the French. In the absence of a substantial French force, the priest had to resort to the tactic of spreading rumours among the Indians as to British intentions in the area. This tactic became known to the British as "the French game."

In the year 1722 war broke out between the Indians and the English settlers in New England. In July, the Indians captured several vessels on the Bay of Fundy and eighteen other vessels along the coast. Throughout 1723 and 1724 Indian raids continued at Canso and Annapolis. Peace came to the area only after the banishment of Father Charlemagne, the death of Father Ralle, and the British raid on Norridgewock.

5. The Treaty of 1725

In 1725, the eastern chiefs sued for peace and agreed to meet the commissioners of Massachusetts and Nova Scotia to sign a peace treaty. Paul Mascarene was chosen as commissioner for Nova Scotia with the following instructions:

- 1) The Indians were to acknowledge the King's exclusive right to all of Nova Scotia.
- 2) The Indians were to promise not to molest the settlers.
- 3) Restitution was to be made for past plunders.
- 4) The number of priests in Acadia was to be limited.
- 5) The Indians had to promise friendship.
- 6) Hostages were required of the Indians as a pledge for speedy ratification of the treaty.⁹

The treaty was negotiated and signed in Boston and then carried about the country gathering Indian band adherents.¹⁰ In 1726, Indians at Canso, Annapolis Royal and Casco signed. In May 1728, 26 Indians from the village of Medoctec adhered to the treaty. As a result of the 1725 treaty there was a marked reduction of the Indian menace to the British in Nova Scotia. Throughout the remainder of the 1720's and into the 1730's the number and severity of Indian raids decreased until they were scattered incidents involving only a few braves.

In the early 1740's a new French priest appeared among the Indian inhabitants of Acadia. Father Sebastien de la Loutre, missionary to the Shubenacadie Indians, was more interested in stirring up their suspicions than in saving their souls. Against the British he promised "une guerre eternelle," persuading the savages to defend their country against the intruders from Chebucto. During the winter of 1746, the Indians, although they had made some movements towards peace with the English, were still hostile, and used their braves to intercept the communications between Annapolis and Louisbourg.

6. The Treaty of 1749.

On the 14 - 25 August 1749, Governor Cornwallis and his council met

9. Murdock B., A History of Nova Scotia, Vol. 1 p. 414.

10. Appendix D.

with the St. Johns and Chinecto tribes of Indians at Chebucto Harbour with the intention of having them adhere to the 1725 Treaty. At this meeting the Indians agreed to recognize the British Crown title to Acadia "according to its ancient boundaries", not to molest settlers, to seek redress for any injuries through British law and to aid in the apprehending of deserters. ¹¹ The terms of this treaty were similar to the one signed 1725 which was based on the instructions sent to Paul Mascarene.

The new treaty apparently had very little success in heading off the feared Indian uprising, for in August Canso was attacked and twenty murdered. Raids also were recorded at Chegnecto, Dartmouth Cove and the British fort at Mines. In October 1749, a bounty of 10 guineas was placed on all male Micmac Indians, dead or alive.

7. The Treaty of 1752.

Between 1713 and 1749 the character of Acadia had scarcely changed. Outside of a weak garrison at Port Royal, thereafter called Annapolis Royal, it remained French in spirit, language, and local custom. Then came the important year of 1749 which remains as the pivotal date in the evolution of Nova Scotia as a British colony.

- 1) In 1749 the colonization of Nova Scotia was taken in hand by the Board of Trade, the Privy Council and the British Parliament.
- 2) Later in the same year came the founding of Halifax (to counter Fort Louisbourg) and soon afterward the establishment of precariously weak English "out-settlements" at Lunenburg and Bedford Basin.

These new settlements were scattered along the eastern shore and far removed from the densely populated French communities clustered around the Minas Basin and the Annapolis River. Due to the isolation and small size of these English enclaves, security from Indian raids was sought by entering into a new treaty of peace and friendship with the east coast Micmac tribes.

On 14 September 1752, Jean Baptiste Cope, an eastern Micmac chief, signed a treaty of peace and friendship with Governor P.T. Hopson at Halifax. This treaty was somewhat different than the ones signed in 1725, 1728 and 1749.

11. Appendix E.

Article one called upon Cope to agree to all the principles of the 1725 Treaty. In turn, the British would allow them to hunt and fish "as usual" and if they required it, a "Truckhouse" would be built at the Chibenaccadie River. Indian trade with Halifax was encouraged and they were assured (article 4) that their skins, feathers, fowl and fish would be disposed of "to the best advantage." This clause undoubtedly reflected the interest the British Board of trade was taking in the economic development of the colony. Provision was made in article 6 to have annual renewal of the treaty at which time presents of blankets, tobacco, powder and shot would be exchanged.¹²

8. Treaties and Negotiations (1752-1761).

The treaty of 1752 marked the beginning of a British "peace offensive" which lasted through the 1750's and eventually brought most of the major bodies of Indians under the terms of "peace and friendship" treaties.

In 1753 and 1755 the Missiquash Indians near Fort Laurence were brought under treaty.¹³ In November, 1753 the Cape Sable Indians sought peace. Beamish Murdoch recorded this incident as follows:

"In November, two Indians, one a chief, came as deputies of the Cape Sable tribe to profess friendship, averring that they had not joined with the others in any hostility, and on that account had received no aid from the French."¹⁴

In the same manner in 1760 the Indians at Halifax and at Chibenaccadie were asked to sign new pronouncements of peace.* In 1753, 1760 and 1761 the Lehéve Indians signed a treaty. The Chibenaccadie and Muscadoboit Indians came to terms 1760, while the Pictouck and Malagonice (Pictou and Merigomishe) Indians signed in the year 1761.¹⁵

In none of these treaties, nor in the negotiations leading up to their signing, was there any reference made to the Treaty of 1752, while the terms of the 1725 treaty formed a basis for these renewed negotiations.¹⁶

12. Appendix F.

13. Murdoch, B. A History of Nova Scotia, Vol. 2, p. 225.

14. I.B.I.D., p. 219.

15. I.B.I.D., pp. 385, 403, 406 - 7. * Appendix L.

16. Dominion Law Reports (1929, 1 D.L.R.), Rex v. Syliboy, p. 309.

9. The expulsion of the Acadians (1755) and the fall of Quebec (1763).

In 1755, those Acadians who had refused to take the oath of allegiance to the British Crown were expelled from the colony. With impending war between Britain and France on the continent, the British found themselves with an intolerable situation of having the strategic colony of Nova Scotia occupied by large numbers of hostile colonists. In addition, the fortress of Louisbourg on Cape Breton provided a haven for insurgents bent upon stirring up the French population and their Indian allies. The French missionaries continued to incite the Indians pointing out to them that the fate which befell the French in Acadia would soon happen to them if they allowed the English to remain secure in Nova Scotia.

As a result of renewed Indian hostilities, on May 14, 1756, Governor Lawrence issued a proclamation which put a price on the head of each Micmac Indian in Nova Scotia. The preamble to the proclamation attempted to justify this drastic action by charging the Micmacs, the tribe most loyal to French, with a breach of the promises of peace and friendship made in the 1752 treaty.¹⁷

In September 1759, Quebec fell to the British forces led by General Wolfe. L.H. Gipson, author of The Triumphant Empire, relates that this news had a decided effect upon the attitude of French settler and Indian alike in Nova Scotia.

"The news of the fall of Quebec on September 17, 1759 had a decided effect upon dissipating the hostility displayed by the refugee Acadians and their Indian allies."¹⁸

10. Belcher's Proclamation (1762).

Now that the continent had been won, Britain set about the task of consolidating her expanded empire. Early in 1762 the Governor of Nova Scotia received instructions from His Majesty (apparently sent to all colonial Governors in North America), entitled "Incroachments upon the Possessions and Territories of the Indians in the American Colonies." As a result Lieutenant-Governor Belcher, who had succeeded Governor Lawrence upon his death in 1759, issued a

17. Appendix G.

18. Gipson, L.H., The Triumphant Empire, p. 137.

proclamation dated May 1762. This document known as Belcher's Proclamation¹⁹ was promulgated by the Lieutenant-Governor despite the fact that on 20 March 1761, Henry Ellis had been appointed governor. The true intent of Belcher's Proclamation was stated by Belcher himself in a letter addressed to the Lord Commissioners for Trade and Plantations on 2 July 1762. The letter contained the following passage:

"In obedience to this Royal Instruction from His Majesty, I caused a Proclamation to be published in His Majesty's name enjoining all persons against any molestation of the Indians in their claims. Lest any difficulties might arise, it appeared advisable, previous to the proclamation, to inquire into the Nature of the Pretensions of the Indians for any part of the lands within this Province. A return was accordingly made to me for a Common-right to the Sea Coast from Cape Fronsac onwards for Fishing without disturbance or Opposition by any of His Majesty's Subjects. This claim was inserted in the Proclamation that all persons might be notified of the Reasonableness of such a permission, whilst the Indians themselves should continue in Peace with Us, and that this Claim should at least be entertained by the Government, till His Majesty's pleasure should be signified. After the proclamation no claims for any other purposes were made ... Your Lordships will permit me humbly to remark that no other Claim can be made by treaties or long possession (the Rule, by which the determination of their Claims is to be made by Virtue of this His Majesty's Instructions) since the French derived their Title from the Indians and the French ceded their Title to the English under the Treaty of Utrecht..."²⁰

The purpose of Belcher's Proclamation was to question Indian fears that their lands were going to be taken over by the new influx of settlers coming from New England following the fall of Quebec.

11. The Treaty of 1779.

For nearly half a century following the Treaty of Utrecht, the Micmacs remained close friends of the French, a friendship which the English could not transfer to themselves. Their hostility to the English prevented any serious attempts at establishing British settlements on the north coast of Nova Scotia and along the south and east coasts of New Brunswick, despite a treaty concluded with them in 1760.²¹

19. Appendix H.

20. Appendix K.

21. Appendix L.

It was not until 1779 that real disputes and difficulties with the Micmacs ceased. Even then, Mr. Francklin who was then Superintendent of Indian Affairs for Nova Scotia, doubted the loyalty of the Nova Scotia Indians if French war ships were ever to appear off the coast.

Francklin's suspicion of Indian loyalty to Britain in Nova Scotia was not ill-founded. On 16 January 1779, Lieutenant Governor Hughes sent George Germaine a copy of a treaty entered into on 19 July 1776 between certain Indian groups in Nova Scotia and the Government of Massachusetts.²² The terms of this treaty called for 600 Indian volunteers to be sent from Nova Scotia to aid Washington's army, at that time engaged against British forces. Here again was a practical example of Indian perfidity in Nova Scotia.²³

The last of the major treaties of "peace and friendship" was signed on 22 September 1779, with the Micmacs from Cape Tormentine to the Bay of Chaleur.²⁴ The Indian adherents to this treaty agreed to confirm their previous treaty commitments, not to aid the American rebels and to aid in the apprehension of criminals. In turn, the Nova Scotia government promised His Majesty's troops and subjects would not interfere with the Indians "in their hunting and fishing", and that traders would be sent to supply the Indians with food and clothing in exchange for furs and other commodities.

Following the signing of the 1779 treaty, there is no further record of any major treaty activity in the Maritimes. The Micmacs were the last tribe to acknowledge the British rule in Nova Scotia, and with their signing, a modicum of peace came to the area. Although local disturbances flared from time to time, for the most part, the British achieved their objective of allaying Indian suspicions and gaining their loyalty.

12. An analysis of "Peace and Friendship" treaties.

As a form of conclusion to this paper, it might be useful to summarize the basic nature of these treaties of "peace and friendship."

1) First of all, unlike the eleven Indian treaties signed in western Canada, no land

22. Appendix I.

23. Appendix N.

24. Appendix O.

entitlement was ever considered. Indeed, geographic areas were only mentioned in the most obscure terms. The Maritime treaties were solely of the "peace and friendship" variety with no provision for continuing benefits to the Indian sign-ators. These instruments were intended to quieten Indian hostility to the British and to gain their allegiance. In return for these pledges, the British offered trade goods. The arrangement was strictly one-sided, with the British gaining all the benefits and holding the initiative at all times.

2) For the most part, the terms of these treaties were similar. Prior to 1749, treaty provisions stressed Indian recognition of the British Crown's title to Acadia, sought pledges of their loyalty and obtained their assistance in apprehending deserters. After 1749, when the influence of the British Board of Trade began to increase, articles encouraging trade with the Indians were inserted into the treaties. The Indians were also assured that they would not be interfered with in "their hunting and fishing." This particular clause was written into many treaties to allay Indian fears that their way of life would be destroyed; and also, to encourage Indian hunting and fishing so as to provide a source of pelts, fish and feathers for colonial merchants.

3) The Indians adhering to these treaties represented local groups, not large tribes covering immense areas of land. In many of these treaties, a clause was inserted whereby the Indians pledged to encourage other tribes to sign. In the case of the 1725 treaty, it was signed at Boston then taken to Nova Scotia where Indian groups from various areas of the colony would gather to sign. The 1752 treaty for instance was signed by Chief Cope who represented only 80 Indians.

13. The legal implications of "peace and friendship" treaties.

The fundamental question underlying all these treaties in the Maritimes is whether these documents can be called "treaties" in a legal sense. This question was given judicial consideration in Rex v. Syliboy when the judge considered the nature of the Treaty of 1752. N.A.M. Mackenzie, in an article entitled "Indians and Treaties in Law", which appeared in The Canadian Bar Review of October, 1929, considered the judge's decision.

In Rex v. Syliboy the judge argued that:

"Treaties are unconstrained Acts of independent powers.' But the Indians were never regarded as an independent power... The savages rights of sovereignty even of ownership were never recognized. Nova Scotia had passed to Great Britain not by gift or purchase from or even by conquest of the Indians but by treaty with France, which had acquired it by priority of discovery and ancient possession; and the Indians passed with it.

"Indeed the very fact that certain Indians sought from the Governor the privilege of right to hunt in Nova Scotia as usual shows that they did not claim to be an independent nation owning or possessing their lands." 25

The judge concluded that the 1752 "treaty" was at best "a mere agreement made by the Governor and council with a handful of Indians giving them in return for good behaviour food, presents, and the right to hunt and fish as usual..." 26

Indeed, the judge even questioned the Governor's authority to sign the treaty for nowhere in his commission was there any mention of power to sign treaties.

Although the judge in this particular case considered the 1752 "treaty" as an agreement, Mackenzie argued that this might not be the decision of another court, as the term "treaty" in International Law has various connotations.

Many questions then still have to be answered. What is a treaty, and when is a so-called treaty not a treaty? Is there any moral obligation on the part of the Crown to treat an agreement as a treaty? What is the difference between a treaty and an agreement, and is an agreement just as binding on the contracting parties as a treaty? Answers to these legal questions will have a great influence on determining the "equitable basis" for the termination of all Indian treaties in Canada.

by: *Treaties & Historical Research*
1971

25. Dominion Law Reports (1929. 1 D.L.R.) Rex v. Syliboy, p. 313.

26. I.B.I.D., p. 314.