Week 7 - Treaties and Indigenous Legal Orders

2021-11-01

Last week we studied the historical roots of the common law doctrine of Aboriginal title and saw, in *St. Catherine’s Milling*, how classical legal thought framed the courts’ conclusion that Indigenous land rights were “personal” rather than “proprietary”. We left off with the observation that beneath the issue of Aboriginal title foregrounded in *St. Catherine’s Milling* was the doctrine of *terra nullius* (“land belonging to no one”). Aspects of *terra nullius*—paired with the doctrine of discovery—undergird courts’ continued assumption of Crown sovereignty and the exclusion of Indigenous sovereignties up to the present day. One consequence of this doctrine has been to largely exclude Indigenous legal orders from the consciousness of the common law.

The path charted by the courts at the end of the nineteenth century, however, was not the only possibility. An alternative to *terra nullius*, we might say, is *treaty*—a legal relationship between nations defining their scope of authority and mutual obligations. Such relationships are based on the shared recognition that each party to the treaty holds authority to govern according to their own systems of law.

Treaty relationships between Indigenous nations and the Crown are widespread in Canada, but they are also diverse and difficult to generalize. This week we will focus on the treaty context in Mi’kma’ki / Atlantic Canada to understand how the Peace and Friendship Treaties were established in the mid-eighteenth century and then interpreted in the classical period. We will see that, with the Nova Scotia County Court’s decision in *R v Syliboy*, common law treaty interpretation in the region became highly restrictive and was based on a rejection of the idea of nation-to-nation relationships and of Mi’kmaw systems of law and governance.

Nevertheless, Mi’kmaq people have continued to use and develop these systems of law and governance. We will look at one description of Mi’kmaw land tenure and ask how we might understand this system in comparison to the structures of common law reasoning we have studied so far in the course.

{{< iframe src=“https://native-land.ca/wp-content/themes/Native-Land-Theme/embed/embed.html?maps=territories,treaties&name=peaceAndFriendship” caption=“Peace and Friendship Treaty, 1752. Source: [native-land.ca](http://www.native-land.ca).” >}}

The early eighteenth-century in what is today Eastern Canada was characterized by political and military struggles and alliances between three powers in the region: the Wabanaki (a political alliance of Mi’kmaw, Wolastoqiyik, and Passamaquoddy peoples, and a separate alliance of communities known as the Abenaki), the British, and the French. 1726 saw the end of a three-year war between New England and the Wabanaki, which had been grounded in concerns about colonial expansion northward (including incursions on Indigenous fishing territories and colonial land settlement). In turn, the British were becoming increasingly motivated to forge friendly relationships with the Wabanaki as counter-weight to French power. This period culminated in the signing of the Treaty of 1725 by various parties between that year and 1726.

It is important to distinguish the 1725 treaty from what are sometimes called the “numbered treaties”—one of which was in issue in *St. Catherine’s Milling*. While the latter treaties have been interpreted by common law courts as “land cession” treaties in which First Nations ceded their land rights to the Crown, the 1725 treaty and subsequent treaties in Atlantic Canada are understood as treaties in which the Indigenous signatories did not cede any of their land rights or their authority to govern their lands.

A general word of caution when reading these treaty documents: the interpretation of historical treaties is a complex exercise. There can be several reasons for this, as described below.[[1]](#footnote-21)

Consider the following challenges related to the interpretation of historical treaties:

* a given treaty may be comprised of multiple documents spanning several years, across changing contexts, and involving different signatories;
* a lack of historical documentation, such as contemporaneous minutes of the treaty signing;
* the possibility (in some cases, the likelihood) that parties to the treaty came with and developed differing understandings of their relationships and obligations to one another;
* the bias against oral traditions inherent in written treaty texts;
* the diversity of interests, perspectives and alliances among Indigenous communities.

Keep these points in mind as you read the treaty texts below, as well as the decision in *R v Syliboy*.

As a starting point for this week’s readings, please watch the following talk about the Peace and Friendship Treaties delivered by Assembly of First Nations Regional Chief Paul J. Prosper and published by the National Centre for Truth and Reconciliation.

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# Treaty of 1725

[*This treaty—the first in a line of treaties entered into by the British and Indigenous nations in the Atlantic region—was first signed in Boston in 1725. The same treaty was signed with different Indigenous parties one year later in 1726.*]

**Ratification of 1725 Treaty**

Articles of Submission & Agreements made at Boston in New England by Sanguaarum alias Loron, Arexus Francois Xavier and Meganumbe Delegates from Penobscott Naudgevaek S. Johns Cape Sables and Other Tribes Inhabiting within His Majesties Territories of Nova Scotia and New England \_\_\_\_\_\_\_\_\_\_

Whereas His Majesties King George by Concession of the Most Christian King made at the Treaty of Utrecht became the Rightfull Possessor of the Province of Nova Scotia or Acadie according to its antient Boundaries We the said “Indians Sanguaarum alias Loron Arexus Francois Xavier and Meganumbe Delegates from the said Tribes Penobscott Naudgewaek St. Johns Cape Sables and other tribes Inhabiting His Majesties and Territories in Nova Scotia or Acadie and New England in the name and behalf of the said Tribes We Represent Acknowledge His Said Majesty King George’s Jurisdiction and Dominion over the said Territories of Nova Scotia or Acadie and make our Submission to his said Majesty in as ample a Manner as We have formerly done to his most Christian Kings \_\_\_\_\_\_\_\_\_\_

And We further promise on behalf of the said Tribes We represent That the Indians shall not Molest any of His Majesties subjects or their Dependents and their Settlements already made or Lawfully to be made or in their Carrying on their Traffick or their 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 Majesties forts but on the Contrary shall bring back any Soldiers they shall find Endeavouring to Run away \_\_\_\_\_\_\_\_\_\_

That in the case of any Misunderstanding Quarrel or Injury between the English and the Indians no private Revenge shall be taken, but Application shall be made to Redress according to his Majesties Laws \_\_\_\_\_\_\_\_\_\_

That if the Indians have made any Prisoners belonging to the Government of Nova Scotia or Acadie during the Course of the War shall be Released at or before the Ratification of this Treaty \_\_\_\_\_\_\_\_\_\_

That This Treaty shall be Ratified at Annapolis Royal \_\_\_\_\_\_\_\_\_\_\_

Dated at the Council Chamber in Boston in New England this fifteenth day of December Anno Domini one Thousand seven hundred and Twenty-five, Annog: Requi Regis Georgu Magna Britannica & Duo decimo \_\_\_\_\_\_\_\_\_\_

**Mascarene’s Treaty of 1725**

By Major Paul Mascarene one of the Councill for His Majestys Province of Nova Scotia or Accadie and Commissioned by the Honourable Lawrence Armstrong Esqr Lieut Governour and Commander in Chief of the Said Province for treating with the Indians engaged in the late Warr-

Whereas Sanguarum als Laurens, Alexis, Francois Xavier and Meganumbe Delegates of the Tribes of Penobscutt, Norrigewock, St. Johns, Cape Sables and other Tribes Inhabiting His Majestys Territories of Nova Scotia or Accadie and New England; have by Instruments Signed by them made their Submission to His Majesty George by the grace of God of Great Britain, France and Ireland King deffender of the Faith and acknowledged His Majestys Just Title to the Province of Nova Scotia or Accadie and promised to live peaceably with all His Majestys Subjects and their Dependants with what further is Contained in the Severall Articles of those Instruments I do in behalf of His Majestys Said Governour and Government of Nova Scotia or Accadie - promise the said Tribes all marks of Favour protection and Friendship and further Ingage and promise in behalf of the Said Government That the Indians shall not be molested in their persons, Hunting, Fishing and Planting Grounds nor in any other their Lawfull Occassions by His Majestys Subjects or their Dependants nor in the Exercise of their Religion Provided the Missionaries residing amongst them have leave from the Governour or Commander in Chief of His Majestys Said Province of Nova Scotia or Accadie for so doing.

That if any of the 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 Benefitt equal with His Majestys other Subjects.

That upon the Indians bringing back any Soldier endeavouring to run away from any of His Majestys Forts or Garrisons the said Indians for this good Office shall be handsomly rewarded. That the Indians in Custody att Annapolis Royall shall be released except such as the Governour or Commander in Chief shall think proper to keep as Hostages att the Ratification of this Treaty which shall be att Annapolis Royall in presence of the Governour or Commander in Chief and the Chiefs of the Indians. Given under my hand & Seal att the Council Chamber in Boston in New England this fifteenth day of December Anno Dom One thousand Seven hundred and twenty five Annoque Regni Regis Georgii Magnae Brittanniae & Duodecimo -

P Mascarene

{{< figure src=“/media/halifax\_1749.jpg” caption=“Halifax, 1749.” >}}

Halifax was settled by the British in Mi’kma’ki without lawful authority or consent from the Mi’kmaq, on land the Mi’kmaq call K’jipuktuk. Like other places in Canada, Halifax’s colonial origins are rooted in the violent displacement and dispossession of Indigenous peoples. This legacy forms a central piece of the legal context for the city today.[[2]](#footnote-22)

Britain’s settlement of Halifax in 1749 was interposed between and closely linked with the Peace and Friendship Treaties signed by the British and Mi’kmaq in 1725 and then in 1752 and 1760-61. As noted above, interpreting the terms of these treaties is a complicated exercise, but it is unambiguous that, as nation-to-nation agreements, they are based on the ideas of building ongoing relationships and of reciprocity. Just as Halifax was settled in apparent breach of the 1725 treaty, the 1752 treaty and subsequent treaties might be seen as a direct response and attempt to repair the relationship between the Mi’kmaq and the British in the aftermath.

Consider the following question: in what way(s) was the settlement of Halifax by the British likely understood to violate the terms of the 1725 treaty?

# 1752 Treaty of Peace and Friendship

[*The following text is quoted in* R v Simon*, [1985] 2 SCR 387 at para 6.*]

Treaty or Articles of Peace and Friendship Renewed between His Excellency Peregrine Thomas Hopson Esquire Captain General and Governor in Chief in and over His Majesty’s Province of Nova Scotia or Acadie. Vice Admiral of the same & Colonel of one of His Majesty’s Regiments of Foot, and His Majesty’s Council on behalf of His Majesty and Major Jean Baptiste Cope, chief Sachem of the Tribe of Mick Mack Indians Inhabiting the Eastern Coast of the said Province, and Andrew Hadley Martin, Gabriel Martin & Francis Jeremiah, Members and Delegates of the said Tribe, for themselves and their said Tribe their Heirs, and the Heirs of their Heirs forever, Begun made and concluded in the manner, form and Tenor following, vizt:

1. It is agreed that the Articles of Submission and Agreement, made at Boston in New England by the Delegates of the Penobscot Norridgwolk & St. John’s Indians, in the year 1725 Ratified & Confirmed by all the Nova Scotia Tribes, at Annapolis Royal, in the month of June 1726, & lately renewed with Governor Cornwallis at Halifax, & 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 & Renew the same Solemn Submissions and promisses for the Strickt observance of all the Articles therein contained as at any time heretofore that been done.
2. That all Transactions during the late War shall on both sides be buried in Oblivion with the Hatchet, and that the said Indians shall have all favour, Friendship & Protection shewn them from this His Majesty’s Government.
3. That the said Tribe shall use their utmost endeavours to bring in the other Indians to Renew and Ratify this Peace, and shall discover and make known any attempts or designs of any other Indians or any Enemy whatever against His Majestys Subjects within this Province so soon as they shall know thereof and shall also hinder and Obstruct the same to the utmost of their Power, and on the other hand if any of the Indians refusing to ratify this Peace, shall make War upon the Tribe who have now confirmed the same; they shall upon Application have such aid and Assistance from the Government for their Defence, as the case may require.
4. It is agreed that the said Tribe of Indians shall not be hindered from, but have free liberty of Hunting & Fishing as usual: and that if they shall think a Truckhouse needful at the River Chibenaccadie or any other place of their resort, they shall have the same built and proper Merchandize lodged therein, to be Exchanged for what the Indians shall have to dispose of, and that in the mean time the said Indians shall have free liberty to bring for Sale to Halifax or any other Settlement within this Province, Skins, feathers, fowl, fish or any other thing they shall have to sell, where they shall have liberty to dispose thereof to the best Advantage.
5. That a Quantity of Bread, Flour, & such other Provisions as can be procured, necessary for the Familys, and proportionable to the number of the said Indians, shall be given them half yearly for the time to come; and the same regard shall be had to the other Tribes that shall hereafter agree to Renew and Ratify the Peace upon the Terms and Conditions now Stipulated.
6. That to Cherish a good Harmony & mutual Correspondence between the said Indians & this Government, His Excellency Peregrine Thomas Hopson Esqr. Captain General & Governor in Chief in & over His Majesty’s Province of Nova Scotia or Accadie, Vice Admiral of the same & Colonel of one of His Majesty’s Regiments of Foot, hereby Promises on the Part of His Majesty, that the said Indians shall upon the first day of October Yearly, so long as they shall Continue in Friendship, Receive Presents of Blankets, Tobacco, and some Powder & Shot; and the said Indians promise once every Year, upon the first of October to come by themselves or their Delegates and Receive the said Presents and Renew their Friendship and Submissions.
7. That the Indians shall use their best Endeavours to save the lives and goods of any People Shipwrecked on this Coast, where they resort, and shall Conduct the People saved to Halifax with their Goods, & a Reward adequate to the Salvadge shall be given them.
8. 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, Advantages and Priviledges, as any others of His Majesty’s Subjects.

In Faith and Testimony whereof, the Great Seal of the Province is hereunto Appended, and the party’s to these presents have hereunto interchangeably Set their Hands in the Council Chamber at Halifax this 22nd day of Nov. 1752, in the Twenty sixth year of His Majesty’s Reign.

{{< figure src=“/media/treaty1752.jpg” caption=“Peace and Friendship Treaty, 1752. Source: Nova Scotia Archives, RG 1, Vol. 430, No. 2.” >}}

In 1928, Grand Chief Gabriel Syliboy was charged and ultimately convicted of hunting muskrats out of season on Unamaki (Cape Breton). Justice Patterson’s interpretation of the 1752 treaty in *R v Syliboy*—though ultimately rejected by Canadian courts—would stand as an authoritative common law precedent for many years to come. The decision would influence relationships between Mi’kmaq peoples and the Crown long after it was issued. As William Wicken notes:[[3]](#footnote-24)

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 v 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.

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. Even when counsel was retained, clients were at times advised to plead guilty rather than enter treaty rights in defence.

# R v Syliboy, [1929] 1 DLR 307

Patterson, (Acting) Co. Ct. J.: —

[1] The defendant, who is the grand chief of the Mick Macks of Nova Scotia was convicted under the Lands and Forests Act, 1926 (N.S.), c. 4, of having in his possession at Askilton in the County of Inverness on November 4, last fifteen green pelts, fourteen muskrat and one fox. He made no attempt to deny having the pelts, indeed frankly admits having them, but claims that as an Indian he is not bound by the provisions of the Act, but has by Treaty the right to hunt and trap at all times. Every now and then for a number of years one has heard that our Indians were making these claims but, so far as I know, the matter has never been before a Court.

[2] The Treaty relied upon is that of 1752, made between Governor Hopson of the Province of Nova Scotia and His Majesty’s Council on behalf of His Majesty, and “Major’ Jean Baptiste Cope, chief Sachem of the Tribe of Mick Mack Indians Inhabiting the Eastern Coast of the said Province, and Andrew Hadley Martin, Gabriel Martin & Francis Jeremiah, Members and Delegates of the said Tribe:” (1 Nova Scotia Archives, p. 683). Article 4 in part says: — “It is agreed that the said Tribe of Indians shall not be hindered from but have free liberty to hunt and fish as usual.”

[3] Observe the date 1752. Cape Breton between 1748 and 1763 was not part of Nova Scotia. It was owned and governed by the French, while Nova Scotia was a colony of Great Britain. It will be remembered that defendant is a Cape Breton Indian and that the offence alleged against him was committed in Cape Breton. Assuming for the time that the Treaty is still in force in Nova Scotia proper, can defendant claim protection under it? Unless there is something more than I have stated, clearly not. But, say his counsel, the Mick Mack Tribe throughout Nova Scotia, including Cape Breton, is one and indivisible, and the Treaty was made with the tribe, and a very bright and intelligent young Indian testifies that two of the signatories to it were Cape Breton Indians. The language of the Treaty not only lends no support to this contention, but shows that it is untenable, and I am satisfied that the young Indian is mistaken.

[4] ”The following Treaty of Peace,” reads the minute of Council, “was Signed, Ratifyed and Exchanged with the Mick Mack Tribe of Indians, Inhabiting the Eastern Parts of this Province:” (1 Archives, pp. 682-3) computed to be ninety in number, — Cope himself claimed authority over only forty. (1 Archives, p. 671). Eight years before there had been three hundred Indians engaged in the attack on Canso (2 Nova Scotia Historical Society Collections, p. 15), all from “the Eastern Parts of this Province” which shows that Cope and the others who joined with him in the Treaty, really represented only a small portion even of these very Indians they claimed to represent. Notice further, how Cope is described as “chief Sachem of the Tribe of Mick Mack Indians Inhabiting the Eastern Coast of the said Province,” (i.e., Nova Scotia proper) and his fellow signatories as “Members and Delegates of the said Tribe.” Article 3 seems conclusive on the point. There it is provided (p. 683): — “That the said Tribe” (i.e. the tribe inhabiting the eastern coast of Nova Scotia) “shall use their utmost endeavours to bring in the other Indians to Renew and Ratify this Peace.” In the proclamation bringing the Treaty into force, Cope is described as “Chief Sachem of the Chibenaccadie (Shubenacadie) Tribe of Mick Mack Indians, Inhabiting the Eastern Coast of this Province,” and his associates as “Delegates of the said Tribe:” (1 Archives, pp. 685-6).

[5] If the communings leading up to the Treaty (Archives p. 671) be examined it will be seen that Cope calls himself “chief of that part of the Nation that lived in these parts of the province,” (that is near Halifax) and had about forty men under him. He accepted the proposals made to him by the Governor in these words: — “I Major Jean Baptiste Cope do accept … the conditions of this answer of His Excellency the Governor … for myself and my people … and I promise … to do my utmost Endeavours to bring here the other Tribes of Mickmacks to make a peace:” (Archives, p. 674).

[6] In the face of this evidence there can be no doubt, I think, that the Treaty relied upon was not 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, and that any benefits under it accrued only to that body and their heirs. The defendant being unable to show any connection, by descent or otherwise, with that body cannot claim any protection from it or any rights under it.

[7] But there is much more than what I might not improperly call internal evidence to show that defendant’s contention that the Treaty was a general and not a local one is untenable. Between 1752 and 1763 we find negotiations going on between the Governor and council and various tribes or local bodies of Indians for treaties: — for instance with the Fort Lawrence (Missiquash) Indians in 1753 and again in 1755; with the Cape Sable Indians in 1753; with Indians near Halifax in 1760; with Chibenaccadie Indians (the very Indians of our Treaty) in 1760 (2 Murdoch’s History of Nova Scotia, pp. 219, 225, 257, 383 and 384). Between same dates we find treaties entered into with Lehéve (LaHave) Indians in 1753, 1760 and 1761; with the Chibenaccadie and Muscadoboit (Shubenacadie and Musquodoboit) Indians in 1760; with certain Indian chiefs in 1761; with the Missiquash Indians, and with the Pictouck and Malagonich (Pictou and Merigomishe) Indians in the same year, (2 Murdoch’s History, pp. 219, 385, 403, 406-7). Why these negotiations — why these treaties if the Treaty of 1752 was general applying to all Nova Scotia?

[8] In none of these treaties, or in the negotiations leading up to them is there any reference to the Treaty of 1752, while there are many to the Treaty of 1725. (1 Archives, pp. 572-3). Indeed the only reference to the Treaty of 1752 that I have been able to find is in that infamous proclamation by Governor Lawrence dated May 14, 1756, wherein he offers a reward of £30 for the capture of any Indian, or £25 ’for any Indian woman. There it is mentioned as a treaty made with a tribe of Mick Macks. (2 Murdoch’s History, p. 308). We read too that in 1763 a chief of the Indians in the Island of Cape Breton repeatedly applied to the commanding officer at Louisbourg for provisions, which were refused, whereupon the chief said he would apply to the French and did so, (p. 437).

[9] That the Governor in Council of Nova Scotia knew that these treaties were of a local character is evident. On February 29, 1760, that body resolved “to make peace with each chief who came in, and afterwards to have a general treaty signed at Chignecto:” (p. 385).

[10] Counsel for the defendant suggest another way in which the benefits from the Treaty were or should be extended to their client and all other Cape Breton Indians. By Royal Proclamation after the Treaty of Paris, Cape Breton and St. John’s (Prince Edward) Island were annexed to Nova Scotia and three years later the Parliament of Nova Scotia by statute declared that the laws of Nova Scotia extended to the Island of Cape Breton. But the expression, “the Laws of Nova Scotia” had reference only to the general laws of the Province and it would be misusing words to speak of the Treaty of 1752 as a law. At any rate the statute of 1766 (N.S.), c. 1, ceased to have any effect in 1784 when Cape Breton was disjoined from Nova Scotia and created a colony with authority to its Governor to convene the Assembly. Separate Cape Breton and Nova Scotia remained until 1820-21 (N.S.), c. 5. After their union in that year an Act was passed enacting that the administration of justice in the Island of Cape Breton should be conformable to the usage and practice of the Province of Nova Scotia. Nothing is said about general laws or treaties. Presumably no mention of general laws was necessary to make them effective, but surely that cannot be said of treaties.

[11] I have referred to the proclamation after the Treaty of Paris. That is relied upon by the defendant for a reason other than that set out in the preceding paragraph. If that proclamation be examined it will be found that it deals only with those territories or countries, of which Nova Scotia was not one, that had been ceded to Great Britain by France. These territories or countries, exclusive of Cape Breton and St. John’s Island which, as we have seen, were annexed to Nova Scotia, were divided into four distinct governments, namely: Quebec, East Florida, West Florida and Grenada. The references in it to the Indians are specifically limited to the Indians of the three first named governments. One can understand an Indian in Quebec for example making a claim that he was guaranteed certain rights about hunting by the proclamation, but I confess I cannot understand a Cape Breton Indian making any such claim.

[12] I might stop here. If the Treaty did not extend to Cape Breton and the Indians there could make no claim under it or derive any benefits from it, the prosecution must succeed and the conviction of the defendant be confirmed. I think, however, I should express my opinion on the other questions raised for I am in hopes that there will be an appeal from my decision and that upon so important a matter we may have the judgment of an Appeal Court.

[13] Mr. McLennan for the prosecution, whose brief is a joy to read so complete and compact it is, contends that even if the Treaty relied upon by the defendant was made for the whole Mick Mack Tribe and did extend to Cape Breton and included the Indians there, it was almost at once put an end to by the breaking out of war. The ink was not much more than dry on the Treaty when Indians led by a son of Cope (let us hope not that son to whom the complacent Governor had sent a laced hat as a present) were carrying on in the characteristic Indian way a war against Britain. It was the very Indians who were parties to the Treaty that were responsible for the repeated raids upon Dartmouth, (2 Murdoch’s History, p. 231), and it is a well-known and established fact that right down until the Treaty of Paris put an end to the war between England and France the Indians were on the side of France and were carrying on war in her behalf. Would that clause in the Treaty guaranteeing them the right to hunt be in consequence put an end to, or would it be merely suspended? Mr McLennan as I have pointed out argues it would be put an end to, but I am inclined to hold it would only be suspended.

[14] He quotes in support of his contention Woolsey on International Law, 5th ed., p. 272: — “Great Britain admits of no exception to the rule that treaties, as such, are put an cad to by a subsequent war between contracting parties:” but this is not Woolsey’s own language, — it is a quotation from Dr. Twiss’ Law of Nations in Peace, 1884, pp. 440-1, para. 252, and it is clear that Woolsey himself does not hold that view, that he recognizes certain exceptions to the rule that treaties are abrogated by war between the contracting parties. Woolsey points out (p. 272) for example that war between the U.S. and England would not end but would merely suspend the stipulation in the Treaty of 1818, 1 Malloy’s Treaties, p. 631, giving the U.S. liberty “forever to cure and dry fish” in certain places.

[15] The treaty we are discussing was not made with the signatories alone but “with their heirs, and the heirs of their heirs forever,” which seems to me to bring that portion of it giving to one of the contracting parties the right to hunt within Woolsey’s exception. In other words it is my opinion and if it were necessary I would so hold that assuming the Treaty of 1752 to be a treaty the right referred to was only suspended during the war and would become operative again when peace came. Quite recently some Canadians in the U.S. Courts have invoked and successfully invoked the provisions of the Jay Treaty, 1794, 1 Malloy’s Treaties, p. 590, though the war of 1812 has intervened.

[16] A treaty such as that with which we are dealing if made today is one that would require to be ratified by Parliament before becoming effective, and would be invalid until such ratification: (6 Hals., pp. 440-1, para. 679). Though there was authority in Cornwallis’ commission to summon a parliament for Nova Scotia, we all know that none was summoned for some years after the treaty was signed. It is a fair inference I think that after parliament had been assembled and began to legislate this treaty should have been ratified, or otherwise it would lose its validity. At any rate it was not very long after Parliament assumed its functions that a statute was passed which ignored the Treaty and treated it as non-existent.

[17] In 1794 the first of our many Game Acts was passed, 1794 (N.S.), c. 4. It provided that no person within a certain period each year should kill partridge or black duck but Indians and poor settlers. It might be argued that the exception goes to show that the Indians had a special right by treaty, but if they had such a right why mention it in the statute? It would seem to me that the proper interpretation would be that they having no such right by treaty were given it by statute. However that may be the next statute on the subject makes the point clear.

[18] By s. 1 of R.S.N.S. 1851, c. 92, it was enacted that: —

”No person shall take or kill any partridge … between the first of March and the first of September in any year; but Indians and poor settlers may kill them for their own use at any season.”

[19] Section 3 of that Act provides that: — “The sessions may make orders respecting the setting of snares or traps for catching moose,” and by s. 5, “may make orders for regulating the periods … within which moose may be killed.” If the Indians were excepted as to the taking or killing of partridge because they had special right by treaty, why were they not so excepted as to setting snares or killing moose?

[20] Then follows a series of statutes prohibiting everyone, Indians not excepted, from hunting during certain seasons until we come to that under which this prosecution was brought. Where a statute and treaty conflict a British Court must follow the statute, (Re Carter Medicine Co.’s Trade-Mark, [1892] 3 Ch. 472; Walker v. Baird, [1892] A.C. 491, at pp. 494-5). The result therefore is that even assuming the so called Treaty of 1752 is a treaty; assuming that it was valid as such without ratification by parliament, and that any rights under it could be claimed by the Indians of all Nova Scotia as that Province is now constituted, the prosecution would still succeed, because the statute not the treaty prevails.

[21] At the trial there was no discussion as to whether the so called treaty was really a treaty or not. Counsel for the defendant, whose closely reasoned brief I cannot too highly commend, did not touch this point. Apparently they are content to accept the description in the document itself, “Treaty or Articles of Peace,” but the prosecution raised the question and I must deal with it. Two considerations are involved. First, did the Indians of Nova Scotia have status to enter into a treaty? And second, did Governor Hopson have authority to enter into one with them? Both questions must I think be answered in the negative.

1. “Treaties are unconstrained Acts of independent powers.” But the Indians were never regarded as an independent power. A civilized nation first discovering a country of uncivilized people or savages held such country as its own until such time as by treaty it was transferred to some other civilized nation. 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 or right to hunt in Nova Scotia as usual shows that they did not claim to be an independent nation owning or possessing their lands. If they were, why go to another nation asking this privilege or right and giving promise of good behaviour that they might obtain it? In my judgment the Treaty of 1752 is not a treaty at all and is not to be treated as such; it is 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 — an agreement that, as we have seen, was very shortly after broken.
2. Did Governor Hopson have authority to make a treaty? I think not. “Treaties can be made only by the constituted authorities of nations or by persons specially deputed by them for that purpose.” Clearly our treaty was not made with the constituted authorities of Great Britain. But was Governor Hopson specially deputed by them? Cornwallis’ commission is the manual not only for himself but for his successors and you will search it in vain for any power to sign treaties.

[22] Having called the agreement a treaty, and having perhaps lulled the Indians into believing it to be a treaty with all the sacredness of a treaty attached to it, it may be the Crown should not now be heard to say it is not a treaty. With that I have nothing to do. That is a matter for representations to the proper authorities — representations which if there is nothing else in the way of the Indians could hardly fail to be successful.

[23] On behalf of the defendant one witness testified that all his life he had fished as he would without regard to the Fisheries Law, and defendant himself swears he has started hunting muskrat for the last thirty-four years on Hallowe’en, October 31.

[24] Neither of them had ever been interfered with. The suggestion was that they had not been interfered with because they were within their rights in doing what they did by virtue of the treaty. I say nothing about fishing, but as to the hunting it was not until 1927 that the close season was extended to November 15. Until that year whenever there had been a close season on muskrat it had ended on November 1. If defendant did not start his hunting until October 31, the reason he was not proceeded against before seems obvious.

[25] There is abundant evidence also that the Indians have been for many years receiving food, blankets, etc., from the government through the Indian agent because, says the defendant, of this treaty. I cannot agree. Rather I think they received these goods, and other benefits as well, not because of the treaty but by virtue of the successive statutes in that behalf: (1842 (N.S.), c. 16; 1844 (N.S.), c. 56; R.S.N.S. 1851, c. 58; and 1859 (N.S.), c. 14). The good work so begun and carried on when Nova Scotia was a separate Province was taken over by the federal government at Confederation and one is glad to learn is being so generously continued.

[26] On no ground that has been advanced, and I am sure everything has been said or done that with any chance of success could have been said or done, can defendant in my opinion succeed. Such sympathy as a Judge is permitted to have is with defendant. I would gladly allow the appeal if I could find any sound reason for doing so, but I cannot and must confirm the conviction. The very capable Magistrate who heard the case below has, I am pleased to see, fixed the penalty at the very lowest figure that the Act allows. Even so I venture to express the hope that the authorities will not enforce the conviction.

[27] I have no doubt whatever that defendant honestly believed that the treaty was valid and that he was entitled under it to kill muskrat or have their pelts in his possession at any time, and as I pointed out, a year ago or rather in 1926 it was no offence on November 4 to have green muskrat pelts in one’s possession. While everyone is presumed to know the law and to know the exact limits of the close season, it is more than likely — is it not a certainty — that the untutored mind of the defendant was not aware that in 1927 the close season had been lengthened to November 15? Of course, ignorance of the law excuses no one, but surely ignorance of the law under such circumstances can be urged as a plea for most lenient treatment — for in such a case as this waiving both penalty and costs.

Unlike in *St. Catherine’s Milling*, the trial court in *Syliboy* had before it considerable first-hand oral evidence from Grant Chief Syliboy and others as to their interpretations of the 1752 treaty. Those perspectives are almost entirely discounted or ignored in Justice Patterson’s decision—a move that is underwritten by the judge’s insistence on seeing the Indigenous signatories as individuals entering into an agreement or contract with the British state, rather than as representatives of sovereign power.

If effective recognition for and implementation of the Peace and Friendship Treaties was set on poor footing in the *Syliboy* decision, how might we understand the possibilities for an alternative path forward for Indigenous-Crown relationships? Any answer to that question must start with engaging Indigenous legal orders as diverse systems of law forming part of Canada’s multi-juridical landscape. Building an authentic, comparative understanding across legal systems is clearly a big undertaking (consider how much effort and energy you are currently expending to learn just the basics of the Anglo-Canadian common law). But it is just as clearly an achievable goal—and one that is increasingly within reach, led by a growing body of Indigenous legal scholarship, research and teaching.

James (Sa’ke’j) Youngblood Henderson explains Mi’kmaw law in the context of treaty in the following way:[[4]](#footnote-26)

The prerogative Treaties enabled the two worldviews and different societies to make a new normative world using the irony of jurisdictions, obligations and rights. To live in the new legal world required each culture to know not only the meaning of the alliance and its terms, but also the connections or transformations that resulted when one normative system passed through another. The prerogative Treaties constructed, through mutual consent, a new normative system out of the various constructions of reality and visions of what the world might be.

For example, the Wabanaki and Mikmaq applied the customary concept of harmony and forgiveness to the English. Specifically, article 2 of the *Mikmaw Compact*, 1752, stated that “all Transactions during the Late War on both sides be buried in Oblivion with the Hatchet.” This fragile quest for an explicit order between the diverse federations through consensual Treaties provided the foundation upon which developed the first British Empire and their colonies, and eventually the United Kingdom.

[Please click here](https://dal.brightspace.com/d2l/le/content/186027/viewContent/2655762/View) to read Dr. Henderson’s description of Mikmaw land tenure and the principle of *netukulimk* (accessible only within Dalhousie). As you do so, can you identify differences and similarities between the structure of Mi’kmaw legal thought and the structure of common law thought studied so far in this course? How might the Peace and Friendship treaties above be interpreted from the perspective of Mi’kmaw land tenure described in the article?

We have seen this week and last how judges in the style of classical common law thought largely foreclosed any genuine consideration of Indigenous laws or of a multi-juridical Canada. Later in the course, we will return to this idea and ask about possibilities for intersections between legal orders.

As you start to think about this question, consider the work and music of Wolastoqiyik artist Jeremy Dutcher, a member of the Tobique First Nation (Neqotkuk) who released his Juno and Polaris prize-winning album *Wolastoqiyik Lintuwakonawa* in 2018. Dutcher, who trained as an operatic tenor at Dalhousie, recorded the album entirely in Wolastoqey as part of a project that brings the artist into a kind of musical dialogue with ancestral voices from his community singing traditional songs that were recorded by the anthropologist William Mechling on wax cylinders between 1907 and 1914.[[5]](#footnote-28)

Are there lessons here for lawyers and others pursuing new ways to think about and shape Canada as a multi-juridical country?

{{< youtube id=“6pDRpDjrBZE” >}}

1. William Wicken, *Mi’kmaq Treaties on Trial: History, Land and Donald Marshall Junior* (Toronto: University of Toronto Press, 2002). [↑](#footnote-ref-21)
2. *Report of the Task Force on the Commemoration of Edward Cornwallis and the Recognition and Commemoration of Indigenous History* (Assembly of Nova Scotia Mi’kmaw Chiefs and City of Halifax, 2020). [↑](#footnote-ref-22)
3. William Wicken, “Heard It from Our Grandfathers: Mi’Kmaq Treaty Tradition and the Syliboy Case of 1928” (1995) 44 *University of New Brunswick Law Journal* 145 at 145-6. [↑](#footnote-ref-24)
4. James [sákéj] Youngblood Henderson, “Mikmaw Tenure in Atlantic Canada” (1995) 18(2) *Dalhousie Law Journal* 196 at 241. [↑](#footnote-ref-26)
5. Sarah MacDonald, “How Jeremy Dutcher Keeps His Ancestors’ Language Alive”, *The Walrus*, June 2018, online: https://thewalrus.ca/how-jeremy-dutcher-keeps-his-ancestors-language-alive/. [↑](#footnote-ref-28)