

Beyond Cultural Differences: Interpreting a Treaty Between the Mi'kmaq and British at Belcher's Farm, 1761

Natasha Powers

ABSTRACT

It has been argued that the 1761 treaty between the Mi'kmaq and British at Governor Belcher's farm proves that their relationship was a simple one of conqueror and conquered. This paper offers an alternative interpretation of the 1761 treaty. Through the guidance of stories told by women in my family, the paper argues that historic treaty rights must be understood within the context of relationships instead of individual or collective rights. It concludes that stories about how we, as Mi'kmaq, are to relate to one another is central to the project of nationhood.

RÉSUMÉ

On fait valoir que le traité de 1761 entre les Mi'kmaq et les Britanniques à la ferme du Gouverneur Belcher prouve que leur relation était une relation simple entre le conquéreur et le conquis. Cet article offre une interprétation alternative du traité de 1761. Grâce à l'aide de récit d'histoires, par des femmes de ma famille, l'article fait valoir que les droits de traités historiques doivent être compris dans le contexte de relations au lieu de droits collectifs ou individuels. Il conclut que le récit d'histoires sur la façon dont nous, en tant que Mi'kmaqs, devons nous situer l'un par rapport à l'autre, est central à l'esprit national du projet.

The conversation with Leon, my Aunt's partner, began in a normal friendly kind of way. We were discussing my plans for the summer. I had just come to the reserve the day before and I was looking for a job. Sitting there in my Aunt's house and looking around at the pictures of my cousins I realize now that I was trying to place myself somewhere. Anyway, I spoke up:

"I'm thinking about volunteering at the Restorative Justice Initiative: they said they might hire me too. But I'm hoping that I'll be able to do research on treaties. I'm going to present my proposal to the Chief and council on Monday."

Leon, who is laying on the couch, trying to pretend that I didn't just interrupt his favorite TV show, scoffs: "pfhh, they aren't going to want to hear anything about that."

While lifting an incredulous eyebrow, I ask: "Well why not?"

I say incredulous because I had just listened to my other uncle complain the previous day about how the chief and council don't care at all about treaty rights. And then only a few minutes later he told me that he isn't concerned with changing anything, he just wanted to be able to live. He told me that this is what everyone on the reserve

wants. At the time, we were in the middle of a discussion/argument and I said that there wasn't much of a difference between his position and the position of the band council. He got mad at me and told me that I needed to be subtler about things. And I know he's right.

Leon, who had been laying down, sits up: "They sold us out. While we were working our butts off in the woods, they signed agreements with the government. When the RCMP came and told us this, we told them that this was Crown land and the band council's jurisdiction ends at the reserve line. Then we were arrested. Your cousin was involved in this too. [I knew this already and I heard that his wife was ripping mad that he got himself arrested]. Now we're going through the courts to show that the Crown land was always reserved land: reserved for us. It's our right."

Getting more excited, he continues: "It's the same with the fishing rights. They sign off our rights with agreements and now we can only catch snow crab for commercial sale."

I agree with him that all of that is completely preposterous. "Why would the band council do that? You guys seem to have the upper hand when it comes to fishing."

Looking down and then up again, he replies: "they flash lots of money in front of their faces."

I can feel this burning in the pit of my stomach and it all clouds in my head: "It's senseless." Then I ask: "But, Leon, why do you think that you have this right?"

Looking at me like I have two heads, he answers: "the treaties"

My uncle Max's warning quickly flashes through my mind. But I go ahead with a very direct question: "So the terms in the treaties indicate that you have these rights?"

Leon answers: "We are a nation. That is what they indicate."

"I disagree with you."

Leon's back straightens. I know he is caught a bit off guard because he thought that we were in agreement about this. But again, I continue.

"I don't think that our ancestors intended for the treaties to be about laying out the exact terms of our co-existence. I mean the treaties are not about divvying up the land in return for protection of their interests." I know at this point that there is a fine line between following those intentions and espousing some right-wing agenda about there being no such thing as a special right. So I feel a bit afraid about this but, at the same time, I have this feeling of determination because I've been thinking about this for so long and been unable to write about it. Anyway, as you can well imagine I could feel the life in me as well.

"What do you mean?" he replies. "My grandfather and his grandfather and your grandfather too, they all knew that the treaties entitled us to fish."

"I know. My grandfather went to court over his treaty right to fish."

"Yeah. He lost that case." Leon continues: "I remember my grandfather telling me about how we had a right to fish and so we should fish no matter what. If they come to us and tell us we can't, ignore them. If they attempt to rock our boat or take our nets, push them away. And if they try to stop us by shooting at us, kill them."

Silence.

"Leon, I'm not trying to say that we don't have a right to fish. It's just that we have to start thinking about this in a different way. I think that

treaties are about how we are going to share a common way of life."

"That's assimilation, we were always a Nation. We didn't want a common anything. According to the Wampum belt, the lines run parallel. They do not converge."

At this point, I feel unsure of myself again. What right do I have to think differently from him about this? Maybe I just don't understand. But instead of hiding behind this insecurity, which is necessarily a part of my relationship with my family, I falter for a moment, and then my voice raises a pitch. "I agree," my heart begins to race "we have our own legal systems, we have our own way of being." Now, the words flow out of my mouth. "And if you really think about it, fundamentally, justice is about the relationship between the individual and the community. So if we are going to actually think through what treaties are about we shouldn't be looking at the terms of it. We should be looking at the type of relationship that should be established."

Leon is sitting up, ready to get into a good argument over this. I can see us discussing every part of this, testing each point of our arguments. Then my aunt walks in. We start discussing her job and my cousins.

I could tell Leon wasn't listening. He was in one of those distracted, "trying to figure things out in your head" states. While my aunt and I were discussing what my cousins have been up to, Leon pops up: "Consistency? We are lacking consistency?"

DEFINING TREATIES

When I first looked at the transcription of an agreement made at Governor Belcher's farm in 1761 between the Governor and the Mi'kmaq, like Leon I wanted to see that the Mi'kmaq had stood firm in their resolve to protect their nationhood. I thought that they would be clear about their interests: as a nation they would have the right to land and all the resources therein and in exchange for this assurance they would no longer attack the British. Also, I wanted to find in this agreement a clue to what they had perceived to be a just relationship. Knowing that this was ideal, I thought that at least there would be no mention of

submission and most definitely no mention of the Mi'kmaq as conquered.

Well, as I read what was transcribed by the British, my heart began to sink. In Governor Belcher's opening statement, he stated: "I assure myself that you submit yourselves to his allegiance with hearts of duty and gratitude as to your merciful conqueror." And to make matters even worse a Mi'kmaq chief opening with: "My Lord and Father," stated "certain it is that we would have wretchedly perished unless relieved by your humanity, for we were reduced to extremities more intolerable than Death itself. You are Master here: such has been the will of God, he has given you the Dominion of those vast countries, always crowning your Enterprises with success."¹ So not only did Belcher state that the Mi'kmaq were a conquered people, but the Mi'kmaq also seemed to be affirming this. Of course, we have to take into account that this was transcribed by the British and translated via a French priest. Nonetheless, as an indication of an oral agreement between the Mi'kmaq and British there is enough supporting evidence to show that this was a treaty of surrender by an already dependant and conquered people. As you can well imagine, I was forced to re-examine my premises and assumptions. While asking myself to what extent I could read this transcription literally, I figured out that I was on the wrong track. I had been reading the agreement with conquest or nationhood as the only possible alternatives.

The switch from thinking of treaty interpretation as an either/or problem began with my cousin sitting me down to tell me a story. He began by telling me about how his grandmother sat him down one day, covered all of the crosses in the living room with sheets and then told him the creation story. Glooscap was the first Mi'kmaq and he came from elements of the land. As a cultural hero with special gifts, Glooscap taught lessons to the Mi'kmaq through misdeeds and accidents. His lessons benefited them because they then would know what could happen and in this way they learned. At the time, the story sounded strangely familiar to me. After thinking about it for awhile, I realized that without actually telling me this story, my mother had taught me to learn in a similar fashion. Then finally, as I was trying to write about treaties, I realized that the significance of the story did not lie in its authenticity, consistency, or

entirety. The pattern or guidance of the story reveals that our worldview is constantly fluctuating. It is in constant motion but a continuity is also evident: indeed, all of our relations are integral to the culture.

UNDERSTANDING THE TREATY

The treaty at Belcher's farm, according to Stephen Patterson in "Indian-white relations in Nova Scotia"² supports his thesis that in 1761 the Mi'kmaq surrendered to the British on British terms. Throughout the period leading up to this cession, the Mi'kmaq were autonomous peoples, "exercising choices which represented their best efforts to accommodate the European intruders and adjust to the challenges and opportunities they posed."³ He further argues that since cultural values are the equivalent of political decisions and self-interest is the equivalent of political conscience, the Mi'kmaq were not motivated by a collective sense of cultural identity. Instead, their choices were "driven by conscious political decisions rooted in people's often imperfect understanding of their own self-interest."⁴ Cultural differences therefore, were irrelevant to the process.

Following Patterson's argument that the Mi'kmaq were individually following their own interests, he suggests that they miscalculated them when they allied with the French. After the defeat of the French at Fort Louisbourg in 1758, Quebec in 1759 and Montreal in 1760, Patterson argues that the Mi'kmaq, who were dependent on French supplies and ammunition, could no longer successfully attack the British and were out of food.⁵ As a result, the Mi'kmaq were forced to eventually surrender to the British as indicated by the 1761 treaty in which a Mi'kmaq chief states that their intention in negotiating with the British was both "to yield [themselves] up to [the British] without requiring any Terms on [their] part"⁶ and also to submit themselves to the "laws of [the British] government, faithful and obedient to the Crown."⁷

Patterson's argument obviously supports Crown sovereignty. But the way he does it is fairly surprising. Anyone would think that he starts out in favor of Aboriginal nations when he argues that they were autonomous peoples who were not victims of history. But things begin to shift when he

argues that the implications of this self-sufficiency is that they made choices without concern to cultural values or at least that the political decisions which represent self-interest are the extent to which cultural values can be taken into consideration. Patterson believes that as reasonable beings we make decisions according to local conditions and circumstances. And according to the tenets of liberal thought, we must all be reasonable beings in order to be rights-bearing individuals. If rights then serve to ensure that all are equal then the rights here involve ensuring that we all have the equal right to make decisions.

Carrying this over to treaty interpretation, Patterson's argument favors looking at treaties as contractual agreements that set out absolute terms of the relationship. He finds however, that since the Mi'kmaq were surrendering, they were not in a good situation to negotiate favorable terms. As a result, the treaties merely assured the Mi'kmaq that with their surrender they would receive, like all other subjects, the protection of the Crown: they would be treated equally. The treaties then do not outline any kind of special rights for the Mi'kmaq.

Like Patterson, Sakej Henderson argues that the Mi'kmaq were independent peoples but his argument differs on the question of conquest. Henderson argues that the treaties set out terms of peace and friendship with the British. As a result, the Mi'kmaq never ceded any land, they only agreed to shared jurisdiction. The premise of his argument is that the Mi'kmaq were distinctive peoples with their own languages, institutions and legal codes. Upon entering treaties with the British, they did so on equal terms and as distinctive peoples. By exploring the treaty order of which the 1761 agreement at Belcher's farm was part, Henderson challenges Patterson's argument that the Mi'kmaq ceded their land. He finds that the intent of prerogative treaties on both sides were to affirm terms of co-existence.⁸

These terms of co-existence, however, were not set in stone; instead they were formed through relations between the Mi'kmaq and the colonists. In order to keep peace in Nova Scotia, the British made sure that the Mi'kmaq were happy by making numerous concessions. For example, when some of the Indians' property was violated by colonists, it was dealt with in a private way instead of hazarding "a decision in the courts, where the

Verdicts if found against them for want of sufficient evidence of otherwise, might have discontented their Tribes, and have been of disagreeable consequences in the present situation of affairs."⁹ These instances demonstrate that the terms of relations between the Mi'kmaq and British were not necessarily determined solely by colonial interests.

However, this requires that the Mi'kmaq had some understanding of the meaning of a treaty. If I take as a given that the Mi'kmaq were not exchanging territory for protection, it seems that they are not addressing the terms laid out in either Belcher's speech or the written treaty. The Mi'kmaq chief is vague, referring mostly to the generosity and good will of the British. And as demonstrated in this excerpt from the ceremony, the only term that he actually acknowledges is the one relating to religion:

There is one thing that binds me more strongly and firmly to you than I can possibly express and that is your indulging me in the free exercise of the religion in which I have been instructed from my cradle. You confess and believe as well as I, in Jesus Christ, the eternal word of almighty God. I own I long doubted whether you was of this faith. But at present I know you much better than I did formerly. I therefore renounce all the ill opinions that have been insinuated to me and my brethren in times past against the subject of Great Britain.¹⁰

Taking this into consideration, there seems to be two choices in interpreting the Mi'kmaq understanding of the treaty: they did not understand it or they were only concerned with securing the more spiritual aspects of it.

In meetings that led up to the agreement, the Mi'kmaq had expressed their interests beyond religious freedom. These included interest in property, trade and liberty to fish and hunt. In 1762, the Indians made "great Complaints that settlements have been made and possessions taken, of lands, the Property of which they have by treaties reserved to themselves." Belcher then lists the areas that are not to be disturbed which included a fair share of land in Nova Scotia. The Mi'kmaq also settled terms of trade with the British which were "so much above

what private dealers could have afforded."¹¹ At a meeting between Michel Augustine (an ancestor of Stephen Augustine and myself), Chief of the Richibucto, and Paul Laurent, Chief of the Tribe of LaHave, speaking on behalf of "several tribes of Mickmacks," they agreed to the terms of a peace and friendship treaty and that "truckhouses should be established for supplying [them] with what they should want."¹² During these meetings, religion was not even mentioned by the chiefs; instead the truckhouses seemed to be the most urgent piece of business. In these discussions, Mi'kmaq were concerned with ensuring a general way of life.

The meetings that led up to the agreement at Belcher's farm seem to contradict the chief's statement in the treaty signing ceremony that religion was of utmost importance. But what this is signifying is not that the Mi'kmaq were not at all concerned with the material aspects of life. Instead, the chief was indicating that in order to share the land, they were also going to have to share a common way of life. They would have to share an understanding that would let them both be. This perspective, then, does not at all conflict with the principles of the wampum belt. Religion, after all, is extremely important, it is a testament to how we should relate to one another. And it determines our conception of a good society. Before the peace treaty, as indicated in the transcription, the Mi'kmaq had been falsely led to believe that the British were not Christians. The French and the Acadians must have been spreading some nasty rumors about the British. Nonetheless, this tells us something very important about the core issue of this treaty. The Mi'kmaq recognized that to secure peace and friendship, a relationship that is based on a common understanding must be established.

RIGHTS AS RELATIONSHIPS

Rights are generally construed as though they are limits on the power of the state in order to protect rights-bearing individuals. This suggests that rights are "trumps," which, according to Dworkin, "state a goal for the community as a whole" and overrule "some background justification for political decisions."¹³ In the justification game, political decisions are "tricks." And rights-claims are trumps that protect individuals from majority decisions and are based on the basic goals or values

of the community. In this case, if a Native treaty right stipulates that he/she has a right to fish, then an official would have to allow them to do so, even if they do not think that the community as a whole would benefit from Natives having this special right. But the right is not absolute. It is dependent on the justification for political decisions that it trumps. The goal of our community, according to Dworkin, is a form of utilitarianism that justifies "the fulfillment of as many of people's goals for their own lives as possible."¹⁴ If we agree with this, how then would rights that go against the interests of the majority be justified?

Dworkin finds that the purpose of utilitarianism is not consistent with majority rule. At the root of utilitarianism is egalitarianism: "people are treated as equals when the preferences of each, weighted only for intensity, are balanced in the same scales with no distinctions for persons or merit."¹⁵ For the sake of consistency, the weights that tip the scales in favor of majority or minority interests must also be consistent with the goals of utilitarianism. A purely egalitarian goal may favor majority rule, as it would dictate that the preferences of a few should not outweigh the preferences of others. But if these preferences (such as Nazism, for example) were inconsistent with the principles of justice that underlie utilitarianism, they would not be given the same weight. Justice, as a means of distributing goods and opportunities, serves utilitarianism by ensuring that everyone receives their fair share without regards to "who he is or is not, or that others think he should have less because of who he is or is not or that others care less for him than they do for other people."¹⁶

Jennifer Nedelsky disagrees with Dworkin's game rules. She does not think that rights as trumps is consistent with the way our society works in general. First of all, she argues that rights, like laws passed by the legislature, are collective choices. Rights represent the values of our society, which are embedded in the law and given effect by judges.¹⁷ Therefore, the way that Dworkin has formulated the problem as though there was a tension between individual rights and democracy¹⁸ is not consistent with the role of rights in our society.

Instead, she argues that rights are a "dialogue of democratic accountability."¹⁹ The game is not about tension and balancing, it is about

inter-dependence and mutual recognition. According to Dworkin, tension is a necessary part of the rights discourse because as individuals we have our own goals and the goal of the community is to allow us to realize those goals. This, Nedelsky argues, is not consistent with human nature and society. For example, the relationship between mother and child cannot function if it is perceived to be a matter of weighing the mother's interests against the interests of the child.²⁰ This also carries over into the way the Mi'kmaq seemed to perceive their relationship with the British. Despite the fact that during negotiations leading up to the treaty they were concerned with hunting, fishing and trade, in the treaty ceremony itself they were not concerned with their interests beyond religion. Likewise, the dialogue of which Nedelsky speaks would involve a consideration of the values of our society and the best means of achieving desirable relationships.

Democracy as an equal voice in determining the values that will be embedded in law may not be easily separated from rights, but protection from democratic outcomes is a necessary function of rights.²¹ Our autonomy, freedom of conscience and religion may need certain protections from majority decisions. Often this protection is perceived to be a matter of weighing interests against one another, according to some higher value. But this perception of rights is dependent on a definition of autonomy as independence. As this independence involves separation from others, rights therefore form a barrier of protection from others and from intrusion by others.²² But if we think of autonomy as inter-dependence or independence to form desirable relationship, the problem at hand is transformed from tension to dialogue.

Constructing a tension between democracy and rights, then, is not helpful because it is not consistent with the way people relate to one another. It is more useful, Nedelsky argues, to consider the source and content of the value against which we measure the democratic outcome. Once it is seen that individual rights are collective choices, and that judges reviewing legislative and executive acts actually enhances democracy, we can begin to think of how rights as relationships can move us beyond the individual vs. collective rights barrier and also beyond the nationhood vs. conquered problem with treaty interpretation. Rights can be

re-defined as relationships instead of individualistic protections if instead of focusing on the limits that they must enforce, we begin to ask, "what relations of power, responsibility and duty do we want them to foster?" Further, following Nedelsky's argument for rights as democratic accountability instead of trumps, we would then ask whether the above relationship would "foster values that are integral to our culture."

Returning once again to the Glooscap story, how are all our relations, as integral to our culture, to be interpreted through rights? And how do we formulate a way of determining what relationships are of value in our society? The process of learning requires that we experience mistakes. A mistake is a fundamental blip in our order of things. When we experience it, we have to stop, reflect and change. This is how my mother taught me to understand, and it is the foundation of a good society because it allows for our understanding and values to always change while the learning process itself remains the same. So instead of there being perhaps an end goal of equality, we would be discussing specific purposes, and the processes which are going to help us achieve our goals. At Belcher's farm, the Mi'kmaq understood that religion is a collective way of determining these goals, which is why they ensured that freedom of religion was included as a term in the treaty. Their conception of rights was collective in nature. But not in a way that separated them from others. Freedom does not have to be about independence. Instead our freedom and right to self-determination could be about establishing relationships of respect. As a result, treaty rights would no longer be about proving whether Native peoples did or did not lose their nationhood as a result of being conquered. Instead, the descendants of the British would respect the guarantee in the treaties that there would be freedom of religion, in the way that the Mi'kmaq understood it.

While discussing the importance of religion, my grandmother succinctly told me that religion was good. I asked her why. She gave me this look. At the time, I thought that I had offended her but now I think that it was more of an exasperated look. I was asking too much of her. But trying to answer it anyway, she said that she had been baptized, gone through communion and always attended church. Then she stopped. And told

me that the church and prayer are two different things. Her parents had taught her to pray. Of course, I now begin to realize that all of our relations are integral to the culture.

ENDNOTES

1. "Governor's Farm Ceremony" 1761-06-25. Public Records Office (England) Colonial Office, 215, v.18, 277r-283r.
2. Stephen Patterson, "Indian-White Relations in Nova Scotia, 1749-61: A Study in Political Interaction," *Acadiensis*, 23:1 (1993): 23-59.
3. Patterson, 23.
4. Patterson, 24
5. Patterson, 53.
6. "Governor's Farm Ceremony" 282r.
7. Ibid, 281r.
8. Sakej Henderson et al., *Aboriginal Tenure in the Constitution of Canada*. (Scarborough: Carswell, 2000), 436.
9. "Belcher to Board of Trade" 1762-06-02, Public Records Office, Colonial Office, 216 v. 19.
10. "Governor's Farm Ceremony" 282r.
11. "Remarks on the Indian Commerce carried on by the Government of Nova Scotia" Public Records Office (England), Colonial Office, 217, v.20, 160r.
12. Nova Scotia Executive Council Minutes, 1760-02-29. Public Archives of Nova Scotia, RG-1, v.188, 135
13. Ronald Dworkin, "Rights as Trumps." In *Theories of Rights* ed. by Jeremy Waldron. (Oxford: Oxford University Press, 1984), 133.
14. Ibid
15. Dworkin, 154
16. Dworkin, 158.
17. Jennifer Nedelsky, "Reconceiving Rights as Relationships," *Review of Constitutional Studies*, 1 (1993): 4.
18. This is also evident in the debate over judicial review. See for example Morton & Knopf, *The Charter Revolution and the Court Party*, (Toronto: Broadview Press, 2000).
19. Nedelsky, 9
20. Nedelsky, 8.
21. Nedelsky, 4-5.
22. Nedelsky, 8.

REFERENCES

- Dworkin, Ronald. "Rights as Trumps," *Theories of Rights*, Jeremy Waldron, ed. Oxford: Oxford University Press, 1984.
- Henderson, Sakej, et al. *Aboriginal Tenure in the Constitution of Canada*. Scarborough: Carswell, 2000.
- Nedelsky, Jennifer. "Reconceiving Rights as Relationships," *Review of Constitutional Studies*, 1 (1993): 1-26.

Nova Scotia Executive Council Minutes, 1760-02-29. Public Archives of Nova Scotia, RG-1, v.188, 135.

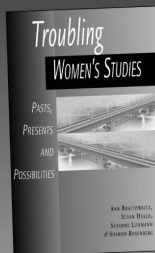
_____ "Governor's Farm Ceremony" 1761-06-25. Public Records Office (England) Colonial Office, 215, v.18, 277r-283r.

_____ "Belcher to Board of Trade" 1762-06-02. Public Records Office, Colonial Office, 216 v. 19.

_____ "Remarks on the Indian Commerce carried on by the Government of Nova Scotia," 1763-04-05. Public Records Office (England), Colonial Office, 217, v.20, 160r.

Patterson, Stephen. "Indian-White Relations in Nova Scotia, 1749-61: A Study in Political Interaction," *Acadiensis*, 23.1 (1993): 23-59.

New from the Women's Issues Publishing Program ...



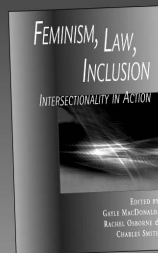
\$28.95 pb
258 pgs

TROUBLING WOMEN'S STUDIES
PASTS, PRESENTS AND POSSIBILITIES

*by Ann Braithwaite, Susan Heald,
Susanne Luhmann & Sharon Rosenberg*

No one interested in Women's Studies can afford to miss these four deeply considered and provocative essays.

— CHRISTINE ST. PETER
University of Victoria



\$28.95 pb
304 pgs

FEMINISM, LAW, INCLUSION
INTERSECTIONALITY IN ACTION

*Edited by Gayle MacDonald,
Rachel Osborne & Charles C. Smith*

In these ten essays, contributors explore contemporary applications of intersectionality theory in feminist legal scholarship, research and activism. A vital contribution to this critical discourse.

S U M A C H P R E S S

sumachpress@on.aibn.com www.sumachpress.com 416-531-6250