Ghosts in the Court: Jonathan Belcher and the Proclamation of 1762

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History occupies a central place in aboriginal rights litigation. As a result, the circumstances and characters of the distant past play crucial roles in the adjudication of aboriginal treaty, rights and title claims. One such character is Jonathan Belcher, the first chief justice and former lieutenant governor of Nova Scotia. In 1762, Belcher issued a Proclamation reserving the north-eastern coast of Nova Scotia (and what is now the eastern coast of New Brunswick) for the Mi'kmaq. In R. v Bernard, the accused pleaded a right to log timber on Crown land on the basis of Belcher's Proclamation. This article argues that in rejecting the legal validity of the Proclamation, the New Brunswick Court of Appeal failed to recognize and grapple sufficiently with the historical circumstances surrounding the Proclamation's issuance and later slide into obscurity. The article contends that in adjudicating contemporary aboriginal constitutional claims, courts must remain sensitive to the complexities and nuances of this period of Maritime history in order to avoid the pitfalls inherent in a narrow legal analysis of the past.

L'histoire occupe une place centrale dans les litiges mettant en cause les droits autochtones. Par conséquent, les circonstances et les personnages du lointain passé jouent des rôles de premier plan dans l'adjudication des revendications des Autochtones relatives aux droits issus de traités. L'un de ces personnages est Jonathan Belcher, premier juge en chef et lieutenant-gouverneur de la Nouvelle-Écosse. En 1762, Jonathan Belcher a publié une Proclamation réservant aux Mi'kmaq la côte nord-est de la Nouvelle-Écosse (et ce qui est aujourd'hui la côte est du Nouveau-Brunswick). Dans l'affaire R. c Bernard, l'accusé, se fondant sur la Proclamation publiée par Belcher, a invoqué le droit de couper du bois sur les terres de la Couronne. L'auteur de cet article allègue qu'en rejetant la validité légale de la Proclamation, la Cour d'appel du Nouveau-Brunswick n'a ni reconnu ni compris les circonstances historiques entourant la publication de la Proclamation et son éventuelle glissement dans l'obscurité. L'auteur prétend que lorsqu'ils sont appelés à se prononcer sur les revendications constitutionnelles contemporaines des Autochtones, les tribunaux doivent être sensibles aux complexités et aux nuances de cette période de l'histoire des Maritimes pour éviter les pièges inhérents à une analyse juridique étroite du passé.

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Introduction

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Introduction

Jonathan Belcher, the first chief justice and former lieutenant governor of Nova Scotia, has returned to the courts over which he once presided. This time, he enters not cloaked in his ceremonial scarlet robes, but rather as a ghost. Belcher and a sweeping Proclamation he issued in 1762 have arisen in R. v. Bernard, the latest case in the on-going aboriginal and treaty rights litigation in the Maritimes. And Belcher is not alone. A host of other apparitions of history — colonial governors, settlers, and Mi'kmaq chiefs — have come to play crucial roles in the litigation of Mi'kmaq constitutional claims. For better or for worse, history reigns supreme in the litigation of aboriginal rights.

On 4 May 1762, Jonathan Belcher issued a Proclamation reserving the north-eastern coast of Nova Scotia (and what is now the eastern coast of New Brunswick) for Mi'kmaq "hunting, fowling, and fishing." Two-hundred and thirty-six years later, on 29 May 1998, Forest Service Officers of the province of New Brunswick arrested and charged Joshua Bernard, a Mi'kmaq from the Eel Ground Band, for illegally cutting spruce trees on Crown lands near the watershed of the north-west Miramichi River and its tributaries. In defending himself in the on-going litigation now before the Supreme Court of Canada, Bernard asserts a treaty right and a right flowing from aboriginal title to harvest and sell commercially forest products from the area. In his claim of aboriginal title the lives of Bernard and Belcher intersect.

3. Bernard was charged with "unlawfully possessing timber from Crown lands...contrary to Section 67(1)(c) of the Crown Lands and Forests Act": Bernard (Prov. Ct.), ibid. at para. 1.
When Joshua Bernard raises aboriginal rights to defend himself, he necessarily turns to history. The Supreme Court’s approach to aboriginal and treaty rights under section 35 of the Constitution Act, 1982⁴, requires litigants — both aboriginal claimants and the Crown — to advance and defend what are essentially historical claims. The Court has held that to qualify as an aboriginal right, a practice, custom, or tradition must have been a distinctive aspect of the aboriginal culture prior to contact between European and aboriginal societies.⁵ To establish aboriginal title, aboriginal groups must prove exclusive occupation of land at the time of the British or Canadian assertion of sovereignty.⁶ In treaty rights cases, the Court has held that extrinsic evidence of the historical and cultural context of a treaty is admissible in order to elucidate the treaty’s written terms.⁷ The privileging of history in the legal tests dealing with aboriginal rights, title, and treaties has transformed political battles of the present into interpretive battles of the past. It is in the details of history that cases are won or lost and, as a result, historians have become the crucial witnesses in aboriginal rights litigation.⁸

Courts are still coming to grips with the theoretical and practical dilemmas of an historical focus in aboriginal rights litigation, including the difficulties of navigating through hundreds, if not thousands, of archival documents and adjudicating between the sometimes conflicting interpretation of those documents by historical witnesses.⁹ Although in

⁹ The trial judge in Bernard notes that “courts are now being presented with considerable historical evidence in treaty cases and this trial was no exception” and cites “the thousands of pages of documents submitted, including diaries of French and English explorers and traders, Legislation of colonial government, Board of Trade correspondence, price lists... and excerpts of the scholarly texts” proffered at trial. Bernard (Prov. Clt.), supra note 2 at paras. 23, 82.

theory expert historical witnesses offer neutral and objective historical analysis, in practical terms, litigants -- the Crown and the aboriginal community supporting the rights claim -- hire historians who will present an historical interpretation that accords with their particular legal interests. Accordingly, the past that is presented in court is often contested rather than certain, complicated rather than clear. Nevertheless, the law requires, as Binnie J. points out, "the finding of certain historical facts. The litigating parties cannot await the possibility of a stable academic consensus. The judicial process must do as best it can." This, then, is the difficult, sometimes impossible, task faced by courts: finding "historical facts" in a distant past, or as Binnie J. A. puts it in Marshall, seeing "through a glass, darkly." The court accomplishes this task, for better or for worse, through analysis that is neither purely legal nor strictly historical, but an amalgam of the two. Although Robertson J. of the New Brunswick Court insists in Bernard that "the interpretation of legal documents, such as Belcher's Proclamation ... is a question of law," as we shall see, the interpretation of treaties and legal instruments in aboriginal rights litigation involves a complicated and inextricable weave of history and law. In this sui generis area of law, legal interpretation and historical interpretation are intertwined.

As a result, there is a need for historians, and perhaps especially legal historians, to critically engage with the historical figures, moments and legal instruments that appear in constitutional aboriginal rights cases. The aim of this paper is to provide such a critical engagement by assessing the New Brunswick Court of Appeal's historical and legal analysis of the Proclamation of 1762. I argue that in finding the Proclamation invalid — in effect legally void — the courts have made errors of both historical and legal interpretation. I will demonstrate that when viewed in its broader context — that is, the colonial politics of its time — the Proclamation of 1762 must be seen as a legally valid instrument dealing with Mi'kmaq land claims. There remains no evidence that the Proclamation was ever repealed or formally disallowed. While the Proclamation is not an independent source of aboriginal title, as argued by Bernard, it does reveal that land was critical in securing peace between the Mi'kmaq and the British. In this sense the Proclamation helpfully illuminates and confirms unwritten concepts about Mi'kmaq land rights in the British-Mi'kmaq treaty

10 Marshall, supra note 7 at 488.
11 Ibid. at 465.
13 Notable examples of work in this emerging field are W.C. Wicken, Mi'kmaq Treaties on Trial: History, Land and Donald Marshall Junior (Toronto: University of Toronto Press, 2002) [Mi'kmaq Treaties on Trial] and "Brightening", supra note 9.
relationship and confirms the continuing existence of Mi’kmaq rights to the land.

To understand how and why Belcher recognized Mi’kmaq land rights in his Proclamation we must shake off the sense that our history has been an “inexorable tale of European advance and Indian retreat.” Instead we must situate ourselves in a time and place when the Mi’kmaq, French, Acadians and British all claimed title to some of the Atlantic region; a time, Beamish Murdoch writes, marked by “[t]he stir and excitement of wars and sieges.” But the “wars and sieges” of colonial Nova Scotia were sources of anxiety, not excitement, for Jonathan Belcher. As lieutenant governor, Belcher sought to secure peace in the colony by appeasing the agitated Mi’kmaq. But Belcher’s anxiety and political naivete led him to misread the mood in the corridors of power in London and on the streets of Halifax. The Board of Trade and Halifax’s settlers and land speculators were loathe to reserve the valuable Atlantic coast for the Mi’kmaq. Within a year of the Proclamation’s issuance, the Board of Trade removed Belcher from his position as lieutenant governor. The Proclamation of 1762 became another of the forgotten promises to the Mi’kmaq.

I. Jonathan Belcher

Jonathan Belcher Sr., Governor of Massachusetts, did not hold Nova Scotia in high regard. In response to British pressure to send New England farmers north to till and settle the lands of Nova Scotia, Governor Belcher confided to a friend in 1733. “[b]y what I heard the government of the petty province of Nova Scotia has been one constant scene of tyranny. God deliver me and mine from the government of soldiers.” Governor Belcher’s prayers proved unsuccessful. Twenty-one years later, his son, Jonathan Belcher Jr., arrived in Halifax as Nova Scotia’s first Chief Justice; six years later Belcher was lieutenant governor.

By all accounts, Jonathan Belcher Jr.’s privileged upbringing as the

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16 The letter is quoted in W.S. MacNutt, The Atlantic Provinces: The Emergence of Colonial Society, 1712-1857 (Toronto: McClelland and Stewart, 1968) at 32 [The Atlantic Provinces]. See also B. Moody, “Making a British Nova Scotia” in J.G. Reid et al., The Conquest of Acadia, 1710: Imperial, Colonial, and Aboriginal Constructions (Toronto: University of Toronto Press) 127 at 144-45 Belcher’s denigration of Nova Scotia, Moody argues, was duplicitous – Belcher’s real objective seems to have been an annexation of Nova Scotia into the New England colonies, Massachusetts and New Hampshire, already under his control.
son of a colonial governor should have better prepared him for his political future in Nova Scotia. After graduating from Harvard, Jonathan Belcher moved to London to study law and represent his father before the British government. After an unsuccessful attempt to win a seat in Parliament, Belcher moved to Dublin in 1741 to take an unpaid position as deputy secretary to the Lord Chancellor of Ireland. Jonathan proved a diligent, if uninspiring, administrator though he was noted for publishing an abridgment of Irish statutes, a copy of which he proudly shipped to his father.

On the strength of his Irish service and as a result of his own efforts to secure a more esteemed appointment, Jonathan Belcher earned the notice of the Lords Commissioners for Trade and Plantations (the Board of Trade), and its president, the Earl of Halifax. The Board of Trade rewarded Belcher with a colonial posting to Nova Scotia as its first chief justice.


19. The Board of Trade, under the Secretary of State for the Southern Department, was established in 1696 by King William III to oversee and administer England’s colonies. On Belcher’s efforts to secure an appointment see B. Cahill and J. Phillips, “The Supreme Court of Nova Scotia: Origins to Confederation” in P. Girard, J. Phillips & B. Cahill, eds., The Supreme Court of Nova Scotia, 1754-2004: From Imperial Bastion to Provincial Oracle (Toronto: University of Toronto Press, 2004) 53 at 56 [The Supreme Court of Nova Scotia].

20. Unlike many colonial judges of the period, Belcher was appointed not by the governor of the colony but directly by the Crown-in-Council. See E. Mancke, “Colonial and Imperial Contexts” in The Supreme Court of Nova Scotia, ibid at 41-42. The text of Jonathan Belcher’s commission as chief justice dated 1 July 1754 and signed by George II is reproduced in C. J. Townshend, History of the Court of Chancery in Nova Scotia (Toronto: Carswell, 1900) at 37-38 [History of the Court of Chancery].

Within two years the population of Halifax swelled to 5,000, but problems followed. Many of the original settlers were unprepared for the harsh weather and the difficult task of clearing the densely forested land. Moreover, the Mi'kmaq, who disapproved of the settlement, kept the settlers and Cornwallis on the defensive with intermittent attacks. Many settlers drifted south toward the more established, and more temperate, colonies. When Jonathan Belcher arrived, Halifax's population had fallen to perhaps 1,500, and despite having had nominal control of the province for forty years, the British remained a minority in the region. The Acadians, whose population had been growing steadily since the early seventeenth century, numbered approximately 15,000, and the Mi'kmaq and the Wuastukwiuk (also known as Maliseet) numbered perhaps 4,000.

Jonathan Belcher's arrival in Halifax was part of a deliberate attempt by the British to improve the government with an eye to securing greater authority and security in the region. The seeds of Belcher's appointment lay in a 1752 dispute among Nova Scotia's untrained judges, various government officials and citizens as to whether English or Massachusetts law applied in Nova Scotia's courts. The protracted quarrel led Governor Cornwallis' successor, Peregrine Thomas Hopson, to appeal to the Board of Trade for a chief justice with legal training. In Jonathan Belcher, Nova Scotia received an anglophile who, although born in the New World, had fully embraced the common law of the British tradition. With a salary of £500, Belcher's duties included administering and presiding over the newly
established Supreme Court, organizing the law of the province, and sitting on the executive council under the leadership of a new lieutenant governor, Charles Lawrence.\footnote{DCB, supra note 17 at 51.}

On the morning of 21 October 1754, a little over a week after his arrival, Belcher dressed in what would become his trademark attire — scarlet robes trimmed in white and full powdered wig.\footnote{Belcher is wearing his robes and wig (and, it seems, the beginnings of a double-chin) in John Singleton’s 1756 portrait. See the opening pages of The Supreme Court of Nova Scotia, supra note 19.} The morning began with an “elegant breakfast” attended by “a great number of gentlemen and ladies and officers of the army” at Pontac’s Inn, followed by an august procession through the “not yet levell’d or paved” streets of Halifax with other members of the executive council, government officials and the colony’s handful of lawyers.\footnote{The Supreme Court’s opening is recounted in *A History of Nova Scotia*, supra note 15 at 250-1 and in J. Muir and J. Phillips, “Michaelmas Term 1754: The Supreme Court’s First Session” in *The Supreme Court of Nova Scotia*, supra note 19 at 259 [“Michaelmas Term”].} After a sermon at St. Paul’s Church, the proceedings reconvened at the court house where, with Lawrence seated beside him, Belcher was presented with the official commission of his appointment. Belcher’s first duty was to swear in the court’s first grand jury — a collection of twenty-three of Halifax’s wealthy and prominent citizens.\footnote{“Michaelmas Term,” ibid. at 261.} Seizing upon the solemnity of the moment, Belcher expounded on the nature of justice and the necessity of knowing one’s place in society:

> It is an excellent aphorism in the Christian System. Let every Man study to be quiet and to do his own Business, and the natural Application is, that Every Individual stands oblig’d to move and act in the Order assign’d to him by Providence, and in that Subordination necessary to the Being and Ends of Government.

In the years to come, Belcher’s hierarchical political theory and tory sensibilities would increasingly alienate him from the members of the grand jury seated before him. It was a rift that eventually cost Belcher his position as lieutenant governor, but in the ceremonial grandeur of the Supreme Court on that fall day of 1754, there were few signs of the turmoil that lay ahead.\footnote{In 1756, Jonathan Belcher Jr. spent much of the year in New Jersey visiting his father and, during the extended visit, was wed in an arranged marriage to Abigail Allen at King’s Chapel in Boston. Late in 1756, the newly wed couple returned to Halifax and Jonathan Belcher resumed his duties as Chief Justice. *Colonial Governor*, supra note 17 at 166.}
Despite its new settlement at Halifax and its new chief justice, Nova Scotia's executive council remained conscious of its numerical inferiority and, by extension, its military vulnerability. Lieutenant Governor Lawrence, like his predecessors, felt threatened by the alliances — both real and imagined — between the French, Mi'kmaq and Acadians. While some scholars have over-emphasized the closeness of the relationship between the Mi'kmaq and the Acadians, there is no denying that the Mi'kmaq had, on the whole, better relations with the French and the Acadians than with the British. Moreover, whatever the more complicated reality on the ground, the Mi'kmaq-Acadian alliance lived largely and menacingly in the minds of Nova Scotia's governors and, as we shall see, Jonathan Belcher in particular. Complaints from Lieutenant Governor Lawrence to the Board of Trade that Nova Scotia settlers were "liable to have their throats Cut every moment by the most inveterate of Enemies, well acquainted with every Creek and Corner of the Country by which they can make their Escape" were typical. Just as dangerous, Lawrence believed, were the Acadians who provided the Mi'kmaq with "intelligence, Quarters, provisions, and assistance in annoying the Government." To assuage his fears, Lawrence assembled Acadian leaders in 1755 and ordered them to take an oath of allegiance to Britain. The Acadians refused, adamant that they retain their neutral status. The response came swift and brutal: Lawrence and the executive council, with the full support of Jonathan Belcher, began forcibly deporting Acadians to various locations throughout the thirteen colonies. Approximately 7,000 Acadians were expelled during the summer and fall of 1755 and perhaps 3,000 more over the course of the next six years.

33. For an account emphasizing the depth of the Mi'kmaq-Acadian relationship see L.F.S. Upton, Mi'kmaq and Colonists: Indian-White Relations in the Maritimes, 1713-1867 (Vancouver: University of British Columbia Press, 1979) at 26-27 [Mi'kmaq and Colonists]. However, Wicken convincingly argues that Mi'kmaq-Acadian relations, although initially harmonious, deteriorated over the course of the eighteenth century as the growing Acadian population placed increasing pressures on the land: "Re-examining Mi'kmaq-Acadian Relations," supra note 25 at 93.
34. Lawrence to Board of Trade, 3 November 1756 quoted in S.E. Patterson, "Indian-White Relations in Nova Scotia, 1749-1761: A Study in Political Interaction" (1993/1994) 23 Acadiensis 23 at 53 ["Indian-White Relations"].
35. Lawrence to Board of Trade, 11 August 1755, ibid at 51.
36. Belcher supported the deportation of Acadians even if they did take an oath of allegiance to Britain: The Atlantic Provinces, supra note 16 at 45. Belcher also provided an opinion supporting the legality of deportation on several grounds. Belcher argued that, as rebels, the Acadians could be subject to collective punishment, that they had forfeited their rights as British subjects in refusing to take the oath of allegiance and that the deportation accorded with the doctrine of military necessity under international law. See An Unsettled Conquest, supra note 22 at 140-157 and Contexts of Acadian History, supra note 25 at 62-94.
But the British knew that control of the region depended more on bringing settlers in than shipping Acadians out. To that end, the Board of Trade aimed to combat the image etched in the minds of many New Englanders, like Jonathan Belcher’s father two decades earlier, of a “government of soldiers.” To appeal to New Englanders, the Board knew it needed a representative assembly for Nova Scotia vested with plenary law-making power. Prior to Belcher’s departure to Halifax the Board impressed upon him the need for such an assembly, although upon Belcher’s arrival Lawrence convinced him that Nova Scotia was not ready for representative government. Pressure for a legislature increasingly came not only from London but also from the streets of Halifax. Not surprisingly, the wealthy and influential merchants from New England, who expected to find a place in such an assembly, demanded representation with increasing fervour. Belcher, for his part, was initially inclined to agree with Lawrence; however, the Board’s continued insistence on an assembly persuaded Belcher to publicly support the idea — not out of any great love for representative democracy but in deference to clear instructions from London. By 1758, Governor Lawrence succumbed to political pressure and established a legislative assembly based largely on Belcher’s design.

The alliance between Belcher and Halifax’s ambitious New England merchants proved temporary. As chief justice, Belcher aimed to resolve one of the principal reasons for his appointment in the first place: the question of whether British or Massachusetts law would govern Nova Scotia. The answer for Belcher was clear, and from his influential place atop the judicial pyramid, he steadily and decisively moved Nova Scotia law towards its British foundations and away from its Massachusetts influences. These juridical shifts agitated Halifax’s New Englanders, loyal as they were to that colony’s distinct and more liberal body of law. The divide between Belcher and Nova Scotia’s New England constituency widened as Belcher gained further political power in the province. Upon Governor Lawrence’s sudden death in the fall of 1760, Belcher issued a proclamation notifying the public that he had assumed interim command of the

38 As well, it is worth remembering that Belcher held his position at His Majesty’s ‘pleasure’ — he was not of the temperament to bite the hand that fed him. Ibid. at 178
39 ibid. supra note 17 at 51. As a member of the executive council, Belcher became a member of the legislative council as well.
40 Ibid.
41 See “Colonial and Imperial Contexts,” supra note 26 at 34.
province. On 21 November 1761, royal assent was given to the permanent appointment of Jonathan Belcher as lieutenant governor.

In his new role, Belcher turned his attention to the Mi'kmaq. Relations between settlers and aboriginal peoples were tense throughout Britain's North American colonies at mid-century and Nova Scotia was no exception. Although treaties of peace and friendship had existed between the Mi'kmaq and the British since 1726, the founding of Halifax had exacerbated existing tensions between the Mi'kmaq and British over land. The Mi'kmaq vigorously opposed British settlement in the province and adopted a policy of harassment and attack against British settlers in an effort to curtail expansion. Shortly after the founding of Halifax, Governor Cornwallis appealed to the Board of Trade that if the Mi'kmaq continued to attack the settlement, "[i]t [would] be very practicable with an additional force by sea and land to root them entirely." To that end, Cornwallis issued a 1749 proclamation ordering British subjects to "annoy, distress, take or destroy the saace commonly called Mickmacks wherever they are found," and offered a reward "upon producing such savage taken or his scalp." The following year, a party of Massachusetts rangers under the leadership of Captain Gorham came to Nova Scotia, and for several months, captured and killed Mi'kmaq for scalp bounties. The Mi'kmaq, in turn, increased the frequency and intensity of their attacks on British settlers. Despite the hostilities, the Board of Trade favoured a policy of

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42 Belcher wrote sombrely to the Board of Trade that Lawrence had "taken ill on the 11th of this month a fever and inflammation of the Lungs, and he died on the 19th universally regretted and mourned": Belcher to Board of Trade, 26 October 1760, Public Archives of Nova Scotia [PANS] MG 1, vol. 1738 and December 12, 1760. PANS MG 1, vol. 1738.

43 Henry Ellis, Governor of Georgia, was appointed as absentee governor. In officially accepting his appointment, Belcher wrote to the Board of Trade that he was "under the deepest Obligations to Duty and Fidelity in the important Trusts and of the highest Gratitude Your Lordships for the honor of our recommendation, and that confidence, which I shall daily endeavour in some measure to deserve." Belcher to Board of Trade, 11 January 1762. PANS MG 1, vol. 1738.


45 Quoted in W.E. Daugherty, Maritime Indian Treaties in Historical Perspective (Ottawa: Indian and Northern Affairs, 1981) at 36 [Maritime Indian Treaties].

46 "Indian-White Relations," supra note 34 at 31. The 'scalp bounty' had its precedents in the New England 'Indian Wars' of the seventeenth century. As early as 1696 Massachusetts had offered a bounty for Mi'kmaq scalps and had sent raiding parties into Acadia: An Unsettled Conquest, supra note 22 at 33.

47 In June 1750, 60 Mi'kmaq attacked Dartmouth killing eight and capturing fourteen. See Mi'kmaq and Colonists, supra note 33 at 54.
conciliation rather than war with the Mi’kmaq. In 1750, they wrote to Cornwallis: “it has been found by experience ... that the gentler methods and offers of Peace have more frequently prevailed with Indians than the sword, if at the same times that the sword is held over their heads.”

In 1752, the British began to hope for a more permanent peace. In July of that year, Cornwallis issued a proclamation forbidding hostilities against the Mi’kmaq, and by November, Governor Hopson — who had replaced Cornwallis — signed a treaty with the Shubenacadie Mi’kmaq represented by Major Jean-Baptiste Cope. The treaty, Hopson hoped, would provide an incentive “to bring over the Rest [of the Mi’kmaq]” although, he admitted, “this is more to be hoped than trusted to.” In the treaty the British promised the Shubenacadie “free Liberty of Hunting & Fishing as usual,” and provided the Band with six months of provisions. But Hopson’s intuitions proved accurate and two years later, no other Mi’kmaq Bands had come forward to sign treaties. Worse still, in the spring of 1754 a group of Shubenacadie Mi’kmaq — including Cope’s son — were captured and killed while transferring provisions across the province. When the news reached Cope, he is said to have thrown his copy of the 1752 treaty into the fire. Over the next five years, hostilities between the Mi’kmaq and the British were renewed including, in 1756, the re-issuance of the bounty on Mi’kmaq scalps.

The hostilities between the British and Mi’kmaq were further exacerbated by the transatlantic British-French conflict, the Seven Years’ War. In June 1758, Louisbourg was attacked and taken by the British, Quebec City fell in September of the following year, and Montreal and the last of the French forces capitulated in the spring of 1760. In Nova Scotia, most Mi’kmaq continued their long-standing alliance with the French, aiding the unsuccessful defence of Louisbourg and leading an unsuccessful attack against Lunenburg in December of 1758. But with the majority of the Acadians deported and the French retreating throughout Nova Scotia, the Mi’kmaq recognized that they were losing not only their military allies, but also their trading partners.

Most Mi’kmaq now favoured peace with the British, and in the winter

48. Board of Trade to Cornwallis, 16 February 1750, quoted in Maritime Indian Treaties, supra note 45 at 37.
49. Hopson to Board of Trade, 6 December 1752, “Indian-White Relations,” supra note 34 at 41.
50. Mi’maq and Colonists, supra note 33 at 54.
51. See Mi’maq and Colonists, ibid. at 55 and An Unsettled Conquest, supra note 22 at 135-36.
52. Mi’maq and Colonists, supra note 33 at 56.
53. Maritime Indian Treaties, supra note 45 at 41.
54. Mi’maq and Colonists, supra note 33 at 57.
and spring of 1760, the parties began renewing their treaty relationship. By far the largest treaty signing took place after Belcher's appointment as lieutenant governor in the early summer of 1761. On 25 June 1761, many of Halifax's dignitaries, soldiers and citizens gathered under the tents erected at Belcher's large farm estate on the outskirts of town. Belcher called the proceeding to order by grandly welcoming, "with the hand of Friendship and Protection," the four Mi'kmaq sakamows (Chiefs). Belcher directed the crowd to a ceremonial grave and held aloft a hatchet; burying it, he proclaimed, would "Blunt the Edge of these Arms ... they shall never be used against us your fellow Subjects." The hatchet was placed in the ground and covered in soil. But Belcher reminded the Mi'kmaq that the weapon was not buried so deep that it could not be retrieved, for there might come a time when "you will resolve and promise to take them up, sharpen and point them against our Common Enemies." 

Jeannot Peguidalouet, a Mi'kmaq sakamow from Unimaki (Cape Breton) replied through a translator:

As long as the Sun and Moon shall endure, as long as the Earth on which I shall dwell shall exist in the same State you this day see it, so long will I be your friend and Ally. Submitting myself to the Laws of your Government, faithful and obedient to the Crown.

With the speeches made and hatchet buried, Belcher and the sakamows signed the treaties before the cheering crowd. Three volleys were fired into the summer sky; a toast was given to the King, and a celebration of dancing and singing began.

At Belcher's farm the British and Mi'kmaq met at a place Richard White has termed the "middle ground" — a place where aboriginal people and newcomers sought to understand and deal with one another through "what they perceived to be their partner's cultural premises." At Belcher's farm we see the mixed metaphors common of the middle ground — the

55. The speeches are printed in "Ceremonials at Concluding a Peace with the several Districts of the General Mi'kmaq Nation of Indians in His Majesty's Province of Nova Scotia and a Copy of the Treaty. 25 June 1761" PANS, RG I, vol. 37, no. 14 ["Ceremonials at Concluding a Peace"]; see also R.H. Whitehead, The Old Man Told Us: Excerpts from Mi'kmaq History 1500-1950 (Halifax: Nimbus Publishing, 1991) at 155 [The Old Man Told Us]; and T.C. Haliburton, An Historical and Statistical Account of Nova Scotia (Halifax: Joseph Howe, 1829) at 231 [An Historical and Statistical Account]. Haliburton refers to the ceremony as the Great Talk. Among the known Mi'kmaq bands at the signing were the Miramichi, Shediac, Cape Breton and Pokemouche.

56. Ceremonials at Concluding Peace, ibid.

57. Mi'kmaq Treaties on Trial, supra note 13 at 217. The translator was Abbé Maillard.

buried hatchet, written treaty, Law. Crown, Sun and Moon. But though the British and Mi’kmaq worlds came together at Belcher’s farm they also remained, in important ways, distinct. White argues that the cultural premises that mark the middle ground are just as often characterized by misperception and mistake as by genuine understanding. We should question, for example, what Jeannot Peguidalouet meant by ‘submission’ to the Law and ‘obedience’ to the Crown, just as we should question whether his Mi’kmaq could be accurately translated and whether the translation was accurately recorded. Although courts have looked for evidence of mutual understanding in the treaties that emerged from this middle ground, the reality is that the treaties may be sites of misunderstanding as much as consensus.

Which is not to say that the treaties were, or are, meaningless. The Mi’kmaq believed that the treaties of 1760/61 were part of an inextricably linked chain dating back to the first peace and friendship treaties of 1726 which included the promise “not to interfere with Mi’kmaq fishing, hunting and planting grounds, or with any other of the Mi’kmaq community’s lawful activities.” The treaties of 1760/61 were silent on the question of land, but the truckhouse system they established implicitly accepted the continuation of Mi’kmaq hunting, fishing and land-use rights. Truckhouses were trading posts where the Mi’kmaq could exchange goods, such as furs and fish, according to a predetermined price list. In Marshall, the Supreme Court held that the treaties of 1760/61 recognized the Mi’kmaq right to hunt, fish and trade. In Bernard, a divided New Brunswick Court of Appeal held that the treaties also supported a right to harvest and sell trees growing on the Crown land subject to the treaties. From the Mi’kmaq perspective, the right to hunt, fish and trade was meaningless without the corresponding lands on which to carry out these activities. The Mi’kmaq interpreted these treaties as an affirmation of their continued title to the lands where they had always lived, hunted and fished. The British were certainly content to leave the Mi’kmaq with this impression, though they

59 Ibid. at 52-53.
60 D. Paul argues that the Mi’kmaq speaker was mistranslated in an effort to make his words more palatable to his audience: We Were Not the Savages: A Mi’kmaq Perspective on the Collision between Europeans and Native American Civilizations (Halifax: Fernwood Publishing, 2000) at 156. See also Mi’kmaq Treaties on Trial, supra note 13 at 217-18.
61 Mi’kmaq Treaties on Trial, ibid. at 205
62 The truckhouses were phrased as a negative covenant in which the Mi’kmaq signatories promised not to “traffic, barter or exchange any commodities in any manner but with such persons or the managers of such truck houses as shall be appointed or established by His Majesty’s Governor”; Maritime Indian Treaties, supra note 45 at 78
63 Marshall, supra note 7 and Bernard (Court of Appeal), supra note 12.
poorly understood the nature and extent of the Mi'kmaq economy and the scope of the Mi'kmaq land use, both coastal and interior. But land, though ignored in the written terms of the treaties, could not be ignored on the ground. Settlement pressures — stretching further up the coast and deeper into the forests — continued unabated after the treaties were signed at Belcher's farm. The Mi'kmaq complained immediately that their treaty rights were being infringed, and it was this delicate issue of land that Belcher sought to address in his Proclamation of 1762.

II. The Proclamation of 1762

As Chief Justice, Jonathan Belcher was known for his haughty nature, social awkwardness, and his preference for the political and legal traditions of England over those of his birthplace. For the most part, however, Nova Scotians tolerated the excesses of Belcher's personality and appreciated his legal expertise. The mood in Halifax changed when Belcher became lieutenant governor. From the outset, Belcher lacked the political tools necessary for a colonial governor: he was a poor consensus builder and a worse financial administrator. Most detrimentally, Belcher lacked the most crucial asset of a politician (even a colonial one) — political friends.

Belcher made most of his political enemies during the Debtors' Act crisis. Personal debt had haunted Belcher nearly all of his adult life, but, ironically, it was his affinity for creditors that precipitated his political downfall. In 1750, in an effort to entice settlers to Nova Scotia, Governor Cornwallis passed the Debtors' Act which insulated debtors from any debts "contracted in England or in any of the Colonies prior to the Establishment of this Settlement." Despite his own impecunious past, Belcher despised the Act's preference for unscrupulous traders and merchants over "honest"

64. See Mi'kmaq Treaties on Trial, supra note 13 at 207-09. For the fullest account of the Mi'kmaq economy during this period see generally W.C. Wicken, Encounters with Tall Sails and Tall Tales: Mi'kmaq Society, 1500-1760 (PhD Thesis, McGill University 1994) [unpublished].


66. For a kindly assessment see C.J. Townshend's references to Belcher as "a man of good ability, good education, of experience in legal proceedings, and of a vigorous and determined character" in History of the Court of Chancery, supra note 20 at 43, 47.

67. When living in Britain, Jonathan found himself deeply in debt and subject to his father consistent berating as a result: see Colonial Governor, supra note 17 at 166.

68. Quoted in The Neutral Yankees, supra note 65 at 75.
creditors. As lieutenant governor, he made no secret of his intention to amend the Act. Not surprisingly, many of the Act’s supporters — including those in the assembly and council — carried large debts abroad. Over the summer of 1761, word spread in Halifax of Belcher’s desire to amend the Act. The assembly was scheduled to begin a new session in October, but in an act of protest and defiance, a group of influential members refused to meet and no quorum could be established. Belcher complained to the Board of Trade of his troubles, of those who weighed “[t]he Cases of private Persons … too strongly … without attending to the difficulties Upon Creditors.” But with an empty assembly, a stalled government, and a colony of debtors fearful of Belcher’s proposed changes to the law, public sentiment turned sharply against Belcher.

In 1762, as Belcher continued to prorogue the assembly, he pleaded to the Board of Trade for advice on how to resolve the impasse. The Board curtly responded that the offending members should be removed from their positions and in August 1762, Belcher happily dismissed his opponents. But the boycotting members had been assembling allies of their own, including Joshua Mauger, a wealthy London-based merchant and influential consultant on Nova Scotia affairs for the Board of Trade. In addition, the Gerrish brothers — Joseph and Benjamin — complained of Belcher’s incompetence directly to the Board. Belcher, aware of the escalating campaign against him, pleaded for the Board’s support. The boycotting members, he wrote, “leave me very little room to execute the agreeable Office

69. In a letter to the Board of Trade, Belcher argued that the Debtors’ Act was “so essentially different from the Acts of the like nature in Great Britain…[and] introduce[d] confusion in a New Settlement, and irreparable injury to fair and honest Creditors” Belcher to Board of Trade, 7 November 1762, PANS MG I, vol. 1738.
70. For example, Joseph Gerrish, a member of the Assembly and one of Belcher’s principal detractors owed several hundred pounds to John Barrell, his former Boston business partner; The Neutral Yankee, supra note 65 at 75.
71. Among the councillors allied against Belcher were, Joseph Gerrish, John Collier, Henry Newton, Michael Franklin, and Charles Morris, ibid. at 77.
72. Belcher to Board of Trade, 13 November 1761, PANS MG I, vol. 1738
73. An unidentified contemporary described the crisis as follows:
All the people of influence were combined against him, & he became as obnoxious to the very Officers of Government… Cabals were formed against him in the Council, in the Assembly, among the Citizens of Halifax, and the Settlers in the Country…
Quoted in The Neutral Yankee, supra note 65 at 77
74. Belcher to Board of Trade, 7 November 1762, PANS RG I, vol. 1738. The expelled members included Joseph and Benjamin Gerrish, Malachy Salter, Jonathan Binney, Philip Knaust, Robert Dennison, and Stephen West. Benjamin Gerrish had more than one reason to dislike Belcher. Belcher had ordered an investigation into Gerrish’s administration of the Mi’kmaq truckhouse trading system because he believed Gerrish to be running the truckhouses fraudulently for personal profit. See Belcher to Board of Trade, 24 January 1763, PANS RG I, vol. 1738.
75. The Neutral Yankee, supra note 65 at 20
[of lieutenant governor]...[T]hey have made their loudest Appeals among the people whom they have endeavoured to incense, & inflame, and have declared that no Stone shall be unturned to represent me in the most prejudicial light to His Majesty's Ministers."

The Board of Trade had their own concerns about Jonathan Belcher. The Board criticized Belcher for his failure to operate within a budget and admonished him "to use the exactest economy in the application of the Publick Money." Belcher, in return, apologized for his over-spending, but blamed the "malicious endeavours" of his opponents and the overspending of the "former Administration.

Compounding Belcher's political fragility was his sense of military vulnerability. By all accounts, Belcher should have felt more stable in 1761: the bulk of the Acadians had been exported, peace with the Mi'kmaq had been renewed, and the French had been defeated in North America. Nevertheless, Belcher, Beanish Murdoch writes, "appears to have been haunted with a constant dread of mischief to arise from the scattered remnants of the Acadians in the remote parts of the province."

The Board of Trade heard often of Belcher's anxiety. In the summer of 1762, Belcher queried whether some Measures might be pursued for removing the Acadians whose Numbers this Summer are increasing as the firmness of the peace with the Indians so considerably depends upon their being separated from these Acadians, who are incessant in their endeavours for alienating the Savages from his Majesty's Government.

Again, four months later, Belcher warned of the Acadians, "who, altho they have surrendered themselves, are yet ready and watchful for an opportunity either by Assistance from the French, or from hopes of Stirring up the Indians, to disturb and distress the New Settlements." Despite the hatchet buried at his farm, Belcher feared war.

It is also likely that Belcher believed he was ill suited to lead the colony

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76. Belcher to Board of Trade, 7 November 1762, PANS RG1, vol. 1738.
78. Belcher to Board of Trade, 31 January 1763, PANS RG1, vol. 1738.
80. Belcher to Board of Trade, 17 July 1762, PANS RG1, vol. 1738.
81. Belcher to Board of Trade, 7 November 1762, PANS RG1, vol. 1738.
in a time of war. Previous Governors Cornwallis and Lawrence had been
veteran soldiers and Belcher, the jurist, may have felt his military inexperience a liability. Moreover, in 1762 the Mi’kmaq were growing increasingly agitated.\textsuperscript{82} In their eyes, the promises of the treaties of 1760/61 were being ignored. The Mi’kmaq believed that the treaties were being undermined by the increasing numbers of settlers who were encroaching on their traditional hunting areas and clearing the forests for farms.

The problem was not particular to Nova Scotia. Lands across the colonies were being aggressively settled in spite of treaties with aboriginal peoples protecting their traditional hunting grounds. In New York, the Mohawk took up arms against the encroaching settlers. These escalating tensions greatly troubled the Board of Trade, who wanted to avoid costly hostilities with the Mohawk and with aboriginal peoples generally. In a letter to King George III, the Board of Trade blamed the settlers and unscrupulous local governments of New York. The Mohawk were justly agitated, the Board explained, because of the "the Cruelty and Injustice with which they had been treated with respect to their Hunting Grounds, in open violation of those solemn Compacts by which they had yielded to us the Dominion but not the Property of their Lands."\textsuperscript{83} The Board asked the King to issue an order "putting a stop to all Settlements upon the Mohawk River."\textsuperscript{84}

The King went much further. On 9 December 1761, he issued a Royal Order — applicable to the colonies of Nova Scotia, New Hampshire, New York, Virginia, North Carolina, South Carolina and Georgia — reminding governors that "the Peace and Security of Our Colonies ... does greatly depend upon the Amity and Alliance of the several Nations of Tribes of Indians ... and upon a just and faithful Observance of these Treaties and Compacts."

"[T]he said Indians," the Order stated, "have made and do still make great Complaints that Settlements have been made and Possession taken of Lands the Property of which they have by Treaties reserved." In order to "support and protect the said Indians in their Just Rights and Possessions" and "to keep inviolable the Treaties and Compacts," the King

\textsuperscript{82} In his letter to the Board of Trade, 17 July 1762, Belcher reports of the "disquiet and complaints among the Indians, by Interruptions in their hunting grounds". PANS RG1, vol. 1738. See generally, J.G. Reid, "Pax Britannica or Pax Indigena? Planter Nova Scotia (1760-1782) and Competing Strategies of Pacification" (2004) 85 Can. Hist. Rev. 669.
\textsuperscript{83} Board of Trade to King George III, 11 November 1761, PANS RG1, vol. 31.
\textsuperscript{84} \textit{Ibid} The river, the Board explained, was a "Possession of which the Indians are the most jealous, having at different times expressed in the strongest terms their Resolution to oppose all Settlements thereon as a Manifest violation of their Rights."
\textsuperscript{85} Orders in Council, 9 December 1761, PANS RG1, vol. 31.
enjoined the colonial governors — including Belcher — from granting “any Lands within or adjacent to the Territories possessed or occupied by the said Indians, or the Property or Possession of which has, at any Time, been reserved or claimed by them.” Further, Belcher was ordered to “publish a Proclamation” requiring the removal of all settlers “seated ... upon any Lands so reserved to or claimed by the said Indians, without any lawful Authority for so doing.” Contravention of the Order, Belcher was warned, would result in “Our highest Displeasure and of being forthwith removed from your ... office.” In January 1762, the Board of Trade sent Belcher the King’s Order and requested that “you do cause the same to be proclaimed in the Province of Nova Scotia under your Government.”

For Belcher, the Royal Order offered a propitious moment to address the agitation among the Mi’kmaq and to demonstrate the competency of his leadership to the Board of Trade. In reserving the Mi’kmaq’s hunting and fishing lands, Belcher hoped the Proclamation would placate their anger about encroaching settlers and reduce the chance of military unrest. But Belcher also likely had the Debtor’s Act crisis in mind. When Belcher received the Royal Order in the early winter of 1762, the assembly had been abandoned by boycotting members, and Belcher’s political enemies were actively seeking his removal as lieutenant governor. With the Proclamation, Belcher may have hoped to consolidate his political power by winning the approval of the Board and perhaps even the King himself. Finally, Belcher believed the Mi’kmaq were making valid claims to the land. Belcher would later explain to the Board that he had conducted an inquiry into the claims of the Mi’kmaq and had determined a legitimate “Common-right to the Sea...for Fishing without disturbance or Opposition by any of His Majesty’s Subjects.” For Belcher, the Proclamation did not create new land rights but, rather, recognized existing ones. In doing so, Belcher believed he was following both the letter and the spirit of the Royal Order.

On 4 May 1762, Belcher issued his Proclamation. The Proclamation began by reciting the reasons set out in the Royal Order for its issuance, namely: complaints by the Indians that settlements were being made on their lands in violation of the treaties, the desire to recognize the “just Rights and Possessions” of the Indians in accordance with the treaties, and the “fatal Effects which would attend a Discontent among the Indians in the present Situation of Affairs.” The Proclamation then required “all Persons what ever who may either wilfully or inadvertently have seated

86. Board of Trade to Belcher, 7 January 1762. PANS RG1, vol. 31.
87. Belcher to Board of Trade, 17 July 1762. PANS MG 1, vol. 1738.
themselves upon any Lands so reserved to or claimed by the said Indians, without any lawful Authority for so doing, forthwith to remove therefrom.”

The Proclamation defined the lands “so reserved” as “Fronsac Passage … to Nartigonneich … to Piktouk … to Cape Jeanne … to Emchih … to Ragi Pontouch … to Tedueck … to Cape Rommentin … to Miramichy … to Bay Des Chaleurs, and the environs of Canso. From thence to Mushkoodabwet, and so along the coast...”. In effect, the vast coastline from the Gulf of the St. Lawrence to Musquodoboit Harbour north-east of Halifax was reserved “for the more special purpose of hunting, fowling and fishing” and “all persons” were enjoined from “molestation of the said Indians in their Claims, till His Majesty’s pleasure in this behalf shall be signified.” Finally, the Proclamation ordered any persons settled in the reserved area to remove themselves from any lands held “to the prejudice of the said Indians in their Claims.”

The Proclamation elicited two principal responses from Nova Scotia residents: derision and ignorance. As a result of the former, Belcher wrote to the Board of Trade justifying the Proclamation and its scope. In his July 1762 letter, Belcher noted that he had investigated the Mi’kmaq’s claims prior to drafting the Proclamation, and was convinced of their validity for a “Common-right” to the coast.89 In response to the latter, Belcher issued a second Proclamation in August reiterating the terms of the May Proclamation and levying a fine of £50 for its violation.90 Neither Proclamation was obeyed. Worse for Belcher, his political enemies in Halifax, mobilized by the Debtors’ Act crisis, used the disaffection surrounding the Proclamation to further spread and entrench Belcher’s unpopularity in Halifax and London. To that end, Joshua Mauger petitioned the Board of Trade for Belcher’s removal, noting that his “Imprudent Conduct [demonstrated he was] unacquainted with and unskilled in the Art of Government.”91

The Board of Trade was listening. In the minutes of their 3 December 1762 meeting, it was reported that Belcher’s Proclamation was

imprudent and not warranted by His Majesty’s Order in Council ... and it is not without the greatest Astonishment and concern that their Lordships observe from the Description of the Lands reserved by the Lieutenant

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89. 17 July 1762, PANS MG1, vol. 1738. Belcher goes on to argue that other claims to the land cannot be made because the Indians ceded title to the French and the French ceded title to the British under the Treaty of Utrecht. In R. v. Côte, [1996] 3 S.C.R. 139, the Supreme Court rejected this argument.


91. Ibid. at 21. Mauger, with his extensive land-holdings and land speculation, had considerable financial incentive to oppose the Proclamation.
Governor’s Proclamation that the reservation does exclude any of His Majesty’s subjects from settling or carrying on the Fishery upon any part of the Coast from Mar caboit to the River St. Lawrence...⑨2

Now, a year later, the Board of Trade read narrowly the Royal Order that had precipitated the Proclamation. The Board was prepared, if necessary, to reserve the unsettled, and less valuable, land of the interior to the Mi’kmaq. The coast, on the other hand, was strategic and economically vital, and therefore it could not be Mi’kmaq land, regardless of treaty, title or Royal Order. The Board of Trade suggested that “had it been necessary or expedient to reserve any Lands to the Indians it should not have been those lying near the Coast but rather the Lands amongst the Woods and Lakes, where the wild Beasts resort and are found in plenty.”⑨3

It is unclear from the surviving evidence how much the Mi’kmaq knew of the Proclamation when it was issued. In his July 1762 correspondence, Belcher indicates that the Proclamation was not “issued at large,” though he may have been back-peddling.⑨4 Joshua Mauger blamed “that silly & too precipitate Proclamation” for inciting Mi’kmaq land claims, although he may have been exaggerating in an attempt to further harm Belcher’s reputation with the Board.⑨5 Whether on the basis of the Proclamation or the treaties, we do know that the Mi’kmaq were advancing land claims throughout this period and whether the Mi’kmaq knew of the Proclamation or not does not change its legal status. The Board noted with concern that the Proclamation encouraged and “in some degree, establish[ed]” Mi’kmaq claims.⑨6 Nevertheless, the legal status of the Proclamation is complicated by the caveat that it was issued “till His Majesty’s pleasure in this behalf shall be signified.”⑨7 All surviving evidence suggests that the Proclamation was never formally disallowed or revoked, although the Board of Trade was clearly unhappy with some of the terms of the Proclamation. After learning of the Board of Trade’s reaction, Belcher, in consultation with his executive council, decided that it would be unwise to revoke or alter the Proclamation for fear of provoking the Mi’kmaq.⑨8 The strategy.

⑨2. Minutes from the Board of Trade Proceedings, 3 December 1762, PANS RG 1, vol. 31.
⑨3. Ibid.
⑨4. Belcher to Board of Trade, 17 July 1762, PANS MG 1, vol. 1738. Belcher writes, “If the Proclamation had been issued at large, the Indians might have been incited by the disaffected Acadians [and] others to have made extravagant and unwarrantable demands...”
⑨5. Mauger to Board of Trade, 28 September 1763, quoted in Miameas and Colonists, supra note 33 at 62.
⑨6. Minutes from the Board of Trade Proceedings, 3 December 1762, PANS RG 1, vol. 37.
⑨8. Ibid. at para. 100.
approved in London and practised in Nova Scotia, was to let the Proclamation slip, as quietly as possible, into oblivion.

The Board still had the problem of Jonathan Belcher. Though Belcher pleaded with the Board for their support, the Proclamation had sealed his political fate. The Board, convinced of Belcher’s financial and administrative incompetence, replaced him as lieutenant governor with Montagu Wilmot in September 1763. In March 1764, the Board wrote to Wilmot and asked him to inform the Mi’kmaq of “His Majesty’s disallowance” of the Proclamation, but Wilmot responded that it was wisest to continue to ignore the Proclamation to avoid “cause for a quarrel” with the Mi’kmaq. Belcher remained chief justice of the province although the two judges appointed to assist him in 1764 were seen as a further rebuke.

Over the next ten years, Belcher retreated from the political spotlight, although he kept busy on the bench and in the affairs of Halifax’s St. Paul’s Church. When Jonathan Belcher died in the spring of 1776 the Proclamation of 1762 seemed forgotten.

III. Belcher and The Proclamation of 1762 in R. v. Bernard

The Mi’kmaq, though, remembered. Over the next two hundred years, the Mi’kmaq consistently appealed to the government to recognize and remember their rights to the land. In 1929 a Nova Scotia judge commented: “Every now and then for a number of years one has heard that our Indians were making [land] claims.” Sixty years earlier, Beamish Murdoch

99. Belcher to Board of Trade, 28 February 1763, PANS MG 1, vol. 1738.
100. See Board of Trade to Wilmot, 22 November 1763, PANS RG 1, vol. 31.
102. “Jonathan Belcher,” supra note 17 at 193. But Belcher was not so willing to let his authority in the legal sphere be undermined. Townsend reports that after the appointment of his two assistant judges, Belcher drafted their powers “so qualified and limited” that they did not have the power “to try a case but in conjunction with the Chief Justice, or even to open or adjourn the Court without his presence and concurrence.” History of the Court of Chancery, supra note 20 at 47.
103. Jonathan Belcher died 30 March 1776 preceded by his wife Abigail (d. October 1771) and survived by a daughter and son. The House of Assembly granted his daughter a pension until she married Belcher’s son, Andrew Belcher, served for many years as a member of the assembly. Andrew’s son, Vice-Admiral Sir Edward Belcher, was famous for his nautical surveys of the African Coast and Arctic Ocean: History of the Court of Chancery, supra note 20 at 47.
noticed a similar phenomenon: “the Indian believe[s]...he ha[s] a right to cut down or bark a tree in the unfenced and uncultivated wilderness”.

Similar claims after the treaty signing at Belcher’s farm had convinced Belcher of the need for the Proclamation of 1762. The Proclamation did not create those claims — they arose from ancient possession of the land and out of a half-century of treaties with the British — but the Proclamation did, for a moment, acknowledge that British promises about Mi’kmaq land rights had been made.

In the on-going litigation of Bernard, Joshua Bernard argues that Belcher’s Proclamation is a source of Mi’kmaq aboriginal title and entitles him to log the Crown land subject to that title. The New Brunswick Court of Appeal unanimously rejected that argument although a majority acquitted Bernard on the basis of a treaty right to log. Thus far, Bernard has largely turned on an interpretation of the treaties of 1760-61 and the Proclamation has been raised only peripherally as an alternative argument. Accordingly, Belcher and the Proclamation appear in Bernard but briefly, and without the context and background presented here.

In rejecting the Proclamation as a basis for aboriginal title, the New Brunswick Court of Appeal held that the Proclamation was “neither warranted nor authorized” by the Royal Order, that Jonathan Belcher “exceeded [his] authority” in reserving coastal lands to the Mi’kmaq, and that, as a result, the Proclamation is “invalid.” No doubt, the Court rests its decision on this basis, at least in part, to circumvent the noted fact “that no formal renunciation or revocation [of the Proclamation] was issued by the King.” In a curious move, Robertson J. A. flips the onus on Bernard, suggesting, “[t]his is one case where the Crown’s silence cannot validate that which is otherwise invalid. In other words, this is not a case where it is necessary to produce evidence of a disallowance. Rather, it is a case in

106. A History of Nova Scotia, supra note 15 at 430. On Murdoch and his generation’s response to the dispossession of the Aboriginal peoples of the Maritimes, see D.G. Bell, “Was Amerindian Dispossession Lawful? The Response of 19th-Century Maritime Intellectuals” (2000) 23 Dal. L.J. 168 (“Was Amerindian Dispossession Lawful?”) Murdoch expressed his own view in 1832 with rhetorical and racist flourish: “[O]ur own nation and...France took possession of an uncultivated soil which was before filled with wild animals and hunters almost as wild. It might with almost as much justice be said that the land belonged to the bears and wild cats, the moose or the cariboo, that ranged over it in quest of food, as to the thin and scattered tribes of men, who were alternately destroying each other or attacking the beasts of the forest” (as cited at 176).

107. This line of reasoning was initially advanced by the trial judge, Bernard (Prov. Ct.), supra note 2 at para. 116, and was supported in the three separate decisions of the Court of Appeal, Bernard (Court of Appeal), supra note 12 at paras. 185, per Daigle J., 272-73, per Robertson J., and 547, per Dechênes J.

108. Bernard (Court of Appeal), ibid. at para. 273.
which it is necessary to show His Majesty assented to an unauthorized
grant."\textsuperscript{109}

But in finding the Proclamation of 1762 unwarranted, unauthorized
and therefore invalid, the Court of Appeal has been seduced by the colo-
nial politics surrounding Jonathan Belcher. It is a misinterpretation of his-
tory as much as it is an error of law. When the Board of Trade and Belcher's
political enemies spoke of the Proclamation as being 'not warranted' they
did not mean it was unauthorized in any legal sense but rather that the
Proclamation was impolitic, evidence of Belcher’s maladministration and
incompetence. The Proclamation’s critics in Halifax were motivated, at
least in part, by a desire to have Belcher removed as lieutenant governor.
Whether as debtors fearful of revisions to the Debtor’s Act or as land specu-
lators anxious to see expansive settlement continue, Belcher’s political
enemies had considerable pecuniary interests in ensuring that he was re-
moved from his position and the Proclamation ignored. The issue vexing
the Board of Trade was not that Belcher had reserved land for the Mi’kmaq,
but where he had reserved land. The Royal Order contemplated the reserva-
tion of ‘Indian’ land just as the Royal Proclamation of 1763 famously
did.\textsuperscript{110} Recall that the Royal Order instructed Belcher to forbid the grant-
ing of land “within or adjacent to the Territories possessed or occupied by
the said Indians or the Property or Possession of which has ... been
reserved or claimed by them.” The point of contention for the Board of
Trade was that Belcher had reserved coastal land and not the interior lands
they cared less about where “the wild Beasts resort and are found in plenty.”
Tellingly, the Board of Trade never took the position that the Proclamation
was legally invalid, on the contrary, their concern was that the Proclama-
tion had “in some degree, establish[ed]” Mi’kmaq land claims. As a result,
the Board’s intention was the tactful “disallowance” of the Proclamation –
a result which was \textit{de facto} achieved by ignoring the Proclamation rather
than risking further agitation of the Mi’kmaq. But because it was legally
issued and never disallowed, the Proclamation of 1762 remains, like the
Royal Proclamation of 1763 and the treaties of 1760 61, operative and
constitutionalized under s. 35(1) of the Constitution Act, 1982.\textsuperscript{111}

An operative Proclamation of 1762 may or may not directly help Joshua
Bernard and his claim of aboriginal title and aboriginal rights. First,
Bernard would have to prove that the lands on which he was logging were
within the ambit of coastal lands described in the Proclamation. Second,
given that the Proclamation specifically refers to “hunting, fowling and fishing,” it is not entirely clear that the Proclamation covers logging activity. Finally, it is clear that Jonathan Belcher did not intend the Proclamation to recognize Mi’kmaq title so much as a “Common-right to the Sea … for Fishing without disturbance or Opposition by any of His Majesty’s Subjects.” Belcher believed that the British possessed the underlying title to the land under the erroneous assumption that “the French derived their Title from the Indians and the French ceded their Title to the English under the Treaty of Utrecht.” But Belcher did believe that the Mi’kmaq were making valid claims to the lands, and although he did not explain the basis of this belief, he likely had in mind the treaties of 1760/61.

The Mi’kmaq, for their part, founded their land claims both on the basis of ancient possession but also on the understanding that they had secured possession of that land — both coastal and interior — under the treaty relationship that had been renewed at Belcher’s farm. For the Mi’kmaq, there was no separation between the right to hunt, fish and harvest and the right to land — they were one and the same. Indeed, how could it be otherwise? How could the Mi’kmaq harvest the resources of the forests and waters as they had always done if settlers were clearing forests where they hunted and building towns on the sites of their coastal villages where they fished? The Proclamation of 1762 recognized that land was crucial to the exercise and continuation of Mi’kmaq treaty rights and in accordance with the Royal Order’s instructions “to keep inviolable the Treaties and Compacts which have been entered into with [the Mi’kmaq].” In this way, the Proclamation is perhaps better viewed not as a stand-alone document but rather as a revealing component of the treaty-diplomacy between the Mi’kmaq and British which confirmed existing land rights, including rights to coastal land. As a result, the Proclamation — though perhaps an indicator of aboriginal title under the test laid out in Delgamuukw — supports an interpretation of the treaties of 1760/61 that includes a broad right to use the land for hunting, fishing and harvesting. From this perspective, although the New Brunswick Court of Appeal rejects the Proclamation on unconvincing grounds, the existence of the Proclamation supports the majority’s broader interpretation of the treaties of 1760/61.

112. Belcher to Board of Trade, 17 July 1762. PANS MG 1, vol. 1738. As well, Belcher’s Act for the Quieting of Possessions of the Protestant Grantees of the Lands Formerly Occupied by the French Inhabitants, S.N.S. 1759, asserted that Nova Scotia “did always of right belong to the Crown of England, both by priority of discovery and ancient possession”. See “Was Amerindian Dispossession Lawful?” supra note 105 at 175.
Conclusion

Jonathan Belcher’s historical legacy features none of the tensions that plagued his time as lieutenant governor. He is thought of as a competent chief justice, if a less than competent lieutenant governor — not the stuff of riveting history. But ordinary as he may have been, Jonathan Belcher lived amidst the extraordinary turbulence of eighteenth-century colonial Nova Scotia: a time when the Mi’kmaq, Acadians, French, and British all claimed title to at least some of the region. In the war for colonial sovereignty of Nova Scotia, promises to the Mi’kmaq were made and promises were forgotten. Unfortunately for the Mi’kmaq, Jonathan Belcher was an unpopular lieutenant governor with the members of his assembly, the settlers of the province, and the Board of Trade. Belcher attempted to recognize Mi’kmaq land rights at a time when Britain was finally establishing itself as the sovereign and dominant power in the region. War was to be avoided with the Mi’kmaq, but not at any cost. Times were changing, and Belcher’s cautious anxiety was being replaced with new confidence, settlement, and expansion. For most newcomers, it was time to forget the past and keep forgetting into the future.

But Jonathan Belcher and the Proclamation of 1762 have returned to court, presenting an opportune moment to remember and examine this past. The aim of this paper has been to place Belcher and the Proclamation in their broader historical context and to demonstrate the ways in which the judicial treatment of the Proclamation to date has been unsatisfying. The unique challenge facing courts in aboriginal rights litigation is to engage in both historical and legal analysis within the constraints and confines of adversarial litigation. Decisions cannot, of course, become historical treatises expanding ever further into a context with infinite bounds, but nor should courts conjure historical ghosts into court only to dismiss them with unduly narrow legal analysis. In the complex blend of law and history in aboriginal rights litigation, legal interpretations will necessarily rely on conceptions and understanding of history. In history and law, the future of aboriginal rights resides.