# A COMMERCIAL HARVESTING PROSECUTION IN CONTEXT: THE PETER PAUL CASE, 1946

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In 1946 Peter Paul, a Lower Woodstock Malecite, was convicted in Magistrate's Court of theft of ash saplings. Had he appealed his conviction the resulting case report would have entered the law books as New Brunswick's first considered adjudication of Maritime treaty rights. But Paul abandoned his appeal, and so the episode passed into obscurity.

In an earlier essay I showed how the dominant culture, having gained the long-sought Maritime peace treaties in the 18th century, proceeded to disregard their significance for Amerindians in the 19th century.[1] The present offering takes the Peter Paul case as a context for extending this exploration of treaty knowledge into the mid 20th century. Paul's conviction may be only an historical footnote but it brought into conjunction two ideas of great importance, Malecite dispossession and Malecite entitlement. By *dispossession* I mean that this 1946 case was the precise historical moment when the long process of dispossessing the Malecites became complete. For nearly 200 years the dominant society had used the machinery of the state to take things away from the Malecites. Prosecution and conviction of Peter Paul for something as trivial as harvest of ash saplings marked the final act of this taking process. By a remarkable symmetry the Peter Paul case was also the first occasion when someone – it was the extraordinary Tappan Adney – researched an argument for aboriginal *entitlement*. Although it would not be until 1999 that the Supreme Court of Canada finally embraced the view that Maritime aboriginals had

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[1] D. Bell, "Was Amerindian Dispossession Lawful?: The Response of 19th-Century Maritime Intellectuals" (2000) 23:1 Dal. L.J. 168. I do not mean that this 1946 treaty case was New Brunswick's first. Twenty-one years earlier there was such a trial at Moncton arising from the trapping of beaver. In it defence counsel Emmet McMonagle made an elaborate-sounding entitlement argument based on the treaties of 1725, 1726 and 1752, Belcher's Proclamation, the Proclamation of 1763 and s. 109 of the *British North America Act*: *[Moncton] Daily Times* (11 & 30 May 1925). McMonagle's submission appears to be notably more comprehensive than would be advanced three years later in the earliest published Maritime treaty case: *R v. Syliboy* (1928), 50 C.C.C. 389 (N.S. Co. Ct.). However, as Magistrate C.A. Steeves acquitted the accused on the facts rather than treaty law, the Crown did not appeal and so the case did not generate written reasons for judgment on the treaty and proclamation issues. Hence it had no value as a legal precedent, although Indian Affairs files reveal that it inspired many attempts to claim its benefit: Ottawa, Library and Archives Canada (RG 10, vol. 8862, file 1/18-11-5). As noted below, Tappan Adney knew of the Moncton case in 1946.

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ancient treaty rights still operating in the modern world, that idea began its modern New Brunswick life half a century earlier in Peter Paul's case.[2]

## The Dispossession Context

In the course of a long life Peter Louis Paul (1902-1989) gained renown as a consultant on the language, ethnology and craft of Malecites, the St John valley tribe of Amerindians. He resided on a small reserve in the lower part of the parish of Woodstock, in western New Brunswick. This Lower Woodstock reserve is near and yet distinct from Medoctec, one of the principal Malecite encampment sites in traditional times. Paul never lived at Medoctec, which had long been in private hands and in the 1960s was flooded by the headpond of a hydroelectric dam, but the site's fate illustrates vividly the Amerindian dispossession that is necessary background to understanding his 1946 harvesting prosecution.

The Medoctec site was located where what is now called Hay's Creek debouches into the St John River.[3] Here commenced the ancient portage and canoe route between the St John valley and both Passamaquoddy Bay and the Penobscot River. Here Malecites maintained a council fire and constructed a stockade, probably for protection against raiding Mohawks; and here, from 1717 to 1767, stood the first Christian chapel in what is now New Brunswick. Medoctec was remote from the Atlantic coast. During the French regime in Acadia, and even after the entry of English-speaking settlers into the St John valley in the 1760s, it was never within 100 kilometres of the advancing settlement frontier. About the only English speakers who reached the place in pre-Loyalist times were captives.[4] Occupation of the site was seasonal, during the warmer months. In the mid 18th century there may possibly have been an attempt by some Malecites to settle year round in the vicinity of the Medoctec chapel; if so, the number of permanent settlers was small.[5]

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[2] Recognition came in *R. v. Marshall*, [1999] 3 S.C.R. 456.

[3] The Malecite site called "Medoctec" by the French is not to be confused with the modern village of "Meductic" a few kilometres below, at the mouth of Eel River. There is no modern history of the Medoctec site. The most reliable work is still that of W.O. Raymond, the most accessible of whose several illustrated sketches of pre-Loyalist Medoctec is *River St John* (Saint John: J.A. Bowes, 1910) at 145-62; a more detailed but earlier and cruder version is given in a pamphlet entitled *Old Meductic Fort and the Indian Chapel of Saint Jean Baptiste* (Saint John: Daily Telegraph Steam Book and Job Print, 1897) [Raymond, *Old Meductic Fort*].

[4] Late 17th-century Medoctec is featured in the best-known of the Maritime captivity narratives: James Hannay, ed., *Nine Years a Captive, or, John Gyles' Experience Among the Malicite Indians, from 1689 to 1698* (Saint John: Daily Telegraph Steam Job Press, 1875) [Hannay]. The only English-speaking non-captives to see Medoctec before the Loyalist advent were government couriers passing to and from Canada and a number of revolutionary "Patriots" and their pursuers. The Patriots and their native allies fled to New England along the Medoctec portage in 1777 in 122 canoes: Frederic Kidder, *Military Operations in Eastern Maine and Nova Scotia during the Revolution* (Albany: J. Munsell, 1867) at 115-17.

[5] Seasonal occupation of Medoctec was not uninterrupted, for Gyles mentions temporary abandonment of the site: Hannay, *supra* note 4 at 21.

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It was the arrival of thousands of American Loyalists into the St John valley in the 1780s that brought Medoctec within the settlement frontier. While Medoctec appeared as a place-name on government maps held at Halifax, officials at Saint John conducting the lottery that divided the central St John valley into settlement blocks for the disbanding Loyalist regiments can have known of it only as a rumour. Consequently they made no attempt to exempt the ancient campsite from allocation. The vicinity of Medoctec fell within the block drawn by the 2nd DeLanceys, who occupied the neighbourhood beginning in 1784. In their collective land grant, issued first under the authority of Nova Scotia and then by the newly-separated colony of New Brunswick, the site fell between two lots. Whether settlers actually took up these lots at this early date is not known. Certainly Medoctec would have seemed an advantageous spot both for the presence of the abandoned but still-standing chapel and because it contained many cleared acres, where Malecites had grown corn for generations. Be that as it may, there is no evidence of an immediate collision between settlers and Malecite claimants, and one historian has speculated that the Malecite withdrew away from the Loyalists, into the upper St John valley. However, late in the 1780s an English Anglican charity opened a school for Malecites near Medoctec. It was situated a few kilometres upriver, near a spot that, decades later, would become the Woodstock Indian reserve. The school ran for only a few years, just until 'white' settlers were well established, but during that time it distributed provisions to about 100 Amerindian families, numbering more than 300 souls.[6] It is natural to suppose that some of these Malecites camped at least temporarily near the school and for that purpose used, or attempted to use, the traditional Medoctec site.

At some point the Malecites did assert their claim to Medoctec. This must have caused tensions and apprehensions in the whole settler community. Concern was sufficiently strong that the central government at Fredericton decided to restore it to its aboriginal claimants. One witness to the parlay that communicated this to the Malecite was the 16-year-old son of the Crown's representative. Years later he recounted the proceeding. As paraphrased by others, his words took on a fanciful colouration:

> With a view to extend the settlement of the country, two commissioners were sent from Halifax [*sic*] to make a treaty with the Indians. They were poled up the [St John] river by two men in a canoe from Fredericton. Approaching the Meductic [site] at nightfall, they became alarmed at the huge fires burning near the fort [the old Malecite stockade] and the unearthly yelling of the semi-nude Indians dancing around them. Passing quietly by, on the opposite side of the river, they proceeded to the house of my father (J. Bedell, Esq), a few miles farther on, where they were entertained for the night. On the following day I was permitted to accompany my father and the commissioners to the fort. Arriving

[6] Raymond, *Old Meductic Fort*, *supra* note 3 at 31-32, 34-38. The lengthy list of Malecite heads of household is at 50-52.

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> at the entrance, the commissioners made known the object of their visit. Presently a number of stalwart men presented themselves, dressed in gorgeous attire. After salutations, the commissioners asked: "By what right or title do you hold these lands?". A tall powerful chief, standing erect, and, with the air of a plumed knight, pointing within the walls of the fort, replied: "There are the graves of our grandfathers! There are the graves of our fathers! There are the graves of our children!"[7]

Even absent corroborating documentation, one would judge the dramatic reference to graves as literally correct, for that is just the sort of vivid detail that a witness would remember. While none of the rest can be accepted as accurate in a literal sense, from the whole one can infer: that Malecites were claiming Medoctec, that the settler community was alarmed, and that government responded by sending someone to reach an accommodation.

One need not rest with inferences and speculations, however, for this transaction is documented. A collection of manuscripts on "Indian" affairs that Lord Beaverbrook presented to the University of New Brunswick in the 1950s includes this 1807 treaty pertaining to Medoctec.[8] It identifies its parties as the Crown, as represented by local magistrate John Bedell "for this purpose duly authorized", and "the Indians of the River St John commonly called and known by the name of the Milasite Tribe represented by those [eleven males] who have subscribed and sealed this Instrument and who alledge that they are duly authorized to agree for the whole". It recites the tribe's long possession of the site and the Malecite wish to continue to cultivate it and make a village there. Government considered these assertions as valid historically and the present claim to be "founded in equity", and it promised to acquire the two lots in question. Then it would "appropriate" to the Malecites a tract measuring 200 rods along the river and half a mile in depth "for the sole use of the said Indians and their Posterity forever". This promised appropriation was subject to certain conditions, including that it would satisfy all claims that Malecites might have to land along the St John River and that Malecites would not dispose of any part of the site without Crown permission. Bedell and the eleven Amerindians signed duplicate originals, one copy of which, following Crown ratification, was to be returned to the Malecites.[9]

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[7] The memoirist is John Bedell Jr. The earliest publication of the Bedell text that I have found is in W.T. Baird, *Seventy Years of New Brunswick Life: Autobiographical Sketches* (Saint John: G.E. Day, 1890) at 112. My supposition is that it appeared first in a Woodstock newspaper.

[8] For much of the 20th century the New Brunswick government's archives were consigned to the attic of the Provincial Legislature. Until at least the 1920s influential visitors could rummage for curiosities freely. Among documents looted from the provincial attic was a series on Amerindian affairs that somehow came into the hands of Lord Beaverbrook.

[9] Agreement between the Government of New Brunswick and the Malecite Tribe (29 July 1807), Fredericton, University of New Brunswick Archives (MG H54 #31). The agreement contemplates that the Crown would convey Medoctec to the tribe subject to conditions, rather than granting them a mere licence of occupation. If a grant did issue in these terms, it would explain why Medoctec never appeared in schedules of Amerindian "reserve" lands. It was a freehold.

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Analyzing the legal standing of this 1807 treaty and tracing minutely the further history of the Medoctec site, including how nearly the Crown kept its promise, are not the present concern. It is sufficient to say that ownership of the site became contested once again, so that by 1841 the province's first Indian commissioner found only 29 Malecites in residence. Moses Perley thought the place:

> "shamefully neglected, and almost a public common. It was stated to me that they had at first 113 rods in front on the River, and that their land run back three miles continuing the same breadth. That they had a writing signed by Governor Carleton [*sic*], which some years ago was left at the Crown Lands' Office, and they have not seen it since. That latterly one Peter Watson has taken possession of a considerable portion of their land by virtue of a Grant or Licence as he alleges, and they now have scarcely a half of the Lot assigned them by Governor Carleton, the boundaries of which were set up and marked during his administration by a Mr Bedell, a Crown Surveyor."[10]

Throughout the 1840s Medoctec was the subject of a bewildering conflict of squatter and grantee claims. The local Indian agent argued persistently that certain 'whites' were perpetrating a great mischief on the Malecites, which government must resist at almost any cost. But the central administration, while not disputing this, seemed unable to act.[11] In the result, government simply abandoned the Medoctec site to settler claimants and in 1851 provided Malecites with a new, smaller lot some kilometres upriver, approximately where the Lower Woodstock reserve remains today.[12] The Malecites had lost Medoctec once again. 'Expropriation' was perfected in the 1960s, with the flooding of the ancient site for hydroelectric purposes without a proper archeological survey. It was among Malecites displaced to this Woodstock reserve that Peter Paul was born.

The taking of the land, first their ancestral homeland of the St John valley and then even the small but culturally vital site at Medoctec, was the greatest hardship that the dominant culture could have inflicted on the Malecite; but a further

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[10] "Extracts from Mr Perley's First Report Respecting the Indians on the Saint John" (12 August 1841): *[Fredericton] Royal Gazette* (23 April 1842). What Perley alleges that the Malecites told him approximates the 1807 transaction except for the reference to Thomas Carleton, who had left the colony in 1803.

[11] Something of the complexity of competing claims and the tension between the local Indian commissioner and the central executive are illustrated in Gary Gould & A.J. Semple, *Our Land: The Maritimes: The Basis of the Indian Claim in the Maritime Provinces of Canada* (Fredericton: Saint Anne's Point Press, 1980) at 64-67.

[12] For no obvious reason the conveyance from Peter Fraser's estate to the Crown has a place in *Indian Treaties and Surrenders*, vol. 3 (Ottawa: Queen's Printer, 1912) at 1-3. It recites that the land thus provided for the Malecites was "in Lieu of a Tract of land of which the said Indians have been wrongfully deprived as is alleged".

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phase of resource deprivation forms the central context of proceedings against Paul in 1946 – denial of the products of forest and stream. Although New Brunswick legislated to promote wildlife conservation as early as the 1780s, it was not until the mid 19th century that influential men began to regard game and fresh-water fish as resources that might be marketed to the larger world as part of the province's identity. Stories that Moses Perley, the Indian Commissioner, wrote for the English market in the 1840s are an early example of this new depiction of New Brunswick as "sportsman's Paradise". Already by the 1850s it was becoming governmental policy both in New Brunswick and in the whole Maritime-New England region that fish and game be conserved so as to be available to sport hunters, especially tourist 'sports', who would bring economic stimulus.[13] To this end New Brunswick began leasing stretches of the best salmon rivers to 'clubs' of wealthy anglers, most of them non-residents, often Americans. To facilitate this leasing policy, the province declared in legislation that it would retain ownership of the banks of many streams in the north and northeast even when the adjacent land was granted for settlement.[14]

In the 1890s the Legislature consolidated fish and game laws in a way that completed a revolution in the chase. It did this by creating wardens and "guardians", a means of specialized enforcement intended to imitate the success of wardens employed privately by the fishing clubs. Now many traditional harvest practices, in some cases long illegal in theory, were suppressed in practice, among them spearing (salmon), netting in fresh water or netting birds, gathering bird eggs, fishing or hunting at night or with lights, dogging, excessive catch and harvesting out of season, on the Sabbath or without licence.[15] Government imposed these restrictions both to promote conservation and in the name of a new male value known as "good sportsmanship". In the eyes of opinion-shapers, a practice such as jacking (hunting with a 'jack', *ie*, a light) was more than illegal; somehow it was disgraceful. It was as if these 'sports', who came from the "brainwork" of city jobs to renew masculinity in the forest, affected to view the chase as a sort of chivalry.[16]

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[13] For example, *Act to Encourage the Visits of Tourists and Sportsmen to the Province*, S.N.B. 1898, c. 8.

[14] *Act to Regulate the Leasing of the Fishery Rights in the Non-tidal Waters Pertaining to the Crown as Riparian Proprietor of Ungranted Crown Lands, and for the Protection of the Fisheries*, S.N.B. 1884, c. 1; *Act to Provide for the Survey, Reservation and Protection of Lumber Lands*, S.N.B. 1884, c. 7 (reserving riparian rights to the Crown).

[15] For example, *Act to Consolidate and Amend the Several Acts for the Protection of Certain Birds and Animals*, S.N.B. 1893, c. 13.

[16] These paragraphs are based on five outstanding historical contributions: William Parenteau & R. W. Judd, "More Buck for the Bang: Sporting and the Ideology of Fish and Game Management in Northern New England and the Maritime Provinces, 1870-1900" in John Reid & Stephen Hornby, eds., *New England and the Maritime Provinces: Connections and Comparisons* (Montréal: McGill-Queen's University Press, 2005) at 232-51 [Parenteau & Judd]; William Parenteau, "A 'very determined opposition to the law': Conservation, Angling Leases, and Social Conflict in the Canadian Atlantic Salmon Fishery, 1867-1914" (2004) 9 Environmental History 436; Peter Thomas, *Lost Land of Moses: The Age of Discovery on New Brunswick's Salmon Rivers* (Fredericton: Goose Lane, 2001) [Thomas]; William Parenteau,"'Care, Control and Supervision': Native People in the Canadian Atlantic Salmon Fishery, 1867-1900" (1998) 79:1 Canadian Historical Review 1; Edward Ives, *George Magoon and the Down East Game War: History, Folklore, and the Law* (Urbana: University of Illinois Press, 1988) c. 3.

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The most notable success of New Brunswick's new game regime, particularly the controversial leasing of fishing rights to clubs, was preservation of the Atlantic salmon at a time when it was becoming practically extinct in neighbouring New England. Another contribution was turning guiding and outfitting for visiting sports into a sort of industry. The vast sporting literature of the late 19th century highlights the skill of Micmac and Malecite guides in particular.[17] But the enforced conservation of fish and game for the pleasure of outsiders came with a social cost. That cost was born primarily by those known as 'pot' hunters; that is, back-country settlers who hunted and fished to help put food on the table. Families who set down on the frontier and attempted to clear it for farming had always considered themselves entitled to the game that came their way, regardless of what the law books said. Until the late 19th century practically everyone took this for granted.[18] But New Brunswick created its new force of fish and game wardens for the very purpose of suppressing such poaching. Now began a period in the region's history that might be called the "war in the woods" or what in Maine was called the "game war" – the conflict between warden service and local populace. Wardens were shot at, their canoes riddled with holes, their barns or houses torched by night; sometimes they were murdered. Memoirs confirm that, even as late as the 1920s, every stranger in the woods in some areas of western New Brunswick was a suspected game warden and that some wardens who entered the forest never emerged.[19]

While the game laws and their enforcement were a hardship for all backwoods people, the most identifiable group on whom they fell heavily were New Brunswick's Amerindians. After the Legislature imposed in 1888 a three-year moratorium on the taking of big game, Malecites petitioned for an exemption, protesting that they "now find it very hard indeed to subsist through the long and cold winters on being entirely deprived...of the privilege of killing deer or moose". In plainer language "Old Margaret" of Tobique protested to Tappan Adney in 1887

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[17] A. Bear Nicholas, "Gabriel Acquin" in *Dictionary of Canadian Biography*, vol. 13 (Toronto: University of Toronto Press, 2000) at 3-5.

[18] For example, explaining local resistance to implementation of the new resource regime on the Tobique River, one observer cited "intense feeling among some of the settlers respecting the manner in which the fishing rights on the river are disposed of [to fishing clubs]". ... "They feel that the fish in the stream which flows past their doors should be as free to them as the air they breathe. They consider the fish to be their birth-right, and they do not like to see strangers come in and enjoy what they feel should be theirs": *[Saint John] Globe* (21 August 1888).

[19] In 1892 Tappan Adney observed the tensions between the Tobique Salmon Club, game wardens and the local populace in the wake of the killing by poachers of Susan Howes, an American fishing tourist: "Third Trip to New Brunswick Including: Odell Stream, Serpentine R, &c: From November, 1891, to November, 1892": Fredericton, UNB Archives (Adney Papers, MG H22, Box 8, 72-74). A candid memoir of poaching in the Hartland area of western New Brunswick in the early 1920s mentions fishing with nets, spears and dynamite and hunting with jack-lights and bait. It also mentions the death of wardens and the sinking of their craft (with them in it) and local resentment "that the wealthy American business men were allowed to lease rivers and streams and to monopolize the salmon and trout fishing in these waters": William Carr, *High and Dry: The Post-War Experiences of the Author of "By Guess and By God"* (London: Hutchinson, 1938), cc. 5, 8.

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that "Seems like that government down Fredericton try [to make] Injun starve". "He make law cant ketch no salmon up here. ... I think that government better send soldiers up here and shoot all the Injuns. Good deal better do that than let Injun starve. ... Then we die quick – now we die slow."[20]

If society in general once thought that settlers had a moral right to take the game that came their way, it had believed this more strongly of the native Amerindians. If few Maritimers ever accepted the notion that ancient Micmacs and Malecites had 'owned' the land, public opinion did allow them the residual privilege of harvesting the products of the forest on unfenced, uncleared land. Customary acceptance of aboriginal privilege was so general that it is rare to find it expressed on paper but I will cite two examples, both from important historians. Writing in the 1860s Beamish Murdoch (1800-76) remarked that tensions between Micmacs and 'white' society had practically disappeared after the 18th-century peace treaties. The "only difference of opinion that remained, was, that the Indian believed that he had a clear right to cut down or bark a tree in the unfenced and uncultivated wilderness – while those who held a written grant or deed, in some rare instances grudged him this privilege, and considered him as a trespasser on their rights".[21] Murdoch's impression that the dominant culture rarely accounted Amerindian harvest practices as trespass is confirmed by observations from New Brunswick's first great historian, W. O. Raymond (1853-1926). Raymond's views are particularly apt in the present context as he grew up in Lower Woodstock a near neighbour of the Malecite reserve and his early historical work was on that area, including ancient Medoctec. After outlining terms of an 18th-century Malecite treaty that he had rescued from a rubbish heap, he offered these further remarks:

> The St John River Indians still possess a traditionary knowledge of the treaty [of Fort Howe] made in September, 1778, and refer to it as the time when the white man and the Indian became "all one brother". Many of the Indians assert that in consequence of the understanding then arrived at the Indian has today the *right to cut an ash tree to obtain splints for his baskets* or take the bark from a birch tree for his canoes wherever he pleases, and without any necessity of asking permission from the present owner of the soil;

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[20] *Act Further to Amend and in Addition to the Laws for the Protection of Certain Birds and Animals*, S.N.B. 1888, c. 12; Petition of Chief Andrew Paul *et al* for relief from the game laws (29 March 1890), Fredericton, Provincial Archives of New Brunswick (Executive Council papers, RS 9, 31 Mar 1890 #3) (Professor Andrea Bear Nicholas advises that all signatories were from the Kingsclear/St Mary's band); E.T. Adney, "First Trip to New Brunswick: Fr June 30, 1887, - Feb 28, '89", Fredericton, UNB Archives (microfilm). (It may be that Old Margaret's "pidgin" dialect was as much a creation of Adney, who was recording anecdotes for possible publication, as of the speaker; half a century later Adney identified the woman's surname as Perley.) Early Nova Scotia conservation laws had made express exception for Micmacs and poor settlers. Although I have found only one occasion (1865) when this was done in New Brunswick, people commonly supposed that there was an aboriginal exemption, or that there were no game laws at all: *eg*, Thomas, *supra* note 16 at 151; Frances Beavan, *Sketches and Tales Illustrative of Life in the Backwoods of New Brunswick, North America* (London: Routledge, 1845) at 59.

[21] Beamish Murdoch, *History of Nova-Scotia, or Acadie*, II, (Halifax: J. Barnes, 1866) at 430-31.

> also to encamp upon the shores of all rivers and streams for the purpose of fishing, etc. In many parts of the province there is an unwritten law to this effect, by virtue of which the Indian roams at pleasure through the white man's woods in quest of the materials for his simple avocations, and likewise in his peregrinations pitches his tent where he wishes without let or hindrance.[22] [emphasis added]

Raymond wrote these words in 1897, just half a century before Peter Paul was charged with theft for doing the very thing mentioned, harvesting ash from private land without permission.

It may be that Archdeacon Raymond was moved to attach these observations to his account of the Treaty of Fort Howe from a sense that the Amerindian privilege of which he wrote was accepted less widely in his own day than formerly. Certainly the notion that Malecites could "encamp upon the shores of all rivers and streams for the purpose of fishing" was already a thing of the past owing to the game laws and their enforcement. I surmise that the new game regime, which effectively prohibited Malecites and others from travelling where they wanted in pursuit of what game they wanted, worked a change in public opinion, so that by the 1940s some farmers were no longer willing to accept any sort of aboriginal harvesting privilege, even for something as trivial as ash saplings. Prosecution of Peter Paul in 1946 signals the symbolic end of the "unwritten law" protecting this residue of aboriginal entitlement. Indeed, immediately after news of his conviction appeared in the press, Paul began to be refused permission to harvest ash where he had done so formerly.[23] In the 18th century the dominant society had taken away title to the land; by the mid-twentieth century it was willing to use the power of the law to deny Malecites the products of the harvest and label them trespassers and thieves.

**Prosecution**

Peter Paul left reserve school at an early age to work with his maternal grandparents. His earliest commercial task was to assist in basket-making by pounding ash so as to separate it into strips for weaving. In the late 1920s, after a decade of summers in semi-pro baseball, he set himself up as a cooper on the Lower Woodstock reserve and for a time in Woodstock proper. Here he made and repaired potato barrels; with a truck he took his repair service into the potato fields directly.[24] From jaundiced

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[22] W.O. Raymond, "Selections from the Papers and Correspondence of James White, Esquire AD 1762-1783", (1897) 1:3 Collections of the New Brunswick Historical Society 306, at 318.

[23] Such incidents are recorded in E.T. Adney's memorandum "Sequels to the Peter Paul theft case..." [n.d.], Fredericton, UNB Archives (Adney Papers, MG H22, case 3, file 1, #48). Ironically, then, Malecites were denied an adjudication of treaty rights but soon they were in the same position practically as if they had litigated the treaty issue and lost.

[24] Fredericton, Provincial Archives of New Brunswick (Peter Paul autobiographical interview with Kenneth Homer, transcript 8: MC 1330, ms 1 B 8); K.V. Teeter, ed., *In Memoriam Peter Lewis Paul, 1902-1989* (Hull: Canadian Museum of Civilization, 1993) at 9, 22, 30 [Teeter].

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comments provoked by the "rights" assertion at his 1946 trial one infers that by the 1940s some members of the larger community saw him as making a good living, perhaps too good for someone enjoying the government-afforded advantages of Indian status.[25]

Like the basket-making of Paul's youth, potato barrel construction and repair required strips of ash. Saplings of about one-inch diameter would be split length-wise and the resultant strips used to hoop the barrels at the top, middle and bottom in order to hold the side panels together.[26] In western New Brunswick, ash is a fairly common tree but it grows only here and there, not in large stands. Black ash, preferred for use in barrel-making, is less common than white ash. Despite its role in barrel and basket-making, ash was not a wood of especial commercial value. It was useful mostly for tool handles, baseball bats, paddles, hockey sticks and similar purposes. Accordingly, to landowners in the western New Brunswick of the first half of the 20th century, the market value of the saplings of such a tree was slight.

One presumes that whatever ash once grew on the small Lower Woodstock Malecite reserve had long since been exhausted, so that Peter Paul would have ranged widely to find his supply. My own grandfather spoke of Malecites arriving by water to cut ash on our land, some kilometres distant from Woodstock. The earliest known occasion when Peter Paul's harvest of black ash saplings brought legal difficulty was 1944. Late that year he was "having trouble with a man who claims to own some land, downriver, on which you cut 30 little ash poles for barrel-hoops, and [you] were threatened with arrest by Mounted Police for taking the same or again enter[ing] the land for the same purpose".[27] Nothing came of this incident directly. However, in mid-1946 Paul was charged with theft of ash poles (*ie*, saplings) valued at more than 25¢ and less than $5 from the property of Harold Rogers of Benton, having been forbidden expressly from harvesting there. Whether Rogers had been the complainant in 1944 is unknown.

On the morning after his arrest Paul contacted Tappan Adney, a friend then living at Upper Woodstock and a student of Malecite technology, language and

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[25] "He owns a truck and often a car, has good machinery, and practically a little factory, and hires men": [Woodstock] *Sentinel-Press* (19 December 1946); *[Hartland] Observer* clipping *(ca* 26 December 1946), Fredericton, UNB Archives (Adney Papers, MG H22, case 3). Paul's business, and the hostility of 'white' coopers to his competition, are documented in unique detail for he is the unnamed "Barrel Maker" informant profiled in T.F.S. McFeat, "Two Malecite Family Industries: A Case Study" (1962), reprinted in H.F. McGee, ed., *Native Peoples of Atlantic Canada: A History of Indian-European Relations* (Ottawa: Carleton University Press, 1983) at 165-95 [McFeat].

[26] When Paul entered business he made barrels for the South American potato export market. Such barrels would be used only once, so he made them with birch rather than ash. When New Brunswick potato exports died out during the Depression he turned to making and repairing barrels for local farmers, who wanted a product that would last for some years, which necessitated hooping with black ash. On occasion he also made baskets and brooms: Fredericton, Provincial Archives of New Brunswick (Peter Paul autobiographical interview with Kenneth Homer, transcript 5: MC 1330, ms 1 B 5).

[27] E.T. Adney to P.L. Paul (4 December 1944), Fredericton, UNB Archives (Adney Papers, MG H22, case 5, file 2, #14).

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culture. It was Adney who appeared to the charge with Paul in Woodstock Magistrate's Court on 22 August 1946. The complainant's evidence was simply that Paul had cut a truckload of young ash on his property. Rogers asked him to stop but he would not, asserting that he had a right to harvest. Acting as Paul's legal "friend", Adney began asserting a treaty-based defence of such depth that the presiding magistrate adjourned proceedings so that Paul might obtain a real lawyer. When court reconvened Leo Cain, a Fredericton lawyer procured by Indian Affairs, won a further adjournment for research, so that it was not until 3 October that the defence presented its three witnesses.[28] Now, contrary to what Adney had advised the court at the outset both openly and by private letter, the defence put no reliance on treaty rights. The press report of evidence is succinct but revealing:

> [Paul] said he had been taking wood whenever he needed it over a period of almost 20 years and that his grandfather and father had told him that the Indians had the right to do this. Much of his evidence as to tribal custom was admitted subject to the objection of D. R. Bishop, council [*sic*] for the Crown, that it was hearsay.
>
> Paul was corroborated by Peter Polchis, 68-year-old resident of the local reservation, who said that Indians had the right to take not only poles for axe handles and baskets but birch bark for canoes and fir for butter firkins.
>
> E. Tappan Adney, Upper Woodstock, also gave evidence that the Indians had been cutting where they liked for the last 50 years to his knowledge and that he had never known them to be challenged before.[29]

Note that even Adney's own evidence went to the issue of long practice; it made no reference to a right derived from treaty.

It is evident that lawyer Cain had abandoned any idea of a treaty-based defence. He must have used the further two-week adjournment, granted to give both sides time to prepare written submissions, to fashion a "colour of right" argument. It went along the following lines: Paul believed plausibly that he had a legal right to take ash anywhere and therefore lacked the mental element required for criminal conviction. He had a "color of right sustained by long tribal usage".[30] On 24

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[28] *[Saint John] Telegraph-Journal* (23 August & 7 September 1946). Although Indian Affairs secured the lawyer, it was Paul who had to pay his $25 fee prior to trial. The Malecites were never happy with Cain, preferring Fredericton lawyer Peter Hughes, whom they regarded as a "friend".

[29] *[Saint John] Telegraph-Journal* (4 October 1946).

[30] *[Saint John] Telegraph-Journal* (25 October 1946). Cain may have adopted the simpler, albeit legally doubtful, "colour of right" defence rather than a treaty argument because of the difficulty of procuring admissible copies of the various treaties. However, Adney wrote that Cain rejected a treaty argument because the Treaty of 1726 did not mention barrel hoops expressly[!]: memorandum "Counsel for Indian Affairs on behalf of the accused rejected a certified photostat..." [n.d.], Fredericton, UNB Archives

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October the presiding magistrate, Kenneth MacLauchlan, found Paul guilty of theft. Perhaps MacLauchlan accepted the Crown's submission that the reason people had not complained in the past of Malecite harvest practice was because ash was of little value, not because Malecites had any right to it.[31] We do know that he expressed fear that a verdict in Paul's favour would seem to authorize Malecites to strip the wood from other people's land. Adney speculates that he had in mind a notorious incident from twenty years earlier when a group of Malecite men from Lower Woodstock harvested rock maple for axe handles from a nearby sugar bush.[32] However, declaring that Paul had acted in ignorance of the law, MacLauchlan ruled that the circumstances called for merely a suspended sentence.

It is doubtful if Paul really consented to a legal strategy that avoided presenting a treaty-based defence. Certainly the chief of the Malecite reserve at neighbouring Tobique, William Saulis, considered the failure to take a stand on treaty issues a calamity and wrote publicly to defend the traditional Malecite understanding:

> So we Indians are now thieves and our fathers and grandfathers have been thieves when they went into the woods anywhere for the ash for our baskets, the bark for our canoes. Our fathers and grandfathers have told us that we have that right. We think we have been allowed to do this undisturbed because we are Indians. ... It is not a right the white man has given us. It is the little that the Indian has left that the white man has not taken away from us. ... We can't prove it because the only record the Indian has is what our fathers and grandfathers tell us, and we know they are not liars.[33]

Counselled by Tappan Adney, Saulis persuaded Paul that a precedent so damaging to the Malecite livelihood must be appealed. He offered the services of his band's own lawyer to take charge of proceedings from the unsatisfactory Cain.[34] And so an appeal was announced. Newspaper coverage, obviously written by Adney himself, promised a treaty argument based on the Nova Scotia version (1726) of the treaty of Boston (1725), noting pointedly that the counsel secured by Indian Affairs had declined to pursue this angle before the magistrate.[35] However, within two

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(Adney Papers, MG H22, case 3, file 1, #43).

[31] Memorandum "When in 1783 the upper river was granted..." [n.d.], Fredericton, UNB Archives (Adney Papers, MG H22, case 2, file 2, #2).

[32] Memorandum "The magistrate's reference to what a bunch of Indians might do..." [n.d.], Fredericton, UNB Archives (Adney Papers, MG H22, case 3, file 1, #48).

[33] *[Woodstock] Sentinel-Press* (2 January 1947). The letter appeared over Saulis' signature but was composed mostly by Adney.

[34] William Saulis to E.T. Adney (1 December 1946), Salem, Peabody Essex Museum (Adney Papers). C.R. Mersereau of Perth, the Tobique band's lawyer, was rounding up witnesses for the new trial until Adney told him to stop.

[35] *[Woodstock] Sentinel-Press* (5 December 1946).

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weeks the appeal was abandoned. Adney claimed that this was done on his advice. One of his reasons was that the only proper forum for adjudicating treaty rights was a federal one (the Exchequer Court), a misunderstanding that illustrates nicely his characteristic boldness in legal matters. A more conventional reason was that legal rules of evidence created a "wide impassable gap" that prevented Malecites from supporting their treaty claim with testimony of traditional understandings and practices. They could offer such evidence more effectively before the current federal parliamentary inquiry into Indian policy.[36] In such a forum Adney might present a great "brief" on the history and status of the Malecites unharassed by pesky lawyers.

**The Entitlement Context**

Edwin Tappan Adney (1868-1950), the US-born writer, artist and linguist who spent much of the 1940s struggling to articulate a basis in law for traditional Malecite harvest practices, arrived in the Woodstock area of western New Brunswick for an initial visit as early as 1887. Here the teenage Adney became enthralled with the family of Francis Sharp, 19th-century Canada's pioneering pomologist. Eventually he married Sharp's daughter Minnie Bell, a music teacher known to history as the first Canadian female to stand for Parliament. Already the youthful Adney's journals reflect a fascination with Malecite technology, particularly traps and canoes. Decades later (and posthumously) his notes and models would become the basis for a definitive account of the Malecite canoe.[37] By his late 20s Adney was in the Yukon, supporting himself as a writer for popular magazines. His oft-reprinted story of those exciting times, published under the title *Klondike Stampede* (1900), remains the classic firsthand account of a gold-rush. Thereafter the restless Adney engaged in entrepreneurial, artistic, and farming ventures at New York City, Montréal and the Sharp acreage in western New Brunswick, but without success to match either his early literary fame or his multifaceted talents. From 1933 until death in 1950 he lived in Upper Woodstock, apparently in quite reduced circumstances, devoting his time to a deep study of the Malecite language and related Algonkian dialects. In this work his principal informant was Peter Paul.[38]

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[36] Memoranda "In the Peter Paul theft case notice of appeal..." and "A report of the trial and verdict..." [n.d.], Fredericton, UNB Archives (Adney Papers, MG H22, case 3, file 1, #6 & #48); *[Woodstock] Sentinel-Press* (2 January 1947).

[37] E.T. Adney & H.I. Chappelle, *Bark Canoes and Skin Boats of North America* (Washington: Smithsonian Institution, 1964); John Jennings, *Bark Canoes: The Art and Obsession of Tappan Adney* (Richmond Hill: Firefly Books, 2004). Adney's manuscripts are divided among the Dartmouth College Library (Hanover, N.H.), New Brunswick Museum (Saint John), UNB Archives and Peabody Essex Museum (Salem, Mass.); the Peter Paul materials are in the latter two collections. His ravishing scale models of Malecite canoes are held by the Mariners' Museum (Newport News, Va.). Works of art on paper are held mostly by the Carleton County Historical Society (Woodstock). A photographic collection is in the McCord Museum (Montréal). Originals of the early journals – really later typed editions of actual journals that do not survive – are divided among the UNB Archives, Dartmouth College and the family, though all but one can be viewed at UNB. No published account of Adney even begins to do justice to his varied and eccentric genius. In 2002 the late James Wheaton circulated a useful paper preliminary to a projected Adney biography under the title "Tappan Adney's Maliseet Studies: More than Canoes".

[38] Because Paul was reared not by his parents but by maternal grandparents, people who themselves had grown up in the middle of the 19th century, he acquired a fund of Malecite language, lore and technology

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While it was language that brought Adney together with Paul, he grew interested in the Malecites not just as an historic remnant but as a living people. His papers from the early 1940s show that Malecites sought him out – or perhaps that he intruded himself into their affairs – regarding both personal dealings with government and the great issues of aboriginal policy. Soon he developed an ill-disguised contempt for the ignorant, condescending bureaucrats of Indian Affairs and their "vicious" policy of dividing Amerindian tribes into separate bands. In Adney's view the Malecites had "refused to be killed out and starved out" and now, along with "all peoples depressed under our colonial systems in all parts of the world", they were nearing a post-war era in which they might reclaim their "just rights". By this time – the 1940s – Adney was in his early 70s. He was living in Upper Woodstock alone, poor, far from the resources of a scholarly library and sensitive that his great (unpublished) language research was being ignored, and in some cases appropriated by others. It may have been with some relief that he turned to this new enthusiasm of improving the political status of the Malecite. Perhaps one of its attractions was that it brought his vast knowledge and scholarly technique to bear on a practical problem, in which his intervention was both needed and gratifyingly welcomed.

At just what point Adney began assembling treaty materials is unclear but he did so as an aspect of his general Malecite research and not for the (subsequent) Peter Paul case specifically.[39] Although presumably too poor to travel, he enjoyed two advantages in this work. Woodstock's L. P. Fisher Public Library held the working collection of the historian W. O. Raymond, where a patient researcher could discover nearly everything in print on the 18th-century treaties. As well, Adney was corresponding with Raymond Gorham (1885-1946), an historical enthusiast at Fredericton who himself was assembling Maritime treaty materials. The stimulus to bring his general historical research to a point came in 1946, not from the arrest of Peter Paul in August but from the announcement in May of a joint Senate-House of Commons special committee to examine aboriginal policy in post-war Canada.

For two years Adney had been in correspondence with Toronto Conservative MP John MacNicol, who was resolved to push a re-examination of the *Indian Act* onto the national agenda as soon as the war ended.[40] Announcement of the parliamentary committee presented Malecites with an historic opportunity to draw attention to the blunders of the *Indian Act* system and promised Adney a public

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that was dying out among those of his own generation. Hence, he was an invaluable source first for Adney beginning in the mid 1930s and then for an impressive succession of Canadian and US scholars. After Paul's death they collaborated on a memoir of their association with him and his family: Teeter, *supra* note 24.

[39] One can say this because, at the time of Peter Paul's arrest scare in 1944, Adney had most of the treaties in hand and was corresponding about them with Gorham: Fredericton, UNB Archives, E.T. Adney to P.L. Paul (4 December 1944): (Adney Papers, MG H22, case 5, file 1, #14).

[40] In September 1946, even as the Peter Paul case was underway, MacNicol visited the St John valley privately, stopping at the Lower Woodstock reserve and meeting with Adney. MacNicol's papers at Library and Archives Canada contain no Adney correspondence.

forum for his views on the significance of the 18th-century treaties. That the departmental bureaucrats who were the first witnesses before the committee drew on the *Syliboy* precedent to deny that Maritime Amerindians had treaty rights drove him on. At first the committee was to hear Maritime witnesses at Ottawa. With that in view Tobique chief William Saulis made it clear in the most flattering terms that he counted on Adney to handle testimony on treaty issues:

> Yes, I agree with you about presenting the treaties, cause I know...you are the only man to present the case to the Committee, and I would rather have you take and handle that part, for the welfare of the St John river Indians. ... [I]n case your not to be the witness to those treaties I will have you come along as advisor, on our expense and pay, to deal [with] the full measure of the treaties. So keep up the good work for the poor helpless Indians. To my judgement you are *the one* chosen by our Creator to be able to justifie all matters, to [the] full extent... . ... In the past you have worked silently and seceratly on the history of the red-men, and God has given you a great wisdom and the time has come for you to come out in the Public eye, to administrate the full truth for your beloved ones... .[41]

By a most remarkable coincidence, it was while Adney was waiting to learn just when he would accompany Saulis to Ottawa to give evidence that Peter Paul was arrested for theft of ash.

Already by the time of Paul's threatened prosecution in 1944, Adney held a settled idea that the ancient treaties protected Malecite harvest practices, and his preparation two years later for the projected parliamentary hearings spurred him to put his views into expanded form. So it was that when Paul was arrested at the end of August 1946 and came to trial almost at once, Adney did not hesitate to take on the case himself. The day that Paul approached him with the news, Adney addressed a private letter to the presiding magistrate outlining a treaty-based theory of defence. When the magistrate responded to his attempt to offer this argument at trial by ordering an adjournment so that Paul could retain a real lawyer, Adney at once wrote to various archival repositories for formally certified treaty copies, to the clerk of the court at Moncton for information on an 1925 beaver trapping case and to the attorney general of Maine for treaty decisions there. But when Paul's new lawyer declined to put forward such a defence and gave Adney the "brush off", he retired from the case in disgust, consoled with the prospect of the forthcoming parliamentary hearings.

It was while the Paul case was under adjournment that Ottawa announced that ten members of the Senate-Commons joint committee would be given the temporary status of a royal commission and in that guise would tour reserves in the

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[41] Fredericton, UNB Archives, William Saulis to E.T. Adney (18 August 1946): (Adney Papers, MG H22, case 3, file 1, #2).

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Maritimes. On 1 November, a week after Paul's conviction, they arrived in western New Brunswick. The little that is known of their proceedings makes the affair seem disappointing. Visits to the small Woodstock reserve and the larger one at Tobique, where Chief Saulis had many witnesses standing by, took only a "few minutes". The fifteen-page report of this "royal commission" refers to hearing 170 witnesses in the Maritimes but there was no such formal process in the upper St John River valley.[42] Undoubtedly Adney was on hand to acquaint MPs and senators with Paul's case and give them some sort of written "brief". To this they responded sensibly that "you must appeal".[43] Accordingly, an appeal was announced but, as noted earlier, soon Adney decided that a new trial based on the "traditional practice" argument would yield the same result as before and that treaty arguments were properly made only in a federal forum, and the appeal was abandoned.[44]

On the whole this "royal commission's" New Brunswick sojourn was an opportunity lost. When it reconvened early in 1947 in its capacity as a parliamentary committee, William Saulis travelled to Ottawa at personal expense to give evidence before it, perhaps the only Maritime chief to be heard. Adney did not accompany him, presumably because of cost.[45] Whether he ever submitted a final version of his projected great work on Malecite political status, of which his surviving papers contain many unfinished attempts, is unknown, though his basic views are plain enough.[46]

Because he himself was a marginal figure, without university education or profession and never holding conventional employment or enjoying a conventional marriage, Adney's style was to think through problems for himself, unblinkered by conventional wisdom. When he turned his attention to the political condition of the Malecite he saw what Amerindians themselves knew well but what most members of the dominant society could not see. The *Indian Act* made bureaucrats all-powerful

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[42] *[Woodstock] Sentinel-Press* (7 November 1946); Canada, Parliament, "Report of [the] Commission on Indian Affairs, 1946" in *Session Papers* No. 68B (1947) at 3; memorandum "The inquiry into Indian Affairs was begun..." [n.d.], Fredericton, UNB Archives (Adney Papers, MG H22, case 2, file 3, #1).

[43] Fredericton, UNB Archives, E.T. Adney to D.R. Bishop (16 December 1946): (Adney Papers, MG H22, case 3, file 1, #29).

[44] Adney was so persuaded that it was "perfectly silly for... any other Indians to make a 'test case'" in a provincial level of court, as opposed to the federal Exchequer Court, that he discouraged strongly the lawyer for the Restigouche Micmacs from taking that route: E.T. Adney to Clarence Rosenhek (6 June 1947), Fredericton, UNB Archives (Adney Papers, MG H22, case 5, file 4, #9).

[45] *[Saint John] Telegraph-Journal* (30 November 1948). Ironically, the reason that Maritime Amerindians were not summoned to Ottawa at public expense to give evidence was that a "royal commission" had heard from them on the spot.

[46] Adney was still working on the subject as late as 1948. His papers include the opening pages of a memorandum entitled "The Political Status of the Indians of the Maritime Provinces" which, despite the breadth of its title, is mostly about Malecites. While this seems not to have been prepared for the Ottawa hearings, it offers an unusually sustained introduction to his ideas. Then, like seemingly dozens of other such memoranda, it descends into fragments: Salem, Peabody Essex Museum (Adney Papers, section 19). Some of the apparently desultory character of Adney's work may be an impression created by the unskilful apportionment of his manuscripts among several repositories.

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and natives utterly dependent. The Crown's supposed trustee relationship with its aboriginal wards was an abused fiction, its powers exceeded and its duties neglected. Federal policy denying the Malecite "national character" and treating them as so many individual bands rendered them almost powerless to resist wrong-headed policies, such as the despised plan to centralize the tribe at the Kingsclear reserve. Although Adney considered that Malecites really did have rights arising from the Treaty of Boston's promise in 1725 that the St John valley tribe would retain all lands that it had not alienated to Europeans, his essential treaty argument was a negative one. His concern was less with what treaties granted *to* Malecites than with the fact that in no treaty had Malecites *surrendered* territory and resources. In one of many letters in the local press he made that point succinctly:

> The full case of the Indian was not presented at the trial in Woodstock. He possesses clear rights [that] are not given the Indian by treaty but were conceded to be the Indian's beginning with the basic treaty of Massachusetts and Nova Scotia at Boston, treaties that have never been abrogated and are of the same force today as they were in 1725-26, and in the 1749, 1752 and 1778 treaties of confirmation. Actually the Indian tribes are acknowledged as having ownership and title in their tribal territories, and the title has never been extinguished, as under the same it was extinguished by purchase with annuities on the American side, and in Ontario and Quebec, after the cession of 1763, by Great Britain.[47]

Although Adney was willing to debate such questions as whether royal governors had authority to make treaties and whether the Proclamation of 1763 applied in the Maritimes, he regarded them as secondary. What he saw clearly was that in former times Amerindians had possession of the land and no one could point to any lawful process whereby they had become dispossessed of it. Hence the Malecite right to the St John River valley was superior to that of Crown grantees, such as the complainant in the Paul case. The long-accepted tradition that Malecites might harvest ash unmolested was a reflection and survival of that prior right.

In 1950 Adney died, his work on the language and political status of the Malecite unfinished, his papers to be scattered among five repositories in eastern Canada and the United States. Peter Paul continued harvesting ash where he chose, regarding his discharge without penalty in 1946 as a victory rather than a defeat and attuned more closely than ever to the myth of the 18th-century treaties. When the ethnologist Thomas McFeat studied the Malecite economy in the 1950s, he found Paul to be far from a traditionalist in vocational terms and yet one who could "quot[e] treaties at some length". Paul took inspiration from the example of the recently-martyred Mohandas Gandhi, for whom prosecution and imprisonment had

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[47] [Hartland] *Observer* clipping (*ca* 26 Dec 1946), Fredericton, UNB Archives (Adney Papers, MG H22, case 3).

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become tools to advance national liberation.[48]

Towards the end of 1951 Paul was arrested again for illegal harvest, this time in the Lindsay district near Woodstock. Several Malecites were involved but only he was charged. Recalling the experience of 1946, Magistrate MacLauchlan decided that he would send the case to County Court, presumably with the idea of having the legal question finally resolved. That was also the wish, at least initially, of Paul's own lawyer. Apprising the Department of Indian Affairs of the charge, Stephen Mooney reckoned that a jury would acquit Paul but that this would not resolve the question because Paul would carry on harvesting and then be charged again. Accordingly, Mooney wanted to frame his defence in treaty terms and wondered what assistance the experts at Indian Affairs would give. The bureaucrats responded that "repeatedly during the last fifty years, we have received reports of the Indian's understanding that they are allowed to cut ash trees on unfenced land for basket making".[49] The department maintained its longstanding position that there was no such treaty right, and they would not pay for Paul's defence.

Now that Adney was dead, Paul's treaty expert was the self-trained Woodstock archeologist Frederick Clarke (1883-1974). For months Clarke worked preparing his evidence but ultimately, like his friend Adney before him, he was denied a hearing:

> I personally prepared the brief [for Paul] and had four or five old treaties, made between whites and Indians, in support of my arguments. Neither brief nor treaties were used. On the day of the trial, I was called (about eleven-thirty in the morning) by the defence lawyer to give evidence. The judge immediately declared a recess of an hour. On resumption of the trial I was not called upon to give my evidence; nor – to my surprise and indignation – during the rest of the proceedings, although every few minutes I expected to be called.[50]

The purpose of this recess was to give Paul's lawyer time to persuade him to give the same evidence as in 1946: that his harvest practice was based on a traditional understanding from his forefathers (as opposed to a treaty right). Apparently the lawyers on both sides were concerned that, if Clarke were called and the trial became focused on treaties, it would take an entire week and require much effort on their part. The deal proposed, at least tacitly, was that Paul would say what he had in 1946 and would receive a similar (non)sentence. Paul suggests that he

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[48] McFeat, *supra* note 25 at 178; personal communication from Nicholas Smith (2005).

[49] Stephen Mooney to Indian Affairs (6 December 1951) and Indian Affairs to Stephen Mooney (12 December 1951), Ottawa, Library and Archives Canada (RG 10, vol. 8862, file 1/18-11-5); [Woodstock] *Sentinel-Press* (10 January 1952). A much earlier invocation of treaty myth in a harvest context is noted in Parenteau & Judd, *supra* note 16 at 244.

[50] G.F. Clarke, *Someone before Us: Our Maritime Indians* (Fredericton: Brunswick Press, 1968) at 215.

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agreed to this but that, when called to the stand, gave different evidence altogether. He drew the court's attention to his earlier prosecution and maintained that he would not ask permission from landholders before harvesting ash because that would be acknowledging their right to refuse, in which he did not believe. The jury found him guilty but Judge Charles Jones imposed no sentence. Two or three years later, when a new crop of ash poles was fit for harvest, Paul returned to Lindsay and cut them without interference.[51]

Peter Paul died in 1989 full of years and honours, a member of the Order of Canada, a doctor of the University of New Brunswick. It was a decade later that the Supreme Court finally recognized the continued existence of a treaty-based harvest right in the contemporary Maritimes. One might like to be able to conclude that Paul's prosecutions of half a century earlier were milestones on the way to that result, but in no obvious sense was this so. As noted at the outset, Paul's legal encounters are practically unknown, remembered only by his family. Nor can one say that the mass of historical and treaty memoranda left behind by Tappan Adney permitted later generations of researchers to begin where he left off. It was nearly 50 years before anyone would match the depth of his treaty and rights analysis but that later research was in no way based on Adney's work, which remained in the archives unused and now is of significance only to historians of the 20th century, not the 18th century.[52]

In retrospect the decision in 1946 not to appeal was a blunder. To be sure, any such appeal would have been unsuccessful. No Canadian judge of the 1940s would have had the legal imagination, or courage, to find that Malecites retained rights arising from their ancient occupation of the soil or from treaties. The legal category known as aboriginal title had not yet been invented. The conditions for that leap of legal imagination in the dominant culture did not exist. But though Paul would have lost his appeal, the mere act of putting before the Carleton County Court a well-researched rights argument would have forced the judge to respond in writing: to explain why the ancient treaties were not treaties, or if they were treaties, why they did not apply to 20th-century Malecites, or if they did apply, why they did not cover Peter Paul's case. Such a legal judgment, its reasoning exposed to the world in the published law reports, would have advanced the cause of aboriginal entitlement, at least indirectly, by giving publicity to Amerindian rights issues and provoking counter-argument in the next law case. From the perspective of 20th-century Canada's slow-to-emerge debate on aboriginal entitlement, the great misfortune of 1946 was not that Peter Paul lost but that he lost in circumstances of legal obscurity.

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[51] *[Saint John] Telegraph-Journal* (12 March 1952); Fredericton, Provincial Archives of New Brunswick (Peter Paul autobiographical interview with Kenneth Homer, transcript 8: MC 1330, ms 1 B 8). Strange to say, one of the jurors at Paul's 1952 trial was Harold Rogers, the complainant in his 1946 prosecution.

[52] I do not mean that Adney's manuscripts on Malecite rights were literally unknown, only practically so. The only place I have noticed them cited is in A. Bear Nicholas, "Maliseet Aboriginal Rights and Mascerene's Treaty, Not Dummer's Treaty", William Cowan, ed., *Actes du Dix-Septième Congrès des Algonquinistes* (Ottawa: Carleton University, 1986) at 215.

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