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Volume 51, numéro 1, printemps 2022

URI : <https://id.erudit.org/iderudit/1092966ar>

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Éditeur(s)

Department of History at the University of New Brunswick

ISSN

0044-5851 (imprimé)

1712-7432 (numérique)

[Découvrir la revue](#)

Citer cet article

Jarvis, A. (2022). Murder, Manslaughter, or Justified Retribution? Tom Williams, Mi'kmaw Law, and Colonial Justice on Prince Edward Island, 1839. *Acadiensis*, 51(1), 39–65.

Résumé de l'article

En 1839, dans la colonie britannique nord-américaine de l'Île-du-Prince-Édouard, Tom Williams, un Mi'kmaw, fut reconnu coupable du meurtre d'un autre Mi'kmaw et condamné à la pendaison. Toutefois, Williams ne fut pas pendu. Cet article avance des raisons possibles pour lesquelles le gouvernement colonial décida de commuer la peine de Williams, en établissant un lien entre cette affaire et la dépossession des Mi'kmaw et leur marginalisation subséquente par la société coloniale, ainsi que la « question des terres » qui dominait alors la vie dans l'île. Cette affaire incarnait la prépondérance du droit colonial britannique et le déclin concomitante du droit mi'kmaw dans la colonie.

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ANNA K.G. JARVIS

En 1839, dans la colonie britannique nord-américaine de l'Île-du-Prince-Édouard, Tom Williams, un Mi'kmaq, fut reconnu coupable du meurtre d'un autre Mi'kmaq et condamné à la pendaison. Toutefois, Williams ne fut pas pendu. Cet article avance des raisons possibles pour lesquelles le gouvernement colonial décida de commuer la peine de Williams, en établissant un lien entre cette affaire et la dépossession des Mi'kmaq et leur marginalisation subséquente par la société coloniale, ainsi que la « question des terres » qui dominait alors la vie dans l'île. Cette affaire incarnait la prépondérance du droit colonial britannique et le déclin concomitante du droit mi'kmaq dans la colonie.

In 1839, in the British North American colony of Prince Edward Island, Tom Williams, a Mi'kmaq man, was convicted of murdering another Mi'kmaq man, Joe Louis, and sentenced to hang. Williams, however, did not hang. This article suggests possible reasons the colonial government chose to commute Williams's sentence, linking the case to the dispossession of the Mi'kmaq and their subsequent marginalization by settler society as well as the "land question" then dominating the Island. The case epitomizes the ascendancy of British colonial law and the concurrent weakening of Mi'kmaq law in the colony.

ON 14 MARCH 1839 TOM WILLIAMS, A MI'KMAW MAN in the British North American colony of Prince Edward Island, was convicted of capital murder for killing Joe Louis, another Mi'kmaq.¹ The jury, however, recommended mercy, and, after consultation with colonial authorities, the chief justice commuted the sentence. The Williams case, unremarkable by many accounts, nonetheless sheds light on the Mi'kmaq on PEI and their

1 "Mi'kmaq" is the singular as well as the adjectival form of "Mi'kmaq." The Mi'kmaq are the Indigenous people whose lands encompass present-day Nova Scotia, New Brunswick, Prince Edward Island, and the Gaspé Peninsula of Quebec and who also reside today in Newfoundland and northeastern Maine.

circumstances in relation to the settler society, which colonized the Island during the 18th century. This article explores the history of the Mi'kmaq on PEI to give context to this case, as well as analyzing the trial itself. While examining written colonial records can offer only a limited picture of Indigenous lives, mining colonial texts can be a fruitful exercise in that it can help “unlock the subtexts [the authors] did not recognize, and give utterance to the other voices – women, natives, labourers – which speak through them.”² In this instance, the mining of the existing written records of the Williams case not only provides information about the PEI Mi'kmaq; it also offers a more complex legal picture than Williams's seemingly straightforward murder conviction would suggest. Analysis of the evidence used to convict Williams suggests that the trial did not adequately address possible mitigating factors of the murder or other pertinent issues, and that this failure stemmed from settler views towards the Mi'kmaq – in particular, the view that the Mi'kmaq possessed no substantive law. Overall, this article argues this case represents the displacement of traditional Mi'kmaq law by the advent of settler colonialism that had become firmly established on the Island by the time of the trial.

The crime took place in Georgetown, a port town in the eastern part of the Island near the confluence of the Brudenell, Montague, and Cardigan rivers.³ The details of the murder were laid out in a letter from Chief Justice Edward Jarvis to Lieutenant Governor Sir Charles FitzRoy; the principal witness at trial was the deceased's son Peter Louis, whom Jarvis gauged to be about 12 years of age and who “gave his testimony throughout with clearness, consistency and intelligence.” Jarvis wrote that

the boy's evidence was to this effect; that his father, the prisoner [Williams], the prisoner's wife, and witness were together in a canoe crossing the river at Georgetown – they were all, except witness himself, much intoxicated; some words of altercation passed between deceased and prisoner relative to the former having some years previously wounded prisoner's son with a knife – deceased told

2 Germaine Warkentin, *Canadian Exploration Literature* (Don Mills, ON: Oxford University Press, 1993), xi.

3 The Mi'kmaq called the site *Samkook* or “the land of the sandy shore”; the European settlement was founded in 1732 by Jean-Pierre Roma as a trading post for provisioning the French military garrison at Louisbourg; see Margaret Coleman, “ROMA, JEAN-PIERRE,” *Dictionary of Canadian Biography Online* III, http://www.biographi.ca/fr/bio/roma_jean_pierre_3F.html.

prisoner he would stick him also with a knife, but witness saw no knife in his fathers hand – he had no knife – that when they reached the shore deceased jumped out into the water, and had hold of the canoe with both his hands to haul it to the land, when prisoner fired at deceased who immediately fell dead.

Jarvis stressed the boy's reliability as a witness, writing that he was "strictly questioned by the Court as to his sense of the obligation of an oath, and answered satisfactorily."⁴

Only two other witnesses were called, Job and Sarah Crew. Jarvis, in a draft of his letter to FitzRoy, detailed their testimony, writing that Job Crew, "a respectable farmer," stated that he had known the prisoner "upwards of 30 years." After hearing of the murder, Crew testified, he said to Williams, "Tom, what's this you've done?" Jarvis continued:

Prisoner answered "I have killed a man, I have killed Joe Louis, I have long had a spite – he hurt my son [and] I have now paid him for it" – that prisoner appeared like a man who had been drunk the night before – that prisoner was much addicted to ardent spirits and when intoxicated was very ferocious and savage – that prisoner did not appear to be sorry for having committed the murder but appeared to glory in it.

Job's daughter Sarah testified that the morning after the murder Williams came to her father's house and asked if she knew what he had done: "She said she had not – he then said he had shot Joe Louis, that he owed him a spite for 6 or 7 years, and that the spite was all over now."⁵

Jarvis then stated "The jury, upon finding their verdict of guilty, recommended the Prisoner to mercy." He declared that while there could be no doubt of Williams's guilt of the crime of murder, it might be for "serious consideration whether the last penalty of the law should be inflicted on him." Jarvis wrote of Williams:

4 Edward Jarvis to Sir Charles FitzRoy, 26 March 1839, MG 11 CO 226, pp. 201-3, Library and Archives Canada (LAC), Ottawa.

5 Jarvis to FitzRoy, draft, 19 March 1839, MG 24, B 13, p. 395, LAC. The relationship evidenced in their testimony suggests that Williams perhaps worked for the Crews and/or other farmers in the area as a day labourer, or sold fish or forest products or crafts locally.

He is a man of advanced age, of wild and savage habits; and was stated by the Witness to be much addicted to the use of ardent Spirits, and when intoxicated to be ferocious and dangerous. During the trial he appeared to be stupidly unconscious of his situation. He has undoubtedly in some degree a sense of the distinction between right and wrong, yet the very circumstance of a total absence of all feeling of remorse for his crime, but on the contrary (as testified by the witness Crew) his appearing to glory in it as a meritorious deed indicated a mind destitute of all sense of moral or religious responsibility, but alive to the savage virtue of revenge.⁶

Jarvis then laid out the possible options for punishment besides death while expressing concern that there was no precedent on the Island of hanging a Mi'kmaq, writing "I am not aware of any instance of a native Indian having ever been executed on this Island – and of but very few in the neighbouring Provinces." He then appeared to recommend commuting Williams's sentence, while acknowledging the need to prevent any further crime being committed:

Should your Excellency think proper to spare the life of this wretched individual, I conceive it would be by no means safe to allow him to be ever again at large in this Island; Such is his Savage character that other individuals, and particularly the witnesses of the trial would never be secure from his Vengeance. It would therefore, I submit, be advisable that he should either be kept in strict confinement, or that some means should be adopted of sending him beyond the limits of the Island, to some place from whence he might not have the probable means of returning.⁷

Jarvis was suggesting either life imprisonment, banishment, or transportation; FitzRoy, in a letter to Lord Glenelg, the colonial secretary, concurred with Jarvis, adding that an example needed to be set for the Mi'kmaq of the Island "who in their ignorance would be led to believe that they might indulge with impunity in the savage practice of revenge and in their well known custom of requiring blood for blood among themselves, and that they are not considered

6 Jarvis to FitzRoy, 26 March 1839, MG 11 CO 226, p. 204, LAC.

7 Jarvis to FitzRoy, 26 March 1839, MG 11 CO 226, pp. 204-5, LAC.

amenable to those laws by which the civilized part of the Community is controlled.”⁸ In the end, the colonial council decided to banish Williams.⁹

Jarvis, in characterizing Williams as “alive to the savage virtue of revenge,” and FitzRoy, in referring to the Mi'kmaw “custom of requiring blood for blood among themselves,” were reflecting a common settler view. Belief in the Mi'kmaq obsession with revenge had been emphasized by Jesuit observers three centuries earlier: Marc Lescarbot wrote that their greatest vice was “they never forget injuries” and Chrestien LeClercq wrote that the Mi'kmaq principal motivation for going to war was “nothing other than a desire to avenge an injury they have received, or, more often, the ambition to make themselves feared and dreaded by foreign nations.”¹⁰ In the late 18th century, convinced of the superiority of British “civilization” – the epitome of which was seen to be British law – colonial officials and jurists in British North America concluded that there existed no comparable system of law amongst the Indigenous peoples whose lands they dispossessed or, at the very most, that there existed only blood feud codes. Colonial law as applied to Indigenous peoples, writes James Youngblood Henderson, “treated Aboriginal laws as a primitive nihilism, based on a state-of-nature premise that lacked the substance of the English common law tradition.”¹¹

Mi'kmaw law has always centred on Mi'kmaw language, culture, and spirituality. The verb-centred Mi'kmaw language has “emphasized the flux of the world, encouraging harmony in all relationships.” Mi'kmaw customary law has provided broad outlines aimed at maintaining balance; it has been “a subtle and complex normative order, where flux was the universal norm and there was no noun-based system of positive law. To codify this subtle order would be to change it.”¹² Harmony has been integral to the Mi'kmaw relationship with the

8 FitzRoy to Lord Glenelg, 23 March 1839, MG 11 CO 226, p. 193, LAC.

9 L.F.S. Upton, *Micmacs and Colonists: Indian-White Relations in the Maritimes, 1713-1867* (Vancouver: University of British Columbia Press, 1979), 148.

10 Marc Lescarbot and Chrestien LeClercq, *Jesuit Relations*, III:87-97 and II:73, quoted in Wilson D. Wallis and Ruth Sawtell Wallis, *The Micmac Indians of Eastern Canada* (Minneapolis: University of Minnesota Press, 1955), 211.

11 James (Sakej) Youngblood Henderson, “First Nations Legal Inheritances in Canada: The Mi'kmaq Model,” in *Canada's Legal Inheritances*, ed. DeLloyd J. Guth and W. Wesley Pue (Winnipeg: University of Manitoba, 2001), 28. While blood revenge was a feature of some Indigenous peoples of the eastern woodlands of North America, so too were structural and cultural limitations on the scale and devastation of warfare that served as systems of restraint; see Wayne E. Lee, “Peace Chiefs and Blood Revenge: Patterns of Restraint in Native American Warfare, 1500-1800,” *Journal of Military History* 71, no. 3 (July 2007): 702.

12 Henderson, “First Nations Legal Inheritances,” 13, 14.

land embodied by the term *netukulimk* – the practice of responsible resource stewardship promoted by social and political organization. Concepts of law, social order, and identity have been grounded in ecology, “the knowledgeable respect for all life forces and the relationship of balance they continually act to create and maintain.”¹³

In Mi’kmaw customary law, resources have been divided based on family and tribal membership; extended kinship networks have been “the primary social unit and genealogical source for establishing and reinforcing community values that were the foundation of Mi’kmaw Indigenous legal traditions and informing their legal consciousness.”¹⁴ Intra-family disputes and conflicts have usually been resolved by the families involved, while regional councils or the Mawiomi, the periodic Mi’kmaw gathering, could also be appealed to.¹⁵ The law has sought not punishment but ultimate reconciliation: “In this private dispute resolution system, almost all offences and quarrels were adjudicated with and between families. . . . Harmony, not justice, was the ideal. When controversies did occur, the predicament should be quickly settled. If not, organised and specific violence could follow.”¹⁶ In sum, *netukulimk* reflects a worldview that connects all things: “The system of kinship relations unites everyone in a web of complementary rights and responsibilities.”¹⁷

Mi’kmaw law based on flexibility, fluidity, and collective stewardship stood in stark contrast to colonial law, with its worldview characterized by “boundedness in space, regularity in time, and individual ownership of land, water, and the resources they bear.”¹⁸ The English common law system based on protecting individual rights, even when dealing with fishing rights in public waters, writes William Wicken, was antithetical to the Mi’kmaw economy based on families working cooperatively.¹⁹ Settlers committed to notions

13 Tuma Young, “L’nuwita’simk: A Foundational Worldview for a L’nuwey Justice System,” *Indigenous Law Journal* 13, no. 1 (January 2016): 79.

14 L. Jane McMillan and Kerry Prosper, “Remobilizing Netukulimk: Indigenous Cultural and Spiritual Connections with Resource Stewardship and Fisheries Management in Atlantic Canada,” *Reviews in Fish Biology and Fisheries* 26, no. 4 (December 2016): 631.

15 James (Sakej) Youngblood Henderson, *The Mikmaq Concordat* (Halifax: Fernwood, 1997), 97–8.

16 Henderson, “First Nations Legal Inheritances,” 16.

17 Jaime Battiste, “Understanding the Progression of Mi’kmaw Law,” *Dalhousie Law Journal* 31, no. 2 (Fall 2008): 327.

18 Michelle A. Lelièvre, *Unsettling Mobility: Mediating Mi’kmaw Sovereignty in Post-Contact Nova Scotia* (Tucson: University of Arizona Press, 2017), 61.

19 William C. Wicken, *Mi’kmaq Treaties on Trial: History, Land, and Donald Marshall Junior* (Toronto: University of Toronto Press, 2004), 105.

of private property and improvement could not grasp, much less honour, Indigenous perspectives on stewardship: “The seeming inability of native people to improve property in the way that liberal theory expected was at the heart of the hostility toward them in settler society.”²⁰ Subjecting the Mi'kmaq to colonial law was part of assimilating them into settler society with its very different values; in this sense, individual rather than collective ownership was encouraged as “part of the broader work of assimilating the Mi'kmaq by transforming them from a nation into individual subjects of the Crown.”²¹

The intrusion of settler economic, political, and legal norms into Mi'kmaw life would seemingly make the ideal of *netukulimk* more difficult to achieve. Louis's stabbing of Williams's son was a violation of harmony within the Mi'kmaw community, as was his taunting of Williams; that Williams felt the need years later to avenge his son's injury indicates that balance had not been restored, nor does Williams appear to have sought redress using settler law. L.F.S. Upton believed that for the most part “the Micmacs and the colonists' criminal laws had little to do with each other,” noting that in court records for Nova Scotia, for example, the Mi'kmaq were “highly conspicuous by their absence,” and exercised their civil law rights such as the right to alienate property to individuals and go into debt “more by accident than design.”²²

Significantly, Louis's provocation of Williams and Williams's shooting of Louis occurred under the influence of drink. Alcohol was a by-product of European trade predating Cartier that brought about changes in the Mi'kmaw traditional way of life. Around 1500 the entire cultural pattern of the Mi'kmaq began changing rapidly after contact with European ships; the trading relationship that evolved between these ships and the Mi'kmaq disrupted their yearly pattern of spending the summers gathering and preserving meat and plant foods for the approaching winter, as the ships were only present on the coast during the summer months.²³ After the departure of the French, overhunting (including trapping), along with the loss of their traditional fishing grounds to European fishing crews, meant that fewer traditional food resources

20 Philip Girard, “Liberty, Order, and Pluralism: The Canadian Experience,” in *Exclusionary Empire: English Liberty Overseas, 1600-1900*, ed. Jack P. Greene (New York: Cambridge University Press, 2010), 176.

21 Lelièvre, *Unsettling Mobility*, 63.

22 Upton, *Micmacs and Colonists*, 142-8.

23 Virginia P. Miller, “Aboriginal Micmac Population: A Review of the Evidence,” *Ethnohistory* 32, no. 2 (Spring 1976): 120.

remained and the Mi'kmaq became vulnerable to famine.²⁴ Participation in a cash economy meant susceptibility to falling prices, and this, in turn, often necessitated killing more game – something that made animals even more scarce and more difficult to hunt with traditional hunting methods.²⁵ With the expansion of British settlement the Mi'kmaq became even further alienated from their traditional modes of subsistence.²⁶

For two centuries the Mi'kmaq had reached “an agreeable *modus vivendi*” with the French, intermarrying with the Acadian population that settled in their territory – an alliance symbolized by the baptism of Grand Chief Membertou into the Catholic Church in 1610.²⁷ After defeating the French, the British divided Mi'kmaq territory into colonial units, creating jurisdictions that did not correspond to Mi'kmaq districts. The Mi'kmaq were dispossessed of their territory despite the treaties they had signed with the British during the 18th century promising not to wage war and to share resources – commitments that the Mi'kmaq saw as recognition and guarantees of their Indigenous rights.²⁸ Under the 1763 Royal Proclamation, the British had promised to keep settlers off unceded Indigenous territory; the Treaty of Niagara concluded the following year renewed and extended a nation-to-nation relationship between settler and Indigenous peoples and affirmed the Covenant Chain of Friendship.²⁹ The Mi'kmaq were not present at Niagara, however, and while the Nova Scotia government acted in accordance with the proclamation to some degree, government officials in New Brunswick “seemed not to know of it.”³⁰

24 Daniel N. Paul, *We Were Not the Savages*, 3rd ed. (Halifax: Fernwood, 2006), 195.

25 Russel Lawrence Barsh, “*Netukulimk* Past and Present: Mikmaq Ethics and the Atlantic Fishery,” *Journal of Canadian Studies* 37, no. 1 (Spring 2002): 25. The Mi'kmaq also had to compete with poor white settler hunters; see Julian Gwyn, “The Mi'kmaq, Poor Settlers, and the Nova Scotia Fur Trade 1783-1853,” *Journal of the Canadian Historical Association* 14 (2003): 85.

26 Jennifer Reid, *Myth, Symbol, and Colonial Encounter: British and Mi'kmaq in Acadia, 1700-1867* (Ottawa: University of Ottawa Press, 1995), 77.

27 Upton, *Micmacs and Colonists*, xii.

28 Marie Battiste, *Living Treaties: Narrating Mi'kmaq Treaty Relations* (Sydney, NS: Cape Breton University Press, 2018), 17.

29 John Borrows, “Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government,” in *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference*, ed. Michael Asch (Vancouver: University of British Columbia Press, 1997), 161.

30 Philip Girard, Jim Phillips, and R. Blake Brown, *A History of Law in Canada, Vol. I: Beginnings to 1866* (Toronto: University of Toronto Press, 2018), 244.

Colonizing governments used the right of Crown or state pre-emption to authorize their acquisition of land, conceding property interests to Indigenous peoples but then monopolizing sovereignty, which, in turn, conferred on the state the exclusive right to purchase Indigenous lands.³¹ Yet despite the Royal Proclamation's stipulation that governors could not grant land within the boundaries of their respective colonies that had not yet been ceded by the Indigenous peoples, and despite a longstanding British tradition, going back to early colonial New England, of purchasing Indigenous land, in the eastern British North American colonies a "new legal imaginary" emerged based on the laws of New France that legitimized a policy of unilateral appropriation of Indigenous land.³² This was the case in both Nova Scotia and what would become New Brunswick, where the Crown failed to extinguish Mi'kmaw property interests before giving colonial land grants to settlers – essentially expropriating Mi'kmaw territory "without compensation or justification."³³ Mi'kmaw dispossession followed the pattern in British North America from 1749 to 1830 identified by John G. Reid in that it was carried out by force "of the demographic and environmental kind" rather than outright physical violence.³⁴ Britain's "new legal imaginary" legitimizing the unilateral appropriation of Mi'kmaw land provided the basis for the creation of reserves as a means of compensating the Mi'kmaq for the loss of their lands.³⁵

The reserves created in Nova Scotia and New Brunswick by the colonial government were initially used as way stations by the Mi'kmaq who kept to their traditional seasonal pathways – mixing subsistence hunting, fishing, and gathering with selling their crafts and labour, often setting up camp near new settlers.³⁶ As settler numbers increased, however, colonial authorities, who saw the reserves as an impediment to the opening up of the country, failed

31 John C. Weaver, *The Great Land Rush and the Making of the Modern World, 1650-1900* (Montreal and Kingston: McGill-Queen's University Press, 2003), 139-40.

32 Alain Beaulieu, "'An equitable right to be compensated': The Dispossession of the Aboriginal Peoples of Quebec and the Emergence of a New Legal Rationale (1760-1860)," *Canadian Historical Review* 94, no. 1 (March 2013): 2-4.

33 G.P. Gould and A.J. Semple, "Historical Recognition of Aboriginal Title," in *Our Land: The Maritimes*, ed. Gould and Semple (Fredericton: Saint Anne's Point Press, 1980), 12.

34 John G. Reid, "Empire, Settler Colonialism, and the Role of Violence in Indigenous Dispossession in British North America, 1749-1830," in *Violence, Order, and Unrest: A History of British North America, 1749-1876*, ed. Elizabeth Mancke, Jerry Bannister, Denis McKim, and Scott W. See (Toronto: University of Toronto Press, 2019), 123.

35 Beaulieu, "'An equitable right to be compensated,'" 4.

36 Bunny McBride, *Our Lives in Our Hands: Micmac Indian Basketmakers* (Halifax: Nimbus Publishing, 1990), 10.

to prevent unauthorized settlement on Mi'kmaw territory.³⁷ With almost the whole land base taken from the Mi'kmaq and Wolastoqiyik, note Philip Girard, Jim Phillips, and R. Blake Brown, their constitutional relationship with Britain was “utterly transformed from what it had been in the eighteenth century.”³⁸ By the early 1800s this change in status led to such decline that the Mi'kmaq at times approached starvation during the ensuing decades.³⁹

The Prince Edward Island Mi'kmaq suffered similarly. In 1758 some were forcibly removed along with the Acadians, many of whom had fled the deportations on the mainland.⁴⁰ In 1767, in an attempt to develop the new colony without drawing on the revenues of the mother country, the British divided the land into 67 lots that were distributed to absentee landowners – mostly military men, politicians, merchants, and civil servants – by lottery.⁴¹ Apart from land set aside for three county seats, a 6,000-acre lot reserved for the Crown, and land retained for fishery reserves, churches, schools, wharves, naval yards, and roads, the proprietorial allocations of 1767, as Rusty Bittermann maintains, were the basis of all title on the Island; the British simply “ignored” any property rights of the Mi'kmaq and the few remaining Acadians.⁴²

The Mi'kmaq initially disregarded the new British claims of property ownership, continuing to move seasonally between coastal, river, and inland sites.⁴³ Increasingly, however, they found their lands overtaken by encroaching settlement. In 1806 Jacques-Ladislav-Joseph de Calonne, a French émigré priest, linked the dispossession of the Mi'kmaq directly to the proprietary division of the Island.⁴⁴ Calonne informed Governor Edmund Fanning that the English government had “divided up the entire Island among various proprietors, the result is that they cannot situation themselves anywhere without being quickly

37 Gould and Semple, *Our Land*, 70.

38 Girard, Phillips, and Brown, *History of Law in Canada*, 493.

39 Paul, *We Were Not the Savages*, 218.

40 J.M. Bumsted, *Land, Settlement, and Politics on Eighteenth-Century Prince Edward Island* (Montreal and Kingston: McGill-Queen's University Press, 1987), 10.

41 F.W.P. Bolger, “The Beginnings of Independence, 1767-1787,” in *Canada's Smallest Province: A History of PEI*, ed. F.W.P. Bolger (Charlottetown: Prince Edward Island Centennial Commission, 1973), 43.

42 Rusty Bittermann, *Rural Protest on Prince Edward Island: From British Colonization to the Escheat Movement* (Toronto: University of Toronto, 2006), 13.

43 Bittermann, *Rural Protest*, 17.

44 John G. Reid, “Empire, the Maritime Colonies, and the Supplanting of Mi'kma'ki/Wulstukwik, 1780-1820,” *Acadiensis* 38, no. 2 (Summer/Autumn 2009): 84.

expelled.”⁴⁵ In the 1830s FitzRoy estimated the PEI Mi'kmaq numbered less than 200, all in “as depraved a condition it was possible for humans to be. Those who were visible spent the summer months . . . visiting white households to sell baskets, birchbark toys, and similar handicrafts. They were also conspicuous as beggars on the streets of Charlottetown.”⁴⁶

After failing to secure aid from governing bodies through proper administrative channels, the Mi'kmaq began addressing themselves directly to the Crown.⁴⁷ In 1838 a petition written by Chief Oliver LeBone described the desperate state of the Mi'kmaq and asked for “a Grant of Land on which our People could permanently reside without fear of molestation,” stating that “our people duly value the benefits resulting from a steady application to farming pursuits, and a settled mode of life.”⁴⁸ The petition was submitted to the Colonial Office along with petitions and documents pertaining to the Escheat movement, a movement by white settlers seeking to escheat the title of PEI's absentee landowners.⁴⁹ Bittermann notes, however, that while the claims Escheat leaders made on behalf of settlers from the British Isles were framed largely in terms of a labour theory of value, LeBone's on behalf of the Mi'kmaq were framed in terms of “aboriginal property rights, previous appeals, and need.”⁵⁰ The system of landlordism had meant the predominance of leasehold tenure on the Island, a situation “absolutely untypical of North America” in which freehold tenure was the norm; for settler tenants and squatters this could mean spending years “improving” the land with no prospect of gaining clear title.⁵¹

While the Mi'kmaq added their request for land on which to farm to those of the escheators, though, this did not signify that they had eschewed their own land tenure patterns but that they sought to survive by framing their immediate aims in the recognized language of British colonial law. Jennifer Reid argues, for instance, that the acceptance of the Mi'kmaq of the changing

45 Jacques-Ladislas-Joseph de Calonne, quoted in Reid, “Empire,” 84.

46 FitzRoy to Glenelg, 8 October 1838, *Journals of the Legislative Assembly*, PEI, 1840, Appendix N, pp. 111-13, quoted in Upton, *Micmacs and Colonialists*, 115.

47 Reid, *Myth, Symbol, and Colonial Encounter*, 83.

48 Petition of Oliver Thomas LeBone, Chieftan of the MicMac tribe of the Indian Inhabitants of Prince Edward Island, May 1838, CO 226/56, pp. 228-9, The National Archives (TNA), UK.

49 Bittermann, *Rural Protest*, 222.

50 Bittermann, “Mi'kmaq Land Claims and the Escheat Movement in Prince Edward Island,” *University of New Brunswick Law Journal* 55 (2006): 175.

51 Ian Ross Robertson, *The Tenant League of Prince Edward Island, 1864-1867: Leasehold Tenure in the New World* (Toronto: University of Toronto Press, 1996), 4, 22-3.

land use and distribution patterns in their territory did not mean they had agreed to conform to “a colonial style of farming in which people were no longer responsible for the welfare of any but themselves,” noting that they persistently opposed the subdivision of their land for the use of individual families.⁵² Even had they wanted to, individual Mi’kmaq could not gain clear title on PEI where freehold was unavailable even to white settlers. In any case the Escheat movement failed to bring about land redistribution, leaving only Lennox Island, a 1,320-acre island off the northwest coast, for the Mi’kmaq by mid-century.⁵³

The dispossession of the Mi’kmaq by settler colonialism and the ongoing struggles over landowning rights were the context, then, in which Tom Williams’s trial took place. It was a period during which the PEI judiciary became increasingly professionalized; while English law and legal institutions had been transplanted into all nascent British colonies, the colony of PEI had been “distinctly on the slow track” in producing a mature system.⁵⁴ Its judiciary faced numerous problems in the early 1800s, including a lack of formal training for judges and a homegrown bar as well as the politicization of the Island’s judges.⁵⁵ The tenure of Chief Justice Jarvis, a second-generation Loyalist who had studied at the Inns of Court and served in several colonial posts, however, brought significant improvement.⁵⁶ It coincided with a period of penal reform in British North America that saw four of the colonies pass legislation greatly reducing the number of offences for which capital punishment could be the penalty.⁵⁷

52 Reid, *Myth, Symbol, and Colonial Encounter*, 85. While some Mi’kmaq did conform to settler norms such as leasing land to white settlers, this would seem to be more what Donald Fyson terms “pragmatic adaptation” than a real shift in values; see Donald Fyson, “Minority Groups and the Law in Quebec, 1760–1867,” in *Essays in the History of Canadian Law*, Vol. XI, ed. G. Blaine Baker and Donald Fyson (Toronto: University of Toronto Press, 2013), 285.

53 Gould and Semple, *Our Land*, 56 and Reid, *Myth, Symbol, and Colonial Encounter*, 34. The island, overlooked in the 1767 lottery, was granted to Sir James Montgomery in 1772; it was sold to the Aborigines’ Protection Society in 1870.

54 Bumsted, “Politics and the Administration of Justice on Early PEI, 1769–1805,” in *Essays in the History of Canadian Law*, Vol IX, ed. Christopher English (Toronto: University of Toronto Press, 2005), 49.

55 H.T. Holman, “The Bar of Prince Edward Island 1789–1852,” *University of New Brunswick Law Journal* 41 (1992): 198.

56 Bumsted and Holman, “JARVIS, EDWARD JAMES,” *Dictionary of Canadian Biography*, vol. 8, University of Toronto/Université Laval, 2003, http://www.biographi.ca/en/bio/jarvis_edward_james_8E.html.

57 Girard, Phillips, and Brown, *History of Law in Canada*, 544.

In 1820 the Queen's County Jail was built along with smaller country jails, and public floggings and use of the pillory became less frequent after 1836 when two criminal statutes replaced the 1792 Act relating to Treasons and Felonies.⁵⁸ Legislation entitled An Act to Improve the Administration of Justice in Criminal Cases dealt with non-capital felonies among other matters, and included the abolition of the benefit of clergy as well as the establishment of the right to defence by counsel.⁵⁹ The latter followed the passage that year in England of the Prisoner's Counsel Act, which gave prisoners in felony trials the right to delegate the complete carriage of their defence to professional counsel.⁶⁰ Williams had the counsel of Charles Young; according to Jarvis's account he called no witnesses, a standard procedure for defence counsel at the time.⁶¹

Given the improvements in the Island's judiciary and Jarvis's proficiency in colonial law, what made him hesitate to hang Williams? While no hangings took place during his tenure from 1828-1852, in 1844 Jarvis wanted to see a capital conviction following the death of George Tanton during a summary arrest for illegal oyster harvesting. But Jarvis was thwarted by the jury, who found the defendant not guilty.⁶² Jarvis, believing William Hiscox guilty of "a cold blooded premeditated murder" gave what was considered "a severe castigation for those in the jury box" before passing the maximum sentence for manslaughter.⁶³ In 1837, while sentencing tenants who had accosted a land agent demanding to see the proprietor's title, Jarvis evoked the spectre of treason charges against those he considered to be instigating the escheat protests. "General combinations to resist the law," he thundered, "might, under some circumstances, amount to a levying of war against the King, a species of high treason, the most atrocious of all crimes, and punishment for which is death in its most horrible shape."⁶⁴ While eventually sentencing the protesters

58 Jim Hornby, *In the Shadow of the Gallows: Criminal Law and Capital Punishment in Prince Edward Island, 1769-1941* (Charlottetown: Institute of Island Studies, 1998), 58-9.

59 S.P.E.I., Acts of the General Assembly of PEI, 1836, c. 21, 127-43.

60 Cerian Charlotte Griffiths, "The Prisoners' Counsel Act 1836: Doctrine, Advocacy and the Criminal Trial," *Law, Crime and History* 4, no. 2 (June 2014): 29.

61 Young was appointed the Island's first Queen's Counsel in 1847.

62 Hornby, *In the Shadow of the Gallows*, 60.

63 An Act to provide for the punishment of Offences against the Person and Property, and to repeal the Act relating to Treasons and Felonies, S.P.E.I. 1836, c. 22, s. 4, p. 145. The account of the trial, quoted in Hornby, 64, is taken from an account by a descendant of Tanton's.

64 Chief Justice Edward Jarvis, quoted in Bittermann, *Rural Protest*, 98-9.

to reasonable terms, Jarvis signified he would not hesitate to impose a death sentence.

One of the principal reasons Jarvis seems to have recommended Williams's death sentence be commuted was the lack of precedent. There had been only one recent case of a Mi'kmaq convicted of murder in the adjoining colonies, and it had not seen the defendant hang; in Nova Scotia in 1829 Peter Paul was charged with shooting his mother-in-law. His counsel argued that the gun had discharged accidentally, but the jury found Paul guilty. Supreme Court Judge Brenton Halliburton did not, however, pass the death sentence, notwithstanding his declaration that Paul's case "must be decided by the same rules of Law which would be applicable to any other of His Majesty's Subjects" because the condemned man "appeared so unconscious of the awful consequences" of his act.⁶⁵ The Colonial Office in London recommended the sentence be commuted to two years' imprisonment "considering the peculiar circumstances of the case."⁶⁶

While British law purported to treat all defendants equally, seemingly considerations other than purely legal ones were at play in the case of Indigenous defendants. Upton notes that Paul "had been treated differently from other British subjects."⁶⁷ Like Paul, Williams was considered a British subject who was subject to British law yet the Colonial Office seemed to have a greater interest than was customary in the outcome of his case. Sidney Haring suggests this was the norm regarding Indigenous people and colonial law, writing, for instance, that in an 1839 case in Upper Canada, Mohawk George Powlis, convicted of murdering Susannah Doxtater, a Mohawk woman, "was relieved from a death sentence and given a relatively lenient seven years in Kingston Penitentiary 'partly on the grounds that protracted imprisonment was felt more severely by Indians.'⁶⁸ As Tina Loo notes, a draconian imperial

65 Judge Brenton Halliburton to Sir Peregrine Maitland, 12 May 1830, quoted in Upton, *Micmacs and Colonists*, 147. Regarding the Williams case, Upton writes that the jury recommended mercy "for Williams was sixty years old," suggesting he received special consideration because of his age.

66 Sir George Murray to Maitland, 28 August 1830, quoted in Upton, *Micmacs and Colonists*, 147.

67 Upton, *Micmacs and Colonists*, 147. Upton suggests that in rural areas for some cases the Mi'kmaq may have been seen to stand outside the law, noting that "no Indian was flogged at a time when thirty-nine lashes remained the standard rural punishment for most offences against property" (148).

68 Sidney L. Haring, *White Man's Law: Native People in Nineteenth-Century Canadian Jurisprudence* (Toronto: Osgoode Society for Canadian Legal History, 1998), 159. Apart from his community of the Six Nations, one of those petitioning for Powlis's release was,

hand was necessary where Indigenous people outnumbered settlers, force that later gave way to measures such as residential schools and the regulation of fishing and hunting through licensing; in British Columbia, for example, where 25 executions of Indigenous people took place during the 1860s, "capital punishment became less central to the colonization of Native peoples, and other forms of control, including mercy – itself still an expression of power and an instrument of control – became more frequent."⁶⁹

Another probable factor in the decision to not hang Williams was that he had killed another Mi'kmaw and not a white settler, something that may also have factored in Paul's lenient sentence. At a time when colonists were constantly encroaching on Mi'kmaw territory and the war against the French and their Mi'kmaw allies was a not-too-distant memory, the Mi'kmaw killing of a white settler would almost certainly have occasioned a more severe penalty. In 1784 the Quebec Court of King's Bench found a Madawaska Wolastoqiyik guilty in the death of a white settler, but acceded to requests that Charles Nichau Noiste, the convicted man, be shot rather than hanged – shooting being "more consonant to the ideas of savages" according to the governor.⁷⁰ In Fredericton, New Brunswick, in 1786, two white settlers were convicted of killing a Wolastoqiyik man; one was reprieved but the other hanged. The latter murder bore a similarity to the Williams case in that the unnamed Wolastoqiyik man was shot in a canoe, while presumed to be escaping with the defendant's hogs.⁷¹

Significantly, the issue of jurisdiction – whether the Mi'kmaq were in fact subject to British law – did not factor into the Williams case. Young did not raise the issue at trial, while Jarvis seems to have assumed Williams was subject to the court's jurisdiction. Yet only 20 years earlier, in Upper Canada, jurisdiction was an issue in the trial of Shawanakiskie, an Odawa who killed another Odawa in Amherstburg. Shawanakiskie argued he had avenged the

ironically, Edward Jarvis's cousin, Samuel Peters Jarvis, who was chief superintendent of Indian Affairs of Upper Canada at the time.

69 Tina Loo, "Savage Mercy: Native Culture and the Modification of Capital Punishment in Nineteenth-Century British Columbia," in *Qualities of Mercy: Justice, Punishment, and Discretion*, ed. Carolyn Strange (Vancouver: University of British Columbia Press, 1996), 107.

70 Joseph Wilson Lawrence, *The Judges of New Brunswick and Their Times* (Fredericton: Acadiensis Press, 1983), 64-5. Fyson notes the 1768 execution of a "Panis Indian" in which instance "the colonial state was very publicly asserting its ultimate jurisdiction" but finds only one execution of an Indigenous defendant in Quebec from 1810-70; see Fyson, "Minority Groups and the Law in Quebec," 317n49.

71 Lawrence, *Judges of New Brunswick*, 60-4.

murder of a parent, a custom sanctioned by Odawa law; in appealing his subsequent conviction Shawanakiskie argued that the exercise of Native laws and customs was guaranteed by treaty, thus rendering Indians immune from legal proceedings in such circumstances.⁷² However, no treaty was found; in his charge to the grand jury, Justice William Campbell concluded that it was at least arguable that “the internal affairs of natives in both unsettled and reserved lands were exempt, not only in fact but in *law*, from colonial law and jurisdiction.”⁷³ And while colonial law was considered to apply in areas settled by Europeans, jurisdiction over offences committed on reserves close to European settlement was less clear.⁷⁴ The site of the Williams murder, Georgetown, was settled, and this was perhaps the reason Williams was considered subject to settler law.⁷⁵

Jarvis’s assumption of jurisdiction reflected the British claim of sovereignty following the dispossession of the Mi’kmaq, one legitimized by a discourse that “played on the protective, just, and generous role of the British sovereign.”⁷⁶ Throughout the empire the assumption of jurisdiction itself led to settler sovereignty that rested, as Lisa Ford suggests, on the conflation of sovereignty, territory, and jurisdiction. By exercising criminal jurisdiction over violence between Indigenous people, she contends, “settler courts asserted that sovereignty was a territorial measure of authority to be performed through the

72 Dennis Carter-Edwards, “SHAWANAKISKIE,” *Dictionary of Canadian Biography*, vol. 6, University of Toronto/Université Laval, 2003 –, http://www.biographi.ca/en/bio/shawanakiskie_6E.html.

73 Mark D. Walters, “The Extension of Colonial Criminal Jurisdiction over the Aboriginal Peoples of Upper Canada: Reconsidering the *Shawanakiskie* Case (1822-26),” *University of Toronto Law Journal* 46 (1996): 306.

74 Girard, Phillips, and Brown, *History of Law in Canada*, 494. The 1752 Treaty between the Mi’kmaq and the British stated that “all Disputes whatsoever that may happen to arise between the Indians now at Peace, and others [of] His Majesty’s Subjects in the Province, shall be tried in His Majesty’s Courts of Civil Judicature, where the Indians shall have the same Benefits, Advantages and Privileges as any others of His Majesty’s Subjects”; see D. Bruce Clarke and the Grand Council of Micmacs, *The Mi’kmaq Treaty Handbook* (Sydney, NS: Native Communications Society of Nova Scotia, 1987). In October 1726 three Mi’kmaq, along with two Acadians, were convicted of piracy, felony, and robbery and hanged for their seizure of a New England fishing vessel off the coast of Mirligueche (now Lunenburg) by the Court of Vice-Admiralty in Boston; see Wicken, *Mi’kmaq Treaties on Trial*, 156-7. Upon hearing that the Mi’kmaq prisoners had spoken with those who had signed the 1725 treaty, the court had determined the defendants should have been aware of the terms of the peace.

75 Three Rivers was a site of the shipbuilding industry; from the late-1820s to the mid-1840s several vessels were launched there annually; see Nicolas de Jong and Marven Moore, *Shipbuilding on Prince Edward Island: Enterprise in a Maritime Setting 1787-1920* (Gatineau, QC: Canadian Museum of Civilization, 1994), 291.

76 Beaulieu, “An equitable right to be compensated,” 15.

trial and punishment of every person who transgressed settler law in settler territory.”⁷⁷ Allan Greer notes that while initially “Indian land” and settler land emerged as legally distinct forms of property, European property was reduced to formal rules embodied by law; the process of property formation during the early colonial period saw land and proprietors as mutually constitutive, playing a part in “creating colonial subjects” by instituting privileges for some while pushing others to the margins.⁷⁸ Although initially the construction of the colonial state was forced to confront “myriad conflicts over the definitions of difference, property, and moral authority,” these were in most cases ultimately smoothed over by the colonial judiciaries.⁷⁹

Legal pluralism had initially existed in North America; between 1650 and 1815 Algonquians and European colonists in the Great Lakes region mutually accommodated each other’s traditions to resolve conflicts to carry on trade.⁸⁰ By the end of the 18th century, however, with British military ascendancy and the dwindling fur trade, there was little incentive for colonists to consider the practices and beliefs of the Indigenous people they had displaced. As Girard, Phillips, and Brown note, “The fluidity and pluralism that had been the hallmark of the interaction between colonial law and Indigenous peoples gave way to the view that European law was supreme, even though it was rarely applied to Indigenous people’s everyday lives.” Between the 1790s and the 1830s the role of the Mi’kmaq and other Indigenous peoples went “from alliance to irrelevance,” and the 1840s saw the beginning of colonial government legislative intervention in Mi’kmaw lives.⁸¹

While not raised at Williams’s trial, the question of jurisdiction *was* raised in a memorial Young presented in Williams’s name following his conviction as Young sought to have the sentence commuted. The memorial argued that being “Savage and Barbarian” Williams could not be considered “in the same light as a civilized British Subject” in that he could not be expected to adhere to the “civilized” standard of conduct expected of British subjects and so could not

77 Lisa Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788-1836* (Cambridge, MA: Harvard University Press, 2010), 2.

78 Allan Greer, *Property and Dispossession: Natives, Empires and Land in Early Modern North America* (New York: Cambridge University Press, 2018), 19.

79 Lauren Benton, “Colonial Law and Cultural Difference: Jurisdictional Politics and the Formation of the Colonial State,” *Comparative Studies in Society and History* 41, no. 3 (July 1999): 575, 564-5.

80 See Richard White, *The Middle Ground: Indians, Empires, and Republics in the Great Lakes Region, 1650-1815*, rev. ed. (New York: Cambridge University Press, 2011).

81 Girard, Phillips, and Brown, *History of Law in Canada*, 489, 488.

be tried under British law. The memorial further stated that Williams “never conceived himself bound by British Laws” and that he “never even heard of, nor knew their force or effect.”⁸² Why Young did not argue that Williams did not consider himself under the court’s jurisdiction at trial is unclear; in arguing that Williams did not consider himself bound by British law, Young seemed to suggest he considered himself bound by Mi’kmaw law.

A more eloquent argument for why Williams was not subject to British law appeared in the *Colonial Herald* in three installments in April 1839. It was written by Thomas Irwin, an Irish immigrant who had worked as both a teacher and a surveyor and had committed his life to helping the Mi’kmaq, being for almost 20 years “the only white person in Prince Edward Island to demonstrate publicly any sympathy for the Indians.”⁸³ Irwin spoke Mi’kmaw but was unable to secure funding to publish a book of Mi’kmaw grammar; owing to his Roman Catholic faith Irwin’s proposals received a partisan reception, including undoubtedly his 1831 petition to the House of Assembly for a grant of land for the Island Mi’kmaq.⁸⁴ In his lengthy missive to the *Colonial Herald* Irwin challenged many aspects of Williams’s conviction, including the court’s jurisdiction.

Irwin argued that the Mi’kmaq had never, by any act of allegiance, admitted the supremacy of the British sovereign, and therefore were not British subjects or amenable to British laws; hence Williams’s indictment, trial, and conviction “were illegal . . . and his sentence null and void, to all intents and purposes.” Unlike the French, continued Irwin, the English did not win the friendship of the Mi’kmaq, and entered into treaties with them to “neutralize their hostility.” The English, however, did not comply with the treaties:

Witness the granting away of every acre on this Island, without retaining even one perch for the use of the Indians. Was this treating them like British subjects? Was this a mode of observing treaties with good faith? *However, as the treaties were prior to the Grants, they will, of right, supercede them; and as they are not yet a dead letter,*

82 Memorial of Tom Williams (rec’d), 15 May 1839, CO 226/58, pp. 53–6, TNA.

83 L.F.S. Upton, “IRWIN, THOMAS,” *Dictionary of Canadian Biography*, vol. 7, University of Toronto/ Université Laval, 2003–, http://www.biographi.ca/en/bio/irwin_thomas_7E.html. Peter Sanger mentions a “white man” in Charlottetown, a Joseph Brooks, who had lived among the Indians “for about forty years”; see Sanger, *The Stone Canoe* (Kentville, NS: Gaspereau, 2007), 25.

84 Gould and Semple, *Our Land*, 32.

the day may not be far distant, when the rights of the Indians may be successfully asserted, with the formality of a Court of Escheat; for theirs is the primeval and indisputable title to the soil, without the equivocal and ambiguous conditions written on a skin of parchment.

The existence of the treaties, concluded Irwin, was in and of itself proof of the independence of the Mi'kmaq as a people, and British gifts of medals and other “tokens of approval” were signs that the British recognized Mi'kmaq sovereignty. Moreover, because the British had entered treaties in bad faith, the Mi'kmaq were not required to adhere to them: since the British were not following their own laws laid out in the treaties, the Mi'kmaq had no obligation to respect British laws.⁸⁵

Besides challenging the court's jurisdiction over Williams, Irwin's letter to the *Colonial Herald* presented what he considered to be mitigating factors to the murder by calling into question the depiction of Williams as an unrepentant murderer. Irwin described Williams, whom he visited in gaol before the commutation of the sentence, as in a “torpor” when visited by the local Catholic priest:

His mind was all chaos – his confinement – his trial – and the fatal tragedy that led to it – together with the conversation of those whom idle curiosity led to visit him – threw his mind into confusion and disorder, so that the Rev. gentleman's charitable intentions were unavailing to waken him to a sense of his deplorable state.

Williams appeared unaware that he was soon to be hanged, owing more to his “not comprehending the import of the instructions given him, than from any obduracy or perversity of heart.” When Irwin, speaking Mi'kmaq, “convey[ed] to him the cheerless tidings [that he was to be hanged],” Williams replied, “Brother, God's will be done! I am reconciled to my fate – I am not conscious of the crime for which I must die; but I suppose I am guilty – so I am told. I forgive every one that has injured me, and I hope God will mercifully forgive me!” Williams, according to Irwin, then asked him for his book of Mi'kmaq prayer, which Irwin assured Williams he could supply from memory. Williams then prayed “devoutly and fervently.”⁸⁶ In his account of Williams, who had

85 Thomas Irwin, “Tom Williams, the Indian,” *Colonial Herald*, 12 April 1839 (italics in original).

86 Irwin, “Tom Williams, the Indian,” *Colonial Herald*, 14 April 1839.

been bequeathed the Catholic faith with Membertou's conversion over two centuries earlier, praying during what he believed to be his final hours, Irwin replaced the drunken Indian narrative with that of the repentant sinner.

While Irwin's letter to the *Colonial Herald* was undoubtedly exaggerated for sympathy and dramatic effect, and for his own interests – he used Williams's story of not having a book of devotion in Mi'kmaq to rail against the sectarian bigotry he believed was preventing him from publishing one – it does highlight some of the factors that could have been given consideration at trial. That the incident, for instance, took place partly in a canoe would seem to rule out premeditation; while it is arguable that Williams may have formed the intent to kill Louis under provocation, it is unlikely he would have set out planning to kill him on the water or upon the exact moment of reaching the shore where the murder took place. Irwin noted that had Williams wanted to kill Louis he could have easily done so: "How many opportunities were afforded him, in the solitude of the forest, for perpetrating the horrid deed, if a desire to satiate his vengeance with blood were his object?"⁸⁷

Another factor seemingly not considered at trial was Williams's capacity to speak English. As has been seen, both Job and Sarah Crew testified that Williams had boasted to them about killing Louis. However, Irwin asks how Williams "could so correctly and connectedly give an account of the affair, and in such good English too, after the surprise so horrid a transaction should occasion; and the more so, since it is well known he speaks very incoherent and almost unintelligible English." Irwin suggests that the true Bill for wilful murder was based on the Crews' evidence alone, and that the Bill of Indictment was founded "*on a mere moral evidence – on a probable and possible supposition, arising from the confession of the prisoner [Williams] before his dissipated senses were recollected.*"⁸⁸

Irwin also questioned the legitimacy of Williams's trial owing to the absence of Mi'kmaq on the jury. He noted that the jury did not consist of Williams's peers, but of

persons wholly unacquainted with the nature, manners, customs and character of the Indians; with their motives of action, the peculiarities of their laws, language, manner of expression – in fine, with every thing pertaining to the accused, who, very naturally,

87 Irwin, "Tom Williams, the Indian," *Colonial Herald*, 13 April 1839.

88 Irwin, "Tom Williams, the Indian," *Colonial Herald*, 13 April 1839 (italics in original).

considered them not as peers, but as foreigners, intruding on his native land⁸⁹

Young had in fact “strongly argued” at the meeting for appointing the jury that it should have Mi'kmaw representation on it, believing the Mi'kmaq might have a different view of “the morality of revenge” than that of colonial law.⁹⁰ For Mi'kmaw defendants, he declared, “in avenging any injury which they may have received, and in considering it to be their duty . . . none but a jury composed of themselves could fully appreciate or justly try the merits of the case.”⁹¹ Young's suggestion was “refused by the Chief Justice and ridiculed by others,” but may have played a part in the jury's recommendation for mercy.⁹² Trial by jury – “a key plank of English legal culture” believed to embody its superiority to other countries' laws – was an integral part of British North American law; as Blake Brown notes, however, during the 19th century legislators increasingly sought to disempower juries believed to represent local community values that might pose obstacles to liberal property ideals.⁹³ In most cases property qualifications for jurors reinforced this trend. But PEI, uniquely among the British North American colonies, had no property qualification for jurors at the time, an anomaly that would have allowed for Mi'kmaw jurors.⁹⁴

While Young did address the absence of Mi'kmaq on the jury, however, he did not make a case at trial for self-defence. In the memorial he argued that at the time of the murder, although Williams did not remember firing off the gun, “yet he distinctly recollects that the said Joe Lewis threatened to stick him with a Knife, and that [Williams] must have done the deed in defence of his own life, while the said Joe Lewis was in the Act of putting into execution

89 Irwin, “Tom Williams, the Indian,” *Colonial Herald*, 12 April 1839.

90 Nathan H. Mair, *Charles Young: Victorian Liberal, 1812-1892*, Resource Book, item 14, n.d., p. 2, PEI Public Archives and Records Office, Charlottetown.

91 Charles Young, quoted in Mair, *Charles Young*, 2-3. Young, while recognizing the Mi'kmaq might have a different perspective on Williams's offense, perpetuates the theory of the Mi'kmaw obsession with revenge in Williams's memorial, writing that “one of the earliest principles which was inculcated in [his mind] in his Youth, was never to forgive an injury, nor to allow it to pass unrevenged.”

92 Mair, *Charles Young*, 3.

93 R. Blake Brown, *A Trying Question: The Jury in Nineteenth-Century Canada* (Toronto: University of Toronto Press, 2009), 7.

94 Statutes of Prince Edward Island, An Act for the More Easy and Effectual Trial of Criminal Offenders, 1773, c. VIII. The requirement that jurors need only be inhabitants would seem to be based on the preponderance of tenants on the Island, although in practice sheriffs would be able to exercise discretion in drawing up lists of potential jurors and thus help determine how representative PEI juries would be.

his said threats.” Young argues that the same instinct displayed by Williams “has induced the said Peter Lewis . . . to conceal the truth, and by having Your Memorialist executed by his evidence, thus revenge his said father’s untimely death.”⁹⁵ Young thus accuses Peter of perjuring his testimony to avenge his father’s death. Irwin also argues that the murder was a case of self defense, writing that Williams and Louis

were drinking together until they both became intoxicated; . . . angry words took place between them, accusations and recriminations ensued; when the deceased, accused of having maltreated and maimed the child of the prisoner, replied “he had done so, and would so use himself.” Hereupon he commenced a search for his knife, upon which the prisoner seized the fatal instrument of death, and discharged its contents, without further reflection, at his unhappy victim.⁹⁶

There is some plausibility to both Young’s and Irwin’s suggestion that Louis threatened to stab Williams, for it seems difficult to imagine Williams, in the excited state described by the Crews, inventing the story to reduce a murder charge to manslaughter.

Moreover, at least one other member of the settler community corroborated Williams’s story that Louis threatened him with a knife. Reverend Roderick McAulay, who attended the coroner’s inquest, wrote to FitzRoy stating that

he was surprised to hear the said Peter Lewis deny at the said trial that his father the deceased, had a knife in his hand while they were in the Canoe, As the said Peter Lewis in his presence and in the presence of the Jury of the said Inquest most distinctly affirmed and stated that while the said Tom Williams and the said Joe Lewis were quarrelling in the said Canoe, that the said Joe Lewis had a knife in his hand and threatened to stick the said Tom with it, that then the said Tom said, “If you kill me, I kill you first” or words to that effect. That the said Tom Williams then took his gun, pointed, fired, and shot him dead.⁹⁷

95 Memorial of Tom Williams (rec’d), 15 May 1839, CO 229/58, pp. 53–6, TNA.

96 Irwin, “Tom Williams, the Indian,” *Colonial Herald*, 13 April 1839.

97 Rev. Roderick McAulay to FitzRoy, 18 March 1839, MG 11 CO 226, pp. 216–7, LAC.

In his letter to FitzRoy, however, Jarvis addressed McAulay's charge that Peter had stated in the Coroner's Inquest that his father had threatened Williams, as it would have both "materially reduced the nature of the crime" and invalidated Peter's testimony. He suggested that McAulay was mistaken:

I find from the minutes of the boy's statement taken at the inquest, that all he said on this point was, that "his father took out his knife and put it in the Canoe." I also learn from personal inquiry of the Coroner that the boy made no further statement in regard to the knife than that contained in the minutes and that, in fact, this conversation took place whilst they were all in the Canoe crossing the river and the murder was not committed until after they had reached the shore, some considerable interval of time having elapsed, I saw no reason upon the trial, to doubt the truth of the boy's evidence.⁹⁸

It is difficult to reconcile Peter's statement that "his father took out his knife and put it in the Canoe" with McAulay's account; possibly Peter used the settler legal system to his advantage and, after reflection, changed his story, both to absolve his father and negate a claim of self-defence for Williams and thus assure him a trip to the gallows.

It is not clear why Jarvis chose to believe Peter over three settler men – McAulay, Young, and Irwin. While Peter had a strong motive to downplay his father's role in provoking Williams to commit the murder, McAulay would seem to have no motive to lie. That Jarvis privileged Peter's testimony was contrary to prevailing settler views of the Mi'kmaq, suggesting that his own beliefs regarding the Mi'kmaq influenced his view of Peter as a credible witness – an "Indian" who occupied a different category than Williams. Whatever factors led Jarvis to determine Peter to be a reliable witness, he seemingly considered Peter, unlike Williams, *not* to be "alive to the savage virtue of revenge." Clearly age, as well as race, was a factor in Jarvis's estimation of witness credibility. The other eyewitness to the murder, Williams's wife, could not testify; the absence of her name in most references to the court proceedings attests to the unequal status of women, particularly Indigenous women, in colonial society.⁹⁹

98 Jarvis to FitzRoy, 26 March 1839, MG 11 CO 226, p. 203, LAC.

99 Young's memorial did give her name as Molly, but an article in the *Royal Gazette* reporting on the coroner's case referred merely to the "squaw" of Tom Williams; see

Overall, the views of the Mi'kmaq that surfaced at trial reflected those of the wider settler society. Settlers assumed the Mi'kmaq would either die off or be assimilated into the settler community: in 1838 a study requested by Glenelg, the colonial secretary, found a striking decline in the Mi'kmaw population, one that reached its nadir around 1840.¹⁰⁰ FitzRoy's comment regarding "those [Mi'kmaq] who were visible" suggests most were invisible to settler society, a perception no doubt reinforced by the fact that the Mi'kmaq did not live in permanent year-round settlements.¹⁰¹ Jennifer Reid argues that for settlers the Mi'kmaq were part of a malignant landscape represented by nature, being both "experienced and perceived by whites as shadows" and becoming "endowed with magical qualities" but also feared, as expressed in the Nova Scotia *Guardian* in 1839:

The spirit of revenge is still smothering in their bosoms and although they make their canoes, and their snowshoes, and their baskets . . . and are indebted to the inhabitants in whose neighbourhood they live for the sale of them it is only the lack of opportunity, or the settled conviction that their hostility [is] unavailing, which prevents that spirit from breaking forth in all the fury of its wonted cruelty.¹⁰²

This fear is reflected in the comments of Jarvis, FitzRoy, and Young regarding the supposed Mi'kmaw penchant for revenge – a predilection, they believed, held in check by British civilization as embodied in settler society, particularly its law.

Notwithstanding such characterizations, the Mi'kmaq persisted despite the dispossession of their land and the threats to their way of life, and indeed at times to their very survival, as they challenged the incursions into their lives brought by settler colonialism. The Mi'kmaq of the 19th century were "people living complicated lives, torn between differing ideals, . . . struggling to extend the realm of freedom beyond the subjugation of the colonizing state."¹⁰³ Bonita

Royal Gazette, vol. VIII, 4 September 1838, no. 422, p. 3, Charlotte-Town, PEI. Wives cannot testify against their husbands; also, presumably her testimony would have been discredited owing to her alleged inebriated state at the time of the murder.

100 Paul, *We Were Not the Savages*, 200–2.

101 Another government member predicted the Island Mi'kmaq would wither "like leaves before the autumn's blast"; quoted in Alan Andrew MacEachern, "Theophilus Stewart and the Plight of the Micmac," *The Island* 28 (Fall/Winter 1990): 4.

102 Quoted in Reid, *Myth, Symbol, and Colonial Encounter*, 64.

103 Andrew Nurse, "History, Law, and the Mi'kmaq," *Acadiensis* 33, no. 2 (Spring 2004): 132.

Lawrence affirms that through militarily resisting colonization, negotiating a Concordat with the Holy See, and surviving policies designed to exterminate them, the Mi'kmaq emerge as “resourceful and capable of engaging a powerful enemy in armed conflict for a significant period of time . . . as actors on an international stage . . . signing international treaties as a nation among nations.”¹⁰⁴ For the Mi'kmaq, moreover, adapting to the reality of their changed homeland “did not signify an acceptance of the cultural meanings that had nourished the changes.”¹⁰⁵ Throughout they have maintained their identity as a people and their political existence as a treaty signatory.

On a broader level, however, the Williams trial represents the supremacy of what is now termed the liberal order over the Mi'kmaw traditional way of life.¹⁰⁶ At trial the contrast between Job Crew, a “respectable farmer,” and Williams, a mobile Mi'kmaw, signified the triumph of British property-holding values over Mi'kmaw land use in the colony. The ideal British colonist was a freeholder “improving” the land, the predominance of leasehold on PEI notwithstanding; the Mi'kmaq, by contrast, were inherently suspect in that they were mobile, their presence on the land seen as transient – a status identified with vagrancy in the British legal mind. Thus Williams’s very mode of existence made him less credible in the eyes of the law – a reality that the circumstance of the murder, occurring in the liminal space between shore and water, would have magnified, putting him outside of settler norms that prioritized fixed borders and clear property delineations. His ultimate punishment, banishment, was based on colonial boundaries that did not correspond with traditional Mi'kmaw districts and that the Mi'kmaq did not recognize: PEI and the northern part of Nova Scotia form the district of Epekwitk Aqq Piktuk, with families “[making] frequent crossings of the Northumberland Strait.”¹⁰⁷

Being seen as eschewing the ideal of owning property by colonists unable to comprehend the nature of the Mi'kmaw connection to the land embodied in *netukulimk*, Williams, although in theory a British citizen, would not be considered worthy of that privilege. The Mi'kmaq failure to aspire to settler

104 Bonita Lawrence, “Rewriting Histories of the Land: Colonization and Indigenous Resistance in Eastern Canada,” in *Racism, Colonialism, and Indigeneity in Canada*, ed. Martin J. Cannon and Lina Sunseri (Don Mills, ON: Oxford University Press, 2011), 73.

105 Reid, *Myth, Symbol, and Colonial Encounter*, 84.

106 My use of the term “liberal order” is based on Ian McKay, “The Liberal Order Framework: A Prospectus for a Reconnaissance of Canadian History,” *Canadian Historical Review* 81, no. 4 (December 2000): 617–45.

107 Paul, *We Were Not the Savages*, 10 and Upton, “Indians and Islanders: The Micmacs in Colonial Prince Edward Island,” *Acadiensis* 6, no. 1 (Autumn 1976): 23.

property-owning norms, moreover, would be seen not as a choice on their part, or as resulting from their dispossession and subsequent impoverishment by colonialism, but as a demonstration of their lower level of evolution and their inability to achieve the highest benchmark of “civilization.” Even Irwin, a fellow Catholic and an Irish immigrant familiar with the scourge of landlordism, had worked as a teacher and a surveyor, occupations essential to the project of colonization.

Law was central to colonialism; this was evident in FitzRoy’s statement to Glenelg that an example had to be set for the Mi’kmaq “who in their ignorance would be led to believe that they . . . are not considered amenable to those laws by which the civilized part of the Community is controlled.” The murder trial ultimately served as a means of reinforcing and consolidating colonial law amongst the Mi’kmaq population of the Island – there had to be some consequence to the transgression of law and order signified by Louis’s death. The trial, on the surface about justice for Louis, was more profoundly a warning to the Mi’kmaq of the Island that they were subject to settler legal norms. Williams posed no threat to actual property, certainly not compared to that posed by Escheat to the system of landlordism. Yet the threat posed by the Escheat movement was more to political, social, and economic hierarchies already challenged by the growing push for responsible government. It was not, fundamentally, an ideological one in that it adhered to liberal notions of property, improvement, and individualism.¹⁰⁸ Chief LeBone, in calling for a “Grant of Land” for his people based on Aboriginal property rights, and Irwin, in calling for a Court of Escheat in which the Mi’kmaq’s “primeval and indisputable title to the soil” would be affirmed, delineated what true justice for the Mi’kmaq would have been. In the absence of such change, the colonial regime could rest assured that the Mi’kmaq posed no serious threat to the liberal order. Once a murder conviction was secured, mercy could be extended; Williams need not hang. Mercy in fact further reinforced the hegemony of colonial law.¹⁰⁹

108 Margaret E. McCallum, “The Sacred Rights of Property: Title, Entitlement, and the Land Question in Nineteenth-Century Prince Edward Island,” in *Essays in the History of Canadian Law: Vol. VIII*, ed. G. Blaine Baker and Jim Phillips (Toronto: University of Toronto Press, 1999), 376.

109 Douglas Hay, “Property, Authority and the Criminal Law,” in Hay, Peter Linebaugh, John F. Rule, E.P. Thompson, and Cal Winslow, *Albion’s Fatal Tree: Crime and Society in Eighteenth-Century England* (New York: Pantheon Books, 1975), 17–63.

The Williams case shows how detailed examination can reveal complexities not immediately evident in the written historical record. While most of the perspectives explored here are still through settler eyes, they do offer an alternative to the accepted official narrative. The 1830s saw the predominance of colonial law within Prince Edward Island and the circumscribing of Mi'kmaw law; caught up in one, Williams was alienated from the other. His trial, based on the myth that colonial law was the only system of law on the Island, underlined its hegemony. It highlighted the challenges the Mi'kmaw encountered when facing colonial justice, with the colonial judicial system's dismissal of Mi'kmaw law as a primitive blood feud code that sought only vengeance. The trial also made evident the settler community's failure to recognize, much less address, the ongoing negative impact on the Mi'kmaw of the dispossession of their land and their consequent impoverishment and marginalization by settler society. While Tom Williams's life was spared, his case embodied the wider changes that would eclipse Mi'kmaw law for decades to come.

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