

R. V. DEDAM, SOMMERVILLE AND WARD

Reported: 51 N.B.R. (2d) 347, 134 A.P.R. 347

New Brunswick Provincial Court, Bertrand P.C.J., July 25, 1983

Fred Ferguson, for the Crown
Graydon Nicholas, for the accused

Three Micmac Indians were charged with unlawful possession of Atlantic salmon contrary to s.57(1) of the Fish and Wildlife Act, S.N.B. 1980, c.F-14.1. They were intercepted by game wardens inside the Tabusintac Indian Reserve. The three accused are Indians within the meaning of the Indian Act, R.S.C. 1970, c.I-6 and reside at Burnt Church Indian Reserve. They argue that the Fish and Wildlife Act has no application to Indians on reserve lands by virtue of s.88 of the Indian Act because they are protected by the Royal Proclamation of 1763 and the Treaty of 1779.

Held: (Bertrand P.C.J.)

1. The Treaty of 1779 is a valid treaty and by virtue of s.88 of the Indian Act it renders the Fish and Wildlife Act inoperative on Micmac reserves "between Cape Tormentine and Bay de Chaleurs".
2. The evidence was sufficient, for the purposes of this case, to establish that the three accused are Micmac Indians, and that they are accepted as such among the Micmac Indians.
3. The three accused live on the Burnt Church Indian Reserve and the reserve is acknowledged to be within the area described in the Treaty of 1779 as "between Cape Tormentine and Bay de Chaleurs". The Tabusintac Reserve, the place at which the accused were intercepted, also falls within the described area. Therefore, their right to hunt and fish was protected by the Treaty of 1779.
4. Accused found not guilty.

* * * * *

BERTRAND P.C.J.: The above persons were charged, separately, at Neguac, New Brunswick, on the 23rd of September 1982 for:

on or about the 16th day of August 1982, at or near Becks Brook in the County of Northumberland and province of New Brunswick, did unlawfully have in his possession Atlantic Salmon to which there was not affixed a tag as prescribed under the Fish and Wildlife Act of New Brunswick and the regulations thereunder of the Fish Inspection Act of New Brunswick and the regulations thereunder, and did thereby commit an offence under s.57(1) of the Fish and Wildlife Act [S.N.B. 1980, c.F-14.1] of New Brunswick.

The three accused appeared to the informations on the 7th of October 1982 and entered Not Guilty pleas. Their trials were fixed, by consent, to the 6th of December 1982. However, on the 29th of November 1982 at the request of all the parties, the trials were reset for the 20th of January, 1983 at Tracadie, New Brunswick.

The trials were held, at Tracadie, New Brunswick, on the 20th of January 1983.

At the onset of the trial, Crown and defense agreed that the evidence presented in one case would be evidence in the other two cases.

It was also argued that the following be admitted as evidence in each case:

1. On the 16th of August 1982 the three accused were found in possession of two Atlantic Salmon at Becks Brook, County of Northumberland and Province of New Brunswick, to which there were not affixed tags as prescribed under the Fish Inspection Act of New Brunswick and their respective Regulations, in violation of section 57(1) of the Fish and Wildlife Act of New Brunswick.

2. The three accused were intercepted by game wardens one-quarter mile inside the Tabusintac Indian Reserve at Tabusintac, New Brunswick.
3. The three accused are Indians according to the Indian Act [R.S.C. 1970, c.I-6] and reside at Burnt Church Indian Reserve in the County of Northumberland and Province of New Brunswick.
4. The Treaty of 22 September 1779 be admitted as defense exhibit #1.
5. The reports (Perley's) on Indian settlements be admitted as defense exhibits #2.
6. That judicial notice be taken of the Royal Proclamation Act of 1763.

Following the above admissions, the Crown Prosecutor closed the Crown's case.

Two witnesses were heard for the defence: Gilbert Sewell and Joseph Knockwood. Both witnesses attempted to trace either the genealogy of the three accused or establish their descendancy from the Micmac Indians who signed the Treaty of 1779.

Briefs on the facts and on the law were submitted by both counsel.

The Crown, in its brief, raises two issues:

- a. There is no significant evidence that the three accused, Eldon Dedam, Herman Sommerville, Eugene Ward are, in fact, descendants of the Micmac Indians living in eastern Nova Scotia and between Cape Tormentine and the Bay of Chaleur in New Brunswick, who signed the Treaty of 1779.
- b. Neither the Proclamation of 1763 nor aboriginal rights exempt the three accused from the application of the Fish and Wildlife Act of New Brunswick.

Counsel for the accused, on the other hand adopts a diametrically opposed view, claiming that:

- a. Because of section 88 of the Indian Act, the New Brunswick Fish and Wildlife Act has no application to Indians on Reserve Land, as such Indians are protected by treaty, notably the Proclamation of 1763 and the Treaty of 1779;
- b. That such treaties and aboriginal rights have been recognized by both sections 25 and 35 of the Constitution Act, 1982.
- c. That the three accused are Micmac Indians and thus descendants of signatories of the Treaty of 1779.

Section 88 of the Indian Act reads as follows:

Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act. R.S., c.149, s.87.

It is obvious from the reading of section 88 of the Indian Act, that the New Brunswick Fish and Wildlife Act applies to all Indians, in the Province of New Brunswick, whether on or off reserves, unless either a treaty or an Act of the Parliament of Canada or both, intervene to nullify such application of this provincial law.

The first question, then, is whether one or more treaties so intervened in this case. The first document relied on by the defense is exhibit D.I. That document reads as follows:

Whereas in May and July last a Number of Indians at the Instigation of the King's Disaffected Subjects did Plunder and Rob Mr. John Cort and several other of the English Inhabitants at Mirimachy of the Principal part of their Effects in which transaction we the undersigned Indians had no concern but nevertheless do blame ourselves for not having exerted our abilities more Effectually than we did to prevent it being now greatly distressed

and at a loss for the necessary supplies to keep us from the Inclemency of the approaching winter and to Enable us to subsist our families and Whereas Captain Augustus Hervey, Commander of His Majesty's Sloop Viper did in July last (to prevent further mischief) Seize upon (in Mirimachy River) sixteen of the said Indians, one of which was killed, three released and twelve of the most atrocious have been carried to Quebec, to be Dealt with, as his Majesty's Government of this Province shall in future Direct, which measure we hope will tend to restore Peace and good order to that neighbourhood.

Be it Know to all men that we John Julien, Chief, Antoine Arneau, Captain, Francis Julien and Thomas Demagoniche Councillors of Mirimichi and also representatives of and authorized by the Indians of Pogmouche and Restigouche, Augustine Michel, Chief, Louis Augustine Cobaise, Francis Joseph Arimph, Captains Antoinnes and Guiaume Gabelier Councillors of Richebouctou and Thomas Tenas Son and Representative of the Chief of Jedyiee do for ourselves and in behalf of the Several Tribes of Mickmack Indians beforementioned, and all others residing between Cape Tormentine and the Bay de Chaleurs In the Gulph of St. Lawrence inclusive, Solemnly Promise and Engage to and with Michael Franklin Esquire the Kings Superintendent of Indian Affairs in Nova Scotia.

That we will behave Quietly and Peaceably towards all His Majesty's King Georges good Subjects treating them upon every Occasion in an honest friendly and Brotherly manner.

That we will at Hazard of our Lives defend and Protect to the Utmost of our Power the Traders and Inhabitants and their merchandize and Effects who are or may be Settled on the Rivers Bays and Sea Coasts within the forementioned District against all the Enemies of His Majesty King George Whether French Rebels or Indians.

That we will whenever it shall be required apprehend and Deliver into the hands of the said Mr. Franklin to be Dealt with according to his Deserts any Indian or other person who shall attempt to Disturb the Peace and tranquility of the said District.

That we will not hold any correspondence or Intercourse with John Allen or any other Rebel or Enemy to king George let his nation or country be what it will.

That we will use our best endeavors to prevail with all other Mickmack Brethren throughout the other parts of the Province to come into the like measures with us for their several Districts.

And we do all by these presents for ourselves and in behalf of our several Constitu(ents?) hereby Renew, Ratify and Confirm all former Treatys entered into by us or any of us or them heretofore with the late Governor Lawrence and others His Majesty's King George's Governors who have Succeeded him in the Command of this province.

In Consideration of the true performance of the foregoing articles on the part of the Indians the said Mr. Franklin as the Kings Superintendant of Indian Affairs doth hereby Promise in behalf of Government.

That the said Indians and their constituents shall remain in the Districts beforementioned Quiet and Free from any molestation of any of His Majesty's troops or other his good subjects in their Hunting and Fishing.

That Immediate measures Shall be taken to cause Traders to supply them with ammunition, Clothing and other necessary Stores in Exchange for their Furs and other Commodities. In Witness whereof we the abovementioned have Interchangeable set our hands and Seals at Windsor in Nova Scotia this Twenty Second day of September 1779.

Done in presence of Us

Alin McDonald Capt. 84
Commanding Fort Edward
Lachn. McLean
Lt. 84 Regt.
Hector Maclean
Adjut. 84th Regt.
Joseph Pernette
George Deschamps

Michael Francklin	
Superintendant of Indian	
Affairs in Nova Scotia	
John Julian X	of Mirimichy and acting for Pogmoshe
Chief	
Francis Julian	
3rd Chief	
Antoine Arneau X	
Captain	
Thomas Demagonishe X	
Counsellor	and Restigouche
Augustine Michael	
1st Chief	
Francis Joseph Arimph	
2nd Chief	of Richebouctou
Augustine Cobaise	
Captain	
Antoinet	
Councillor	
Guillaume Gabelier	
DO	Son and Representative of the
Thomas Tenas	Chief of Jedyiee

That document is accompanied by a covering letter which is also reproduced hereunder:

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Nova Scotia Windsor 26 sept. 1779

My Lord

Some days ago a Deputation of Ten consequential Indians residing on the Gulph of St. Lawrence came to me from thence, for them to Mirimichy, to pray assistance for the women and children of those savages, who were carried prisoners to Quebec in the Viper Sloop of war, and to discover by indirect, altho modest questions, the fate of the Prisoners themselves; and after much conversation on those points, they agreed to several articles by way of Treaty, which they signed the Twenty second instant; a copy of it I have now the honor to inclose.

I hope I shall be able to prevail on some of the Traders to venture supplies for them to Mirimichy, at any rate so far as Fort Cumberland, altho the hazard will be great from the privaters who swarm and infest the whole coast.

These Indians are returned home, and they appeared to be satisfied.

I flatter myself this transaction will meet with your Lordships Approbation.

I have the honor to be with the Most profound Respect.

My Lord

Your Lordships

Most Obediant and
Most humble Servant

Mich Francklin

That document - Exhibit D-1 - was accepted in evidence by both parties and the validity of that treaty and its terms are not contested.

The terms of the Treaty of 1779 that are pertinent to this case are in the fourth and fifth paragraphs on page 2 of the Treaty and read:

And we do all by these presents for ourselves and in behalf of our several Constitu(ents?) hereby Renew, Ratify and Confirm all former Treatys entered into by us or any of us or them heretofore with the late Governor Lawrence and others His Majesty's King George's Governors who have Succeeded his in the Command of this Province.

In Consideration of the true performance of the foregoing articles on the part of the Indians the said Mr. Francklin as the Kings Superintendant of Indian Affairs doth hereby Promise in behalf of Government.

That the said Indians and their constituents shall remain in the Districts beforementioned Quiet and Free from any molestation of any of His Majesty's troops or other his good subjects in their Hunting and Fishing.

In the case of R. v. Paul (1980), 30 N.B.R. (2d) 545; 70 A.P.R. 545; 54 C.C.C. (2d) 506 [[1981] 2 C.N.L.R. 83], at page 554 N.B.R., A.P.R., pages 512 and 513 C.C.C. [p.90 C.N.L.R.], Hughes C.J.N.B., interpreted the Treaty of 1779 in the following terms:

Turning now to the Treaty of 1779 it appears the only term which refers to hunting is in the following:

That the said Indians and their Constituents shall remain in the Districts beforementioned Quiet and Free from any molestation of any of His Majesty's Troops or other his good Subjects in their Hunting and Fishing.

It is obvious the term cannot be construed as a grant of the right to hunt and fish but, giving the term the most liberal interpretation it is possible to bear, it could and probably should, in the circumstances be interpreted as a recognition of pre-existing right which the Indians had exercised from time immemorial and consequently may be treated as a confirmation of that right free from molestation by British Troops and subjects.

There is no evidence the treaty was ever abrogated but there is also no evidence as to what land constituted "the Districts". In these circumstances, I would interpret it to mean the Micmac Indian Reserves between Cape Tormentine and Bay DeChaleurs including the Red Bank Reserve and the Indians having a right to live on those reserves. Consequently, I would hold the right of hunting and fishing for such Indians is restricted to those reserves.

I see no reason to deviate from this interpretation of the Treaty of 1779; indeed, I feel I am bound by it.

I hold, therefore, that the Treaty of 1779 is a valid Treaty; that by virtue of section 88 of the Indian Act it renders the New Brunswick Fish and Wildlife Act inoperative on Micmac Indian Reserves "between Cape Tormentine and Bay de Chaleurs".

Now it was agreed that the three accused were intercepted with the two salmons one quarter of mile inside the Tabusintac Indian Reserve at Becks Brook, in the County of Northumberland in the province of New Brunswick, an Indian reserve within the area of "Cape Tormentine and the Bay de Chaleurs".

Consequently, Indians having the right to live on the reserves are not subject to the provisions of the New Brunswick Fish and Wildlife Act whilst hunting or fishing within the limits of their reserves.

In considering the applicability of the Proclamation of 1763, LaForest J.A., in R. v. Polchies and Paul (1982), 43 N.B.R. (2d) 449; 113 A.P.R. 449 [[1983] 3 C.N.L.R. 131], for the Court of Appeal of New Brunswick had this to say [p.134 C.N.L.R.]:

It is true that s.88, in addition to the exception for treaties already discussed, makes these laws subject to any Act of the Parliament of Canada, but though the Proclamation may, when applicable, have the force of statute, it is not a statute of the Parliament of Canada.

LaForest J.A., went on to conclude that the Proclamation of 1763 would not exempt Indian Reserves from the application of the New Brunswick Fish and Wildlife Act.

There, then, remains the question of whether the Treaty of 1779 protects the three accused as Micmac Indians, from the application of the New Brunswick Fish and Wildlife Act.

Counsel for the Crown contends that there is insufficient evidence to prove that any of the three accused is a "descendant" of the signatories of the Treaty of 1779. He rests his argument on the testimony of the defense witnesses who, admittedly, were unable to establish descendancy by actual proof, beyond doubt.

I think the question can be answered in two parts: (a) that of "descendancy"; (b) the degree of proof required to establish descendancy.

Dealing with (a) first. The New Brunswick Fish and Wildlife Act is, in my opinion, a so-called public welfare statute whose purpose is the protection and management of certain public resources, namely the supply of fish and wild game within the Province of New Brunswick. Such statutes do not require proof beyond reasonable doubt, as a rule, but by preponderance of reasonable evidence.

The defense did not ask the three accused to testify in this regard. However, it presented the testimony of two witnesses, knowledgeable in matters of Indian genealogy and tradition. Mr. Knockwood, a researcher for the Union of New Brunswick Indians for 12 years and a Micmac Indian, testified that he researched the genealogy of each of the three accused Indians in an effort to establish their Micmac ancestry. In each case Mr. Knockwood was able to trace the ancestry back to about 1980 [sic] when the records petered out. On direct questioning by the court, Mr. Knockwood had this to say:

THE COURT: No question in your mind that the three accused are Indians?

WITNESS: They're Micmac Indians, yes.

THE COURT: No one's ever questioned that?

WITNESS: No one.

THE COURT: They're accepted as such?

WITNESS: They are accepted as such; and to my knowledge, they're descendants of that Treaty and that Constitution of this area.

I wish that I had the proof. I could have got it for you, it would have been – I'd have no problem. I know it's there, just that those two records are missing.

THE COURT: You seem to know a lot about Indian genealogy and that sort of thing. How does one become a Micmac if not through being born within a Micmac tribe?

WITNESS: There's no other way.

THE COURT: There's no other way?

WITNESS: No.

THE COURT: So he's got to be born a Micmac?

WITNESS: That's right, there's only [one] way to be born - and that's from a Micmac family, mother and father.

THE COURT: I think the previous witness said that if you wanted to marry a girl, you would have to move in with that girl's family. Can I assume that you could move from - let's say, the Cree Indians. Is that a tribe?

WITNESS: Yes, it is.

THE COURT: To a Micmac? Would you become a Micmac eventually if you do marry in that family?

WITNESS: No, you would still be a Cree but you would understand the language. You would be able to understand the Micmac language, it would take time, but you would never become a Micmac. Your family would, later on in years, because then the descendants would be dropping.

THE COURT: The descendants would be Micmac?

WITNESS: Right.

THE COURT: But you would not?

WITNESS: You would not, right. If you would marry - if a Cree married a Micmac girl, the kids from them would be part Cree and part Micmac; but they are in - say - in a Micmac territory. They would consider them all Micmacs, but the person himself would know he is a Cree.

THE COURT: Is there such thing as being accepted as a Micmac even though you're not?

WITNESS: Yes, there is, but the people know that they are not true Micmacs and they would never say anything about it; but I know that these people here, these three boys here are true Micmacs. I have no problems, no doubts in my mind about these three boys.

The other witness for the defense, Mr. Gilbert Sewell, a Micmac Indian, Chief of the Papineau Indian Reserve in Bathurst, New Brunswick, has been doing research on Indian History in America for the past 12 years, some of which was sponsored by a Ford Foundation grant in 1972. This witness was "convinced" that the three accused are Micmac Indians, but his conviction stemmed more from personal knowledge of the accused rather than from actual researched facts.

Such, then, is the evidence of the defense. The Crown, on the other hand did not present any rebuttal evidence.

I am of opinion that the evidence presented to the court concerning the tribal ancestry of the three accused is sufficient, for the purpose of this case, to establish that they are Micmac Indians, and that they are accepted as such among the Micmac Indians.

It has been agreed that the three accused are Indians living on the Burnt Church Indian Reserve. That reserve is situated at Burnt Church, in the County of Northumberland of this Province and acknowledged to be within the area described in the Treaty of 1779 as "between Cape Tormentine and the Bay de Chaleurs".

In view of the above I find the defendants not guilty.