AUGUSTINE AND AUGUSTINE v. R.; BARLOW v. R.

New Brunswick Court of Appeal, Stratton C.J.N.B., Hoyt, Rice, JJ.A., October 15, 1986

J.T. Keith McCormick, for the Crown
Graydon Nicholas, for the appellants

The appellants, members of two Micmac Indian bands, appealed their convictions for unlawfully hunting at night contrary to s.33(1)(a) of the Fish and Wildlife Act, R.S.N.B. 1973, c.F-14.1.

The appellants admitted the offences as charged but claimed hunting and fishing rights contained in a 1773 Treaty gave them immunity from prosecution. The appellants argued that s.88 of the Indian Act, R.S.C. 1970, c.I-6, together with the treaty provisions, rendered provincial hunting and fishing laws inapplicable. The Treaty, a treaty of peace and friendship rather than land cession, provided, inter alia, that the Micmacs shall be "Free from any molestation of any of His Majesty's Troops or other of his good Subjects in their Hunting and Fishing." Chief Sewell of the Pabineau Reserve gave evidence at trial on the history of the Micmac stating that the alleged offences occurred within the territory covered by the Treaty. The trial judge referred to this evidence and other material, including a thesis by B.G. Hoffman, which he had solicited from the counsel for the appellants without the knowledge of the Crown counsel. The trial judge held that the Treaty and s.88 of the Indian Act, together with the Treaty of Paris and s.35 of the Constitution Act, 1982, protected the appellants from the effects of the Fish and Wildlife Act.

The appeal to the Court of Queen's Bench was allowed. Mr. Justice Meldrum held that since Chief Sewell had not been "qualified" as an expert witness only that portion of his evidence which was within his personal knowledge was admissible. He held also that the other material, including the Hoffman thesis, not before the Court at trial was inadmissible.

At the Court of Appeal, the appellants argued: (1) that the excluded evidence was admissible; (2) that it was open to the Provincial Court Judge to refer to the thesis and other material not admitted into evidence at the trial; (3) that the Treaty of 1779 protected them from prosecution; and (4) that the Royal Proclamation and s.25 of the Constitution Act, 1982 offered a defence to prosecution.

Held: Appeals dismissed, order of the Court of Queen's Bench confirmed, both matters returned to the Provincial Court for sentencing.

1. There is no judicial discretion to admit inadmissible evidence even where the opposing counsel fails to object to its admissibility at trial. The Provincial Court Judge had a duty to exclude those portions of Chief Sewell' s testimony that were legally inadmissible.

2. While there is authority for the proposition that a court may take judicial notice of the facts of history and is entitled to rely on its own historical knowledge and researches, the power is a limited one. The thesis should not have been referred to since it was not established to be a source of either indisputable accuracy or authority.

3. Under s.730(2) of the Criminal Code and s.28 of the Summary Convictions Act, R.S.N.B. 1973, c.S-5, the appellants must prove that their Treaty rights offered them a defence. While it is possible that the Treaty of 1779 is a Treaty for the purposes of s.88 of the Indian Act, the appellants failed to meet the onus of proof.

4. Even if the Royal Proclamation extends to New Brunswick, in view of s.88 of the Indian Act and in light of the lack of proven Treaty rights, the appellants were subject to the Fish and Wildlife Act. No new rights are created by s.25 of the Constitution Act, 1982. It merely protects aboriginal, treaty or other rights from the effects of other provisions of the Canadian Charter of Rights and Freedoms.

* * * * * *

STRATTON C.J.N.B.: The issue in these appeals is whether, pursuant to a document referred to as a treaty of 1779 entered into between the Kings Superintendent of Indian Affairs in Nova Scotia and representatives of the Micmac Indians, and to s.88 of the Indian Act, R.S.C. 1970, c.I-6, the appellants Peter Joe Augustine, Gary Augustine and Raymond Garfield Barlow enjoy hunting rights which preclude their prosecution under the Fish and Wildlife Act, R.S.N.B. 1973, c.F-14.1.

The issue is similar in many respects to that considered by the Supreme Court of Canada in R. v. Simon [1985], 62 N.R. 366, [1986] 1 C.N.L.R. 153 (S.C.C).

I. The Factual Background

The appellants Peter Joe Augustine and Gary Augustine are members of the Richibucto-Big Cove Indian Band (No. 15) of the Micmac people. The appellant Raymond Garfield Barlow is a member of the Micmac Indian Island Band (No. 28). Each of the three was charged under s.33(1)(a) of the New Brunswick Fish and Wildlife Act with unlawfully hunting wildlife at night. The charge against the two Augustines reads:

> On or about the 18th day of September, 1981 [they] did unlawfully hunt wildlife in the night on the Salmon River Road, County of Kent, Province of New Brunswick, contrary to and in violation of s.33, subsection (1)(a) of the New Brunswick Fish and Wildlife Act, being chapter 14.1 of the Revised Statutes of New Brunswick and amendments thereto.

The charge against Barlow reads:

> On or about the 5th day of October, 1982 A.D., [he] did unlawfully hunt wildlife in the night in a resort of game at or near the Indian Island Road, County of Kent, Province of New Brunswick, contrary to and in violation of s.33, subsection (1)(a) of the New Brunswick Fish and Wildlife Act, being chapter 14.1 of the Revised Statutes of New Brunswick and amendments thereto.

Section 33(1)(a) of the Fish and Wildlife Act provides:

> 33.(1) Every person commits an offence who
> (a) hunts wildlife in the night;

At their trial in Provincial Court before His Honour Judge Ian P. Mackin, the appellants admitted the offences as charged but counsel on their behalf argued that the right to hunt given in the so-called Treaty of 1779, in combination with s.88 of the Indian Act, R.S.C. 1970, c.I-6 offered them immunity from prosecution under s.33(1)(a) of the Fish and Wildlife Act.

Section 88 of the Indian Act provides:

> 88. 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.

The document of 1779, the relevant part of which states that the Micmacs shall be "free from any molestation of any of His Majesty's troops or other His good subjects in their hunting and fishing", provides:

> Whereas in May and July last a number of Indians at the Instigation of the Kings disaffected subjects did Plunder and Rob Mr. John Cort and several other of the English Inhabitants at Mirimichy 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 Abilitys more Effectually than we did to prevent it, being now greatly distressed and at a loss for the necessary supplys to keep us from the Inclemency of the Approaching winter and to Enable us to Subsist our familys, And Whereas Captain Augustus Hervey Commander of His Majestys Sloop Viper did in July last to prevent further Mischief Seize upon in Mirimichy 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 Majestys Government of this Province shall in future Direct, which measure we hope will tend to restore Peace and goon Order in that Neighbourhood.
>
> Be it Known to all men, that we John Julien, Chief, Antoine Arneau Captain, Francis Julien and Thomas Demagonishe Councillors of Mirimichy , and also Representatives of, and Authorized by the Indians of Pogmousche and Restigousche, Augustine Michel Chief, Louis Augustine Cobaise, Francis Joseph Arimph Captains, Antoines, and Guiaume

Gabelier Councillors of Richebouctou, and Thomas Tanas Son and Representative of the Chief of Iedyac, do for ourselves and in behalf of the several Tribes of Mickmack Indians beforementioned and all others residing between Cape Tormentine and the Bay DeChaleurs in the Gulph of St. Lawrence inclusive, Solemnly Promise to Engage Augustine Captains, to and with Michael Francklin Esq., the King's Superintendant of Indian Affairs in Nova Scotia.

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

That we will at the 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 Districts against all the Enemys of His Majesty Ring George whether French Rebells or Indians.

That we will whenever it shall be required apprehend and deliver into the Hands of the said Mr. Francklin, to b, dealt with According to his Deserts, any Indian or other person who shall attempt to Disturb the Peace and Tranquillity of the said District.

That we will not hold any Correspondance or Intercourse with John Alien, or any other Rebell or Enemy to King George let his Nation or Country be what it will.

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

And we do also by these presents for ourselves, and in behalf of our several Constituents hereby Renew, Ratify and Confirm all former Treatys, entered into by us, or any of us, or them heretofore with the or any lare Governor Lawrence, and others His Majesty 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. Francklin as the King's 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 Majestys 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 Furrs and other Commoditys. In Witness whereof we the abovementioned have Interchangeably set our hands and Seals at Windsor in Nova Scotia this Twenty Second day of September 1779.

Done in presence of us

Allen McDonald Capt. 84th Regt. Commanding Fort Edward

Lauchl McLean) Lieut. 84 Regt.)

Hector McLean) Adjt. Of 84 Regt.)

Joseph Pemette) J.P. George Deshamps)

his John Julien X (L.S.)) of Mirimichy
1st Chief mark) and acting for
Francis Julien X (L.S.)) Pogmosche and
2 Do Antoine Arneau X (L.S.)) Restigousche
Captain Thomas Demagonische)
X (L.S.) Councillor)
Augustine Michel X)
(L.S.) 1st Chief)
Francs. Joseph Arimph X)
(L.S.) 2 Do) of
Augustine Cobaise) Richebouctou
X (L.S.) Captain)
Antoine X (L.S.))
Councillor)
Guiaume Gabelier X)
(L.S.) Do
Thomas Tanas X (L.S.) Son and Representative of the Chief of Iedyiec

A true copy Michl Francklin Superintendant of Indian Affairs in

Michl Francklin (L.S.) Superintendant of Indian Affairs in the Province

II. (1.) The Provincial Court Judgment

The appeal book contains only the judgment in respect of the charge against the Augustines. We can only assume it was agreed that the judgment in that proceeding would determine the outcome of the charge against Barlow. In any event, Judge Mackin found that the Augustines were "both Micmac Indians governed by the Treaty of 1779". After quoting some of the provisions of that document, he referred to the decision of this Court in R. v. Paul [1980], 30 N.B.R.(2d) 545, [1981] 2 C.N.L.R. 83 which, he said, decided that "the Treaty of 1779 applied on Indian Reserve lands" He then said this:

> As reserves did not exist in Nova Scotia (New Brunswick) at the time of signing the 1779 Treaty, hunting and fishing rights were not restricted in my opinion to non-existent reserves. By its literal wording the Treaty of 1779 applied to all parts of present day New Brunswick where the Micmac hunted and fished from Cape Tormentine to the Bay de Chaleurs.

The Judge then referred to evidence given at trial by Chief Gilbert Sewell to the effect that there were seven Micmac Districts in what was originally Nova Scotia, a fact which the Judge said was confirmed by an historical ethnograph of the Micmacs of the 16th and 17th centuries written by one Bernard Gilbert Hoffman for his degree of Doctor of Philosophy in Anthropology at the University of California. On the basis of this evidence the Judge concluded:

> Kent County clearly falls within the area of the Treaty. The game wardens have clearly molested the Micmac Indians in their treaty rights and charges against them must be dismissed and the game taken returned.

Having come to the conclusion that the appellants should be acquitted, the Judge went on to state that the right of the Micmac Indians to hunt and to fish within the Treaty districts constituted existing rights under s.35(1) of the Constitution Act, 1982 and that the Treaty of Paris and the Royal Proclamation of 1763 "apparently confirmed certain aboriginal rights in present day New Brunswick".

(2.) The Judgment in the Court of Queen's Bench

The Crown appealed the acquittal of the appellants to the Court of Queen's Bench, contending that:

a) the hunting and fishing rights accruing to the appellants as Micmac Indians under the document of 1779 were restricted in their application to Indian reserves;

b) the trial Judge erred in ruling upon documents not admitted as evidence at the trial of the appellants; and

c) the trial Judge erred in stating that the Treaty of Paris and the Royal Proclamation of 1763 "apparently confirmed certain aboriginal rights in present day New Brunswick"

Mr. Justice Meldrum, who heard the appeals, accepted the submissions of Crown counsel and allowed the appeals. It was his opinion that on the basis of the only evidence that was properly before him and in light of the decisions of this Court in R. v. Paul, cited above, and R. v. Polchies et al. [1982], 43 N.B.R.(2d) 499, [1983] 3 C.N.L.R. 131, both of which will be discussed larer in these reasons, Judge Mackin had no option but to convict. In coming to that conclusion Meldrum J. ruled that the evidence of Chief Sewell, except as it referred to matters within his own knowledge, was inadmissible as were seven items of marerial that were not before the Court at the time of trial including the Hoffman thesis which the Judge had solicited from counsel for the appellants herein without the knowledge of Crown counsel and without affording her an opportunity to examine, cross-examine or comment upon it.

III. The Issues

In their submissions to this Court, the appellants raised the following issues:

1) Was the evidence given by Chief Sewell and excluded by Meldrum J. admissible?

2) Was the learned Provincial Court Judge correct in referring to materials not admitted into evidence at trial?

3) Can the appellants rely upon the document of 1779 as a defence to prosecution under s.33(1)(a) of the Fish and Wildlife Act?

4) Can the appellants rely upon the Royal Proclamation of 1763 and s.25 of the Constitution Act, 1982, as a defence to prosecution under s.33(1)(a) of the Fish and Wildlife Act?

IV. The Evidence of Chief Sewell

Gilbert Sewell, at the time of trial, was Chief of the Pabineau Indian Reserve at Bathurst, N.B. He testified he began to research the history of the Micmac people in 1968, a research that continued when he was employed by the Department of Indian Affairs from 1969 to 1972. In the latter year, he received a grant from the Ford Foundation and travelled through 35 States and 8 Provinces doing research on native folklore, history and medicine. It was Chief Sewell's evidence that historically the Micmac territories were divided into seven districts. There was a Grand Chief of the Micmac people and seven district chiefs as well as a chief for each particular family group. The present Richibucto-Big Cove Indian Reserve, he said, was located in district no. 6, a district that appears to have comprised that area of eastern New Brunswick extending from the present Nova Scotia border on the south to the Miramichi River on the north. It was also Chief Sewell's evidence that the Salmon River Road, where the Augustines were alleged to have committed the offence with which they were charged, was included in the Micmac territory, presumably district no. 6.

The Crown contends that Chief Sewell's testimony was opinion evidence and as no attempt was made to have him qualified as an expert competent to give opinion evidence, his evidence was not admissible in proof of material facts. Crown counsel therefore submits that Meldrum J. was correct when he said:

> I am not prepared to hold or suggest that Chief Sewell could not have been qualified as an expert, nor that his research and study could not have been useful to the Court. On the other hand he was not so qualified and as a result was only entitled to testify to matters within his own knowledge.

The appellants argue, however, that they did not present Chief Sewell as an expert witness but only to establish the traditional system of the Micmac people. Chief Sewell, they submit, had specific knowledge concerning the seven districts that comprised the Micmac territories and knew that the alleged offences had occurred within district no. 6. Moreover, they point out, not only did Crown counsel fail to object at trial to the testimony given by Chief Sewell, they in fact informed the trial Judge: "We accept the testimony of Chief Sewell but we reserve the right to cross-examine [him] at a later dare". That cross-examination did in fact take place when, in response to questions by two separate Crown counsel, Chief Sewell repeated his testimony that the Micmac territories were divided into seven districts and that the district involved in the present instance was district no. 6.

It has been held that a judge has no discretion to admit and act on any item of: legally inadmissible evidence: see Myers v. Director of Public Prosecutions, [1964] 2 All E.R. 881 (H.L.) cited with approval by Chief Justice Cartwright in R. v. Wray, [1970] 4 C.C.C. 1 at pp. 10-11. In the Myers case Lord Reid stated the rule as follows at p. 887:

> It is true that a judge has a discretion to exclude legally admissible evidence if justice so requires, but it is a very different thing to say that he has a discretion to admit legally inadmissible evidence. The whole development of the exceptions to the hearsay rule is based on the determination of certain classes of evidence as admissible or inadmissible and not on the apparent credibility of particular evidence tendered. No matter how cogent particular evidence may seem to be, unless it comes within a class which is admissible it is excluded.

It has also been held that it is the duty of a trial Judge in criminal proceedings to exclude inadmissible evidence, whether objected to or not, even though that evidence is adduced by

counsel for the accused: see R. v. Ambrose [1975], 25 C.C.C. (2d) 90 (N.B.C.A.) Moreover, in a criminal trial, a mistake by counsel in failing to object to evidence does not relieve the Judge from his duty to see that only admissible evidence is used, nor deprive counsel of his right to object to the evidence on appeal: see SchwartIenhauer v. R. [1935], 64 C.C.C. 1 (S.C.C.).

But in cases involving Indians the admonition of Dickson C.J. in the Simon case must also be kept in mind. There, when addressing the question of proof of descendancy, the Chief Justice said at p. 380 [pp. 171-72]:

> The Micmacs did not keep written records. Micmac traditions are largely oral in nature. To impose an impossible burden of proof would, in effect, render nugatory any right to hunt that a present-day Shubenacadie Micmac Indian would otherwise be entitled to invoke based on this treaty.

In the present case, even though Crown counsel may have appeared to accept the testimony of Chief Sewell, this did not, in my opinion, relieve the Provincial Court Judge of his duty to exclude those portions of the testimony that were legally inadmissible. While Chief Sewell's testimony with respect to the seven districts that comprised the Micmac territories and his evidence that the alleged offences had occurred within District No. 6 may have been factual, I would expressly exclude his conclusion of law that since the signing of the document of 1779 the Micmac people are able to hunt anywhere in New Brunswick without regard to the provisions of the Fish and Wildlife Act.

V. Trial Judge Referring to Materials not Admitted into Evidence at Trial

In an appendix to his reasons for judgment acquitting the appellants, the Provincial Court Judge listed "material considered" by him including an "Historical Ethnography of the Micmac 16th and 17th Centuries by B.G. Hoffman." This "material" was not produced at the trial but was supplied to the Judge at his request by counsel for the appellants who neglected to furnish a copy thereof to Crown counsel.

The Crown submits that in relying upon material not introduced at trial to determine a question of fact Judge Mackin violated the principle that courts should act only on evidence given in open court. Moreover, Crown counsel argues that even though judicial notice may be taken of the facts of history, notice should not be taken of conclusions or opinions not grounded upon known facts divulged by evidence. The facts sought to be proved in the present case, the existence and area of the Micmac districts, and the applicability of the document of 1779 are not, the Crown contends, ancient facts of a public nature susceptible of proof in accordance with the principles of judicial notice.

There is authority for the proposition that a court may take judicial notice of the facts of history whether past or contemporaneous and that the court is entitled to rely on it's own historical knowledge and researches: see Calder et al. v. A.G.B.C. [1973], 34 D.L.R.(3d) 145 (S.C.C.) and R. v. Polchies et al., previously cited. But there are limits. The general rule or principle of judicial notice was stated by O'Hearn, County Court Judge, in R. v. Bennett [1971], 4 C.C.C.(2d) 55 at p. 66 as follows:

> Courts will take judicial notice of what is considered by reasonable men of that time and place to be indisputable either by resort to common knowledge or to sources of indisputable accuracy easily accessible to men in the situation of members of that court.

In a recent case, also involving an Indian's alleged right to hunt, Mr. Justice Lambert of the British Columbia Court of Appeal examined evidence that was not presented at trial but was careful to note that he took "judicial notice of [only] indisputable, relevant, historical facts by reference to a readily obtainable and authoritative source, in accordance with the ordinary principles of judicial notice": see R. v. Bartleman [1984], 12 D.L.R. (4th) 73 at p. 77 [[1984] 3 C.N.L.R. 114] Mr. Justice Lambert also added this [at p. 117 C.N.L.R.]:

> To the extent that these writings deal with facts, I have relied on them only to draw my attention to facts that I was then able to verify independently by examining the letters and the written component of the treaties, and no further. For the purposes of my own independent verification, I have reached only those conclusions that I regard as being beyond rational dispute.

The practice of taking judicial notice of historical records and historical facts in the context of the Bartleman decision is reviewed in some detail by Professor M.H. Ogilvie of the Department of Law, Carleton University, Ottawa in a case note published in (1986), 64 Can. Bar. Rev. 183.

Although the contentious thesis by Mr. Hoffman is not part of the record on this appeal, I would agree with Meldrum J. that it ought not to have been considered by the Judge of first instance because it was not established to be a source of either indisputable accuracy or authority.

VI. The Document of 1779

The document referred to as a treaty of 1779 appears to be the last in a series of such documents generally described as treaties of peace and friendship entered into between the British and the Indians of the Maritime Provinces. It has been said that the purpose of these early documents was not to extinguish Indian title to lands but to forge political alliances with various tribes and to obtain their allegiance to Britain in the intercolonial warfare against the French. In any event, the 1779 document was signed by Michel Francklin, the King's Superintendent of Indian Affairs in Nova Scotia and by delegates of the Mirimichy (Miramichi), Pogmousche (Pokemouche), Restigousche (Restigouche), Richebouctou (Richibucto), and Iedyac (Shediac) tribes of Mickmack (Micmac) Indians. These delegates purported to sign for themselves and on behalf of all other tribes residing between Cape Tormentine and the Bay DeChaleurs in the Gulf of St. Lawrence. By its terms the Indian signatories promised to behave quietly and peaceably, to defend and protect settlers on the sea coast, to deliver up any person who disturbed the peace, not to assist or associate with any enemy of King George and to "use our best endeavours to prevail with all other our Mickmack Brethern throughout the other parts of the Province, to come into the like measures with us for their several districts"

In consideration of the true performance by the Indians of their promises, the King's Superintendent of Indians promised immediate measures would be taken to cause traders to supply them with ammunition, clothing and other necessary stores in exchange for their furs and other commodities and,

> "that the said Indians and their constituents shall remain in the districts before mentioned quiet and free from any molestation of any of His Majesty' a troops or other his good subjects in their hunting and fishing." (Emphasis added)

The document of 1779 was first considered by this Court in R. v. Francis, [1970] 3 C.C.C. 165. In that case an Indian registered as a member of the Micmac Band and residing on the Big Cove Reservation in Kent County was convicted of the offence of fishing for salmon with a net in the Richibucto River without having a license to do so, contrary to a fishing regulation enacted under the authority of the federal Fisheries Act, R.S.C. 1970, c.F-14. The sole issue before the Court in that case was whether the Indian was immune from the prohibition imposed by the regulation by virtue of three documents referred to in the judgment as treaties, one in 1725, another in 1752 and another in 1779. The judgment of the Court was delivered by Hughes J.A. who said at p. 169:

> I entertain no doubt that the Treaty of 1779 unlike the treaties of 1725 and 1752 was intended to apply to the several tribes of Micmac Indians residing in the Richibucto area but I find it impossible to construe the treaty as conferring, either expressly or impliedly, any right of hunting and fishing. At most there was a promise on the part of the Superintendent of Indian Affairs that in consideration of the performance of the promises of the Indian delegates, the Indians might remain in their districts free from molestation by British troops or other British subjects, in their hunting and fishing, which I think we may assume provided the principal source of food supply and was their way of life. In my opinion the Indian delegates were bargaining for protection against a recurrence of such incidents as are referred to in the recital to the treaty, and were seeking to obtain ammunition, clothing and other commodities rather than irrevocable rights for their people to hunt and fish at will to be enjoyed in perpetuity.

The 1779 document was next discussed by this Court in R. v. Paul (1980), 30 N.B.R. (2d) 545, [1981] 2 C.N.L.R. 83, a decision referred to earlier in these reasons. In that case the accused, a registered Indian, was a descendant of the Miramichi Tribe of Micmac Indians and was a member of the Red Bank Indian Band. He was found by a game warden to be in possession of an undressed beaver skin. The accused was off the reserve at the time and intended to sell the skin to a licensed fur dealer. The beaver had been trapped on the reserve. The accused was charged with unlawful possession of an undressed beaver skin contrary to s.72(2) of the Game Act, the

predecessor to the present Fish and Wildlife Act. In his defence, the accused relied upon s.88 of the Indian Act and the three documents, called treaties, that were made with the Indian people in 1725, 1752, and 1779.

The majority judgment of the Court was delivered by Chief Justice Hughes. In that judgment the Chief Justice appears to have modified his decision in R. v. Francis, holding that it was "not necessary that a treaty must create rights for Indians in order to render inapplicable to Indians laws of general application in the Province". After deciding that there was no evidence to establish that the treaties of 1725 and 1752 applied to Indians from whom the accused was descended, Chief Justice Hughes held that the "Treaty" of 1779 applied to the Micmac Indians at Miramichi, including the tribe of which the accused was a member. After quoting the term of the document that referred to hunting and fishing, the Chief Justice said this at p. 553 [p. 90 C.N.L.R]:

> 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 beat, it could and probably should, in the circumstances, be interpreted as a recognition of a 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 Mickmack 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 restricted to those reserves.

A more recent and binding authority is the decision of the Supreme Court of Canada in the Simon case. In that case a Micmac Indian who was a member of the Shubenacadie Indian Creek Band in Nova Scotia raised the Treaty of 1752 as a defence to charges of illegal possession of a shotgun and a rifle during closed season contrary to the Nova Scotia Lands and Forests Act. The accused was driving on a public road adjacent to the reserve when he was stopped by the R.C.M.P. and the evidence was discovered. He argued that the Treaty of 1752 granted him immunity from prosecution under the Nova Scotia Lands and Forests Act. That Treaty provided that a tribe of eastcoast Micmac Indians would "not be hindered from, but have free liberty of hunting and fishing as usual". The Court held that the Treaty protected Indian hunting rights and that a treaty Indian had the right to possess a gun and ammunition in a safe manner in order to be able to exercise his right to hunt.

In the course of the decision in the Simon case, Chief Justice Dickson, speaking for a unanimous Court, considered several issues that have relevance to the present case and stated the following conclusions:

1) Both the Governor and the Micmacs entered into the Treaty of 1752 with the intention of creating mutually binding obligations which would be solemnly respected.

2) Indian Treaties should be given a fair, large and liberal construction in favour of the Indians.

3) As a registered Indian under the Indian Act and an adult member of the Shubenacadie Indian Brook Band of Micmac Indians living in the same area as the original Micmac Indian tribe that was a party to the treaty of1752, Simon established a sufficient connection to the tribe originally covered by the treaty.

4) The fact that the treaty of 1752 did not create new hunting or fishing rights but merely recognized pre-existing rights does not render s.88 of the Indian Act inapplicable.

5) The effect of s.88 of the Indian Act is to exempt the Indians from provincial legislation which restricts or contravenes the terms of any treaty.

6) The intent of the Nova Scotia Legislature in enacting s.150(1) of the Lands and Forests Act was to promote the preservation of wildlife in the Province by restricting hunting to certain seasons of the year and by requiring permits. Notwithstanding this intent, the imposition of seasonal limitations and licensing requirements for the purpose of wildlife conservation restricted Simon's right to hunt over the lands covered by the Treaty and the clear terms of the Treaty must prevail over the provincial legislation.

It is to be observed that there are differences between the Treaty that was considered in the Simon case and the document of 1779. The latter is not actually labelled a Treaty nor does it have the usual form of a Treaty. It was not signed by the Governor of Nova Scotia not does it bear the great seal of the Province as was the case with the 1752 Treaty that was considered in the Simon judgment. Nor do the Indian signatories to the document purport to bind their "tribe, their heirs and the heirs of their heirs forever" as did the Indian signatories to the 1752 Treaty. It is also to be noted that while Governor Hopson of Nova Scotia in the Treaty of 1752 promised that the Indian signatories "shall not be hindered from but have free liberty of hunting and fishing as usual", the promise of Superintendent Francklin in the 1779 document does not go that far. His promise was only that the Indian signatories "shall remain. ..free from any molestation of any of his Majesty's troops or other his good subjects in their hunting and fishing". This latter promise is, I think, akin to the Governor' a promise not to "hinder" the Indians in their hunting and fishing and appears to lack the commitment contained in the 1752 Treaty that the Indians "shall...have free liberty of hunting and fishing as usual".

Moreover, in a letter dared September 26, 1779 written by Superintendent Francklin to the Lords of Trade in London, Mr. Francklin seems to indicate that the principal concern of the ten member Micmac delegation was the urgent need for supplies and a secondary concern for those of their brothers who had been captured and taken away to Quebec. It has to be acknowledged, however, that he does refer to the document of 1779 as a treaty. The letter reads:

> Some days ago a Deputation of Ten Consequential Indians residing on the Gulph of St. Lawrence came to me from thence, their Principal Message was to require supplys might be sent 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 fare 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 rare 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 Obedient and Most humble Servant
> Mich Francklin

I would also note, parenthetically, that although the document of 1779 purported to promise the Micmac signatories “that immediate measures shall be taken to cause traders to supply them with ammunition, clothing and other necessary stores…”, in the letter to his superiors Mr. Francklin stated only a "hope" that he would be able to prevail upon some of the traders to venture supplies to the Micmac on the Miramichi.

Notwithstanding the differences in the two documents and the additional fact that the “transaction" referred to in Mr. Francklin's letter appears to have contemplated the ultimate approval of the lords of Trade, (and we were not informed whether this approval was ever received), was the document of 1779 a Treaty within the meaning of s.88 of the Indian Act? To answer this question, we must determine the common understanding of the parties to the document at the time it was executed. Was it entered into with the intention of creating mutually binding obligations which would be solemnly respected? And did the promise by Superintendent Francklin that the Indians "shall remain in the districts before mentioned quiet and free from any molestation of any of His Majesty's troops or other His good subjects in their hunting and fishing" constitute “a positive source of protection" against infringements on the hunting and fishing rights of the Micmac Indians for all time?

It is, I think, correct to say that in recent years courts have taken an expansive view of what 'rinds of documents are included within the category of "Treaties with Indians" recognized by s.88. in R. v. White and Bob (1965), 50 D.L.R.(2d) 613 (B.C.C.A.), aff'd (1966), 52 D.L.R.(2d) 481 (S.C.C.),

the exact nature of the document relied upon by the defendants in their answer to a charge under the British Columbia Game Act was not clear. The document was of an informal nature and it was not certain whether Governor Douglas signed it in his capacity as Governor or as the Factor of the Hudsons Bay Company. Nonetheless, the Court held that the document constituted a valid Treaty within the meaning of s.88 of the Indian Act. The criteria to be applied in determining whether a document constituted a Treaty as contemplated by s.88 was stated by Mr. Justice Norris as follows:

> The question is, in my respectful opinion, to be resolved not by the application of rigid rules of construction without regard to the circumstances existing when the document was completed nor by the tests of modern day draftsmanship. In determining what the intention of Parliament was at the time of the enactment of s.87 [now s.88] of the Indian Act, Parliament is to be taken to have had in mind the common understanding of the parties to the document at the time it was executed. In the section "Treaty" is not a word of art and in my respectful opinion, it embraces all such engagements made by persons in authority as may be brought within the term "the word of the white man" the sanctity of which was, at the time of British exploration and settlement, the most important means of obtaining the goodwill and co-operation of the native tribes and ensuring that the colonists would be protected from death and destruction. On such assurance the Indians relied.

In R. v. Taylor and Williams (1981), 62 C.C.C.(2d) 227, [1981] 3 C.N.L.R. 114 (Ont. C.A.), a Treaty with certain Indian tribes did not contain any provision or reservation of hunting and fishing rights although minutes of council meetings which preceded and followed the signing of the provisional agreement which led to the written Treaty recorded a request by the Chiefs that they not be prevented "from the right of fishing, the use of the waters, and hunting where we can find game" The Court held that the minutes of council were as much a part of the Treaty as were the written articles. Associate Chief Justice MacKinnon, writing for a unanimous Court, had this to say about Indian Treaties at pp. 235-236 [p. 123 C.N.L.R.]:

> The principals to be applied to the interpretation of Indian treaties have been much canvassed over the years. In approaching the terms of a treaty quite apart from the other considerations already noted, the honour of the Crown is always involved and no appearance of "sharp dealing" should be sanctioned. Mr. Justice Cartwright emphasized this in his dissenting reasons in R. v. George, [1966] 3 C.C.C. 137 at p. 149, 55 D.L.R. (2d) 386, [1966] S.C.R. 267 at p. 279, where he said:
>
> > We should, I think, endeavour to construe the treaty of 1827 and those Acts of Parliament which bear upon the question before us in such manner that the honour of the Sovereign may be upheld and Parliament not made subject to the reproach of having taken away by unilateral action and without consideration the rights solemnly assured to the Indians and their posterity by treaty.
>
> Further, if there is any ambiguity in the words or phrases used, not only should the words be interpreted as against the framers or drafters of such treaties, but such language should not be interpreted or construed to the prejudice of the Indians if another construction is reasonably possible: R. v. White and Bob (1964), 50 D.L.R.(2d) 613 at p. 652, 52 W.W.R. 193 (B.C.C.A.); affirmed 52 3.L.R. (2d) 481n, [1965] S.C.R. vi (S.C.C.).
>
> Finally, if there is evidence by conduct or otherwise as to how the parties understood the terms of the treaty, then such understanding and practice is of assistance in giving content to the term or terms. As already stated, counsel for both parties to the appeal agreed that recourse could be had to the surrounding circumstances and judicial notice could be taken of the facts of history. In my opinion, that notice extends to how, historically, the parties acted under the extends acted to under treaty after its execution.

In the Simon case, it was argued that some form of land cession is necessary before an agreement can be described as a Treaty under s.88. In answer to that submission, Chief Justice Dickson quoted with approval the previously noted remarks of Norris J.A. in R. v. White and Bob and then said this at p. 381 [p. 174 C.N.L.R.]:

> In my view, Parliament intended to include within the operation of s.88 all agreements concluded by the Crown with the Indians that would otherwise be enforceable treaties, whether land was ceded or not. None of the Maritime treaties of the eighteenth century cedes land. To find that s.88 applies only to land cession treaties would be to limit severely its scope and run contrary to the principle that Indian treaties and statutes relating

> to Indians should be liberally construed and uncertainties resolved in favour of the Indians.

If one were to adopt the expansive view of the kinds of documents that courts have determined are included within the category of "Treaties with Indians", it would probably be correct to say that the document of 1779 would qualify as a Treaty as contemplated by s.88 of the Indian Act. Notwithstanding, I think it is important to note that when considering the Treaty of 1752 in the Simon case the Supreme Court of Canada did not, as counsel suggests, decide that on the basis of the Treaty Simon could hunt with impunity outside the Shubenacadie - Indian Brook Reserve. In point of fact there was no clear evidence as to where Simon intended to hunt. When he was stopped by the R.C.M.P., he was on a public highway outside of the Reserve though adjacent to It. Simon maintained merely that he was going to hunt in the vicinity. In any event, as Chief Justice Dickson pointed out at p. 379 of the report, even though the agreed statement of facts did not disclose whether or where Simon had hunted or was intending to hunt [p. 170 C.N.L.R.]:

> It seems clear that, at a minimum, the treaty [of 1752] recognizes some hunting rights in Nova Scotia on the Shubenacadie Reserve and that any Micmac Indian who enjoys those rights has an incidental right to transport a gun and ammunition to places where he could legally exercise them. (Emphasis added)

In an interesting commentary on the Simon decision published in the Winter (1986) Edition of the New Brunswick Solicitor's Journal, Professor David G. Bell of the Faculty of Law, University of New Brunswick, wrote:

> Ultimately, then, Simon cannot be taken as authority for any proposition broader than that a Shubenacadie Micmac intending to hunt on the Reserve may be in possession of a rifle and ammunition in a vehicle on a road adjacent to his Reserve without thereby violating Nova Scotia game laws.

It is, I think, also important to note that when one examines the provisions of the Fish and Wildlife Act it seems clear that the intent of the New Brunswick Legislature in enacting s.33(1)(a), was to promote the preservation of wildlife in the Province by prohibiting night hunting. It should as well be noted that the alleged treaty rights relied upon by the appellants as a defence in the present case are an exception to the general prohibition against hunting at night and that the burden of proving that they were entitled to the benefit of the exception rested on them: see s.730(2) of the Criminal Code and s.28 of the Summary Convictions Act, R.S.N.B. 1973, c.S-5. Thus, it was necessary that the appellants establish that an enforceable treaty existed which exempted them from prosecution under the Fish and Wildlife Act. This, in my opinion, they have failed to do either by the admissible portion of Chief Sewell's evidence or by any other admissible evidence. Even assuming, but without deciding, that the offences charged against the Augustines occurred in District No. 6, we do not know, by evidence of conduct or otherwise, how the parties understood the terms of the document of 1779 or how, historically, they acted under it following its execution or, indeed, whether they intended to create mutually binding obligations that would be solemnly respected for all time. In the absence of such evidence, it is my opinion that the appellants have failed to meet the onus of proof that was theirs.

In a case as significant and important as this one, I would have thought that relevant and authoritative historical research would have been tendered in evidence at the trial to establish a factual basis for a finding that the appellants' alleged Treaty right to hunt prevailed over provincial legislation. But this was not done and on the basis of the admissible evidence available in the present proceedings, I am unable to conclude that the document of 1779 is a defence to the prosecution of the appellants under s.33(1) of the Fish and Wildlife Act.

VII. The Proclamation of 1763, and Section 25 of the Constitution Act, 1982

The appellants further submit that the Royal Proclamation of 1763 extends to and includes the Micmac Indians of New Brunswick and affords a defence to the present charges. They specifically rely upon that portion of the Proclamation which provides as follows:

> And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Bunting Grounds....

The question whether the Royal Proclamation of 1763 affords a defence to a charge under the Fish and Wildlife Act was considered by this Court in R. v. Polchies et al., previously cited. In that case, several Maliseet Indians were charged with offences under the Act including hunting wildlife with a light and the unlawful possession of a deer. La Forest J.A., writing for a unanimous Court, determined that even if the proclamation applied in this Province, it did not provide a defence to the accused. He wrote at pp. 454-55 [p. 134 C.N.L.R.]:

> Provincial laws of general application apply to Indians as well as to other subjects (see Natural Parents v. Superintendent of Child Welfare, [1976] 2 S.C.R. 751; 6 N.R. 491), and whether this is so by virtue of incorporation by s.88 of the Indian Act or whether such laws apply to Indians of their own force, general provincial game laws like the Fish and Wildlife Act apply to Indians; see Kruger and Manuel v. R. (1977), 34 C.C.C.(2d) 377. 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. The provisions of the Fish and Wildlife Act here in question, therefore, apply to the appellants, whether or not the Proclamation extends to this province.
>
> In my opinion, the foregoing flows from the Supreme Court of Canada decision in Kruger v. Manuel. There the accused, non-treaty Indians resident in British Columbia, were charged with hunting without a permit during the closed season contrary to the Wildlife Act of that province, which provides that "no person shall" hunt out of season without the requisite permit. At the time of the offence, the accused were hunting for food on unoccupied Crown land. Their major defence was that the Wildlife Act was not a law of general application, but this defence was rejected by the Supreme Court. Dickson J., giving the judgment of the court, had this to say at p. 382:
>
> > However abundant the right of Indians to hunt and to fish, there can be no doubt that such right is subject to regulation and curtailment by the appropriate legislative authority. Section 88 of the Indian Act appears to be plain in purpose and effect. In the absence of treaty protection or statutory protection Indians are brought within provincial regulatory legislation.
>
> He elsewhere indicated that this was so whether the Indians might have title to the land by virtue of the Proclamation of 1763 or by aboriginal rights; see pp. 380, 384, 385-6. In particular, he had this to say at p. 384:
>
> > It has been urged in argument that Indians having historic hunting rights which they have not surrendered should not be placed in a more invidious position than those who entered into treaties, the terms of which preserved those rights.
>
> However receptive one may be to such an argument on compassionate grounds, the plain fact is that s.88 of the Indian Act, enacted by the Parliament of Canada, provides that "subject to the terms of any treaty" 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 as stated.

The decision in Kruger and Manuel v. The Queen relied on by La Forest J.A. in the Polchies case was recently discussed by the Supreme Court of Canada in Dick v. The Queen (1985), 22 C.C.C.(3d) 129, [1985] 4 C.N.L.R 55. In the latter case the accused, a non-treaty Indian, was a member of the Alkali Lake Band of the Shuswap people. He was charged with killing a deer out of season contrary to the provisions of the British Columbia Wildlife Act. The killing of the deer occurred in the traditional hunting grounds of the Alkali Lake Band but outside a reserve. At trial evidence was adduced that the deer was killed for food and as to the importance of hunting in the Band's culture. The accused was convicted at trial and his appeals to the County Court and to the British Columbia Court of Appeal were dismissed.

On a further appeal by the accused to the Supreme Court of Canada, his appeal was dismissed, the Court being unanimously of the opinion that the British Columbia Wildlife Act was a law of general application within the meaning of s.88 of the Indian Act and that it had been referentially incorporated into federal law by s.88 of the Indian Act. It therefore seems now to be well established that even if the Royal Proclamation of 1763 extends to New Brunswick, in view of s.88 of the Indian Act and in the absence of established treaty rights, the Fish and Wildlife Act would apply to the appellants.

The appellants also rely on s.25 of the Constitution Act, 1982 as a defence. That section provides:

> 25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including
>
> (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
>
> (b) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement.

Professor Hogg in his text Constitutional Law of Canada (2nd ed.) at p. 567 points out, however, that s.25 "does not create any new rights, or even fortify existing rights. It is simply a saving provision, included to make clear that the Charter is not to be construed as derogating from 'any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada'. In the absence of s.25, it would perhaps have been arguable that rights attaching to groups defined by race were invalidated by s.15 (the equality clause) of the charter." I would respectfully subscribe to this view of s.25 of the Constitution Act, 1982.

In the result, I would agree with Meldrum J. that neither the Proclamation of 1763 nor s.25 of the Constitution Act, 1982 afford the appellants a defence to the present charges.

VIII. Conclusion

For the reasons given, I would dismiss the appeals and confirm the order of Meldrum J. that convictions be entered against the appellants and that both matters be returned to the Provincial Court for the imposition of sentence.