REGINA V. JOSEPH FOWLER

[Indexed as **R. V. Fowler**]

New Brunswick Provincial Court, Clendening J., February 19, 1993

The defendant was charged with possession of a firearm in a wildlife resort, which was situated on unoccupied Crown land, during open season for hunting contrary to s.41 of the *Fish and Wildlife Act,* R.S.N.B. 1973, c.F-14.1. The defendant who was not a registered Indian pursuant to the *Indian Act,* R.S.C. 1985, *c.I-5,* claimed exemption from provincial regulation of hunting rights by virtue of Aboriginal and treaty rights which are afforded protection by s.35 of the *Constitution Act, 1982.* The defendant claimed Maliseet Indian descent from his mother and her people who were signatories to the Treaty of 1725 which preserved pre-existing hunting and fishing rights. The Crown argued that the rights claimed by the defendant could only be accorded to registered Indians. The Crown further argued that only status Indians were entitled to treaty benefits.

Held: Not guilty of the offence charged.

1. The courts should be fair and liberal in interpreting the treaty rights of Indians. The considerable testimony and documentary evidence demonstrated that the defendant is a descendant of the Maliseet people who are covered by treaty which includes the right to hunt.

2. The evidence further demonstrates that non-registration is not to be equated with non-entitlement.

3. A defendant asking for entitlement to benefit from treaty rights must establish a sufficient and substantial connection with a tribe which was signatory to the treaty in question. The defendant established such a connection and is therefore accorded the protection of the *Constitution Act, 1982.*

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CLENDENING J.: The defendant, Joseph Fowler, is not a registered Indian within the meaning of the *Indian Act,* R.S.C. 1985, c. 1-5. On September 19, 1990, Mr. Fowler, Sean McKinney and Phil Fraser were hunting in the Grouse Block area, unoccupied crown land, off the Hanwell Road, and eight miles outside the Fredericton city limits. Both Phil Fraser and Sean McKinney are status Indians registered under the *Indian Act.* Mr. Fowler has never applied for status under the aforementioned legislation.

Mr. Joseph Fowler was charged by the game wardens with having in his possession a firearm in a resort of wildlife during open season for hunting in violation of s.41 of the *Fish and Wildlife Act* of New Brunswick. The defendant further testified he did not purchase a license to hunt during the fall hunting season of 1990.

No charges were laid against Mr. Fowler's two companions. The events above were established at trial and are not in dispute.

The defendant argues he has a defence as an Aboriginal person who by virtue of his birth possesses both Aboriginal and treaty rights to hunt. The defence further argues that those rights have been clarified and preserved by virtue of s.35 of the *Constitution Act, 1982* and that s.41 of the *Fish and Wildlife Act,* R.S.N.B. 1973, c.F-14.1 could not apply in derogation of these rights by virtue of the guarantees afforded by s.35 of the *Constitution Act, 1982.*

The Crown argues that the rights claimed by Mr. Fowler are accorded only to Indians as defined by the *Indian Act* as follows:

> "Indian" means a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian.

They further argue that a particular person is entitled to treaty benefits if he is a status Indian.

The Crown and defence agree that the Treaty of 1725 and as later ratified in 1726, 1749 and 1760 validly confers rights on the Maliseet Indians (St. John River Indians) and that preexisting hunting and fishing rights are preserved.

Since the validity of the treaty documents is not being disputed the only question for this court to answer is the defendant's entitlement to benefit from the protection of these treaties.

It is useful to look at who is afforded protection under s.35 of the *Constitution Act i*t states:

> 35.(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this act, "aboriginal peoples of Canada" include Indian, Inuit and Metis people of Canada.

The defence argues that Mr. Fowler is included in the definition of Aboriginal peoples of Canada under ss.(2) definition. They do not argue that he is an Inuit or a Metis so he must therefore come under the definition of Indian.

It is interesting to note what the Supreme Court of Canada said in the *Re Eskimo* case [1939] S.C.R. 104, [1939] 2 D.L.R. 417 with respect to s.91(24) of the *B.N.A. Act* [now the *Constitution Act, 1867]* and the scope of the term "Indian". This case decided in the affirmative that Eskimos were considered Indians for the purpose of s.91(24) in that the Dominion Parliament had exclusive jurisdiction over Indians (including Eskimos). The Court said at p.429 [D.L.R.]:

> If "Indians" standing alone in its application to British North America denotes the aborigines, then the fact that there were aborigines for whom lands had not been reserved seems to afford no good reason for limiting the scope of the term "Indian" itself.

Should the term Indian be construed narrowly in this particular case or are the courts as far back as the above 1939 decision directing that we not impose an impossible burden as Chief Justice Stratton (as he then was) said in *R.* v. *Augustine* (1986), [1987] 1 C.N.L.R. 20 at 29, 35 D.L.R. (4th) 237, 30 C.C.C. (3d) 542, 74 N.B.R. (2d) 156 at 169, 187 A.P.R. *156* [quoting Dickson C.J. in *R.* v. *Simon,* [1985] 2 S.C.R. 387, [1986] 1 C.N.L.R. 153 at 171- 72, 24 D.L.R. (4th) 390, 23 C.C.C. (3d) 238, 71 N.S.R. (2d) *15,* 171 A.P.R. *15,* 62 N.R. 366]:

> ... to impose an impossible burden of proof would, in effect, render nugatory the right to hunt

Although this statement is not on point with Mr. Fowler's defence, it does indicate that the courts should be fair and liberal in interpreting the treaty rights of Indians.

The defence presented considerable testimony and documentary evidence with respect to Mr. Fowler's ancestry. This defendant makes no claim of Indian descent from his father but does claim Maliseet Indian descent from his mother and her people.

This court heard from the defendant and his mother, Mary Geneva Nash Fowler. Mrs. Fowler testifies she is an Indian and both of her parents were Indian. Her mother, Josephine Atwin, was born on the Oromocto Reserve and lived there until she married Joseph Nash.

Cleadie Barnett, a genealogist, testified as to a family history she investigated for the defendant. Mrs. Barnett could not find all of the documentary evidence with respect to each family member because records were not always kept. Some of the family names of Mrs. Fowler's ancestors were Sabattis, Sacobie and Polchies, all names clearly identified as Maliseet by Professor Ericson, an anthropology professor who has researched extensively Indian culture, particularly Indians of Old Acadia.

Larry Gilbert testified he was acting Registrar of Indian Affairs in 1987 and had previously been Associate Registrar of Indian Affairs. He testified that the instrument to put a person on the Indian Register is a Letter of Authority. He further testified that many people are eligible who have not applied to become registered. He confirmed that Margaret Nash was added to the Indian Register and to the band list of St. Mary's Band. Frank Nash, Mr. Fowler's great grandfather, was Margaret Nash's brother.

The Letter of Authority adding Margaret Nash to the Registrar's list was entered as Exhibit D 34. It further indicates the possible entitlement of others to be registered and confirms that cousins of Mr. Fowler's great grandfather were registered.

This evidence all shows that the defendant's ancestors were members of the St. Mary's Band and Oromocto Band. It further demonstrates that non-registration is not to be equated with non-entitlement.

In this court's opinion Mr. Joseph Fowler has demonstrated a substantial connection to the Maliseet people. He has shown that he is a descendant of the Maliseet Indians; that is, the St. John River Indians. This tribe is covered by the treaties aforementioned. These treaties do contain the right to hunt.

In this court's opinion a defendant asking for entitlement to benefit from these treaty rights must establish a sufficient and substantial connection with a tribe which was a signatory to the treaty before the court. This court finds that Mr. Joseph Fowler has established such a connection to the Maliseet people.

Are Indians accorded status under the *Indian Act* the only Indians entitled to the treaty right to hunt? Courts have concluded that s.35(1) of the *Constitution Act, 1982* affords Aboriginal peoples constitutional protection against legislative powers.

Mr. Fowler, in this court's opinion, is protected under the *Constitution Act* aforesaid. This will not open the flood gates to unrestricted hunting by everyone claiming Indian ancestry because (see *R.* v. *Chevrier,* [1988] 1 C.N.L.R. 128 (Ont. Dist. Ct.)) each claimant will have to prove a substantial connection to a signatory of the treaty in question. As *R.* v. *Chevrier* states, such proof in most cases will be restricted to status Indians. It is just and fair in the circumstances of the case to find that he is an Aboriginal person accorded the protection of the Constitution.

This court finds the defendant, Mr. Joseph Fowler, not guilty of the offence charged.