

## REGINA v. FRANCIS

(1969), 10 D.L.R. (3d) 189 (also reported: [1970] 3 C.C.C. 165, N.B.R. (2d) 14, 9 C.R.N.S. 249)

New Brunswick Supreme Court, Appeal Division, Bridges C.J.N.B., Limerick and Hughes JJ.A., 14 November 1969

(On appeal from judgment of New Brunswick County Court, **reported sub. nom. Francis v. The Queen, supra** p. 320)

**Indians - Treaty rights - Indian fishing without licence - Licence required by legislation - Pre-confederation treaties establishing special rights for Indians - Whether treaties override legislation - Fisheries Act (Can.), s. 34 - Fisheries Regulations (N.B.), s. 17 (2) - Indian Act (Can.), s. 87.**

**Constitutional law - Fisheries legislation - Indian fishing without licence - Licence required by legislation - Pre-confederation treaties establishing special rights for Indians - Whether treaties override legislation - Fisheries Act (Can.), s. 34 - Fisheries Regulations (N.B.), s. 17 (2) - Indian Act (Can.), s. 87.**

Even if it can be established that an Indian has a right to fish at a particular place and that right has been conferred by treaty, such right does not exclude the applicability of federal fisheries legislation to that Indian. Thus where an Indian fishes without a licence as required by federal legislation a conviction resulting therefrom will be upheld.

[*Simon v. The Queen*, 124 C.C.C. 110, 43 M.P.R. 101; *R v. George*, 55 D.L.R. (2d) 386, [1966] 3 C.C.C. 137, [1966] S.C.R. 267, 47 C.R. 382; *Sikyee v. The Queen*, 50 D.L.R. (2d) 80, [1965] 2 C.C.C. 129, [1964] S.C.R. 642, 44 C.R. 266, 49 W.W.R. 306, folld]

APPEAL by the accused from his conviction by Leger, Co.Ct.J., 1 N.B.R. 886, on a charge of fishing for salmon without a licence contrary to s. 34 of the *Fisheries Act*, R.S.C. 1952, c. 119, and s. 17(2) of the Fishery Regulations, P.C. 1965-484 (N.B.).

*R. Dwight Mitton*, Q.C., for defendant, appellant.

*Guy A. Richard*, for the Crown, respondent.

The judgment of the Court was delivered by

HUGHES, J.A.:— The appellant who is an Indian registered as a member of the Micmac band and residing on the Indian reservation on the north bank of the Richibucto River at Big Cove in the County of Kent, was convicted in the County Magistrate's Court for the County of Kent for that he

on or about the 22<sup>nd</sup> day of September, A.D., 1966, did fish for salmon with a net, in the Main Richibucto River, without a license, contrary to and in violation of Section 17(2) of the New Brunswick Fishery Regulations P.C. 1965-484, and amendments thereto, made pursuant to section 34 of the Fisheries Act of Canada Chapter 119 R.S.C. 1952 and amendments thereto.

The appellant appealed against his conviction to the Kent County Court, where, following a trial *de novo*, the learned Judge dismissed the appeal and affirmed the conviction without costs. On the trial *de novo* the taking of oral evidence was dispensed with and counsel agreed that the appeal should be decided upon certain admissions made by the appellant and on the documentary evidence introduced by his counsel to which I shall hereafter refer. The present appeal is provided for by s. 743 of the *Criminal Code*. That section limits the grounds of appeal to those that involve a question of law alone. As the appeal only lies with leave of the Court, I am treating this proceeding as including an application for such leave, and I would grant the same.

The appellant having admitted that he fished for salmon with a net in the Richibucto River on the date charged without having a licence to do so and that his fishing was contrary to s. 17(2) of the New Brunswick Fishery Regulations, P.C. 1965-484, which reads in part:

17(2) No person shall fish for, catch or kill salmon with a net of any kind,...except under a licence.

The sole question which we have to determine on this appeal is whether the appellant enjoys immunity from the prohibition imposed by s. 17(2) of the Regulations by reason of any special rights at the Big Cove Indian Reserve or elsewhere.

The appellant based his claim to immunity on three treaties, all of which were duly proved and received in evidence on the trial *de novo*, and may be identified and referred to as follows:

(a) The submission and agreement of the Delegates of the Eastern Indians, dated at Boston, December 15, 1725 entered into between His Majesty's Government of Massachusetts Bay, New Hampshire and Nova Scotia on the one part and Sauguaarum alias Loron Arexus, Francois Xavier and Meganumbe, of the other part, acting as delegates on behalf of several tribes of Eastern Indians, viz: The Penobscot, Narlogwalk, St. Johns, Cape Sables and other tribes inhabiting within His Majesty's territories of New England and Nova Scotia. I shall hereafter refer to his agreement as the Treaty of 1725;

(b) The treaty or Articles of Peace and Friendship dated November 22, 1752, entered into at Halifax, Nova Scotia, between Peregrine Thomas Hopson, Captain General and Governor in Chief of Nova Scotia of the first part and Major Jean Baptiste Cope chief Sachem of the Tribe of Mick Mack Indians inhabiting the Eastern Coast of the said Province, and others, of the second part. I shall hereafter refer to this treaty as the Treaty of 1752; and

(c) A Treaty or agreement dated September 22, 1779, entered into at Windsor, Nova Scotia, between Michael Francklin, Superintendent of Indian Affairs in the Province of Nova Scotia on the one part and ten Indians representing a number of tribes of Mickmack Indians between Cape Tormentine and the Bay DeChaleurs in the Gulph of St. Lawrence inclusive, of the other part. I shall hereafter refer to this treaty or agreement as the Treaty of 1779.

Both the Treaty of 1725 and the Treaty of 1752, which were alleged as defences by the appellant, were considered by this Court in *Simon v. The Queen* (1958), 124 C.C.C. 110, 43 M.P.R. 101. The Court found neither treaty afforded a defence to the accused who, like the appellant in the present case, was an Indian of the Micmac tribe residing at the Big Cove Indian Reservation in Kent County, had been charged with an offence against the New Brunswick Fishery Regulations. In delivering the judgment of the Court, McNair, C.J.N.B., held that it had not been shown that the Treaty of 1725 applied to the band of Micmacs of which the appellant was a member. With reference to the Treaty of 1752 the Court adopted the view of Patterson, Co.Ct.J., who heard the appeal in *R. v. Syliboy*, [1929] 1 D.L.R. 307, 50 C.C.C. 389, that the treaty was made, not with the Micmac nation or tribe as a whole, but, only with a small group of Micmac Indians inhabiting the eastern part of what is now the Province of Nova Scotia with their habitat in or about the Shubenacadie area.

Counsel for the appellant has caused diligent searches to be made at the archives in several places in Canada and elsewhere for material tending to establish the applicability of these treaties to the present area, but nothing has been placed before us which was not before the Court in the Simon case except the Treaty of 1779. In my opinion the conclusions reached by the Court in that case with reference to the application of the treaties of 1725 and 1752 were fully justified and I can find nothing in the material before us upon which I could reach a different conclusion. In consequence I must hold that these treaties provide no basis, wither legal or moral, for a defence in the present case.

The Treaty of 1779 has not been considered in any previous case and I shall therefore set it out verbatim. It reads as follows:

Whereas in May and July last a number of Indians at the Instigation of the Kings disaffected subjects did Plunder stok 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 Ausgustus Hervey Commander of His Majestys Sloop Niper 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 Majesty's Government of this Province, shall in future Direct, which measure we hope will tend to restore Peace and good 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, Antoinnes, and Guiaume Gabelier Councilors 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 before-mentioned and all others residing between Cape Tormentine and the Bay of DeChaleurs in the Gulph of St. Lawrence inclusive, Solemnly Promise and Engage 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 tem 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 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. Francklin, 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 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 out 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 late, 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	his		
	John Julien X (L.S.)	)	of Mirimichy
	1 <sup>st</sup> Chief		
Allen McDonald Capt.	mark	)	and acting for
84 <sup>th</sup> Regt.	Francis Julien X (L.S.)	)	Pogmosche and
Commanding Fort	2 Do		
Edward	Antoine Arneau X (L.S.)	)	Restigousche
	Captain		
	Thomas Demagonische	)	
	X (L.S.) Councillor	)	
Lauchl McLean )			
Lieut. 84 Regt. )	Augustine Michel X	)	
	(L.S.) 1 <sup>st</sup> Chief	)	
Hector McLean )	Francs. Joseph Arimph X	)	
Adj. Of 84 Regt. )	(L.S.) 2 Do	)	of
J.P	Augustine Cobaise	)	Richebouctou
Joseph Pemette )	X (L.S.) Captain	)	
George Deshamps )	Antoine X (L.S.)	)	
	Councillor	)	
	Guiame Gabelier X	)	
	(L.S.) Do		
	Thomas Tanas X (L.S.)		Son and
A true copy	Representative of the Chief of Iedyiec		
Michl Francklin	Michl Francklin (L.S.)		Superintendant of
Superintendant of	Indian Affairs in the Province		
Indian Affairs in	of Nova Scotia		
Nova Scotia			

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, wither expressly or impliedly, any right of hunting and fishing. At most there was a promise on the part of the Superintendent of Indians 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 Indians 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.

Even if the Treaty of 1779 should be interpreted as an agreement to recognize for all time a right of the Micmac Indians to hunt and fish, there still remains the question whether such right was suspended or abridged by s. 17(1) of the New Brunswick Fishery Regulations, passed under the authority of the *Fisheries Act*, R.S.C. 1952, c. 119. The Regulation embodies a general prohibition against fishing salmon with a net, without a licence, which prohibition is made applicable by s. 3 whereof in respect of the seacoast and inland fisheries of the Province of New Brunswick except as thereafter expressly otherwise limited. No exception affects the present case.

Counsel for the appellant urged that rights acquired under Indian treaties are protected by s. 87 of the *Indian Act*, R.S.C. 1952, c. 149, which reads:

87. 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.

This section was first enacted by the *Indian Act*, 1951 (Can.), c. 29. Its purpose and effect was decided by the Supreme Court of Canada in *R. v. George*, 55 D.L.R. (2d) 386, [1966] 3 C.C.C. 137, [1966] S.C.R. 267. Martland, J., who delivered the judgment for the majority, said at p. 397 D.L.R., p. 150 C.C.C.:

In my opinion, it was not the purpose of s. 87 to make any legislation of the Parliament of Canada subject to the terms of any treaty. I understand the object and intent of that section is to make Indians, who are under the

exclusive legislative jurisdiction of the Parliament of Canada, by virtue of s. 91(24) of the *British North America Act, 1867*, subject to provincial laws of general application.

and at p. 398 D.L.R., p. 151 C.C.C.:

This section (s. 87) was not intended to be a declaration of the paramountcy of treaties over federal legislation. The reference to treaties was incorporated in a section the purpose of which was to make provincial laws applicable to Indians, so as to preclude any interference with rights under treaties resulting from the impact of provincial legislation.

Accordingly, in my opinion, the provisions of s. 87 do not prevent the application to Indians of the provisions of the *Migratory Birds Convention Act*.

The New Brunswick Fishery Regulations were passed, not under authority of provincial legislation but, under s. 34 of the *Fisheries Act*, of Canada a federal statute. It is clear therefore that the Regulations are in no way affected by s. 87 of the *Indian Act*.

There can be no doubt that since the decisions of the Supreme Court of Canada in *Sikyee v. The Queen*, 50 D.L.R. (2d) 80, [1965] 2 C.C.C. 139, [1964] S.C.R. 642, and *R. v. George*, *supra*, legislation of the Parliament of Canada and Regulations made thereunder, properly within s. 91 of the *B.N.A. Act, 1867*, are not qualified or in any way made unenforceable because of the existence of rights acquired by Indians pursuant to treaty. It follows that even if the appellant had established that a right to fish salmon in the Richibucto River had been conferred by an Indian treaty, the benefit of which he was entitled to claim, such right could afford no defence to the charge on which he was convicted.

The appeal must, therefore, be dismissed, but in the circumstances, without costs.

***Appeal dismissed.***