

RE v. SYLIBOY

[1929] 1 D.L.R. 307 (also reported: (1928), 50 C.C.C. 389)

Nova Scotia County Court, Patterson, Acting Co. Ct. J., 10 September 1928

Criminal Law I A--Game and Fisheries--Indians--Cape Breton--Treaty of 1752--Scope and effect.

The Treaty of 1752 made between Governor Hopson and certain of the Mick Mack Indians of Nova Scotia, was not in reality a treaty, not being made between competent contracting parties and did not extend to Cape Breton Indians. The latter therefore acquired no rights to hunt under the treaty contrary to the general game laws of Nova Scotia.

APPEAL by the accused from his conviction by a Magistrate, on a charge of unlawful possession of furs. Affirmed.

D. McLennan, K.C., for Crown.

J. McDonald, K.C., and *C. MacKenzie*, K.C., for accused.

PATTERSON, (ACTING) CO. CT. J.:-- The defendant, who is the grand chief of the Mick Macks of Nova Scotia was convicted under the Lands and Forests Act, 1926 (N.S.), c. 4, of having in his possession at Askilton in the County of Inverness on November 4, last fifteen green pelts, fourteen muskrat and one fox. He made no attempt to deny having the pelts, indeed frankly admits having them, but claims that as an Indian he is not bound by the provisions of the Act, but has by Treaty the right to hunt and trap at all times. Every now and then for a number of years one has heard that our Indians were making these claims but, so far as I know, the matter has never been before a Court.

The Treaty relied upon is that of 1752, made between Governor Hopson of the Province of Nova Scotia and His Majesty's Council on behalf of His Majesty, and "Major Jean Baptiste Cope, chief Sachem of the Tribe of Mick Mack Indians Inhabiting the Eastern Coast of the said Province, and Andrew Hadley Martin, Gabriel Martin & Francis Jeremiah, Members and Delegates of the said Tribe:" (1 Nova Scotia Archives, p. 683). Article 4 in part says:--"It is agreed that the said Tribe of Indians shall not be hindered from but have free liberty to hunt and fish as usual."

Observe the date 1752. Cape Breton between 1748 and 1763 was not part of Nova Scotia. It was owned and governed by the French, while Nova Scotia was a colony of Great Britain. It will be remembered that defendant is a Cape Breton Indian and that the offence alleged against him was committed in Cape Breton. Assuming for the time that the Treaty is still in force in Nova Scotia proper, can defendant claim protection under it? Unless there is something more than I have stated, clearly not. But, say his counsel, the Mick Mack Tribe throughout Nova Scotia, including Cape Breton, is one and indivisible, and the Treaty was made with the tribe, and a very bright and intelligent young Indian testifies that two of the signatories to it were Cape Breton Indians. The language of the Treaty not only lends no support to this contention, but shows that it is untenable, and I am satisfied that the young Indian is mistaken.

"The following Treaty of Peace," reads the minute of Council, "was Signed, Ratified and Exchanged with the Mick Mack Tribe of Indians, Inhabiting the Eastern Parts of this Province:" (1 Archives, pp. 682-3) computed to be ninety in number,--Cope himself claimed authority over only forty. (1 Archives, p. 671). Eight years before there had been three hundred Indians engaged in the attack on Canso (2 Nova Scotia Historical Society Collections, p. 15), all from "the Eastern Parts of this Province" which shows that Cope and the others who joined with him in the Treaty, really represented only a small portion even of these very Indians they claimed to represent. Notice further, how Cope is described as "chief Sachem of the Tribe of Mick Mack Indians Inhabiting the Eastern Coast of the said Province," (*i.e.*, Nova Scotia proper) and his fellow signatories as "Members and Delegates of the said Tribe." Article 3 seems conclusive on the point. There it is provided (p. 683):--"That the said Tribe" (*i.e.* the tribe inhabiting the eastern coast of Nova Scotia) "shall use their utmost endeavours to bring in the other Indians to Renew and Ratify this Peace." In the proclamation bringing the Treaty into force, Cope is described as "Chief Sachem of the Chibenaccadie (Shubenacadie) Tribe of Mick Mack Indians, Inhabiting the Eastern Coast of this Province," and his associates as "Delegates of the said Tribe:" (1 Archives, pp. 685-6).

If the communings leading up to the Treaty (Archives p. 671) be examined it will be seen that Cope calls himself "chief of that part of the Nation that lived in these parts of the province," (that is near Halifax) and had about forty men under him. He accepted the proposals made to him by the Governor in these words:--"I Major Jean Baptiste Cope do accept the conditions of this answer of His Excellency the Governour for myself and my people and I promise to do my utmost Endeavours to bring here the other Tribes of Mickmacks to make a peace:" (Archives, p. 674).

In the face of this evidence there can be no doubt, I think, that the Treaty relied upon was not made with the Mick Mack Tribe as a whole but with a small body of that tribe living in the eastern part of Nova Scotia proper, with headquarters in and about Shubenacadie, and that any benefits under it accrued only to that body and their heirs. The defendant being unable to show any connection, by descent or otherwise, with that body cannot claim any protection from it or any rights under it.

But there is much more than what I might not improperly call internal evidence to show that defendant's contention that the Treaty was a general and not a local one is untenable. Between 1752 and 1763 we find negotiations going on between the Governor and council and various tribes or local bodies of Indians for treaties:--for instance with the Fort Lawrence (Missiquash) Indians in 1753 and again in 1755; with the Cape Sable Indians in 1753; with Indians near Halifax in 1760; with Chibenaccadie Indians (the very Indians of our Treaty) in 1760 (2 Murdoch's History of Nova Scotia, pp. 219, 225, 257, 383 and 384). Between same dates we find treaties entered into with Lehéve (LaHave) Indians in 1753, 1760 and 1761; with the Chibenaccadie and Muscadoboit (Shubenacadie and Musquodoboit) Indians in 1760; with certain Indian chiefs in 1761; with the Missiquash Indians, and with the Pictouck and Malagonich (Pictou and Merigomishe) Indians in the same year, (2 Murdoch's History, pp. 219, 385, 403, 406-7). Why these negotiations--why these treaties if the Treaty of 1752 was general applying to all Nova Scotia?

In none of these treaties, or in the negotiations leading up to them is there any reference to the Treaty of 1752, while there are many to the Treaty of 1725. (1 Archives, pp. 572-3). In- deed the only reference to the Treaty of 1752 that I have been able to find is in that infamous proclamation by Governor Lawrence dated May 14, 1756, wherein he offers a reward of & pound; 30 for the capture of any Indian, or & pound; 25 for any Indian woman. There it is mentioned as a treaty made with a tribe of Mick Macks. (2 Murdoch's History, p. 308). We read too that in 1763 a chief of the Indians in the Island of Cape Breton repeatedly applied to the commanding officer at Louisbourg for provisions, which were refused, whereupon the chief said he would apply to the French and did so, (p. 437).

That the Governor in Council of Nova Scotia knew that these treaties were of a local character is evident. On February 29, 1760, that body resolved "to make peace with each chief who came in, and afterwards to have a general treaty signed at Chignecto:" (p. 385).

Counsel for the defendant suggest another way in which the benefits from the Treaty were or should be extended to their client and all other Cape Breton Indians. By Royal Proclamation after the Treaty of Paris, Cape Breton and St. John's (Prince Edward) Island were annexed to Nova Scotia and three years later the Parliament of Nova Scotia by statute declared that the laws of Nova Scotia extended to the Island of Cape Breton. But the expression, "the Laws of Nova Scotia" had reference only to the general laws of the Province and it would be misusing words to speak of the Treaty of 1752 as a law. At any rate the statute of 1766 (N.S.), c. 1, ceased to have any effect in 1784 when Cape Breton was disjoined from Nova Scotia and created a colony with authority to its Governor to convene the Assembly. Separate Cape Breton and Nova Scotia remained until 1820-21 (N.S.), c. 5. After their union in that year an Act was passed enacting that the administration of justice in the Island of Cape Breton should be conformable to the usage and practice of the Province of Nova Scotia. Nothing is said about general laws or treaties. Presumably no mention of general laws was necessary to make them effective, but surely that cannot be said of treaties.

I have referred to the proclamation after the Treaty of Paris. That is relied upon by the defendant for a reason other than that set out in the preceding paragraph. If that proclamation be examined it will be found that it deals only with those territories or countries, of which Nova Scotia was not one, that had been ceded to Great Britain by France. These territories or countries, exclusive of Cape Breton and St. John's Island which, as we have seen, were annexed to Nova Scotia, were divided into four distinct governments, namely: Quebec, East Florida, West Florida and Grenada. The references in it to the Indians are specifically limited to the Indians of the three

first named governments. One can understand an Indian in Quebec for example making a claim that he was guaranteed certain rights about hunting by the proclamation, but I confess I cannot understand a Cape Breton Indian making any such claim.

I might stop here. If the Treaty did not extend to Cape Breton and the Indians there could make no claim under it or derive any benefits from it, the prosecution must succeed and the conviction of the defendant be confirmed. I think, however, I should express my opinion on the other questions raised for I am in hopes that there will be an appeal from my decision and that upon so important a matter we may have the judgment of an Appeal Court.

Mr. McLennan for the prosecution, whose brief is a joy to read so complete and compact it is, contends that even if the Treaty relied upon by the defendant was made for the whole Mick Mack Tribe and did extend to Cape Breton and included the Indians there, it was almost at once put an end to by the breaking out of war. The ink was not much more than dry on the Treaty when Indians led by a son of Cope (let us hope not that son to whom the complacent Governor had sent a laced hat as a present) were carrying on in the characteristic Indian way a war against Britain. It was the very Indians who were parties to the Treaty that were responsible for the repeated raids upon Dartmouth, (2 Murdoch's History, p. 231), and it is a well-known and established fact that right down until the Treaty of Paris put an end to the war between England and France the Indians were on the side of France and were carrying on war in her behalf. Would that clause in the Treaty guaranteeing them the right to hunt be in consequence put an end to, or would it be merely suspended? Mr. McLennan as I have pointed out argues it would be put an end to, but I am inclined to hold it would only be suspended.

He quotes in support of his contention Woolsey on International Law, 5th ed., p. 272:-- "Great Britain admits of no exception to the rule that treaties, as such, are put an end to by a subsequent war between contracting parties:" but this is not Woolsey's own language,--it is a quotation from Dr. Twiss' Law of Nations in Peace, 1884, pp. 440-1, para. 252, and it is clear that Woolsey himself does not hold that view, that he recognizes certain exceptions to the rule that treaties are abrogated by war between the contracting parties. Woolsey points out (p. 272) for example that war between the U.S. and England would not end but would merely suspend the stipulation in the Treaty of 1818, 1 Malloy's Treaties, p. 631, giving the U.S. liberty "forever to cure and dry fish" in certain places.

The treaty we are discussing was not made with the signatories alone but "with their heirs, and the heirs of their heirs forever," which seems to me to bring that portion of it giving to one of the contracting parties the right to hunt within Woolsey's exception. In other words it is my opinion and if it were necessary I would so hold that assuming the Treaty of 1752 to be a treaty the right referred to was only suspended during the war and would become operative again when peace came. Quite recently some Canadians in the U.S. Courts have invoked and successfully invoked the provisions of the Jay Treaty, 1794, 1 Malloy's Treaties, p. 590, though the war of 1812 has intervened.

A treaty such as that with which we are dealing if made to-day is one that would require to be ratified by Parliament before becoming effective, and would be invalid until such ratification: (6 Hals., pp. 440-1, para. 679). Though there was authority in Cornwallis' commission to summon a parliament for Nova Scotia, we all know that none was summoned for some years after the treaty was signed. It is a fair inference I think that after parliament had been assembled and began to legislate this treaty should have been ratified, or otherwise it would lose its validity. At any rate it was not very long after Parliament assumed its functions that a statute was passed which ignored the Treaty and treated it as non-existent.

In 1794 the first of our many Game Acts was passed, 1794 (N.S.), c. 4. It provided that no person within a certain period each year should kill partridge or black duck but Indians and poor settlers. It might be argued that the exception goes to show that the Indians had a special right by treaty, but if they had such a right why mention it in the statute? It would seem to me that the proper interpretation would be that they having no such right by treaty were given it by statute. However that may be the next statute on the subject makes the point clear.

By s. 1 of R.S.N.S. 1851, c. 92, it was enacted that:--

"No person shall take or kill any partridge . . . between the first of March and the first of September in any year; but Indians and poor settlers may kill them for their own use at any season."

Section 3 of that Act provides that:--"The sessions may make orders respecting the setting of

snare or trap for catching moose," and by s. 5, "may make orders for regulating the periods within which moose may be killed." If the Indians were excepted as to the taking or killing of partridge because they had special right by treaty, why were they not so excepted as to setting snares or killing moose?

Then follows a series of statutes prohibiting everyone, Indians not excepted, from hunting during certain seasons until we come to that under which this prosecution was brought. Where a statute and treaty conflict a British Court must follow the statute, (*Re Carter Medicine Co.'s Trade-Mark*, [1892] 3 Ch. 472; *Walker v. Baird*, [1892] A.C. 491, at pp. 494-5). The result therefore is that even assuming the so called Treaty of 1752 is a treaty; assuming that it was valid as such without ratification by parliament, and that any rights under it could be claimed by the Indians of all Nova Scotia as that Province is now constituted, the prosecution would still succeed, because the statute not the treaty prevails.

At the trial there was no discussion as to whether the so called treaty was really a treaty or not. Counsel for the defendant, whose closely reasoned brief I cannot too highly commend, did not touch this point. Apparently they are content to accept the description in the document itself, "Treaty or Articles of Peace," but the prosecution raised the question and I must deal with it. Two considerations are involved. First, did the Indians of Nova Scotia have status to enter into a treaty? And second, did Governor Hopson have authority to enter into one with them? Both questions must I think be answered in the negative.

(1) "Treaties are unconstrained Acts of independent powers." But the Indians were never regarded as an independent power. A civilized nation first discovering a country of uncivilized people or savages held such country as its own until such time as by treaty it was transferred to some other civilized nation. The savages' rights of sovereignty even of ownership were never recognized. Nova Scotia had passed to Great Britain not by gift or purchase from or even by conquest of the Indians but by treaty with France, which had acquired it by priority of discovery and ancient possession; and the Indians passed with it.

Indeed the very fact that certain Indians sought from the Governor the privilege or right to hunt in Nova Scotia as usual shows that they did not claim to be an independent nation owning or possessing their lands. If they were, why go to another nation asking this privilege or right and giving promise of good behaviour that they might obtain it? In my judgment the Treaty of 1752 is not a treaty at all and is not to be treated as such; it is at best a mere agreement made by the Governor and council with a handful of Indians giving them in return for good behaviour food, presents, and the right to hunt and fish as usual--an agreement that, as we have seen, was very shortly after broken.

(2) Did Governor Hopson have authority to make a treaty? I think not. "Treaties can be made only by the constituted authorities of nations or by persons specially deputed by them for that purpose." Clearly our treaty was not made with the constituted authorities of Great Britain. But was Governor Hopson specially deputed by them? Cornwallis' commission is the manual not only for himself but for his successors and you will search it in vain for any power to sign treaties.

Having called the agreement a treaty, and having perhaps lulled the Indians into believing it to be a treaty with all the sacredness of a treaty attached to it, it may be the Crown should not now be heard to say it is not a treaty. With that I have nothing to do. That is a matter for representations to the proper authorities--representations which if there is nothing else in the way of the Indians could hardly fail to be successful.

On behalf of the defendant one witness testified that all his life he had fished as he would without regard to the Fisheries Law, and defendant himself swears he has started hunting muskrat for the last thirty-four years on Halloween, October 31. Neither of them had ever been interfered with. The suggestion was that they had not been interfered with because they were within their rights in doing what they did by virtue of the treaty. I say nothing about fishing, but as to the hunting it was not until 1927 that the close season was extended to November 15. Until that year whenever there had been a close season on muskrat it had ended on November 1. If defendant did not start his hunting until October 31, the reason he was not proceeded against before seems obvious.

There is abundant evidence also that the Indians have been for many years receiving food, blankets, etc., from the government through the Indian agent because, says the defendant, of this treaty. I cannot agree. Rather I think they received these goods, and other benefits as well, not because of the treaty but by virtue of the successive statutes in that behalf: (1842 (N.S.), c. 16; 1844 (N.S.), c. 56; R.S.N.S. 1851, c. 58; and 1859 (N.S.), c. 14). The good work so began and

carried on when Nova Scotia was a separate Province was taken over by the federal government at Confederation and one is glad to learn is being so generously continued.

On no ground that has been advanced, and I am sure every- thing has been said or done that with any chance of success could have been said or done, can defendant in my opinion succeed. Such sympathy as a Judge is permitted to have is with defendant. I would gladly allow the appeal if I could find any sound reason for doing so, but I cannot and must confirm the conviction. The very capable Magistrate who heard the case below has, I am pleased to see, fixed the penalty at the very lowest figure that the Act allows. Even so I venture to express the hope that the authorities will not enforce the conviction.

I have no doubt whatever that defendant honestly believed that the treaty was valid and that he was entitled under it to kill muskrat or have their pelts in his possession at any time, and as I pointed out, a year ago or rather in 1926 it was no offence on November 4 to have green muskrat pelts in one's possession. While everyone is presumed to know the law and to know the exact limits of the close season, it is more than likely--is it not a certainty--that the untutored mind of the defendant was not aware that in 1927 the close season had been lengthened to November 15? Of course, ignorance of the law excuses no one, but surely ignorance of the law under such circumstances can be urged as a plea for most lenient treatment--for in such a case as this waiving both penalty and costs.

Appeal dismissed.