R. v. NICHOLAS AND BEAR ET AL.

New Brunswick Provincial Court, Desjardin J., June 4, 1984

Four Maliseet Indians from the Tobique Indian Reserve were charged with obstructing a fisheries officer contrary to s.38 of the Fisheries Act, R.S.C. 1970, c.F-14, Two were also charged with unlawfully fishing with the use of a gill net in non-tidal waters contrary to s.7 of the New Brunswick Fishery Regulations. The said nets were adjacent to or secured to the southeast bank of the Tobique River,

The defense agreed that the land on the southeast bank of the Tobique River was never properly surrendered and therefore still a part of the Tobique Indian Reserve; that there was an aboriginal right to fish by any means, at any time, within the bounds of the reserve land; and, that the aboriginal and treaty rights of the defendants to fish at the relevant time and place was recognized and affirmed under s.35 of the Constitution Act, 1982.

Held: Each defendant found guilty as charged. On each charge, each defendant is fined $100 and in default 10 days' imprisonment.

1. The land in question, on the southeast bank of the Tobique River was included in the schedule to An Act to confirm an agreement between Canada and New Brunswick respecting Indian Reserves, S.N.B. 1958, c.4. That legislation cured defective titles. Accordingly, the southeast bank of the Tobique River is validly surrendered lands and does not form part of the Tobique Indian Reserve.

2. Assuming the treaties of 1725 and 1778 applied to the accused, such treaties are subject to federal laws and regulations and, in particular, s.7(1) of the New Brunswick Fishery Regulations.

3. The "hunting grounds" referred to in the Royal Proclamation of 1763 include land reserved for fishing.

4. The Royal Proclamation includes the Maliseet Indians of New Brunswick. The reference therein to colonies and the nations or tribes of Indians include the Province of Nova Scotia which in territory, at that time, took in most of the Province of New Brunswick.

5. Although it can be said that the defendants are aboriginal peoples whose fishing rights ate recognized by virtue of s.25 of the Canadian Charter of Rights and Freedoms, their rights are by virtue of s.1 of the Charter subject to reasonable limits prescribed by law. The Fisheries Act and regulations thereunder are prohibitory and have for effect the purpose of conservation and management of the fisheries.

6. Section 35 of the Constitution Act, 1982 has not changed the aboriginal and treaty rights existing on April 17, 1982, but has recognized and affirmed constitutionally the Indian rights as they stood on that date, so that past (validly enacted) alterations or extinguishments continue to be legally effective.

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DESJARDINS J. : The accused were charged on the information of S.H, Sprague, a federal fishery officer, acting for and on behalf of Her Majesty the Queen as follows:

(a) Dwight Bear of Maliseet, in the County of Victoria and Province of New Brunswick, on or about the 7th day of August A.D. 1982 at or near the Parish of Perth in the County of Victoria and Province of New Brunswick, did wilfully obstruct a fisheries officer in the execution of his duty, contrary to and in violation of section 38 of the Fisheries Act, being chapter F-14 of the Revised Statutes of Canada, 1970, as amended.

(b) Roger Hugh Bear, also of Maliseet, charged with the same offence, under section 38 of the Fisheries Act.

(c) Wayne Nicholas, also of Maliseet and charged with the same offence under section 38 of the Fisheries Act.

(d) Gerald Roland Bear, also of Maliseet, and charged with the same offence under section 38 of the Fisheries Act.

(e) Gerald Roland Bear of Maliseet, in the County of Victoria and Province of New Brunswick, on or about the 7th day of August, 1982, at or near the Parish of Perth, in the County of Victoria and Province of New Brunswick, did unlawfully fish by use of a gill net in non-tidal waters, to wit, the Tobique River, in violation of and contrary to section 7(1) of the New Brunswick Fishery Regulations, Consd. Reg. Can. 1978, c.844, made pursuant to section 34 of the Fisheries Act being chapter F-14 of the Revised Statutes of Canada 1970 as amended,

(f) Wayne Nicholas, also charged with the same offence, contrary to section 7(1) of the New Brunswick Fishery Regulations.

The trial was heard on the 21st day of March 1983 and was then adjourned for presentation of briefs and further for the decision.

By agreement of counsel, Graeme Shaw, for the Attorney General of Canada and Graydon Nicholas for the accused, the evidence was heard in the trial of Dwight Bear, charged under s.38 of the Fisheries Act and the evidence was subsequently read in and applied, mutatis mutandis, as the evidence in all of the other
cases.

By a statement of facts agreed to by both counsel for the Attorney General of Canada and for the defendant it was agreed as follows:

(1) That all the defendants did at the time and place referred to in the informations obstruct a federal fishery officer subject to the special defences raised,

(2) That at the time and place referred to in the informations, the defendants, Gerald Roland Bear and Wayne Nicholas, did fish by use of a gill net in non-tidal waters.

(3) That the fishery officers when obstructed were attempting to arrest the defendants in relation to the use of the said gill nets in non-tidal waters.

At the conclusion of the trial it was proven to my satisfaction that:

(1) All the defendants are Indians, being members of the Maliseet Band, living in the Tobique Indian Reserve, and all being registered as such pursuant to the Indian Act, R.S.C. 1970, c.L-6;

(2) That the said nets were adjacent to or secured to the southeast bank of the Tobique River, which said land is purported to be surrendered by the Maliseet Band in 1892 to Her Majesty; and

(3) That fishing by the use of a gill net in non-tidal waters, to wit, the Tobique River was prohibited at the alleged time and place under tile New Brunswick Fishery Regulations passed pursuant to s.34 of the Fisheries Act, R.S.C. 1970, c.F-14.

The defense called one witness and submitted documentary evidence in support of its contentions that:

> (1) The land on the south east bank of the Tobique River was never properly surrendered and therefore still a part of the Tobique Indian Reserve;
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> (2) That under treaties, and specifically, the Royal Proclamation of 1763, as entrenched in section 25 of the Canadian Charter of Rights, the Maliseet Indians at Tobique Indian Reserve have an aboriginal right to fish by any means, at any time, within the bounds of their Reserve lands; and
>
> (3) That the aboriginal and treaty rights of the defendants to fish at the relevant time and place was recognized and affirmed under section 35, Part 11, of the Constitution Act, 1982.

The documentary evidence presented by the defense is listed as follows, together with some pertinent historical events:

(1) The Submission and Agreement of the Delegates of the Eastern Indians, dated December 15, 1725, known as the Treaty of 1725;

(2) The Royal Proclamation of 1763;

(3) The Conference with the Indians at Menaguashe, dated September 24, 1778, and known as the Peace Treaty of 1778, together with a covering letter dated 17 October 1778;

(4) In 1784 the Province of New Brunswick became a separate and distinct entity from the Province of Nova Scotia;

(5) The Petition and Order-in-Council, setting up the Tobique Indian Reserve in 1801;

(6) The Moses Perley Report of 1841, respecting the Indian settlements;

(7) On August 17, 1892, the Tobique Indian Reserve was redefined by the surrender of all that portion of lands lying east of the confluence of the Tobique and Saint John Rivers.

I will first deal with the defense claim of the improperly surrendered reserve land. Mr. Darrell Paul, who is a Research Director for the Union of New Brunswick Indians, testified that in August 1892, the Maliseet Band at Tobique Reserve had purported to surrender all the lands lying southeast of the Tobique River but that the procedural and legal requirements outlined in s.39 of the Indian Act, R.S.C. 1886, c.43 were never met in that the Governor-in-Council, had not accepted the alleged surrender.

Mr. Paul claims he was informed by people from the office of Native Claims representative from the Federal Department of Justice, that they could not locate such an Order-in-Council and therefore he assumes that there is none.

I adopt the reasoning of Tomlinson Prov.Ct.J., in R. v. Nicholas et al. (1978), 22 N.B.R. (2d) 285; 39 A.P.R. 285, at pp.293-94 [[1979] 1 C.N.L.R. 69, at pp.75-76]:

> While it is not in the power of this court to determine the question of lawful title to lands, the court is bound by the provisions of chapter 4 of the Acts of the Legislature of New Brunswick, 1958, entitled, An Act to confirm an agreement between Canada and New Brunswick respecting Indian Reserves. This schedule of Reserve Lands includes Tobique Indian Reserve. The preamble and pertinent sections express the matter concisely as follows:
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> > Whereas since the enactment of the British North America Act, 1867, certain lands in the Province of New Brunswick set aside for Indians have been surrendered to the Crown by the Indians entitled thereto;
> >
> > And whereas from time to time Letters Patent have been issued under the Great Seal of Canada purporting to convey said lands to various persons;
> >
> > And whereas two decisions of the Judicial Committee of the Privy Council relating to Indian lands in the Province of Ontario and Quebec lead to the conclusion that said lands could only have been lawfully conveyed by authority of New Brunswick with the result that the grantees of said lands hold defective titles and are thereby occasioned hardship and inconvenience;
> >
> > Now this agreement witnesseth that the parties hereto, in order to settle all outstanding problems relating to Indian reserves in the Province of New Brunswick and to enable Canada to deal effectively in future with lands forming part of said reserves, have mutually agreed subject to the approval of the Parliament of Canada and the Legislature of the Province of New Brunswick as follows:
> >
> > (2) All grants of patented land are hereby confirmed, etc.
> >
> > (3) New Brunswick hereby transfers Canada all rights and interest of Province in reserve lands, etc.
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> To my knowledge this legislation has not been challenged, I therefore can only conclude that the fishway being on the east bank of the Tobique River is on validly surrendered lands and does not form part of the present Tobique Indian Reserve.

A similar legislation was enacted by the Parliament of Canada , S.C. 1959, c.47.

I also hasten to add that it is hearsay evidence when Mr. Paul claims he could not find any evidence of an Order-in-Council accepting the surrender. He was in contact with the proper officials of the Government of Canada; surely he could have obtained a duly authorized certificate by an appropriate official stating that no such Order-in-Council exists. I therefore find that this defense argument fails.

I wish to treat some of the documentary evidence; in particular the Treaties of 1725 and 1778. Defense counsel did not present any arguments nor did he lead any evidence pertaining to these documents. Even if the treaties apply to the accused, I am of the view that they are of no effect as such, by reason that the rights therein are invalid if they are found to be in conflict with federal laws and regulations made thereunder. In R. v. George, [1966] S.C.R. 267, Martland J., stated at page 281, in referring to s,88 of the Indian Act:

> This section was not intended to be a declaration of the paramountcy of treaties over a 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.

In R. v. Kruger and Manuel (1977), 15 N.R. 495, 34 C.C.C. (2d) 377, at p.382 C.C.C., Dickson J., said:

> 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 in effect.

I find that the right to fish and hunt as declared in those treaties to be in conflict with and therefore to be subjected to the overriding effect of s.7(1) of the New Brunswick Fishery Regulations made under authority of s.34 of the Fisheries Act. See also R. v. Francis (1970), 2 N.B.R. (2d) 14, 3 C.C.C, (2d) 165 (N.B.C.A.); R. v. Sikyea, [1964] S.C.R. 642.

The defense submits that the defendants are aboriginal people and that their aboriginal or treaty rights to fish are guaranteed under s.25(a) of the Canadian Charter of Rights and Freedoms. Section 25(a) reads as follows:

> 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,

The pertinent passage of the Royal Proclamation is 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 being ceded to or purchased by Us, are reserved to them, or any of them as their *Hunting Grounds*. (Emphasis added)

In R. v. Jacques, 20 N.B.R. (2d) 576, 34 A.P.R. 576 [[1978] C.N.L.R. (no.4) 61], Judge L. Ayles, Prov.Ct.J., reasoned that the word "hunting" was not synonymous to fishing and the Proclamation having made no reference to "fishing", it therefore did not recognize fishing rights.

It is my view that the term "hunting ground", in the Royal Proclamation of 1763 should include a recognition of the right of the Indians to also use the lands reserved unto them for fishing. In this I intend to give a liberal interpretation of the passage, in accordance with Dickson J., in Nowegijick v.

Minister of National Revenue et al. (1983), 46 N.R. 41 [[1983] 2 C.N.L.R. 89], a Supreme Court of Canada decision pronounced 25 January 1983, where he said at p.48 N.R. [pp.93-94 C.N.L.R.]:

> Indians are citizens and, in affairs of life not governed by treaties or the Indian Act, they are subject to all of the responsibilities, including payment of taxes, of other Canadian citizens.
>
> It is legal lore that, to be valid, exemptions to tax laws should be clearly expressed. It seems to me, however, that treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favor of the Indians. (Emphasis added)

In R. v. Paul, 30 N.B.R. (2d) 545, 70 A.P.R. 545, at page 554 [[1981] 2 C.N.L.R. 83, at 90), Chief Justice Hughes of the N.B. Court of Appeal, favoured giving the most liberal interpretation to the Treaty of 1779,

Our courts in New Brunswick have been reluctant to recognize the Royal Proclamation to include the Maliseet Indians of New Brunswick. It is my view that the reference to colonies and the nations or tribes of Indians therein include the Province of Nova Scotia which in territory, at that time, took in most of the Province of New Brunswick.

It is known historically that the Maliseets settled all along the Saint John River and therefore it must be intended that the Proclamation referred to all of the reserves inhabited by them inasmuch as they were part of the same, “Nation or Tribe of Indians.”

In the Moses Perley Report, Mr. Perley described life as it was in 1841 at the Tobique Indian Reserve, and he reports that the Indians were always engaged in fishing for salmon, as was their custom. At pages xcv-xcvi of the report, it states:

> Mr.--proposes to erect a dam at the foot of the Narrows, which will flow back the water for some distance, thus checking the violence of the stream and rendering it navigable with ease and safety at all times. He also offers to construct a lock for the passage of boats, and keep open a fish-way, to allow the thousands of salmon which annually frequent this, their favorite River, to pass up to the usual spawning ground.
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> I brought this matter before the Indians of Tobique, in full Council, and found their sole objection to the establishment of Saw Mills at the Narrows was this – that the Salmon Fishery, on which they now mainly depend for support during the summer season, would thereby, sooner or later, be altogether destroyed. The Indian method of taking the salmon is altogether by the spear and torch, and it struck me that they prized much more highly the dash and excitement of the sport in taking the fish, then the profit arising from the sole [sic] of them. During my stay at the Tobique, the day was spent by the Indians in almost listless idleness; but so soon as night fell, the torch was lit, the spear lifted, the canoe launched, and all became life, bustle and activity. The sport was pursued the whole night, and day light exhibited heaps of glittering salmon on the bank and the Indians languidly creeping off to sleep away another day of total idleness.

and later on in his report, he stated the following on page xcvii:

> The Indians at Tobique subsist in a great measure by the chose, by occasional employment in lumbering, and in piloting rafts down the Tobique and the Saint John. They seem by no means inclined to continue labour, or the cultivation of the soil, yet, from the advantages of

> their situation, and the value of the Salmon Fishery, they have rather comfortable dwellings, and appear in easy circumstances as compared with others of the Tribe.

and at page cviii, Mr. Perley, giving a summary stated:

> The Indian should not be placed in a situation where he could not follow the sports of the field, as he cannot be expected all at once to change the whole habits of his life, and on the instant, give hunting, fishing and fowling, which he has always followed without restriction, and which he is ardently attached. The excitement of the sport is to him fascinating, and the greatest pride of his life is to return his Wigwam successful. To attain this success, he patiently bears cold, hunger and fatigue to an extent which a white man could scarcely endure. He must first be allowed to pursue fishing and fowling during some part of the season, and be gradually induced to give less time to them, and a greater portion to more profitable employment.

It appears from Mr. Perley in his report, that not only was the salmon fishery part of their custom, it seems that the Indians took it as a great sport at which he recognizes the need for restraint and better management. He recommends a reduction in fishing in favour of spending more time and effort to more profitable employment.

During the trial it was not established whether the defendants were fishing for food for their own use, or for the sport, or for commercial gain. It seems from the evidence that the nets were for salmon (see transcript page 22, line 31) and that the fishing involved was for the purpose of netting salmon (transcript page 59 lines 3 to 30).

Although it can therefore be said that the defendants are aboriginals wherein their fishing rights are recognized by virtue of s.25(a) of the Charter of Rights, I find that these rights are subordinated to section one of the Charter and consequently to the regulatory enactments of the New Brunswick Fishery Regulations. The Fisheries Act and the Regulations thereunder are prohibitory and have for effect the purpose of conservation and management of the fisheries. R. v. Jack (1979), 28 N.R. 162 [[1979] 2 C.N.L.R. 25] (S.C.C.). Section 1 of the Charter reads as follows:

> 1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a democratic society.

The need for such regulations, in my mind, is obvious. To permit anyone an unfettered right to fish would be synonymous to granting the right to cause the extinction of any given species of fish, and in this case, I am referring the salmon.

It is also noteworthy that the there provisions in s.6.1 of the New Brunswick Fishery Regulations respecting the issuing of a licence to an Indian to fish for food, subject to terms, the purpose of which are to ensure the proper management and control of these fisheries. There was no evidence of any compliance with this regulation nor with regulations pursuant to s.73(1)(a) of the Indian Act, which provides for the protection of fish on reserves.

For the reasons given in the three consider it necessary for the preceding paragraphs, I do not consider it necessary for the Crown to introduce further evidence that would demonstrate the reasonable limits prescribed by the Fisheries Act and regulations.

I finally come to the last argument raised by the defense which consists of the entrenchment of the fishing rights of the defendants by virtue of s.35 of Constitution Act, 1982.

Section 35 reads as follows:

> 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" includes Indian, Inuit and Metis peoples of Canada.

Prior to the enactment of the Constitution Act, 1982, on 17 April 1982, any treaty rights that came into conflict with federal legislation such as the Fisheries Act and regulations, the federal legislation overruled the treaties. R. v. Francis, supra; R. v. George, supra; R. v. Sikyea, supra; R. v. Kruger and Manuel, supra; and when aboriginal rights came into conflict with federal legislation, the legislation also would overrule aboriginal rights. In R. v. Derricksan (1976), 16 N.R. 231, 31 C.C.C. (2d) 575 (S.C.C.), Laskin C.J.C., said on behalf of the court:

> On the assumption that Mr. Saunders is correct in his submission (which is one which the Crown does not accept) that there is an aboriginal right to fish in the particular area arising out of Indian occupation and that this right has had subsequent reinforcement (and we express no opinion on the correctness of this submission), we are all of the view that the Fisheries Act, R.S.C. 1970, c.F-14, and the regulations thereunder which, so far as relevant here, were validly enacted, have the effect of subjecting the alleged right to the controls imposed by the Act and Regulations.

In the book Canada Act 1982, Annotated, by Peter W. Hogg, published by the Carswell Company Ltd., Toronto, in 1982, Professor Hogg, in dealing with s.35 states at pages 82-83:

> The word “existing” in s.35 makes clear that aboriginal or treaty rights which are acquired in the future are not protected by s.35. Section 35 can only apply to aboriginal or treaty rights which are acquired before April 17, 1982. If we assume that those rights have in the past been vulnerable to legislative alteration or extinguishment, then s.35 could be given one of three effects. The first and most radical, interpretation of s.35 is that the rights are “constitutionalized” retroactively so that all legislation, past as well as future, which purports to alter or extinguish the rights is rendered of no force or effect (s.52(1)), and the rights are restored to their original unimpaired condition. This interpretation of s.35 is not particularly plausible in light of the words “existing” and “recognized” in s.35(1), not to mention the unpredictable and undoubtedly far-reaching ramifications of the interpretation.
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> A second possible interpretation would treat s.35 as recognizing native rights precisely as they existed on April 17, 1982, that is to say, not only subject to all alterations or extinguishments previously enacted, but also subject to continuing vulnerability to future legislative change. The interpretation of s.35 is also implausible because it gives no effect to the word “affirmed”, and it makes s.35 redundant since s.25 already saves all the rights referred to in s.35.
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> A third possible interpretation of s.35 finds the middle ground between the two extreme views stated. The third interpretation is that aboriginal and treaty rights are “constitutionalized” prospectively, so that past (validity enacted) alterations or

> extinguishments continue to be legally effective, but future legislation which purports to make any further alterations or extinguishments is of no force or effect. This interpretation of s.35, would "freeze" native rights in their condition on April 17, 1982, is a plausible one which gives effect to the words "existing" and 'recognized" while still allowing the word "affirmed" to produce a constitutive effect.

It is submitted by defense counsel that the defendants, as Indians are part of the aboriginal peoples of Canada (which I accept) and that their aboriginal rights to fish have finally obtained legislative recognition and affirmation, both of which were absent prior to April 17, 1982. Finally, it is contended that the continued exercise of the aboriginal right to fish has been restored and reasserted by s.35. This contention would have the effect of annulling all legislation, past, present and future, dealing with the fishing right of the aboriginal peoples.

It is my opinion that the third interpretation of Prof. Hogg is the correct one. In find that s.35 of the Constitution act, 1982 has not changed the said rights existing on the 17 April 1982, but has in fact "recognized" and "affirmed" constitutionally the Indian rights as they stood as affected by valid legislation and case law on that particular date (i.e. a "freeze"). This is especially plausible in light of s.37 which proposes a constitutional conference within one year wherein one item o the agenda must be "constitutional matters that directly affect the aboriginal peoples of Canada including the identification and definition of the rights of those peoples to be included in the Constitution of Canada". Any change in those rights would therefore need constitutional amendment.

For all of the above reasons, I find that at the time and place in question, it was unlawful for the defendants to fish contrary to s.7(1) of the New Brunswick Fishery Regulations and that the fisheries officers were in the lawful execution of their duties when they were obstructed by the defendants. I therefore find each of the defendants guilty as charged for the offences contrary to s.38 of the Fisheries Act and impose on each a fine of $100.00. In default of payment within the time allowed, I sentence each to be imprisoned in a provincial jail for a term of 10 days. And I also find the two defendants, Wayne Nicholas and Gerald Roland Bear, guilty as charged for the offences contrary to s.7(1) of the New Brunswick Fishery Regulations and impose on each a fine of $100.00 and in default of payment of the fine within the time allowed, I sentence each to be imprisoned in a provincial jail for the term of 10 days.

I allow until July 31, 1984, to pay the fines.