R. v. PAUL; R. V. POLCHIES

New Brunswick Court of Queen's Bench, Dickson J., March 30, 1988

J.T. Keith McCormick, for the appellant Crown
Graydon Nicholas, for the respondents

An appeal by the Crown of the dismissal of two actions (see [1986] 1 C.N.L.R. 105 (N.B.Prov.Ct.).) The respondents, both Maliseet Indians resident on the St. Mary's Reserve at Fredericton, N.B., were charged separately that he "did unlawfully transport or have in his possession a firearm in a resort of wildlife during the night "contrary to the New Brunswick *Fish and Wildlife Act,* S.N.B. 1980, c.F-14.1, s.42(1)(g). The facts as alleged were established at the *trial* of the respondent Paul. The events occurred off-reserve. The evidence from Paul's case was adopted for the respondent Polchies.

The trial court judge delivered one set of reasons to cover both cases. The actions were dismissed on the grounds that certain treaties as well as the *Royal Proclamation of 1763* afforded a complete defence at least as far as hunting was concerned.

The Crown appealed arguing, (a) that the treaties had been abrogated by the outbreak of hostilities subsequent to the conclusion of the treaties, and, (b) that the Royal Proclamation was not applicable in the Province of New Brunswick.

Held: Appeals dismissed.

1. Once it has been established that a valid treaty has been entered into, the party arguing for its termination bears the burden of proving the circumstances and events justifying termination.

2. It was not established that the Treaties of 1725, 1726, and 1749 were abrogated by the subsequent hostilities. Furthermore, the point was not important since the Treaty of 1760 revived the earlier treaties.

3. It was not established that the Treaty of 1760 had been abrogated by the subsequent hostilities. The acts entered into evidence were relatively insignificant and temporary and were, as is made obvious by a 1778 Conference, obviously forgiven and forgotten.

4. The treaties, together with s.88 of the *Indian Act,* R.S.C. 1970, c.I-6 give the accuseds immunity from prosecution under provincial law for the alleged hunting offences.

5. It was not necessary to consider the applicability of the Royal Proclamation.

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DICKSON J.: This is an appeal by the appellant Crown from an order made by a Provincial Court Judge [see: *R.* v. *Paul and Polchies,* [1986] 1 C.N.L.R. 105] sitting at Fredericton dismissing an information laid against the respondent Paul charging that he did:

> … at or near Crow Hill Road, York County, New Brunswick, unlawfully transport or have in his possession a firearm in a resort of wildlife during the night, contrary to and in violation of Section 42, sub-section (1)(b) of the *Fish and Wildlife Act* [S.N.B. 1980, c.F-14.1] of New Brunswick and amendments thereto.

The Crown also appeals from a similar order dismissing an information laid against the respondent Polchies and charging him with a similar offence. The evidence taken in the case of one accused had been adopted in the case of the other, and, as the cases were similar and involve the same issues, the trial judge delivered one set of reasons covering both cases. For the same reasons, and with consent of counsel, the two appeals have been heard jointly and both are dealt with in these reasons.

At trial it was established that each respondent is a Maliseet Indian and resident on the St. Mary's Indian Reserve at Fredericton, and also that at the time and place alleged each accused was in possession of a firearm in a resort of wildlife during the night. It may be noted that the events

occurred outside the bounds of an Indian reserve.

As a ground of defence it was contended that the accused were lawfully in possession of firearms under the circumstances in which they possessed them by virtue of certain aboriginal and treaty rights, that those rights had been clarified and preserved by ss.25 and 35 of the *Constitution Act, 1982,* and that the provincial statute could have no application to them in derogation of those rights by virtue of s.88 of the *Indian Act,* R.S.C. 1970, c.I-6.

Those sections of the *Constitution Act, 1982* provide (insofar as relevant):

> 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,...
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> 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 the Indian, Inuit and Metis peoples of Canada.

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 bylaw 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 treaties relied upon by the accused were treaties, or agreements in the nature of treaties, entered into respectively in the years 1725, 1726 and 1749, all of which will be more fully alluded to below, as well as the *Royal Proclamation of 1763.* The trial judge found, in effect, that the treaties relied upon were all in fact treaties, that they could not be considered abrogated by any subsequent hostilities involving the Indians concerned, that they as well as the Royal Proclamation confer on the Maliseet Indians of New Brunswick the right to hunt and fish throughout all of what is now New Brunswick and do so without application, at least insofar as hunting is concerned, of provincial laws of general application, including the *Fish and Wildlife Act.* In so finding, he took the view that he was not bound by certain decisions of other courts in New Brunswick, pertaining particularly to the 1725 treaty, on the ground, as he found, that those decisions had been given per incuriam, all relevant authorities and evidence not having been drawn to the court's attention. He found it unnecessary to consider the *Constitution Act, 1982* in reaching his conclusion. In the result the trial judge found that the accused were acting within their treaty rights and were not guilty of the offences charged.

The Crown appeals against such acquittals on the grounds that the trial judge erred in:

> (a) holding that the treaties of 1725, 1726 and 1749 were not abrogated by hostilities on the part of Indian signatories or their descendants subsequent to their having been concluded; and
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> (b) holding that the Royal Proclamation of 1763 applies to Indians resident in what now constitutes the Province of New Brunswick.

In limiting its grounds of appeal as it has done the appellant in effect concedes, at least insofar as these appeals are concerned, that the treaties relied upon were, unless abrogated by subsequent hostilities, treaties which fall within the exclusionary provision of s.88 of the *Indian Act,* that they conferred a right to hunt which covers the activities engaged in by the respondents, and that, subject to the same proviso, the respondents were covered by the treaties and by virtue of s.88 are exempt from prosecution under s.42 of the provincial *Fish and Wildlife Act.* The essential issue involved in the appeals is therefore whether or not the treaties have been abrogated by subsequent hostilities.

I propose to review briefly the treaties concerned and other related documents and also the events relied upon by the Crown - established essentially by documentary evidence - which might suggest that the treaties had been abrogated.

On August 31, 1725 an order-in-council (Exh. D1) made by Lieutenant-Governor Armstrong of that colony of Britain known as the Province of Nova Scotia, which then included essentially what is now comprised within New Brunswick (although the location of the boundary between that province and the adjoining Province of New England was still vague), noted that advice had been received from Lieutenant-Governor Dummer of New England that the Indians "toward these parts" were suing for peace and that, in order that the Nova Scotia government might "reap the advantages thereof', he had appointed Major Paul Mascarene and one Major Newton, both also members of the Council, to act as commissioners there on behalf of the Province. Instructions to them covering their acting "in conjunction with the Government of New England" were approved by the order.

The instructions (Exh. D2), dated the same day, were directed to Mascarene. They recited that Armstrong had been informed by Dummer that a cessation of arms between the latter's government and "the Indians" had been agreed upon and that a "treaty for peace" was in preparation and that the former desired that Nova Scotia should not be excluded from the benefits of the peace. Mascarene was instructed and empowered by the instructions to act as a Commissioner for Nova Scotia and on behalf of the British Crown at the treaty negotiations to be held in Boston. He was further instructed to have regard to the 1713 Treaty of Utrecht entered into by Britain and France and to regulate himself by certain articles agreed upon by the Nova Scotia Council at Annapolis Royal on November 3, 1724, which articles settled the demands to be made of the Indians. He was to seek inclusion in the treaty of an article providing that the Indians should not assist colonial soldiers in desertion and was to assure the Indians that, in return for the observation of that stipulation and compliance generally with the provisions of the treaty agreed upon, they were to be accorded the encouragement and protection of the Nova Scotia government He was also to seek provision that if the treaty were at any time offended and injury should occur through acts committed on one side or the other, the injured person or persons should not seek redress other than by application to the government which would act impartially, and providing that the Indians would at all times submit themselves as good subjects to the government Intermarriage between Indians and other subjects of the Crown was to be encouraged by a monetary grant.

The resultant treaty of peace entitled "The Submission and Agreement of the Delegates of the Eastern Indians" (Exh. D3), was concluded and entered into at Boston on December 15, 1725 between the Province of the Massachusetts Bay and representatives of "the several Tribes of the Eastern Indians, viz. the Penobscot, Norridgewalk, St. Johns, Cape Sables and other Tribes inhabiting within His Majesty's Territories of New England and Nova Scotia, who have been engaged in the present war". It is generally recognized that the SL Johns Tribe comprised Maliseet Indians in the SL John River area. The Cape Sables Tribe was one composed of Micmac Indians located essentially in what is now Nova Scotia.

To synopsize the principal provisions of the treaty, it recited that the several tribes who were parties to it had contrary to earlier treaties continued for some years acts of hostility against the Crown's subjects but were desirous of reconciling their differences with the Government of Massachusetts Bay, New Hampshire, Nova Scotia, the Province of New York and the Colonies of Connecticut and Rhode Island It then provided: that the Indians represented undertook "at all times forever" to desist from acts of hostility toward the Crown's subjects; that the Crown's subjects might enter upon and enjoy "their rights of land and former settlements, properties and possessions within the Eastern Part" of the Province of Massachusetts Bay without molestation or disturbance by the Indians; that the various tribes within the said Province should enjoy "all their lands, liberties and properties not by them conveyed or sold to, or possessed by it of the English subjects as aforesaid. As also the privilege of fishing, hunting, and following as formerly"; that all trade and commerce between "the English and Indians" should fall under the management and regulation of the Government of Massachusetts Bay; that if any controversy or difference should arise "for any real or supposed wrong or injury down on either side", no private revenge should be taken but "proper application shall be made to His Majesty's Government upon the place for remedy or redress thereof in a due course of justice, we submitting ourselves to be ruled and governed by His Majesty's laws and desiring to benefit of the same"; that the Government of the Province of New Hampshire should, with exception of the article in respect of trade, be considered included under the treaty; that the Indians did further undertake with (Lieutenant-Governor Armstrong of the Province of Nova Scotia or Acadie) to live in peace with the Crown's subjects in that province "according to the articles agreed on with Major Paul Mascarene commissioned for that purpose and further to be ratified or mentioned in the said articles"; and that the treaty was to

be ratified and confirmed by the tribes concerned at Falmouth in the May following.

By a further treaty (Exh. D4) concluded at Boston the same day, viz December 15, 1725, and incorporated in Articles of Submission and Agreement signed by the same Indian representatives, who were described as delegates from the Tribes of Penobscot, Norridgewalk, St. Johns, Cape Sables "and other tribes of the Indians inhabiting within His Majesty's territories of Nova Scotia and New England", it was recited that the British Crown had by the concession of France made by the Treaty of Utrecht become "the rightful possessor of the Province of Nova Scotia or Acadie according to its ancient boundaries". By the submission or treaty the Indians acknowledged the British Crown's jurisdiction and dominance of the Province of Nova Scotia and undertook: that they would not molest the Crown's subjects "in their settlements already made or lawfully to be made, or in their carrying on their trade and other affairs within the said Province"; that "if there happens any robbery or outrage committed by any of the Indians, the Tribe or Tribes they belong to shall cause satisfaction and restitution to be made to the parties injured"; that they would not assist deserting soldiers; that "in case of any misunderstanding, quarrel or injury between the English and the Indians, no private revenge should be taken but application shall be made according to His Majesty's Laws"; that any prisoners held by the Indians should be released; and that the treaty would be ratified at Annapolis Royal.

Included with and complementary to this treaty is an edict issued the same day at Boston by Major Mascarene, as a member of the Council of the Government of Nova Scotia and as a commissioner designated and authorized by the Lieutenant-Governor of that Province "for treating with the Indians engaged in the late war", by which he gives to the Indians on behalf of the Lieutenant-Governor and Government of Nova Scotia certain undertakings including that "the Indians shall not be molested in their persons, hunting, fishing and planting grounds, nor in any other their lawful occasions . .. nor in the exercise of their religion, provided the missionaries residing among them have permission from the Governor or Commander in Chief of the ... Province of Nova Scotia for so doing"; and that "if any Indians are injured by any of the Crown's subjects they shall have satisfaction and reparation made" under the law and shall be treated equally in that regard with other subjects; and that the Indians shall be "handsomely awarded" for returning deserting soldiers; and that the Indians in custody at Annapolis Royal excepting for such as the Crown "shall think proper to keep as hostages at the ratification of this Treaty which shall be at Annapolis Royal in presence of the Governor... and the Chiefs of the Indians". This edict, referred to therein as a treaty, was signed by Mascarene and "attested" by Lieutenant-Governor Armstrong, and was further "endorsed" by Armstrong on July 27, 1726. According to notations on both the treaty D4 and the edict, copies of both were enclosed with a letter from Armstrong to His Majesty's British government on the latter date.

In a letter dated August 16, 1726 (Exh. D5), Lieutenant-Colonel Doucett, the Lieutenant-Governor of the garrison at Annapolis Royal, reported to His Majesty's government in Britain that the Indians had attended at Annapolis Royal to "ratify the peace". With the letter was forwarded a copy of the instrument signed by the Indians and also the undertakings delivered to the Indians, which latter had been signed by Doucett on behalf of the government.

The instruments signed respectively by Doucett and by the Indians (Exh. D6) are both dated June 21, 1726 and, according to endorsements on them, copies of both had been included with Armstrong's letter of July 27, 1726. The instrument signed by Doucett recited that Major Mascarene had, in conjunction with the Province of New England, concluded the December 15, 1725 treaty and that the Chiefs of the Tribes had attended and ratified the same. Doucett then, in the absence of Armstrong but on behalf of the Nova Scotia government and in the name of the Crown, entered into articles incorporating undertakings essentially in the form of those contained in Mascarene's earlier edict.

The instrument signed by the various Chiefs and representatives of the Indians confirmed and ratified the 1725 treaty and acknowledged the British Crown's jurisdiction and dominion over the territories of the Province of Nova Scotia. Also included were particular undertakings similar to those contained in D4.

The 1726 treaty was renewed and re-enacted in respect of the Chignecto and St. Johns Tribes at a meeting between the Nova Scotia Council and representatives of those tribes at Halifax on August 14, 1749, as evidenced by minutes of Council covering that meeting and also minutes of a meeting of the Council alone held on the previous day (Exh. D7). The minutes of the first meeting indicate that the representatives of the "St. John's Indians" has been sent by their tribes to "agree upon articles of a lasting peace upon the same footing as the last made in 1726"; that the "said treaty" had been read before the Council, and that it had been agreed to "renew the same"; and

that Council would meet with the Indians the following day for that purpose.

At the joint meeting the following day the Indian representatives acknowledged that they were authorized to renew the 1726 treaty, a copy of which was in their possession. A copy of the treaty was read and translated and the Indians agreed to "renew every article of the Treaty now read".

The Crown at trial entered as evidence various documents which, as was contended, tended to show that hostilities between the Indians and the Crown may have abrogated the treaties. It is perhaps desirable to review these.

The first was a proclamation (Exh. Ch) issued by the same Paul Mascarene on October 13, 1744, he being then the President of the Nova Scotia Council and the Commander-in-Chief for the time being of Nova Scotia and of the Garrison at Annapolis Royal. The proclamation referred to the recent declaration of war by Britain against France and to the fact that many Indian tribes had, contrary to their undertakings to live in peace, "joined the enemies to help in the attack against the fort (Annapolis)". The proclamation was directed to British subjects and prohibited them from helping or assisting the enemy or "generally the Indians residing" in Nova Scotia. By a subsequent order made on December 8, 1744, Mascarene authorized one Capt. Gorham to take a sloop "up the Bay" in company with a New England sloop to "annoy and destroy the Indian enemy who have made war against His Majesty's subjects".

A second exhibit (Exh. C2) is a declaration of war made against the Cape Sables and SL Johns Indians by Governor Shirley of the Province of Massachusetts Bay in New England at Boston on October 19, 1744. The declaration recited that "the Indians inhabiting ... the Province of Nova Scotia, commonly called the Cape Sables Indians" had during the prior winter murdered "divers English subjects" engaged on a fishing vessel and that the Cape Sables and the Indians of the St. Johns Tribe had joined with the French in assaulting the fort at Annapolis Royal and had also killed the master of a sloop who was bringing provisions there. The declaration recognized the continuing friendship of the Penobscot, Norridgewalk and Pigwacket Tribes and of the Passamaquoddy and "all other of the Eastern Indians who inhabited to the westward of St. Johns" and called on them to join "in this war with the Cape Sables and St. Johns Indians and to pursue them as enemies and rebels".

A supplementary proclamation made by Shirley at Boston on November 2, 1744 referred to the "violation of their solemn treaties" by the Cape Sables and St. Johns Tribes, and called upon volunteers to kill and take prisoner Indians of those tribes after October 26, 1744 "and before June 30, 1745 (or for such part of that time as the war shall continue)" at any place to the eastward of a line to be fixed by him as Governor, with a bounty offered in that regard. The line prescribed commenced "at the seashore at three leagues distance from the easternmost part of the mouth of Passamaquoddy River, from thence to run north into the country through the Province of Nova Scotia to the River of St. Lawrence". Insofar as it is relevant, such a line would run northward from the Bay of Fundy and pass Fredericton a short distance to its west.

Minutes of a Council meeting held at Annapolis Royal on August 9, 1745 (Exh. C9) referred to a report that the Indians in the area were at that time making overtures of peace but suggested that the Nova Scotia Council was loathe to act without the concurrence of Governor Shirley of the Province of Massachusetts Bay.

From minutes of a meeting of the Nova Scotia Council held at Halifax on May 14, 1756 (Exh. C-11), it appears that Indians in the Baie Verte area of Chignecto - although of what tribes is not specified - had recently been "doing mischief' at Fort Monckton and had killed a number of persons in that area and elsewhere, which prompted the Council again to establish by proclamation (Exh. C13) a bounty on Indians heads.

A further "Treaty of Peace and Friendship" (Exh. C14) was concluded at Halifax on February 23, 1760 between the Government of Nova Scotia and St. Johns and Passamaquoddy Tribes. This treaty recited in full the "submission and Agreement" made and concluded at Boston in 1725 involving, inter alia, the same two tribes, and the renewal and confirmation of the same at Halifax in 1749 by the same two tribes, and also the document by which the 1749 treaty was ratified by the "Chiefs and Captains of the River St. John and places adjacent" on behalf of their respective different tribes. This latter had been done at the "River St. Johns" on September 4, 1749. The 1760 treaty acknowledged that the earlier treaties had since been violated but that the Indians desired to enter into a treaty for "the renewal and future firm establishment of peace and amity" between the two tribes and the Crown's other subjects and to renew their allegiance to the Crown. The earlier treaties "and every part thereof' were thereby renewed and the Indians engaged "that

the same shall forever hereafter be strictly performed and observed". Other more specific undertakings were also contained which are not here of consequence.

One other document of consequence is in evidence (Exh. C15) and that is a copy of the Proceedings of a Conference held between various Crown representatives, and representatives of the Maliseet Indians of the River St. John and of various tribes of Micmac Indians, viz, the Richibouctou, the Mirimichi, the Chignectou, the Pogmouche and the Minas Basin Tribes.

The meeting was held at the Harbour of the River SL John on September 24, 1778. The Chief Crown representative present, the Superintendent of Indian Affairs, expressed concern that the Maliseets had recently plundered a vessel, ransomed another, had robbed and disarmed a number of the citizens and had killed a number of cattle in the St. John River area, but indicated that he was disposed on behalf of the Crown to settle and adjust amicably all differences between the Indians and the Crown's other subjects. It was indicated that the Indians had been misled by American revolutionary leaders and were prepared to make reparations. The form of an oath was agreed upon, which was duly taken individually by all Indians present. By it they promised to bear allegiance to the Crown and gave other more particular undertakings. One of these provided "I will follow my hunting and fishing in a peaceable and quiet manner".

It was the contention of the Crown at trial, as on appeal, that the promises of Major Mascarene, made in 1725 and further contained in the 1726 treaty ratifying the 1725 treaty, were contingent on the Indians fulfilling their undertakings given in those two treaties, and more particularly that undertaking that they would not molest British subjects; that subsequent hostilities involving the Indians, including the St. John Tribe, in assisting the French attack on the fort at Annapolis Royal and other incidents had in 1744 let to a declaration of war against, inter alia, the St. Johns Tribe by the Governor of Massachusetts Bay, which declaration had been ratified by the Nova Scotia Council; that again following the 1749 treaty renewing the 1725 treaty hostile acts in 1756 by Indians in the Baie Verte area had led to a declaration of war against the Indians by the Nova Scotia Council; that, although peace had again been restored by the Treaty of 1760, the Indians had again been guilty of hostile acts preceding the 1778 conference when they had assisted the American revolutionaries; that such hostile acts could only have been considered to abrogate the earlier treaties, which had recognized hunting and fishing rights; and that the treaty or "arrangement" of 1778 made at Saint John had failed to confer or recognize any native hunting or fishing rights as being vested in the Indians of New Brunswick.

It is apparent from a reading of the reasons delivered by the trial judge and of the transcript of the trial proceedings - and most notably that portion covering the argument of counsel - that the trial judge had addressed himself thoroughly to those contentions. While pointing out that outbreaks of hostilities had undoubtedly suspended temporarily the operation of earlier treaties during the course of such hostilities, he found that the effect of the 1760 treaty was to restore completely the arrangements covered by the 1725 and 1726 treaties. He further found in effect that those hostilities which occurred following 1760, and which precipitated the 1778 conference, were so minor and sporadic in nature, as recognized by the agreements made at the conference, that they could not be construed as having abrogated the earlier treaties.

The question of whether or not treaties may be abrogated by subsequent hostilities was one of those issues dealt with by the Supreme Court of Canada in *Simon* v. *R.,* [1985] 2 S.C.R. 387, 24 D.L.R. (4th) 390, 23 C.C.C. (3d) 238, [1986] 1 C.N.L.R. 153 a decision delivered subsequent to the trial judge's decision in the instance case. That case involved a Micmac Indian resident in Nova Scotia, who had been charged with the offence of possession of a rifle and shotgun cartridges in alleged contravention of the *Lands and Forests Act* of that province. The accused there contended that a right to hunt as set out m a certain Treaty of 1752 concluded between the Micmac and the Crown, in combination with s.88 of the *Indian Act,* offered him immunity from prosecution under the provincial act. It is perhaps noteworthy that the 1752 treaty had renewed the same 1725 treaty made at Boston with which the instant case is concerned. It had also, like the treaty here involved, provided a mechanism for dispute resolution, a circumstance of which the Supreme Court of Canada was to take note.

In the *Simon* case the Nova Scotia Court of Appeal [134 D.L.R. (3d) 76, 65 C.C.C. (2d) 323, [1982] 1 C.N.L.R. 118] had found that the 1752 treaty had been effectively terminated the following year by hostilities which involved a Micmac band killing a number of British subjects. In overruling the Court of Appeal on this point and in directing acquittal of the accused, Dickson C.J., speaking for the Court, stated, at p.404 [p.169 C.N.L.R.]:

> It may be that under certain circumstances a treaty could be terminated by the breach of

> one of its fundamental provisions. It is not necessary to decide this issue in the case at bar since the evidentiary requirements for proving such a termination have not been met. Once it has been established that a valid treaty has been entered into, the party arguing for its termination bears the burden of proving the circumstances and events justifying termination. The inconclusive and conflicting evidence presented by the parties makes it impossible for this Court to say with any certainty what happened on the eastern coast of Nova Scotia 233 years ago. As a result, the Court is unable to resolve this historical question. The Crown has failed to prove that the Treaty of 1752 was terminated by subsequent hostilities.

Having regard to those principles established by the Supreme Court of Canada in *Simon* -which are of course binding on this Court - it is my view that the trial judge made no error in determining that the Crown had failed to establish at trial that the 1725, 1726 and 1749 treaties had been abrogated by subsequent hostilities. One can quite obviously ignore those hostilities which occurred before 1760 because the treaty of that year explicitly renewed the earlier treaties. Insofar as those hostilities which are touched upon in the evidence and which occurred after 1760 are concerned, the views expressed in the *Simon* case, and above quoted, are equally applicable here. The acts of hostility complained of were relatively insignificant and temporary and were quite obviously shortly later forgiven and forgotten as appears by the arrangements made at the 1778 conference. On the basis of the inconclusive and conflicting evidence available it is as equally difficult for this Court to resolve the historical question involved as it was for the Court in the *Simon* case to resolve the similar historical question there in issue. One is led to the conclusion that the Crown has failed to prove that the treaties concerned were terminated by subsequent hostilities.

The fact that the treaties must in the premises still be considered in effect, in combination with s.88 of the *Indian Act,* offers the accused immunity from prosecution for the alleged hunting offences under the provincial statute.

It is unnecessary for me in the circumstances to consider the second ground of appeal, viz, that relating to the applicability of the 1763 Royal Proclamation.

The Crown's appeal is dismissed and the acquittal of the two accused affirmed.