VINOL JOSEPH PAUL (Appellant) v. THE QUEEN (Respondent); DONALD BERNARD MOULTON (Appellant) v. THE QUEEN (Respondent)

[Indexed as: **R. v. Paul**]

New Brunswick Court of Queen's Bench, Trial Division, Dickson J., March 15, 1988

G. Nicholas, for the appellants
R. V. Levesque, for the Crown

The accused, Maliseet Indians resident on the Tobique Indian Reserve, appealed their conviction of unlawfully fishing with the use of a gill net in non-tidal waters contrary to s.7 of the *New Brunswick Fishery Regulations* made pursuant to s.34 of the *Fisheries Act,* R.S.C. 1970, c.F-14. The trial judge rejected the accuseds' arguments that they were legally entitled to fish by virtue of a 1725 treaty and the *Royal Proclamation of 1763* and that such treaty rights took precedence over the *Fisheries Act* and regulations by virtue of s.35 of the *Constitution Act, 1982.*

The accused appealed on the ground that the trial judge erred in his interpretation of s.35(1) and argued that s.35 be interpreted so that the rights recognized and affirmed would be constitutionalized retroactively, i.e. that the rights would be restored to their original unimpaired condition.

Held: Appeals dismissed; convictions affirmed.

1. The interpretation of s.35 put forth by the appellants was rejected. There is no suggestion in the wording of s.35 that it was ever contemplated that the section would restore or revive treaty or aboriginal rights originally granted or enjoyed but since limited.

2. The use of the word "existing" in s.35 connotes that the rights recognized and affirmed are those rights in existence on the enactment of the *Constitution Act, 1982* on April 17, 1982. The rights conferred by the treaty of 1725 and the Royal Proclamation relied upon by the appellants had on April 17, 1982 been limited or restricted by the *Fisheries Act.*

* * * * * *

DICKSON J: This is an appeal by each of the accused from his conviction before a Provincial Court Judge sitting at Perth-Andover on a charge that he:

> ... at or near Tobique Narrows ... did unlawfully fish by use of a gill net in non-tidal waters, to wit, he Tobique River, in violation of and contrary to Section 7(1) of the New Brunswick Fishery Regulations, C.R.C. 1978 c.844, made pursuant to Section 34 of the Fisheries Act of Canada, being Chapter F-14, R.S.C. 1970, as amended.

The two accused were tried separately on separate informations. Because the circumstances relevant to the two appeals are similar, they were, with consent of counsel, argued jointly.

The accused are Maliseet Indians who are members respectively of two bands resident on the Tobique Indian Reservation. At trial it was established, through admissions contained in an agreed statement of facts, that the offence charged had in each case been *prima facie* committed. But the accused contended that they were legally entitled to fish as they were fishing by virtue of certain treaty rights created in favour of Maliseet Indians by a 1725 treaty known as "The Submission and Agreement of the Delegates of the Eastern Indians" and by the *Royal Proclamation of* 1763 and that such treaty rights take precedence over the *Fisheries Act,* R.S.C. 1970, c.F-14 and any regulations made under it by virtue of s.35 of the *Constitution Act, 1982.*

That section provides:

> 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.

In rejecting the contention of the accused in this regard the trial judge adopted the reasoning contained in an earlier judgment he had delivered in *R. v. Nicholas and Bear et al.,* 55 N.B.R. 413, [1985] 4 C.N.L.R. 153 where two of several accused had been similarly charged with an offence under s.7(1) of the *New Brunswick Fishery Regulations* and where the same defence had been raised.

On the appeal the appellants contend that the learned trial judge erred in his interpretation of s.35(1). More particularly they urged that s.35, notwithstanding its reference to *existing* aboriginal and treaty rights, should be given that interpretation suggested as one of three possible alternatives by Professor Hogg in his text *Canada Act 1982 Annotated* (1982), viz, that the rights recognized and affirmed 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 and that the rights are restored to their original unimpaired condition.

I reject that contention, as my brother Godin J. has done in *Martin et al. v. R.* (1986), 65 N.B.R. 21, where the same issue was before him, and as Gerein J. did in the Saskatchewan case of *R. v. Eninew,* 7 C.C.C. (3d) 443, [1984] 2 C.N.L.R. 122. Presence of the word "existing" in s.35(1) can in my view only connote that the rights thereby recognized and affirmed were those existing, or in being or in actuality, at the time of the enactment of the *Constitution Act, viz,* on April 17, 1982. Any rights conferred by the treaty or the Proclamation relied upon had on that date been limited or altered by the *Fisheries Act* which had previously been enacted. There is no suggestion in the wording of s.35(1) that it was ever contemplated that that section should have the effect of restoring or reviving any treaty or aboriginal rights originally granted or enjoyed and since limited.

It may be noted that the interpretation to be placed on s.35(1) was one of the questions framed for consideration by the Supreme Court of Canada in *Simon v. R.,* [1985] 2 S.C.R. 387, [1986] 1 C.N.L.R. 153 but the Court found it unnecessary to consider that question in the determination of the appeal there involved.

The appeals are dismissed and the convictions stand.