R. v. PAUL AND POLCHIES

New Brunswick Provincial Court, Harper J., October 2, 1984

Graydon Nicholas, for the accused
Keith McCormick, for the Crown

The two accused, Maliseet Indians from the St. John's Tribe, were charged with unlawfully transporting or having in possession a firearm in a wildlife resort during the night, contrary to s.42(1)(b) of the Fish and Wildlife Act, S.N.B. 1980, c.F-14.1. The accused argued that by reason of the Treaty of 1726 and other agreements they had a right to hunt and fish and were not subject to the Fish and Wildlife Act.

Held: Accused acquitted.

1. Treaties relating to Indian tights should be given their widest interpretation in favour of the Indians.

2. Many of the early Maritime treaties ending hostilities were suspended and rendered temporarily of no effect during renewed hostilities but were from time to time ratified and renewed. Such was the case with the Treaty of 1726.

3. The New Brunswick Court of Appeal in R. v. Paul, [1981] 2 C.N.L.R. 83 was incorrect in deciding that the Treaty of 1726 did not include the "St. John's Indians" within the ambit of its granting hunting and fishing privileges. The court was per incuriam of the direct involvement of the Maliseets in the signing of the treaty and its ratification.

4. Similarily the courts have considered the Treaty of 1725: R. v Simon (1958), 43 M.P.R. 101, R. v. Francis (1970) 3 C.C.C. 165 and R. v. Paul (1980), 30 N.B.R. (2d) 545, 70 A.P.R. 545, [1981] 2 C.N.L.R. 83, and have concluded that it confers no benefit to Indians of New Brunswick.

5. In R. v. Polchies and Paul; R. v. Paul (1983), 43 N.B.R. (2d) 449 (sub nom. R. v. Polchies et al., [1983) 3 C.N.L.R. 131) the New Brunswick Court of Appeal considered the Treaty of 1778 and concluded it does not guarantee Indians hunting and fishing rights.

6. Similarly in Simon v. R., [1982] 1 C.N.L.R. 118 the Nova Scotia Supreme Court, Appeal Division considered the Treaty of 1752 and concluded it was not legally a treaty and if it was it did not guarantee Indian hunting tights. (Editor' s Note: The Supreme Court of Canada held on appeal (judgment reported infra at p.153) that the Treaty of 1752 continues to be in force and effect. Section 88 of the Indian Act therefore operates to exempt Indians from legislation restricting or contravening a term of the treaty.)

7. The court is not bound by the prior decisions in the Simon, Francis and Paul cases (supra) as those decisions were made without the benefit of many documents which have recently been discovered. A decision made without the benefit of relevant authorities is not a binding precedent.

8. The Treaties of 1726 and 1749 are treaties which have never been abrogated and guarantee Indians in New Brunswick the right to hunt and fish.

9. By virtue of s.88 of the Indian Act, R.S.C. 1970, C.I-6 the Fish and Wildlife Act is not applicable to those Indians who have the benefit of the Treaties of 1726 and 1749.

*** * * * * ***

HARPER J.: The above-named defendants were tried before this court on separate informations, but since both the offence alleged and the facts and circumstances which occurred in both instances are identical I have elected to consolidate both cases for the purpose of rendering judgment.

Both defendants were at all times represented by Graydon Nicholas with Keith McCormick acting throughout for the Crown.

The relevant portions of each information allege respective defendant:

> ... did on or about the 19th day of November, A.D. 1983, at or near the 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.

There is no dispute as to the facts and without difficulty this court finds that both defendants on the date in question were respectively in possession of firearms in a resort of wildlife during the night. All events occurred in the Province of New Brunswick. The late Honourable John R. McNair, then Chief Justice of the Province of New Brunswick made the declaration that all of this province is a "resort of game" and this finding has been accepted as the law in this province. See R. v. Jorden, [1964] 2 C.C.C. 243 (N.B.C.A.).

This court finds as a fact that both defendants are Maliseet Indians ordinarily residing in the reserve situated at Kingsclear, New Brunswick. The events in question did not occur within the boundaries of an Indian reserve. Were they not of Indian blood this court would find them both guilty.

Both defendants claim special status arising out of the fact that they are of Indian blood and of the Maliseet tribe and therefore both have aboriginal and treaty rights which have been clarified and preserved by ss. 25 and 35 of the Constitution Act, 1982.

It is trite law to state that prior to the passage of the Constitution Act, 1982 no practical, enforceable rights were accorded our aboriginal peoples of Indian origin except insofar as some might be found in s.88 of the Indian Act, R.S.C. 1970, c.I-6 and/or any treaty applicable to the benefit of any particular band or tribe.

The Supreme Court of Canada in the case of R. v. Kruger and Manuel, [1978] 1 S.C.R. 104, 15 N.R. 495, 34 C.C.C. (2d) 377, clearly enunciates the foregoing principle. In that case Dickson, J. (as he then was) stated for the court on p.382 C.C.C. as follows:

> However abundant the right of Indians-to hunt and 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 effect. In the absence of treaty protection or statutory protection Indians are brought within Provincial Regulatory Legislation.

and on p.384 C.C.C.:

> …the terms of the treaty are paramount; in the absence of a treaty provincial laws of general application apply. (Emphasis added)

In so far as New Brunswick is concerned its aboriginal peoples have never been accorded any special rights of hunting or fishing by Statute, and to the knowledge of this court have to this date succeeded but once in the establishment of special rights accorded by treaty,

This was the case of R. v. Paul (1980), 30 N.B.R. (2d) 545, 70 A.P.R. 545, 54 C.C.C. (2d) 506 [(1981) 2 C.N.L.R. 83], in which the New Brunswick Court of Appeal found that the defendant Paul, who was found in possession of undressed skins of beaver while not being specially authorized so to be under s.2 of the Game Act, R.S.N.B. 1973, c.G-1, was not guilty of the offence charged because of the terms of a certain treaty which accorded him special status. The court so found, even though the possession was not within the bounds of his reserve. The above-cited judgment was delivered in 1980, and since that date the New Brunswick Court of Appeal has not recognized any other treaty rights operating to the benefit of New Brunswick Indians with respect to hunting and fishing rights.

The defendants in the instant case rest their case upon the dual grounds of treaty rights and as well upon ss.25 and 35 of the Constitution Act.

This court will first consider the question as to whether or not there are in existence any treaty rights which may operate to the benefit of the defendants and which are preserved by s.88 of the Indian Act. In other words the court will consider the matter in the context of the law of Canada as it existed immediately prior to the passage of the Constitution Act.

In considering this aspect of the defence the court must first address the concept of that which constitutes a treaty made in Canada between the white man and the Indians.

Having in mind the vastly different degrees of education and sophistication existing between the parties at the time any agreements were reached which might be considered "treaties" this court without hesitation adopts the approach of the British Columbia Court of Appeal in the leading case of R. v. White an Bob, 50 D.L.R. (2d) 613. This judgment was upheld by the Supreme Court of Canada see 52 D.C.R. (2d) 481.

In that case the court was concerned with the meaning of the word "treaty" in the context of section 88 of the Indian Act.

Davey J.A., of the B.C. Court of Appeal stated on page 617 of the court's judgment as follows:

> In considering whether ex. 8, is a Treaty within the meaning of Section 87 [now s.88], regard ought to be paid to the history of our country; its original occupation and settlement.

In the same judgment Norris J.A., stated on p.657 as follows:-

> I have no doubt that in enacting s.87 [now s.88] of the Indian Act, Parliament recognized the fact that Indian Treaties would have been completed in degrees of formality varying the circumstances of each one -- some with Government Representatives, some with military commanders and others with frontier representatives of the great trading companies.

Norris J.A., further states on pp.651-52 of the same said case:

> … in my opinion the word treaty as used in the Section [s.87 now 9.88] should, for the reasons already stated herein, be given its widest meaning in favour of the Indians. (Emphasis added)

In the American case of Worchester v. Georgia (1832), 8 L.Ed. 512, at p.579, Mr. Justice Marshall stated as follows:

> How the words of the treaty were understood by this unlettered people rather than their critical meaning, should form the rule of construction. (Emphasis added)

It is the opinion of this court the said Mr. Justice Marshall in the Worchester case (supra) has hit upon the pith and substance of the rule of construction applicable to all formal agreements between Indians and the whites either as the rule is, or in the alternative, as it should be.

A further case in support of the premise that treaties relating to Indian rights should be given their widest interpretation in favour of the Indians is the recent decision of R. v. Taylor and Williams (1982), 62 C.C.C. (2d) 227 [[1981] 3 C.N.C.R. 116.]. In that case, MacKinnon A.C.J.O., stated as follows on pp.235-36 [p.123 C.N.L.R.]:

> In approaching the terms of a treaty ⋯ the honour of the Crown is always involved and no appearance of “sharp dealing” should be sanctioned.

The defendants rely on the rights they claim which arise under the Treaty of 1726 (so-called). There is little doubt that there were a great many treaties entered into between the Indian and the white man within the territorial boundaries of that which ate now the Maritime Provinces. Unfortunately, many lie buried in the antiquity and will probably never be found.

It is also of note that many of the earliest treaties ending hostilities were suspended and rendered temporarily of no effect during subsequent outbreaks of hostilities and were, from time to time, ratified and renewed.

Such is the case with reference to the Treaty of 1726 upon which the defendants rely.

On December 15, 1725, a treaty was signed at Boston between the Governor of Massachusetts and various Indian tribes (including the Maliseets of the River Saint John) See Ex. D-3. Major Paul Mascarene attended the meetings at Boston with full power to enter into the proceedings on behalf of the Province of Nova Scotia (See Ex. D-1). His authority was to teach agreement with the Indians in the Province "to its outmost extent and boundaries" (p.53-D-1).

This treaty has been judicially scrutinized by the New Brunswick court of Appeal which found that it did not include the "St. John's Indians" within the ambit of its granting of hunting and fishing privileges. See R. v. Paul (1980), 30 N.B.R. (2d) 545, 70 A.P.R. 545, at pp.545 and 552, [1981] 2 C.N.L.R. 83. With all due respect, it is respectfully suggested that that case was incorrectly

decided in that the court was "per incuriam" of the direct involvement of the Maliseets at Boston on December 15, 1725 (see Ex. D-6) or the ratification of the Boston agreement at Annapolis Royal on June 4, 1726. See Ex. D-4, pp.203 and 208; and Ex. D-6 pp.38, 39 and 43.

Again in August 14, 1749, the Treaty of 1725 was re-affirmed by Lord Cornwallis for the Crown and the "St. John's Indians". See Ex. D-7.

Looking to the Crown's Exhibits, the court has considered Ex. C-14 which purports to be a treaty affecting the St. Johns and Passamaquody Indians concluded and signed at Halifax, February 23, 1760. For convenience this court has numbered the pages thereof from 1 to 25 inclusive. This document refers to the Boston Treaty of 1725 (supra); its renewal and confirmation at Halifax in 1749; its subsequent violations thereof (see p.16); and the Indians' agreement to renew and confirm the original treaty (the essential parts of which are set out verbatim in pages 1-16 inclusive) of said Ex. C-14.

On page 19 of Ex. D-6 (supra) the Indians agree as follows:

> [We] ... do accordingly in the name and behalf of the said tribes of Passamaquody and St. Johns hereby renew and confirm the aforesaid Articles of submission and agreements, and every part thereof and do solemnly promise and engage that the same shall for ever hereafter be strictly observed and performed (Emphasis added)

It is obvious from perusal of these exhibits, one by one chronologically, that despite the fact that there were sporadic periods of open warfare between the whites and the Indians during the years from 1725 to the year 1760, neither side believed the Treaty of 1725 to be irrevocably destroyed or abrogated.

The evidence in fact is very much to the contrary as that original treaty (or "Articles of Submission and Agreement" if you will) is not only referred to in each subsequent agreement of peace, but is quoted from in extenso in every succeeding document evidencing a state of peace.

It is of great note that the Maliseets not only were aware of its contents but had at one time an actual copy of it.

In perusing Exhibit D-7 (page 14) the following interrogation of the Indians by Lord Cornwallis appears:

> Governor - Do you remember the Treaty made with your Indians in 1726.
> Indians - Yes--some of us were present when it was made.
> Governor - Will you have it read to you.
> Indians - We have a copy of it ourselves and we have come to renew it.
> Governor - Have you instructions from your Tribes to renew the same Treaty ---
> Indians - Yes.
> (Emphasis added)

As previously noted in this judgment Ex. D-7 was dated August 14, 1749, some several years after the original treaty was concluded, and despite that fact the Governor saw fit to have the entire original treaty read in French and interpreted into Maliseet by "Martin the Indian". See Ex. D-7, p.14.

Although it was not submitted as an exhibit by either side in the present case, the court has received a copy of a treaty dated even later in time to the said Treaty of 1749. This Treaty was attached as appendix "E" to the Factum of the Attorney General of New Brunswick filed as intervenant for consideration by the Supreme Court of Canada. The case in question is entitled "James Matthew Simon, Appellant and Her Majesty the Queen, Respondent" and has not as yet been argued before the Supreme Court (appealed from N.S.S.C., App.Div, [1982] C.N.L.R. 118; appeal heard October 23-24, 1984; appeal allowed, judgment reported infra at p.153].

This court is convinced that the manner in which the original Treaty of 1725 (as renewed and affirmed at Annapolis Royal in 1726) and re-affirmed and ratified on several occasions in later years, is almost conclusive proof of the intent of the parties to the original treaty that it would never become abrogated or a nullity but would be forever in force.

This latest (Nova Scotia) treaty mentioned above is noted not with specific reference to the tights of the Maliseet defendants in the instant case, but to support the court's view that the Treaty of 1725 was considered almost as a sacred thing by the parties to it. Despite the many wars, hostilities,

raids, killings, and treacheries on the part of both the Indian and the white man, each time when peace was restored the parties again re-affirmed the Treaty of 1725.

True, it is, that the treaty mentioned in said Factum in the James Simon case (supra) is made between the King and a certain tribe of Micmac Indians in Nova Scotia; but some of the terms thereof are indicative of the position this court takes in regard to the vital importance attached originally (and at all times thereafter) by the parties to the Treaty of 1725, and their constant practice of renewing it and re-affirming it and "re-ratifying" it each time hostilities ceased.

The original treaty considered in said James Simon case (supra) was contained as an enclosure in a letter from Governor Hopson to the Earl of Halderness and was concluded December 6, 1752 at Halifax. It reads in part as follows:

> It is agreed that the articles of Submission and Agreements made at Boston in New England by the Delegates of the Penobscot, Norridwalk and St. John's Indians in the year 1725 Ratified and Confirmed by all the Nova Scotia Tribes at Annapolis Royal in the month of June 1726 and lately renewed with Governor Cornwallis at Halifax and Ratified at St. John's River now read over explained and Interpreted shall be and are hereby from this time forward renewed, reiterated and forever Confirmed by them and their tribes .... (Emphasis added)

Thus it was that as late as the year 1752 in Nova Scotia the Micmac Indians re-affirmed and ratified the Treaty of 1752 and as previously stated the Maliseets of the River St. John who are directly concerned with this case also did the same at Saint John in 1760 (see Ex. C-14 supra).

No documents were produced to the court dated later in time than said Ex. C-14 but Ex. C-15, also produced by the Crown, refers to the rights of the Indians to hunt and to fish under a separate and distinct treaty.

This document was executed in the harbour of the River St. John near Fort Howe on September 24, 1778. This treaty (for such it certainly was in the broad sense of the term at least) was made between the Maliseets of the St. Johns River and His Majesty King George the Third as represented by Michael Franklin, Superintendent of Indian Affairs. It was necessitated by a certain declaration of war delivered by the Maliseets to Saint John, New Brunswick at the instigation of one John Allen of Machias, Maine. The declaration necessitating the treaty reads in part as follows:

> You know we are Americans, that this is our Native Country. You know the King of England with his Evil Councillors has been trying to take away the Lands and Libertys of our Country, but God, the King of Heaven, Our King fights for us and says America shall be free, it is so now in spight [sic] of all Old England and his comrads can do.
>
> The great men of Old England in this country told us, that the Americans would not let us Enjoy out religion, this is false, not true, for America allows everybody to pray to God as they please, You know Old England never would allow that ….

As a result of this declaration the Said Michael Franklin brought a priest, one Father Bourg with him to Saint John to negotiate articles of peace to end the war and to protect the lives and property of the Loyalists who had recently settled along the banks of the River St. John. It is of note that there were no fatalities occasioned the whites during the short term of hostilities which occurred following said declaration.

The treaty required the Maliseets to take an oath of allegiance to His Majesty; guaranteed them freedom to practice their religion; provided for reparation by the Indians for damages occasioned the settlers in consequence of the war, and further contained the following paragraph:

> I do promise that I will not take part directly, or indirectly against the King, in the troubles now subsisting between Great Britain and His Majesty's Subjects of America, but that I will follow my hunting and Fishing in a peaceable and quiet manner. (Emphasis added)

True it is that this particular treaty was judicially interpreted by the New Brunswick Court of Appeal decision in R. v. Polchies and Paul; R. v. Paul and Paul (1983), 43 N.B.R . (2d) 449, [sub nom. R. v. Polchies et al., [1983] 3 C.N.L.R. 131].

The judgment of the Coram was delivered by LaForest J.A. and he states after quoting the same paragraph from said Treaty of 1778 on p. 453 [p.133-34 C.N.L.R.] as follows:

> I need not consider whether this document I need our the teal question is constitutes a treaty … whether the clause I have just quoted is capable of being construed as securing a right to hunt that overrides provincial game laws under s.88 of the Indian Act.
>
> I cannot so construe it. The clause simply records a promise by the Indians not to join the Americans in the war against the British but to carry on their hunting and fishing in peaceful manner. I agree that Indian treaties should be liberally construed (See R. v. Paul (1980), 54 C.C.C. (2d) 506, per Hughes C.J., at p.513) [sub nom. Paul v. R. (1981] 2 C.N.L.R. 83], but under no reasonable construction can one convert a promise made on behalf of the Indians to one made on behalf of the Crown. (Emphasis added)

This above cited example of "liberal construction" by the New Brunswick Court of Appeal is, it is respectfully suggested, in direct contrast with the approach of the Ontario Court of Appeal in the case of R. v. Taylor and Williams (1982), 62 C.C.C. (2d) 227 ([1981] 3 C.N.L.R. 114].

In chat case the judgment of the court was delivered by MacKinnon A.C.J.O. The pertinent principles that court found to be applicable are succinctly stated in the headnote of the case on p.228 which reads in part as follows:

> The minutes of the Council meeting, which preceeded and followed the signing of the provincial agreement which led to the written treaty, recorded the oral portion of that treaty and were as much a part of it as were the written articles ....
>
> While there was no reservation in the written 'treaty of hunting and fishing rights, it was clear that the Indians were expected to remain on the land, and it is difficult to imagine how they were to survive if their ancient right to hunt and fish for food was not continued. (Emphasis added)

With all humility the above quoted phrase echoes a similar conclusion reached by this court in the trial judgment of R. v. Polchies (supra) reported in (1982), 37 N.B.R. (2d) 546, 97 A.P.R. 546 [(1982] 4 C.N.L.R. 132] where the court states as follows on p.554 [p.136 C.N.L.R.]:

> Over the centuries the practice of the Maliseets of hunting and fishing was not only in accordance with their way of life, but was the very foundation of life itself upon which they depended to provide the food necessary to sustain their families and themselves.

and further on p.586 (p.163 C.N.L.R.]:

> It can hardly be fairly inferred that the British in requiring the Indians to follow their hunting and fishing in a peaceable and quite manner did nor: also conclude that the transaction occasioned a guarantee by the British that the Indians could continue to have the tight to hunt and fish in the future they had in the past. No other interpretation meets the demands of common sense.

True it is that the New Brunswick Court of Appeal did not have the advantage of considering the reasoning in the Ontario Court of Appeal decision in R. v. Taylor and Williams (supra). Be that as it may, the judgment of La Forest J.A., stands as law and is binding on this court. For any trial court to take any other attitude would result in chaos. It follows then, that the defendants can derive no benefit from Ex. C-14, the Treaty of 1778.

By the same token, it might be concluded that the several decisions of the New Brunswick Court of Appeal with reference to the Treaty of 1725 have also established for all times that no benefit accrues to the Indian peoples of this province as a result of that document.

There is no doubt that the N,, Brunswick Court of Appeal has considered that Treaty in at least three separate judgments:

(1) R. v. Simon (1958), 43 M.P.R. 101;
(2) It was re-stated by Hughes J.A. (as he then was), in R. v. Francis, [1970] 3 C.C.C. 165; and
(3) Again, by Hughes C.J.N.B., in R. v. Paul (1980), 30 N.B.R. (2d) 545, 70 A.P.R. 545 [sub nom. Paul v. R., [1981] 2 C.N.L.R. 83].

This court is sufficiently concerned about the present status of the law with reference to that particular treaty that it feels bound to re-stare one paragraph of its judgment in R. v. Polchies (supra) which appears on p.570 [p.150 C.N.L.R.]:

> Despite the fact that this court is bound by the decisions in Simon, Francis, and Paul (supra) I suggest with all due deference to the learned justices who decided those cases that they ... are wrongly decided.

Much history has come to light since the above-mentioned cases were decided by our Court of Appeal and many documents have since been found of which the courts were per incuriam at the time those decisions were rendered.

Documents of paramount significance are included as defendants' exhibits in the instant case. To the knowledge of this court most, if not all of them, have not been judicially considered prior to this time.

Exhibit D-1 constitutes the minutes of a meeting of Council held at the home of the Lt. Governor of Nova Scotia on August 31, 1725. The minutes recite the facts that the Indians of New England were suing for peace and that the Nova Scotia government might reap the advantages thereof. It was recorded that one Major Paul Mascarene and one Hibbert Newton had been given authority and instructions from the Governor of Nova Scotia to proceed to Boston to act as commissioners for Nova Scotia at the forthcoming meeting. They were given power to act on behalf of the province. Ex. D-2 outlines the instructions.

The instructions read in part on p.51 et seq. thereof as follows:

> … in order that this Province may not be excluded from the Benefits of an Honourable, Secure and lasting Peace ... you [should] be present at all assemblies and meetings of their Council, or of their commissioners appointed for the Negotiations of the Peace with the Indians ... in ascertaining and maintaining His Majesty's Crown and Dignity, His Right and Just Title to, and authority in and over this Province of Nova Scotia to its outmost extent and boundaries - That the Savages Through Evasions, may have no pretences to any part thereof, in order to Disturb our future Peace, farther than what was agreed upon in their behalf at the Treaty of Utrecht between the Two Crowns of Great Britain and France.
>
> You are to Regulate yourself as far as possible by the articles agreed upon, by the Govnr [sic] and Council at Annapolis Royal the 3rd of November 1724 to be Demanded of the Indians at the Negotiation of a Peace, of which a Coppy [sic] is hereunto annexed .. You are to assure the Indians that upon their due and punctual performance of this, and their faithful observation of the Articles Agreed upon, they shall meet with Due Encouragement and Protection from this His Majesty's Government who Dent Delight in War and Bloodshed, but like good neighbours to live with them in friendship … you are to inform me as frequently as possible of your Reception, and All your proceedings, that I may, in Respect to the Indians of this Province, Regulate myself accordingly, and lay the same before his Majesty by one of his principal Secretarys of State by all live with them in friendship opportunities …. (Emphasis added)

Exhibit D-3 is the Submission and Agreement of the Delegates of the Eastern Indians (including the St. John's) and reads in part on, p.4 thereof as follows:

> … and further we the Aforenamed Delegates Doe [sic] Promise and Engage with Honourable Lawrence Armstrong, Esq. Lt. Governor and Commander in Chief of His Majesties [sic] province of Nova Scotia or Accadie [sic] to live in peace with his Majesties and Good Subjects and their Dependants in that Government according to the articles agreed on with Major Paul Mascarene Commissioned for that purpose and further to be Ratified as mentioned in the 7th article. (Emphasis added)

Exhibit D-4 sets out the separate and distinct articles of submission made at Boston and affecting in particular the Maliseets and is dated December 15, 1725. It is contained in a letter from Armstrong to Newcastle July 27, 1726. By this document the Indians acknowledge the "Sovereignty of King George over the Territories of the said Province of Nova Scotia or Accadie". Article 7 of the Agreement provides "That this Treaty shall be Ratified at Annapolis Royal".

Exhibit D-4 is a most important treaty and stipulates the agreements of the British Crown made in return for the articles of submission and is also dated December 15, 1725.

It sets out Major Paul Mascarene's authority to act on behalf of the Province of Nova Scotia (or Accadie) and stipulates that whereas the Maliseets (inter alia) have made their submission to King George.

> … I do in behalf of His Majesty' s said Governor and government of Nova Scotia (or Accadie) promise the said Tribes all marks of Favour protection end friendship- And I further Engage and promise in behalf of the said Government That the Indians shall not be molested in their persons, Hunting, Fishing and planting grounds ...

It is difficult indeed to imagine anything more precise and unambiguous than the foregoing words. Two separate documents were executed on the same date: (1) The submissions of the Indians to the King's authority; and (2) His promises to them.

In addition to the foregoing, Ex. D-5 was also submitted by agreement of counsel as were all other exhibits. Said Exhibit D-5 is dated at Annapolis Royal August 16, 1726, and is a letter from Colonel John Doucett, Lieut. Governor of Annapolis reporting to England, commencing "May it please your Lordships" and reads in part as follows:

> I can acquaint your Lordships that several [sic] Indian tribes have been att [sic] this Garrison to ratify the peace with us. Num. 1, is the instrument they have signed to this Government and Num. (2) is what I have signed to them in behalf of this Government. (Emphasis added)

Exhibit D-6 recites in full the obligations of the Nova Scotia Government arising out of the Articles of Submission entered into by the Maliseets and others at Annapolis Royal on June 24, 1726. It is signed by John Doucett Lieutenant Governor of Annapolis Royal and cites the agreement made with Paul Mascarene in Boston December 15, 1725, and reads in part as follows:

> … I do therefore in the absence of the Honourable Lawrence Armstrong Esq. the Lieutenant Governor and Commander in Chief as aforesaid by and with the advice of the Council for this His Majesty's said Province for and in the name of My Master His Most Sacrede [sic] Majestie George of Great Brittain France and Ireland King Defender of the faith etc. the Chiefs of the said Indian tribes having conformed to the said articles stipulated by their said Delegates Come [sic] here; and first performed their Parts Ratifie [sic] and Confirme [sic] the same, and in testimony thereof I have to following Articles Sett [sic] my hand and seal; Whereas the Chiefs of the ... St. John' s ... and of the other Indian tribes of their representations, belonging to and Inhabiting within this His Majesty's Province of Nova Scotia, Conforme to the Articles stipulated by their Delegates Sanquarum (alias) Lawrance Alexis Francois Xavier … at Boston in New England, the fifteenth day of December one thousand seven hundred and twenty-five Have come to this His Majesties Fort of Annapolis Royal and ratified said Articles, and made their submissions to His Majesty George … I do therefore in His Majesties name, for and in behalf of this his said Government of Nova Scotia or Accadie promise the Said Chiefs and h their respective tribes all Marks of Favour protection and friendship.
>
> And I do further promise in the absence of His Hon. the Lieut. Governor of the province in behalf of this said Government that the said Indians shall not be molested in their persons, Hunting, fishing and planting on their planting ground, not in any other lawful occasion by His Majesties Subjects or their Dependants, nor in the exercise of their Religion … (Emphasis added)

This court quoted from Ex. D-6 (supra) in extenso for the convenience of any other court which may review this judgment, so that it will be made aware of the true and positive import of the words used.

By admission in this case, the defendants , are Maliseet Indians and members of the tribe known as the St. John's. This court feels constrained to state that because of prior difficulties in that regard the defendants saw fit to, include an Exhibit D-8 which is a portion of the transcript of evidence from another case involving Indian rights in which this court was involved. EX. D-8 is comprised of several pages of testimony in which one Peter Paul, an eminent Indian historian, attempts to prove the Maliseet Indians are in fact, exactly that.

Having gone to a great deal of effort to trace with particularity the negotiations and agreements made between the Maliseets and the white man from 1725 through many years following, is this court now at an impasse and restricted from finding as it believes it should by reason of the precedents of Simon, Francis and Paul cases (supra)?

I think not; and two reasons for such a conclusion are as follows:

(1) Since the courts were "per incuriam" of the many documents that have recently been discovered the previous decisions are not binding on any court. The authority for this proposition is to be found in the meaning of the phrase itself which is defined by Osborn's Concise Law Dictionary (3rd Ed. 1947) at p.237 thusly:

> Per incuriam (Through want of care) E.g., in Conway v. New Ideal Homesteads, Ltd., [1936) 3 All E.R, 78, the Court of Appeal gave leave to appeal per incuriam against the decision of the County Court, overlooking the statutory minimum of 20.
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> A decision of the Court is not a binding precedent if given per incuriam, i.e. without the Court's attention having been drawn to the relevant authorities.

(2) In any event this court relies on the Treaty of 1726 as contained in Colonel Doucett's letter of 1726 as well as on Ex. D-7, which is a treaty made on August 13, 1749, between Lord Cornwallis and the St. John's Indians. By this treaty all of the contents of the 1725 submission and Crown guarantees of fishing and hunting rights are re-affirmed and ratified. This court finds that both the Treaty of 1726 as set out in Ex. D-4 and the Treaty of 1749 as set out in Ex. D-7:

(a) are treaties,
(b) have never been abrogated,
(c) guarantee the Maliseets the right to hunt and fish throughout all of that which is now New Brunswick,
(d) and further that they remove the Maliseets from the obligation to obey most of the provisions of the Fish and Wildlife Act (supra).

It is not necessary therefore that this court consider the Constitution Act, 1982 in reaching its conclusion. This court has already found that the Proclamation of 1763 (supra) is applicable to the Indians of New Brunswick (see R. v. Polchies; R. v. Paul (supra) at p.576 et seq. [p.154 C.N.L.R.). This finding has never been specifically over-ruled by any court. True it is that the judgment of Creaghan J., of the Court of Queen's Bench in R. v. Polchies; R. v. Paul, 39 N.B.R. (2d) 62 [[1982] 4 C.N.L.R. 167] makes reference to it where it states on p.65 [p.169 C.N.L.R.] thereof "It was also argued that the British Royal Proclamation of October 7, 1763 (R.S.C. 1970, Appendices, pp.123-129) must be considered in this Appeal". But this one sentence is the only reference to said Proclamation in said judgment and in the appeal division in the same case (supra) La Forest J.A., expressed doubt it applied but did not consider it necessary to decide the poi" (see p.453 of his judgment [pp.134-35 C.N.L.R.])·

Upon the several grounds that the Royal Proclamation of 1763 (supra) is applicable to the defendants and as well that the Treaties of 1726 and 1749 (supra) afford them protection from the laws of general application with reference to hunting, both defendants are found "not guilty" of the respective offence charged.