PALMER ET AL. v. NOVA SCOTIA FOREST INDUSTRIES

Reported: 60 N.S.R. (2d), 128 A.P.R. 271

Nova Scotia Supreme Court, Trial Division, Nunn J., September 15, 1983

Richard A. Murtha, Bruce H. Wildsmith, and Elizabeth May, for the plaintiffs
George T.H. Cooper, Q.C., George W. MacDonald and Harvey L. Morrison, for the defendant

Editor's Note: Please be advised that the full text of this decision had not been reproduced below. In editing this judgment, we have reproduced only the introductory paragraphs, passages summarizing the evidence of the Indian plaintiffs, the portion of the judgment pertaining to the native law issue discussed therein, and the concluding paragraphs. The accompanying headnote and subject index entries are based on the native law issue. Information as to the outcome of the action initiated by the plaintiffs is provided in items 3 and 4 of the headnote.

The plaintiffs, a group of Nova Scotia residents, including two Micmac Indian chiefs representing their bands in a representative capacity, applied for an injunction restraining the defendant, a company engaged in the forest industry in Nova Scotia, from spraying certain areas in the province with phenoxy herbicides. The concern expressed by the bands was that the effects of the spray program would interfered with their aboriginal rights to carry out their way of life, including activities such as hunting, fishing, gathering berries, etc. The issue addressed by the court was whether the Indians represented in this case have aboriginal rights to non-reserve lands, that is, lands owned by the defendant or by the Crown in the right of the Province of Nova Scotia and leased to the defendant.

Held: (Nunn J.)

1. Micmac Indians in Nova Scotia do not have any aboriginal rights extending to non-reserve lands unless those rights are expressly given in a treaty or by ancestral connection with any group who may have had such treaty rights. There was no such proof in this case. R. v. Isaac (1975), 13 N.S.R. (2d) 460, 9 A.P.R. 460 - followed; R. v. Cope, [1982] 1 C.N.L.R. 23, 49 N.S.R. (2d) 555, 96 A.P.R. 555 - followed; R. v. Simon, [1982] 1 C.N.L.R. 118, 49 N.S.R. (2d) 566, 96 A.P.R. 566 - followed.

2. The denial of aboriginal rights to non-reserve lands does not affect the claims on behalf of the bands in this action insofar as reserve lands are concerned. The right of the bands involved arising out of reserve lands, stands on the same footing as other privately owned property of the other plaintiffs.

3. The plaintiffs (Indian and non-Indian) in this action failed to prove any strong probability or a sufficient degree of probability of risk to health to warrant the granting of the injunction sought.

4. Application dismissed.

[1] NUNN J.: This is an application by the named plaintiffs in their individual capacities and as representatives of others for an injunction restraining the defendant, a company engaged in the forest industry in Nova Scotia, from spraying certain areas in the Province of Nova Scotia with phenoxy herbicides.

[2] The action was originally brought in the late summer of 1982 when the plaintiffs obtained from this court per Burchell J., an interim injunction restraining any spraying by the defendant pursuant to a licence to spray during 1982 issued by the Nova Scotia Department of the Environment. The injunction was subsequently lifted by the Nova Scotia Court of Appeal in December, 1982 on the ground that no spraying could take place until the summer of 1983 and that there could be a full trial and hearing of the issues by that time.

[3] The matter was then brought to trial in Sydney commencing May 2, 1983, with the relief claimed, in the statement of claim, to be a permanent injunction restraining the spraying of 2,4-D (Esteron 600), 2, 4, 5-T with its contaminant TCDD, and Esteron 3-3E, which is a mixture of 2,4-D and 2,4,5-T.

[4] The trial commenced, by agreement of the parties, on the basis that although the defendant's licence to spray was only for 1982, it was the defendant's intention, if spraying were permitted or not contested, to apply for a new licence for 1983. It appeared that such a license would be granted if applied for in the absence of any restriction by this court. This was a troublesome matter, which I pointed out to the parties before and during the trial, as the court does not issue a useless injunction. Without a license there is nothing to enjoin. However, as I stated, it was in the interests of the parties, and the public generally, that this matter be heard and disposed of. It was on this basis, and by agreement, that the matter continued.

[5] The trial consumed 21 days of taking evidence, 2 days of oral argument and further written briefs. The plaintiffs tendered 35 witnesses and the defendant 14. Aside from most of the named plaintiffs, all the rest of the witnesses with but a few exceptions were experts - highly educated in their various fields to which they gave evidence.

[6] There were approximately 150 filed exhibits which included 12 volumes of reports of the plaintiff's experts and 5 volumes of reports of the defendant's experts. Attached to the expert reports were literally hundreds of scientific articles and excerpts from scientific articles.

[7] The subjects of dioxins and chlorophenols has been widely disputed in many countries of the world both politically and before regulatory agencies. To my knowledge this is the first occasion where the dispute has reached the courts in Canada….

[13] A summary of the evidence of each of the plaintiffs follows….

[21] Brian GooGoo, a full-blooded Micmac Indian, lives on the Whycocomagh Reserve which is 11/2 miles from Site E - Skye Mountain and located at the base of the mountain. He was formerly a chief and has been delegated by the Whycocomagh Indian Band to represent the Band in a representative capacity in this action.

[22] As part of life on the Reserve, the Indians hunt, fish, pick berries, medicinal bark, roots and herbs on the Reserve and on Crown lands. They fish eels, trout, salmon, flatfish, oysters and lobsters in the Bras D'Or Lakes into which a number of streams flow from Skye Mountain.

[23] The concern here is that their way of life is being threatened by the effect the spray program will have on the area and to their health through their water and food supply. This witness asserted such effects are an interference with his people's aboriginal rights to carry out their lifestyle activities as they have done for centuries. He suggested a greater interference with those aboriginal rights by the very fact that the defendant has come upon some of those Crown lands, by virtue of leases, cut the timber and destroyed wild life without any consultation with the Indians. This latter aspect may very well be beyond the scope of the matter involved in this action.

[24] Thomas Francis, another full-blood Micmac living on the Afton Reserve, Antigonish County, and presently Chief of the Afton Reserve, is a plaintiff representing the Afton Reserve Micmac Band. This reserve constitutes two sections, both of which are adjacent to site C - Fraser's Grant. The Afton River flows from the site through the Reserve. There are 200 people living on the Reserve and they use the river as a source of fish, smelt and trout, medicinal roots, and for recreation. One person has cattle which drink from it and it is used for personal washing and washing clothes. He lives 4 miles from the spray site.

[25] The spray site itself is and has been used by the Band for hunting, fishing, the collection of roots, herbs and barks for herbal medicines and picking blueberries and raspberries.

[26] His concern also is related to the safety of the chemicals and that this proposed spraying may be an interference with the Band's aboriginal rights….

[489] Turning to the second issue, namely whether the native Indians represented in this case have aboriginal rights on lands owned by the defendant or by the Crown, in the right of the Province of Nova Scotia and leased to the defendant.

[490] The matter of aboriginal rights of the Micmac Indian in Nova Scotia has been considered by the Appeal Court of this province in R. v. Isaac (1975), 13 N.S.R. (2d) 460; 9 A.P.R. 460. In that case MacKeigan C.J.N.S., made an extensive review of the original rights of Indians to the use of the land when the white man came and the extent to which those rights have been modified, affirmed or extinguished in Nova Scotia. That case dealt with the conviction of an Indian for possession of a rifle contrary to s. 150 of the Nova Scotia Lands and Forest Act. The alleged

offence occurred on an Indian Reserve. It is therefore distinguishable from the matter I am considering. However, the review is most helpful.

[491] At p.485 Chief Justice MacKeigan concludes:

> This Part has established that Indians in Nova Scotia has a usufructuary right to the use of land as their hunting grounds. That right was not extinguished for reserve land before Confederation by any treaty, or by Crown grant to others or by occupation by the white man. It has not been extinguished or modified since 1867 by or under any federal Act. (We are not concerned whether the right may still exist for any land other than reserves. It would appear that in Nova Scotia, apart from reserves, only a few thousand widely scattered acres have never been granted, placed under mining or timber licences or leases, set aside as game preserves or parks, or occupied prescriptively.)

[492] It is with these words in parenthesis that I am concerned for, as I read them, they imply that, aside from reserves, usufructuary rights, is they apply at all, only apply to those "few thousand widely scattered acres" and no to lands which have been granted or been placed under timber leases.

[493] The lands I am concerned with are all lands which have been granted to the defendant or purchased by it or have been leased to the defendant under a timber lease.

[494] In the Isaac case, supra, MacDonald J.A., at pp. 498 and 499, makes these observations:

> With deference to those who may hold a contrary view, I think that a real distinction exists in law between the status of an Indian hunting on reserve ground and an Indian or non-Indian hunting on non-reserve lands. In addition to what the Chief Justice has said I believe that one basis for this distinction lies in the historical background of Indian reserves.
>
> Prior to their conquest the Indians possessed this province. After conquest and with the expansion of the white immigrant population the position of the Indians was compromised and as a result of treaties and governmental policy they were literally forced to lice in an on certain designated tracts of lands which were called reserves.
>
> This action resulted in the Indians being stripped of many of their rights, but the one right that was never taken away from them by treaty or otherwise, was the right to hunt or fish on reserve land. Although such right could be taken away by amendments to the Indian Act or by regulations made thereunder, this has not been done.
>
> In consequence it is my opinion that the historical and traditional right of an Indian to hunt on a reserve in this province remains to this day unhampered and unimpeded by the relevant provisions of s. 150 of the Lands and Forests Act. No such right is vested in Indians or non-Indians hunting on non-reserve lands. What I am saying is that historically, reserves were created for the use of Indians: not only as their place of residence but also as their hunting and fishing grounds. Thus, hunting and fishing on reserves are inextricably bound up with land and land use as to constitute a usufructuary right - a legal right that has never been taken away. (Emphasis added)

[495] This reasoning goes further than the comments of Chief Justice MacKeigan and, while obiter with regard to non-reserve lands, I find it compelling.

[496] I have read each and every treaty submitted to me and find nothing which helps to establish or preserve Indians' rights to non-reserve lands nor anything specifically referring to aboriginal rights. I also read the two volumes, filed herein, which outline the Indian claims. They are positional documents only, of a political nature and, as I understand, originally submitted to the government of this province to establish a position.

[497] Counsel for the plaintiff argues that aboriginal rights incorporated into treaties become treaty rights but where there are no treaties, or where the treaties do no deal with aboriginal rights, they continue to exist. He suggested this was the reason why the Constitution Act, 1982 was passed. That statute is, however, of no help in determining whether such rights do, indeed, exist.

[498] One of the treaties submitted to me and relied upon by the plaintiffs was the treaty of 1752 which was alleged to be a special royal grant to all Micmacs of the privilege of hunting and fishing free of any restriction. This treaty has already been considered by MacKeigan C.J.N.S., in R. v.

Cope, 49 N.S.R. (2d) 555; 96 A.P.R. [[1982] 1 C.N.L.R. 23], who found that the treaty did not grant a right to Micmacs to hunt and fish but merely affirmed the existence aboriginal rights of a small band of Micmacs. At p. 5560 [p.27 C.N.L.R.], he states:

> Review of the actual agreement shows, however, that it was in any event a mere acknowledgement of aboriginal rights indistinguishable from the many other temporary Indian peace 'treaties' of that period.

[499] In considering the same treaty, MacDonald J.A., in R. v. Simon, 49 N.S.R. (2d) 566; 96 A.P.R. 566[[1982] 1 C.N.L.R. 118], after reviewing the authorities, stated at p.577 [p.127 C.N.L.R.]

> There can be no doubt that the Treaty of 1752 was one of peace. In my opinion, the resumption of hostilities by the Indians in Nova Scotia terminated automatically and for all time any and all obligations to them under such treaty.

[500] With this, I agree.

[501] Mr. Justice Macdonald, however, went further and stated that if he was wrong on the extinguishment of the treaty, then a valid claim could only be made is there was proof of ancestral connection between the claimants under the treaty and the signatories thereto. No such proof was given in that case or is there any in the present case.

[502] Further, it has already been held that this Treaty does not apply to Cape Breton which at that time was not part of Nova Scotia. See R. v. Syliboy (1928), 50 C.C.C. 389.

[503] I do not find, therefore, any rights to hunt and fish on the lands in question in any treaty or by ancestral connection with any group who may have had such rights.

[504] In my opinion the situation as to aboriginal rights may very well differ from province to province so that a finding of particular aboriginal rights in one province is of little help in making a determination in this province. Further, such rights might exist in one province and not in another.

[505] Following the reasoning of Chief Justice MacKeigan and MacDonald J.A., in the Isaac, Cope and Simon cases, supra, I am satisfied that the Micmac Indians in Nova Scotia do not have any aboriginal rights extending to the lands of the defendant or the lands under timber lease from the Crown in the right of the Province.

[506] It must be made cleat that I am only concerned with a particular aboriginal right - that of usufruct. No other aboriginal rights are involved here.

[507] That finding does not affect the actions on behalf of both Indian bands in this action insofar as reserve lands are concerned. The aboriginal rights claimed on the non-reserve land here for hunting, fishing, gathering herbs and the like, and were asserted to prevent the defendant from spraying on those lands directly. If I had found such a right, it would still have to be decided whether the right would, in fact, prevent the spraying. In other words, would the right be to hunt and fish and gather herbs in lands that have been sprayed through the exercise of another right, that of the defendant or to do so in unsprayed lands.

[508] Unless there is a difference because of the materials being sprayed here, it would seem that the former would be the case. To hold otherwise would create a situation whereby any activity, such as cutting trees whose bark was medicinal, or indeed cutting or removing anything which contributed to animal life, would be enjoinable. Such has never been the situation in Nova Scotia in all its history.

[509] In view of the fact that I have already denied aboriginal rights to the extent mentioned, it is unnecessary for me to decide this issue. It must be clear, however, that this denial relates only to that part of the Indian claim relating to aboriginal rights and the right of the bands involved arising out of reserve lands stands on the same footing as other privately owned property of other plaintiffs….

[601] Therefore, the answer to the single remaining question I posed earlier which has two parts - have the plaintiffs offered sufficient proof that where is a serious risk of health and that such serious risk of health will occur if the spraying of the substances here is permitted to take place - is, for each part, in the negative.

[602] One final comment is warranted. This decision could have been much shorter and, I am sure, the parties would have accepted that it was on the basis of the evidence presented, and that all was considered. It was obvious throughout that the subject is of vital interest to the public. It still is, as is evidenced by events in this province after the trial itself. For this reason I felt it incumbent upon me to set forth this detail of fact and my own observations so as to make clear that all the evidence, fully weighed and considered, this court is of the opinion that these spraying operations can be carried out in safety and without risk to the health of the citizens of this province.

[603] The plaintiffs, therefore, fail in this action and the defendant is entitled to its costs, to be taxed.

[604] Since the defendant has claimed damages and the parties agreed to set aside the matter of damages until after the decision of the main issue, I shall hear the parties as to damages at their convenience.

[605] Judgment to be entered accordingly.