R. V. RILEY ET AL.

Unreported at date of publication

Ontario Provincial Offences Court, Phillips P.C.J., November 28, 1983

J.N. Buchanan, for the Crown
P. Williams, for the defendants

The defendant Chippewa Indians were jointly charged with unlawfully molesting the usual place of habitation of a fur-bearing animal, contrary to s.68(a) of the Game and Fish Act, R.S.O. 1980, c.182 as amended. In addition, the defendants D.R. and L.R. were charged with unlawfully hunting without a licence, contrary to s.36 of the same Act. The defendants admitted that the Crown's evidence made out a prima facie case on all charges. It was agreed that the occurrences took place within the geographical area described in the Treaty of 1790. The Treaty document did not contain a reservation of, or reference to, the right to hunt or trap. In 1794 a number of Chippewa Chiefs signed a hand-written document, in the form of a Memorial, allegedly preserving and protecting their rights to hunt on the lands covered by the Treaty of 1790. It was agreed that the court should examine the history of the period and place.

The defence argued, based on s.35 of the Constitution Act, 1982, that to the extent that the Game and Fish Act is inconsistent with the aboriginal and treaty rights of the defendants to hunt, it is of no force and effect. It also argued that since the Treaty of 1790 omitted any reference to the purchase of the right to hunt, s.88 of the Indian Act, R.S.C. 1970, c. I-6 and the Constitution Act, 1982 render the Game and Fish Act of no effect.

The Crown argued that the Treaty of 1790 made no provision for Chippewa hunting rights on the ceded lands and that sufficient sustenance was available to the Indians on territories lying north of the Thames River which had not yet been surrendered to the Crown. The Crown relied on the "contra proferentem" rule of interpretation to argue that no weight should be given to the Memorial of 1794. The Crown submitted that s.88 of the Indian Act made Indians subject to provincial legislation in the absence of treaty or statutory protection, that s.35 of the Constitution Act, 1982 shields existing treaty and aboriginal rights only if those rights are inconsistent with any other federal or provincial laws, and that the Game and Fish Act is not inconsistent with either the treaty rights allegedly reserved or the aboriginal rights claimed by the defendants.

Held: (Phillips P.C.J.)

1. The Royal Proclamation of 1763 does not apply to treaty lands in southwestern Ontario.

2. The Treaty of 1790, in spite of the fact that it was made in disputed territory, is a valid and binding document, and not a "provisional agreement", as was the case in R. v. Taylor and Williams, [1981] 3 C.N.L.R. 114, 34 O.R. (2d) 360, 62 C.C.C. (2d) 227. Standing alone, it is an outright grant of land and release of all claims on the south side of the Thames. It did not affect the Chippewas' right to hunt and fish on hunting grounds north of the Thames, nor did it deal with land north of the Thames, as suggested in the Memorial of 1794.

3. The Memorial was a unilateral document made several years after the Treaty was signed. It cannot be described as minutes of the Treaty Council. It is ambiguous and inconsistent with the terms of the Treaty. As a matter of law, no weight can or should be assigned to the Memorial.

4. There is neither historical nor traditional evidence to support the claim that the Chippewas' right to hunt in the area south of the Thames was recognized at the time of the Treaty of 1790.

5. The Chippewas' right to cede the lands to the British cannot be based upon occupation or use, but may be based upon succession.

6. Section 88 of the Indian Act provides, in part, that ". . . 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 . . . ." The Game and Fish Act is a Law of general application to all persons within Ontario, and, as the right claimed by the defendants is not protected by either treaty or statute, applies to the defendants.

7. Section 35 of the Constitution Act, 1982 does not change the existing law in relation to Indians

exercising their treaty rights to hunt, whether such existing law is federal or provincial. The effect of the word "existing" in s.35 was to limit the rights of aboriginal people to those rights which were in actual existence at the time of the enactment of the Constitution Act, 1982.

8. Defendants found guilty.

* * * * * *

PHILLIPS P.C.J.: The defendants, James Riley, Darren Riley and Levi Riley, Indians by definition under the Indian Act, R.S.C. 1970, c.I-6, are jointly charged that they did unlawfully molest the usual place of habitation of a fur-bearing animal, contrary to section 68(a) of the Game and Fish Act, R.S.O. 1980, c.182 as amended.

In addition, the defendants Darren Riley and Levi Riley are severally charged that they did unlawfully hunt without the authority of a licence, contrary to section 36 of the same Act.

The defendants James Riley, Darren Riley and Levi Riley were observed chopping the trunk of a tree with an axe on private property in the Township of Southwold, in the County of Elgin. The tree, when examined by an expert, was said to have been the place of habitation of a fur-bearing animal.

Subsequently, the defendants Darren Riley and Levi Riley were observed leaving the same premises in the company of James Riley who was carrying a .22 calibre rifle. The parties had in their possession raccoon pelts and seveal dead raccoons. James Riley was duly licenced to hunt small game and he was therefore not included as a party to the alleged offence under section 36 of the Game and Fish Act.

The facts were agreed upon by counsel and the trials therefore proceeded in accordance with the provisions of section 39(1) and section 47(4) of the Provincial Offences Act, R.S.O. 1980, c.400 with the consent of counsel.

Counsel for the defendants admits that if evidence was adduced by the Crown in accordance with the agreed statement of facts, the Crown has made out a prima facie case on all charges, subject to the defence submissions relating to the historical and constitutional rights and privileges claimed by the defendants.

No evidence was called by the defence. On the other hand, certain documentary and historical material was produced to the Court in support of the defendants' position.

It is acknowledged that the defendants are members of the Chippewa band and that the Chippewas were parties to a land cession treaty which was made "at Detroit, in the District of Hesse, in the Province of Quebec, on the 19th day of May, 1790".

The treaty is described by the Chippewas as the "Great Deed" and was entered into between Alexander McKee, Deputy Agent of Indian Affairs and seven chiefs of the Chippewa Nation, as well as the Chiefs of the Pottowatomis, Hurons and Ottawas.

The treaty is an outright grant of land in favour of His Majesty George The Third, subject to two reservations, and contains the following provision:

> And we, the said Chiefs, for ourselves and the whole of our said nations, our and their heirs, executors and administrators do covenant, promise and grant to and with His said Majesty George the Third, His heirs and successors, by these presents, that His said Majesty, His heirs and successors, shall and lawfully may from henceforth and forever after peaceably and quietly have, hold, occupy, possess and enjoy the said tract or parcel of land hereby given and granted, with all and every of its appurtenances, free, clear and discharged, or well and sufficiently saved, kept harmless and indemnified of, from and against all former and other gifts, grants, bargains and sales, and of, from and against all former and other titles, troubles, charges or incumbrances whatever, had, done or suffered, or to be had done or suffered, by any of us, the Chiefs, or by any one whatever of the said nations, ours and their heirs, executors or

administrators. . . .

It is agreed that the occurrences which resulted in these charges took place within the geographical area described in the treaty.

The two reserved parcels of land are far removed from this jurisdiction. The document does not contain a reservation of, or reference to, the right to hunt and trap.

The consideration for the conveyance was twelve hundred pounds currency of the Province of Quebec at five shillings per Spanish dollar, paid in merchandise.

The Treaty of 1790 was followed by speeches at the Huron Village on August 16, 1790, by a Huron Chief and a principal Ottawa Chief to Sir John Johnson, Superintendent-General and Inspector-General of Indian Affairs since 1785. The Chiefs informed Johnson of their dedication to maintain full dominion and control over the two parcels of land reserved for them by the Treaty in clear and uncertain terms. (Lajeunesse, The Windsor Border Region, 1960, p. 173)

The end of the American Revolution and the recognition of the independence of the United States took place in 1783. The British agreed to evacuate the territory lying south of a line drawn through the Great Lakes and connecting rivers "with all convenient speed". The British evacuation of Detroit occurred thirteen years after the Treaty of 1783 and, only then, after considerable strife between the Indians, who were believed to have been encouraged by the British, and the United States Army.

The alleged boundary dispute which delayed the British evacuation of Detroit was resolved in 1794, a year which has some significance in this matter.

Counsel for the defendants submitted a copy of a handwritten document to the Court, in the form of a Memorial, signed by a number of Chippewa Chiefs and dated at Detroit on March 7, 1794. The Memorial, it is submitted, preserves and protects the right of the Chippewas to hunt on the lands which were the subject of the Treaty of 1790.

A few months after the 1794 Memorial was signed by the Chiefs, the United States Army decisively defeated the Indians at Fallen Timbers. Britain readily concluded the Jay Treaty with the Americans in 1794, thereby settling outstanding differences over the boundary, the western posts including Detroit and other matters. As a result of the conclusion of the Jay Treaty, Britain evacuated Detroit in 1796.

The Treaty of 1790, in spite of the fact that it was made in disputed territory, is a valid and binding document.

The Memorial of 1794 is an interesting and ambiguous unilateral declaration or affidavit by the Chippewa Chiefs who signed it concerning their recollection as to what had occurred at Detroit during the negotiations leading to the execution of the Treaty of 1790.

Both counsel argued at length as to the meaning, substance and import of the Memorial during their respective submissions to the Court. It is therefore of value to reproduce the full text of the document as accurately as possible from the photocopy which was filed as Exhibit Four:

> We the under mentioned Indian Chiefs do solemnly protest,
> that when application was made to us Indians (by Col.
> McKee) for the land on the River LaTranche, for the use
> of Government, we unanimously consented to grant the
> south side of it, but could not with propriety give
> the north side, as we wanted land to hunt and plant
> upon for our sustenance.
>
> Being called upon by Col. McKee, three days successively
> upon the same subject, he flattered us as follows:
>
> That it was absolutely necessary that our Father the
> King should have this land for very obvious purposes,
> and by giving it up in a Loyal, Friendly and Peacably
> Manner, we should be amply recompensed by Him (The King),
> and he further told us seriously that our Father the King
> wanted only the land on each side of the River (for a

> little way back from the River) and that we should enjoy every part of it for hunting, planting, etc. except the River side, upon which flattering prospects we made with him the following agreement, that the land on each side the River should be granted to our (except the tract of land which we had sold before that time to our beloved Sister Sally Ainse and who had for the above considerably over paid us).
>
> Colonel McKee readily consented to this remarking himself that She was a very good woman and our Sister, and said he did not require her Land, and recommended us very much for our honesty and fidelity to our Sister. On which conditions we presented a string of wampum to him, and in Token of the above agreement which he received, (being two days before the great Deed was Signed). We asked him for writing to secure this land to our Sister, which he promised to write out but as he was very busy, he said he would give it to us on the Morrow, on the next day, but we have had no writing but promises and puttings off ever since.
>
> It is our custom when a favour is asked of us, if we receive a String of Wampum we grant that Favour. We give the Wampum back, which Col. McKee should have done, if he did not mean to perform what he agreed to. And we do positively declare that Col. McKee received and kept the String of Wampum two days before the Great Deed was signed (to the best of our knowledge).
>
> If, as Col. McKee says it was after the Signing of the Great Deed and of Consequence too Late, Why did he receive from us the String of Wampum, and make us such Promises, When he might have given us a flat denial.
>
> We the undermentioned Chiefs do sacredly protest that this is a true statement to the best of our knowledge.
>
> Detroit 7 March 1794.
>
> (Totems or marks of Chiefs)

Counsel for the defendants has served upon the Attorneys-General of Canada and Ontario notice of his intention to attack the constitutional validity of the Ontario Game and Fish Act. In summary, the defence position is that to the extent that the Game and Fish Act is inconsistent with the aboriginal rights and treaty rights of the defendants to hunt, it is of no force and effect. It is submitted that the Constitution Act, 1982, section 35, recognizes and affirms the aboriginal rights of the Chippewas as an aboriginal people. It is also argued that since the Treaty of 1790 omits any reference to the purchase of the right to hunt, section 88 of the Indian Act may be invoked and that the combined effect of section 88 of the Indian Act and the Constitution Act renders the Game and Fish Act of no effect:

Section 88 of the Indian Act, R.S.C. 1970, c.I-6 reads:

> 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 by-law 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 Constitution Act, 1982, Part II provides:

> Rights of the Aboriginal Peoples of Canada

> 35.(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

The Crown takes the position that the Treaty of 1790 makes no provision for a right in favour of the Indians to hunt on the ceded tract and that sufficient sustenance was available to the Indians on the considerable territory lying north of the Thames River which had not, in the year 1790, been surrendered to the Crown. Further it is submitted that no weight should be given to the petition or Memorial of 1794 on the ground that the "contra proferentem" rule of interpretation should apply.

The legal principles applicable, according to the Crown, are that by application of section 88 of the Indian Act, aboriginals are subject to provincial regulatory legislation in the absence of treaty protection or statutory protection. Furthermore, section 35 of the Constitution Act shields existing treaty and aboriginal rights only if those rights are inconsistent with any other federal or provincial law. The Crown submits that the Game and Fish Act is not inconsistent with either the treaty rights which are alleged to have been reserved or the aboriginal rights claimed by the defendants.

Counsel for the defendants made frequent reference in his written submissions to the decision of the Ontario Court of Appeal in R. v. Taylor and Williams (1981), 34 O.R. (2d) 360 [[1981] 3 C.N.L.R. 114]. MacKinnon A.C.J.O., at p.364 [p.120 C.N.L.R.] of the decision observed:

> Cases on Indians or aboriginal rights can never be determined in a vacuum. It is of importance to consider the history and oral traditions of the tribes concerned, and the surrounding circumstances at the time of the treaty, relied on by both parties, in determining the treaty's effect.

And further

> In the instant appeal, both counsel were in agreement that we could, and indeed should, look at the history of the period and place. . . .

Counsel in these matters have approached the issues on the basis of a similar agreement.

The Court has secured a map reproduced from the National Map Collection, Public Archive of Canada, London, 1813, which was prepared by the then Surveyor General at the request of Lieutenant-Governor John G. Simcoe. The map depicts the Province of Upper Canada, showing "All the New Settlements, Townships, etc. with the Counties adjacent from Quebec to Lake Huron". The Chippewa Hunting Country, as it is described, is shown in bold outline running from Lake Superior on a line above Lake Huron to the Johnstown District to eastern Ontario. A Chippewa settlement is shown immediately to the north of the Thames River, above the Township of Southwold in the London District. Several settlements of Delaware Indians are clustered about in the same general area as the Chippewa village.

The earliest recorded history of the Indian presence in the area which is now constituted as Southwold Township, in the County of Elgin, indicates that the Antwondaronks, or "Neutrals", an agricultural tribe, occupied a substantial village which is now known as the Southwold Earthwork. (James H. Coyne, "The Country of the Neutrals", Historical Sketches of The County of Elgin, published by the Elgin Historical Institute, 1895, and see map p.290, Diamond Jenness, Indians of Canada, 1977.)

The fate of the Neutrals and their neighbours to the north, the Tobacco people, is described by Lajeunesse, The Windsor Border Region at page xxxii:

> After the dispersal of the Hurons, the Iroquois carried the terrors of their ferocious prowess southwest to the Petuns or Tobacco Nation and then southward to the land of the Neutrals. By 1651 the whole of western Ontario . . .was nothing but the unpopulated hunting grounds of the Iroquois.

Coyne writes that, "After the expulsion of the Neutrals, the north shore of Lake Erie remained an unpopulated wilderness until the close of the last (eighteenth) century". He says that historical "references to the region are few and scanty. Travellers did not penetrate into the country".

The Ojibwa or Chippewa controlled all the northern shores of Lakes Huron and Superior from Georgian Bay to the edge of the prairies. Diamond Jenness (supra) notes, however, at page 282, that, "About the beginning of the eighteenth century, when the strength of the Iroquois commenced to wane. . . the main body of the Ojibwa suddenly entered on a career of expansion. . . ." Coyne alludes to the Ojibwa tradition to the effect that they defeated the Iroquois in a succession of skirmishes ending in a complete victory at the outlet of Burlington Bay and concludes: "Whatever may have been the truth of the details, there is no doubt of the fact that the Ojibways . . . were the sole occupants of Western Ontario at the time of the (British) conquest in 1759."

The final note concerning Indian settlement in the area relates to the Delawares. The Moravians and Delawares had fled the American-Indian war zone in the Ohio country and initially settled on the Canadian shore of the Detroit River where they built a meeting house and school. Their stay was of short duration, however, and two years after the Treaty of 1790 had been signed at Detroit, on April 12th, 1792, the Moravians and Delawares left the district to go and found a settlement "far up the River Thames" (Lajeunesse, The Windsor Border Region, pp.civ and cv).

The initial position adopted by the defence in this matter, as in many similar cases, is that the Royal Proclamation of 1763 (R.S.C. 1970, App.II, pp.123-129) recognizes and preserves the hunting rights of the Chippewas in the lands involved here. An extension of that line of reasoning is that, while the Treaty of 1790 may be construed as a surrender by the Indians of their exclusive right of occupation, the Chippewas retained the residual rights which were preserved for them by the Royal Proclamation.

In Province of Ontario v. Dominion of Canada, (1908) 42 S.C.R. 1, pp.103-4, Idington J. observed:

> A line of policy begotten of prudence, humanity and justice adopted by the British Crown to be observed in all future dealings with the Indians in respect of such rights as they might suppose themselves to possess was outlined in the Royal Proclamation of 1763 erecting, after the Treaty of Paris in that year, amongst others, a separate government for Quebec, ceded by that treaty to the British Crown.
>
> That policy adhered to thenceforward, by those responsible for the honour of the Crown led to many treaties whereby Indians agreed to surrender such rights as they were supposed to have in areas respectively specified in such treaties.

In Kruger and Manuel v. The Queen (1977), 34 C.C.C. (2d) 377, the judgment of the Court was delivered by Dickson J. who specifically avoided a determination of "the force of the Royal Proclamation of 1763" because the Court was not required to do so in order to dispose of the grounds of appeal. Dickson J., in commenting upon the judgment of the Court below, included the following passage [p.379]:

> On further appeal to the British Columbia Court of Appeal the convictions were restored . . . . Robertson J.A., who delivered the judgement of the Court, was of the view that **s**.88 of the Indian Act . . . made provincial laws of general application, among which he numbered the Wildlife Act, applicable to Indians . . . .
>
> He concluded on the authority of this Court's decision in R. v. George, [1966] 3 C.C.C. 137, 55 D.L.R. (2d) 386, [1966] S.C.R. 267 that s.4 of the Wildlife Act applied to the appellants unless they could bring themselves within the opening words of s.88 or under the exceptions spelled out in the latter part of the section. With respect to the opening words of the section, Mr. Justice Robertson had this to say: [pp.122-3 C.C.C.,

> . . . the Proclamation of 1763 was entirely unilateral and was not, and cannot be described as, a treaty. Assuming (without expressing any opinion) that the Proclamation has the force of a statute, it cannot be said to be an Act of the Parliament of Canada; there was no Parliament of Canada before 1867 and by no stretch of the imagination can a proclamation made by the Sovereign in 1763 be said to be an act of a legislative body which was not created until more than a hundred years later.

The question was again considered by the Supreme Court of Ontario in R. v. Tennisco, unreported [reported [1981] 4 C.N.L.R. 138], a decision of Griffiths J., released on December 3rd, 1981. In Tennisco, the Court accepted the reasoning of Robertson J.A. and held that the Proclamation as such was not a treaty. Griffiths J. observed [p.148 C.N.L.R.]:

> The Proclamation remained a unilateral act of the Crown, offering rights and protections to the Indians dependent upon the goodwill of the Crown.
>
> With the passage of time and until Confederation, it is true that the Proclamation was regarded as having the force and effect of a statute: Calder at al. v. The Attorney General of British Columbia [1973] S.C.R. 313, per Hall J. at pp.394-401. Although it had statutory force and was considered the "Indian Bill of Rights" it never became in the ordinary sense of the word a treaty.
>
> In its simplest form the treaty must of necessity consist of an agreement or settlement arrived at between two or more parties with all of the elements of a valid contract. To be a treaty, the provisions of the agreement or settlement, at the very least, must be capable of enforcement during the life of the instrument at the instance of both parties. Here, as I have found, the rights conferred under the Proclamation could at any time be legally withdrawn or altered at the instance of the Crown alone.

In Kruger and Manuel, (supra), Dickson J. emphasized at the outset that "the important constitutional issue as to the nature of aboriginal title, if any, in respect of lands in British Columbia, the further question as to whether it had been extinguished, and the force of the Royal Proclamation of 1763. . . will not be determined in the present appeal" [p.380].

The legal position of the Indians in long-settled privately owned lands in southwestern Ontario is conceivably quite different from that of the aboriginals in western Canada.

The political circumstances in post-revolutionary America and the pressures upon Great Britain on a global basis at the time, called for the diplomatic settlement of unresolved questions on an international and local basis by treaties and land cession agreements which would effectively resolve boundary disputes and provide for the orderly settlement of the ceded lands.

A sympathetic analysis of the relations between Indians and whites is provided in a study entitled "Native Rights in Canada" prepared by the Indian-Eskimo Association [D.E. Sanders (ed.), Native Rights in Canada (1st ed.). I.E.A., Toronto, 1970.] The following observation appears at p.10:

> Formal treaties . . . helped to accomplish peaceful settlement by showing deference to the tribes and establishing reservations with some consultation and consent.
>
> . . . when political alliances were necessary they were entered into. When land cession treaties served to facilitate settlement and avoid hostility, they were used. When it was felt that settlement could be accomplished without treaties, no treaties were made.

The British plan of settlement of present southwestern Ontario was a cohesive one in that parcels or tracts of land were systematically acquired by land cession treaties. The Treaty of 1790, described as Treaty #2, was one of the cornerstones of the orderly acquisition of contiguous parcels of land for the purposes of survey and settlement.

Therefore, while the Royal Proclamation of 1763 may yet have force in some areas of Canada, it is little more than an historical curiosity insofar as treaty lands in southwestern Ontario are concerned.

The defendants' statement of fact and law contains a lengthy submission relating to aboriginal rights in general and the aboriginal right of the Indians to hunt in particular.

The courts in Canada have, until recently, approached the subject of aboriginal title by commencing their examination of the question on the basis of the decision of the Judicial Committee of the Privy Council in St. Catharines Milling and Lumber Co. v. The Queen (1888), 14 App. Cas. 46. The decisions which have attempted to rationalize the concepts of aboriginal title and aboriginal rights by reference to St. Catharines Milling have been lengthy and complex. The judgment of Norris J.A., of the British Columbia Court of Appeal in R. v. White and Bob (1965), 50 D.L.R. (2d) 613 and the decision of the Supreme Court of Canada in Calder v. Attorney-General of B.C. (supra) are representative of the difficult issues which have arisen when the Courts have embarked upon a general analysis of these concepts.

It is therefore significant that Dickson J; in Kruger and Manuel (supra) made the following instructive observations at p.380:

> . . . a sound rule to follow is that questions of title should only be decided when title is directly in issue. Interested parties should be afforded an opportunity to adduce evidence in detail bearing upon the resolution of the particular dispute. Claims to aboriginal title are woven with history, legend, politics and moral obligations. If the claim of any Band in respect of any particular land is to be decided as a justiciable issue and not a political issue, it should be so considered on the facts pertinent to that Band and to that land, and not on any global basis.

Davey J.A., in R. v. White and Bob (supra) approached the issue on the basis of similar principles when he found that the question which was before the Court for determination was resolved by reference to specific agreements which reserved to the Indians "their peculiar rights of hunting and fishing over their ancient hunting grounds".

The Supreme Court of Ontario, in R. v. Taylor and Williams (supra) dealt with Treaty #20, which was the Treaty under consideration in that case, as a voluntary agreement between the parties and the terms of the oral minutes of a council meeting held at the time the Treaty was negotiated were deemed to form as much a part of the Treaty as the written articles of the Provisional Agreement. The alleged offence in that case occurred on unoccupied Crown lands within the area covered by the Treaty.

The Treaty of 1790 was not a provisional agreement and, subject to a consideration of the effect of the Memorial of 1794, there were no minutes of a council meeting which can be imported into the Treaty. Counsel for the defendants submits that the Chippewas surrendered only their exclusive right of occupation. The Treaty standing alone, however, is an outright grant of land and release of all claims. Consideration must nevertheless be given to the legal effect of the Memorial of 1794 in order to determine whether that document forms part of the Treaty of 1790 or confirms the reservation to the Chippewas of the aboriginal right, if any, to hunt on the ceded lands.

The document purports to review certain matters which were discussed by the Chippewas and McKee during the three day period of negotiations which led to the completion of the Treaty of 1790 and describes the disappointment of the Chiefs in relation to the subsequent inaction of McKee concerning their grant of land to one Sally Ainse. The Chiefs said that they were unanimous in consenting to the grant of the south side of the river but that McKee told them that the King wanted only the land on each side of the river for "a little way back from the river" and that the Chippewas could enjoy any part of it for hunting, fishing and so forth except the river side.

The Treaty of 1790, or "Great Deed" as the Indians themselves described it, was a surrender of lands on the south side of the Thames. The Chippewas' right to hunt and fish on the extensive hunting grounds north of the Thames was not affected by the Treaty. Sally (Sarah) Ainse is said to have acquired an enormous tract of land from the Chippewas which extended "150 acres in depth" along the north side of the Thames from Lake St. Clair up to the Forks (now Chatham).

The Treaty did not deal with land on both sides of the river, as suggested in the Memorial.

The Memorial cannot in any sense be described as Minutes of a Council. It was a unilateral document which was made several years after the Treaty was signed.

McKee is described as having declared that the discussion, at least insofar as the Ainse assurance was concerned, took place after the Treaty was signed.

The Chiefs attested that the Memorial recounted events "to the best of their knowledge". It is obvious, however, that the document is ambiguous and inconsistent with the terms of the Treaty.

The Chiefs were unquestionably sincere in their support of Ainse and the Memorial represents a petition on her behalf. The Treaty was not a "provisional agreement" and the subsequent Memorial cannot be considered "as much a part of that treaty as the written articles of the Provisional Agreement" as was the case in Taylor and Williams. As a matter of law, no weight can or should be assigned to the Memorial of 1794.

The crux of the decision in R. v. Taylor and Williams (supra) is found at p.365 [p.120 C.N.L.R.]. MacKinnon A.C.J.O. states:

> In interpreting the treaty, accordingly, it is appropriate to have regard to the following matters. First, the tribes who were parties to the treaty had hunted and fished in the area covered by the treaty, and had taken bullfrogs for food there since earliest memory. It is part of the oral tradition of the tribes that this right was not only recognized at the time of the treaty, but that they continued to exercise the right without interruption up until the present.

The right which the defendants now ask the Court to recognize is the right to hunt on the ceded tract.

There is no historical evidence to support the claim that the Chippewas' right to hunt in the area south of the Thames was recognized at the time of the Treaty of 1790.

There is no evidence of a tradition supporting the exercise of the Indians' right to hunt in the area now known as Southwold Township.

The reference in the defence submissions which is said to indicate that the Indians took raccoons in a similar fashion in 1793 was an account in the Simcoe Papers. The account relates to raccoon hunting by Indians between the Mohawk settlements on the Grand River and the Moravian Delaware settlement on the Thames. The reference relates to the areas immediately adjacent to the Grand and Thames Rivers and obviously covers a substantial amount of territory in several present day Counties. It is of interest to note that there was at least one upper Delaware village on the Thames at the north end of Southwold Township in 1793. The historical records show that the Delaware Indians arrived in the area of the upper Thames several years after the Treaty of 1790 was signed.

The pages of history are virtually blank insofar as Indian activity is concerned in the area now known as Southwold Township from the time of the destruction of the Neutrals until the work upon the surveys of the area was commenced by the British in 1793.

The basis of the Chippewas' right to cede the lands to the British cannot be based upon occupation or use. It may, however, be based upon succession. The Neutrals were succeeded by the Iroquois and the Iroquois were succeeded by the Chippewas. The Iroquois are said to have used the former lands of the Neutrals and other conquered tribes as their hunting grounds. The Chippewas expanded their territorial influence after the power of the Iroquois began to wane. Their right to hunt in Southwold Township has not, however, been established. Thus R. v. Taylor and Williams can be distinguished on that ground alone.

Section 88 of the Indian Act, R. S.C. 1970, c.I-6 provides, in part, that ". . . 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. . .".

In R. v. Commanda, [1939] 3 D.L.R. 635, at 639, it was said that,

> The Game and Fisheries Act is general in its application to all persons within the Province, controlling even the land owner as to game on his private land. Its primary objective is protection of game and fish within the Province and that is what it "relates" to and not to Indians because it happens to affect them.

The Ontario Game and Fish Act was referred to in Taylor and Williams (supra) as a law of general application, without comment.

Finally, in Kruger and Manuel v. The Queen (supra) Dickson J. observed at p.382:

> However abundant the right of Indians to hunt and to fish, there can be no doubt that such right is subject to regulation and curtailment by the appropriate legislative authority. Section 88 of the Indian Act appears to be plain in purpose and effect. In the absence of treaty protection or statutory protection Indians are brought within provincial regulatory legislation.

In the present case, the right claimed by the defendants is not protected by either treaty or statute. The defendants are therefore brought within the Game and Fish Act, a provincial regulatory law of general application.

The findings of fact and the application of the relevant decisions referred to in the instant case indicate that but a brief comment as to section 35 of the Constitution Act, 1982, is required in order to conclude the matter.

The effect of section 35 in relation to a federal statute, the Migratory Birds Convention Act, R.S.C. 1970, c.M-12, was considered by the Saskatchewan Provincial Court in R. v. Bear [reported [1983] 2 C.N.L.R. 123], which was decided on January 11, 1983. Seniuk P.C.J., held that section 35 of the Constitution Act does not change the existing law in relation to Indians exercising their treaty rights to hunt and that the Migratory Birds Convention Act continued to apply to Indians. The defendant was convicted and an appeal against the conviction was dismissed by Milliken J. of the Saskatchewan Court of Queen's Bench on May 6, 1983 [reported [1983] 3 C.N.L.R. 57].

The Saskatchewan Queen's Bench again considered the matter in R. v. Adam Eninew, decided on July 22, 1983, and reported in (1983), 10 W.C.B. 219 [also reported [1984] 2 C.N.L.R. 122, 7 C.C.C. (3d) 443]. The appeal was from a conviction on a charge of unlawfully hunting game birds out of season contrary to regulations promulgated under the Migratory Birds Convention Act. It was held that the accused was bound by the regulation made under the Act on the ground that the effect of the word "existing" in section 35 of the Constitution Act was to limit the rights of aboriginal people to those rights which were in actual existence at the time of the enactment of the Constitution Act. The summary of the decision as reported in the Weekly Criminal Bulletin goes on to say that "as of April 17, 1982, Indians did not enjoy an unrestricted right to hunt, their Treaty rights having been abridged by the earlier enacted regulations which the Constitution Act did not have the effect of repealing or rendering invalid".

The reasoning which was followed by the courts in arriving at the decisions involving section 35 of the Constitution Act as it relates to the federal Migratory Birds Convention Act is equally applicable to provincial regulatory legislation which was enacted for the purpose of accomplishing the same general objectives.

The Game and Fish Act is binding upon all persons in relation to the lands which were the subject of the breaches of the statute which are referred to in the information and there will be a finding of guilt on each of the charges.