

# NOVA SCOTIA MICMAC MOOSE HARVEST CASES

**Counsel for The Crown: Alison Scott, Wayne Hutchison**

**Counsel for the Defendants: Bruce H. Wildsmith, D. Bruce Clarke, Ronald J. MacDonald**

## Background

In the summer of 1988, the Province of Nova Scotia announced that it would grant two hundred licences to hunt moose in Inverness and Victoria Counties on Cape Breton Island. The licences were to be awarded by lottery, with all interested hunters, including Micmacs, being eligible to apply. The Micmac community was not consulted or separately advised of the hunt authorized by the Province.

The Union of Nova Scotia Indians, which represents all the bands on Cape Breton Island and several bands on the mainland of Nova Scotia, and the Native Council of Nova Scotia, which represents off-reserve Micmacs, decided to jointly organize, with the cooperation of the Grand Council of Micmacs, a separate Micmac Moose Harvest. After informing the Province of Nova Scotia and making allowance for considerations of safety and conservation, a Micmac Moose Harvest was announced by the two Micmac political organizations to take place in Victoria and Inverness Counties prior to the hunt authorized by the Province of Nova Scotia. No more than one hundred moose were expected to be taken.

The Province of Nova Scotia, upon being informed of the proposed Micmac Harvest, wrote to all of the Chiefs in Nova Scotia to advise that it considered the Micmac Harvest illegal. On the opening day of the Micmac Harvest the law enforcement agencies formed a blockade on the main access road to the hunting areas in the Cape Breton Highlands, and as a result charged a number of Micmac with hunting offences involving the possession of firearms in an area frequented by moose during the closed season and hunting without a licence. Other Micmacs were similarly charged on subsequent days and some were found in possession of or claimed moose carcasses.

In total, fourteen Micmac were charged with various hunting offences under the Nova Scotia *Wildlife Act* and Regulations.

After several court appearances and motions, the Crown proceeded on one information against four of the individuals, with the trial opening August 28, 1989. At that time, Agreed Statements of Fact were submitted to the court on behalf of all fourteen defendants. These Agreed Statements of Fact admitted the essential components of the offences, i.e. that the facts upon which the information was based were true. In addition, the Agreed Statements of Fact indicated that each of the defendants was a registered Micmac Indian who was engaged in the Micmac Moose Harvest organized by the Micmac community and was hunting for food for himself and his family and relatives and other members of the Micmac community.

The defendants raised as their only defence the claim that they possessed aboriginal and treaty rights to hunt that took priority over the Nova Scotia *Wildlife Act* and Regulations.

Over the course of the fall and winter of 1989-1990, the Crown called two witnesses and the defence ten witnesses. The Crown's first witness was Art Patton a wildlife biologist from the Nova Scotia Department of Lands and Forests, who testified as to the moose populations in Victoria and Inverness Counties and concepts of moose conservation. The Crown also called Dr. Stephen Patterson, a history professor from the University of New Brunswick, to speak about the history of the treaties made by the British with the Micmac during the 1700s. The defence called Ms. Ruth Whitehead (an ethnologist with the Nova Scotia Museum), Dr. Ron Nash (an archaeologist from St. Francis Xavier University), Bernard Francis (a Micmac linguist), Mr. Noel Doucette and Mr. Howard Jeddore (two of the hunters), Mrs. Helen Martin (a Micmac elder), Sakej Henderson (a native lawyer and academic who had extensively studied the historical documents), Dan Christmas from the Union of Nova Scotia Indians and Dwight Dorey from the Native Council of Nova Scotia (who had helped organize the harvest), and Dr. Brian Slattery (a legal historian from Osgoode Hall Law School in Toronto).

The defence had not completed its evidence when the Nova Scotia Supreme Court, Appeal Division, handed down its decision in *Denny, Sylliboy and Paul* (reported *R. v. Denny*, [1990] 2 C.N.L.R. 115). As a result, the defence made a motion for a directed verdict of acquittal.

The Crown took the position that it did not oppose a motion for acquittal and that an acquittal

represented an appropriate disposition of the case. Crown counsel wrote to the trial judge on March 23, 1990, stating:

It is the Crown's position that the *Denny* decision has created, in essence, a presumption of aboriginal rights. This changes the state of the law as it stood at the time the prosecutions were initiated. In light of this change, it is our view that insufficient evidence has been led by the Crown to discharge the burden upon it to rebut the presumption of aboriginal rights.

The trial judge granted the defence motion and entered acquittals in respect of the four defendants in relation to whom the evidence had been led to that point in time. In relation to the other ten defendants, the Crown offered no evidence and acquittals were entered.

### The Charges

The following were the names and charges filed against the fourteen defendants:

The four defendants, Benedict Toney, Alexander Michael, Gregory Gordon Lewis and Henry Joseph Googoo, were jointly charged with the following offences:

Count 1: Did unlawfully hunt or attempt to hunt Wildlife (namely moose) during a time other than an open season for that species of Wildlife, contrary to Section 39(2)(a) of Chapter 13 of the Statutes of Nova Scotia 1987, The Wildlife Act.

Count 2: Did unlawfully possess a firearm in a wildlife habitat during the closed season without a permit issued by the Department to transport a firearm contrary to Section 6(1) of the Firearm and Bow Regulations made pursuant to Section 113(1) and 113(2) of Chapter 13 of the Statutes of Nova Scotia 1987, The Wildlife Act.

The defendants, Dwight Allister Dorey, Noel Doucette, Howard Jeddore, William S. Herney, David Joseph Toney, John Wilfred Sylliboy, were charged in separate informations with the offences outlined in Count 1 and Count 2, *supra*.

The defendants, Darren J. Googoo, *Roy v. Peck*, and Stephen D. Paul, were jointly charged with the offence outlined in Count 1, *supra*, and with a second offence:

That they did unlawfully possess the carcass of a moose during the closed season for moose in contravention of the regulations made pursuant to Section 66, Subsection (1) Wildlife Act, Contrary to Section 66, Subsection (2) of Chapter 13 of the Statutes of Nova Scotia 1987, the Wildlife Act.

The defendant, Edward Googoo, was charged with committing the following offence contrary to section 4(5)(a) of the Moose Hunting Regulations:

No person shall take, hunt or kill or attempt to take, hunt or kill moose unless that person holds a valid moose hunting licence.

Transcript of Representations and Disposition by the Court. March 26, 1990. (As the trial terminated before conclusion, the testimony of some witnesses was not transcribed.)

### **R. V. TONEY et al.**

Nova Scotia Provincial Court, LeVatte J., March 26, 1990

#### BY THE COURT:

I think it's the Crown's case to talk first, isn't it?

#### BY MS. SCOTT:

I believe it's Defence motion, Your Honor.

#### BY MR. WILDSMITH:

Yes, as Your Honor will realize from receiving the correspondence initially from us sending you a copy of the *Denny* case and last Friday sending you a letter followed shortly thereafter by a letter from the Crown, it is our intention to make a motion this morning. My colleague, Mr. Clarke will actually make that motion for us.

BY MR. CLARKE:

Good morning, Your Honor, the Defence would like to make a motion at this time for a verdict of acquittal for the accused under this Information which is being tried now, and then subsequently for the other Informations which we'll be calling afterwards. The...

BY THE COURT:

That Informations?

BY MR. CLARKE:

There are, I believe, in the trial that we have been conducting, there are four defendants.

BY THE COURT

I thought we were conducting it against all of them.

BY MR. CLARKE:

Yes, and then after, ah procedural, Your Honor, it seems appropriate to deal with the motion, the acquittal, separately one after another, because they are separate informations on which the individuals are charged. The reasons for requesting an acquittal at this time is the fact that the Court of Appeal decision was recently rendered in the *Denny* case [*R. v. Denny*, [1990] 2 C.N.L.R. 115] a copy of which Your Honor has been provided, and in the *Denny* case there was a confirmation by the Court of Appeal that aboriginal rights continue to exist in Nova Scotia and acquittals in those cases are on appeal. The question then for Your Honor, seems to be whether, if Your Honor is willing to enter an acquittal at this time, and then if so, on what possible grounds the acquittal could be granted. The Crown has advised us and has through correspondence advised Your Honor and my learned friend will obviously speak to it, that the ground on which they're prepared not to contest our application is that the Crown has not led sufficient evidence to rebut the presumption of aboriginal rights. In our view, Your Honor, the *Denny* case does not create a presumption of aboriginal rights. It's a case where aboriginal rights were proven and it seems that Your Honor can, in our view, recognize the evidence which has been brought before you and in the course of making a decision on this motion, so we would suggest to you that you can consider the evidence that you've heard so far in the context of making that decision, although the decision has been made at this time because of the *Denny* case. There are three major possible defences that have been put forward by the defendants. The first being aboriginal rights, the second being treaty rights and third being the *Royal Proclamation of 1763*. There's no, there has never been a dispute on the actus reus of the offences, the actual acts which arose out of the moose harvest that was organized by the Micmac governing organizations. Your Honor has heard days, more correctly weeks, of evidence concerning mostly... yes a great deal of evidence, ah, most of it concerning various treaties that were signed, treaty signed in 1725, 1752, both which contained the right to hunt, and then subsequent treaties signed in 1760-61, which again we submit contained the right to hunt. Those ah, the treaty signed in 1761, of course as Your Honor will recall, specifically referred to Cape Breton. Your Honor has also heard evidence from witnesses about the applicability of the *Royal Proclamation of 1763*. So, we submit to Your Honor, that although it's quite possible for your ruling to be on the basis of aboriginal rights, it's also possible we believe for your Honor to make comments with respect to the evidence which has been heard before you concerning other matters relevant to the Defence. This has been a long, drawn-out trial which has explored a number of issues and it would be hoped that this could be as meaningful a day as possible so that we would submit that it is open to you to make the decision and in that decision to talk about the treaties and the Royal Proclamation. My learned friend has suggested to you that we're seeking a broad declaration of rights. I have no idea where she got that phrase or concept from. We are not seeking a broad declaration of rights. We are not looking for declaratory relief at all, but we are suggesting that it is quite possible for you to comment on the evidence on the other issues that have been heard before.

BY MS. SCOTT:

Very briefly, Your Honor has our submissions in written form and just to reiterate our position, we're of the view that the Crown has not discharged the onus which had been created by the *Denny* case and in light of that we're in agreement with my friend that it's appropriate for an acquittal to be entered. In our submission it's important to remember the purpose of a criminal proceeding, that is to determine the guilt or innocence of the accused person. In this particular case the Crown has not discharged the burden to establish guilt. So the natural result is, of course, acquittal. It's inappropriate in our view, to go beyond that to determine rights between the parties which may have long-reaching civil consequences as to the relationship between the Native community and the non-Native community in a criminal form when it's not necessary, particularly in light of the manner in which events have unfolded to date. The only other comment I have, Your Honor, is that

ah, with respect to the procedure element of the case, we have, I believe, one Information before us with four accused named in the Information. The other Informations, we will not be calling any evidence with respect to this matter.

BY THE COURT

I thought we were acting on all of them.

BY MS.SCOTT:

I think the agreement was we would proceed with the four and then at the conclusion of that, offer the same evidence with respect to the remaining, with respect to the balance, but at this point we're prepared to say that we're not going to be calling any evidence on the other Informations.

BY THE COURT:

Well, which are the four?

BY MS. SCOTT:

Toney...

BY THE COURT:

Gregory Gordon Lewis, Alexander Michael, and Henry Joseph Googoo?

BY MS. SCOTT:

Yes. Those are the submissions of the Crown.

BY THE COURT:

And ah, even the second one about Count Number Two, there's two counts on this Information. The first one is "did unlawfully hunt or attempt to hunt wildlife (namely moose) during a time other than an open season for that species of wildlife contrary to Section 39(2)(a) of Chapter 13 of the Statutes of Nova Scotia 1987, *The Wildlife Act*. And further at the same time and place did unlawfully possess a firearm in a wildlife habitat during the closed season without a permit issued by the Department to transport a firearm contrary to Section 6(1) of the Firearm and Bow Regulations made pursuant to Section 113(1) and 113(2) of Chapter 13 of the Statutes of Nova Scotia 1987, the *Wildlife Act*." Today is March the 26th. I find that the Crown has not proven its case beyond a reasonable doubt and therefore I find the accused, Benedict Toney, Alexander Michael, Gregory Gordon Lewis and Henry Joseph Googoo not guilty. What's the next one we're going to deal with?

BY MR. CLARK:

The ah, the subsequent predict the same motion with respect to the Information against Dwight Allister Dorey.

BY THE COURT:

Again there's two Counts so...

BY MS.SCOTT:

The Crown is calling no evidence on that, Your Honor.

BY THE COURT:

Finding of the Court in this matter on both Counts not guilty.

BY MR. CLARKE:

We make a motion for dismissal on the charge against Noel Doucette.

BY THE COURT:

Alright, two Counts also here. You want to repeat what you said before, or what?

BY MR. CLARKE:

Well, I guess the motion is one for dismissal and the Crown will then indicate that they will lead no evidence and it's not really the same motion, is it, it's it's...

BY MS. SCOTT:

If Your Honor would just call the case we can indicate we'd call no evidence, it's not necessary, and then you move for dismissal.

BY THE COURT:

Alright. Noel Doucette. Ah, finding of the Court in this matter, both Counts, not guilty.

BY MR. CLARKE:

Your Honor, Stephen Paul, Roy Peck and Darren Googoo.

BY MS. SCOTT:

Crown calls no evidence.

BY THE COURT:

There's three of them here, isn't there?

BY MR. CLARKE:

Yes. Defence moves for a dismissal of those charges.

BY THE COURT:

I'm finding them not guilty.

BY MR. CLARKE:

Howard Jeddore

BY MS. SCOTT

Crown calls no evidence.

BY MR. CLARKE:

Defence moves for a dismissal.

BY THE COURT:

Finding of the Court on the last matter as I just said, because the Crown has not proven its case beyond a reasonable doubt and finding of the Court in this matter here against Howard Jeddore is the same thing.

BY MR. CLARKE:

Edward Googoo.

BY MS. SCOTT:

Crown calls no evidence.

BY THE COURT:

Thank you.

BY MR. CLARKE:

Defence will move for dismissal.

BY THE COURT

And ah, this went by Summary Offence Information.

BY MR. CLARKE:

William Herney.

BY THE COURT:

William Herney. Two Counts.

BY MS. SCOTT:

Crown calls no evidence.

BY MR. CLARKE:

Defence will move for dismissal.

BY THE COURT:

Found not guilty.

BY MR. CLARKE:

David Joseph Toney.

BY THE COURT:

Two Counts.

BY MS. SCOTT:

Crown call no evidence.

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BY MR. CLARKE:

Defence would move for dismissal.

BY THE COURT:

Found not guilty.

BY MR. CLARKE:

John Wilfred Sylliboy.

BY MS. SCOTT:

Crown calls no evidence.

BY MR. CLARKE:

Defence will move for dismissal.

BY THE COURT:

Found not guilty on both Counts. I think that wraps up them all now, doesn't it? Well, thank you very much.

BY MR. CLARKE:

If I may, Your Honor, the Defence would like to express our appreciation for your patience and forbearance throughout this matter.

BY THE COURT:

Thank you. I found that the counsel were easy to get along with and ah, tried to be reasonable in their arguments when a difficult point came up. It's taken a long time and it's taken a bit of good out of myself, and all I can do is say I'm happy it's over. I don't think there is anything else I have to say. Would you close the Court, please.

COURT CLOSED