

DONALD JOHN MARSHALL, Jr. v HER MAJESTY THE QUEEN

SUPREME COURT OF CANADA

Heard November 5, 1998

Judgment September 17, 1999

The accused, a Mi'kmaq Indian, was charged with three offences set out in the federal fishery regulations: the selling of eels without a licence, fishing without a licence and fishing during the close season with illegal nets. He admitted that he had caught and sold 463 pounds of eels without a licence and with a prohibited net within close times. The only issue at trial was whether he possessed a treaty right to catch and sell fish under the treaties of 1760-61 that exempted him from compliance with the regulations. During the negotiations leading to the treaties of 1760-61, the aboriginal leaders asked for truckhouses "for the furnishing them with necessaries, in Exchange for their Peltry" in response to the Governor's inquiry "Whether they were directed by their Tribes, to propose any other particulars to be Treated upon at this Time". The written document, however, contained only the promise by the Mi'kmaq not to "Traffick, Barter or Exchange any Commodities in any manner but with such persons, or the Manager of such Truckhouses as shall be appointed or established by His majesty's Governor". While this "trade clause" is framed in negative terms as a restraint on the ability of the Mi'kmaq to trade with non-government individuals, the trial judge found that it reflected a grant to them of the positive right to bring the products of their hunting, fishing and gathering to a truckhouse to trade. He also found that when the exclusive trade obligation and the system of truckhouses and licensed traders fell into disuse, the "right to bring" disappeared. The accused was convicted on all three counts. The Court of Appeal upheld the convictions. It concluded that the trade clause did not grant the Mi'kmaq any rights, but represented a mechanism imposed upon them to help ensure that the peace between the Mi'kmaq and the British was a lasting one, by obviating the need of the Mi'kmaq to trade with the enemies of the British or unscrupulous traders.

Held (Gonthier and McLachlin JJ. dissenting): The appeal should be allowed and an acquittal entered on all charges.

Per Lamer C.J. and L'Heureux-Dubé, Cory, Iacobucci and Binnie JJ.: When interpreting the treaties the Court of Appeal erred in rejecting the use of extrinsic evidence in the absence of ambiguity. Firstly, even in a modern commercial context, extrinsic evidence is available to show that a written document does not include all of the terms of an agreement. Secondly, extrinsic evidence of the historical and cultural context of a treaty may be received even if the treaty document purports to contain all of the terms and even absent any ambiguity on the face of the treaty. Thirdly, where a treaty was concluded orally and afterwards written up by representatives of the Crown, it would be unconscionable for the Crown to ignore the oral terms while relying on the written ones.

There was more to the treaty entitlement than merely the right to bring fish and wildlife to truckhouses. While the treaties set out a restrictive covenant and do not say anything about a positive Mi'kmaq right to trade, they do not contain all the promises made and all the terms and conditions mutually agreed to. Although the trial judge drew positive implications from the

negative trade clause, such limited relief is inadequate where the British-drafted treaty document does not accord with the British-drafted minutes of the negotiating sessions and more favourable terms are evident from the other documents and evidence the trial judge regarded as reliable. Such an overly deferential attitude to the treaty document was inconsistent with a proper recognition of the difficulties of proof confronted by aboriginal people. The trial judge's narrow view of what constituted "the treaty" led to the equally narrow legal conclusion that the Mi'kmaq trading entitlement, such as it was, terminated in the 1780s. It is the common intention of the parties in 1760 to which effect must be given. The trade clause would not have advanced British objectives (peaceful relations with a self-sufficient Mi'kmaq people) or Mi'kmaq objectives (access to the European "necessaries" on which they had come to rely) unless the Mi'kmaq were assured at the same time of continuing access, implicitly or explicitly, to a harvest of wildlife to trade.

This appeal should be allowed because nothing less would uphold the honour and integrity of the Crown in its dealings with the Mi'kmaq people to secure their peace and friendship, as best the content of those treaty promises can now be ascertained. If the law is prepared to supply the deficiencies of written contracts prepared by sophisticated parties and their legal advisors in order to produce a sensible result that accords with the intent of both parties, though unexpressed, the law cannot ask less of the honour and dignity of the Crown in its dealings with First Nations. An interpretation of events that turns a positive Mi'kmaq trade demand into a negative Mi'kmaq covenant is not consistent with the honour and integrity of the Crown. Nor is it consistent to conclude that the Governor, seeking in good faith to address the trade demands of the Mi'kmaq, accepted the Mi'kmaq suggestion of a trading facility while denying any treaty protection to Mi'kmaq access to the things that were to be traded, even though these things were identified and priced in the treaty negotiations. The trade arrangement must be interpreted in a manner which gives meaning and substance to the oral promises made by the Crown during the treaty negotiations. The promise of access to "necessaries" through trade in wildlife was the key point, and where a right has been granted, there must be more than a mere disappearance of the mechanism created to facilitate the exercise of the right to warrant the conclusion that the right itself is spent or extinguished.

There is a distinction to be made between a liberty enjoyed by all citizens and a right conferred by a specific legal authority, such as a treaty, to participate in the same activity. A general right enjoyed by all citizens can be made the subject of an enforceable treaty promise. Thus the accused need not show preferential trading rights, but only treaty trading rights. Following the enactment of the Constitution Act, 1982, the fact the content of Mi'kmaq rights under the treaty to hunt and fish and trade was no greater than those enjoyed by other inhabitants does not, unless those rights were extinguished prior to April 17, 1982, detract from the higher protection they presently offer to the Mi'kmaq people.

The accused's treaty rights are limited to securing "necessaries" (which should be construed in the modern context as equivalent to a moderate livelihood), and do not extend to the open-ended accumulation of wealth. Thus construed, however, they are treaty rights within the meaning of s. 35 of the Constitution Act, 1982. The surviving substance of the treaty is not the literal promise of a truckhouse, but a treaty right to continue to obtain necessaries through hunting and fishing by trading the products of those traditional activities subject to restrictions that can be justified

under the Badger test. What is contemplated is not a right to trade generally for economic gain, but rather a right to trade for necessities. The treaty right is a regulated right and can be contained by regulation within its proper limits. Catch limits that could reasonably be expected to produce a moderate livelihood for individual Mi'kmaq families at present-day standards can be established by regulation and enforced without violating the treaty right. Such regulations would accommodate the treaty right and would not constitute an infringement that would have to be justified under the Badger standard.

The accused caught and sold the eels to support himself and his wife. His treaty right to fish and trade for sustenance was exercisable only at the absolute discretion of the Minister. Accordingly, the close season and the imposition of a discretionary licencing system would, if enforced, interfere with the accused's treaty right to fish for trading purposes, and the ban on sales would, if enforced, infringe his right to trade for sustenance. In the absence of any justification of the regulatory prohibitions, the accused is entitled to an acquittal.

Per Gonthier and McLachlin JJ. (dissenting): Each treaty must be considered in its unique historical and cultural context, and extrinsic evidence can be used in interpreting aboriginal treaties, absent ambiguity. It may be useful to approach the interpretation of a treaty in two steps. First, the words of the treaty clause at issue should be examined to determine their facial meaning, in so far as this can be ascertained, noting any patent ambiguities and misunderstandings that may have arisen from linguistic and cultural differences. This exercise will lead to one or more possible interpretations of the clause. At the second step, the meaning or different meanings which have arisen from the wording of the treaty right must be considered against the treaty's historical and cultural backdrop. A consideration of the historical background may suggest latent ambiguities or alternative interpretations not detected at first reading.

The treaties of 1760-61 do not grant a general right to trade. The core of the trade clause is the obligation on the Mi'kmaq to trade only with the British. Ancillary to this is the implied promise that the British will establish truckhouses where the Mi'kmaq can trade. These words do not, on their face, confer a general right to trade. Nor does the historic and cultural context in which the treaties were made establish such a right. The trial judge was amply justified in concluding that the Mi'kmaq understood the treaty process as well as the particular terms of the treaties they were signing. On the historical record, moreover, neither the Mi'kmaq nor the British intended or understood the treaty trade clause as creating a general right to trade. To achieve the mutually desired objective of peace, both parties agreed to make certain concessions. The Mi'kmaq agreed to forgo their trading autonomy and the general trading rights they possessed as British subjects, and to abide by the treaty trade regime. The British, in exchange, undertook to provide the Mi'kmaq with stable trading outlets where European goods were provided at favourable terms while the exclusive trade regime existed. Both the Mi'kmaq and the British understood that the "right to bring" goods to trade was a limited right contingent on the existence of a system of exclusive trade and truckhouses. The finding that both parties understood that the treaties granted a specific, and limited, right to bring goods to truckhouses to trade is confirmed by the post-treaty conduct of the Mi'kmaq and the British. Soon after the treaties were entered into, the British stopped insisting that the Mi'kmaq trade only with them, and replaced the expensive truckhouses with licenced traders in 1762. The system of licenced traders, in turn, died out by the 1780s. The exclusive trade and truckhouse system was a temporary mechanism to achieve peace

in a troubled region between parties with a long history of hostilities. When the restriction on the Mi'kmaq trade fell, the need for compensation for the removal of their trading autonomy fell as well. At this point, the Mi'kmaq were vested with the general non-treaty right to hunt, to fish and to trade possessed by all other British subjects in the region. The conditions supporting the right to bring goods to trade at truckhouses, as agreed to by both parties, ceased to exist.

It follows from the trial judge's finding that the "right to bring" goods to trade at truckhouses died with the exclusive trade obligation upon which it was premised that the treaties did not grant an independent right to truckhouses which survived the demise of the exclusive trade system. This right therefore cannot be relied on in support of an argument of a trade right in the modern context which would exempt the accused from the application of the fisheries regulations.

Supreme Court of Canada

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