12 of 24 DOCUMENTS

Case Name:

R. v. Paul

Between
Her Majesty the Queen, and
John E. Paul

[2011] N.B.J. No. 217

2011 NBPC 23

New Brunswick Provincial Court
Judicial District of Woodstock

R.L. Jackson C.J. Prov. Ct.

Heard: November 24-28, 2008; January 28, December 7-9, 2009;
January 14, 2010.
Judgment: June 14, 2011.

(19 paras.)

Counsel:

William Richards: for the Crown.

Jayme L.J. O'Donnell: for the Defendant.

R.L. JACKSON C.J. PROV. CT.:--

Introduction:

1 The Defendant, a registered Status Indian under the ***Indian Act,*** *R.S.C. c. I-5,* of Maliseet ancestry and a member of St. Mary's First Nation, is charged with unlawfully making improvements on Crown lands without permission by erecting thereon a hunting camp.

2 In the Defendant's Brief on Law the issues raised in this litigation are set out as follows:

(a) Whether the Defendant has an **Aboriginal** and/or treaty to hunt in the south and west of

the Village of Meductic, namely the Duck Lake Road area;

(b) Whether this right to hunt includes the reasonable incidental aspect of building shelters as a necessary part of the Maliseet style of hunting;

(c) Whether if an **Aboriginal** and/or treaty right to construct shelters as being incidental to the right to hunt is infringed by the existing legislation, the *Crown Lands and Forests Act*; and

(d) If there is infringement on treaty rights by relevant legislation, the *Crown Lands and Forests Act*, whether section 88 of the *Indian Act* would apply to the present situation, as a law of general application

3 The Crown, in its Brief suggests two other questions for consideration, namely: whether the area in question is in fact traditional Maliseet territory, and whether the fact that in 1857 the land was granted by the Crown to one James Munchie and only reacquired by the Crown in 1999, alienates the land from a claim pursuant to section 35 of the ***Constitution Act,*** *1982*.

Facts

4 By an Agreed Statement of Facts filed as Exhibit 1 in the trial the Defendant concedes that "The Camp in question, constructed by Mr. Paul for his use, constitutes an "improvement" for the purposes of the prohibition contained in s. 71(a) of the ***Crown Lands and Forests Act***." and also that "the Defendant did not have the consent of the Minister of Natural Resources to make improvements to Crown Land.".

Analysis and Decision

5 As the Defendant has admitted the essential elements of the offence the onus now shifts to him to demonstrate on a balance of probabilities an **aboriginal** and/or a treaty right. If such a right is proven then the onus shifts back to the Crown to establish extinguishment of that right and if there is no extinguishment, the Defendant must show that there has been an infringement of the **aboriginal** right by the ***Crown Lands and Forests Act***. Finally the Crown must justify any infringement of the **aboriginal** right proven. (***R. v. Bernard*** *(2003), 262 N.B.R. (2d) 1*.)

6 The Defendant asserts that he has an **aboriginal** right to hunt and that incidental to that right, he has the right to construct a shelter for the purpose of exercising his hunting practices. A consideration of this claim necessarily entails consideration of the Crown's position that, as the Defendant was hunting outside traditional Maliseet hunting areas, he cannot avail himself of an **aboriginal** right. In making this submission, the Crown relies on the opinion of Dr. Patterson, who was declared a witness qualified to give opinion evidence *inter alia* on the culture, polity and economic activities of the Algonquin peoples of Easter North America. He opined that the Maliseet on the Saint John river and the Passamaquoddy in the Saint Croix watershed are two discreet groups who, although culturally similar, viewed themselves as a separate people and had separate, although contiguous, traditional hunting areas. In both the map in Vincent Erickson's **Handbook of North American Indians** (Exhibit 19, tab 1) and that prepared by William Ganong (Exhibit 10, tab 2 and Exhibit 15) separate areas are shown for the Maliseet and Passamaquoddy. It is worth noting that the area in question is located very close to the suggested "boundary" between the hunting areas although in both maps, it is clearly in Passamaquoddy territory.

7 Mr. Paul himself testified to having hunted in this area for over 20 years and two elders, both of whom were declared experts in oral history and tradition, Wayne Nicholas and Richard Polchies, said that the area in question was in Maliseet territory. In addition Dr. Wicken, who was called by the Defendant and was qualified to give opinion evidence *inter alia* on the histories, cultures, lifestyles and relationships of the Maliseet, Mi'kmaq and related Eastern Indian peoples inhabiting Maine and Eastern Canada, opined that he was unable to draw a definite conclusion as to the existence of two separate tribes. He referred to **A Report on Tribal Boundaries and Hunting areas of the Malecite Indian of New Brunswick** (Exhibit 10, tab 3) by Speck and Hadlock, where it is noted that the Solomon family traditionally hunted in the area "north of Lake George, Pokiok, Magaguadavic, and Mud lake" and this is also shown on

the map at page 71 of the article. At page 87 of that article under the heading "Comments" Hadlock notes:

> "It may be noted that on the accompanying map there are several family names, which indicate family hunting territories, outside of the generally accepted tribal bounds of the Malecite. In drawing a map of the area controlled or claimed by groups of Indians who were in a constant state of migration, such a map can only at best indicate the probable limits of tribal territory at a given time in the history of the tribe."

That seems to me to be a reasonable proposition when trying to determine what the traditional hunting areas of any group were at the time of contact with Europeans. Unfortunately the various tribes neither recorded in writing nor mapped their territories, and what one must rely on are records usually made by non-**aboriginals** and often centuries after the fact. While they may serve as a guide they cannot be relied on as having pinpoint accuracy.

8 I find it noteworthy that the Defendant's mother was born and raised on the former St. Croix Reserve just outside of McAdam. The reserve is shown on the Erickson map (supra) as being clearly inside Passamaquoddy territory although both the Defendant and Mr. Polchies say she was Maliseet. In his testimony, Mr. Paul positioned the camp as being ten miles from McAdam (said to be in Passamaquoddy territory) and fifteen from Pokiok (said to be in Maliseet territory).

9 It is beyond dispute that the Maliseet travelled in this territory as they, in common with other groups, used the Magaguadavic/St. Croix watershed as a portage route to gain access to coastal areas in what is now Maine and New Brunswick. The John Gyles narrative (Exhibit 10, tab 7) points out that this was the case in the late 1600s. As noted by Dr. Wicken in his testimony, while a group of Maliseet who were travelling through this area might carry some food, they would also hunt along the way, if the opportunity presented itself, in order to sustain themselves on the journey.

10 I accept the evidence of Wayne Nicholas that Maliseet territory encompassed the St. John river area through to the St. Lawrence, down to the St. Croix and Maine, all connected by river routes and portages. I need not for the purposes of this decision decide whether or not the Passamaquoddy and Maliseet are of the same or of a different tribe as, in my view, the "boundaries" or dividing line outlined by Ganong and Erickson are visual representations only and were never intended to be, nor should they be, relied upon as a definitive determination of the extent of territories. It is clear that Maliseet people have travelled through the Magaguadavic/St.Croix river system for centuries; that there have been Maliseet reserves in that general area, and that the area is contiguous to areas not disputed as being Maliseet territory, such as the Pokiok and Meductic (Eel) rivers. I therefore conclude that the Duck Lake area where the Defendant's camp was constructed is within traditional hunting territory of the Maliseet peoples.

11 It cannot be seriously disputed that hunting, and in particular moose hunting, was an integral part of Maliseet culture and way of life at the time of first contact. As Bastarache J. noted in ***R. v. Sappier; R. v. Gray,*** *[2006] 2 S.C.R. 686, at paragraph 2*:

> "The Maliseet and Mi'kmaq were migratory living from hunting and fishing, and using the rivers and lakes of Eastern Canada for transportation. The central question on appeal is how to define the distinctive culture of such peoples, and how to determine which pre-contact practices were integral to that culture."

And later at paragraph 20:

> "In order to be an **aboriginal** right, an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the **aboriginal** group claiming the right. *R. v. Van der Peet*, 1996 CanLII 216 (S.C.C.)], [1996] 2 S.C.R. 507, at para. 46."

The real question in this case is whether that right included the reasonably incidental aspect of building shelters as a necessary part of hunting.

12 Both oral historians, Mr. Polchies and Mr. Nicholas spoke of the Maliseet people hunting in groups, often family groups, and of travelling while hunting for periods of weeks. Mr. Nicholas in particular noted that the Maliseet used various types of shelter during the hunt dependant on the time of year, and also that some shelters were of a more permanent nature to which people might return year after year. Dr. Wicken also testified that when the Maliseet moved from their larger villages generally along the St. John River and travelled inland to hunt they did establish some semi-permanent types of structures dependant on the situation and the climate.

13 The Supreme Court in ***R. v. Sundown,*** *132 C.C.C. (3d) 353* discussed the term "reasonably incidental" in these words:

> "28 How should the term "reasonably incidental" be defined and applied? In my view it should be approached in this manner. Would a reasonable person, fully apprised of the relevant manner of hunting or fishing, consider the activity in question reasonably related to the act of hunting or fishing? It may seem old fashioned to apply a reasonable person test but I believe it is both useful and appropriate.
>
> 29 The reasonable person must be dispassionate and fully apprised of the circumstances of the treaty rights holder. That reasonable person must also be aware of the manner in which the First Nation hunted and fished at the time the treaty was signed. That knowledge must, of course, be placed to some extent in today's context ... A form of shelter was always necessary to carry out the expeditionary hunting of the Joseph Bighead First Nation. At the time of the treaty, the shelter may have been a carefully built lean-to. That shelter appropriately evolved to a tent and then a small cabin. Thus, the reasonable person, informed of the manner of hunting at the time of the treaty, can consider it in the light of modern hunting methods and can determine whether the activity in question -- the shelter -- is reasonably incidental to the right to hunt.
>
> 30 In order to determine what is reasonably incidental to a treaty right to hunt, the reasonable person must examine the historical and contemporary practice of that specific treaty right by the **aboriginal** group in question to see how the treaty right has been and continues to be exercised. That which is reasonably incidental is something which allows the claimant to exercise the right in the manner that his or her ancestors did, taking into account acceptable modern developments or unforeseen alterations in the right. The question is whether the activity asserted as being reasonably incidental is in fact incidental to an actually practised treaty right to hunt. The inquiry is largely a factual and historical one. Its focus is not upon the abstract question of whether a particular activity is "essential" in order for hunting to be possible but rather upon the concrete question of whether the activity was understood in the past and is understood today as significantly connected to hunting. Incidental activities are not only those which are essential, or integral, but include, more broadly, activities which are meaningfully related or linked." (Underlining added)

14 Cory, J. held that a hunting cabin was reasonably incidental to Mr. Sundown's right to hunt in the traditional expeditionary style. This is the same style spoken of by Messrs. Polchies and Nicholas. However the Court also introduced a qualification at paragraph 36 when it said:

> "36 Any interest in the hunting cabin is a collective right that is derived from the treaty and the traditional expeditionary method of hunting. It belongs to the Band as a whole and not to Mr. Sundown or any individual member of the Joseph Bighead First Nation. It would not be possible, for example, for Mr. Sundown to exclude other members of this First Nation who have the same treaty right to hunt in Meadow Lake Provincial Park." (Underlining added)

15 Other Courts, in interpreting ***Sundown*** have addressed this issue, such as ***R. v. Baker,*** *[2008] O.J. No. 154*, and ***Saskatchewan v. Landry,*** *2001 SKQB 424.* In ***Baker***, Laskin J.A. found that Mr. Baker had not established any **aboriginal** right and said:

> "9 The record in this case contains little evidence to connect Mr. Baker's construction of his cabin either to the historical or contemporary practice of the Couchiching First Nation. In short, he did not show that he built a communal *Sundown* cabin. Instead, as the appeal court judge held, he seems to have built a summer cottage for personal use. Further, as the cabin is less than an hour from his home, he could exercise his treaty right to hunt and fish without the cabin."

Similarly in ***Landry*** *the* Court focused on the Defendant's use of the cabin and its proximity to his other residences and noted:

> "19 I turn to the second aspect of this difficult case. Was Mr. Landry's use of the land consistent with his rights under Treaty No. 6?
>
> 20 That question is answered authoritatively by the decision of the Supreme Court of Canada in *R. v. Sundown*. The cabin constructed by Sundown was intended for the use of expeditionary hunters. It was available to all members of his reserve and was deemed to be the property of the band. There was no suggestion it was ever Mr. Sundown's permanent or even secondary residence. Mr. Sundown had a permanent residence some 100 kilometers away.
>
> 21 Mr. Landry's cabin was constructed, furnished and used at all times as his personal residence. No other **aboriginal** person, other than members of his family and guests, were intended to use it for any purpose let alone traditional uses such as hunting, trapping and fishing. There is no evidence anyone considered the La Ronge band had any interest in the cabin or right to use it.
>
> 22 Even if the defendant had carried on trapping as his major occupation the result would have been no different. The fact is its use for trapping was very limited and was completely secondary to its function as a wilderness home. The defendant falls entirely outside the criteria established for traditional **aboriginal** activity *in R. v. Sundown*."

16 I accept that the Defendant, as a Maliseet, had a **aboriginal** right to hunt and that the establishment of shelters are reasonably incidental to that right. However the cases are clear that this is a collective right and the evidence here points to the fact that Mr. Paul constructed the camp himself in his favourite hunting area, with his personal resources and that it was used by his family, their friends and other persons from St. Mary's First Nation who were invited and taken there by Mr. Paul. There is no evidence of a communal use of the camp. There was a suggestion that there was a guest book which could establish that others used the camp, however such evidence was not lead by the Defendant. The evidence here is remarkably similar to that in both ***Baker*** and ***Landry*** in that the camp was constructed by the Defendant, primarily used by him, his family and guests and was in close proximity to both a secondary residence at Davidson Lake, some 42 kilometers away, and to his primary residence on St. Mary's First Nation, some 70 kilometers further away. Accordingly I find that the evidence does not establish that the construction of his camp was reasonably incidental to his **aboriginal** right to hunt; rather he constructed a camp on his favourite hunting area in which he could have, and previously did, hunt without the aid of a shelter.

17 Because of the position I have taken in regards to the exercise of the Defendant's **aboriginal** right I do not find it necessary to determine whether or not the Defendant had a treaty right to hunt as the comments in regard to the construction being reasonably incidental to any such right found would apply equally to a treaty right to hunt. I do note

the position of the Crown with respect to the treaty of 1760, which they agree is subsisting, and the effect of the swearing of allegiance to the British Crown by **aboriginal** peoples, however I decline to deal with that issue as it is unnecessary given the position I have taken in regard to the construction of the camp being reasonably incidental to the right to hunt.

18 Similarly I do not find it necessary to decide either the question of infringement of the **aboriginal** right to hunt by the ***Crown Land and Forests Act***, the application of section 88 of the ***Indian Act*** or the effect, if any, of the ***Crown Grant of 1857***. If I am in error in respect of the construction of the Defendant's cabin being reasonably incidental to his **aboriginal** right to hunt I would be of the opinion that the Crown has not satisfied me that the ***Crown Grant of 1857*** extinguished that right. I accept the logic of ***R. v. Bartleman,*** *(1984), 55 B.C.L.R. 78* and ***R. v. Alphonse*** *(1993), 80 B.C.L.R.(2d) 17* and, as there is no evidence that the lands in question were ever cultivated, fenced or occupied, I find that there was no extinguishment of the Defendant's **aboriginal** right to hunt on those lands.

19 The Defendant having failed to establish an **aboriginal** right to construct the camp on what is admittedly Crown Lands, and having admitted that he had no permit as required by the ***Crown Lands and Forests Act***, I am required to find him guilty of the charge.

R.L. JACKSON C.J. PROV. CT.

cp/e/qlrxg/qljxr/qlana