

# **SIMON v. THE QUEEN (sub nom. REGINA v. SIMON)**

**(1958), 43 M.P.R. 101 (also reported: 124 C.C.C. 110)**

**New Brunswick Supreme Court, Appeal Division, McNair C.J.N.B., Bridges and Ritchie JJ.A., 19 September 1958**

The appellant, an Indian, registered under the Indian Act as a member of the band of Micmacs residing on the Big Cove Reservation in Kent County, was convicted for violation of the New Brunswick Fishery Regulations made under The Fisheries Act of Canada having set a net in the Richibucto River above a certain point. The appellant claimed immunity by virtue of the 1752 treaty which had been negotiated by the Governor of Nova Scotia with a tribe, so-called, of Micmac Indians. The appellant relied on article 4 of the treaty which he claimed entitled him to fish with nets in the water of the Richibucto River irrespective of any prohibitions contained in the Regulations.

*Held*, by McNair, C.J.N.B., Bridges and Ritchie, JJ.A. concurring, the appellant made no effort to establish any connection, by descent or otherwise, with the original group of Indians with whom the 1752 treaty was made. The record is completely devoid of evidence to show any connection, by blood or otherwise, between the appellant and his band and such group of Indians.

A similar claim based on a Boston treaty of 1725 must, on like grounds, be rejected.

The appellant failed to show vested in himself any right to any immunity that may have been contemplated by the Parliament of Canada when enacting s. 87 of the Indian Act. The proviso in the section invites elucidation. Appeal dismissed.

1958. June 10. *Mark Yeoman* for the Appellant.

*Charles Leger* for the Respondent contra.

*Mark Yeoman* in reply.

1958. September 19. The judgment of the Court was delivered by

McNAIR C.J.N.B.:--The appellant, an Indian registered under the Indian Act as a member of the band of Micmacs residing on the Big Cove Reservation in Kent County, was convicted before the Magistrate for Kent County of a violation of the New Brunswick Fishery Regulations made under the Fisheries Act of Canada. The offence consisted of setting a net in that portion of the Richibucto River above a line drawn across it from a point at or near its confluence with Bass River. An appeal to the Kent County Court, under Part XXIV of the Criminal Code relating to summary convictions, was dismissed. The accused now appeals to this Court claiming immunity on the ground of treaty rights.

He relies on Section 87 of the Indian Act:

"87. 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 such laws are inconsistent with this Act or any order,

rule, regulation or by-law made thereunder, and except to the extent such laws make provision for any matter for which provision is made by or under this Act."

As stated by Kellock J. in *Francis v. The Queen*, [1956] S.C.R. 618 at page 631 "treaty", as used in section 87, extends to and embraces treaties with Indians and has no reference to treaties in the conventional sense, being international agreements.

The appellant rests his claim to immunity upon a treaty found recorded in the minutes of a meeting of Council held at the Governor's House in Halifax on November 22nd, 1752, which had been negotiated by the Governor of Nova Scotia with a tribe, so-called, of Micmac Indians. The minutes are on file in the Public Archives of the Province and a certified copy was put in evidence before the Magistrate. They show a "Treaty and Articles of Peace and Friendship Renewed" were entered into by His Excellency Peregrine Robert Hopson, Esquire, Captain General and Governor in Chief in and over His Majesty's Province of Nova Scotia or Acadie-- and His Majesty's Council, on behalf of His Majesty, with Major Jean Baptiste Cope, Chief Sachem of the Tribe of Indians inhabiting the Eastern Coast of the said Province, and Andrew Hadley Martin, Gabriel Martin and Francis Jeremiah, members and delegates of the said Tribe, "for themselves and the said Tribe, their heirs and the heirs of their heirs forever;" and that an order was made that provisions issue according to the allowance of the troops, for six months for ninety of the said Indians "being the computed number of that Tribe."

Article 1 of the treaty will be set out in extenso later. Article 2 provides all transactions during the late war "shall on both sides be buried in oblivion with the hatchet" and assures to the said Indians the favour, friendship and protection of His Majesty's Government. By Article 3 the said tribe undertake to use their utmost endeavor to bring in "the other Indians to renew and ratify this peace", to make known any attempts or designs of other Indians or any enemy against His Majesty's subjects within the Province and to hinder and obstruct the same to their utmost power; and, on behalf of the Government, aid and assistance are assured to the said tribe if war is made upon them by other Indians refusing to ratify the peace. Article 4 reads: "It is agreed that the said Tribe of Indians shall not be hindered from, but shall have free liberty of hunting and fishing as usual"; and provides for a truckhouse at the River Chibennaccadie or other place of resort to supply the said Indians with merchandise in exchange for what they shall have to dispose of, if such truckhouse is thought needful; and, in the meantime, the said Indians shall be at liberty to bring their products for sale at Halifax or any other settlement in the Province. Article 5 provides for certain provisions to be furnished half yearly "necessary for the family's and proportionable to the number of the said Indians" and to be furnished also to the other tribes that might thereafter renew the peace upon the terms of the treaty. Article 6 stipulates that there will be furnished yearly on October 1st presents of blankets, tobacco, powder and shot to the said Indians so long as they shall continue in friendship, which they were to come by themselves or delegates each year to receive and renew their friendships and submissions. By Article 7 the said Indians undertook to lend their efforts to save the lives and goods of people shipwrecked "on this coast where they resort" and convey them to Halifax, for which they would receive reward.

The appellant contends the privileges accorded by the opening clause of Article 4 entitle him to fish with nets in the waters of the Richibucto River irrespective of any prohibitions contained in the Fisheries Act or the regulations thereunder.

In *R. v. Syliboy*, [1928] 1 D.L.R. 307 the accused, a Cape Breton Indian, had been charged with a

violation of the provincial game laws in force in Nova Scotia. He claimed exemption by virtue of the 1752 treaty. Having regard to the language of the treaty, we are satisfied with the correctness of the view taken by Patterson, Acting County Court Judge, that the treaty was not made with the Micmac Nation or Tribe as a whole but only with a small group of Micmac Indians inhabiting the eastern part of what is now the Province of Nova Scotia with their habitat in or about the Shubenacadie area. This view is confirmed by the terms of the treaty proclamation approved at a meeting of Council held on November 24th 1752 which appears in a publication containing Nova Scotia Documents entitled "Nova Scotia Archives", to which our attention was drawn. The proclamation recites the treaty as made "between this Government and Major Jean Baptiste Cope, Chief Sachem of the Chibennaccadie Tribe of Mick Mack Indians, Inhabiting the Eastern Coast of this Province, and the Delegates of the said Tribe fully empowered for the purpose" and commanded His Majesty's subjects to forbear all acts of hostility against "the aforesaid Major Jean Baptiste Cope, or His Tribe of Chibennacadie Mick Mack Indians."

The appellant made no effort to establish any connection, by descent or otherwise, with the original group of Indians with whom the 1752 treaty was made. Alternatively, before this Court, the appellant relied upon an earlier treaty which is the subject of Article 1 of the 1752 treaty:

"1. It is agreed that the Articles of Submission and Agreement made at Boston in New England by the Delegates of the Penobscot Norridgwook & St. Johns Indians in the year 1725 Ratified & Confirmed by all the Nova Scotia Tribes at Annapolis Royal in the month of June 1725 & lately renewed with Governor Cornwallis at Halifax & Ratified at St. Johns River, now read over, Explained and Interpreted shall be and are hereby from this time forward Renewed, Reiterated, and forever Confirmed by them and their Tribe; and the said Indians for themselves and their Tribe and their Heirs aforesaid do make & Renew the same Solemn Submissions and promises for the Strickt observance of all the Articles therein contained as at any time heretofore hath been done."

No copy of the Boston treaty of 1725 was in evidence in the courts below. However, since the argument before us there has been made available a photostatic copy of the treaty which is on file in the Archives Division of the Office of the Secretary of the Commonwealth of Massachusetts at the State House in the City of Boston. It was entered into on December 15th 1725 by His Majesty's Governments of Massachusetts Bay, New Hampshire and Nova Scotia, on behalf of themselves and the British Subjects under them and as well the Governments and people of the Province of New York and the Colonies of Connecticut and Rhode Island, with Sauguaaram, alias Loron Arexus Francois Xavier, and Meganumbe as delegates of the several tribes of Eastern Indians, viz.: the Penobscot, Narwgwalk, St. Johns, Cape Sables and other Tribes inhabiting His Majesty's Provinces aforesaid and their natural descendants respectively all their lands, liberties and properties not by them conveyed or sold to or possessed by any of the English Subjects as aforesaid, as also the privilege of fishing, hunting and fowling as formerly."

There is nothing before us to indicate to what Nations the Indians concerned in the 1725 treaty belonged nor to show that the Micmacs, or any particular tribe of them, were involved or that the band of Micmacs on the Big Cove Reservation, of which the appellant is a member, are natural descendants of any of the Eastern Indians with whom the treaty was made. Likewise the record is completely devoid of evidence to show any connection, by blood or otherwise, between the appellant and his band and any of the Indian tribes who, according to Article 1 of the 1752 treaty,

had lately at Halifax and the St. Johns River ratified the earlier treaty.

On the evidence the appellant has failed to show vested in himself any right to any immunity that may have been contemplated by the Parliament of Canada when enacting s. 87 of the Indian Act. In consequence, it is unnecessary for us to attempt any definition of the privileges to which legislative countenance has been so given. The proviso found in the section invites elucidation. The task of determining its scope and effect is one which, in our respectful opinion, could fittingly be undertaken by the Executive Authority.

The appeal must be dismissed. There will no order as to costs.

*Appeal dismissed.*