NOVA SCOTIA COURT OF APPEAL

Citation: *R. v. Marshall*, 2003 NSCA 105

Date: 20031010
Docket: CAC 178066
Registry: Halifax

Between:

Stephen Frederick Marshall, Keith Lawrence Julien, Christopher James Paul, Jason Wayne Marr, Simon Joseph Wilmot, Donald Thomas Peterson, Stephen John Knockwood, Ivan Alexander Knockwood,, Leander Philip Paul, William John Nevin, Roger Allan Ward, Mike Gordon Peter-Paul, John Michael Marr, Carl Joseph Sack, Matthew Emmett Peters, Stephen John Bernard, William Gould, Camillius Alex Jr., John Allan Bernard, Peter Alexander Bernard, Eric Stephen Knockwood, Gary Hirtle, Jerry Wayne Hirtle, Edward Joseph Peter-Paul, Angus Michael Googoo, Lawrence Eric Hammond, Thomas M. Howe, Daniel Joseph Johnson, Dominic George Johnson, James Bernard Johnson, Preston MacDonald, Kenneth M. Marshall, Stephen Maurice Peter-Paul, Leon R. Robinson, Phillip F. Young

Appellants

v.

Her Majesty the Queen

Respondent

JUDGE: CROMWELL, J.A.
SAUNDERS, J.A. (Concurring by Separate Reasons)

APPEAL HEARD: March 24, 25, 26 and 27, 2003

JUDGMENT DELIVERED: October 10, 2003

SUBJECT: **Treaty Rights - Right to Gather for Trade - Logging Aboriginal Title - Test for Exclusive Occupation**

SUMMARY: The appellants, who are status Mi'kmaq Indians, cut timber on Crown lands without authorization. That is an offence under s. 29 of the **Crown Lands Act**, R.S.N.S. 1989, c. 114. They were charged and at their trials sought acquittals on the basis that they are entitled to cut timber on Crown lands by virtue of treaty rights or aboriginal title. The trial judge rejected these defences and convicted. The appellants appealed unsuccessfully to the Summary Conviction Appeal Court and sought leave to appeal to the Court of Appeal.

ISSUES:

1. Did the Summary Conviction Appeal Court err in law in deciding that the appellants do not have a treaty right to cut timber on Crown lands without authorization?

2. Did the Summary Conviction Appeal Court err in law in determining that the appellants had not established aboriginal title to the cutting sites?

RESULT: (Unanimously) Leave to appeal was granted, the appeals allowed and a new trial on all counts was ordered. The Court set out the correct legal principles relating to the appellants' claimed treaty right to "gather" trees for trade and to their claims of aboriginal title to the cutting sites. The Court did not rule on whether either of these claims had been established. That will have to be decided at the new trial ordered by the Court.

The Summary Conviction Appeal Court erred in law with respect to the test for determining whether the appellants' treaty rights afford a defence to charges of cutting timber on Crown lands without authorization.

Cromwell, J.A. (Oland, J.A. concurring) held that the claimed

treaty right, which was to gather trees for trade, must be assessed in light of the traditional Mi'kmaq hunting, fishing and gathering lifestyle and economy of the 1760s. Both the resource and the activity must be considered. To determine whether the activities are protected by this treaty right, the question to be answered is whether the conduct constituting the offences was gathering things traditionally gathered or its modern equivalent or its logical evolution. To fall within the treaties, the activity must be traditional Mi'kmaq gathering or its logical evolution and the resource must be of a type traditionally gathered or its logical evolution.

Saunders, J.A., concurring by separate reasons, proposing a different analytical framework to stress the importance of accurately characterizing the right claimed, grounding that right to the purpose of the treaty and emphasizing the determination of what was reasonably within the contemplation of the parties to the 1760 - 61 treaties. Saunders, J.A. also added a cautionary note with respect to the consequences of this court's decision.

(Unanimously) With respect to aboriginal title, the Summary Conviction Appeal Court erred by insisting on evidence of intensive, regular use of the cutting sites rather than asking simply whether there was sufficient evidence of occupation to the standard, described in the reasons for judgment, over a territory that included the cutting sites.

(Unanimously) The Royal Proclamation of 1763 did not reserve lands for the Mi'kmaq in Nova Scotia.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 120 pages.