CITATION: R. v. Meshake, 2007 ONCA 337
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COURT OF APPEAL FOR ONTARIO

WEILER, MacFARLAND and LaFORME JJ.A.

BETWEEN:

HER MAJESTY THE QUEEN

(Respondent)

and

HOWARD MESHAKE

(Appellant)

Louis Strezos and William Henderson, for the appellant

Owen Young, Ria Tzimas and Brian Wilkie, for the respondent

Heard: January 11, 2007

On appeal from the judgment of Justice Peter Bishop dated January 14, 2003, with reasons reported at [2003] O.J. No. 202 allowing the appeal from acquittal entered by Justice of the Peace Marjorie A. Pasloski dated March 6, 2002, with reasons reported at (2004), 58 O.R. (3d) 779.

H.S. LaForme J.A.

BACKGROUND

[1] In both this appeal and the companion appeal in *R. v. Shipman* (Docket C44543), the Aboriginal appellants were convicted for hunting on lands where their own communities had no specific treaty reference for hunting. In both appeals the appellants

sought to establish their own connection to the hunted lands on the basis of their relationship with aboriginal communities that have unchallenged treaty hunting rights over the lands in issue.

[2] In this appeal, the appellant is Howard Meshake, an Ojibway and a member of the Aroland First Nation[1] located near Nakina, Ontario. His community enjoys hunting rights under Treaty 9. At trial, and on the appeal to the Ontario Court of Justice, he took the position that he could exercise his Treaty 9 hunting rights near Sioux Lookout, which is in Treaty 3, based on his marriage to a member of the Lac Seul First Nation, a signatory to Treaty 3.

[3] Mr. Meshake was hunting moose near Sioux Lookout in Treaty 3 territory. In defence of a charge of hunting moose without a provincial licence, contrary to s. 47(1) of the *Game and Fish Act*, R.S.O. 1990, c. G.1,[2] Mr. Meshake asserted at trial that he was insulated from conviction by the constitutionally protected Treaty 9 right to hunt.

[4] Mr. Meshake's trial proceeded over six days in Provincial Offences Court. He defended the charge on two grounds: (i) that he has a protected s. 35(1) *Constitution Act, 1982*, being Schedule B to the *Canada Act* (U.K.), 1982, c.11, kinship treaty right to hunt for moose that cannot be infringed upon by Ontario through the licensing restrictions of the *Game and Fish Act*; and (ii) Treaty 9 contains no geographic restrictions on his ability to hunt as an Aboriginal person and as such any limitation imposed by Ontario is of no force or effect.

[5] The Justice of the Peace accepted Mr. Meshake's first argument that he has a protected s. 35(1) *Constitution Act* treaty right to hunt. She found it was unnecessary to address the second argument regarding any geographic restrictions in Treaty 9 on his ability to hunt. The Justice of the Peace acquitted him. The Crown appealed the acquittal to the Ontario Court of Justice where the appeal was allowed, the acquittal was set aside, and a conviction was entered.

[6] The Justice of the Peace found that the evidence established that cross-boundary marriage was "not an uncommon event" and that an Ojibway man would be expected to hunt to sustain himself and his family regardless of where he lived. She observed that neither Treaty 3 nor Treaty 9 explicitly discussed the social and family aspects of Ojibway life. She then concluded, "I am satisfied that the government and its

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[1] I use the term First Nation as being the same as "reserve" as defined by the *Indian Act*, R.S.C. 1985, c. I-5.

[2] The trial proceeded under the provisions of the *Game and Fish Act*, which was repealed and replaced by the *Fish and Wildlife Conservation Act, 1997*, S.O. 1997, c.41.

commissioners could not have intended that an adult male's right to hunt was extinguished because he married outside of his treaty area."

[7] The appeal judge disagreed with this finding. He concluded that since Treaties 3 and 9 are silent on the issue of marriage, the lack of evidence relating to Ojibway culture at the time of the signing of the treaties "should have led to a finding that no promise was made".

[8] Leave to appeal to this court was granted by Feldman J.A. on April 10, 2003, on the issue of whether Mr. Meshake's treaty rights allow him, as the spouse of a Treaty 3 Nation member, to hunt in the Treaty 3 area.

Agreed Facts

[9] For purposes of the proceedings throughout, the following facts were agreed upon:

- On October 14, 1996, at 10:36 a.m. Mr. Meshake was stopped by a conservation officer on the Cub Lake Road off of Highway #516 northeast of Sioux Lookout. He was driving a pickup truck and he was in possession of a 30-30 rifle and 8 live rounds of ammunition. The rifle was in a case on the seat beside him. Mr. Meshake indicated he had been hunting moose.
- Mr. Meshake did not produce a moose-hunting licence but did produce an Indian Status Card for the officer. Mr. Meshake was (and is) a member of the Aroland Band from Treaty 9.
- The officer advised Mr. Meshake that he was hunting in the Treaty 3 area. Mr. Meshake was uncertain where the boundary was. The officer showed him a map with the treaty boundaries drawn on it.
- The area where the defendant was hunting is within the geographical boundaries described in Treaty 3. The Ministry of Natural Resources states that the area is approximately 70 km west of the boundary between Treaty 3 and Treaty 9.
- Mr. Meshake is in a common law marriage with Ms. Olga Jeannie Carpenter, whom he met in 1995. They have one child. In 1995, he moved to Sioux Lookout

where Ms. Carpenter is a member of the Lac Seul First Nation, a signatory to Treaty 3.

- Since moving to Sioux Lookout, Mr. Meshake hunted in the surrounding Treaty 3 area with Ms. Carpenter's family, including her mother, grandfather, uncles and sister. At other times he would hunt by himself. He also would take Ms. Carpenter's family to hunt in his traditional territory in Treaty 9 and they did not get permission from anyone.

[10] Other evidence was called at trial, including expert opinion evidence. The parties disagree over how to interpret that evidence. I will address some of the expert evidence as I proceed through these reasons; however, the disagreement over this evidence does not affect my decision.

[11] A very brief description of Treaty 3 and Treaty 9 will assist in better understanding the analysis that follows.

The Treaties

[12] Treaty 3 was made with the Ojibway and others at the northwest angle of the Lake of the Woods in October 1873. It effected the surrender of Aboriginal title and rights in respect of some fifty thousand square miles located in Manitoba and northwestern Ontario.

[13] The written text of Treaty 3 describes the communal Treaty 3 harvesting right[3] in the following terms:

> Her Majesty further agrees with Her said Indians that they, the said Indians, shall have right to pursue their avocations of hunting and fishing through-out the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by Her Government of Her Dominion of Canada, and saving and excepting such tracts as may, from time to time, be required or taken up for settlement, mining, lumbering or other purposes by Her said Government of the Dominion of Canada, or by any of the

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[3] "Harvesting rights" generally means the Aboriginal and treaty right of Aboriginal people to hunt, fish and trap for food, social or ceremonial purposes. In *Sparrow v. The Queen*, [1990] 1 S.C.R. 1075, the Supreme Court of Canada held that, after conservation and other valid legislative objectives, Aboriginal rights to fish for food, social and ceremonial purposes have priority over all other uses of the fishery.

> subjects thereof duly authorized therefor by the said Government. [Emphasis added.]

[14] Treaty 9 was made in 1905 and 1906. Also described as the James Bay Treaty, it effected the surrender of Aboriginal title and Aboriginal rights of approximately 90,000 square miles of the lands drained by the Albany and Moose river systems together with the portions of the Northwest Territories lying between the Albany river, the district of Keewatin and Hudson Bay.

[15] The written text of Treaty 9 describes the communal treaty harvesting right in the following terms:

> And His Majesty the King hereby agrees with the said Indians that they shall have the right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the government of the country, acting under the authority of His Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes. [Emphasis added.]

THE ISSUE

[16] Mr. Meshake submits that Treaty 9 includes a "kinship right" that permits him, in certain circumstances, to exercise the Treaty 9 right to hunt outside the Treaty 9 territory. His testimony at trial was that as an Aboriginal person he was entitled to hunt in his wife's Treaty 3 area and for that matter throughout Canada.

[17] By the time this appeal came on for hearing in this court, the original issue for consideration had effectively expanded. Because of certain concessions by the Crown – which are set out below – an additional issue to address is whether or not Mr. Meshake is entitled to "shelter" under Treaty 3 rights and thereby rely on those rights to hunt within Treaty 3 territory. Although it may appear obvious, I will describe the term "shelter" in the context of treaty interpretation in more detail below.

Crown Concessions

[18] I would note at the outset that the analysis of this appeal was greatly assisted by three very fair and noteworthy Crown concessions. First, the Crown accepts that had Mr. Meshake been hunting moose in his Treaty 9 territory, the Treaty 9 right to hunt would have provided him with a valid defence to this *Game and Fish Act* charge.

[19] Second, the Crown accepts that had Mr. Meshake been able to demonstrate that he was validly exercising the Treaty 3 right to hunt in Treaty 3 territory, he would also have

a defence to the charge. That is to say, if Mr. Meshake was hunting moose in accordance with Ojibway custom whereby Treaty 3 rights-holders had invited and accepted him into their community and to share in their treaty harvest, then he would have a defence under Treaty 3.

[20] Moreover, the Crown accepts that if, as a matter of law, a defence was available to Mr. Meshake based on his exercise of a Treaty 3 right, there is evidence before the court that the Aboriginal collectivity of which Mr. Meshake's wife's family was a part had, in accordance with custom, accepted him as one of them and had permitted him to share in their harvest of resources.

ANALYSIS

[21] In my view, focusing on and responding to the Crown's concessions sufficiently answers this appeal. The "sheltering" defence was available to Mr. Meshake and because of this, I would allow the appeal.

[22] Mr. Meshake presents two arguments that support the contention that a "sheltering" defence is available to him: first, because Treaty 3 is compatible with his Treaty 9 argument; or second, because the record supports a finding that he has a valid defence under Treaty 3. I will deal with Mr. Meshake's submissions in order.

Treaty 3 is Compatible with Treaty 9

[23] Mr. Meshake submits that the right he claims is a Treaty 9 right to hunt within a marriage – a kinship custom – that is recognized and reciprocated by the Treaty 3 Lac Seul First Nation. In oral argument, counsel for Mr. Meshake likened this analytical concept to that of jurisdictional comity between nations. I understood the analogy of counsel to be that of a code of conduct which different First Nations or Treaty areas observe towards each other from mutual convenience or courtesy.

[24] I prefer to resolve this appeal on the basis of whether or not Mr. Meshake is able to shelter under the rights afforded by Treaty 3. In taking this approach to allow the appeal, it will not be necessary to decide this issue. However, without being taken to have decided the issue of comity – to use the expression of counsel - I would simply observe that, the argument may not advance reciprocity of treaty rights to any greater degree then that of sheltering, as I explain that term below.

[25] I turn then to the issue of whether Mr. Meshake can shelter under Treaty 3 such that it affords him a defence to *Game and Fish Act* charge.

Treaty 3 Affords Mr. Meshake a Defence

[26] I begin by noting that the Justice of the Peace acquitted Mr. Meshake on the basis of his having acquired a kinship right to hunt in Treaty 3 territory through marriage. She

specifically declined to decide the broader issue of whether Mr. Meshake's Treaty 9 right to hunt extended to anywhere in Canada.

[27] In conducting her analysis, the Justice of the Peace restated the several established principles of treaty interpretation set out by the Supreme Court of Canada in *R. v. Marshall*, [1999] 3 S.C.R. 456 (*Marshall No. 1*). Moreover, in my view, she appears to have made every effort to apply these principles in reaching the decision she did. For purposes of my analysis, however, although I am mindful of all the principles, I will primarily focus on the interpretation principle that I find to be most salient to this appeal.

[28] Specifically, in *R. v. Morris*, 2006 SCC 59, the Supreme Court of Canada noted at para. 18 that the language used in treaties often reflected vague vocabulary for treaty promises. In light of this, the court reaffirmed the principle that, "[t]he goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed": see *Marshall No. 1*, *supra*, at 474.

[29] In other words, the promises in the treaty must be placed in their historical, political and cultural contexts to clarify the common intentions of the parties and the interests they intended to reconcile at the time. In this regard the Justice of the Peace noted that the treaties themselves give no information about how family life, religious practice or trading patterns might be affected by the agreements the Ojibway made with the Crown. She then considered the expert evidence and the reasonable interpretations to be made from it and at para. 24 held that:

> Given that clearly stated position [that the Ojibway were to remain as independent and self-supporting as possible] and the frequency of cross treaty-boundary contact, it would make no sense for the government of the day to intentionally restrict hunting to the point where a man, who married outside his treaty area, could not provide for himself and his family. And it would have made no sense for the Ojibway, given their tradition of hunting, to agree to such a treaty condition.

[30] Moreover, she found that Treaty 3 does not contain any wording, nor are there any contemporaneous documents or writings, inconsistent with the rights claimed for Mr. Meshake and with the customs of the Lac Seul/Treaty 3 community. Her approach, in my view, was wholly in accordance with the established principles of treaty interpretation and the evidence supports her conclusions, which reveal no palpable and overriding error.

[31] In my view, the trial record amply supports the Justice of the Peace's further findings of fact, including her finding that Mr. Meshake was accepted into the Treaty 3

community of Lac Seul, that Mr. Meshake has become part of the Lac Seul community arising from his marriage to Ms. Carpenter, and that he had been accepted within the community and welcomed to hunt with the Carpenter family. The community has recognized the marriage and has welcomed him in. Their son is a registered or status Indian[4] and a member of the Lac Seul First Nation, not of the Aroland community.

[32] Finally, the evidence supports a finding that Aboriginal peoples would travel to other communities to marry and continue to hunt, and it supports an interpretation that sharing in community harvests through kinship is in harmony with the Ojibway custom of sharing harvests between First Nations and families.

[33] In sum, the record fully supports the Justice of the Peace's findings of fact that Mr. Meshake was hunting moose in accordance with Ojibway custom whereby Treaty 3 rights holders had invited and accepted him into their community and to share in their treaty harvest. In other words, the evidence taken as a whole supports the conclusion that Mr. Meshake was entitled to shelter under Treaty 3.

[34] It was the view of the appeal judge that the lack of direct evidence at trial that any specific regular cross-border marriages were taking place when the treaty was signed meant that this was neither an ancient practice nor a pre-treaty practice or custom. He concluded, therefore, that the trial court's decision that Mr. Meshake had an individual right to hunt in a treaty area outside his own through marriage constituted an error in law.

[35] Respectfully, this conclusion ignores – and indeed, is contrary to – several important principles of treaty interpretation that the Supreme Court of Canada restated in *Marshall No. 1* at 511-13 such as: in searching for the common intention of the parties, the integrity . . . of the Crown is presumed; a technical or contractual interpretation of treaty wording should be avoided; and, treaty rights . . . must not be interpreted in a static or rigid way. They are not frozen at the date of signature; rather, the interpreting court must update treaty rights to provide for their modern exercise.[5]

[36] In modern times, where Canadian society is measured and judged by principles such as those enshrined in the *Charter of Rights and Freedoms*, the Justice of the Peace's findings would seem to more accurately reflect the intent and spirit of the principles of treaty interpretation. I therefore agree with the interpretation of the evidence as found by the Justice of the Peace in this regard, and disagree with the difference of opinion expressed by the appeal judge.

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[4] That is to say, his status as an "Indian" as defined by s. 2(1) of the *Indian Act*.
[5] This is per McLachlin J. writing in dissent on the ultimate outcome of the case, but not on this point.

[37] I would observe that, on the appeal to the Ontario Court of Justice, it is apparent that the appeal judge decided this case, and reversed the decision of the Justice of the Peace, solely on the issue of Mr. Meshake's rights pursuant to Treaty 9. He did not have the benefit of the Crown's concessions that this court found so helpful, and which were directed at Mr. Meshake's rights, as they might exist, under Treaty 3. Had he such benefit, I believe the appeal judge would likely have decided the appeal in the same way that I have.

[38] Accordingly – and given my opinion regarding Mr. Meshake's entitlement to shelter under Treaty 3 – if the *Game and Fish Act* in these circumstances amounted to a *prima facie* infringement of this constitutionally protected treaty right, the province would then have the onus of meeting the justification test established in *R. v. Sparrow*, *supra*, at 1113-114, and *R. v. Badger*, [1996] 1 S.C.R. 771 at 812. That is, it would have to establish that any infringement of the treaty right by the province acting within its constitutionally mandated powers can be justified: see *Morris*, *supra*, at para. 55.

[39] As noted, the Crown accepts that if there is a treaty right to hunt applicable to Mr. Meshake, the *Game and Fish Act* amounts to an infringement without justification of that right. In my view, although the Justice of the Peace did not specifically hold that Mr. Meshake's treaty right to hunt was pursuant to a right he acquired through kinship or sheltering under Treaty 3, her analysis and findings nevertheless support this result. Specifically, by virtue of Treaty 3 and his marriage to Ms. Carpenter, Mr. Meshake has a defence to the *Game and Fish Act* charge and was properly acquitted by the Justice of the Peace.

DISPOSITION

[40] For these reasons I would allow Mr. Meshake's appeal. I would therefore set aside the conviction as found by the appeal court and reinstate the acquittal as found by the Justice of the Peace.

RELEASED:

"MAY -3 2007"
"KMW"

"H.S. LaForme J.A."
"I agree K.M. Weiler J.A."
"I agree J. MacFarland J.A."