CITATION: R. v. Shipman, 2007 ONCA 338
DATE: 20070503
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COURT OF APPEAL FOR ONTARIO

WEILER, MacFARLAND and LaFORME JJ.A.

BETWEEN:

HER MAJESTY THE QUEEN

(Respondent)

and

WILLIAM WAYNE SHIPMAN, CLARK PETERS JR., CLARK PETERS, PAUL TOOSHKENIG and LONNIE SHIPMAN

(Appellants)

H.W. Roger Townshend and Renée Pelletier, for the appellants

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

Heard: January 12, 2007

On appeal from the judgment of Justice Wayne W. Cohen dated July 5, 2005, with reasons reported at [2005] O.J. No. 4247, dismissing the appeal from convictions entered by Justice of the Peace Jane E. Forth dated February 9, 2004, with reasons reported at 2004 ONCJ 51.

H.S. LaForme J.A.

2007 ONCA 338 (CanLII)

2007 ONCA 338 (CanLII)

OVERVIEW

[1] In both this appeal and the companion appeal in *R. v. Meshake* (Docket C39900), the Aboriginal appellants were convicted for hunting on lands where it was asserted that their own communities had no historical practice of hunting. Both appeals concern the sharing of treaty wildlife harvesting resources.[1] Both have been argued from the perspective of the appellant hunters and their claims to have rights to hunt on lands in respect of which others have treaty rights.

[2] Each of these appeals examines the important issue of whether an Aboriginal person can lawfully "shelter" under a treaty that he is not a signatory to. In *Meshake*, the appellant was from a Treaty 9 community but was hunting in Treaty 3 territory. Mr. Meshake's sheltering issue arose out of his marriage into a Treaty 3 community.

[3] Here, Lonnie Shipman and the other named appellants resided at Walpole Island First Nation[2] but were hunting in Robinson-Superior Treaty territory. Walpole Island has no rights of its own in respect of the Robinson-Superior tract, and it is not a signatory to the Robinson-Superior Treaty. Nevertheless, the appellants rely on a connection with a Robinson-Superior Treaty community to shelter under that treaty. The connection, stated briefly, is simply one of invitation or permission to hunt by a First Nation within the treaty area. I will say more about this connection below.

BACKGROUND

[4] By and large the facts in this case are not in dispute and were presented throughout as being agreed upon. The appellants are members of the Walpole Island First Nation community located at the mouth of the St. Clair River in the southwest reaches of the province. In October 2000, they were hunting moose in the District of Algoma in the northeast region of the province without the licences required by the *Fish and Wildlife Conservation Act, 1997* (*FWCA*), S.O. 1997, c. 41. The area in which they were hunting is within the tract covered by the Robinson-Superior Treaty of 1850.

[5] Upon returning from the hunt the band office was open and Mr. Shipman advised them that he had been hunting and that he had been stopped by Ministry officials. The then Chief of the Michipicoten First Nation testified that consent would have been extended to the hunting party.

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[1] "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.

[2] 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.

2007 ONCA 338 (CanLII)

[6] Thus, the community of rights holders that the appellants chose for asserting a right to shelter under was that of the Michipicoten First Nation. Michipicoten First Nation is an Ojibway community and a holder of treaty rights under the Robinson-Superior Treaty.

[7] The Robinson-Superior Treaty grants Aboriginal signatories hunting and fishing rights over the lands surrendered in the treaty. I will describe the treaty more fully below. These harvesting rights are treaty rights recognized and affirmed in s. 35 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act* (U.K.), 1982, c. 11.

[8] In addition to the agreed facts, the trial evidence about the Robinson treaties was presented principally through two experts, anthropologist Paul Driben and historian James Morrison. It is this evidence and its conclusions that the parties primarily disagree on, however, the disagreements do not materially impact on my analysis.

[9] The appellants were charged and convicted under the *FWCA* by a Justice of the Peace in Provincial Offences Court. Their convictions were upheld on appeal to the Ontario Court of Justice.

The Treaty and Crown Concessions

[10] By two Robinson Treaties of 1850 the Crown obtained the surrender of the tract of country lying between the Height of Land and Lakes Huron and Superior. Robinson-Superior effected the surrender by the Ojibway of the north shore of Lake Superior of all Aboriginal title and rights in respect of their traditional territory.

[11] The two treaties were the first in Canada to provide the signatories with the right to continue hunting and fishing on their ceded lands. The terms of the Robinson-Superior Treaty that are relevant on this appeal are:

> And the said William Benjamin Robinson of the first part, on behalf of Her Majesty and the Government of this Province, hereby promises and agrees … to allow the said chiefs and their tribes the full and free privilege to hunt over the territory now ceded by them, and to fish in the waters thereof as they have heretofore been in the habit of doing …. [Emphasis added.]

[12] For purposes of this appeal, the Crown makes three submissions, two of which are significant and very helpful concessions:

1. In accordance with accepted treaty interpretation principles, the court's determination of the nature and scope of the Michipicoten treaty right to hunt "as they have heretofore been in the habit of doing" may be

informed by Ojibway custom as it existed at treaty time or as it has evolved since;

2. If the custom of the Michipicoten at treaty time included the sharing of their hunt, they may do so in accordance with that custom as a matter of interpretation of Robinson-Superior which grants the right to hunt "as they have heretofore been in the habit of doing"; and

3. A proper inquiry into ancestral custom for purposes of interpreting Robinson-Superior would necessarily include such topics as:

   - whether there was a custom of inviting and accepting others to share in the hunt and in the harvesting resources of treaty rights holders;
   - in what circumstances such sharing would take place;
   - how consent or permission to share the resource would be given;
   - the nature and scope of consent or permission typically given; and
   - who would have authority to give it?

[13] As in the *Meshake* appeal, the very fair concessions by the Crown go a long way in deciding this appeal. Stated simply, the Crown concedes that the principle of an Aboriginal person sheltering under another's treaty rights is a protected constitutional right, provided it is supported by Aboriginal custom as it existed at treaty time or as it has evolved since. I agree with this concession.

The Trial and Appeal Decisions

[14] The submission of the appellants at trial was that there was implied permission at the very least from the Michipicoten First Nation to hunt in its treaty area. They argued that when they had asked on previous occasions, permission was routinely granted to share in the First Nation's hunt for one's own use.

[15] The Crown asserted throughout that none of the defendants had permission in October 2000 to hunt the area. Further, the Crown argues that the record fails to disclose whether such consent would, as a matter of custom, have been granted in the circumstances of the present case, or even who would have had authority to grant it. In the absence of such evidence, there is no basis for concluding that consent was implied.

2007 ONCA 338 (CanLII)

2007 ONCA 338 (CanLII)

[16] As I said, the Justice of the Peace convicted the appellants. In doing so she made two findings and holdings that are particularly relevant on this appeal. First, at para. 63 of her reasons, she found that Aboriginal persons hunting outside their treaty area "cannot hunt as a Native without a license". She goes on at para. 64 to hold that:

> [The defendants] cannot shelter under another Treaty. Rights are derived from the Treaty itself and members of a Treaty cannot bestow their rights on others. Members of a particular treaty area may invite and give permission with respect to another person to hunt, but if that person is not a party to the Treaty, they cannot give the person permission to hunt illegally without a licence. Permission on its own, does not give the third party a right in law.

[17] Specifically, she held that it is not reasonable to conclude that it was the common intention of the parties who signed the Robinson-Superior Treaty in 1850 to believe the Ojibway people would have the right to shelter or grant permission to outsiders to hunt. Respectfully, as I will explain below, this misstates the law.

[18] Second, in interpreting the treaty the Justice of the Peace found at para. 62 that the part of the treaty that reads: "and further, to allow the said chiefs and their tribes the full and free privilege to hunt over the territory now ceded by them" is:

> … clear, concise, unequivocal and straightforward. The statement is neither vague nor ambiguous. Parties to the Treaty may hunt over the area ceded. This phrase cannot be categorized as a "doubtful expression", that must be resolved in favour of the Indians.

[19] Regarding the decision of the appeal court: I would simply note at this time that the appeal judge primarily agreed with the reasons for the decision given by the Justice of the Peace and dismissed the appellants' appeal. However, aside from any relevance to this appeal there are some concerns that I have regarding the appeal judge's reasons, which I will address later.

ISSUES

[20] The appellants have advanced two issues:

> 1. Does the Michipicoten First Nation treaty right to hunt encompass the invitation and acceptance by the First Nation of outsiders to share in their treaty resource (i.e. to shelter under the treaty rights)? And, if so, how is their acceptance to be evidenced? And,

> 2. Whether the *FWCA's* regulated licensing scheme is invalid, or at least inapplicable, to Aboriginal people on the basis that it does not provide for priority of the constitutionally protected harvesting rights of Aboriginal people.

[21] In my view, the answer to the first issue is determinative of the need for this court to consider the second. In this regard, while I would answer the first issue in the affirmative, I would nevertheless dismiss the appellants' appeal. As I explain below, I am satisfied that on the facts of this case, the appellants are not entitled to shelter under the hunting rights provided for by the Robinson-Superior Treaty. Accordingly, because the appellants cannot avail themselves of a constitutional defence, there is no need to consider the validity or application of the *FWCA*.

ANALYSIS

[22] In dismissing the appeal, the appeal judge correctly approached his analysis of the trial decision primarily on the basis of deference to the Justice of the Peace, unless palpable and overriding error could be demonstrated. Furthermore, the appeal judge by and large also correctly summarized the issue before him, namely:

> This matter is fact driven and dependent to a certain extent of the position taken by the learned Justice of the Peace relating to the consent, implied consent or no consent as may have been given to Lonnie Shipman by the Chief of the Michipicoten Band.

[23] However, in my opinion, the Justice of the Peace made several errors of law in her decision, which was wrongly upheld on the appeal. Nevertheless, as I said, I would dismiss this appeal, but for different reasons than those that underlie the decisions at trial and on appeal to the Ontario Court of Justice.

[24] My analysis is informed by the Supreme Court of Canada's recent decision in *R. v. Morris,* 2006 SCC 59 and the Crown's concessions, which neither the Justice of the Peace or the appeal judge had the benefit of having. With this I turn first to the trial decision, which I disagree with for two reasons.

[25] First, the Justice of the Peace erred when she held that it is not reasonable to conclude that it was the common intention of the parties who signed the Robinson-Superior Treaty in 1850 to believe the Ojibway people would have the right to shelter or grant permission to outsiders to hunt.

[26] As this decision, and that of *Meshake*, concludes – and upon which the Crown is in accord – Aboriginal persons can, in the right circumstances, shelter under another First

2007 ONCA 338 (CanLII)

2007 ONCA 338 (CanLII)

Nation's treaty rights. Thus, it is an error to conclude that in all cases an Aboriginal person must be a party to the treaty in question or that permission alone cannot provide a right under the treaty.

[27] Second, the Justice of the Peace erred in interpreting the treaty as she did at para. 62 when she referred only to that part which reads, "and further, to allow the said chiefs and their tribes the full and free privilege to hunt over the territory now ceded by them". In her decision, the Justice of the Peace held that, "this phrase cannot be categorized as a 'doubtful expression', that must be resolved in favour of the Indians".

[28] This is an error because the promises included in the treaty include the right to hunt as the Ojibway "have heretofore been in the habit of doing". Although the Justice of the Peace alluded to this aspect of the promise on several occasions in her reasons, she ignored it when interpreting the promise. Her trial analysis also required a consideration of this phrase.

[29] In *Morris,* the Supreme Court of Canada observed at para. 18 that the language used in treaties often reflected vague vocabulary for treaty promises. In light of this, the court then 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 *R. v. Marshall*, [1999] 3 S.C.R. 456 (*Marshall No. 1*), at 4740.

[30] 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.

[31] In this case – as in *Meshake* – the treaty itself provides no information about how family life, religious practice or trading patterns might be affected by the agreement the Ojibway made with the Crown. Thus, it becomes necessary to consider the evidence and the reasonable interpretations to be made from it.

[32] As found by the Justice of the Peace, there was extensive evidence at trial, principally from Mr. Morrison and Dr. Driben, about hospitality, the sharing of resources and reciprocity in Ojibway custom. Indeed, there was evidence that there were spiritual consequences for those who did not adhere to the custom. The evidence also suggested that it is an Ojibway custom to grant permission to other First Nation groups who wished to hunt for food purposes.

[33] The Justice of the Peace found at para. 17 "permission, in all probability, did occur when an Ojibway from outside another's territory was travelling through". She went on, however, to hold at para. 18 that:

> … the evidence heard with respect to permission previously given by members of the Michipicoten community, more particularly the Chief of the Michipicoten First Nation, was based on respect and good will, but that practice has no standing in law.

[34] Respectfully in my view, this is where the Justice of the Peace fell into error. Contrary to her holding that the practice of granting permission "has no standing in law"; it actually does.

[35] The evidence, first of all supports the Justice of the Peace's conclusion that Ojibway custom at the time the Robinson-Superior Treaty was signed included the sharing of the resources with others "passing through" with permission. And, as the Crown concedes, since the custom of the Michipicoten at the time of the Robinson Superior Treaty included the granting of permission to share their hunt, they can continue to do so "as they have heretofore been in the habit of doing". Thus, in the correct circumstances, the practice of granting permission to outsiders to share in treaty harvesting rights to hunt does have standing in law.

The Appeal Decision

[36] The appeal judge found that the Justice of the Peace was correct in law and dismissed the appeal. Given my conclusions as to the errors committed by the Justice of Peace, it follows that the decision of the appeal judge, while correct in the result, is also wrong in law.

[37] In sum, it was an error for the trial court and the appeal court to hold that signatories to the Robinson-Superior Treaty could not, by custom, share their treaty harvesting right to hunt with others. Furthermore, the courts were in error in holding that the Michipicoten First Nation could not, in any circumstances, shelter or grant permission to others to share in such rights.

Factors in Sheltering by Consent

[38] Having decided that there was a custom of inviting and accepting others to share in the harvesting resources of treaty rights holders, the Crown submits that it then becomes necessary for this court to decide further issues. These issues it is said would include such things as: the circumstances in which sharing would take place, how consent or permission should be given, the nature and scope of consent or permission typically given, and who would have authority to give it.

[39] While I agree that these are the types of issues or factors that a court might wish to consider in clarifying a treaty custom, it is not appropriate or helpful, in my view, to lay down any hard and fast rules on how to do so. Indeed, in the circumstances of this case it

2007 ONCA 338 (CanLII)

2007 ONCA 338 (CanLII)

is not, strictly speaking, necessary to do so. Moreover, it is my view that a more thorough examination of these issues is more appropriately the subject of tripartite negotiations. That is to say, the First Nations together with representatives of the governments of Ontario and Canada are better equipped than are the courts in resolving these issues.

[40] Nevertheless, it appears to me that this court can offer some general comments, which are intended to primarily assist in reducing any tensions that might currently exist between the parties. It appears to me that this perhaps underlies the purpose for the Crown's submission that this court address these further issues. Some general comments will also provide perspective for my decision on the evidence in this case, which I set out later on. Thus, it is in this context that I would make the following observations.

[41] I would begin with this perhaps obvious principle; each case should be decided on its own unique facts and circumstances. The language of treaties will vary, as will the traditions and values that comprise the related Aboriginal customs being considered. The function of defining the Crown's additional issues – whether in court or through negotiations - must be carried out through the application of the principles of treaty interpretation established by the Supreme Court of Canada. This will include the principle that "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": *Marshall No. 1*, *supra*, at 511-513.[3]

[42] Regarding the Robinson-Superior Treaty, the evidence established that the custom of the Michipicoten Ojibway included sharing the treaty resource with others seeking food and who were passing through the territory. Thus, a reasonable modern day interpretation would include circumstances where other Aboriginal persons seek permission or consent to share in the harvest resource as the term has been defined in law.

[43] Importantly, treaty harvesting rights are communal in nature. They "do not belong to the individual, but are exercised by authority of the local community …" *R. v. Marshall*, [199] 3 S.C.R. 533 at 547 (*Marshall No. 2*). Thus, permission or consent would typically be granted through the First Nation Chief or others designated by the Chief or First Nation Council.

[44] The form of consent, and to whom consent or permission is granted, will simply be a matter of evidence that is sufficient to satisfy natural resource officers, police, and the court. It would seem that at the very least, however, the identity of those to whom consent is being granted ought to be included in the consent. Such evidence would go a

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[3] This is per McLachlin J. writing in dissent on the ultimate outcome of the case, but not on this point.

long way to avoiding difficulties with enforcement officials and providing an adequate defence to any charges.

2007 ONCA 338 (CanLII)

[45] In Aboriginal custom, protection and conservation of harvesting resources is paramount and it would be unusual if this was not reflected in the granting of consent to share in it. Any departure from this aspect of Aboriginal custom would probably negative any consent that may have been granted.

[46] I would close here with this note of caution. My observations should not be taken as in any way being exhaustive of the factors to consider in clarifying the treaty right. Nor are they to be viewed as amounting to the minimum evidentiary requirement necessary to defend any *FWCA* charges. These are, of course, matters for a trial court to decide. They are intended, as I said, to be of assistance in hopefully relieving any tensions that may exist between enforcement officials and Aboriginal people, and to provide some context for my conclusions regarding the evidence in this case.

[47] At this point, the question that remains to be decided is whether the evidentiary record in the present case supports a finding that the appellants were hunting moose in accordance with Ojibway custom. I have already concluded that the Robinson-Superior Treaty rights holders, namely, the Michipicoten First Nation can allow for the sharing of their hunt with permission. The question therefore is: does the evidence at trial, taken as a whole, support the conclusion that the appellants were entitled to shelter under the treaty rights of the Michipicoten First Nation?

Application to this Case

[48] A summary of the relevant portions of the evidence at trial, and as set out in the reasons of the Justice of the Peace, will be instructive.

[49] Lonnie Shipman testified that he and the other appellants were hunting moose for food and that in four prior years he had sought and received permission of the Michipicoten First Nation to hunt in their traditional territory. One of the appellants had accompanied Mr. Shipman hunting on previous occasions, while the remaining three had not hunted the area before. However, on this occasion, when he went to the band office of Michipicoten First Nation, it was closed. Nevertheless, he and the other appellants decided to hunt based on permission having been given in previous years.

[50] First, as I said, the treaty rights are communal; any consent that may be granted must reflect respect for the community of treaty rights holders, which means that any consent granted to share the harvesting resource must weigh and consider the communal interest. In order to properly do this, the person capable of granting the consent would normally require the request in advance.

[51] Second, because Aboriginal custom includes a paramount protection and conservation of harvesting resources, any consent granted would also need to weigh and consider this concern. Thus, in deciding to grant consent one would need to know all those who are seeking consent and the area the consent applies to.[4]

[52] In this case, although consent would have been granted after the fact by the Chief, there was no opportunity for the Chief, on behalf of the community, to consider and respond to historical Aboriginal custom. That is, he was not able to properly consider and weigh the communal rights and protection and conservation of the resource in advance.

[53] As I noted, of the five appellants, only two had hunted previously within Michipicoten First Nation territory, and only Lonnie Shipman was granted some form of consent on a prior occasion. Importantly, none of the appellants were granted consent to share in Michipicoten First Nation's treaty harvesting rights on the date in question. Accordingly, the appellants cannot shelter under the harvesting rights pursuant to the Robinson-Superior Treaty and, in my view, their appeal should be dismissed.

[54] Having found that the appellants have no treaty right defence to the charges, I find it unnecessary to decide the appellants' second issue of whether the *FWCA's* regulated licensing scheme is required to provide for priority of harvesting rights of Aboriginal people but fails to do so.

[55] Before concluding, I wish to return briefly to the reasons for the decision of the appeal court. I believe it is important to make some corrections with regard to that decision. First, the appeal judge observed at paras. 35 and 36:

> Mr. Townshend, counsel for the defendants, has asked the court to consider the hospitality reciprocity as being of great cultural significance because of the Anishinabe perspective and the social institution of the clan system. This was not accepted by Justice of the Peace Forth because of the lack of significant evidence as tendered.
>
> In effect this was the year 2000 that the hunting expedition took place, not 1850. Times have changed.

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[4] This observation is based on the probability that several separate First Nation communities will exist within the overall treaty area. Each First Nation will no doubt have its own specific territorial boundaries. I assume, therefore, without deciding, that a specific First Nation that grants consent to others would not do so without regard to another First Nation's boundaries.

2007 ONCA 338 (CanLII)

[56] Respectfully, if the appeal judge's view is that modern times have overtaken the Ojibway custom of "hospitality and reciprocity" in 1850, and as it has evolved, he would be wrong. As I wrote in *Meshake* at para. 41, this view ignores, and is contrary to, several important principles of treaty interpretation that the Supreme Court of Canada restated in *Marshall No. 1* at pp. 511-513 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 are not frozen at the date of signature. That is, the interpretation of treaties requires an updating of the rights to provide for their modern exercise.

[57] Second, the appeal judge makes some findings respecting the Robinson-Superior Treaty signatories and their understanding as to their rights to regulate the fish and game resource. Again with respect, there was no foundation or requirement for him to do so and his reasons on this point should be ignored.

DISPOSITION

[58] For the foregoing reasons, I would dismiss the appeal.

RELEASED:

"MAY -3 2007"
"KMW"

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

2007 ONCA 338 (CanLII)