

SUPREME COURT OF CANADA -- JUDGMENTS TO BE RENDERED IN APPEALS

OTTAWA, 2005-07-12-16:00 EDT.

THE SUPREME COURT OF CANADA ANNOUNCED TODAY THAT JUDGMENT IN THE FOLLOWING APPEALS WILL BE DELIVERED AT 9:45 A.M. ON **WEDNESDAY, JULY 20, 2005.**

FROM: SUPREME COURT OF CANADA (613) 995-4330

Comments / Commentaires : comments@scc-csc.gc.ca

1. *Her Majesty the Queen v. Joshua Bernard* (N.B.) (30005)
2. *Her Majesty the Queen v. Stephen Frederick Marshall, et al.* (N.S.) (30063)

30005 Her Majesty The Queen v. Joshua Bernard

Constitutional law - Native law - Indians - Treaty rights - Aboriginal land title - Whether the Respondent has a treaty right to harvest and sell logs from Crown lands - Whether the treaty right can be exercised by individuals without community authority - Whether the Respondent exceeded the inherent limitation of the treaty in respect of an individual's right to harvest resources in order to earn a moderate livelihood - Whether the treaty right was extinguished by pre-Confederation legislation in the Province of New Brunswick - Whether infringement of the treaty right by s. 67(1)(c) of the *Crown Lands*

and Forest Act, S.N.B. 1980, c. C-38.1, was justified - Whether Court of Appeal exceeded its jurisdiction pursuant to s. 839(1) of the Criminal Code, R.S.C. 1985, c. C-46.

The Respondent was charged with unlawfully possessing timber from Crown lands in May, 1998, near Mullin Stream Road in the County of Northumberland, New Brunswick, contrary to section 67(1)(c) of *The Crown Lands and Forests Act*, S.N.B. 1980 c. C-38.1 (the "*Act*"). The Crown land is licensed to Repap Inc., a pulp and paper company. The Respondent was hauling wood for a Mr. Stephen Paul, and transporting it for sale to Anderson's Mill in Miramichi City. The Respondent acknowledged that he was in possession of timber cut from Crown lands without Crown authorization. However, the Respondent relies for his defence upon the existence of a treaty right or a right as part of aboriginal title. The Respondent is of Mi'kmaq descent, a registered status Indian, and a member of the Eel Ground Band near Miramichi, New Brunswick. The Respondent's defence of his charge raised the following issues for the Court: i) did the Respondent have a treaty right to commercially harvest and sell forest products either individually or as part of an Aboriginal community; ii) did the Respondent have the right referred to in i) above as part of an Aboriginal community as an aspect of aboriginal title; iii) if such rights exist, have they been lawfully extinguished; and iv) do the authorizations required under the *Act* infringe a treaty right or Aboriginal title right, and if so, is such infringement justified.

The Provincial Court of New Brunswick held that the Respondent had neither a treaty right nor an ability on the basis of aboriginal title which would provide a defence to his charge. The Respondent was therefore convicted of the offence. The Court of Queen's Bench of New Brunswick dismissed the Respondent's appeal. The Court of Appeal of New Brunswick allowed the appeal, with Deschênes J.A. dissenting. The majority held that the Respondent held a treaty right to harvest and sell trees growing on the Crown lands at issue, and that the right was not restricted to resources traditionally traded at the time the treaty was signed. They held that this right had not been extinguished and that the provincial legislation was an unjustified infringement of the right. Daigle J.A. also found that the Respondent could rely upon aboriginal title to the land in question. The Court stayed the effect of their judgment for one year from the date of their decision.

Origin of the case: New Brunswick

File No.: 30005

Judgment of the Court of Appeal: August 28, 2003

Counsel: William B. Richards/Pierre Castonguay for the Appellant
 Bruce H. Wildsmith Q.C. for the Respondent

30063 Her Majesty the Queen v. Stephen Frederick Marshall et al

Constitutional Law - Native Law - Treaty Rights - Aboriginal Title - Whether the Nova Scotia Court of Appeal exceeded the limits of appellate review in setting aside the convictions without identifying an error of law by the Summary Conviction Appeal Court with respect to the applicability of the Halifax Treaties of 1760-61 - Whether the Court of Appeal erred in law with respect to the test for the applicability of the Halifax Treaties of 1760-61 by eliminating any meaningful consideration of the common intention of the parties - Whether there is no right to hunt, fish and gather and trade for necessaries under the Halifax Treaties - Whether the Court of Appeal exceeded the limits of appellate review in setting aside the convictions without identifying an error of law by the Summary Conviction Appeal Court with respect to the Respondents' assertion of aboriginal title - Whether the Court of Appeal incorrectly restated the test for aboriginal title - Whether the Court of Appeal erred in applying the aboriginal perspective to the Respondent's assertion of aboriginal title - Whether the Court of Appeal erred respecting the test for exclusivity of aboriginal title - Whether the Court of Appeal erred in eliminating the requirement of continuity from the test for aboriginal title - Whether the Court of Appeal erred in finding that any treaty rights to log, or aboriginal title to the cutting sites were not extinguished - Whether the Court of Appeal erred in law in not applying proper tests for treaty rights and Aboriginal title, and in not applying the proper tests, or the tests it adopted, to the facts of the case and acquitting the Respondents, or one or more of them, on all counts, or on one or more counts - Whether the *Royal Proclamation of 1763* reserved to the Mi'kmaq the unceded, unpurchased land in Nova Scotia in 1763 - Whether the King had the authority to reserve land to the Mi'kmaq since Nova Scotia established a Legislative Assembly in 1758?

The Respondents were charged with cutting timber on Crown lands without authorization and in some cases with removing timber from Crown lands without

authorization contrary to s.29 of the *Crown Lands Act*, R.S.N.S. 1989, c.114. These offences occurred in five counties on mainland Nova Scotia and three counties on Cape Breton Island.

All of the Respondents were registered status Mi'kmaq Indians at the time of the offences and all but one were members of Nova Scotia Mi'kmaq Indian Bands. The Respondents admit cutting timber on the lands or removing timber from the lands as charged but say no authorization was needed as their Mi'kmaq ancestors had aboriginal title to all of Nova Scotia and they inherited it. They say their title was bolstered by the *Royal Proclamation of 1763* and further, the 1760-61 treaties give them a right to harvest forest products which, in their view includes the commercial harvesting of timber. These claims were rejected at trial and at the Summary Conviction Appeal Court (SCAC). The Court of Appeal allowed their appeal, held that the lower courts applied wrong legal principles and ordered a new trial.

Origin of the case: Nova Scotia

File No.: 30063

Judgment of the Court of Appeal: October 10, 2003

Counsel: Alexander M. Cameron/William D. Delaney for the Appellant/
Respondent on Cross-Appeal
Bruce H. Wildsmith Q.C./Eric A. Zscheile for the
Respondents/
Appellants on Cross-Appeal