2016 NBQB 021 S/A/9/10

Date: 20160127

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF SAINT JOHN

BETWEEN:

STEPHEN CHARLES BERNARD

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

DATE OF DECISION APPEALED:	August 16, 2010
DATES OF APPEAL HEARING:	September 29, 2015 and January 7, 2016
DATE OF DECISION:	January 27, 2016
APPEARANCES:	Rebecca J. Butler for the appellant William B. Richards for the respondent

DECISION

McLellan, J.:

[1] The appellant Stephen Charles Bernard, 57, a lifelong resident of Saint John, NB and a Status Indian of the Shubenacadie Band in Nova Scotia, appeals his conviction of hunting without a license in a wooded area in Saint John beside the St. John River on November 16, 2004 contrary to the provincial law requiring licenses, s. 32(1)(b) of the *Fish and Wildlife Act*, R.S.N.B. 1973, c. F-14.1. Mr. Bernard did not have a lawyer to assist him at his 10-day trial. The decision appealed from is reported as *R. v. Bernard*, 2010 NBPC 30 (CanLII).

[2] Mr. Bernard claims exemption from the provincial requirement for a hunting license because he is a Status Indian and says that he has the benefit of "existing aboriginal … rights" to hunt in the Saint John area. He does not assert treaty rights. He is proud of his Mi'kmaq heritage and says he has the benefit of the *Constitution Act, 1982*:

> "35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> "35(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.
>
> . . .
>
> "52(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."

[3] In this case at trial the Crown framed the issue as follows:

> "Has the Defendant established that the aboriginal group of which he is a member (i.e. Shubenacadie Mi'kmaq) has an aboriginal hunting right at the location where the Defendant was apprehended in the present case?"

[4] Mr. Bernard submitted that the issues at trial were somewhat broader:

"What was the traditional territory of the Mi'kmaq people before contact with Europeans and as a member of the Mi'kmaq people as recognized under the *Indian Act* does the Defendant have an Aboriginal Right to hunt in that territory?"

[5] In a later brief the Crown restated and generalized the issues as follows:

"Is the Defendant an aboriginal pursuant to Section 35 of the Constitution Act 1982?

"If the Defendant is an aboriginal, is it permissible for him to exercise aboriginal rights in the St. John river valley?"

[6] In effect Mr. Bernard wants the court to interpret s. 35(1) of the *Constitution Act* as meaning:

"Anyone with a Status Indian band card indicating membership in one of the bands of aboriginal peoples of Canada may hunt, fish or harvest in any location where members of his or her cultural group of aboriginal ancestors probably hunted, fished or harvested in the 17th or 18th century."

[7] Mr. Bernard asserts that he has an aboriginal right to hunt in the lower St. John River valley area, not the benefit of a treaty right to hunt there. He has a Certificate of Indian Status identifying him as "an Indian within the meaning of the *Indian Act*, chapter 27, Statutes of Canada (1985)" of the Shubenacadie Band as number 025. Mr. Bernard says that his grandfather moved from Shubenacadie to Saint John in approximately 1929.

[8] Shubenacadie is roughly 200 km by water from the mouth of the St. John River. That was not an obstacle for the Mi'kmaq. The Supreme Court of Canada summarized historical evidence in another case as follows:

> "17 . . . Mi'kmaq were accomplished sailors. Dr. William Wicken, for the defence, spoke of "the Maritime coastal adaptation of the Micmac" . . .
> . . . The Mi'kmaq, according to the evidence, had seized in the order of 100 European sailing vessels in the years prior to 1760. There are recorded Mi'kmaq sailings in the 18th century between Nova Scotia, St. Pierre and Miquelon and Newfoundland." *R. v. Marshall*, [1999] 3 S.C.R. 456; 1999 CanLII 665 (SCC), para 17; ("Marshall 1").

[9] In a treaty rights case regarding alleged illegal hunting in 1980 (before the enactment of the *Constitution Act, 1982*) the Supreme Court of Canada accepted registration under the *Indian Act* as a member of the Shubenacadie Band as "sufficient to prove the appellant's connection to the tribe originally covered by the Treaty" and noted:

> "[44] ... True, this evidence is not conclusive proof that the appellant is a direct descendant of the Micmac Indians covered by the Treaty of 1752. It must, however, be sufficient, for otherwise no Micmac Indian would be able to establish descendancy. The Micmacs did not keep written records. Micmac traditions are largely oral in nature. To impose an impossible burden of proof would, in effect, render nugatory [of little value] any right to hunt that a present day Shubenacadie Micmac Indian would otherwise be entitled to invoke based on this Treaty." *Simon v. The Queen*, [1985] 2 S.C.R. 387; 1985 CanLII 11.

[10] The evidence suggests in this case that Mr. Bernard may be the only member of the Shubenacadie Band to assert a right to hunt in the Saint John area. He may be the only Mi'kmaq hunter who lives in Saint John. He identifies with the broader Mi'kmaq Nation and not the Band of which he is a card-carrying member. He asserts his claim of an aboriginal right to hunt as an aboriginal individual by himself, not associated with a particular Band.

[11] Mr. Bernard in effect does not want his individual status and rights as a Mi'kmaq to be reduced, constrained or limited by association with the band that his grandfather moved away from long ago. It appears that Mr. Bernard wants official recognition that he is a Mi'kmaq Indian, unaffiliated with any particular modern band and free to hunt in the areas where Mi'kmaq hunted several centuries ago.

[12] The world has become more crowded and complicated than it was in the 17th century. Everyone now has much less freedom to refrain from associating with others. Circumstances now force people to closely associate with others and to subordinate their own wishes to the will of the majority in groups, communities, regions, provinces, states, nations, countries and alliances.

[13] Constitutions and other laws that were unimaginable a few generations ago have replaced earlier laws or understandings. Various groups and political entities are now empowered to define, control and regulate the conduct of individuals, regardless of their "rights" in earlier times.

[14] Modern constitutions and laws often conflict with and overrule or cancel earlier laws, understandings, treaties, rights and cherished freedoms from simpler times. For example in a case upholding a mandatory union dues check-off clause in a collective agreement, the Supreme Court of Canada considered the "freedom of association" provision in section 2(d) of the *Canadian Charter of Rights and Freedoms*. That case is *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 SCR 211; 1991 CanLII 68 (SCC).

[15] In *Lavigne* Justice La Forest wrote at pages 320-321 and 324-325:

> "As a matter of metaphysical and sociological reality, "no man is an island" and the *Charter* must be taken to recognize this. At the very fundamental level, it could certainly not have been intended that s. *2(d)* protect us against the association with others that is a necessary and inevitable part of membership in a democratic community, the existence of which the *Charter* clearly assumes. Thus, it could not be said that *s. 2(d)* entitles us to object to the association with the government of Canada and its policies which the payment of taxes would seem to entail given the comprehensive nature of its authority and functions. In Justice Holmes' phrase, the state is "the one club to which we all belong" and its activities will inevitably associate us with policies and groups with which we may not wish to be associated: see Robert Horn in *Groups and the Constitution* (1971), at p. 3.

"Realistically, too, as I will more fully explain later, the organization of our society compels us to be associated with others in many activities and interests that justify state regulation of these associations. Thus I doubt that s. *2(d)* can entitle us to be free of all legal obligations that flow from membership in a family. And the same can be said of the workplace. In short, there are certain associations which are accepted because they are integral to the very structure of society. Given the complexity and expansive mandate of modern government, it seems clear that some degree of involuntary association beyond the very basic foundation of the nation state will be constitutionally acceptable, where such association is generated by the workings of society in pursuit of the common interest.

. . .

"As I indicated above, the right of an individual to refrain from associating with others is a qualified one. To hold otherwise would be to deny the realities of modern society and would open the door to frivolous claims. As Douglas J. stated in *International Association of Machinists v. Street*, 367 U.S. 740 (1961), at pp. 775-76 (concurring opinion):

> 'Some forced associations are inevitable in an industrial society. One who of necessity rides busses and street cars does not have the freedom that John Muir and Walt Whitman extolled. The very existence of a factory brings into being human colonies. Public housing in some areas may of necessity take the form of apartment buildings which to some may be as repulsive as ant hills. Yet people in teeming communities often have no other choice.
>
> 'Legislatures have some leeway in dealing with the problems created by these modern phenomena.'

> Douglas J. concludes that, when an individual's association with others is "compelled by the facts of life", *supra*, at p. 776, the government may intervene to shape the form that association will take, within certain prescribed limits.
>
> "In essence, whether, and under what circumstances, such government intervention is permissible is the broad issue presented by this appeal. More particularly, the threshold issue in this case is whether Parliament or the legislatures may create democratically run bodies comprised of persons naturally associated with one another in certain activities or interests, and grant them authority to direct those activities without breaching the freedom of association -- in the present case, unions."

[16] Such "bodies comprised of persons naturally associated with one another in certain activities or interests" with "authority to direct those activities" include the Band Council in Shubenacadie.

[17] For any legal authority to allow any individual Indian to hunt where members of his or her tribal group probably hunted in the 17th or 18th century would appear to conflict with section 15 of the *Canadian Charter of Rights and Freedoms*. That provision came into force on April 17, 1985 (shortly after the Supreme Court of Canada decision in *Simon*). It expands equality provisions in earlier laws and confirms equality "before and under the law" and "equal benefit of the law without discrimination based on race, national or ethnic origin" and other improper grounds.

[18] Section 15 of the *Charter* provides:

> "15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

> "15(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

[19] The *Charter* comprises sections 1 to 34 or Part 1 of the *Constitution Act, 1982*. The next section of the *Constitution Act, 1982* is section 35 that Mr. Bernard says exempts him from having to comply with provincial hunting laws. As noted earlier that section provides:

> "35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> "35(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

[20] Section 35 affirms "rights of the aboriginal peoples". That section does not use words that could conflict s. 15 of the *Charter* such as "rights of each aboriginal individual", "rights of any member of any aboriginal band or group", or "rights of any descendant of the First Nations".

[21] Against that background, the Supreme Court of Canada made clear in a 2006 decision regarding Maliseet and Mi'kmaq individuals from New Brunswick that an aboriginal right to harvest a natural resource is a communal right:

> "The right to harvest ... is not one to be exercised by any member of the aboriginal community independently of the aboriginal society it is meant to preserve."
> *R. v. Sappier; R. v. Gray*, [2006] 2 S.C.R. 686, 2006 SCC 54, para 26.

[22] Section 35 also uses the word "existing" in the phrase "The existing aboriginal and treaty rights", not "The aboriginal and treaty rights" or "All aboriginal treaty rights".

[23] In interpreting whether claimed aboriginal rights are "existing" or in "existence" the Supreme Court of Canada has rejected any general solution and emphasized the importance of evidence of "the practices, customs and traditions of the particular aboriginal community claiming the right" and "the specific history of the group claiming the right". The Supreme Court has:

> "... rejected the notion that claims to aboriginal rights could be determined on a general basis. This position is correct; the existence of an aboriginal right will depend entirely on the practices, customs and traditions of the particular aboriginal community claiming the right. As has already been suggested, aboriginal rights are constitutional rights, but that does not negate the central fact that the interests aboriginal rights are intended to protect relate to the specific history of the group claiming the right. Aboriginal rights are not general and universal; their scope and content must be determined on a case-by-case basis. The fact that one group of aboriginal people has an aboriginal right to do a particular thing will not be, without something more, sufficient to demonstrate that another aboriginal community has the same aboriginal right. The existence of the right will be specific to each aboriginal community." *R. v. Van der Peet*, [1996] 2 S.C.R. 507, 1996 CanLII 216 (SCC), at para. 69.

[24] As well, the Supreme Court of Canada in another case involving a Mi'kmaq from Nova Scotia narrowed the location for the exercise of aboriginal and treaty rights from broad words suggesting almost anywhere to "the area traditionally used by the local community". The Supreme Court said:

> "... the exercise of the treaty rights will be limited to the area traditionally used by the local community...". *R. v. Marshall*, [1999] 3 S.C.R. 533, 1999 CanLII 666 (SCC) ("Marshall 2"), para 17.

[25] The Supreme Court also says that aboriginal hunting rights are "site-specific":

> "Aboriginal hunting rights, including Métis rights, are contextual and site-specific."

R. v. Powley, [2003] 2 S.C.R. 207; 2003 SCC 43 (CanLII), at para 19.

[26] In those decisions the Supreme Court of Canada is clarifying and applying the *Constitution Act, 1982*. The effect of the *Constitution Act, 1982* and those decisions is to overrule or cancel any inconsistent earlier laws and understandings concerning aboriginal and treaty rights. The *Constitution Act, 1982* spells out:

> "52(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."

[27] In this case Mr. Bernard is charged with hunting without a license in 2004. In reviewing the evidence at trial and the legal authorities the trial judge, a Judge of the Provincial Court, concluded:

> "[140] In my opinion the following observation made John Giokas & Paul L.A.H. Chartrand, in *Aboriginal Peoples*, (2002) 83 at 111.163 has some application:
>
> > "Aboriginal rights are not inherited by individuals, like personal property; nor are they inherited as genetic traits according to racist notions. A community is a social and legal fiction maintained through generations by social institutions. A successful defence based upon an Aboriginal right requires proof of membership in the Aboriginal community in which the Aboriginal right is vested."
>
> "[141] If I have erred in adopting the test which I have, or in its application, and one individual can resume the practice after 250-300 years, then the exemption under s. 35 applies.
>
> "[142] The Defendant has satisfied me, on the balance of probabilities, that Mi'kmaq peoples inhabited the area of the locus in quo [the Saint John area] at the time

of European contact and enjoyed the aboriginal right to hunt for food in that site for the years they inhabited such territory.

"[143] However the Defendant has failed to satisfy me that he is a member of that original right-bearing Mi'kmaq community. As such he has failed to establish that he had a right to hunt in the locus in quo [Saint John area] on the date in question."

[28] On this appeal Mr. Bernard has not persuaded me that the trial judge erred in finding him guilty of hunting in New Brunswick without a license. Mr. Bernard's Shubenacadie Band card and his Mi'kmaq heritage do not exempt him from the licensing requirements and hunting laws of New Brunswick.

[29] The trial judge also said:

"[2] This is one of those cases which cause criminal courts great concern. It illustrates the need to find a more effective, timely and fair method to resolve questions between aboriginals and the state over aboriginal rights. Such questions lend themselves to civil resolutions, perhaps in the mode of a civil or administrative, order or finding so that the parties can determine their respective rights.

"[3] LeBel J. gave voice to this not uncommonly expressed concern in *R. v. Marshall, R. v. Bernard,* 2005 SCC 43 (CanLII); [2005] 2 S.C.R. 220 at para 142**:**

> 'Although many of the aboriginal rights cases that have made their way to this Court began by way of summary conviction proceedings, it is clear to me that we should re-think the appropriateness of litigating aboriginal treaty, rights and title issues in the context of criminal trials. The issues that are determined in the context of these cases have little to do with the criminality of the accused's conduct; rather, the claims would properly be the subject of civil actions for declarations. Procedural and evidentiary difficulties inherent in adjudicating aboriginal claims arise not only out of the rules of evidence, the interpretation

> of evidence and the impact of the relevant evidentiary burdens, but also out of the scope of appellate review of the trial judge's findings of fact. These claims may also impact on the competing rights and interests of a number of parties who may have a right to be heard at all stages of the process. In addition, special difficulties come up when dealing with broad title and treaty rights claims that involve geographic areas extending beyond the specific sites relating to the criminal charges.'

"[4] Here, we have an unrepresented defendant facing a charge under provincial legislation for which there is, on conviction, a mandatory fine (the minimum being $2,000 and the maximum being $4,000) AND a mandatory jail term of seven days. On top of that, the Defendant is a Status Indian of a Mi'kmaq Band who believes and has been led, in other encounters with some law enforcement persons, to believe that he has an aboriginal right to hunt for food in the Saint John area, what he refers to as traditional Mi'kmaq territory.

"[5] He presents as a quiet, principled and law-abiding individual, a civic employee, who has been searching for an answer to his question. In fact he has posed the question to authorities in the past. He just wants to know if and where he can hunt without breaking the law.

"[6] The issues raised in the case are historical in nature, significant in potential ramifications and require expert testimony. This testimony, while most interesting, is research driven, detailed and lengthy. The area continues to be researched and opinions are speculative in some instances. For an unrepresented defendant, without the resources of the state to engage in this research personally or by expert, this presents a major obstacle.

"[7] To put some context on the significance of one issue, the taking of evidence, which spans a five year period, was interrupted for a lengthy period largely at the request of the government to allow for aboriginal groups and the government to enter into

> negotiations on this issue. The government had announced this negotiation in its Throne speech. After over two years of such, negotiations broke down and the prosecution resumed."

[30] The comment of LeBel J. in *R. v. Marshall; R. v. Bernard* quoted above was in a case of two appeals being heard together by the Supreme Court of Canada regarding Mi'kmaqs in Nova Scotia and New Brunswick cutting logs on Crown land. The Bernard in that case was a Joshua Bernard, not the Mr. Bernard in this case. The earlier decision of the New Brunswick Court of Appeal in Joshua Bernard's case is dated August 28, 2003 and comprises 343 pages in the printed law reports: *R. v. Bernard* (2003), 262 N.B.R.(2d) 1.

[31] In that lengthy decision on August 28, 2003 the New Brunswick Court of Appeal acquitted Joshua Bernard, a Mi'kmaq on a charge of unlawful possession of timber cut from Crown lands.

[32] If the Mr. Bernard in this case had studied that decision before he went hunting on November 16, 2004, he might have felt that as a Mi'kmaq he had an even stronger case to hunt without a license than Joshua Bernard had to cut timber on Crown land without a license.

[33] On July 20, 2005 that New Brunswick Court of Appeal decision was reversed and Joshua Bernard's conviction was restored by the Supreme Court of Canada.

[34] In this case Mr. Bernard attended Provincial Court on 22 days, including 10 days for his trial. He also appeared before this Court on another 12 days to deal with various preliminary issues and his appeal. Thus he has had to be in court on more than 30 different days to fully and finally deal with this matter.

[35] When sentencing Mr. Bernard on October 29, 2010 the Judge of the Provincial Court said:

"Applying the law in most cases is seen as an honourable and appropriate function, designed to further its aims including promoting respect for such law and the authorities charged with enacting and enforcing the law. Today presents a situation where it is difficult to apply the law as it is written. That situation requires a judge to impose a criminal sanction which will deprive a citizen of his liberty as well as impose a substantial financial penalty, in circumstances which clearly do not support such sanction.

"In my reasons on decision on finding Mr. Bernard guilty, I outlined the dilemma as follows:

> 'This is one of those cases which cause criminal courts great concern. It illustrates the need to find a more effective, timely and fair method to resolve questions between aboriginals and the state over aboriginal rights. Such questions lend themselves to civil resolutions, perhaps in the mode of a civil or administrative, order or finding so that the parties can determine their respective rights.'

"While recognizing the legislature's authority to create minimum penalties for offences, the failure to provide the court with any discretion to recognize cases such as here, appears to bring disproportionate weight to the offence by excluding consideration of extenuating circumstances present.

"If a defendant has been cavalier; or emboldened; or willfully blinded as to the law; if he has been irresponsible, acting without principle or acting in defiance of the law and authority; then the minimum penalty would be appropriate, keeping in mind the objectives of the legislation.

"However, the legislation creating the minimum penalty does not permit a court to take into consideration the absence of these aggravating factors. It does not permit the court to

> recognize a citizen who has been responsible; diligent; principled and honourable; yet caught in a battle of history for determination of rights.
>
> "I am reminded of the concept of the honour of the Crown. It is a concept, which some consider a cornerstone in the development of our law, calling on the State, to act honourably toward its people for the sake of the sovereign, embodying justice and fairness to protect them and provide some measure of accountability for the exercise of authority against them.
>
> "While it may not be applicable to this case, and while it may be that the defendant could, if he had chosen to, advocated a defence of officially induced error, nevertheless we have a defendant who acted in good faith at the time; sought to obtain an answer to a valid live question; has fought his case without legal counsel; performed valiantly in protecting what he considered to be an Aboriginal right; enjoyed before this court a substantial measure of success; and yet the State seeks to throw him in jail.
>
> "It does not bode well for promotion of respect for the law nor facilitation of determination of citizen's rights. It is with a great deal of regret that I now impose the minimum sentence of 7 days in jail and a fine of $2,000. All right Mr. Bernard if you just want to have a seat, I think probably whatever is going to happen as far as getting a stay [of the sentence pending appeal to the Court of Queen's Bench, to avoid immediate imprisonment] should be able to be undertaken."

[36] This Court is a superior court of general jurisdiction and has inherent jurisdiction unlike the Provincial Court or various other courts, boards and tribunals. In contrast with a "superior court", those other decision-makers are often referred to in the cases as "inferior courts", although "statutory court" might be more accurate.

[37] The Supreme Court of Canada has recognized the broad extent of the inherent jurisdiction of superior courts in a number of cases. In a 2011 decision Binnie J. writing for the Supreme Court in *R. v. Caron*, [2011] 1 S.C.R. 78; 2011 SCC 5 (CanLII); said:

> "[29] While contempt proceedings are the best known form of "assistance to inferior courts", the inherent jurisdiction of the superior court is not so limited. Other examples include "the issue of a subpoena to attend and give evidence; and to exercise general superintendence over the proceedings of inferior courts, *e.g.*, to admit to bail" (Jacob, [at pp. 48-49). In summary, Jacob [Jacob, I. H. "The Inherent Jurisdiction of the Court" (1970), 23 *Curr. Legal Probs.* 23] states, "The inherent jurisdiction of the court may be invoked in an apparently inexhaustible variety of circumstances and may be exercised in different ways" (p. 23 (emphasis added)). I agree with this analysis. A "categories" approach is not appropriate.
>
> "[30] Of course the very plenitude of this inherent jurisdiction requires that it be exercised sparingly and with caution. In the case of inferior tribunals, the superior court may render "assistance" (not meddle), but only in circumstances where the inferior tribunals are powerless to act and it is essential to avoid an injustice that action be taken."

[38] Here in this case of Mr. Bernard the trial judge, a Judge of the Provincial Court was powerless to avoid imposing a minimum statutory jail sentence and fine but anxious "to avoid an injustice". Thus he seems to have arranged for an immediate application for a stay of the sentence to this Court. I interpret that as a request for assistance by the Provincial Court to this Court "to avoid an injustice".

[39] In these unique circumstances I dismiss the appeal but exercise the inherent jurisdiction of this Court to permanently stay or suspend the minimum statutory sentence imposed on Mr. Bernard of seven days imprisonment and a fine of $2,000.

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H.H. McLellan
A Judge of the Court of Queen's Bench
of New Brunswick