

2004 CarswellMan 603, **2004 MBQB 247**, 222 Man. R. (2d) 1

R. v. Moody

HER MAJESTY THE QUEEN and LESLIE MOODY and SAMUEL DYSART (Accused)

Manitoba Court of Queen's Bench

Menzies J.

Judgment: November 5, 2004

Docket: Thompson Centre CR 03-15-00037, 03-15-00039

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Counsel: Heather Leonoff, Q.C., D. Coggan for Prosecution

Leslie Moody, Samuel Dysart, Accused for themselves

Subject: Public; Constitutional; Criminal

Aboriginal law --- Constitutional issues — Rights under constitutional statutes generally — Constitution Act, 1867 (British North America Act)

Accused were "Indians" within meaning of s. 91 ¶ 24 of Constitution Act, 1867 who faced numerous charges under Criminal Code of Canada — Accused claimed to be members of Nisichawayasihk Cree Nation (Nation), but led no evidence in support of this claim — Nation was signatory to Treaty No. 5, 1875 between Crown and Indians within ceded tract of land — Accused applied to oust criminal jurisdiction of court on grounds of immunity from prosecution under Code by virtue of their status as "Indians" under Constitution Act — Application dismissed — If accused were members of Nation, they were subject to prosecution under Code — Under Treaty No. 5, 1875, Nation accepted sovereignty of Queen, and agreed to obey law and maintain peace and good order — Any traditional right or custom which accused claimed created immunity from criminal prosecution was voluntarily surrendered in Treaty No. 5, 1875 — Even if accused did not fall under provisions of Treaty No. 5, 1875, this would not assist them in their assertion of immunity — Canadian criminal law applied to all First Nation peoples, since claim of immunity was inconsistent with sovereignty of Dominion of Canada — Accused's status as "Indians" was found within, and as part of, broader community over which Canada was sovereign — For purposes of criminal law, accused were ordinary members of Canadian society.

Aboriginal law --- Constitutional issues — Rights under constitutional statutes generally — Constitution Act, 1982

Accused were "Indians" within meaning of s. 35 of Constitution Act, 1982 who faced numerous charges under

Criminal Code of Canada — Accused claimed to be members of Nisichawayasihk Cree Nation (Nation), but led no evidence in support of this claim — Nation was signatory to Treaty No. 5, 1875 between Crown and Indians within ceded tract of land — Accused applied to oust criminal jurisdiction of court on grounds of immunity from prosecution under Code by virtue of their status as "Indians" under Constitution Act — Application dismissed — If accused were members of Nation, they were subject to prosecution under Code — Under Treaty No. 5, 1875, Nation accepted sovereignty of Queen, and agreed to obey law and maintain peace and good order — Any traditional right or custom which accused claimed created immunity from criminal prosecution was voluntarily surrendered in Treaty No. 5, 1875 — Even if accused did not fall under provisions of Treaty No. 5, 1875, this would not assist them in their assertion of immunity — Canadian criminal law applied to all First Nation peoples, since claim of immunity was inconsistent with sovereignty of Dominion of Canada — Accused's status as "Indians" was found within, and as part of, broader community over which Canada was sovereign — For purposes of criminal law, accused were ordinary members of Canadian society.

Criminal law --- Constitutional authority — Federal criminal law powers — Criminal power

Accused were "Indians" within meaning of Constitution Act who faced numerous charges under Criminal Code of Canada — Accused claimed to be members of Nisichawayasihk Cree Nation (Nation), but led no evidence in support of this claim — Nation was signatory to Treaty No. 5, 1875 between Crown and Indians within ceded tract of land — Accused applied to oust criminal jurisdiction of court on grounds of immunity from prosecution under Code by virtue of their status as "Indians" under Constitution Act — Application dismissed — If accused were members of Nation, they were subject to prosecution under Code — Under Treaty No. 5, 1875, Nation accepted sovereignty of Queen, and agreed to obey law and maintain peace and good order — Any traditional right or custom which accused claimed created immunity from criminal prosecution was voluntarily surrendered in Treaty No. 5, 1875 — Even if accused did not fall under provisions of Treaty No. 5, 1875, this would not assist them in their assertion of immunity — Canadian criminal law applied to all First Nation peoples, since claim of immunity was inconsistent with sovereignty of Dominion of Canada — Accused's status as "Indians" was found within, and as part of, broader community over which Canada was sovereign — For purposes of criminal law, accused were ordinary members of Canadian society.

Cases considered by *Menzies J.*:

Mitchell v. Minister of National Revenue (2001), 2001 SCC 33, 2001 CarswellNat 873, 2001 CarswellNat 874, (sub nom. *Mitchell v. M.N.R.*) 83 C.R.R. (2d) 1, 269 N.R. 207, (sub nom. *Mitchell v. M.N.R.*) 199 D.L.R. (4th) 385, (sub nom. *Mitchell v. M.N.R.*) [2001] 3 C.N.L.R. 122, 206 F.T.R. 160 (note), (sub nom. *Mitchell v. M.N.R.*) [2001] 1 S.C.R. 911, [2002] 3 C.T.C. 359 (S.C.C.) — considered

Statutes considered:

Constitution Act, 1867, (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5

s. 91(24) — referred to

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), c. 11, reprinted R.S.C. 1985, App. II, No. 44

s. 35 — referred to

Criminal Code, R.S.C. 1985, c. C-46

Generally — referred to

Treaties considered:

Treaty No. 5, 1875 (Between Her Majesty the Queen and the Saulteaux and Swampy Cree Tribes of Indians at Beren's River and Norway House), 1875

Generally — referred to

APPLICATION by accused to oust criminal jurisdiction of court on grounds of immunity from prosecution under *Criminal Code* by virtue of their status as "Indians" under *Constitution Act*.

Menzies J.:

The Position of the Accused

1 The two Accused come before the court facing numerous charges under the *Criminal Code* alleged to have occurred on or about April 18th, 2003 in the settlement of Nelson House in Manitoba.

2 The Accused claim they are 'Indians' within the meaning of section 91 (24) of the *Constitution Act*, 1867 and within the meaning of section 35 of the *Constitution Act*, 1982. The Crown does not dispute that assertion. The Accused assert they are immune from prosecution under the *Criminal Code of Canada* by virtue of their status as 'Indians' under the aforementioned Acts. It is the Accused's position their status renders non-aboriginal laws inoperative as against them.

Treaty Five

3 Although they offer no sworn evidence, the Accused claim to be members or at least residents of the traditional lands of the Nisichawayasihk Cree Nation. The Accused argue that they have retained their aboriginal rights as an autonomous nation. The people of Nisichawayasihk Cree Nation were signatories to Treaty Five.

4 The Supreme Court of Canada dealt with the nature of Aboriginal Rights in the decision of *Mitchell v. Minister of National Revenue* also known as *Kanentakeron*, [2001] 1 S.C.R. 911 (S.C.C.). At paragraph 9 MacLachlin C. J. stated:

English law, which ultimately came to govern aboriginal rights, accepted that the aboriginal peoples possessed pre-existing laws and interests, and recognized their continuance in the absence of extinguishment, by cession, conquest, or legislation; see, e. g., the Royal Proclamation of 1763, R. S. C. 1985, App II, No. 1, and *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at p. 1103. At the same time however, the Crown asserted that sovereignty over the land, and ownership of its underlying title, vested in the Crown: *Sparrow*, supra.

5 And at paragraph 10:

Accordingly, European settlement did not terminate the interests of aboriginal peoples arising from their historical occupation and use of the land. To the contrary, aboriginal interests and customary laws were presumed to survive the assertion of sovereignty, and were absorbed into the common law as rights, unless (1) they were incompatible with the Crown's assertion of sovereignty, (2) they were surrendered voluntarily via

the treaty process, or (3) the government extinguished them: see B. Slattery, "Understanding Aboriginal Rights" (1987), 66 Can. Bar Rev. 727. Barring one of these exceptions, the practises, customs and traditions that defined the various aboriginal societies as distinctive cultures continued as part of the law of Canada: see *Calder v. Attorney-General of British Columbia*, [1973] S. C. R. 313, and *Mabo v. Queensland* (1992), 175 C.L.R. 1, at p. 57 (per Brennan J.), pp. 81-82 (per Deane and Gaudron JJ.), and pp. 182-183 (per Toohey J.).

6 With this legal framework the court must consider the assertion of immunity by the Accused as member of the Nisichawayasihk Cree Nation. Treaty Five contained the following provision:

And the undersigned Chiefs, on their own behalf, and on behalf of all other Indians inhabiting the tract with- in ceded, do hereby solemnly promise and engage to strictly observe this treaty, and also to conduct and be- have themselves as good and loyal subjects of Her Majesty the Queen. They promise and engage that they will, in all respects, obey and abide by the law, and they will maintain peace and good order between each other, and also between themselves and other tribes of Indians, and between themselves and other of Her Majesty's subjects, whether Indians or whites, now inhabiting or hereafter to inhabit any part of the said ceded tracts; and that they will not molest the person or property of any inhabitant of such ceded tracts, or the property of Her Majesty the Queen, or interfere with or trouble any person passing or travelling through the said tracts or any part thereof; and that they will aid and assist the officers of Her Majesty in bringing to justice and punishment any Indian offending against the stipulations of this treaty, or infringing the laws in force in the country so ceded.

[The Honourable A. Morris, *The Treaties of Canada with The Indians of Manitoba and the North-West Ter- ritories including the Negotiations on which they were based* (Toronto: Belfords, Clark & Co., 1994) at 347]

7 By virtue of the provisions of Treaty Five, the Nisichawayasihk Cree Nation accepted the sovereignty of Her Majesty the Queen and agreed to obey and abide by the law. In addition, the peoples of the Nisichawayasihk Cree Nation agreed to maintain 'peace and good order'.

8 In my opinion, whatever traditional right or custom which the Accused assert creates immunity from criminal prosecution (which right was not articulated by either of the Accused) was surrendered voluntarily in Treaty Five. As members of the Nisichawayasihk Cree Nation, the Accused would be subject to prosecution un- der the *Criminal Code of Canada*.

Absence of a Treaty

9 Due to the lack of evidence led by the Accused, there may be some question as to whether the Accused are included in the provisions of Treaty Five or not. In my opinion this uncertainty does not assist the Accused in their assertion of immunity from prosecution.

10 Although the majority of the Supreme Court did not address the issue in the *Mitchell* case, supra, Binnie J. was of the opinion that even in the absence of a treaty, Canadian Criminal Law applies to all First Nation peoples because a claim of immunity is inconsistent with an assertion of sovereignty. Binnie J. stated at para- graph 133:

In the earlier years of the century the federal government occasionally argued that Parliament's jurisdiction under s. 91(24) of the Constitution Act, 1867 ("Indians, and Lands reserved for the Indians") was plenary.

Indians were said to be federal people whose lives were wholly subject to federal "regulation". This was rejected by the courts, which ruled that while an aboriginal person could be characterized as an Indian for some purposes including language, culture and the exercise of traditional rights, he or she does not cease to exist thereby to be a resident of a province or territory. For other purposes he or she must be recognized and treated as an ordinary member of Canadian society. In a decision handed down soon after the coming into force of the Constitution Act, 1982, *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, a tax case, Dickson J. (as he then was) wrote at p. 36, "Indians are citizens and, in affairs of life not governed by treaties of the Indian Act, they are subject to all of the responsibilities... of other Canadian citizens". See also *Natural Parents v. Superintendent of Child Welfare*, [1976] 2 S.C.R. 751, at p. 763, per Laskin C.J., and *Dick v. The Queen*, [1985] 2 S.C.R. 309, at p. 326, per Beetz J. In *Gladstone* (at para.73) and again in *Delgamuukw v. British Columbia*, [1997] 3 S. C. R. 1010 (at par. 165), Lamer C. J. repeats that "distinctive aboriginal societies exist within, and are a part of, a broader social, political and economical community, over which the Crown is sovereign" (emphasis added). The constitutional objective is reconciliation not mutual isolation.

11 And at para. 135:

What is significant is that the Royal Commission itself sees aboriginal peoples as full participants with non aboriginal peoples in a shared Canadian sovereignty. Aboriginal peoples do not stand in opposition to, nor are they subjugated by, Canadian sovereignty. They are a part of it.

12 Binnie J. continued at para. 141:

Professor B. Slater formulated the traditional principle as follows:

When the Crown gained sovereignty over an American territory, colonial law dictated that the local customs of the native peoples would presumptively continue in force and be recognizable in the courts, except insofar as they were unconscionable or incompatible with the Crown's assertion of sovereignty. [Emphasis added].

("Understanding Aboriginal Rights" (1987), 66 Can. Bar Rev. 727, at P. 738)

13 And finally at para. 150:

Yet the language of s. 35 (1) cannot be construed as a wholesale repudiation of the common law. The subject matter of the constitutional provision is "existing" aboriginal and treaty rights and they are said to be "recognized and affirmed" not wholly cut loose from wither their legal or historical origins. One of the defining characteristics of sovereign succession and therefore a limitation on the scope of aboriginal rights, as already discussed, was the notion of incompatibility with the new sovereignty. Such incompatibility seems to have been accepted, for example, as a limitation on the powers of aboriginal self-government in the 1993 working report of the Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government and the Constitution*, supra, at p. 23:

...Aboriginal nations did not lose their inherent rights when they entered into a confederal relationship with the Crown. Rather, they retained their ancient constitutions so far as these were not inconsistent with the new relationship. [Emphasis added.]

14 In my opinion the assertion by the Accused that they are immune from criminal prosecution due to their

aboriginal status is inconsistent with the sovereignty of the federal and provincial governments. Their status is one found within and as a part of the broader community over which Canada is sovereign. The Accused are, for some intents and purposes "Indians" within the meaning assigned by the Constitution. However, for the purposes of the criminal law they remain ordinary members of Canadian society. To grant the Accused immunity from criminal prosecution would be inconsistent with the sovereignty of the Dominion of Canada.

Decision

15 Having found no constitutional basis to oust the criminal jurisdiction of the Court, the Crown will be permitted to proceed with the criminal prosecutions against the Accused.

Application dismissed.

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