Treaty Rights Can Be Acquired Through Sheltering

1. R. v. Meshake, an Aboriginal man from a Treaty 9 community was charged with hunting in Treaty 3 territory contrary to section 47(1) of the Game and Fish Act [1]. The case concerns the sharing of treaty wildlife harvesting resources.

The Ontario Court of Appeal overturned the decision of the Ontario Court of Justice by holding that Mr. Meshake was entitled to "shelter" under Treaty 3 and so hunt in Treaty 3 territory. Historically, treaty rights were conferred on those who were signatories to the treaty. In this case, Justice LaForme broadened this historical interpretation by holding that Mr. Meshake could hunt in Treaty 3 territories because his spouse was a Treaty 3 member. The court referred to this acquisition through kinship as "sheltering" under another's treaty rights [2].

The "sheltering" defence presented in Meshake was supported by the principles of treaty interpretation established in R. v. Marshall [3], which held that treaties should be interpreted with the goal of reconciling the interests of the parties at the time the treaty was signed. Pursuant to Marshall, the Court of Appeal confirmed the view of the Justice of the Peace.

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. [4]

The facts of the case supported this interpretation of Treaty 3. Meshake was accepted into the Treaty 3 community of Lac Seul First Nation; he was welcome to hunt with his spouse's family; and his child was a member of the Lac Seul community. Also important to the court's decision were two concessions made by the Crown. The Crown conceded that 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" [5]. The Crown also conceded that Mr. Meshake's wife's family "had, in accordance with custom, accepted him as one of them and had permitted him to share in their harvest of resources" [6].

Justice LaForme expands on the concept of "sheltering" in the companion case to Meshake, R. v. Shipman[7]. Whereas the legal issue in Meshake deals with "sheltering" under a treaty right through marriage,Shipman concerns "sheltering" under a treaty

through invitation or permission to hunt by a First Nations group in their treaty area.

The Court of Appeal confirmed the ruling of the lower courts by holding that Mr. Shipman could not shelter under a treaty based on consent. However, the case does not stand for the principle that permission granted to third parties has no standing in law. Indeed, Justice LaForme states that “Aboriginal persons can, in the right circumstances, shelter under another First Nation’s treaty rights” [8]. In this case, the evidence demonstrated that the custom of the Michipicoten Ojibway included “sharing the treaty resource with others seeking food and who were passing through the territory” [9]. Thus, granting permission to non-Robinson-Superior Treaty members to hunt in Michipicoten territory would be in keeping with custom.

In this case, Shipman was found guilty of contravening the Fish and Wildlife Conservation Act, 1997 because he had not requested consent from the Michipicoten First Nation prior to hunting. So although the Court of Appeal held that “granting permission does have standing in law,” it limits this right by holding that such a grant must be given prior to the activity in question [10]. This limitation accounts for the communal nature of treaty harvesting rights and the importance of protecting and conserving harvesting resources in Aboriginal culture; grants must be given by the Chief on behalf of the Aboriginal community as a whole [11]. Thus, because Shipman was not given consent prior to hunting, the court held Shipman could not “shelter” under the Michipicoten’s treaty rights.

Cases

- R. v. Meshake http://www.canlii.org/en/on/onca/doc/2007/2007onca337/2007onca337.html
- R. v. Shipman http://www.canlii.org/en/on/onca/doc/2007/2007onca338/2007onca338.html
- R. v. Marshall http://www.canlii.org/en/ca/scc/doc/1999/1999canlii665/1999canlii665.html

Further Reading

- "Aboriginal Rights", Centre for Constitutional Studies,http://www.law.ualberta.ca/centres/ccs/Current-Constitutional-Issues/Aboriginal-Rights.php
- Legal Interpretation of Treaties, Indian and Northern Affairs Canada (23 April 2006)
- Treaty Guides, Indian and Northern Affairs Canada (26 July 2006)

[1] 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.
[2] R. v. Meshake, 2007 ONCA 337 at 39 [Meshake].
[3] R. v. Marshall, [1999] 3 S.C.R. 456.
[4] Meshake, supra, note 2 at 29.
[5] Meshake, supra, note 2 at 19.
[6] Meshake, supra, note 2 at 20.
[7] R. v. Shipman, 2007 ONCA 338 [Shipman].