# R. v. Harquail (L.), (1993) 144 N.B.R.(2d) 146 (PC)

**Judge:** Savoie, P.C.J.

**Court:** Provincial Court of New Brunswick

**Case Date:** October 04, 1993

**Jurisdiction:** New Brunswick

**Citations:** (1993), 144 N.B.R.(2d) 146 (PC)

**Id. vLex:** VLEX-681152549

**Link:** http://vlex.com/vid/r-v-harquail-l-681152549

## Text

Case cited by: 3 cases, 3 other sources

**R. v. Harquail (L.) (1993), 144 N.B.R.(2d) 146 (PC);**
**144 R.N.-B.(2e) 146; 368 A.P.R. 146**
MLB headnote and full text
[French language version follows English language version]
[La version française vient à la suite de la version anglaise]

.....

R. v. Lloyd Harquail
**Indexed As: R. v. Harquail (L.)**
New Brunswick Provincial Court
Savoie, P.C.J.
October 4, 1993.

**Summary:**

The accused was charged under s. 58 of the Fish and Wildlife Act with unlawful possession of moose meat.

The New Brunswick Provincial Court acquitted the accused.

**Fish and Game - Topic 824**

Indian and Inuit rights - Definitions - Indian - Defined - The accused was charged under s. 58 of the Fish and Wildlife Act with unlawful possession of moose meat - He pleaded in defence his treaty rights, notwithstanding that he was a non-status Indian - Defence witnesses testified that he was a direct descendant of full status Indians - The New Brunswick Provincial Court found that the accused had established his Indian ancestry to the extent that he was part of a group of non-status Indians who enjoy the privileges recognised by the treaties.

**Indians, Inuit and Métis - Topic 4406**

Treaties and proclamations - When applicable - [See **Fish and Game - Topic 824** ].

**Cases Noticed:**

R. v. Fowler (J.) (1993), 134 N.B.R.(2d) 361; 342 A.P.R. 361 (Prov. Ct.), refd to. [para. 15].

R. v. Paul (1980), 30 N.B.R.(2d) 545; 70 A.P.R. 545; 54 C.C.C.(2d) 506 (C.A.), refd to. [para. 16].

R. v. Simon, [1985] 2 S.C.R. 387; 62 N.R. 306; 71 N.S.R.(2d) 15; 171 A.P.R. 15; 23 C.C.C.(3d) 238, refd to. [para. 17].

**Statutes Noticed:**

Fish and Wildlife Act, S.N.B. 1980, c. F-14.1, sect. 58 [para. 1].

Treaty of 1779, generally [para. 16].

**Counsel:**

None disclosed.

This case was heard before Savoie, P.C.J., of the New Brunswick Provincial Court, who delivered the following judgment on October 4, 1993.

**[1] Savoie, P.C.J.** : Lloyd Harquail was charged by the game wardens under s. 58 of the New Brunswick **Fish and Wildlife Act** . The section reads as follows:

> "Every person who at any time has in his possession the carcass of a bear, moose or deer or any part thereof, except in accordance with this Act and the Regulations, commits an offence."

**[2]** He was found in possession of a portion of a moose carcass in circumstances which indicated he failed to comply with the **Act** and its Regulations.

**[3]** The facts here are not in dispute. The defendant admits the allegations contained in the information, saving and excepting that he acted "unlawfully".

**[4]** At the request of Ernie Grey, a Micmac, a Status Indian, the defendant assisted him in the butchering of a moose as compensation, a common practice amongst Indians.

**[5]** The defendant claims treaty exemption, by reason of aboriginal rights, expressed in terms of ancestral lineage. He has found support for his position in the research and testimony of some defence witnesses.

**[6]** The Crown called no evidence.

**[7]** The issue here, then, is whether Mr. Harquail, as a non-status Indian, can still claim immunity under the statute, by reason of his ancestral lineage, and by a liberal interpretation of the **Treaty of 1752** and others, such as the **Treaty of 1779** .

**[8]** The defense called a number of witnesses. Frank Palmeter is the president of the Aboriginal People's Council. It represents non-status Indian who live off reserves. He explained that the label " Status and Non-Status Indian " was invented by people other than Indians themselves, such as the Department of Indian Affairs, and that the title was not attributed in accordance with the same criteria as established by his council, such as, for instance, the requirement of proven aboriginal ancestry.

**[9]** He testified that Mr. Harquail, whose status had once been challenged, was the subject of an ancestral verification which resulted in the abandonment of the challenge.

**[10]** He demonstrated the manner in which he had proceeded in his search for the status of the defendant which traced his direct Indian lineage back to 1881 and beyond, right back to the treaties which establish such immunity, as far back as 1752. Mr. Palmeter established solid credentials in the field in which he testified. I accept his findings and conclusions relative to the aboriginal ancestry of the Harquail family, generally and the defendant, specifically.

**[11]** Anthony Francis, an elderly former Band Chief, and a registered Indian, testified for the defendant. He is also present and a part of the genealogy produced and relied upon by the defendant in support of his claim for immunity and supports the defendant in his claim. He has a personal knowledge of the ancestors of the defendant up to mary Louise Harquail, his grandmother, born in 1866 and married to Michael

Francis in 1901.

**[12]** The defence evidence, which was not challenged, supports the defendant's argument that he is a direct descendant of full Status Indians in accordance with supporting documents received in evidence as exhibits D-10 to D-18 inclusive.

**[13]** Other documents produced by the defendant include ancient treaties and related documents which tend to support the Indian's claim for exemption under the **Fish and Wildlife Act** , inter alia, all of which have been received in evidence as Exhibits D-1 to D-9, inclusive and Exhibit D-19.

**[14]** Further documents received in evidence as exhibits D-10 to D-18, inclusive, are tendered to confirm the claim of the defendant that he is a direct descendant of Joseph Harquail and Susan McCurdy, two Indians, who married in Dalhousie, New Brunswick in 1867. These are extracts of certificates of birth, marriage, etc., of the parish churches.

**[15]** Judge Clendening of this court, earlier this year, found for the defendant, in a case similar to this one, in **R. v. Fowler (J.)** (1993), 134 N.B.R.(2d) 361; 342 A.P.R. 361 (Prov. Ct.).

**[16]** The New Brunswick Court of Appeal in **R. v. Paul** (1980), 30 N.B.R.(2d) 545; 70 A.P.R. 545; 54 C.C.C.(2d) 506, had to make a similar decision and was asked to quash a guilty verdict. It considered the treaties of 1725, 1752 and 1779. Chief Justice Hughes, in granting the appeal, applied the treaty rights contained in the treaty of 1779, which recited, inter alia, as follows:

> "That the said Indians and their constituents shall remain in the Districts before mentioned Quiet and Free from any molestation of any of His Majesty's Troops or other his guard subjects in their Hunting and Fishing ."

**[17]** The Supreme Court of Canada, in **R. v. Simon** , [1985] 2 S.C.R. 387; 62 N.R. 306; 71 N.S.R.(2d) 15; 171 A.P.R. 15; 23 C.C.C.(3d) 238, determined that any doubt remaining in the mind of the court should always be resolved in favour of the Indian.

**[18]** Having considered all the evidence, I find that the defendant has established his Indian recestry to the extent that he is part of a group of non-status Indians who enjoy the privileges recognized by the treaties, in particular the **Treaty of 1779** , and the case law above cited.

**[19]** Based on that finding, I am satisfied that the defendant can escape liability under the statute and claim immunity from its punitive provisions.

**[20]** I find him not guilty.

Accused acquitted.

Editor: Janette Blue/gas