

ONTARIO COURT OF JUSTICE
(Northwest Region)

5 B E T W E E N:

HER MAJESTY THE QUEEN

Appellant

10 - and -

O'SULLIVAN LAKE OUTFITTERS INC., HOWARD MESHAK
and ELSIE MESHAK

15 Respondents

20 R E A S O N S F O R J U D G M E N T

THE HONOURABLE JUSTICE D. PETTIT BAIG
DELIVERED ORALLY on September 26, 2008 at THUNDER BAY, Ontario

30 APPEARANCES:

B. Wilkie

Counsel for the Provincial Crown

J. Erickson and E. Esquega

Counsel for the Respondents

1.
Reasons for Judgement

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R E A S O N S F O R J U D G M E N T

BAIG, J: (Orally)

This is an appeal by the Crown with respect to the decision of His Worship Justice of the Peace M. Donio, made November 29, 2006, which resulted in a stay of all charges against the defendants. The charges are that O'Sullivan Lake Outfitters Inc. and Elsie Meshake and Howard Meshake,

1. on or about the 7th of July 2003, at the Waters of Ogoki Lake, Unorganized Territory, Northwest Region, did commit the offence of unlawful construction of a building on public land without the authority and terms and conditions of a work permit, thereby contravening Section 2(1)(a) of Ontario Regulation 453/96 made pursuant to the *Public Lands Act*, R.S.O. 1990, Chapter 43, and further,

2. between 17 July 2003 and 8 October 2003, at the same place did unlawfully continue an activity while a stop work order was issued, and thereby contravene Section 14(a), (b) of the *Public Lands Act*, R.S.O. 1990, Chapter 43.

RELEVANT FACTS

1) Howard and Elsie Meshake are status Indians in accordance with the *Indian Act* R.S.C. 1985, Chapters 1-5. They are members of the Aroland First Nation which community is a signatory (or adheres) to The James Bay Treaty - Treaty #9, therefore the community has treaty rights pursuant to the treaty which include the right to hunt, fish and gather.

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2) Members of the Aroland First Nation are entitled to exercise their rights in and around the area of Ogoki Lake and specifically on Combe Island.

3) On or about 7 July 2003, the Meshakes began construction of a cabin on Combe Island in Ogoki Lake, the dimensions of which are 32 feet by 16 feet. The Meshakes did not apply for nor obtain a *Public Lands Act* work permit for the cabin.

4) (a) O'Sullivan Lake Outfitters Inc (the Company) is and was at all times a valid corporation, incorporated pursuant to the laws of Ontario, with its head office 18 miles past Aroland First Nation. The Company is in the business of providing hunting and fishing opportunities for tourists and has 8 or 9 outpost camps, one of which is on the Ogoki River, about 4 miles upriver from Ogoki Lake. The Meshakes are the only officers and directors of the Company and are involved in the operation of the Company from May until October.

(b) The Meshakes wanted for some years to move the Ogoki River camp to the mouth of the river for safety reasons connected to the difficulties of landing a float plane on a moving body of water and traversing the river rapids in small boats to fish on the lake.

(c) The Meshakes wrote to the Ministry of Natural Resources in 1999 concerning their desire to move and again in August 2002 when they applied to move the outpost camp. In February 2003 they sent another letter requesting a response which they finally received soon after, denying their request.

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5) At the time of the construction activity, Combe Island was public land administered under the Public Lands Act. On 10 July 2004, the island was included in the newly created Ogoki River Provincial Park.

6) At the time of the construction activity the Ministry of Natural Resources had not consulted with the Aroland First Nation with respect to the intent and application of the draft policy and procedure entitled *Work Permits for Incidental Buildings on Public Lands*, which was treated as 'in force' by ministry staff.

7) Elsie Meshake testified that:

(a) she was born at a lake approximately 15 miles north of Ogoki Lake. After her birth she resided at Ogoki Lake on Combe Island with her parents and brothers and sisters (10 siblings in all) until she married at age 15. As a result of living at the remote location, she went to school for half a year, and is now unable to read or write;

(b) in July 2003 the Meshakes built the cabin on Combe Island near the old cabins which had been used by the family in the past because Ms. Meshake believes this island is home. It was built near to the old cabins which had been used by the family in the past. The cabin was constructed with the assistance of their four children, Ms. Meshake's brothers and other family members;

(c) they did not build the cabin with the intention of using it commercially: such a possibility arose after the cabin was built;

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(d) the cabin was used by her and her family, including her four children and her siblings;

(e) they used the cabin when possible throughout the year; however, in the summer season they were busy with the Company;

(f) the construction of the cabin cost approximately \$20,000, with some of the materials given to the Meshakes by family and friends;

(g) she personally hired Nakina Air Service to haul the materials that were used to build the cabin. The Company was the vehicle used to pay for the flight services of Nakina Air Service, since the principle of Nakina Air, Greg Bourdignon preferred billing the Company as opposed to the Meshakes personally for collection purposes. He had worked for the Meshakes for some years in connection with the Company and was accustomed to billing the Company. The Meshakes, with the income earned from their general store in Aroland, paid for the services of Nakina Air. The Company did not have sufficient revenue or retained earnings and was indebted to the Meshakes as of 31 October 2003, and the Meshakes did not draw an income from the Company;

(h) prior to constructing the cabin, the Meshakes did not seek a work permit from the Ministry of Natural Resources because they did not believe it was necessary because they are Native, and because Ms. Meshake had lived on Combe Island all her life and considered it to be "home";

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8) Gary Davies gave evidence on behalf of the Crown concerning the work permit system. He noted that:

- (a) applications for work permits are only available at the Ministry of Natural Resources District offices or on the internet;
- (b) applications are not available in languages other than English or French;
- (c) a Ministry of Natural Resources representative is not able to identify an applicant for a work permit as a First Nation person who is applying pursuant to his or her treaty rights, unless the applicant attends at the Ministry of Natural Resources office personally, or provides a cover letter so indicating;
- (d) the *Work Permit for Incidental Buildings on Public Land* policy and procedure is believed to be available on the internet, and was finally passed from "draft" form to an "interim" form in October 2006;
- (e) there is no regulation or policy requiring a response to an application for a work permit within a defined period of time;
- (f) the length of time required for the Ministry of Natural Resources to respond to an application for a work permit can take several months, if not longer; and,
- (g) there is an appeal mechanism for those who are denied a work permit, pursuant to Ontario Regulation 975. This regulation requires applicants to file notices in writing and written submissions. Furthermore, there are no specific

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time periods as to when decisions and hearings are to occur.

9) With respect to the issuing of the stop work order, it was the evidence of Conservation Officer Tom Gross that he:

(a) placed a stop work order on the cabin on Combe Island on 17 July 2003;

(b) called the place of business of the Company on the same day and advised the person who answered the telephone of the stop work order. Apparently he spoke with a niece of the Meshakes;

(c) did not comply with the Ministry of Natural Resources stop work order procedure which required him discuss the matter with the offending party and identify the problem prior to taking any action;

(d) failed to follow up with the Meshakes on the issue of the cabin or the stop work order until 26 July 2003;

10) Elsie Meshake testified that she never saw the stop work order, and was not advised of any telephone call made to the Company by Mr. Gross on 17 July. When she met with Mr. Gross on 26 July, he was explaining the stop work order when she advised him that the cabin which was built for their personal use was already completed.

11) (a) In November 2003, at a meeting in Aroland between members of the Aroland First Nation and the Ministry of Natural Resources concerning land use rights and traditional lands, the Meshakes were concerned because they were not permitted to move their outpost camp on Ogoki River to the river mouth.

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5 (b) Emotions were running high and Elsie Meshake said that she would use the Combe Island cabin as a commercial outpost cabin and that the Ministry of Natural Resources should charge her so that the matter could get into court which was the fastest way to get the issues resolved.

10 (c) At some point, either at that meeting or later, she had a discussion with a Ministry of Natural Resources representative (D. Haldane) and asked what steps should be take to use the cabin as an outpost cabin. He advised her to write a letter to the Ministry.

15 12 (a) In January 2004, the Meshakes wrote to the Ministry of Natural Resources and requested permission to use the Combe Island cabin as a commercial outpost cabin.

(b) By letter dated 2 February 2004, Haldane of the Ministry of Natural Resources responded to the Meshake letter in the negative.

20 13) The charges before the court were laid on 8 October 2004 with a first appearance on 7 December 2004.

Decision of His Worship Justice of the Peace Marcel Donio.

25 14) (a) By agreement, the first part of the trial held on 29 and 30 November 2006 was to determine whether the Combe Island cabin was constructed for commercial purposes. His Worship considered the whole of the evidence and determined that there was
30 insufficient evidence of intent to find that the cabin was built for commercial purposes.

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His Worship found specifically that the cabin was built for the personal use of Elsie and Howard Meshake and their family, including their extended family.

5 b) The second part of the trial took place on 5 July 2007 with the bulk of the evidence admitted by way of an agreed statement of fact. One further witness called by the Crown, Gary Davies, testified concerning the *Public Lands Act* and the work permit process as administered by the Ministry of Natural Resources.

10 (c) Following argument on 30 August 2007, His Worship delivered his decision on 26 November 2007.

15 (d) He reviewed Treaty 9 which promised the surrendering communities that their hunting and fishing rights would continue as before, which meant that cabins could be built to facilitate those treaty rights. The community members would not be compelled to reside on the reserve set aside for them.

20 (e) He reviewed the work permit system as administered by the Ministry of Natural Resources, which at the time was based on a draft of the *Incidental Buildings Policy*. He noted that:

25 (i) the policy required consultation which did not occur with respect to the drafting of the policy itself;

(ii) the policy catered to English French proficiency;

30 (iii) the application process does not have any time stipulations within which the Ministry must respond;

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(iv) there were no consultations with the people in the north with respect to this province-wide policy;

(v) the permits are available only at the Ministry of Natural Resources District offices, ie. Geraldton, or on the internet.

(f) Overall, he found that the work permit process has an adverse impact on people like Elsie Meshake who are illiterate, whose second language is English and who would have to travel some 70 kilometers to the Ministry office. Furthermore, the appeal process requires either literacy or a significant financial cost.

(g) He found that the cabin built by the Meshakes had a communal aspect in terms of the contributions in materials and labour by others, that it was built for the personal use of the Meshakes and their extended family (which he calculated to be at least 30 people) who are members of the Aroland First Nation, that the cabin was needed to exercise their rights to hunt, fish and trap in the area, and he referred to the support of the community which was demonstrated by a resolution of the Nishnawbe-Aski Native Organization supporting the construction of the cabin.

(h) He found that Conservation Officer Gross did not comply with the process set out by the Ministry of Natural Resources with respect to stop work orders.

(i) Following a review of the evidence and his findings of fact, His Worship found that there had been a significant infringement of the Meshakes

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rights and that the work permit process with its open-ended possibility of delay created a "tremendous disadvantage to the applying party, as opposed to the approving party". His Worship found that the treaty rights are to be uninterrupted in the people's pursuit of a traditional lifestyle and that this policy resulted in a significant interference in their rights.

(j) Thus, the Justice of the Peace found that the *Public Lands Act* infringed the defendants' pursuit of a traditional lifestyle and their aboriginal treaty rights, which infringement was not justified.

(k) The defence requested a stay of proceedings, and it was granted.

15. I am satisfied, based on the findings and decisions of His Worship, that he would have found the defendants not guilty of the charges, if that request have been made.

THE LAW: THE TREATY

16) (a) In 1905 and 1906 representatives of the Government of Canada and Ontario travelled to Northern Ontario to negotiate a treaty for the area, now known as The James Bay Treaty - Treaty #9, whereby the parties agreed to share such lands in exchange for various promises.

(b) When one reads the various Treaty #9 documents, it is apparent that that the terms of the treaty were negotiated throughout the expedition at the various meetings with the First Nation people of Treaty #9;

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5 (c) The lands "surrendered" to the Crown were encumbered with the express conditions that the people would not be confined to their reserves (which were created pursuant to the treaty) and that they could continue to go out on the land and exercise hunting, fishing, and gathering rights as they had done in the past without interference from the government.

10 (d) In the Commissioners' Report of 6 November 1905, the concerns of Chief Missabay were noted and addressed by the commissioners and documented as follows:

15 "Missabay, the recognized chief of the band, then spoke, expressing the fears of the Indians that, if they signed the treaty, they would be compelled to reside upon the reserve to be set apart for them, and would be deprived of the fishing and hunting privileges they now enjoy. On being informed that their fears in regard to
20 **both** these matters were groundless, as their present manner of making a livelihood **would in no way be interfered with**, the Indians talked the matter over among themselves, and then asked to be given till the following day to
25 prepare their reply...

In the end they accepted those promises.

17) Litigation of Treaty Rights.

30 According to the case of R. v. Badger (1996), 133 D.L.R. (4th) 324, at paragraphs 41 and 52 (S.C.C.), treaties are to be given a just, broad and liberal interpretation, with uncertainties resolved in favour of the Aboriginal signatories and their

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5 descendants. The reasons for generous rules of interpretation include:

(i) the honour of the Crown is at stake in its dealings with Aboriginal peoples. Any interpretation must uphold the integrity of the Crown; and,

10 (ii) the treaties were negotiated between representatives of entirely foreign cultures, and written in a language foreign to the Aboriginal signatories.

ISSUES.

18) The issues in this appeal are as follows:

15 (i) is the finding of the Justice of the Peace that the construction of the cabin is protected by the treaty rights supported by the evidence;

(ii) is the requirement to obtain a permit a *prima facie* infringement of the treaty right;

20 iii) if it is a significant *prima facie* infringement, can it be justified?

ISSUE # 1

25 19) Is the cabin protected by the treaty rights? The Justice of the Peace correctly found that the cabin is a part of the rights promised by Treaty #9 since:

(a) the members of the community are entitled to exercise their rights in and around the area of Ogoki Lake and specifically on Combe Island; and,

30 (b) the cabin on Combe Island is remotely located and is only accessible by airplane or by a long boat ride with portage.

20) With respect to the Crown's allegation that the Meshakes built the cabin for a commercial

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purpose as opposed to their personal use, the presiding Justice of the Peace found that they did not, which is supported by the following evidence:

5 (a) when the Meshakes wrote to the Ministry of Natural Resources on 26 August 2002 for permission to relocate their Ogoki River outpost camp to Ogoki Lake, they were requesting to locate to the mouth of the river and not to Combe Island which is quite a distance from the river mouth;

10 (b) at the November 2003 Aroland First Nation Native Values meeting the discussion became quite passionate and focused on a dispute concerning traditional lands. At that point Elsie Meshake announced that she would use the Combe cabin as a tourist camp and that the Ministry of Natural Resources should charge her so that the Treaty Rights issues could be adjudicated by a court. This announcement is not sufficient in the
15 circumstances to establish the intent attributed to it by ministry officials;

20 (c) the evidence at the trial was that the cabin was never used for any commercial purpose;

25 (d) with respect to the 8 January 2004 letter from the Company to the Ministry of Natural Resources, that letter was "simply a request" that was denied;

30 (e) when Ms. Meshake said, "We got cabins right next - not too far from where this cabin is", she was referring to her extended family. This is corroborated when she states in relation to the Raven Lake cabin, "We got a cabin - we got a cabin there too, my family does". Accordingly, when considering the extent of her immediate and

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extended family, it is not unreasonable for more than one cabin to be available at Combe Island for the use of the members of Aroland First Nation;

(f) with respect to the cabins that the Company administers, the availability of these cabins should be irrelevant since they are owned by the corporation and are used for commercial activities only.

21) Therefore, the finding of the Justice of the Peace that the cabin was for personal use and part of the treaty rights promised by Treaty #9 is supported by the evidence.

I accept that it is sufficiently supported by the evidence to justify his findings.

ISSUE #2

22) Is the requirement of a work permit a *prima facie* infringement of the Meshakes' Treaty Rights? The evidence adduced at trial supports His Worship's findings that the requirement of a work permit constitutes a *prima facie* infringement of the Meshake's Aboriginal and Treaty Rights to construct a cabin.

(a) The requirement of having to obtain a work permit unreasonably restricts the Meshakes from freely exercising their rights without government consent and causes hardship because of the possibility of delay or denial. If they fail to obtain a work permit, they are deemed to commit an offence if they occupy the Crown land and place any material on it.

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(b) In these circumstances, the evidence before the court supporting the *prima facie* argument is that:

(i) there is no guarantee that the Meshakes would be provided with a work permit if they applied for one in accordance with the existing scheme. In fact, Ontario Regulation 975 contemplates that an officer may refuse a work permit entirely;

(ii) applications for work permits are only available at the Ministry of Natural Resources District office or on the internet;

(iii) the applications are only available in English or French and assume that applicants are literate;

(iv) there is not any way for a Ministry of Natural Resources representative to be able to identify a First Nation applicant for a work permit;

(v) there is no regulation or policy requiring a response to an application for a work permit within a defined period of time;

(vi) the length of time required for the Ministry of Natural Resources to respond to an application for a work permit could take several months, if not longer, which is different from, for example, a licence to fish which can be issued immediately; and finally,

(vii) if the application is approved and a work permit is issued, the Ministry of Natural Resources can impose conditions.

23) Furthermore, the work permit scheme is not consistent with the treaty and is in direct

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conflict with its terms, which include the promise that "the manner of making a livelihood would in no way be interfered with".

24. Requiring First Nations people of Treaty #9 to get a work permit prior to any construction is an interference with the exercise of their Aboriginal and Treaty Rights and is, therefore, a *prima facie* infringement that is significant, in accordance with the finding of the Justice of the Peace.

ISSUE #3

24) Can a significant *prima facie* infringement be justified?

(a) Provincial legislation which *prima facie* infringes non-commercial treaty rights cannot be incorporated and enforced pursuant to section 88 of the *Indian Act*, which makes those Treaty Rights immune from the Crown's ability to justify, unless the Crown is doing so in accordance with its constitutionally mandated powers. This is in accordance with the case of *R. v. Morris*, [2006] 2 S.C.R. 915, at paragraphs 44 to 55, and 60.

(b) Section 88 of the *Indian Act* specifically states that:

"Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or the First Nations Fiscal and Statistical Management Act, or with any order, rule, regulation or law of a band made under those Acts, and except to the extent that those

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provincial laws make provision for any matter for which provision is made by or under those Acts". *Indian Act*, R.S.C. 1985, Chapters 1 to 3, S.88.

(c) The court in *Morris* suggested that only the Federal Crown has the constitutionally mandated power to infringe treaty rights and not the Provincial Crown:

"Where a *prima facie* infringement of a Treaty Right is found, a province cannot rely on section 88 by using the justification test from *Sparrow* and *Badger* in the context of section 35(1) of the Constitution Act, 1982, as alluded by Lamer C.J. in *Cote*, at para 87. The purpose of the *Sparrow/Badger* analysis is to determine whether an infringement by a government acting within its constitutionally mandated powers can be justified. This justification analysis does not alter the division of powers, which is dealt with in section 88. Therefore, while the *Sparrow/Badger* test for infringement may be useful, the framework set out in those cases for determining whether an infringement is justified does not offer any guidance for the question at issue here".

R. v. Morris, *supra*, at paragraph 55.

25) The Meshakes constructed their cabin on Combe Island for their personal use and not for any commercial related purpose. The requirement of having to obtain a work permit prior to constructing the cabin is a *prima facie* infringement of their treaty right which results in section 88 being triggered so that the Provincial Crown is not at liberty to infringe those rights.

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Therefore the Provincial Crown cannot in turn attempt to justify any such infringement since it is not constitutionally mandated. See *R. v. Morris*, supra, at paras 50, 51, 54, and 55.

26) Further, the Crown breached the principles of constitutionalism and the rule of law by acting in an arbitrary manner in seeking to enforce a draft policy concerning the activity in question.

(a) In the case Reference Re: Succession of Quebec, [1998] 2 S.C.R 217 at para 70, the Supreme Court of Canada emphasized the importance of the principles of constitutionalism and the rule of law and has affirmed that the principles "*lie at the root of our system of government*". The court held that the rule of law encompasses many things but summarized the principles as follows: "*at its most basic level, the rule of law vouches after the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action*".

(b) Again, quoting from the same case, the elements of the rule of law include that: "*...it is supreme over the acts of both government and private persons...it requires the creation and maintenance of an actual order of positive laws... and the exercise of all public power must find its source in a legal rule... the relationship between the state and the individual must be regulated by law*".

(c) In explaining the difference between the principle of constitutionalism and the rule of law

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5 the Court explained that "the constitutionalism principle refers that all government action comply with the Constitution. The rule of law principle requires that all government action must comply with the law, including the constitution".

27) The Crown, in these circumstances, has offended the principles of constitutionalism and the rule of law because:

10 (a) the Crown is arbitrarily seeking to enforce a draft policy concerning the issuance of work permits for incidental cabins that does not have legislative approval; and,

15 (b) the process for implementing and enforcing the same on the First Nations people has not satisfied section 35 of the *Constitution Act, 1982*, and the jurisprudence that has evolved in accordance with that provision.

20 Therefore, the court grants relief pursuant to subsection 52(1) of the *Constitution Act, 1982* by way of an order dismissing the appeal.

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THE HONOURABLE JUSTICE D. PETTIT BAIG