These provisions do not impose a legal duty not to communicate information regarding a patient to the police. The medical doctor who does so may be guilty of professional misconduct. If so, he may become subject to the disciplinary procedures provided in the Act. The hospital employee is not subject to any statutory penalties.

In substance then, the position taken by the majority in the Court is that the police informer privilege does not apply if the informant has communicated information which he should not have given. With respect, in my opinion, the answer to this is that the privilege in question is not given to the informer and, therefore, misconduct on his part does not destroy the privilege. The privilege is that of the Crown, which is in receipt of information under an assurance of confidentiality. The existence of the privilege is not to be determined by the nature of the conduct of the informer. As Lord Simon of Glaisdale said in the *N.S.P.C.C.* case at p. 233:

> . . . the rule can operate to the advantage of the untruthful or malicious or revengeful or self-interested or even demented police informant as much as of one who brings information from a high-minded sense of civil duty. Experience seems to have shown that though the resulting immunity from disclosure can be abused the balance of public advantage lies in generally respecting it.

The informant in the *N.S.P.C.C.* case was under a legal duty not to publish defamatory material concerning the plaintiff. In the light of the facts disclosed, the informant to the N.S.P.C.C. did publish defamatory material. None the less, the N.S.P.C.C., on the analogy of the police informer privilege, was not compelled by the Court to breach the assurance of confidentiality which had been given to the informant. Public policy required that the N.S.P.C.C., in order to carry out its objects, be enabled to obtain information from any source under an assurance of confidentiality.

In my opinion, the statutory provisions to which I have referred do not preclude the right of the Crown to resist compulsion to disclose the names of its informants to whom an assurance of confidentiality has been given.

In the present case, the identity of the public informers is being sought, not by an accused person or a litigant in civil proceedings, but is being sought by the tribunal itself which summoned the police witnesses in order to obtain such disclosure but, in my opinion, the fact that it is the tribunal itself which seeks the information does not affect the application of the rule. The *Public Inquiries Act, 1971* does not confer on the Commissioner any

wider powers than those which may be exercised, on application of a party, by a Judge conducting judicial proceedings. The police informer privilege is not in any way diminished by any provision of the *Public Inquiries Act, 1971*. On the contrary, s. 11 of the Act specifically provides that nothing is admissible in evidence at any inquiry that would be inadmissible in a Court by reason of any privilege under the law of evidence.

I would allow the appeal and set aside the judgment of the Court of Appeal. I would answer each of the questions in the stated case in the negative and would answer the second question posed in the amended order of McIntyre J. in the affirmative. I would make no order as to costs.

RITCHIE J., concurs with MARTLAND J.

DICKSON J., concurs with LASKIN C.J.C.

ESTEY, MCINTYRE and CHOUINARD JJ., concur with MARTLAND J.

Appeal allowed.

REGINA v. TAYLOR AND WILLIAMS

Ontario Court of Appeal, MacKinnon A.C.J.O., Brooke and Lacourcière JJ.A. October 16, 1981.

Indians — Aboriginal rights — Hunting and fishing — Extinguishment by treaty — Treaty referring to surrender of tract of land but no reference to hunting and fishing rights — Minutes of council meeting recording oral portion of treaty — Minutes referring to Indians having "equal right" to fish and hunt on lands — Whether effect of treaty to extinguish hunting and fishing rights — Whether Indians merely given same rights as other persons to hunt on treaty lands — Whether treaty to be given interpretation most favourable to Indians — Indian Act, R.S.C. 1970, c. I-6, s. 88 — Game and Fish Act, R.S.O. 1970, c. 186, s. 74.

The accused, who were Indians within the meaning of the *Indian Act*, R.S.C. 1970, c. I-6, were charged and convicted of taking bullfrogs during the closed season established under the Regulations passed pursuant to s. 74 (rep. & sub. 1980, c. 47, s. 27) of the *Game and Fish Act*, R.S.O. 1970, c. 186 (now R.S.O. 1980, c. 182, s. 77). The accused argued that by virtue of s. 88 of the *Indian Act* and a treaty entered into with the Crown in 1818 known as Treaty No. 20, the provincial legislation did not apply to them. Section 88 provides that all laws of general application from time to time in force in the Province are applicable to Indians "subject to the terms of any treaty . . .". Treaty No. 20 was entered into by the Indians at a time of famine and surrendered certain large tracts of land including the land upon which the accused had taken the bullfrogs. In the treaty itself there was no provision for or reservation of fishing and hunting rights. However, the accused relied on the minutes of a council meeting which recorded the oral portion of the

treaty. This meeting both preceded and followed the signing of the provisional agreement. In the minutes of this meeting there was recorded a request by the chiefs that they not be prevented "from the right of fishing, the use of the waters, and hunting where we can find game." A request was also made for reservation of certain islands for farming. In response the negotiator for the Crown stated "the request for the Islands, I shall also inform [the King] of, and have no doubt but that he will accede to your wish. The rivers are open to all and you have an equal right to fish and hunt on them". The Crown argued that the Indians intended to surrender their hunting and fishing rights and that the oral representations merely advised the Indians that they were to have an equal right with all others and it was not a preservation of special rights. The accused's appeal to the Ontario Divisional Court was allowed. On appeal by the Crown to the Court of Appeal, *held*, the appeal should be dismissed.

The minutes of the council meeting, which preceded and followed the signing of the provisional agreement which led to the written treaty, recorded the oral portion of that treaty and were as much a part of it as were the written articles. In interpreting a treaty a Court must consider the history and oral traditions of the tribes concerned, and the surrounding circumstances at the time of the treaty. In this case the Court had to have regard to the fact that the tribes who were parties to the treaty had hunted and fished in the area covered by the treaty and had taken bullfrogs for food since earliest times. It was part of the oral tradition of the tribes that this right was not only recognized at the time of the treaty but that they continued to exercise the right without interruption until the present. The Court also had to have regard to the fact that one of the reasons for the Crown entering into the treaty was to facilitate Crown grants of land to settlers who were arriving in the area at the time. At this time historical evidence was that both the settlers and the Indians were suffering great privation. Finally, historical records indicated that the negotiator on behalf of the Crown was a highly regarded public servant who was well trusted by the Indians themselves. While there was no reservation in the written treaty of hunting and fishing rights it was clear that the Indians were expected to remain on the land, and it is difficult to imagine how they were to survive if their ancient right to hunt and fish for food was not continued. In approaching the terms of the treaty the honour of the Crown is always involved and no appearance of sharp dealing may be sanctioned. If there is any ambiguity in the words or phrases used, not only should the words be interpreted as against the framers or drafters of such treaty but such language should not be interpreted or construed to the prejudice of the Indians if another construction is reasonably possible. Finally, if there is evidence by conduct or otherwise as to how the parties understood the terms of the treaty then such understanding and practice is of assistance in giving content to the term or terms.

All these principles lead to the conclusion that the terms of the treaty, which include the oral terms recorded in the minutes, preserve the historic right of these Indians to hunt and fish on Crown lands in the lands conveyed and fall under the exception provided in the opening words of s. 88 of the *Indian Act*. When considered in context, the assurance by the representative of the Crown with respect to the hunting and fishing in the area covered by the treaty was not intended to put any limitation on the rights of Indians but rather was emphasizing that that right would continue. The accepted evidence was that this understanding of the treaty had been accepted and acted on for 160 years without interruption and it was too late now to deprive the Indians of their historic aboriginal rights.

[*R. v. George*, [1966] 3 C.C.C. 137, 55 D.L.R. (2d) 386, [1966] S.C.R. 267, 47 C.R. 382; *R. v. White and Bob* (1964), 50 D.L.R. (2d) 613, 52 W.W.R. 193; affd 52 D.L.R. (2d) 481*n*, [1965] S.C.R. vi, refd to]

APPEAL by the Crown from a judgment of the Divisional Court, 55 C.C.C. (2d) 172, allowing an appeal by the accused from their conviction on a charge of unlawfully taking bullfrogs during closed season contrary to s. 74 of the *Game and Fish Act* (Ont.).

B. Wright, Q.C., and *J. T. S. McCabe*, for the Crown, appellant.

D. D. White and *P. Williams*, for accused, respondents.

The judgment of the Court was delivered by

MACKINNON A.C.J.O.:—The respondents, Indians by definition under the *Indian Act*, R.S.C. 1970, c. I-6, s. 2(1), were charged and convicted of taking bullfrogs during the closed season established under provincial legislation of general application. The respondents successfully argued on appeal to the Divisional Court that by virtue of s. 88 of the *Indian Act* and a treaty that the chiefs of their tribe had entered into with His Majesty the King in 1818, the provincial legislation did not apply to them. Section 88 reads:

> 88. Subject to the terms of any treaty and any other Act of the Parliament of Canada, 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 such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.

The Divisional Court were also of the view that a 1923 treaty may have extinguished all fishing, hunting and trapping rights of the Indians in Ontario, and, accordingly, while agreeing with the respondents on the major issue before them, sent the matter back for a new trial to deal with the effect of the 1923 treaty [55 C.C.C. (2d) 172]. Counsel for the Crown advised us that if we agreed with the Divisional Court as to the effect of the 1818 treaty, he was not requesting a new trial to consider the effect of the 1923 treaty.

I

Ontario Regulation 576 of 1976 passed pursuant to s. 74 [rep. & sub. 1980, c. 47, s. 27] of the *Game and Fish Act*, R.S.O. 1970, c. 186 [now R.S.O. 1980, c. 182, s. 77], for the first time introduced throughout Ontario a closed season on the hunting of bullfrogs, commencing October 16, 1976, and ending June 30, 1977. The closed season thereafter ran from October 16th of one year until June 30th of the following year.

On June 11, 1977, the respondents took 65 bullfrogs from the waters of Crow Lake in the Township of Belmont in the County of Peterborough. It is agreed that the bullfrogs were taken from unoccupied Crown lands being the navigable waters of Crow Lake. It is also agreed that the respondents took the bullfrogs for food for their familiies and not for any commercial purposes.

II

The respondents are descendants and members of the Indian tribes who were parties to "Articles of Provisional Agreement" (as it was described in its opening words) entered into at what is believed now to be Port Hope, Ontario on November 5, 1818, between the Honourable William Claus, Deputy Superintendent General of Indian Affairs, on behalf of His Majesty, and six chiefs of the Chippewa Nation, inhabiting the back parts of the Newcastle District. The document is known as Treaty No. 20. By this provisional agreement the Indians ceded a tract of land containing about 1,951,000 acres to the Crown. The bullfrogs taken by the respondents were within the area covered by this treaty. After setting out the names of the parties and describing the land to be surrendered, the treaty went on to say:

> And the said Buckquaquet, Pishikinse, Pahtosh, Cahgahkishinse, Cahgagewin and Pininse, as well for themselves as for the Chippewa Nation inhabiting and claiming the said tract of land as above described, do freely, fully and voluntarily surrender and convey the same to His Majesty without reservation or limitation in perpetuity.

The consideration for the conveyance was "yearly, and in every year, forever, the said sum of seven hundred and forty pounds currency in goods at the Montreal price, which sum the said Chiefs and Principal People, parties hereunto, acknowledge as a full consideration for the lands hereby sold and conveyed to His Majesty". In 1821 the consideration was restated as "being at the rate of ten dollars for each individual now living". The payments have long since ceased. The question is whether there was other, and for the Indians, more material consideration given to them, namely, the reservation to them and their descendants of their aboriginal fishing and hunting rights.

A council meeting between the Deputy Superintendent of Indian Affairs and the chiefs of the six tribes who were parties to the provisional agreement was held the same day as the provisional agreement. The council meeting both preceded and followed the signing of the provisional agreement. Counsel for both parties to this appeal agreed that the minutes of this council meeting recorded the oral portion of the 1818 treaty and are as much a

part of that treaty as the written articles of the provisional agreement. As these minutes are central to the issue in this appeal, they must be recited in whole:

> Minutes of a Council held at Smiths Creek, in the Township of Hope on Thursday the 5th of November 1818, with the Chippewa Nation of Indians, inhabiting & claiming a Tract of Land situate between the Western Boundary Line of the Midland District & the Eastern Boundary Line of the Home District, & extending Northerly to a Bay at the Northern Entrance of Lake Simcoe in the Home District
>
> Present
>
> The Honbl W. Claus Dep. Supt. General of Indian Affairs
>
> I. Givins Esq. Supt. of Indian Affairs for the Port of York
>
> W. Hands, Clerk Indn. Dept.
>
> W. Gruet, Interpreter
>
> After the usual ceremonies the Dep. Supt. General addressed the Chiefs as follows:
>
> Children. I salute you in behalf of your Great Father & condole with you for the loss you have met with since I last met you — it is the will of the Great Spirit to remove our nearest & dearest connexions, we must submit to his will & not repine. I should have seen you before this, but I have had business with others of your Nation which has kept me until this day. My errand is, to put at rest the doubts with respect to the Lands in the back parts of this Country which you seem to think were never disposed of to the King, & hope that hereafter none of your young men will be so idle as to remove the Posts or marks which will be put up by the Kings Surveyors. Your Great Father has directed me to lay before you a sketch of the Country in the back of this & you will point out to me the Land as far as the last purchase was, from the Waters edge from the Great Lake.
>
> Children. You must perceive the number of your Great Fathers children about here have no home, & out of pity for them, he wishes to acquire Land to give to them — He is charitable to all, does not like to see his children in distress. Your Land is not all that he has been purchasing, he has looked to the setting of the Sun, as well as to the rising, for places to put his Children, & when he asked your Country from you, he does not mean to do as formerly, to pay you at once, but as long as any of you remain on the Earth to give you Cloathing [*sic*] in payment every year, besides the presents he now gives you. You will go to your Camp & consult together & when you have made up your minds come & let me hear what it is
>
> Buckquaquet, Principal Chief addressing the Dept. Supt. general, said
>
> Father. We have heard your words, & will go to our Camp & consult & give you an answer to the request of our Great Father — But, Father, our Women & Children are very hungry, and desired me to ask you to let them taste a little of our Fathers Provisions & Milk —
>
> After their return, Bucquaquet continued
>
> Father. You see me here, I am to be pitied, I have no old men to intruct me. I am the Head Chief, but a young man. You must pity me, all the old

people have gone to the other world. My hands are naked, I cannot speak as our Ancestors were used to.

Father. If I was to refuse what our Father has requested, our Women & Children would be more to be pitied. From our Lands we receive scarcely anything, & if your words are true we will get more by parting with them, than by keeping them — our hunting is destroyed, & we must throw ourselves on the compassion of our Great Father the King.

Father. Our young People & Chief have always thought of not refusing our Father any request he makes to us, & therefore do what he wishes.

Father. If it was not for our Brethren the Farmers about the Country we should near starve for our hunting is destroyed.

Father. *We hope that we shall not be prevented from the right of Fishing, the use of the Waters, & Hunting where we can find game. We hope that the Whites who are to come among us will not treat us ill,* some of young men are giddy, but we hope they will not hurt them.

Father. *The young men, I hope you will not think it hard at their requesting, that the Islands may be left for them that when we try to scratch the Earth, as our Brethren the Farmers do, & put any thing in that it may come up to help our Women & Children.*

Father. *We do not say that we must have the Islands, but we hope our Father will think of us & allow us this small request* — this is all we have to say —

To which the Dept. Supt. general replied

Children — I have heard your answer, & in the name of your Great Father thank you for the readiness with which you have complied with his desire. Your words shall be communicated to him. *The request for the Islands, I shall inform him of, & have no doubt but that he will accede to your wish. The Rivers are open to all & you have an equal right to fish & hunt on them.* I am pleased to learn from you, that your Brothers the Whites have been so kind to you & hope those that will come among you will be as charitable. Keep from Liquor, & your young men will not be giddy. It is the ruin of your Nation. As soon as I get your Numbers you shall get something to eat, & some Liquor. Do not expect much, for I have so great a dread of it that I am at all times disinclined to give you any. We will now sign the Paper, it is merely to shew your Great Father our work, & when he agrees to our proceeding, you will then have to sign another Paper which Conveys the Country we now talk about to him, & the first payment will be made, an equal quanitity of which you will receive every year —

(Emphasis added.)

III

Cases on Indian or aboriginal rights can never be determined in a vacuum. It is of importance to consider the history and oral traditions of the tribes concerned, and the surrounding circumstances at the time of the treaty, relied on by both parties, in determining the treaty's effect. Although it is not possible to remedy all of what we now perceive as past wrongs in view of the

passage of time, nevertheless it is essential and in keeping with established and accepted principles that the Courts not create, by a remote, isolated current view of events, new grievances.

In the instant appeal, both counsel were in agreement that we could, and indeed should, look at the history of the period and place, and at the Papers and Records of the Ontario Historical Society dealing with this particular treaty and the persons involved in it. The Crown was of the view that a historical analysis of the times and conditions supported its position that the Indians intended to surrender their hunting and fishing rights. Counsel for the respondents took the contrary view.

IV

In interpreting the treaty, accordingly, it is appropriate to have regard to the following matters. First, the tribes who were parties to the treaty had hunted and fished in the area covered by the treaty, and had taken bullfrogs for food there since earliest memory. It is part of the oral tradition of the tribes that this right was not only recognized at the time of the treaty, but that they continued to exercise the right without interruption up until the present. The respondents' evidence as to the oral traditions of the Indian tribes concerned was accepted by the trial Judge and was not disputed by the Crown.

Secondly, it appears that one of the reasons for the Crown entering into the treaty was to facilitate the Crown grants of land to settlers who were arriving in the county in 1818. From the histories of the period, it is clear that the early settlers in the area were in difficult material circumstances. Edwin Guillet in his book *Early Life in Upper Canada* (1933), in describing the conditions at the time of the treaty wrote at p. 62:

> The first township in Peterborough County to be surveyed was Smith, in 1818, and in that year a number of English immigrants from Cumberland made their way thither via Rice Lake and the Otonabee River. They erected a temporary log house near the site of the city of Peterborough, and all lived in it until a small shanty had been built on each lot. They suffered great privations before they were able to grow potatoes and wheat on a few small patches of cleared land.

That the early settlers found themselves in adverse circumstances is also evident from the minutes of the council meeting quoted above wherein Mr. Claus addressed the Indian chiefs as children and advised them that the "Great Father" wished to acquire land for the settlers who had no home and were in distress.

The minutes also make it clear that the Indians were equally suffering great privation at the time. The chiefs, through their

spokesman, addressed Claus as "Father" and before they retired to consider the request of their Great Father, advised Claus that their women and children were very hungry and desired some of their "Fathers Provisions & Milk". We were advised that, historically, the Indian used the word "milk" to mean rum. Claus, in his reply, advised them that he would give them some liquor but also told them not to expect much as he dreaded the effect on them. After the Indians returned from their consultation, the spokesman said he was a head chief but a young man with his "hands naked", which could be taken to mean that he had no wampum which was a further indication of the dire circumstances of the Indians. The histories of the period indicate that the beaver hunting in the area had been destroyed and the Indians greatly relied on beaver skins for trading. As a result, as he said, they received scarcely anything from the lands and "we must throw ourselves on the compassion of our Great Father the King . . . Our young People & Chief have always thought of not refusing our Father any request he makes to us, & therefore do what he wishes".

Finally, it should be noted that William Claus, who represented the King, is described in vol. XXV of the Papers and Records of the Ontario Historical Society published by the Society in 1929 as "a valuable and highly esteemed public servant" who "made at least seven of the treaties of surrender with lands with the Indians from 1798 to 1818", and who "because of his familiarity with the Indians in all their ways and with their language, and his kindly attitude toward them, was trusted by them and exceptionally successful in dealing with them for the Crown".

V

The respondents argue that a proper interpretation of the treaty, when the relationship between the Crown and the Indians and their necessitous circumstances at the time is considered, is that the agreement and reassurance contained in the minutes was a clear reservation to the Indians of their time-honoured rights to hunt and fish over the lands now conveyed to the Crown — certainly so long as they were held by the Crown. If that is so then it follows, they submit, that the treaty comes within the opening words of s. 88 of the *Indian Act*.

The words that have caused the difficulty and which have to be interpreted in deciding whether the treaty reserved to the Indians the right to hunt and fish are the following (emphasized in the earlier quotation):

The Indian spokeman said:

> Father — We hope that we shall not be prevented from the right of Fishing, the use of the Waters, & Hunting where we can find game.
>
> . . . . . .
>
> Father — The young men, I hope you will not think it hard at their requesting, that the Islands may be left for them that when we try to scratch the Earth, as our Brethren the Farmers do, & put any thing in that it may come up to help our Women & Children.
>
> Father — We do not say that we must have the Islands, but we hope our Father will think of us & allow us this small request . . .

To these particular requests, Claus replied:

> The request for the Islands, I shall also inform him of, & have no doubt but that he will accede to your wish. The Rivers are open to all & you have an equal right to fish & hunt on them.

The request and the assurance were given before the treaty was signed. From the treaty it can be seen that there was no reservation established for the Indians. It is clear, on the other hand, that both parties expected the Indians to remain on the lands conveyed as the Indian spokesman said, "We hope that the Whites who are to come among us will not treat us ill, some of [the Indian] young men are giddy, but we hope they will not hurt them". No exception was taken to this statement by Claus but rather he said, "I am pleased to learn from you, that your Brothers the Whites have been so kind to you, and hope *those that will come among you* will be as charitable" (emphasis added).

If the Indians were to remain in the area one wonders how they were to survive if their ancient right to hunt and fish for food was not continued. Be that as it may, the question to be answered is whether this treaty can be interpreted so as to limit the applicability of the Ontario *Game and Fish Act* which, it is agreed, is a law of general application.

The principles to be applied to the interpretation of Indian treaties have been much canvassed over the years. In approaching the terms of a treaty quite apart from the other considerations already noted, the honour of the Crown is always involved and no appearance of "sharp dealing" should be sanctioned. Mr. Justice Cartwright emphasized this in his dissenting reasons in *R. v. George*, [1966] 3 C.C.C. 137 at p. 149, 55 D.L.R. (2d) 386, [1966] S.C.R. 267 at p. 279, where he said:

> We should, I think, endeavour to construe the treaty of 1827 and those Acts of Parliament which bear upon the question before us in such manner that the honour of the Sovereign may be upheld and Parliament not made subject to the reproach of having taken away by unilateral action and without consideration the rights solemnly assured to the Indians and their posterity by treaty.

Further, if there is any ambiguity in the words or phrases used,

not only should the words be interpreted as against the framers or drafters of such treaties, but such language should not be interpreted or construed to the prejudice of the Indians if another construction is reasonably possible: *R. v. White and Bob* (1964), 50 D.L.R. (2d) 613 at p. 652, 52 W.W.R. 193 (B.C.C.A.); affirmed 52 D.L.R. (2d) 481*n*, [1965] S.C.R. vi (S.C.C.).

Finally, if there is evidence by conduct or otherwise as to how the parties understood the terms of the treaty, then such understanding and practice is of assistance in giving content to the term or terms. As already stated, counsel for both parties to the appeal agreed that recourse could be had to the surrounding circumstances and judicial notice could be taken of the facts of history. In my opinion, that notice extends to how, historically, the parties acted under the treaty after its execution.

In my view, all the principles recited lead to the conclusion that the terms of the treaty, which include the oral terms recorded in the minutes, preserve the historic right of these Indians to hunt and fish on Crown lands in the lands conveyed and fall under the exception established by the opening words of s. 88 of the *Indian Act*.

The Crown's position was simply that "the terms of the treaty" did not preserve or grant the right to fish and hunt on Crown lands inconsistent with the application of provincial laws. The surrender of the Indian lands to the Crown, counsel submitted, included a surrender of their aboriginal hunting and fishing rights. Once it is accepted that the minutes of the council meeting between the representative of the Crown on the one hand and the Indian chiefs on the other is part of the treaty, it cannot be successfully argued that Treaty No. 20 is "silent" on the question of the right to hunt and fish.

With respect to the oral representation made in answer to the "hope" expressed by the Indians that they would not be prevented from hunting and fishing, it is argued that that representation was only to advise the Indians that they were to have an equal right with all others and was not a preservation of special rights. The transcript of the minutes cannot and should not be analyzed in minute detail. The use of certain words and their conciliatory tone only serve to emphasize the disparity in the positions of the two parties to the treaty, but do not lessen the force of the request nor the right to be attached to the assurance — quite the contrary.

The Indians' request for the continued right to hunt and fish was put on a higher plane than their request for the islands. In making their request for the islands their spokesmen said "We do not say that we *must* have the Islands" (emphasis added). No such qualification or limitation was put on their request that their traditional and historic right to hunt and fish for food continue. The representative of the Crown was clearly not intending to put any limitation on the rights of the Indians by saying that the rivers were open to "all" and that the Indians had an "equal" right to fish and hunt. These words immediately follow his dealing with the Indians' request for the islands to which he replied that no doubt "[your Great Father] will accede to your wish". It seems to me that rather than putting a limitation on the Indians' ancient right, William Claus, whose integrity was respected by the Indians, was emphasizing that that right would continue. The accepted evidence was that this understanding of the treaty has been accepted and acted on for some 160 years without interruption. In my view, it is too late now to deprive these Indians of their historic aboriginal rights: *R. v. White and Bob*, *supra*, at pp. 648-9 (B.C.C.A.).

VI

The Divisional Court held, as secondary support for its conclusion, that the native hunting and fishing rights were confirmed by the *Royal Proclamation of 1763*. Their conclusion was that for the Indians to lose those rights, they had to be taken away by the specific terms of a treaty. The Court concluded [at p. 179] that the provincial laws of general application dealing with hunting and fishing do not apply to Indians "because of the Royal Proclamation which preserves those rights independent of s. 88".

In view of my conclusion on the other aspect of this appeal, it is not necessary for me to come to any final conclusion on this secondary ground used by the Divisional Court to support its conclusion. However, I must say that I have serious reservations as to the correctness of their view of the Royal Proclamation and its relationship to s. 88 of the *Indian Act* and I am not to be taken as agreeing with the members of the Divisional Court on this particular point.

VII

As noted at the beginning of these reasons, there no longer is any request that consideration be given to the 1923 treaty and, accordingly, the appeal is dismissed without any reference back to the County Court as directed by the Divisional Court. I think it is

appropriate in this type of case to ask the Crown to pay the costs of the respondents on a solicitor-and-client basis.

Appeal dismissed.

REGINA v. CYRENNE, CYRENNE AND CRAMB

District Court Judges' Criminal Court, District of Thunder Bay, Ontario, FitzGerald D.C.J. September 11, 1981.

Criminal negligence — Elements of offence — Parents and minister charged with criminal negligence causing death of 12-year-old child — Accused Jehovah Witnesses and refusing to permit blood transfusion — Whether conduct amounting to criminal negligence — Whether objective test of reasonable parents applicable — Whether Crown required to prove that decision to refuse transfusion caused child's death — Cr. Code, ss. 197, 202, 203.

The three accused were charged with criminal negligence causing death contrary to s. 203 of the *Criminal Code* as a result of the death of a 12-year-old girl. Two of the accused were the child's parents and the third was their minister. All three accused were Jehovah Witnesses and they had removed the critically ill child from the hospital when it became apparent that the physicians treating her intended to give her a blood transfusion. The accused testified that the giving of blood transfusions was not only against their religion but from their reading and experience they believed transfusions to be of no benefit and possibly harmful. Prior to leaving the hospital the attending physician had told the accused that he could not say that the deceased would recover if given the transfusion. The deceased died of a rare blood disease which came on very suddenly and she died two and a half days later. The evidence indicated that the standard treatment involves the use of corticosteroids and usually blood transfusions, particularly in severe cases such as in the case of the deceased. The Crown and defence both called eminent medical experts. The Crown expert testified that had transfusions been administered the child would likely have lived. The defence expert testified that while he would have given the child transfusions had he been treating her on the basis that anything could happen, nevertheless, it was his opinion that when the child was removed from the hospital the disease was so far advanced that the transfusion would not have saved her life. On the trial of the accused, *held*, the accused must be acquitted.

In this case the liability of the accused parents, and the minister for aiding and abetting them, depended on the combined operation of s. 197 (am. 1974-75-76, c. 66, s. 8) of the *Criminal Code*, which imposes a duty on parents to provide the necessaries of life for a child under 16, and ss. 202 and 203, which provide that a person is criminally negligent if in doing anything or omitting to do anything which it is his legal duty to do he shows a reckless disregard for the life or safety of another person, which act or omission causes the death of that person. In this case the legal duty was the duty imposed by s. 197, and medical treatment tending to preserve life is a necessary of life. Thus if the accused by denying treatment to the deceased accelerated her death then that would support a conviction. However, the decision to force treatment on a child over parental objection should only be taken if the physicians can demonstrate that the child would have a substantially better chance of recovery with the treatment than without it. "Recovery" in this context meaning a significant remission, not a mere brief and transitory slowing.

In determining whether conduct is criminally negligent the Courts apply an objective standard, except that the background and experience of the accused must be one of the factors to be considered in determining whether the accused was reckless in adopting the particular course of conduct. The standard of conduct, which in this case was that of reasonable parents, must then be applied to the conduct of the particular accused in the particular circumstances which existed. It was not, however, relevant what the accused believed to be the proper treatment. Rather the relevant determination was whether what each accused did or omitted to do was reckless having regard to the information available to each of them in light of the knowledge, background, training and experience which they were capable of applying to evaluation of the data available at the time of the decision. In this case the accused were told that without the transfusion the child would die and that while there could be no guarantee she would not die in any event, transfusion was the only hope of avoiding otherwise certain death. The accused acting as reasonable parents were not entitled to deprive the deceased of that treatment and in so doing they acted in reckless disregard for her life and safety.

However, the evidence failed to prove beyond a reasonable doubt that such reckless conduct caused the death of the deceased. While it was at least possible that the child's life would have been saved by the transfusion this was not proof beyond a reasonable doubt. It was more probable that the opinion of the Crown's expert was correct but it was more than remotely possible that the transfusion might have been ineffective or even fatal.

[*R. v. Morby* (1882), 8 Q.B.D. 571; *R. v. Morby* (1882), C.L. Cases 34, consd; *R. v. Brooks* (1902), 5 C.C.C. 372, 9 B.C.R. 13; *R. v. Downes* (1875), 1 Q.B.D. 25; *R. v. Senior*, [1899] 1 Q.B. 283; *R. v. Lewis* (1903), 7 C.C.C. 261, 6 O.L.R. 132; *Peda v. The Queen*, [1969] 4 C.C.C. 245, 6 D.L.R. (3d) 177, [1969] S.C.R. 905, 7 C.R.N.S. 243; *Binus v. The Queen*, [1968] 1 C.C.C. 227, [1967] S.C.R. 594, 2 C.R.N.S. 118; *R. v. Rogers*, [1968] 4 C.C.C. 278, 4 C.R.N.S. 303, 65 W.W.R. 193; *Miller v. Minister of Pensions*, [1947] 2 All E.R. 372; *R. v. Sears* (1947), 90 C.C.C. 159, [1948] O.R. 9, 5 C.R. 1; *R. v. Deabay*, [1966] 2 C.C.C. 148, refd to]

TRIAL of the accused on a charge of criminal negligence causing death contrary to s. 202 of the *Criminal Code*.

G. How, Q.C., for accused.
R. Courtis, for the Crown.

FITZGERALD D.C.J. (orally):—In view of the intense public interest which this trial has generated I suggest to the press and to the public that, in considering the reasons I am about to give for my decision in this case, it be kept constantly in mind that it is not the function of this Court to express approval or disapproval of what the accused persons did or failed to do. The duty of the Court is not to comment on the propriety of their conduct but rather to determine whether the conduct of the accused was contrary to the law of the land to such a degree that it constituted a crime against the state. Moreover, if the Court is to register a conviction against the accused persons it must find that their conduct was not only unlawful but was also a violation of the

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