

REGINA (Appellant) v. HENRY FLETT (Respondent)

[Indexed as: R. v. Flett]

Manitoba Court of Queen's Bench, Schwartz J., September 1, 1989

P.E. Clarke, for the appellant
V.S. Savino, for the respondent

The Crown appeals the acquittal (reported [1987] 3 C.N.L.R. 70) of the respondent treaty Indian on charges of unlawfully hunting migratory birds, to wit, Canada Geese, out of season on unoccupied Crown land, and with possession of migratory birds, contrary to the *Migratory Birds Convention Act*, R.S.C. 1970, c.M-12.

The principal issue on the appeal was whether s.35(1) of the *Constitution Act, 1982* reestablished for treaty Indians the unlimited right to hunt contrary to the provisions of the *Migratory Birds Convention Act*. Sub-issues were: (1) Whether the *Migratory Birds Convention Act* was a regulation contemplated in Treaty No. 5, or whether the limitations imposed by the Act so prohibited hunting as to exceed the right to regulate? (2) Were the hunting rights described in Treaty No. 5 extinguished prior to 1982 and therefore not in existence when s.35 recognized and affirmed existing treaty rights?

Held: Appeal dismissed.

1. The *Migratory Birds Convention Act* is not a regulation as contemplated by Treaty No. 5. Promises given by the Government of Canada to the band assured its members that limitations such as those in the *Migratory Birds Convention Act* were never intended to apply to treaty Indians hunting on Crown lands.
2. The limitations in the *Migratory Birds Convention Act* amount to a prohibition rather than a regulation.
3. When interpreting treaty rights one must look at the right as stated in the original treaty unless that right has been extinguished.
4. The *Migratory Birds Convention Act* did not extinguish hunting rights in Treaty No. 5. Hunting rights existing at the signing of Treaty No. 5 are recognized and affirmed by s.35(1) of the *Constitution Act, 1982*.
5. Section 35 rights are not subject to s.1 limits of the *Constitution Act, 1982*.
6. Section 35(1) entrenches existing Indian treaty rights.

* * * * *

SCHWARTZ J.:

I. Nature of Proceedings

This is an appeal by the Crown from the acquittal of Henry Flett by Provincial Judge Martin at The Pas, Manitoba on May 14, 1987 [[1987] 5 W.W.R. 115, [1987] 3 C.N.L.R. 70]. He was charged under the *Migratory Birds Convention Act*, R.S.C. 1970, c.M-12 [now R.S.C. 1985, c.M-7] and Regulations, (*Convention Act*) with hunting out of season and having possession of two Canada geese.

II. Decision

The Crown's appeal fails and the acquittal is confirmed for the following reasons.

III. Facts

The facts are not in dispute.

On April 20, 1985, Henry Flett was involved in a car accident at The Pas. In the trunk of his car was a 12-gauge shotgun, shells and two Canada geese in a plastic bag. He admitted he had shot

the geese on April 19, 1985, on unoccupied Crown land, out of season.

He was then a treaty Indian and a member of The Pas Indian Band, a signatory of Treaty No. 5. That Treaty was, "made and concluded at Berens River the 20th day of September and at Norway House the 24th day of September in the year of Our Lord One Thousand Eight Hundred and Seventy-five."

The *Convention Act* was first enacted by Canada in 1930.

IV. Trial Judge's Special Findings

The trial judge received evidence concerning the historical hunting practices and rights of The Pas Indian Band.

He heard considerable evidence from several elders of The Pas Indian Band which confirmed that the members of that band always felt that they could take "birds for food" until prosecutions came up in the 1950s and 1960s. He also found on evidence that geese and ducks have been part of the diet of band members, from time immemorial.

V. Trial Judge's Ruling

In acquitting the accused, Judge Martin relied on the decision of the British Columbia Court of Appeal in *R. v. Sparrow*, [1987] 2 W.W.R. 577, [1987] 1 C.N.L.R. 145, 9 B.C.L.R. (3d) 300, 36 D.L.R. (4th) 246, 32 C.C.C. (3d) 65. He concluded that the Charter of Rights and Freedoms "reverses" the decisions previously delivered by the Supreme Court of Canada, particularly *R. v. Sikyea*, [1964] S.C.R. 642, 49 W.W.R. 306, 50 D.L.R. (2d) 80, 50 O.L.R. (2d) 90, 44 C.R. 266, [1965] 2 C.C.C. 129; *R. v. George*, [1966] S.C.R. 267, 55 D.L.R. (2d) 386, 47 C.R. 382, [1966] 3 C.C.C. 137; and *R. v. Daniels*, [1968] S.C.R. 517, 64 W.W.R. 385, 2 D.L.R. (3d) 1, 4 C.R.N.S. 176, [1969] 1 C.C.C. 299 [the "hunting rights" trilogy].

In accepting the *Sparrow* decision *supra*, he declined to follow the contrary decisions of the Saskatchewan Court of Appeal in *R. v. Eninew*; *R. v. Bear*, [1984] 2 C.N.L.R. 126, 10 D.L.R. (4th) 137, 12 C.C.C. (3d) 365 which held that the *Convention Act* regulations are reasonable and desirable limitations on the right to hunt preserved by the various Indian treaties.

VI. Grounds of Appeal

Included in the Crown's grounds of appeal are the following:

that the learned Provincial Court Judge erred in his interpretation of the scope and effect of s.35(1) of the *Constitution act*, 1982;

that the learned Provincial court judge erred in concluding that the *Convention Act* and regulations are inconsistent with s.35 of the *Constitution Act*, 1982, and is therefore of no force and effect:

that the learned provincial Court Judge erred in failing to recognize that the hunting rights in Treaty No. 5 are subject to such regulations as may from time to time be made by "Her Government of Her Dominion of Canada";

that the learned Provincial Court Judge erred in failing to recognize that Treaty No. 5 specifically provides for the extinguishment of all claims heretofore referred.

VII. Principal Issue of the Appeal

The principal issue on this appeal is whether s.35(1) of the *Constitution Act*, 1982 reestablishes for treaty Indians the unlimited right to hunt contrary to the provisions of the *Convention Act*. It is generally accepted that the trilogy held treaty hunting rights to be limited by that Act.

In answering the question, two sub-issues are raised.

First: Is the *Convention Act* a "regulation" contemplated in Treaty No. 5 as regulations "as may from time to time be made by Her Government..." as argued by the Crown? Or do the limitations imposed on treaty Indians under the *Convention Act* so prohibits hunting as to exceed the right to regulate?

Second: Were the hunting rights described in Treaty No. 5 extinguished prior to 1982, and

therefore not in existence in 1982 when s.35(1) of the *Constitution Act* "recognized and affirmed" the existing treaty rights of the Indian? The Crown argues that the hunting rights were effectively extinguished prior to 1982. The respondent's position is that the rights were never extinguished. At most, it is said they were suspended during the period from the enactment of the *Convention Act* to the enactment of the *Constitution Act*.

The learned trial judge described the issue as "...whether or not the accused, a treaty Indian,...in view of the express provisions of s.35(1) of the *Constitution Act*, 1982, had the right to hunt migratory birds out of season for food on unoccupied Crown lands to which he had access."

VII. Reasons for decision

The *Convention Act* is not, in my view, a regulation contemplated by Treaty No. 5. It goes far beyond what was contemplated when the treaty was explained and executed. Promises were given by the Government of Canada to the Pas Indian Band in executing the treaty which assured its members that limitations such as those contained in the *Convention Act* were never intended to apply to treaty Indians hunting on Crown lands.

Those limitations amount to a prohibition rather than a regulation, which must, by definition, be reasonable in its application. Prior to the *Constitution Act*, 1982, those prohibitions were recognized as being within the power of the Government of Canada to impose even though in contravention of its contractual obligation under Treaty No. 5.

The trilogy recognized the fundamental right of Canada to pass the *Convention Act* notwithstanding that it offended the contractual rights of the band.

Those rights were described by Hall J. when he delivered the judgement of the Supreme Court in *Sikyea*, *supra*, affirming the judgment of the Court of Appeal for the Northwest Territories. In his reasons Hall J. expressly agreed with the reasons for judgment and conclusion of Johnson J.A., stating:

He had dealt with the important issues fully and correctly in their historical and legal settings...

The judgment of Johnson J.A. in the *Sikyea* case had stood over the years as a correct treatment of the history of Indian hunting claims, rights and disappointments.

At page 330 [C.C.C.] of his judgment, reported in [1964] 2 C.C.C. 325, 46 W.W.W. 65, 43 D.L.R. (2d) 150, 43 C.R. 83 (N.W.T.C.A.) he quotes with approval the judgment of McGillivray J.A. in the *Wesley* case (*R. v. Wesley*, [1932] 2 W.W.R. 337, 58 C.C.C. 269, [1932] 4 D.L.R. 774, 26 A.L.R. 433). McGillivray J.A. expressed the view that, "I do not think that any of the makers of it [the treaty] could by any stretch of the imagination be deemed to have contemplated a day when the Indians would be deprived of an unfettered right to hunt game of all kinds for food on unoccupied Crown land."

In dealing with the second issue concerning extinguishment, I adopt the reasoning of Madam Justice Conrad in *R. v. Arcand* (1989), 65 Alta L.R. (2d) 326, 2 C.N.L.R. 110 (Q.B.). In her reasons for judgment she analyzes the meaning of the word "existing" used in s.35 of the *Constitution Act*.

I fully adopt her reasoning and conclusion that the "original rights theses" is the correct one to follow when interpreting Indian treaty rights.

She also determined that the *Convention Act* did extinguish the hunting rights described in the Alberta band treaty before her.

I adopt her remarks when she said at p.335 of her reasons [p.117 C.N.L.R.]:

Thus, I am of the opinion the rights under Treaty No. 6 as they existed at the time of the signing of the treaty have been "recognized and affirmed" by virtue of s.35(1) of the *Constitution Act*, 1982.

I declare likewise, substituting for Treaty No. 6, Treaty No. 5, that the hunting rights existing at the signing of the Treaty are "recognized and affirmed" here in Manitoba.

Section 35 is in Part II of the *Constitution Act* and not subject to the limitations in s.1.

For these reasons, I agree that s.35(1) entrenches existing Indian treaty rights.

Counsel have submitted a considerable list and number of books of authorities which I do not believe are required to be listed. I have read them. In addition to the authorities and article referred to by Madam Justice Conrad, I have also been aided by the excellent paper of Mr. William Pentney of the Faculty of Law, Common Law, University of Ottawa. His paper entitled "The Rights of the Aboriginal Peoples of Canada and the Constitution Act, 1982" has been published in two parts in the University of British Columbia Law Review, volumes 22:1 and 22:2 (1988).

Accordingly, the appeal is dismissed and counsel may, if they wish, speak to costs by giving notice and arranging an appropriate date with the trial co-ordinator.