R. V. SUNDOWN

Saskatchewan Court of Queen's Bench, Walker J., February 11, 1988

R.G. Peterson, for the respondent
J.R. Cherkewich, for the appellant

The appellant treaty Indian, a member of a Treaty No.6 band, sold or purported to sell fish on a reserve to a non-Indian. He was convicted of unlawfully selling or offering for sale fish, contrary to s.42(2)(e) of the *Saskatchewan Fishery Regulations,* made pursuant to the *Fisheries Act,* R.S.C. 1970, c.F-14. Treaty No.6 promised "the right to pursue their avocations of hunting and fishing ... subject to such regulations as may from time to time be made by her Government of her Dominion of Canada...".

Held: Appeal dismissed.

1. Nothing in Indian aboriginal rights, treaty rights or the Natural Resources Transfer Agreement extends to or permits the selling of fish without a licence.

2. Treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of Indians. However, the fishing rights clause in the Treaty is not of doubtful meaning, ambiguous or technical. The federal regulations under consideration are reasonable and they do not alter treaty rights. Selling fish or offering it for sale is not reasonably incidental to the act of fishing for food.

3. Section 2 of the Natural Resources Transfer Agreement bound the province over to uphold all previous "arrangements" whereby any person had become entitled to any interest in resources as against the Crown. Even if Indians have a profit a prendre based on the treaty right of fishing, as argued by the appellant, s.2 of the Natural Resources Transfer Agreement does not include treaty rights or profits a prendre.

4. Section 7 of the *Fisheries Act* does not exempt treaty Indians from the operation of the Act or Regulations.

5. The appellant's treaty rights do not exempt him from the operation of the *Fisheries Act* or Regulations.

6. Sections 73(1)(a) and 81(o) of the *Indian Act,* R.S.C. 1970, c.I-6, empower the Governor in Council and band councils, respectively, to make regulations for the management, protection and preservation of fur-bearing animals, fish and other game on reserves. The enactment of enabling provisions, without more, does not create a conflict or inconsistency with the *Fisheries Act* or Regulations. No regulations have been made under s.73(1)(a). Band Bylaw No.1.0, made under the authority of s.81(o), does not deal with "selling" or "offering for sale" of fish, and does not assist the appellant.

7. The treaty rights of Saskatchewan Indians to hunt and fish have been merged and consolidated into s.12 of the Natural Resources Transfer Agreement, which limits them to hunting and fishing for food.

8. Section 35(1) of the *Constitution Act, 1982* must be read subject to the Natural Resources Transfer Agreement, and has no effect on the application of provincial game laws to treaty Indians under the Agreement.

* * * * * *

General

WALKER J.: This is an appeal from conviction and sentence. The offence of which the appellant was convicted was that he did unlawfully "sell or offer for sale" fish contrary to s.42(2)(e) of the federal *Fisheries Act,* R.S.C. 1970, c.F-14, *Saskatchewan Fishery Regulations.* The sentence was a fine of $100.00 in default five days.

The appellant asks:

(1) The setting aside of the conviction and entering of an acquittal;

(2) Alternatively, an order directing a new trial;

(3) Alternatively, a setting aside of the sentence and substituting of a conditional or absolute discharge.

Facts

These are, on the appellant's own submission, the only facts necessary to consider:

(1) The appellant was a treaty Indian;

(2) He sold or purported to sell fish;

(3) On a reserve;

(4) To a non-Indian.

It is part of the appellant's case that the fish were "personal property", but that is a legal conclusion not a fact. While the appellant pointed out that there was a question whether the fish in question were commercially taken, he did not wish to proceed on that point.

Statute and Other Law

These statutory and regulatory provisions are relevant:

(1) The *Fisheries Act,* R.S.C. F-14.

(2) *Saskatchewan Regulation* 42(2)(e), under the *Fisheries Act.*

(3) The *Indian Act,* R.S.C. 1970, I-6, ss.32, 73, 81, 88, 89, 90 and 91.

(4) Bylaw No.1.0 of the Joseph Bighead Band.

(5) Treaty No.6.

(6) Saskatchewan Natural Resources, c.41, 20-21 Geo.5, --- "the Natural Resources Agreement" or “N.R.A.”

The Issues

This is, much in his wording, the appellant's position:

(1) Since there are special rules of interpretation to be used in interpreting treaties and statutes affecting Indians, the appellant had a right to fish both as a treaty right pursuant to Treaty No.6 and a profit a prendre. (Dealt with as (b) and (c) infra.)

(2) Pursuant to s.7 of the *Fisheries Act,* he did not require a licence to fish. (Dealt with as (d) infra.)

(3) The *Indian Act* has provisions regarding the taking of animals and fish. It is the *Indian Act* and not the *Fisheries Act* which regulates these matters on reserve land. (Dealt with as (e) infra.)

(4) The Joseph Bighead Indian Band, of which the accused was a member, has a bylaw (No.1.0) respecting the preservation of wildlife passed pursuant to the *Indian Act.* The person who attempted to buy fish on the reserve was in violation of the bylaw. (Dealt with as (f) infra.)

(5) The fish seized from the appellant were seized without warrant. If they were seized without warrant inside the reserve they were "personal property" and subject to exemption from seizure under s.89 of the *Indian Act.* If they were seized outside the Reserve, then Charter considerations regarding unlawful search and seizure should come into play. (Dealt with as (g) infra.)

It is the Crown's position that, where aboriginal and treaty rights arise, those rights are protected from legislative intrusion. It is the Crown's position that a single issue arises in this appeal, namely,

the extent of treaty and aboriginal rights granted to native persons with reference to hunting and fishing and whether, in fact, the conduct of the appellant is conduct protected by aboriginal and treaty rights.

(a) General

Indian fishermen have special rights arising from Indian aboriginal rights, treaty rights and the Natural Resources Transfer Agreement. When Indians are fishing for food on unoccupied Crown lands or other lands to which they have a right of access, they are not subject to provincial legislation imposing licensing requirements. The only restriction is that the game or fish must be used for food.

In *R.* v. *Mousseau,* [1980] 3 C.N.L.R. 63, 31 N.R. 620 (S.C.C.), Dickson J.A., examined paragraph 13 of the Manitoba Natural Resources Transfer Agreement, which is equivalent to Saskatchewan's Natural Resources Agreement, paragraph 12, and, at p.69, said:

> In my opinion, the Indians have a right to hunt, trap, and fish, game and *fish, for food at all* seasons of the year....
>
> ... where a right of access to hunt is recognized in respect of any lands, the right is general for Indians and cannot be restricted by provincial legislation imposing seasonal restrictions ... or other such considerations: *the important criterion is hunting for food.* (emphasis added)

At the heart of this appeal is the question whether a treaty Indian has special rights to fish other than "for food". He can, by reason of special status and without having to meet certain requirements that govern other citizens, take fish for food. Can he do more? Can he sell fish or offer it for sale without meeting licensing requirements?

In *R.* v. *Wesley,* [1932] 2 W.W.R. 337 (Alta.S.C., App.Div.), McGillivray J.A., at p.344, put it so:

> I think the intention was that in hunting for sport or for commerce the Indian like the white man should be subject to laws which make for the preservation of game but, in hunting wild animals for the food necessary to his life, the Indian should be placed in a very different position from the white man who, generally speaking, does not hunt for food and was by the proviso to s.12 reassured of the continued enjoyment of a right which he has enjoyed from time immemorial.

This passage was quoted with approval by the Supreme Court of Canada in *Prince and Myron* v. *R.,* [1964] S.C.R. 81, and *Cardinal* v. *A.G. Alta.,* [1973] 6 W.W.R. 205. Nothing in Indian aboriginal rights, treaty rights or the N.R.A. extends to or permits the selling or the offering for sale of fish without a licence. The preservation for Indians of their mode of life does not extend to or permit the selling and offering for sale of fish without a licence. The having of "a right to fish" begs the real question on this appeal which is the having of a right to sell or offer to sell fish.

The various matters argued by the appellant and replied to by the respondent, as broadly indicated in the appellant's view of the issues, supra, are interrelated, interdependent and overlapping. It is not ideal to attempt to isolate them and treat them separately, as such. The general approach may be sufficient to provide an answer to this appeal against the appellant. Nonetheless, I may be wrong and thus go on to consider other matters argued in somewhat separate fashion as did counsel.

(b) The Treaty Right of Fishing - Treaty No.6

Treaty No.6 provides:

> Her Majesty further agrees with her said Indians that they, the said Indians, shall have the right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, *subject to such regulations* as *may from time to time be made by her Government of her Dominion of Canada* (emphasis added)

In *Nowegijick* v. *Minister of National Revenue,* [1983] 2 C.N.L.R. 89, 46 N.R. 41 (S.C.C.), Dickson J., at p.94 C.N.L.R., stated:

> It seems to me, however, that treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indian. If the statute contains language which can reasonably be construed to confer tax exemption, that construction, in

> my view, is to be favoured over a more technical construction which might be available to deny exemption. In *Jones* v. *Meehan, 175* U.S. 1, it was held that "Indian treaties must be construed, not according to the technical meaning of the words, but in a sense in which they would naturally be understood by the Indians".

I have these remarks, and others like them, clearly in mind. Nonetheless, I cannot overlook these words in Treaty No.6:

> ...the right to pursue their avocations of hunting and fishing … subject to such regulations as may from time to time be made by her Government of her Dominion of Canada...

They are not of doubtful meaning or ambiguous or technical. The regulations now under consideration are federal regulations which are reasonable. They do not alter treaty rights. The conduct of the appellant was not protected by aboriginal and treaty rights. By offering for sale or undertaking endeavors to sell, the appellant engaged in something other than "hunting and fishing" for food. He left the domain of "hunting and fishing" for food and entered the completely different domain of selling fish or offering it for sale. The transaction is out of the scope of treaty rights guaranteed to him and he cannot claim protection under the terms of those rights. He was acting beyond the scope of his aboriginal and treaty rights and is bound by the same legislative provisions as are white persons within the province and has therefore committed the offence alleged. He has not been deprived of "the same mode of living as before". He can "enjoy [his] hunting and fishing as before". He can "retain [his] old mode of living". He "[has] everything [he] had before". He cannot, however, under treaty and aboriginal rights, sell or offer for sale fish. No other construction is possible. *R.* v. *Moosehunter,* [1981] 1 S.C.R. 282, [1981] 1 C.N.L.R. 61, 36 N.R. 437, 9 Sask. R. 149 (S.C.C.), deals with para. 12 of the Saskatchewan Natural Resources Agreement, supra, in the context of the "proviso" and the "for food" aspect. See also *R.* v. *George,* [1966] S.C.R. 267, 78 A.R. 351, and [1969] S.C.R. 642 and *R.* v. *Horseman,* [1987] 5 W.W.R. 454, [1987] 4 C.N.L.R. 99, 78 A.R. 351 (Alta.C.A.).

The Indians may have understood that their mode of life was to be preserved and that they would be able to enjoy their hunting and fishing rights as they had before and "as usual" and as always". The Indians may have understood that insofar as their hunting and fishing was concerned little would change in terms of access to animals and fish. But how does all this come into play in respect of selling fish and offering fish for sale without a licence in present circumstances? In my view, it does not. Selling fish or offering it for sale is not reasonably incidental to the act of fishing itself or, more properly speaking, fishing for food. Treaty No.6 is of no help to the appellant.

(c) <u>The Treaty Right of Fishing - Treaty No.6- as a Profit a Prendre</u>

Section 2 of the N.R.A. reads:

> *The Province will carry out in accordance with terms thereof* every contract to purchase or lease any Crown lands, mines, or minerals and *any other arrangement whereby any person has become entitled to any interest therein as against the Crown* and further agrees not to affect or alter any term of any such contract to purchase, lease, or any other arrangement by legislation or otherwise except either with the consent of all parties thereto other than Canada or insofar as any legislation may apply generally to all similar agreements relating to lands, mines or minerals in the Province to interest therein irrespective of who may be the parties thereto. (Emphasis added)

The appellant relies on it in arguing that Indians have a profit a' prendre based on the treaty right of fishing.

R. v. *Simon,* [1986] 1 C.N.L.R. 153, 62 N.R. 366, 71 N.S.R. (2d) 15, 171 A.P.R. 15 (S.C.C.), is heavily relied on by the appellant. He seemed to present it in the context of his argument based on profit a' prendre. In any event, this is a good enough point at which to deal with it. At pp.167-168 C.N.L.R. it reads:

> … Secondly, the respondent maintained that "as usual" should be interpreted to limit the treaty protection to hunting for noncommercial purposes. It is difficulty to see the basis for this argument in the absence of evidence regarding the purpose for which the appellant was hunting. In any event, article 4 of the treaty appears to contemplate hunting for commercial purposes when it refers to the construction of a truck house as a place of exchange and mentions the liberty of the Micmac to bring game to sale: see *R.* v. *Paul,* supra, at *p.563* per Ryan J.A., dissenting in part.

> It should be clarified at this point that the right to hunt to be effective must embody those activities reasonably incidental to the act of hunting itself, an example for which is travelling with the requisite hunting equipment to the hunting grounds.... The appellant was simply travelling in his truck along a road with a gun and some ammunition. He maintained that he was going to hunt in the vicinity. In my opinion, it is implicit in the right granted under article 4 of the Treaty of 1752 that the appellant has the right to possess a gun and ammunition in a safe manner in order to be able to exercise the right to hunt. Accordingly, I conclude that the appellant was exercising his right to hunt under the treaty.

When speaking of "noncommercial purposes", Dickson C.J.C., with respect, spoke only of a difficulty he saw in the evidentiary circumstances of the case before him. He proceeded, finally, on other grounds, namely that the appellant had done something reasonably incidental to the act of hunting.

I doubt the treaty rights here suggested come within "other arrangement" in s.2 of the N.R.A. I am unable to construe s.2 of N.R.A. to include a "profit a prendre" whereby the federal government bound the province over to uphold all previous "arrangements" whereby any person had become entitled to any interest therein as against the Crown. These are the appellant's words.

(d) Application of the Fisheries Act and Regulations - Section 7

This is the appellant's argument. The *Fisheries Act* has no application to the Indian fishery. It is limited in its application to the Indian fishery by the operation of s.7, which reads:

> The Minister may. *..wherever the exclusive right of fishing does not already exist by law,* issue or authorize to be issued, leases and licenses for fisheries or fishing.... (emphasis mine)

Parliament intended to limit application to those situations where the exclusive right of fishing did not already exist by law. Treaty No.6 clearly was in existence prior to the implementation of the *Fisheries Act.* In any case, even if the *Fisheries Act* had arisen prior to 1876, the areas comprised of Treaty No.6 were not part of the Dominion of Canada and, secondly, the aboriginal right of fishing would clearly have been contemplated by the phrase used in s.7 of the *Fisheries Act* to wit: "the exclusive right of fishing". The Treaty creates a personal and usufructuary right - a right to use and take the fruits and produce of the surrendered lands and to hunt fish thereon. There is nothing in Treaty No.6 affecting the prior aboriginal right to fish. This is shown by the terms of the Treaty No.6 and the negotiations leading up to it. The Indian fishery has an existing exclusive right of fishing and therefore comes within the exception outlined in s.7 *Fisheries Act.* The profit a prendre in relation to fish in Treaty No.6, as referred to in (c) above, is an existing right unless proven otherwise by the Crown. If an ambiguity exists in s.7 of the *Fisheries Act,* it must be resolved in favour of the Indians. The *Fisheries Act* is silent as to Indians. If Parliament wanted to regulate Indian fishing under it, it could have clearly said so. What the statute has not done, the regulations cannot do. This, again, is the appellant's argument much in his words.

I do not accept this reasoning and argument of the appellant. The appellant is not exempted from the operation of the *Fisheries Act* and the Regulations by s.7 or otherwise.

These are the related issues:

(1) Do the federal *Fisheries Act* and Regulations thereunder apply to natives?

(2) The standing of treaty rights?

In *R.* v. *Francis* (1969), 2 N.B.R. (2d) 14, 10 D.L.R. (3d) 165 (N.B.C.A.), at p.195, Hughes J.A., speaking for the court, said:

> The *New Brunswick Fishery Regulations* were passed, not under authority of provincial legislation but, under s.34 of the *Fisheries Act* of Canada, a federal statute. It is clear therefore that the *Regulations* are in no way affected by s.87 of the *Indian Act.*
>
> There can be no doubt that since the decisions of the Supreme Court of Canada in *Sikyea* v. *The Queen,* 50 D.L.R. (2d) 80; [1965] 2 C.C.C. 129; [1964] S.C.R. 642, and *R.* v. *George,* supra, legislation of the Parliament of Canada and Regulations made thereunder, properly within s.91 of the *B.N.A. Act,* 1867, are not qualified or in any way made unenforceable because of the existence of rights acquired by Indians pursuant to treaty. It follows that even if the appellant had established that a right to fish salmon in the Richibucto River had been

conferred by an Indian treaty, the benefit of which he was entitled to claim, such right could afford no defence to the charge on which he was convicted.

In *R.* v. *Eninew; R.* v. *Bear,* [1984] 2 C.N.L.R. 126, 32 Sask. R. 237, 12 C.C.C. (3d) 365 (Sask.C.A.), at p.368 [pp.128-29 C.N.L.R.], Hall J.A. speaking for the court, said:

> In my opinion, it makes no difference to the outcome whether the reasons followed in the trial courts are adopted or whether, as the appellant contends, s.35(1) of the *Constitution Act, 1982* recognizes and affirms the treaty rights as originally set out in the respective treaties. The rights so given were not unqualified or unconditional. In each case the right to pursue the avocation of hunting was subject to such regulations as may from time to time be made by the Government of Canada. Regulations made under the *Migratory Birds Convention Act* are the type of regulations which were contemplated in Treaties Nos. 6 and 10. The purpose of the *Migratory Birds Convention Act* is to conserve and preserve migratory birds, including mallard ducks. That purpose is of benefit to the appellants. Indeed, it was said that the Indians in general, and the appellants in particular, are concerned with and practice conservation. They would not hunt ducks during the summer nesting season. They would be affected by the regulations only during the "spring flying". They would accept as reasonable regulations such as those aimed at preserving the existence of the whooping crane.
>
> It follows that the treaty rights can be limited by such regulations as are reasonable. The *Migratory Birds Convention Act* and the regulations made pursuant to it, based as they are on international convention, are reasonable, desirable limitations on the rights granted. That, in effect, is what was held in *Sikyea* v. *The Queen* and the other cases above noted.

The appellant is not exempted from the operation of the *Fisheries Act* and the Regulations.

(e) The Indian Act, ss.73(1)(a) and 81(o)

I was referred by the appellant to *Indian Hunting, Trapping and Fishing Rights in the Prairie Provinces of Canada* [Saskatoon: University of Saskatchewan Native Law Centre, 1983], by Kent McNeil, at pp.57-59, dealing with the *Indian Act,* ss.73(1)(a) and 81(o), and their effect on "other federal legislation". This, it seemed to me, was one major thrust of the appeal.

Section 73(1)(a) of the *Indian Act* reads:

> 73.(1) The Governor in Council may make regulations
>
> (a) for the protection and preservation of fur-bearing animals, fish and other game on reserves

This regulation-making power is paralleled by the authority granted to band s.81(o), which reads:

> 81. The council of a band may make by-laws not inconsistent with this Act or with any regulation made by the Governor in Council or the Minister, for any or all of the following purposes, namely:
> …
>
> (o) the preservation, protection and management of fur-bearing animals, fish and other game on the reserve councils by

The effect of these provisions on the application on reserves of other federal legislation, such as the *Fisheries Act,* is important in this appeal.

At pp.57-59 Mr. McNeil has this to say:

> In a number of cases involving the *Fisheries Act* it has been argued that, even in the absence of regulations or by-laws made under section 73(1)(a) or 81(o), those sections exclude the application of other federal laws relating to game and fish because they make specific provision for the regulation of hunting, trapping and fishing on reserves. In other words, by enacting those sections Parliament intended to give control over those activities to the Governor in Council and band councils to the exclusion of other federal laws, and if those bodies choose not to act it must be because they want those activities to be unrestricted. In *R.* v. *Billy* [[1982] 1 C.N.L.R. 99 (1977)] the British Columbia Court of Appeal rejected an argument of this sort based on section 81(o). Counsel for the accused, who was

charged with violation of the *British Columbia Fishery Regulations* made under the *Fisheries Act,* argued that the regulation in question was inconsistent with section 81(o) because both dealt with the manner by which fish may be caught. The regulation, it was contended,

> … could only be brought into effect with respect to Indians fishing on lands reserved for Indians under the provisions of the *Indian Act* because that is an Act having special application to Indians and must prevail over the *Fisheries Act,* which is an Act of general application.

Mr. Justice Taggart, who delivered the judgment, stated:

> I entertain considerable doubt as to the validity of the argument that there is an inconsistency. That doubt I entertain primarily because there is no evidence that there has ever been enacted a by-law of the Band Council. Absent the enactment of such a by-law, there seems to me to be nothing in existence at the present time which could be said to be inconsistent with the Fisheries Regulations.

However, he also relied on the authority of the *Sikyea, George,* and *Derriksan* decisions:

> The effect of each of those cases, it seems to me (and I refer particularly to the *Derriksan* case in this connection) is to hold that having regard for the language of the Fisheries Regulation here in question, it admits of no exceptions, whether in favour of Indians or others, and that irrespective of where the offence is committed, that is to say, whether it is committed on or off an Indian reserve.

The *Billy* decision was followed by Mr. Justice Dickson of the New Brunswick Court of Queen's Bench in *R.* V. *Sacobie* [[1981] 2 C.N.L.R. 115 (N.B.Q.B.)] and *R.* v. *Saulis* [[1981] 2 C.N.L.R. 121 (N.B.Q.B.)]. In both cases Dickson J. held that sections 73(1)(a) and 81(o) of the *Indian Act* do not exclude the application of the *Fisheries Act* and its regulations to Indians, whether they are fishing on or off reserves. The same conclusion was reached in *R.* v. *Perley* [[1982] 2 C.N.L.R. 185 (N.B.Q.B.)] by Mr. Justice Stevenson,...who wrote:

> The enactment of the enabling provisions found in ss.73 and 81 of the *Indian Act* does not create a conflict or inconsistency with the *Fisheries Act* or the Fisheries Regulations. Regulations or by-laws, when made under the *Indian Act,* will not necessarily conflict with the fisheries legislation - indeed they might be made expressly subject to it. In the absence of any such conflicting regulation or bylaw the argument of the appellant [that, by enacting sections 73(1)(a) and 81(o), Parliament took fisheries on reserves outside the application of the *Fisheries Act]* is without merit.

…

In none of the cases referred to above were there regulations or by-laws made under section 73(1)(a) or 81(o) which may have conflicted with the *Fisheries Act* or the *Migratory Birds Convention Act.* There was a suggestion in the *Billy* and *Perley* cases, however, that if there had been such regulations or bylaws they would have taken precedence. The trial judge in *Sacobie* was of the same view. It is respectfully submitted that this is the correct approach to take in such a situation. The power to make regulations and by-laws relating to the preservation of game and fish on reserves was first given to the Governor in Council and band councils in 1951, when what are now sections 73(1)(a) and 81(0) were included in the *Indian Act.* Since these sections postdate the enactment of both the *Fisheries Act* and the *Migratory Birds Convention Act* and grant specific jurisdiction within the limited territory of reserves, it was probably intended that regulations and by-laws made pursuant thereto would have precedence over those Acts. The power granted by those sections would be severely limited, in particular with regard to fisheries, if this was not the intention. Furthermore, with respect to section 81(o) it is noteworthy that the power granted to band councils is to make by-laws "not inconsistent with this Act or with any regulation made by the Governor in Council or the Minister". Applying the *expressio unius* rule of statutory interpretation, the implication is that band councils acting within the limited jurisdiction set out in section 81 can make by-laws which are inconsistent with *other* federal legislation.

The only known case where this issue has been directly before a court is *R.* v. *Sands* [(Sept. 1, 1981), unreported], a decision of the Ontario Provincial Court. The accused, a status Indian, was charged with possession of a migratory bird out of season contrary to the *Migratory Birds Convention Act* and the regulations thereunder. The alleged offence took place on a reserve. There was a band by-law in force at the time which provided, *inter alia,* that

> [o]pen season, bag limits, possession limits and all other matters not provided for in this by-law shall be, with respect to ducks, as set out in the regulations for the Province of Ontario made under authority of the *Migratory Birds Convention Act....*
>
> Council for the accused contended that this by-law took precedence over and superseded the *Migratory Birds Convention Act* and for this reason the accused should have been charged under the by-law rather than under the Act. [Judge Fowler rejected this argument] ... the *Sands* decision appears to be ... of doubtful authority.
>
> It is therefore concluded that section 81(o) of the *Indian Act* may provide a means by which band councils can avoid the application of the *Fisheries Act* and the *Migratory Birds Convention Act* on their reserves. Until the issue is authoritatively determined by the courts, there are strong arguments in favour of the precedence of by-laws made under that section over those *Acts.*

I agree with the authorities dealt with by Mr. McNeil that the enactment of the enabling provisions found in ss.73 and 81 of the *Indian Act* do not, without more, create a conflict or inconsistency with the *Fisheries Act* or the *Fishery Regulations.*

There are still no regulations under s.73(1)(a) of the *Indian Act* for me to consider. There is, however, bylaw 1.0 to consider. It is not necessary for me to consider Mr. McNeil's suggestion that s.81(o) of the *Indian Act* may provide a means by which band councils can avoid the application of the *Fisheries Act* on their reserves. It is not necessary for me to consider what he sees as strong arguments in favour of the precedence of bylaws made under s.81(o) of the *Indian Act* over the *Fisheries Act* and Regulations under it. Regulations or bylaws made under the *Indian Act* will not necessarily conflict with the fisheries legislation. Bylaw 1.0 does not do so. I am unable to accept the reasoning of the appellant, as I understand it, which starts with a simple provision that "no person other than a member of the band shall camp, hunt or gather berries within (a certain) part of the reserve, on pain of being guilty of an offence, and ends with the "conflict" which is so basic a part of the judicial reasoning which is reflected in the McNeil reasoning. I am unable to accept the reasoning of the appellant which ends with bylaw 1.0 being in effect, "the appellant's licence", utilizing the concept of "personal property" within the *Indian Act.* It is conflicting regulations or bylaws that are significant. There is none here. There is no conflict here. The *Fisheries Act* and Regulations, s.42(2)(e), apply. The approach canvassed by Mr. McNeil and the appellant is for another day.

(f) The Joseph Bighead Indian Reserve Bylaw No.1.0

This is Bylaw No.1.0:

THE JOSEPH BIGHEAD BAND OF INDIANS

Bylaw No.1.0

Being a bylaw respecting the Preservation of wildlife

WHEREAS Section 81(o) and (r) of the Indian Act empowers the Council of a Band of Indians to enact bylaws respecting the preservation, protection and management of wildlife and the imposition of a penalty for the violation thereof;

NOW THEREFORE the Council of the Joseph Bighead Band of Indians enacts as a bylaw thereof as follows:

…

(c) "Hunt" means and includes to hunt, snare, trap, shoot, take, or otherwise destroy or worry any species of animal or game, and

…

2. No person, other than a member of the band, shall camp, hunt or gather berries within that part of the Reserve....

3. Any person who violates any of the provisions of this bylaw shall be guilty of an offence, and shall be liable, on summary conviction, to a fine....

This is the appellant's position. The Joseph Bighead Indian Band Bylaw No.1.0, being a bylaw respecting the preservation of wildlife, deals with the preservation, protection and management of wildlife on the Joseph Bighead Indian Reserve. "Hunt" is defined within the bylaw to include the "taking" of any species of animal or game. It also stipulates that no person other than a member of the Band shall hunt (take) the animals to be found on the reserve. The phrase preservation, protection and management of wildlife also includes the regulation and disposition of wildlife. It is also significant to note that s.81 (1)(n) provides for the regulation of the conduct and activities of hawkers, peddlers or others who enter the Reserve to *buy,* sell or otherwise deal in wares or merchandize. In this case, the informant was obviously on the reserve buying fish and was subject to the local band government jurisdiction. He was obviously in violation and guilty of an indictable offence under s.32 and 33 of the *Indian Act.*

The bylaw, whatever other effect it may have, cannot operate to free the appellant from the operation of s.42(2)(e) of the federal *Fisheries Act, Saskatchewan Fishery Regulations.* The informant was a trespasser and subject to a fine - no more and no less. Violation of Bylaw 1.0 and whether the informant was or not a trespasser, even if proved, beg the question in this appeal.

The appellant says the sale of fish was authorized by law. The first "law" put forward as authorization for the sale is Bylaw 1.0. The appellant concedes it is not "elegantly" stated or precise. To apply it in present circumstances, I must, among many other difficulties, including that in the preceding paragraph, surmount the difficulty presented by the word "hunt" and its definition as *meaning and including* "to hunt, snare, trap, shoot, take, or otherwise destroy any species of *animal* or *game".* Ordinarily "hunt" does not mean "fish". Ordinarily fishing does not mean snaring, trapping or shooting fish. To "take" or "otherwise destroy", in their context, do not indicate fishing. I cannot, moreover, even with the liberal interpretation contended for by the appellant, in construing Bylaw 1.0, equate "fishing" with "hunting" to the end that the appellant got lawful possession of the fish under or as a result of it, with the right to dispose of it and sell it, subject only to the *Indian Act,* as personal property. This bylaw has little to do with the preservation, protection and management of fish on the reserve. It provides no answer or defence to the appellant in face of the regulations made under the *Fisheries Act.* There is nothing in the bylaw regarding "selling" or "offering for sale" of fish. It does not aid the appellant.

(g) Unlawful Search and Seizure in Violation of Charter Right

This is the appellant's position, the seizure of the fish from the vehicle driven by the appellant was without warrant. If the seizure was on a reserve, then section 89 of the *Indian Act* comes into play. It provides that the personal property of an Indian situated on a reserve is not subject to attachment, levy, seizure or execution in favour or at the instance of any person other than an Indian. The onus is on the Crown to establish ownership and selling of the fish. The fish while on the reserve was personal property of an Indian and as personal property of an Indian were clearly not subject to the *Fisheries Act.*

Any shortcoming in search and seizure would, in the context of this appeal and at most, have resulted in the exclusion of the evidence seized. It was not essential to the case in any event.

The Natural Resources Agreement

Saskatchewan Natural Resources Agreement, 5.5.1930, c.87, S.C. 1930, c.41 reads:

> 12. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish *for food* at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access. (emphasis added)

The Supreme Court of Canada has stated that the effect of the N.R.A. is to "merge and consolidate" treaty rights. What does that mean?

Courts have held:

(1) The essential differences, for present purposes, between the treaty and the agreement are:

(i) under the former the hunting rights were at large, while under the latter the right is limited to hunting for food; and (ii) under the former the rights were limited to about one-third of the province of Alberta, while under the latter they extend to the entire province. *(Frank* v. *The Queen,* [1977] 1 S.C.R. 95, [1977] 4 W.W.R. 294 (S.C.C.) at p.297.)

(2) The right of Indians to hunt for sport or commercially could be regulated by provincial game laws but the right to hunt for food could not. *(R.* v. *Moosehunter,* supra, at p.63 C.N.L.R.)

Section 12 of the N.R.A., with its wording "for food", is of no comfort to the appellant, if, indeed, the appellant relied on it as such.

The Effect of Section 35 of the Constitution Act, 1982

The Court of Appeal for Saskatchewan in *R.* v. *Horse,* [1984] 4 C.N.L.R. 99, 34 Sask. R. 58, considered the effect of s.35(1) of the *Constitution Act 1982,* stating [at p.106 C.N.L.R.]:

> Section 35(1) must be read subject to the game laws paragraph of the Constitution which provides for Indian hunting, fishing and trapping. The treaty rights to hunt and fish which were consolidated in s.12 of the Agreement as at April 17, 1982, existed only to the extent that they had not been modified by that paragraph. In my opinion, s.35(1*)* has no effect on the application of provincial game laws to treaty Indians under the Agreement.

Section 35 does not aid the appellant.

(h) Miscellaneous Issues

There may have been other bases for appeal. if so, they do not aid the appellant. I find them against the appellant.

Judgment

The appeal is dismissed. The conviction is affirmed. There was an appeal against sentence. It was not argued. If it was intended to be argued and overlooked, it may be spoken to at a time to be arranged by counsel with the local registrar.