

R. v. WARD

New Brunswick Court of Queen's Bench, Stevenson J., October 15, 1987

John L. McAllister, for the appellant Crown
Graydon Nicholas, for the respondent

The Crown appealed the acquittal of the accused charged with unlawfully fishing with a net without being permitted to do so by, and without being in possession of, a licence or permit contrary to s-s-.13(6) of the New Brunswick Fishery Regulations, C.R.C. 1978, c. 844 made pursuant to s. 34 of the Fisheries Act, R.S.C. 1970, c.F-14.

The accused, a member of the Eel Ground Indian Band, contended that he was permitted to fish with a net pursuant to s. 6 of a band by-law which authorized unlimited fishing by band members by any means, including nets, except by the use of explosive substances or devices. The band by-law was made pursuant to s. 81 of the Indian Act, R.S.C. 1970, c. I-6.

Held: Appeal allowed; guilty verdict entered.

- 1. Section 6 of the by-law cannot be characterized as being made for the purpose of preservation, protection and management of fish of the reserve as required by the enabling authority given the band by s. 81 of the Indian Act, R.S.C. 1970, c.I-6. Section 6 is ultra vires and cannot afford a defence to the charge.

* * * * *

STEVENSON J.: The Attorney General of Canada appeals from a decision of a judge of the Provincial Court dismissing an information against Donald Peter Ward alleging that he on June 16, 1986 did unlawfully fish with a net in the Northwest Miramichi River without being permitted to do so by, and without being in possession of, a licence or permit contrary to s-s.13(6) of the New Brunswick Fishery Regulations, C.R.C. 1978, c. 844.

Subsection 13(6) of the Regulations makes it an offence to fish with a net in the Miramichi River and its tributaries upstream from a line at the mouth of the river as defined in schedule VII to the Regulations. The defendant admits that he fished with a net. He is a member of the Eel Ground Indian Band. His defence was that he was permitted to fish with a net by s. 6 of a band by-law. Section 6 of the by-law is as follows:

Members of the Eel Ground Indian Band shall be permitted to engage in fishing upon Eel Ground Indian Band waters at any time and by any means except by the use of rockets, explosive materials, projectiles, or shells.

It seems to be common ground that the portion of the river where the respondent fished is within Eel Ground Indian Band waters, being part of one of three tracts of land set apart for the use and benefit of the Eel Ground Band.

In acquitting the defendant the trial Judge followed the decision of P.S. Creaghan J. in R. v. Barnaby (1986), 68 N.B.R. (2d) 71, [1987] 2 C.N.L.R. 125 (N.B.Q.B.), wherein Judge Creaghan held that s. 6 of the by-law prevails over s-s-.13(6) of the Regulations.

In the present case the Attorney General raises the issue of whether s. 6 of the by-law is intra vires the band council. Judge Creaghan did not directly address that issue although he quoted from an unreported decision of the British Columbia County Court dealing with a by-law that was almost identical to the Eel Ground by-law. The County court Judge found that under a reasonable interpretation of the Indian Act, R.S.C. 1970, c. I-6 and the by-law, the by-law provided for preservation, protection and management of fish and the harvesting of fish in band waters. With respect, I have come to a different conclusion.

Section 81 of the Indian Act, R.S.C. 1970, c. I-6, authorizes a band council to make by-laws not inconsistent with the Indian Act or with any regulation made under that Act for, inter alia, the purposes of:

- (o) the preservation, protection and management of fur-bearing animals, fish and other games on the reserve.

The by-law is entitled A By-Law for the Preservation, Protection and Management of Fish on the Reserve. Some of its provisions are clearly aimed at preservation, protection and management of fish. For instance, ss. 2, 7 and 12 provide for the appointment of fisheries officers by the band council and define the powers and duties of such officers. Section 4 prohibits fishing for, catching or killing salmon fry, parr and smelt and the taking of salmon or grilse under three pounds in weight except with hook and line. Section 5 prohibits fishing by persons who are not members of the band. Section 8 requires that stakes, posts, buoys or other materials placed in the water for fishing purposes be removed within 48 hours after their use ends. Section 9 guarantees that one-half the width of a river or stream, and of any main channel is left open at all times. Section 10 prohibits destruction of salmon eggs and fry. Section 11 prohibits pollution of the water. Clearly almost all of these provisions can be characterized as being for the protection, preservation and management of fish.

On the other hand, s. 6 purports to authorize unlimited fishing by band members (at least for fish three pounds or more in weight) by any means, including nets, except by the use of explosive substances or devices.

While one might be tempted to test such a provision by comparing it with provisions of the Regulations prohibiting certain methods of fishing and regulating the number of fish that may be caught or retained, the weakness in that approach is that it might lead one to invalidate the by-law or a part thereof merely because it provides a less stringent scheme of preservation and management than the one contained in the Regulations.

The validity of the by-law must be determined in isolation from the Fisheries Act, R.S.C. 1970, c.F-14 and Regulations and tested solely against the enabling authority given the band by s. 81 of the Indian Act.

In my opinion s. 6 of the by-law which permits virtually unlimited fishing, cannot be characterized as being made for the purpose of preservation, protection and management of fish on the reserve. The rest of the by-law can stand on its own. It is a case for application of the rule of severability. I therefore hold that s. 6 of the by-law is ultra vires the band council and did not afford the respondent a defence to the charge against him.

Counsel for the respondent also made an argument based on s. 25 of the Canadian Charter of Rights and Freedoms but I cannot see that s. 25 has any relevance to this case.

The appeal is allowed, the verdict of acquittal is set aside and a verdict of guilty is entered. The matter is remitted to the Provincial Court and Court is directed to impose a sentence that is warranted in law.