

R. V. STEINHAUER

Unreported at date of publication

Alberta Provincial Court, Dzenick P.C.J., March 16, 1984

D.E. Demetrick and I. Freund, for the Crown
J. Sayers, for the accused

The defendant, a treaty Indian of the Saddle Lake and Goodfish Indian bands, was charged with unlawful use of a gill net for fishing at Beaver Lake, Alberta, without having a valid Indian domestic licence, contrary to s.33(1) of the Alberta Fishery Regulations enacted under the Fisheries Act, R.S.C. 1970, c.F-14. It is admitted that the accused had been fishing in Beaver Lake and that he did not have a valid Indian domestic licence for that lake although he did possess licences for several other lakes.

The defendant is a Treaty No.6 Indian and Beaver Lake is within the Treaty No.6 area.

The defendant argued that Treaty No.6 guaranteed the Indian right to fish and that the requirement to obtain a fishing licence is contrary to this right. It was further argued that by virtue of ss.25 and 35 of the Constitution Act, 1982, the treaty right to fish overrides any existing legislation.

Held: (Dzenick P.C.J.)

1. The regulation requiring a licence does not violate treaty or customary or traditional fishing rights, inasmuch as by the treaty such rights are subject to valid federal regulations.
2. Section 25 of the Constitution Act, 1982 has no application to the Fisheries Act and its regulations as no Charter rights have been violated or denied.
3. Section 35 of the Constitution Act, 1982 does not operate so that the treaty right to fish overrides existing legislation, as the Fisheries Act and regulations were existing at the time of the enactment of s.35.
4. Conviction entered, fine of \$100.00.

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DZENICK P.C.J. (orally): The defendant, Clifford Roy Steinhauer, is charged with unlawful use of a gill net for fishing at Beaver Lake, Alberta, on or about September 2nd, 1982, while not being the holder of a valid Indian domestic licence, contrary to section 33(1) of the Alberta Fishery Regulations issued pursuant to the Fisheries Act, R.S.C. 1970, c.F-14, and amendments thereto.

The admitted facts are that on September 2nd, 1982, about 10:00 A.M. , the defendant, while operating his motor vehicle on a highway near Lac La Biche, Alberta, was checked by a fishery officer at which time the officer observed a gill net and approximately 35 fresh whitefish in the back of the defendant's vehicle.

The defendant admitted to having caught the fish in the waters of Beaver Lake, Alberta by gill net set the evening of September 1st, 1982, and lifted out of the lake water on the morning of September 2nd, 1982.

The defendant did not possess a valid Indian domestic licence for fishing in Beaver Lake but did possess at least six valid Indian domestic licences for other lakes situate in the general area. He testified that he thought that he had left it at home but later conceded that he did not possess the required licence for Beaver Lake.

It was further established that any treaty Indian may obtain a domestic fishing licence without charge, subject to the stipulation that such a licence may only be issued to one person within the family for a particular lake and that there is no quota for the issue of Indian domestic licences for any specific lake.

The defendant's sole family responsibility consists of himself, his wife and three children ranging in ages two to five years.

For purposes of this case, it was further agreed that the defendant is a treaty Indian of both the Saddle Lake and Goodfish Lake Indian bands and that he has never been refused the issue of an Indian domestic fishing licence. A further fact agreed upon by counsel is that both the Saddle Lake Band and the Goodfish Lake Band, being sister bands, adhered to Treaty No.6 and that Beaver Lake falls within Treaty 6 area.

The issues raised in defence are:

1. The Indian right to fish has always been included within the treaties, in this case Treaty No.6, and that the requirement to obtain a fishing licence is in violation of this treaty and their customary and traditional fishing rights.
2. That the Canadian Charter of Rights and Freedoms, (being Schedule B of the Constitution Act, 1982) notably sections 25 and 35, overrides any existing legislation.

Dealing firstly with the treaty rights, Treaty No.6 provides inter alia:

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 tracts surrendered as hereinbefore described, subject to such regulations as may from time to time be made by Her Government of Her Dominion of Canada, and saving and excepting such tracts as may from time to time be required or taken up for settlement, mining, lumbering or other purposes by Her said Government of the Dominion of Canada, or by any of the subjects thereof, duly authorized therefor, by the said Government; ...

The Fisheries Act, R.S.C. 1970, c.F-14, section 34, in particular, provides:

The Governor in Council may make regulations for carrying out the purposes and provisions of this Act and in particular, but without restricting the generality of the foregoing, may make regulations

And there are a series of conditions, amongst which:

- 34.(f) respecting the issue, suspension and cancellation of licences and leases.

The Alberta Fishery Regulations (C.R.C. 1978, c.838) passed pursuant to the provisions of the Fisheries Act, provide inter alia:

- 3.(1) These Regulations apply to
- (a) all parts of Alberta except any area that is part of a National Park; and
 - (b) all persons in Alberta including Metis and Indians.
- 4.(1) No person shall engage in fishing in any waters of Alberta except under the authority of and in accordance with the terms and conditions of a licence issued under these Regulations.
- 33.(1) No person shall use a gill net for fishing unless he holds a valid domestic, Indian domestic, Metis domestic, zone commercial, zone fisherman's or zone recreational fishing licence.

Section 55, although it appears to be somewhat redundant, further provides:

55. Except as provided in these Regulations, no person shall fish in any waters of Alberta.

In Sikyea v. The Queen, [1964] S.C.R. 642, [1965] 2 C.C.C. 129, an Indian charged pursuant to the Migratory Birds Convention Act, R.S.C. 1952, c.179 and regulations - Migratory Birds Regulations (P.C. 1958-1070, S.O.R./58-308) raised as a defence to shooting a wild duck out of season his treaty rights and the right to engage in the pursuit of their ancient right to hunt, trap and fish for food at all seasons of the year.

The Supreme Court of Canada agreed with the Court of Appeal of the Northwest Territories that treaties promising unrestricted hunting privileges to Indians are nevertheless subject to the prohibitions of the Migratory Birds Convention Act and regulations.

In R. v. George, [1966] 3 C.C.C. 137, the Supreme Court of Canada (with one dissenting judgment) held that section 87 (presently section 88) of the Indian Act, making all laws of general application in force in any province, subject to the terms of any treaty and any Act of Parliament, applicable to Indians in the province, cannot be construed as making the provisions of the Migratory Birds Convention Act subordinate to a treaty of 1827.

The purpose of section 87 (as indicated, now section 88) of the Indian Act, is to make Indians, otherwise under the exclusive legislative jurisdiction of Parliament under section 91(24) of the British North America Act [now the Constitution Act, 1867], subject to provincial laws of general application and not to make any legislation of Parliament subject to the terms of any treaty.

In the last paragraph of the judgment, Mr. Justice Martland states:

Accordingly, in my opinion, the provisions of section 87 do not prevent the application to Indians of the provisions of the Migratory Birds Convention Act. I can see no valid distinction between the present case and that of Sikyea v. The Queen....

In R. v. Francis (1969), 10 D.L.R., (3d) 189 (N.B.C.A.) the court, dealing with an offence under the Fisheries Act of Canada and Fishery Regulations of New Brunswick, held that even if a right to fish at a particular place was conferred by treaty, such right does not exclude the applicability of federal fisheries legislation to that Indian.

Hughes J.A., concludes at page 195:

The New Brunswick Fishery Regulations were passed, not under the 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 [now s.88] 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 under which he was convicted.

In Derrickson v. The Queen, [1976] 6 W.W.R. 480, the Supreme Court of Canada, in dealing with aboriginal rights rather than treaty rights, in a judgment delivered by Laskin C.J.C. (orally) held:

On the assumption that Mr. Sanders is correct in his submission (which is one which the Crown does not accept) that there is an aboriginal right to fish in the particular area arising out of Indian occupation and that this right has had subsequent reinforcement (and we express no opinion on the correctness of this submission), we are all of the view that the Fisheries Act, R.S.C. 1970, c.F-14, and the regulations thereunder which, so far as relevant here, were validly enacted, have the effect of subjecting the alleged right to the controls imposed by the Act and regulations

In Elk v. The Queen, [1980] 4 W.W.R. 671, the Supreme Court of Canada upheld a decision of the Manitoba Court of Appeal which held that a federal-provincial government agreement to assure Indians the right to hunt, trap and fish game and fish for food at all seasons on certain Crown lands did not exempt the accused from compliance with the Fisheries Act and regulations thereunder.

It is clear from all the relevant decisions and the provisions of Treaty No.6, that the right of the Indians to pursue the avocations of hunting and fishing are, to quote in the words of the treaty: "subject to such regulations as may from time to time be made by Her Government of Her Dominion of Canada, and saving and excepting such tracts..." (emphasis mine) and that such regulations are validly enacted.

Although some of the cases referred to dealt with the Migratory Birds Convention Act and regulations, the principle determined therein is equally applicable to the Fisheries Act and regulations.

The requirement to obtain a licence in accordance with such regulations in no way violates the treaty nor customary or traditional fishing rights, if any.

The second issue is:

What effect does the Canadian Charter of Rights and Freedoms, notably sections 25 and 35, have on the existing law?

Section 25 provides:

The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada, including

- (a) any rights or freedoms that may have been recognized by the Royal Proclamation of October 7th, 1763; and
- (b) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement.

Section 35(1) states:

The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Defence counsel argues that section 25 operates defensively to make sure that the rights are not impinged upon. It is further argued that section 35 is not subject to or qualified by section 1 of the Charter and that it is not subject to the overriding mechanism by the provinces provided for by section 33.

The submission basically is that the right subsists to fish in any manner whatever without regulations or control and that the issuance of licences is an abrogation of such right to fish.

In R. v. Eninew (unreported, Sask.Q.B., July 22, 1983) [reported at [1984] 2 C.N.L.R. 122, aff'd [1984] 2 C.N.L.R. 126] sections 25 and 35 were raised in defence with respect to a charge under the Migratory Birds Convention Act.

Gerein J., came to the conclusion that section 25 had no application to the matter before the court and that section 35 of the Constitution Act, 1982 did not have the effect of repealing the regulation or rendering it invalid, but rather, recognized and secured the status quo.

In Bear v. R. (unreported, Sask.Q.B., May 6, 1983) [reported at [1983] 3 C.N.L.R. 57, aff'd [1984] 2 C.N.L.R. 126] the accused appealed a conviction under sections 6 and 12 of the Migratory Birds Convention Act, R.S.C. 1970, c.M-12 on the ground that section 35 of the Constitution Act, 1982 has, by its wording, repealed the provisions of the Migratory Birds Convention Act insofar as such Act affects the right of the treaty Indians to hunt migratory birds for food at any time.

Milliken J., was unable to accept such an interpretation of section 35 and dismissed the appeal. The court held [p.57 C.N.L.R.]:

... Bear's right to hunt migratory birds is subject to the provisions of the Migratory Birds Convention Act, as Bear's right to hunt migratory birds under the treaties had at the coming into effect of the Constitution Act, 1982 been restricted by the Migratory Birds Convention Act.

In an article entitled, "The Rights and Freedoms of the Aboriginal Peoples of Canada" by then Dean Kenneth Lysyk (now Mr. Justice Lysyk of the British Columbia Supreme Court) found in a text entitled, Canadian Charter of Rights and Freedoms Commentary, the author states at p.471:

The salient feature of section 25 is that it does not purport to create new rights or freedoms. Its function is to ensure that the rights and freedoms of the aboriginal people existing independently of the Charter are not diminished by the Charter.

The section 35 argument is similarly of no assistance to the accused, as the regulations were existing at the time of the enactment.

Under the provisions of the treaty, the government nonetheless retains the right to make such regulations from time to time.

As with the Migratory Birds Convention Act and regulations, section 25 has no application in this instance to the Fisheries Act and regulations.

In my view, no Charter rights have been violated or denied in this case.

Accordingly. I find the accused guilty as charged.

[Submissions on sentencing omitted.]

In this instance, there is no evidence before the court that the accused was fishing for purposes other than his home or family consumption, and it was considered by the Crown that a licence, an Indian domestic licence is not that difficult for a person properly qualified to obtain, nor is there any charge for it.

In this case, there will be a fine of \$100. In default, ten days in gaol.