STEINHAUER v. R.

Alberta Court of Queen's Bench, Veit J., March 1, 1985

Judith Sayers, for the appellant
Richard Taylor, for the Attorney General of Alberta
J.A. Isaac, Q.C. and K. Lambrecht, for the Department of Justice (Intervenor)

Held: Appeal denied.

1. The appellant did not satisfy the onus of proving the applicability of the Royal Proclamation of 1763 to the territory in question (Beaver Lake). The said Proclamation has been held to apply to territory not granted to the Hudson Bay Company, whereas Beaver Lake was granted tot he Hudson Bay Company as part of Rupert's Land.

2. In any event, the said Royal Proclamation has no applicability because, where, as in this case, Indian bands entered into treaties with the Crown, the treaty provisions superseded the Royal Proclamation.

3. The fishing rights of Indians protected by Treaty No. 6 are, by the terms of the Treaty, "subject to such regulations as may" be made by the Government of Canada. Even if such regulations can only be made for conservation purposes, there was no evidence presented relating to such a requirement, nor was the "conservation limitation" argued at trial or on this appeal.

4. The appellant did not establish a right by custom or tradition. Witnesses who related to oral history of the band were not established to be experts; the evidence did not prove that custom existed from time immemorial; the evidence did not prove that the custom was never abrogated. Any rights to fish without a licence have been abrogated since the passage of the said regulations.

5. Neither s. 25 or s. 35 of the Constitution Act, 1982, add to aboriginal and treaty rights, but only protect existing rights.

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VEIT J.: In this summary conviction appeal [from the judgment of the Provincial Court, [1984] 4 C.N.L.R. 126] the appellant, an Indian member of a band which adheres to Treaty No. 6, raises three objections to his conviction on a charge of using a gill net for fishing without a licence therefor [contrary to s. 33(1) of the Alberta Fishery Regulations enacted pursuant to the Fisheries Act, R.S.C. 1970, c.F-14]: first, he pleads that the requirement to obtain a fishing licence violates his right to fish as contained in the Royal Proclamation of 1763; second, he pleads that the requirements to obtain a fishing licence violates the rights which he acquires pursuant to Treaty No. 6; third, he states that customary and tradition law, independent from the Royal Proclamation and the treaty rights, guarantee him the right to fish without a licence; fourth, he states that ss.25 and 35 of the Constitution Act, 1982, preserve his rights to fish without a licence.

The appeal is denied.

I am attaching to these reasons the reasons of the Provincial Judge; those reasons set out the admitted facts in this case [see [1984] 4 C.N.L.R. 126].

Ground I - Royal Proclamation, 1763

(a) Geographic application

The responsibility of proving that the Proclamation of 1763 applies to the territory which includes Beaver Lake in on the defendant. No evidence in support of that contention was called during the trial. On this appeal counsel relied for support upon the British Columbia Court of Appeal decision in R. v. White and Bob (1964), 52 W.W.R. 193, 50 D.L.R. (2d) 613 for the proposition that the Royal Proclamation applies to Indians in the West. However, the facts in that case occurred on Vancouver Island; there is nothing in the appellant's case to suggest that a decision relating to Vancouver Island necessarily applies to Beaver Lake. It is to be noted, however, that the White

and Bob case, among other authorities, interpreted the Royal Proclamation as applying to those western territories which had not been granted to the Hudson Bay Company.

It would appear that the territory which includes Beaver Lake was granted to the Hudson Bay Company under the name of Rupert's Land: Sigeareak E1-53 v. R., [1966] S.C.R. 645, 56 W.W.R. 478, 57 D.L.R. (2d) 536; The Queen v. Secretary of State for Foreign Affairs, ex parte: Indian Association of Alberta et al., [1982] 2 All E.R. 122, Lord May at p. 141 [[1981] 4 C.N.L.R. 86].

I am not satisfied that the appellant has established the geographic application of the Royal Proclamation.

(b) Application to fishing

The appellant argues that the jurisprudence establishes that although the language of the Proclamation of George III of October 7, 1763 is as follows:

> And whereas it is just and reasonable…that the several Nations or Tribes of Indians with whom we are connected, and who live under our Protection, should not be molested or disrupted in the possession of such Parts of Our Dominions and Territories as…are reserved to them…as their Hunting Grounds,

the phrase, "hunting grounds" has always been interpreted to mean a right to fish as well as to hunt. In support of that position, the appellant refers to R. v. Sikyea (1964), 46 W.W.R. (N.S.) 65 at pp. 66-67, 43 D.L.R. (2d) 150, 2 C.C.C. (2d) 325 (N.W.T.C.A.); R. v. Taylor and Williams (1981), 55 C.C.C. (2d) 172, [1981] 3 C.N.L.R. 114 (Ont.C.A.); and R. v. Tennisco, [1983] 1 C.N.L.R. 112 (Ont.Prov.Ct. 1980), reversed on other grounds 64 C.C.C. (2d) 315, 131 D.L.R. (3d) 96, [1981] 4 C.N.L.R. 138.

It is the respondent's contention that as the Proclamation specifically deals with hunting rights and does not mention fishing rights and as hunting and fishing are typically mentioned separately in treaties, the Proclamation is restricted to hunting rights: R. v. Nicholas et al., [1981] 2 C.N.L.R. 114 (N.B.S.C., App.Div. 1979), affg. 22 N.B.R. (2d) 285, [1979] 1 C.N.L.R. 69 (N.B.Prov.Ct.).

The Sikyea decision does not appear to have been brought to the attention of the New Brunswick courts.

It may well be that the use of an usufructuary approach to the 1763 Proclamation to in the some of the appellant's authorities is the proper approach to take. However, as indicated in the reasons given above and in those given below it is not necessary for me to make a finding with respect to this aspect of the Proclamation of 1763 in this case.

(c) Status of Royal Proclamation where subsequent treaty

Where Indian bands entered into treaties with the Crown, in the usual situation, the treaty provisions supersede the provisions of the Royal Proclamation: R. v. Secretary of State for Foreign Affairs, ex parte: Indian Association of Alberta et al., [1982] 2 All E.R. 122, Lord Denning at p. 125 [[1981] 4 C.N.L.R. 86]; B. Slattery, "The Constitutional Guarantee of Aboriginal and Treaty Rights," 8 Queen's L.J. 232; K. McNeil, Indian Hunting, Trapping and Fishing Rights in the Prairie Provinces of Canada (Saskatoon: university of Saskatchewan Native Law Centre, 1983).

In my view, the opinion of Errol P. Mendes to the contrary expressed in the article, Are There Constitutional and Inherent Rights to Indian Self-Government? (December, 1982), is not upheld in the jurisprudence and does not appear to be supported by the wording of the treaty itself.

I conclude that the Royal Proclamation of 1763 has no application to the determination of this appeal.

Ground II - Treaty No. 6

Treaty No. 6 does protect the fishing rights of treaty Indians in the geographical area to which it relates. However, it is not a blanket protection. The language of the treaty specifically states that the fishing rights throughout the tract are "subject to such regulations as may from time to time be made by Her Government of Her Dominion of Canada".

Even if this right to make regulations is limited by a requirement to the effect that such regulations must be for the purpose of preserving the fish stock or conservation of that stock, there is no evidence in the instant case relating to such a requirement and this "conservation limitation" was argued neither at the trial nor in this appeal.

The right of the Government of Canada to restrict the fishing rights of Treaty No. 6 Indians by regulation is clear and the impugned legislation appears to do no more than what the federal government was entitled to do: R. v. George, [1966] S.C.R. 267, 55 D.L.R. (2d) 386, [1966] 3 C.C.C. 137, 47 C.R. 382; Sikyea v. R., [1964] S.C.R. 642, 49 W.W.R. 306, 50 D.L.R. (2d) 80, [1965] 2 C.C.C. 129.

Ground III - Rights Established by Custom or Tradition

If there are customary or traditional rights to fish, or to fish with gill net, to which the appellant is entitled, the appellant has not made out a case for the existence in this treaty area, by this band, of such rights. (a) There was no evidence led at the trial with respect to the qualifications of those called to testify to relate the oral history of the band and their position as depositors of the culture. Their status as experts in the area of customary law was not established. (b) The evidence falls far short of proving that any customs existed for time immemorial. (c) The evidence falls short of indicating that the custom was never abrogated. First, it is to be noted that those who testified indicated that they themselves had applied for, and received, fishing licences in the past. Second, any rights to fish without a licence have been abrogated since the passage of the regulations which are the subject of this trial.

In the result the appellant has not established his right to the benefit of any customary or traditional law.

Ground IV - Rights Arising from the Constitution Act, 1982

Section 25 of the Constitution Act, 1982 is a shield and does not add to aboriginal rights. There is no aspect of the Canadian Charter of Rights and Freedoms from which the appellant needs shielding in this particular case.

Section 35 of the Constitution Act, 1982 clearly refers to the protection of Indian rights as of April 17, 1982; the insertion of the word "existing" can only be said to have been deliberately effected to achieve that result. Since there was, on the evidence in this case, no existing right for Treaty No. 6 Indians to fish without a licence on April 17, 1982, s. 35 cannot be on assistance to the appellant.

The Constitution Act, 1982 can have no application to this appeal.

There is no merit to any of the grounds of appeal; the appeal is denied.