REGINA (Respondent) v. MACHATIS, MARTEN (Appellants) and ATTORNEY GENERAL OF CANADA (Intervenor)

[Indexed as: **R. v. Machatis**]

Alberta Court of Appeal, Bracco and Cote JJ. A., Cawsey J. (ad hoc), January 17, 1991

R.F. Taylor and M. Unsworth, for the Crown
L.T. Mandamin, for the accused
W.W. Smart, for the intervenor

The accused Treaty No. 6 Indians appealed their convictions on charges of fishing without a licence contrary to s.21(1) of the *Alberta Fishery Regulations* made pursuant to the *Fisheries Act,* R.S.C. 1985, c.F-14 (see [1991] 1 C.N.L.R. 154 (Alta. Q.B.)). Neither appellant had applied for a domestic fishing licence even though the licences were available free of charge to Treaty No. 6 Indians. Section 65 of the *Alberta Fishery Regulations* permits the holder of a domestic license to subsistence fish for food for the licensee and family members residing with the licensee. Treaty No. 6 recognizes the right of Indians covered by the treaty to fish "subject to regulations which may be made from time to time by Her Government of Her Dominion of Canada. "

At trial the appellant father and son were acquitted of the charges. The trial judge held that restricting distribution of fish to licensees and their immediate households was an infringement on the band's treaty and aboriginal rights protected under s.35 of the *Constitution Act, 1982.* The trial in this case was held prior to the Supreme Court of Canada's decision in *R. v. Sparrow*, [1990] 3 C.N.L.R. 160.

The Crown appealed on the grounds that s.21(1) of the *Alberta Fishery Regulations* did not infringe the Treaty No. 6 right and that s.35 of the *Constitution Act, 1982* did not render s.21 (1) of the regulations inapplicable to the respondents. The Alberta Court of Queens Bench found that s.35(1) protected treaty and aboriginal rights but not from valid regulation enacted after the *Constitution Act, 1982* took effect. Treaty and aboriginal rights must be considered in the context of Canada's contemporary realities. The regulation's licensing requirement was imposed for a valid legislative purpose of conserving and managing the fishery. It therefore constituted a reasonable restriction on the respondents treaty right to fish and did not infringe s.35(1) of the *Constitution Act, 1982.*

The accused appealed. In oral argument they contended that the aboriginal right and the treaty right were and are a collective right. The appellants therefore argued that requiring one licence for the band would be constitutional, but requiring a licence for each individual would not.

Held: Appeal dismissed.

1. Section 65 of the federal regulations is entirely permissive. It is of no practical effect standing alone, and does not create any offence or infringe anyone's rights to do anything. Also, none of the other provisions of the regulations appear to interlock with that section. Nothing in the regulations prevent Treaty No. 6 Indians possessing domestic fishing licenses from sharing their catches with other band members. Section 21 makes it an offence to fish without a licence, but the descriptions of the licences available are unconditional.

2. The argument that treaty and aboriginal rights are collective and cannot be replaced by series of individual rights under the licensing regime was introduced in oral argument of this appeal. It doesn't appear in the appellant's factum and the Crown cannot be expected to meet arguments on appeal that have not been raised in the lower courts. There is no evidence that a collective band or family license was sought. The issue cannot be decided without proper evidence.

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PER CURIAM: The appellants were acquitted in Provincial Court but convicted on a Crown appeal to the Court of Queen's Bench, [1991] C.N.L.R. 154, 72 Alta. L.R. (2d) 311, 104 A.R. 33. The charge was fishing with a gill net without a licence. The facts are not really contested.

Having a proper licence would be a defence to that charge, but the appellants expressly declined to take out a licence, preferring to rely on their aboriginal and treaty rights. They are treaty Indians and members of a recognized band which is a party to Treaty Six, which recognizes their right to fish "subject to regulations which may be made from time to time by Her Government of Her Dominion of Canada." There was clear evidence that treaty Indians could have a domestic fishing licence for the asking, without fee. The government required licence applications to get information about fishing for conservation purposes. However, the government did not insist on receiving the information, and would give a treaty Indian such a licence whether or not he supplied the information requested.

Section 65 of the federal regulations which govern fishing in Alberta say that the holder of a domestic fishing licence may fish for purposes of food for his household or their animals.

Because of that section, a great deal of evidence was led at trial about this particular band's custom of sharing food, particularly with kin. What is more, these accused testified that they had gone fishing in response to a very broad hint (really a polite request) for fish from an elderly couple who were no longer able to do any fishing for themselves. It seems to have been assumed that the elderly couple also lacked a licence. The trial judge held that restricting holders of such licences to fishing for themselves and their immediate household was an infringement of the band's treaty and aboriginal rights and so was invalid because of s.35 of the *Constitution Act, 1982.* The Crown argues that that was not the charge (and indeed it is not clear whether anybody was ever prosecuted for such a thing). The Crown therefore contends that the point was moot or premature.

A much simpler answer to that issue emerged during oral argument in the Court of Appeal. Section 65 of the fishing regulations for Alberta does not say that the holder of a domestic fishing licence may fish *only* for his family. Nor does it forbid anyone to do anything. Counsel were not able to find in those regulations any other provision which had that effect. Section 65 being entirely permissive, it is of no practical effect standing alone, and does not create any offence or infringe anyone's rights to do anything. What is more, none of the other provisions of those regulations appear to interlock with that section. Section 21 makes it an offence to fish without a licence, but the descriptions of the licences available are bald and unconditional. None of them incorporate s.65 even referentially. Nor does there appear to be any such offence as fishing beyond the terms of one's licence. The Crown tried to make a possible argument based on the phrase "under the authority of a licence." But the fact that that phrase is used in some provisions of those regulations and not others speedily shows that such an interpretation would produce some very peculiar results. It would indeed invalidate some of the other prohibitions in the statute. That cannot be correct.

Therefore we have no hesitation in saying that nothing has been shown to us which would stop treaty Indians holding domestic licences from sharing their catches with other members of their Indian band. Indeed nothing would stop them from fishing with that avowed intent.

That gives the appellants much of the relief which they have sought in all levels of court, and renders totally hypothetical most of the argument and evidence adduced on all three levels of court. Once this became apparent, counsel for the appellants still tried to attack the regulatory scheme as being unconstitutional. He was not able to say that the mere requirement of a licence was an unreasonable requirement which would violate either treaty or aboriginal rights. In view of the above-quoted wording of the treaty, that is not at all surprising.

However, counsel for the appellants did contend strongly before us that the aboriginal right and the treaty right were and are a collective right, so that replacing them with a series of individual rights would be seen by the band as being a serious derogation from the aboriginal and treaty rights. The appellants' counsel therefore argued that requiring one licence for the band would be constitutional, but requiring a licence for each individual would not. Presumably he objects to family licences. The appellants assume that the effect of the regulations is to permit only the issuance of individual licences (which may in fact be family licences). They assume that those regulations do not permit the issue of a licence to a whole Indian band. There was no argument directed to that specific point and we prefer for that and other reasons appearing below to express no concluded view on whether the regulations permit a band licence. There is no evidence that anyone sought a band licence here, and some evidence would suggest that no one did.

The problem with this argument about replacing collective rights with individual licences is that it was made first in the middle of the oral argument in the Court of Appeal. In particular, it does not appear to us that any of the evidence at trial was really directed to the issue. At trial no one really

had notice of that issue. There were incidental mentions of traditions and collective attitudes and rights of the band or of the signatories to the treaty, but those were really only adduced in the narrow context of sharing fish with relatives or members of the band. Careful reading of the argument at trial shows that the aspect of the licensing scheme which was attacked was the supposed prohibition on sharing, not the fact that licences were for individuals rather than the band. The reasons for judgment at trial and on appeal to the Court of Queen's Bench do not mention band licences and the argument was likely not made in Queen's Bench either. The appellants' factum objects to the regulations only because they prevent sharing, and does not suggest the licence should be for the band rather than individuals (or families).

The trial in this case was held before the Supreme Court of Canada clarified or changed a good deal of the law and procedure in this area in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, [1990] 3 C.N.L.R. 160, [1990] 4 W.W.R. 410, 70 D.L.R. (4th) 385, 46 B.C.L.R. (2d) 1, 56 C.C.C. (3d) 263, 111 N.R. 241. If the defence leads evidence of certain points, that case puts a serious onus of proof on the Crown to justify various types of inroads into treaty and aboriginal rights. Whether a band licence would be workable might be the subject of evidence. All levels of court in Canada have spoken from time to time of the great evils of attempting to decide issues under the *Constitution Act, 1982* without a proper (or indeed any) factual foundation. We are not persuaded that the procedure outlined in the *Sparrow* case is applicable here.

The band licence argument is one which was open to the appellants to raise at trial, but they did not raise it. It is impossible to decide it without proper evidence. We see no reason why the Crown should be forced to start over again with an entire new trial of this old charge. We were told that in the meantime the two appellants have been "sentenced" and received absolute discharges; so the practical consequences to them of this particular prosecution are slight. They were obviously conducting themselves so as to create a test case, so anyone reading the reasons of the Court of Queen's Bench or these reasons would find therein no stain on their honour.

Therefore, we make no decision about whether a scheme of individual (or family) licences instead of one band licence is an unconstitutional restriction of treaty or aboriginal rights of an arguable collective nature. If there is a future prosecution of anyone else (or a new prosecution of these appellants), such accused may argue that point on its merits. There is no res judicata or precedent created on that point by these reasons.

Accordingly, we dismiss the appeal from the Court of Queen's Bench and leave in place the convictions for fishing without a licence.