EASTMAIN BAND V. GILPIN

Quebec Provincial Court, Lavergne P.C.J., April 1, 1987

Bernard Hanssens, for the plaintiff Claude Beaudet, for the accused

The accused was charged with allowing his child to be in breach of curfew, contrary to a band by-law, enacted under the Cree-Naskapi (of Quebec) Act, S.C. 1983-84, c.18, s.45(1)(d)(iv). The curfew was applicable only to those under the age of sixteen years. The accused brought a preliminary motion challenging the legality of the by-law on the ground that the band council's power to adopt by-laws in such matters was derived from legislation which did not expressly empower it to establish discriminatory standards based on age. Section 15 of the Constitution Act, 1982 was not raised by the accused. The band council argued that the by-law powers exercised pursuant to the Act were not delegated to it by Parliament but stemmed from its own internal, residual sovereignty which was recognized, not created, by Parliament in the Act, and hence the general principles of administrative law regarding the delegation of powers were inapplicable to it.

Held: Motion denied.

1. The James Bay and Northern Quebec Agreement confirms the survival of Indian rights since the Conquest.

2. The Agreement and Cree-Naskapi (of Quebec) Act, the legislation giving effect to it, establish Cree local government in a very different and original fashion than has been traditionally done in Canada by the Constitution Act, 1867, i.e. without either the Parliament of Canada or the Legislative Assembly of Quebec retaining supervisory power over administrative bodies created by them.

3. The Crees' rights concerning Category 1A lands, conferred and recognized by the Agreement, have been constitutionally protected by ss.35(1) and (3) of the Constitution Act, 1982, and by s.52 any laws encroaching upon the rights conferred under the Act would be inoperative, unless brought about by constitutional amendment pursuant to s.35(1).

4. The right of a band council to make by-laws is part of those guaranteed rights, and the Cree bands have full power to legislate within specified fields, according to community needs identified by themselves.

5. From this perspective, the Crees hold some sort of residual sovereignty as regards their local governments.

6. The Band's curfew by-law was intra vires.

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LAVERGNE P.C.J.: Donald Gilpin has been charged as follows:

> On or about 22nd April 1986, at or about 21:30 hours, in a public place within the Category IA lands of the Eastmain Band, to wit, on a public road, did permit his child, William Gilpin, to be in a place other than his place of residence after 21:00 hours, contrary to section 3 of the Eastmain Band Curfew By-Law No. 3 respecting curfew on Category IA land of the Eastmain Band, enacted under the Cree-Naskapi (of Quebec) Act., S.C. 1983-84, c. 18, thereby committing an offence under section 6 of the said by-law.

Before a plea had been entered, counsel for the accused filed a preliminary motion contesting the legality of the by-law under which the charge had been laid. Counsel alleged that the Eastmain Band Council's power to adopt by-laws in such matters was derived from legislation which did not expressly empower it to establish discriminatory standards based on age. Consequently, the accused could not have contravened such by-law because it could not have been raised against him. Since the by-law was ultra vires, the Court had simply no jurisdiction.

At the hearing, held in Eastmain on November 19, 1986, the Court asked counsel to provide notes and authorities in support of their respective claims. Counsel for the accused complied on November 27, while counsel for the Band Council could not submit his text before January 29, 1987. Counsel for the accused applied for a right to reply no later than March 1, 1987. Counsel

for the Band Council agreed, and counsel for the accused exercised this right on March 2, 1987.

By way of introduction, the Court deems it advisable to recall the provisions of the by-law under contestation and to review counsel's allegation. In parts II and III, the Court will isolate the principle and conclusions prompted by the circumstances of this case, with regard to relevant doctrine, precedents and legislation.

I - INTRODUCTION

The Eastmain Band Curfew By-Law No. 3 was adopted by the Eastmain Band Council on September 9, 1984, under 5. 45 of the Cree-Naskapi (of Quebec) Act (S.C. 1983-1984, c.18), a federal statute assented to on June 14, 1984, governing, among others, the Crees of this band.

The by-law provides for a curfew set at 9:00 p.m. or 10:00 p.m. depending on the time of the year, and applicable only to young people under sixteen years of age (s.1(a)). Under s.3, these persons must not be in anyplace other than their residence, after the hours mentioned, except with prior authorization from their parents.

Section 4 imposes the same prohibition with respect to public places, except where the child is accompanied by one parent or by an adult authorized to accompany him or her. Section 6 imposes a penalty on parents who allow their children to contravene the curfew. Thus, the by-law gives rise to discrimination based on age, since it makes a distinction between Eastmain' s adult population and its citizens of minor age: only those less than sixteen years of age are subject to it.

Counsel for the accused referred to the long recognized principle of public law whereby the power to adopt by-laws is a juridical power expressly given by a statute. This, according to counsel, applied particularly in the case of provisions affecting fundamental rights and freedoms. One of the more recent applications of this rule was brought to light in Ville de Montreal v. Arcade Amusements Inc. et autres, in a judgment rendered in 1985 by the Supreme Court of Canada ([1985] 1 S.C.R. 368). Counsel for the accused quoted abundantly from it.

The provision of above-mentioned Cree-Naskapi (of Quebec) Act empowering the band council to make a by-law in this matter reads as follows

> 45.(1) Subject to this section, a band may make by-laws of a local nature for the good government of its Category IA or IA-N land and of the inhabitants of such land, and for the general welfare of the members of the band, and, without limiting the generality of the foregoing, may make by-laws respecting
>
> d) public order and safety, including
> …
>
> (iv) curfews.

This act would therefore empower band councils to legislate on curfews only, and no more. The accused claimed that the fundamental principle of equality before the law prohibited the making of by-laws which include discrimination based on age, when the enabling statute does not expressly provide for it. The Cree-Naskapi (of Quebec) Act does not empower the band councils to make curfew by- laws applicable to a class of citizens only.

Counsel for the prosecution submitted that this principle of administrative law could not apply to the Cree-Naskapi (of Quebec) Act, since this statute constituted the legislative recognition, for the benefit of the Cree populations mentioned, of a form of residual sovereignty in the administration of their internal affairs, including the organization of local government. This conclusion can be inferred from the James Bay and Northern Quebec Agreement, signed in November 1975, and from the statutes which ratified it and brought it into force. Counsel for the prosecution also raised a constitutional argument which could countenance his thesis.

It is appropriate to cite the summary of his argument, at page 10 of his written submission:

> (a) The Cree-Naskapi (of Quebec) Act is the legislative expression of the treaty rights recognized for the James Bay Crees bands in the James Bay and Northern Quebec Agreement and constitutionalized under sections 35 and 52 of the Constitution Act, 1982;
>
> (b) The by-law powers exercised by the Cree bands pursuant to the Cree-Naskapi (of

Quebec) Act are not delegated to them by the Parliament of Canada but stem from their own internal, residual sovereignty and are recognized, not created, by Parliament in the Act;

(c) Hence the general principles of administrative and municipal law regarding the delegation of powers are inapplicable to by-laws enacted by a Cree band since such powers cannot be unilaterally abrogated or rescinded by Parliament and since a Cree band exercises such powers pursuant to its own internal sovereignty, not as a result of delegation by another sovereign body;

(d) A James Bay Cree band does have the power to enact, by by-law, curfews for a specific age group, which power it has exercised in the case at bar.

II - THE ARCADE AMUSEMENT CASE AND THE BASIS OF THE PRINCIPLE OF NON-DISCRIMINATION

In Ville de Montreal v. Arcade Amusements Inc. ([1985] 1 S.C.R. 368), the Supreme Court had the opportunity once again to state the principle of law whereby regulatory power remains essentially a legislative power delegated by the sovereign and competent legislative authority: in our juridical system, the federal and provincial Parliaments. In their Traite de droit administratif, Dussault and Borgeat point out:

> Le pouvoir d' etablir des normes legales de comportement a ete confie par la Constitution au Parlement federal et aux Parlements des Etats membres. Ils sont ainsi devenus les seuls responsables du domaine legislatif de l'activite etatique. Lorsqu' un Parlement choisit de deleguer une partie de ses pouvoirs a l'Administration, il est en droit d' imposer toutes les conditions qu' ii juge necessaire pour restreindre et controler l'exercice du pouvoir ainsi concede. Aucun texte de la Constitution ne venant en garantir l'existence, le pouvior reglementaire est completement dependant de la volonte du Parlement: celui-ci est le seul maitre de l'existence et de la portee de ce pouvoir, subordonne de celui-ci. (1)

Therefore, only Parliament should yield the delicate place a class of citizens at a disadvantage.

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(1). Dussault, Rene et Borgeat, Louis, Traite de administratif, Quebec, P.U.L., 1984, tome 1, 955 p., p.405.

In Ville de Montreal v. Arcade Amusements Inc., the defendant questioned before the Supreme Court the legality of s.8 of By-Law 5156 respecting amusement machines and arcades. The by-law prohibited use of these machines and access to arcades for persons less than eighteen years of age.

Yet, in spite of the scope of the general powers conferred by its Charter, no provision gave the City of Montreal the explicit power to make distinction based on age.

Beetz J. wrote at page 413:

> It must be held that, in the absence of express provisions to the contrary or implicit delegation by necessary inference, the sovereign legislator has reserved itself the important power of individuals in accordance with such fine distinctions. The principle transcends the limits of administrative and municipal law. It is a principle of fundamental freedom.

This principle, whereby the administration cannot adopt discriminatory by-laws, seems to have long been recognized in English and Canadian public law. Whether this prohibition issues from constitutional or quasi-constitutional provisions, or from common law (2) , it is undoubtedly an important restriction on regulatory power, affirmed and imposed by jurisprudence even before the Constitution Act, 1867.

Such a restriction could be explained by the inferior and subordinate status of regulatory power and by-laws in relation to the Parliament's legislative power and to the law (3).

Since regulatory power emanates from parliamentary authority, which, in this country, rests with the sovereign legislative power, it is limited by the framework of the enabling law. As a result, the courts have often inferred that Parliament did not wish to empower the regulatory authority to

adopt discriminatory regulations or retroactive by-laws, for instance, or allow further delegation of power, when the enabling law did not clearly provide for it.

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2. Dussault, Rene and Borgeat, Louis, op.cit., 557 et 5., Garant, Patrice, Droit administratif, Montreal, Ed. Yvon Blais Inc., 2nd ed. , 1985, p.1032, p.819 et 5..

3. Dussault, Rene and Borgeat, Louis, op. cit., 452.

In short, the power to discriminate belongs to the sovereign federal and provincial Parliaments.

Section 15 of the Constitution Act, 1982 strengthens this principle of non-discrimination. It creates an impediment to legislative and regulatory activity, subject to s.1. However, in the case at bar, there is no reason to discuss the matter any further, since this aspect was not raised by the accused.

III - SCOPE OF REGULATORY POWERS CONFERRED BY STATUTES UPON TUE CREE BAND COUNCILS

As we mentioned earlier, counsel for the band council countered the argued principle of non-discrimination by referring to the sovereignty (which he called "residual") attributed to the Crees in the fields and matters described in the Cree-Naskapi (of Quebec) Act. In the final analysis, these matters cover all aspects of the organization and administration of local communities. Residual sovereignty would be inconsistent with the principle of non-discrimination which, therefore, could not apply to the case at bar.

In dealing with this argument, the Court will seek a basis for it, if any, in the relevant texts adopted prior to the Cree-Naskapi (of Quebec) Act. Then the Court will examine this Act and the Constitution Act, 1982, and look for indications leading to the conclusion that the band councils may adopt discriminatory by-laws.

A - Relevant texts prior to the Cree-Naskapi (of Quebec) Act

The Court will first refer to the James Bay and Northern Quebec Agreement, signed in Quebec City on November 11, 1975. Only the relevant provisions applying to the James Bay Cree and to Category IA lands will be considered.

This Agreement was the end of two years of negotiations begun in the early 1970s as a result of the gigantic works at James Bay. The Courts were then seized of two cases: Gros-Louis et autres v. La Societe de developpement de la Baie James et autres (1974) R.P. 38, set aside by Societe de developpement de la Baie James et autres, [1974] R.P. 38, set aside by Societe de developpement de la Baie James et autres v. Kanatewat, [1975] A.C. 166.

Regardless of the controversy raised by the issue of Indian titles before the Agreement was signed, the territorial evolution of Quebec since the Conquest seemed to confirm the survival of Indian claims, although they remained the object of discussions in some respect (4).

Articles 2.1 and 2.2 of the Agreement rather seem to confirm the existence of Crees' rights. The articles provide for rights and benefits set forth in the Agreement, to be ceded in consideration of the Crees' claims:

> 2.1 In consideration of the rights and benefits herein set forth in favour of the James Bay Crees and the Inuit of Quebec, the James Bay Crees and the Inuit of Quebec hereby cede, release) surrender and convey all their native claims, rights) titles and interests, whatever they may be, in and to land in the Territory and in Quebec, and Quebec and Canada accent such surrender.
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> 2.2 Quebec and Canada, the James Bay Energy Corporation, the James Bay Development Corporation and the Quebec Hydro-Electric Commission (Hydro-Quebec), to the extent of their respective obligations as set forth herein, hereby give, grant, recognize and provide to the James Bay Crees and the Inuit of Quebec the rights) privileges and

benefits specified herein, the release, surrender and conveyance mentioned in paragraph 2.1 hereof.

Canada hereby approves of and consents Agreement and undertakes, to the extent of its obligations herein, to give, grant, recognize and provide to the James Bay Crees and the Inuit of Quebec the rights, privileges and benefits herein.

Article 2.6 provides that the legislation declaring the Agreement valid would extinguish all native claims, rights and title.

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4. Brun, Henri, Le tern toi re du Quebec, six etudes juridigues, P.U.L., 1974, p.289, p.32-91; Patenaude, Micheline, Le droit povincial et les terres indiennes, Montreal, Editions Yvon Blais Inc., 1986, p.198, p.1-85; Brun, Henri and Temblay, Guy, Droit constitutionnel, Cowansville, Editions Yvon Blais Inc., 1982, p.798, p.119-124; O'Reilly, James, La Loi constitutionnelle de 1982, droits des Autochtones, (1974) 25, Cahiers de droit, 125.

While Native sovereignty over the land occupied by the Crees does not seem consistent with our country's history, the Court believes that the James Bay Agreement and the legislative texts giving it effect compel us to examine the Crees' juridical position in the light of the legislative power given their "local governments These are set up in a very different and original fashion when compared to the traditional juridical order established in Canada by the Constitution Act, 1867 and its amendments.

The Agreement provides for adoption by the Parliament of Canada and the Quebec National Assembly of suitable legislation to approve the Agreement, to give it effect and to declare et valid (art. 2.5).

Article 2.15 stipulates that the Agreement may be amended or modified in the manner provided, or with the consent of all the parties. Article 5.1.2 sets up Category IA lands withdrawn from the territory as a whole (art. 1.16) to be set aside for the exclusive use and benefit of the James Bay Cree bands, including the Great Whale River Band. Subject to the terms and conditions of the Agreement, these lands will come under the management and control of Canada.

Section 9 of the Agreement entitled "Local Government over Category IA Lands" provides for the adoption by the federal government of special legislation concerning local government for the James Bay Crees on lands allocated to them. Article 9.0.1 listed some of the fields over which the new governments would have jurisdiction. Article 9.0.1(p) stipulated that:

Such legislation shall contain the following inter alia:
…

p) and such other powers as may be incidental and/or the implementation of the Agreements;

Under article 9.0.2, Canada and the James Bay Crees agreed, after the execution of the Agreement, to discuss the terms of the special legislation recommended in article 9.0.1. Finally, article 9.0.4 laid down that the provisions of s.9 could only be amended with the consent of Canada and the interested Native party.

The validating legislation contemplated in the Agreement was passed in 1976. The second and parts of the third paragraph of the Canadian statute (S.C. 1976-1977, c.32), assented to on July 14, 1977, reads as follows:

AND WHEREAS the Government of Canada and the Government of Quebec have assumed certain obligations under the Agreement in favour of the said Crees and Inuit;

AND WHEREAS the Agreement provides, inter alia, for the grant to or the setting aside for Crees and Inuit of certain lands in the Territory, the right of the Crees and Inuit to hunt, fish and trap in accordance with the regime established therein, the establishment in the Territory of regional and local governments to ensure the full and active participation of the Territory, measures to safeguard and protect their culture and to ensure their involvement in the promotion and development of their culture,...

With the Quebec legislation assented to on June 30, 1976 (S.Q. 1976, c. 46), the Agreement came into force and recognized the rights, privileges and benefits provided for its beneficiaries.

While giving the Agreement its full legal effects, the approving legislation also sanctioned the permanence of a local and autonomous government guaranteed by s.9 of the Agreement (art. 9.0.4).

The Agreement settled the territorial issue while establishing a kind of municipal structure under the sole government of the native peoples. Within this framework, they could adopt all kinds of measures to ensure the safeguard and the promotion of their culture, to set up a land allotment regime, and to regulate, among other things, hunting, fishing and trapping, and the protection of the environment and of natural resources. The Agreement is more than a treaty; it clearly reflects the will of the authorities to recognize the Crees exclusive rights to Category IA lands, as well as a right to a local government of a municipal nature.

Furthermore, the Agreement draws a clear distinction between the guardianship regime under the Indian Act (R.S.C. 1970, c.I-6), which was to be abolished by the contemplated legislation. Therefore, in the Court's opinion, the will to give the Crees the power of self-government does not go with the traditional supervisory power retained by the Parliaments with regard to the regulatory power of administrative bodies created by them. The Agreement must be seen and interpreted within the overall context of the Natives' legitimate claims, to which the authorities agreed for considerations of a partly historical nature, while taking account of a distinct social and cultural group.

Seen in this perspective the distinctions between ss.10 and 9 of the Agreement, set forth by counsel for the accused, are not convincing. We must remember that Category IA lands have been set aside for the Crees' exclusive use and withdrawn from provincial authority. Section 10 of the Agreement deals with Category lA lands, and provides for the regime which is entirely different from the special status reserved for Category IA lands.

The Cree-Naskapi (of Quebec) Act (S.C. 1983-1984, c.18), the Constitution Act, 1982 and the 1983 Proclamation amending the Constitution strengthen the Court' 5 conviction that, as our law stands, the Crees enjoy a special status with regard to Category lA lands.

B. The Cree-Naskapi (of Quebec) Act

The Cree-Naskapi (of Quebec) Act, assented to on June 14, 1984, gave substance to Canada's pledge under article 9.0.1 of the Agreement. In fact, the Act emanates from this pledge. The preamble to the Act stresses the wishes already formulated in the Agreement and the approving legislation, and confirms the will to give the Crees and Naskapis an organized and efficient local government regime, the management and control of Category IA lands, and the power to ensure the safeguard of their individual and collective rights. Without a doubt, the Act includes a wide range of powers similar to those given the municipalities governed by the Cities and Towns Act (R.S.Q., c.C-19) and the Municipal Code of Quebec (R.S.Q., c.C-27.l). The Cree-Naskapi (of Quebec) Act includes provisions reflecting the legislator's will to ensure the right for the Crees to set their own standards of behaviour according to their social needs.

Under ss.7 and 8 of this Act, the band councils may require the holding of a licence permit, and prohibit an activity. According to s.9, the Statutory Instruments Act (S.C. 1970-71-72, c.38) does not apply to resolutions or by-laws of bands made under the Cree-Naskapi (of Quebec) Act.

Section 3 provides that where there is any inconsistency between the Cree-Naskapi (of Quebec) Act and any other federal act, the former Act will prevail. Section 4 stipulates that provincial laws do not apply where they are inconsistent with by-laws made by band councils. Finally, under s.5, the Indian Act does not apply to Cree and Naskapi bands, except for the purpose of determining Indian status within the meaning of the Indian Act.

The subjects and powers of bands are described at ss. 21(a) to 21(j). Section 21(f) reads:

> 21. The objects of a band are
> f) to promote the general welfare of the members of the band;

When interpreting the validity of a by-law, the objective of the organization described in the law should he taken into account. This method of interpretation was recognized by a majority of Supreme Court justices in CKOY Ltd. v. R. ((1979) 1 S.C.R. 2). In the case at bar, s.45 (1)(d)(iv)

authorizes the bands to make by-laws respecting curfew. There is good reason to wonder whether the Eastmain Council, for the good of its members' general welfare, could avail itself of s.21(f) to introduce discrimination in its curfew by-law. There is room for doubt in the light of the reasons given by Beetz J. in the Arcade Amusements case.

Nevertheless, the Court believes that this case does not concern statutory instruments within the meaning generally accepted in public law, because of the spirit reflected by the Agreement and the ensuing legislation.

Native rights have been given constitutional recognition. Section 35(1) of the Constitution Act, 1982 stipulates:

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

And as though to remove all ambiguity as to whether or not the James Bay Agreement was a treaty, the proclamation of 1983 amending the Constitution (O.G. part. III, August 10, 1984, p.1581) added a third paragraph to s.35:

> (3) For greater certainty, in subsection (1) treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

Similarly, s-s.1 of s.52 of the Constitution Act, 1982 states:

> The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Since patriation of the Constitution had raised e bad feelings among the Natives because they were not consulted, s.35.1 was added by the proclamation of 1983. This section provided for an agreement to invite the Native peoples of Canada to be present when amendments were to be made to s.91(24) of the Constitution Act, 1867 giving the federal Parliament jurisdiction over the Indians and lands set aside for Indians, as well as to ss.35 and 35.1 of the Constitution Act, 1982.

Therefore, the Crees' rights conferred and recognized by the James Bay Agreement, as regards Category IA lands, have been made constitutional. These rights were given legislative approval by the Cree-Naskapi (of Quebec) Act as promised in the Agreement. That being the case, it seems that the federal Parliament cannot adopt laws encroaching upon the rights conferred upon the Crees and the Naskapis under the Cree Naskapi (of Quebec) Act, without violating the Constitution. Such laws would be inoperative as they would be inconsistent with the rights guaranteed the Natives by s.35(3) of the Constitution Act, 1982 (s.52). Any change to the Natives' existing rights would be legal only if brought about by a constitutional amendment.

Consequently, subordination, which is one of the essential characteristics of regulatory power in our juridical system, does not apply to the case at bar. Band councils' regulatory power is not subjected to the will of the federal Parliament, because this power is included in the rights guaranteed by the Constitution. In the Court's opinion the right of a local administration to make by-laws is part of those guaranteed rights. The federal Parliament could not adopt a law taking away from the band councils the power to regulate curfews, for instance. This Situation is unique in Canada. The constitutional amendment proclaims the permanence and stability of the James Bay Cree population and, therefore, undoubtedly confers upon it a particular status. Since the Constitution prevents Parliament from adopting laws encroaching upon the guaranteed rights regarding Category IA lands, it would be rather strange were this same Parliament to retain the right to delegate to Cree bands the power to make discriminatory by-laws. It would be illogical and inconsistent to transfer a power irrevocably, subject only to a constitutional amendment, and retain a right to supervise the manner in which this power is exercised.

Respect for those fundamental freedoms which mainly motivated the principle of non-discrimination in matters of regulatory power, except when expressly stipulated in the enabling law, is safeguarded by s.15 of the Charter of Human Rights and Freedoms.

The Court concludes that the principle of non-discrimination in the exercise of regulatory power does not apply to this case. The above-mentioned texts must be interpreted, by

necessary implication, as conferring the Cree bands full power to legislate within specified fields, according to community needs identified by themselves.

In this perspective, the Court agrees with the proposition that the Crees hold some sort of residual sovereignty as regards their local governments.

Therefore, the Court: Declares the Eastmain Band Curfew By-Law legal, and dismissed the preliminary motion submitted by the accused.