SERO v. GAULT

(1921), 50 O.L.R. 27 (also reported: 20 O.W.N. 16, 64 D.L.R. 327)

Ontario Supreme Court, Riddell J., 20 March 1921

Fisheries--Fishing by Seine without License--Seizure of Seine by Fishery Officers--Authority of Regulations Made under Dominion and Provincial Statues--Dominion Fisheries Act, 1914, 4 & 5 Geo. V. ch. 8, secs. 5, 45, 80--Ontario Game and Fisheries Act, R.S.O. 1914, ch. 262, secs. 24, 61 (5)--Action against Officers for Value of Seine--Notice of Action--Public Authorities Protection Act, R.S.O. 1914, ch. 89--Validity of Fisheries Legislation and Regulations thereunder--Powers of Dominion and Province-- Adoption by Dominion of Language of Provincial Legislation-- Appointment of Provincial Officers to Act under Dominion Statute -- Abdication of Legislative Power--Duty of Officers to Seize Seine--Power to Legislate in Respect of Indians--Application of Legislation to Indians Living on Reserve-- Royal Grant to Indians --"Customs and Usages."

In an action by an Indian, living on an Indian Reserve, against a fishery inspector and a game and fishery overseer, in trover, to recover the value of a seine fishing net, the property of the plaintiff, seized by the defendants upon the Reserve, the defendants justified the seizure under the Dominion Fisheries Act, 1914, 4 & 5 Geo. V. ch. 8, and the Ontario Game and Fisheries Act, R.S.O. 1914, ch. 262, no license to fish having been taken out by the plaintiff or those who used the seine for fishing:--

Held, that no notice of action was necessary: Public Authorities Protection Act, R.S.O. 1914, ch. 89.

Venning v. Steadman (1884), 9 Can. S.C.R. 206, distinguished.

2. A regulation made by order in council (Dominion) of the 29th October, 1915, pursuant to the power given by sec. 45 of the Dominion Fisheries Act, and adopted from a provincial regulation, to the effect that no one shall fish by means other than by angling and trolling except under license from a duly authorized officer of the Provincial Government, was not open to objection on the principle the Parliament has no power to divest the Dominion in favour of the Province of a legislative power conferred on it by the British North America Act (*St. Catherines Milling and Lumber Co. v. The Queen* (1887),13 Can. S.C.R. 577, 637).

3. As the powers of the Dominion and Province covered the whole field of legislation, there was, *quâcunque viâ*, valid legislation for- bidding such fishing as was done by the plaintiff and the fishermen on the Reserve without a license; and the fishing was unlawful.

4. Section 6 (5) of the Ontario Game and Fisheries Act makes it the duty of every overseer to seize all nets used contrary to the regulations; and sec. 80 of the Dominion Act makes a similar provision; by sec. 5 of the Dominion Act the Governor in Council is empowered to appoint fishery officers, and by the order in council above mentioned the Provincial officers are in substance made Dominion officers; and so the defendants in making the seizure were acting with- in the scope of their duty.

5. The Dominion and the Province have the power to pass such legislation as that referred to in respect of Indians, and Indians are not exempt from its operation.

6. The land of the band of Indians occupying the Reserve was the property of the King, and the only rights they have in the land came through royal grant--the "Simcoe deed" of 1793, a grant of land "to be held and enjoyed by them in the most free and ample manner and according to the several customs and usages," with a proviso against alienation. "Customs and usages" are words of tenure, and not indicative of the manner in which the Indians are to use the land. Moreover, there was no evidence that fishing with a seine was one of the customs of the Indians in 1793. There is nothing in the grant suggesting exclusion from the ordinary laws of the land, and the Indians are subject to those laws.

The action was, therefore, dismissed.

ACTION in trover for the value of a seine fishing net seized and taken away by the defendants.

The action was tried by RIDDELL, J., without a jury, at Belleville and Ottawa.

E. G. Porter, K.C., for the plaintiff.

William Carnew and *Malcolm Wright*, for the defendants.

Edward Bayly, K.C., for the Attorney-General for Ontario.

A. G. Chisholm, amicus curiæ.

March 20. RIDDELL, J.:--The plaintiff is a widow, a member of the Tyendinaga Band of Mohawks, residing on the Indian Reservation in the township of Tyendinaga, in the county of Hastings. She was the owner of a seine fishing net, partly made by her on the Reserve and partly purchased by her, nearly 400 feet in length (about 23 rods is given as the length), and with a mesh of about 3

inches. This was operated by a number of Indians of the same band, on shares, catching fish in the Bay of Quinté, opposite the Indian Reserve. The fishing was done to a certain extent for food for the operators, but also for commercial purposes--for sale of the fish to all who came desirous of buying.

The manner of fishing is well-known--a long rope attached to one end of the seine is wound round a "spool" on the shore; the net itself is loaded on a boat which is rowed out on the water, the rope being unwound from the spool correspondingly; beginning at a convenient distance, generally when the rope is wholly unwound, the seine is wholly paid-out as the boat proceeds; then the boat comes around to a convenient distance from the shore, and a rope at the other end of the seine is paid out, and the end brought to the shore to a spool, at a distance from the other approximately equal to the length of the seine. Then the ropes are both wound in simultaneously, with the effect that the fish captured by the net are brought to shore.

No license had been taken out by the plaintiff or the actual fishermen.

Thomas Gault, one of the defendants, is a fishery inspector; the other, John Fleming, is a game and fishery overseer--they went upon the Indian Reserve, where the seine was lying, seized it, and took it away.

This action is in reality in "trover" for the value of the seine seized and taken away.

The defence of want of notice is set up: while it is true that under *Venning v. Steadman* (1884), 9 Can. S.C.R. 206, a fishery inspector is an officer within the protection of the former statute in that behalf, the law was altered in 1911 by the Public Authorities Protection Act, 1 Geo. V. ch. 22--now R.S.O. 1914, ch. 89--so that no notice of action is now necessary.

The substantial defence is that the defendants had a right to act as they did by virtue of statutes of the Dominion and of the Province--and it is necessary to examine this legislation somewhat minutely.

The Dominion Fisheries Act. 1914, 4 & 5 Geo. V. ch. 8, by sec. (*c*), (*e*), (*f*), gives the Governor in Council power to "make regulations . . . . to regulate and prevent fishing . . . . to forbid fishing except under authority of leases or licenses . . . . prescribing the time when and the manner in which fish may be fished for and caught. . ."

Under and in virtue of that Act, an order in council was passed on the 29th October, 1915--Statutes of Canada, 1916, pp. cxc. sqq.--making the Dominion fishery regulations for the Province of Ontario. These regulations were in the same language as the regulations adopted by the Province of Ontario. Amongst these regulations was: "Section 4 . . . No one shall fish by means other than by angling or trolling excepting under lease, license, or permit from a duly authorized officer of the Provincial Government." It is contended that this regulation, adopted from those of the Province, is open to objection on the principle of law laid down by Strong, J. (afterwards Sir Henry Strong, C.J.), in the Supreme Court of Canada, in *St. Catharines Milling and Lumber Co. v. The Queen* (1887), 13 Can. S.C.R. 577, at p. 637: "That Parliament has no power to divest the Dominion in favour of the Province of a legislative power conferred on it by the British North America Act is, I think, clear." I cannot agree with that contention: Parliament gave certain powers to the Governor in Council; the Governor in Council exercised these powers; and that the Governor in Council was satisfied with regulations drawn up by another authority, and enacted the regulations in the same language, is no more an abdication of authority than if the Governor in Council had adopted the language of a scientist or a text-writer. Assuming that the law is correctly laid down by Mr. Justice Strong, it is not applicable here.

The Ontario legislation is the Ontario Game and Fisheries Act, R.S.O. 1914. ch. 262--taken from 3 & 4 Geo. V. ch. 69 Ont.)--this by sec. 24 gives to the Lieutenant-Governor in Council the power (sub-sec. 1 (*a*) to make regulations "prohibiting fishing except under the authority of a license issued on the terms and conditions prescribed by the regulations." The Lieutenant-Governor in Council made regulations, the wording of which was followed in the Dominion regulations: Statutes of Canada 1916, pp. cxc. sqq.

It was not argued, and it is too late a day to argue, that the Dominion Parliament and the Ontario Legislature had not the power to empower the Governor-General in Council and the Lieutenant-Governor in Council to make regulations having the force of law in respect of a class of subjects within the ambit of the respective powers of the Dominion and Province.

Consequently, as the powers of the Dominion and Province cover the whole field of legislation, there is, *quâcunque viâ*, valid legislation forbidding such fishing as is in question in this case without a license, etc.--there is no pretence that there was license, permit, or other authorization; accordingly, unless other considerations prevail, the fishing in question was unlawful.

The Ontario Game and Fisheries Act, R.S.O. 1914, ch. 262, sec. 61 (5), makes it the duty of every overseer forth- with to seize, *inter alia*, all nets used contrary to the regulations; the Dominion Act, sec. 80, provides, *inter alia*, that all nets used in violation of any regulation made under the Act shall be confiscated to His Majesty and may be seized and confiscated, on view, by any fishery officer. By sec. 5 the Governor in Council is empowered to appoint fishery officers, and by the order in council already mentioned the Governor in Council in substance made every officer having authority from the Department of Game and Fisheries of the Province of Ontario a fishery officer under the Dominion Act (p. cxc.)

If then (1) there is power in either Dominion or Province or in both together to pass such legislation in respect of these Indians, and if (2) the legislation, etc., would, being valid, apply to Indians, the defendants should succeed; but, if either hypothesis fail, the plaintiff succeeds.

It is well-known that claims have been made from the time of Joseph Brant that the Indians were not in reality subjects of the King but an independent people--allies of His Majesty--and in a measure at least exempt from the civil laws governing the true subject. "Treaties" have been made wherein they are called "faithful allies" and the like and there is extant an (unofficial) opinion of Mr. (afterwards Chief) Justice Powell that the Indians, so long as they are within their villages, are not subject to the ordinary laws of the Province.

As to the so-called treaties, John Beverley Robinson, Attorney-General for Upper Canada (afterwards Sir John Beverley Robinson, C.J.), in an official letter to Robert Wilmot Horton, Under Secretary of State for War and Colonies, March 14, 1824, said:--

"To talk of treaties with the Mohawk Indians, residing in the heart of one of the most populous districts of Upper Canada, upon lands purchased for them and given to them by the British Government, is much the same, in my humble opinion, as to talk of making a treaty of alliance with the Jews in Duke Street or with the French emigrants who have settled in England:" Canadian Archives, Q. 337, pt. II., pp. 367, 368.

I cannot express my own opinion more clearly or convincingly. The unofficial view expressed by Mr. Justice Powell at one time, he did not continue to hold.

The question of the liability of Indians to the general law of the land came up in 1822. Shawanakiskie, of the Ottawa Tribe, was convicted at Sandwich of the murder of an Indian woman in the streets of Amherstburg, and sentenced to death. Mr. Justice Campbell respited the sentence, as it was contended that Indians in matters between themselves were not subject to white man's law, but were by treaty entitled to be governed by their own customs--Canadian Archives, Sundries, U.C., September, 1822. It was said that Chief Justice Powell had in the previous year charged the grand jury at Sandwich that the Indians amongst them- selves were governed wholly by their own customs. Powell, when applied to by the Lieutenant-Governor, denied this, and sent a copy of his charge, which was quite to the contrary--ib., October, 1822: and all the Judges, Powell, C.J., Campbell and Boulton. JJ., disclaimed knowledge of any such treaty, and concurred in the opinion that an Indian was subject to the general law of the Province. The Indian was, however, respited that the matter might be referred to England: ib., October, 1822. It was referred to the Law Officers of the Crown, who reported in favour of the validity of the conviction: the Lieutenant-Governor, Sir Peregrine Maitland, was instructed that there was no basis for the Indian's claim to be treated according to his customary law, that the offence was very heinous, the prisoner bore the reputation of great ferocity, and there appeared to be no ground for clemency--but, as Maitland might be in possession of further facts, he was given discretionary power to mitigate the punishment--the warrant sent distinctly recognized the legality of the conviction and authorized the execution of the sentence, but left the discretion with the Lieutenant-Governor: Canadian Archives, Q. 342, pp. 40, 41, 1826.

The law since 1826 has never been doubtful. I may say that I have myself presided over the trial of an Indian of the Grand River when he was convicted of manslaughter, and sentenced. I can find no justification for the supposition that any Indians in the Province are exempt from the general law--or ever were.

But, whatever may have been the status of the original Indian population, the law as laid down by Blackstone in his Commentaries, bk. 1, p. 366, has never been doubted: "Natural-born subjects (as distinguished from aliens) are such as are born within the dominions of the Crown of England ... and aliens, such as are born out of it." He adds (p. 369): "Natural allegiance is therefore a debt of gratitude, which cannot be forfeited, cancelled or altered by any change of time, place, or circumstance, nor by any- thing but the united concurrence of the legislature:" *Eyre v. Countess of Shaftsbury* (1722), 2 P. Wms. 102, at p. 124.

Halsbury's Laws of England, vol. 1, pp. 302, 303, says: "Persons born within the allegiance of the

Crown include every one who is born within the dominions of the Crown whatever may be the nationality of either or both of his parents," with certain well-defined exceptions not of importance here. See the Imperial Acts (1914) 4 & 5 Geo. V. ch. 17 and (1918) 8 & 9 Geo. V. ch. 38; and our Dominion Act (1919) 9 & 10 Geo. V. ch. 38, sec. 1.

Admittedly all parties to this action were born within the allegiance of the Crown; and indeed if they were not, they could claim no higher rights than those who were: Blackstone, Comm., bk. 1, pp. 369, 370; Halsbury's Laws of England, vol. 1, p. 306.

There is no overriding and prohibitive Imperial legislation in the way, and I must hold that the Dominion and the Province have the power to pass such legislation as is here concerned in respect of Indians.

I think, too, that the legislation does apply to Indians i.e., that Indians are not exempt from its operation.

The legislation is general, and there is nothing to indicate any exception in their favour.

The land of this band was beyond question the property of the King; the only rights the Indians have in the land came through royal grant, i.e., the "Simcoe deed" of April 1, 1793--a grant of "special grace. . . . and mere motion" of certain land "purchased . . . of the Messissague Nation . . . bounded in front by the Bay of Quinté . . . to be held and enjoyed by them in the most free and ample manner and according to the several customs and usages . . ." with a proviso against alienation, etc. It is plain, I think, that these words "customs and usages" are words of tenure, setting out the estate of the grantees in the land, and not indicative of the manner in which they are to use the land. See *Battishill v. Reed* (1856), 18 C.B. 696; *Onley v. Gardiner* (1838), 4 M. & W. 496. For example, suppose that the custom of the Indians was to grow corn and not wheat, could it be contended that growing wheat would be beyond their rights under the grant--if to make maple syrup from the sap of the maple, would they be wrong to chop down the trees and form arable land? Or, if they were wont to break up land with mattocks or hoes, were they precluded from using ploughs?

Moreover, there is no evidence that fishing with a seine was one of the customs of the Indians in 1793.

There is nothing in the grant suggesting exclusion from the ordinary laws of the land--and I must hold that the Indians are subject to these laws.

The many other difficulties in the way of the plaintiff I do not think it necessary to discuss.

I think that the action must be dismissed with costs if asked.

I had hoped to find much in the Canadian Archives helpful in this inquiry, but have not been able to apply to this decision a great deal of the interesting information stored at Ottawa.

Mr. A. G. Chisholm, counsel for the Six Nations, whom I heard as amicus curiæ, made a very able and interesting argument, chiefly on historical grounds; but, for the reasons stated, I am unable to accede to it.

Of course, I deal only with the law as I find it, and express no opinion as to the generosity, wisdom, or advisability of the legislation.