

R. v. GOOGOO

Nova Scotia Provincial Court, O'Connell P.C.J., February 4, 1987

Wayne J. MacMillan, for the Crown
Bruce H. Wildsmith, for the defendant

The accused, a registered Indian, was charged under s.6(5)(b) of the Nova Scotia Fishery Regulations, C.R.C. 1978, c.848 made pursuant to s.34 of the Fisheries Act, R.S.C. 1970, c.F-14 with being in possession of a net without lawful excuse. At the time of the alleged offence the accused was fishing for food for himself and other members of the reserve. The accused did not have a licence to fish, The issue before the court was whether the accused was entitled to invoke as a defense his aboriginal and treaty rights to fish, constitutionally guaranteed by s.35(1) of the Constitution Act, 1982.

Held: Accused guilty as charged.

- 1. The accused had no right to have any net in his possession without a licence on April 17, 1982, when s.35(1) was proclaimed in force, because his right to have a net in his possession had been extinguished before that date. Section 35(1) does not have the effect of reviving treaty rights that have been extinguished.
- 2. Even assuming there was an aboriginal right to have a net in one's possession, it was not a defense to a statutory prohibition in the Fisheries Act and the regulations made thereunder.

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O'CONNELL P.C.J.: John A. Googoo is a member of the Whycocomagh Indian Band and a registered Indian under the Indian Act R.S.C. 1970, c.I-6. He was charged under s.6(5)(b) of the Nova Scotia Fishery Regulations, C.R.C. 1978, c.848 with being in possession of a net without lawful excuse. The charge reads:

...at or near Whycocomagh in the County of Inverness, Nova Scotia, on or about the 21st day of October 1986, did have in his possession a net without lawful excuse, contrary to Section 6(5)(b) of the Nova Scotia Fishery Regulations, C.R.C., 1978, c. 848, as amended, made pursuant to Section 34 of the Fisheries Act, R.S., c. 119 [now R.S.C. 1970, F-14], as amended, and did thereby commit an offence under Section 61(1) of the said Fisheries Act, as amended.

Prior to April 17, 1982, fishing in Whycocomagh Bay and other "Canadian fisheries waters", as defined in the Fisheries Act, R.S.C. 1970, c.F-14 was exclusively regulated by the federal government pursuant to the Fisheries Act and the regulations made thereunder. The purposes of this Act are to provide for the proper management and control of the seacoast and inland fisheries of Canada together with the conservation and protection of fish. Section 34 of the Fisheries Act which empowers the Governor in Council to make regulations for carrying out the purposes and provisions of the Fisheries Act reads in part:

- 34. (a) for the proper maintenance and control of the seacoast and inland fisheries;
- (b) respecting the conservation and protection of fish;
- (c) respecting the catching, loading, handling, transporting, possession and disposal of fish;
- (d) ...
- (e) respecting the use of fishing gear and equipment;
- (f) respecting the issue, suspension and cancellation of licences and leases;
- (g) respecting the terms and conditions under which a licence or lease may be issued;
- (h) ...

Section 6(5)(b) of the Nova Scotia Fishery Regulations reads:

6.(5)(b) No person shall have in his possession any net or seine without lawful excuse.

The following statement of facts were agreed by prosecution and defense counsel at trial:

- 1. John A. Googoo is a full-blooded, adult Micmac Indian registered under the Indian Act, R.S.C. 1970, Chapter 2-6, as member number 200 of the Whycocomagh Indian Band.

2. John A. Googoo resides on the Whycocomagh Indian Reserve, (Reserve No. 2 in the Province of Nova Scotia), near Whycocomagh, in the County of Inverness and Province of Nova Scotia.

3. On or about the 21st day of October, 1986, John A. Googoo was observed by Fisheries Officers coming ashore by row boat at the Whycocomagh Indian Reserve, aforesaid. At that time two (2) nets were observed in the boat as he came ashore. On request the individual identified himself as John A. Googoo. John A. Googoo stated that he owned The nets were seized.

4. John A. Googoo is 26 years old (born August 9, 1961) and resides on the Whycocomagh Reserve. He is not married and has some employment as a silviculture worker. On October 21, 1986 he was fishing to obtain food for himself and other members of the Whycocomagh Reserve to whom he gives fish. Mr. Googoo like many members of the Whycocomagh Band has hunted and fished all his life to assist in providing food for himself, his family and the Reserve community. He was taught to fish by his father, and his father by his father. This has regularly included fishing in Whycocomagh Bay for trout, smelt, cod, salmon and eels for subsistence purposes.

5. On October 21, 1986, John A. Googoo did not hold a fisher man's registration card and was not licensed to fish.

The prosecution argued that the accused was not a treaty Indian and could not invoke the provisions of ancient treaties in his defense.

The prosecution further argued that when the Treaty of 1752 was made between Britain and the Micmac Indians, which gave the Micmacs the right to hunt and fish as usual in return for good behaviour, it did not extend to Micmac Indians on Cape Breton Island because Cape Breton Island, at that time, was under French domination.

The Supreme Court of Canada in R. v. Simon, [1986] 1 C.N.L.R. 153, 62 N.R. 366, 24 D.L.R. (4th) 390, recognized the difficulty Indians have of proving descendancy, because of the Indian tradition of not committing things to writing. The accused is a full-blooded registered member of the Cape Breton Micmac Whycocomagh Band, living in the same area as the original Micmac tribe, which enjoyed the benefits of treaties recognizing and confirming their existing hunting and fishing rights.

There is sufficient evidence to prove that the accused is a Whycocomagh Micmac Indian and a descendant of a member of the original Micmac Indian Band at Whycocomagh, covered by the relevant treaties.

As noted, the prosecution contended that the Treaty of 1752, signed at Halifax, under the Great Seal of Nova Scotia, by the Governor and Great Chief Jean Baptiste Cope and other delegates of the Micmac nation, did not apply to Micmac residents of Cape Breton Island because at the time Cape Breton was a colony of France.

The French were driven out of Canada in 1759 and by 1763 the struggle between France and Great Britain for control of Canada was over. By the Treaty of Paris in 1763, France ceded all its remaining territory in Canada to the British Crown.

Documents Number 48 and Number 58 in the Simon case, materials from the Public Archives of Nova Scotia and the Royal Proclamation of 1763 demonstrate that the hunting and fishing rights given the Micmacs of Nova Scotia by the Treaty of 1752 included Micmacs residing on Cape Breton Island.

The Proclamation of 1763 has been described as the Imperial Constitution of Canada during the period 1763-1774. It has the force of a statute and so far therein as the rights of Indians are concerned, it has never been repealed. Chief Justice MacKeigan in R. v. Isaac (1975), 9 A.P.R. 460, 13 N.S.R.(2d) 460, stated that the Royal Proclamation included Micmac Indians on Cape Breton Island.

In determining whether the above documents, incorporating agreements between the Crown and the Nova Scotia Micmacs, are treaties, consideration must be given to the nature of the documents and not exclusively on the nomenclature expressed in the documents themselves. Those

documents must be given a fair, large and liberal construction in favour of Indians. In other words, they must be construed in a sense in which they would be understood by Indians.

The documents were executed because the British wanted to ensure peace and good order be maintained on Cape Breton Island and in consideration of this undertaking by the Micmacs, agreed to recognize and confirm their existing hunting and fishing rights. These documents created mutually binding obligations.

These treaty-like documents have the effect of extending to the Micmacs on Cape Breton Island, the same rights and benefits enjoyed by the Micmac Indians residing on the mainland of Nova Scotia, by the Treaty of 1763.

The main issue before this court, is whether the accused is entitled to invoke, as a defense to the charge of possessing a net without lawful excuse, his aboriginal and treaty rights to fish, constitutionally guaranteed on April 17, 1982 by s.35(1) of the Constitution Act, 1982.

Parliament has the constitutional authority and responsibility under Head 12 of s.91 of the Constitution Act, 1867, to make laws in relation to seacoast and inland fisheries. Indians share with other Canadians the need for reasonable regulations to ensure proper management and conservation of this resource. The regulations made pursuant to the Fisheries Act place limits on the rights of all persons including Indians.

Parliament has the constitutional authority and responsibility under Head 24 of s.91 of the Constitution Act, 1867 to make laws in relation to Indians and lands reserved to Indians.

On April 17, 1982, the Constitution Act, 1982 was proclaimed.

Section 35(1) of the Act reads:

35.(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed. (Emphasis added)

It must be emphasized that s.35(1) of the Constitution Act, 1982 does not purport to revoke the power of Parliament to act under Head 12 or Head 24. The power to regulate fisheries, including Indian access to the fisheries continues, subject only to the new constitutional guarantee that aboriginal and treaty rights existing on April 17, 1982 may not be taken away. Existing means unextinguished.

The recent decision of R. v. Simon confirmed the settled law that where provincial laws conflict with treaty provisions, the terms of the treaty prevail. This result has been reached with the assistance of the clause in s.88 of the Indian Act, R.S.C. 1970, c.1-6 which provides that provincial laws of general application apply to Indians "subject to the terms of any treaty". The clause has been applied, as an exercise of federal legislative authority in relation to Indians to prevent provincial legislation from interfering with a treaty guarantee of hunting rights. Section 35(1) of the Constitution Act, 1982 adds nothing as far as the protection of treaty rights against provincial law is concerned.

In the case of conflict between federal legislation and an Indian treaty, the position under existing law is quite different. The Supreme Court of Canada has considered several situations involving a federal enactment in conflict with Indian treaty guarantees, and in each case the provisions override the treaty right. See R. v. Sikyea (1964), 43 D.L.R.(2d) 150; R. v. George [1966] S.C.R. 267. Under existing law therefore, federal enactments have paramount effect over treaty rights and the latter must yield to the extent of any conflict.

Prior to April 17, 1982 Indians were subject to Nova Scotia Fishery Regulations made pursuant to the Fisheries Act. The regulations, as noted above, provided for the proper management, conservation and control of the inland fisheries of Canada. The purpose of the regulations were the regulation of the inland fishery and not the suppression of Indians.

When the Constitution Act, 1982, was proclaimed, s.6(4)(b) of the Nova Scotia Fishery Regulations, C.R.C., 1978, c. 848, prohibited all persons from having a fishing net or seine in their possession unless they held a license. The regulation found in s.6(4)(b), above was amended in 1983 by s.6(5)(b) by P.C. 1983-2799 to read, "that no person shall have in his possession any net or seine without lawful excuse". The said amendment did not purport to make any significant alteration or extinguishment in treaty rights of Indians to have in their possession any net.

The accused had no right to have any net in his possession without a license on April 17, 1982 when s.35(1) of the Constitution Act, 1982 was proclaimed because his unbridled right to have a net in his possession had been extinguished before that date. Whatever treaty rights the accused's ancestors may have enjoyed in relation to fishing nets had become lost by operation of law well before this charge was laid. Section 35(1) does not have the effect of reviving treaty rights that had been extinguished.

The accused is charged with a post-1982 regulation which is basically the same as a pre-1982 regulation. It is only the scope of the regulation that is changed. The regulation enacted in 1983 (P.C. 1983-2799) did not suppress any treaty rights enjoyed by the accused on April 17, 1982.

In his argument, Mr. Wildsmith raised the aboriginal right of the accused to have a net in his possession. A review of the authorities is not helpful in determining what the phrase "aboriginal rights", in s.35 means. No evidence was led by the defense to establish that there is an aboriginal right to have a net in one's possession, subject to reasonable regulation to ensure proper management and conservation of the fishing resource.

Even assuming there is an aboriginal right to have a net in one's possession, it is not a defense to statutory prohibition found in the Fisheries Act and the regulations made thereunder. In R. v. Derriksan (1976), 31 C.C.C.(2d) 575, a charge had been laid under federal fishing legislation. In brief remarks, the Supreme Court of Canada rejected a defense based on aboriginal fishing rights arising out of Indian occupation, holding that such a right would be anyway overridden by federal legislation.

It is clear that Indians having nets in their possession, even in exercise of an aboriginal right to have nets in their possession, is in the same category as treaty rights and subject to any controls imposed by the Fisheries Act and the regulations made thereunder.

As the accused cannot invoke the provisions of s.35(1) of the Constitution Act, 1982 as a defense, I find him guilty as charged.

As the accused may have misinterpreted the decision in Simon, I am fining him \$100.00, in default 10 days, to be paid on or before June 1, 1957.