

R. V. JANVIER AND CARDINAL

Alberta Provincial Court, Aime J., January 18, 1988

Margaret Unsworth, for the Crown
Leonard (Tony) Mandamin, for the accused

Cardinal and Janvier were charged with fishing with a gill net during the closed season contrary to s.34(1) of the Alberta Fishery Regulations. They were fishing in an area traditionally used by the local Indian and Metis people. Cardinal had applied to regain Indian status under Bill C-31. The defendants claimed exemption from the Alberta Fishery Regulations by reason of their constitutionally protected aboriginal and treaty rights.

Held: Accuseds found guilty.

1. The provisions of Treaty No. 8 extinguish pre-existing aboriginal rights to fish.
2. The Constitution Act, 1982, s.35, protects Indian rights as they existed on 17 April 1982. The Indian right to fish at that time was a regulated right. Therefore, the Indian treaty right to fish is subject to federal regulation.
3. The federal authorities have the power to regulate fishing for the purposes of conservation. The Indian right cannot be restricted to support recreational or commercial fishing. The federal authorities have asserted that the impugned regulatory scheme is a conservation measure. It is reasonable for the court to accept that assertion.
4. The accused Cardinal, not yet being a registered Indian, cannot claim Treaty No. 8 rights and privileges.
5. Aime J. added in a note that the Alberta Fishery Regulations of 1987, allow greater latitude in issuing Indian and Metis domestic fishing licences. The treaty right can be prohibited only if necessary for conservation and the interests of all people.

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AIME J.:

The Issue

Can an Indian as defined under the Indian Act, R.S.C. 1970, c.I-6 fish in a stream or river on unoccupied crown land with a gill net notwithstanding the Alberta Fishery Regulations, C.R.C. 1978, c.838 or does the prohibition from fishing during a closed season apply regardless of Treaty No. 8 and the Natural Resources Transfer Agreement with the province of Alberta.

The Facts

Cardinal and Janvier, residents of Janvier, Alberta had a five inch gill net set in Sawbones Creek on May 8 and 9, 1986. Sawbones Creek is a local name for a tributary of Christina and the Clearwater Rivers. The net did not completely block the creek but they did manage to catch a number of walleye. Janvier was employed by the Indian band at approximately a \$1000.00 per month and it is understood Cardinal was also employed and both had use of the band truck. The Game and Fisheries officers found and seized the fish nets in question. They had only vague information as to the manner of set, the size or the description of the creek. The two defendants were charged with unlawfully fishing with a gill net in a stream, contrary to 5.34(1) of the Alberta Fishery Regulations.

It can be accepted that traditionally Indian and Metis people of the Janvier area have fished in the lakes and streams in the vicinity with any instrument of their making including gill nets, snares, spears, log or Stone traps, etc. The gill net is used as being more practical.

Historically fish is one of the food supplies and fishing in a stream when fish are spawning was the most rewarding. I suspect native people are not different than anyone else, enjoy a feast of their traditional food when available, fresh fish being one, but not a necessity. The Alberta Fishery Regulations at the time:

34.(1) No person shall fish with a gill net in any stream or river.

(2) Subsection (1) does not apply to the holder of a valid domestic or Indian domestic licence when fishing waters designated in Schedule XIII.

(3) Any person using a gill net pursuant to subsection (2) shall not

(a) use a net in any waters specified in Schedule XIII between April 1st and May 15th in each calendar year....

The two defendants Janvier and Cardinal clearly were fishing contrary to the Alberta Fishery Regulations, a federal statute.; They had no Indian domestic licence nor could they have been issued one for Sawbones Creek as it is not in Schedule XIII, and in addition, were fishing during a closed season. Defense counsel submitted four reasons why the defendants being of Indian status are exempt under the Alberta Fishery Regulations. These issues are as follows:

1. Was there an Indian aboriginal or treaty right to fish?

2. Is that Indian aboriginal or treaty right to fish still in existence notwithstanding the provisions of the Alberta Fishery Regulations 1978?

3. Can the accused Walter Janvier and John Cardinal claim the benefit of the Indian aboriginal treaty right to fish?

4. Is the aboriginal or the treaty right recognized and affirmed by s.35(1) of the Constitution Act, 1982?

The defence were relying on the provisions of Treaty No. 8 of which Indian people of Janvier have accepted, the aboriginal rights of native peoples, and the Natural Resources Transfer Agreement of the province of Alberta.

First I would like to deal with Treaty No. 8 with the relative paragraph,

... and her Majesty the Queen hereby agrees with the said Indians that they shall have right to pursue their usual vocation of hunting, trapping and fishing, throughout the tract surrendered as therefore described, subject to such regulations as may from time to time be made by the government of the country, acting on the authority of Her Majesty.

Defence counsel pointed out that the treaty commissioners in their report had solemnly assured them (Indians) the treaty right to hunt and fish would be subject to government regulation only to the extent that the regulations were in the interest of the Indians and for conservation purposes. I would accept that the commissioners have attempted to clarify the objection of the wording in Treaty No. 8 and so should become part of the treaty commitment. Defence counsel further submits that s.25(1) of the Constitution Act 1982 guarantees that aboriginal and treaty rights and freedoms are not to be abrogated or derogated by rights and freedoms guaranteed in the Charter. To support his position he has made reference to Sparrow v. R., [1987] 2 W.W.R. 557, [1987] 1 C.N.L.R. 145 (B.C.C.A.) and R. v. Steinhauer, [1985] 3 C.N.L.R. 187 (Alta.Q.B.).

R. v. Steinhauer was a case at Lac La Biche where an Indian was convicted of fishing with a gill net without a licence contrary to 5.33(1) of the Alberta Fishery Regulations. The Indian submitted that the license requirement violated his right to fish under the Royal Proclamation of 1763 and Treaty No. 6, that he was entitled by custom and tradition to fish without a license, and that s.25 of the Canadian Charter of Rights and Freedoms and s.35 of the Constitution Act, 1982 preserved his right to fish without a licence, his appeal against conviction was dismissed. It was held that the right of the Government of Canada to restrict the fishing rights of Treaty No. 6 Indians by regulation as clear and impugned legislation appears to do no more than what the federal government is entitled to do.

Secondly, dealing with the B.C. case of Sparrow v. R., 1986, the particulars were as follows: The accused, a member of the Musqueam Band, was charged under s.61(1) of the Fisheries Act, R.S.C. 1970, c.F-14 with fishing with a drift net that was longer than permitted by the band's Indian Food Fishing Licence. The accused admitted the charge and contended that, because he had aboriginal right to fish, the net length restriction was inconsistent with s.35(1) of the Constitution Act 1982, which recognized and affirms existing aboriginal rights. The purpose was to reduce the amount of catch that the Indian people were harvesting as it was excessive to their

needs and the fear of depleting stock. The appeal was granted on the basis that the trial judge erred in the reasons for conviction. In this case the Appeal Court of British Columbia took exception to the trial judge's finding that there was no aboriginal right and that in any event the federal power to regulate in the field of fisheries continued to be unfettered. They did however make the following comments [p.177 C. N.L.R.]

Parliament has the constitutional authority and responsibility under Head 12 of s.91 of the Constitution Act, 1867, to make laws in relation to sea coast and inland fisheries. Indians share with other Canadians the need for reasonable regulations to ensure the 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.

The point of this whole case deals with the relationship between the Fishery Regulations and the aboriginal rights of Indians. It is quite clear from these two cases that Indian people are bound by the Fishery Regulations. Steinhauer has several Indian domestic fishing licences but not for the lake in which he was fishing with a gill net. His appeal from conviction was dismissed. Sparrow v. R. was a question of the fisheries administration restricting the length of nets being used by Indian people on the Fraser River. These two decisions support the application of law that Indian people are subject to the federal Fishery Regulations. It is submitted by the Crown that there is no aboriginal right to fish in Alberta. Any such rights which may have existed were given up by the Indians in signing treaties and that Treaty No. 8 is clear. A great deal of evidence was lead by defense counsel as to the aboriginal rights of Indian people. Regina v. Steinhauer does not support this proposition. On this point I must agree Indian people are bound by their Treaty and that their aboriginal right has been extinguished. The federal authorities have the right to regulate fishing for the purposes of conservation. I must agree that s.35 of the Constitution Act, 1982 clearly refers to the protection of Indian rights as of April 17, 1982 which guarantees Indian rights as they existing at the time. Having found that Indian people of Janvier are bound by Treaty No. 8 and also that the Alberta Fishery Regulations apply to native people for the purposes of fish conservation.

I can now deal with the Fishery Regulations as they apply to Indian people, in this particular case. The real issue then is not whether the federal government can make regulations restricting fishing, but were the regulations necessary for conservation and long term interests of all people including Indians. Mr. Norris, Fisheries Manager, for the Northeast Region explained the reasons for closing fishing seasons during spawning, that is April 1 to May 15. The department policy is that their priorities are domestic followed by recreational, then commercial. I cannot see Indian people being restricted to support recreational or commercial fishing. The administration claims there must be management of the fisheries and that restricting netting of fish during the spawning run in creeks and rivers is a logical and acceptable control. They could not present any particular information regarding fish stocks in Sawbones Creek or Christina Lake. They have been accused of allowing over fishing commercially on Christina Lake in the past.

It seems reasonable to me the administration should not have to go any further than asserting conservation measures are necessary and that prohibiting netting of fish in small creeks during spawning season are justified.

John Cardinal is claiming the rights and benefits of a Treaty Indian and that he has applied for Indian status. Under the Indian Act the definition of an Indian is described:

"Indian" means a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian.

They can be registered as a band member, or on a general registry managed by the Department of Indian Affairs. The evidence does not support Cardinal in his claim to be a registered Indian even though he may at some future time be registered. I therefore find that he is not entitled to the rights and privileges under Treaty No. 8. Both defendants are found guilty of fishing with gill nets in Sawbones Creek during closed season in violation of the Alberta Fishery Regulations and are not exempted by Treaty No. 8 or aboriginal rights.

I'd like to observe that the new Alberta Fishery Regulations of 1987, gives the fishery officer (at the least it would appear) greater latitude in issuing Indian Domestic or Metis Domestic Licences. It cannot be misunderstood that native people do have the right under their treaty to fish for their own needs and can only be prohibited when it can be shown that it is necessary for conservation and the interests of all people.