R. v. SUTHERLAND AND NAPASH

Unreported at date of publication

Ontario Provincial Court, Cloutier P.C.J., April 18, 1984

R.N. Fournier, for the Crown
C.M. Beamish, for the accused

The accused charged with unlawful possession of migratory game birds during closed season contrary to s. 6 of the Migratory Birds Convention Act, R.S.C. 1970, c.M-12. The two accused, Treaty No. 9 status Indians, were hunting within the Treaty No. 9 area. They argued that their treaty right to hunt migratory birds is recognized and affirmed by s. 35(1) of the Constitution Act, 1982 and that to the extent that the Migratory Birds Convention Act is inconsistent with that right it is of no force and effect by virtue of s. 52(1) of the Constitution Act, 1982.

Held: (Cloutier P.C.J.)

1. Prior to the enactment of the Constitution Act, 1982, it was clear that federal legislation applied to Indians exercising their treaty rights to hunt.

2. At the time of the passing of the Canada Act, 1982, the Migratory Birds Convention Act had abrogated or restricted the treaty right to hunt in certain circumstances and that Act remains in force.

3. Section 35 of the Constitution Act, 1982 does not receive former treaty rights that have been restricted - it merely recognizes those rights that were unrestricted or in existence.

4. Guilty of the offences as charged.

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CLOUTIER P.C.J. (orally): These matters that were dealt with together were adjourned to this date for judgment. Written and oral submissions were made to the court by both counsel, for the Crown and the defendants. The court has considered all of these submissions and the relevant law applicable to the charges.

The charges before the court are that the accused…Marcel Sutherland…and Susan Napash…on or about the 28th day of April, 1983, at the Township of Pearce, in the District of Cochrane, that they did without lawful excuse have in their possession migratory game birds to wit: Canada geese and Mallard ducks during the time when the taking of such birds is prohibited, contrary to section 6 of the Migratory Birds Convention Act, the Revised Statutes of Canada, Chapter 179 [now R.S.C. 1970, c.M-12].

At the commencement of the trial it was agreed that each of the defendants is an Indian as defined in the Indian Act, R.S.C. 1970, c.I-6, and that each of them is a member of one of the bands which were signatories to Treaty No. 9, and as such is entitled to any defence which may arise out of Treaty No. 9. The defendants admitted that they possessed Canada geese, a migratory bird as defined in the Migratory Birds Convention Act, and it is admitted on behalf of the defendants that the season as defined in the regulations to the Migratory Birds Convention Act, R.S.C. 1970, c.M-12, and that the season for Canada geese was not open at the time.

The Indians of Treaty No. 9, have always relied o the treaty as a guarantee of their hunting, trapping and fishing rights within the area covered by the treaty. On the facts of the case there is no question that the accused persons were hunting within the Treaty No. 9 area, that they are Treaty No 9 Indians and are entitled to rely on any defence which Treaty No. 9 may offer them.

At page 20 of the Treaty booklet, Treaty No. 9 provides.

> And His Majesty the King hereby agrees with the said Indians that they shall have the right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time

> be made by the government of the country, acting under the authority of His Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.

Prior to the enactment of the Constitution Act, 1982, it was clear that the Indian treaty right to hunt did not prevent the application of ordinary federal legislation.

The courts were called upon to determine the issue whether provisions of federal legislation inconsistent with treaty rights were applicable to Indians exercising their treaty (or aboriginal) rights to hunt and fish for food. They answered in the affirmative: federal legislation was held to be paramount to Indians exercising these rights. With regards to the Migratory Birds Convention Act: R. v. Sikyea (1964), 43 D.L.R. (2d) 150 (N.W.T.C.A.), affirmed (1965), 50 D.L.R. (2d) 80 (S.C.C.); R. v. George (1966), 55 D.L.R. (2d) 386 (S.C.C.); R. v. Daniels (1969), 2 D.L.R. (3d) 1 (S.C.C.); and in regards to federal fisheries legislation: R. v. Derriksan (1977), 71 D.L.R. (3d) 159 (S.C.C.).

On April 17, 1982, the Constitution Act, 1982 was proclaimed. Section 35(1) of that Act:

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

Now it has been submitted by the defence as follows…that the defendants' treaty right to hunt migratory birds for food is an existing treaty right which is recognized and affirmed by section 35(1).

And that prior to the coming into force of the Constitution Act, 1982, the appellant's treaty right to hunt migratory birds for food continued to exist although it was unexercisable to the extent of the restrictions in the Migratory Birds Convention Act, R.S.C. 1970, c.M-12 and the regulations made thereunder.

On April 17, 1982, the appellant's treaty right to hunt migratory birds for food became constitutionally protected and, thereafter, is no longer subject to the inconsistent provisions of the Migratory Birds Convention Act or its regulations.

It was further submitted that section 35(1) of the Constitution Act, 1982 by recognizing and affirming treaty rights, constitutionally entrenches these rights.

Any law that is inconsistent with these rights is inconsistent with their recognition and affirmation. Accordingly, by virtue of section 52(1) such a law is of no force or effect to the extent of the inconsistent. Section 52(1) of the Constitution Act, 1982 reads:

> 52.(1) 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.

And again it is submitted in support for this interpretation on e should refer to the case of: The Queen v. Secretary of State for Foreign and Commonwealth Affairs, [1982] 2 All E.R. 118 [[1981] 4 C.N.L.R. 86] (C.A., Eng.) per Lord Denning, M.R. at page 129 [p.99 C.N.L.R.]:

> It seems to me that the Canada Bill itself does all that can be done to protect the rights and freedoms of the aboriginal peoples of Canada. It entrenches them as part of the Constitution, so that they cannot be diminished or reduced except by the prescribed procedure and by the prescribed majorities.

Again it is submitted that section 35(1) of the Canada Act 1982 provides as follows:

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

Subsection 2 of the Act brings the Indian people of Canada within the provisions of subsection 1. While the Canada Act does not create new rights for Indian people, it recognizes and affirms existing rights and removes any doubt there may have been regarding the validity of efficacy of those earlier agreements or treaties entered into with the native people of Canada.

It is also submitted that the provisions of the Migratory Birds Convention Act and its regulations should be interpreted as merely restricting the exercise of treaty hunting rights and not as extinguishing them.

The courts were not called upon to determine the narrow question of whether the effect of federal legislation was to merely restrict the exercise of the treaty right to hunt or to somehow extinguish the right itself. The language used…again it is submitted by the defence…is inconsistent with the submissions that the treaty right was merely restricted but not extinguished.

Counsel further submitted that a workable test to determine whether a particular aboriginal or treaty right has been extinguished or merely rendered unexercisable by legislation, would be to ask whether the right should be restored if the legislation affecting it was repealed. And in that respect refers the court to Kent McNeil, in an article called "The Constitution Rights of the Aboriginal Peoples of Canada" reported in (1982), 4 Supreme Court Law Review at page 255, where at page 257-58 he says:

> While it may be conceded that section 35(1) probably does not revive rights previously abrogated by legislation, it is suggested that different considerations apply to rights that were merely restricted but not extinguished. Thus, where aboriginal title to land has been extinguished by legislation, that title would no longer have been in existence on April 17, 1982 and would not have been reviewed by section 35(1). Aboriginal or treaty rights to hunt, trap and fish that have been limited by federal or provincial legislation, on the other hand, continue to exist even though their exercise has been restricted. A workable test that might be applied to determine whether a particular right has been extinguished or merely rendered unexercisable would be to ask whether the right would be restored if the legislation affecting it was repealed. If the answer is no, then the right must have been extinguished; if yes, it must still exist and therefore is entitled to constitutional protection under section 35(1).

In conclusion counsel for the defendants submits that the defendants' treaty right to hunt migratory birds is an existing treaty right recognized and affirmed by section 35(1) as part of the Constitution of Canada. To the extent that the Migratory Birds Convention Act is inconsistent with the appellant's [sic] treaty right to hunt migratory birds for food, it is respectfully submitted, that such Act is of no force and effect by virtue of section 52(1) of the Constitution Act.

The court finds that the accused are "Indians" within the meaning of the Act, and also members of Treaty No.9. The court also finds that they were in possession of migratory birds and this during the closed season, within the meaning of the Migratory Birds Convention Act.

Prior to the enactment of the Constitution Act, 1982 it is trite law that such treaty rights were subject to federal legislation of the law in : R. v. Sikyea and R. v. George which I have referred to earlier.

The Constitution Act, 1982 by virtue of section 35 confirms the existing aboriginal and treaty rights. Accordingly, the court finds nothing has changed insofar as the law enunciated in the aforementioned cases of Sikyea and George is concerned.

An argument can be made for the proposition that the Migratory Birds Convention Act merely restricted the exercise of treaty rights and that by virtue of section 52 of the Constitution Act, that previous law being inconsistent, should now have no force and effect. Indirectly then section 52 has the effect of lifting the so-called restriction and revives or reinstates the treaty rights, irrespective of the Migratory Birds Convention Act.

This argument however must fall, for it is based on the premise that the treaty rights ere not abrogated by the federal legislation. As such, section 35 of the Constitution Act cannot revive rights which have been abrogated nor can section 52 serve a similar purpose. In the case of R. v. Sikyea the Supreme Court of Canada ruled that in fact the Migratory Birds Convention Act effectively abrogated the treaty rights of the accused Sikyea.

In a recent District Court decision of R. v. Joseph Hare et al. (Ont.Dist.Ct.) 10 W.C.B. 292 [[sub nom. R. v. Hare and Debassige, [1984] 1 C.N.L.R. 131], His Honour Judge Murphy had occasion to review the existing law and recognized the fact of "abrogation". He said [p. 146 C.N.L.R.]:

> I believe that the judgments of Sissons J. and Johnson J.A. in Sikyea indicate clearly that at the time the Government of Canada entered into the Migratory Birds Convention with the

> United States and passed the Migratory Birds Convention Act to implement that Convention, the Government was fully cognizant of the rights of the Indians and Eskimos because special provisions were made in the Convention and in the Act and regulations to give members of those races special rights not available to other citizens of Canada. Johnson J.A. held that by implication, other rights of those people were abrogated.

Finally, a similar reasoning appears in a recent decision of R. v. Adam Eninew, it is a non-reported case of July 22nd, 1983 by Gerein J. of the Saskatchewan Queen's Bench [reported [1984] 2 C.N.L.R. 122, aff'd [1984] 2 C.N.L.R. 126 (C.A.)], where the presiding judge agreed that section 35 of the Constitution Act was not intended to safeguard all rights whatsoever of the aboriginal people, but only those rights which were in actual existence at the time of the enactment of the Constitution Act. He says at page 5 [p.125 C.N.L.R.] of his judgment:

> Rather the Constitution Act only recognized and secured the status quo.

To abrogate a right the court cannot legislate. It can only interpret the law and render a judgment. The Supreme Court of Canada has done that in the case of R. v. Sikyea. And in that case it was held that the Migratory Birds Convention Act abrogated the right to hunt under certain circumstances. So that the Supreme Court of Canada held that it cannot revoke or repeal treaty rights but it can only say that they do not apply or that they cannot be enforced.

Whether the Migratory Birds Convention Act merely abrogates, extinguishes, renders unexercisable or merely restricts the exercise of the treaty rights is purely academic because the Supreme Court of Canada judgments that I have referred to are still in existence and binding on this court and this court is not prepared to rule differently. The Migratory Birds Convention Act is still in force, it existed at the time of the passing of the Canada Act 1982.

I find that the Canada Act 1982 does not revive former restricted rights. It merely recognizes those rights that were unrestricted or in existence.

And the court finds that the law is still as enunciated in Sikyea and George, and that accordingly native rights under their treaties are still subject to the Migratory Birds Convention Act which is a federal statute.

And as such, there will be a conviction.