R. v. SEWARD ET AL.

British Columbia Provincial Court, Greer J., January 30, 1985

Louise Mandell, for the accused
Joe Martin, for the Crown

Six Indians were charged with two offences against the British Columbia Fishery (General) Regulations made pursuant to the Fisheries Act, R.S.C. 1970, c.F-14. The offences were one of fishing by means of a set salmon net and one of fishing by means of a net without a valid licence. The facts were admitted and the accused argued that they had the benefit of one of the "Douglas Treaties', negotiated between 1850 and 1875.

Held: Guilty as charged.

1. The Douglas Treaties provided, among other things, that Indians "are at liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly." Treaty No.8, entered into on June 21, 1899, had a similar provision but with the added words "subject to such regulations as may from time to time be made by the government of the country". Section 88 of the Indian Act, R.S.C. 1970, c.I-6, is not a declaration of the paramountcy of treaties over federal legislation (R. v. George, [1966] S.C.R. 267, 55 D.L.R. (2d) 386, 47 C.R. 382 followed).

2. This court is bound by a decision of the British Columbia Supreme Court in R. v. Cooper et al. (1969), 1 D.L.R. (3d) 113 which involved similar offences and an identical treaty to the Douglas Treaty here under consideration. In that case, Mr. Justice Brown felt bound by the above-mentioned George case, that federal legislation and regulations may impinge on treaty rights.

3. The court found itself precluded from accepting the reasoning of Judge Murphy in R. v. Hare and Debassige et al. (1983), 8 C.C.C. (36) 541, [1984] 1 C.N.L.R. 131, as persuasive as that reasoning was. Thus, the Crown did not need to prove beyond a reasonable doubt that the Parliament had expressly and by direct reference to it extinguished a right granted by treaty.

4. The Constitution Act, 1982 s.35(1) protects rights in existence as of April 17, 1982 only.

5. The court referred to the Crown's arguments that the Fisheries Act and regulations were enacted for the purpose of conservation and management of the fishery, and that the limitation and prohibitions in the Fisheries Act, and regulations comprised, pursuant of s.1 of the Canadian Charter of Rights and Freedoms, "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". The court concluded that the defence could not succeed.

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GREER J.: These six accused, Anthony Clark Seward, McCardy Charles Jones, Mervin Bennet Seward, Rodney Dwayne Seward, Gregory Wayne Seward and Randolf Keith Seward, who are all native Indians, are charged with two offences against the British Columbia Fishery (General) Regulations which are made pursuant to the Fisheries Act, R.S.C. 1970, c.F-14, of Canada.

These offences, one of fishing by means of a set salmon net, and of fishing by means of a net without a valid licence, are alleged to have occurred on or about the 22nd day of September, 1983 at or near a place known as the "Bore Hole" on the Nanaimo River, in the County of Nanaimo, Province of British Columbia.

The accused, through their counsel, admit the Crown's case.

Their defence is that they all being native Indians, and members of the Nanaimo Indian Band, have the benefit of a treaty made by their ancestors with the Hudson’s Bay Company, which preserved their right to fish in the area where they were found. It is their view that the regulations they are alleged to have breached do not apply to them because of the special status accorded to them by the Crown through these treaties. They also argue that their treaty rights have been confirmed and re-established by the enactment of the Constitution Act, 1982, and that the Parliament of Canada had no right to abrogate or infringe upon those rights by enacting the regulations under the Fisheries Act.

The Crown's argument put simply, as I understand it, is that while recognizing the treaty rights of these accused persons, that these rights are subject to regulations lawfully enacted by the Parliament of Canada. That legal jurisprudence has affirmed that position, and that special rights have been afforded to native Indians in the regulations for the food fishery permits.

The very same treaty that we are dealing with in the case at bar was first considered in 1964 by the British Columbia Court of Appeal [see R. v. White and Bob (1964), 52 W.W.R. 193]. Mr. Justice Norris, in reviewing the background to the treaty, started with the Royal Proclamation of 1763 at page 218 of the W.W.R.:

> The royal proclamation of 1763 was declaratory and confirmatory of the aboriginal rights and applied to Vancouver Island. For the British, the proclamation of 1763 dealt with a new situation arising from the war with the French in North America, in which Indians to a greater or less degree took an active part on both sides, and, incidentally, from the Treat of Paris of 1763 which concluded that war. The problem which then faced the British was the management of a continent by a power, the interests of which had theretofore been confined to the sea coast. As exploration advanced, the natives of the interior and western reaches must be pacified, trade promoted, sovereignty exercised and justice administered even if only in a general way, until such time as British settlement could be established. It was a situation which was to face the Imperial power in varying degree and in various parts of the continent until almost the close of the 19th century. In the circumstances, it was vital that aboriginal rights be declared and the policy pertaining thereto defined. This was the purpose and the substance of the royal proclamation of 1763. The principles there laid down continued to be a charter of Indian rights through the succeeding years to the present time recognized in the various treaties with the United States in which Indian rights were involved and in successive land treaties made between the crown and the Hudson's Bay Company with the Indians.

The Royal Proclamation has been recognized for many years as having the effect of a statute, and so far as the rights of the Indians are concerned, it has never been repealed (see Rex v. McMaster, [1926] Ex CR 68),

The effect of the Proclamation is that it not only gave recognition to the Indians as a separate nation, but it also was an acknowledgement of the protectorate obligation the Crown felt that it owed toward the Indians. It furthermore recognized that the lands possessed by the Indians anywhere in North America are reserved to them unless and until ceded to the Crown. At the time of the Royal Proclamation, the separate territory of Vancouver Island was not even known to exist.

The colony of Vancouver Island was granted to the Hudson's Bay Company by a charter dated January 13th, 1849. Again, this charter recognizes the Indians as a separate and distinct nation r and gives, as one of the reasons for the colonization of the Island, "the protection and welfare of the native Indians residing on Vancouver Island." Sir James Douglas was appointed Governor of this new colony, and granted Letters Patent by the monarch on May 16th, 1851. These detail his power and authority to colonize Vancouver Island. In it he is given, "the power and authority to make such laws and ordinances as may from time to time be required for the 'peace, order and good government of the Colony"'.

Prior to the enactment by the British Parliament of the Act authorizing the colonization of Vancouver Island by Sir James Douglas, his immediate superior, E.B. Lytton, the Colonial Secretary in Condon wrote to Governor Douglas on July 31, 1850, outlining in some detail the Policies he hoped and expected the Governor would carry into effect in the process of colonization. In particular, Governor Douglas was enjoined:

> ...to consider the best and most humane means of dealing with the Native Indians. The feelings of this country would be strongly opposed to the adoption of any arbitrary or oppressive measures toward them. I am reluctant at this distance and with the imperfect means of knowledge I possess, to offer as yet any suggestion as to the prevention of affrays between the Indians and the immigrants. This question is of such a local character that it must be solved by your knowledge and experience and I commit it to you in the full persuasion that you will pay every regard to the interests of the natives which enlightened humanity can suggest. Let me not omit to observe that it should be an invariable condition in all bargains or treaties with the natives for the cessation of lands possessed by them that subsistence should be supplied to them in some other shape, and above all that it is the earnest desire of Her Majesty' s Government that your early attention should be given to the

> best means of diffusing the blessings of the Christian Religion and of "civilization among the natives."

A similar view is expressed almost a year later, on April 11th, 1859, in a letter from Lord Carnarvon, Assistant Colonial Secretary to Governor Douglas. He says, in part:

> I am glad to perceive that you have directed the attention of the House to that interesting and important subject, the relations of Her Majesty's Government and of the Colony to the Indian race. Proofs are unhappily still too frequent of neglect which Indians experience when the white man obtains possession of their country, and their claims to consideration are forgotten at the moment when equity most demands that the hand of the protector should be extended to help them. In the case of the Indians of Vancouver Island and British Columbia, Her Majesty's Government earnestly wish that when the advancing requirements of colonization preys upon the lands occupied by members of that race, measures of liberality and justice be adopted for compensating them for the surrender of the Territory which they have been taught to regard as their own,

Some two years later, on March 25, 1861, Governor Douglas in a letter forwarding a petition from the legislature to the Colonial Secretary in London asking for more money to pay the Indians for their land, had this to say:

> ….as the native Indian population on Vancouver Island have distinct ideas of property in land, and mutually recognize their several exclusive possessory rights in certain districts, they would not fail to regard the occupation of such portions of the Colony by white settlers, unless with the full consent of the proprietary tribes, as national wrongs; and the sense of injury might produce a feeling of irritation against the settlers, and perhaps disaffection to the Government that would endanger the peace of the country.

Sir James Douglas negotiated some fourteen treaties on Vancouver Island and they have become to be known as the "Douglas Treaties." Eleven of these were made at Fort Victoria, two at Fort Rupert, and one at Nanaimo. These were negotiated between 1850 and 1875. Apart from the description of the lands surrendered by the tribes to the Hudson's Bay Company, and the amount of money paid, each treaty contains the same conditions, namely:

> … the condition of, or understanding of this sale is this, that our village sites and enclosed fields are to be kept for our own use, and for the use of our children, and for those who follow after us; and the land shall be properly surveyed hereafter. It is understood, however, that the land Itself, with these small exceptions, becomes the entire property of the white people forever; it is also understood that we are at liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly.

In the case of the Nanaimo Indian Band, the land surrendered and conveyed was "the country extending from Commercial inlet twelve miles up the Nanaimo River."

To compare the wording in the Douglas Treaties quoted aforesaid, there has been entered in evidence, Treaty No.8, made on June 21, 1899. It was made as to land in the north easterly section of British Columbia. This treaty, it should be borne in mind, was made almost twenty-five years after the Douglas Treaties. In this treaty, Her Majesty agreed with "the Indians that they shall have the right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered, 'subject to such regulations as may from time to time be made by the Government of the Country,'"

There was a significant paragraph in the report sent by the Indian Treaty Commissioner to the Superintendent of Indian Affairs in Ottawa on September 22, 1899. In this report, they outline in some considerable detail, the negotiations they carried on with the Indians before the treaties were signed:

> Our chief difficulty was the apprehension that the hunting and fishing privileges were to be curtailed. The provision in the treaty under which ammunition and twine is to be furnished went far in the direction of quieting the fears of the Indians, for they ad mi t red that it would be unreasonable to furnish the means of hunting and fishl. ng if laws were to be enacted which would make hunting and fishing so restricted as to render it impossible to make a livelihood by such pursuits, But over and above the provision, we had to solemnly assure them that only such laws as to hunting and fishing as were in the interest of the Indians and were found necessary in order to protect the fish and fur-bearing animals would be made,

> and that they would be as free to hunt and fish after the treaty as they would be if they never entered into it.

The chief significance of this treaty is, of course, that there has now been inserted, twenty-five years after the Douglas Treaties had been concluded, the words "subject to such regulations as may from time to time be made by the Government." No such reservation is contained in the Douglas Treaties, or the one negotiated with the Nanaimo Indians.

In contrast, how did the Americans deal with their natives? The treaty concluded in 1855 in Whatcom County in the State of Washington was entered as an exhibit in this case. It was quite different than the British Columbia treaties insofar as fishing is concerned, Article 111 says, in part:

> ...the right of taking fish at all usual and accustomed grounds and stations is further secured to said Indians in common with all the citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries and pasturing their horses in open and unclaimed lands;

Governor Douglas, in a letter dated May 16, 1850, wrote to Archibald Barclay, the Hudson's Bay Company secretary in tendon. In this letter, he advises that he has informed the Indians on the Island

> ...that they would not be disturbed in the possession of their village sites and enclosed fields, which are of small extent, and they were at liberty to hunt over the unoccupied lands, and to carry on their fisheries with the same freedom as when they were the sole occupants of the country.

Finally, we have in evidence an extract from the Journals of the Legislature of Vancouver Island for Tuesday, February 8, 1859. An enquiry had been made by one of the members to Governor Douglas as to whether certain Indians could be removed from a piece of land inside Victoria Harbour. Governor Douglas, in his reply, referred to the reservations set aside for the Indians, and also described the rights reserved to them in the following language:

> They (the Indians) were to be protected in their original right of fishing in the Coasts and in the Bays of the Colony, and of hunting over all unoccupied lands;

The expert called by counsel for the defence, Mr. David Henry Gottesman, who has done considerable work and research on historical land material and on the Douglas Treaties, expressed his opinion that the fishing rights enjoyed by the Nanaimo Indian Band were unrestricted and that they have the tight to fish as they did prior to the conclusion of the treaty with Governor Douglas.

I also heard viva voce evidence from members of the band. One of the elders described their system of government and explained that the traditions, customs and usages of the tribe have been handed down orally from father to child. That their oral traditions have always maintained that they have the right to fish in the area of the Nanaimo River because this was within the area surrendered by their treaty. They also fished in the salt water in the vicinity of Nanaimo, such as Nanoose Bay, Five Fingers and Snake Island. The methods of fishing have changed Little from the olden days. With the advent of modern materials, cotton and hemp have given away to nylon, etc, The Nanaimo Band consists of four different reserves, all clustered around the Nanaimo River because it has always been considered one of the greatest and abundant salmon rivers in the province. More than fifty percent of the diet of the Indians in the band consists of fish, even to this day. A good percentage of the band rely upon social assistance as their only source of income, and to be able to fish and hunt for food is very important to maintain their diet. In addition, they also find that fish occupies an important part of their cultural activities, such as the potlach. We also learned through one of the elders that they can now obtain from the Fisheries Department, a permit to catch fish for food during certain months of the year. In addition, a seiner is made available to allow them to obtain more fish for food if they wish to avail themselves to it. The band assistant manager told us that there were six hundred and forty-five members in the band, of which four hundred and nine actually live on reserves in the Nanaimo area.

There is no question in my mind that the Douglas Treaties, of which the treaty in the case at bar is one, takes precedence over provincial laws and regulations. The principle was first established in the White and Bob case quoted earlier. It has also been enunciated most recently in our British Columbia Court of Appeal in the case of R. v. Bartleman (1984), 13 C.C.C, (3d) 488, [1984] 3 C.N.L.R. 114. The chief obstacle to be surmounted by the accused is that, on the basis of jurisprudence thus far, it would appear that the weight of judicial opinion has favoured the

interpretation that treaties may be abrogated, or at least made subject to the terms of any federal statutes or regulations made by authority of an Act of the Parliament of Canada. Several cases dealing with the Migratory Birds Convention Act, R.S.C. 1970, c ,M-12 , an Ac t of the latter category have decided that it has precedence over treaty rights possessed by Indians in the territory affected.

Section 88 of the Indian Act, R.S.C, 1970, c.I-6 provides:

> Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.

The treaty that we are dealing with in this case, is a treaty within the meaning of s,88 quoted above (see R. v. White and Bob (1964), 2 W.W.R. 193). For some period of time after the above section was enacted in 1951, there was a body of opinion that the words, "all laws of general application from time to time in force in any province" could include Acts of the Parliament of Canada. Indeed, Professor (as he then was) K. Lysyk, in an article entitled "Indian Hunting Rights" (1966), 2 U.B.C. Law Rev. 401 said of that section at p.409:

> It may be noted that by the terms of Section 87 (as it then was) the laws which are stated to be subject to the terms of any treaty are "all provincial laws of general application" but as "all laws of general application from time to time in force in any province."

The words actually used in the section are capable of being construed to include more than just provincial laws in the sense of enactments of the provincial legislature since entry into Confederation. Further, until very recently, it was arguable that the phrase, " all laws...in force in any province" should be read so as to include federal laws in force in the province, i.e. enactments of the Parliament of Canada.

The argument has now been put to rest as a result of the decision of the Supreme Court of Canada in R. v. George, [1966] S.C.R. 267, 55 D.L.R. (2d) 386, 47 C.R. 382. In that case, Mr. Justice Martland, speaking for the majority of the court held that this section was not intended to be a declaration of the paramountcy of treaties over federal legislation. He was of the view that the reference to treaties was incorporated in a section, the purpose of which was to make provincial laws applicable to Indians so as to preclude any interference with rights under treaties resulting 'from the impact of provincial legislation This decision has been the subject of some controversy and criticism, (See Annotation entitled, "The Unilateral Abrogation of Indian and Eskimo Treaty Rights" (1966), 47 C.R. 395 by C.A.G. Palmer.) The dissenting judgment of Mr. Justice Cartwright in this case has also been quoted with approval by many scholars who disagree with the conclusions reached by the majority. At p.393 of the 47 C.R., he reaches these conclusions:

> We should, I think, endeavour to construe the treaty...and those Acts of Parliament which bear upon the question before us in such a manner that the honour of the Sovereign may be upheld and Parliament not subject to the reproach of having taken away by unilateral action and without consideration, the rights solemnly assured to the Indians and their posterity by treaty. Johnson J.A. with obvious regret, felt bound to hold that Parliament had taken away those rights, but I am now satisfied that on its true construction, section 87 of the Indian Act shews that Parliament was careful to preserve them, At the risk of repetition, I think it is clear that the effect of section 87 is two-fold, It makes Indians subject to the laws of general application in force in the Province in which they reside but at the same time it preserves inviolate to the Indians whatever rights they have under the terms of any treaty so that in the case of conflict between the provisions of the land and the terms of the treaty, the latter shall prevail.

The case of R. v. Cooper; R. v. George; and R. v. George, decided in the British Columbia Supreme Court by Mr. Justice Brown in 1968, and reported in (1968), 1 D.L.R. (3d) 113, involved offences committed against the Fisheries Act, the same statute as we are considering in the case at bar. The treaty involved was one of the Douglas Treaties concluded with the Sooke Tribe on Vancouver Island. It is identical to the treaty in this case. Mr. Justice Brown felt bound to follow the majority judgment of the Supreme Court of Canada in the George case, and held that the Fisheries Act and regulations may impinge on treaty tights. He noted, with regret, that he was unable to distinguish that case merely on the ground that it dealt with the Migratory Birds Convention Act and regulations.

Counsel for the accused, while recognizing that the foregoing cases clearly seem to establish that federal legislation can cut down or modify treaty rights, argue that there has, as yet, been no clear decision deciding under what circumstances can such a Curtailment take place.

Also since the enactment of the Constitution Act, 1982, recognizes and affirms existing treaty and aboriginal rights, questions are now arising as to two matters, viz. (a) What is the definition of treaty rights? Are they rights which are, by their very definition, subject to federal legislation? and (b) If federal legislation had the capacity prior to 1982 of curtailing treaty rights, which treaty rights exist now and are protected by the Charter?

The Constitution Act, 1982 was enacted into law on April 17, 1982. It consists of several parts. Part 1 is the Canadian Charter of Rights and Freedoms which provides:

> 25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including
>
> (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
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> (b) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement.

Part II of the Act deals with the rights of the aboriginal peoples of Canada:

> 35.(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Metis peoples of Canada.

Part VII of the Act contains s.52, which provides:

> 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 and effect.

Counsel for the accused relies upon the case of R. v. Hare and Debassige a decision of His Honour Judge C.T. Murphy of the District Court of Manitoulin pronounced on September 9, 1983, and reported at (1983), 8 C.C.C. (3d) 541, [1984] 1 C.N.L.R. 131 as the correct way to analyze and determine the rights of the accused in this case. This case has been decided since the enactment of the Constitution Act. There were involved in that case, two native Indians who were charged with breaches of the Ontario Fishery Regulations made pursuant to the Fisheries Act of Canada, as are the accused in this case. The fish were taken on lands covered by the Manitoulin Treaty of 1862. This gave the Indians the same right to take fish over the area as the white settlers had. At the trial, the Judge held that the rights possessed by the Indians varied as the regulations changed so as to affect them as the white settler was affected.

His Honour Judge Murphy concluded that the Treaty of 1862 gave the forefathers of the accused, and therefore the accused as well, the right to take fish from the Lake by using a gill net. He then proceeded to determine whether or not that right had been extinguished or overridden by subsequent legislation. He considered the George case, supra, and Sikyea v. R., (1964) S.C.R. 642, 49 W.W.R. 306, 50 D.L.R. (2d) 80, [1965] 2 C.C.C. 129, 44 C.R. 266, and found that they established three things beyond a doubt [p.139 C.N.L.R.]:

> (1) the opening words of s.88 of the Indian Act are not to be construed as a declaration of the paramountcy of treaties over federal legislation, nor do they make any legislation of the Parliament of Canada subject to the terms of any treaty;
>
> (2) Parliament has the power to breach Indian treaties if it so wills; and
>
> (3) parliament did, in fact, breach some hunting rights contained in Indian treaties when it passed the Migratory Birds Convention Act and regulations.

Judge Murphy distinguished both the George and Sikyea cases because his case did not involve the application of the opening words of s.88 of the Indian Act or the Migratory Birds Convention Act. He, therefore, restricted his considerations to the second proposition, viz., Parliament has the

power to breach Indian treaties if it wishes. He thought that the two questions to be addressed were [p.140 C.N.L.R.]:

(a) by what means may such treaties be breached or the rights granted thereunder be abrogated or varied; and
(b) does the Fisheries Act and regulations passed thereunder comply with any such requirements?

Judge Murphy went on to consider how Parliament could exercise its right to abrogate or breach the Treaty of 1862.

He concluded that Indian treaties have gained considerable stature since 1857 when Lord Watson said that they were nothing more than a personal obligation by the Governor of the old province. He stated that while the majority judgment of Mr. Justice Martland in the George case found that Parliament did abrogate certain treaty rights by passing the Migratory Birds Convention Act and regulations, he (Mr. Justice Martland) did not deal with the observations of Chief Justice McRuer as set out in the dissenting judgment of Cartwright J. to the effect that if it is within the power of Parliament to abrogate the treaty right (a point which he left open and did not decide) that power could only be exercised by legislation expressly and directly extinguishing the right and that it certainly could not be extinguished by order-in-council.

Judge Murphy says at p.553 [pp.143-44 C.N.L.R.]:

> While there may have been some doubt in the minds of jurists regarding the extent and validity of the treaty rights of Indians as they were called upon to interpret them in earlier years, there can be no such doubt in the mind of anyone called upon to deal with these rights today. Section 35(1) of the Canada Act 1982 provides as follows:
>
> > The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> While the Canada Act does not create new rights far the Indian people, it recognizes and affirms existing rights....In my view, those treaties should be treated with the same solemnity and seriousness as are treaties entered into with foreign sovereign states and as being as valid and binding as an Act of the Parliament of Canada. (In fact, s.88 of the *Indian Act* in effect gives the treaties equal status with Acts of Parliament vis-a-vis Acts of the provincial legislatures.) There is no doubt that Parliament can unilaterally abrogate any such treaty, just as it can unilaterally abrogate any treaty with a foreign country or repeal one of its own statutes. It is equally clear that Parliament can unilaterally vary any such treaty just as it can amend one of its own statutes.
>
> However, it is my opinion that any abrogation, derogation or variance of treaty rights must be accomplished by legislation which is (a) clear and unequivocal in its terms; (b) gives some indication that Parliament was aware of the existence of the rights upon which it (c) reflects an intention on the part of Parliament to exercise its power of abrogation, derogation or variation.
>
> (b) Does the Fisheries Act and regulations made thereunder conform with the above requirements?

Judge Murphy was unable to find anything in the Fisheries Act or the regulations which indicated to him that Parliament even remotely considered in any way the treaty right bestowed upon various bands of native people in Canada. At the bottom of p.554 [pp.144-45 C.N.L.R.] he says:

> There is nothing in the Act or regulations that indicates to me either that Parliament or the Governor in Council even recognized the existence of such treaty rights, much less that they intended to unilaterally abrogate or derogate from those rights when the Act was passed and amended or when the amending regulations were promulgated.
>
> To illustrate, let us assume the Treaty of 1862 had been signed with the Government of the United States of America. I believe it highly unlikely that the Government of Canada could legally enact legislation which would have the effect of unilaterally derogating from or varying American fishing rights under such a treaty without specifically and unequivocally spelling out that intent in the relevant statute. When one considers the true meaning of the word "treaty" and the recognition that Indian treaties have been accorded in the Constitution Act, 1982, one would be hard pressed to hold that a treaty

> entered into by the representatives of the Government of Canada with representatives of Canada's native peoples should be considered less seriously and with less respect or concern than a treaty entered into with a foreign government.

Judge Murphy found that the Crown in his case had failed to satisfy the onus it had to satisfy him, beyond a reasonable doubt, that the fishing rights which he found had been given the forefathers of the accused in the 1862 treaty had been abrogated or varied by the parliament of Canada.

In the result, Judge Murphy found that while the accused, in this case, were violating the fishery regulations at the time and place referred to in the Informations, they were exempted from these regulations by the rights and benefits conferred on them under the treaty and acquitted the accused.

As persuasive as the reasoning is in this case, am unable to reach the conclusion as His Honour Judge Murphy did as to the binding effect of the case of R. v. Cooper et al. decided by Mr. Justice Brown in the Supreme Court of British Columbia.

He did not feel constrained to follow this decision inasmuch as it was reached after considering the majority decision of the Supreme Court of Canada in R. v. George.

In my opinion, despite a strong inclination to be able to rule otherwise, i consider that i am bound by the case of R. v. Cooper et al. because: (a) It dealt with a treaty identical in form and content to the Nanaimo Treaty; (b) It dealt with charges laid under the regulations made pursuant to the Fisheries Act of Canada, as does the case at bar,

As to the effect of s.35(1) of the Constitution Act, 1982, the reasoning of Mr. Justice Guerin of the Saskatchewan Court of Queen's Bench in the case of R. v. Eninew reported in (1983), 7 C.C.C. (3d) 443, [1984] 2 C.N.L.R. 122 is persuasive. Although the case dealt with the Migratory Birds Convention Act and considered a treaty which in itself was subject to such regulations as the government might from time to time have passed, the grammatical analysis made of s.35(1) therein [p,124 C.N.L.R.]:

> To begin, the word "existing" must relate to the entire phrase "aboriginal and treaty rights" and not, as submitted on behalf of the appellant, only the word "aboriginal".
>
> Section 35 deals with the rights of aboriginal peoples of Canada. The whole reason for the section is to safeguard certain rights. However, the section is not intended to safeguard any and all rights whatsoever of the aboriginal peoples but only certain rights, namely, aboriginal rights and treaty rights. The word "rights", as used in the section, is qualified by the words "aboriginal" and "treaty". To divorce the word "aboriginal" from the word "rights" would bring about a nonsensical result. One would be left with the question aboriginal what? Thus, the words "aboriginal and treaty tights" must be viewed as one phrase in which the prime word is "rights" as qualified and described by the words "aboriginal and treaty". This being so, the word "existing" must relate to the entire phrase as a whole. In fact, in my mind, the word "existing" has reference to the word "rights", albeit as qualified by the words "aboriginal" and "Treaty".
>
> What then is the effect of the word "existing"? In my opinion, it circumscribes the rights of the aboriginal peoples of Canada. It limits the rights of those peoples to those rights which were in being or which were in actuality at the time when the Constitution Act, 1982 came into effect, namely, April 17, 1982. Were it to be otherwise, Parliament would have used the word "original" or some like word or would have utilized some other device such as a date.

The Crown's final argument is based on the principle that the Fisheries Act and regulations are enacted for the purpose of conservation and management of the fishery. That the need to conserve the fishery is obvious and to limit the right of even Indians to fish whenever they wish without restriction makes no sense.

Furthermore, as I understand their argument, the limitations and prohibitions in the Fisheries Act and regulations come under the subject clause of s.1 of the Charter of Rights and Freedoms as "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

In conclusion, and with a large measure of regret and reluctance, I have concluded that the defence put forward by the accused cannot succeed.

While it is quite evident that the treaty rights given by the Douglas Treaties are the widest of any which have been considered during the arguments in this case, the inevitable conclusion is that based on the jurisprudence thus far, which is binding authority upon this court, those rights may be abrogated by Parliament.

If there is to be any change in this rule of law, in my view, Perhaps one might hope it will do so now Parliament must do so. Perhaps one might hope it will do so now that further constitutional conferences seem to be in the offing.

In the result, I must find each of the accused guilty as charged.