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# R. v. Dick (B.C.C.A.)

Between
Her Majesty The Queen, Respondent, and
Harry Thomas Dick, Appellant, and
Carrier Sekani Tribal Council, The Attorney General of Canada,
Delgamuukw et al., Musqueam Indian Band and Okanagan Tribal
Council, Intervenors

[1993] B.C.J. No. 1396
Vancouver Registry No. CA011223

**British Columbia Court of Appeal**
**Vancouver, British Columbia**
**Taggart, Lambert, Hutcheon, Macfarlane and Wallace JJ.A.**

Heard: November 12, 13, 14, 15, 18, 19 20, 21, 22, 1991
Judgment: June 25, 1993
(17 pp.)

*Criminal law — Provincial offences — Fishing and hunting — Possession of dead wildlife without licence — Aboriginal rights — Lottery scheme for distribution of permits for hunting of elk.*

This was an appeal by the accused from conviction on a wildlife offence. The accused was convicted of having dead wildlife in his possession without a licence or permit contrary to section 34(2) of the Wildlife Act. Section 17(1) of the Act authorized issuance of Limited Entry Hunting permits by lottery or random selection. No priority was given to aboriginal's living in the management unit. The son of the accused stored elk meat in the accused's freezer with his knowledge and consent. The accused was an aboriginal living on the reserve. He never held a permit. At the time of the offence hunting of elk was prohibited. The trial judge held the accused was exercising an aboriginal right when he possessed the meat but that the permit scheme was a reasonable one imposed for conservation purposes.

**HELD:** The appeal was allowed. The accused was acquitted. The accused was exercising an aboriginal right when found in possession. The Act was law of general application within section 88 of the Indian Act and therefore incorporated by reference as federal law. It was open to the trial judge to find that the accused was exercising an aboriginal right. It was a finding a judge properly instructed could have made. Under the lottery scheme the accused's right to hunt was no longer a reasonable prospect, but a matter of chance. The scheme as it ignored aboriginal rights did not satisfy the basic principle of infringing on aboriginal rights as little as possible. Section 88 of the Indian Act was not inconsistent with section 35(1) of the Constitution Act. Section 34(2) and 17(1) of the Wildlife Act and the regulations thereunder constituted a prima facie infringement of aboriginal rights not justified before the courts and therefore inconsistent with section 35(1) and 52(1) of the Constitution Act. The provisions were of no force or effect as to aboriginal persons.

**STATUTES, REGULATIONS AND RULES CITED:**

Constitution Act, 1867, s. 91(24).
Constitution Act, 1982, ss. 35, 35(1), 52(1).
Indian Act, R.S.C. 1985, c. I-5, s. 88.
Wildlife Act, S.B.C. 1982, c. 57, ss. 2, 17(1), 34(2).
Wildlife Act Regulations.

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Supporting Intervenors:

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Reasons for judgment delivered by Macfarlane J.A., concurred in by Taggart, Hutcheon and Wallace JJ.A., allowing the appeal. Lambert J.A. delivered separate and concurring reasons for judgment.

**MACFARLANE J.A.**:—

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## I. INTRODUCTION

¶ 1 This appeal concerns aboriginal hunting rights, and whether the provisions of the Wildlife Act, S.B.C. 1982, c.57 are inconsistent with s.35(1) of the Constitution Act, 1982.

¶ 2 Mr. Dick was acquitted of having dead wildlife in his possession without a license or permit, contrary to s.34(2) of the Wildlife Act. That section reads:

> 34. (2) A person commits an offence where he has dead wildlife or a part of it in his possession except under a licence or permit or as provided by regulation.

¶ 3 S.17(1) of the Act authorizes the issuance of Limited Entry Hunting Permits by lottery or other means of random selection.

¶ 4 The trial was held before His Honour, Judge Sarich, of the Provincial Court of British Columbia. The reasons of the trial judge are reported at [1989] 1 C.N.L.R. 132. At p.135 of those reasons the trial judge describes the permit scheme established by the regulations pursuant to the Wildlife Act:

> ... The provincial government undertook the regulation of hunting by legislation as well as efforts to conserve and propagate the herds to establish a stable continuing elk population. These efforts have now devolved to where hunting of these animals has been limited to a small finite number of animals from each of a number of management area units into which Vancouver Island, together with the rest of the province, has been divided. A limited entry hunting permit to hunt one elk of a designated sex and age out of each management area unit in which such animals can be found is given to an applicant whose name is drawn in a lottery. This lottery is open to any permanent resident of the province without discrimination, but also with no provision for Indian food hunting by people not having secured such a right by treaty. There is one exception however, in that there is a proportionate number of permits reserved for distribution by lottery to commercial hunting guides. These permits are available for trophy hunting by non-residents of the province at considerable expense.

¶ 5 Paragraph 9 of the statement of facts contained in the Province's factum acknowledges that the limited entry permit system does not give priority to Indian people living in the management unit in which hunting will take place.

¶ 6 The Crown appealed to the County Court. Mr. Dick was convicted, it being held that the Wildlife Act is a law of general application, governing all hunters, including Indians. It was also held that the regulation was a reasonable one imposed for conservation purposes.

¶ 7 The findings of fact upon which the trial and the summary conviction appeal proceeded were stated succinctly by Hutchinson C.C.J. in R. v. Dick, [1989] 4 C.N.L.R. 120 at 120-121 in this way:

> The respondent is a native Indian and lives on reserve land at Ahaminaquus near the mouth of the Gold River, Vancouver Island. He has status as a member of the band which has occupied that land since long before the advent of the Europeans. The trial judge found, and it is not challenged by the Crown, that [p.137 C.N.L.R.]:
>
> > I find then that the people who were permanently resident in the settlement of Ahaminaquus had from time immemorial developed and enjoyed an aboriginal right to hunt elk on unoccupied lands adjacent to that settlement, and to possess the meat of those animals. This right existed and was recognized by governmental authority at the time that sovereignty was asserted by England through the Hudson's Bay Company and then the colony of Vancouver Island.
>
> On 10 July 1987 while the respondent was at work his 19 year old son shot an elk he had seen across the river. The elk was cut up and put in the respondent's freezer with his knowledge and consent. The respondent in his evidence said he had been hunting deer, elk, moose, seal and bear for years which was used to feed members of his family, several of whom lived with him. He said he had never had a permit to hunt and he relied on his aboriginal right to do so.
> At the time of the charge the hunting of elk was prohibited under the Wildlife Act. Roosevelt Elk are indigenous to Vancouver Island and in the last century were plentiful in the areas surrounding Gold River as well as in many other areas of Vancouver Island. They are easier to hunt than deer as they have a tendency to herd if they sense danger.

> The evidence of Wildlife Officer Davies showed that unregulated hunting and then poaching of elk for many years so depleted the stock that from 1910 to 1954 and again from 1970 to 1977 no hunting of elk was permitted on Vancouver Island. During the 1950s and 1960s, 1,000 people wanted to hunt elk. By 1977 the number had increased significantly; at present 7,000 people apply each year for the limited entry permits that are now issued for the few elk that the Department of Wildlife consider can reasonably be hunted without endangering the stock. The elk population on Vancouver Island is now between 2,200 and 2,800 head, and if the stringent regulations were relaxed, the elk population would quickly be decimated in the opinion of Mr. Davies. His evidence was accepted by the trial judge in his reasons.

II. THE TRIAL JUDGMENT

¶ 8 The trial judge held that Mr. Dick was exercising an aboriginal right when he possessed the meat of the elk which his son had shot. The County Court judge proceeded on the same basis.

¶ 9 The Crown argued before the trial judge that the aboriginal right to hunt had been extinguished by legislation and, in particular, by s. 2 of the Wildlife Act. That, and other extinguishment submissions, were rejected by the trial judge. In doing so he relied upon the decision of the Court of Appeal of this Province in R. v. Sparrow (1987), 36 D.L.R. (4th) 246 and the decision of His Honour, Judge Barnett, in R. v. Alphonse, [1988] 3 C.N.L.R. 92.

¶ 10 The trial judge said this, at p. 138:

> However, both the Sparrow and Alphonse decisions recognize that a right such as that claimed by Dick is subject to reasonable regulation for purposes of conservation. And the Crown argues that the primary purpose of the Wildlife Act and its regulations is the conservation of wildlife. For that purpose all persons except those with rights spelled out by treaty, are bound by the Act and its regulations.
> But the people of Gold River are cognizant of and accept the need for conservation and propagation of the elk herds in their area. They take no issue with the concept of limited entry hunting permits providing their right to hunt for food is recognized and given effect to within that concept. These people are quite prepared to co-operate with the officers of the government in reasonable conservation measures. But they question rather cynically how it can be that within the concept of limited entry hunting a specific number of permits to hunt elk is allocated to professional guides for trophy hunting while their right to hunt these animals for food is denied.

III. THE COUNTY COURT JUDGMENT

¶ 11 The County Court judge, Judge Hutchinson (as he then was), agreed that Mr. Dick was exercising an aboriginal right in possessing the elk meat but he was doing so contrary to reasonable regulations enacted to ensure the conservation of the resource. He referred to evidence that limited entry permits were necessary for conservation purposes.

¶ 12 In referring to the last paragraph in the judgment of the trial judge, the County Court judge said:

> In that passage the trial judge considered the respondent's aboriginal right to hunt. In his reasons he did not deal with the need to conserve this limited resource; so while the priority of the right to hunt elk was properly a dominant concern in the trial judge's reasons, he did not deal with the need to regulate all harvesting of elk herds to a level consistent with the preservation of that species.

> Crown counsel submits that the trial judge has not applied the effect of the decision in R. v. Sparrow, supra, to this case; although the aboriginal right to hunt elk exists in favour of the respondent, yet that right is in proper cases limited by reasonable regulations to ensure the conservation of the resource. On the evidence before the trial judge about the vulnerability of the Roosevelt elk to hunting and the need for stringent regulations to conserve the small numbers remaining (all of which evidence was accepted by the trial judge) the inescapable conclusion is that the regulations apply to the respondent despite his aboriginal right. For that reason I allow the appeal, and record a conviction.

¶ 13 It is to be noted that both the trial judge and the County Court judge did not have the advantage of what was later said by the Supreme Court of Canada in R. v. Sparrow, [1990] 1 S.C.R. 1075. Accordingly, the legislation in question was not analyzed on the basis prescribed by the Supreme Court of Canada.

¶ 14 The issue arising from the two sets of reasons is not whether the limited entry permit system was appropriate but whether any recognition and effect was given to aboriginal hunting rights when the scheme was conceived.

IV. THE ISSUES

¶ 15 The theory of the defence which gives rise to the issues on this appeal may be stated in this way. Mr. Dick was exercising an aboriginal right when he was found in possession of a dead elk. The power to regulate aboriginal hunting may be exercised only by the Parliament of Canada pursuant to s.91(24) of the Constitution Act, 1867. Thus, the provincial Wildlife Act can have no force and effect except by being referentially incorporated as federal law under s.88 of the Indian Act, R.S.C. 1985, c. I-5. The Wildlife Act is not a law of general application. Consequently, s.88 cannot give it force as federal law; it is ultra vires the Province inasmuch as it purports to apply to Indians. In the alternative, if the Wildlife Act is a law of general application, s.88 is inconsistent with s.35(1) of the Constitution Act, 1982 and, therefore, unconstitutional. In the further alternative, s.34(2) of the Wildlife Act is inconsistent with s.35(1) and thereby of no force and effect by reason of s.52(1) of the Constitution Act, 1982.

¶ 16 Most of the same issues are raised in R. v. Alphonse. My reasons in that appeal are being handed down concurrently with these reasons, and I would dispose of similar issues on this appeal on the same basis.

¶ 17 With respect to s.88 of the Indian Act I make this general statement: the appellant is correct in saying that in Dick v. The Queen, [1985] 2 S.C.R. 309 the Supreme Court of Canada did not consider the effect of s.35 (1) of the Constitution Act, 1982 upon s.88 of the Indian Act. But, as I said in Alphonse, the fact that s.88 referentially incorporates laws that affect Indians qua Indians does not necessarily mean that s.88 is inconsistent with s.35(1). The purpose of s.88 is to give effect to provincial laws of general application. An unconstitutional regulation will not be incorporated as federal law. The question whether incorporated legislation may be challenged as violating s.35(1) is distinct from the issue whether s.88 is intra vires the powers of Parliament. S.88 is an enabling provision. By itself it does not interfere with the exercise of aboriginal rights. In my opinion it is not inconsistent with s.35(1).

¶ 18 If incorporated provincial legislation offends s.35(1), and fails to meet the Sparrow tests, it will have no force and effect with respect to Indians by reason of s.52(1) of the Constitution Act, 1982. The provisions of s.88 play no part in that particular constitutional analysis.

¶ 19 I turn then to the real question in this appeal.

V. WHETHER s.34(2) OF THE WILDLIFE ACT IS INCONSISTENT WITH s.35(1) OF THE CONSTITUTION ACT, 1982, AND THEREBY OF NO FORCE AND EFFECT BY REASON OF s.52(1) OF THE CONSTITUTION ACT, 1982.

¶ 20 The charge in this case differs from Alphonse, who was charged with hunting at a time not within the open season (s.27(1)(c) of the Wildlife Act). The charge against Mr. Dick is for having dead wildlife in his possession, without having a licence or permit. The focus is on the permit provisions of the Act.

¶ 21 S.17(1) of the Wildlife Act deals with the issuance of limited entry permits. It provides:

> Limited entry hunting authorization
> 17. (1) The Lieutenant Governor in Council, by regulation, may
> (a) limit hunting for a species of wildlife in an area of the Province,
> (b) provide for limited entry hunting authorizations to be issued by means of a lottery or other method of random selection among applicants, and
> (c) do other things necessary for the purposes of this section.

As I said earlier, the appellant does not say that a system of limited entry permits is an inappropriate conservation measure, but does say that the system, as established and operated, fails to meet the Sparrow tests.

## VI. QUESTIONS ARISING FROM A SPARROW TYPE ANALYSIS WHICH MUST BE EXAMINED IN THIS CASE.

¶ 22 These questions include:

a) whether Mr. Dick was exercising an aboriginal right in possessing the remains of an elk;
b) whether Mr. Dick has established a prima facie infringement of s.35(1) of the Constitution Act, 1982 by showing that s.34(2) and s.17(1) of the Wildlife Act, and the regulations made pursuant to s.17(1), have the effect of interfering with an existing aboriginal right; and,
c) if Mr. Dick has established a prima facie interference with an aboriginal right, whether the Province has established that such interference was justified.

¶ 23 I will deal with a) and b) together because the Province takes the position that the two judges below erred in finding that Mr. Dick was exercising an aboriginal right, and therefore erred in finding interference with that right.

¶ 24 The Province submits Mr. Dick failed to establish that the elk was taken in the exercise of an aboriginal right. It asserts:

i) Mr. Dick failed to establish that the person who shot the elk was entitled to exercise an aboriginal right;
ii) the use of the remains of the animal by Mr. Dick was not in accord with aboriginal practice;
iii) the animal was a cow elk, and that the aboriginal practice was to protect female elk at that time of the year by prohibiting hunting, except when there was a real need for food.

¶ 25 Both the judges below found as a fact that Mr. Dick's son had shot the elk. I think that finding is one which a judge, properly instructed, could reasonably have made: R. v. Yebes, [1987] 2 S.C.R. 168 at 185-6.

¶ 26 Counsel have drawn our attention to conflicts in the evidence concerning the aboriginal practice with respect to the use of the remains, and the killing of a cow elk on the date in question. But, again, applying the Yebes test, I think it was open to the judges below to characterize the conduct of Mr. Dick as the exercise of an aboriginal right.

¶ 27 Both the judges below held that Mr. Dick had met the burden of showing a prima facie infringement of s.35 of the Constitution Act, 1982. But the Province submits that the closed season and the Limited Entry Permit system did not interfere with Mr. Dick's exercise of his aboriginal right, there being no evidence that he had been deprived of the opportunity to provide enough game for his family.

¶ 28 I think that the trial judge was correct in concluding that the legislation constituted an unreasonable interference with the aboriginal right to hunt and could lead to undue hardship. The right to hunt elk and to obtain meat for food and ceremonial purposes was no longer a reasonable prospect for Mr. Dick and other members of his band. As a result of the legislation it was a matter of chance to be determined by a lottery.

¶ 29 Turning to question c), the analysis in the County Court was limited to the question of whether the Wildlife Act and the regulations at issue had a valid objective. It was held that the objective, being conservation, was a reasonable limit on Mr. Dick's right to hunt. Neither the trial judge nor the County Court judge had the advantage of the analysis of the Supreme Court of Canada in Sparrow. Thus, the enquiry did not go beyond that first step of the justification analysis.

¶ 30 At p.1116 of Sparrow, Dickson C.J.C. and La Forest J. said:

> If the objective pertained to conservation, the conservation plan would be scrutinized to assess priorities.

¶ 31 There is no basis in the Wildlife Act and the regulations made under it for the assessment of priorities and the balancing of competing interests. If any priority is given it is in favour of professional guides. (Trial judge, p.138.)

¶ 32 Moreover, it is clear that the scheme, which operates "by means of a lottery or other method of random selection among applicants" cannot satisfy the basic principles stated in Sparrow: it appears to disregard aboriginal hunting rights; it is not sensitive to the needs of aboriginal hunters; it does not treat their claims in a serious way; and, it makes no attempt to assess or allocate priorities. There is no indication that the conservation scheme infringes as little as possible on aboriginal rights. It is obviously a subject which demands consultation, and careful reconsideration.

¶ 33 It appears that s.34(2), s.17(1) of the Wildlife Act, and the regulations made thereunder, cannot be justified on the evidence before us. What the contours of a justificatory standard ought to be in relation to aboriginal hunting rights must be determined in a specific factual context (Sparrow, at p.1111). That factual context, and the appropriate analysis has not been developed in this case.

VII. SUMMARY

¶ 34 1. Mr. Dick was exercising an aboriginal right when he was found in possession of a dead elk.

¶ 35 2. The Wildlife Act is a law of general application within the meaning of s.88 of the Indian Act, and is referentially incorporated as federal law pursuant to s.88.

¶ 36 3. S.88 is not inconsistent with s.35(1) of the Constitution Act, 1982.

¶ 37 4. S.34(2) and s.17(1) of the Wildlife Act and the regulations made thereunder constitute a prima facie infringement of aboriginal rights which has not been justified on the evidence before this court and thus they are inconsistent with s.35(1) of the Constitution Act, 1982. Accordingly, applying s.52(1) of the Constitution Act, 1982, ss.34(2) and 17(1) of the Wildlife Act are of no force or effect with respect to aboriginal persons.

¶ 38 I would allow the appeal and would restore the acquittal.

MACFARLANE J.A.
**TAGGART J.A.**:— I agree.
**HUTCHEON J.A.**:— I agree.
**WALLACE J.A.**:— I agree.

The following is the judgment of

¶ 39 LAMBERT J.A.:-- Harry Thomas Dick is a descendant of the Muchalaht and Mowachaht peoples. He lives with his family at Ahaminaquus, also known as Indian Reserve No. 12, at the mouth of Gold River on Vancouver Island.

¶ 40 On 10 July, 1987, Mr. Dick's son and one of the son's friends together shot a Roosevelt elk on the opposite side of the Gold River from the reserve, and within the traditional hunting grounds of the Muchalaht people. They brought the carcass home and the women of the family butchered it, wrapped the pieces, and stored the meat in two deep freezes in the family home. On the following day, Mr. Dick and his family left in their boat for their summer camp at Yuquot, also known as Friendly Cove. Later that day, Provincial Conservation Officers, on the authority of a search warrant, entered Mr. Dick's home and seized and carried away the elk meat.

¶ 41 Mr. Dick was charged on this Count:

> Harry Thomas DICK, on or about the 10th day of July 1987, at or near Gold River, in the Province of British Columbia, did have dead wildlife in his possession without a licence or permit, contrary to Section 34(2) of the Wildlife Act.

¶ 42 The relevant passages of the Wildlife Act are section 2 and subsection 34(2), which read:

> 2. (1) Ownership in all wildlife within the Province is vested in the Crown in right of the Province.
>
> (2) A person who lawfully kills wildlife and complies with all applicable provisions of this Act and the regulations acquires the right of property in that wildlife.
>
> . . .
>
> 34. (2) A person commits an offence where he has dead wildlife or a part of it in his possession except under a licence or permit or as provided by regulation.

¶ 43 Mr. Dick, in his evidence at trial, said that he had been hunting deer, elk, moose, seal and bear for years. The meat was used to feed the members of his family, several of whom lived with him. Mr. Dick said that he had never had a permit to hunt and that when he hunted he did so in the exercise of his aboriginal rights.

¶ 44 The trial was held before His Honour Judge Sarich of the Provincial Court of British Columbia. Judge Sarich's reasons are reported at [1989] 1 C.N.L.R. 132. Judge Sarich decided that the elk was shot in the exercise of an aboriginal right and that the carcass was retained and butchered for food in the exercise of an aboriginal right. He decided that ss.34(2) of the Wildlife Act was an infringement of Mr. Dick's aboriginal right to possess the elk carcass to use for sustenance purposes; that the decision of this Court in The Queen v. Sparrow (1986), 36 D.L.R. (4th) 246 applied; and that Mr. Dick's aboriginal rights in relation to hunting elk and using the meat for food provided a defence to the Count on which he had been charged. Accordingly, Judge Sarich acquitted Mr. Dick.

¶ 45 The Crown appealed to the Summary Conviction Appeal Court. The appeal was heard by His Honour Judge Hutchinson of the British Columbia County Court. The appeal was heard before the decision of the

Supreme Court of Canada in The Queen v. Sparrow, [1990] 1 S.C.R. 1075. Judge Hutchinson decided that the need for conservation of the limited population of Roosevelt elk on Vancouver Island overrode Mr. Dick's aboriginal rights. He set aside Mr. Dick's acquittal and entered a conviction. Judge Hutchinson's reasons are reported at [1989] 4 C.N.L.R. 120.

¶ 46 This appeal is brought from Judge Hutchinson's decision. It is limited to questions of law alone. The questions of law alone which were argued on this appeal were almost the same as the questions of law alone which were argued in the Alphonse appeal. The two appeals were argued together as part of a group of Indian appeals being heard by the same five-judge division of this Court. The decision of the Court on this appeal is being given at the same time as the decision on the Alphonse appeal.

¶ 47 In the Alphonse appeal, as in this appeal, there was a finding by the trial judge that the act which gave rise to the charge was an act in the exercise of an aboriginal right.

¶ 48 In the Alphonse appeal, as in this appeal, the Provincial Crown abandoned all extinguishment arguments which might be relevant to the appeal except this one:

> 3. Insofar as the Appellants in the Dick and Alphonse appeals allege that they "owned" the wildlife, the Province submits that those ownership rights over wildlife have been extinguished by virtue of the provisions of Section 2 of the Wildlife Act, first enacted as S.B.C. 1971, c. 69, s. 28.

¶ 49 I dealt with this argument in Part III of my reasons in Alphonse. For the reasons given there I would not accede to this argument in this appeal.

¶ 50 The decisive question of law alone in this appeal, as in the Alphonse appeal, is whether the relevant section of the Wildlife Act, in this case s. 34(2), applied to the act that constituted the exercise of aboriginal rights, either from its own Provincial force or as a law of general application which was given Federal force by s. 88 of the Indian Act. For the reasons set out in Part V of my reasons in Alphonse I conclude here, as I concluded there, that s. 34(2) of the Wildlife Act did not apply to Mr. Dick at all, (just as s. 27(1)(c) did not apply to Mr. Alphonse), when Mr. Dick exercised his aboriginal rights to have the carcass of the Roosevelt elk in his possession on or about 10 July, 1987.

¶ 51 Accordingly, I would allow the appeal, set aside the conviction, and enter a verdict of acquittal.

LAMBERT J.A.

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