R. v. FLETT

Manitoba Provincial Court, Martin P.C.J., May 13, 1987

Vic Savino, for the accused
Pamela Clark, for the Crown

The accused, a treaty Indian, was charged with unlawfully hunting migratory birds, to wit, Canada Geese, out of season on unoccupied Crown land, and with possession of migratory birds killed in contravention of the Migratory Birds Convention Act, R.S.C. 1970, c.M-12. The issue before the court was whether the accused, by virtue of s.35(1) of the Constitution Act, 1982, had the right to hunt migratory birds for food out of season on unoccupied Crown land to which he had a right of access or whether that right was still subject to the Migratory Birds Convention Act.

Held: Accused acquitted.

1. By virtue of the Constitution Act, 1982 s.35, federal or provincial governments cannot proceed to extinguish or ban a treaty or aboriginal right that has existed and has now been recognized by s.35, but may in some form regulate that right. However, that regulation cannot have the effect of entirely removing the traditional treaty or aboriginal right. Extinguishment and recognition are essentially different concepts.

2. The government in enacting s.35 intended that rights guaranteed and existing since time immemorial would be recognized, and therefore not abrogated, denied or extinguished, without at least constitutional enactment.

3. The Migratory Birds Convention Act cannot be used to extinguish the accused's aboriginal right to hunt migratory birds for food at all seasons on land to which he had access. To the extent that the Act is inconsistent with the Constitution in extinguishing the entrenched rights, it is of no force and effect. The accused had the right to shoot and as well to possess the geese.

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MARTIN P.C.J.: All proper notices have been given in respect to constitutional issues raised in this case and there is no issue as to jurisdiction.

The accused a treaty Indian, a member of The Pas Indian Band, and who lives on The Pas Indian Reserve was found in possession of two Canada Geese on April 20, 1985 at The Pas, in Manitoba.

He stands charged as follows:

> 1.(a) On or about the 19th day of April, 1985, at or near the Town of The Pas, Manitoba, did unlawfully hunt a species of Migratory game bird named in schedule "A" of the Migratory Birds Regulations, to wit: Canada Geese, at time other than during an open season specified in the said schedule "A" for the Federal zone at or near The Pas and for the Federal species, contrary to Section 5(4) of the Migratory Birds Convention Act and Regulations, R.S.C. 1952, C.179 [R. S. C. 1970, c.M-12],
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> (b) On or about the 19th day of April, 1985 at or near the Town of The Pas, Manitoba, did unlawfully have in his possession migratory birds, to wit: two Canada Geese, that were killed in contravention of the Migratory Birds Convention Act and Regulations contrary to Section 6(1)(b) of the Migratory Birds Convention Act and Regulations, R.S.C. 1952, C.179.

The issue before me is whether or not, the accused, a treaty Indian, on April 19, 1985 in view of the express provisions of s.35(1) of the Constitution Act, 1982, had the right to hunt migratory birds, out of season for food on unoccupied Crown lands to which he had access.

Section 35(1) of the Constitution Act, 1982 states as follows:

> 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.

Section 25 of the same Constitution Act as well protects aboriginal and treaty rights from being abrogated or derogated, generally:

> 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
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> (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 now exist by way of land claims agreements or may be so acquired.

To put the issue in another way -- Does s.35(1) as now inserted in the Constitution protect the longstanding Indian or aboriginal right to hunt and fish for food, or is that longstanding right (which I will outline briefly later) still subject to the Migratory Birds Convention Act as the courts have clearly enunciated over the years. I refer particularly to the Supreme Court of Canada decisions in the well known cases of R. v. Sikyea (1964), 50 D.L.R. (2d) 80, R. v. George (1966), 55 D.L.R. (2d) 386, R. v. Daniels (1968), 2 D.L.R. (3d) 1 and others. Before the constitutional changes effected in 1982, I would have no hesitation in saying that I am clearly bound by the law as stated in those cases, as would be the accused, and he would have to stand convicted. Defence counsel more or less concedes, however reluctantly, that would be the case. But the issue is not as simple as that.

I have received lengthy and able briefs and arguments from both Crown and Defence, but I do not propose to review these arguments in detail, except where it may be necessary to refer to a particular point , but I must point out that after counsel made their submissions I have received the decision of Sparrow v. R. (and intervenors) of the British Columbia Court of Appeal, dated December 24, 1986 at Vancouver [reported [1987] 1 C.N.L.R. 145], wherein a five judge panel of that Court met head-on the question of the effect of the changes in 1982 on aboriginal and treaty rights of aboriginals. I specifically adopt the reasoning of that unanimous decision insofar as it is applicable and analogous to the situation in this case.

That case dealt specifically with aboriginal salmon fishing rights the Musqueam Indian Band -- but the principles of law enunciated are in my opinion applicable in this case.

First I must note that the British Columbia Court of Appeal disagreed with the reasoning in two cases relied on by the Crown in this case: specifically the Saskatchewan Court of Appeal in R. v. Eninew and Bear (1984), 12 C.C.C. (3d) 365, [1984] 2 C.N.L.R. 126 and the Ontario Court of Appeal case of R. v. Hare and Debassige, [1985] 3 C.N.L.R. 139 which the Crown argues, stand for the proposition that the constitutional enactment in s.35(1) changed nothing. The status quo remains because of the interpretation of the word "existing" found therein.

The British Columbia court disagreed with the proposition that all s.35(1) does is to guarantee aboriginal or treaty rights existing as at April 17, 1982. Even though there are two decisions of other provinces' courts of appeal, I am not bound by them, and I choose to follow the reasoning in the British Columbia Court of Appeal. With respect I do not believe that s.35(1) of the Constitution can be interpreted as narrowly as the Saskatchewan and Ontario Courts of Appeal have done.

But the British Columbia court does not stop there. As I read and understand the decision, it says, that by virtue of the enactment in 1982, governments, either federal or provincial, cannot proceed to extinguish or ban entirely a treaty or aboriginal right, but may in some form regulate that right. I think the important point in that decision is that once it is established that a treaty or aboriginal right existed and has been recognized, now, by virtue of s.35, that right is preserved, albeit subject to some regulation but that regulation cannot have the effect of entirely removing the traditional treaty or aboriginal right.

The court there was concerned with the conservation of the salmon fishery but would not concede the government's right to take away the Indians' historic right to take fish for food, nor severely curtail that right. The court observed that extinguishment and regulation are essentially different concepts.

The court heard a consider able amount of evidence from several elders of The Pas Indian Band which confirms that the members of that band always felt that they could take "birds for food" until the prosecutions of the 1950s and 60s. It was further established on evidence that geese and ducks have from time immemorial been part of the Indians' diet.

Now in light of the above I turn to the case at hand. Indians in this part of the country have traditionally hunted and fished for food. They subsisted in part from hunting and fishing right up to the late fifties and sixties when the many Supreme Court decisions, some of which I mentioned above, had the effect of extinguishing their traditional right to hunt wild fowl at all seasons, as being contrary to the federal Migratory Birds Convention Act. They continued to enjoy that right, free from prosecution, until the last half of this century notwithstanding the passage of that Act in 1917.

It can be said, based on the facts, they (the Indians) were exercising an aboriginal right to seek food, but as well it was a treaty right. In 1876 The Pas Band, which it is to be remembered, the accused is a member, entered into Treaty number "Five," (in evidence) which inter alia states:

> Her Majesty further agrees with her said Indians that they the said Indians, shall have the right to pursue their avocations of hunting and fishing throughout the tract surrendered …

This apparent unlimited right was trammelled somewhat, or an attempt was made to do so, when the Government in Ottawa in 1930 entered into the Natural Resources Transfer Agreements with the western provinces which were constitutionally entrenched in the Manitoba agreement. By amendment in that year the famous, or infamous, but by now notorious s.13 was inserted:

> 13. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

Notwithstanding the passage of the Migratory Birds Convention Act in 1917 and the constitutional entrenchment of s.13, the Indians continued to hunt migratory game birds for their support and subsistence (limited to some degree territorially) until the sixties, as noted, when the courts decided they did not have that right; and that the Government of Canada could, through its Migratory Birds Convention Act extinguish the Indians' right.

I say "extinguish", because the effect was to place treaty Indians on exactly the same footing as any other white recreational hunter.

It is axiomatic that the Indians could never understand, much less accept, these decisions, nor I might add the federal and provincial governments' policies, whatever their motive, to vigorously prosecute them, when they were found hunting migratory birds for food out of season.

I acknowledge at once, as noted in many decisions, including Sparrow, that we now live in a modern industrialized society, (which may have passed many Indian reservations, at least those in the North of Canada where the primary food supply still comes from the wild), and society has changed drastically since these treaty rights were granted to Indians. But one wonders if that fact can justify the extinguishment of entrenched rights -- at least without negotiations which the Sparrow case speaks of and indeed which the new Constitution now provides specifically, s.37(2) of the Constitution.

I must not and do not quarrel with the decisions of the highest court in our land. Those decisions stand for what was determined to be the law at that point in time.

At that point the constitutional concepts in this country were much different than they are now with the advent of the new Constitution and Charter of Rights. Since 1982 we are under a new regime with fewer constraints and totally new concepts of constitutional interpretation. This has been expressed many times by constitutional experts, by judges at all levels, and by our political leaders,

It follows that the old concept of the supremacy of Parliament is no longer the broad guiding principal which must govern this Court in its deliberations, when faced with constitutional challenges. One speaks of "reading up" and "reading down" to protect constitutionally entrenched rights and freedoms, from statutory encroachment. In this case, that part of the Migratory Birds Convention Act and the present interpretation placed thereon, that laws of general application are applicable to Indians, cannot stand so as to restrict the rights I speak of.

Finally, it is not this Court which causes the law, as expressed in the Supreme Court decisions to be re-evaluated but rather the 'fathers' of our new Constitution, who in their wisdom changed the scheme of things in 1982 and inserted s.35(1).

Therefore we are now in my opinion under that new regime. Our Constitution, with the Indian leaders partial approbation, makes a new or renewed pledge to those Indians, that their existing aboriginal and treaty rights are recognized and affirmed. By re-stating this principle in 1982, surely the government intended that rights guaranteed and existing since time immemorial will be recognized, and therefore not abrogated, derogated or without at least consultation and subsequent constitutional enactment.

What is the effect then, of these new constitutional guarantees?

In my opinion the Migratory Birds Convention Act cannot be used to extinguish the Indians' right to hunt migratory birds for food at all seasons. To the extent that the Migratory Birds Convention Act is inconsistent with the Constitution in extinguishing the entrenched rights I speak of, it has no force and effect.

Its logically follows that Mr. Flett had the right to shoot and so well possess the geese as he did, and he must be acquitted on both counts. Shotgun, shells, and geese to be restored to Mr. Flett.