HER MAJESTY THE QUEEN V. ROGER JONES AND HOWARD PAMAJEWON

[Indexed as: **R. V. Jones and Pamajewon**]

Ontario Court (Provincial Division), Carr J., March 29, 1993

D. Nahwegahbow, for the accused
D. Upton, for the prosecution

The defendants, the chief and a councillor of the Shawanaga First Nation were charged with unlawfully keeping a common gaming house contrary to s.201(1) of the *Criminal Code,* R.S.C. *1985,* c.C46. The defendants pleaded not guilty and put forward three defences to the charge. First, they argued that the essential elements of the charge were not proven by the Crown. Second, they argued that s.15 of the *Criminal Code* provides a defence in that they were acting in obedience to the laws made and enforced by persons in possession of sovereign power. Third, the defendants argued that the Shawanaga First Nation possesses the inherent right to govern itself and therefore, the laws of Canada are of no force or effect whatsoever.

Held: Guilty as charged.

1. The essential elements of the charge were proven by the Crown. The games played were games of chance and were prohibited. The premises were described in terms such that they were within the definition of a common gaming house provided by s.197(1) of the Criminal Code. The defendants were present at the relevant times and their activities were described in a manner consistent with being keepers of a gaming house as defined in s.197(1) of the Criminal Code.

2. Section 15 of the Criminal Code provides a defence to persons who have committed what otherwise would be a crime but by reasons of an act or omission required by laws made and enforced by an illegitimate usurper of political power. The defendants failed to demonstrate that the Shawanaga lottery laws required them to engage in the gaming activities in question. Furthermore, the defendants failed to show that the Shawanaga Band Council which passed the Shawanaga lottery law possessed actual or de facto sovereign power over the place where the act occurred, or that the laws were enforced or even capable of being enforced by the band council.

3. Citing *R. v. Sparrow*, [1990] 3 C.N.L.R. 160 and *Delgamuukw v. British Columbia*, [1991] 5 C.N.L.R. 1. It was concluded that underlying tide, sovereignty and legislative power remains vested in the Crown and not in the Shawanaga First Nation. The intention of the Crown to extinguish the Shawanaga First Nation's right of self-government has been clearly and plainly expressed. This necessarily includes criminal law-making capacity.

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CARR J. (orally): The defendants Roger Jones and Howard Pamajewon stand charged that they, between the 11th day of September, 1987 and the 6th day of October, 1990, at the Indian Reserve of Shawanaga in the said Region, unlawfully did keep a common gaming house at Shawanaga Indian Reserve, to wit: bingo, Nevada break-open tickets, Wheels of Fortune and Blackjack, contrary to s.201(1) of the *Criminal Code of Canada.*

The defendants pleaded not guilty and put forward three separate defences to the charge. First of all, they argue that the essential elements of the charge have not been proven by the Crown. Secondly, the defendants rely upon s.15 of the *Criminal Code* and argue that they were acting in obedience to the laws for the time being made and enforced by persons in *de facto* possession of sovereign power in and over the place where the act or omission occurred. Lastly, the defendants argue that the Shawanaga First Nation has, and had at the relevant time, as it always has had, the inherent right to govern itself and as such the laws of Canada and, in particular, s.201 of the *Criminal Code* of Canada are of no force and effect whatsoever on the Shawanaga Reserve.

Because the alleged offence took place on the Shawanaga Reserve, the territory effectively of a sovereign and independent nation, the defendants are not accountable, they argue, to the provisions of the *Criminal Code* and must therefore, be acquired.

Have the essential elements of the charge been proven by the Crown? The Crown proffered no evidence *viva voce* to prove the delict but rather, and with the consent of counsel for the

defendants, put to the court a narrative of the facts agreed to by the defendants as being true.

The defendants argue that even in this way the Crown failed to prove that the defendants were keepers of a common gaming house in the Province of Ontario. I disagree.

The games played were put forward as being games of chance and prohibited. The premises were described in terms such that they were clearly within the definition of a common gaming house provided by s.197(1) of the *Criminal Code.* The defendants were present at the relevant times and their activities were described in such a way that they appeared "to be, or to assist, or act on behalf of an owner or occupiers of the place" and as such were keepers as defined in s.197(1) of the *Criminal Code* of a common gaming house.

The premises in question were shown to be located in Ontario. The defendants admitted that "the date and time and place are as indicated in the Information." The Information alleges that the games took place at the Indian Reserve of Shawanaga in the Northwest Region of the Province of Ontario in Canada.

In addition, the advertisements for the games, filed as exhibits, clearly confirm the location as being at Shawanaga in Ontario.

The defendants relied upon s.15 of the *Criminal Code* which reads as follows:

> 15. No person shall be convicted of an offence in respect of an act or omission in obedience to the laws for the time being made and enforced by persons in *de facto* possession of sovereign power in and over the place where the act or omission occurs.

The defendants Roger Jones and Howard Pamajewon at the material time were Chief and Councillor, respectively, of the Shawanaga Band Council. Council had passed three resolutions designed to promote commercial gaming on the reserve. Resolution 797 dated May 12th, 1987 reads as follows:

> Be it resolved that the Shawanaga First Nation Government officially advises the Federal Government of Canada and the Provincial Government of Ontario that the Shawanaga First Nation Government does not recognize these governments' laws having any application or jurisdiction on our sovereign land base set out in the 1850 Robinson Huron Treaty which was set aside and held by our people.
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> Further, be it resolved that the Shawanaga First Nation rejects any enforcement officer entering Shawanaga First Nation lands to enforce federal or provincial laws without first signing a treaty agreement with the Shawanaga First Nation Government giving these governments jurisdiction on our lands.

Two further band resolutions dated August 31ST, 1981 purported to a) pass the Shawanaga First Nation Lottery law and, b) to establish the Shawanaga First Nation lottery authority and to name its members

In order to shelter under s.15 as a statutory defence, the defendants must prove, on a balance of probabilities, the essential elements of the section. In my view, they have not succeeded in so doing.

The section is designed to afford a defence to persons who have committed what otherwise would be a crime but by reasons of an act or omission required by laws made and enforced by an illegitimate usurper of political power such as by way of a coup d'etat.

Although the activities of the defendants may have been in accordance with the Shawanaga lottery laws as set out in their Memorandum of Argument, the defendants have not demonstrated that they were acting in "obedience" to the said law or, to put it another way, that the Shawanaga law "required" the defendants to engage themselves in the gaming activities in question.

Obedience is defined in *Black's Law Dictionary,* 5th ed., as follows: "Compliance with a command, prohibition or known law and rule of duty prescribed. The performance of what is required or enjoined by authority."

Furthermore, the defendants have not shown that the band council which passed the Shawanaga lottery law possessed actual (or *de facto)* and independent and supreme (or sovereign power) in and over the place where the act occurred, or that the laws were enforced or even capable of being

enforced by the band council.

Lastly, the defendants argue that they should be acquitted because the laws of Canada have and, at the material time, had no bearing on their conduct. The defendants argue that they were in fact citizens of a separate and independent nation, possessing the inherent right to govern itself. The defendants were accountable, therefore, only to the laws of the Shawanaga First Nation with respect to their actions on Shawanaga soil. The defendant Roger Jones stated with passion and conviction that:

> We regard ourselves as a sovereign nation, we sign treaties and we have the right to pass laws in our lands and if we wish to pass a law that's going to generate revenue for our community in whatever manner we see fit, we have the right to do that. We have the right to trade with other nations just as Canada trades with the U.S. We have the right to do that.

In response to the following question by the Crown:

"So, no law, nothing from Canada applies. It's a completely different country." Mr. Jones replied:

"Yes, we're sovereign. That's what inherent rights are about."

Shawanaga Band Council resolution 797 dated May 12th, 1987, made when the defendant Jones was Chief, echoes the same sentiments.

The defendants correctly rely upon the decision of the Supreme Court of Canada in *R.* v. *Sparrow,* [1990] 1 S.C.R. 1075, [1990] 3 C.N.L.R. 160, [1990] 4 W.W.R. 410, 70 D.L.R. (4th) 385, 46 B.C.L.R. 1, 56 C.C.C. (3d) 263, 111 N.R. 241 as support for the proposition that the prosecution must prove that the right to self government which the Shawanaga First Nation possessed in times passed has in fact been extinguished by the Crown.

It has been established by the Supreme Court of Canada in *Sparrow* that the Crown has had the right unilaterally to extinguish existing Aboriginal rights if it did so with clear and plain intent and prior to the coming into effect of s.35 of the *Constitution Act, 1982.*

It is clear from the evidence of James Morrison that the Shawanaga Reserve is in fact in the area covered by the Royal Proclamation of 1763.

Dickson C.J.C. and La Forest 3. for the Supreme Court of Canada in the *Sparrow* decision had this to say with respect to the significance of the Royal Proclamation of 1763 at page 283 [C.C.C.; p.177 C.N.L.R.]:

> It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, there was from the outset never any doubt that sovereignty and legislative power and, indeed, the underlying tide to such lands vested in the Crown.

In my view, this perspective of the Crown continued and was indeed confirmed in the Robinson Huron Treaty of 1850 wherein the Native parties to the treaty are referred to as subjects of Her Majesty. Although the reserve lands were not ceded to the Crown by the Natives, the fact that "underlying title to such land remained vested in the Crown," is readily apparent in that the Natives did not, and in the words of the treaty, retain any right "to sell, lease or otherwise dispose of any portions of their reservations without the consent of the superintendent general of Indian Affairs or other officer of like authority."

Ultimately s.91(24) of the *Constitution Act, 1867* confirmed that the exclusive legislative authority of Parliament of Canada extends "to Indians and lands reserved for the Indians.'

The intention of the Crown to extinguish the right of self-government of the Shawanaga First Nation or the larger Aboriginal nation to which the Shawanaga First Nation belongs or belonged at the relevant time has been clearly and plainly expressed. This necessarily includes criminal law-making capacity.

It may be that the Crown, for various reasons, has chosen not to prosecute specific criminal offences alleged to have taken place on Indian reserves from time to time over the years such as in the cases cited by the witness Morrison. However, in no way does this suggest that the Crown was recognizing a right of self-government within the criminal law sphere.

In the words of McEachern C.J.B.C. in the *Delgamuukw* v. *British Columbia* case, [1991] 5 C.N.L.R. 1 at 211, [1991] 3 W.W.R. 97, 79 D.L.R. (4d) 185 at 454:

> I fully understand the plaintiffs' wishful belief that their distinctive history entitles them to demand some form of constitutional independence ... But, neither this nor any other court has jurisdiction to undo the establishment of the colony, Confederation or the constitutional arrangements which are now in place. Separate sovereignty or legislative authority, as a matter of law, is beyond the authority of any court to award.

There will be, as a result, a finding of guilty.