WAYNE NICHOLAS, GERARD BEAR, DWIGHT BEAR and ROGER HUGH BEAR (Appellants) v. THE QUEEN (Respondent)

[Indexed as: **R v. Nicholas and Bear**]

New Brunswick Court of Queen's Bench, Trial Division, Dickson J., March 16, 1988

G. Nicholas, for the appellants
G. Shaw, for the respondent

Each of the four appellants, members of the Maliseet Band living on the Tobique Reserve, appealed their conviction of obstructing a fisheries officer contrary to s.38 of the *Fisheries Act,* R.S.C. 1970, c.F-14 (see [1985] 4 C.N.L.R. 153). Two of the appellants were also charged and convicted of unlawfully fishing with the use of a gill net in non-tidal waters contrary to s.7 of the *New Brunswick Fishery Regulations* and they appealed these convictions.

The appellants appealed on the grounds that the trial judge erred in ruling 1) that the *Royal Proclamation of 1763,* as recognized by s.25 of the *Canadian Charter of Rights and Freedoms,* was subordinate to s.1 of the Charter; 2) the aboriginal right to fish was not recognized and affirmed in s.35 of the *Constitution Act, 1982.*

Held: Appeals dismissed; convictions affirmed.

1. The words "existing aboriginal and treaty rights" in s.35(1) can only be taken to mean those rights as they existed on the enactment of the *Constitution Act, 1982* on April 17, 1982. The rights confirmed by the 1725 treaty and Royal Proclamation relied upon by the appellants had, on April 17, 1982, been limited or restricted by the *Fisheries Act.* The words of s.35(1) cannot be taken as suggesting that it was ever contemplated that the section would have the effect of restoring or reviving treaty or aboriginal rights originally granted and enjoyed but since limited.

2. Aboriginal rights bestowed under the Royal Proclamation are on the same footing as treaty rights and it is only those remaining unrestricted rights conferred by the Proclamation and existing on April 17, 1982 which are recognized and affirmed by s.35(1). On this basis it was not necessary for the Court to consider the first ground of appeal.

3. Section 25 of the *Constitution Act* does not confer any new substantive rights or freedoms. In enacting s.25 Parliament was saying that the rights and freedoms generally stated in the Charter should not be construed so as to abrogate or derogate from aboriginal rights recognized under s.35.

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DICKSON J: These are appeals by each of the four appellants from their conviction before a Provincial Court Judge [reported [1985] 4 C.N.L.R. 153] sitting at Perth-Andover on various informations alleging offences against either the federal *Fisheries Act,* R.S.C. 1970, c.F-14 or the regulations made thereunder. The appellant, Dwight Bear was charged that he did:

> ... at or near the Parish of Perth . . . wilfully obstruct a fisheries officer in the execution of his duty, contrary to and in violation of section 38 of the Fisheries Act, being Chapter F-14 of the Revised Statutes of Canada, 1970 as amended.

Each of the other appellants was charged with a similar offence arising out of the same circumstances.

The appellant Gerald Bear was also charged that he did:

> ... at or near the Parish of Perth ... unlawfully fish by use of a gill net in non-tidal waters, to wit, the Tobique River, in violation of and contrary to section 7(1) of the New Brunswick Fishery Regulations, Consd. Reg. Can. 1978, c.844, made pursuant to section 34 of the Fisheries Act....

The appellant Nicholas was also charged with a similar offence under s.7(1).

Each of the informations was dealt with separately but by agreement of counsel the evidence taken in respect of one of the informations was adopted as the relevant evidence in respect of all other informations. In an oral judgment, reported at 55 N.B.R. (2d) 413, [1985] 4 C.N.L.R. 153 the trial judge found all accused guilty as charged.

All of the appellants are Indians and members of the Maliseet Band living on the Tobique Indian Reserve. At trial, essentially through admissions contained in an agreed statement of facts, it was established that all accused had performed the acts complained of. The grounds of defence relied upon, apart from one including the question of whether or not the locus fell within the bounds of the reserve (a question with which we are not concerned on these appeals), were essentially that the accused were at the time of the alleged offences exercising treaty rights of fishing bestowed on the Maliseet Indians by a 1725 treaty, known as "The Submission and Agreement of the Delegates of the Eastern Indians," and by the *Royal Proclamation of* 1763,which rights, by virtue of ss.25 and 35(1) of the *Constitution Act, 1982,* remained in effect and could not be limited by either the *Fisheries Act,* R.S. C. 1970, c.F-14 or regulations made thereunder.

Those sections of the *Constitution Act, 1982* referred to provide as follows:

> 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 may be acquired by the aboriginal peoples of Canada by way of land claims settlements.
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> …
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> 35.(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
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> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Metis peoples of Canada.

In his reasons the trial judge stated [pp. 162-63 C.N.L.R.]:

> Although it can ... be said that the defendants are aboriginals wherein their fishing rights are recognized by virtue of s.25(a) of the Charter of Rights, I find that these rights are subordinated to section one of the Charter and consequently to the regulatory enactments of the *New Brunswick Fishery Regulations.* The *Fisheries Act* and the Regulations thereunder are prohibitory and have for effect the purpose of conservation and management of the fisheries....
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> The need for such regulations, in my mind is obvious. To permit any one an unfettered right to fish would be synonymous to granting the right to cause the extinction of any given species of fish, and in this case, I am referring to the salmon.

Section 1 of the *Canadian Charter of Rights and Freedoms,* to which the trial judge refers reads as follows:

> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

In dealing with s.35 of the *Constitution Act* the trial judge pointed out that prior to its enactment any treaty or other aboriginal rights in conflict with federal legislation were, under a long line of authorities, deemed limited by that legislation. He then went on to consider the three alternative constructions which Professor Hogg in his text *Canada Act 1982 Annotated* (1982) suggested might be possibly placed upon s.35 and adopted the third alternative, viz, that aboriginal and treaty rights are "constitutionalized" prospectively, so that past (validly enacted) alterations or extinguishment continue to be legally effective, but future legislation which purports to make any further alterations or extinguishments is of no force or effect. In the result he found that what were confirmed and recognized by s.35(1) were those rights as they stood at the date of proclamation of the *Constitution Act, viz,* on April 17, 1982, and that the original rights bestowed by the treaty and the Royal Proclamation must be deemed to have been limited by those restrictions imposed by earlier legislation such as the *Fisheries Act.* In the further result the trial judge found that it was unlawful for the accused to fish contrary to s.7(1) of the *New Brunswick Fishery Regulations* and

that the fisheries officers were engaged in the lawful execution of their duties when they were obstructed by the accused.

The appellants' appeal on the grounds that:

> (a) (The trial judge) erred in law by ruling that the Royal Proclamation of October 7, 1763, as recognized by section 25(a) of the Charter of Rights, was subordinate to Section 1 of the Charter of Rights; and
>
> (b) (The trial judge) erred in law by ruling that the aboriginal right to fish was not recognized and affirmed in Section 35 of the Constitution Act, 1982.

As to the second ground of appeal, I am of the opinion that use of the expression "existing aboriginal and treaty rights" in s.35(1) can only be taken to mean those rights as they existed on April 17, 1982, i.e. as modified by the earlier federally-enacted *Fisheries Act,* and I find that the trial judge has not erred in his interpretation of that section. As I have had occasion to point out in a recent judgment in *Paul and Moulton v. R.* (as yet unreported) [*R. v. Paul,* reported *infra at* p. 135] the wording employed in s.35(1) cannot be taken as suggesting that it was ever contemplated that that section should have the effect of restoring or reviving any treaty or aboriginal rights originally granted or enjoyed and since limited. Such an interpretation has earlier been placed on the section by my brother Godin J. in *Martin et al. v. R.* (1986), 65 N.B.R. 21 and by Gerein J. in the Saskatchewan case *R. v. Eninew,* 7 C.C.C. (3d) 443, [1984] 2 C.N.L.R. 122. See also A.G. *for Ontario v. Bear Island Foundation et al.; Potts et al. v. A.G. for Ontario* (1984), 15 D.L.R. (4th) 321, [1985] 1 C.N.L.R. 1 (Ont. *S.C.), R. v. Steinhauer (1985*), 63 A.R. 381, [1985] 3 C.N.L.R. 187 (Alta. Q.B.) and *R. v. Hare et al.,* [1985] 3 C.N.L.R. 139, 14 W.C.B. 161 (Ont. C.A.). It may be noted that the interpretation to be placed on s.35(1) was one of the questions framed for consideration by the Supreme Court of Canada in *Simon v. R.,* [1985] 2 S.C.R. 387, [1986] 1 C.N.L.R. 153, but the Court found it unnecessary to consider that question in the determination of the appeal there involved.

Aboriginal rights conferred under the Royal Proclamation stand on precisely the same footing as do treaty rights and it is only those remaining unrestricted rights conferred by it and existing at the time of enactment of the *Constitution* Act, 1982 which were recognized and affirmed by s.35(1). It is therefore unnecessary to consider the first ground of appeal and whether or not the exclusionary or "notwithstanding" clause of s.1 of the Charter can be relied upon to warrant a finding that federal legislation justly limits or modifies under that clause the treaty or aboriginal rights involved. I do point out that s.25 of the *Constitution Act,* 1982 confers no new substantive rights or freedoms other than the right not to have aboriginal rights or freedoms derived from a treaty or otherwise abrogated or derogated from by any other guarantee, of general application, contained in the Charter. In my view what Parliament was saying in enacting s.25 was that, even though aboriginal and treaty rights then existing and recognized under s.35 might offend against, say, s.15(1) of the Charter, which provides for equality before and under the law, s.15(1) cannot serve to abrogate or derogate from such rights. The possible application of s.25 to other sections of the Charter is not readily apparent to me although it may be to others. In one sense the purpose of s.25 was to supplement and extend explicitly to the aboriginal people of Canada s.15(2) of the Charter. See also *A.G. for Ontario v. Bear Island Foundation et al.; Potts et al. v. A.G. for Ontario* (supra).

The appeal of each of the appellants is dismissed and his conviction affirmed.