WOLVERINE AND BERNARD v. R.

Saskatchewan Court of Queen's Bench, Wimmer J., February 9, 1987

J.R. Cherkewich, for the appellants
J. Halyk, for the respondent

The appellants, treaty Indians, were each separately charged and convicted with unlawfully hunting within a game preserve contrary to s.5(1)(a) of the Wildlife Regulations, 1981, made pursuant to the Wildlife Act, S.S. 1979, c.W-13.1. They were each hunting for food and hunting safely. The game preserves was found to be occupied Crown land and that it was constituted in good faith and not for the purpose of encroaching upon Indian hunting rights. The appellants argued that they were entitled to hunt for food in the game preserve by virtue of paragraph 12 of the Saskatchewan Natural Resources Agreement.

Held: Appeal dismissed.

1. Right of access to trap and fish does not give rise to a right of access to hunt. "Hunting, trapping and fishing" are read disjunctively. Hunting for food is permitted only where there is a right of access for the purpose of hunting, and hunting is not permitted where the right of access is only for the purpose of trapping and fishing. R. v. Masuskapoe, [1987] 1 C.N.L.R. 98 -- followed.

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WIMMER J.: Wolverine and Bernard were charged in separate informations with the offence of unlawfully hunting within a game preserve contrary to s.5(1)(a) of the Wildlife Regulations, 1981. Each was convicted in the Provincial Court and ordered to pay a fine of $100. A single notice of appeal was filed referring to both convictions. No objection was taken to this procedure and the two appeals from conviction were heard as one.

The facts are, for the most part, agreed. Wolverine and Bernard, both treaty Indians, together shot and killed a moose within an area constituted by provincial authorities as a game preserve. They were hunting for food and hunting safely. The trial judge found as a fact that the game preserve was occupied Crown land and that it was constituted in good faith and not for the purpose of encroaching upon entrenched Indian hunting rights.

The argument advanced before the trial judge and on appeal is that Wolverine and Bernard were entitled to hunt for food in the game preserve by virtue of s. 12 of the Saskatchewan Natural Resources Transfer Agreement. That paragraph preserves the right of Indians to hunt, trap, and fish for food at any time on all unoccupied Crown lands and on any other land, to which they may have a right of access. It is argued that because trapping and fishing is permitted within the game preserve in question, it follows that Indians also have a aright of access to hunt there for food.

This issue is identical to that considered and ruled upon by Halvorson J. in R. v. Masuskapoe (1986), 47 Sask. R. 27, [1987] 1 C.N.L.R. 98 (q.b.). He held that a right of access to trap or fish did not give rise to a right of access to hunt. Counsel for Wolverine and Bernard simply asserts that Masuskapoe was wrongly decided and that its example should be followed. However, even if I disagreed with Halvorson J. - which I do not - I would regard myself as bound by his prior decision.

It is true that the doctrine of stare decisis does not absolutely bind a judge of first instance to follow a prior decision of another judge of the same court, but a failure to do so is a disservice to litigants, lawyers and inferior courts who are entitled to see the law as reasonably settled and certain. It is for courts of appeal, not individual judges of equal jurisdiction, to correct judicial errors.

In my opinion, the proper practice was set out by Wilson J. of the British Columbia Supreme Court in Re Hansard Spruce Mills Ltd., 13 W.W.R. 285, 34 C.B.R. 202, [1954] 4 D.L.R. 590. I quote from p. 286:

> …I say this: I will only go against a judgment of another judge of this court if:

(a) Subsequent decisions have affected the validity of the impugned judgment;

(b) It is demonstrated that some binding authority in case of law or some relevant statute was not considered;

(c) The judgment was unconsidered, a nisi prius judgment given in circumstances familiar to all trial judges, where the exigencies of the trial require an immediate decision without opportunity to fully consult authority

If none of these situations exists I think a trial judge should follow the decisions of his brother judges.

A similar position was taken by Jackett, President of the Exchequer Court, in Can. S.S. Lines v. M.N.R., [1966] Ex. C.R. 972, [1966] C.T.C. 255 at 259, 66 D.T.C. 5205:

I think I am bound to approach the matter in the same way that the similar problem was approached in each of these cases until such time, if any, as a different course is indicated by a higher Court. When I say I am bound, I do not mean that I am bound by any strict rule of stare decisis but by my own view as to the desirability of having the decisions of this Court follow a consistent course as far as possible.

In R. v. Nor. Elec. Co., [1955] O.R. 431, 21 C.R. 45, 111 C.C.C. 241, [1955] 3 D.L.R. 449 at 466, 24 C.P.R. 1 (H.C.), McRuer C.J.H.C. stated:

Having regard to al the rights of appeal that now exist in Ontario, I think Hogg J. stated the right common law principle to be applied in his judgment in R. ex rel. McWilliam v. Morris, [1942] O.W.N. 447 where he said: "The doctrine of stare decisis is one long recognized as a principle of our law. Sir Frederick Pollock says, in his First Book of Jurisprudence, 6th ed., p.321: 'The decisions of an ordinary superior court are binding on all courts of inferior rank within the same jurisdiction, and, though not absolutely binding on courts of co-ordinate authority nor on that court itself, will be followed in the absence of strong reasons to the contrary'."

I think that "strong reasons to the contrary" does not mean a strong argumentative reason appealing to the particular Judge, but something that may indicate that the prior decision was given without consideration of a statute or some authority that ought to have been followed. I do not think "strong reason to the contrary" is to be construed according to the flexibility of the mind of the particular Judge.

The rule - if it can be characterized as such - to be delivered from the foregoing passages is that one trial judge will not, except in extraordinary circumstances, refuse to follow a prior decision of another judge of the same court. Accordingly, I decline counsel's invitation to, in effect, sit on appeal from my colleague Halvorson J.

The appeals of Wolverine and Bernard are each dismissed.