CANADA / JUDGMENT

R. v. Morris

2002 BCSC 780

COURT	DECIDED
Supreme Court of British Columbia	24 May 2002

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

Source record

2002BCSC0780

Citation:	Morris and Olsen v. HMTQ Date: 20020524 2002 BCSC 780
Docket:	19763 Registry: Duncan IN THE SUPREME COURT OF BRITISH COLUMBIA
BETWEEN:	REGINA respondent
AND:	ivan morris and carl olsen appellants

REASONS FOR JUDGMENT

OF THE

HONOURABLE mr. JUSTICE singh

Counsel for the Respondent:

B.W. Rendell

Counsel for the Appellants:

L. Mandell, Q.C.

and A.A. Walkem

Date and Place of Hearing:

April 22-24, 2002

Duncan, BC

Introduction

[1] The appellants were convicted in Provincial Court of the following counts:

IVAN MORRIS and CARL OLSEN, on or about the 28th day of November, 1996, at or near Youbou, in the Province of British Columbia did hunt wildlife, deer, with a firearm during prohibited hours, contrary to Section 27(1)(d) of the Wildlife Act of British Columbia, S.B.C., c. 57.

IVAN MORRIS and CARL OLSEN, on or about the 28th day of November, 1996, at or near Youbou, in the Province of British Columbia did hunt wildlife, deer, by the use of or with the aid of a light or illuminating device, contrary to Section 27(1)(e) of the Wildlife Act of British Columbia, S.B.C., c. 57.

CARL OLSEN, on or about the 28th day of November, 1996, at or near Youbou, in the Province of British Columbia, did discharge a firearm at wildlife from a motor vehicle, contrary to Section 28 (1) of the Wildlife Act of British Columbia, S.B.C., c. 57.

[2] This is an appeal from conviction by both Ivan Morris and Carl Olsen, both members of the Tsartlip Indian Band.

Factual Background

[3] The trial judge summarised the relevant facts as follows:

The two Defendants, members of the Tsartlip Indian Band, were deer hunting near Youbou in the late evening of November 28, 1996. Unknown to the Defendants, provincial conservation officers had set up a trap in that location for night hunters, consisting of a mechanical deer decoy with reflecting eyeballs that simulate the look of a deer when illuminated by artificial light. The Defendants were driving along North Shore Road when they spotted what they took to be a deer. The vehicle stopped, and Defendant Carl Olsen took three shots from the passenger seat of the vehicle. The rifle was then passed across two children, also seated in the front seat, to Defendant Ivan Morris, who proceeded to take two shots himself from outside the vehicle. Conservation officers then apprehended the Defendants.

[4] At trial, an admission of facts was filed. It reads as follows:

The following facts are hereby admitted for the purpose of dispensing with the proof thereof for the purpose of the trial:

1. The accused Ivan Morris ("Morris") and Carl Olsen ("Olsen") are Indians within the meaning of the Indian Act and have ancestral ties to the Tsartlip Indian Band located near Saanichton, British Columbia;

2. That the Tsartlip Indian Band is a member of the Saanich First Nation. The members of the Saanich Nation are classified as part of the Coast Salish group of aboriginal peoples. The Coast Salish people form a distinctive aboriginal group who share a distinctive language, cultural traits and geographical area.

3. That the ancestors of the Tsartlip Band were signatories to the North Saanich Treaty ("Douglas Treaty"), signed in or about the year 1852 and which provides, among other clauses, that beneficiaries of this treaty "are at liberty to hunt over the unoccupied lands, and carry on our fisheries as formerly";

4. The Douglas Treaty is a treaty for the purposes of s. 88 of the Indian Act, R.S.C. 1985 C.1-5 and s. 35 of the Constitution Act, 1982.

5. That Morris and Olsen are entitled to the benefits of the Douglas Treaty;

6. That Morris and Olsen have an ancestral connection to the geographical territory in which they were hunting on November 28, 1996, being an area situated west of the village of Youbou along North Shore Road, and that they were entitled to hunt deer over this geographical territory pursuant to their rights under the Douglas Treaty.

Issues on Appeal

[5] The appellants allege the trial judge erred in:

1) finding the appellants' right to hunt by virtue of the Douglas Treaty did not include the right to hunt at night or the right to hunt with illumination;

2) applying a s.35 analysis to answer the question of whether provincial regulations apply to the defendants by virtue of the Douglas Treaty and section 88 of the Indian Act;

[6] The respondent submits that the trial judge erred in:

1) concluding that night hunting has been an accepted practice of the Tsartlip people from pre-treaty days to the present and that night hunting with illumination was one of the various methods used by the Tsartlip from time immemorial.

Statutory Provisions

[7] The relevant statutory provisions are as follows:

British North America Act, 1867 [now the Constitution Act, 1967]:

91 (24) provides the Parliament of Canada with exclusive legislative authority "over Indians and lands reserved for Indians".

Constitution Act, 1982:

35 (1). The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognised and affirmed.

Indian Act, R.S.C. 1970, c.1-6:

88. Subject to the terms of any treaty, and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.

Applicable provisions of the Wildlife Act, S.B.C. c. 57:

27 (1) A person commits an offence where he hunts, takes, traps, wounds or kills wildlife

(d) with a firearm or a bow during the prohibited hours,

(e) by the use or with the aid of a light or illuminating device,

(2) Subsection (1) (d) and (e) does not apply to a person who hunts or traps wildlife that is on his property and is a menace to a domestic animal or bird.

28. (1) A person who discharges a firearm or wounds or kills wildlife from a motor vehicle or from a boat which is propelled by a motor commits an offence.

Treaty

[8] The treaty at issue in this case was entered into by James Douglas on behalf of the Hudson Bay Company. The treaty was made prior to Confederation. It has been judicially considered. In Claxton v. Saanichton Marina Ltd., [1989] 3 C.N.L.R. 46 (B.C.C.A.), the Court of Appeal reviewed the background and terms of the treaty. At p. 47 the court writes:

On February 11, 1852, Governor James Douglas concluded a treaty with representatives of the Saanich Tribe At that time Douglas was engaged in a program of acquiring Indian lands on Vancouver Island for the purpose of settlement and colonization. Between April 29, 1850 and February 8, 1851, Douglas had concluded treaties with twelve Indian tribes on Vancouver Island.

[9] The portion of the treaty relevant to this case is as follows:

it is understood however that the land itself with these small exceptions, becomes the entire property of the white people forever, it is also understood that we are at liberty to hunt over the unoccupied lands; and to carry on our fisheries as formerly. [My emphasis.]

[10] The respondent concedes that the Douglas Treaty is a treaty for the purposes of s. 88 of the Indian Act. This is in keeping with the holding in R. v. Bartleman (1984), 55 B.C.L.R. 78 (B.C.C.A.). The respondent further concedes, albeit for the purposes of this appeal only, that the term "as formerly" applies to the "liberty to hunt over the unoccupied lands". The trial judge relying on a liberal and generous interpretation of the treaty found "as formerly" applied to the right to hunt.

Decision at trial

[11] Higinbotham Prov. Ct. J. began his reasons by noting that there are two tests for determining the validity of a provincial regulation once it is found that the regulation impacts on a protected treaty right. The first test is applied in light of s. 35 of the Constitution Act, 1982. In keeping with the decision of R. v. Sparrow (1990), 56 C.C.C. (3d) 263 (S.C.C.), the Province bears the burden of justifying the violation or infringement. The second test is under s. 88 of the Indian Act. Because s. 88 includes the provision "subject to the terms of any treaty, and any other Act of the Parliament" there may be an implicit justification requirement under s. 88. The trial judge relied on R. v. Cote, [1996] 3 S.C.R. 139 at p. 191, with respect to this second approach. The argument before the trial judge focussed on the first approach and s. 35, Constitution Act, 1982. As such, the trial judge began his analysis in light of R. v. Sparrow. He commented that he would return to the s. 88 dilemma if necessary. In determining whether the prohibition against hunting with lights is unreasonable the trial judge found that since the provision related to safety it was not unreasonable. The trial judge was also satisfied that the prohibition against night hunting did cause real hardship to the Tsartlip people. He was not "persuaded that the hardship [was] so great as to be disproportionate to the public safety objective of the prohibition". Finally the prohibition against night hunting did not deny the Tsartlip people of their preferred means of exercising their right to hunt. The trial judge's reasons for judgment on this last point at paras. 16-20, are as follows:

The right asserted by the Defendants is a communal right to hunt "as formerly". I take this to mean that the Defendants have a right to hunt deer for food and ceremonial purposes. I do not take the words "as formerly" as putting an imprimatur on any particular method or style of hunting carried out prior to the treaty agreement. Thus, for purposes of the Sparrow analysis, it is not a "right to hunt at night", or a "right to hunt with illumination" that forms the basis of the enquiry. It is the hunting of game that is of defining cultural significance, not the methods of the hunt.

The methods of hunting are important none the less, if the state purports to preclude or place a significant limitation on the communal right-holders' preferred means of exercising the right. If a preferred means of exercising the right exists, that practice may be nearly as important as the right to which it refers. I think it is for these reasons that the court in Sparrow held that a regulatory or statutory denial of such a preferred means would require justification.

In the case at bar there is a considerable body of evidence supporting the fact that night hunting has been an accepted practice of the Tsartlip people from pre-treaty days to the present. There is also ample evidence that night hunting is very effective and convenient. I am sure that was as true prior to the treaty as it is now. The difference is that with increases in human habitation and the consequent denigration of wildlife habitat, aboriginal hunters must travel farther to hunt, and wildlife resources are somewhat diminished. As the cost of hunting increases both in terms of time and money, effective and efficient hunting practices take on added importance. One way to save time and money is to hunt at night. It is in this sense that night hunting with the use of lights may be said to have achieved the status of a "preferred" method, but not as a matter of

cultural significance.

As pointed out previously in these reasons, in Regina v. Seward, [1997] 1 C.L.N.R. 138, I held on similar facts that the convenience of the hunter was a determining factor, and that the choice of the individual hunter to hunt at night could constitute a "preferred means", so long as that choice was consistent with the historical hunting practices of the aboriginal group. Our Court of Appeal, which confirmed that "preferred means", are established at the community level, explicitly rejected this interpretation. In order for night hunting to achieve constitutionally protected status, the Defendants would be required to establish that the practice was "a crucial element of the distinctive culture" of their aboriginal community, as per Seward, supra, at page 14. The Defendants have failed to establish that fact in this case, and have established only that night hunting with illumination was one of the various methods employed by the Tsartlip from time immemorial, none of which methods are in and of themselves a defining feature of their society.

Employing the Sparrow test, I am unable to find that the specific legislation in question has the effect of infringing the hunting right of the Tsartlip people. It is therefore unnecessary for me to embark on an enquiry as to whether the legislation could otherwise be justified. I am also satisfied that these provisions of the Wildlife Act do not conflict either with the Indian Act or the treaty in any way, because the right to hunt does not include either the right to hunt at night, or the right to be aided by illuminating devices. I therefore turn now to the other significant defence to these charges offered by Defence Counsel.

[My emphasis.]

[12] Much of the evidence at trial bearing on the issues before me on this appeal was canvassed in the written submissions provided by both counsel. Below is a summary of that evidence as it relates to the issues before me.

Summary of Evidence

[13] I will now review this evidence.

[14] Gerald Brunham is a conservation officer with the B.C. Ministry of Environment. Mr. Brunham testified that on the night of November 28, 1996, he along with Ronald Heusen, Ken Broadland, Graham Turnball and Peter Powell were involved in a deer decoy operation. The operation was set up as a result of numerous complaints about night hunting. The operation was on the North Shore Road approximately 11 kilometres west of Youbou, B.C.. Mr Brunham said he was in the command post when he observed a vehicle approach. He testified he saw the passenger shine a flashlight out the window. He also heard three shots fired. He then observed the passenger in the vehicle pass the rifle across two juveniles to the driver who was exiting the vehicle. Two more shots were fired. Following the shots officers Heusen and Broadland approached the suspect's vehicle and detained the suspects. Officer Turnball collected the exhibits from the site including live rounds and casings.

[15] Senior conservation officer James Stephen testified as an expert on hunting methods and hunters' safety. He provided evidence about the concerns relating to night hunting. These concerns included the difficulty in identifying the target and the fact that peripheral vision is minimised. Officer Stephen also testified that although there were measures that could be employed to make night hunting safer, these measures were not practical.

[16] David Paul testified on behalf of the defence as a band administrator, prior chief and band councillor with the Tsartlip band council. Mr. Paul testified that from his perspective the Tsartlip's treaty right to hunt at night could be practised safely. He explained the tradition of teaching children and grandchildren safe hunting practices.

[17] Joseph Bartleman provided evidence regarding the safety practices of the Tsartlip people.

[18] Saul Terry testified as a member of the Union of B.C. Indian Chiefs. He testified with respect to the provincial government's duty to consult with aboriginal people on provincial policy or regulation issues.

[19] Thomas Sampson also testified on behalf of the defence. His evidence was tendered in support of the night hunting tradition of the Tsartlip people.

[20] The accused Ivan Morris and Carl Olsen testified as to the facts surrounding the charges, the practice of night hunting with illumination and the safety teaching of the Tsartlip people.

Analysis

[21] I will address each of the three issues raised on this appeal separately. I propose to examine the issue raised by the respondent before moving on to the appellant's issues. The respondent challenges the findings of fact made by the trial judge.

1. Did the trial judge err in concluding that night hunting has been an accepted practice of the Tsartlip people from pre-treaty days to the present and that night hunting with illumination was one of the various methods used by the Tsartlip from time immemorial?

[22] At para. 18 of his reasons for judgment, the trial judge held that "there is a considerable body of evidence supporting the fact that night hunting has been an accepted practice of the Tsartlip people from pre-treaty days to the present". He then went on to find that "night hunting with illumination was one of the various methods employed by the Tsartlip from time immemorial".

[23] The respondent alleges that there was no evidence upon which the trial judge could have reached that conclusion. Any evidence of night hunting was limited to evidence of present day practices or the practices of parents and grandparents of the appellants. The appellants submit that the trial judge correctly weighed the oral history offered by the Tsartlip people in coming to his conclusion; this is in keeping with the jurisprudence in this area.

i) Standard of review

[24] The applicable standard of appellate review is set out in R. v. Marhsall, [1999] C.N.L.R. 161, by the Supreme Court of Canada at para. 18:

The permissible scope of appellate review in these circumstances was outlined by Lamer C.J. in R. v. Van der Peet, [1996] 2 S.C.R. 507, at para. 82 [137 D.L.R. (4th) 289, [1996] 9 W.W.R. 1, 23 B.C.L.R. (3d) 1, [1996] 4 C.N.L.R. 177, 109 C.C.C. (3d) 1, 50 C.R. (4th) 1, 200 N.R. 1]:

In the case at bar, Scarlett Prov. Ct. J., the trial judge, made findings of fact based on the testimony and evidence before him, and then proceeded to make a determination as to whether those findings of fact supported the appellant's claim to the existence of an aboriginal right. The second stage of Scarlett Prov. Ct. J.'s analysis - his determination of the scope of the appellant's aboriginal rights on the basis of the facts as he found them- is a determination of a question of law, which, as such, mandates no deference from this Court. The first stage of Scarlett Prov. Ct. J's analysis, however - the findings of fact from which that legal inference was drawn - do mandate such deference and should not be overturned unless made on the basis of a "palpable and overriding error".

[My emphasis.]

ii) Oral History Evidence

[25] The use of aboriginal oral history evidence has been recognised by the Supreme Court of Canada in Delgamuukw v. B.C., [1997] 3 S.C.R. 1010 at para. 87; R. v. Van der Peet, [1996] 2 S.C.R. 507 at paras. 62-63 and Mitchell v. M.N.R. 2001 SCC 33 at paras. 27-49 and 51.

[26] The most recent pronouncement on the admissibility of oral history and the rules of evidence comes from Mitchell v. M.N.R. at paras. 29-31:

Courts render decisions on the basis of evidence. This fundamental principle applies to aboriginal claims as much as to any other claim. Van der Peet and Delgamuukw affirm the continued applicability of the rules of evidence, while cautioning that these rules must be applied flexibly, in a manner commensurate with the inherent difficulties posed by such claims and the promise of reconciliation embodied in s. 35 (1). This flexible application of the rules of evidence permits, for example, the admissibility of evidence of post-contact activities to prove continuity with pre-contact practices, customs and traditions (Van der Peet, supra, at para. 62) and the meaningful consideration of various forms of oral history (Delgamuukw, supra).

The flexible adaptation of traditional rules of evidence to the challenge of doing justice in aboriginal claims is but an application of the time honoured principle that the rules of evidence are not "cast in stone, nor are they enacted in a vacuum" (R. v. Levogiannis, [1993] 4 S.C.R. 475 at p. 487). Rather, they are animated by broad, flexible principles, applied purposively to promote truth finding and fairness. The rules of evidence should facilitate justice, not stand in its way. Underlying the diverse rules on the admissibility of evidence are three simple ideas. First, the evidence must be useful in the sense of tending to prove a fact relevant to the issues in the case. Second, the evidence must be reasonably reliable; unreliable evidence may hinder the search for the truth more than help it. Third, even useful and reasonably reliable evidence may be excluded

in the discretion of the trial judge if its probative value is overshadowed by its potential for prejudice.

In Delgamuukw, mindful of these principles, the majority of this Court held that rules of evidence must be adapted to accommodate oral histories, but did not mandate the blanket admissibility of such evidence or the weight it should be accorded by the trier of fact; rather, it emphasised that admissibility must be determined on a case-by-case basis (para. 87). Oral histories are admissible as evidence where they are both useful and reasonably reliable, subject always to the exclusionary discretion of the trial judge.

[27] In Mitchell v. M.N.R. the court found that the trial judge erred in finding that the plaintiffs established an aboriginal right to trade with First Nations to the north. At trial, there was insufficient evidence that such trading practices ever took place. In other words, there was no evidence upon which the trial judge could rely in concluding that such a right existed.

[28] In the circumstances of this case the trial judge heard evidence that the Tsartlip people hunted at night with the aid of light prior to contact with Europeans. This evidence came by way of oral history testimony. In fact, as many as three witnesses provided oral history to the court with respect to hunting at night with light. One of these witnesses, sixty-five-year-old Tom Sampson, testified as a hunting member of the Tsartlip Indian Band. Mr. Sampson has hunted for approximately fifty-six years. His testimony is perhaps the most useful and reliable.

[29] With respect to hunting at night, Mr. Sampson testified at p. 12, line 20-47 and p. 13, line 1-4, as follows:

Q What were some of the teachings that your grandparents at that time passed on to you about the hunt?

A Well, we learnt by watching, you know, what was -- the way they hunted, my grandparents and right up to my father and my uncles. I watched my grandparents first because they were the ones who taught me, or at least by watching, how to hunt, what to hunt for.

We had to learn all of the animals by looking at their eyes; the mink, the raccoon and all of them have a different look, and we had to know the difference because you couldn't just shoot anything you saw, you had to know exactly which animal you were killing. When we were hunting for our livelihood we knew the mink was the most valuable one and -- because of the shape of their eyes, they were tiny and they were real small, and we knew which one it was.

Q Okay. So the shape of their eyes. This is when you were hunting at night?

A Yeah. Well, the raccoon has round eyes, eh.

Q Yeah.

A And the mink has different kind of eyes, they're slanted. But I learnt in hunting there was -- the technique, at least on a canoe, was very much coordinated, especially hunting at nighttime. In them days we used a carbide light, it was what the coal miners used to use, and prior to that we used -- in fishing, we used the hollowed out part of our canoe and we used pitch from a tree, the stumps we would cut out and shape and put in front of the canoe as a light for hunting and fishing.

[My emphasis.]

[30] The following exchange took place, at p. 14, line 27-39:

Q Have you ever -- or you testified that you've hunted at night. Why do you hunt at night?

A Well, I learned it from my grandparents, for one thing, and I'm sure what they taught me then during night hunting was, as far as we were concerned, the best time to hunt, and for a lot of reasons. One of them would be, when you're hunting in a canoe, for example, you've got to wait for the right tides, you've got to wait for the right kind of night, it's got to be totally dark, or it should be totally dark. And I know I never hunt, you know, unless it's that way, not at nighttime.

[31] In response to further questions, Mr. Sampson stated at p. 15, line 2-18 and at p. 26, lines 26-42:

Q So can hunting be done safely at night?

A I believe it's -- at least the way we do it, as part of our culture and part of the way we've always done things, is it's the safest way of hunting, because you can -- it does two different, two things: one, it teaches you to recognize the animal when it's walking and when it's standing. You know, it helps us to determine how to -- how to hunt the animals at nighttime. But every family and every tribe does it -- has its own teaching to that, they may do it differently. And the way I'm telling it, because I was taught to -- taught by my grandparents, that each animal walks differently and each animal looks different. So if you know that, then obviously we can tell the difference, and it" safer to hunt at nighttime. [My emphasis.]

Q If you had been asked, what are some of the alternatives that you could think of that would have taken Tsartlip's aboriginal and treaty right to hunt seriously while still addressing the province's safety concerns about night hunting?

A Education is one of the things. We had -- Your Honour, we had meetings in the south island on the aboriginal justice system and we had conservation officers there, Crown, RCMP, judges from all over British Columbia, and we did meet with them to explain that. And conservation officers attended these meetings and we explained to them the reason for night hunting, and the reasons why we practised it, because we had done this prior to 1492, and we still practice it to this day. And it's not only because we want the animal, but it's an educational process as well. [My emphasis.]

[32] The above exchanges point clearly to the fact that the Tsartlip people hunted at night with illumination pre-contact. His evidence is admissible as meaningful oral history.

[33] The trial judge reasoned that there was a considerable body of evidence to support his finding that night hunting has been an accepted practice of the Tsartlip people from pre-treaty days to the present. I infer that in addition to the testimony of Tom Sampson, the trial judge found the testimony of Wayne Morris and Carl Olsen both helpful and reliable.

[34] Wayne Morris testified as follows at pp. 15-16, lines 42-47 and 1-4:

Q And how would you characterize a gun and lights?

What are they in relation to the hunt?

A They're tools that we need when we go out there because long ago there was -- we had what they called torch lamps, and I heard this story told to me by our older hunters, that they used sticks with pitch on the end of them to do the same kind of hunt. So now we've come into -- we've moved into these new tools of the spotlight and of the gun, where it's made it easier for us to hunt.

[My emphasis.]

[35] Carl Olsen also testified at pp. 46-48, lines 43-47, 1-4, 15-25, 1-5:

Q Do the Tsartlip People harvest resources at night?

A Yes, they do. Actually I'll just go back to, like being with my dad. Clams, oysters, and I think one of the other ones up here a ways, that we got cod was by my dad using a spear, and that was done at night and that was used -- he used a light at the front of a canoe.

Q Do the Saanich People hunt at night?

A Yes.

Q Yeah. How long have the Saanich People hunted at night?

A Well, I think, if I can go back, like into the fifties when I was actually a really young kid, I remember some of the older -- the elders of that day, actually going out in the canoe in the evening and hunting at night. I don't know if I could use names, like Phil Pelkey, Elliot Pelkey. People like that went out and hunted at night.

A My hunting is what we do, I think it's -- it's many generations old. Like I said, with the devolution of our Native communities there was a lot of things that have been lost, and unfortunately hunting and fishing was some of them. Our own community members is one of them, and I was afraid of hunting at night, and I think when I was training, it reassured me that I have a right, and that right is to be able to hunt and fish to provide for family members, community members. So all I felt I was doing that night was practicing something that's a right.

[My emphasis.]

[36] Evidence of post-contact activities to prove continuity with pre-contact practices, customs and traditions is admissible: see Van der Peet, supra, at para. 62. In this case, the trial judge relied on the testimony of Mr. Sampson that night hunting had been practised amongst the Tsartlip prior to 1492. He also relied on testimony of Mr. Olsen, Mr. Morris and Mr. Simon in concluding that, "night hunting with illumination was one of the various methods employed by the Tsartlip from time immemorial".

[37] Witnesses provided oral history. I do not find that there is any evidence that the witnesses' testimony was tainted or otherwise inherently unreliable. The oral history was admitted in light of the circumstances of this case. The conclusions drawn by the trial judge were based on his assessment of the evidence and the witnesses at trial. There is no palpable and overriding error. The trial judge did not err in concluding that night hunting has been an accepted practice of the Tsartlip people from pre-treaty days to the present or that night hunting was used from time immemorial.

2. Did the trial judge err in finding that the appellants' right to hunt by virtue of the Douglas Treaty did not include the right to hunt at night or the right to hunt with illumination?

[38] The appellants submit that the trial judge erred in excluding the right to hunt at night with illumination from treaty protection. First, say the appellants, the right to hunt under the treaty includes the method, timing and extent of the hunt. In support of this submission, the appellants rely on the decisions of R. v. Badger, [1996] 2 C.N.L.R. (S.C.C.), R. v. Prince and Myron, [1964] S.C.R. 81 and R. v. Horseman, [1990] 1 S.C.R. 901. Second, argue the appellants, hunting rights are at the core of federal jurisdiction under s. 91(24) of the Constitution Act, 1867. Section 88 of the Indian Act prevents provincial regulations from entrenching upon that core: R. v. White and Bob (1965), 50 D.L.R. (2d) 613 ; R. v. Bartleman (1984), B.C.L.R. 78 (B.C.C.A.). Third, there is no express or implied term that the hunting methods are subject to regulation by the province for safety purposes.

[39] The respondent argues that the right to hunt does not include the right to hunt by a specific method. Moreover, even if the treaty right to hunt includes the right to do so by any method (including hunting at night with illumination), the limitation on this method for the purposes of public safety does not constitute an unconstitutional infringement.

i) Method

[40] On my review of the jurisprudence, where an aboriginal right to hunt is protected by a treaty, the method or means used is also protected: R. v. Badger, supra. In R. v. Badger, supra, the Supreme Court of Canada considered the issue of whether the Alberta Wildlife Act, S.A. 1984, c.W-9-1, infringed the appellants right to hunt under Treaty No. 8. In the circumstances of that case, the treaty was subject to the provisions of the Natural Resources Transfer Agreement [NRTA]. In concluding that there can be no limitation on the method, timing and extent of an Indian right to hunt under a treaty, the court relied on R. v. Horseman, [1990] 1 S.C.R. 901 (S.C.C.). The following passage from R. Horseman, supra, appears in R. v. Badger, supra, at para. 46:

Although the Agreement [the NRTA] did take away the right to hunt commercially, the nature of the right to hunt for food was substantially enlarged. The geographical areas in which the Indian people could hunt was widely extended. Further, the means employed by them in hunting for their food was placed beyond the reach of provincial governments. For example, they may hunt deer with night lights and with dogs, methods which are or may be prohibited for others

[41] In the case before me, the treaty is not subject to the NRTA. Nonetheless the passage from R. v. Horseman, supra, as affirmed in R. v. Badger, supra, provides strong authority for my conclusion that where aboriginal people hunt pursuant to a treaty right, the methods and means employed by them are protected.

[42] That being said, in my opinion the real issue in this appeal is not whether the Douglas Treaty protects the method of hunting, that is hunting at night with light, but rather whether there are limits to the exercise of that treaty right. As such, the inquiry does not end with the finding that the method of hunting is protected under the Douglas Treaty.

ii) Section 88 and Treaty Rights

[43] Treaty rights fall within s. 91 (24) of the Constitution Act, 1867. Provincial laws that impact on treaty rights or affect Indians in their Indianness do not apply to aboriginal people of their own force. The laws can only become applicable through s. 88 of the Indian Act.

[44] The respondent concedes that due to the doctrine of inter-jurisdictional immunity that the assistance of s. 88 is required. The Wildlife Act purports to restrict the rights of the appellants to engage in an activity which relates to Indianess: Kitkala Band v. British Columbia (Small Business, Tourism and Culture), 2000 BCCA 42 at para. 72. The Wildlife Act can only be made applicable to aboriginal people through s. 88 of the Indian Act.

[45] The appellants submit that pursuant to s. 88 of the Indian Act, provincial laws cannot apply to restrict a treaty right. Treaty rights can only be regulated by regulations imposed by the federal government subject to s. 35, Constitution Act, 1982.

[46] Section 88 reads:

88. Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any Province are applicable to and in respect of Indians in the Province, except to the extent that those laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that those laws make provision for any matter for which provision is made by or under this Act. [My emphasis.]

[47] I have already found that where the Tsartlip people hunt pursuant to their right to hunt under the Treaty, the various methods of hunting are protected. It is also conceded that the explicit term "as formerly", as expressed in the words of the treaty, applies to the liberty to hunt. The appellants say that the Treaty term "as formerly" includes hunting at night with illumination as evidenced by the oral testimony. Furthermore, courts should interpret

treaties liberally and in a manner that would naturally be understood by the Indians. Relying on R. v. Bartleman, supra, the appellants submit that under the Douglas Treaty the only restriction on hunting is "that the hunting must take place within the geographical area of the traditional hunting grounds of the Saanich people and, second, the hunting must take place on land that is unoccupied in the sense that the form of hunting that is being undertaken does not interfere with the actual use and enjoyment of the land by the owner or occupier".

[48] While the method, means or manner used may equal a protected term, the real issue is whether such can be exercised carte blanche. I find that it cannot; rights do not exist in a vacuum.

iii) Implicit term to hunt safely within hunting methods

[49] The trial judge's findings with respect to night hunting and safety are as follows:

[I]t is undeniably true that the Province of British Columbia has taken a firm and consistent attitude against night hunting, based upon the advice from conservation officers that the practice is inherently unsafe. Certainly the evidence in this case supports such a finding. It is night hunting that brings added and unacceptable danger, according to the evidence. The evidence establishes that it is dangerous to permit the use of high-powered rifles in the dark, and to leave it to individual hunters to use their common sense to minimize those risks in the face of a sudden opportunity to kill game.

I accept that the treaty holders in this case, the Tsartlip Indian Band, have a tradition of teaching firearms safety to their children. I also accept that the two Defendants have knowledge of firearm safety. More importantly, I accept the evidence of the elders and other witnesses who testified before me that safety is an integral part of the hunting tradition of the Coast Salish people, of whom the Tsartlips form a part. This universal concern for hunting safety is well founded, and in conjunction with the expert evidence in this case, satisfies me that the prohibition against night hunting is not unreasonable on its face. I do not accept that the Tsartlip view and practices of hunting safety are an adequate or reasonable response to the inherent dangers of night hunting.

The reasonableness of a prohibition against hunting with the use of lights is slightly more problematic. If night hunting is dangerous primarily because of the lack of light, one might argue that the use of lights to hunt at night reduces the risk. It might be further argued that night hunting ought to be prohibited unless lights are utilized, but having heard the evidence on the matter, it is apparent that the use of lights at night brings a new set of problems, even as it eliminates others. Most important, it brings the problem of tunnel vision, where the hunter becomes so focussed on the illuminated target, he tends to fail to be sufficiently aware of the periphery of his view, or even the background. This leads to a significant risk of accidental injury to persons or property. I do not question that proper training and other measures can be taken to reduce the risk, but we do not live in a perfect world. The statutory provision is directed at the issue of safety, and is reasonable on its face as a measure to help ensure that needless risk is avoided.

[50] The respondent submits that the province may regulate for safety purposes and that reasonable regulations aimed at public safety do not infringe treaty rights.

[51] The appellants say that the proper focus is not on the aim or the purpose of the challenged provincial regulation, but rather the effect of the regulation on the treaty right. It is submitted that if the effect of the regulation is to 'abrogate', 'qualify', 'conflict', 'derogate from', 'infringe or restrict' a treaty right, the treaty right prevails and therefore the provincial Wildlife Act is inapplicable by reason of s. 88 of the Indian Act.

[52] On the whole, the focus must remain on the impact or effect of the legislation or regulation. In this case, I do not find that the Wildlife Act, impacts on the treaty right in question in any of the above mentioned ways. The right itself is not infringed, restricted, qualified, abrogated or conflicted with. Inherent or implicit in the right itself is the understanding that the right will be exercised reasonably.

[53] The comments of Dickson J. (as he then was), in Myran v. The Queen, (1976) 23 C.C.C. (2d) 73, provides some guidance on this point. In Myran v. The Queen, the court considered whether or not treaty Indians were immune from prosecution under the hunting provisions of the Wildlife Act, R.S.M. 1970, C.W140. At para. 76, Dickson J. stated:

I think it is clear from Prince and Myron that an Indian of the Province is free to hunt or trap game in such numbers, at such times of the year, at by such means or methods and with such contrivances, as he may wish, provided he is doing so in order to obtain food for his own use and on unoccupied Crown lands or other lands to which he may have a right of access. But that is not to say that he has the right to hunt dangerously and without regard for the safety of other persons in the vicinity. Prince and Myron deal with "method". Neither that case nor those, which preceded it, dealt with protection of human life. I agree with what was said in the present case by Mr. Justice Hall in the Court of Appeal for Manitoba:

In the present case the governing statute is the Wildlife Act, supra, and in particular Sec. 41 (1) thereof. Section 10(1) under which the accused were charged does not restrict the type of game, nor the time or method of hunting, but simply imposes a duty on every person of hunting with due regard for the safety of others. Does that duty reduce, detract or deprive Indians of the right to hunt for food on land to which they have a right of access? If one regards that right in absolute terms the answer is clearly in the affirmative; but is that the case? Surely the right to hunt for food as conferred or bestowed by the agreement and affirmed by the statute cannot be so regarded. Inherent in the right is the quality of restraint, that is to say that the right will be exercised reasonably. Section 10 (1) is only a statutory expression of that concept, namely that the right will be exercised with due regard for the safety of others, including Indians. [My emphasis.]

[54] This passage has been judicially applied in circumstances where it was argued that provisions of the Firearm Act, R.S.B.C. 1979 c. 134 infringed the right to hunt under a treaty: R. v. Napoleon, [1984] B.C.J. No. 1310 (Q.L.) (B.C.Co.Ct), affirmed on appeal, R. v. Napoleon (1985), 21 C.C.C. (3d) 515 (B.C.C.A.). Courts have also held that treaty rights must be exercised in a reasonable manner where aboriginal persons have challenged the prohibition against hunting at night with light: R. v. Augustine, [2001] N.B.J. No. 9 (Q.L.) (N.B.Q.B.).

[55] Here, the Tsartlip treaty right to hunt at night with light for food must be balanced against the need to prevent human injury or even loss of life.

[56] This concept is best expressed by the majority of the Supreme Court of Canada in R. v. Nikal, [1996] 1 S.C.R. 1013, where the court considered fishing rights under s. 35 (1) of the Constitution. The court adopts the Ontario Court of Appeal position that there are limitations on treaty rights. These comments are persuasive particularly when read alongside the requirement of reasonableness as explained in Myran v. The Queen, supra, and R. v Simon, [1985] 2 S.C.R. 387. The comments appear beginning at para. 91:

With respect to licensing, the appellant takes the position that once his rights have been established, anything which affects or interferes with the exercise of those rights, no matter how insignificant, constitutes a prima facie infringement. It is said that a licence by its very existence is an infringement of the aboriginal right since it interferes that government permission is needed to exercise the right and the appellant is not free to follow his own or his band's discretion in exercising that right.

This position cannot be correct. It has frequently been said that rights do not exist in a vacuum, and that the rights of one individual or group are necessarily limited by the rights of another. The ability to exercise personal or group rights is necessarily limited by the rights of others. The government must ultimately be able to determine and direct the way in which these rights should interact. Absolute freedom in the exercise of even a Charter or constitutionally guaranteed aboriginal right has never been accepted, nor was it intended. Section 1 of the Canadian Charter or Rights and Freedoms is perhaps the prime example of this principle. Absolute freedom without any restriction necessarily infers a freedom to live without any laws. Such a concept is not acceptable in our society. On this issue the reasons of Blair J.A. in R. v. Agawa (1988), 65 O.R. (2d) 505 (C.A.), at p. 524 are persuasive and convincing. He recognised the need for a balanced approach to limitations on treaty rights, stating:

Indian treaty rights are like all other rights recognised by our legal system. The exercise of rights by an individual or group is limited by the rights of others. Rights do not exist in a vacuum and the exercise of any right involves a balancing with the interests and values involved in the rights of others [Emphasis added.]

[57] To exercise a treaty or aboriginal right without due regard or consideration for public safety is not a reasonable exercise of that right: R. v. Badger at para. 88-89, R. v. Simon, supra, at para. 414, R. v. McCoy, [1994] 4 C.N.L.R. 139 (N.B.C.A.), R. v. Sutherland (1980), 53 C.C.C. (2d) 289 at p. 460, R. v. Sundown, [1999] 1 S.C.R. 393 at para. 26, R. v. Seward (1999), 133 C.C.C. (3d) 437 (B.C.C.A.), R. v. Paul, [2000] 3 C.N.L.R. 262 (Q.S.C.) and R. v. Bernard, 2002 NSCA 5, R. v. Augustine, 2001 NBCA 112.

[58] The treaty right to hunt must be exercised with regard to safety. Although the appellants have a treaty right to hunt at night, that right must be exercised in light of safety considerations. In other words, the explicit term "as formerly" must reconcile with the need to ensure public safety. All treaty rights, irrespective of the nature of the right must be carried out subject to public safety. The implicit term to hunt safely does not result in any conflict or any infringement in any manner whatsoever.

[59] Implicit in the trial judge's conclusion is his finding that public safety considerations override any treaty/ aboriginal rights; the Wildlife Act does not single out the holders of treaty/aboriginal rights and is a law of general application within provincial jurisdiction. In this he committed no error.

[60] The appellants furthermore submit that the evidence supports the fact that the treaty right embraces and embodies the Tsartlip hunting safety practices including night hunting and the method, manner or means exercised by the Tsartlip at the time of the hunting and thereafter. They have made the appropriate and acceptable adjustments and adaptations with regard to safety considerations necessitated by population growth, urbanization and modern technologies in hunting equipment and methods. The Tsartlip appreciation and respect for public safety as evidenced by their practices, were known to the treaty makers at the time and therefore it was not intended then that these safety practices would be subject to regulation by the Province and since these safety practices are still honoured and maintained the Province by enacting the Wildlife Act intruded upon their rights without justification. They forcefully submit that such can only be exercised by the Parliament of Canada in accordance with the paramountcy doctrine. They say this has been accomplished by the Parliament of Canada through the applicable provisions in the Criminal Code of Canada and the Federal Firearms Act, S.C. 1995, c. 39. They submit therefore that the provisions of the Wildlife Act are ultra vires the Province. I do not accede to this. I find comfort in what was said by our Court of Appeal in R. v. Seward, supra, that the purpose of this legislation is preventative safety of all of the citizens of the Province. It is parallel to any of the Federal legislation and not in conflict with or an intrusion into Federal powers.

3. Did the trial judge err in applying a s.35 analysis to answer the question of whether provincial regulations apply to the defendants by virtue of the Douglas Treaty and section 88 of the Indian Act?

[61] The appellants argue that the trial judge erred in applying a s. 35 analysis instead of a s. 88 analysis. It is clear from the notice filed pursuant to the Constitutional Question Act, R.S.B.C. 1996, c. 68, prior to trial that the defendants relied on s. 35 of the Constitution Act, 1982. The notice reads as follows:

TAKE NOTICE THAT counsel on behalf of the accused will challenge the constitutional applicability of sections 27(1)(d) and 27(1)(e) of the Wildlife Act, S.B.C., c. 57 (hunting with a firearm during prohibited hours, and with the aid of a light or illumination device). The particulars of the points to be argued are:

1. The defendants are members of the Tsartlip Indian Band and assert their Treaty and Aboriginal rights to hunt in the traditional territory of the Saanich Nation.

2. The defendants rely on s. 35 of the Constitution Act, 1982, which recognizes and affirms existing Aboriginal rights. The defendants claim that section 27(1)(d) and (e) unjustifiably interfere with their Aboriginal right to hunt in the area of Margeurite Creek, north of the Tsartlip Indian Reserve.

The trial judge was invited on behalf of counsel for the accused to proceed by way of a justification analysis.

[62] The transcript of proceedings at p. 14, line 22-39, reads as follows:

MR. WALKER: Those conclude my points today. I'd like to ask Ms. Walkem to speak to the aboriginal law.

THE COURT: All right. Thank you, Mr. Walker.

MS. WALKEM: Just to briefly outline the points I'll be touching on. First of all, I wanted to talk generally about the right to hunt, and the fact that the right to hunt at night is encompassed and embodied within that right in the perspective of the Tsartlip people with respect to the harvesting of resources at night. Second, I'll be addressing the point about Section 88, and whether or not the Wildlife Act is applicable in this instance. Then there's a third point which won't -- which is not necessary if it's found that the Act isn't applicable, we'll be proceeding through the infringement and justification analysis as set out in Sparrow.

THE COURT: All right.

[My emphasis.]

[63] The learned trial judge found that the Wildlife Act was valid provincial legislation of general application with an overriding purpose of public safety. Accordingly, he held that the statute is not in conflict with the terms of the treaty under s. 88 as the provisions did not in any way impact upon the treaty right to hunt or the methods employed to exercise such rights.

[64] It was unnecessary therefore for Higinbotham Prov. Ct. J., to engage in an analysis of reasonable justification under R. v. Sparrow and s. 35. However, he committed no error.

[65] In summary therefore, the appeal is dismissed for these reasons:

A) The Wildlife Act is valid provincial legislation of general application aimed at ensuring safety;

B) The jurisprudence is clear that conservation and safety measures are implicit, if not expressed, in the exercise of Aboriginal and treaty rights; and

C) Public safety is a preventative measure for all, including aboriginal and treaty rights holders.

[66] To the extent that the Wildlife Act, a valid piece of provincial legislation of general application includes public safety provisions, such provisions provide reasonable guidelines within which treaty rights must be exercised.

"T.M. Singh, J."

The Honourable Mr. Justice T.M. Singh

These Reasons for Judgment were released from the Duncan Registry on May 24, 2002 and are date stamped accordingly.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE https://www.bccourts.ca/jdb-txt/sc/02/07/2002bcsc0780.htm

CASE PAGE https://chat.esheria.ai/case-law/canada/r-v-morris-2002-bcsc-780

Prepared on 30 October 2026 · Esheria