

CANADA / JUDGMENT

Regina v. Howse

2002 BCSC 235

COURT

Supreme Court of British Columbia

DECIDED

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2002 BCSC 235 Docket:

19504

Registry: Cranbrook

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

REGINA
APPELLANT

AND:

JOHN GRANT HOWSE, DAN LAFRANCE, LEONEL COURCHAINED,
FREDERICK LABOUCANE AND JOHN PRATT
RESPONDENTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE METZGER

Counsel for the Crown: Brian W. Rendell

Counsel for the Respondents: Joseph Gereluk

Date and Place of Trial: September 19, 2001

Cranbrook, BC

FACTS:

- [1] This matter arises out of several hunting excursions in October 1997 which, but for the application of Aboriginal rights protected under section 35 of The Constitution Act, 1982, would be illegal under the provisions of the Wildlife Act, R.S.B.C. 1996, c. 488.

- [2] An admission of facts was filed which conceded that the defendants had engaged in a "protest hunt for the purposes of gathering food." It is set out in full at paragraph 6 of the Reasons for Judgment of the learned trial judge.
- [3] The defendants, and the offences they admitted committing but for the constitutional exemption they claim, are as follows:
- (a) John Grant Howse: (i) hunt wildlife without possessing a hunting licence, contrary to s. 11(1)(a)(i) of the Wildlife Act; (ii) unlawful use of a motor vehicle to hunt, contrary to s. 13(2)(t) of B.C. Reg. 190/94; (counts 1 & 2)
 - (b) Leonel Courchaine: (i) hunt wildlife without a hunting licence, contrary to s. 11(1)(a)(i) of the Wildlife Act; (ii) kill wildlife, a bull moose, at a time not within open season, contrary to s. 26(1)(c) of the Wildlife Act; (iii) have possession of dead wildlife, a bull moose, other than as authorised under licence or permit, or as provided by regulation, contrary to s. 33(2) of the Wildlife Act; (counts 4 - 6)
 - (c) Frederick Laboucane: (i) hunt wildlife, an antlerless whitetail deer, without holding a Limited Entry Hunting Authorisation, contrary to s. 11(1)(a)(ii) of the Wildlife Act; (ii) hunt wildlife, an antlerless whitetail deer, in a designated limited entry hunting area, when not in possession of valid Limited Entry Hunting Authorization, valid resident hunting licence or B.C. resident species licence contrary to s. 9(1)(b) of B.C. Reg. 134/93; (iii) have possession of dead wildlife, an antlerless whitetail deer, other than as authorised under licence or permit, or as provided by regulation, contrary to s. 33(2) of the Wildlife Act; (iv) kill wildlife, an antlerless whitetail deer, at a time not within open season, contrary to s. 26(1)(c) of the Wildlife Act; (v) fail to produce necessary licence for inspection to an officer on request, contrary to s. 97(a) of the Wildlife Act; (counts 7 - 11)
 - (d) John Pratt: (i) hunt wildlife, an antlerless whitetail deer without a Limited Entry Hunting Authorisation contrary to s. 11(a)(ii) of the Wildlife Act; (ii) have possession of dead wildlife, an antlerless whitetail deer, other than as authorised under licence or permit or as provided by regulation, contrary to s. 33(2) of the Wildlife Act; (iii) fail to comply with a condition or instruction of a species licence, by failing to cancel it in accordance with the instructions on it, contrary to s. 16.01(b) of B.C. Reg. 340/82 (counts 12 - 14)
 - (e) Dan LaFrance admitted to being a party with each of the others in the offences of hunting and illegal possession offences.
- [4] The defendants filed a notice under the Constitutional Questions Act, R.S.B.C. 1996, c. 68, the particulars of which are set out in paragraph 8 of the Reasons for Judgment of the learned trial judge, in which they claimed that they are Métis with an Aboriginal inherent, constitutional or treaty right to pursue their historical, economic and cultural traditions, which include the right to hunt for food in a traditional communal Métis manner in Canada and, in particular, British Columbia.

- [5] The defendants had legal representation prior to the trial, and for final submissions. During the calling of evidence, they represented themselves.
- [6] The defendants testified, as did two other witnesses identified as Métis people living in the Kootenay area, and a third from the Dawson Creek area. There was no expert evidence called, and no evidence of a historical or anthropological nature, other than from several of the defendants. Each of the defendants presented a genealogy of their respective families. The authors of these documents did not testify.
- [7] Dan LaFrance presented himself as the "Captain of the Hunt" and spokesperson for the group. He presented almost all the evidence heard about the history of the Métis people.
- [8] Mr. LaFrance also filed and relied upon selected extracts of the Royal Commission on Aboriginal Peoples.
- [9] Concerning the hunting which resulted in the charges, Mr. LaFrance referred to it as a "collective hunt" and explained that it was the second such hunt to be held in British Columbia, the first having been held on Vancouver Island several years earlier. He explained that collective hunting was traditionally exercised in the prairies following the buffalo and other game. At both this hunt and the earlier one, people claiming Métis status came from various places throughout the province.
- [10] In Mr. LaFrance's opinion Métis rights can be exercised anywhere. He stated "from our view, we don't have a traditional territory. It's never been defined. We are the nomadic Aboriginal peoples. The - I think I made reference to elders speaking of - of oral tradition where - where you could walk, that's your grounds, where you could ride, where you could paddle." Only LaFrance's personal opinion and the opinion of the other defendants, was presented as evidence on this point.
- [11] John Howse testified relying on several pages of material extracted from several different books.
- [12] Leonel Courchaine testified and produced what he called the genealogy of the Courchaine family. This showed that he had no ancestral connection with British Columbia.
- [13] Frederick Laboucane testified using a genealogy with no information of authorship. He believes that all of British Columbia is his Métis homeland.
- [14] John Pratt testified, as did Latrica Nicholas and Doreen McGee who presented themselves as Métis from the Kootenay region.

ALLEGED ERRORS IN JUDGMENT:

- [15] The appellant in this case alleges the learned trial judge erred in:
1. Concluding that the respondents had established that hunting for food was "integral" to their community.

2. Concluding that there was sufficient evidence of continuity from the historic Métis community to the area in question.
3. Concluding that the respondents' were, in fact, members of the relevant community.

[16] The appellant further submits that the learned trial judge erred by:

1. Finding that the respondents had established a *prima facie* infringement of a right; and
2. By failing to allow the Crown an opportunity to justify this infringement.

ANALYSIS:

[17] I note that I have had the benefit of *R. v. Mitchell* (also referred to as *Mitchell v. M.N.R.*), 2001 S.C.C. 33 and *R. v. Powley*, *supra*, both cases decided after the learned trial judge's judgment on April 28, 2000.

[18] In paragraph 39 of *Regina v. Mitchell*, *supra*, the court had this to say:

There is a boundary that must not be crossed between a sensitive application and a complete abandonment of the rules of evidence. As Binnie J. observed in the context of treaty rights, "[g]enerous rules of interpretation should not be confused with a vague sense of after-the-fact largesse" (*R. v. Marshall*, [1999] 3 S.C.R. 456, at para. 14). In particular, the *Van der Peet* approach does not operate to amplify the cogency of evidence adduced in support of an aboriginal claim. Evidence advanced in support of aboriginal claims, like the evidence offered in any case, can run the gamut of cogency from the highly compelling to the highly dubious. Claims must still be established on the basis of persuasive evidence demonstrating their validity on the balance of probabilities. Placing "due weight" on the aboriginal perspective, or ensuring its supporting evidence an "equal footing" with more familiar forms of evidence, means precisely what these phrases suggest: equal and due treatment. While the evidence presented by aboriginal claimants should not be undervalued "simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case" (*Van der Peet*, *supra*, at para. 68), neither should it be artificially strained to carry more weight than it can reasonably support. If this is an obvious proposition, it must nonetheless be stated.

[19] In *R. v. Powley*, 53 O.R. (3d) 35, the Ontario Court of Appeal considered the tests for the assessment of section 35 Aboriginal harvesting rights, as set out in *R. v. Sparrow*, *supra*, *R. v. Van der Peet*, [1996] 2 S.C.R. 507, *R. v. Gladstone*, [1966] 4 C.N.L.R. 65 (S.C.C.), and *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672. At paragraphs 90 and 91 of *R. v. Powley*, *supra*, the court said this:

An important aspect of the *Van der Peet* test for aboriginal rights under s. 35 is that the rights are communal in nature: *Van der Peet*, at p. 540; *Sparrow*, at pp. 1111-12; *R. v. Sundown*, [1999] 1 S.C.R. 393 at p. 412, 177 Sask. R. 1. Aboriginal rights do not belong to individuals but are community-based, and accordingly, can only be exercised by those individuals who are members of the rights-bearing community. A significant corollary of the communal nature of aboriginal

rights, as explained in Van der Peet, at p. 559, is that the rights specific to the site and the history of each particular community is "not general and universal; their scope and content must be determined on a case-by-case basis...The existence of the right will be specific to each aboriginal community." The claimant must show continuity of the contemporary community and its practice with the historic community and its practices: Van der Peet at p. 556; Gladstone at p. 747; Côté at p. 183.

The communal nature of the right gives rise to several issues here, namely whether the practice was "integral" to Métis culture, whether there is sufficient continuity from the historic Métis community to the contemporary one and whether the respondents are in fact member of the relevant community.

Did the learned trial judge err in concluding that the defendants (respondents) had established that hunting for food was integral to their community?

[20] The Learned Trial Judge concluded that:

...The evidence presented at trial would support the conclusion that hunting was an integral part of the Métis culture prior to the assertion of effective control by the European authorities. The evidence at trial indicates that the Métis lived off the land for subsistence purposes. Hunting was of central significance to the Métis, and integral to their distinctive society. (Reasons for Judgement, para 32)

[21] As commented upon in Powley, at para. 121:

The "integral" requirement was explained in Van der Peet, at 553-554 in the following terms:

To satisfy the integral to a distinctive culture test the aboriginal claimant must do more than demonstrate that a practice, custom or tradition was an aspect of, or took place in, the aboriginal society of which he or she is a part. The claimant must demonstrate that the practice, custom or tradition was a central and significant part of the society's distinctive culture. He or she must demonstrate, in other words, that the practice, custom or tradition was one of the things which made the culture of the society distinctive - that it was one of the things that truly made the society what it was.

This aspect of the integral to a distinctive culture test arises from the fact that aboriginal rights have their basis in the prior occupation of Canada by distinctive aboriginal societies. To recognize and affirm the prior occupation of Canada by distinctive aboriginal societies it is to what makes those societies distinctive that the court must look in identifying aboriginal rights. The court cannot look at those aspects of the aboriginal society that are true of every human society (e.g., eating to survive), nor can it look at those aspects of the aboriginal society that are only incidental or occasional to that society; the court must look instead to the defining and central attributes of the aboriginal society in question. It is only by focusing on the aspects of the aboriginal society that make that society distinctive that the definition of aboriginal rights will accomplish the purpose underlying s. 35(1). [emphasis in original]

[22] The evidence showed that Métis society was highly disparate in how they pursued their livelihoods. Many were hunters but many were "trappers and fishermen, while others worked as guides, interpreters, tradesmen and post managers" (LaFrance Exhibit 7, Tab 2, p. 2).

[23] Mr. LaFrance expressed his opinion that hunting was integral to the Métis way of life. There were no experts called or corroborative evidence called on this point. The learned trial judge's conclusion that hunting was integral to the Métis' distinctive society was based on that testimony. The question as to whether hunting was a defining and central attribute of the Métis society or whether it was only incidental or occasional to that society can not be determined on the evidence before the learned trial judge.

[24] Thus, I must find that the learned trial judge erred in finding that there was sufficient evidence to support his conclusion that hunting was a distinctive feature of the Métis society. Not every form of Aboriginal conduct constitutes an Aboriginal right.

Did the learned trial judge err in concluding that there was sufficient evidence of continuity with a historic Métis community in the area in question?

The claimant must show continuity of the contemporary community and its practice with the historic community and its practices. (Powley, *supra*, para. 90)

[25] Thus, the respondents must produce evidence of:

- (a) Their connection with and the existence of a contemporary Métis community;
- (b) The existence of a historic community and the contemporary community's connection to it; and
- (c) The practices of the historic community.

[26] The learned trial judge in his Reasons for Judgment at paragraphs 16, 17, 20, and 21 refers to "Métis Nation", "Métis Nation as the governing body in B.C.", and to a "Kootenay Métis Nation". This not evidence of a contemporary Métis community. This is only evidence of the existence of various organizations.

[27] The learned trial judge at paragraph 12(5) of his Reasons for Judgment found that the Ontario Superior Court judgment held that "objectively determinable ties of a claimant to a local Métis Community were unacceptable and not required."

[28] It is clear in the Court of Appeal decision of Powley, (which was not before the learned trial judge) that there was never an abandonment of the necessity of the claimants showing an ancestral family connection to a Métis community with an historical connection to the hunting area.

- [29] Other than a claim by the respondents to be Métis and the claim by Howse and Laboucane to be members of the Kootenay Regional Association (neither of which is disputed in this appeal), there is no claim by the respondents of a continuity of community as between the respondents.
- [30] Mr. LaFrance attempts to show an existence of an historic Métis community by pointing out the existence of LaFrance Creek in the Kootenay area of British Columbia. Mr. LaFrance says he is related to all LaFrances in North America, and he is Métis. Therefore, the creek must have been named after a Métis person living in the area.
- [31] Mr. Howse, who was born in Saskatchewan of a Métis father and a Dutch-Pennsylvanian mother, asserts that his ancestor was Joseph Howse, an Englishman, who had travelled in British Columbia in the employ of the Hudson's Bay Company, accompanied by Métis people. The document he produced stated that Howse had travelled in the area with "nine servants and some Indians", and that he had decided that "warring tribes of the Rocky Mountains made trade there so dangerous that it was not worth the trouble", and that Howse Pass was named after him for his use of it. Of the nine men who accompanied Howse on his trip into the Kootenay area, none have "French sounding" names which, according to Mr. LaFrance, is suggestive of a Métis connection.

[32] In *Mitchell v. M.N.R.*, *supra*, the Supreme Court had this to say at paragraphs 55 and 56:

55 The importance of trade - in and of itself - to Mohawk culture is not determinative of the issue. It is necessary on the facts of this case to demonstrate the integrality of this practice to the Mohawk in the specific geographical region in which it is alleged to have been exercised...

The appellant argues that the Mohawks have an aboriginal right to fish in Lake St. Francis. In order to succeed in this argument the appellant must demonstrate that, pursuant to the test laid out by this Court in *Van der Peet*, fishing in Lake St. Francis was "an element of a practice, custom or tradition integral to the distinctive culture" of the Mohawks. [Emphasis added.]

The majority, in assessing the integrality of this practice to the Mohawks in *Adams*, consistently tied the claimed right to the specific area at issue - the region of Lake St. Francis (see paras. 37 and 45). *Côté*, *supra*, similarly emphasized that it is the exercise of the claimed right in a specific geographical area that must be integral (paras. 41-78). In that case, the Court stated that "[a]n aboriginal practice, custom or tradition entitled to protection as an aboriginal right will frequently be limited to a specific territory or location, depending on the actual pattern of exercise of such an activity prior to contact" (para. 39).

56 Thus, geographical considerations are clearly relevant to the determination of whether an activity is integral in at least some cases, most notably where the activity is intrinsically linked to specific tracts of land. However, as Lamer C.J. observed in *Delgamuukw*, "aboriginal rights...fall along a spectrum with respect to their degree of connection with the land" (para. 138). In this regard, I note that the relevance of geography is much clearer in hunting and fishing cases such as *Adams* and *Côté*, which involve activities inherently tied to the land, than it is in relation to

more free-ranging rights, such as a general right to trade, which fall on the opposite end of the spectrum. General trading rights lack an inherent connection to a specific tract of land.

[33] The case before the learned trial judge was an issue of hunting rights. Thus, the claimants had to show that the Métis practice, custom, or tradition of hunting was tied to a specific geographical area.

[34] None of the defendants had any historic or familial connection to the area of the hunt. None could trace their Aboriginal ancestry to the Cranbrook area. There is no convincing evidence of a Métis historic community in the Kootenay area. There was not sufficient evidence that would allow the court to conclude that any of the defendants had the necessary connection to the land to entitle them to exercise Aboriginal harvesting rights. There was not sufficient evidence upon which the learned trial judge could conclude that any of the defendants had the necessary territorial connection to the Kootenay area.

Did the learned trial judge err in concluding that the defendants had established that the legislation in question constituted an infringement of their Aboriginal right to hunt?

[35] At paragraph 36 of his Reasons for Judgment, the learned trial judge says this:

In *R. v. Sparrow*, (supra), the Supreme Court of Canada held that the first question to be asked is whether the legislation in question has the effect of interfering with an existing aboriginal right. If it does have such an effect, it represents a *prima facie* infringement of s. 35(1). In this case, I find that the aboriginal right of Métis people in British Columbia to hunt moose and deer is interfered with by the regulatory scheme currently in place. There has been no consultation with the local or provincial Métis councils, associations or elders concerning aboriginal hunting rights.

[36] In *Sparrow*, the Supreme Court has set out a new detailed test for courts hearing assertions of Aboriginal rights. Summarily stated, the test is:

1. The party asserting an Aboriginal right has the onus to prove it.
2. The asserting party must prove that the impugned legislation interferes with or infringes upon that Aboriginal right. This is a three-fold test:
 - a) Is the limitation reasonable?
 - b) Does the regulation impose undue hardship?
 - c) Does the regulation deny to the holder of the right their preferred means of exercising that right?
3. Once infringement is proved, the Crown bears the burden to prove justification:
 - a) Is there a valid legislative objective?
 - b) Is the honour of the Crown in dealing with the Aboriginal people preserved?

- [37] In *R. v. Gladstone*, supra, paragraph 52 states "it is the cumulative effect on the appellant's rights from the operation of the regulatory scheme that the court is concerned with."
- [38] Not every infringement on the exercise of an Aboriginal right constitutes a prima facie infringement for the purposes of a section 35 analysis, the question being whether the regulatory regime significantly restricts the exercise of the right (See: *R. v. Marshall* (1999), 1939 C.C.C. (3d) 391 at 403 (S.C.C.); *R. v. Nikal*, [1996] 3 C.N.L.R. 178 (S.C.C.).)
- [39] Have the collective rights of the Band and the members of the Band, not the individual appellants, suffered undue hardship by reason of the regulation? (See: *Sparrow*, 1111-1112 [S.C.R.] and *R. v. Sampson and Elliott* (1995), 67 B.C.A.C. 180.)
- [40] Those defendants who had hunted without a licence as a form of protest gave no evidence that any form of hardship resulted through the legislation. Several of those who hunted one species of animal during closed season acknowledged that a legal hunt of a different species was available. None of the witnesses gave evidence that their involvement in this hunt was infringed upon by any of the laws in question. The thrust of the evidence on this issue was that the Métis right to hunt had been infringed generally because the Métis and their rights had not been specifically recognized.
- [41] The evidence does not support the finding of the learned trial judge that there was a prima facie infringement nor was there an opportunity for the Crown to call evidence that the "infringement" was justified.

CONCLUSION:

- [42] Appeal allowed.
- [43] The learned trial judge found on the agreed statement of facts, the Crown had met its onus regarding the offences charged. As the appeal has been allowed, the defendants must be found guilty as charged. Sentencing is adjourned to a date convenient to the parties.

"R.W. Metzger, J."

The Honourable Mr. Justice R.W. Metzger

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