Case Name:

R. v. Stagg

Between
Her Majesty the Queen, and
Norman Stagg

[2011] M.J. No. 56

2011 MBPC 9

Manitoba Provincial Court

B.M. Corrin Prov. Ct. J.

February 11, 2011.

(19 paras.)

Counsel:

Nathaniel Carnegie and Alanna Littman, for the Crown.

Dr. John Murdoch, as Agent, for the Defendant.

B.M. CORRIN PROV. CT. J.:--

INTRODUCTION

1 The accused acknowledged committing offences contrary to section 78 of *The Fisheries Act*, R.S., c. F-14, s.1, as follows:

> * Between the 21st day of June, 1007 and the 31st day of October A.D. 2007, at or near Gypsumville in the Province of Manitoba, did unlawfully contravene Section 12(2) of the Manitoba Fishery Regulations, SOR/87-509 by being the holder of a licence and failing to comply with all conditions specified in the licence, to wit: harvesting greater than 10% of a

winter quota in pickerel/sauger during the summer or fall commercial fishing season thereby committing an offence contrary to section 78(a) of *The Fisheries Act* R.S., c.F-14, s.1.

* Between the 21st day of June, 1007 and the 31st day of October A.D. 2007, at or near Gypsumville in the Province of Manitoba, did unlawfully contravene Section 33 of *The Fisheries Act*, R.S., 1985, c. F-14, s. 33; 1991, c.1, s.8., by selling or possessing any fish that has been caught in contravention of this *Act* of regulations and did thereby commit an offence contrary to section 78(1) of *The Fisheries Act*, R.S., c. F-14, s. 1.

2 Mr. Stagg filed a Notice of Constitutional Question on April 27, 2010. A copy of said Notice is attached hereto as Appendix A.

3 Since the commission of the offences is not in question, the first step in this judgment is to determine whether Mr. Stagg has proven a *prima facie* infringement of an Aboriginal or Treaty right to sell fish commercially. The jurisprudence as established by the Supreme Court of Canada (SCC) states that once such onus is met, the onus will then shift to the Crown to show that the *prima facie* infringement is justified by a valid legislative objective that is consistent with the special trust relationship that exists between the Crown and aboriginal peoples. (*R. v. Sparrow*, (1999) 1 S.C.R. 1075 at 112).

4 In *R. v. Van der Peet* (1996) 2 S.C.R. 507 at paragraphs 44-46, the Supreme Court of Canada defined the scope of Aboriginal rights. To constitute an Aboriginal right, an activity must be "an element of a practice, custom or tradition integral to the distinctive culture of the Aboriginal group claiming the right". In addition, because Aboriginal rights aim to protect the distinctive aspects of Aboriginal cultures, they must be shown to have originated in the practices, customs or traditions of an Aboriginal group in existence prior to European contact.

THE EVIDENCE AND ANALYSIS The Aboriginal Right and/or Treaty Agreement

5 Because Mr. Stagg was engaged in commercial-scale fishing activity, evidence of traditional practices that amounted to commercial scale fishing have to be proved. Yet Mr. Stagg led no evidence of any sort with respect to this subject matter. There is thus no basis for concluding that commercial-scale fishing qualified as an integral part of the culture of Dauphin River First Nation prior to contact with Europeans.

6 Similarly, no attempt was made by Mr. Stagg to present evidence that the relevant Treaty (No. 5) protected commercial-scale fishing.

7 In summary then, Mr. Stagg led no evidence whatsoever that any past historical practice of the Dauphin River First Nation gave rise to an Aboriginal or Treaty right to sell fish commercially. Indeed, it is exceptional and noteworthy that not a single witness, expert or otherwise, was called to testify on behalf of the defence to establish that he was entitled to exercise such rights.

8 Mr. Stagg also alleged in his submission that Treaty No. 5 involved coercion and misrepresentation and was therefore not legally valid. He called no evidence to support this allegation. Dr. John Murdoch, speaking on behalf of Mr. Stagg as agent, not witness, chose rather to make known his own views of history as he thought pertinent to the issue - views that he insisted the Court should take judicial notice of as they were based on what he considered to be unambiguous historical artifacts. Suffice it to say that I do not share Dr. Murdoch's view that these documents are unambiguous.

9 It is also noteworthy, as the Crown submitted, that Chapter twelve of the Natural Resources Transfer Agreement (the *NRTA*) purports to modify the fishing rights which are contained in paragraph 13 of the Manitoba *NRTA* which is Schedule (1) to the *Constitutional Act* (1930) provided that:

> "The Agreements set out in the Schedule to this *Act* are hereby confirmed and shall have the force of law notwithstanding anything in *The Constitution Act,* 1867..."

10 Paragraph 13 of the Manitoba Agreement (the *NRTA*)further provides that:

> "In order to secure the Indians of the Province, the continuance of the supply of game and fish for their support and subsistence, Canada agrees that *the laws respecting game enforced in the Province from time to time, shall apply to the Indians within the boundaries thereof*, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access." (italics added)

11 The *NRTA* later became enshrined as a constitutional document by virtue of being mentioned in the schedule to *The Constitution Act* of 1982.

12 In *R. v. Horseman* (1990) 1 S.C.R. 901, a majority of the Supreme Court of Canada accepted that Treaty 8 (which covers a large tract of northern Alberta) was understood by its aboriginal signatories as having conferred a right to hunt and exchange the produce of the buffalo hunt for resale, but concluded that Paragraph 12 of the Agreement between Canada and Alberta (the "*Alberta NRTA*") (which is identical to paragraph 13 of the Manitoba *NRTA)* modified the underlying treaty right by limiting it to the right to hunt, fish and trap for food. In *R. v. Badger*, (1996) 1 S.C.R. 771, a majority of the Supreme Court of Canada reiterated the conclusion that Paragraph 13 of the Alberta *NRTA* extinguished any treaty right to hunt on a commercial basis.

13 In *R. v. Gladue* (1995) Carswell ALTA, 803, the Alberta Court of Appeal in dealing with an accused who was charged with an offence under the Alberta Fishery Regulations (equivalent to the Fishery Regulations at issue in this case) held that no valid distinction could be drawn between

commercial hunting and commercial fishing rights with reference to the effect of the *NRTA* on such rights and accordingly both were extinguished. The Alberta Court of Appeal reiterated this conclusion in *R. v. Jacko*, (2000) ABCA 178.

14 This Court is of the opinion that both such judgments are correct and that the accused, Mr. Stagg, therefore has no Treaty right to fish commercially and thus no right under Treaty No. 5 that could have been infringed.

The Royal Proclamation Agreement

15 It was also Mr. Stagg's position that the Court should take judicial notice that Manitoba's Fishing Regulations have no legal force over him because of the Royal Proclamation of 1869. The Court was told that this document constituted a promise made by the Queen to persons living in what was then known as the North-west, which included the ancestors of the members of the present-day Dauphin River First Nation, that they would continue to be entitled to be governed by their customary laws. As I understood his submission Mr. Stagg essentially argued that this Proclamation should be held to form part of the Canadian Constitution in a manner that limited the manner in which Federal jurisdiction respecting Aboriginal people might be exercised, that is to say, that only the Parliament of Great Britain has the authority to reduce the rights and freedoms of Aboriginal peoples subject to Treaty No. 5. In other words, that Federal Legislation or consequent Provincial Regulations of the sort at issue in this case cannot apply to Mr. Stagg.

16 Mr. Stagg's constitutional submission in this respect relied in large measure on the decision of Judge Leo Wenden of the Alberta Provincial Court in *R. v. Caron* (2008) ABPC 232, which held that the Royal Proclamation of 1869 entrenched language rights in Alberta. It is therefore noteworthy that this decision was appealed and overruled by the decision of Madam Justice Eidsvik (2009) ABQB 745 (Alberta Court of Queen's Bench). At paragraph 167 of that decision Justice Eidsvik states:

> "In my view, in summary, the Proclamation of 1869, by itself did not entrench language rights, for two reasons, which I will explain in greater detail in the following paragraphs. Firstly, **based on the evidence before me**, the Proclamation was never passed into law by the British Parliament. Even if it had been, an ordinary statute would not have constitutionalized rights. Secondly, although the Crown had the authority to exercise its constituent power of resettlements prior to the granting of a legislature, I am of the view that this was not done through the Royal Proclamation of 1869. This Proclamation does not grant a legislature, affect the organization of the Courts, or refer to anything comparable to a constituent power. A reading of the Proclamation of 1869 leads me to conclude that its purpose was to calm the people about the annexation. This Proclamation, in my view, was a political gesture and had no legal force." (bold print added)

Unlike Justice Eidsvik, there was no evidence put before me respecting the historical context of this document. There is therefore actually nothing which can even be adjudicated upon with respect to the effect of the aforementioned Proclamation, an order-in-council made by the Governor-in-Council of the Dominion of Canada. I hasten to add that my personal reading of the document also suggests that it was only an attempt to ensure the residents of the North-west that British law would continue to prevail after annexation.

17 Not surprisingly, the Crown took the position that there was no legal basis for such a radical argument. In this regard it was noted that section 52 of the 1982 Constitutional enactment defined the Constitution to include, inter alia "the Acts and Orders referred to in the schedule" and that the Proclamation was not included in such schedule. The Crown noted that the general view, as endorsed by the Constitutional expert Professor Peter Hogg, Q.C., in his landmark text Constitutional Law of Canada, 5th Edition, Scarborough:Thomson Carswell, 2007 (at 1-9 and 12-1, 12-4 and 12-5) was that only documents listed in the schedule form part of the Constitution. It was therefore the Crown's position that the Proclamation, being an historical document not referred to in the schedule, lacked constitutional status and could not have the effect of limiting legislative sovereignty in which otherwise a level of government had legislative competence.

CONCLUSION

18 This Court concludes that the accused has at best established a possible Treaty right as modified by the *NRTA* to fish to provide food for himself and his family but not to breach the terms of his commercial fishing licence as was admitted in this case. Mr. Stagg's argument that he has a right to fish commercially without observance of Provincial Regulations is therefore dismissed.

19 The Court also concludes that the Royal Proclamation of 1869 did not limit the scope of federal or provincial powers with respect to commercial fishing in Canada as alleged by the defendant and that accordingly the regulations in issue in this case do apply to Mr. Stagg as submitted by the Crown.

B.M. CORRIN PROV. CT. J.

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