

Case Name:

R. v. Lefthand

Between

**Her Majesty the Queen, applicant, and
Ezra Elliot Lefthand, respondent
(Docket: 0501-0334-A)**

And Between

**Her Majesty the Queen, respondent, and
Edward Joseph Eagle Child, applicant
(Docket: 0501-0125-A)**

[2006] A.J. No. 204

2006 ABCA 70

68 W.C.B. (2d) 564

Dockets: 0501-0334-A and 0501-0125-A

Alberta Court of Appeal
Calgary, Alberta

**Martin J.A.
(In Chambers)**

Heard: February 2 and 16, 2006.

Judgment: February 23, 2006.

(11 paras.)

Aboriginal law -- Fishing rights -- Offences -- Applications for leave to appeal conviction on a charge of fishing in closed waters, and for leave to appeal and acquittal on a charge of fishing with bait, allowed -- Issues raised had arguable merit or a reasonable possibility of success -- Alberta Fishery Regulations, ss. 4 and 23.

Criminal law -- Fishing and hunting offences -- Baiting -- Fishing in prohibited area -- Applications for leave to appeal conviction on a charge of fishing in closed waters, and for leave to appeal and acquittal on a charge of fishing with bait, allowed -- Issues raised had arguable merit or a reasonable possibility of success -- Alberta Fishery Regulations, ss. 4 and 23.

Applications by the Crown and Eagle Child for leave to appeal from an acquittal in the first case, and a conviction in the

second case, on charges of fishing with bait, contrary to s. 23 of the Alberta Fishery Regulations, and fishing in closed waters contrary to s. 4 of the Regulations, respectively. Eagle Child was a Treaty 7 Indian. He admitted the elements of the offence of fishing in closed waters, but raised a treaty right to fish for food as a defence. The trial judge found that the closure of the waters did not constitute a prima facie infringement of Eagle Child's right to fish for food, and convicted him. On appeal to the Alberta Court of Queen's Bench, the court agreed that there was no prima facie infringement, and upheld the conviction. Lefthand also admitted the elements of the offence of fishing with bait, and raised the same defence. He was convicted after the trial judge found there was no prima facie infringement of his right to fish for food. On appeal, the verdict was overturned and Lefthand was acquitted. The court found there was an infringement of the treaty right which had not been justified.

HELD: Applications for leave to appeal allowed. The Crown's proposed appeal of the Lefthand decision involved issues of law alone that were of public importance. Further, the issues raised had arguable merit or a reasonable possibility of success. The Crown agreed that Eagle Child's application for leave should be granted in order that legal certainty may be provided in relation to fishery management in Alberta.

Statutes, Regulations and Rules Cited:

Alberta Fishery Regulations, 1998, S.O.R./98-246, ss. 4, 23

Appeal From:

Appeal from the Judgment of The Honourable Madam Justice Phillips. Dated the 14th day of October, 2005. (2005 ABQB 748, Docket: #0403-23677-S1)

Appeal from the Judgment of The Honourable Mr. Justice Power. Dated the 15th day of April, 2005. (2005 ABQB 275, Docket: #0168-08719-S1)

Counsel:

M. David Gates, Q.C., Counsel for the Department of Justice, Canada

Alan Hunter, Q.C., Counsel for Ezra Elliot Lefthand

Kenneth R. McLeod, Q.C., Counsel for Edward Joseph Eagle Child

REASONS FOR DECISION
APPLICATIONS FOR LEAVE TO APPEAL

MARTIN J.A.:--

Introduction

1 The following Orders arise from two applications for leave to appeal, which were heard together. Both involve issues relating to whether certain provincial fishing regulations infringe treaty rights.

Facts

2 The first application involves Edward Eagle Child, a Treaty 7 Indian. On May 26th, 2001, he was charged with fishing in the closed waters of the St. Mary River, contrary to s. 4 of the Alberta Fishery Regulations, 1998

(S.O.R./98-246) and Variation Order SF01-01. He admitted the elements of the offence but raised a treaty right to fish for food as a defence. The trial judge found that the closure of the waters did not constitute a prima facie infringement of Mr. Eagle Child's right to fish for food, and convicted him. On appeal to the Court of Queen's Bench of Alberta, Power J. agreed that there was no prima facie infringement, and upheld the conviction.

3 Mr. Eagle Child seeks leave to appeal Power J.'s decision. Although it argues that this decision was correct, the Crown /Respondent agrees that the application for leave to appeal should be granted in order that legal certainty may be provided in relation to fishery management in Alberta. The proposed grounds for which leave to appeal is sought are as follows:

1. Did the Learned Summary Conviction Appeal Court err in law in upholding the Applicant's conviction and in concluding that the closure of the St. Mary River did not amount to a prima facie infringement of his treaty right to fish for food, as modified by the Natural Resources Transfer Agreement ("NRTA")?
2. Did the Learned Summary Conviction Appeal Court err in law in its interpretation and application of the Sparrow test for infringement to the undisputed facts of this case?

4 The second application involves Mr. Lefthand, who is also a Treaty 7 Indian. On the 16th of June, 2001, he was charged with fishing with bait (earthworms) in the waters of the Livingston River in southern Alberta, contrary to s. 23 of the Alberta Fishery Regulations, 1998 (S.O.R./98-246) and a bait ban in Variation Order SF01-06. He also admitted the elements of the offence and raised his treaty right to fish for food as a defence. At trial, the Provincial Court Judge applied the test in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, and convicted Mr. Lefthand, finding there was no prima facie infringement of his right to fish for food. On appeal to the Court of Queen's Bench of Alberta, Phillips J. overturned that verdict and acquitted Mr. Lefthand. In her Reasons for Judgment, she found there was an infringement of the treaty right which had not been justified. She held that the Crown had a duty to consult with affected aboriginal peoples when it undertook to do a review of fisheries management in the area and that the Crown had breached this duty to consult.

5 The Crown seeks leave to appeal Phillips J.'s decision on the following grounds:

1. The Summary Conviction Appeal Court erred in law by finding that s. 23 of the Alberta Fishery Regulations, 1998 (S.O.R./98-246) as modified by Variation Order SF01-06, which imposed a bait ban on the Livingston River, was a prima facie infringement of the Treaty 7 right to fish, as modified by the Natural Resources Transfer Agreement ("NRTA");
2. The Summary Conviction Appeal Court erred in law by finding that the scope and content of a treaty right is determined solely from the language of the treaty itself; and
3. The Summary Conviction Appeal Court erred in law by failing to apply the correct legal test in determining that there was a prima facie infringement of the Treaty 7 right to fish, as modified by the NRTA.

Analysis

6 As matters stand, we now have two conflicting decisions dealing with essentially the same issues from the same level of court.

7 The Crown's application for leave to appeal the Lefthand decision is opposed. I have had the benefit of counsels' submissions and I am satisfied that the criteria for granting leave to appeal are met in both cases. Specifically, I find that the issues involve questions of law alone; that they are of public importance; and that the issues raised have arguable merit or a reasonable possibility of success.

8 Accordingly, leave to appeal is granted on the aforementioned grounds with one footnote. I agree with Mr. Hunter,

counsel for Mr. Lefthand, that with regard to the proposed second ground of appeal, the judgment of Phillips J. did not say:

"... The scope and content of a treaty right is determined solely from the language of the treaty itself" [Emphasis added].

The actual words in the judgment are:

"The content of an asserted Treaty right is to be gleaned from the language of the Treaty itself...."

9 Still, I will grant leave to appeal on that ground as well, in the hope that this question may also be addressed and resolved.

10 The Crown also asks that both matters be consolidated. In my view, these are separate and distinct cases which do not require consolidation. However, I will direct that they be heard by the same panel of this court, one case immediately after the other.

11 Judgment accordingly.

MARTIN J.A.

cp/e/qw/qlmmm