Case Name:

R. v. Sundown

Her Majesty The Queen, appellant;
v.
John Sundown, respondent, and
The Attorney General of Quebec, the Attorney General of Manitoba and the Attorney General for Alberta, interveners.

[1999] S.C.J. No. 13

[1999] A.C.S. no 13

[1999] 1 S.C.R. 393

[1999] 1 R.C.S. 393

170 D.L.R. (4th) 385

236 N.R. 251

[1999] 6 W.W.R. 278

J.E. 99-696

177 Sask.R. 1

132 C.C.C. (3d) 353

[1999] 2 C.N.L.R. 289

86 A.C.W.S. (3d) 1006

41 W.C.B. (2d) 323

File No.: 26161.

Supreme Court of Canada

1998: November 3 / 1999: March 25.

Present: Lamer C.J. and L'Heureux-Dubé, Cory, McLachlin, Iacobucci, Bastarache and Binnie JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Indians -- Treaty rights -- Right to hunt and fish -- Treaty Indian constructing log cabin in provincial park -- Park regulations prohibiting construction of dwelling on park land without permission -- Whether cabin reasonably incidental to hunting and fishing rights -- If so, whether regulations infringe upon hunting rights -- Parks Regulations, 1991, R.R.S. c. P-1.1, Reg. 6, s. 41(2)(j) -- Treaty No. 6 -- Natural Resources Transfer Agreement, para. 12 -- Indian Act, R.S.C., 1985, c. I-5, s. 88.

The respondent, a member of a Cree First Nation that is a party to Treaty 6, cut down some trees in a provincial park and used them to build a log cabin. The provincial Parks Regulations prohibit the construction of a temporary or permanent dwelling on park land without permission. Pursuant to the provisions of Treaty 6, the respondent is entitled to hunt for food on land that is occupied by the provincial Crown, including the provincial park. He testified that he needed the cabin while hunting, both for shelter and as a place to smoke fish and meat and to skin pelts. Evidence was presented at trial of a long-standing band practice to conduct "expeditionary" hunts in the area now included within the park. In order to carry out these hunts shelters were built at the hunting sites. The shelters were originally moss-covered lean-tos, and later tents and log cabins. In 1930, the Natural Resources Transfer Agreement between the province of Saskatchewan and the federal government modified Treaty 6 by extinguishing the treaty right to hunt commercially but expanding the geographical areas in which Indians have the treaty right to hunt for food. The respondent was convicted of building a permanent dwelling on park land without permission. The summary conviction appeal court quashed the conviction, and the Court of Appeal affirmed that decision.

Held: The appeal should be dismissed.

A hunting cabin is reasonably incidental to this First Nation's right to hunt in their traditional expeditionary style. This method of hunting is not only traditional but appropriate and shelter is an important component of it. A reasonable person apprised of the traditional expeditionary method of hunting would conclude that for this First Nation the treaty right to hunt encompasses the right to build shelters as a reasonable incident to that right. The small log cabin is an appropriate shelter for expeditionary hunting in today's society.

By building a permanent structure such as a log cabin, the respondent was not asserting a proprietary interest in park land. Treaty rights, like aboriginal rights, must not be interpreted as if they were common law property rights. Any interest in the hunting cabin is a collective right that is derived from the treaty and the traditional expeditionary method of hunting; it belongs to the band as a whole, not to the respondent or any individual band member. Furthermore, there are limitations on permanency implicit within the right itself. First, provincial legislation that relates to conservation and that passes the justificatory standard set out in Sparrow could validly restrict the building of hunting cabins. Second, there must be compatibility between the Crown's use of the land and the treaty right claimed. The third limitation on the treaty right to hunt is found in the term of the treaty that restricts the right to hunt to lands not "required or taken up for settlement". Neither the second nor the third limitation applies here. In light of the Crown's concession that the regulations at issue are not related to conservation, the issue of whether they can be justified under the Sparrow test should not be considered in this appeal.

Under s. 88 of the Indian Act, all provincial laws of general application apply to Indians subject to "the terms of any treaty". Since the regulations in issue would conflict with Treaty 6, which permits the respondent to build a cabin as an activity reasonably incidental to his right to hunt, they are inapplicable to him under s. 88.

Cases Cited

Referred to: R. v. Horseman, [1990] 1 S.C.R. 901; R. v. Sutherland, [1980] 2 S.C.R. 451; Simon v. The Queen, [1985] 2 S.C.R. 387; R. v. Sioui, [1990] 1 S.C.R. 1025; R. v. Badger, [1996] 1 S.C.R. 771; R. v. Van der Peet, [1996] 2 S.C.R. 507; R. v. Sparrow, [1990] 1 S.C.R. 1075; R. v. Smith, [1935] 2 W.W.R. 433; Myran v. The Queen, [1976] 2 S.C.R. 137; Dick v. The Queen, [1985] 2 S.C.R. 309; R. v. Côté, [1996] 3 S.C.R. 139.

Statutes and Regulations Cited

Constitution Act, 1930 (U.K.), 20 & 21 Geo. 5, c. 26 [reprinted in R.S.C., 1985, App. II, No. 26], s. 1.
Constitution Act, 1982, s. 35(1).
Indian Act, R.S.C., 1985, c. I-5, s. 88.
Natural Resources Transfer Agreement [confirmed by the Constitution Act, 1930], para. 12.
Parks Act, S.S. 1986, c. P-1.1, s. 4(4).
Parks Regulations, 1991, R.R.S. c. P-1.1, Reg. 6, ss. 41(1), (2)(j), 59(a).
Treaty No. 6 (1876).

Authors Cited

Morris, Alexander. The Treaties of Canada with the Indians of Manitoba and the North-West Territories, including the negotiations on which they were based, and other information relating thereto. Facsim. reprint of the 1880 ed. Saskatoon: Fifth House Publishers, 1991.

APPEAL from a judgment of the Saskatchewan Court of Appeal, [1997] 4 C.N.L.R. 241, [1997] 8 W.W.R. 379, 158 Sask. R. 53, 153 W.A.C. 53, 117 C.C.C. (3d) 140, [1997] S.J. No. 377 (QL), dismissing the Crown's appeal from a decision of the Court of Queen's Bench, [1995] 3 C.N.L.R. 152, [1995] 7 W.W.R. 289, 133 Sask. R. 3, [1995] S.J. No. 303 (QL), quashing the respondent's conviction in Provincial Court, [1994] 2 C.N.L.R. 174, [1993] S.J. No. 702 (QL), for building a permanent dwelling on park land. Appeal dismissed.

P. Mitch McAdam, for the appellant.
James D. Jodouin and Gary L. Bainbridge, for the respondent.
René Morin, for the intervener the Attorney General of Quebec.
Deborah L. Carlson, for the intervener the Attorney General of Manitoba.
Robert J. Normey, for the intervener the Attorney General for Alberta.

Solicitor for the appellant: John D. Whyte, Regina.
Solicitors for the respondent: Woloshyn Mattison, Saskatoon.
Solicitor for the intervener the Attorney General of Quebec: René Morin, Sainte-Foy.
Solicitor for the intervener the Attorney General of Manitoba: The Department of Justice, Winnipeg.
Solicitor for the intervener the Attorney General for Alberta: Robert J. Normey, Edmonton.

The judgment of the Court was delivered by

1 CORY J.:-- Like his ancestors John Sundown, a Cree Indian and a member of the Joseph Bighead First Nation, hunted and fished in Meadow Lake Provincial Park. In order to carry out these activities he constructed a log cabin in the Park. This act breached the Park Regulations. On this appeal it must be determined whether the cabin is reasonably incidental to the hunting and fishing rights of this First Nation. If it is, do the Park Regulations infringe upon the hunting rights of this First Nation set out in Treaty No. 6 and modified by the Natural Resources Transfer Agreement

(NRTA)?

I. Factual Background

A. The Respondent

2 The respondent, John Sundown, is a Cree Indian and a member of the Joseph Bighead First Nation, which is a party to Treaty No. 6 by adhesion. In 1992, Mr. Sundown cut down some 25 mature white spruce trees in Meadow Lake Provincial Park and used them to build a one-storey log cabin, approximately 30 feet by 40 feet. The Parks Regulations, 1991, R.R.S. c. P-1.1, Reg. 6, prohibit both the construction of a temporary or permanent dwelling on park land without permission (s. 41(2)(j)) and the taking or damaging of trees without consent (s. 59(a)).

3 Pursuant to the provisions of Treaty No. 6, Mr. Sundown is entitled to hunt for food on land that is occupied by the provincial Crown, including Meadow Lake Provincial Park. He testified that he needed the cabin while hunting, both for shelter and as a place to smoke fish and meat and to skin pelts. At trial, evidence was presented of a long-standing Band practice to conduct "expedition hunts" in the area now included within the Park. In order to carry out these hunts shelters were built at the hunting sites. The shelters were originally lean-tos covered with moss. Later they were tents and log cabins.

B. The History of Treaty No. 6

4 Treaty No. 6 reads in part as follows:

> Her Majesty further agrees with Her said Indians that they, the said Indians, shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by Her Government of Her Dominion of Canada, and saving and excepting such tracts as may from time to time be required or taken up for settlement, mining, lumbering or other purposes by Her said Government of the Dominion of Canada, or by any of the subjects thereof duly authorized therefor by the said Government.

5 Treaty No. 6 is one of 11 numbered treaties concluded between the federal government and various First Nations between 1871 and 1923. They were negotiated with the aim of facilitating European settlement of western Canada. Treaty No. 6, also known as the Treaties at Forts Carlton and Pitt, was signed in 1876 and covered an expanse of 120,000 square miles. The area ceded covered much of central Alberta and Saskatchewan. In exchange for the land, the federal government provided or made a commitment to provide the bands with reserves, schools, annuities, farm equipment, ammunition, and assistance in times of famine or pestilence. Hunting, fishing and trapping rights were also secured to the Indians. Indeed, it is clear from the record of the negotiations that the guarantee of these rights was essential for the First Nations in their acceptance of the treaty. In The Treaties of Canada with the Indians of Manitoba and the North-West Territories (1991 (reprint)), Alexander Morris, the Lieutenant Governor in charge of the negotiations, recorded the following exchange. The Chiefs stated, "We want to be at liberty to hunt on any place as usual" (p. 215). Mr. Morris responded as follows (at p. 218):

> You want to be at liberty to hunt as before. I told you we did not want to take that means of living from you, you have it the same as before, only this, if a man, whether Indian or Half-breed, had a good field of grain, you would not destroy it with your hunt. [Emphasis added.]

6 It is clear from the history of the negotiations between Alexander Morris and the First Nations who signed Treaty No. 6 that the government intended to preserve the traditional Indian way of life. Hunting and fishing were of fundamental importance to that way of life. This was recognized in the treaty negotiations and in the treaties themselves. At p. 193 of The Treaties of Canada with the Indians, supra, Morris writes:

> I then asked the Bear to tell the other two absent Chiefs, Short Tail and Sagamat, what had been done; that I had written him and them a letter, and sent it by Sweet Grass, and that next year they could join the treaty; with regard to the buffalo, the North-West Council were considering the question, and I again explained that we would not interfere with the Indian's daily life except to assist them in farming. [Emphasis added.]

7 The Joseph Bighead First Nation adhered to Treaty No. 6 in 1913.

8 In 1930, Treaty No. 6 was modified by the NRTA, entered into by the province of Saskatchewan and the federal government. Pursuant to s. 1 of the Constitution Act, 1930, R.S.C., 1985, App. II, No. 26, it is clear that the NRTA has constitutional status. Paragraph 12 of the NRTA reads as follows:

> 12. In order to secure to 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 in force 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.

In R. v. Horseman, [1990] 1 S.C.R. 901, it was held that para. 12 of the Alberta NRTA modified Treaty No. 8 in two ways. It extinguished the treaty right to hunt commercially but expanded the geographical areas in which Indians have the treaty right to hunt for food. At p. 933, per Cory J.:

> Although the [Natural Resources Transfer] Agreement 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. Nor are the Indians subject to seasonal limitations as are all other hunters.

C. The Meadow Lake Provincial Park

9 Meadow Lake Provincial Park is considered a "natural environment park". Recreational activities pursued within the park are intended to conform with the natural landscape of the park: The Parks Act, S.S. 1986, c. P-1.1, s. 4(4). The Park contains many lakes, including Mistohay Lake on which the respondent built the cabin, large tracts of forest and several roads including Provincial Highway 224. There is a cottage subdivision of 200 to 300 cottages. There are as well approximately 15 cottages located outside the subdivision. Some commercial activities are found within its boundaries. They include gas wells, pipeline clearings and a lodge offering accommodation. Finally, there are services to accommodate the park users, including lakeside fuel pumps, picnic and campground areas, landfill sites, boat launches and toilet facilities. This is a large park. Non-aboriginal persons can hunt in the park during the appropriate season. Aboriginal hunters can, as well, exercise their treaty hunting rights within the confines of the park. In short, Meadow Lake Provincial Park is not, as the respondent correctly points out, virgin forest.

D. The Hunting Methods of the Joseph Bighead First Nation

10 It is uncontested that the respondent, Mr. Sundown, had the right to hunt in Meadow Lake Provincial Park, as this Park is a "lan[d] to which the said India[n] may have a right of access". In this regard R. v. Sutherland, [1980] 2 S.C.R. 451, considered the interpretation of para. 13 of Manitoba's NRTA. That paragraph is identical to para. 12 of the Saskatchewan NRTA, the provision pertinent to this case. At p. 460, Dickson J. (as he then was) writing for the Court stated:

> The Indians' right to hunt for food under para. 13 is paramount and overrides provincial game laws regulating hunting and fishing. The Province may deny access for hunting to Indians and non-Indians alike but if, as in the case at bar, limited hunting is allowed, then under para. 13, non-dangerous . . . hunting for food is permitted to the Indians, regardless of provincial curbs on season, method or limit. [Emphasis added; citation omitted.]

11 Evidence was adduced at trial which described the traditional methods of hunting of the Joseph Bighead First Nation. This evidence was uncontroverted and appears to have been accepted by the trial judge. It is clear that the traditional method of hunting of the Joseph Bighead First Nation is "expeditionary", a hub-and-spoke style of hunting in which hunters set up a base camp for some extended period of time ranging from overnight to two weeks. Each day they move out from that spot to hunt. They then return to the base camp to smoke fish or game and to prepare hides. Originally these shelters were moss-covered lean-tos and later tents and log cabins.

E. The Charges

12 Mr. Sundown was charged with violating the Regulations that prohibit the cutting of trees or the building of cabins without permission from the Minister. He was convicted of both offences in Provincial Court. He appealed his convictions by way of summary conviction appeal to the Court of Queen's Bench. The conviction for building a permanent dwelling on park land (s. 41(2)(j)) was quashed and the conviction for cutting trees (s. 59(a)) was upheld. The Crown appealed the quashed conviction and the respondent appealed the conviction for cutting trees. The Court of Appeal dismissed the Crown appeal and allowed the respondent's appeal from conviction, entering an acquittal instead. Wakeling J.A., in dissent, would have restored the conviction for building a dwelling and quashed the conviction respecting the trees.

13 The charge of cutting down trees plays no part in this appeal. Mr. Sundown has admitted building a log cabin but claims that he was entitled to do so as it is an essential aspect of his right to hunt granted by Treaty No. 6 as modified by the NRTA.

II. Relevant Statutory and Constitutional Provisions

14 Constitution Act, 1982

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

> Treaty No. 6

> Her Majesty further agrees with Her said Indians that they, the said Indians, shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by Her Government of Her Dominion of Canada, and saving and excepting such tracts as may from time to time be required or taken up for settlement, mining, lumbering or other purposes by Her said Government of the Dominion of Canada, or by any of the subjects thereof duly authorized therefor by the said Government.

> Natural Resources Transfer Agreement of 1930 entered into by the Government of Canada and the Province of Saskatchewan

12. In order to secure to 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 in force 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.

Indian Act, R.S.C., 1985, c. I-5

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.

Parks Regulations, 1991, R.R.S. c. P-1.1, Reg. 6

41(1) No person shall:

(a) occupy;
(b) undertake research on;
(c) alter;
(d) use or exploit any resource in, on or under; or
(e) develop;

park land without a disposition.

(2) Without limiting the generality of subsection (1), no person shall:

. . .

(j) construct or occupy a temporary or permanent dwelling on park land

. . .

without a disposition or the prior written consent of the minister.

59

No person shall

(a) take, damage or destroy a flower, plant, shrub, tree or any other natural vegetation on park land without the prior written consent of the minister;

III. Prior Judgments

A. Saskatchewan Provincial Court, [1994] 2 C.N.L.R. 174

15 In the opinion of the trial judge the respondent, by permanently occupying a portion of the park, interfered with the rights of other park users and with the natural landscape, and could interfere with other treaty-rights holders who might want to exercise their rights. As well, she found that the respondent could not establish a proprietary right to the land on which the cabin was built. She held that the Parks Regulations, 1991 were constitutionally valid and applicable to the respondent.

B. Saskatchewan Court of Queen's Bench, [1995] 3 C.N.L.R. 152

16 Klebuc J., on the summary conviction appeal, held that the respondent's right to hunt consists of the rights found in Treaty No. 6 that were merged and consolidated in para. 12 of the NRTA.

17 Klebuc J. then considered whether the impeached activities fell within the scope of the respondent's treaty rights. In doing so he reviewed the decision of this Court in Simon v. The Queen, [1985] 2 S.C.R. 387. At p. 403 it was held that "the right to hunt to be effective must embody those activities reasonably incidental to the act of hunting itself," such as "travelling with the requisite hunting equipment to the hunting grounds" (per Dickson C.J.). Klebuc J. defined the test for ancillary activities as being "whether the activity or equipment is 'reasonably related' and 'reasonably required' having regard to the circumstances" (p. 164). On the facts of this case, he found that the use of the cabin was reasonably related to the act of hunting. He noted that the respondent's permanent home is far from Mistohay Lake, that he had a longstanding practice of hunting at that lake, and that he had previously used a cabin near that location.

18 Klebuc J. then considered whether the respondent's activities prevented the Province from accomplishing its objectives for the park land. He concluded that there was no evidence of a "material incompatibility between the Province's intended use of the lands within the Park and the impeached activities" (p. 166). He therefore allowed the appeal with respect to building the cabin and entered an acquittal, and dismissed the appeal with respect to cutting the trees.

C. Saskatchewan Court of Appeal, [1997] 4 C.N.L.R. 241

(1) Vancise J.A. for the majority

19 The conviction for cutting trees was set aside and an acquittal entered. The parties agreed that the summary conviction appeal judge had erred because the trees had been taken and used by a third party, not the respondent.

20 Vancise J.A. considered the test set out in Simon, supra, to determine whether the construction of the cabin was "reasonably incidental" to the constitutionally protected right to hunt. He interpreted Dickson C.J.'s use of the word "incidental" to mean "activities which are reasonably related to the act, of hunting in order to make them effective" (p. 257). He found that the building and use of the cabin were related to hunting for food but that it remained to be determined whether they were also "reasonably incidental" to the constitutionally protected right to hunt.

21 He acknowledged that a treaty right to hunt could be exercised in a modern form. He observed that the respondent's preferred method of hunting was the expeditionary method which was used by his father and grandfather. The expeditions typically lasted four days to a week with the cabin used as a base camp for shelter and for processing the game. Vancise J.A. held that the use of the cabin was "a means to facilitate and exercise the act of hunting" (p. 258).

22 He held that the provincial regulations were not applicable to the respondent because their objective, the orderly development of provincial parks, did not justify overriding the respondent's constitutionally protected right to hunt.

(2) Wakeling J.A. in dissent

23 Wakeling J.A. disagreed with the majority's conclusions respecting the use of the cabin and ruled that the building of a shelter was not reasonably incidental to the right to hunt. He was of the view that the respondent had other means of obtaining the customary shelter than by building a permanent cabin and that treaty rights should be balanced with the province's interest in the orderly development of resources. Wakeling J.A. referred to R. v. Sioui, [1990] 1 S.C.R. 1025, in support of his position that the public interest in the use of park lands had to be taken into consideration. He concluded that the construction of the log cabin was not reasonably incidental to the right to hunt.

IV. Analysis

A. General Principles of Treaty Interpretation

24 The principles of interpretation to be followed in considering treaties signed with the First Nations are summarized in R. v. Badger, [1996] 1 S.C.R. 771. It was put in this way at para. 41:

> First, it must be remembered that a treaty represents an exchange of solemn promises between the Crown and the various Indian nations. It is an agreement whose nature is sacred. . . . Second, the honour of the Crown is always at stake in its dealing with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. It is always assumed that the Crown intends to fulfil its promises. No appearance of "sharp dealing" will be sanctioned. . . . Third, any ambiguities or doubtful expressions in the wording of the treaty or document must be resolved in favour of the Indians. A corollary to this principle is that any limitations which restrict the rights of Indians under treaties must be narrowly construed. . . . Fourth, the onus of proving that a treaty or aboriginal right has been extinguished lies upon the Crown. There must be "strict proof of the fact of extinguishment" and evidence of a clear and plain intention on the part of the government to extinguish treaty rights. [Citations omitted.]

Treaties may appear to be no more than contracts. Yet they are far more. They are a solemn exchange of promises made by the Crown and various First Nations. They often formed the basis for peace and the expansion of European settlement. In many if not most treaty negotiations, members of the First Nations could not read or write English and relied completely on the oral promises made by the Canadian negotiators. There is a sound historical basis for interpreting treaties in the manner summarized in Badger. Anything else would amount to be a denial of fair dealing and justice between the parties.

25 Treaty rights, like aboriginal rights, are specific and may be exercised exclusively by the First Nation that signed the treaty. The interpretation of each treaty must take into account the First Nation signatory and the circumstances that surrounded the signing of the treaty. Lamer C.J. was careful to stress the specific nature of aboriginal rights in R. v. Van der Peet, [1996] 2 S.C.R. 507. At para. 69 he wrote:

> The fact that one group of aboriginal people has an aboriginal right to do a particular thing will not be, without something more, sufficient to demonstrate that another aboriginal community has the same aboriginal right. The existence of the right will be specific to each aboriginal community. [Emphasis added.]

This principle is equally applicable to treaty rights. Dickson C.J. and La Forest J. also emphasized the specific nature of aboriginal and treaty rights in R. v. Sparrow, [1990] 1 S.C.R. 1075, when they discussed the correct test to apply under s. 35(1) of the Constitution Act, 1982. At p. 1111 this appears:

> We wish to emphasize the importance of context and a case-by-case approach to s. 35(1). Given the generality of the text of the constitutional provision, and especially in light of the complexities of aboriginal history, society and rights, the contours of a justificatory standard must be defined in the specific factual context of each case. [Emphasis added.]

Thus, in addition to applying the guiding principles of treaty interpretation, it is necessary to take into account the circumstances surrounding the signing of the treaty and the First Nations who later adhered to it. For example, consideration should be given to the evidence as to where the hunting and fishing were done and how the members of the First Nation carried out these activities.

B. The Nature of the Right to Hunt Under Treaty No. 6

26 Meadow Lake Provincial Park is Crown land and members of the public can hunt in it during the specified season. The parties agree that Mr. Sundown has the right to hunt in the park. Like other adherents to Treaty No. 6 he is entitled to hunt for food. This he can do at any time so long as he does not endanger others and complies with the appropriate safety regulations and the conservation regulations, which are justifiable under Sparrow. See Sutherland, supra, at p. 460.

27 Both parties submitted that, in order to determine whether the right to shelter is reasonably incidental to the right to hunt, the test set out in Simon, supra, must be applied. In that case, Mr. Simon was charged under a provincial statute with unlawfully carrying a rifle and shotgun shells. In his defence, he argued that he was immune from prosecution as a result of his treaty right to hunt and the application of s. 88 of the Indian Act. Writing for the Court, Dickson C.J. stated at p. 403:

> It should be clarified at this point that the right to hunt to be effective must embody those activities reasonably incidental to the act of hunting itself, an example of which is travelling with the requisite hunting equipment to the hunting grounds. [Emphasis added.]

28 How should the term "reasonably incidental" be defined and applied? In my view it should be approached in this manner. Would a reasonable person, fully apprised of the relevant manner of hunting or fishing, consider the activity in question reasonably related to the act of hunting or fishing? It may seem old fashioned to apply a reasonable person test but I believe it is both useful and appropriate.

29 The reasonable person must be dispassionate and fully apprised of the circumstances of the treaty rights holder. That reasonable person must also be aware of the manner in which the First Nation hunted and fished at the time the treaty was signed. That knowledge must, of course, be placed to some extent in today's context. For example, in the past it was reasonably incidental to hunting rights to carry a quiver of arrows. Today it is reasonably incidental to hunting rights to carry the appropriate box of shotgun shells or rifle cartridges. A form of shelter was always necessary to carry out the expeditionary hunting of the Joseph Bighead First Nation. At the time of the treaty, the shelter may have been a carefully built lean-to. That shelter appropriately evolved to a tent and then a small cabin. Thus, the reasonable person, informed of the manner of hunting at the time of the treaty, can consider it in the light of modern hunting methods and can determine whether the activity in question -- the shelter -- is reasonably incidental to the right to hunt.

30 In order to determine what is reasonably incidental to a treaty right to hunt, the reasonable person must examine the historical and contemporary practice of that specific treaty right by the aboriginal group in question to see how the treaty right has been and continues to be exercised. That which is reasonably incidental is something which allows the claimant to exercise the right in the manner that his or her ancestors did, taking into account acceptable modern developments or unforeseen alterations in the right. The question is whether the activity asserted as being reasonably incidental is in fact incidental to an actually practised treaty right to hunt. The inquiry is largely a factual and historical one. Its focus is not upon the abstract question of whether a particular activity is "essential" in order for hunting to be possible but rather upon the concrete question of whether the activity was understood in the past and is understood today as significantly connected to hunting. Incidental activities are not only those which are essential, or integral, but include, more broadly, activities which are meaningfully related or linked.

31 It is uncontroverted that the Joseph Bighead First Nation has traditionally hunted in what was described as an expeditionary style. Like the spokes of a wheel the hunters radiate out from the base each day to search for game. The

hunt may continue for two weeks. The base provides a place for dressing the game and smoking the fish. Further, it provides the hunters with shelter for the duration of the hunt. Without shelter, expeditionary hunting, the traditional method used by this First Nation, would be impossible. There is no doubt, in the context of this treaty and of this First Nation, that some form of shelter is in fact a necessary part of expeditionary hunting. Accordingly, shelter is also reasonably incidental to this method of hunting.

32 It was argued that, even if shelter is encompassed by the treaty right to hunt, a permanent structure such as a cabin is not. More will be said on the aspect of permanence later. At this juncture I would simply observe that it has often been observed, most recently in Van der Peet, supra, that judges must not adopt a "frozen-in-time" approach to aboriginal or treaty rights. The words of Dickson C.J. and La Forest J. in Sparrow, supra, at p. 1093 in regard to aboriginal rights apply equally to treaty rights:

> . . . the phrase "existing aboriginal rights" must be interpreted flexibly so as to permit their evolution over time. To use Professor Slattery's expression, in "Understanding Aboriginal Rights" [(1987), 66 Can. Bar Rev. 727], at p. 782, the word "existing" suggests that those rights are "affirmed in contemporary form rather than in their primeval simplicity and vigour". Clearly, then, an approach to the constitutional guarantee embodied in s. 35(1) which would incorporate "frozen rights" must be rejected. [Emphasis added.]

33 A hunting cabin is, in these circumstances, reasonably incidental to this First Nation's right to hunt in their traditional expeditionary style. This method of hunting is not only traditional but appropriate and shelter is an important component of it. Without a shelter, it would be impossible for this First Nation to exercise its traditional method of hunting and their members would be denied their treaty rights to hunt. A reasonable person apprised of the traditional expeditionary method of hunting would conclude that for this First Nation the treaty right to hunt encompasses the right to build shelters as a reasonable incident to that right. The shelter was originally a moss-covered lean-to and then a tent. It has evolved to the small log cabin, which is an appropriate shelter for expeditionary hunting in today's society.

C. The Issue of Permanency

34 The issue of the permanency of the cabin was raised by the Crown in this appeal and was a key point in the dissent of Wakeling J.A. It was argued that, by building a permanent structure such as a log cabin, the respondent was asserting a proprietary interest in park land. For a First Nation member to assert a proprietary right would, it is said, be contrary to the essential purpose of the Crown in negotiating the treaty and contrary to its terms.

35 I cannot accept this argument. Treaty rights, like aboriginal rights, must not be interpreted as if they were common law property rights. Chief Justice Dickson and La Forest J. made this point in Sparrow, supra, at pp. 1111-12:

> Our earlier observations regarding the scope of the aboriginal right to fish are relevant here. Fishing rights are not traditional property rights. They are rights held by a collective and are in keeping with the culture and existence of that group. Courts must be careful, then, to avoid the application of traditional common law concepts of property as they develop their understanding of what the reasons for judgment in Guerin [v. The Queen, [1984] 2 S.C.R. 335], at p. 382, referred to as the "sui generis" nature of aboriginal rights. [Emphasis added.]

Aboriginal and treaty rights cannot be defined in a manner which would accord with common law concepts of title to land or the right to use another's land. Rather, they are the right of aboriginal people in common with other aboriginal people to participate in certain practices traditionally engaged in by particular aboriginal nations in particular territories.

36 Any interest in the hunting cabin is a collective right that is derived from the treaty and the traditional expeditionary method of hunting. It belongs to the Band as a whole and not to Mr. Sundown or any individual member of the Joseph Bighead First Nation. It would not be possible, for example, for Mr. Sundown to exclude other members of this First Nation who have the same treaty right to hunt in Meadow Lake Provincial Park.

37 Furthermore there are limitations on permanency implicit within the right itself. Three such limitations were properly conceded by the respondent.

38 First, provincial legislation that relates to conservation and that passes the justificatory standard set out in Sparrow, supra, at pp. 1111-13, could validly restrict the building of hunting cabins. Badger, supra, specifically considered the ability of the Alberta government to legislate pursuant to the provisions of para. 12 of its NRTA which is identical to para. 12 of the Saskatchewan NRTA. Badger held that both Treaty No. 8 and the NRTA specifically provided that hunting rights would be subject to regulation pertaining to conservation. It was put in these words at para. 70:

> [B]y the terms of both the Treaty and the NRTA, provincial game laws would be applicable to Indians so long as they were aimed at conserving the supply of game. However, the provincial government's regulatory authority under the Treaty and the NRTA did not extend beyond the realm of conservation. [Emphasis added.]

Thus, provincial laws that pertain to conservation could properly restrict treaty rights to hunt provided they could be justified under Sparrow. In many, if not most, situations, the conservation of fish and game requires the preservation of their habitat.

39 The second limitation on permanency is that imposed by the requirement that there be compatibility between the Crown's use of the land and the treaty right claimed. See Sioui, supra. In Sioui, a group of Huron argued that they had a treaty right to perform religious rites within the Jacques Cartier Park. These rites included cutting down branches, camping and making fires, contrary to provincial regulations. The Crown contended in response, inter alia, that the territorial scope of the treaty did not include the park. To decide the case it was necessary to determine the scope of the territory the parties to the treaty had intended to come within its purview. That is to say, exactly where could the Huron practise their religion?

40 Lamer J. (as he then was), for the Court, answered this question in this way at p. 1070:

> The interpretation which I think is called for when we give the historical context its full meaning is that Murray and the Hurons contemplated that the rights guaranteed by the treaty could be exercised over the entire territory frequented by the Hurons at the time, so long as the carrying on of the customs and rites is not incompatible with the particular use made by the Crown of this territory. [Emphasis added.]

He went on to say at p. 1071:

> Accordingly, I conclude that in view of the absence of any express mention of the territorial scope of the treaty, it has to be assumed that the parties to the treaty of September 5 intended to reconcile the Hurons' need to protect the exercise of their customs and the desire of the British conquerors to expand. Protecting the exercise of the customs in all parts of the territory frequented when it is not incompatible with its occupancy is in my opinion the most reasonable way of reconciling the competing interests. [Emphasis added.]

Moreover, at p. 1073, "[f]or the exercise of rites and customs to be incompatible with the occupancy of the park by the Crown, it must not only be contrary to the purpose underlying that occupancy, it must prevent the realization of that purpose" (emphasis added).

41 Thus, if the exercise of the respondent's hunting right were wholly incompatible with the Crown's use of the land, hunting would be disallowed and any rights in the hunting cabin would be extinguished. For example, if the park were turned into a game preserve and all hunting was prohibited, the treaty right to hunt might be entirely incompatible with the Crown's use of the land. See in this respect R. v. Smith, [1935] 2 W.W.R. 433 (Sask. C.A.). This position accords as

well with Myran v. The Queen, [1976] 2 S.C.R. 137, which held that there was no inconsistency in principle between a treaty right to hunt and the statutory requirement that the right be exercised in a manner that ensured the safety of the hunter and of others.

42 The third limitation on the treaty right to hunt is found in the term of the treaty that restricts the right to hunt to lands not "required or taken up for settlement". This is in essence a subset of the second limitation since by definition the use of lands taken up for settlement is a Crown use of land wholly incompatible with the right to hunt. Thus, if the park lands were to be converted into lands used for settlement, any rights in a hunting cabin would disappear if it was found that the right to hunt itself had been extinguished.

43 Neither the second nor the third of these three limitations applies in the case at bar to limit the rights of the respondent to hunt or to build a shelter to facilitate that hunt. Meadow Lake Provincial Park is not virgin forest. It currently contains many cabins, as well as numerous facilities to assist park users, including boat launches, picnic areas and gas stations. It is clear that the Crown's use of the land is not wholly incompatible with the respondent's right to hunt. In other words, the respondent's right to hunt does not prevent the realization of the Crown's purpose. Neither have the park lands been taken up for settlement. It remains to be seen whether the regulation in issue is related to conservation and was therefore contemplated by the treaty. If it was, the question then becomes whether it can be justified under the Sparrow test.

D. The Regulation at Issue

44 For ease of reference, I repeat the regulation under which the respondent was charged:

> 41(1) No person shall:
> (a) occupy;
> (b) undertake research on;
> (c) alter;
> (d) use or exploit any resource in, on or under; or
> (e) develop;
>
> park land without a disposition.
>
> (2) Without limiting the generality of subsection (1), no person shall:
>
> . . .
>
> (j) construct or occupy a temporary or permanent dwelling on park land
>
> . . .
>
> without a disposition or the prior written consent of the minister.

These regulations prohibit the construction of either a temporary or permanent structure without the written permission of the minister.

45 The Crown has expressly disavowed the idea that these regulations are related to an overall scheme of conservation. In its factum, the Crown wrote, "These regulations are unrelated to the conservation of fish, fur bearing animals and big game and, therefore, consideration of the various conservation schemes that are in place in the Park is unnecessary." It is possible that the Crown may be employing an unnecessarily restrictive definition of conservation. These regulations appear to have some environmental concerns. For example, a requirement that cabins be built at least

150 feet away from the shore may be concerned with possible pollution of the lake, the erosion of the shoreline and the effects of that erosion on water quality. It may well be that the conservation laws discussed in Badger should be construed generously to refer not only to the conservation of game and fish but also to the environment they inhabit. Legislation aimed at preserving habitat and biodiversity, the water quality of ground water and of lakes, rivers and streams, topsoil conservancy and the prevention of erosion may be laws in relation to conservation. However, in light of the Crown's concession, this issue should not be considered in this appeal.

46 This is not to foreclose the possibility that the Crown could, in properly drafted regulations, reasonably limit the hunting rights of Treaty No. 6 adherents. Regulations clearly aimed at conservation that carefully consider the treaty rights of the respondent and others in his position may very well pass the Sparrow justification test. However, both the purpose of the regulations and the accommodation of the treaty rights in issue would have to be clear from the wording of the legislation. It would not be sufficient for the Crown to simply assert that the regulations are "necessary" for conservation. Evidence on this issue would have to be adduced. The Crown would also have to demonstrate that the legislation does not unduly impair treaty rights. The solemn promises of the treaty must be fairly interpreted and the honour of the Crown upheld. Treaty rights must not be lightly infringed. Clear evidence of justification would be required before that infringement could be accepted.

Section 88 of the Indian Act

47 Section 88 of the Indian Act, R.S.C., 1985, c. I-5, reads as follows:

> 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.

The regulations in issue are provincial laws of general application that, if they were to apply to Mr. Sundown, would conflict with the treaty. Accordingly, they must give way to "the terms of any treaty". The rights of Mr. Sundown under Treaty No. 6 permit him to build a cabin as a reasonably incidental activity to his right to hunt. Thus, the regulations are inapplicable to him under s. 88. See, for example, Dick v. The Queen, [1985] 2 S.C.R. 309.

48 The Crown argued, not in its factum but briefly in its oral submissions, that "an implicit justification requirement" can be found in s. 88. The Chief Justice raised this same issue in R. v. Côté, [1996] 3 S.C.R. 139, at para. 87, without resolving it. He stated, "I know of no case which has authoritatively discounted the potential existence of an implicit justification stage under s. 88" (emphasis in original). In the absence of any significant argument on this issue, it is not appropriate to consider it, important as it may be.

49 In the result, I would dismiss the appeal.

50 A constitutional question was stated. It read:

> Question: Are ss. 41(2)(j) and 59(a) of The Parks Regulations, 1991, R.R.S. c. P-1.1, Reg. 6, constitutionally inapplicable to the respondent by virtue of his treaty right to hunt as recognized by s. 35 of the Constitution Act, 1982?
>
> Answer: As this appeal was resolved without reference to the Constitution Act, 1982, this question

need not be answered.